

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

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

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

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

#### (4) VOLUNTARY DECERTIFICATION.

(a) A CAPCO may voluntary decertify itself as a CAPCO if any of the following conditions are met:

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

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

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

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

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

(END)

**FISCAL ESTIMATE**  
DOA-2048 (R02/97)

ORIGINAL  
 CORRECTED

UPDATED  
 SUPPLEMENTAL

LRB or Bill No./Adm. Rule No.  
**Comm 111**  
Amendment No. if Applicable

**Subject**

Certified Capital Companies

**Fiscal Effect**

State:  No State Fiscal Effect

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

Increase Existing Appropriation  
 Decrease Existing Appropriation  
 Create New Appropriation

Increase Existing Revenues  
 Decrease Existing Revenues

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

Local:  No local government costs

1.  Increase Costs  
 Permissive  Mandatory

2.  Decrease Costs  
 Permissive  Mandatory

3.  Increase Revenues  
 Permissive  Mandatory

4.  Decrease Revenues  
 Permissive  Mandatory

5. Types of Local Governmental Units Affected:

Towns  Villages  Cities  
 Counties  Others \_\_\_\_\_  
 School Districts  WTCS Districts

**Fund Sources Affected**

GPR  FED  PRO  PRS  SEG  SEG-S

Affected Ch. 20 Appropriations

**Assumptions Used in Arriving at Fiscal Estimate**

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

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

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

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

No costs are anticipated by this program on local government.

**Long-Range Fiscal Implications**

Program costs will increase at the rate of inflation.

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

Authorized Signature/Telephone No.

*Philip E. Albert*  
(608) 267-0710

Date

5/15/99

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

1997 Session

ORIGINAL  
 CORRECTED

UPDATED  
 SUPPLEMENTAL

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

Amendment No.

Subject  
 Capital Cetified Companies

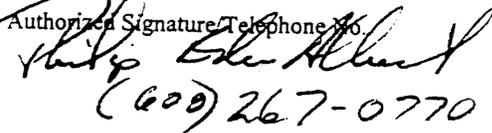
**I. One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):**

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

**NET ANNUALIZED FISCAL IMPACT**

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

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

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

Date  
 5/14/95

## Briefing for Senator Robson on Comm 111 CAPCO Emergency Rules

### Just what is CAPCO?

CAPCO stands for Certified Capital Companies

### Do other states have CAPCO's ?

Yes.

### How did the CAPCO legislation come to be and just how does it work?

The lack of venture capital hinders high tech-growth and small business development. This legislation provides a pool venture capital from insurance companies and provides a tax credit for insurance companies investments. The legislation is patterned after legislation in some other states. Some examples of companies in Wisconsin are:

CAPCO is the result of bipartisan legislation sponsored by Senator Gwendolynne Moore and Representative David Ward

CAPCO was created through separate legislation by 1997 Wisconsin Act 215. *The act took effect on July 1, 1999.* **Briefly** the ACT:

- Provides a tax credit to insurance companies that make investment capital available to certified capital companies for investment
- Requires Commerce to certify, audit, and decertify Capital Companies based upon rules it promulgates determine qualified businesses and certify applications from CAPCO's for investment up to \$50 million as specified in the law.
- Requires CAPCO's to meet certain criteria in order to be certified
- Specifies how CAPCO's need to be operated, including its investment pool of dollars in qualified businesses
- Requires CAPCO's to invest in only qualified businesses
- Requires CAPCO's to provide audited financial statements to Commerce each fiscal year

### What fiscal impact does this legislation have on Commerce and how is it paid for?

Commerce estimates the act has an annual fiscal impact on state operations of approximately \$100,700 and the equivalent work of 2 FTE's.

Two positions were approved by the Legislature with the passage of the act.

The Act requires CAPCO's to pay an initial nonrefundable certification fee of \$7,500 and an annual fee of \$5,000 to offset the cost.

