DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089		Hearing Location: Conf Rm 3B, 201 W. Washington Avenue Madison
Rule Number: Comm 111		Hearing Date: August 17, 1999
Relating to: Certified Capital Companies;		

Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		the sale of securities of a qualified business held by it (other than through a redemption or repurchase of such securities) or a merger involving the qualified business.	
		B. Initial Public Offering.	
		The revised rules as currently drafted provide an exemption from the 50% rule for sale proceeds received as part of an initial public offering. It is Advantage's opinion that the word "initial" should be deleted and that the exemption should apply to any "public offerings." It has been Advantage's experience that venture investors are more likely to sell their holdings in a portfolio company as part of a secondary public offering completed after the initial public offering. Sales in an initial offering are, for the most part, limited to sales by the issuing company in order to raise capital. Use of the term public offering will cover sales completed as part of an IPO as well as sales made in the public markets after an IPO.	Comment accepted and the rule has been expanded to include all public offerings.
		C. Limitation on the Application of 50% Rule.	
		As was discussed at length at the August 17th public hearing, it is crucial to the success of the CAPCO Program in Wisconsin that that 50% limitation only apply to the reinvestment of the CAPCO's original investment. For example, assume that the CAPCO makes a $2 million investment in a qualified Wisconsin business. Due to its success, the portfolio company is then acquired by a third party for cash in a stock sale that yields the CAPCO $20 million in cash proceeds. Given that the revised rules mandate that subsequent qualified investments be deemed to have been made using the returned proceeds before any other funds of the CAPCO, the CAPCO will be forced to invest $20 million in qualified investments in order to receive $10 million in credit toward the statute's investment milestones. This seems to be a very harsh standard and one that penalizes CAPCOs that have had the good fortune of backing the right entrepreneur.	Comment noted and accepted. The Department, after a further review of the Statutes, agrees with the consensus of testimony that the 50% limitation should only apply to the original investment and to due otherwise would be a substantial penalization. Different wording suggestions were recommended on the best way to accomplish this and a different wording suggestion was selected.

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		Advantage suggests that the 50% limitation be limited to the return of the original investment made by the CAPCO. In the example set forth above, the CAPCO would only receive $1 million in credit towards the investment milestones for the first $2 million in qualified investments that it makes after the return of the sale proceeds. Any qualified investments made after the placement of the initial $2 million then would be counted towards the statute's investment milestones on a 100% basis. To accomplish this change, we suggest adding the following provison to the end of the first sentence of 111.06(2)(b)(2)(a): "provided that this reduction only apply to the reinvestment of an amount of such proceeds equal to the amount of the CAPCO's qualified investment made on the initial investment date."	
		D. Other Comments	
		It is also Advantage's opinion that the reduction should only apply to the proceeds of sales that occur within the first six months rather than the first year. The goal of this limitation is to prevent churning of a CAPCO's portfolio in order to satisfy the statutory investment milestones. It is our experience that a six month holding period provides a sufficient deterrent for abuse, whereas a one year holding period begins to encroach upon a time frame during which successful investments may be harvested.	Comment noted and accepted. Differences of opinion exist over the minimum length of time that an investment may be turned over; therefore, the Department has decided to use one year as proposed.
		Furthermore, given the confusion and difficulty that these recycling provisions have engendered, Advantage suggests that the 50% reduction apply only to the 100% decertification requirement and not to the 30% and 50% investment milestones. This puts the incentive on the equity holders of the CAPCO to ensure that the investments are truly long-term investments, without subjecting the CAPCO's investors to such uncertainty. The investors can limit the types of investments that a CAPCO makes (i.e. ensure that it only make qualified investments), but is nearly impossible for investors to have any control over the eventual liquidation of those investments.	Comment noted and accepted.

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		2. Decertification for Failure to Maintain Original Certification Requirements (Comm. 111.10(3)(b)(5)	
		The revised rules add a provision that permits decertification of a CAPCO for failure to maintain the rule's initial certification requirements. Although it is Advantage's opinion that this new requirement is a good addition, Advantage suggests limiting the maintenance requirement to subsections (a), (c), (d) and (g) of Comm. 111.03(2). Subsections (e) and (f) are not applicable to a CAPCO on a continuing basis and the requirements of subsection (b) impose too high of a standard for most CAPCOs. The requirement that a CAPCO at all times have a minimum of $500,000 in cash, cash equivalents or marketable securities is in conflict with the aims of the statute. The CAPCO program seeks to have the funds that the CAPCOs raise invested in the securities of Wisconsin entrepreneurs, which will be necessarily illiquid. Since CAPCOs usually have little control over the timing of liquidity events with their portfolio companies, imposing a requirement that a CAPCO always maintain $500,000 in cash will hamstring a CAPCO's ability to fully manage its portfolio.	Comment noted and accepted. After a further review of the Statutes, the Department concludes that requiring the CAPCO to maintain $500,000 at all times goes beyond the Statutes and the rule has been amended accordingly.
		3. Qualified Distribution (Comm. 111.08(1))	
		A question was raised at the August 17th public hearing as to the definition of "capitalization" that would be used to interpret the new 25% limitation on certain organizational and syndication costs that qualify as qualified distributions. Advantage suggests that a definition of capitalization be included to read as follows: "capitalization" means, with respect to a certified capital company, the sum of (i) certified capital investments received by the certified capital company and (ii) the certified capital company's stockholders', partners' or members' equity, as the case may be, as determined in accordance with generally accepted accounting principles.	Comment noted and accepted and recommendation added to the rule.

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		4. <u>Restrictions on Management</u> (Comm. 111.06(5))	
		This section of the proposed rules prohibits an insurance company from managing a CAPCO, but also provides an exception in cases where a certified investor is exercising its legal rights, including interim management of the CAPCO. It is Advantage's opinion that the inclusion of the exception is not only proper, but actually necessary for the success of the Wisconsin program. The exception, however, should not be limited to "certified investors," but should be extended to include insurance companies in general, as it is insurance companies that are prohibited by this Section, not just certified investors. CAPCOs may incur contractual obligations with insurance companies (i.e. credit support contracts, debt for which no credits were allocated, etc.) that are distinct from its obligations to its certified investors. These insurance companies, in the case of a default by the CAPCO on these obligations, need the ability to exercise their legal remedies, including interim management of the CAPCO, in order to protect their standing as creditors as would certified investors. To this end, Advantage suggests replacing the second sentence of the rule as currently drafted with the following: "This subsection does not preclude an insurance company or affiliate thereof 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 such insurance company or affiliate."	Comment noted and accepted and the rule has been amended as suggested.
		Failure to make this change will severely limit a CAPCO's ability to contract with an insurance company in any way other than as a certified investor. Furthermore, the management restrictions are primarily intended to prevent self-dealing by insurance companies in the CAPCO program, from which they derive tax benefits. Management by an insurance company who is not a certified investor of a CAPCO, although not a desired situation, does not present the same potential for conflicts of interest that management by a certified investor does. The exemption for certified investors, however, is needed in order to facilitate investments	Comment noted and accepted.

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		from insurance companies. Likewise, the exception is needed for other insurance companies in order to allow a CAPCO to contract with insurance companies for other things besides the investment of certified capital.	
		5. Definitions	
		As purely a corrective matter, the following definitions can be deleted from the rules as they do not appear in the revised text: "Allowable Organizational Costs," "Direct Organizational Costs," "Financial Institution" and "Pre-opening and Development Stage Enterprise Costs." In addition, in the definition of "certified capital company tax credit," the words "tax credit" should be added after "Certified Capital Company" in the statutory cross reference.	Comment noted and accepted and unused definitions deleted.
		As mentioned above, please feel free to call Advantage representatives at 1-800-569-2916 or 1-800-671-3151 if there are any questions with respect to these comments or any further discussion is warranted.	
	Tim Elverman Stonehenge Capital Corporation 111 East Kilbourn Avenue Suite 2060 Milwaukee, WI 53202-6611	Appreciated the opportunity to comment on the emergency rule.	Comment accepted.
		Recommends definition for capitalization and pleased to offer a definition as follows:	Comment noted and accepted and definition added to the rule.
		"Capitalization" means, with respect to a certified capital company, the sum of (I) certified capital investments received by the certified capital company, and (ii) the certified capital company's stockholders', partners', or members' equity, as determined in accordance with generally accepted accounting principles."	
		Also, notice s. Comm 111.10 (3) provides a 120 cure period to a CAPCO after notice is provided and before decertification occurs and recommends a 120 cure period be provided in s. Comm 111.10 (2), dealing with disqualifications too.	Comment noted and accepted and rule amended to include suggestion.

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	John Neis Venture Investors Management LLC 608-441-2700	Thank you for the opportunity to comment on the emergency rules and the proposed changes to those rules for the Certified Capital Company program. I . have only a few comments at this time.	Comment noted.
		Timing of Certification of Certified Capital Investments	
		The issuance of securities to an investor making a certified capital investment requires significant documentation. The statutory language requires an undertaking to make the investment within five days of notice, limiting the time available to complete this task. The ability to prepare in advance is limited because the amount of the investment for each investor is not known until the notice is received.	Comment noted and accepted.
		Venture capital funds typically have small staffs. We have diverse demands on our time, including activities like speaking engagements and portfolio company board meetings that require travel and have to be scheduled weeks or months in advance.	Comment noted and accepted.
		In the emergency rule 111.04 (2)(d), it states that investments will be certified not later than 15 business days after the application. As a result, the notice for certification in the current year could be issued any time between Monday, October 4 and Friday, October 22. This means that the time that must be dedicated to document preparation could fall any time between October 4 and October 27. The need to maintain flexibility in our schedules for most of the month of October is an unreasonable hardship for the scheduling of our small team and for our investors.	Comment noted and accepted
		I have two suggestions to lessen this burden. First and most important, I'd suggest the following wording for paragraph (d)- Investments shall be certified by the department in the order of the date received, effective on the 15th business day after application. The department shall provide notification that is effective on the 15th business day after application to the person and the CAPCO who submitted the	Comment noted. The Department realizes that the Statutory time frame of 5 days to make an investment to is very short and recognizes the importance of providing the information in the notice timely. The language has been modified to include that the Department will provide prompt notice by first class mail and facsimile.

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		application for certified capital investment on behalf of the person of the amount of the investment that has been certified. The notice shall be delivered no later than on the effective date of the notice.	
		My second suggestion relates to paragraph 111.04(2)(a). I recognize that the statutory language requires an undertaking to make the investment within 5 days of notification, If the Department of Commerce is allowed the flexibility to interpret this, I suggest that the word "business" be inserted between "5" and days'.	Comment noted and accepted. The suggestion to add the term "business" is included in the rule.
		If the first suggestion is adopted, we know with certainty that we can reserve our October 25-27 schedules to complete the documentation and issue the securities, leaving the ability to make firm commitments of our time earlier in the month. If the second suggestion is adopted, we don't lose the weekend and have the whole week of October 25-29 to complete the transaction.	Comment noted and accepted.
		Qualified Investment Schedule	
		At last week's hearing, the insertion of 111.06(2)(b)2.c. triggered a comment from Michael Johnson of Advantage Capital Partners on the definition of proceeds. I believe that the intent of the limitation of 111.06(2)(b)2.a. is to limit short term, low risk investments as a means of the qualified investment schedule. Rather than retroactively reducing the credit given to the short-term investment, the Department crafted the language to limit the credit when the amount is reinvested. However, I think that Michael Johnson is correct in stating that the reduction to 50% credit should only apply to the lesser of the total proceeds received or cost of the exited qualified investment. Otherwise, the CAPCO could be severely penalized for making a successful high-risk investment that exceeded investor expectations.	Comment noted and accepted. After a further review of the Statutes, the Department concludes that requiring the CAPCO to maintain $500,000 at all times goes beyond the Statutes and the rule has been amended accordingly

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		As an example, suppose a CAPCO receiving an allocation of $10 million of the $50 million tax credit pool makes a $1 million investment in a firm that is sold in less than a. year, resulting in a return of $20 million to the investor. Originally, that firm would be required to invest $3 million in qualified investments in three years, $5 million within five years, and $1 0 million over time. As currently drafted, if this was the first investment and it was exited before any other investment is made, the next $20 million in investments would only receive 50% credit towards this goal. As a result, the CAPCO would have to invest an additional $4 million to reach the three year minimum, $8 million to reach the five year minimum, and $18 million to reach the 100% requirement. The greater the success (which implies that greater risk was taken), the greater the penalty.	
		I support the insertion of 111.06(2)(b)2.c. because it provides protection against manipulation around the penalties in 111.06(2)(b)2.a. However, I recommend that the language in 111.06(2)(b)2.a. be amended to read:	Comment noted and accepted.
		The proceeds, up to a maximum of the investment cost, 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.	Comment noted and accepted and language included.
		Mr. Johnson also recommended an exclusion other than a sale in an initial public offering, arguing that a holding period of greater than six months represented a long term commitment. However, an investment holding period of less than a year is extraordinarily short for a venture capital investments. As a result, I recommend against broadening the exclusions.	Comment noted and accepted.

