WEST VIRGINIA LEGISLATURE
FIRST REGULAR SESSION, 1991

ENROLLED

HOUSE BILL No. 2837

(By Mr. Speaker, Mr. Chambers, and Bunk)
[By Request of the Executive]

Passed March 9, 1991

In Effect 90 Days From Passage
ENROLLED

H. B. 2837

(By Mr. Speaker, Mr. Chambers, and Delegate Burk)
[By Request of the Executive]

[Passed March 9, 1991; in effect ninety days from passage.]

AN ACT to amend and reenact sections two, three, four, five, six, seven, eight, nine, ten, 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; and to further amend said article by adding thereto four new sections, designated sections eighteen, nineteen, twenty and twenty-one, all relating to the West Virginia Capital Company Act; declaration of policy and purposes; definitions; rules; standards; tax credits; recapture provisions; unqualified investments; disclosure requirements; application requirements; qualified investments; liquidation and dissolution; restrictions on investments; conflict of interest; investment reporting and record keeping; examinations; results of failure to comply; ruling procedure; effective date; transition rules; limitation on financial institutions and confidentiality.

Be it enacted by the Legislature of West Virginia:

That sections two, three, four, five, six, seven, eight, nine, ten, 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; and that said article one be further amended by adding thereto four new sections, designated sections...
eighteen, nineteen, twenty and twenty-one, all to read as
follows:

ARTICLE 1. WEST VIRGINIA CAPITAL COMPANY ACT.

§5E-1-2. Declaration of policy.

1 (a) The Legislature finds and declares that the West
2 Virginia economy can be strengthened by promoting
3 private investment in West Virginia businesses.
4
5 (b) The Legislature further finds that:
6
7 (1) Investment of capital in the West Virginia
8 economy can be promoted by making tax credits
9 available to taxpayers investing in West Virginia capital
10 companies;
11
12 (2) Demands on state revenues restrict the financial
13 ability of this state to make unlimited tax credits
14 available for investment purposes and require that this
15 state place reasonable limits on the total amount of tax
16 credits to be made available for investment incentives;
17
18 (3) Establishment of a tax credit program, which
19 gives priority to investments in capital companies in the
20 order in which they are qualified as such, will encourage
21 investment in West Virginia businesses; and
22
23 (4) The promotion of private investment in West
24 Virginia businesses will tend to reduce unemployment
25 by creating new or maintaining existing employment
26 opportunities for the citizens of this state.

§5E-1-3. Purposes.

1 (a) The purpose of this article is to promote the
development of the human resources and the diversifi-
cation of the economy of West Virginia. The investment
capital generated by this article must be used to
encourage and assist the strengthening of the economy
through loans, equity investments, and other business
transactions for purposes of developing new business
and industry in West Virginia, rehabilitating existing
business and industry, and stimulating and assisting in
the expansion of business activities that promote and
maintain the economic stability of this state by provid-
ing maximum opportunities for employment of West
Virginians and improving the standard of living of the
people of this state.

(b) This article is aimed at:

(1) Increasing the availability of development capital
in order to encourage and assist in the creation,
development and expansion of businesses based in West
Virginia;

(2) Developing, preserving, diversifying, expanding
and strengthening the agricultural, industrial and
business base of West Virginia’s economy, particularly
for those businesses utilizing this state’s technical,
managerial and research resources in domestic and
international markets; and

(3) Providing the residents of West Virginia with
greater opportunities to invest and participate in the
economic development and potential of this state.

§5E-1-4. Definitions.

As used in this article, the following terms 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; computer software development companies engaged in the creation of computer software; and wholesale or retail distribution activities within the state. The investment by a West Virginia capital company in purchases of property to be leased by it, as lessor, through a capital lease to a West Virginia business lessee engaged in one of the above enumerated activities is a qualified investment.

(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.

(g) “Capital lease” means a lease meeting one or more of the following criteria:

(1) The lease transfers ownership of the property to the lessee at the end of the lease term by the lessee’s exercise of a purchase option which is de minimis in amount; or

(2) The lease term is equal to seventy-five percent or more of the estimated economic life of the leased property. However, if the beginning of the lease term falls within the last twenty-five percent of the total estimated economic life of the leased property, including earlier years of use, this criterion shall not be used; or

(3) Under generally accepted accounting principles, the lessee cannot treat payments to the capital company as payments under an operating lease; or

(4) For federal income tax purposes, the parties are required to treat payments as amortization of principal and interest.
§5E-1-5. Rules.

