

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1990

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ENROLLED

HOUSE BILL No. 4692

(By Mr. Speaker, Mr. Chambers, & Del. R. Burke)
[By Request of the Executive]

— ● —

Passed March 7, 1990

In Effect July 1, 1990 ~~Passage~~

ENROLLED

H. B. 4692

(By MR. SPEAKER, MR. CHAMBERS, AND DELEGATE R. BURK)
[By Request of the Executive]

[Passed March 7, 1990; in effect July 1, 1990.]

AN ACT to amend and reenact sections four, five, six, seven, eight, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen and seventeen, article one, chapter five-e of the code of West Virginia, one thousand nine hundred thirty-one, as amended, all related to the West Virginia capital company act; providing definitions, changing the designation "board" or "board of directors of the West Virginia Industrial and Trade Jobs Development Corporation," wherever found in the article, to the designation "authority" or "West Virginia Economic Development Authority," as the statutorily mandated successor oversight entity, authorizing the promulgation of rules and regulations, providing for qualification of capital companies, requiring that capital companies obtain a West Virginia business registration certificate, providing for tax credits for investors in capital companies, prescribing how tax credits for investments made in specified time periods may be taken, providing that the amount of the tax credit for investment in a capital company made subsequent to the effective date of the provision be thirty percent of the investment multiplied by the percentage of the capital base of the capital company invested in qualified investments, substituting reference to section thirty-nine of the Internal Revenue Code of one thousand nine hundred eighty-six, as amended, for section forty-six(b) of the

Internal Revenue Code of one thousand nine hundred fifty-four, as amended, in reference to carryforward and carryback of credit, providing that no investor shall be entitled to or take tax credit arising from investment made by any other investor, providing that the tax credit shall not offset or apply against interest, penalties or additions to tax, defining the date when investment is made, eliminating the carryback of tax credits after June thirty, one thousand nine hundred ninety, providing that investors who, within the previous five years, have been the recipient of a venture capital investment from a certified West Virginia capital company shall not be entitled to tax credits under the West Virginia capital company act, providing that sections eight and twelve of the aforesaid article one, chapter five-e, of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be effective upon passage by the Legislature, setting forth an additional investment schedule bracket whereby eighty percent of the capital base of a West Virginia capital company must be invested in qualified investments within five years of the date on which the capital company was designated as qualified by the economic development authority, requiring that at least forty percent of the total capital base of a capital company be invested in nonpreferred equity securities, requiring, if any part of the capital base of a capital company is invested in debt, that at least forty percent of the total capital base shall, before investment is made in any other form of debt, be invested in debt not secured by real property which, because of the interest rate, terms or collateral relating to such debt; or which, because of the financial condition of the borrower, would not be carried by a commercial bank as a prudent loan investment, defining businesses owned by employees, officers, investors, members of boards of directors, or the family of such persons in which a capital company cannot invest as businesses in which such persons hold ten percent or more ownership in the total value of stocks or in the capital interest or profits interest, defining a business to be related to a capital company if it and the capital company are both members of the same controlled group, defining a

business to be related to a capital company if both the capital company and the purportedly related business are owned by a single trust or group of trusts related through common fiduciaries or grantors, or through interlocking fiduciaries or grantors, eliminating the statutory reference to section 267 of the Internal Revenue Code of one thousand nine hundred fifty-four for determining relationships for defining related party transactions, permitting the defining of familial relationships by regulation for purposes of determining attribution of ownership or relationship with regard to forbidden related party investments or transactions.

Be it enacted by the Legislature of West Virginia:

That sections four, five, six, seven, eight, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen and seventeen, article one, chapter five-e of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted, all to read as follows:

ARTICLE 1. WEST VIRGINIA CAPITAL COMPANY ACT.

§5E-1-4. Definitions.

1 As used in this article, the following terms shall have
2 the meanings ascribed to them in this section, unless the
3 context in which the term is used clearly requires
4 another meaning or a specific different definition is
5 provided.