Commerce expects to certify approximately 16 CAPCO's

### Events leading up to the emergency rule.

Commerce developed rules and held a public hearing on June 17, 1999

The hearing was attended by Rep. Ward, Senator Moore's Office and approximately 30 persons

Commerce was requested to adopt an emergency rule

Commerce received substantial testimony from The Wisconsin Legislative Council and the public that has been incorporated in the emergency rule  
The emergency rule was promulgated on July 16<sup>th</sup> and took effect on July 23<sup>rd</sup>.

**Advanced Notice to Interested Party**

AUG 13 1999

August 5, 1999

Dear Interested Party:

On June 17, 1999, the Department of Commerce (Commerce) held a public hearing on proposed rules to implement 1997 Wisconsin Act 215 relating to Certified Capital Companies. The hearing was well attended, the response was very favorable, and Commerce received substantial testimony on the proposed rule.

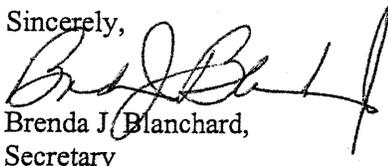
The response from those attending the hearing was overwhelming in favor of adopting an interim emergency rule. Following the hearing, Commerce followed suit and developed an emergency rule utilizing the valuable public comments received on the proposed rule and adopted an emergency rule that took effect on July 23, 1999.

You are cordially invited to attend a meeting on August 17<sup>th</sup>, in Room 3B, 201 W. Washington Avenue at 2:00 PM to provide any comments you may have on the emergency rule.

Since the adoption of the emergency rule, we have received additional comments and suggestions on the rule. Attached is a draft copy of the emergency rule incorporating those additional suggestions the department has received. In order to make that meeting on August 17<sup>th</sup> most productive, we wanted to give you the benefit of our latest thoughts on the rule in advance of the meeting, so that you, in turn, have time to collect your thoughts and suggestions prior to the meeting. It is our intention to use the comments and suggestions we receive to shape the final rule Commerce will advance to the Legislature and ultimately adopted.

We are looking forward to seeing you on the 17<sup>th</sup>. Please note if you are unable to attend the meeting, you may forward written comments to us. We will accept written comments and suggestions on the emergency rule until August 27<sup>th</sup>.

Sincerely,

  
Brenda J. Blanchard,  
Secretary

**DEPARTMENT OF COMMERCE**

**EMERGENCY RULE RELATING TO CERTIFIED CAPITAL COMPANIES**

**Finding of Emergency and Rule Analysis**

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

**Analysis of Rules**

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

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

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

**Contact Person**

Phillip Edw: Albert, Deputy Secretary, 608-267-0770

**ORDER**

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

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

Brenda J. Blanchard  
Brenda J. Blanchard, Secretary

## Preface

*Please note that since the adoption of the emergency rule, the Department of Commerce has received additional suggestions on the adoption of permanent rule that will ultimately replace the emergency rule. Those suggestions have been inserted in the draft text of the emergency rule to show interested parties the proposed final rule under consideration.*

### Chapter Comm 111

#### CERTIFIED CAPITAL COMPANIES

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

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

#### CERTIFIED CAPITAL COMPANIES

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

**Comm 111.02 Definitions.** In this chapter,

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

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

- (a) A person who, directly or indirectly, owns, controls, or holds power to vote, 10% or more of the outstanding voting securities or other voting ownership interests of the certified capital company or certified investor.
- (b) A person, 10% of whose outstanding voting securities or other voting ownership interests are directly or indirectly owned, controlled or held with power to vote by the certified capital company or certified investor.
- (c) A person directly or indirectly controlling, controlled by, or under common control with, the certified capital company or certified investor.
- (d) A partnership in which the certified capital company or certified investor is a general partner.

