

## Walker, Mike

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**From:** Carling Dinkler <cdinkler@enhancedcapital.com>  
**Sent:** Friday, February 28, 2020 3:13 PM  
**To:** Sawyer, Scott; Rules Coordinator  
**Cc:** Saglio, Jesse; Bill Walsh; Michael Korengold; Shane McCarthy; Mark Slusar; Hitesh Shah  
**Subject:** [EXTERNAL] RE: Electronic Copy of Enhanced Comment Letter  
**Attachments:** Draft Regulations\_February 2020\_ECD Redline.docx

As an amendment to our comment letter, please find the attached version of the draft regulations with suggested edits.

**From:** Carling Dinkler  
**Sent:** Wednesday, February 19, 2020 12:23 AM  
**To:** scott.sawyer@commerce.ri.gov; rulescoordinator@commerceri.com  
**Cc:** Jesse.Saglio@commerceri.com; Bill Walsh <walshwg@gmail.com>; Michael Korengold <mkorengold@enhancedcapital.com>; Shane McCarthy <smccarthy@enhancedcapital.com>; Mark Slusar <mslusar@enhancedcapital.com>; Hitesh Shah <hshah@enhancedcapital.com>  
**Subject:** Electronic Copy of Enhanced Comment Letter

Scott and Michael:

We submitted a hard copy of the attached letter today at the hearing. I wanted to provide an electronic copy as well.

- Carling

870-RICR-30-00-8

## **TITLE 870 – RHODE ISLAND COMMERCE CORPORATION**

### **CHAPTER 30 – TAX CREDITS AND EXEMPTIONS**

#### **SUBCHAPTER 00 – N/A**

PART 8 – Rules and Regulations for the Rhode Island Small Business Development Fund

#### **8.1 Purpose**

These rules and regulations are promulgated to set forth the principles, policies and practices of the Rhode Island Commerce Corporation in implementing and administering R.I. Gen. Laws Chapter 42-64.33, the Small Business Development Fund Act.

#### **8.2 Authority.**

These Rules are promulgated by the Rhode Island Commerce Corporation pursuant to R.I. Gen. Laws Chapters 42-64.33 and 42-64-7. These Rules have been prepared in accordance with the requirements of the Rhode Island Administrative Procedures Act, R.I. Gen. Laws Chapter 42-35.

#### **8.3 Scope**

These Rules shall apply to any Application for a tax credit under the Act. Notwithstanding anything contained in these Rules to the contrary, the Rhode Island Commerce Corporation shall have and may exercise all general powers set forth in the Act that are necessary or convenient to effectuate its purposes, and these Rules shall be liberally construed so as to permit the Rhode Island Commerce Corporation to effectuate the purposes of the Act, the public interest, and other applicable State laws and regulations. The Rhode Island Commerce Corporation, upon an affirmative vote of its board of directors, may provide exemption from the application of such portion of these Rules as may be warranted by extenuating circumstances arising from such application, based upon the written recommendation of the staff of the Rhode Island Commerce Corporation delineating the reasons for such exemption.

#### **8.4 Severability**

If any provision of these Rules, or the application thereof to any person or circumstance, is held invalid by a court of competent jurisdiction, the validity of the remainder of the Rules shall not be affected thereby.

## 8.5 Definitions

- A. The following words and terms, when used in these Rules, shall have the following meanings, unless the context clearly indicates otherwise.
1. "Act" means R.I. Gen. Laws Chapter 42-64.33 known as the Small Business Development Fund Act.
  2. "Affiliate" means as set forth in the Act.
  3. "Applicant" means an entity that applies for Certification pursuant to these Rules.
  4. "Application" means a document and additional materials in the form prescribed by the Corporation submitted by an Applicant to the Corporation as provided in the Rules.
  5. "Board" means the Board of Directors of the Corporation, or, at the election of such directors, a committee thereof.
  6. "Bond" means a surety-financial guarantee bond or a surety bond posted annually beginning within 30 days prior to the fourth credit allowance date and each year thereafter until the small business development fund successfully exits the program. The Bond shall have the following conditions:
    - a. The annual face value of the Bond shall be the cumulative amount of tax credit that may be utilized by a small business fund investor on such credit allowance date less the cumulative amount of revenue impact of the investments completed.
    - b. The Corporation shall provide a form of Bond with terms and conditions acceptable to the Corporation.
    - a.c. The Bond will be issued by a company with an A.M. Best rating of A or better that is registered to do business in the State and not an investor in a Small Business Development Fund.
  - 6.7. "Business plan" means as set forth in § 8.6(A)(8) of this Part.
  - 7.8. "Capital investment" means any Equity Investment or Debt Investment in a Small Business Development Fund by a Small Business Fund Investor that:
    - a. is acquired after the effective date of this chapter at its original issuance solely in exchange for cash;
    - b. has one hundred percent (100%) of its cash Purchase Price used by the Small Business Development Fund to make Qualified Investments in Eligible Businesses located in this State within three (3) years of the initial Credit Allowance Date; and

- c. is designated by the Small Business Development Fund as a capital investment under the Act and is certified by the Corporation pursuant to this Part. This term shall include any capital investment that does not meet the provisions of this Part if the investment was a capital investment in the hands of a prior holder.

~~8.9.~~ "Certificate of good standing" means a certificate of good standing issued by the Rhode Island Secretary of State.

~~9.10.~~ "Certification" means the document issued to an Applicant by the Corporation after Board approval of a complete Application.

~~10.11.~~ "Corporation" means the Rhode Island Commerce Corporation established under the Corporation Act.