DEPARTMENT OF COMMERCE
PUBLIC HEARING ATTENDANCE RECORD

RULE NO.: Comm 111

RELATING TO: Certified Capital Companies

LOCATION: Rm. 3B, 201 W. Washington Ave

DATE: June 17, 1999

TIME: 9:00 AM

CITY: Madison

Name	Representation (Business, Assoc., Group, Self, etc.)	City and State	Appearing in Support	Appearing in Opposition	Appearing for Information
Rob Buchanan	Sen. Gwen Moore	Madison	✓		
John Neis	Venture Investors	Madison			
Tom Schrader	WHEDA	Madison			✓
Siobain Beddow	WHEDA	Madison			✓
David A Erne	Reinhart, Boerner Law Firm	Milwaukee			✓
Cathy Gillman	Foley + Lardner	Madison			✓
Maurice Doyle	Advantage Capital	St. Louis			✓
Michael Johnson	" "	" "			✓
Phil Thomas	Growth Capital Alliance	" "			✓
Raymond Tafforu	Michael Best & Friedrich	Madison WI			✓
Allen Dines	Midwest Biotech Inv. Gp	Madison WI			
Tim Eluerman	Bank One, Wisconsin	Milw, WI	✓		
Scott Button	Venture Investors	Madison, WI			✓
Kim Rupp	Office of Rep. Ward	Madison, WI	✓		
Guy Paige	Madison Capital Partners	Madison, WI	✓		
Daryll Lund	Community Bankers of WI	Madison			
James Tenuta	Advantage Capital Partners	Madison			

COM-10532 (N.03/97)

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	Michael T. Johnson Advantage Capital Partners 909 Poydras Street, Suite 2230 New Orleans, LA &0112 (504) 522-4850	Advantage Capital Partners, has prepared the following comments. These comments are based upon Advantage's experience in fund raising and investment activities under the CAPCO programs currently in place in Louisiana, Missouri, New York and Florida, and its involvement with the drafting and passage of the Wisconsin CAPCO legislation.	Comments accepted.
		General The proposed rules do a good job of covering the main issues under the program; however, there are a few areas where improvements can be made. Based on its experience, Advantage believes that these changes are necessary (i) to facilitate fund raising efforts thereby ensuring active insurance company participation in the Wisconsin program and (ii) to create an efficient process by which Wisconsin entrepreneurs are funded by CAPCOS. Substantive Issues Concerning the Proposed Rules 1. The Need to Promulgate Rules on an Emergency Basis.	Comments accepted.
		Of utmost importance to the success of the Wisconsin CAPCO program is the promulgation of emergency rules in the near future. As currently drafted, the rules provide for the submission of applications for CAPCO status between July 15 and August 15 with applications for the allocation of tax credits to be submitted in October. If fund-raising is to occur in 1999 and the process of funding Wisconsin entrepreneurs started in 1999, emergency rules must be promulgated. Potential applicants for CAPCO status will need rules under which their applications are to be filed very soon. In order to submit a complete application by July 15 of this year, applicants need to know within the next week or two exactly what should be included in their applications. In addition, fund-raising will be impossible without a firm set of rules governing the program.	Comments accepted and emergency rule promulgated.

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		Without these rules, Wisconsin entrepreneurs will not begin to receive the investment funds made available under the CAPCO program until late 2000 at the earliest. It is the suggestion of Advantage that emergency rules be adopted in the next week or two that cover the application process, including establishment of the forms that an applicant will need to complete in order to qualify as a CAPCO. Subsequently, final rules should be adopted by mid-August to facilitate fimdraising in the early fall as is envisioned by the statute and the proposed rules. Investors will be unwilling to invest unless they can look to firm rules to see how the program will be operated. Given the structure of the proposed rules, without the adoption of the emergency rules, there will be no money raised under the program nor entrepreneurs funded in 1999.	
		2. Comm 111.02(14). Advantage suggests deleting the word "additional" in the first line of this proposed definition and including "sales gowth" as one of the purposes for which a business may need CAPCO funding. The elimination of the word "additional" makes it clear that CAPCOs may fund true start-up entities, which represent the entrepreneur in its purest sense. Any prohibition on a CAPCO's ability to invest in a start-up company would eliminate a large segment of Wisconsin entrepreneurs from CAPCO funding, entrepreneurs whom the statute was in large part designed to help. Further, the inclusion of "sales growth" as a permitted need for CAPCO funding makes it clear that expansion funding is not reserved solely for physical expansion. Many entities (i.e. high technology and internet concerns) may need expansion funds to commercialize and market their products but have no need to physically expand their facilities. Sales growth, therefore, rather than expansion is the proper term for describing their need for expansion funding.	Comment accepted and rule modified in def. of "in need of venture capital".

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		3. Comm 111.03(2)(g). Advantage strongly suggests deleting this subsection. The proposed rule 111.03(2) sets forth the requirements for CAPCO certification that all applicants must meet, which, except for the inclusion of subsection 2(g), are identical to the statutory requirements. Subsection (g), however, imposes an additional requirement upon applicants for CAPCO certification, namely that at least two key employees of the CAPCO (employees having management discretion) live and work in the State of Wisconsin. Inclusion of this proposed requirement may in the final rules deter several potential CAPCOs from participating in Wisconsin.	Comment accepted and rule modified to require the CAPCO to maintain an office and staff in the state.
		Given the overall size of the Wisconsin program ($50 million) and the likelihood that each CAPCO will only receive a portion of that overall amount, this requirement may make participation in Wisconsin uneconomical for may potential applicants. In particular, as a protection for state interests, the management fee that a CAPCO is allowed to pay under the statute is limited to 2.5% of the money that a CAPCO raises under the program. With this limitation the annual management fee, especially in the case of smaller CAPCOS, may simply not be sufficient to fund the costs of maintaining an office in Wisconsin and staffing it with at least two investment professionals.	Comment accepted, however,the statutes do not permit the Department to regulate "non certified funds" so no change can be made.
		Some CAPCOs may need to be afforded the flexibility to use other staffing structures in managing their Wisconsin operations. The state should be able to rely on market forces to ensure that only those CAPCOs that are truly committed to the Wisconsin program and that have the ability to properly manage a Wisconsin-only investment portfolio will receive funding. Further, inclusion of this additional requirement with respect to certification is most likely beyond the rule-making authority delegated to the department in the statute. The Wisconsin legislature adopted very specific certification requirements for CAPCOs and did not empower the department to adopt additional requirements, as it did with certain other sections of the legislation. Therefore, it would seem that the inclusion of this additional requirement may very well be beyond the authority delegated to the	Comment accepted and rule modified to require the CAPCO to maintain and office and staff in the state.

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		department.	
		4. Comm 111.06(l)(a). Advantage suggests replacing the phrase "that is structured with a maturity or redemption of five years or greater, in any" with the following phrase: "for the purchase of any."	Comment accepted and rule modified.
		The requirements of a "qualified investment" are specifically set forth in the CAPCO legislation (s.560.34, Stats.) and are repeated verbatim in the proposed 111.06 except for the changes that this suggestion would reverse. It is the opinion of Advantage that changing the specifics of a statutorily prescribed definition is beyond the rule-making authority delegated to the department in the CAPCO statute. Further, it should be pointed out that the statute already imposes the five-year minimum maturity for debt instruments. See s.560.34(l)(a)(2), Stats. Therefore, the additional requirement in the proposed rule is somewhat redundant. Any changes to the statutory definition made by the rule would limit the flexibility that CAPCOs and Wisconsin entrepreneurs have with respect to structuring different financing options, flexibility that the legislature specifically permitted where it deemed appropriate and restricted where it did not deemed appropriate.	Comment accepted and rule amended accordingly.
		5. Comm 111.06(2)(b)(2). Advantage suggests replacing the last two lines of this subsection with the following (new language has been underlined): "towards the percentage requirements under paragraph (a) and s.560.34(lm) a and placement of 100% of investments as qualified investments in 111.08(2) and (3), s.560.36(2) and (3), Stats., 111.10(4)(a)(2) and 560.37(3m)(a)(2), Stats." These additions make two important changes. First, a reference is added to s.111.08(2), which is another section of the proposed rules that discusses 100% requirement. Second, statutory references are added to make clear	Comment accepted along with others. Section Comm 111.06(2) redrafted to include this consideration along with other suggestions presented to improve the readability and clarity .

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		that this provision, which permits the recycling of investment proceeds, also applies to the percentage requirements contained in the statute. Including the statutory references is of particular importance as the statute leaves to the rules the determination of how reinvested funds are to be counted; therefore, it must be clear that the rules also cover to the statutory requirements.	
		6. Comm 111.06(2)(b)(3). Advantage suggests replacing the last three lines of this subsection with the following: "of the initial investment date, shall count 50% towards the 100% requirement for investments in qualified investments contained in 111.08(2) and (3), s.560.36(2) and (3), Stats., 111.10(4)(a)(2) and s.560.37(3m)(a)(2), Stats."	See preceding comment and explanation.
		This revision accomplishes the same purposes suggested in Comment 4, and also deletes language with respect to the 50% limitation applying to the requirements of paragraph (a). Subsection 111.06(2)(b)(3)(a) of the proposed rule specifically states that the reduction will not apply to the requirements of paragraph (a). The suggested deletion would eliminate any confusion with respect to this issue, which is vital to a successful CAPCO program as investors and managers need to have complete confidence in what the investment requirements imposed by the statute are.	See preceding comments and explanation.
		7. Comm 111.06(2)(b)(3) (a) . At the end of the section, the following should be added: "or of s.560.34(lm)(a), Stats." This makes clear that this provision also applies to the requirements contained in the statute.	See preceding comments and explanation.
		8. Comm 111.06(2)(b)(4). Replace lines 3 and 4 of this subsection with the following: "(a), s.560.34(lm)(a), Stats., and placement of 100% of the investments as qualified investments in ss. 111.08(2) and (3), s.560.36(2) and (3), Stats., 111.10(4)(a)(2) and s.560.37(3m)(a)(2), Stats., if such reinvestment is made within six	See preceding comments and explanation.

