

ALABAMA DEPARTMENT OF COMMERCE  
ADMINISTRATIVE CODE

CHAPTER 281-2-1  
CERTIFIED CAPITAL COMPANIES

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281-2-1-.01      Definitions.

As used in this chapter, the following terms shall have the following meanings:

- (1) "ACT" means Act No. 2002-429.
- (2) "ADO" means the Alabama Development Office.
- (3) "AFFILIATE". An affiliate of another person shall include any of the following:
  - (a) A person who directly or indirectly either:
    - (i) Beneficially owns fifteen percent (15%) or more of the outstanding voting securities or other voting ownership interests of the other person, whether through rights, options, convertible interests, or otherwise; or
    - (ii) Controls or holds power to vote fifteen percent (15%) or more of the outstanding voting securities or other voting ownership interests of the other person.
  - (b) A person owning fifteen percent (15%) or more of the outstanding voting securities or other voting ownership interests of which are directly or indirectly either:

(i) Beneficially owned by the other person, whether through rights, options, convertible interests, or otherwise; or

(ii) Controlled or held with power to vote by the other person.

(c) A partnership or limited liability company in which the other person is a general partner, managing member or manager, as the case may be.

(d) An officer, director, employee, or agent of the other person, or an immediate family member of the officer, director, employee, or agent.

(e) The term affiliate shall include, in addition to the persons listed above in this subsection, any person, directly or indirectly, controlling, controlled by or under common control with such person. As used in this definition, the term "CONTROLS", including the term "CONTROLLING", "CONTROLLED BY" and "UNDER COMMON CONTROL WITH" means the following:

(i) In connection with certified investors means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than commercial contract for goods or non-management services, or otherwise, unless the power is the result of an official position with a corporation or a corporate office held by the person. Control is presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing fifteen percent (15%) or more of the voting securities of any other person.

(ii) In connection with persons other than certified investors means the possession, directly or indirectly, of the power to direct the management or policies of a person, whether through the ownership of voting securities, by contract or otherwise. Each of a company's officers, directors or partners exercising executive responsibility (or persons having similar status or functions) is presumed to control the company. A person is presumed to control a corporation if the person: (1) directly or indirectly has the right to vote fifteen percent (15%) or more of a class of the corporation's voting securities, or (2) has the power to sell or direct the sale of fifteen percent (15%) or more of a class of the corporation's voting securities. A person is

presumed to control a partnership if the person has the right to receive upon dissolution, or has contributed, fifteen percent (15%) or more of the capital of the partnership. A person is presumed to control a limited liability company if the person: (1) directly or indirectly has the right to vote fifteen percent (15%) or more of a class of the interests of the limited liability company; (2) has the right to receive upon dissolution, or has contributed, fifteen percent (15%) or more of the capital of the limited liability company or (3) is an elected manager of the limited liability company.

(iii) In addition to the above definitions, if a person owns or controls less than the threshold of voting securities involved (15%), that person's relationship with the remaining members in control or management should be examined to determine if a control block exists, directly or indirectly.

(iv) In addition to the test based on status or voting control, an examination of the contractual, consulting, and other arrangements shall be undertaken to determine if control is being directly or indirectly exercised.

(4) "ALLOCATION DATE" means the date on which the certified investors of a CAPCO are allocated certified capital by the ADO under the Act.

(5) "APPLICANT" means a Person who applies to be a CAPCO.

(6) "BINDING LETTER OF INTENT" means an agreement of a certified investor to make an investment of certified capital in a CAPCO up to a certain specified amount that is subject to an allocation of tax credits pursuant to the Act and these rules. The amount of the specified investment may not be subject to reduction for reasons other than application of the provisions of the Act and these rules.

(7) "BUSINESS DAY" means any day on which the ADO is open for the transaction of normal business.

(8) "CAPCO" means a certified capital company as defined below.

(9) "CERTIFIED CAPITAL" means an investment of cash by a certified investor in a CAPCO that fully funds the purchase price of an equity interest in the CAPCO or a qualified debt instrument issued by the CAPCO. As used in this definition,

(a) The term "INVESTMENT IN CASH BY A CERTIFIED INVESTOR" means a disbursement of cash by a certified investor.

(b) The term "EQUITY INTEREST" means an interest in a person, other than an individual, that provides a return contingent on the economic performance of that person that is not a debt interest, including common stock, preferred stock, partnership interest or membership interest.

(10) "CERTIFIED CAPITAL COMPANY" means a partnership, corporation, trust or limited liability company, whether organized on a profit or not-for-profit basis, that has as its primary business activity the investment of cash in qualified technology businesses and that is certified as meeting the criteria of the Act.

(11) "CERTIFIED INVESTOR" means an insurance company or other person that has state premium tax liability, that contributes certified capital pursuant to an allocation of premium tax credits under the Act.

(12) "COMPLETE CONTACT INFORMATION" means the physical address, mailing address, telephone number, facsimile number and e-mail address of a person.

(13) "DIRECTOR" means the Director of the ADO.

(14) "ENTERPRISE WITH WHICH THE PERSON IS ASSOCIATED" means any enterprise of which the person or a member of his or her family is an officer, director, partner, managing member, or beneficial owner of more than 10% of the ownership interests of the enterprise.

(15) "FAMILY MEMBER OF THE PUBLIC EMPLOYEE" means the spouse or a dependent of the public employee.

(16) "FAMILY MEMBER OF THE PUBLIC OFFICIAL" means the spouse, a dependent, an adult child and his or her spouse, a parent, a spouse's parents, a sibling and his or her spouse, of the public official.

(17) "FULLY FUNDS" means an amount alone that is sufficient to satisfy the certified investor's obligations relating to the purchase of an equity interest in, or qualified debt instrument issued by, a CAPCO or a CAPCO's obligations relating to the purchase of an equity interest in, or debt instrument issued by, a qualified technology business, as the case may be.

(18) "GENERALLY ACCEPTED ACCOUNTING PRINCIPLES" means those conventions, rules and procedures that constitute accepted accounting practices in the United States, as determined by the Financial Accounting Standards Board and any successor organization thereto that is charged with the promulgation of such conventions, rules and procedures.

(19) "GENERALLY ACCEPTED AUDITING STANDARDS" means those conventions, rules and procedures that constitute accepted auditing practices in the United States, as determined by the American Institute of Certified Public Accountants and any successor organization thereto that is charged with the promulgation of such conventions, rules and procedures.

(20) "INDEPENDENT CERTIFIED PUBLIC ACCOUNTANT" means any of the certified public accountants listed on the Division of Purchasing Professional Provider List maintained by the State of Alabama Department of Finance.

(21) "KEY EMPLOYEES" means the two (2) principals or persons employed or engaged to manage the funds of the applicant as required by Section 3(c)(2) of the Act.

(22) "MANAGERS" means all of the persons that are, or will be, involved in the management of an applicant or a CAPCO, as the case may be.

(23) "ORGANIZATIONAL DOCUMENTS" means the documents pursuant to which an applicant was formed and its business will be conducted. For example, the organization documents for a limited liability company include the certificate of organization, the operating agreement and any agreements between the persons having an ownership in the limited liability company.

(24) "PERSON" means a natural person or entity, including a corporation, general or limited partnership, trust or limited liability company.

(25) "PREMIUM TAX CREDIT ALLOCATION CLAIM" means a claim for allocation of premium tax credits.

(26) "PRIME RATE" shall be the rate of interest published in the Wall Street Journal as the prime rate.

(27) "PUBLIC EMPLOYEE" means any person employed at the state, county, or municipal level of government or their instrumentalities in the State of Alabama, including governmental corporations and authorities, but excluding employees of hospitals or other health care corporations including contract employees of those hospitals or other health care corporations, who is paid in whole or in part from state, county or municipal funds. For purposes of this chapter, a public employee does not include a person employed on a part-time basis whose employment is limited to providing professional services other than lobbying, the compensation for which constitutes less than 50 percent of the part-time employee's income. For purposes of this Act, a person shall retain his or her status as a public employee for a period of two (2) years after her or she leaves public employment.

(28) "PUBLIC OFFICIAL" means any person elected to public office in the State of Alabama, whether or not that person has taken office, by the vote of the people at state, county, or municipal level of government or their instrumentalities, including governmental corporations, and any person appointed to a position at the state, county, or municipal level of government or their instrumentalities, including governmental corporations. For purposes of this Act, a public official includes the chairs and vice-chairs or the equivalent offices of each state political party as defined in Section 17-16-2. For purposes of this Act, a person shall retain his or her status as a public official for a period of two (2) years after he or she leaves public office.