~~11.12.~~ "Corporation act" means RI Gen Laws § 42-64-1 *et. seq.*

~~12.13.~~ "Credit allowance date" means the date on which a Capital Investment is made and each of the five (5) anniversary dates of the date thereafter.

~~13.~~ "Debt investment" means a loan with a term of not less than ten years.

14. "Depository institution" means a financial institution that
- a. is in the business of regularly accepting deposits from the public,
  - b. is a national bank or federal savings association regulated by the United States Department of Treasury, Office of Comptroller of the Currency, credit union regulated by the National Credit Union Administration, or other bank or financial institution regulated or insured by the Federal Deposit Insurance Corporation, Federal Reserve Board, or Conference of State Bank Supervisors, and
  - c. is registered with the Rhode Island Secretary of State, the Department of Business Regulation or is otherwise licensed to conduct business in the State and has a physical branch location in the State that accepts deposits from its customers.
15. "Eligible business" means a business that, at the time of the initial Qualified Investment in the company:
- a. has less than two hundred fifty (250) Employees;
  - b. has not more than fifteen million dollars (\$15,000,000) in net income from the preceding tax year;
  - c. has its Principal Business Operations in this State;
  - d. maintains its Principal Business Operations in the State during the term of a Qualified Investment to such business; and
  - e. is engaged in industries related to clean energy, biomedical innovation, life sciences, information technology, software, cyber physical systems, cybersecurity, data analytics, defense,

shipbuilding, maritime, composites, advanced business services, design, food, manufacturing, transportation, distribution, logistics, arts, education, hospitality, tourism, or, if not engaged in the industries, the Corporation makes a determination that the investment will be beneficial to the economic growth of the State.

16. "Eligible distribution" means as set forth in the Act.
17. "Employee" means an individual employed for remuneration.
18. "Equity investment" means an investment of funds in exchange for an ownership stake in a business.
19. "Jobs created" means a newly created position of employment that was not previously located in the State at the time of the Qualified Investment in the Eligible Business and requiring a minimum of thirty five (35) hours worked each week, measured each year by subtracting the number of full-time thirty five (35) hours per week employment positions at the time of the initial Qualified Investment in the Eligible Business from the monthly average of full-time thirty five (35) hours per week employment positions for the applicable year. The number shall not be less than zero.
20. "Jobs retained" means a position requiring a minimum of thirty five (35) hours worked each week that existed prior to the initial Qualified Investment. Retained jobs shall be counted each year based on the monthly average of full-time thirty five (35) hours per week employment positions for the applicable year. The number shall not exceed the initial amount of retained jobs reported and shall be reduced each year if employment at the Eligible Business concern drops below that number.
21. "Letter of good standing" means a letter from the Division of Taxation certifying that the taxpayer is in good standing for purposes of financing transactions.
22. "Minority business enterprise" means as set forth in the Act.
23. "Nationally-Recognized Economic Forecasting Firm" means one or more nationally recognized firms as certified by the Corporation in its sole discretion. Certification will be accordance with criteria set forth in the Application. An Applicant may seek to have a firm certified prior to submitting an Application.
24. "Nonpublic companies" means a corporation, limited liability company, partnership, or limited partnership that does not offer or trade its stocks or membership interests to the public on any stock market exchange, which entity is organized under the laws of United States America or a political subdivision thereof.

25. "Positive economic impact" means:
- a. as used in § 8.10(C)(2) of this Part, the projected State tax revenue to be generated as a result of an Applicant's Qualified Investments is in excess of the tax credits to be awarded to the Applicant under the Program,
  - b. as used in § 8.14(A)(1) of this Part, the actual performance of an Applicant's Qualified Investments have resulted in State tax revenues that are in excess of the tax credits that have been certified.
26. "Principal business operations" means the location where at least sixty percent (60%) of a business's Employees work or where Employees who are paid at least sixty percent (60%) percent of the business's payroll work. A business that has agreed to relocate Employees using the proceeds of a Qualified Investment to establish its principal business operations in a new location shall be deemed to have its principal business operations in the new location if it satisfies these requirements no later than one hundred eighty (180) days after receiving a Qualified Investment.
27. "Program" means the Small Business Development Fund program created under the Act.
28. "Purchase price" means the amount paid to the Small Business Development Fund that issues a Capital Investment which shall not exceed the amount of Capital Investment authority certified pursuant to this Part.
29. "Qualified investment" means any Equity Investment in or Qualified Loan to an Eligible Business; provided that, with respect to any one Eligible Business, the maximum amount of Equity Investments and/or Qualified Loans made in the business by one or more Small Business Development Funds, on a collective basis with all of the businesses' affiliates, with the proceeds of Capital Investments shall be twenty percent (20%) of the Small Business Development Fund's Capital Investment authority, exclusive of investments made with repaid or redeemed investments or interest or profits realized thereon. An Eligible Business, on a collective basis with all of the businesses' affiliates, is prohibited from receiving more than four million dollars (\$4,000,000) in Equity Investments and/or Qualified Loans from one or more Small Business Development Funds with the proceeds of Capital Investments.
30. "Qualified loan" means a loan with a maturity of not less than one year from the date of the loan, excluding revolving lines of credit and debt secured by a first mortgage on any real estate or ground lease; provided,

however, revolving lines of credit and debt secured by a first mortgage on real estate or ground lease with a term of more than one year made to an Eligible Business are permitted if such Eligible Business has received a Refusal Letter or a Referral Letter from a Depository Institution.

