

CR 09-082

**ORDER OF THE
DEPARTMENT OF COMMERCE**

CREATING RULES

The Wisconsin Department of Commerce adopts an order to repeal Comm 129.10 (5);
to renumber Comm 129.10 (6) and (7);
to amend Comm 129.11 (1) (intro.) and 129.14 (1) (a);
to repeal and recreate Comm 129.02 (3), 129.10 (1), 129.12 (6), 129.13; and
to create Comm 129.12 (3) (b) 3., 129.125, 129.135 and 129.36 (1) (c) relating to tax credits for
angel investments and early stage seed investments, and affecting small businesses.

Rule Summary

1. Statutes Interpreted.

Section 560.205, as modified by 2007 Wisconsin Act 20 and 2009 Wisconsin Act 2.

2. Statutory Authority.

Sections 227.11 (2) (a) and 560.205 (3) (d).

3. Explanation of Agency Authority.

Section 227.11 (2) (a) of the Statutes authorizes the Department to promulgate rules interpreting the provisions of any Statute administered by the Department. Section 560.205 (3) (d) directs the Department to promulgate rules for administering the corresponding statutory requirements for angel investment tax credits and early stage seed investment tax credits.

4. Related Statute or Rule.

Several statutes and other Departmental rules address tax incentives for business development in Wisconsin. For example, (1) sections 560.70 to 560.7995 of the Statutes and chapters Comm 100, 107, 112 and 118 address statewide tax-credit programs for job creation, capital investment, employee training and corporate headquarters; and (2) several other sections of chapter 560 and other Comm chapters address more-narrowly targeted business development

incentives, such as for film productions, dairy manufacturing facilities, and fuel and electricity used in manufacturing.

5. Plain Language Analysis.

The rules in this order (1) revise the eligibility requirements for these tax credits, (2) newly enable insurers to apply for these tax credits, (3) substantially increase the aggregate amount of investment in a qualified new business venture that may qualify for the tax credits, (4) substantially increase the aggregate amount of tax credits that may be claimed, (5) newly require investments to be maintained for at least 3 years, (6) newly enable transferring the credits to another person, (7) newly enable carrying forward the early stage tax credits, and (8) newly enable the Department to require a grant or loan origination fee.

6. Summary of, and Comparison With, Existing or Proposed Federal Regulations.

Neither the Department nor the Department of Revenue is aware of any existing or proposed federal regulation that applies these tax credits.

7. Comparison With Rules in Adjacent States.

Minnesota offers various tax credit programs, but none that are similar to the Early Stage Business Investment program in Wisconsin. Minnesota has no rules addressing loan and grant origination fees for its economic development programs.

Iowa offers a University-Based Research Utilization Program to provide tax credits to businesses and university employees to promote the adoption of new technology developed at the state universities. Businesses must be utilizing technology based on patents awarded to Iowa State University, the University of Iowa, or the University of Northern Iowa and be less than 1 year old. Researchers who developed the intellectual property utilized by the business are also eligible for up to 10 percent of the businesses tax liability in individual income tax credits. Administrative rules for this program are available in the Iowa Administrative Code, 261-Chapter 63. Further information is available through the Iowa Department of Economic Development Web site at www.iowalifechanging.com. Iowa has no rules addressing loan and grant origination fees for its economic development programs.

Illinois offers various tax credit programs, but none that are similar to the Early Stage Business Investment program in Wisconsin. Illinois has no rules addressing loan and grant origination fees for its economic development programs.

Michigan offers a High-Tech and High Wage MEGA Tax Credit program that provides tax credits to promote the development of high-tech businesses in traditional and emerging industries. A business is eligible for tax credits to offset their Michigan business tax liability. Tax credit amounts are based on job creation. There are no rules for the program, however guidelines can be found through the Michigan Economic Development Corporation's Web site at www.themedc.org. Michigan has no rules addressing loan and grant origination fees for its economic development programs.