(29) "QUALIFIED TECHNOLOGY BUSINESS" means a business that, at the time of a CAPCO's first investment in the business:

(a) Is headquartered in the State of Alabama and intends to remain in the State of Alabama after receipt of the investment by the CAPCO, or is headquartered in another state and intends to relocate its headquarters to the State of Alabama after receipt of the investment by the CAPCO. As used in this definition, the terms "HEADQUARTERED" and "HEADQUARTERS" mean:

(i) The office from which the material investment and administrative functions of the qualified technology business physically are conducted; and

(ii) The physical location in which the material books and records of the qualified technology business are maintained.

(b) Has its principal business operations located in the State of Alabama and intends to maintain business operations in the State of Alabama after receipt of the investment by the CAPCO, or has its principal business operations located in another state, and intends to relocate business operations to the State of Alabama within ninety (90) days after receipt of investment by the CAPCO. As used in this definition, the term "PRINCIPAL BUSINESS OPERATIONS" means:

(i) The physical location in which the material operations of the qualified technology business are conducted; and

(ii) That one of the following applies to the business:

(A) a minimum of forty percent (40%) of the annual expenditures of the qualified technology

business are spent or proposed to spent in the State of Alabama;

(B) a minimum of forty percent (40%) of the assets of the qualified technology business are located or held in the State of Alabama; or

(C) a minimum of forty percent (40%) of the revenues generated or proposed to be generated by the qualified technology business are generated or proposed to be generated by services performed from or products manufactured or assembled in the State of Alabama.

(c) Has agreed to use the qualified investment primarily to either support business operations in the State of Alabama, or in the case of a start-up company, establish and support business operations in the State of Alabama, except in each case, advertising, sales and promotional operations which may be conducted outside of the State of Alabama. As used in this definition, the term "SUPPORT BUSINESS OPERATIONS" means the expansion, modernization or retention of current operations. The term "SUPPORT BUSINESS OPERATIONS" will not generally include the relocation of business operations from one location in the State of Alabama to another, unless it can be documented to the satisfaction of the ADO that (i) there is a legitimate business reason for such relocation or (ii) but for the CAPCO's investment, the business would relocate to another state.

(d) Has not more than one hundred (100) employees and either employs at least eighty percent (80%) of its employees in the State of Alabama, or pays at least eighty percent (80) percent of its payroll to employees in the State of Alabama. As used in this definition, the term "EMPLOYEES IN THE STATE OF ALABAMA" means employees that are residents of the State of Alabama, as determined for purposes of Alabama income taxation, and the term "EMPLOYEES" means natural persons that are engaged by a qualified technology business for wages for a minimum of 2,080 hours per year.

(e) Is primarily engaged in any of the following:

(i) Manufacturing, processing, or assembling products.

(ii) Conducting research and development.

(iii) Providing services.

(f) Is not primarily engaged in any of the following:

- (i) Retail sales.
- (ii) Real estate development.
- (iii) The business of insurance, banking, lending, lobbying, or political consulting.
- (iv) The provision of professional services provided by accountants, attorneys, or physicians.

(g) As used in subsections (e) and (f) of this section, the term "PRIMARILY" means over fifty percent (50%) of the revenues of an enterprise for the preceding fiscal year, as determined in accordance with generally accepted accounting principles, or, in the case of a new enterprise, over fifty percent (50%) of the projected revenues of an enterprise.

(30) "QUALIFIED DEBT INSTRUMENT" means a debt instrument issued by a CAPCO to a Certified Investor, at par value or a premium, that:

(a) Has an original maturity date of at least five (5) years after the date of issuance.

(b) Has a repayment schedule that is not faster than a level principal amortization over five (5) years. A repayment schedule is NOT FASTER THAN A LEVEL PRINCIPAL AMORTIZATION OVER FIVE (5) YEARS if the repayment schedule for the debt instrument issued by the CAPCO has a scheduled outstanding principal balance greater than a hypothetical note with the same price and yield as the CAPCO's debt instrument which provides for principal to be amortized over equal, consecutive daily payments, where payments are first allocated to accrued interest and then to principal. For purposes of determining compliance with the preceding two sentences, insignificant deviations from the five (5) year level principal amortization standard shall be disregarded. An "insignificant deviation" is any acceleration of the five (5) year principal amortization standard that lasts less than ninety (90) days.

(c) Has no interest, distribution, or payment features that are related to the profitability of the CAPCO or the performance of the CAPCO's investment portfolio.

In the event a CAPCO redeems or repurchases a qualified debt instrument within five (5) years of issuance, any premium tax credits used by the investor applicable to the qualified debt instrument redeemed or repurchased shall be immediately repaid to the ADO. The foregoing sentence shall not apply (i) to any repurchase or

redemption made after a CAPCO has made cumulative qualified investments equal to at least 100% of its certified capital and (ii) to any principal or interest payments made with respect to a qualified debt instrument that are made in accordance with the requirements of subsections (b) and (c) of this definition.

(31) "QUALIFIED DISTRIBUTION" means any distribution or payment from certified capital by a CAPCO in connection with the following:

(a) (i) The reasonable costs and expenses of forming, organizing and syndicating the certified capital company, including the costs of financing and insuring the obligations of the certified capital company so long as, at the time the certified capital company initially receives its investment of certified capital from its certified investors, the certified capital company has cash or Permissible Investments equal to at least fifty percent (50%) of the amount of certified capitalsuch certified capital company initially received as investment from its certified investors and (ii) the reasonable costs and expenses of managing and operating the certified capital company, including but not limited to reasonable and necessary fees paid for professional services (such as legal and accounting services) related to the operation of the certified capital company and an annual management fee in an amount that does not exceed two and one-half percent (2½%) of the certified capital of the certified capital company; provided that no distribution or payment authorized by this paragraph (a) be made directly or indirectly to a certified investor, except for distributions or payments made in consideration for a guaranty, indemnity, bond, insurance policy or other payment undertaking described by Section 4(b) of the Act, and other costs of financing and insuring the obligations of the CAPCO.

(b) Any projected increase in federal or state taxes, including penalties and interest related to state and federal income taxes, of the equity owners of the CAPCO resulting from the earnings or other tax liability of the CAPCO to the extent that the increase is related to the ownership, management, or operation of the CAPCO.

(32) "QUALIFIED INVESTMENT" means the investment of cash by a CAPCO in a qualified technology business for the purchase of any debt, debt participation, equity or hybrid security of any nature or description, including a debt instrument or security that has the characteristics of debt but that provides for conversion into equity or equity participation instruments such as options or warrants. As used in this subsection, the term "INVESTMENT OF CASH BY A CAPCO" means a disbursement of

cash by a CAPCO in a qualified technology business that fully funds the purchase price of any of the interests listed above in the qualified technology business and that would be considered a venture capital investment as defined in Regulation 281-2-1-.02(2)(c). For purposes of determining the amount of a particular qualified investment, any fees, charges or other compensation (other than interest, dividends, profit distributions or other similar forms of payment) paid by a qualified technology business to a CAPCO shall reduce the amount of the CAPCO's qualified investment in the qualified technology business.

(33) "REASONABLE" means fair, proper, just or suitable under the circumstances.

(34) "STATE PREMIUM TAX LIABILITY" includes:

(a) Any liability incurred by any person under Chapter 4A of Title 27 of the Code of Ala. 1975, the Alabama Insurance Code.

(b) If the tax liability imposed under Chapter 4A of Title 27, the Alabama Insurance Code, on January 1, 2002, is eliminated or reduced, any tax liability imposed on an insurance company or other person that had premium tax liability under Chapter 4A of Title 27, the Alabama Insurance Code, on that date.

(c) Any tax liability incurred by any person under Section 31 of Chapter 10 of Title 27 of the Code of Ala. 1975, the Alabama Insurance Code.

(d) If the tax liability imposed under Section 31 of Chapter 10 of Title 27 of the Code of Ala. 1975, the Alabama Insurance Code, on January 1, 2002, is eliminated or reduced, any tax liability imposed on an insurance company or other person that had premium tax liability under Section 31 of Chapter 10 of Title 27 of the Code of Ala. 1975, the Alabama Insurance Code, on that date.

(35) "VOTING SECURITIES OR OTHER VOTING INTERESTS" means securities or other interests, the holders of which are presently entitled to vote for the election of directors or the appointment or election of managers, other than interim management as permitted in Regulation 281-2-1-.05(4).

