

STATE OF WYOMING

WYOMING SMALL BUSINESS INVESTMENT CREDIT PROGRAM

Rules and Regulations

CHAPTER 1 – WYOMING SMALL BUSINESS INVESTMENT CREDIT PROGRAM

Section 1. Purpose. The rules are adopted in order to implement W.S. 9-12-1301 through 9-12-1312, which provide for the requirements for certification as a small business investment company, providing requirements for participating investors, providing for determination of qualified investments, providing for requirements for continuance of certification, providing a credit against certain taxes for certain investments, providing reporting requirements and providing for certification of compliance.

Section 2. Authority. Authority for the promulgation of these rules is granted in W.S. 9-12-104(a)(iv).

Section 3. Definitions.

- (a) “The article” means W.S. 9-12-1301 through 9-12-1312;
- (b) “Fiscal year” means the twelve (12) month period that a company uses when reporting to the Internal Revenue Service;
- (c) “Follow-on capital” means any additional investments of capital made in a qualified business that has received a qualified investment;
- (d) “Headquartered” means an organization’s principal office is located in Wyoming and at least sixty percent (60%) of the organization’s employees are employed in Wyoming or 60% of the business payroll is paid to individuals living in Wyoming;
- (e) “Liquid assets” means an investment that can be converted to cash in less than 20 days;
- (f) “Person” means a natural person or entity, including a corporation, general or limited partnership, trust or limited liability company;
- (g) “Principal office” means the main administrative functions of the organization and the original books and records are maintained in the Wyoming office;

(h) “Qualified debt instrument” means a debt instrument issued by a Wyoming small business investment company which:

(i) Is issued at par value or a premium;

(ii) Has an original maturity date of at least four (4) years from the date of issuance and a repayment schedule which is not faster than a level principal amortization over four (4) years. A repayment schedule is not faster than a level principal amortization over four (4) years if the repayment schedule for the debt instrument issued by a Wyoming small business investment company has a scheduled outstanding principal balance greater than a hypothetical note with the same price and yield as the Wyoming small business investment company’s debt instrument that provided for principal to be amortized over equal, consecutive daily payments, where payments are first allocated to accrued interest and then to principal. However, a participating investor may receive payments at any time for future earned interest, provided the amount received does not exceed the present value of that future interest payment, discounted by a factor that is not less than the stated interest rate of the debt instrument;

(iii) Satisfies the rating criteria to qualify as “NAIC 1” as determined by the securities valuation office of the national association of insurance commissioners; and

(iii) Has no interest, distribution or payment features that are related to the profitability of the Wyoming small business investment company or the performance of the Wyoming small business investment company’s investment portfolio.

(j) “Qualified distribution” means any distribution or payment made by a Wyoming small business investment company in connection with:

(i) The costs and expenses of forming, syndicating and organizing the Wyoming small business investment company, including any fee paid for professional services, and the costs of financing and insuring the obligations of the Wyoming small business investment company provided that the distribution or payment is not made directly or indirectly to a participating investor or an affiliate of a participating investor, including:

(A) That at the time the Wyoming small business investment company closes its investment from its participating investors and after deducting the aggregate of the costs of organizing, forming, syndicating, insuring and defeasing the obligations, the Wyoming small business investment company must have cash or other liquid assets available for qualified investments, in an amount equal to at least fifty percent (50%) of the amount of designated capital initially received from its participating investors.

(ii) An annual management fee not to exceed three percent (3%) of designated capital on an annual basis to offset the costs and expenses of managing and operating a Wyoming small business investment company;

(iii) Reasonable and necessary fees in accordance with industry custom for ongoing professional services, including, but not limited to, legal and accounting services related to the operation of a Wyoming small business investment company;

(iv) An increase or projected increase in federal or state taxes, including penalties and related interest, of the equity owners of a Wyoming small business investment company resulting from the earnings or other tax liability of a Wyoming small business investment company to the extent that the increase is related to the ownership, management or operation of a Wyoming small business investment company; and

(v) Payments of principal and interest to holders of qualified debt instruments issued by a Wyoming small business investment company.