8. Summary of Factual Data and Analytical Methodologies.

The data and methodology for developing these rules were derived from and consisted of (1) incorporating the criteria in 2007 Wisconsin Act 20 and 2009 Wisconsin Acts 2 and 28; (2) incorporating applicable best practices the Department has developed in administering similar programs for business development and tax-credit verification; and (3) reviewing Internet-based sources of related federal, state, and private-sector information.

9. Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of an Economic Impact Report.

The primary documents that were used to determine the effect of the rules on small business were 2007 Wisconsin Act 20 and 2009 Wisconsin Acts 2 and 28. These Acts apply their private-sector requirements only to businesses and individuals for which a corresponding tax credit is desired.

10. Effect on Small Business.

The rules are not expected to impose significant costs or other adverse impacts on small businesses because the rules address submittal of documentation, and other activities, only by applicants that choose to pursue tax credits for angel investments and early stage seed investments.

11. Agency Contact Person.

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SECTION 1. Comm 129.02 (3) is repealed and recreated to read:

Comm 129.02 (3) “Headquarters” means the commercial business location where staff members or employees are physically employed and where at least 51% of the company’s financial, personnel, legal, planning, or other headquarters functions are handled.

SECTION 2. Comm 129.09 (10) is renumbered Comm 129.09 (11).

SECTION 3. Comm 129.09 (10) is created to read:

Comm 129.09 (10) “Proprietary technology” means a product or process that is marketed under exclusive legal right of the inventor or maker and is protected by secrecy, patent, trademark or copyright against free competition.

SECTION 4. Comm 129.10 (1) is repealed and recreated to read:

Comm 129.10 (1) CERTIFICATION CONDITIONS. A business may be certified by the department as a qualified new business venture for the purposes of ss. 71.07 (5b) and (5d), 71.28 (5b), 71.47 (5b) and 76.638, Stats., and may retain the certification, only if the business satisfies all of the following conditions:

- (a) It has its headquarters in this state.
- (b) At least 51% of the employees employed by the business are employed in this state.
- (c) It has the potential for increasing jobs in this state, or increasing capital investment in this state, or both, and any of the following apply:
 - 1. It is engaged in, or has committed to engage in, innovation in this state in any of the following:
 - a. Manufacturing, biotechnology, nanotechnology, communications, agriculture, or clean energy creation or storage technology.
 - b. Processing or assembling products, including medical devices, pharmaceuticals, computer software, computer hardware, semiconductors, any other innovative-technology products, or other products that are produced using manufacturing methods which are enabled by applying proprietary technology.
 - c. Services that are enabled by applying proprietary technology.
 - 2. It is undertaking pre-commercialization activity related to proprietary technology that includes conducting research, developing a new product or business process, or developing a service which is principally reliant on applying proprietary technology.
- (d) It is not primarily engaged in real estate development; insurance; banking; lending; lobbying; political consulting; professional services provided by attorneys, accountants, business consultants, physicians, or health care consultants; wholesale or retail trade; leisure; hospitality; transportation; or construction, except construction of power production plants that derive energy from a renewable resource as defined in s. 196.378 (1) (h), Stats.
- (e) At the time it is first certified, it meets all of the following:
 - 1. It has fewer than 100 full-time-equivalent employees.
 - 2. It has been in operation for not more than 10 consecutive years.
 - 3. It has not received aggregate private equity investment in cash of more than \$10 million.

(f) It qualifies under the criteria established in sub. (3).

SECTION 5. Comm 129.10 (5) is repealed.

SECTION 6. Comm 129.10 (6) and (7) are renumbered Comm 129.10 (5) and (6).

SECTION 7. Comm 129.11 (1) (intro.) is amended to read:

Comm 129.11 (1) CERTIFICATION CONDITIONS. Investment fund managers shall be certified by the department for the purposes of ss. 71.07 (5b), 71.28 (5b), 71.47 (5b) and 76.638, Stats. In determining whether to certify an applicant as a certified fund manager, the department shall consider all of the following factors:

SECTION 8. Comm 129.12 (3) (b) 3. is created to read:

Comm 129.12 (3) (b) 3. Funds invested by certified fund managers, with principal offices based outside of this state, shall be made side by side with equity investors based in this state or be made in certified companies with investors based in this state with a minimum participation by state investors as determined by the department based on the following criteria:

a. The fund manager's experience in managing venture capital funds and investing in high-growth businesses.

b. The fund manager's past performance of investment funds managed by the fund manager, businesses assisted and the ability to access follow-on funding.

c. The fund manager's focus on targeted industries, group members and geographic distribution.

d. The portion of the investment fund's capital that the fund manager expects to invest in qualified new business ventures and the commitment to investment in this state.