6 (a) "Authority" means the West Virginia economic
7 development authority, provided for in article fifteen,
8 chapter thirty-one of this code.

9 (b) "Capital base" means equity capital or net worth.

10 (c) "Certified West Virginia capital company" means:

11 (1) A West Virginia business development corporation
12 created pursuant to article fourteen, chapter thirty-one
13 of this code; or

14 (2) A profit or nonprofit entity organized and existing
15 under the laws of this state, created for the purpose of
16 making venture or risk capital available to qualified
17 investments, that has been certified by the authority.

18 (d) "Qualified investment" means a debt or equity
19 financing of a West Virginia business but only if the
20 business is engaged in one or more of the following
21 activities: Manufacturing; agricultural production or
22 processing; forestry production or processing; mineral
23 production or processing, except for conventional oil and
24 gas exploration; service industry; transportation;
25 research and development of products or processes
26 associated with any of the activities previously enumer-
27 ated above; tourism; and wholesale or retail distribution
28 activities within the state.

29 (e) "Qualified West Virginia capital company" means
30 a West Virginia capital company that has been desig-
31 nated by the authority as a qualified capital company
32 under the provisions of section six of this article.

33 (f) "State" means the state of West Virginia.

§5E-1-5. Rules and regulations.

1 The authority shall promulgate rules and regulations
2 in accordance with article three, chapter twenty-nine-a
3 of this code, to carry out the purposes of this article.

§5E-1-6. Qualification of West Virginia capital companies.

1 (a) The authority shall qualify West Virginia capital
2 companies commencing after the effective date of this
3 article. A company seeking to be qualified as a West
4 Virginia capital company must make written applica-
5 tion to the authority on forms provided by the authority.
6 The application must contain the information required
7 by section ten of this article. Further, the application
8 must specify the level of capitalization of the company.

9 (b) The application shall set forth the applicant's
10 purpose.

11 (c) The authority may certify West Virginia capital
12 companies in existence after the first day of July, one
13 thousand nine hundred eighty-six.

14 (d) All capital companies shall obtain a business
15 registration certificate pursuant to section three, article
16 twelve, chapter eleven of this code. No capital company

17 shall be certified until an application has been filed by
18 the capital company for the said business registration
19 certificate.

§5E-1-7. Minimum standards of qualified West Virginia capital companies.

1 The authority shall qualify West Virginia capital
2 companies that have been capitalized at a minimum
3 level of one million dollars. Capitalization of the
4 company may be increased pursuant to regulation of the
5 authority.

§5E-1-8. Tax credits.

1 (a) The total amount of tax credits authorized for a
2 single qualified company may not exceed two million
3 dollars. Capitalization of the company may be increased
4 pursuant to regulation of the authority.

5 (b) The total credits authorized by the authority for
6 all companies may not exceed a total of ten million
7 dollars each fiscal year. The authority shall allocate
8 these credits to qualified companies in the order that
9 said companies are qualified.

10 (c) For investment made on and after the effective
11 date of this section, any investor who, within the five
12 year period prior to the making of an investment in a
13 capital company, has been the recipient, either directly
14 or indirectly, of a venture capital investment from a
15 certified West Virginia capital company shall not be
16 entitled to or take any tax credit under this article.

17 (d) For investment made prior to the effective date of
18 this section, any investor, including an individual,
19 partnership or corporation, that makes a capital
20 investment in a qualified West Virginia capital com-
21 pany is entitled to a tax credit equal to fifty percent of
22 the investor's investment. The credit allowed by this
23 article shall be taken after all other credits allowed by
24 chapter eleven of this code. It shall be taken against the
25 same taxes and in the same order as set forth in
26 subsections (c) through (i), section five, article thirteen-
27 c, chapter eleven of this code. The credit for investments
28 by a partnership or by a corporation electing to be

29 treated as a Subchapter S corporation may be divided
30 among partners or shareholders of the investor or
31 between the investor and its partners or shareholders
32 pursuant to election of partners or shareholders. No
33 investor shall be entitled to and no investor may take
34 any credit arising from investment made by any other
35 investor.