**Author:** F. Neal Wade

**Statutory Authority:** Code of Ala. 1975, as amended; Act 2002-429.

**History: New Rule:** Filed July 25, 2003; effective August 29, 2003. **Amended:** Filed February 6, 2008; effective March 12, 2008.

281-2-1-.02      Certified Capital Company.

To qualify as a CAPCO all of the following must apply:

(1) The applicant must have, at the time of application for certification, an equity capitalization of at least \$500,000 in the form of cash or cash equivalents. The applicant must maintain this equity capitalization until it receives an allocation of certified capital pursuant to Section 17 of the Act. As used in this subsection, the term "EQUITY CAPITALIZATION" means the applicant's total cash and cashequivalents less the applicant's total liabilities, each as determined in accordance with generally accepted accounting principles.

(2) At least two principals or persons employed or engaged to manage the funds of the applicant must have at least four (4) years of experience making venture capital investments in small businesses on behalf of or as an institutional or accredited investor. As used in this subsection, the following terms shall have the following meanings:

(a) "PRINCIPALS" means persons who have a material direct or indirect ownership interest in the applicant such that those persons each have a material influence over the policies and decisions of the applicant, including its investment decisions.

(b) "PERSON EMPLOYED OR ENGAGED TO MANAGE THE FUNDS OF THE APPLICANT" means a person who, in exchange for reasonable compensation, has a material influence over the policies and decisions of the applicant, including its investment decisions.

(c) "VENTURE CAPITAL INVESTMENTS" means the investment of funds in enterprises that would qualify as qualified technology businesses under the Act, which investment involves some investment risk but offers the potential for above average future returns.

(3) The applicant must satisfy any additional reasonable information requirement imposed by the ADO under these regulations.

(4) The applicant must have incorporated or organized within the State of Alabama no later than fifteen (15) days before applying for certification.

(5) The applicant must have established an office within the State of Alabama before or within sixty (60) days of

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certification. As used in this subsection, the term "OFFICE WITHIN THE STATE OF ALABAMA" means a place of business physically located in the State of Alabama from which all material policies are, and will be, made and all material orders are, and will be, issued.

(6) A CAPCO may agree pursuant to Section 13 of the Act to indemnify, or purchase a guaranty, indemnity, bond, insurance policy or other payment undertaking for the benefit of, a certified investor for losses resulting from the recapture or forfeiture of premium tax credits under Section 12 of the Act.

(7) The key employees of the CAPCO must:

(a) Work in the "office within the State of Alabama" established by the applicant or CAPCO, as the case may be, for at least 1,400 hours per year; and

(b) Reside in the State of Alabama, as determined for purposes of Alabama income taxation.

**Author:** F. Neal Wade

**Statutory Authority:** Code of Ala. 1975, as amended; Act 2002-429.

**History: New Rule:** Filed July 25, 2003; effective August 29, 2003. **Amended:** Filed February 6, 2008; effective March 12, 2008.

**281-2-1-.03 Qualified Technology Business.**

(1) A qualified technology business shall not include:

(a) An enterprise that principally conducts irregular or non-continuous operations;

(b) An enterprise that intends to derive principally all of its income from passive investments that generate interest, dividends or capital gains;

(c) An affiliate of a CAPCO; provided, however, that a person that is not an affiliate of a CAPCO prior to the CAPCO initially investing in such person will not be deemed to be an affiliate of the CAPCO merely as a result of the investment by the CAPCO; provided, further, however, that a person that is an affiliate of a CAPCO prior to the CAPCO initially investing in such person solely by reason of a prior investment in such person (including any directorship associated therewith) by an entity that is itself an affiliate of the CAPCO will not be deemed to be an affiliate of the CAPCO so long as;

(i) at least one investor who is not an affiliate of the CAPCO participates in such round of funding in the qualified technology business on the same terms and conditions as the CAPCO; and

(ii) the investment made by the CAPCO and its affiliates in the round of funding does not exceed 50% of the total amount invested in the qualified technology business in such round of funding.

(d) A CAPCO;

(e) An enterprise that promotes a religion, political party or political candidate;

(f) An enterprise engaged in any illegal business; and

(g) An enterprise that is associated with a:

(i) public employee;

(ii) public official;

(iii) family member of the public employee, or

(iv) family member of the public official.

(2) Notwithstanding the foregoing, the ADO may, in its discretion, approve an investment in a business that would qualify as a qualified technology business, but for the application of section (1)(g) above, if and only if (i) the disqualifying relationship is one of a public employee and not a public official and (ii) the ADO determines that such a waiver would be in the economic interest of the state.

**Author:** F. Neal Wade

**Statutory Authority:** Code of Ala 1975, as amended; Act 2002-429.

**History: New Rule:** Filed July 25, 2003; effective August 29, 2003. **Amended:** Filed February 6, 2008; effective March 12, 2008.

#### **281-2-1-.04      Qualified Investment.**

(1) A CAPCO may, before making an investment in a business, request from the ADO a written opinion as to whether the business in which it proposes to invest is a qualified technology business or a qualified diversity business.

(2) The ADO shall, not later than the fifteenth (15 th ) business day after the date of the receipt of a request under subsection (1) of this section, determine whether the business meets the definition of a qualified technology business or a qualified diversity business, and notify the CAPCO of the determination and an explanation of its determination or notify the CAPCO that an additional fifteen (15) days will be needed to review and make the determination.

(3) If the ADO fails to notify the CAPCO with respect to the proposed investment within the period specified by subsection (2) of this section, the business in which the CAPCO proposes to invest is considered to be a qualified technology business or a qualified diversity business, as applicable.

(4) The following transactions shall not be considered an "INVESTMENT OF CASH BY A CAPCO" for purposes of determining whether an investment is a qualified investment:

(a) A debt instrument, including those owned through debt participations, that has a final stated maturity of less than two years from the date of issuance and/or a repayment schedule that is faster than level principal amortization over two years. The preceding sentence shall not prohibit (i) the qualified business from voluntarily prepaying a qualified investment at anytime or (ii) the certified capital company from exercising any of its rights as a creditor, including the acceleration of the debt owed upon a default by the qualified business under the terms of the debt instrument or upon the acquisition merger or sale of all or substantially all of the assets of the qualified business;

(b) Purchases of interests in a qualified technology business that have restrictions on the use of the proceeds by the qualified technology business selling the interest, other than those restrictions usual or customary to venture capital investing and lending, such that the proceeds will be repaid by the qualified technology business without having been at risk;

(c) Accruals of principal, interest, royalty or other income;

(d) Letters of credit;

(e) Loan guarantees; or

(f) Loan collection expenses or legal fees incurred by a CAPCO in protecting its collateral interest in an investment.

(5) The Director may disqualify an investment which has been approved pursuant to subsections (1), (2), or (3) of this Regulation 281-2-1-.04 if and only if the request for written approval contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading.

**Author:** F. Neal Wade

**Statutory Authority:** Code of Ala. 1975, as amended; Act 2002-429.

**History: New Rule:** Filed July 25, 2003; effective August 29,

2003. **Amended:** Filed February 6, 2008; effective March 12, 2008.

**281-2-1-.05      Certified Investor.**

(1) An insurance company or other persons who may have state premium tax liability or the affiliates of the insurance companies or other persons may not directly or indirectly do any of the following:

(a) Manage a CAPCO.

(b) Beneficially own, whether through rights, options, convertible interests, or otherwise, more than fifteen percent (15%) of the outstanding voting securities of a CAPCO.

(c) Control the direction of investments by a CAPCO.

(2) Not more than one (1) certified investor in any CAPCO or affiliates thereof, may provide a guaranty, indemnity, bond, insurance policy, or other payment undertaking in favor of all of the certified investors of the CAPCO and its affiliates with respect to any program.

(3) Subsection (1) of this section applies without regard to whether the insurance company or other person or the affiliate of the insurance company or other person is licensed by or transacts business in the State of Alabama.

(4) The Act does not preclude a certified investor, an insurance company, or any other person from exercising its legal rights and remedies, including interim management of a CAPCO, if authorized by law, with respect to a CAPCO that is in default of its statutory or contractual obligations to the certified investor, insurance company, or other person, or establishing controls to ensure that the CAPCO satisfies the requirements of the Act.

(5) Nothing in this section shall limit an insurance company's ownership of nonvoting equity interests in a CAPCO.

(6) Each CAPCO shall report to the ADO as soon as practicable after the receipt of certified capital the following:

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

(b) The amount of each certified investor's investment of certified capital and premium tax credits.

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

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(7) A certified investor may not make an investment with a CAPCO with respect to program one before January 25, 2004, and with respect to program two before April 4, 2008.

