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CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 99-089

AN ORDER to create chapter Comm 111, relating to certified capital companies.

Submitted by **DEPARTMENT OF COMMERCE**

05-17-99 RECEIVED BY LEGISLATIVE COUNCIL.

06-15-99 REPORT SENT TO AGENCY.

RS:JES:jal;rv

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CLEARINGHOUSE RULE 99-089

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

I. Statutory Authority

- a. Section Comm 111.03 (2) (g) requires that at least two key employees of a certified capital company reside in Wisconsin. What statutory authority exists for this provision?
- b. The placement of the statements in s. 560.32 (1) (a) and (b), Stats., in quotation marks indicates that s. 560.32 (1), Stats., contemplates that these statements will be reproduced verbatim in any offering material involving the sale of securities of a certified capital company. As such, the authority for the department to modify the content of these statements in s. Comm 111.04 (1) (a) and (b) is not apparent.
- c. Paragraph (a) in the second sub. (1) in s. Comm 111.04 limits the amount of investments a person may make in a certified capital company at any time to \$10 million. This is in addition to the limit of \$10 million in certified capital investments in all certified capital companies prior to August 1, 2000 under par. (e) in the second sub. (1) in s. Comm 111.04. Since s. 560.32 (2), Stats., does not contain a similar limit on investments in a certified capital company as those specified in par. (a), the authority for the department to specify the \$10 million limit in par. (a) is not apparent.
- d. Under s. Comm 111.06 (1) (a) (intro.), to be a qualified investment, a cash investment in a qualified business that is an equity security of the qualified business must be structured with a maturity or redemption of five years or greater. Since s. 560.34 (1) (a) 1., Stats., does not contain this five year or greater maturity redemption requirement, the

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS
[s. 227.15 (2) (e)]

Comment Attached YES NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached YES NO

department's authority for imposing this structure on equity securities is not apparent. See also the new condition expressed in s. Comm 111.06 (1) (a) 2. c.

e. The provisions in the first sub. (3) in s. Comm 111.06 establish limits on "all capital not invested in qualified investments" by a certified capital company. The authority for the department to apply these limits to capital that the company derived from sources other than certified capital investments is not apparent. Also, the authority for the department to prescribe how the company shall manage certified capital investments not invested in qualified investments beyond the limits in s. 560.34 (2), Stats., is not apparent.

f. The department establishes in s. Comm 111.10 (3) (b) additional criteria for decertifying a certified capital company that are not specified in s. 560.37 (3), Stats. What is the statutory authority for the provision? Is it contained in ss. 227.11 (2) (a) and 560.31 (1), Stats.?

2. Form, Style and Placement in Administrative Code

a. The department should review the entire rule and, as appropriate, correct the following deficiencies in drafting style or form:

- (1) In s. Comm 111.01, the word "the" before the word "certified" should be deleted.
- (2) The preferred drafting style for the introduction to a list of definitions in a chapter of the administrative code is to use "In this chapter:". This style was not followed in s. Comm 111.02 (intro.).
- (3) Definitions should not contain substantive provisions. [See s. 1.01 (7) (b), Manual.] Definitions with substantive provisions include s. Comm 111.02 (2) (a) and (24).
- (4) To alert the reader of the rule that a definition is repeating a statutory definition, the rule should reference the statutory definition rather than repeat the definition in the text of the rule. For example, s. Comm 111.02 (1) should read: "(1) 'Affiliate' has the meaning specified in s. 560.30 (1)." If the department desires to have the text of the definition included with the rule, it can repeat the statutory definition in a note following the reference to the statutory definition.
- (5) Parentheses should not be used in the rule. [See s. 1.01 (6), Manual.] This style was not followed, for example, in ss. Comm 111.02 (2) (a), (3) and (9) (c) and 111.09 (1) (i) 3. In s. Comm 111.02 (3), the acronym "CAPCO" should be setoff in quotation marks as an alternative defined term.
- (6) Definition should be drafted in a singular rather than the plural. See the definition of "employes" in s. Comm 111.02 (8). Similarly, "obligations" should be "obligation" in subd. 3. a. in the first sub. (3) in s. Comm 111.06.

- (7) To avoid ambiguity and facilitate any future amendments to the rule, lists of items should be drafted in the standard format that includes the use of "following" in the introductory clause to the list, delineation of whether the list is exclusive or inclusive through the use of terms such as "any of" versus "all of" in the introductory clause and ending each item in the list with a period. This format was not followed in numerous lists in the rule, including lists in s. Comm 111.02 (15) and the first sub. (3) in s. Comm 111.06.
- (8) Slashed alternatives should not be used in the rule. See, for example, s. Comm 111.02 (23) (c).
- (9) The rules should be drafted in the active voice. [See s. 1.01, Manual.] Examples of provisions that are not in the active voice include ss. Comm 111.03 (1) (a) and 111.04 (1) (intro.).
- (10) Mandatory duties should be denoted in a rule through the use of "shall"; an optional provision or discretionary authority should be denoted through the use of "may." Prohibitions should be stated as "no person may . . ." or "a person may not . . ." In addition, "should," "will," "must" or "it is the responsibility of" should not be used to express a mandatory or permissive action. [See s. 1.01 (2), Manual.] This drafting style was not followed throughout the rule. See, for example, s. Comm 111.03 (1) (e) (intro.) and the second sub. (1) (b) in s. Comm 111.04.
- (11) A subsection number should be placed within parentheses. This style was not followed in the first sub. (2) in s. Comm 111.06.
- (12) A noun should not end in "(s)" to indicate that it may be singular or plural. [See s. 1.01 (6), Manual.] This style was not followed, for example, in s. Comm 111.09 (1) (c) 2.
- (13) Numbers, except "1," should be written in numerals, unless a sentence begins with the number. See, for example, s. Comm 111.09 (1) (j).

b. The department should review the entire rule, and correct it as necessary, to ensure that it conforms to the preferred drafting style for the system of numbering and cross-references. Examples of deficiencies in numbering and cross-references include the following:

- (1) A reference to a consecutive series of provisions should use "to" rather than "through." See, for example, s. 111.01 and subd. 3. f. following the first sub. (3) in s. Comm 111.06.
- (2) References to alternative provisions should be in the singular. See the use of "ss." in s. Comm 111.02 (3). The notation "s." should be used.

- (3) External references in an administrative rule should include the agency's abbreviation. For example, "s. 111.10" in s. Comm 111.06 (1) should be stated as "s. Comm 111.10."
- (4) All subunits of a rule should end with a period. See, for example, "par" rather than "par." in par. (b) 3. (intro.), 4. and 5. in the first sub. (2) in s. Comm 111.06.
- (5) The first two statutory references in s. Comm 111.10 (3) (a) should include "Stats." only once; the first "Stats." should be deleted. See s. 560.37 (3), Stats.
- (6) Paragraphs should be designated by a lowercase letter enclosed in parentheses. This was not done in the reference to "par. (b)" in s. Comm 111.10 (3) (c).
- (7) The subdivisions in the first sub. (3) in s. Comm 111.06 should be paragraphs following an introduction that grammatically leads into them. Regarding the inappropriate use of an introduction, see also, ss. Comm 111.03 (1) (e), 111.04 (1) (f) and 111.06 (2) (b).

c. The department should review the entire rule and, as appropriate, correct the following deficiencies in the placement of provisions within the rule:

- (1) A definition of one term should not be placed within the definition of another term. This style was not followed in pars. (a) to (e) in the definition of "equity in a qualified business" in s. Comm 111.02 (9).
- (2) Definitions should be placed in alphabetical order. This style was not followed for the definitions of "net worth," "primary business of a CAPCO" and "principal business operations in Wisconsin" in s. Comm 111.02 (19), (22) and (23).
- (3) The text in subs. (1) to (3) in s. Comm 111.03 (1) (e) appear to be placed in subdivisions because of the reference in these provisions to the notice in par. (e) (intro.), which should be renumbered as subd. 1. To avoid ambiguity, these subdivisions should include specific references to the notice using, for example, "the notice specified in subd. 1." In addition, s. Comm 111.03 (1) (e) 4. should be drafted as a separate paragraph as the contents of subd. 4. do not relate to the notification under par. (e) (intro.). Similar comments may be made on the use of "proceeds" in par. (b) 1. and 2. in the first sub. (2) in s. Comm 111.06.
- (4) Section Comm 111.04 contains two subs. (1) and no sub. (2).
- (5) Section Comm 111.06 contains two subs. (2) and two subs. (3).

- (6) Section Comm 111.07 contains two subs. (4).
 - (7) Section Comm 111.09 contains only one subsection. In this section, sub. (1) should be redrafted to be s. Comm 111.09 (intro.) and pars. (a) to (j) should be redrafted as subsections.
 - (8) The text of subs. 1. in s. Comm 111.09 (1) (b) should be incorporated into the text of par. (b) (intro.) as there is only one subdivision under par. (b).
 - (9) The relation of s. Comm 111.02 (2) (a) and (b) to the definition of "allowable organizational costs" in s. Comm 111.02 (2) (intro.) is not apparent. Since pars. (a) and (b) contain substantive provisions, their text should be placed in the substance of the rule and not in a definition.
- d. Section Comm 111.02 (2) (b) is more appropriately placed in a note to the rule.
 - e. In s. Comm 111.02 (13), the final occurrence of the letter "s" should be deleted.
 - f. In s. Comm 111.02 (15) (a), the word "common" should be replaced by the word "Common."
 - g. Section Comm 111.02 (19) should be rewritten to read: "'Net worth' means assets minus liabilities in accordance with GAAP."
 - h. In s. Comm 111.02 (23), the first letter of each paragraph should be capitalized.
 - i. In s. Comm 111.09 (1) (b) 1., the word "Principals" should be replaced by the word "principals." Also, the notation ", Stats." should be inserted following the statutory citation.
 - j. In s. Comm 111.09 (1) (f), only the first letter of each subdivision should be capitalized.