36 (e) For investment made on or after the effective date
37 of this section, any investor, including an individual,
38 partnership or corporation, that makes a capital
39 investment in a qualified West Virginia capital com-
40 pany is entitled to a tax credit equal to thirty percent
41 of the investor's investment made on or after the
42 effective date of this section in the capital company
43 multiplied by the percentage of the total capital base of
44 the capital company which is invested in qualified
45 investments as of December thirty-one of the taxable
46 year. The credit allowed by this article shall be taken
47 after all other credits allowed by chapter eleven of this
48 code. It shall be taken against the same taxes and in the
49 same order as set forth in subsections (c) through (i),
50 section five, article thirteen-c, chapter eleven of this
51 code. The credit for investments by a partnership or by
52 a corporation electing to be treated as a Subchapter S
53 corporation may be divided among partners or share-
54 holders of the investor or between the investor and its
55 partners or shareholders pursuant to election of
56 partners or shareholders. No investor shall be entitled
57 to and no investor may take any credit arising from
58 investment made by any other investor.

59 (f) For purposes of this article, the date upon which
60 investment is made shall be the date upon which actual
61 payment is made by the investor.

62 (g) The tax credit allowed under this section is to be
63 credited against the taxpayer's tax liability for the
64 taxable year in which the investment in a qualified West
65 Virginia capital company is made. If the amount of the
66 tax credit exceeds the taxpayer's tax liability for the
67 taxable year, the amount of the credit which exceeds the
68 tax liability may be carried back or may be carried
69 forward in accordance with the provisions of section

70 thirty-nine of the Internal Revenue Code of one thousand
71 nine hundred eighty-six, as amended: *Provided*, That,
72 after the thirtieth day of June, one thousand nine
73 hundred ninety, no credit may be carried back to any
74 taxable year, and all credit allowed under this section
75 shall thereafter be credited against the taxpayer's tax
76 liability for the taxable year in which the investment in
77 a qualified capital company is made. If the tax credit
78 for the year exceeds the taxpayer's liability for the
79 taxable year, the amount of the credit which exceeds the
80 taxpayer's liability for the taxable year, the amount of
81 the credit which exceeds the tax liability may be carried
82 forward, but not carried back, for each succeeding tax
83 year up through and including the fifteenth tax year
84 after the tax year during which each investment is
85 made.

86 (h) The tax credit provided for in this section is
87 available only to those taxpayers whose investment in a
88 qualified West Virginia capital company occurs after
89 the first day of July, one thousand nine hundred eighty-
90 six.

91 (i) This credit shall not in any circumstance be used
92 to offset or in any manner apply against interest,
93 penalties or additions to tax.

94 (j) This section shall be effective upon passage by the
95 Legislature.

§5E-1-10. Application requirements.

1 Each company shall make application to the authority
2 on forms provided therefor, which shall set forth:

3 (1) Capitalization level of capital company;

4 (2) Purpose of the company;

5 (3) Names of investors;

6 (4) A process for disclosing to investors the tax credit
7 available pursuant to this article. Such disclosure shall
8 clearly set forth that no tax credit will be available until
9 the qualification of said company shall be granted by the
10 authority and the disclosure of immunity of the state for
11 damages is provided to said investors; and

12 (5) The location of the escrow account which has been
13 established for investors for the period of time between
14 the investment and the qualification of the capital
15 company by the authority.

§5E-1-11. Disclaimer of liability of the state.

1 The state of West Virginia shall not be held liable by
2 any court of law to any investor or qualified capital
3 company as a result of this article or any of the activities
4 authorized herein.

§5E-1-12. Qualified investments.