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		months of the original investment's return to"	
		See explanation of changes in Comment 5. The same purposes are accomplished by these suggested revisions.	
		9. Comm 111.06(2)(b)(5). Replace the first two lines of the section with the following: "5. For purposed of satisfying the percentage requirements of paragraph (a), s.560.34(lm)(a), Stats., and the placement of 100% of investments in ss. 111.08(2) and (3), s.560.36(2) and (3), Stats., 111.10(4)(a)(2) and s.560.37(3m)(a)(2), Stats., the cumulative" See Comments 5 and 8 for explanation.	See preceding comments and explanation.
		10. Comm 111.09(1)(d)(1). Advantage suggests deleting this proposed requirement in its entirety. This proposed section imposes a record-keeping requirement on CAPCOs to maintain records that prove its investors are subject to premium tax liability. On one hand, once insurance companies have made an investment in a CAPCO, it is the insurance companies that will usually be seeking information from the CAPCO, not vice versa. Therefore, it would be odd for a CAPCO to impose a continuing reporting requirement on its investors. On the other hand, the state does not have a strong interest in making sure that CAPCO investors can avail themselves of premium tax credits. If investors cannot use the credits they earn, the state will actually benefit. Given the lack of state interest in the information requested by this proposed rule and the burden it would place on the CAPCOS, it seems only reasonable to delete this proposed requirement.	Comment accepted. Department crmncurs. Section redrafted after re examination of the statutory requirements.
		11. Comm 111.10(3)(b)(1). Advantage strongly suggests adding the word "Materially" at the beginning of this subsection. It seems slightly arbitrary to permit CAPCOs to be decertified for any	Comment accepted and rule modified to include the suggestion.

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089			Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Rule Number: Comm 111			Hearing Date: June 17, 1999
Relating to: Certified Capital Companies			
Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		violation of the rules, when only a material violation of the actual statute can result in decertification. See s.560.37(3), Stats. and Comm 111.10(3)(a). The addition of "materially" in this subsection would make the standards consistent for all violations, whether of the rules or the statute.	
		12. Comm 111.10(3)(b)(3) and (4). Advantage suggests deleting these two sections. Although it is Advantage's general policy to support any type of provision that helps to protect the state from abuse or participation in the CAPCO program by so-called "bad actors," these provisions seem to cast too broad of a net. Subsection 3 for instance, would cover traffic violations and other minor crimes. Subsection 4 also is too broad. Given the nature of civil litigation today, especially with respect to financial transactions that go bad, fraud and/or misrepresentation are likely to be alleged. It seems rather draconian for a CAPCO to be decertified for these types of issues. In all likelihood the proposed rules were not intended to capture these types of crimes or liabilities, but, as currently written, they do. Perhaps a more focused rule would permit decertification of a Wisconsin CAPCO if one of its affiliates is decertified under the CAPCO laws of another state for fraud or other bad actions.	Comments accepted. Department concurs the section is drafted too narrowly and agrees with the points raised and has amended (3)(b) to reflect major concerns such as "material violations" and 'breach of fiduciary trust", rather than mere traffic violations.
		Nevertheless, inclusion of these sections may also be beyond the statutory authority of the department in this area. Whereas Subsections 1 and 2 address violations of the rules or processes authorized by the rules, Subsections 3 and 4 address external matters and, therefore, are most likely beyond the statutory authority of the department.	
		Corrective Suggestions	
		I. Comm 111.02(2). In the definition of "allowable organizational costs," the phrase "to incorporate" should be replaced with "to organize." This change will ensure that certified capital companies may be structured as non-corporate entities, which is specifically	Comment accepted and rule revised to include the suggestion.

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089	Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Rule Number: Comm 111	Hearing Date: June 17, 1999
Relating to: Certified Capital Companies	

Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		allowed by the statutory requirements for CAPCO certification. See 560.31(2)(a), Stats.: "The person is a partnership, corporation, trust or limited liability company...." (emphasis added).	
		2. Comm 111.02(9). The definition of "Equity in a qualified business" should be changed to "Equity security of a qualified business." This change matches the definition with the actual term that is used in Proposed Rule Comm 111.06(l)(a)(1).	Comment accepted and rule revised to include the suggestion. Renumbered because of other suggestions.
		3. Comm 111.02(9)(c). The currently proposed definition of "warrants for future ownership" should be replaced with the following: ... Warrants for future ownership' means options on the stock or other ownership interests of the qualified Wisconsin business, which the qualified Wisconsin business may repurchase (a "call") or which the qualified Wisconsin business may be required to repurchase (a "put") at some fixed amount or an amount based on a pre-agreed upon formula." The underlined words are those that have been added to the original definition. Advantage believes this revised definition more clearly states the definition of "warrants" and also incorporates the concept of a non-corporate entity by including the phrase "or other ownership interests." It is important that Wisconsin entrepreneurs be allowed to conduct their businesses through noncorporate entities, if they so choose, especially given the tax advantages of other types of entities (i.e., no entity level taxation with LLC).	Comment accepted and rule revised to include the suggestion, except for adding "Wisconsin" before business.
		4. Comm 111.02(9)(d). The phrase "or other ownership interests" should be added after the word "stock" in both places it appears in this subsection (d). This change makes clear that CAPCOs are permitted to invest in the equity securities of non-corporate entities (i.e. limited liability companies).	Comment accepted and rule revised to include the suggestion. Renumbered as a separate definition based on other comments.

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089	Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Rule Number: Comm 111	Hearing Date: June 17, 1999
Relating to: Certified Capital Companies	

Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		5. Comm 111.03(l)(e)(4). This subsection should be renumbered as 111.03(l)(f). This will ensure that the denial process with respect to CAPCO certification applies to all applications, not just those that are incomplete or in need of additional information.	Comment accepted and rule renumbered to include the suggestion.
		6. Comm 111.04(l)(a) and (b). In an effort to avoid confusion between the legends that are specifically required by the statute and those proposed in the rules, the following changes should be made to 111.04(l)(a) and (b). The changes fashion legends that afford protection for the state (as does the statute) as well as to the department (as do the rules):	Comment accepted in part and rule revised to be in alignment with statutory wording.
		a) In subsection (a), (i) in line one, replace the phrase "the department does not" with "neither the department nor the state," (ii) change the word "endorse" to "endorses" on line two and (iii) replace the phrase "by department" at the end of the subsection with the phrase "by the state or the department."	
		b) In subsection (b), (i) place a period after the first "Stats." on line three, (ii) immediately before the word "unless" on line three insert the following: "Investments in a certified capital company are not eligible for a certified capital company investment credit under § 76.635.Stats.," and (iii) insert the phrase "state or the" immediately before the word "department" on line four.	
		7. Comm 111.04(2)(f). In line one of this section, the reference should be to subsections (d) and (e) rather than (b) and (c).	Comment accepted in part. A new (f) was added revised to acknowledge dollar limits specified in the statutes and be in alignment with statutory wording, thus changing the references slightly that were suggested.
		8. Comm 111.04(2)(f)(2). Advantage suggests inserting the parenthetical "(and not rejected or withdrawn)" after the word "filed' in the last line of the subsection. This section describes the pro-rata allocation process that arises when applications for certified capital	This suggestion was not accepted nor included.

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089	Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Rule Number: Comm 111	Hearing Date: June 17, 1999
Relating to: Certified Capital Companies	

Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		company investments exceed the amount of tax credits available. The addition of the parenthetical makes it clear that only those previously filed applications that actually still have the potential to be granted are counted against the remaining amount of available credits.	
		9. Comm 111.06(2)(b)(1). Advantage suggests deleting this subsection because the proposed 111.06(2)(b)(2) (as revised as suggested above) sets forth the same concept more definitively.	Commented accepted along with other suggestions resulted in redrafting this subsection.
		10. Comm 111.07(2). In line three, add "(b)" after "s.111.06(l)."	Commented accepted and included.
		11. Cornm 111.09(l)(e)(4). Change the section reference from Comm 110.05 to 111.05.	Commented accepted, included, and renumbered(5)(e)4.

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089	Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Rule Number: Comm 111	Hearing Date: June 17, 1999
Relating to: Certified Capital Companies	

Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
	John Neis Venture Investors Management LLC University Research Park 505 South Rosa Road Madison, WI 53719 (608) 441-2700	Thanks Department for the opportunity to comment on the draft rules. Indicates Venture Investors was formed in 1982 and is the manager of two early stage venture capital funds in Madison. Intends to form a third fund as a Certified Capital Company and have begun discussions with potential investors. Plans to raise a fund that is a combination of certified capital from insurance companies and non-certified capital from other investors. Believes that the intent of the legislation is to encourage the formation of risk capital pools, and indicates they have a particular focus on rules that may diminish the overall impact of the CAPCO program by discouraging the participation of non-certified investors. Comments are provided into three categories: substantive issues, comments, other substantive issues, and drafting corrections. **Substantive issues:**	Comments accepted.
		1. Section 111.02(22): The 75% figure used in defining the primary business of a CAPCO will effectively limit the aggregate capital raised by the Certified Capital Companies. The artificial geographic constraints on the use of noncertified capital will be a significant deterrent for investors that are not receiving the tax benefits. If you are requiring that 75% of the investments are in qualified businesses, you are essentially limiting total investments to $66.7 million, with $50 million in qualified businesses. Participation of noncertified investors should be encouraged rather than discouraged. We expect to raise more in non-certified capital than certified capital. We also expect to invest the majority of the non-certified capital in qualified businesses. However, a rule requiring that a specific percentage of noncertified capital must also be invested in qualified businesses raises a concern that we may be forced to pass on an attractive opportunity with our non-certified capital because of this artificial geographic constrain, thereby reducing our potential returns. As a result, it reduces the likelihood that investors other than insurance companies will participate.	Comment accepted and reduced figure from 75% to 50% as suggested. Renumbered to (24).

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089	Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Rule Number: Comm 111	Hearing Date: June 17, 1999
Relating to: Certified Capital Companies	

Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		The legislation requires that the primary business activity must be the investment of cash in qualified businesses. At a minimum, this should be reduced to 50%, allowing the formation of larger capital pools, thereby creating the ability to invest more in any given business. If the primary objective is cash investments in businesses, with 40% in qualified businesses in Wisconsin, 30% in non-qualified businesses in Wisconsin, and 30% on companies outside the State, it could be argued that the primary business is investment in qualified businesses in Wisconsin. Given the strict requirements for investment of the Certified Capital, this should not be a major issue for WDOC. We recommend far greater flexibility in the definition of primary business activity, to encourage the formation of larger capital pools.	
		2. Section 111.02(20)(c): A "Qualified Distribution" should include a management fee calculated on the capital of a CAPCO that is not certified capital as well as a management fee based on the certified capital. In my earlier comment letter, I suggested a fee not to exceed 2.5% of the certified and non-certified capital, including irrevocable commitments to contribute non-certified capital. This could be addressed by adding to the definition of "Qualified Distribution," or by adding a new subsection to Section Comm 111.08, providing that the payment of a management fee of up to 2.5% of noncertified as well as certified capital shall not be deemed to adversely affect the ability of the CAPCO to place 100% of the certified capital in qualified investments, and that a written determination to that effect will be promptly issued upon request. The addition of non-certified capital will *enhance* the ability of the CAPCO to place 100% of the certified capital in qualified investments, even after the payment of the additional management fees. Again, as drafted, it discourages the formation of larger capital pools because of the inability of the CAPCO managers to generate enough income to staff the operation.	Comment accepted; however, the Statutes cover only certified funds, so the department can't extend the management fee to cover non-certified funds. A CAPCO is free to charge any managemetn fee it chooses on non-certified capital.
		3 .Section 111.03(l)(e)4.: Although the WDOC must give grounds for its denial of certification of a prospective CAPCO, there appears to be no	Comment accepted and an appeal provision has been added.