4. Adequacy of References to Related Statutes, Rules and Forms

a. The analysis accompanying the rule cites ss. 560.30 to 560.38, Stats., as authorizing rule making. This reference is unduly broad as it contains all of the statutes in ch. 560, Stats., relating to certified capital companies. The specific statutes that establish the duty of the department to adopt rules, ss. 560.31 (1) and 560.34 (1m) (b), Stats., should be cited.

b. The rule incorporates by reference the generally accepted accounting principles adopted by the American Institute of Certified Public Accountants. [See s. Comm 111.02 (13).] Consent for incorporation of this standard must be obtained from the Revisor of Statutes and the Attorney General pursuant to s. 227.21 (2) (a), Stats. The analysis accompanying the rule should, but does not, indicate that this consent has been given either prior to this rule promulgation or concurrently with this rule promulgation.

c. The reference to the generally accepted accounting principles in s. Comm 111.02 (13) is vague. Which version of the principles is being referenced?

d. Sections Comm 111.03 and 111.04 refer to forms. The department should ensure that the requirements of s. 227.14 (3), Stats., are met.

e. The reference to "par. (b) or (c)" in par. (f) (intro.) of the second sub. (1) in s. Comm 111.04 appears to be in error. Based upon the cross-references in s. 560.32 (2) (d), Stats., on which par. (f) is based, it appears that this reference should be to "par. (d) or (e)."

f. The reference to "s. 111.06 (1) to (e)" in s. Comm 111.07 (2) is incorrect. The department should revise this reference.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. "Operation" should begin with a capital "O" in the table of contents entry for s. Comm 111.06 at the beginning of the rule.

b. Section Comm 111.02 (2) needs to be rewritten. For example, only the first letter of the defined term should be capitalized. Next, the definition uses inconsistent terminology by referring to the term "direct costs" and "direct organizational costs." The first sentence of the subsection is a run-on sentence containing substantive material that should be placed elsewhere in the rule. In par. (a), the reference to "generally accepted accounting principles" should be replaced by the acronym "GAAP," which is a defined term. As noted previously in this report, the last two sentences of par. (a) are substantive and par. (b) should be placed in a note to the rule.

c. The definition of "employees" in s. Comm 111.02 (8) is unclear. What is "the business" referred to in this definition. Who are "persons leased to the business"?

d. Paragraphs (a) to (d) in s. Comm 111.02 (9) are grammatically incorrect. For example, in sub. (9) (a), it appears that the first comma should be replaced by the word "that" and that the word "and" should be replaced by the word "or."

e. The rule uses the term "qualified Wisconsin business." See, for example, s. Comm 111.02 (9) (c) and (b) 2. in the first sub. (2) in s. Comm 111.06. If this term is the same as a "qualified business," as defined in s. Comm 111.02 (18), then "qualified Wisconsin business" should not be used in the rule. If it is different, then it should be defined in s. Comm 111.02.

f. The reference to a "significant equity interest" in s. Comm 111.02 (9) (e) is vague. Can the department define "significant"?

g. In s. Comm 111.02 (9) (f), "conceptually" is redundant and should be deleted. Also, this definition should end with "approved by the department" rather than "as the department may approve."

h. Throughout the rule, the department should consistently use either "CAPCO" or "certified capital company." See, for example, s. Comm 111.02 (15), where par. (a) uses "CAPCO" and par. (b) uses "certified capital company."

i. Since "GAAP" is a defined term, the definition of "net worth" in s. Comm 111.02 (19) should end with the phrase "in accordance with GAAP."

j. In s. Comm 111.02 (24), is the phrase "bank or other commercial lender" the same as "financial institution," as defined in s. Comm 111.02 (12)? If so, "financial institution" should be used in sub. (24).

k. In s. Comm 111.03 (1) (d), the comma should not be underscored.

l. Section Comm 111.03 (1) (e) 2. is ambiguous. Is the "date completed" the date of the original application or the date that the completed application was resubmitted?

m. Since "net worth" is a defined term, the phrase "as defined by GAAP" in s. Comm 111.03 (2) (b) is redundant and should be deleted.

n. In s. Comm 111.03 (2) (g), what does the term "key" mean?

o. The last clause in par. (f) 2. in the second sub. (1) in s. Comm 111.04 is an incomplete sentence.

p. The last sentence in par. (g) in the second sub. (1) in s. Comm 111.04, refers to applications received on the same date as the forfeited investment application. Should this provision in this sentence also apply to applications received after the date of the forfeited investment application?

q. The phrase "this reduction" in par. (b) 3. a. in the first sub. (2) in s. Comm 111.06 is unclear. Which reduction does it refer to? Also, the word "may" should be replaced by the word "does."

r. In par. (b) 4. in the first sub. (2) in s. Comm 111.06, the colon after "if" should be deleted.

s. In par. (b) 5. in the first sub. (2) in s. Comm 111.06, the script ")," should be deleted.

t. The provisions in pars. (b) 1. and 5. in the first sub. (2) in s. Comm 111.06 appear to be duplicative. The text of subd. 5. should be either clarified to distinguish it from subd. 1. or deleted.

u. The reference to the "date specified in par. (a)" or the "dates specified in par. (a)" in par. (c) (intro.), 1. and 2. in the first sub. (2) in s. Comm 111.06 are vague as par. (a) contains three dates, the investment date, three years after the investment date and five years after the investment date.

v. Since "trust company" is included in the definition of "financial institution," "or trust company" should be deleted in subd. 3. b. in the first sub. (3) in s. Comm 111.06.

w. The phrase "the rules under" in the first sub. (4) in s. Comm 111.07 is redundant and should be deleted.

x. Can the department provide a definition of "business secret" in s. Comm 111.07 (5) to help ensure consistent interpretation of this subsection?

y. In s. Comm 111.09 (1) (intro.), "an" should be "and."

z. The reference to "the application" in s. Comm 111.09 (1) (a) is vague. Which application does par. (a) refer to?

aa. In s. Comm 111.09 (1) (d) 9., what does the phrase "associated with" mean?

ab. In s. Comm 111.09 (1) (d) 1., should "and" be "or"?

ac. The reference to a "due diligence file" in s. Comm 111.09 (1) (e) 10. is vague. Can the department specify the specific records that should be kept in a due diligence file? Similarly, the records required under s. Comm 111.09 (1) (g) are vague. What specific records should a certified capital company maintain relating to its capital that is not invested in qualified businesses?

ad. In s. Comm 111.09 (1) (j), the use of the word "registered" is confusing. Does the department mean "certified"?

ae. The second period after the title of s. Comm 111.10 (2) should be deleted.

af. Should "section" in s. Comm 111.10 (3) (b) 1. and 2. be replaced with "chapter"?

ag. In s. Comm 111.10 (3) (b) 3., the word "against" should be replaced by the word "under."

ah. The effect of decertification in s. Comm 111.10 (5) should contain an exception for decertification under s. Comm 111.10 (3) (c).

FISCAL ESTIMATE
DOA-2048 (R02/97)

ORIGINAL
 CORRECTED

UPDATED
 SUPPLEMENTAL

LRB or Bill No./Adm. Rule No.

Comm 111

Amendment No. if Applicable

Subject

Certified Capital Companies

Fiscal Effect

State: No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation

Increase Existing Appropriation
 Decrease Existing Appropriation
 Create New Appropriation

Increase Existing Revenues
 Decrease Existing Revenues

Increase Costs - May be Possible to Absorb Within Agency's Budget Yes No

Decrease Costs

Local: No local government costs

1. Increase Costs
 Permissive Mandatory

3. Increase Revenues
 Permissive Mandatory

5. Types of Local Governmental Units Affected:

Towns Villages Cities

2. Decrease Costs
 Permissive Mandatory

4. Decrease Revenues
 Permissive Mandatory

Counties Others _____

School Districts WTCS Districts

Fund Sources Affected

GPR FED PRO PRS SEG SEG-S

Affected Ch. 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

The 1997 Wisconsin Act 215, authorizes the creation of a certified capital company program and provides tax credits to persons who make certain types of investments in certified capital companies (CAPCOs). The act authorizes the Department of Commerce (Commerce) to administer the program and creates a program revenue appropriation in which fees and other monies collected for administering the program are deposited. As required by the law and rules Commerce will: (1) certify capital companies; (2), certify qualified businesses; (3) review annual reports and financial statements; (4) make written determinations regarding certified capital company distributions; (5) conduct annual compliance reviews of certified capital companies; and (6) determine and issue written notices of investment pool disqualification's.

Based on limited data, Commerce estimates it will certify approximately 16 CAPCO's and the program will generate approximately \$120,000 in program revenue from; (1) a \$7,500 application fee from a capital certified company seeking certification and (2) an annual \$5,000 certification fee.

Commerce estimates 2.0 PR positions at an annual cost of \$100,700 are required to administer the program. The costs are broken down as follows:

| | |
|---|------------------|
| 1.0 Financial Examiner (Salary and Fringe Benefits) | \$45,000 |
| 1.0 Financial Specialist (Salary and Fringe Benefits) | \$33,000 |
| Supplies and Services | \$ 1,800 |
| Rent | \$ 4,200 |
| Department Overhead Charges | \$ 16,200 |
| Total | \$100,700 |

No costs are anticipated by this program on local government.

Long-Range Fiscal Implications

Program costs will increase at the rate of inflation.

Agency/Prepared by: (Name & Phone No.)
Commerce/Troy Brown 266-7099

Authorized Signature/Telephone No.

Troy Brown
(608) 267-0770

Date

5/14/99

FISCAL ESTIMATE WORKSHEET
Detailed Estimate of Annual Fiscal Effect
DOA-2047(R02/97)

ORIGINAL UPDATED
 CORRECTED SUPPLEMENTAL

LRB or Bill No./Adm. Rule No. Amendment No.
Comm 111

Subject
Capital Cetified Companies

I. One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):

| II. Annualized Costs: | Annualized Fiscal impact on State funds from: | |
|---|---|------------------------|
| | Increased Costs | Decreased Costs |
| A. State Costs By Category | \$ | \$ - |
| State Operations - Salaries and Fringes | | |
| (FTE Position Changes) | (2.0 FTE) | (- FTE) |
| State Operations - Other Costs | | - |
| Local Assistance | | - |
| Aids to Individuals or Organizations | | - |
| TOTAL State Costs By Category | \$ 100,700 | \$ - |
| B. State Costs By Source of Funds | Increased Costs | Decreased Costs |
| GPR | \$ | \$ - |
| FED | | - |
| PRO/PRS | 100,700 | - |
| SEG/SEG-S | | - |
| III. State Revenues- Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.) | Increased Rev. | Decreased Rev. |
| GPR Taxes | \$ | \$ - |
| GPR Earned | | - |
| FED | | - |
| PRO/PRS | 120,000 | - |
| SEG/SEG-S | | - |
| TOTAL State Revenues | \$ 120,000 | \$ - |

NET ANNUALIZED FISCAL IMPACT

| | STATE | LOCAL |
|------------------------|------------|-------|
| NET CHANGE IN COSTS | \$ 100,700 | \$ 0 |
| NET CHANGE IN REVENUES | \$ 120,000 | \$ 0 |

Agency/Prepared by: (Name & Phone No.)
Commerce/Troy Brown 266-7099

Authorized Signature/Telephone No.
Troy Brown
(609) 267-0770

Date
5/14/98

FINAL REGULATORY FLEXIBILITY ANALYSIS

Department of Commerce

CLEARINGHOUSE RULE NO.: 99-089

RULE NO.: Comm 111

RELATING TO: Certified Capital Companies

Final regulatory flexibility analysis not required. (Statement of determination required.)

1. Reason for including or failing to include the following methods for reducing impact of the rule on small businesses: Less stringent compliance or reporting requirements; less stringent schedules or deadlines for compliance or reporting requirements; simplification of compliance or reporting requirements; establishment of performance standards to replace design or operational standards; exemption from any or all requirements.

The Department has held two public hearings to gather public input on the rules. The first public hearing sought comments on a proposed rule. The rule was changed based on public comment and an emergency rule was promulgated based on public hearing comments. A second public hearing was held on the emergency rule and the Department received additional public hearing comments on the emergency rule. Those comments were also incorporated in the final rule. The reporting requirements are specified in the law that certified capital companies must comply with.

2. Issues raised by small businesses during hearings, changes in proposed rules as a result of comments by small businesses and reasons for rejecting any alternatives suggested by small businesses.