(k) “Qualified Investment” means the investment of money by a Wyoming small business investment company in a qualified business for the purchase of any debt, debt participation, equity or hybrid security of any nature and description, including a debt instrument or security which has the characteristics of debt but provides for conversion into equity or equity participation instruments such as options or warrants, but shall not include any purchase of a guaranteed portion of a federally guaranteed loan; provided that the investment must not have a final stated maturity or be subject to mandatory redemption or repurchase prior to two (2) years from the date of initial investment and, provided further, that not more than fifty percent (50%) is used to refinance existing non-Wyoming small business investment company debt. Notwithstanding the foregoing, a qualified investment shall not include an investment that results, or could result, in a Wyoming small business investment company owning fifty percent (50%) or more of the voting or non-voting stock of a qualified business as evidenced by a proforma capitalization table presented to the Wyoming small business investment company, unless;

(i) Such ownership is the result of:

(A) The Wyoming small business investment company’s exercise of its rights and remedies following a default in the obligations of the qualified business;

(B) The Wyoming small business investment company’s exercise of preemptive rights granted to it in connection with its initial investment in a qualified business, provided such rights are exercised in connection with an investment in such qualified business by a party other than the Wyoming small business investment company or an affiliate of the Wyoming small business investment company;

(C) The operation of any anti-dilution rights granted to a Wyoming small business investment company in connection with its initial investment in a qualified business; or

(D) Such investment is approved by the Council prior to its being made.

(l) “Remaining uninvested designated capital” means the difference between designated capital and the cumulative amount of all qualified investments in qualified businesses.

Section 4. Application and certification as a Wyoming small business investment company.

(a) The Council shall provide a form for applying for certification as a Wyoming small business investment company. The form shall include a complete list of required documentation from an applicant, as outlined in the article, along with the following additional required documentation:

(i) The applicant shall submit a nonrefundable application fee as set forth by rule in the fee schedule.

(ii) The applicant shall submit with the application copies of all organizational documents including articles of incorporation or organization, bylaws or operating agreements and a commitment that if certified, the Wyoming small business investment company will establish in Wyoming its headquarters within 60 days of certification.

(iii) The applicant shall submit biographical, personal, financial, investment and historical data for each manager, principal, and the entity itself that provides the following, as applicable:

(A) Prior venture capital firms with which the manager or principal was employed that specifically includes details on:

(I) the valuation of portfolio investments, including the manager or principal’s ability to structure and execute timely and effective exits from portfolio investments;

(II) historical investment performance of prior firms managed by the same managers or principals;

(III) the investment philosophy of the firm;

(IV) the history and strategy of the firm and its managers or principals for obtaining investors and making investments;

(V) disclosure of any fines, penalties, or other sanctions or actions by any state federal, or other regulatory entity, including the Securities and Exchange Commission against the firm or its managers or principals, relating to violations of any type; and

(VI) a five-year business plan, which shall include the applicant's investment strategy and investment criteria. If the Council determines that an applicant's investment strategy or investment criteria would not effectively further economic development in Wyoming the applicant's certification may be denied.

(b) Any other documents deemed necessary by the Council to determine the quality of the firm's management, reputation, code of ethics, investment strategy and practices and to ensure that the applicant is acquainted with requirements of this article.

(c) Any false, inaccurate or misleading information provided in the application may be grounds for rejection of the application and denial of further consideration, as well as decertification, if the information, discovered at a subsequent date, would have resulted in the denial of the certification. If an applicant discovers that any information provided to the Council is inaccurate or because business conditions have changed, they shall notify the Council within ten (10) business days and submit updated information within an additional ten (10) business days. The applicant shall also notify the Council as soon as possible or within ten (10) business days when the applicant is unable to continue as a viable going concern and when the applicant is subject to litigation that may affect its viability as a going concern.

(d) The date of receipt of an application is the postmark date of the date of the independent delivery. Incomplete applications shall be treated as not received. All submissions to the Council may be either by hand delivery or via overnight common carrier. The delivery address shall be noted on the application.

(e) After an application and supporting documents are received, the Council shall consult with the Wyoming state banking commissioner if an applicant is a commercial bank or bank holding company so that the principals' experience as an officer and business qualifications can be determined as described in the article.

(f) Council staff shall determine if an applicant is eligible and if the application is complete. If an application is determined to be incomplete, staff shall notify the applicant within 10 business days, where practical, of deficiencies and a deadline for submitting additional information.

