WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1990

- - -

ENROLLED

HOUSE BILL No. 4692

(By Mr. Speaker, Mr. Chambers, and Del. R. Rush)

[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.

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

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

(b) “Capital base” means equity capital or net worth.

(c) “Certified West Virginia capital company” means:

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

(2) A profit or nonprofit entity organized and existing under the laws of this state, created for the purpose of making venture or risk capital available to qualified investments, that has been certified by the authority.
(d) "Qualified investment" means a debt or equity financing of a West Virginia business but only if the business is engaged in one or more of the following activities: Manufacturing; agricultural production or processing; forestry production or processing; mineral production or processing, except for conventional oil and gas exploration; service industry; transportation; research and development of products or processes associated with any of the activities previously enumerated above; tourism; and wholesale or retail distribution activities within the state.

(e) "Qualified West Virginia capital company" means a West Virginia capital company that has been designated by the authority as a qualified capital company under the provisions of section six of this article.

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

§5E-1-5. Rules and regulations.

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

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

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

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

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

(d) All capital companies shall obtain a business registration certificate pursuant to section three, article twelve, chapter eleven of this code. No capital company
shall be certified until an application has been filed by the capital company for the said business registration certificate.

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

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

§5E-1-8. Tax credits.

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

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

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

(d) For investment made prior to the effective date of this section, any investor, including an individual, partnership or corporation, that makes a capital investment in a qualified West Virginia capital company is entitled to a tax credit equal to fifty percent of the investor's investment. The credit allowed by this article shall be taken after all other credits allowed by chapter eleven of this code. It shall be taken against the same taxes and in the same order as set forth in subsections (c) through (i), section five, article thirteen-c, chapter eleven of this code. The credit for investments by a partnership or by a corporation electing to be
(e) For investment made on or after the effective date of this section, any investor, including an individual, partnership or corporation, that makes a capital investment in a qualified West Virginia capital company is entitled to a tax credit equal to thirty percent of the investor’s investment made on or after the effective date of this section in the capital company multiplied by the percentage of the total capital base of the capital company which is invested in qualified investments as of December thirty-one of the taxable year. The credit allowed by this article shall be taken after all other credits allowed by chapter eleven of this code. It shall be taken against the same taxes and in the same order as set forth in subsections (c) through (i), section five, article thirteen-c, chapter eleven of this code. The credit for investments by a partnership or by a corporation electing to be treated as a Subchapter S corporation may be divided among partners or shareholders of the investor or between the investor and its partners or shareholders pursuant to election of partners or shareholders. No investor shall be entitled to and no investor may take any credit arising from investment made by any other investor.

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

(g) The tax credit allowed under this section is to be credited against the taxpayer’s tax liability for the taxable year in which the investment in a qualified West Virginia capital company is made. If the amount of the tax credit exceeds the taxpayer’s tax liability for the taxable year, the amount of the credit which exceeds the tax liability may be carried back or may be carried forward in accordance with the provisions of section
thirty-nine of the Internal Revenue Code of one thousand nine hundred eighty-six, as amended: *Provided, That,* after the thirtieth day of June, one thousand nine hundred ninety, no credit may be carried back to any taxable year, and all credit allowed under this section shall thereafter be credited against the taxpayer's tax liability for the taxable year in which the investment in a qualified capital company is made. If the tax credit for the year exceeds the taxpayer's liability for the taxable year, the amount of the credit which exceeds the taxpayer's liability for the taxable year, the amount of the credit which exceeds the tax liability may be carried forward, but not carried back, for each succeeding tax year up through and including the fifteenth tax year after the tax year during which each investment is made.

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

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

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

§5E-1-10. Application requirements.

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

(1) Capitalization level of capital company;

(2) Purpose of the company;

(3) Names of investors;

(4) A process for disclosing to investors the tax credit available pursuant to this article. Such disclosure shall clearly set forth that no tax credit will be available until the qualification of said company shall be granted by the authority and the disclosure of immunity of the state for damages is provided to said investors; and
(5) The location of the escrow account which has been established for investors for the period of time between the investment and the qualification of the capital company by the authority.