1 (a) A qualified West Virginia capital company must
2 use its capital base to make qualified investments
3 according to the following schedule:

4 (1) At least twenty percent of its capital base within
5 the first year of the date on which the capital company
6 was designated as qualified by the authority;

7 (2) At least forty percent of its capital base within two
8 years of the date on which the capital company was
9 designated as qualified by the authority;

10 (3) At least sixty percent of its capital base within
11 three years of the date on which the capital company
12 was designated as qualified by the authority; and

13 (4) At least eighty percent of its capital base within
14 five years of the date on which the capital company was
15 designated as qualified by the authority.

16 (b) At all times during the investment periods set
17 forth herein, and thereafter, for investment made by a
18 capital company on or after the effective date of this
19 section, at least forty percent of the total capital base
20 of a capital company shall be invested in nonpreferred
21 equity securities. If any part of the capital base of a
22 capital company is invested in debt, at least forty
23 percent of the total capital base shall, before investment
24 is made in any other form of debt, be invested in debt
25 not secured by real property which, because of the
26 interest rate, terms or collateral relating to such debt,
27 would not be carried by a commercial bank as a prudent
28 loan investment, or which, because of the financial

29 condition of the borrower, would not be carried by a
30 commercial bank as a prudent loan investment.

31 (c) The authority shall annually examine the certified
32 audit of each qualified company, as required by section
33 sixteen of this article, and the results of said audit shall
34 be used to notify the tax commissioner of any companies
35 that are not in compliance with this section.

36 (d) A qualified West Virginia capital company that
37 fails to make qualified investments pursuant to subsec-
38 tion (a) of this section shall pay to the tax commissioner
39 a penalty equal to all of the tax credits allowed to the
40 taxpayers investing in said company with interest at the
41 rate of one and one-half percent per month, compounded
42 monthly, from the date the tax credits were certified as
43 allocated to the qualified West Virginia capital com-
44 pany. The tax commissioner shall give notice to the
45 company of any penalties under this section. The tax
46 commissioner may abate said penalty upon written
47 request if the capital company establishes reasonable
48 cause for the failure to make qualified investments. The
49 tax commissioner shall deposit any amounts received
50 under this subsection in the state general fund.

51 (e) This section shall be effective upon passage by the
52 Legislature.

§5E-1-13. Restrictions on investment.

1 (a) No more than thirty percent of the equity raised
2 by a West Virginia capital company under this article
3 may be invested in any one West Virginia business.

4 (b) Related party investments proscribed.

5 (1) No portion of the capital base of a West Virginia
6 capital company under this article shall be invested in
7 a business that is related to that West Virginia capital
8 company, or in any business that is owned or operated
9 by, or employs, any officer, investor, member of the
10 board of directors, or employee of that West Virginia
11 capital company, or the family of such person, unless the
12 economic development authority approves, in writing, of
13 the making of such investment.

14 (2) For purposes of this subsection a business shall be
15 treated as owned by an employee, officer, investor,
16 member, employee, or the family of such person, if the
17 ten percent or more in value of the outstanding stock
18 of such business is owned, directly or indirectly, by or
19 for such persons or the family of such persons; or ten
20 percent or more of the capital interest or the profits
21 interest, if the business is owned, directly or indirectly,
22 by any such person or the family of any such person.

23 (3) A capital company shall be treated as related to
24 a business for purposes of this section if the same person,
25 corporation or trust or the family of the same person,
26 or members of the same controlled group of corpora-
27 tions, or the grantor or a fiduciary of any trust or if any
28 group of trusts having the same grantors or fiduciaries
29 or interlocking grantors or interlocking fiduciaries
30 thereof own ten percent in value or more of the
31 outstanding stock of the capital company and a business,
32 directly or indirectly; or ten percent or more in value
33 of the capital interest, or the profits interest, of the
34 capital company and a business. A business shall be
35 treated as related to a capital company if the same
36 business owns ten percent in value or more of the
37 outstanding stock, directly or indirectly, of a capital
38 company or ten percent or more of the capital interest,
39 or the profits interest, in a capital company. A business
40 shall be treated as related to a capital company if the
41 capital company owns ten percent or more in value of
42 the outstanding stock, directly or indirectly, of such
43 business or ten percent or more in value of the capital
44 interest, or the profits interest, in the business.