(g) The Council reserves the right to contract with an independent party to review, investigate and certify that the applications received meet the requirements of

statute. The cost for such review shall be paid for by the applicant according to a fee schedule adopted by the Council sufficient to cover actual direct and indirect costs of the review.

(h) Once applications are complete, they shall be forwarded to the board of directors of the council for their review and evaluation.

(j) The board of directors of the Council shall review applications and approve the issuance of a certification as a Wyoming small business investment company or provide the grounds for the refusal.

(k) Any offering material used by a Wyoming small business investment company shall include the following statement: BY AUTHORIZING THE FORMATION OF A WYOMING SMALL BUSINESS INVESTMENT COMPANY, THE STATE OF WYOMING DOES NOT ENDORSE THE QUALITY OF MANAGEMENT OR THE POTENTIAL FOR EARNINGS OF THE COMPANY AND IS NOT LIABLE FOR DAMAGES OR LOSSES TO A PARTICIPATING INVESTOR IN THE COMPANY. USE OF THE WORD "QUALIFIED" IN AN OFFERING DOES NOT CONSTITUTE A RECOMMENDATION OR ENDORSEMENT OF THE INVESTMENT BY THE WYOMING BUSINESS COUNCIL. IF APPLICABLE PROVISIONS OF LAW ARE VIOLATED, THE STATE OF WYOMING MAY REQUIRE FORFEITURE OF UNUSED PREMIUM TAX CREDITS AND REPAYMENTS OF USED PREMIUM TAX CREDITS.

Section 5. Aggregate limitations on investment tax credits; Allocation.

(a) The aggregate amount of investment tax credits to be allocated to all participating investors of Wyoming small business investment companies under this article shall not exceed thirty million dollars (\$30,000,000.00).

(b) Tax credits shall be allocated to participating investors as specified in the article.

(c) As specified in the article, the Council may impose a civil penalty upon a participating investor which does not invest the full amount of designated capital required to fund the credits allocated to it by the Council in accordance with the credit allocation claim filed on its behalf. The Council shall provide notice to the participating investor that a civil penalty is being imposed. Any hearing requested shall be administered according to rules promulgated by the Wyoming Office of Administrative Hearings. The cost of the hearing shall be paid by the participating investor that requested the hearing. The Office of Administrative Hearings will determine if the penalty is adequate to cover the direct and indirect cost to the state as a result of the investor's failure to invest the full amount of designated capital. The Office of Administrative Hearings shall make a recommendation to the Council board of directors who will issue a final decision on the civil penalty.

(d) A participating investor may sell or transfer its premium tax credits one hundred eighty (180) days or more from the date on which the participating investor invested designated capital, provided that the participating investor who is transferring or selling the credits obtains prior written approval for the transfer or sale from the Council and the Insurance Commissioner. A participating investor shall submit the requested information on a form that the Council and the Insurance Commissioner provide. In no instance shall a participating investor transfer or sell premium tax credits that have already been applied to its or another participating investor's premium tax liability.

(e) Any transfer or sale of credits shall not affect the time schedule for claiming a credit. Applications for the transfer of credits shall be submitted to the Insurance Commissioner no later than January 15 of the year that the credits will be transferred in order for the purchaser or transferee to be able to apply the credits on the annual premium tax return that is filed on March 1 of that year. The Insurance Commissioner shall notify the seller or transferor and the purchaser or transferee in writing, no later than February 15 as to whether or not the sale or transfer of the credits has been approved and the amount of the credits that can be applied.

Section 6. Request for determination of qualified investment and requirements for continuance of certification.

(a) Before making a proposed qualified investment in a specific business, a Wyoming small business investment company shall request from the Council a written determination that the proposed investment is a qualified investment in a qualified business. The Council shall notify a Wyoming small business investment company within ten (10) business days from the receipt of a request of its determination and an explanation thereof. If the Council does not notify the Wyoming small business investment company of its determination within ten (10) business days, the proposed investment is deemed to be a qualified investment in a qualified business.

(b) The Council shall provide a form for Wyoming small business investment companies to request a determination whether a proposed investment is a qualified investment in a qualified business. The Wyoming small business investment company shall provide all information it has gathered on the business including its plan of operation and plans for future expansion.