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

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

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

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

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

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

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

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

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

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

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

(8) "Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, by common management or otherwise. A person having a contract or arrangement giving that person control is deemed to be in control despite any limitations placed by law on the validity of the contract or arrangement. There is a rebuttable presumption of control if a person directly or indirectly owns, holds with the power to vote or holds proxies to vote more than 10% of the voting securities of another person, except that no person shall be presumed to control another person solely by reason of holding an official position with that person.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) The costs of forming, syndicating, managing or operating the certified capital company, ~~including Allowable Organization Costs.~~

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

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

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

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

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

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

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

(31) "Unable to obtain conventional financing" means the business has failed in an attempt to obtain funding ~~for a loan~~ from a financial institution ~~as evidenced in writing from the financial institution~~ or that the business cannot reasonably be expected to qualify for such financing under the standards of commercial lending.

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

(33) "Warrants for future ownership" means options on the stock or other ownership interests of the qualified business ~~in~~ which the qualified business may repurchase ~~a call~~, or which the qualified business may be required to repurchase ~~a put~~, at some fixed amount or an amount based on a pre-agreed upon formula.

### **Comm 111.03 Certification of certified capital companies.**

#### **(1) APPLICATION TO BECOME A CAPCO.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(g) The person agrees to maintain in the state of Wisconsin an investment office and staff actively engaged in making investments in the state of Wisconsin.

#### **Comm 111.04 Investments in certified capital companies.**

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

(a) By authorizing the formation of a certified capital company, the state does not necessarily endorse the quality of management or the potential for earnings of the company and is not liable for damages or losses to a certified investor in the company. Use of the word

"certified" in an offering is not a recommendation or endorsement of the investment by State of Wisconsin Department of Commerce.

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

## (2) CERTIFICATION OF CERTIFIED CAPITAL INVESTMENTS.

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

(b) No CAPCO, either alone or acting in aggregate with its affiliates, may submit applications under par. (a), the cumulative amount of the investments which exceeds the amount available for certification by the department as specified in par. (e).

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

2. These amounts may be subject to further proration under s. Comm 111.04 (2) (g).

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

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

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

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

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

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

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

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

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

#### **Comm 111.05 Qualified businesses.**

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

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

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

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

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

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

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

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

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

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

#### **Comm 111.06 Operation of certified capital companies.**

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

(a) The investment is a cash investment in a qualified business for the purchase of any of the following:

1. An equity security of the qualified business.

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

a. The debt is unsecured.

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

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

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

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

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

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

1. The request for the exemption shall be made in writing to the department and outline the specific conditions of the request.
2. The department shall respond to the written request for an exemption within 30 business days after receipt of the written request. If the department fails to respond affirmatively to the exemption in writing, it may be presumed that the exemption is acceptable.

**(2) A QUALIFIED INVESTMENT SCHEDULE.**

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

**TABLE 111.06-2A**

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

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

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

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

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

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

c. The proceeds received from the sale of qualified investments which are returned to a CAPCO shall be presumed to be placed in the order received in subsequent qualified investments, and shall be presumed to be placed in qualified investments before funds which have never been placed in qualified businesses.

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

(c) The date funds are placed in accordance with Table 111.06-2A is the date funds are received by the qualified Wisconsin business from the CAPCO, as evidenced by the date of a check or other means of funds transfer. The CAPCO shall submit all of the following information to the department within thirty days of the dates specified in TABLE 111.06-2A:

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

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

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

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

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

company. This subsection does not preclude a certified investor or an affiliate of the certified investor from exercising its legal rights and remedies, including interim management of a CAPCO, in the event that a CAPCO is in default of its statutory or contractual obligations to the certified investor.

**Comm 111.07 Reporting requirements and fees.**

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

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

(b) The amount of the certified capital investment.

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

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

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

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

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

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

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

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

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

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

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

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

(1) QUALIFIED DISTRIBUTION. The distribution is a qualified distribution, provided that in this section qualified distributions under s. 560.30 (10) (a) may not exceed 25% of the certified capital company's total capitalization.