No testimony was received directly on the issue how the rule would impact small business, but the department has included the comments received that improve the administration, as well as those affected by the rule and who need to comply with the rule.

(Continued on reverse side)

3. Nature and estimated cost of preparation of any reports by small businesses.

No testimony was received as to the cost of preparing reports. Section 560.35, Stats., requires that certified capital companies report information related to capital investments and furnish annual financial statements to the Department, along with a fee for review by the Department.

4. Nature and estimated cost of other measures and investments required of small businesses.

None.

5. Additional cost to agency of administering or enforcing a rule which includes any of the methods in 1. for reducing impact on small businesses.

None.

6. Impact on public health, safety and welfare caused by including any of the methods in 1. for reducing impact on small businesses.

None.

DEPARTMENT OF COMMERCE
RULES RELATING RELATING TO THE
CERTIFIED CAPITAL COMPANIES

Analysis of Rules

4. Specific section

Statutory Authority: ss 560.30 through 560.38, Stats.

Statutes Interpreted: ss 560.30 ^{to} through 560.38, Stats.

Pursuant to ss. 560.30 through 560.38, Stats., the Department of Commerce (Commerce) is responsible for certifying capital companies. The certified capital companies are eligible for receiving premium tax credits from insurance companies to use to provide capital to new and growing certain small businesses in this state. Under the law, a person must apply to Commerce and submit a nonrefundable fee to become a certified capital company. These rules delineate the process that applicants must use as well as the process Commerce will use to evaluate and certify a capital company. The law limits a certified capital company from providing capital to certain businesses and to qualified investments. A certified capital company may request Commerce to determine whether an investment is a qualified investment and these rules specify the requirements to follow in making such requests. A certified capital company is also required to report specific information to Commerce on the investment capital, on violations of agreements by a qualified business receiving investment capital, and submit fiscal year financial statements to Commerce for audit. The law requires Commerce to conduct annual compliance reviews of certified capital companies and allows for decertification by the department, as well as voluntary decertification by the certified capital company.

Contact Person

Troy Brown, Director

608-266-7099

ORDER

The Department of Commerce hereby creates ch. Comm 111 relating to certified capital companies.

Chapter Comm 111

CERTIFIED CAPITAL COMPANIES

Section 1. ch. Comm 111 is created to read:

- Comm 111.01 Purpose.
- Comm 111.02 Definitions.
- Comm 111.03 Certification of certified capital companies.
- Comm 111.04 Investments in certified capital companies.
- Comm 111.05 Qualified businesses.
- Comm 111.06 Operation of certified capital companies.
- Comm 111.07 Reporting requirements and fees.
- Comm 111.08 Distributions.
- Comm 111.09 Documents and record requirements.
- Comm 111.10 Compliance reviews: decertification; disqualification.

CERTIFIED CAPITAL COMPANIES

Comm 111.01 Purpose. The purpose of this chapter is to establish the procedures for the administration of the certified capital companies by the department of commerce, as provided by ss. 560.30 through 560.38, Stats.

Comm 111.02 Definitions. The definitions in this section apply only to this chapter.

(1) "Affiliate" means, with respect to a certified capital company or a certified investor, any of the following:

(a) A person who, directly or indirectly, owns, controls, or holds power to vote, 10% or more of the outstanding voting securities or other voting ownership interests of the certified capital company or certified investor.

(b) A person, 10% of whose outstanding voting securities or other voting ownership interests are directly or indirectly owned, controlled or held with power to vote by the certified capital company or certified investor.

(c) A person directly or indirectly controlling, controlled by, or under common control with, the certified capital company or certified investor.

(d) A partnership in which the certified capital company or certified investor is a general partner.

(e) A person who is an officer, director or agent of the certified capital company or certified investor, or is an immediate family member of such an officer, director or agent.

(2) "Allowable Organizational Costs" means those direct costs incurred to incorporate and charter an entity, however, such costs are limited to 25% of capitalization, before any reduction for disallowed organizational costs.

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(a) Direct organizational costs include, but are not limited to legal, accounting, consulting, and printing costs directly related to the chartering or incorporation process, pre-opening and development stage enterprise costs that may be capitalized under Generally Accepted Accounting Principles (GAAP) and filing fees paid to chartering authorities. Allowable organization costs may be capitalized and amortized over a period not to exceed five years. Direct costs associated with the offering and issuance of capital stock are not considered to be organization costs and shall not be capitalized; these costs shall be deducted from the proceeds in recording initial capitalization.

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(b) Pre-opening and development stage enterprise costs that generally are not capitalized under GAAP, such as salaries and employment benefits, rent, depreciation, supplies, directors' fees, training, travel, expenses associated with the establishment of business relationships, postage and telephone fees are examples of costs that shall be expensed and not capitalized.

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Sub (3) "Certified capital company ^{or} (CAPCO)" means a person that has been certified by the department under s. 560.31, Stats., and that has not been decertified under ss. 560.37 (3) or (3m), Stats..

Sub (4) "Certified capital company tax credit" means the tax credit under s. 76.635, Stats.

CR *Sub* (5) "Certified capital investment" means an investment in a certified capital company that is certified under s. 560.32 (2), Stats., and that fully funds either the investor's equity interest in a certified capital company, a qualified debt instrument that a certified capital company issues, or both.

2 *In stock* (6) "Certified investor" means a person who makes a certified capital investment.

(7) "Department" means the department of commerce.

2-Sub *2-5* *Sub* (8) "Employees" mean full-time employees of the business, persons leased to the business, and persons from whom the business obtains services necessary to its day-to-day operations on an independent contractor basis.

2-Don *2-5* *Sub* (9) "Equity in a qualified business" means one or more of the following:

2-Don *2-5* *Sub* (a) "Royalty rights" means rights to receive a percent of gross or net revenues, may be fixed or variable, may provide for a minimum or maximum dollar amount per year or in total, may be for an indefinite or fixed period of time, and may be based upon revenues in excess of a base amount.

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(b) "Net profit interests" means rights to receive a percent of operating or net profits, may be either fixed or variable, may provide for a minimum or maximum dollar amount per year or in total, may be for an indefinite or fixed period of time, and may be based upon operating or net profits in excess of a base amount.

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(c) "Warrants for future ownership" means options on the stock of the qualified Wisconsin business may repurchase a warrant (a "call") or the qualified Wisconsin business may be required to repurchase a warrant (a "put") at some fixed amount or an amount based on a pre-agreed upon formula.

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(d) "Equity sale participation rights" means conversion options of debt, to convert all or a portion of the debt to the qualified Wisconsin business's stock, then to participate in the sale of the stock of the qualified Wisconsin business.

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(e) "Equity rights" means the receipt or creation of a significant equity interest in a qualified Wisconsin business.

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(f) Other conceptually similar rights and elements as the department may approve.

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(12) "Financial institution" means a state or national bank, trust company, savings bank, building and loan association, savings and loan association or credit union doing business in this state.

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(13) "GAAP" means generally accepted accounting principles as adopted by the American Institute of Certified Public Accountants.

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(14) "In need of venture capital" means that the qualified business requires additional debt or equity funds, or both, for working capital, expansion, research and development, or modernization of current operations.

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(15) "Investment in a CAPCO" for the purpose of earning tax credits or reductions under s. 76.635(2), Stats., means a transaction that, in substance and in form, is the investment of cash in exchange for:

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(a) common stock, preferred stock, or an equivalent ownership interest in a CAPCO, or

(b) A debt instrument that a certified capital company issues at par value or at a premium; that has an original maturity date of at least 5 years from the date on which it was issued; that has a repayment schedule that is no faster than a level principal amortization and, until the certified capital company may make distributions other than qualified distributions, the interest, distribution or payment features of which are not related to the certified capital company's profitability or the performance of its investment portfolio.

(16) "Investment date" means, with respect to each investment pool, the date on which the last certified capital that is part of that investment pool was invested in the certified capital company.

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(17) "Investment pool" means the aggregate of all investments of certified capital in a certified capital company that are made as part of the same transaction, except that investments received more than 30 days apart may not be considered part of the same investment pool.

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(18) "Qualified business" means a business which is a qualified business under s. 560.33, Stats. *Note the meaning ... s. 560.31(8)*
Note -> 560.33

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(19) "Net Worth" means assets minus liabilities in accordance with Generally Accepted Accounting Principles as adopted by the American Institute of Certified Public Accountants.

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(20) "Qualified distribution" means a distribution or payment by a certified capital company to its equity holders for any of the following:

(a) The costs of forming the certified capital company, including allowable organizational costs.

(b) The costs of syndicating, managing or operating the certified capital company.

(c) An annual management fee that does not exceed 2.5% of the certified capital company's total certified capital.

(d) Reasonable and necessary fees paid for professional services related to the operation of the certified capital company.

(e) A projected increase in federal or state taxes, including penalties and interest on those taxes, of the equity owners of the certified capital company if those amounts are related to the certified capital company's ownership, management or operation.

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(21) "Qualified investment" means an investment in a qualified business by a certified capital company that meets the requirements under s. 560.34, Stats.

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(22) "Primary business of a CAPCO" means that the investment of cash in qualified businesses constitutes at least 75% of the business activity of the certified capital company.

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(23) "Principal business operations in Wisconsin" means a business that operates primarily in Wisconsin at the time of the initial investment and is in good standing with the Wisconsin secretary of state, if applicable, and meets one or more of the following:

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(a) the business has more than 50 percent of its total assets located in Wisconsin;

(b) more than 50 percent of the business' net income is allocable or apportionable to Wisconsin in accordance with Wisconsin income tax law, but disregarding whether the business is taxable or tax exempt for Wisconsin income tax purposes;

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(c) more than 50 percent of the total salaries, wages and/or other compensation of the business are paid to Wisconsin employees.

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(24) "Unable to obtain conventional financing" means the business has failed in an attempt to obtain funding for a loan from a bank or other commercial lender, which is evidenced by an affidavit from the business that certifies that the business failed in an attempt to obtain such conventional financing.

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Comm 111.03 Certification of certified capital companies.

(1) APPLICATION TO BECOME A CAPCO.

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(a) Applications shall be submitted using the department's application form and shall contain the information specified in the application form.

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(b) Applications shall be submitted with a nonrefundable application fee of \$7,500.

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(c) Applications shall be received on a business day between July 15 to August 15 of each calendar year. In the event that August 15 is not a business day, applications shall be received by the first business day thereafter. All applications received by the department on the same day shall be treated as having been made contemporaneously.

(d) If a submitted application is complete and meets the requirements of this chapter, the department shall grant or deny an application for certification within 30 days of the date of application.

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(e) If an application is determined to be incomplete or additional information is needed, the department will notify the applicant in writing within 20 days of the receipt of the application.

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1. If an application is completed within 5 working days of the applicant's receipt of such notice, the completion of the application shall have no effect on the date by which the certification applied for must be granted or denied.

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2. If an application is not completed within 5 working days of the applicant's receipt of the notice, the date completed shall be considered the date of application.

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3. If such information is not supplied within 120 days applicant's receipt of the written notice, the application shall be deemed withdrawn and the department shall have no obligation to provide additional notices to the applicant.

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4. If the department denies certification, the department shall include with the denial a detailed description of the grounds for the refusal, including suggestions for removal of those grounds.