31. "Referral letter" means a letter from ~~signed under oath from the Chief Executive Officer of a~~ Depository Institution ~~or equivalent officer if such institution does not have a Chief Executive Officer~~ referring an Eligible Business to a Small Business Development Fund and certifying that Depository Institution would not be able to make any loan to the Eligible Business either alone or in combination with the Small Business Development Fund to accomplish the funding needs requested by the Eligible Business for a revolving line of credit or senior secured loan due solely to issues of creditworthiness.
32. "Refusal letter" means a letter from ~~assigned under oath from the Chief Executive Officer of a~~ Depository Institution ~~or equivalent officer if such institution does not have a Chief Executive Officer~~ denying an Eligible Business a loan based on standard commercial terms in the market for an equivalent borrower and certifying that Depository Institution has denied such application for business reasons and not at the request of the Eligible Business or any representative of a Small Business Development Fund.
33. "Request for determination" means a request by a Small Business Development Fund to the Corporation for determination that a business in which an investment is being made is an Eligible Business.
34. "Request to exit" means the request to exit from the Program made by a Small Business Development Fund.
35. "Revenue impact assessment" means a prospective assessment of an Applicant's Qualified Investments on the State's economy and on State and local tax revenues completed by a Nationally-Recognized Economic Forecasting Firm, which shall include the following:
  - a. An analysis of the direct and indirect impacts of the proposed Qualified Investments on employment, earnings, value added and output in Rhode Island, using a nationally recognized and commonly used economic modeling system, excluding therefrom any measurement of induced impacts.
  - b. The analysis shall be based on the Applicant's anticipated mix of Qualified Investments in the State by industry, type of financing (equity investments or loans) and purpose (property acquisition, construction, equipment financing, working capital etc.), as presented in the Business Plan. The analysis will not be based on



prior revenue impact assessments or similar prospective analyses prepared for a similar program.

- c. Economic and tax revenue impacts shall be based on new Jobs Created and Jobs Retained as a result of the anticipated Qualified Investments; provided, however, that Jobs Retained will only be considered by the Corporation for the purpose of this analysis on the basis of evidence satisfactory to the Corporation that in the absence of such investment a proposed recipient of Small Business Development Fund financing:
    - (1) Would no longer be doing business in the State; or
    - (2) Would have reduced its employment in the State by at least the number of claimed Jobs Retained.
  - d. An analysis submitted in relation to a Qualified Investment made for the principal purpose of financing construction shall only relate to the period of construction and no longer unless the Applicant can demonstrate by evidence satisfactory to the Corporation that such construction was needed to support expansion or retention of the recipient's ongoing operations in the State and that in the absence of such investment a proposed recipient of Small Business Development Fund financing:
    - (1) Would no longer be doing business in the State; or
    - (2) Would have reduced its employment in the State by at least the number of claimed Jobs Retained.
  - e. Financing for acquisition of real property will not be considered a Qualified Investment under such analysis unless it can be demonstrated by evidence satisfactory to the Corporation that such acquisition is needed to support the creation or retention of jobs in the State and that in the absence of such investment a proposed recipient of Small Business Development Fund financing:
    - (1) Would no longer be doing business in the State; or
    - (2) Would have reduced its employment in the State by at least the number of claimed Jobs Retained.
  - f. The analysis must include evidence that the projected outcomes set forth therein are credible.
36. "Rules" means the rules and regulations promulgated by the Corporation pursuant to the Act as amended from time to time.

37. "Small business development fund" means an entity certified by the Corporation under this Part.
38. "Small business fund investor" means an entity that makes a Capital Investment in a Small Business Development Fund.
39. "State" means the state of Rhode Island and Providence Plantations.
40. "State tax liability" ~~means~~ means as set forth in the Act.

## **8.6 Eligibility**

- A. In order for a Small Business Development Fund to have an Equity Investment or Debt Investment certified as a Capital Investment and eligible for credits pursuant to the Act, the Applicant shall meet the following requirements:
  1. The Applicant has submitted a complete Application to the Corporation as determined by the Board under § 8.10 of this Part;
  2. The Applicant is registered to do business in the State at the time of filing an Application with the Corporation;
  3. The Applicant has all required licensure to conduct business in the State at the time of the filing of its Application with the Corporation;
  4. The Applicant and any investor seeking an allocation of tax credits shall be in good standing with the Division of Taxation at the time of the filing of its Application with the Corporation;
  5. The Applicant or an Affiliate shall be licensed as a Rural Business Investment Company, under Subtitle H of the Consolidated Farm and Rural Development Act, as amended, 7 U.S.C. § 2009cc, or as a Small Business Investment Company, under the Small Business Investment Act of 1958, as amended, 15 U.S.C. § 681;
  6. The Applicant or Affiliates of the Applicant have invested at least one hundred million dollars (\$100,000,000) in Nonpublic Companies;
  7. The Applicant's Qualified Investments will result in the creation of Jobs Created or Jobs Retained;
  8. The Applicant has submitted a Business Plan on a form promulgated by the Corporation, which shall contain the following:
    - a. Overview of investment strategy and target deal profile;
    - b. Management structure and staffing of the Applicant;