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089		Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Rule Number: Comm 111		Hearing Date: June 17, 1999
Relating to: Certified Capital Companies		

Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		appeal procedure. Given that applications for CAPCO certification may be made only during a one-month period in any year, a prospective CAPCO that is denied certification will suffer significant harm if its certification application was denied erroneously. The rules, therefore, should provide a mechanism to appeal a denial without waiting a year to reapply for certification.	
		4. Section 111.06(3): At the least, the word "certified" should be inserted between "All" and "capital" on line 1. Without this addition, the proposed rules would prohibit the investment strategy of also raising non-certified capital for investment in qualified and non-qualified - investments. By imposing the constraints of the CAPCO program on non-certified investments in the CAPCO without the tax credit benefits, this strongly discourages the formation of larger capital pools. • However, this insertion alone still imposes unreasonable limitations. This Rule might disrupt the ability to invest the certified capital in a mixture of qualified and non-qualified businesses, and later call the upon the noncertified equity commitments to complete the obligation to invest in Qualified Businesses. If the CAPCO does not invest in Qualified Businesses when and as required, the tax credits are disallowed, so the State loses nothing. The investors are sophisticated institutions that understand their fiduciary obligations. The risk of these non-certified investments are borne by the CAPCO's investors, not the State. This proposed Rule seems to directly contradict the Statute, which provides in Section 560.34(2) that "all certified capital investments in a certified capital company that are not invested in qualified investments may be held or invested by the certified capital company as it considers appropriate..."	Comments accepted, suggestions included and the rule was revised accordingly to accommodate the suggestions.
		5. We have several comments on Section 111.09(l), but in my oral comments, I focused on Subparagraphs (e)10 and (e)12: These requirements are far too broad. WDOC has no legitimate need to review the entire due diligence file and all correspondence between a CAPCO and a portfolio company. This material would include highly	Comments accepted, suggestions included and the rule was revised substantially to accommodate the suggestions.

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089		Hearing Location: Conf. Room 3B, 201 W. Washington Ave.	
Rule Number: Comm 111		Hearing Date: June 17, 1999	
Relating to: Certified Capital Companies			
Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		sensitive strategic plans and trade secrets that have no bearing on the issues with respect to which WDOC needs oversight. The requirement that all such information be exposed to public view would undoubtedly deter many prospective Qualified Businesses from seeking CAPCO funding and it would deter prospective co-investors from outside of Wisconsin from participating in a round of financing with the CAPCO. This would significantly diminish the potential success of the program for all involved.	
		Other substantive issues	
		6. On page one, the analysis of the proposed rules inaccurately portrays the CAPCO program. The second sentence of the analysis asserts that CAPCOs receive premium tax credits from insurance companies. This is incorrect. Instead, insurance companies receive premium tax credits for investments in CAPCOS. The fifth sentence of that paragraph states that the "law limits a certified capital company from providing capital to certain businesses and to qualified businesses." The statute provides only that a CAPCO must be primarily involved in making investments in qualified businesses; it is not prohibited from making investments in other businesses (except insurance companies or their affiliates). Although the proposed rules contain this limitation, we would propose that this limitation be removed. By maintaining the flexibility to invest in other businesses, it allows the CAPCO to maximize returns for non-certified investors and enables the CAPCO to co-invest in transactions originated by other venture capital firms in nonqualified businesses. This is essential to maintain the relationships with other venture capital firms to attract their participation in investments in qualified businesses originated by the CAPCO.	Comments accepted and summary clarified to accommodate the suggestions.
		7. Section 111.02(9): The definition of "equity" seems over inclusive. The key should be that the funds are at risk, unsecured, not repayable on a fixed schedule or on demand, and generally not the kind of investment that you could sell to a bank.	Comment accepted and revised based on this as well as other suggestions.

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089	Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Rule Number: Comm 111	Hearing Date: June 17, 1999
Relating to: Certified Capital Companies	

Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		8. Section 111.02(14): The definition of "in need of venture capital" needs refinement. What business can't claim that it requires additional debt or equity for working capital, expansion, or modernization? If a business needs equity for modernization, but intends to use the funding to purchase the equity of current owners, it would meet the strict definition. The definition of need should include the intention to use the investment proceeds for this purpose.	Comment noted. The Department interprets that under the definition equity funds are limited to modernization and not the purchase of equity from current owners.
		9. Section 111.02(15): How does the use of the phrase "Investment in a CAPCO" differ from the Statute's "Certified Capital Investment." This is confusing. In general, the Rules should not duplicate statutory provisions; and more particularly, they should not cover the same ground with slightly different language, as they do here and in several other instances noted below.	Comment noted and accepted.
		10. Section 111.02(24): The definition of "unable to obtain conventional financing" is both far too easy to achieve, and too subjective to give CAPCOs and would be portfolio companies any assurance that the test has been met. The rule should also apply some standard loan underwriting criteria to the prospective Qualified Business' financial statements to determine that it could not have financed the proposed activity through a financial institution or asset-based lender. We would suggest that the WDOC talk to Wisconsin based financial institutions or asset-based lender to identify those criteria that automatically remove a firm from consideration. This would both force companies to submit themselves to an objective facts and circumstances test for qualification, and save qualifying companies the time, expense, and other undesirable results of applying for financing for which they clearly do not qualify. If the WDOC wants to maintain the flexibility in the Rules, those that appear to qualify for conventional financing (and it should), the Rules should outline how a failed attempt is determined so that a business could not "fail" in its attempt to obtain conventional financing by asking for an amount that is clearly unreasonable, refusing to accept standard	Comment accepted. The Department acknowledges this is difficult to set precise standards due to wide range of variables and has referenced "standards of commercial lending" to the definition.

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089			Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Rule Number: Comm 111			Hearing Date: June 17, 1999
Relating to: Certified Capital Companies			
Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		terms and conditions for companies in similar circumstances, by refusing to cooperate with loan underwriting procedures, by failing to provide necessary documentation, by approaching an inappropriate source for conventional financing, etc. They should also specify what is meant by an "attempt," so that a discouraging exchange at the local country club, or a denial by an inappropriate source is not sufficient to meet the definition.	
		11. Section 111.03(l)(c): The rules state that all applications for CAPCO certification received on the same day are treated as being made contemporaneously. We do not understand the significance of the date of the application, relative to the application date for other organizations. If it has no relevance, it should be removed from the rules to avoid confusion.	Comment accepted and deleted.
		12. Section 111.04(l): The required securities disclosures in the proposed rules are not identical to disclosures set forth in the Statute, Section 560.32(l)(b). This is confusing and could lead to inadvertent technical violations. Potential applicants should be given notice of, and an opportunity to prepare for, any test that will be applied.	Comment accepted and wording corrected.
		13. Section 111.04(2): The certification requirements limit the certified investments of any particular insurer (without regard to its affiliates) to $10,000,000 regardless of the date on which such investment is certified. The Statute limited such investments to $10,000,000 for an insurance company and its affiliates only until July 1, 2000. If the limit is retained in the rules regardless of the date, a similar limitation should be incorporated into Section 111.04(2)(f)2. by adding between the words "certified" and "and" on line two "(up to a maximum of $10,000,000)". Preferably, the time period set forth in the Statute should be retained. There is no limitation on the total amount in investments that can be submitted for certification in 111.04(2), even though there is only a total pool of $50 million in tax credits available. For example, you could have three firms submitting certified capital investments for certification. Suppose	Comment accepted and wording changed to acknowledge both dollar limits and date noted in the Statutes.

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089	Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Rule Number: Comm 111	Hearing Date: June 17, 1999
Relating to: Certified Capital Companies	

Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State		Comments/Recommendations	Agency Response
			Firm A investors submitted $25 million in certified capital investments, Firm B investors submitted $50 million in certified capital investments, and Firm C investors submitted $300 million in certified capital investments (even though they know that the firm's investors would only have $50 million certified if it was the only CAPCO). Under strict interpretation of the rules, Firm A would have $3.3 million certified, Firm B would have $6.7 million certified, and Firm C would have $40 million certified. Even if Firm C was the only firm with investors that sought certification and were allocated the entire $50 million, only $50 million would actually be invested. Submissions of amounts greater than this are not genuine commitments, they are intended to only maipulate the allocation. Total requests for certification of investments into any single CAPCO during a year should not be able to exceed the tax credits available during that year	
		14.	Section 111.04(2)(g): The notification procedures for certification of investments are confusing. Although this rule discusses certification of investments and pro-rating the amount requested if necessary, and requires investment within 5 days of certification by the department, it does not clearly require the department to provide notice to the prospective investor of the amount certified. The rule also does not require notice to the CAPCO of the certification, although the CAPCO must notify the department if the investment is not made within 5 days of certification. Given the importance of the date of certification and the investment time limits set forth in subsection (g), the rule should explicitly require the department to notify the prospective investor as well as the CAPCO concerning the certification of an investment and the amount so, certified, and count the 5 days from the date that notice is given by the department rather than certification by the department. The CAPCO then could be required to provide notice immediately to the Department if the investment is not made within that 5-day period. The last sentence of subsection (g) should be revised by adding before the period the	Comment noted. The Department received additional recommendations on this issue on the hearing on the emergency rule and modified the rule to accommodate some of the concerns. Please see those hearing comments and response.

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089			Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Rule Number: Comm 111			Hearing Date: June 17, 1999
Relating to: Certified Capital Companies			
Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		following: ", or to applications received subsequent to that date if the full amount requested in applications received on such date has been certified."	
		15. Section 111.04(3): The proposed rules do not define "equity securities" or "control", as I previously recommended. A rule should be promulgated to more particularly define the terms "equity securities" (e.g., will convertible debt or options be included?), "manage" and "control." It is our assumption that debt instruments with conversion features or which are issued along with options will be counted as equity to prevent abuse by insurance companies in an effort to create captive entities under their control. However, debt without any equity feature or voting rights should not be included in the equity cap calculation.	Comment noted. A definition that parallels a statutory definition of control has been added. *Do you remember how we handled the equity securities issue.*
		16. Section 111.05(l)(d) and (e): In the definition of qualified business, "consolidated" should be defined to include all affiliates that could be consolidated with the business under federal income tax principles, regardless of whether the business has made the election to file consolidated income tax returns. Without this change, a business could make itself qualified simply by not electing to file consolidated returns, which would place too much emphasis on a tax election without changing the economic situation of the business.	Comment noted. The Department will handle this by administrative decision.
		17. Section 111.05(2): The proposed rules should provide a procedure for a CAPCO to use to request pre-approval of a qualified business, with a form to be used to make such a request (or a list of the information that should be included in such a request) and time limits within which the department must respond. With no time limits, the department may not respond in a sufficiently timely manner to allow the CAPCO to invest, or the CAPCO may not request pre-approval because of a fear that the response would not be timely. This rule might be more useful if it also allowed prospective qualified businesses to request pre-approval on their own from the department,	Comment noted and time of 30 business days for the Department to reach a decision is added as well as a presumption that it is acceptable if the department does not respond within the time frame.