(2) REQUIREMENTS FOR CERTIFICATION. The department shall certify a person as a certified capital company if the department determines that all of the following conditions have been met:

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(a) The person is a partnership, corporation, trust or limited liability company, whether organized for profit or not for profit, that has as its primary business activity the investment of cash in qualified businesses.

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(b) The person has a net worth, as defined by GAAP, at the time of application, of at least \$500,000 and has at least \$500,000 in cash, cash equivalents and marketable securities, as defined by GAAP.

(c) The directors, officers, general partners, trustees, managers or members or persons having a similar function are familiar with the requirements of this chapter.

(d) At least 2 officers, directors, general partners, trustees, managers or members each have at least 2 years of experience in the venture capital industry.

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(e) The person has included, in any offering material involving the sale of securities, the statement required under s. 111.04 (1).

(f) The person has paid a nonrefundable application fee of \$7,500.

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(g) At least 2 key employees of the CAPCO, or an affiliate of the CAPCO, who are involved in the CAPCO's management decisions shall work and reside in the state of Wisconsin.

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Comm 111.04 Investments in certified capital companies.

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(1) REQUIRED DISCLOSURES IN SECURITIES OFFERINGS. Any offering material involving the sale of securities of a certified capital company shall include all of the following statements:

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(a) By authorizing the formation of a certified capital company, the department does not necessarily endorse the quality of management or the potential for earnings of the company and is not liable for damages or losses to a certified investor in the company. Use of the word "certified" in an offering is not a recommendation or endorsement of the investment by department. → of course

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(b) Investments in a prospective certified capital company prior to the time the company is certified are not eligible for a certified capital company investment credit under s. 76.635, Stats., unless the proposed investment is certified under s. 560.32 (2), Stats., before the investment is made. In the event that certain statutory provisions are violated, the department may require forfeiture of unused certified capital company investment credits and repayment of used certified capital company investment credits.

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(1) CERTIFICATION OF CERTIFIED CAPITAL INVESTMENTS.

(a) A person may apply to make a certified capital investment in a certified capital company by providing notice under this paragraph to the department on a form specified by the

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department. The notice shall include the name of the person, the name of the certified capital company, the amount of the investment, up to \$10,000,000, and any other information specified by the department. The notice shall also include an undertaking by the person to make the investment within 5 days after the department notifies the person that the investment has been certified.

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(b) Applications for certification of certified capital investments will not be accepted prior to October 1 of each calendar year.

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(c) Investments shall be certified in the order of the date received, not later than 30 days after application.

(d) The department may certify an investment under this subsection only if, after the certification, the department will not have certified a total of more than \$50,000,000 in investments under this subsection.

(e) Prior to August 1, 2000, the department may not certify an investment under this subsection if, after the certification, the investor, together with all affiliates of the investor, would have more than \$10,000,000 in certified capital investments.

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(f) If, as a result of the limitations under par. (b) or (c), the department may not certify the full amount requested in applications for certified capital investments submitted under par. (a), the department shall allocate the amounts available for certification in order of priority based on the date on which the application was filed.

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1. If the amounts available for certification are insufficient to certify the full amount of all applications for certified capital investments that are submitted on the same day, the department shall prorate the available amount on the basis of the amount, up to \$10,000,000, that the investor has committed to invest in the certified capital company under par. (a). ? who invests basic within 10 on (e)

2. The pro rata amount certified for any one applicant shall be the product of a fraction, the numerator of which is the amount of the investment such person requested to be certified and the denominator of which is the total amount of the investments for which applications were filed on the same day, multiplied by the amount of investments that may be certified under s. 560.32(2)(b), Stats. After giving effect to all investments that have been certified or applications that have been filed with the department prior to such day.

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(g) A certified capital company shall provide the department with evidence that it receives an investment of the certified capital in cash within 5 working days of such investment being certified by the department. In the event that a certified capital company does not receive an investment of capital equaling the amount of investment certified to an investor within 5 working days of the certified capital company's receipt of notice from the department, the certified capital company shall so notify the department by overnight common carrier delivery service and the certified capital investment shall be forfeited. The forfeited certified capital investment amount shall be reallocated to investment applications received on the same date as the forfeited investment application.

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(3) LIMITATION ON CERTIFIED INVESTOR INVESTMENT. A certified investor may not, individually, or with or through one or more affiliates, own 10% or more of the equity securities in, be a general partner or manager of, or otherwise control the investments of the certified capital company. This subsection does not preclude a certified investor from exercising its legal rights and remedies, including interim management of a certified capital company, in the event that a certified capital company is in default of its statutory or contractual obligations to the certified investor.

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Comm 111.05 Qualified businesses.

(1) QUALIFICATIONS. A business is a qualified business if all of the following requirements are met as of the time that a certified capital company, or any affiliate of the certified capital company, makes its first investment in the business:

(a) The business is headquartered in this state and its principal business operations are located in the state.

(b) The business is in need of venture capital and is unable to obtain conventional financing.

(c) The business has no more than 100 employees, at least 75% of whom are employed in this state.

(d) During its 2 most recent fiscal years, the business had, together with all of its consolidated affiliates, an average annual net income, after federal income taxes and excluding any carry-over losses, of not more than \$2,000,000, as determined in accordance with GAAP.

(e) The business has, together with its consolidated affiliates, a net worth that is not in excess of \$5,000,000 as determined in accordance with GAAP.

(f) The business is not predominantly engaged in professional services provided by accountants, lawyers or physicians.

(g) The business is not engaged in the development of real estate for resale.

(h) The business is not engaged in banking or lending and does not make any loans to, or investments in, certified capital companies.

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(2) DEPARTMENT OPINIONS AND EXCEPTIONS. A certified capital company may, prior to making an investment in a specific business, request a written opinion from the department that a business in which it proposes to invest is a qualified business. If the department determines that the business meets the requirements under sub. (1), the department shall issue a written opinion stating that the business is a qualified business.

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Comm 111.06 Operation of certified capital companies.

(1) **QUALIFIED INVESTMENTS REQUIREMENTS.** In order for a certified capital company to prevent disqualification under s. 111.10 of an investment pool, the certified capital company shall ensure that the investment pool makes qualified investments in accordance with the schedule under sub. (2). An investment is a qualified investment if the investment meets all of the following requirements:

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(a) The investment is a cash investment in a qualified business that is structured with a maturity or redemption of five years or greater, in any of the following:

1. An equity security of the qualified business.

2. A debt security of the qualified business if the debt has a maturity of at least 5 years and if one of the following conditions is met:

a. The debt is unsecured.

b. The debt is convertible into equity securities or equity participation instruments such as options or warrants.

c. The debt is issued in combination with an equity security of the qualified business.

(b) As a condition of the investment, the qualified business agrees not to use the proceeds from the investment for the purpose of relocating its operations.

(c) As a condition of the investment, the qualified business agrees, as long as the certified capital corporation continues to hold the investment, not to relocate its headquarters out of this state.

(d) As a condition of the investment, the qualified business agrees, as long as the certified capital corporation continues to hold the investment, to maintain at least 75% of its employees in this state.

(e) As a condition of the investment, the qualified business agrees, as long as the certified capital corporation continues to hold the investment, to maintain at least 75% of its employees at work sites that were maintained by the qualified business at the time that the investment was made, unless the qualified business obtains an exemption from the department under this paragraph. The department may grant an exemption unless it determines that the qualified business is locating the employees at new sites to take advantage of lower wage rates in the areas where the new sites are located.

2) QUALIFIED INVESTMENT SCHEDULE.

(a) A certified capital company shall ensure that each of its investment pools makes qualified investments according to the following schedule:

1. Within 3 years after the investment date for a particular investment pool, at least 30% of the investment pool shall be placed in qualified investments.
2. Within 5 years after the investment date for a particular investment pool, at least 50% of the investment pool shall be placed in qualified investments.

(b) The proceeds of all capital from a qualified investment returned to a certified capital company by a qualified business may be placed in new qualified investments.

1. The proceeds shall count toward the percentage requirements under par. (a) and placement of 100% of investments as qualified investments in ss. 111.08 (3) and 111.10 (4) (a) 2.

2. Any proceeds received from the sale of a qualified investment returned to a certified capital company that are reinvested in another qualified Wisconsin business shall count 100% towards the percentage requirements under par (a) and placement of 100% of investments as qualified investments in ss. 111.08 (3) and 111.10 (4) (a) 2.

3. Any qualified investment that is sold by the certified capital company within one year of the initial investment date, shall count only 50% towards the percentage requirements under par (a) and placement of 100% of investments as qualified investments in ss. 111.08 (3) and 111.10 (4) (a) 2.

a. This reduction may not apply to the percentage requirements of par.(a).

b. The reduction in the amount of an investment for terms of certain percentage requirements shall apply at all times until the certified capital company has been voluntarily decertified.

4. Proceeds of a qualified investment that are reinvested in the same qualified business or an affiliate of such business shall not count towards the percentage requirements contained in par (a), and placement of 100% of investments as qualified investments in ss 111.08 (3) and 111.10 (4) (a) 2., if such reinvestment is made within six months of the original investment's return to the certified capital company.

5. For purposes of satisfying the percentage requirements of par (a), and placement of 100% of investments as qualified investments in ss. 111.08 (3) and 111.10 (4) (a), the cumulative amount of qualified investments made by the certified capital company shall be considered.

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(c) The date funds are placed is the date funds are received by the qualified Wisconsin business from the certified capital company, as evidenced by the date of a check or other means of funds transfer. The certified capital company shall submit the following information to the department within thirty days of the dates specified in par. (a):

1. The amount of certified capital placed in qualified investments as of the date specified in par. (a); and

2. The amount of the total certified capital provided by investors to the certified capital company as of the date specified in par. (a).
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(3) NONQUALIFIED INVESTMENTS. (a) All capital not invested in qualified investments by the certified capital company: ^ is certified

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1. Must be held in a financial institutions or held by a broker-dealer registered under s. 551.31, Stats.

2. Must not be invested in a certified investor of the certified capital company or any affiliate of the certified investor of the certified capital company.

3. Must be invested only in:

a. Any United States Treasury obligations;

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b. Certificates of deposit or other obligations, maturing within 3 years after acquisition of such certificates or obligations, issued by any financial institution or trust company incorporated under the laws of the United States;
↑ Admitted in Financial

c. Marketable obligations, maturing in 5 years or less after the acquisition of such obligations, which are rated "A" or better by any nationally recognized credit rating agency;

d. Mortgage-backed securities, with an average life of 5 years or less, after the acquisition of such securities, which are rated "A" or better by any nationally recognized credit rating agency;

e. Collateralized mortgage obligations and real estate mortgage investment conduits that are direct obligations of an agency of the United States Government; are not private-label issues; are in book-entry form; and do not include the classes of interest only, principal only, residual, or zero; or

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f. Interests in money market funds, the portfolio of which is limited to cash and obligations described in pars. a through d.

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(2) DIVERSIFICATION REQUIREMENT. A certified capital company may not make a qualified investment in a person if, at the time of the investment, more than 15% of the total

certified capital of the certified capital company would be invested in that person and affiliates of that person.