- c. Biographies of the Applicant's principals, managers and/or officers;
- d. Plans for collaboration with colleges, universities or other institutions of higher learning, if any;
- e. Plans for collaboration with other community-based partners, if any, including any outreach to such partners;
- f. A certificate from the Applicant that
  - (1) all fundraising has been completed by the Applicant;
  - (2) it has irrevocable commitments and/or investments in place equal to its proposed total of all Capital Investments, and
  - (3) the total amount of the Capital Investments;
- g. A certificate from each Small Business Fund Investor confirming the irrevocable commitment or investment in the Applicant;
- h. A detailed description of each Small Business Fund Investor in the Applicant including the following:
  - (1) The name, address and principal contact for each Small Business Fund Investor in the Applicant and type of investor (individuals, partnerships, corporations, institutions, trusts, limited liability companies etc.); and
  - (2) The amount of the investment made or committed by each Small Business Fund Investor in the Applicant and whether the investment is an Equity Investment or Debt Investment;
- i. A credible narrative to include the following for Qualified Investments:
  - (1) The expected date after Certification that the Applicant will start accepting applications for investments in Eligible Businesses;
  - (2) Anticipated fees, charges, rates and/or assessments to be charged by the Applicant for investments in Eligible Businesses;
  - (3) The deployment strategy including industries and/or sectors the Applicant expects to target the estimated percentage of distribution of the total investments of the Applicant across the identified industries and/or sectors in Eligible Businesses and the size, stage, industry, and other portfolio company

**Commented [CD1]:** This information could be provided after fund closing. All credit and non-credit funding must be complete within 60 days of the fund being certified.

characteristics relevant to the Applicant's investment strategy;

- (4) The strategy for identifying and meeting unmet access to capital needs in the State.
- (5) A delineation for Equity Investment subtypes such as seed, early-stage venture capital, late-stage venture capital, private equity; and a delineation of Qualified Loan subtypes such as construction financing, mortgage financing, equipment financing, working capital and the expected collateral associated with such loans;
- (6) The expected number of Jobs Created as a result of the Applicant's investments by year and in the aggregate from Certification to the anticipated exit from the Program;
- (7) The expected number of Jobs Retained as a result of the Applicant's investments by year and in the aggregate from Certification to the anticipated exit from the Program; and
- (8) A breakdown of the categories of Jobs Created and/or Jobs Retained by occupational category and listing the expected average annual wages/salaries for each Job Created and/or Job Retained with respect investments.

j.g. A certification from the Applicant and each of its proposed Small Business Fund Investors on a form promulgated by the Corporation containing, among others, the covenants, representations and warranties and an acknowledgment that the breach of any of the covenants, representations or warranties shall result in a reduction of the tax credits pursuant to § 8.14 of this Part;

k.h. A complete Revenue Impact Assessment;

l.i. A detailed plan for marketing and outreach to Minority Business Enterprises;

m.j. A credible, verifiable mechanism satisfactory to the Corporation to be used and implemented by the Applicant for each of its Qualified Investments to assess whether such Qualified Investment will result in Jobs Created or Jobs Retained that would not otherwise occur but for such investment by the Applicant;

n.k. A credible, verifiable mechanism satisfactory to the Corporation to be used and implemented by the Applicant for each of its Qualified Investments to assess whether each Qualified Investment

generates a return in excess of a corresponding tax credit awarded under the Act and these Rules;

- e.l. A list of at least three references from letter of support from a governmental units or political subdivisions that administered a similar tax credit program in which the Applicant or an Affiliate participated if applicable;
  - e.m. A list of all pending litigation in which the Applicant or Affiliate is a party including the names of all parties, the date of commencement of the case and the state and court in which the case is pending;
  - e.n. A list of all litigation in which a judgment entered against the Applicant or an Affiliate including the names of all parties, the date of the judgment and the state and court in which the judgment entered together with a copy of any such judgment;
  - e.o. A list of all pending litigation in which a principal, manager, officer and/or employee of the Applicant is a party that in any way relates to claims involving investments, financing, fraud, misrepresentation, embezzlement, tax evasion, breach of fiduciary duty or claim arising from dishonesty; including the names of all parties, the date of commencement of the case and the state and court in which the case is pending; and
  - e.p. A list of all litigation in which a judgment entered against a principal, manager, officer and/or employee of the Applicant in relation to any claims involving investments, financing, fraud, misrepresentation, embezzlement, tax evasion, breach of fiduciary duty or claim arising from dishonesty; including the names of all parties, the date of judgment and the state and court in which the judgment entered together with a copy of any such judgment.
9. As of the Application Date, the Applicant has established one or more accounts with a Rhode Island branch of a Depository Institution in which the Equity Investment and/or Debt Investment received by the Applicant will be deposited if the Application is approved;
  10. The Applicant has provided a form of financial guaranty Bond or other such surety Bond issued by a company with an A.M. Best rating of A or better that will be filed beginning within 30 days prior to the fourth credit allowance date; and
  11. All fees due under this Part have been paid.

## 8.7 Application

- A. Each Application made by an Applicant shall be in the format prescribed by the Corporation and shall include, among other things, the following:
1. The name, address and principal contact for the Applicant;
  2. State and Federal tax identification numbers;
  3. A Certificate of Good Standing for the Applicant dated within thirty days of the date of submission of the Application to the Corporation;
  4. A Letter of Good Standing for the Applicant and each Small Business Fund Investor seeking an allocation of tax credits dated within thirty days of the date of submission of the Application to the Corporation;
  5. A copy of the Applicant's or an Affiliate's license as a Rural Business Investment Company, 7 U.S.C. § 2009cc, or as a Small Business Investment Company, 15 U.S.C. § 681;
  6. A certificate executed under oath before a notary public by an executive officer of the Applicant within three days of the submission of the Application attesting that the rural business investment company license or small business investment company license submitted with the Application remains in effect and has not been revoked;
  7. Copies of the applications submitted to the respective federal agency in relation to the licenses supplied in conformance with § 8.7(A)(5) of this Part;
  8. Evidence that the Applicant or Affiliates of the Applicant have invested at least one hundred million dollars (\$100,000,000) in Nonpublic Companies, which shall include the following:
    - a. The name, address and federal tax identification number of each Affiliate included in the entities that provided the investments totaling \$100,000,000;
    - b. The name, address and telephone number of each manager of each Affiliate referenced in §8.7(A)(8) of this Part;
    - c. A list of each investment made by each Affiliate referenced in §8.7(A)(8) of this Part over the past fifteen years including, the date, the amount, the form of investment (loan/equity) and to whom the investment was made with an identification of the business name, its principal officers, partners or managers, address and telephone number;