**Author:** F. Neal Wade

**Statutory Authority:** Code of Ala. 1975, as amended; Act 2002-429.

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**281-2-1-.06 Application.**

An applicant that has not previously been certified by the ADO as a Certified Capital Company must file an application to become certified as a CAPCO in the form prescribed by the ADO, as that form may be amended from time to time by the ADO. The ADO may certify for participation in program two any previously certified CAPCO that has remained in compliance with the requirements of the Act upon the submission of an application for recertification and participation in program two in the form prescribed by the ADO, as that form may be amended from time to time by the ADO. An application for recertification and participation in program two shall be considered a separate certification from a prior certification under this section and investments in and by such CAPCO shall be considered separately.

(1) Applications may be submitted by hand or by certified mail to the ADO, Alabama Center for Commerce, 401 Adams Avenue, Suite 670 Montgomery, Alabama 36104, Attention F. Neal Wade, Director. Applications with respect to program one may be submitted no earlier than 9:00 am (Montgomery, Alabama time) on October 1, 2003. Applications for certification as a CAPCO with respect to program two and for recertification and participation in program two may be submitted no earlier than 9:00 a.m. (Montgomery, Alabama time) on December 10, 2007.

(2) Each applicant must submit three (3) original applications for certification as a CAPCO or for recertification and participation in program two, as applicable.

(3) An application shall be considered received by the ADO when the ADO receives three (3) original applications, each of which is complete in all material respects, along with the nonrefundable application fee set forth below. The ADO shall stamp applications received by the ADO with the date and time of receipt by the ADO. The following applications shall be considered as not having been filed with the ADO and will be returned by the ADO to the applicant by mail in which case the ADO shall have no further obligation to provide additional notices to the applicant:

(a) Applications submitted prior to the stated time; and

(b) Applications determined by the ADO to be materially incomplete.

(4) A completed application to become certified as a CAPCO shall include the following:

(a) A nonrefundable application fee in the amount of \$7,500 in the form of a cashier's check, certified check or company check made payable to "Alabama Development Office" which the ADO shall use to offset the administrative costs related to the CAPCO program;

(b) A nonrefundable program administration fee in the amount of \$17,500 in the form of a cashier's check, certified check or company check made payable to "Alabama Development Office" which the ADO shall use to offset the administrative costs related to the CAPCO program;

(c) A completed disclosure statement identifying all persons who may financially benefit from the applicant's designation as a CAPCO. Such statement must be submitted in the form prescribed by the ADO, as that statement may be amended from time to time by the ADO;

(d) A notarized and sworn affidavit from all of the managers of the applicant stating that each of the managers (or providing details and an explanation as to why such manager cannot state that he or she):

1. Has read the Act and these regulations;
2. Fully understands the requirements of the Act and these regulations;
3. Is not, and will not become during tenure as manager of the applicant or the CAPCO, as the case may be, affiliated with an employee of the ADO;
4. Is not, and will not become during tenure as manager of the applicant or the CAPCO, as the case may be, affiliated with a certified investor of the applicant or CAPCO, as the case may be;
5. Has not been convicted of and is not currently under indictment or prosecution for securities fraud or other criminal acts, other than minor traffic offenses. As used in this subsection, "MINOR TRAFFIC OFFENSES" means all traffic offenses other than serious traffic offenses as set forth in Chapter 5A of Title 32 of the Code of Ala. 1975, as amended;
6. Has not filed for bankruptcy within the past seven (7) years; and

7. Has not been ordered to pay and is not currently involved in legal action with the State of Alabama or any agency or department thereof for the payment of funds owed to the State of Alabama or other parties that the State of Alabama represents.

(e) A notarized and sworn affidavit from all of the managers of the applicant stating that:

1. The primary business activity of the applicant is, and will remain, the investment of cash in qualified technology businesses;

2. The key employees have at least four (4) years of experience making venture capital investments in small businesses on behalf of or as an institutional or accredited investor; and

3. The key employees will work in the office established by the applicant as its headquarters for at least 1,400 hours per year and will reside in the State of Alabama, as determined for purposes of Alabama income taxation.

(f) A detailed description of the following signed by the key employees and the managers of the applicant:

1. The key employees' connection and commitment to the State of Alabama; and

2. The key employees' experience with the Alabama economic landscape, especially with regard to making venture capital investments in qualified technology businesses.

(g) Appropriate documentation regarding the due authorization of the application.

(h) A certification from the chief executive officer or its equivalent of the applicant that the managers named in the application are a complete and accurate listing of all managers of the applicant and any affiliates of the applicant involved in the management of the applicant and that persons affiliated with a certified investor of the applicant are not, and will not, control the direction of investments of the applicant.

(i) The complete organizational documents of the applicant reflecting appropriate filing with appropriate state agencies, if any is required. In addition, if the applicant is to be managed by a management or similar company, the complete organizational documents of the management company.

(j) The names and complete contact information of the key employees of the applicant.

(k) Any assumed or "doing business as" names that the applicant conducts business under and any required assumed or "doing business as" filings with an agency of the State of Alabama, if applicable. If the applicant is to be managed by a management or similar company, any assumed or "doing business as" names that the management company conducts business under and any required assumed or "doing business as" filing with an agency of the State of Alabama, if applicable.

(l) If the applicant is to be managed by a management or similar company, a copy of the fully-executed contract pursuant to which the management company will manage the applicant and a copy of any other agreements between the management company and the applicant. The management contract must fully describe the nature of the relationship between the management company and the applicant and any actions that the management company may take on behalf of the applicant.

(m) The names and full contact information of all members of the applicant's governing body of the applicant, including a description of the level of control over the applicant.

(n) The names and full contact information of contacts at the applicant's existing office locations.

(o) Financial statements audited in accordance with generally accepted auditing standards, including an income statement, balance sheet and statement of cash flows. The financial statements must be accompanied by an original, executed and unqualified opinion of an independent certified public accountant stating that the applicant has an equity capitalization of at least \$500,000. The opinion of the independent certified public accountant shall:

1. Be dated no earlier than thirty-five (35) days before the application is submitted to the ADO; and
2. Be printed on the letterhead of the independent certified public accountant, containing complete contact information for the independent certified public accountant.

(p) The following information relating to the key employees:

1. A detailed description and supporting documentation of how each of the key employees qualifies as having at least four (4) years of experience making venture capital investments in small businesses on behalf of or as an institutional or accredited investor. Such description and supporting documents shall include, but not be limited to the following, and shall be certified as accurate by each key employee:

(i) A detailed resume with a listing of references including full contact information for each reference;

(ii) A description of the success of the key employee in performing his/her function;

(iii) The attainment of investment return goals; The number of enterprises funded;

(iv) The annual dollar amount of money for which he/she had primary responsibility; and

(v) Any other information reasonably requested by the ADO.

2. A listing of all applicable licenses and degrees that each key employee holds (or has held within the last ten (10) years). Such listing shall indicate the following and shall be certified as accurate by each key employee:

(i) Whether the license is active and in good standing;

(ii) The date on which it will expire or did expire;

(iii) Whether any license has been revoked and the date of revocation and an explanation surrounding such revocation;

(iv) Whether any disciplinary action has ever been imposed upon the applicant and/or the key employees with regards to such license;

(v) The date of such disciplinary action and a description surrounding such disciplinary action; and

(vi) Whether any investigation has ever been carried out on the applicant and/or the key employees with regards to such license and the

date of investigation and a description  
surrounding such investigation.

3. The applicant's overall investment strategy and the applicant's three (3) year business plan, including an organizational chart, that has been prepared by the key employees, as applicable, and which demonstrates the key employee's ability to make investments of cash in qualified technology businesses; and

4. An instrument authorizing the ADO to conduct a background and credit investigation of the applicant and the key employees.

(q) A statement signed by the chief executive officer or its equivalent of the applicant stating that:

1. Neither the applicant nor any of its investors have violated or will violate the provisions of the Act or these regulations;

2. The information submitted in connection with the application is complete, accurate and true; and

3. The information submitted as part of the application will endure and continue to be legally binding if an applicant is certified as a CAPCO by the ADO. This statement shall state that the applicant understands that the ADO shall continue to rely on original applications.

(r) A listing of all persons that have an ownership interest in the applicant, including voting and non-voting ownership interests. This listing must include the percentage ownership interest of each and a description of the ownership interest. Provided, however, that where the applicant is an entity that is registered with the U.S. Securities and Exchange Commission under Section 12(g) or Section 15(d) of the Securities Exchange Act of 1934, the applicant must include only those persons having beneficial ownership of equity securities of the applicant of more than five percent (5%).

