WEST VIRGINIA CODE CHAPTER 5b ARTICLE 12

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§5B-12-1. Title.

The provisions of this article shall be known as, and may be cited as, the WV First Small Business Growth Act.

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§5B-12-2. Definitions.

(a) Any term used in this article has the meaning ascribed by this section unless a different meaning is clearly required by the context of its use or by definition in this article.

(b) For purposes of this article, the term:

"Affiliate" means an entity that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under the common control with another entity. An entity is controlled by another entity if the controlling entity holds, directly or indirectly, the majority of voting or ownership interest in the controlled entity or has control over day-to-day operations of the controlled entity by contract or by law.

"Applicable percentage" means zero percent for the first two credit allowance dates, and 15 percent for the next four credit allowance dates.

"Capital investment" means any equity investment in a growth fund by a growth investor which:

(A) Is acquired after the effective date of this article at its original issuance solely in exchange for cash;

(B) Has 100 percent of its cash purchase price used by the growth fund to make qualified investments in eligible businesses located in this state by the third anniversary of the initial credit allowance date; and

(C) Is designated by the growth fund as a capital investment under this article and is certified by the department under the provisions of §5B-12-3 of this code.

(D) This term shall include any capital investment that does not meet the criteria provided under paragraph (A) of this subdivision, if such investment was a capital investment in the hands of a prior holder.

"Credit allowance date" means the date on which the department certifies a growth fund's capital investment and each of the five anniversary dates of such date thereafter.

"Department" means the West Virginia Department of Commerce.

"Eligible business" means a business that, at the time of the initial qualified investment in the business has fewer than 250 employees and has its principal business operations in West Virginia: *Provided*, That any business which is classified as an eligible business at the time of the initial investment in such business by a growth fund shall remain classified as an eligible business and may receive follow-on investments from any growth fund, and such follow-on investments shall be qualified investments even though such business may not meet the definition of an eligible business at the time of such follow-on investment.

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"Growth fund" means an entity certified by the department under the provisions of §5B-12-3 of this code and is a person who has developed a business plan to invest in business concerns in this state under this article and has successfully solicited one or more growth investors to make capital investments in the growth fund under this article in support of the plan.

"Growth investor" means any entity that makes a capital investment in a growth fund.

"Principal business operations" means the location where at least 60 percent of a business's employees work or the location where employees who are paid at least 60 percent of such business's payroll work. A business that has agreed to relocate employees using the proceeds of a qualified investment to establish its principal business operations in a new location shall be deemed to have its principal business operations in such new location if it satisfied the requirements of this subdivision no later than 180 days after receiving a qualified investment.

"Purchase price" means the amount paid to the growth fund that issues a capital investment which shall not exceed the amount of capital investment authority certified under the provisions of §5B-12-3 of this code.

"Qualified investment" means any investment in an eligible business or any loan to an eligible business with a stated maturity date of at least one year after the date of issuance, excluding revolving lines of credit and senior-secured debt unless the chief executive or similar officer of the eligible business certifies that the eligible business sought and was denied similar financing from a depository institution, by a growth fund: *Provided*, That with respect to any one eligible business, the maximum amount of investments made in such business by one or more growth funds, on a collective basis with all of the businesses' affiliates, with the proceeds of the capital investments, shall be the greater of 20 percent of the growth fund's capital investment authority or $7.5 million, exclusive of investments made with repaid or redeemed investments or interest or profits realized thereon.

"Senior-secured debt" means any loan that is secured by a first mortgage on real estate with a loan-to-value ratio of less than 80 percent.

"State tax liability" means the tax imposed by §33-314, §33-3-14a, §33-3-16, or §33-3-17 of this code, or any other insurance premium or retaliatory tax imposed on an insurance company by the state: *Provided*, That if the tax liability imposed under these sections is eliminated or reduced, the term "state tax liability" shall also include any tax liability imposed by this state on an insurance company or other person that had premium tax liability under the laws of this state for the purpose of making up tax revenue lost by the state as a result of the elimination or reduction of the taxes imposed under said sections: *Provided, however*, That no provision of this article may be construed or operate to reduce distributions or allocations otherwise required to be made for purposes other than for deposit in the general revenue fund, if applicable, under §33-3-14, §33-3-14a, §33-3-14d, §33-3-14e, and §33-3-33 of this code. An insurance company claiming a credit against state

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premium tax or retaliatory tax shall not be required to pay any additional premium tax, retaliatory tax, fee, charge, or other penalty or tax imposed on an insurer as a result of applying for or claiming the credit authorized by this article. The credit may fully offset any retaliatory tax imposed by this state.

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§5B-12-3. Program established; application.

(a) There is hereby created the WV First Small Business Growth Program, to be administered by the Department of Commerce.