- d. The number of Jobs Created, Jobs Retained and the economic impact for each investment listed in § 8.7(A)(8)(c) of this Part; and
  - e. The audited financial statements for the Applicant and for each Affiliate referenced in §8.7(A)(8) of this Part for the past ten years.
9. A complete Business Plan;
10. Criminal background checks for all executives and managers of the Applicant;
11. A list of not less than ten dates for which responsible personnel shall be available for an interview with Corporation staff. All dates must be no less than thirty (30) and no more than sixty (60) days from the date of the submission of the Application;
12. Evidence of compliance with the 2020 Global Investment Performance Standards published by the CFA Institute; except, to the extent such standards are not applicable or relevant to the Applicant or its Affiliate, an Applicant may provide an explanation as to why the standards are not applicable or relevant and an alternative showing of adherence to high standards. The Applicant may submit to the Corporation such explanation and a form of third-party verification of adherence to high standards by the Applicant or Affiliates of the Applicant that have invested at least one hundred million dollars (\$100,000,000) in Nonpublic Companies. The Corporation shall within 15 days confirm that the explanation and the form of third-party verification is acceptable
- ~~12.13.~~ Payment of all fees and costs required under § 8.8 of this Part; and
- ~~13.14.~~ Such other information as the Corporation deems appropriate or necessary in connection with the Application.

## 8.8 Fees

- A. An Applicant shall be charged a one-time, non-refundable Application fee by the Corporation of five thousand dollars (\$5,000) and may be charged fees for ongoing administration in relation to an approved Application and a termination fee upon exit from the Program. The Corporation shall publish a fee schedule, as amended by the Corporation from time to time, on its website.
- B. An Applicant will be required to make advance payment to the Corporation of the full amount of direct fees and costs paid to third-parties by the Corporation in relation to the consideration for approval of the Applicant's Application.
- C. An Applicant shall make payment of all fees and costs within thirty (30) days of a request from the Corporation. If an Applicant fails to make timely payment after request by the Corporation, the Corporation may send a notice of default to the Applicant and provide the Applicant an additional thirty (30) days for payment of

such fees and costs. If an Applicant fails to timely make payment of such fees and costs after a notice of default under this section, the Corporation shall be entitled to payment from the Bond or other approved surety for such amounts



together with interest thereon from the date of the initial request for payment from the Corporation to the Applicant in the amount of twelve percent (12%) per annum.

- D. An Application shall be deemed incomplete if any fee or cost for which the Corporation has made a request for payment to the Applicant remains unpaid.

### 8.9 Review Process.

- A. Prior to consideration by the Board, each Application shall be reviewed to confirm compliance with the Corporation Act, the Act and these Rules, ~~and the Corporation may reject any incomplete or deficient Application.~~
- B. ~~The Corporation may require 1. In the submission case of additional information in connection with any an incomplete or deficient Application, or, the revision Corporation shall provide notice of such a conditional rejection to the Applicant within thirty days.~~
  - 2. ~~The Applicant shall have fifteen days from the date of the notice of conditional rejection under subsection 1 of this Part hereof to provide all additional information to the Corporation or otherwise cure such deficiencies in the Application, and may permit the resubmission of an necessary to complete the Application.~~
    - a. ~~If the Applicant fails to timely provide any additional information, the Application shall be deemed rejected as being incomplete without further action by the Corporation.~~
    - b. ~~If the Applicant fails to timely provide all additional information to the Corporation or deficient cure any deficiencies necessary to complete the Application, the Corporation shall provide a final notice of rejection and denial to the Applicant within thirty days after the deadline for submission under subsection 2 of this Part hereof. Upon the issuance of such final notice of rejection and denial, the Applicant shall only be eligible to submit a new Application with a new submission date.~~
    - c. ~~If the Applicant timely provides all additional information to the Corporation and cures any deficiencies necessary to complete the Application, the Corporation shall provide a notice to the Applicant within thirty days after the deadline for submission under subsection 2 of this Part hereof indicating that the staff of the Corporation has referred the matter to the Board for consideration and the Application shall be considered filed as of the original date of submission for the purposes of consideration by the Board.~~

- B. After submission of an Application and review by the Corporation which is not rejected, the staff of the Corporation shall refer the Application for review and consideration by the Board.

### 8.10 Board Consideration of Application

- A. Upon referral from staff of the Corporation, the Board will determine whether the Application is complete and will consider, among other things, the following in making such determination:

1. Whether all information required by these Rules has been submitted by the Applicant; and
2. Whether the Business Plan is complete and satisfactory to the Board as determined in its discretion.

- B. If the Board determines that the Application is incomplete ~~it shall notify the Applicant in writing of such determination~~ the Corporation shall provide notice to the Applicant of a conditional rejection of the Application within thirty days of the date of referral of the Application by the staff of the Corporation to the Board.

1. The Applicant shall have fifteen (15) days from the date of the notice of conditional rejection under subsection B of this Part hereof to provide all additional information to the Corporation or otherwise cure such deficiencies in the Application necessary to complete the Application. If the Applicant fails to provide any additional information, the Application shall be deemed rejected without further action by the Board or the Corporation. The Board shall make a determination of completeness to the extent the Applicant timely submits additional information.