(s) In the event that the listing provided in response to (q) above contains the name of a corporation, general or limited partnership, trust, limited liability company or other entity that is not a natural person, a listing of all persons that have an ownership interest in such entity, including voting and non-voting ownership interests.

(t) A sample of offering materials used or to be used in investor solicitations.

(u) A covenant and agreement of the managers and the applicant to the State of Alabama and its people that:

1. The applicant will not use the CAPCO program as a pretext for any transaction that will subvert the purpose of the Act;
2. The applicant will act in the best interests of the State of Alabama and its people, recognizing that the reason for the Act is the welfare and prosperity of the State of Alabama and its people;
3. The managers and the applicant will comply with any and all requirements of the Act and these regulations; and
4. The applicant will submit to the State of Alabama a ten percent (10%) share of any distributions (other than qualified distributions, the principal and interest portions of any payments made with respect to a qualified debt instrument, and the return of the initial \$500,000 equity contribution and any other equity contributions) from the applicant to its equity holders.

Covenant (iv) shall be effective separately and independently from the Act and these regulations, and shall continue to be binding after the applicant has made qualified investments in an amount cumulatively equal to one hundred percent (100%) of the certified capital.

(5) A completed application for recertification and participation in program two shall include the following:

(a) A nonrefundable application fee in the amount of \$7,500 in the form of a cashier's check, certified check or company check made payable to "Alabama Development Office" which the ADO shall use to offset the administrative costs related to the CAPCO program;

(b) A nonrefundable program administration fee in the amount of \$17,500 in the form of a cashier's check, certified check or company check made payable to "Alabama Development Office" which the ADO shall use to offset the administrative costs related to the CAPCO program;

(c) Appropriate documentation regarding the due authorization of the application for recertification and participation in program two.

(d) An original executed report of an independent certified public accountant stating that the applicant has at least \$500,000 in net worth and at least \$500,000 in liquid assets. The report of the independent certified public accountant shall:

1. Be dated no earlier than thirty-five (35) days before the application for recertification and participation in program two is submitted to the ADO; and
2. Be printed on the letterhead of the independent certified public accountant, containing complete contact information for the independent certified public accountant.

(e) A statement signed by the chief executive officer or its equivalent of the applicant stating that:

1. Neither the applicant nor any of its managers, key employees, governing body, or investors have violated or will violate the provisions of the Act or these regulations;
2. The information submitted in connection with the application for recertification and participation in program two is complete, accurate and true; and
3. The information submitted as part of the application for recertification and participation in program two will endure and continue to be legally binding with respect to certification under any program. This statement shall state that the applicant understands that the ADO shall continue to rely on original applications.

(f) A sample of offering materials used or to be used in investor solicitations in program two.

(g) A sworn statement in an affidavit from its chief executive officer that all of the information contained within the original application is true and correct as of the date of the application for recertification and participation in program two except as specifically set forth in an attachment to such affidavit. Any information being updated and appended to the affidavit shall reference the section of the original application for certification as a CAPCO being updated.

(6) The ADO shall not recognize applications or will not certify an applicant as a CAPCO with respect to either program one or program two if there has been an exchange of money or other consideration for purposes of attempting to gain from

the ADO a favorable review of an application for certification. If an applicant or affiliate of an applicant has purchased the assets or otherwise taken control of another CAPCO for the purpose of gaining certification, such CAPCO shall be immediately be decertified. Further, the ADO shall not certify an applicant as a CAPCO if the applicant is directly or indirectly owned or operated by or is otherwise associated with:

- (a) public employee;
- (b) public official;
- (c) family member of the public employee, or
- (d) family member of the public official.

Notwithstanding the foregoing, the ADO may, in its discretion, certify an applicant as a CAPCO that would otherwise meet the requirements for certification but for the application of the immediately preceding sentence, if and only if (i) the disqualifying relationship is one of a public employee and not a public official and (ii) such relationship cannot reasonably be deemed to be potentially harmful to the economic interest of the state.

(7) Any false, inaccurate, or misleading information provided in an application submitted to the ADO may be grounds for rejection of the application and denial of further consideration, as well as decertification of the CAPCO and each of its investment pools, if such information discovered at a subsequent date would have resulted in the denial of such certification.

(8) Whenever any material information that an applicant supplied in its application has become inaccurate or obsolete, the applicant shall file an amended application, including originally executed signature pages. Such amended applications must be submitted within five (5) business days of the information becoming inaccurate or obsolete during the application process. Such amended applications shall be filed in the same manner as the application; provided, however, that, based on the extent of the revisions that need to be made by the applicant and then reviewed by the ADO, the ADO shall determine if a new application fee or portion thereof will be charged. The review period for the application shall begin upon the filing of the amended application.

(9) The applicant shall, as soon as possible or within five (5) business days, notify the ADO in writing:

- (a) When the applicant is unable to continue as a viable going concern;

(b) When the applicant is subject to litigation which may affect its viability as a going concern; and/or

(c) If a merger or acquisition of the applicant or by the applicant has occurred. In the case of a merger or acquisition, the ADO shall request additional information as needed to determine if the requirements of the Act and these regulations continue to be met.

(10) The ADO reserves the right to determine what information is material regarding the completion, execution and filing of an application, an amended application or a notification required under this section. The ADO may request any such additional information from the applicant as the ADO deems necessary to appropriately review an application, amended application or notification.

(11) In the event that an incomplete application is submitted that is not considered materially complete by the ADO or additional information is requested by the ADO, the ADO shall notify the applicant within fifteen (15) days of receipt of the application. If an incomplete application is completed or incomplete information is supplied within five (5) business days of the applicant's receipt of such notice from the ADO, the application will be considered filed with the ADO on the date it was first received by the ADO. If an incomplete application is not completed or the additional information is not supplied within five (5) business days of the applicant's receipt of the notice thereof, then the ADO may, in its discretion, deem the application to not have been filed with the ADO and return the application to the applicant by mail in which case the ADO shall have no further obligation to provide additional notices to the applicant.

(12) Any manager of a CAPCO that has not submitted the affidavits, certifications and statements provided in this section as part of the application process shall submit such affidavits, certifications and statements prior to participating in the management of the CAPCO.

**Author:** F. Neal Wade

**Statutory Authority:** Code of Ala. 1975, as amended; Act 2002-429.

**History: New Rule:** Filed July 25, 2003, effective August 29, 2003. **Amended:** Filed February 6, 2008; effective March 12, 2008.

#### 281-2-1-.07      Application Review.

The Director shall review the application for certification as a CAPCO, including the organizational documents and business history, and the application for recertification and participation in program two of each applicant and shall ensure that the

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applicant satisfies the requirements of the Act and these regulations.

(1) Not later than the thirtieth (30th) day after the date an application is filed, the Director shall either issue the certification or refuse to issue the certification and communicate in detail to the applicant the grounds for the refusal, including suggestions for the removal of these grounds. If an applicant submits an amended application within fifteen (15) days of receipt of refusal from the ADO, the ADO shall have fifteen (15) days from the receipt of such amended application by which to communicate its approval or refusal of such amended application to the applicant. The ADO shall review and approve or reject applications in the order submitted, and in the event more than one (1) application is received by the ADO on any date, all such applications shall be reviewed and approved or refused simultaneously, except in the case of incomplete applications or applications for which additional information is requested by the ADO and is not supplied by the applicant within the allowable time limits established by the ADO.

(2) Any certification issued by the ADO shall be, and shall so state, that the certification is contingent upon the accuracy and continuing accuracy of all information submitted as part of the application. The certification issued by the ADO shall be effective from the date of issuance and shall continue until such time as the CAPCO has been decertified pursuant to the Act or these regulations, whether such decertification is a result of the CAPCO's annual review or otherwise.

(3) An applicant whose application is refused may file an amended application in accordance with the provisions of the Act or these regulations

(4) The ADO may, in its discretion, issue certification to an applicant that is contingent upon the fulfillment of certain requirements, including, but not limited to, the provision of additional information and the hiring of a key employee to meet the requirements set forth herein. If these requirements are not fulfilled as specified by the ADO, the ADO may decertify the CAPCO.

**Author:** F. Neal Wade

**Statutory Authority:** Code of Ala. 1975, as amended; Act 2002-429.

**History: New Rule:** Filed July 25, 2003; effective August 29, 2003. **Amended:** Filed February 6, 2008; effective March 12, 2008.