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

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

§5E-1-12. Qualified investments.

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

1. At least twenty percent of its capital base within the first year of the date on which the capital company was designated as qualified by the authority;
2. At least forty percent of its capital base within two years of the date on which the capital company was designated as qualified by the authority;
3. At least sixty percent of its capital base within three years of the date on which the capital company was designated as qualified by the authority; and
4. At least eighty percent of its capital base within five years of the date on which the capital company was designated as qualified by the authority.

(b) At all times during the investment periods set forth herein, and thereafter, for investment made by a capital company on or after the effective date of this section, at least forty percent of the total capital base of a capital company shall be invested in nonpreferred equity securities. If any part of the capital base of a capital company is invested in debt, 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, would not be carried by a commercial bank as a prudent loan investment, or which, because of the financial
condition of the borrower, would not be carried by a commercial bank as a prudent loan investment.

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

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

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


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

(b) Related party investments proscribed.

(1) No portion of the capital base of a West Virginia capital company under this article shall be invested in a business that is related to that West Virginia capital company, or in any business that is owned or operated by, or employs, any officer, investor, member of the board of directors, or employee of that West Virginia capital company, or the family of such person, unless the economic development authority approves, in writing, of the making of such investment.
(2) For purposes of this subsection a business shall be treated as owned by an employee, officer, investor, member, employee, or the family of such person, if the ten percent or more in value of the outstanding stock of such business is owned, directly or indirectly, by or for such persons or the family of such persons; or ten percent or more of the capital interest or the profits interest, if the business is owned, directly or indirectly, by any such person or the family of any such person.

(3) A capital company shall be treated as related to a business for purposes of this section if the same person, corporation or trust or the family of the same person, or members of the same controlled group of corporations, or the grantor or a fiduciary of any trust or if any group of trusts having the same grantors or fiduciaries or interlocking grantors or interlocking fiduciaries thereof own ten percent in value or more of the outstanding stock of the capital company and a business, directly or indirectly; or ten percent or more in value of the capital interest, or the profits interest, of the capital company and a business. A business shall be treated as related to a capital company if the same business owns ten percent in value or more of the outstanding stock, directly or indirectly, of a capital company or ten percent or more of the capital interest, or the profits interest, in a capital company. A business shall be treated as related to a capital company if the capital company owns ten percent or more in value of the outstanding stock, directly or indirectly, of such business or ten percent or more in value of the capital interest, or the profits interest, in the business.

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

§5E-1-14. Conflict of interest.

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

§5E-1-15. Investment reporting and record keeping.
(a) Each qualified West Virginia capital company shall report to the tax commissioner and the authority on a semiannual basis:

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

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

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

(4) All qualified investments the company has made.

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

§5E-1-16. Examination.

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

(b) The authority may examine, under oath, any of the officers, directors, agents, employees or investors of a West Virginia capital company regarding the affairs and business of the company. The authority may issue subpoenas and subpoenas duces tecum and administer oaths. Refusal to obey such a subpoena or subpoena duces tecum may at once be reported to the circuit court of the county in which the company is located or the
persons subpoenaed reside and the circuit court shall enforce obedience to the subpoena or subpoena duces tecum in the manner provided by law for compliance with a subpoena or subpoena duces tecum issued by a circuit court of this state.

§5E-1-17. Decertification.

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

(b) The authority shall give a West Virginia capital company written notice of any inadequacies in its compliance with the provisions of this article, and specify a period of time the company has to redress such inadequacies. Failure within said time period to make corrections will result in further action by the authority pursuant to this section or the regulations issued pursuant to section five of this article.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Frederick P. Pizer
Chairman Senate Committee

Bernard V. Kelly
Chairman House Committee

Originating in the House.

Takes effect July 1, 1990.

James E. Robelles
Clerk of the Senate

Donald E. Kopp
Clerk of the House of Delegates

Paul B. Miller
President of the Senate

J. Sterling Duckworth, Jr.
Speaker of the House of Delegates

The within is disapproved this the 16th day of March, 1990.

George Caperton
Governor
PRESENTED TO THE
GOVERNOR
Date 3/13/90
Time 2:10 PM