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(3) RESTRICTIONS ON MANAGEMENT. No certified capital company may be managed or controlled by, or have a general partner that is, an insurance company or an affiliate of an insurance company.

Comm 111.07 Reporting requirements and fees. 9)

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(1) RECEIPTS OF CERTIFIED CAPITAL. As soon as practicable after the receipt of a certified capital investment, a certified capital company shall report all of the following to the department:

(a) The name of the certified investor from which the certified capital was received, including the certified investor's tax identification number.

(b) The amount of the certified capital investment.

(c) The date on which the certified capital investment was received by the certified capital company.

(d) The investment date for the investment pool of which the certified capital will be a part.

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(2) VIOLATIONS OF AGREEMENTS BY QUALIFIED BUSINESSES. As soon as practicable after the receipt of information by the certified capital company that a qualified business has violated an agreement made under s. 111.06 (1) to (e), the certified capital company shall notify the department of the violation and the facts giving rise to the violation. (5)?

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(3) ANNUAL REPORTS. On or before January 31 annually, a certified capital company shall report all of the following to the department:

(a) The amount of the certified capital company's certified capital at the end of the preceding year.

(b) Whether the certified capital company has invested more than 15% of its total certified capital in any one person.

(c) All qualified investments that the certified capital company has made during the previous calendar year and the investment pool from which each qualified investment was made.

(4) FINANCIAL STATEMENTS. Within 90 days of the end of the certified capital company's fiscal year, the certified capital company shall provide to the department a copy of its annual audited financial statements, including the opinion of an independent certified public accountant. The audit shall indicate the methods of operation and conduct of the business of the certified capital company to determine whether the certified capital company is complying with

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the rules under this chapter, including whether certified capital has been invested in the manner required under s. 111.06. The financial statements provided under this subsection shall be segregated by investment pool and shall be audited on that basis to allow the department to determine whether the certified capital company is in compliance with s. 560.34 (1m), Stats.

11 Stats
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(4) FEES. Annually, on or before January 31, a certified capital company shall pay a nonrefundable certification fee of \$5,000 to the department, unless January 31 falls within 6 months of the date on which the certified capital company was certified under s. 111.03.

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S. 111.03
(5) EXEMPTIONS FROM RIGHTS OF INSPECTION AND COPYING. If the department determines that a document submitted by a certified capital company under this section contains a trade secret, as defined in s. 134.90 (1) (c), Stats., or a business secret, that document is not subject to the right of inspection and copying under s. 19.35, Stats.

11 Stats
Comm 111.08 Distributions. A certified capital company may make a distribution only if one of the following conditions is met:

(1) QUALIFIED DISTRIBUTION. The distribution is a qualified distribution.

(2) WRITTEN DETERMINATION. The department made a written determination that the distribution may be made without adversely affecting the ability of the certified capital company to place, in qualified investments, an amount equal to 100% of the certified capital in the investment pool from which the distribution is to be made.

(3) PLACEMENT OF 100% OF INVESTMENTS IN QUALIFIED INVESTMENTS. The certified capital company has placed in qualified investments an amount equal to 100% of the certified capital investments in the investment pool.

(4) DEBT PAYMENTS. The distribution is a payment of principal or interest owed and due to a debt holder of a certified capital company, even if the debt holder is also a holder of equity and even if the indebtedness is a certified capital investment.

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Comm 111.09 Documentation and Records Requirements.

(1) Each certified capital company shall prepare and maintain on a current basis the following records and make them available to the department:

(a) A complete executed copy of the application, any amendments thereto and the attached schedules; when application is filed

(b) Files for each director and principal of the certified capital company containing the following:

1. Evidence that at least two of the Principals meet the requirements of s. 560.31(2)(d).

(c) Records concerning all securities issued by the certified capital company which include each of the following:

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1. The type of the security issued; *periods*
 2. The name, address, and telephone number of the investor(s);
 3. The date of the transaction;
 4. The total dollar amount invested;
 5. Copies of any prospectus or offering material used in connection with the sale of securities by the certified capital company;
 6. Evidence that the offering security contains the statements required by s. 111.04 (1).

(d) Records relating to each certified investor of the certified capital company which include each of the following:

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1. Evidence demonstrating that the certified investor is subject to premium tax liability pursuant to ss 76.60, 76.63, 76.65 and 76.66, Stats.
 2. The investor's state and federal tax identification numbers and premium tax identification number.

(e) Records relating to each qualified business invested in by the certified capital company which includes the following:

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1. The name of the business;
 2. The location of the headquarters and principal business operations of the business;
 3. A description of the type of business engaged in;
 4. Evidence that the business meets the definition of a qualified business as defined by s. 110.05. *COMM*
 5. A copy of any contractual agreement entered into between the certified capital company and the business;
 6. The amount of investment made in the business;
 7. The type of investment made along with supporting documentation;
 8. The date of the investment;

9. A description of the procedures used to select the business for investment including the names of all individuals associated with the certified capital company who participated in the decision;

10. A due diligence file on the business;

11. Copies of any prospectus or offering material used in connection with the sale of securities by the business to the certified capital company;

12. All correspondence between the certified capital company and the qualified business;

13. A summary listing all investments made in qualified businesses as of the end of each calendar year.

14. The number of jobs created each calendar year by the qualified business.

(f) Organizational documents of the certified capital company, and any amendments to these documents, as are applicable, based upon the type of organizational structure. These documents should include the following, as applicable:

1. Articles of Incorporation;

2. Partnership Agreement;

3. Articles of Organization;

4. Bylaws; and

5. Evidence of registration with the secretary of state.

(g) Records relating to the capital of the certified capital company which is not invested in qualified businesses.

(h) Records relating to all distributions by the certified capital company which includes each of the following:

1. The date of the distribution;

2. The amount of the distribution;

3. To whom the distribution was paid;

4. The purpose of the distribution;

5. A statement describing how each distribution is permitted under s. 560.36, Stats..

(i) Financial records, prepared in accordance with generally accepted accounting principles, which include each of the following:

1. A journal or journals, including cash receipts and disbursements records, and any other records of original entry forming the basis of entries in any ledger;

2. General and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, and income and expense accounts;

3. All bills or statements (or copies thereof), paid and unpaid, relating to the business of the certified capital company.

(j) Records required by this section shall be preserved for a period of not less than ten (10) years while effectively registered with the department, nor for less than five (5) years after decertification as a certified capital company at the office located in this state.

Comm 111.10 Compliance reviews; decertification; disqualification.

(1) ANNUAL COMPLIANCE REVIEW. The department shall conduct an annual review of each certified capital company to determine if the certified capital company is complying with the requirements of this chapter, to advise the certified capital company regarding the status of its investments as qualified investments and to ensure that no investment has been made in violation of this chapter. The cost of the annual review shall be paid by each certified capital company according to a reasonable fee schedule adopted by the department.

(2) DISQUALIFICATION. Any material violation of s. 560.34 (1m), Stats., is a ground for disqualification of the noncomplying investment pool. If the department determines that the certified capital company is not in compliance with s. 560.34 (1m), Stats., with respect to an investment pool, it shall send a written notice to the certified capital company and the commissioner of insurance stating that the investment pool has been disqualified.

(3) DECERTIFICATION OF A CERTIFIED CAPITAL COMPANY.

(a) Any material violation of s. 560.34 (1m), (2), (3) or (4), Stats., or s. 560.35 (1), (2), (3) or (4), Stats., is a ground for decertification of the noncomplying certified capital company. If the department determines that the certified capital company is not in compliance with s. 560.34 (1m), (2), (3) or (4), Stats., or s. 560.35 (1), (2), (3) or (4), Stats., the department shall send a written notice to the certified capital company that the certified capital company may be subject to decertification in 120 days from the date on which the notice was mailed, unless the certified capital company brings itself into full compliance with ss. 560.34(1m), (2), (3) or (4) and 560.35 (1), (2), (3) and (4), Stats. If at the end of the 120-day period the certified capital company is not in compliance with ss. 560.34(1m), (2), (3) or (4) and 560.35 (1), (2), (3) and (4), Stats., the department shall send a notice to the certified capital company and the commissioner of insurance stating that the certified capital company has been decertified.

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(b) The department may also decertify a certified capital company if the department determines that the applicant, or any principal or director of the certified capital company, has:

1. Violated any provision of this section;

2. Made a material misrepresentation or false statement or concealed any essential or material fact from any person during the application process or with respect to information and reports required of certified capital companies under this section;

3. Been convicted of, or entered a plea of guilty or *nolo contendere* to, a crime against the laws of this state or any other state or the United States or any other country or government, including a fraudulent act in connection with the operation of a certified capital company, or in connection with the performance of fiduciary duties in another capacity; or

4. Been adjudicated liable in a civil action on grounds of fraud, embezzlement, misrepresentation, or deceit.

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(c) If the department determines that the certified capital company has committed any of the item in par. B, the department shall send a written notice to the certified capital company that the certified capital company may be subject to decertification in 120 days from the date on which the notice was mailed, unless the certified capital company brings itself into full compliance. If at the end of the 120-day period the certified capital company is not in compliance, the department shall send a notice to the certified capital company and the commissioner of insurance stating that the certified capital company has been decertified. For decertification under this paragraph, the certified investment is not subject to recapture and forfeiture.

(4) VOLUNTARY DECERTIFICATION.

(a) A certified capital company may voluntarily decertify itself as a certified capital company if any of the following conditions are met:

1. It has been at least 10 years since the last certified capital investment was made in the certified capital company.

2. The certified capital company has placed in qualified investments an amount equal to 100% of the certified capital investment in the certified capital company.

(b) A certified capital company wishing to decertify itself under this subsection shall send a notice to the department certifying that it is eligible for decertification under par. (a). The decertification is effective on the date that the notice under this paragraph is received by the department.

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(5) EFFECT OF DECERTIFICATION. Decertification of a certified capital company or an investment pool has the effects specified in s. 76.635 (4), Stats.

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(6) NOTICES TO CERTIFIED INVESTORS. The department shall notify a certified investor when the certified capital company tax credit arising from a certified investment is no longer subject to recapture and forfeiture under s. 76.635 (4), Stats.

(END)

*Pursuant to s. 227.22 (2), Stats., these rules shall take effect on the first day of the month following publication in the Wisconsin Administrative Register.

NOV 03 1999

P. O. Box 7970
Madison, Wisconsin 53707
(608) 266-1018
TDD #: (608) 264-8777
www.commerce.state.wi.us

Tommy G. Thompson, Governor
Brenda J. Blanchard, Secretary

November 2, 1999

The Honorable Glenn Grothman
State Representative
15 N. State Capitol
Madison, WI 53707-8952

Dear Representative Grothman:

Deputy Secretary Phil Albert has shared your inquiry with me if we are interested in requesting an extension on the emergency rule related to ch. Comm 111 Certified Capital Companies (CAPCO) that will expire on December 19, 1999.

Please note that we are definitely interested in requesting an extension on the emergency rule and we sincerely appreciate your call and informing us that the Joint Committee for the Review of Administrative Rules will most likely not meet in December.