- a. If the Applicant fails to timely provide all additional information to the Corporation or cure any deficiencies necessary to complete the Application as determined by the Board, the Corporation shall provide a final notice of rejection and denial to the Applicant within thirty days after the deadline for submission under subsection 1 of this Part hereof. Upon the issuance of such final notice of rejection and denial, the Applicant shall only be eligible to submit a new Application with a new submission date.

- b. If the Applicant timely provides all additional information to the Corporation and cures any deficiencies necessary to complete the Application as determined by the Board, the Corporation shall provide a notice to the Applicant within thirty days after the deadline for submission under subsection 1 of this Part hereof indicating that the Application is complete.

- C. If the Board determines the Application is complete, the Board will then determine whether the Corporation will grant or deny the Application in full or in part within thirty (30) days from its determination of completeness. The Corporation shall deny the Application if:
1. The Applicant does not satisfy the Eligibility Criteria set forth in § 8.6 of this Part;
  2. The Revenue Impact Assessment does not demonstrate that the Applicant's Business Plan will result in a Positive Economic Impact on the State over a ten (10) year period that exceeds the cumulative amount of tax credits that would be issued if the Application were approved;
  3. The Corporation has already approved the maximum amount of Capital Investment permitted under the Act; or
  4. The Board is unable to make the findings required under the Corporation Act.
- D. The Board may condition approval of an Application in its discretion including, but not limited to, requirements for the ongoing review ~~of and approval of proposed~~ Qualified Investments for compliance with this Part.
- E. The Board may, for the purposes of the consideration of Applications under this § 8.10 of this Part, seek the input of a committee of the Board.

### **8.11 Certification**

- A. After Board approval of an Application in accordance with § 8.10 of this Part, the Corporation shall issue a Certification to the Applicant certifying that the proposed Equity Investment or Debt Investment qualifies as a Capital Investment under the Act, subject to the following limitation:
1. The Corporation shall certify no more than sixty-five million dollars (\$65,000,000) in Capital Investment under the Act and no more than twenty million dollars (\$20,000,000) of Capital Investment may be allocated to any individual Small Business Development Fund.
- B. The Corporation shall certify Capital Investments in the order that the Applications are received by the Corporation.
- C. Applications received on the same day shall be deemed to have been received simultaneously.
- D. For Applications that are complete and received on the same day, the Corporation shall certify the Applications in proportionate percentages based upon the ratio of the amount of Capital Investments requested in an Application to the total amount of Capital Investments requested in all Applications.

## **8.12 Capital Investment**

- A. Within sixty (60) days of the Applicant receiving the Certification from the Corporation, the Capital Investment shall issue and the Small Business Development Fund shall receive cash in the amount of the certified amount from a Small Business Fund Investor and deposit the same in an account at a Depository Institution.
- B. At least forty-five percent (45%) of the Small Business Fund Investor's Capital Investment shall be composed of capital raised by the Small Business Fund Investor from sources, including directors, members, employees, officer, and Affiliates of the Small Business Fund Investor, other than the amount of the capital invested by the allocatee claiming the tax credits in exchange for the allocation of tax credits; provided that at least ten percent (10%) of the Capital Investment shall be derived from the Small Business Investment Fund's managers.
- C. The Applicant shall provide the Corporation with written evidence satisfactory to the Corporation of the receipt of the cash investment within sixty-five (65) days of the Applicant receiving notice of Certification.
- D. If the Applicant does not receive the cash investment and issue the Capital Investment within sixty (60) days of the Applicant receiving the Certification from the Corporation, the Certification shall lapse, and the Applicant shall not issue the Capital Investment without reapplying to the Corporation for Certification.
- E. Lapsed Certifications revert to the Corporation and shall be reissued pro rata to Applicants whose Capital Investment allocations were reduced pursuant to the Act and then in accordance with the Application process.

## **8.13 Request for Determination.**

- A. A Small Business Development Fund, before making a Qualified Investment, may request from the Corporation a written opinion as to whether the business in which it is proposed to invest is an Eligible Business.
- B. The Corporation may promulgate an application form in relation to a Request for Determination.
- C. The Corporation, not later than the fifteenth business day after the date of receipt of a complete Request for Determination, shall notify the Small Business Development Fund of its determination. The date of receipt of a Request for Determination can only be a business day that the Corporation is open for business.
- D. If the Corporation fails to notify the Small Business Development Fund by the fifteenth business day after receipt of a Request for Determination of either its

rejection of the Request for Determination as being incomplete or its determination of eligibility by mailing a notice to the registered agent on file for such entity with the Secretary of State or to such other address as the Corporation may have in its records for such entity or via email to the email address provided by the Applicant in connection with its Application, the business in which the Small Business Development Fund proposes to invest shall be considered an Eligible Business.

#### **8.14 Reduction of Credit Allocation**

- A. The Corporation shall reduce a tax credit allocation upon the occurrence of the following:
  - 1. As of the date of filing a Request to Exit, the performance of the Small Business Development Fund's Qualified Investments have not resulted in a Positive Economic Impact as set forth in the approved Application; or
  - 2. The Small Business Development Fund breaches the various covenants, representations and warranties certified in the Business Plan.
- B. The method for calculating the tax credit reduction will be included in the Application.
- C. To the extent all tax credits have already been issued with respect to a Small Business Development Fund enrolled in the Program or the reduction of the tax credit allocation exceeds the remaining tax credits to be issued with respect thereto, the Corporation shall be entitled to payment from the Bond or other such approved surety of an amount equal to the amount of such reduction of the tax credit allocation.
- D. If a Small Business Fund Investor fails to surrender the rights to any remaining tax credit allocation within ten days after notice from the Corporation, the Corporation shall be entitled to payment from the Bond or other such approved surety of an amount equal to the amount of such tax credit allocation.