**281-2-1-.08      Allocation And Transfer Of Tax Credits.**

(1) A premium tax credit allocation claim must be prepared and executed by a certified investor in the form prescribed by the

ADO, as such form may be amended from time to time by the ADO. With respect to program one, a CAPCO must file the claim with the ADO not later than January 10, 2004 and all premium tax credit allocation claims received by the ADO prior to January 10, 2004, will be deemed to have been received on January 10, 2004. With respect to program two, a CAPCO must file the claim with the ADO no later than March 20, 2008 and all premium tax credit allocation claims received by the ADO prior to March 20, 2008 will be deemed to have been received on March 20, 2008. Each premium tax credit allocation claim form must include an affidavit of the certified investor under which the certified investor becomes legally bound and irrevocably committed to make an investment of certified capital in a CAPCO in the amount allocated even if the amount allocated is less than the amount of the claim, subject only to the receipt of an allocation under Section 19 of the Act.

(2) A certified investor may not claim a premium tax credit under Section 16 of the Act for an investment that has not been funded, even if the certified investor has committed to fund the investment.

(3) Together with the premium tax credit allocation claims of its certified investors for a particular program, each CAPCO must submit a nonrefundable claim fee in the amount of \$15,000 in the form of a cashier's check, certified check or company check payable to "Alabama Development Office" which the ADO shall use to offset the administrative costs related to the CAPCO program. The information to be submitted as part a premium tax credit allocation claim is as follows:

(a) The name, address and NAIC number of each investor;

(b) The amount of the investment of certified capital or the amount of a binding letter of intent for the investment of certified capital;

(c) The amount of premium tax credits requested; and

(d) The date the certified capital was received or the date a binding letter of intent was made.

(4) Within ten (10) business days of being notified of the allocation of premium tax credits, a CAPCO must provide the ADO with a written statement certifying that the investment was made within the provisions of the Act and these regulations.

(5) The Director reserves the right to decertify an investment pool of a CAPCO with respect to program one or program two if the allocation of premium tax credits results in such investment pool having certified capital of less than \$5,000,000.

(6) Tax credits may be transferred without limitation at any time, other than as set forth in these regulations and in the Act.

Within thirty (30) days after the transfer or sale of tax credits, the original holder of the tax credits ("TRANSFEROR") shall notify the ADO in writing of the name of new holder of the tax credits ("TRANSFeree") the amount of tax credits transferred, the price of such credits, the date the transfer occurred, the tax identification number of transferee, and the remaining balance of credits held by the transferor. In the event such notice is not received by the ADO within the thirty (30) day period, the transfer shall be void.

(7) Tax credits may be sold or transferred only to an insurance company or other person that has state premium tax liability;

(8) If the transferor has an A.M. Best rating less than "A", the ADO may require such transferor to post or provide acceptable security to the ADO for full amount of the tax credits subject to recapture received prior to any transfer. In the event the ADO requires security to be posted or provided such security may be in the form of bonds, bank letter of credit or low risk marketable securities acceptable to the ADO. Such securities will be held by the ADO until the CAPCO has invested one hundred percent (100%) of any investment pool containing the certified capital for which such credits were earned in qualified technology businesses and the annual review of, the CAPCO is completed. If the CAPCO or its related investment pool is decertified, the ADO may immediately draw on that security for the amount, which is required to be repaid as a result of the decertification. There is no requirement for the transferee to provide security for the amount of tax credits received;

(9) Investments made by an insurance company in an applicant with respect to program one or program two, as applicable, prior to the time such certification or recertification is granted with respect to such program, are not eligible for tax credits;

(10) In the event certified capital is invested by an investor in a CAPCO, and such certified capital is not eligible for tax credits due to the limitations of the Act or the limitations imposed by these regulations, the investor may withdraw such certified capital at any time without restriction;

(11) In the event the ADO receives notification of receipt of certified capital from a CAPCO and limitation with respect to which tax credits apply, the ADO shall notify the CAPCO of the total amount of credits which are available within fifteen (15) days. If the CAPCO does not receive investments in certified capital equaling the aggregate amount of tax credits allocated within such period, that portion of the tax credits will be forfeited and department will reallocate the unfunded portion of the tax credits in accordance with Regulation 281-2-1-.08(23).

(12) Once the ADO has made an allocation of tax credits under either program one or program two, which equals in aggregate the

maximum amount of credits that may be allowed and allocated to investors in any calendar year with respect to such program, the ADO will not accept and will not consider additional requests for allocation of tax credits for that year.

(13) A certified investor who makes an investment of certified capital shall in the year of investment earn a vested credit against state premium tax liability equal to one hundred percent (100%) of the certified investor's investment of certified capital, subject to the limits imposed by the Act and these regulations. With respect to certified capital invested pursuant to program one, a certified investor may take up to twelve and one-half percent (12.5%) of the vested premium tax credit in any taxable year of the certified investor beginning on or after January 1, 2006. None of the vested premium tax credit received in program one may be used to offset any state premium tax liability incurred prior to January 1, 2006. With respect to certified capital invested pursuant to program two, a certified investor may take up to five percent (5%) of the vested premium tax credit in any taxable year of the certified investor beginning on or after January 1, 2010; provided that (i) for any taxable year beginning on or after January 1, 2014, a certified investor may take up to seventeen and one-half percent (17.5%) of the vested premium tax credit until the tax credits taken by such investor equal one hundred percent (100%) of the certified investor's program two certified capital, and (ii) each certified investor will agree, as a condition to receiving an allocation of certified capital, to refrain from utilizing any credits for taxable year 2010 and to treat those credits as carried forward credits that may be utilized in any taxable year subsequent to 2010. None of the vested premium tax credits received in program two may be used to offset any state premium tax liability incurred prior to January 1, 2010.

(14) The credit to be applied against state premium tax liability in any one (1) year may not exceed the state premium tax liability of the certified investor for the taxable year. Any unused credit against state premium tax liability may be carried forward indefinitely until the premium tax credits are used.

(15) With respect to credits earned pursuant to program one, on each estimated tax payment date falling in a tax year beginning on or after January 1, 2006 a certified investor or permitted transferee of premium tax credits under the Act may credit or deduct a pro rata portion of its premium tax credits for the corresponding tax year against the estimated payments of premium tax liability for such tax year which are required to be made on such date in an amount equal to the pro rata payment of the tax year's premium tax liability required to be made on such payment date. A certified investor or permitted transferee may make a similar adjustment with respect to credits earned pursuant to program two beginning with estimated payment dates falling in a tax year beginning on or after January 1, 2011.

(16) A certified investor claiming a credit against state premium tax liability earned through an investment in a CAPCO is not required to pay any additional retaliatory tax levied by law as a result of claiming that credit. An investment made under the Act is an "Alabama investment" for purposes of the Act.

(17) The total amount of certified capital for which premium tax credits may be allowed under the Act for all years in which premium tax credits are allowed is \$100,000,000 with respect to certified capital allocated under program one and \$100,000,000 with respect to certified capital allocated under program two. Notwithstanding any provision of the Act to the contrary, the granting of any credits against the insurance premium tax shall not affect the insurance premium tax receipts of the Education Trust Fund which is provided for in Act 93-679, 1993 Regular Session.

(18) A CAPCO and its affiliates may not file premium tax credit allocation claims with respect to a particular program in excess of the maximum amount of certified capital for which premium tax credits may be allowed under such program as provided in the Act.

(19) The maximum amount of premium tax credit allocation claims that may be filed under a particular program on behalf of any one (1) insurance company, on an aggregate basis with its affiliates, in one (1) or more certified capital companies, shall not exceed \$15,000,000.

(20) If the total premium tax credits claimed by all certified investors with respect to a particular program exceeds the total limits on premium tax credits for such program established by the Act, the ADO shall allocate the total amount of premium tax credits allowed under the Act to certified investors in certified capital companies on a pro rata basis as set forth below.

(21) The pro rata allocation for each certified investor in connection with a particular program shall be the product of:

(a) A fraction, the numerator of which is the amount of the premium tax credit allocation claim filed on behalf of the investor with respect to a program and the denominator of which is the total amount of all premium tax credit allocation claims filed on behalf of all certified investors with respect to that program.

(b) The total amount of certified capital for which premium tax credits may be allowed for the applicable program under the Act.

(22) On January 25, 2004, the ADO shall notify each CAPCO of the amount of tax credits allocated to each certified investor under program one. On April 4, 2008, the ADO shall notify each CAPCO of the amount of tax credits allocated to each certified investor

under program two. Each CAPCO shall notify each certified investor of their premium tax credit allocation under program one or program two, as applicable.