Please except this letter as our formal request for an extension of the emergency rule. On June 17, 1999, we held a public hearing on a proposed rule. The participants at that hearing overwhelming requested the agency to promulgate an emergency rule to begin implementation of the CAPCO program authorized by 1997 Wisconsin Act 215. The emergency rule was adopted in July after the hearing and took effect on July 23, 1999. A separate hearing on the emergency rule was held on August 17, 1999. The final rule is currently in legislative review, so we are unable to provide you with the exact number of days that will be need for the extension to provide coverage until the permanent rule becomes effective. However, we expect that review to end within the next few days at which time we will be able to confirm with you the exact number of days that will be needed for the extension.

This law was authored by Representative David Ward and Senator Gwendolynne and we have been working very closely with them to implement this very important legislation.

Once again, thank you thinking of us and for inquiring about the extension.

Sincerely,


for
Brenda J. Blanchard
Secretary

Cc. Senator Judith Robson
Senator Gwendolynne Moore
State Representative David Ward

DEPARTMENT OF COMMERCE

EMERGENCY RULE RELATING RELATING TO CERTIFIED CAPITAL COMPANIES

Finding of Emergency and Rule Analysis

The Department of Commerce finds that an emergency exists and that the adoption of the rule included in this order is necessary for the immediate preservation of public health, safety and welfare.

JUL 19 1999

Analysis of Rules

Statutory Authority: ss. 560.31, 560.34 (1m) (b), and 227.24, Stats,

Statutes Interpreted: ss 560.31, 560.34 (1m) (b), and 227.24, Stats,

On June 17, 1999, the Department of Commerce (Commerce) held a public hearing on proposed rules in response to 1997 Wisconsin Act 215. That act provides tax credits to persons that make certain investments in certified capital companies that are certified by Commerce. Legislators and persons interested in the rules testified at the hearing and requested that Commerce adopt an emergency rule that would (1) allow persons to apply for certification to become certified as capital companies, (2) allow persons to apply to make a certified capital investment in a certified capital company, and (3) set forth the operational and reporting requirements of certified capital companies required under the law. Since then, articles in the newspaper as well as business journals have pointed out the lack of venture capital in the state hinders high-tech growth and making that capital available will benefit Wisconsin as it has done in other states. This emergency rule is necessary to begin implementation of the law and to place Wisconsin in a better position to make capital available to draw high-tech industries, create new businesses, and expand existing businesses that will ultimately create new jobs and benefit all its citizens. Pursuant to s. 227.24, Stats., the emergency rule takes effect on publication in Thin the newspaper.

Contact Person

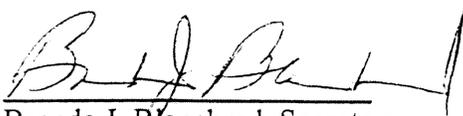
Phillip Edw. Albert, Deputy Secretary,

608-267-0770

ORDER

The Department of Commerce hereby creates ch. Comm 111, relating to Certified Capital Companies.

Dated at Madison, Wisconsin, this 16
day of July, A.D. 1999,
By the Department of Commerce


Brenda J. Blanchard, Secretary

Chapter Comm 111

CERTIFIED CAPITAL COMPANIES

Section 1. ch. Comm 111 is created to read:

Comm 111.01 Purpose.

Comm 111.02 Definitions.

Comm 111.03 Certification of certified capital companies.

Comm 111.04 Investments in certified capital companies.

Comm 111.05 Qualified businesses.

Comm 111.06 Operation of certified capital companies.

Comm 111.07 Reporting requirements and fees.

Comm 111.08 Distributions.

Comm 111.09 Documents and record requirements.

Comm 111.10 Compliance reviews: decertification; disqualification.

CERTIFIED CAPITAL COMPANIES

Comm 111.01 Purpose. The purpose of this chapter is to establish the procedures for the administration of certified capital companies by the department of commerce, as provided by ss. 560.30 to 560.38, Stats.

Comm 111.02 Definitions. In this chapter,

(1) "Affiliate" has the meaning specified in s. 560.30 (1), Stats.

Note: S. 560.30 (1) "Affiliate" means with respect to a certified capital company or a certified investor, any of the following:

(a) A person who, directly or indirectly, owns, controls, or holds power to vote, 10% or more of the outstanding voting securities or other voting ownership interests of the certified capital company or certified investor.

(b) A person, 10% of whose outstanding voting securities or other voting ownership interests are directly or indirectly owned, controlled or held with power to vote by the certified capital company or certified investor.

(c) A person directly or indirectly controlling, controlled by, or under common control with, the certified capital company or certified investor.

(d) A partnership in which the certified capital company or certified investor is a general partner.

(e) A person who is an officer, director or agent of the certified capital company or certified investor, or is an immediate family member of such an officer, director or agent.

(2) "Affiliate of an insurance company" has the meaning specified in s. 560.30 (1), Stats.

(3) "Allowable organizational costs" means those direct costs incurred to organize and charter an entity, but does not mean pre-opening and development stage enterprise costs.

(4) "Certified capital company 'CAPCO'" has the meaning under s. 560.30 (2), Stats.

Note: s. 560.30 (2) "Certified capital company" means a person that has been certified by the department under s. 560.31, Stats., and that has not been decertified under s. 560.37 (3) or (3m), Stats..

(5) "Certified capital company tax credit" has the meaning under s. 560.30 (3), Stats..

Note: s. 560.30 (3), Stats., "Certified Capital Company" means the tax credit under s. 76.635, Stats.

(6) "Certified capital investment" has the meaning under s. 560.30 (4), Stats.

Note: s. 560.30 (4), Stats., "Certified capital investment" means an investment in a certified capital company that is certified under s. 560.32 (2), Stats., and that fully funds either the investor's equity interest in a certified capital company, a qualified debt instrument that a certified capital company issues, or both.

(7) "Certified investor" has the meaning under s. 560.30 (5), Stats.

Note: s. 560.30 (5), Stats., "Certified investor" means a person who makes a certified capital investment.

(8) "Department" means the department of commerce.

(9) "Direct organizational costs" means, but are not limited to legal, accounting, consulting, and printing costs directly related to the chartering or incorporation process, pre-opening and development stage enterprise costs that may be capitalized under GAAP, and filing fees paid to chartering authorities.

(10) "Employee" means a full-time employe of the business, a person leased to the business, and a person from whom the business obtains services necessary to its day-to-day operations on an independent contractor basis.

(11) "Equity rights" means the receipt or creation of an equity interest in a qualified business.

(12) "Equity sale participation rights" means conversion options of debt, to convert all or a portion of the debt to the qualified Wisconsin business's stock or other ownership interest, then to participate in the sale of the stock or other ownership interest of the qualified Wisconsin business.

(13) "Equity security of a qualified business" means royalty rights, net profit interests, warrants for future ownership, equity sale participation rights, equity rights, or other similar rights as determined by the department.

(14) "Financial institution" means a state or national bank, trust company, savings bank, building and loan association, savings and loan association or credit union doing business in this state.

(15) "GAAP" means generally accepted accounting principles.

(16) "In need of venture capital" means that the qualified business requires debt or equity funds, or both, for working capital, expansion, research and development, sales growth, or modernization of current operations.

(17) "Investment in a CAPCO" for the purpose of earning tax credits or reductions under s. 76.635 (2), Stats., means a transaction that, in substance and in form, is the investment of cash in exchange for any of the following:

(a) Common stock, partnership or membership interest, preferred stock, or an equivalent ownership interest in a CAPCO, or

(b) A debt instrument that a certified capital company issues at par value or at a premium; that has an original maturity date of at least 5 years from the date on which it was issued; that has a repayment schedule that is no faster than a level principal amortization and, until the certified capital company may make distributions other than qualified distributions, the interest, distribution or payment features of which are not related to the certified capital company's profitability or the performance of its investment portfolio.

(18) "Investment date" has the meaning under s. 560.30 (6), Stats.

Note s. 560.30 (6), Stats., "Investment date" means, with respect to each investment pool, the date on which the last certified capital that is part of that investment pool was invested in the certified capital company.

(19) "Investment pool" has the meaning under s. 560.30 (7), Stats.

Note: s. 560.30 (7), Stats., "Investment pool" means the aggregate of all investments of certified capital in a certified capital company that are made as part of the same transaction, except that investments received more than 30 days apart may not be considered part of the same investment pool.

(20) "Marketable securities" means both debt and equity securities for which market quotations are available.

(21) "Net profit interests" means rights to receive a percent of operating or net profits that may be either fixed or variable, may provide for a minimum or maximum dollar amount per year or in total, may be for an indefinite or fixed period of time, and may be based upon operating or net profits in excess of a base amount.

(22) "Net worth" means assets minus liabilities in accordance with GAAP.

(23) "Pre-opening and development stage enterprise costs" means those costs that generally are not capitalized under GAAP, such as salaries and employment benefits, rent, depreciation, supplies, directors' fees, training, travel, expenses associated with the establishment of business relationships, postage and telephone fees.

(24) "Primary business activity" means the investment of a CAPCO's certified capital primarily in qualified investments in qualified businesses. Primary business activity is demonstrated by having at all times, a minimum of 50% of total certified capital of each investment pool, which has been collected in cash, available for investment in or having been invested as qualified investments in qualified businesses.

(25) "Principal business operations in Wisconsin" means a business that operates primarily in Wisconsin at the time of the initial investment and is in good standing with the Wisconsin department of financial institutions, if applicable, and meets one or more of the following:

- (a) The business has more than 50 percent of its total assets located in Wisconsin;
- (b) More than 50 percent of the business' net income is allocable or apportionable to Wisconsin in accordance with Wisconsin income tax law, but disregarding whether the business is taxable or tax exempt for Wisconsin income tax purposes;
- (c) More than 50 percent of the total salaries, wages and other compensation of the business are paid to Wisconsin employees.

(26) "Qualified business" has the meaning under s. 560.30 (8), Stats.

Note: s. 560.30 (8), Stats., "Qualified business" means a business which is a qualified business under s. 560.33, Stats.

(27) "Qualified distribution" has the meaning under s. 560.30 (10), Stats.

Note: s. 560.30 (10), Stats., "Qualified distribution" means a distribution or payment by a certified capital company to its equity holders for any of the following:

- (a) The costs of forming the certified capital company, including Allowable Organizational Costs.
- (b) The costs of syndicating, managing or operating the certified capital company.
- (c) An annual management fee that does not exceed 2.5% of the certified capital company's total certified capital.
- (d) Reasonable and necessary fees paid for professional services related to the operation of the certified capital company.
- (e) A projected increase in federal or state taxes, including penalties and interest on those taxes, of the equity owners of the certified capital company if those amounts are related to the certified capital company's ownership, management or operation.

(28) "Qualified investment" has the meaning under s. 560.30 (11), Stats.

Note: s. 560.30 (11) Stats., "Qualified investment" means an investment in a qualified business by a certified capital company that meets the requirements under s. 560.34, Stats.

(29) "Royalty rights" means rights to receive a percent of gross or net revenues that may be fixed or variable, may provide for a minimum or maximum dollar amount per year or in total, may be for an indefinite or fixed period of time, or may be based upon revenues in excess of a base amount.

(30) "Unable to obtain conventional financing" means the business has failed in an attempt to obtain funding for a loan from a financial institution as evidenced in writing from the financial institution.