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

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

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

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

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

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

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

(a) The type of the security issued;

- (b) The name, address, and telephone number of the investor;
  - (c) The date of the transaction;
  - (d) The total dollar amount invested;
  - (e) Copies of any prospectus or offering material used in connection with the sale of securities by the CAPCO;
  - (f) Evidence that the offering security contains the statements required by s. Comm 111.04 (1).
- (4) Records relating to each certified investor of the CAPCO which include each of the investor's state and federal tax identification numbers and premium tax identification number.
- (5) Records relating to each qualified business invested in by the CAPCO which includes the following:
- (a) The name of the business;
  - (b) The location of the headquarters and principal business operations of the business;
  - (c) A description of the type of business engaged in;
  - (d) Evidence that the business meets the definition of a qualified business as defined by s. Comm 111.05, including a signed affidavit that the business is in need of venture capital and cannot obtain conventional financing.
  - (e) A copy of any contractual agreement entered into between the CAPCO and the business;
  - (f) The amount of investment made in the business;
  - (g) The type of investment made along with supporting documentation;
  - (h) The date of the investment;
  - (i) A due diligence file on the business for inspection, upon request;
  - (j) Copies of any prospectus or offering material used in connection with the sale of securities by the business to the CAPCO;
  - (k) A summary listing all investments made in qualified businesses as of the end of each calendar year.
  - (l) The number of jobs created each calendar year by the qualified business.

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

- (a) Articles of incorporation;
- (b) Articles of organization;
- (c) Certificate of limited partnership;
- (d) Partnership agreement;
- (e) Operating agreement;
- (f) Bylaws; and
- (g) Evidence of registration with the department of financial institutions.

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

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

- (a) The date of the distribution;
- (b) The amount of the distribution;
- (c) To whom the distribution was paid;
- (d) The purpose of the distribution;
- (e) A statement describing how each distribution is permitted under s. 560.36, Stats. and s. Comm 111.08.

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

- (a) A journal or journals, including cash receipts and disbursements records, and any other records of original entry forming the basis of entries in any ledger;
- (b) General and auxiliary, or other comparable records; reflecting asset, liability, reserve, capital, and income and expense accounts;
- (c) All bills or statements, or copies thereof; paid and unpaid, relating to the business of the CAPCO.

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

## **Comm 111.10 Compliance reviews; decertification; disqualification.**

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

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

### **(3) DECERTIFICATION OF A CERTIFIED CAPITAL COMPANY.**

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

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

1. Violated any material provision of this chapter;
2. Made a material misrepresentation or false statement or concealed any essential or material fact from any person during the application process or with respect to information and reports required of CAPCOs under this section;
3. Been convicted of, or entered a plea of guilty or nolo contendere to, a crime under the laws of this state or any other state or the United States or any other country or government, involving a fraudulent act in connection with the operation of a CAPCO, or in connection with the performance of fiduciary duties in another capacity; or
4. Been adjudicated liable in a civil action on grounds of fraud, breach of fiduciary trust, embezzlement, misrepresentation, or deceit.
5. Fails to maintain the requirements of s. Comm 111.03(2).

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

#### (4) VOLUNTARY DECERTIFICATION.

(a) A CAPCO may voluntary decertify itself as a CAPCO if any of the following conditions are met:

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

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

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

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

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

(END)



SEP 21 1999

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

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

September 13, 1999

Senate Chief Clerk  
Room 402  
1 East Main Street  
Madison, Wisconsin 53703

Assembly Chief Clerk  
Room 402  
1 East Main Street  
Madison, Wisconsin 53703

Dear Chief Clerks:

**TRANSMITTAL IN FINAL DRAFT FORM OF ADMINISTRATIVE  
RULES AND REPORT**

CLEARINGHOUSE RULE NO.: 99-089

RULE NO.: Comm 111

RELATING TO: Certified Capital Companies

Pursuant to section 227.19, Stats., agencies are required to submit, in triplicate, copies of the proposed administrative rules in final draft form together with a rule report and an analysis. The recommendations received from the Legislative Council are also to be submitted.

At this time, this material, together with cover letters to the President of the Senate and the Speaker of the Assembly, is being transmitted for referral to the standing committees for legislative review.