Note: The intent of this subdivision is to provide the Department flexibility in order to protect the program from potential misuse and to help grow in-state investors. Out-of-state investors with strong management, a strong history of performance, and a focus on targeted industries and companies in this geographic region will have minimal side-by-side investment requirements. In contrast, out-of-state investors with smaller fund size, minimal experience, or a broad fund focus that does not parallel the goals of the program may have larger side-by-side investment requirements.

SECTION 9. Comm 129.12 (6) is repealed and recreated to read:

Comm 129.12 (6) REVOCATION OF CREDITS. (a) 1. The department may revoke tax credits issued under ss. 71.07 (5b) and (5d), 71.28 (5b), 71.47 (5b) or 76.638, Stats., under any of the following conditions:

a. Investments made in a certified business receiving tax credits under ss. 71.07 (5b) and (5d), 71.28 (5b), 71.47 (5b) or 76.638, Stats., are not maintained by the angel investor, angel investment network, or certified fund manager for a minimum of 36 months from the date of investment.

b. Investment funds are not used for legitimate business purposes as determined by the department.

2. The department shall notify the department of revenue of any tax credits revoked under subd. 1.

(b) If tax credits have been transferred under s. Comm 129.125, the certified fund manager shall be responsible for repayment of any revoked tax credits.

SECTION 10. Comm 129.125 is created to read:

Comm 129.125 Transfer. (1) A person who is a member of a certified fund and who is eligible to claim a credit under s. 71.07 (5b), 71.28 (5b), 71.47 (5b) or 76.638, Stats., may sell or otherwise transfer the credit to another person who is subject to the taxes or fees imposed under s. 71.07 (5b), 71.28 (5b), 71.47 (5b) or 76.638, Stats., if all of the following apply:

(a) The person transferring the tax credit has been allocated a tax credit by the certified fund manager.

(b) The person transferring the tax credit has received prior authorization from the certified fund manager.

(c) The person transferring the tax credit will not be selling or otherwise transferring early stage seed investment tax credit more than once per investment in a certified business in any 12-month period.

(d) The tax credit to be sold or otherwise transferred has not previously been sold or transferred under this section.

(2) The certified fund manager shall notify the department and the department of revenue of the transfer and shall submit all of the following information:

(a) A copy of the transfer documents showing the transfer of tax credits from the seller to the buyer.

(b) A fee in the amount of 1% of the amount of the tax credit sold or otherwise transferred, to be deposited in the appropriation account under s. 20.143 (1) (gm), Stats.

(c) Any other documents as required by the department to verify the sale or transfer of tax credits.

SECTION 11. Comm 129.13 is repealed and recreated to read:

Comm 129.13 Tax credit limits. (1) QUALIFIED NEW BUSINESS VENTURE. The aggregate amount of investment in any one qualified new business venture that may qualify for tax credits under ss. 71.07 (5b) and (5d), 71.28 (5b), 71.47 (5b) and 76.638, Stats., shall be limited to an amount determined by the department at the time of certification or recertification, up to each of the following maximums:

(a) \$4,000,000 in qualified investments for taxable years beginning before January 1, 2011.

(b) \$8,000,000 in qualified investments for taxable years beginning after December 31, 2010.

Note: Certified businesses seeking to increase the maximum qualified investment amount after December 31, 2010, under this subsection will be required to request an increase to the aggregate amount of investment that may qualify for tax credits and be approved by the Department at the time of recertification.