#### **8.15 Recapture**

- A. The Corporation, working in coordination with the Division of Taxation, may recapture, from any entity that claims a credit on a tax return, the credit allowed under the Act or these Rules if:
  - 1. The Small Business Development Fund does not invest one hundred (100%) percent of its Capital Investment authority in Qualified Investments in this State within three (3) years of the first credit allowance date;
  - 2. The Small Business Development Fund, after satisfying the requirements of § 8.12(A) of this Part, fails to maintain Qualified Investments equal to one hundred (100%) percent of its Capital Investment authority until the

sixth anniversary of the initial credit allowance date. For the purposes of this subsection of this Part, a Qualified Investment is considered maintained even if the Qualified Investment was sold or repaid so long as the Small Business Development Fund reinvests an amount equal to the capital returned or recovered by the Small Business Development Fund from the original investment, exclusive of any profits realized, in other Qualified Investments in this State within twelve (12) months of the receipt of the capital. Amounts received periodically by a Small Business Development Fund shall be treated as continually invested in Qualified Investments if the amounts are reinvested in one or more Qualified Investments by the end of the following calendar year. A Small Business Development Fund shall not be required to reinvest capital returned from Qualified Investments after the fifth anniversary of the initial Credit Allowance Date, and the Qualified Investments shall be considered held continuously by the Small Business Development Fund through the sixth anniversary of the initial Credit Allowance Date;

3. The Small Business Development Fund, before exiting the Program in accordance with the Act and these Rules, makes a distribution or payment that results in the Small Business Development Fund having less than one hundred percent (100%) of its Capital Investment authority invested in Qualified Investments in this State or available for investment in Qualified Investments and held in cash and other marketable securities;
  4. The Small Business Development Fund, before exiting the Program in accordance with the Act and these Rules, fails to make Qualified Investments in Minority Business Enterprises that when added together equal at least ten percent (10%) of the Small Business Development Fund's Capital Investment authority; or
  5. The Small Business Development Fund violates § 8.12(D) of this Part.
- B. Recaptured credits and the related Capital Investment authority revert to the Corporation and shall be reissued pro rata to Applicants whose Capital Investment allocations were reduced pursuant to the Act and these Rules and then in accordance with the Application process.
- C. Enforcement of each of the recapture provisions of the Act and these Rules shall be subject to a six (6) month cure period. No recapture shall occur until the Small Business Development Fund has been given notice of noncompliance and afforded six (6) months from the date of the notice to cure the noncompliance.
- D. No Eligible Business that receives a Qualified Investment under the Act or these Rules, or any affiliates of the Eligible Business, may directly or indirectly:
1. Own or have the right to acquire an ownership interest in a Small Business Development Fund or member or affiliate of a Small Business

Development Fund, including, but not limited to, a holder of a Capital Investment issued by the Small Business Development Fund; or

2. Loan to or invest in a Small Business Development Fund or member or affiliate of a Small Business Development Fund, including, but not limited to, a holder of a Capital Investment issued by a Small Business Development Fund, where the proceeds of the loan or investment are directly or indirectly used to fund or refinance the purchase of a Capital Investment under the Act or these Rules.

#### **8.16 Program Exit**

- A. On or after the sixth anniversary of the initial Credit Allowance Date, a Small Business Development Fund may seek to exit the Program by first filing all reporting required under this Part and after the passage of ninety (90) days from filing such complete reporting, filing a Request to Exit as provided in this Section (§ 8.16 of this Part).
- B. The Corporation shall, from time to time, promulgate forms and reports that shall be a requirement for consideration of the exit of an approved Applicant from the Program.
- C. The Corporation shall not accept a Request to Exit unless the Board has approved such filing pursuant to this Section (§ 8.16 of this Part).
- D. The Board will review the reporting submitted by the Small Business Development Fund for completeness and conformance with the requirements of this Part and make a determination as to whether the Small Business Development Fund may make seek to exit the Program. The Corporation will notify the Small Business Development Fund within one hundred twenty (120) days after receipt of the reporting provided under this § 8.16 of this Part whether it is complete and in conformance with the Corporation's requirements and this Part. If the Board determines the reporting is deficient in any manner, the Corporation shall notify the Small Business Development Fund who shall be provided an opportunity to resubmit such reporting. A resubmission of the required reporting shall be treated in the same manner as an original filing including the timelines set forth under this § 8.16 of this Part.
- E. After Board approval for the filing of a Request to Exit, the Small Business Development Fund shall have thirty (30) days to file a Request to Exit with the Corporation failing which the Small Business Development Fund will be required to resubmit new reporting pursuant to § 8.16(A) of this Part.
- F. Upon the timely filing of a Request to Exit in conformance with this § 8.16 of this Part, the Corporation shall have thirty (30) days from the receipt of the Request to Exit to respond. The Corporation may deny any incomplete Request to Exit and/or require the submission of additional information in connection with any

such request. In evaluating the Request to Exit, the fact that no credits have been recaptured and that the Small Business Development Fund has not received a notice of recapture that has not been cured pursuant to § 8.15(C) of this Part shall be sufficient evidence to prove that the Small Business Development Fund is eligible for exit. The Corporation or the Division of Taxation shall not be precluded from sending a notice of recapture up to and including thirty (30) days after the filing of an eligible Request to Exit, and upon the sending of such notice the Request to Exit shall automatically be denied.