(23) If a CAPCO does not receive an investment of certified capital with respect to either program one or program two, as applicable, equaling the amount of premium tax credits allocated to a certified investor in a program for which it filed a premium tax credit allocation claim before the end of the tenth (10th) business day after the date of receipt of notice of allocation, the CAPCO shall notify the ADO by overnight common carrier delivery service and that portion of capital allocated to the certified investor in that program shall be forfeited. The ADO shall reallocate the forfeited capital among the certified investors in the other certified capital companies that originally received an allocation in that program so that the result after reallocation is the same as if the initial allocation in the program under the Act had been performed without considering the premium tax credit allocation claims that were subsequently forfeited.

(24) In any case under the Act or another law of the State of Alabama in which the assets of a certified investor are examined or considered, the certified capital may be treated as an admitted asset, subject to the applicable statutory valuation procedures.

(25) A certified investor is not required to reduce the amount of premium tax included by the investor in connection with rate making for any insurance contract written in the State of Alabama because of a reduction in the investor's Alabama premium tax derived from the credit granted under the Act.

(26) Within thirty (30) days after the final allocation of all premium tax credits with respect to program one or program two, the ADO will notify the Alabama Department of Insurance of the allocation of premium tax credit to each certified investor with respect to such program. Each CAPCO receiving an allocation shall cooperate with the ADO in making such notification.

**Author:** F. Neal Wade

**Statutory Authority:** Code of Ala. 1975, as amended; Act 2002-429.

**History: New Rule:** Filed July 25, 2003; effective August 29,

2003. **Amended:** Filed February 6, 2008; effective March 12, 2008.

#### **281-2-1-.09      Continuance Of Certification.**

(1) To continue to be certified with respect to program one and program two, a CAPCO shall make qualified investments according to the following schedule:

(a) For programs one and two, before the third (3rd) anniversary of an investment pool allocation date, a CAPCO

must have made qualified investments of certified capital of such investment pool in qualified technology businesses in an amount cumulatively equal to at least thirty-five percent (35%) of the certified capital in that investment pool.

(b) For program two, of the amount invested before the third (3rd) anniversary of the program two investment pool allocation date pursuant to paragraph 1(a), above, a CAPCO must have invested at least \$75,000 of such investment pool amount in no less than one (1) qualified diversity business.

(c) For programs one and two, before the fifth (5th) anniversary of an investment pool allocation date, a CAPCO must have made qualified investments of certified capital of such investment pool in qualified technology businesses in an amount cumulatively equal to at least fifty percent (50%) of the certified capital in that investment pool.

(d) For program two, of the amount invested before the fifth (5th) anniversary of the program two investment pool allocation date pursuant to paragraph 1(c), above, a CAPCO must have invested at least \$75,000 of such investment pool amount in no less than three (3) qualified diversity businesses, for a cumulative investment amount of at least \$225,000.

(2) The aggregate cumulative amount of all qualified investments made from an investment pool by a CAPCO after the applicable program allocation date shall be considered in the computation of the percentage requirements applicable to each program under the Act. Any proceeds received from a qualified investment in a program may be invested in another qualified investment and count toward any requirement in the Act with respect to investments of certified capital in that same program.

(3) A business that is classified as a qualified technology business at the time of the first (1st) investment in the business by a CAPCO remains classified as a qualified technology business and may receive follow-on investments from any CAPCO. Except as provided by this subsection, a follow-on investment made under this subsection is a qualified investment even though the business may not meet the definition of a qualified technology business at the time of the follow-on investment; provided, however, that a CAPCO may make a follow-on investment in a program one portfolio company of program two investment pool funds only if, at the time of the initial investment of the program two investment pool funds, the program one portfolio company meets the definition of a qualified technology business.

(4) A qualified investment may not be made at a cost to an investment pool of a CAPCO greater than fifteen percent (15%) of the total certified capital of that investment pool of the CAPCO.

(5) If, before the one hundred eightieth (180th) day after the date that a CAPCO makes an investment in a qualified technology business, the qualified technology business moves its principal business operations from the State of Alabama, the investment may not be considered a qualified investment for purposes of the percentage requirements under the Act.

(6) A CAPCO shall invest any certified capital not invested in qualified investments only as follows ("Permissible Investments"):

(a) Cash deposited with a federally insured financial institution.

(b) Certificates of deposit in a federally insured financial institution.

(c) Investment securities that are obligations of the United States or its agencies or instrumentalities or obligations that are guaranteed fully as to principal and interest by the United States.

(d) Debt instruments rated at least "A" or its equivalent by a nationally recognized credit rating organization, or issued by, or guaranteed with respect to payment by, an entity whose unsecured indebtedness is rated at least "A" or its equivalent by a nationally recognized credit rating organization, and which indebtedness is not subordinated to other unsecured indebtedness of the issuer or the guarantor.

(e) Obligations of the State of Alabama or any municipality or political subdivision of the State of Alabama.

(f) Any other investments approved in advance and in writing by the ADO.

(7) For the purposes of this section, the dates required for qualified investments with respect to either program one or program two shall be referred to as milestone dates. The term "MUST HAVE MADE QUALIFIED INVESTMENTS", means the date funds are received by the qualified technology business from the CAPCO, as evidenced by the date of a check or other means of funds transfer. The CAPCO must submit the following information to the ADO within thirty (30) days of the milestone dates for each of its investment pools:

(a) The amount of certified capital from the applicable investment pool placed in qualified investments as of the milestone date.

(b) The amount of total certified capital from the applicable investment pool provided by certified investors to the CAPCO as of the milestone date.

(8) In the event that the CAPCO fails to meet the milestone dates with respect to a particular program, or in the event the CAPCO fails to submit the information required above within the time period specified, the CAPCO shall be notified and allowed to resolve the deficiency within one hundred twenty (120) days. In the event the deficiency is not resolved within the time limit, the investment pool may be decertified by the ADO.

(9) In the event that the CAPCO willfully provides materially false or incorrect information with respect to any program milestones that would have resulted in the decertification of a CAPCO's investment pool, full recapture of all tax credits earned with respect to both program one and program two may be required by the ADO.

(10) Not later than January 31 of each year, each CAPCO shall report to the ADO all of the following information with respect to its investment pool(s):

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

(b) Whether or not the CAPCO has invested more than fifteen percent (15%) of the total certified capital of any one investment pool with respect to either program one or program two in any one (1) business.

(c) Each qualified investment that the CAPCO made during the preceding year and, with respect to each qualified investment in a qualified technology business in which the CAPCO is an investor as of the date of the report, (i) the number of employees of the qualified technology business at the time the qualified investment was made, (ii) the name of each qualified technology business that is also a qualified diversity business as defined herein, and (iii) the current number of employees of the qualified technology business.

(d) Any other information required by the ADO.

(11) Not later than April 1 of each year, the CAPCO shall provide to the ADO an annual audited financial statement that includes the opinion of an independent certified public accountant; provided, however, that any CAPCO that is initially certified as such during 2007 or 2008 shall not be required to submit the information set forth in this paragraph until April 1, 2009. The audit or other review by the certified public accountant, shall address the methods of operation and conduct of the business of the CAPCO to determine whether:

(a) The CAPCO is complying with the Act and these regulations.

(b) The funds received by the CAPCO have been invested as required within the time provided by Regulation 281-2-1-.09(1).

(c) The CAPCO has invested the funds in qualified technology businesses.

(d) The CAPCO has invested the funds in qualified diversity businesses.

(e) As used in this subsection, the term "AUDITED FINANCIAL STATEMENT" means a complete set of financial statements prepared in accordance with generally accepted accounting standards, including an income statement, balance sheet and statement of cash flows, which financial statements have been audited by an independent certified public accountant in accordance with generally accepted auditing standards.

(12) Not later than January 31 of each year, each CAPCO shall pay (i) a nonrefundable renewal fee of \$5,000 to the ADO for each investment pool of the CAPCO certified by the ADO, and (ii) a nonrefundable program maintenance fee of \$5,000 to the ADO for each investment pool of the CAPCO certified by the ADO. If a CAPCO fails to pay any renewal fee or program maintenance fee on or before that date, the CAPCO must pay, in addition to the renewal or program maintenance fee then due, a late fee of \$5,000 per unpaid fee to continue its certification.

(13) Notwithstanding subsection (12), a CAPCO is not required to pay any renewal fee or program maintenance fees within six (6) months of the date on which the CAPCO's certification or recertification is issued pursuant to Section 3 of the Act and Regulation 281-2-1-.06.

**Author:** F. Neal Wade

**Statutory Authority:** Code of Ala. 1975, as amended; Act 2002-429.

**History: New Rule:** Filed July 25, 2003; effective August 29, 2003. **Amended:** Filed February 6, 2008; effective March 12, 2008.