45 (4) For purposes of this article, family relationships
46 subject to the proscription set forth in this section shall
47 be determined in accordance with regulations issued by
48 the authority pursuant to section five of this article.

§5E-1-14. Conflict of interest.

1 No officer, member or employee of the authority shall
2 be financially interested, directly or indirectly, in any
3 capital company.

§5E-1-15. Investment reporting and record keeping.

1 (a) Each qualified West Virginia capital company
2 shall report to the tax commissioner and the authority
3 on a semiannual basis:

4 (1) The name of each investor in the qualified West
5 Virginia capital company who has applied for a tax
6 credit;

7 (2) The amount of each investor's investment;

8 (3) The amount of the tax credit allowed to the
9 investor and the date on which the investment was
10 made; and

11 (4) All qualified investments the company has made.

12 (b) The company shall provide each investor in a
13 qualified West Virginia capital company with a certif-
14 icate authorizing the tax credits, and a true copy of the
15 certificate shall be submitted with each taxpayer's tax
16 return requesting a credit under section eight of this
17 article.

§5E-1-16. Examination.

1 (a) Annually each qualified capital company shall
2 cause its books and records to be audited by an
3 independent certified public accountant in accordance
4 with generally accepted auditing and accounting
5 principles. In addition to the performance of a financial
6 audit, the audit shall address the methods of operation
7 and conduct of the business of the West Virginia capital
8 company to determine compliance with this article and
9 that the funds received by the company have been
10 invested within the time limits required by this article.
11 Upon completion, a copy of the audit report shall be
12 certified and sent to the authority.

13 (b) The authority may examine, under oath, any of the
14 officers, directors, agents, employees or investors of a
15 West Virginia capital company regarding the affairs
16 and business of the company. The authority may issue
17 subpoenas and subpoenas duces tecum and administer
18 oaths. Refusal to obey such a subpoena or subpoena
19 duces tecum may at once be reported to the circuit court
20 of the county in which the company is located or the

21 persons subpoenaed reside and the circuit court shall
22 enforce obedience to the subpoena or subpoena duces
23 tecum in the manner provided by law for compliance
24 with a subpoena or subpoena duces tecum issued by a
25 circuit court of this state.

§5E-1-17. Decertification.

1 (a) If the examination conducted pursuant to section
2 sixteen discloses that a West Virginia capital company
3 is not in compliance with the provisions of this article,
4 the authority may exercise any of the powers necessary
5 and appropriate to protect the authority's interest.

6 (b) The authority shall give a West Virginia capital
7 company written notice of any inadequacies in its
8 compliance with the provisions of this article, and
9 specify a period of time the company has to redress such
10 inadequacies. Failure within said time period to make
11 corrections will result in further action by the authority
12 pursuant to this section or the regulations issued
13 pursuant to section five of this article.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Frederick L. Porter
Chairman Senate Committee

Bernard V. Kelly
Chairman House Committee

Originating in the House.

Takes effect July 1, 1990.

Harold E. Adams
Clerk of the Senate

Donald S. Hogg
Clerk of the House of Delegates

Will Smith
President of the Senate

Paul C. Anderson
Speaker of the House of Delegates

The within *is disapproved* this the *16th*
day of *March*, 1990.
Easton Caperton
Governor

PRESENTED TO THE

GOVERNOR

Date 3/13/90

Time 2:40 PM

RECEIVED

1930 MAR 19 PM 3:41

OFFICE OF ASST VIRGINIA
SECRETARY OF STATE