The authority shall promulgate rules in accordance with article three, chapter twenty-nine-a of this code, to carry out the policy and purposes of this article, to provide any necessary clarification of the provisions of this article, and to efficiently provide for the general administration 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) An applicant shall establish an escrow account located in West Virginia, into which account funds invested in the applicant shall be deposited and held for the period of time between their receipt by the applicant and the designation of the applicant as a qualified company. Such funds shall not be invested by the applicant until such designation by the authority. In the event the authority does not designate the applicant a qualified company, such funds shall be returned to the investors, if requested by the investors.

(e) A West Virginia capital company may not qualify or be issued a certification under this article unless the company holds a valid business registration certificate issued pursuant to article twelve, chapter eleven of this code. A company exempt from registration under said article twelve may qualify and be certified under this article upon proof of its exemption.
§5E-1-7. Minimum standards of qualified West Virginia capital companies.

The following requirements apply to all qualified companies:

(a) A qualified company shall be a certified West Virginia capital company.

(b) A qualified company shall have a reasonably accessible business office located within the state of West Virginia, which office shall have a listed telephone number and shall be open to the public during normal business hours.

(c) A qualified company shall maintain all of its capital base, except that which has been invested to meet the purposes of this article, in bank accounts and financial institutions which are located in the state of West Virginia, or in such other interest bearing instruments with a maturity of less than one year which are obtained from and managed by a West Virginia corporation.

(d) A qualified company shall have a capital base of at least one million dollars, but not greater than four million dollars, which capital base must be raised after the first day of July, one thousand nine hundred eighty-six. If the amount of the investment in a qualified company in any fiscal year exceeds four million dollars, such amount in excess of four million dollars is not eligible for tax credits under this article.

(e) No more than twenty-five percent of each separate capital base of a qualified company shall be in the form of full recourse, interest bearing demand notes, backed by an irrevocable letter of credit or bond from a reputable source, as determined by the authority.

(f) A qualified company's stated purpose must be to encourage and assist in the creation, development or expansion of West Virginia businesses.

(g) A qualified company, seeking to establish a separate capital base or increase its capital base, shall establish an escrow account located in West Virginia,
into which account funds invested in the qualified company shall be deposited and held for the period of time between their receipt by the qualified company and the designation as qualified of a separate capital base or an increase to capital base. Such funds shall not be invested by the qualified company until such designation by the authority. In the event the authority does not designate as qualified a separate capital base or an increase to capital base, such funds shall be returned to the investors, if requested by the investors.

(h) A qualified company, when soliciting funds for its capital base, must disclose that no tax credit for the investor’s investment will be available until the authority designates as qualified a capital base or an increase to capital base and issues to the qualified company notice of such qualification and a certificate of tax credit.

§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 rule 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) Any investor, including an individual, partnership or corporation who makes a capital investment in a qualified West Virginia capital company is entitled to a tax credit equal to fifty percent of the 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 treated as a Subchapter S corporation may be divided pursuant to election of partners or shareholders.
(d) 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 for the taxable year may be carried to succeeding taxable years until used in full, or until forfeited: Provided, That (i) tax credits may not be carried forward beyond fifteen years, and (ii) tax credits may not be carried back to prior taxable years. Any tax credit remaining after the fifteenth taxable year is forfeited.

(e) 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.

(f) The tax credit allowed under this section may not be used against any liability the taxpayer may have for interest, penalties or additions to tax.

(g) Notwithstanding any provision in this code to the contrary, the tax commissioner shall publish in the state register the name and address of every taxpayer, and the amount, by category, of any credit asserted under this article for any tax year beginning on or after the first day of January, one thousand nine hundred ninety-one. The categories by dollar amount of credit received, shall be as follows:

1. More than $1.00, but not more than $50,000;
2. More than $50,000, but not more than $100,000;
3. More than $100,000, but not more than $250,000;
4. More than $250,000, but not more than $500,000;
5. More than $500,000, but not more than $1,000,000;
6. More than 1,000,000.