Respectfully submitted,

Brenda J. Blanchard  
Secretary



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

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

September 13, 1999

Senator Fred Risser  
President of the Senate  
Room 220 South, State Capitol  
Madison, Wisconsin 53702

Representative Scott Jensen  
Speaker of the Assembly  
Room 211 West, State Capitol  
Madison, Wisconsin 53702

Dear Senator Risser and Representative Jensen:

### NOTICE OF ADMINISTRATIVE RULES IN FINAL DRAFT FORM

CLEARINGHOUSE RULE NO.: 99-089

RULE NO.: Comm 111

RELATING TO: Certified Capital Companies

Section 227.19, Stats., requires agencies to submit proposed rules in final draft form to the presiding officer of each house for referral to the appropriate legislative standing committees.

The following information, as required by law, is being submitted to you.

1. Rules in final draft form (in triplicate).
2. Report consisting of:
  - a) Rule Report.
  - b) Public Hearing Attendance Record.
  - c) Public Hearing Comment and Agency Response Form.
  - d) Legislative Council Rules Clearinghouse Report.
  - e) Response to Legislative Council Rules Clearinghouse Report.
  - f) Fiscal Estimate.
  - g) Final Regulatory Flexibility Analysis.

If you have any questions regarding this matter, please do not hesitate to contact us.

Respectfully submitted,

Brenda J. Blanchard  
Secretary



State of Wisconsin \ Department of Commerce

# **RULES in FINAL DRAFT FORM**

**Rule No.:** Comm 111

**Relating to:** Certified Capital Companies

**Clearinghouse Rule No.:** 99-089

## DEPARTMENT OF COMMERCE

### RULE RELATING TO CERTIFIED CAPITAL COMPANIES

#### Analysis of Rules

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

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

The Department of Commerce (Commerce) proposes rules to implement 1997 Wisconsin Act 215. Under that act, persons that make certain investments in certified capital companies that are certified by Commerce are eligible for receiving premium tax credits. Under the law, a person must apply to Commerce and submit a nonrefundable fee to become a certified capital company. These rules delineate the process that applicants must use as well as the process Commerce will use to evaluate and certify a capital company. The law limits a certified capital company from providing capital to certain businesses and to qualified investments. A certified capital company may request Commerce to determine whether an investment is a qualified investment and these rules specify the requirements to follow in making such requests. A certified capital company is also required to report specific information to Commerce on the investment capital, on violations of agreements by a qualified business receiving investment capital, and submit fiscal year financial statements to Commerce for audit. The law also requires Commerce to conduct annual compliance reviews of certified capital companies and allows for decertification by the department, as well as voluntary decertification by the certified capital company.

#### Contact Person

Philip Edw. Albert, Deputy Secretary,

608-267-0770

#### ORDER

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

## Chapter Comm 111

### CERTIFIED CAPITAL COMPANIES

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

Comm 111.01 Purpose.

Comm 111.02 Definitions.

Comm 111.03 Certification of certified capital companies.

Comm 111.04 Investments in certified capital companies.

Comm 111.05 Qualified businesses.

Comm 111.06 Operation of certified capital companies.

Comm 111.07 Reporting requirements and fees.

Comm 111.08 Distributions.

Comm 111.09 Documents and record requirements.

Comm 111.10 Compliance reviews: decertification; disqualification.

### CERTIFIED CAPITAL COMPANIES

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

**Comm 111.02 Definitions.** In this chapter,

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

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

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

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

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

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

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

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

(3) "Capitalization" means, with respect to a CAPCO, the sum of certified capital investments received by the CAPCO, and the CAPCO's stockholders', partners', or members' equity, as the case may be, as determined in accordance with GAAP.

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

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

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

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

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

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

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

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

(8) "Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, by common management or otherwise. A person having a contract or arrangement giving that person control is deemed to be in control despite any limitations placed by law on the validity of the contract or arrangement. There is a rebuttable presumption of control if a person directly or indirectly owns, holds with the power to vote or holds proxies to vote 10% or more of the voting securities of another person, except that no person shall be presumed to control another person solely by reason of holding an official position with that person.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(22) "Primary business activity" means the investment of a CAPCO's certified capital primarily in qualified investments in qualified businesses. Primary business activity is demonstrated by having at all times, a minimum of 50% of total certified capital of each

investment pool, which has been collected in cash, available for investment in or having been invested as qualified investments in qualified businesses.