- G. The Corporation shall not unreasonably deny a Request to Exit submitted under § 8.16 of this Part. If the Request to Exit is denied, the Corporation shall provide notice, which notice shall include the reasons for the determination and such notice of denial may be included in a notice of recapture.
- H. The Corporation shall not revoke a tax credit certificate after the Small Business Development Fund's exit from the Program but may obtain payment from the Bond or other approved surety after such exit.
- I. The Small Business Development Fund may seek a reduction of the Bond or other approved surety requirement at the time of filing the Request to Exit to an amount equal to the total repayment obligations that could be due under § 8.17 of this Part as calculated by the Corporation.

## **8.17 Repayment**

- A. If the number of Jobs Created or Jobs Retained by the Eligible Businesses that received Qualified Investments from the Small Business Development Fund, calculated pursuant to complete and accurate reports filed by the Small Business Development Fund and approved by the Corporation is:
  - 1. Less than sixty percent (60%) of the amount projected in the approved Small Business Development Fund's Business Plan filed as part of its application for Certification under the Act and these Rules, then the State shall receive thirty percent (30%) of any distribution or payment to an equity or debt holder in an approved Small Business Development Fund made after its exit from the Program in excess of eligible distributions; or
  - 2. Greater than sixty percent (60%) but less than one hundred percent (100%) of the amount projected in the approved Small Business Development Fund's Business Plan filed as part of its application for Certification under the Act and these Rules, then the State shall receive fifteen percent (15%) of any distribution or payment to an equity or debt holder in an approved Small Business Development Fund made after its exit from the Program in excess of Eligible Distributions.
- B. The Small Business Development Fund determined to be in breach under § 8.17(A) of this Part due to a failure to meet the Job Creation or Job Retention



requirements as set forth in an approved Business Plan, the Small Business Development Fund shall make payment within ten (10) days of the amounts demanded by the Corporation arising from such breach. If the Small Business Development Fund fails to make such payment the Corporation shall be entitled to payment from the Bond or other approved surety, plus all fees, costs and expenses associated with any efforts by the Corporation to obtain payment of such amounts including reasonable attorney's or consultant's fees.

- C. At the time a Small Business Development Fund files a Request to Exit, the Small Business Development Fund shall calculate the aggregate internal rate of return of its Qualified Investments. If the Small Business Development Fund's aggregate internal rate of return on its Qualified Investments at exit exceeds ten percent (10%), then, after Eligible Distributions, the State shall receive ten percent (10%) of any distribution or payment in excess of the aggregate ten percent (10%) internal rate of return to an equity or debt holder in an approved Small Business Development Fund.

### **8.18 Reporting.**

- A. The Small Business Development Fund shall report to the Corporation for each Equity Investment made the following within thirty (30) business days after such investment is made:
1. The date of the investment;
  2. The amount of the investment;
  3. The terms and/or nature of the investment;
  4. The purpose of the investment;
  5. The name, business address in this State and federal tax identification number for the Eligible Business;
  6. The number of employees at the Eligible Business together with a copy of the payroll records of the Eligible Business;
  7. A listing of each employee including name, title/position, residence address and the location at which such employee works;
  8. The amount of all other investments or loans made by any person or entity within a year preceding the investment made by the Small Business Development Fund;
  9. Any expected or anticipated investments, grants and/or funding sources to be received by the Eligible Business within two hundred seventy days of the investment by the Small Business Development Fund inclusive of the

amount, source of funding, the identity of the investor and contact information for the investor;

10. A detailed description of the mechanism adopted in conformance with § 8.6(A)(8)(m) and (n) of this Part and its implementation by the Applicant in conformance with its Business Plan; and
11. Other information as required by the Corporation.

B The Small Business Development Fund shall report to the Corporation for each Qualified Loan made the following within thirty (30) days after such investment is made:

1. The date of the investment;
2. The amount of the investment;
3. The terms and/or nature of the investment;
4. The purpose of the investment;
5. The name, business address in this State and federal tax identification number for the Eligible Business;
6. The number of employees at the Eligible Business together with a copy of the payroll records of the Eligible Business;
7. A listing of each employee including name, title/position, residence address and the location at which such employee works;
8. The amount of all other investments or loans made by any person or entity within a year preceding the investment made by the Small Business Development Fund;
9. Any expected or anticipated investments, grants and/or funding sources to be received by the Eligible Business within two hundred seventy days of the investment by the Small Business Development Fund inclusive of the amount, source of funding, the identity of the investor and contact information for the investor;
10. A detailed description of the mechanism adopted in conformance with § 8.6(A)(8)(n) of this Part and its implementation by the Applicant in conformance with its Business Plan verifying that such Qualified Loan will result in job creation or job retention that would not otherwise occur but for such investment by the Applicant; and
11. Other information as required by the Corporation.

- C. The Small Business Development Fund shall report to the Corporation during the term of each Equity Investment or Qualified Loan on a quarterly basis:
1. The number of Employees at the Eligible Business together with a copy of the payroll records of the Eligible Business for the first pay period of each month;
  2. A listing of each Employee including name, title/position, residence address and the location at which such Employee works as of the first pay period of each month; and
  3. Other information as required by the Corporation.

#### **8.19 Administration and Examination of Records**

- A. The Corporation may examine any books, paper, records or memoranda bearing upon the approval of an Applicant or the administration of the Program, and may require the attendance of any person executing any Application, report or other statement, or of any officer or employee of any taxpayer receiving funds from a Small Business Development Fund, or the attendance of any other person, and may examine such person under oath respecting any matter which the Corporation deems pertinent or material in determining eligibility claimed under the Act or in any way related to the administration of the Program including, but not limited to, the recapture provisions contained in the Act and these Rules.

#### **8.20 Forms.**

- A. The Corporation may from time to time promulgate forms required to be used by Applicants or others in relation to the Corporation's administration of the Program.