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089	Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Rule Number: Comm 111	Hearing Date: June 17, 1999
Relating to: Certified Capital Companies	

Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		thereby streamlining the process of making the qualified investment.	
		18. Section 111.06(l)(a): Equity securities do not have a maturity or redemption date. Therefore, the introductory language "that is structured with a maturity or redemption of five years or greater, in any of the following" should be deleted and replaced with "that is".	Comment noted and language deleted.
		19. Section 111.06(1)(a)2.c: The inclusion of debt issued in connection with an equity security as a qualified investment will broaden the definition of "qualified investment" too much and permit significant amounts of nonconvertible secured debt to constitute a qualified investment as long as it is issued in conjunction with some minimal or insignificant amount of equity securities. *This is a major loophole that could defeat the purpose of the legislation.* Qualified investments should be either true equity, or debt that meets the statutory requirements.	Comment noted and accepted and rule modified.
		20. Section 111.06(l)(e): The proposed rules permit the department to grant an exemption regarding the work site maintenance covenant of the qualified business. It is not clear whether the exemption applies to the qualified business entering into the covenant (i.e. in some cases the department will not require the covenant at all) or whether it applies in the breach (i.e. the department may waive a breach of the covenant by the qualified business after the investment is made). The rule should specify what type of exemption is intended, and should provide a procedure for requesting exemption. The rule might also place some parameters on the department's discretion with regard to exemption so that the exemptions are applied equitably and consistently.	Comments noted. Additional provisions regarding the request to the department for the exemption and response time frame have been added to the rule.
		21. Section 111.06(2)(b): With respect to subparagraph 1, the proceeds of a qualified investment should not count toward the percentage requirements. Instead, the original investment counts toward the requirements. Otherwise, restate it to read "The portion of the	Comments noted. Rule changed along with other comments submitted.

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089	Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Rule Number: Comm 111	Hearing Date: June 17, 1999
Relating to: Certified Capital Companies	

Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		proceeds of all capital from a qualified investment returned to a certified capital company by a qualified business that are placed in new qualified investments 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."	
		In the introductory language of subparagraph 3, the rule should state whether sold" includes investments that are redeemed by the company, converted as part of an IPO, or other similar disposition. The circumstances under which it is sold should have a bearing on how it is counted. If it sold through the exercise of a redemption right of the investor, it is questionable whether the investor ever intended a long term investment. If sold as a part of the sale of a controlling interest in the company, or an initial public offering, the language is reasonable. However, the percentage should be less and the period be longer (two year minimum) for the exercise of a put or call option.	Comment noted and included in the rule.
		Subparagraph 3a: The language is appropriate, but seems to contradict the introductory language that the one-year/50% provision applies to the 30%/3-year and 50%/5-year investment schedule.	Comment noted (2) is rewritten for clarity.
		Subparagraph 4: Six months is extraordinarily short and a failure to place a limitation on the percentage that could be applied as specifically allowed in the statute makes this particularly susceptible to abuse in highly seasonal businesses. For example, a $1 million unsecured loan for with a five year maturity could be made in September and repaid in January after the Christmas holidays. If this is repeated every year for five years, the CAPCO would get $3 million applied to the investment requirements ($1 million for the first year and then $500,000 a year the next four years because of the short term limitation). The limitation should be at least a year for the same business or affiliate to prevent	Comment note and accepted. Increased time from six month to one year.

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089		Hearing Location: Conf. Room 3B, 201 W. Washington Ave.	
Rule Number: Comm 111		Hearing Date: June 17, 1999	
Relating to: Certified Capital Companies			

Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		seasonal abuse. The reinvestment of any amount up to the proceeds received should be only partially applied. Finally, any reinvestment that occurs based on a put option of the company (i.e. the Qualified Business has the right to demand reinvestment) should be excluded since the Qualified Business never lost access to the proceeds that were distributed.	
		Subparagraph 5: Some limit should be imposed for the reinvestment of dividends and other earnings in respect to the investment. Alternatively, such earnings should be explicitly defined as "proceeds" subject to subparagraph 4. Otherwise, the return of an investment in the form of "dividend" or other earnings distributions could be used to circumvent the limits on reinvestment.	Comment noted. Additional comments and suggestions were received on the public hearing on the emergency rule. Please see those comments and the specific recommendations that were incorporated by the Department.
		22. Section 111.06(2)(c)2.: Certified capital should be reported by investment pool since the rules of Section 111.06(2)(a) apply to investment pools rather than certified capital in the aggregate	Comment noted. The Department concurs with the interpretation noted.
		23. Section 111.08(2): For purposes of administration of the CAPCO, the rules should provide a procedure for requesting a written determination regarding distributions, as well as providing a time within which the department must respond.	Comment noted. An administrative policy is being developed.
		24. Section 111.08: See item 2 above.	Comment noted.
		25. Section 111.09(l): Subparagraph (d)l.: If the department has specific evidence that it would like to see (e.g. an affidavit of the investor, tax returns), it should so specify. (More to the point, why does WDOC care whether or not the investor will be able to realize the tax benefits?) The same comment applies to subparagraph (e)4, the required evidence should be specified.	Comment accepted and rule amended to accommodate the suggestions.

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089 | Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Rule Number: Comm 111 | Hearing Date: June 17, 1999
Relating to: Certified Capital Companies

Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		26. Subparagraph (e)14.: If this information is required, it should be made part of the agreement required under s. 111.06(b) through (e) (the covenants required of the qualified business).	Comment noted. This information is not necessary to determine the operational quality of the CAPCO.
		27. Tax returns should be included in the list of records that the CAPCO must retain.	Comment accepted The Department interprets that tax records will be part of the financial records.
		28. Section 111.10(l): The rules reference a fee schedule for annual compliance reviews but do not provide one.	Comment noted. The Department has not determined the amount of the fee at this time.
		29. Section 111.10(3)(a): Add on lines 2, 4, 8 and 9 following "Stats." the phrase "or corresponding provisions of these rules" since the statutes (e.g. s. 560.34(2)) may be less stringent than the rules. The rules perhaps should add a provision addressing a default that cannot be cured within the 120-day cure period, even though the cure is diligently pursued during that period.	Comment noted and added the term Stats. appropriately as suggested. All decisions have the right of appeal and this process may be used in case if the default can not be cured in 120 days.
		30. Section 111.10(3)(b): Subparagraph 1 duplicates s. 111.10(3)(a) in part and should be deleted. If it is retained, it should have a materiality modifier to avoid nullifying s. 111.10(3)(a). In general, the addition of subjective grounds for decertification which may be inadvertent, or over which the CAPCO may not have control, will make the job of attracting insurance companies to invest in CAPCOs much more difficult.	Comment noted and added "material" before violation.
		31. Section 111.10(3)(c): Conviction of a traffic violation by a director thirty years ago could technically result in decertification under this language. This needs to be more narrowly defined. With respect to a breach of s.111.10(3)(b) because of a crime committed by a principal or director, is there an available remedy by firing the person and replacing him or her with a new principal or director?	Comment noted. Also, added breach of fiduciary trust in (3) (c) to denote that the Department is interested in more important type of violations.
		32. The draft rules do not address procedures for the transfer of premium tax credits by certified investors or for proving eligibility to make a	Comment noted the Department has consulted with the OCI on the rules, but has no authority to interpret matters

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089	Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Rule Number: Comm 111	Hearing Date: June 17, 1999
Relating to: Certified Capital Companies	

Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		certified investment. I had asked our counsel to contact the Office of the Commissioner of Insurance regarding these matters. Roger Peterson at OCI (267-4384), the individual overseeing the CAPCO program for OCI, indicated that OCI would not promulgate rules with respect to these matters because they have no authority to do so. OCI plans to discuss these matters with the WDOC and ask that the draft rules cover some of these matters. Roger would not be more specific about OCI's suggestions. I recommend that the rules cover these matters so that there is an ability to comment them.	pertaining to tax credits administered by OCI.
		33. Section 111.02(13): "american institute of certified public accountants" should have initial caps. The extra "s" following the period in that definition should be deleted.	Comment noted. The GAAP principles are generally recognized respect of the AICP, and thus the reference has been subsequently deleted.
		34. Section 111.02(15)(a): Insert after "preferred stock," the following: "partnership or membership interest,".	Comment accepted and included in the definition of "investment of a CAPCO".
		35. Section 111.02(19): Replace the portion of the sentence following the word "with" on the first line with the word "GAAP".	Comment noted and accepted in the definition of "net worth".
		36. Section 111.02(20)(a): "allowable organizational costs" should have initial caps.	Comment noted and rule revised.
		37. Section 111.02(23): "secretary of state" on the third line should be replaced with "Department of Financial Institutions".	Comment noted and suggestion included
		38. Section 111.03(l)(c): change the word "to" between "July 15" and "August 15" on line one to "and".	Comment noted and suggestion included.
		39. Section 111.03(l)(e)3.: Insert the word "of' between "days" and "applicant's" on the first line.	Comment noted and suggestion included
		40. Section 111.03(2)(c): Add at the end of the sentence before the period "and of sections 560.30 through 560.38, Stats." to reference	Comment noted and suggestion included

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089			Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Rule Number: Comm 111			Hearing Date: June 17, 1999
Relating to: Certified Capital Companies			
Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		the CAPCO statutes as well as the rules.	
		41. Section 111.04: The second subsection (1) should be (2).	Agree, suggestion incorporated.
		42. Section 111.04(2)(f)2.: On line three, add a comma after the word "Stats." and remove the initial cap on the word "After".	Agree, suggestion incorporated.
		43. Section 111.04(3): On line three replace the word "investments" with "investment decision".	Agree, suggestion incorporated.
		44. Section 111.06(2): Add a "(" before the number "2" in the heading.	Agree, suggestion incorporated.
		45. Section 111.06(2)(b)4.: Delete the ":" after "if" on line 4.	Agree, suggestion incorporated
		46. Section 111.06(2)(b)5.: Delete ",)," following "(a)" on line 1.	Agree, suggestion incorporated
		47. Section 111.06(3): Change "d" to "e" on line 2.	Comment noted, but unable to decifer the nature of the request.
		48. Section 111.06: The paragraph numbered "(2)" on the bottom of page 12 ("Diversification Requirement") should be numbered "(4)". The paragraph numbered "(3)" on the top of page 13 ("Restrictions on Management") should be numbered "(5)".	Agree, suggestions incorporated
		49. Section 111.07(2): Add "(b)" between "(1)" and "to" on line 3.	Agree, suggestion incorporated
		50. Section 111.07(4): On line 6, reference the CAPCO statutes as well as the rules of this chapter. On line 7, add "and s. 560.34, Stats." After "111.06".	Agree, suggestions incorporated
		51. Section 111.09(l): Add a "d" to "an" on line 1.	Agree, suggestion incorporated
		52. Section 111.09(l)(b): Combine the introductory language for (b) and subparagraph 1. At the end of the sentence that is currently subparagraph 1, add ", Stats. And s. 111.03(2)(d) and (g).".	Agree, suggestion incorporated

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089			Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Rule Number: Comm 111			Hearing Date: June 17, 1999
Relating to: Certified Capital Companies			
Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		53. Section 111.09(l)(0: Replace the list of documents with the following: "1. Articles of Incorporation, Articles of Organization, Certificate of Limited Partnership; Partnership Agreement, Operating agreement, Bylaws; and Evidence of registration with the department of financial institutions."	Agree, suggestion incorporated
		54. Section 111.09(l)(h)5.: Delete the second period at the end of line one, and add after the word "Stats." on lines one "and s. 111.08.".	Agree, suggestion incorporated
		55. Section 111.09(l)(i): Replace "generally accepted accounting principles" with "GAAP" since it is a defined term.	Agree, suggestion incorporated
		56. Section 111.09: Item "(j)" on page 17 should be numbered "(2)".	Agree, suggestion incorporated
		57. Section 111.10(l): Reference the CAPCO statutes as well as the rules on line 3.	Agree, references incorporated
		58. Section 111.10(2): Delete the second period following the heading online 1. Add "and s. 111.06(2)" following "Stats." on line 1 and on line 3.	Agree, suggestion incorporated
		59. Section 111.10(3)(a): Delete the word "in" between "decertification" and "120" on line 6. Add "by such date." after "Stats." and before "If' on line 8. Add the word "full" between "in" and "compliance" on line 9.	Agree, suggestios incorporated
		60. Section 111.10(5): Add "disqualification of' before "an" at the beginning of line 2.	Comment accepted and included in rule.