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

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

(24) "Proceeds of all capital from a qualified investment returned to a CAPCO by a qualified business" means any cash received by a CAPCO from a qualified business in the form of dividends or other equity distributions, interest on debt securities, debt principal repayments, proceeds received in foreclosure, liquidation or dissolution, or the redemption or repurchase price paid for securities held by the CAPCO.

(25) "Proceeds from the sale of a qualified investment" means cash received by a CAPCO as a result of 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.

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

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

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

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

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

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

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

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

(30) "Unable to obtain conventional financing" means the business has failed in an attempt to obtain funding from a financial institution or that the business cannot reasonably be expected to qualify for such financing under the standards of commercial lending.

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

(32) "Warrants for future ownership" means options on the stock or other ownership interests of the qualified business which the qualified business may repurchase, or which the qualified business may be required to repurchase, at some fixed amount or an amount based on a pre-agreed upon formula.

#### **Comm 111.03 Certification of certified capital companies.**

##### **(1) APPLICATION TO BECOME A CAPCO.**

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

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

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

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

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

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

2. If an incomplete application is not completed within 5 business days of the applicant's receipt of the notice, the date in which the application is completed shall be the date the completed application is resubmitted.

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

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

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

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

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

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

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

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

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

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

(g) The person agrees to maintain in the state of Wisconsin an investment office and staff actively engaged in making investments.

#### **Comm 111.04 Investments in certified capital companies.**

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

(a) By authorizing the formation of a certified capital company, the state does not necessarily endorse the quality of management or the potential for earnings of the company and

is not liable for damages or losses to a certified investor in the company. Use of the word "certified" in an offering is not a recommendation or endorsement of the investment by State of Wisconsin Department of Commerce.

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

## (2) CERTIFICATION OF CERTIFIED CAPITAL INVESTMENTS.

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

(b) No CAPCO, either alone or acting in aggregate with its affiliates, may submit applications under par. (a), the cumulative amount of the investments which exceeds the amount available for certification by the department as specified in par. (e).

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

2. These amounts may be subject to further proration under s. Comm 111.04 (2) (g).

(c) Applications for certification of certified capital investments shall be accepted by the department beginning on a date specified by the department. The department shall provide to all certified CAPCOs written notice of no less than 30 business days of the date of application. The amount requested in the application shall be subject to the limits provided for under par. (f).

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

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

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

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

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

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

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

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

### **Comm 111.05 Qualified businesses.**

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

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

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

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

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

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

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

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

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

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

#### **Comm 111.06 Operation of certified capital companies.**

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

(a) The investment is a cash investment in a qualified business for the purchase of any of the following:

1. An equity security of the qualified business.

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

a. The debt is unsecured.

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

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

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

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

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

1. The request for the exemption shall be made in writing to the department and outline the specific conditions of the request.
2. The department shall respond to the written request for an exemption within 30 business days after receipt of the written request. If the department fails to respond affirmatively to the exemption in writing, it may be presumed that the exemption is acceptable.

**(2) A QUALIFIED INVESTMENT SCHEDULE.**

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

**TABLE 111.06-2A**

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

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

1. The portion of the proceeds of all capital from a qualified investment returned to a CAPCO by a qualified business that are placed in new qualified investments shall count 100%

towards the percentage requirements in TABLE 111.06-2A and placement of 100% of investments as qualified investments in s. Comm 111.08 (3) and Comm 111.10 (4) (a) 2.

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

a. The proceeds, 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 as part of a public offering, that are placed in a new qualified investment, shall count 50% towards the percentage requirements contained in Table 111.06-2A and ss. Comm 111.08 (3), and s. Comm 111.10 (4) (a) 2. The reduction in the amount of an investment for terms of certain percentage requirements shall apply at all times until the CAPCO has been voluntarily decertified.