#### **281-2-1-.10        Distributions.**

(1) A CAPCO may make a qualified distribution at any time. To make a distribution or payment from a particular investment pool, other than a qualified distribution and therepayment of the initial \$500,000 equity contribution or any other equity contribution made by its equity holders, a CAPCO must (i) have made qualified investments from such investment pool in an amount cumulatively equal to at least one hundred percent (100%) percent of the certified capital invested in such investment pool and, (ii) with respect to a program two investment pool, have invested at least \$75,000 of such investment pool in no less than five (5) qualified

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diversity businesses, for a cumulative investment amount of at least \$375,000.

(2) Notwithstanding subsection (1) of this section, a CAPCO may make payments of principal and interest on its indebtedness without any restriction, including payments of indebtedness of the CAPCO on which certified investors earned premium tax credits.

(3) In both program one and program two, the State of Alabama shall receive a ten percent (10%) share of any distributions other than qualified distributions, payments with respect to indebtedness, and the return of the initial \$500,000 equity contribution and any other equity contributions, from the CAPCO to its equity holders.

(4) Except with respect to required payments to the State of Alabama pursuant to subsection (3) above, (i) once a CAPCO has made qualified investments in an amount cumulatively equal to one hundred percent (100%) of the certified capital allocated to it with respect to a particular program, of which, in the case of a program two investment pool, at least \$75,000 of such program two investment pool shall have been invested in no less than five (5) qualified diversity businesses, for a cumulative investment amount of at least \$375,000, the investment pool associated with such capital shall no longer be subject to regulation under the Act or these regulations, and (ii) once all of a CAPCO's investment pools have satisfied the requirement of the preceding sentence, the CAPCO shall no longer be subject to regulation under the Act or these regulations.

**Author:** F. Neal Wade

**Statutory Authority:** Code of Ala. 1975, as amended; Act 2002-429.

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**281-2-1-.11 Annual Review By The ADO.**

(1) The ADO shall conduct an annual review of each CAPCO to:

(a) Ensure that the CAPCO and each of its investment pools continue to satisfy the requirements of the Act and these regulations, and that the CAPCO has not made any investment in violation of the Act or these regulations.

(b) Determine the eligibility status of its qualified investments.

(2) The cost of the annual review shall be paid by each CAPCO according to a reasonable fee schedule adopted by the ADO.

(3) A material violation of Regulations 281-2-1-.05(6) or 281-2-1-.09 is grounds for decertification of the noncomplying

investment pool, as applicable, in accordance with Section 11 of the Act and Regulation 281-2-1-.13. A willful or fraudulent violation of the Act or these regulations shall be grounds for the decertification of the CAPCO and each of its investment pools. If the ADO determines that a CAPCO is not in compliance with the above referenced sections or has committed a willful or fraudulent violation of the Act or these regulations, the Director shall notify the officers of the CAPCO in writing that the CAPCO or one or more of its investment pools, as applicable, may be subject to decertification after the one hundred twentieth (120th) day after the date of mailing of the notice, unless the deficiencies are corrected and the CAPCO returns to compliance with those sections.

(4) The Director of the ADO may decertify a CAPCO or one or more of its investment pools, as applicable, after opportunity for hearing, if the director finds that the CAPCO or its investment pools, as applicable, are not in compliance with Regulations 281-2-1-.05(6) or 281-2-1-.09, or have committed a willful or fraudulent violation of the Act or these regulations at the end of the period established by subsection (3) of above. Decertification under this subsection is effective on receipt of notice of decertification by the CAPCO. The ADO shall notify any appropriate state agency of the decertification.

(5) If a CAPCO reasonably believes that it has complied with some or all of the milestone and other requirements set forth in Regulation 281-2-1-.09(1), the CAPCO may request an audit pursuant to Regulation 281-2-1-.11(1) which shall be conducted by ADO within 90 days of such request. The ADO shall issue a report to the CAPCO indicating whether the CAPCO has complied with the requirements of Regulation 281-2-1-.09(1) and specifying in detail its compliance deficiencies, if any. In lieu of an audit pursuant to this section, the ADO may issue agreed upon procedures to be performed and reported by an independent party. Any audit requested by a CAPCO and performed by the ADO or an independent party shall be at the CAPCO's expense

**Author:** F. Neal Wade

**Statutory Authority:** Code of Ala. 1975, as amended; Act 2002-429.

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2003. **Amended:** Filed February 6, 2008; effective March 12, 2008.

### **281-2-1-.12      Offering Materials.**

Any offering materials involving the sale of securities of the CAPCO must include the following statement:

"By authorizing the formation of a CAPCO, the State of Alabama 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 certified investor in the company. Use of the word "certified" in an offering does not constitute a

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recommendation or endorsement of the investment by the ADO of public accounts. If applicable provisions of law are violated, the State of Alabama may require forfeiture of unused premium tax credits and repayments of used premium tax credits."

**Author:** F. Neal Wade

**Statutory Authority:** Code of Ala. 1975, as amended; Act 2002-429.

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**281-2-1-.13 Decertification.**

(1) Decertification of a CAPCO or one or more of its investment pools may cause the recapture of premium tax credits previously claimed with respect to program one or program two and the forfeiture of future premium tax credits to be claimed with respect to such program by certified investors with respect to the company, as follows:

(a) Except as set forth in subdivision (b) of subsection (1) of this section, decertification of a CAPCO or a particular investment pool on or before the third (3rd) anniversary of an investment pool's allocation date causes the recapture of any premium tax credit previously claimed with respect to such program and the forfeiture of any future premium tax credit to be claimed by a certified investor with respect to such investment pool.

(b) For an investment pool that meets the requirements for continued certification under Section 6(a)(1) of the Act and Regulation 281-2-1-.09(1)(a) and (b) with respect to program one or program two, as applicable, and subsequently fails to meet the requirements for continued certification under Section 6(a)(2) of the Act and Regulation 281-2-1-.09(1)(c) and (d) with respect to the applicable program, any premium tax credit that has been or will be taken by a certified investor in such investment pool on or before the third (3rd) anniversary of the investment pool's allocation date with respect to the applicable program is not subject to recapture or forfeiture, but any premium tax credit that has been or will be taken by a certified investor after the third (3rd) anniversary of such allocation date of the CAPCO with respect to the applicable program is subject to recapture or forfeiture.

(c) For an investment pool that has met the requirements for continued certification under Section 6(a)(1) and (2) of the Act and Regulation 281-2-1-.09(1) with respect to either program one or program two and is subsequently decertified, any premium tax credit that has been or will be taken by a certified investor in such investment pool on or before the fifth (5th) anniversary of the investment pool's allocation

date with respect to the applicable program is not subject to recapture or forfeiture, but any premium tax credit to be taken after the fifth (5th) anniversary of such allocation date with respect to the applicable program is subject to forfeiture only if the investment pool or CAPCO is decertified on or before the fifth anniversary of such allocation date.

(d) For a CAPCO that (i) has invested an amount cumulatively equal to one hundred percent (100%) of the certified capital of a particular investment pool in qualified investments with respect to the applicable program, and (ii) in the case of a program two investment pool, has invested at least \$75,000 of such program two investment pool in no less than five (5) qualified diversity businesses, for a cumulative investment amount of at least \$375,000, any premium tax credit claimed or to be claimed by a certified investor in such investment pool with respect to the applicable program is not subject to recapture or forfeiture under the Act.

(2) The ADO shall send written notice to the address of each certified investor whose premium tax credit is subject to recapture or forfeiture, using the address shown on the last premium tax filing.

(3) In the event that decertification of a CAPCO or one or more of its investment pools occurs with respect to a particular program, investor(s) in the CAPCO whose premium tax credit is subject to recapture or forfeiture shall, within thirty (30) days of receipt of notice sent by the ADO, submit funds in the amount of all premium tax credits previously claimed by investor with respect to the applicable program and subject to recapture, if any, with respect to its investment in the affected investment pool(s). In the event an investor fails to provide the ADO with such funds within the thirty (30) day period, a penalty shall be added to such payment. The penalty shall be equal to the product of (x) the amount of the payment, (y) the number of days elapsed from the date on which the funds were due or the date the funds were paid to investors or a CAPCO affiliate and (z) the prime rate plus three (3) percentage points divided by three hundred sixty (360). In addition, the certified investor shall pay any legal or other costs relating to the collection of such payment. Payment shall be in the form of a cashier's check made payable to the ADO, or a wire transfer to the ADO.

**Author:** F. Neal Wade

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