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089	Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Rule Number: Comm 111	Hearing Date: June 17, 1999
Relating to: Certified Capital Companies	

Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
	David Krosner Reinhart Boerner Van Deuren Norris & Reisel		

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089		Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Rule Number: Comm 111		Hearing Date: June 17, 1999
Relating to: Certified Capital Companies		

Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
	bach, S.C. 1000 North Water Street Milwaukee, WI 53203-3400 414- 298-1000	Our firm represents the Wilshire Group in connection with its formation of a Wisconsin certified capital company. As you may know, the Wilshire Group has successfully formed certified capital companies in New York and Florida. As a result, Wilshire is intimately familiar with the operations of certified capital companies and the issues that they face. After reviewing the proposed rules, it is clear to Wilshire that the Department has carefully considered and addressed those various issues. Accordingly, Wilshire has only the following limited comments to the proposed rules.	Comment noted and accepted.
		<u>Limit the Maximum Allocation Reguest that any Single Certified Capital Company can Make to $50 Million.</u> Wilshire agrees with the comment made by Stifel Financial Corporation that Wisconsin should limit the amount of an allocation of tax credits which any single certified capital company may request under the program to $50 million. The program currently permits the allocation of $50 million of tax credits. Therefore, any certified capital company which requests in excess of the $50 million maximum available is simply doing so in an effort to increase its likelihood of receiving a greater allocation than it would otherwise receive. Both Wilshire and our firm agree with comments and legal analysis made by Stifel Counsel in its letter dated June 16, 1999.	Comment noted and corresponding change made to rules.
		Wilshire agrees with the adoption of Emergency Rules by July 1, 1999 or as soon thereafter as possible. If rules are not in by July 1, 1999, it is highly unlikely that applications from potential certified capital companies would be able to be submitted between July 15, 1999 and August 15, 1999 as provided in the rules. Likewise, if the deadline for submission of applications from potential certified capital companies is extended beyond August 15, 1999, it is highly unlikely that potential CAPCOs would be certified and in a position to make investments in small Wisconsin businesses during 1999.	Comment noted and emergency rule promulgated.
		Broaden the requirement that the Certified Capital Company have at least two key employees who are Wisconsin residents to require that it have two Wisconsin residents who are key emploves, principals, partners or members.	Comment noted and rule amended.

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089
Rule Number: Comm 111
Relating to: Certified Capital Companies
Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Hearing Date: June 17, 1999

Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		Although, Wilshire understands the Department' s desire to have key decision-makers of each certified capital company resident in Wisconsin, requiring those individuals to be "key employees" unduly constrains the capital company's ability to operate its business in the most efficient means possible. The Department's goal of requiring someone of decision-making authority to have a presence in Wisconsin would be equally achieved by permitting those individuals to be employees, principals, partners or members. By allowing the individuals to be principals, partners or members, as well as employees, the capital company can be operated more efficiently since such individuals will not necessarily need to devote their full-time efforts to the business of the capital company. In addition, we believe the Department should provide some guidance as to what level of employee would satisfy the definition of "key employee."	
		Comm 111.06. We agree with the comment made by Bank One Corporation that the language added by the Department in Comm 111.06(l)(a), which states that the cash investment in a qualified business must be 'structured with a maturity or redemption of five years or greater," goes beyond the authority of the Department in promulgating rules for this program. Wisconsin Statutes section 560-34(l)(a)2 clearly indicates that a debt security must have a maturity of at least five years. The statute does not however, place a similar five-year maturity or redemption limitation on other investments. Like Bank One, Wilshire believes that the more flexibility that is permitted in the investment vehicles, the better able the capital companies will be to serve Wisconsin businesses.	Comment noted and accepted and rule amended to delete the requirement.
		Comm 111.09(l)(4)1 Should be Deleted. We concur with the comments made by Advantage Capital Partners suggestion that the above section be deleted. As Advantage has indicated, it seems unusual to require the certified capital company to maintain records demonstrating that its investors are subject to premium tax liability. Rather, it is the insurance companies that will be able to prove that they are subject to premium tax liability, not the capital companies. Requiring the capital companies to maintain these records would simply create unnecessary paperwork since the	Comment noted and requirement deleted.

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089	Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Rule Number: Comm 111	Hearing Date: June 17, 1999
Relating to: Certified Capital Companies	

Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		information can and will be provided directly by the insurance companies.	
		Comm 111.06 (3) Should be Revised to Clarify that the subsection does not Preclude an Insurance Company or any Other Party from Exercising its Legal Rights and Remedies in the Event that a Certified Capital Company is in Default of its Contractual Obligations to that Party. Comm 111.06 (3) provides that no certified capital company may be managed or controlled by an insurance company or an affiliate of an insurance company. Like Comm 111.04 (3), Wilshire believes that this section should be revised to include a sentence which indicates that the subsection does not preclude an insurance company or an affiliate of an insurance company from exercising its legal rights and remedies, including interim management of a certified capital company, in the event that the certified capital company defaults in its statutory or contractual obligations to the insurance company. Certified capital companies, like all other businesses, enter into various contracts, including insurance contracts, which are required in connection with the formation, syndication and operation of the capital company. If the certified capital company breaches its contractual obligations under such contracts, the other party, whether an insurance company or otherwise, should be able to pursue all its contractual rights and remedies. Some of these remedies may include interim management of the certified capital company.	Comment noted. In response to this and other questions, the Department has included a statutory definition for what constitutes control. This definition does not preclude insurance companies and CAPCO's from other legal rights they may have under contract law.
		Comm 111.05(2) Should Impose a Time Period Within Which the Department must Respond to Requests for Written Opinions from Capital Companies. Comm 111.05(2) gives a certified capital company the ability, prior to making an investment in a specific business, to request a written opinion from the Department that a business in which it proposes to invest is a qualified business. Wilshire appreciates the Department's willingness to provide guidance in those instances where there may be some question as to whether a business is a qualified business. By providing a specific timeframe within which the Department must respond to such requests will help facilitate the decision-making process of the specific businesses involved. Without such a timeframe, capital companies will not be able to provide those businesses with a definitive timeframe for their investment	Comment noted and response time period added

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089
Rule Number: Comm 111
Relating to: Certified Capital Companies
Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Hearing Date: June 17, 1999

Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		This may lead those businesses to pursue other, more costly financing alternatives and an undue delay in receiving funds could cause them significant harm. We propose that the Department have a specified period of time, perhaps 15 or 30 days and, if the Department does not respond within that period of time, the business should be presumed to be a qualified business. By having that presumption, the Department will not have the added burden of issuing a written opinion in all instances.	
		Comm 111.06(3)3 Should be Revised to Include any Other Investment that the Department Specifically Approves. Comm 111.06(3)3 provides a laundry list of permitted investments for the capital held by a certified capital company prior to its investment in qualified businesses. Although the laundry list appears to 'include many of the appropriate investments, the Department should have the authority to permit other investments upon a written request of a certified capital company. By having such a general catch-A the Department will be able to ensure that the capital is invested in secure obligations while at the same time providing some added flexibility to the capital companies to consider other appropriate investments which now exist or may be developed in the financial markets in the future. In addition, we would propose that the lives of the various securities listed be extended beyond the maturities indicated.	Comment noted and accepted. This section was substantially revised based on comments received and after a review of he statutes. Since the Department does not regulate noncertified funds, the requirements were deleted.
		Wilshire is excited about the opportunity of forming a Wisconsin certified capital company and looks forward to working with the Department once the rules, or emergency rules, are ultimately adopted. In the meantime, if you have any questions or comments regarding the comments made by Wilshire, please call me. Representatives of Wilshire would also be happy to discuss any of the comments or other issues associated with the statute with the Department if they so desire.	Comment noted and accepted.
	Timothy J. Elverman Bank One Corporation	Bank One Corporation is a financial services company with more than 80 offices in Wisconsin, providing both traditional banking services and products and services in the areas of trust, investment, credit cards, auto	Comment noted and accepted.

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089	Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Rule Number: Comm 111	Hearing Date: June 17, 1999
Relating to: Certified Capital Companies	

Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		leasing, and insurance. We trace our roots in Wisconsin to the establishment of the Marine Fire and Casualty Insurance Company in 1839. While Bank One has these significant operations in Wisconsin, we also offer financial services in many other states in the country.	
		Overview	
		We are making these comments based on our experience working with Certified Capital Company (CAPCO) programs in other states. Bank One, through its affiliate, Banc One Equity Investors, has been certified as a CAPCO in the states of Louisiana, Missouri, New York, and Florida. We appreciate the fact that the Wisconsin Department of Commerce has reviewed the CAPCO programs and rules in these other states. The proposed Wisconsin rules reflect that knowledge base. After reviewing the proposed rules, Bank One has the following comments and suggestions.	Comment noted and accepted.
		Implementation of the CAPCO **Program**	
		The CAPCO legislation takes effect on July 1, 1999. When this legislation was overwhelmingly approved by the Legislature in early 1998, it was anticipated that there would be adequate time between May of 1998 and July 1, 1999 to prepare the rules for the program. It was anticipated by the bill's sponsors and supporters that the program would be fully operational during the latter part of 1999. There have been many positive articles written about the program during the past year and there is great anticipation by those who will be seeking venture capital investments under this program.	Comment noted and accepted.
		With these facts in mind, Bank One hopes that the Department of Commerce (the Department) will make every attempt to have the program operational by July 1, or shortly thereafter. To ensure that the timetable outlined in the proposed rules can be followed and that entrepreneurs in Wisconsin will be able to seek investments this year, it will be necessary for the Department to promulgate these rules on an emergency basis. Since the rules call for applications from potential CAPCOs to be submitted between	Comment noted and emergency rule promulgated.

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089		Hearing Location: Conf. Room 3B, 201 W. Washington Ave.	
Rule Number: Comm 111		Hearing Date: June 17, 1999	
Relating to: Certified Capital Companies			
Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		July 15, 1999 and August 15, 1999, it will be necessary to have the rules approved and operational no later than the first week of July. If the rules (or at least part of the rules) are not approved on an emergency basis, the entire timetable for the commencement of the CAPCO program in Wisconsin will be jeopardized. If the program is delayed, investments in small businesses will be postponed, and the desirable benefits of the CAPCO program will not be realized by the state in the near future. In fact, without the rules becoming operational on an emergency basis, it is not likely that investments in small businesses in the state would be made before the end of the year 2000.	
		Comm 111.03 Certification of Certified Capital Companies	
		Under this section of the proposed rules, the Department has specified, in Comm 111.03(2), the Requirements For Certification. The Department correctly listed the requirements for certification which are specified in Wis. Stat. Sec. 560.31(2). However, the Department added a new requirement which is not specified in the statute. In Comm 111.03(2)(g), the Department has summarily decided to require that at least two "key" employees of the CAPCO, or an affiliate of the CAPCO, who are involved in the CAPCO's management decisions, work and reside in the state of Wisconsin.	Comment noted and rule modified based on comments received.
		While Bank One understands the Department's wishes to have CAPCOs operating in Wisconsin which have a familiarity with the state and its businesses, this requirement in the rules appears to go beyond the Department's authority. If the Legislature had desired such a requirement, they would have specified it in the statute. The requirements for certification are very specific in the statutes, and this is not one of them.	Comment noted, but the Department feels strongly that the CAPCO's need a physical presence in Wisconsin.
		Bank One does not object to this requirement because it would exclude our company from consideration for certification as a CAPCO. As noted earlier, Bank One has a major presence in the state, and could therefore meet this requirement. We object to its inclusion because it goes beyond the authority granted to the Department for rule making. Requiring two in-state staff	Comment noted. See preceding responses.