(31) "Venture capital" means any type of debt financing or equity investment, or both.

(32) "Warrants for future ownership" means options on the stock or other ownership interests of the qualified business in which the qualified business may repurchase a call, or which

the qualified business may be required to repurchase a put, at some fixed amount or an amount based on a pre-agreed upon formula.

Comm 111.03 Certification of certified capital companies.

(1) APPLICATION TO BECOME A CAPCO.

(a) Any person seeking to become a CAPCO shall submit an application using the department's application form and shall provide the information specified in the application form.

(b) The application shall be submitted with a nonrefundable application fee of \$7,500.

(c) The application shall be received on a business day between July 15 and August 15 of each calendar year. In the event that August 15 is not a business day, applications shall be received by the first business day thereafter.

(d) If a submitted application is complete and meets the requirements of this chapter, the department shall grant or deny an application for certification within 30 business days of the date of application.

(e) If an application is determined by the department to be incomplete or additional information is needed, the department shall notify the applicant in writing within 20 business days of the receipt of the application.

1. If an application as specified in par. (a) is completed within 5 business days of the applicant's receipt of such notice, the completion of the application shall have no effect on the date by which the certification applied for must be granted or denied.

2. If an application as specified in par. (a) is not completed within 5 business days of the applicant's receipt of the notice, the date in which the application is completed shall be the date the completed application is resubmitted.

3. If such information is not supplied within 120 days of the applicant's receipt of the written notice, the application shall be deemed withdrawn and the department shall have no obligation to provide additional notices to the applicant.

(f) If the department denies certification, the department shall include with the denial a detailed description of the grounds for the refusal, including suggestions for removal of those grounds.

(g) Any person denied certification as a CAPCO may appeal to the secretary of the department within 30 business days of the denial. The appeal shall outline why the certification should be granted.

(2) REQUIREMENTS FOR CERTIFICATION. The department shall certify a person as a CAPCO if the department determines that all of the following conditions have been met:

(a) The person is a partnership, corporation, trust or limited liability company, whether organized for profit or not for profit, that has as its primary business activity the investment of cash in qualified businesses.

(b) The person has a net worth at the time of application, of at least \$500,000 and has at least \$500,000 in cash, cash equivalents and marketable securities.

(c) The directors, officers, general partners, trustees, managers or members or persons having a similar function are familiar with the requirements of this chapter and ss. 560.30 to 560.38, Stats.

(d) At least 2 officers, directors, general partners, trustees, managers or members each have at least 2 years of experience in the venture capital industry.

(e) The person has included, in any offering material involving the sale of securities, the statement required under s. Comm 111.04 (1).

(f) The person has paid a nonrefundable application fee of \$7,500.

(g) The person agrees to maintain an office and staff in the state of Wisconsin.

Comm 111.04 Investments in certified capital companies.

(1) REQUIRED DISCLOSURES IN SECURITIES OFFERINGS. A CAPCO shall include all of the following statements in any offering material involving the sale of securities:

(a) By authorizing the formation of a certified capital company, the state does not necessarily endorse the quality of management or the potential for earnings of the company and is not liable for damages or losses to a certified investor in the company. Use of the word "certified" in an offering is not a recommendation or endorsement of the investment by State of Wisconsin Department of Commerce.

(b) Investments in a prospective certified capital company prior to the time the company is certified are not eligible for a certified capital company investment credit under s.76.635, Stats. Investments in a certified capital company are not eligible for a certified capital company investment credit under s.76.635, Stats., unless the proposed investment is certified under s. 560.32 (2), Stats., before the investment is made. In the event that certain statutory provisions are violated, the state may require forfeiture of unused certified capital company investment credits and repayment of used certified capital company investment credits.

(2) CERTIFICATION OF CERTIFIED CAPITAL INVESTMENTS.

(a) A person may apply to make a certified capital investment in a CAPCO by providing notice under this paragraph to the department on a form specified by the department. The notice shall include the name of the person, the name of the CAPCO, the amount of the investment, as limited by par. (f), and any other information specified by the department. The notice shall also include an undertaking by the person to make the investment within 5 days after the department notifies the person that the investment has been certified. All such notices shall be submitted to the department by the CAPCO on behalf of the person making application.

(b) No CAPCO may submit applications under par. (a), the cumulative amount of the investments which exceeds the amount available for certification by the department as specified in par. (e).

1. If a CAPCO submits applications under par. (a), the cumulative amount of the investments which exceeds the amount available for certification by the department as specified in par. (e), the department shall, notwithstanding s. Comm 111.04 (2) (g), prorate the amount of the individual applicants' investments to reduce the cumulative amount of the investments to the amount available for certification by the department as specified in par. (e). These amounts may be subject to further proration under s. Comm 111.04 (2) (g).

(c) Applications for certification of certified capital investments shall not be accepted prior to October 1 of each calendar year. The amount requested in the application shall be subject to the limits provided for under par. (f).

(d) Investments shall be certified by the department in the order of the date received, not later than 15 business days after application. The department shall notify the person and the CAPCO who submitted the application for certified capital investment on behalf of the person of the amount of the investment that has been certified.

(e) The department may certify an investment under this subsection only if, after the certification, the department will not have certified a total of more than \$50,000,000 in investments under this subsection.

(f) Prior to August 1, 2000, the department may not certify an investment under this subsection if, after the certification, the investor, together with all affiliates of the investor, would have more than \$10,000,000 in certified capital investments.

(g) If, as a result of the limitations under par. (e) or (f), the department may not certify the full amount requested in applications for certified capital investments submitted under par. (a), the department shall allocate the amounts available for certification in order of priority based on the date on which the application was filed and not rejected or withdrawn.

1. If the amounts available for certification are insufficient to certify the full amount of all applications for certified capital investments that are submitted on the same day, the department shall prorate the available amount on the basis of the amount, up to \$10,000,000, prior to August 1, 2000, that the investor has committed to invest in the CAPCO under par. (a).

2. The pro rata amount certified for any one applicant shall be the product of a fraction, the numerator of which is the amount of the investment such person requested to be certified and the denominator of which is the total amount of the investments for which applications were filed on the same day, multiplied by the amount of investments that may be certified under s. 560.32(2)(b), Stats., after giving effect to all investments that have been certified or applications that have been filed with the department prior to such day.

(h) A CAPCO shall provide the department with evidence that it receives an investment of the certified capital in cash within 5 business days after the department notifies the person that the investment has been certified. In the event that a CAPCO does not receive an investment of capital equaling the amount of investment certified to an investor within 5 working days of the

CAPCO's receipt of notice from the department, the CAPCO shall so notify the department by overnight common carrier delivery service and the certified capital investment shall be forfeited. The forfeited certified capital investment amount shall be reallocated by the department to investment applications received on the same date as the forfeited investment application.

(3) **LIMITATION ON CERTIFIED INVESTOR INVESTMENT.** A certified investor may not, individually, or with or through one or more affiliates, own 10% or more of the equity securities in, be a general partner or manager of, or otherwise control the investment decision of the CAPCO. This subsection does not preclude a certified investor from exercising its legal rights and remedies, including interim management of a CAPCO, in the event that a CAPCO is in default of its statutory or contractual obligations to the certified investor.

Comm 111.05 Qualified businesses.

(1) **QUALIFICATIONS.** A business is a qualified business if all of the following requirements are met as of the time that a CAPCO, or any affiliate of the CAPCO, makes its first investment in the business:

(a) The business is headquartered in this state and its principal business operations are located in the state.

(b) The business is in need of venture capital and is unable to obtain conventional financing.

(c) The business has no more than 100 employees, at least 75% of whom are employed in this state.

(d) During its 2 most recent fiscal years, the business had, together with all of its consolidated affiliates, an average annual net income, after federal income taxes and excluding any carry-over losses, of not more than \$2,000,000, as determined in accordance with GAAP.

(e) The business has, together with its consolidated affiliates, a net worth that is not in excess of \$5,000,000 as determined in accordance with GAAP.

(f) The business is not predominantly engaged in professional services provided by accountants, lawyers or physicians.

(g) The business is not engaged in the development of real estate for resale.

(h) The business is not engaged in banking or lending and does not make any loans to, or investments in, certified capital companies.

(2) **DEPARTMENT OPINIONS.** A CAPCO may, prior to making an investment in a specific business, request a written opinion from the department that a business in which it proposes to invest is a qualified business. If the department determines that the business meets the requirements under sub. (1), the department shall issue a written opinion within 30 business days of the date of request stating that the business is a qualified business. In the event the department fails to issue an opinion that the business meets the requirements under sub. (1)

within 30 business days, the CAPCO may presume that the business meets the requirements of a qualified business.

Comm 111.06 Operation of certified capital companies.

(1) **QUALIFIED INVESTMENTS REQUIREMENTS.** In order for a CAPCO to prevent disqualification under s. Comm 111.10 of an investment pool, the CAPCO shall ensure that the investment pool makes qualified investments in accordance with the schedule under sub. (2). An investment is a qualified investment if the investment meets all of the following requirements:

- (a) The investment is a cash investment in a qualified business for the purchase of any of the following:
 - 1. An equity security of the qualified business.
 - 2. A debt security of the qualified business if the debt has a maturity of at least 5 years and if one of the following conditions is met:
 - a. The debt is unsecured.
 - b. The debt is convertible into equity securities or equity participation instruments such as options or warrants.
 - c. The debt is unsecured and is issued in combination with an equity security of the qualified business.
- (b) As a condition of the investment, the qualified business agrees not to use the proceeds from the investment for the purpose of relocating its operations.
- (c) As a condition of the investment, the qualified business agrees, as long as the CAPCO continues to hold the investment, not to relocate its headquarters out of this state.
- (d) As a condition of the investment, the qualified business agrees, as long as the CAPCO continues to hold the investment, to maintain at least 75% of its employees in this state.
- (e) As a condition of the investment, the qualified business agrees, as long as the CAPCO continues to hold the investment, to maintain at least 75% of its employees at work sites that were maintained by the qualified business at the time that the investment was made, unless the qualified business obtains an exemption from the department under this paragraph. The department may grant an exemption unless it determines that the qualified business is locating the employees at new sites to take advantage of lower wage rates in the areas where the new sites are located.
 - 1. The request for the exemption shall be made in writing to the department and outline the specific conditions of the request.
 - 2. The department shall respond to the written request for an exemption within 30 business days after receipt of the written request. If the department fails to respond

affirmatively to the exemption in writing, it may be presumed that the exemption is acceptable.

(2) A QUALIFIED INVESTMENT SCHEDULE.

(a) A CAPCO shall ensure that each of its investment pools makes qualified investments according to TABLE 111.06 –2A.

TABLE 111.06-2A

| Investment Date for a Particular Investment Pool | Minimum % of the Investment Pool Placed in Qualified Investments |
|--|--|
| Within 3 years | at least 30% |
| Within 5 years | at least 50% |

(b) The proceeds of all capital from a qualified investment returned to a CAPCO by a qualified business may be placed in new qualified investments:

1. The portion of the proceeds of all capital from a qualified investment returned to a CAPCO by a qualified business that are placed in new qualified investments shall count 100% towards the percentage requirements in TABLE 111.06-2A and placement of 100% of investments as qualified investments in s. Comm 111.08 (3) and Comm 111.10 (4) (a) 2.