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

c. The proceeds received from the sale of qualified investments which are returned to a CAPCO shall be presumed to be placed in the order received in subsequent qualified investments, and shall be presumed to be placed in qualified investments before funds which have never been placed in qualified businesses.

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

(c) The date funds are placed in accordance with Table 111.06-2A is the date funds are received by the qualified Wisconsin business from the CAPCO, as evidenced by the date of a check or other means of funds transfer. The CAPCO shall submit all of the following information to the department within thirty days of the dates specified in TABLE 111.06-2A:

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

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

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

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

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

**Comm 111.07 Reporting requirements and fees.**

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

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

(b) The amount of the certified capital investment.

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

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

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

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

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

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

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

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

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

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

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

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

(1) QUALIFIED DISTRIBUTION. The distribution is a qualified distribution as provided in s. 560.30 (10) (a), Stats.

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

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

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

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

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

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

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

- (a) The type of the security issued;
- (b) The name, address, and telephone number of the investor;
- (c) The date of the transaction;
- (d) The total dollar amount invested;
- (e) Copies of any prospectus or offering material used in connection with the sale of securities by the CAPCO;
- (f) Evidence that the offering security contains the statements required by s. Comm 111.04 (1).
- (4) Records relating to each certified investor of the CAPCO which include each of the investor's state and federal tax identification numbers and premium tax identification number.
- (5) Records relating to each qualified business invested in by the CAPCO which includes the following:
  - (a) The name of the business;
  - (b) The location of the headquarters and principal business operations of the business;
  - (c) A description of the type of business engaged in;
  - (d) Evidence that the business meets the definition of a qualified business as defined by s. Comm 111.05, including a signed affidavit that the business is in need of venture capital and cannot obtain conventional financing.
  - (e) A copy of any contractual agreement entered into between the CAPCO and the business;
  - (f) The amount of investment made in the business;
  - (g) The type of investment made along with supporting documentation;
  - (h) The date of the investment;
  - (i) A due diligence file on the business for inspection, upon request;
  - (j) Copies of any prospectus or offering material used in connection with the sale of securities by the business to the CAPCO;
  - (k) A summary listing all investments made in qualified businesses as of the end of each calendar year.

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

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

(a) Articles of incorporation;

(b) Articles of organization;

(c) Certificate of limited partnership;

(d) Partnership agreement;

(e) Operating agreement;

(f) Bylaws; and

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

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

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

(a) The date of the distribution;

(b) The amount of the distribution;

(c) To whom the distribution was paid;

(d) The purpose of the distribution;

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

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

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

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

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

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

**Comm 111.10 Compliance reviews; decertification; disqualification.**

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

(2) DISQUALIFICATION. Any material violation of s. 560.34 (1m), Stats., is a ground for disqualification of the noncomplying investment pool. If the department determines that the CAPCO is not in compliance with s. 560.34 (1m), Stats. and s. Comm 111.06 (2), with respect to an investment pool, the department shall send a written notice to the CAPCO that the CAPCO may be subject to decertification 120 days from the date on which the notice was mailed, unless the CAPCO brings itself into full compliance with s. 560.34(1m), Stats., and s. Comm 111.06 (2) by such date. If at the end of the 120-day period, the CAPCO is not in full compliance with s. 560.34(1m), Stats., and s. Comm 111.06 (2), the department shall send a notice to the CAPCO and the commissioner of insurance stating that the CAPCO has been decertified.

**(3) DECERTIFICATION OF A CERTIFIED CAPITAL COMPANY.**

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

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

1. Violated any material provision of this chapter;

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

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

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

5. Fails to maintain the requirements of s. Comm 111.03(2) (a), (c), (d), and (g).

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

**(4) VOLUNTARY DECERTIFICATION.**

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

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

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

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

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

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

(END)

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

# RULE REPORT

## Department of Commerce

Rule No.: Comm 111

Relating to: Certified Capital Companies

*Agency contact person for substantive questions:*

Name Troy Brown

Title Director, Office of Loan and Grant Administration

Telephone Number 266-7099

*Agency contact person for internal processing:*

Name Richard Meyer

Title Code Consultant

Telephone Number 266-30807099

1. Agency statutory authority under which the agency intends to promulgate the rule(s).

Section 560.31, Stats.