(b) A growth fund that seeks to have an equity investment certified as a capital investment eligible for credits authorized under the provisions of this article shall apply to the department. The department shall begin accepting applications within 90 days of the effective date of this article. The application shall include:

(1) The amount of capital investment requested;

(2) A copy of the growth fund applicant's or an affiliate of the growth fund applicant's licenses as a rural business investment company under 7 U.S.C. § 2009cc or as a small business investment company under 15 U.S.C. § 681, and a certificate executed by an executive officer of the growth fund applicant attesting that such license remains in effect and has not been revoked;

(3) Evidence that, as of the date the application is submitted, the growth fund applicant or affiliates of the growth fund applicant have invested at least $100 million in nonpublic companies located in counties within the United States with a population of less than 75,000 according to the 2020 Federal Decennial Census of the United States; such evidence may be in the form of a list containing the names of the companies, their location and the amounts invested by the growth fund applicant or affiliates of the applicant, provided that an officer of the growth fund applicant certifies such list;

(4) A business plan that includes a revenue-impact assessment projecting state and local tax revenue to be generated by the growth fund applicant's proposed qualified investments, prepared by a nationally recognized, third-party, independent economic forecasting firm using a dynamic economic forecasting model that analyzes the growth fund applicant's business plan over the 10 years following the date that the application is submitted to the department. Such plan shall include an estimate of the number of jobs created and jobs retained in this state as a result of the growth fund applicant's qualified investments; and

(5) A nonrefundable application fee of $5,000 payable to the department.

(c) Within 30 days after the receipt of a completed application, the department shall grant or deny the application in full or in part. The department shall deny the application if:

(1) The growth fund applicant does not satisfy all the criteria provided by subsection (b) of this section;

(2) The revenue-impact assessment submitted with the application does not demonstrate that the growth fund applicant's business plan will result in a positive fiscal impact on the state over a 10-year period that exceeds the cumulative amount of credits that would be issued to the growth fund applicant if the application was approved; or

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(3) The department has already approved the maximum amount of capital investment authority under §5B-12-4 of this code.

(d) If the department denies any part of the application, it shall inform the growth fund applicant of the grounds for such denial. If the growth fund applicant provides any additional information required by the department or otherwise completes its application within 15 days of the notice of denial, the application shall be considered complete as of the original date of submission. If the growth fund applicant fails to provide the information or fails to complete its application within the 15-day period, the application shall remain denied and must be resubmitted with a new submission date and a new application fee.

(e) Upon approval of an application, the department shall certify the proposed equity investment as a capital investment eligible for credits under this article, subject to limitations laid out in §5B-12-4 of this code. The department shall provide written notice of the certification to the growth fund applicant which shall include the amount of the growth fund applicant's capital investment authority and a schedule of credits by year and amount related to the capital investment authority. The department shall certify capital investments in the order that the application is received by the department. Applications received on the same day shall be deemed to have been received simultaneously. For applications that are complete and received on the same day, the department shall certify applications in proportionate percentages based upon the ratio of the amount of capital investment authority requested in all applications.

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§5B-12-4. Certification.

(a) The department shall certify capital investment authority under the provisions of this article in amounts that would not authorize more than $15 million in credits to be claimed against state tax liability in any calendar year, excluding any credit amounts carried forward as provided under §5B-12-5(a) of this code. Within 90 days of the growth fund applicant receiving notice of certification, the growth fund shall issue the capital investment authority to and receive cash in the amount of the certified amount from a growth investor. At least 10 percent of the growth fund's capital investment shall be composed of capital raised by the growth fund directly or indirectly from sources including directors, members, employees, officers, and affiliates of the growth fund, other than the amount invested by the allocatee claiming the credits in exchange for such allocation of credits. The growth fund shall provide the department with evidence of the receipt of the cash investment within 95 days of the growth fund applicant receiving notice of certification.

(b) If the growth fund does not receive the cash investment and issue the capital investment within such time period following receipt of the certificate notice, the certification shall lapse and the growth fund shall not issue the capital investment without reapplying to the department for certification. Lapsed certifications shall revert to the department and shall be reissued pro rata to any growth fund applicant whose capital investment allocations were reduced in accordance with the application process provided under §5B-12-3(e) of this code.

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§5B-12-5. Tax credit established; recapture provisions.

(a) Upon making a capital investment in a growth fund, a growth investor shall have an earned and vested right to credits against such entity's state tax liability that may be utilized on each credit allowance date of such capital investment in an amount equal to the applicable percentage for such credit allowance date multiplied by the purchase price paid to the growth fund for the capital investment. The amount of the credit claimed by a growth investor or its allocatee shall not exceed the amount of such entity's state tax liability for the tax year for which the credit is claimed. No credit may be claimed under this article against a growth investor's state tax liability for any investor's tax year that begins prior to calendar year 2029. Any amount of credit that a growth investor or its allocatee is prohibited from claiming in a tax year as a result of this section may be carried forward for use in any of the five subsequent tax years, but shall not be carried back to prior tax years. It is the intent of this article that a growth investor claiming a credit under this article is not required to pay any additional tax that may arise as a result of claiming such credit.