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089	
Rule Number: Comm 111	Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Relating to: Certified Capital Companies	Hearing Date: June 17, 1999

Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		people for each CAPCO could also preclude CAPCOs from being formed in the state. Since CAPCOs must compete for the limited allocation of tax credits under this program, this requirement could make it economically unfeasible for smaller CAPCOs to operate in the state.	
		Since we understand the desirability of having someone associated with a certified CAPCO located in the state for the Department and others to contact, it would seem appropriate for the Department to require that the CAPCO applicant have a state agent, with a local address and local phone number. However, specifying the number of employees who must reside in the state clearly is beyond the authority granted to the Department under the law.	Comment noted. See preceding responses.
		Section Comm 111.04, Investments in Certified Capital Companies	
		In Section (1), Certification of Certified Capital Investments, the Department outlines the procedure to be followed when an insurance company wishes to make an investment in a certified capital company. The procedure includes filing notice with the Department on a form specified by the Department. Included in that notice must be a commitment by the person to make their investment within five days after the Department has notified that person that the investment has been certified.	Comment noted and accepted.
		The proposed rule also calls for the Department to certify investments in the order of the date received, but not later than 30 days after application. Bank One appreciates the fact that there is a 30 day limit on certifying investments after an application for certification has been filed. However, Bank One wants to caution the Department that it may be wise and helpful for all parties involved in the process if there is at least some minimum time between application and certification. Since the investment must be received by the CAPCO within five days after the investment has been certified by the Department, it will be necessary for the CAPCO and its investor to have all documentation and paperwork ready to be signed before certification notice is received from the Department. Therefore, it would be	Comment noted and accepted. The Department decided to reduce the time to make the determination from 30 days to 15 days.

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089	
Rule Number: Comm 111	Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Relating to: Certified Capital Companies	Hearing Date: June 17, 1999

Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		helpful to have some minimum period of time between the date of the application and the date on which the Department will certify the investments. This would not jeopardize other parts of the proposed rule, since investments could still be certified in the order of the date received. It simply would be helpful if the "announcement day" for the certifications would be at least 15 working days after the application day. This would help to ensure that the CAPCOs and their investors would be able to comply with the five day investment requirement.	
		Additionally, it would be extremely helpful for the CAPCOs to have some information concerning the total dollar amount of applications for credits prior to the official allocation announcement day. The insurance companies committing to the CAPCO program must reserve funds for this investment and need to have an estimate of their allocation as soon as possible.	Comment noted. Information is available upon request.
		Section Comm 111.06, Operation of Certified Capital Companies	
		In this section of the proposed rules the Department has added language in Comm 111.06(l)(a) which states that the cash investment in a qualified business must be "structured with a maturity or redemption of five years or greater". This change in the clear statutory language of Wis. Stats. Sec. 560.34(a) appears to go beyond the authority of the Department in promulgating rules for this program. That section of the law (Sec. 560.34(a)(2)) is very specific in stating that a debt security of the qualified business is an eligible investment if the debt has a maturity of at least five years etc. However, the statute does not place the five year maturity or redemption limitation on other investments. Bank One does not understand why this requirement would be placed in the proposed rules since it could limit the flexibility needed by the CAPCOs to invest in the very companies which this legislation is intended to help. Therefore, we recommend deleting the words "that is structured with a maturity or redemption of five years or greater" from Comm 111.06(l)(a).	Comment noted and accepted and rule modified to include suggestion.
		Section Comm 111.10 Compliance Reviews; Decertification;	

DEPARTMENT OF COMMERCE
PUBLIC HEARING COMMENT AND AGENCY RESPONSE

Clearinghouse Rule No.: 99-089 | Hearing Location: Conf. Room 3B, 201 W. Washington Ave.
Rule Number: Comm 111 | Hearing Date: June 17, 1999
Relating to: Certified Capital Companies

Comments: Oral or Exhibit No.	Presenter, Group Represented, City and State	Comments/Recommendations	Agency Response
		Disqualification	
		Bank One supports the goals of the legislation and the proposed rules to make sure that only "good players" are involved in the CAPCO program in Wisconsin. However, Bank One feels the Department may have over reached its authority when it drafted section Comm 111.10(3)(b)(3). The proposed rules state that the Department may decertify a certified capital company if the Department determines that the applicant, or any principal or director of the certified capital company, has been convicted of ANY crime against the laws of this state or any other state. Bank One agrees that the CAPCO should be decertified if the acts were related to fraud, or connected in any way to the CAPCO operation. However, offenses such as traffic offenses should not lead to decertification of a CAPCO. This section should be changed to more specifically refer to activities relevant to the CAPCO operation.	Comment noted and accepted and rules modified to indicate the department is not interested in decertifyuing CAPCO's for non-CAPCO related violations, including minor violations such as traffic offenses.
		Summary	
		Bank One applauds the work done by the Department of Commerce in drafting these proposed rules for the operation of the state's CAPCO program. We appreciate the opportunity to offer comments and hope that our suggestions of minor changes will assist the Department as the final rules are approved and implemented.	Appreciation noted and accepted.
		The most critical task at hand is to get the rules approved as promptly as possible so that the timetable outlined in the proposed rules can be followed. In that regard, it may be necessary for the Department to implement part or all of the proposed rules on an "emergency rules" basis. There has been great anticipation of the CAPCO program in the state, and there are many entrepreneurs and small business owners eagerly waiting for the first allocations under the program. The sooner the program becomes operational, the sooner Wisconsin will begin to reap the benefits from this business and job creation program.	Comment noted and emergency rule promulgated.

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	Sara E. Kotthoff Thompson Coburn Attorneys at law One Mercantile Center St. Louis, MO 63101-1693 314-552-6065	On behalf of our client, Stifel Financial Corporation ("Stifel Financial"), we respectfully request that the Department of Commerce (the "Department") consider the following comments to the proposed rules regarding certified capital companies. These comments are in addition to the previous comment regarding the need for a limit on the amount of tax credits which may be requested by a single certified capital company during the allocation process.	Comment accepted.
		Need for Regulations/Formal Advice It is our understanding that there has been some discussion regarding whether regulations should be issued by the Department under an emergency clause or whether the Department should proceed with the program without regulations of any kind. It is our belief that regulations issued under an emergency clause are preferable to no regulations. To the extent that there are issues which may need clarification or amplification under the statute, the extent of written regulations increases the likelihood that all entities have an identical understanding and appreciation of the manner in which the program will operate. In addition, to the extent that further clarifications or interpretive requests are necessary after the adoption of regulations, formal advice to all entities who have applied for certification as a certified capital company (or prior to the application deadline, all entities which have attended the public hearing or submitted written comments on the regulation) will also further this purpose. Sometimes, informal advice which is given to only to the entity making an inquiry can lead to an imbalance of information which may only become apparent after it is too late to rectify the situation.	Comments noted and emergency rule adopted.
		Timing of Allocations and Investments Section 111.04 of the proposed regulations contemplates that, upon	Comment accepted.

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		application of an investor for an allocation of tax credits, the Department will certify the investments within 30 days after the application and the investor will be required to make the investment within 5 days after such notification or forfeit the investment. First, it should be made clear that each certified capital company will submit the applications on behalf of its investors and that notification should be made to the certified capital company (rather than to the investor itself).	
		In addition, the timing of notification to the certified capital company should be shortened. The method of allocating the tax credits is fairly mechanical and should not require 30 days. The timing for the investment should, however, be lengthened. It has been our experience that, once the certified capital company receives notice of the allocation it begins distributing the transaction documents to the various investors (many of whom may not be known until the days immediately preceding the allocation deadline). The documentation involved can be quite complex and adequate time should be given to permit the investors to comment upon the documentation prior to the investment deadline.	Comments noted and accepted and time shortened to 15 days. Additional suggestions received on the emergency rule and additional changes made to the final rule.
		We would, therefore, propose that these deadlines be "flipped" - notification from the Department should be made within 5 business days (or some other similar time frame) of the allocation request date and the investors should be required to make their investments within 30 days of the date the certified capital company is notified of the allocation.	Comment noted. The statutes require investments be made within 5 days.
		Participating Debentures	
		The proposed regulations (following the provisions of the statute) permit debentures to be sold to raise certified capital so long as any participation feature does not commence until the certified capital company is permitted to make distributions other than qualified distributions under the statute and regulations. We appreciate the legislature's and the Department's recognition that, even if couched in terms of a "debenture," so long as this type of equity feature will not cause distributions to be made prior to the	Response being developed as part of general questions about the program.

DEPARTMENT OF COMMERCE
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		time distributions can be made to holders of equity interests, it satisfies the state's concerns regarding a premature withdrawal of assets but permits flexibility in structuring the securities to be sold by certified capital companies. Please confirm our understanding that a single debenture can contain repayment provisions for principal and interest (which can be paid prior to the time equity distributions can be paid) as well as this type of participation feature.	
		<u>Organizational Costs</u> Some certified capital companies hire an underwriting firm to assist with the sale of their securities to raise certified capital. In my client's case, its broker-dealer subsidiary has undertaken the sale of the securities. Please clarify in the regulations that a reasonable underwriting fee can be paid to the affiliated broker-dealer (i.e., that this payment is considered a qualified distribution notwithstanding payment to an affiliate of the certified capital company).	This appears to be within the definition of qualified distribution-"forming, syndicating, managing or operation".
		<u>Unable to Obtain Conventional Financing</u> Under the regulations, as currently proposed, it appears that an actual attempt to obtain bank financing be required in order to qualify for an investment from a certified capital company. Given the stage of the business in which many investments under these types of programs are made, this may be an unnecessary requirement. Generally, companies are unwilling to accept the terms of a typical venture capital type of investment if they have other financing alternatives. One alternative would be to permit some other form of evidence that the business is unable to obtain conventional financing.	Comment noted and accepted. The Department acknowledged the difficulty lenders had with providing this type of information and modified the rule to require this information be provided by the business in the form of an affidavit.
		<u>Control or Management by an Affiliate of an Insurance Company</u> The word "affiliate" is undefined as it relates to an affiliate of an insurance	Comment noted and accepted. The Department has included a statutory definition of control that, in essence,

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		company for purposes of Section 111.06 of the proposed regulations. In the case of our client, an insurance company owns approximately 14.58% of the common stock of Stifel Financial (which is expected to own a majority of the equity interests in the certified capital company). Stifel Financial is a publicly-held corporation subject to SEC reporting requirements whose stock is traded on the New York Stock Exchange. Stifel Financial does not have an insurance subsidiary.	limits ownership to 10%.
		Stifel Financial recognizes that it cannot permit any insurance company (or its insurance company affiliates) owning 10% or more of the Company's stock to become certified investors in a Stifel Financial-sponsored certified capital company in Wisconsin. Stifel Financial is concerned, however, that an unduly restrictive reading of Section 560.34(4) of the Wisconsin certified capital company act and the regulations, as proposed, could preclude Stifel Financial from forming a certified capital company in Wisconsin. We believe that the intent of this provision is to ensure that an insurance company cannot, either directly or indirectly, form and control a certified capital company in which it invests. In addition, this type of restriction would appear to be inappropriate in a situation such as the Company's where the entity is a publicly-traded entity which cannot control ownership of its common stock.	Comment noted. A definition of control has been added.
		Therefore, we would propose that the regulations be clarified to indicate that a publicly traded entity which does not sell insurance or have an insurance company subsidiary would not, for the purposes of this provision, be considered to be an affiliate of an insurance company. We appreciate the opportunity to bring these matters to your attention. If you need clarification of any of these matters or wish to discuss these or any other issues relating to certified capital companies further, please call.	See preceding comment.
		In addition, we would appreciate receiving a copy of the transcript of the public hearing and the written comments received with respect to the regulations.	Request acknowledged.