2. Citation of federal regulations which require adoption or which are relevant to the proposed rule(s)

None

3. Citation of court decisions which are applicable to the proposed rule(s).

None

4. Description of the proposed rule(s).

See analysis of proposed rules.

5. Reason for the proposed rule(s).

See analysis of proposed rules.



**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
Ex.1	Michael T. Johnson Advantage Capital Partners 909 Poydras Street Suite 2230 New Orleans, LA 70112  (504) 522-48500	<p>Set forth below are the comments of Advantage Capital Partners ("Advantage") with respect to the revised Emergency Rules on Certified Capital Companies ("CAPCOs") that were made available by the Wisconsin Department of Commerce (the "Department") at the August 17, 1999 public hearing concerning such rules. Although the Department's revisions addressed most of Advantage's original comments, the few additional comments set forth below address issues that, in Advantage's opinion, are very important to the success of the CAPCO Program in Wisconsin. Representatives of Advantage are available at 1-800-569-2916 or 1-800-671-3151 for further discussion or clarification of these comments.</p> <p>1. <u>Recycling Provisions</u> (Comm. 111.06(2)(b))</p> <p>Section 560.34(1m)(b) of the Wisconsin Statutes states the Department of Commerce "shall" promulgate rules concerning the reinvestment of proceeds from the sale of a qualified investment, which "may" provide that a CAPCO only receive partial credit for the reinvestment of proceeds received from the sale of short-term investments. In addition, the Department "may" also include rules for the partial treatment of sale proceeds that are reinvested in the same qualified business. Comm. 111.06(2)(b)(1)-(2) sets forth the Department's proposed rules with respect to these issues. As currently drafted, the rules provide that reinvestments of proceeds in qualified investments will be counted 100% towards the statutory investment milestones, except in certain limited situations.</p> <p>The proposed rules make three distinctions that determine how reinvestments are to be treated. The rules distinguish between "proceeds of all capital from a qualified investment returned to a CAPCO by a qualified business," "proceeds received from the sale of a qualified business returned to a CAPCO," and "proceeds from the sale of a qualified business that are reinvested in that qualified business." Any proceeds that fall under the first category may be reinvested and receive full credit for such reinvestment.</p>	<p>Comment noted and accepted.</p> <p>Comment noted.</p> <p>Comment noted.</p>

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

Any proceeds that are classified in category two will receive full reinvestment credit, unless the sale resulting in the proceeds occurred within one year of the CAPCO's initial investment in the qualified business. Proceeds from these sales (except in the case of an IPO) will only receive 50% credit upon reinvestment. Category three proceeds will also receive full credit upon their reinvestment unless the reinvestment occurs within one year of receiving the proceeds from the qualified investments, in which case no credit will be allowed on the reinvestment.

A. Return v. Sale

It is very important, given the structure contained in the proposed rules, to specify what qualifies as a "return" and what qualifies as a "sale." It is Advantage's opinion that the term "return" should include all of the following: dividends and other equity distributions (including liquidating distributions), interest and principal payments, and proceeds from the redemption or repurchase of securities; in short, the return of any investment to the CAPCO by a qualified business. On the other hand, the term "sale" should be expanded to cover cash proceeds received in a merger as well as the proceeds from the sale of the actual securities held by the CAPCO. To address this, Advantage suggests adding the following definitions that should apply to Comm. 111.06:

"proceeds of all capital from a qualified investment returned to a CAPCO by a qualified business" means any cash received by a CAPCO from a qualified business in the form of dividends or other equity distributions, interest on debt securities, debt principal repayments, proceeds received in foreclosure, liquidation or dissolution, or the redemption or repurchase price paid for securities held by the CAPCO.

"proceeds from the sale of a qualified investment" shall mean cash received by a CAPCO as a result of

Comment noted and recommendations for adding additional definitions clarifying what qualifies as a return and what qualifies as a sale are added to the rule.