§5E-1-9. Recaptures; unqualified investments.

A taxpayer receiving a credit hereunder is not subject
to a recapture provision for any credit claimed by the
taxpayer but the company is subject to the civil penalty
provided for in subsection (e), section twelve of this
article.
§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-1-12. Qualified investments; liquidation or
dissolution.
  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 thirty-five percent of its capital base
  5 within the first year of the date on which the capital
  6 company was designated as qualified by the authority;
  7 (2) At least fifty-five percent of its capital base within
  8 two years of the date on which the capital company was
  9 designated as qualified by the authority; and
  10 (3) At least seventy-five percent of its capital base
  11 within three years of the date on which the capital
  12 company was designated as qualified by the authority.
  13 (b) A qualified West Virginia capital company shall
  14 maintain its qualified investments for a period of at
least five years, except that a qualified West Virginia capital company receiving repayment or return of a qualified investment (exclusive of interest, dividends or other earnings on such investment) shall reinvest the company's repaid or returned cost basis in the investment in a qualified investment which remains outstanding for a period of time at least equal to the remainder of the initial five-year term, such reinvestment to be made within twenty-four months from the date of repayment or return, unless a waiver is obtained from the authority prior to the end of said twenty-four month period: Provided, That such returned amounts may be accumulated for six months before the aforesaid twenty-four month period commences.

(c) A qualified West Virginia capital company may be dissolved or liquidated only after notice and approval of such dissolution or liquidation by the authority. The authority shall provide by rule a procedure for application for approval to dissolve or liquidate a capital company and such approval shall not be unreasonably withheld, the intention of this provision being to ensure compliance with subsection (b) of this section. Unless waived by the authority, no dissolution or liquidation of any qualified West Virginia capital company may be made if such dissolution or liquidation would cause the provisions of subsection (b) of this section to be violated.

(d) The authority shall annually audit 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.

(e) A qualified West Virginia capital company that fails to make or maintain qualified investments pursuant to 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.


(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) No portion of the capital base of a West Virginia capital company may be invested in a business that is the “alter ego” of that West Virginia capital company. Furthermore, after the effective date of this article no investments shall be made by a West Virginia capital company to a business that is an “alter ego” of the West Virginia Capital Company: Provided, That this restriction on investments shall not effect any contracts entered into prior to the effective date of this article. For purposes of this subsection, a business is an “alter ego” of the West Virginia capital company if any one or more of the following criteria are satisfied:

(1) The ownership of the business is substantially related to the ownership of the capital company; or

(2) The board of directors of the business is controlled by the capital company: Provided, That a capital company may control the board of directors of a business if control consists of no more than a simple majority of the board.

(c) No owner, director, officer or employee of a West Virginia capital company may occupy any management position in any business in which that capital company has invested, unless such person is filling that management position in a effort to remedy problems arising from a lack of profitability of the business or from dishonesty of the persons otherwise managing the business.

(d) Each qualified West Virginia capital company may not invest any of its capital base in any of the following businesses:
(1) Banks;
(2) Savings and loans association;
(3) Credit companies;
(4) Financial or investment advisors;
(5) Brokerage or financial firms;
(6) Other capital companies;
(7) Charitable and religious institutions;
(8) Conventional oil and gas exploration;
(9) Insurance companies;
(10) Residential housing or development; or
(11) Any other business which the authority determines to be against the public interest, the purposes of this article or in violation of any law.

The authority, by the promulgation of rules in accordance with section five of this article, may designate, in addition to those listed in this subsection, other businesses in which capital companies may not invest any of their capital base.