(b) No credit claimed under this section shall be refundable or saleable on the open market. Credits earned by or allocated to a partnership, limited liability company, or S corporation may be allocated to the partners, members, or shareholders of such entity for their use in accordance with the provisions of any agreement among such partners, members, or shareholders, and any such entity shall notify the department of the names of the entities that are eligible to utilize such credit. Such allocation shall not be considered a sale for the purpose of state law. An insurer allocated a credit in accordance with this section may transfer a credit under this section to an affiliate of the insurer that is subject to state tax liability if the insurer notifies the department of the transfer and includes with that notification a copy of the transfer documents.

(c) The department may recapture credits from a taxpayer that claimed a credit authorized under this section if:

(1) The growth fund does not invest 100 percent of its capital investment authority in qualified investments in this state within three years of the initial credit allowance date;

(2) The growth fund fails to maintain qualified investments equal to 100 percent of its capital investment authority from the third anniversary until the sixth anniversary of the credit allowance date. For the purposes of this subsection, a qualified investment is considered maintained even if the qualified investment was sold or repaid so long as the growth fund reinvests an amount equal to the capital returned or recovered or repaid by the growth fund from the original investment, exclusive of any profits realized, in other qualified investments in this state within 12 months of receipt of such capital. Amounts received periodically by a growth fund shall be treated as maintained in qualified investments if the amounts are reinvested in one or more qualified investments by the end of the following calendar year. A growth fund shall not be required to reinvest capital returned from qualified investments after the fifth anniversary of the credit allowance date, and such qualified investments shall be considered maintained by the growth fund through the sixth anniversary of the credit

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allowance date;

(3) Prior to the earlier of exiting the program in accordance with this article or 30 days after the sixth anniversary of the credit allowance date, the growth fund makes a distribution or payment that results in the growth fund having less than 100 percent of its capital investment authority invested in qualified investments in the state or held in cash or other marketable securities; or

(4) The growth fund violates the provisions of §5B-12-6 of this code, in which case the department may recapture an amount equal to the amount of the growth fund's capital investment authority found to be in violation of such provisions.

(d) Recaptured credits and related capital investment authority shall revert to the department and shall be reissued pro rata to growth fund applicants whose capital investment allocations were reduced in accordance with the application process provided under §5B-12-3(e) of this code.

(e) No recapture shall occur until the growth fund has been given notice of noncompliance and afforded six months from the date of such notice to cure the noncompliance.

(f) A growth fund, before making a qualified investment, may request from the department a written opinion as to whether the business in which it proposes to invest is an eligible business. The department, no later than 15 business days after the date of receipt of such request, shall notify the growth fund of its determination. If the department fails to notify the growth fund of its determination by the 20th business day, the business in which the growth fund proposes to invest shall be deemed an eligible business.

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§5B-12-6. Investment prohibitions

No eligible business that receives a qualified investment under the provisions of this article, or any affiliates of such eligible business, shall directly or indirectly:

(1) Own or have the right to acquire an ownership interest in a growth fund or member or affiliate of a growth fund including, but not limited to, a holder of a capital investment issued by a growth fund; or

(2) Loan to or invest in a growth fund or any member or affiliate of a growth fund including, but not limited to, a holder of capital investment issued by a growth fund, where the proceeds of such loan or investment are directly or indirectly used to fund or refinance the purchase of capital investments under this article.

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§5B-12-7. Annual reporting.

(a) Growth funds shall submit a report to the department by June 30 of each calendar year during the compliance period. The report following the third anniversary of the initial credit allowance date shall provide documentation as to the investment of 100 percent of the purchase price of such capital investment in qualified investments. Unless previously reported pursuant to this subsection, such reports shall also include:

(1) The name and location of each eligible business receiving a qualified investment;

(2) Bank statements of such growth fund evidencing each qualified investment;

(3) A copy of the written opinion of the department, as provided in §5B-12-5(f) of this code, or evidence that such business was an eligible business at the time of such qualified investment, as applicable;

(4) The number of jobs created and jobs retained as a result of each qualified investment;

(5) The average salary of positions described in subdivision (4) of this subsection; and

(6) Such other information as required by the department.

(b) For all subsequent years, growth funds shall submit an annual report to the department by June 30 of each calendar year during the compliance period. The report shall include, but is not limited to, the following:

(1) The number of jobs created and jobs retained as a result of qualified investments;

(2) The average annual salary of positions described in subdivision (1) of this subsection; and

(3) Such other information as required by the department.

(c) On or following the sixth anniversary of the credit allowance date, a growth fund may apply to the department to exit the program and no longer be subject to the regulation hereunder. The department shall respond to the exit application within 15 days of receipt. In evaluating the exit application, the fact that no credits have been recaptured and that the growth fund has not received a notice of recapture that has not been cured pursuant to §5B-12-5(e) of this code shall be sufficient evidence to prove that the growth fund is eligible for exit. The department shall not unreasonably deny an exit application submitted under this section. If an exit application is denied, the notice shall include the reasons for the determination.

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