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	Sara E. Kotthoff Thompson Coburn Attorneys at law One Mercantile Center St. Louis, MO 63101-1693 314-552-6065	Additional comments submitted by Sara E. Kotthoff As we discussed yesterday by telephone, one issue that our client, Stifel Financial Corporation ("Stifel Financial") has indicated that the Department of Commerce (the "Department") may wish to address, either through regulation or by interpretive advice under the Wisconsin statutes regarding certified capital companies, is the maximum allocation request that can be made by a single certified capital company.	Comment noted and accepted.
		The Missouri Department of Economic Development recently took the position that without a formal regulation limiting the amount of the allocation requests, they were required to accept a request from a single certified capital company for an allocation of premium tax credits under the Missouri certified capital company program in excess of the maximum amount of available tax credits. Of the four certified capital companies making allocation requests, two requested in excess of the maximum and one obtained subscriptions for less than the maximum amount of tax credits available. Stifel CAPCO II, L.L.C. ("Stifel CAPCO") voluntarily stayed within the implicit limit. Because Stifel CAPCO did not deliberately seek oversubscriptions, Stifel CAPCO suffered a 20% decrease in its allocation of premium tax credits compared to that it would have received if all certified capital companies had held to this implicit limit. The result could have been even more dramatic if one or more certified capital companies had decided to exceed the maximum by an even larger amount. Legal Analysis	Comment noted and accepted and rule modified based on suggestion.
		We believe that the appropriate interpretation of the Wisconsin statute regarding the allocation process for certified capital companies is that a certified capital company may request an allocation of tax credits under the program of any amount up to and including $50 million, but not in excess of $50 million. Any other interpretation would be contrary to the spirit and the	Comment noted and accepted and language added related to the allocation up to $50 million.

DEPARTMENT OF COMMERCE
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		letter of the law on this issue.	
		First, statutory construction principles require the "natural" interpretation of words used unless some other meaning is clearly intended. The natural interpretation for a statute which creates a program providing for allocation of an aggregate of $50 million in tax credits based upon allocation requests is that each of the entities requesting the allocation cannot request more than $50 million of tax credits.	Comment noted and rule amended to acknowledged the comment.
		In addition, the regulatory provisions provide for requests for allocations from potential certified investors to include binding letters of intent to invest in a certified capital company. To the extent that a certified capital company submits more than $50 million of "binding letters of intent", only $50 million of such letters of intent can be bona fide binding letters of intent. If a certified capital company requests more than the total allocable tax credits, either (1) each insurance company subscribing to securities to be issued by that certified capital company can be deemed to be subscribing to no more than their pro rata share within the certified capital company or (2) there have been prior agreements within the insurance companies as to the actual allocations among them. Otherwise, an insurance company investor would presumably require that a certified capital company not accept subscriptions for more than $50 million because any subscriptions accepted in excess of that amount would be dilutive to its subscription. The reason for the limitation on the allocation request for each certified capital company, whether regulatory or as the natural interpretation of the statute, is to ensure that all subscriptions are bona fide. To determine the bona fides of any subscription, you must determine the amount for which each insurance company is "at risk", i.e., the maximum amount that each insurance company can be required, either by the Department or by the certified capital company, to invest.	See preceding responses
		Since each certified capital company is aware that there are only $50 million of premium tax credits available, it also knows that it cannot possibly fill subscriptions in excess of $50 million. Therefore, a certified capital	See preceding responses

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PUBLIC HEARING COMMENT AND AGENCY RESPONSE

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		company submitting allocations in excess of $50 million must, by definition, have reached agreement with each of its investors, whether pro rata or otherwise, as to the allocations of tax credits to be made to each investor. Otherwise, it could not legally and ethically accept subscriptions in excess of the maximum number of subscriptions it could fill.	
		Whether an insurance company is merely agreeing to a pro rata decrease in its investment size even if the certified capital company received the entire $50 million allocation or has a side agreement to essentially assign all or part of its requested subscription to another insurance company, the allocation request in excess of $50 million is not bona fide because the insurance companies are, in aggregate, "at risk" only for $50 million, not for the full amount of allocations requested.	See preceding responses.
		Unless it limits the allocation a certified capital company may request to $50 million or treating any allocation request in excess of $50 million as an allocation request for $50 million, the Department is creating the possibility of inflated subscription requests by each insurance company (each with the full knowledge that they cannot be required to invest the full amount under their subscriptions) or "stalking horse" subscriptions where the "investor" has no actual intent to invest. This would unfairly decrease the premium tax credits each bona fide investor in other certified capital companies will receive. If each certified capital company were to take this approach, there would be less ability for any insurance company to reasonably determine the amount of investment it will be allowed to make and causing all insurance companies to inflate their investment subscriptions. It will also create the possibility of "stalking horse" subscriptions which are included for the sole purpose of increasing the allocation request without any intent that the investment would ever be made.	See preceding responses.
		The reason a certified capital company (and its investors) are willing to inflate their allocation request is to attempt to increase the pro rata allocation received by the certified capital company and its investors vis a vis other certified capital companies. To permit this type of manipulation of the	See preceding responses.

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		allocation process would create a "free-for-all" atmosphere which, we believe, is contrary to the letter and the spirit of the laws and the regulations.	
		Under this atmosphere, insurance companies will either decide in the future not to invest under this program in Wisconsin because of the uncertainties involved or will decide to invest in a particular certified capital company only if it can demonstrate that it can solicit subscriptions, most of which will never be consummated, far in excess of the available allocation amount. Otherwise, the time and effort required by an insurance company to evaluate the investment would exceed any potential benefit to the insurance company.	See preceding responses.
		Therefore, we believe that permitting a certified capital company to request more than $50 million in the allocation process would be contrary to the provisions of the statute and, furthermore, would subvert the intent and spirit of these provisions.	See preceding responses.
		Ramifications of Soliciting Over-Subscripttions	
		While a certified capital company can attempt to increase its allocation request by soliciting additional subscriptions if allocation requests in excess of $50 million are permitted, in determining whether to follow this approach, each certified capital company should be mindful of certain legal and ethical concerns. The insurance companies who have subscribed in that certified capital company's offering would object to this approach unless the new subscriptions were "paper" subscriptions (where the new subscribers agree in advance not to require their subscriptions to be filled) because it would reduce the amount of tax credits they could receive under the program.	See preceding responses.
		Certified capital companies should also be cautious in considering soliciting "paper" subscriptions. This issue is analogous to the situation when some brokerage firms were over subscribing to United States Treasury securities in federal auctions a number of years ago. In that situation, the Securities	See preceding responses.

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		and Exchange Commission charged the brokerage firms with fraudulently manipulating the market for the United States Treasury securities.	
		We appreciate the opportunity to bring this matter to your attention. If you wish to discuss this or any other issue(s) relating to certified capital companies further, please call.	Comment noted.
	Ian H. Cameron WBD Finance Corporation P.O. Box 677 Menasha, WI 54952 920-729-1775	The creation of Certified Capital Companies will certainly be a welcome addition to the family of investors and lenders supporting small business. We are very interested in pursuing an opportunity in creating or managing a certified capital company. I think there are a number of issues which need clarification and a number questions which must be addressed.	Comment noted and accepted.
		1 . The basis for the program is to meet the funding needs of a qualified small business if the business is "unable to obtain conventional financing". There is a wide gap between venture capital and conventional financing i.e. U.S. Small Business Administration 7(a) and 504 loan programs. WHEDA, WDOC Community Development Block Grants, etc. All of which provide some type of subordinate, long term financing for small businesses,	Comment noted.
		2. There is no definition of "venture capital". Many conventional banks consider subordinate debt as a type of venture capital because of the loan's risk characteristics . Although, the U.S. Small Business Administration 504 loan program is a secured loan program, the loan is subordinate to conventional financing and the unavailability of collateral is not a reason to decline a 504 loan. Since an SBA 504 loan is a subordinate debt Instrument, unlike the 7(a) loan guaranty program. can a 504 loan be considered 'venture capital"?	Comment noted. A definition of in need of venture capital has been added.
		3. The requirements for certification specify that the person has a net worth of $500,000 as defined by GAAP. However, a person may	Comment noted. The requirement is statutory.

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		not make a qualified investment in a certified capital company until the company is certified. If WDOC is to reach its goal of creating 16 CAPCO'S, it will be difficult to raise the equity necessary to meet the minimum requirements, until the company is certified. Would pledges or other binding commitments for funding on the condition that the company receives certification be acceptable?	
		4. The certified capital company staffing requirement refers to 'venture capital industry" without defining 'venture capital'. The underwriting @methods and due diligence requirements are very similar for all "at risk" or subordinate lenders and investors, The real difference is that the traditional venture capital company attempts to maximize the return on the investment while subordinate lenders agree to limit returns in exchange for a slight increase in the assurance of repayment. To open the field of applicants for certification, I'd propose that the staffing requirement read:	Comment noted and accepted. Several comments and suggestions were received on this issue and the department has modified the provision considering all the testimony.
		At least 2 officers, directors, general partners, trustees, managers, members or contract personnel managers each have a least 2 years of experience in investment of or lending to qualified businesses.	See preceding comment.
		The requirements for certification state that the company "has as its primary business activity the investment of cash in qualified businesses". Since the entire pool is rather small can small business lending or investing activities that do not meet the definition of 'qualified investments" be used to fulfill the "primary business activity" requirements?	See preceding comment.
		I believe that you are familiar with our activities. We have four offices throughout the state with a 504 loan portfolio in excess of $200 million and 600. small businesses. We have provided assistance to a wide range of business start-ups and expansions. We are uniquely qualified to provide statewide coverage for this program and infuse new energy into the traditional venture capital industry.	Comment noted and accepted.

RESPONSE TO LEGISLATIVE COUNCIL CLEARINGHOUSE REPORT

Department of Commerce

CLEARINGHOUSE RULE NO.: 99-089

RULE NO.: Comm 111

RELATING TO: Certified Capital Companies

Agency contact person for substantive questions.

Name: Richard Meyer

Title: Chief Code Consultant

Telephone No. 266-3080

Legislative Council report recommendations accepted in whole.

[x] Yes [ ] No

1. Review of statutory authority [s. 227.15(2)(a)]

   a. [ ] Accepted

   b. [ ] Accepted in part

   c. [ ] Rejected

   d. [ ] Comments attached

2. Review of rules for form, style and placement in administrative code [s. 227.15(2)(c)]

   a. [ ] Accepted

   b. [ ] Accepted in part

   c. [ ] Rejected

   d. [ ] Comments attached

(Continued on reverse side)

3. Review rules for conflict with or duplication of existing rules [s. 227.15(2)(d)]

   a. ☐ Accepted

   b. ☐ Accepted in part

   c. ☐ Rejected

   d. ☐ Comments attached

4. Review rules for adequate references to related statutes, rules and forms [s. 227.15(2)(e)]

   a. ☐ Accepted

   b. ☐ Accepted in part

   c. ☐ Rejected

   d. ☐ Comments attached

5. Review language of rules for clarity, grammar, punctuation and plainness [s. 227.15(2)(f)]

   a. ☐ Accepted

   b. ☐ Accepted in part

   c. ☐ Rejected

   d. ☐ Comments attached

6. Review rules for potential conflicts with, and comparability to, related federal regulations [s. 227.15(2)(g)]

   a. ☐ Accepted

   b. ☐ Accepted in part

   c. ☐ Rejected

   d. ☐ Comments attached

7. Review rules for permit action deadline [s. 227.15(2)(h)]

   a. ☐ Accepted

   b. ☐ Accepted in part

   c. ☐ Rejected

   d. ☐ Comments attached