2. The proceeds received from the sale of a qualified investment returned to a CAPCO that are placed in a new qualified investment in another qualified business shall count 100% towards the percentage requirements in TABLE 111.06-2A and placement of 100% of investments as qualified investments in ss. Comm 111.08 (3), and s. Comm 111.10 (4) (a) 2. except as follows:

a. The proceeds received from the sale of a qualified investment returned to a CAPCO within one year of the initial investment date, other than those sold a part of an initial public offering, that are placed in a new qualified investment, shall count 50% towards the percentage requirements contained in Table 111.06-2A and ss. Comm 111.08 (3), and s. Comm 111.10 (4) (a) 2. The reduction in the amount of an investment for terms of certain percentage requirements shall apply at all times until the CAPCO has been voluntarily decertified.

b. Proceeds from the sale of a qualified investment that are reinvested in that qualified business or an affiliate of that business shall not count towards the percentage requirements contained in TABLE 111.06-2A, and placement of 100% of the investments as qualified investments in ss. Comm 111.08 (3), s. Comm 111.10 (4) (a) 2, if such reinvestment is made within one year of the original investment's return to the CAPCO.

3. For purposes of satisfying the percentage requirements of TABLE 111.06-2A, and placement of 100% of investments ss. Comm 111.08 (3), and ss. Comm 111.10 (4) (a) 2., the cumulative amount of qualified investments made by the CAPCO shall be considered.

(c) The date funds are placed in accordance with Table 111.06-2A is the date funds are received by the qualified Wisconsin business from the CAPCO, as evidenced by the date of a

check or other means of funds transfer. The CAPCO shall submit all of the following information to the department within thirty days of the dates specified in TABLE 111.06-2A:

1. The amount of certified capital placed in qualified investments as of the date specified in par. (a); and

2. The amount of the total certified capital provided by investors to the CAPCO as of the date specified in TABLE 111.06-2A.

(3) NONQUALIFIED INVESTMENTS. All certified capital investments in a CAPCO that are not invested in qualified investments may be held or invested by the CAPCO as it considers appropriate, except that a CAPCO may not invest certified capital investments in an insurance company or in an affiliate of an insurance company.

(4) DIVERSIFICATION REQUIREMENT. A CAPCO may not make a qualified investment in a person if, at the time of the investment, more than 15% of the total certified capital of the CAPCO would be invested in that person and affiliates of that person.

(5) RESTRICTIONS ON MANAGEMENT. No CAPCO may be managed or controlled by, or have a general partner that is, an insurance company or an affiliate of an insurance company. This subsection does not preclude a certified investor or an affiliate of the certified investor from exercising its legal rights and remedies, including interim management of a CAPCO, in the event that a CAPCO is in default of its statutory or contractual obligations to the certified investor.

Comm 111.07 Reporting requirements and fees.

(1) RECEIPTS OF CERTIFIED CAPITAL. As soon as practicable after the receipt of a certified capital investment, a CAPCO shall report all of the following to the department:

(a) The name of the certified investor from which the certified capital was received, including the certified investor's tax identification number.

(b) The amount of the certified capital investment.

(c) The date on which the certified capital investment was received by the CAPCO.

(d) The investment date for the investment pool of which the certified capital will be a part.

(2) VIOLATIONS OF AGREEMENTS BY QUALIFIED BUSINESSES. As soon as practicable after the receipt of information by the CAPCO that a qualified business has violated an agreement made under s. Comm 111.06 (1)(b) to (e), the CAPCO shall notify the department of the violation and the facts giving rise to the violation.

(3) ANNUAL REPORTS. On or before January 31 annually, a CAPCO shall report all of the following to the department:

(a) The amount of the CAPCO's certified capital at the end of the preceding year.

(b) Whether the CAPCO has invested more than 15% of its total certified capital in any one person.

(c) All qualified investments that the CAPCO has made during the previous calendar year and the investment pool from which each qualified investment was made.

(4) **FINANCIAL STATEMENTS.** Within 90 days of the end of the CAPCO's fiscal year, the CAPCO shall provide to the department a copy of its annual audited financial statements, including the opinion of an independent certified public accountant. The audit shall indicate the methods of operation and conduct of the business of the CAPCO to determine whether the certified capital company is complying with the rules under this chapter, including whether certified capital has been invested in the manner required under ss. 111.06 and 560.34, Stats. The financial statements provided under this subsection shall be segregated by investment pool and shall be audited on that basis to allow the department to determine whether the CAPCO is in compliance with s. 560.34 (1m), Stats.

(5) **FEES.** Annually, on or before January 31, a CAPCO shall pay a nonrefundable certification fee of \$5,000 to the department, unless January 31 falls within 6 months of the date on which the CAPCO was certified under s. Comm 111.03.

(6) **EXEMPTIONS FROM RIGHTS OF INSPECTION AND COPYING.** If the department determines that a document submitted by a CAPCO under this section contains a trade secret, as defined in s. 134.90 (1) (c), Stats., that document shall not be subject to the right of inspection and copying under s. 19.35, Stats.

Comm 111.08 Distributions. A CAPCO may make a distribution only if one of the following conditions is met:

(1) **QUALIFIED DISTRIBUTION.** The distribution is a qualified distribution. Allowable organization costs shall be limited to 25% of capitalization, before any reduction for disallowed organizational costs. The allowable organization costs may be capitalized and amortized over a period not to exceed five years. Direct costs associated with the offering and issuance of capital stock may not be considered to be organizational costs and shall not be capitalized; these costs shall be deducted from the proceeds in recording initial capitalization.

(2) **WRITTEN DETERMINATION.** The department made a written determination that the distribution may be made without adversely affecting the ability of the CAPCO to place, in qualified investments, an amount equal to 100% of the certified capital in the investment pool from which the distribution is to be made.

(3) **PLACEMENT OF 100% OF INVESTMENTS IN QUALIFIED INVESTMENTS.** The certified capital company has placed in qualified investments an amount equal to 100% of the certified capital investments in the investment pool.

(4) **DEBT PAYMENTS.** The distribution is a payment of principal or interest owed and due to a debt holder of a CAPCO, even if the debt holder is also a holder of equity and even if the indebtedness is a certified capital investment.

Comm 111.09 Documentation and Records Requirements. Each CAPCO shall prepare and maintain on a current basis the following records and make them available to the department:

(1) A complete executed copy of the application in accordance with s. Comm 111.03, any amendments thereto and the attached schedules;

(2) Files for each director and principal of the CAPCO containing evidence that at least two of the principals meet the requirements of s. 560.31(2)(d), Stats. and s. Comm 111.03 (2)(d) and (g).

(3) Records concerning all securities issued by the CAPCO which include each of the following:

(a) The type of the security issued;

(b) The name, address, and telephone number of the investor;

(c) The date of the transaction;

(d) The total dollar amount invested;

(e) Copies of any prospectus or offering material used in connection with the sale of securities by the CAPCO;

(f) Evidence that the offering security contains the statements required by s. Comm 111.04 (1).

(4) Records relating to each certified investor of the CAPCO which include each of the investor's state and federal tax identification numbers and premium tax identification number.

(5) Records relating to each qualified business invested in by the CAPCO which includes the following:

(a) The name of the business;

(b) The location of the headquarters and principal business operations of the business;

(c) A description of the type of business engaged in;

(d) Evidence that the business meets the definition of a qualified business as defined by s. Comm 111.05.

(e) A copy of any contractual agreement entered into between the CAPCO and the business;

(f) The amount of investment made in the business;

(g) The type of investment made along with supporting documentation;

(h) The date of the investment;

(i) A due diligence file on the business for inspection, upon request;

(j) Copies of any prospectus or offering material used in connection with the sale of securities by the business to the CAPCO;

(k) A summary listing all investments made in qualified businesses as of the end of each calendar year.

(l) The number of jobs created each calendar year by the qualified business.

(6) Organizational documents of the CAPCO, and any amendments to these documents, as are applicable, based upon the type of organizational structure. These documents shall include the following, as applicable:

(a) Articles of incorporation;

(b) Articles of organization;

(c) Certificate of limited partnership;

(d) Partnership agreement;

(e) Operating agreement;

(f) Bylaws; and

(g) Evidence of registration with the department of financial institutions.

(7) Records relating to the certified capital of the CAPCO which is not invested in qualified businesses.

(8) Records relating to all distributions by the CAPCO which includes each of the following:

(a) The date of the distribution;

(b) The amount of the distribution;

(c) To whom the distribution was paid;

(d) The purpose of the distribution;

(e) A statement describing how each distribution is permitted under s. 560.36, Stats. and s. Comm 111.08.

(9) Financial records, prepared in accordance with GAAP, which include each of the following:

(a) A journal or journals, including cash receipts and disbursements records, and any other records of original entry forming the basis of entries in any ledger;

(b) General and auxiliary, or other comparable records; reflecting asset, liability, reserve, capital, and income and expense accounts;

(c) All bills or statements, or copies thereof; paid and unpaid, relating to the business of the CAPCO.

(10) Records required by this section shall be preserved for a period of not less than 10 years while effectively certified with the department, nor for less than 5 years after decertification as a CAPCO at the office located in this state.

Comm 111.10 Compliance reviews; decertification; disqualification.

(1) ANNUAL COMPLIANCE REVIEW. The department shall conduct an annual review of each CAPCO to determine if the CAPCO is complying with the requirements of this chapter and ss. 560.30 to 560.38, Stats., to advise the CAPCO regarding the status of its investments as qualified investments and to ensure that no investment has been made in violation of this chapter. The cost of the annual review shall be paid by each CAPCO according to a reasonable fee schedule adopted by the department.

(2) DISQUALIFICATION. Any material violation of s. 560.34 (1m), Stats., is a ground for disqualification of the noncomplying investment pool. If the department determines that the CAPCO is not in compliance with s. 560.34 (1m), Stats. and s. 111.06 (2) Stats., with respect to an investment pool, it shall send a written notice to the CAPCO and the commissioner of insurance stating that the investment pool has been disqualified.

(3) DECERTIFICATION OF A CERTIFIED CAPITAL COMPANY.

(a) Any material violation of s. 560.34 (1m),(2), (3) or (4), or s. 560.35 (1), (2), (3) or (4), Stats., is a ground for decertification of the noncomplying CAPCO. If the department determines that the CAPCO is not in compliance with s. 560.34 (1m), (2), (3) or (4), or s. 560.35 (1), (2), (3) or (4),Stats., the department shall send a written notice to the CAPCO that the CAPCO may be subject to decertification 120 days from the date on which the notice was mailed, unless the CAPCO brings itself into full compliance with ss. 560.34(1m), (2), (3) or (4) and 560.35 (1), (2), (3) and (4), Stats. by such date. If at the end of the 120-day period, the CAPCO is not in full compliance with ss. 560.34(1m), (2), (3) or (4) and 560.35 (1), (2), (3) and (4), Stats., the department shall send a notice to the CAPCO and the commissioner of insurance stating that the CAPCO has been decertified.

(b) The department may also decertify a CAPCO if the department determines that the applicant, or any principal or director of the CAPCO, has:

1. Violated any material provision of this chapter;