(2) ANGEL INVESTMENTS. (a) Statewide, the aggregate amount of tax credits under s. 71.07 (5d), Stats., that may be claimed for investments in businesses certified under s. Comm 129.10 shall be limited to each of the following, except as provided in par. (b):

1. \$3,000,000 per calendar year for calendar years beginning after December 31, 2004, and before January 1, 2008.

2. \$5,500,000 per calendar year for calendar years beginning after December 31, 2007, and before January 1, 2011.

3. \$18,000,000 per calendar year for calendar years beginning after December 31, 2010.

(b) An additional \$250,000 in angel investment tax credits will be made available for investments in nanotechnology businesses, for taxable years beginning after December 31, 2010.

(c) If the demand for tax credits exceeds the amount of tax credits available as identified in par. (a), the department may reserve tax credits from the following calendar year for qualifying investments.

(d) \$2,000,000 in aggregate investment by any one angel investor or member of an angel investment network in any one qualified new business venture shall qualify for tax credits for taxable years beginning before January 1, 2008.

Note: The limit in this paragraph was previously \$500,000 and was amended to \$2,000,000 in 2007 Wisconsin Act 20 section 1981. For taxable years after December 31, 2007, there is no limit to the aggregate investment by an angel investor or investment network in a qualified new business venture that qualifies for tax credits except for the limits imposed under subsection (1).

(3) EARLY STAGE SEED INVESTMENTS. (a) Statewide, the aggregate amount of tax credits under ss. 71.07 (5b), 71.28 (5b), 71.47 (5b) and 76.638, Stats., that may be claimed for investments by fund managers in businesses certified under s. Comm 129.10 shall be limited to each of the following, except as provided in par. (b):

1. \$3,500,000 per calendar year for calendar years beginning after December 31, 2004, and before January 1, 2008.
2. \$6,000,000 per calendar year for calendar years beginning after December 31, 2007, and before January 1, 2011.
3. \$18,500,000 per calendar year for calendar years beginning after December 31, 2010.

(b) An additional \$250,000 in early stage seed investment tax credits will be made available for investments in nanotechnology businesses, for taxable years beginning after December 31, 2010.

(c) If the demand for tax credits exceeds the amount of tax credits available as identified in par. (a), the department may reserve tax credits from the following calendar year for qualifying investments.

(d) \$2,000,000 in aggregate investment by any one certified fund manager in any one qualified new business venture shall qualify for tax credits for taxable years beginning before January 1, 2008.

Note: Under this paragraph, there is no limit to the aggregate investment amount by a certified fund manager in a qualified new business venture that qualifies for tax credits, for taxable years after December 31, 2007, except for the limits imposed under subsection (1).

SECTION 12. Comm 129.135 is created to read:

Comm 129.135 Credit carryforward. (1) Notwithstanding the amount limitations under s. Comm 129.13, the department, in consultation with the department of revenue, may carry forward to subsequent taxable years unclaimed credit amounts of the early stage seed investment credits under ss. 71.07 (5b), 71.28 (5b), 71.47 (5b) and 76.638, Stats., and the angel investment credit under s. 71.07 (5d), Stats.

(2) Annually, no later than July 1, the department shall submit its recommendations for the carry forward of credit amounts to the department of revenue.

SECTION 13. Comm 129.14 (1) (a) is amended to read:

Comm 129.14 (1) (a) The total amount of tax credits verified under ss. 71.07 (5b) and (5d), 71.28 (5b), ~~and 71.47 (5b)~~ and 76.638, Stats., per taxable year.

SECTION 14. Comm 129.36 (1) (c) is created to read:

Comm 129.36 (1) (c) The department may charge a grant or loan recipient an origination fee of not more than 2 % of the grant or loan amount if the grant or loan equals or exceeds \$100,000. The department shall deposit all origination fees collected under this subsection into the appropriation account under s. 20.143 (1) (gm), Stats.

(END)

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EFFECTIVE DATE

Pursuant to s. 227.22 (2) (intro.), Stats., these rules shall become effective on the first day of the month commencing after publication in the Wisconsin administrative register.

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File reference: Comm 129/rules 2009 LR ac