(c) The date of receipt of an application is the postmark date of the date of the independent delivery. Incomplete applications shall be treated as not received. All submissions to the Council may be either by hand delivery or via overnight common carrier. The delivery address shall be noted on the application.

(d) A request shall not be considered until all requested information is provided. If the requested documentation is incomplete, Council staff shall notify the

Wyoming small business investment company of what is missing and provide a deadline to submit additional information so that a determination can be made.

(e) A Wyoming small business investment company shall pay a nonrefundable annual certification fee, set by rule, to the Council not later than April 1 of each year, except that an annual certification fee is not required if the payment date is within six (6) months of the date a Wyoming small business investment company is first certified by the Council.

(f) If a Wyoming small business investment company fails to pay its annual certification fee on or before April 30 of each year, the company must pay, in addition to the annual certification fee, a late fee of five thousand dollars (\$5,000.00) to continue its certification.

(g) If a Wyoming small business investment company fails to pay its annual certification fee and late fee as stated in paragraph (f) of this subsection within 60 days after April 1, the Wyoming small business investment company shall be subject to decertification.

(h) On the 6th anniversary of a Wyoming small business investment company's allocation date, the Council shall determine if at least seventy percent (70%) of its designated capital has been invested in qualified investments. If the seventy percent (70%) threshold has not been met, the Council shall notify the Wyoming small business investment company that they are not permitted to receive management fees. Any fees paid after the notice shall reduce the amount considered as a qualified investment in qualified businesses.

(j) On the 8th anniversary of a Wyoming small business investment company's allocation date, the Council shall determine if at least one hundred percent (100%) of its designated capital has been invested in qualified investments. If the one hundred percent (100%) threshold has not been met, the Council shall notify the Wyoming small business investment company that they are not permitted to receive management fees. Any fees paid after the notice shall reduce the amount considered as a qualified investment in qualified businesses.

(k) Any investment returns or profits received by the Wyoming small business investment company from a qualified investment in a qualified business may be invested in another qualified investment in a qualified business and counted towards any requirement in this section with respect to investments of designated capital.

(l) Any amounts received by a Wyoming small business investment company from a qualified business as commitment fees, closing fees, license fees, royalties or similar charges shall be considered as reductions in the Wyoming small business investment company's qualified investments in qualified businesses in the computation of the percentage requirements of this article.

(m) If a qualified business that receives a qualified investment from a Wyoming small business investment company moves its principal office outside Wyoming or fails to relocate its principal office to Wyoming before the 90th day after a Wyoming small business investment company makes an investment in it, the investment is not considered a qualified investment for the purposes of the percentage requirements in this article.

(n) Any transfer, sale, acquisition, purchase, assignment or merger of a Wyoming small business investment company ownership interest shall be pre-approved by the Council. In no event shall an owner or any affiliate, having an ownership interest of ten percent (10%) or greater, of a Wyoming small business investment company, acquire an ownership interest of ten percent (10%) or greater in another Wyoming small business investment company without the written approval of the Council. The Council may request any information deemed necessary to evaluate changes in Wyoming small business investment company ownership.

Section 7. Wyoming small business investment company reporting requirements.

(a) In addition to the reporting requirements specified in the article, each Wyoming small business investment company shall report to the Council the following:

(i) The North American Industry Classification System (NAICS) code for each qualified business that receives a qualified investment.

(ii) A complete copy of the most recent tax return filed with the Internal Revenue Service for each qualified business that receives a qualified investment as soon as practicable after receiving it from the qualified business.

Section 8. Decertification; certification of compliance.

(a) The Council shall conduct an annual review of each Wyoming small business investment company to determine if each Wyoming small business investment company is abiding by the requirements of statute and to ensure that no investment has been made in violation of this article. The fee for annual reviews shall be set by the board of directors of the Council and shall cover the actual direct and indirect costs of the review or certification.

(b) The Council shall notify a Wyoming small business investment company as soon as practicable if any material violation of statute has occurred that will cause decertification of the Wyoming small business investment company. The Council shall give up to 15 business days for a Wyoming small business investment company to cure any material violation that will lead to decertification.

(c) The Council shall provide written notice to the Insurance Commissioner and participating investor within ten (10) business days of any decertification proceedings and the amount of credits that will be disallowed due to the decertification.