§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, at a minimum, 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 is entitled to a tax credit;
(2) The amount of each investor's investment in the capital company;
(3) The amount of the tax credit allowed to the investor and the date on which the qualified investment that generated the tax credit was made;
(4) All qualified investments the company has made;

(5) An affidavit for each business invested in, prepared by any officer or partner of each such respective business which sets forth (A) that it is a business located in or principally based in West Virginia; (B) that more than fifty percent of its assets, operations and employees are located in West Virginia; and (C) a brief description of the activities the business is engaged in; and

(6) An affidavit pertaining to each business invested in, prepared by an officer, partner or trustee of the qualified West Virginia capital company which demonstrates with respect to such business (A) that the business invested in is not a business engaged in an activity prohibited by subsection (d), section thirteen of this article; (B) that more than fifty percent of the assets, operations and employees of the business invested in are located in West Virginia; and (C) that, if a qualified investment, the business invested in is engaged in activities that meet the requirements of a qualified investment as listed in subdivision (d), section four of this article.

(b) The authority, by the promulgation of rules, in accordance with section five of this article, may require that each qualified West Virginia capital company, in its semiannual report to the tax commissioner and the authority, disclose information in addition to the disclosures required by subsection (a) of this section.

(c) 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 claiming 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.

(c) In addition to the audits herein required, the
authority and the tax commissioner may jointly audit
any capital company or number of capital companies in
any year on a random basis, or for cause, or for any
other basis the authority or the tax commissioner may
select. The tax commissioner may also audit any
company or business in which a capital company has
made an investment, or which a capital company
proposes to invest, on a random audit selection basis, or
for cause, or on any other basis the tax commissioner
may select. Nothing herein shall be construed to
prohibit the tax commissioner from conducting any
audit relating to the administration or enforcement of
the tax laws of this state which the tax commissioner
may, in his discretion, determine to be appropriate.

§5E-1-17. Failure to comply.

(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.


(a) The authority may issue an informal ruling as to its position on the application of this article and the rules promulgated thereunder to a stated transaction or event.

(b) Such rulings will only be issued after receipt of a written request and payment of a nonrefundable filing fee.

(c) Such rulings shall not constitute binding precedent, and are issued solely for the guidance of those persons requesting the ruling. Such rulings may be modified prospectively at any time with notice to the recipient of the ruling at said recipient’s last address known to the authority and may be published or released by the authority with facts or characteristics identifying the person or persons requesting the ruling omitted or modified.

(d) Notwithstanding any provision of this section, rulings relating to issues of taxation may be issued only by the state tax commissioner, and may not be issued by the authority.

§5E-1-19. Effective date; transition rules.

(a) The provisions of subsection (d), section eight of this article relating to credit carryback that were in effect on the first day of January, one thousand nine hundred ninety, apply to any credit earned prior to the effective date of the amendments to that subsection, notwithstanding the fact that the taxpayer's taxable year does not end until a date on or after the effective date of the amendments to that subsection. The provi-
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9 sions of subsections (d) and (f), section eight of this
10 article, as amended, prohibiting credit carryback and
11 application of credit against interest, penalties and
12 additions to tax apply to any credit earned on or after
13 the effective date of the amendments to that subsection.
14 (b) The provisions of section twelve of this article
15 relating to minimum investment time limitations that
16 were in effect on the first day of January, one thousand
17 nine hundred ninety, apply to any capital base qualified
18 prior to the effective date of the amendments to that
19 subsection. The provisions of subsection (a), subsection
20 (b), subsection (c), section twelve of this article, as
21 amended, apply to any capital base qualified on a date
22 on or after the effective date of the amendments to that
23 section.
24 (c) The provisions of section twenty of this article
25 relating to financial institutions are applicable to
26 investments by financial institutions made on a date on
27 or after the effective date of that section. Investments
28 made on a date prior to the effective date of that section
29 remain unaffected by the provisions of that section.
30 (d) The provisions of subsections (b) through (d),
31 section thirteen of this article relating to investment
32 restrictions are applicable to investments made on a
33 date on or after the effective date of those subsections.
34 Investments made on dates prior to the effective date of
35 those subsections remain unaffected by the provisions of
36 those subsections.
37 (e) As used in this section "amendments" means
38 changes made in this article during the regular session
39 of the Legislature in the year one thousand nine hundred
40 ninety-one.

§5E-1-20. Limitation on financial institutions.
1 Not more than forty-nine percent of the total capital
2 base of any capital company may be owned by banks,
3 savings and loan associations, savings banks or other
4 financial institutions, or any affiliate thereof, as
5 investors. No officer, employee or director of any such
6 financial institution may serve on the board of any

(a) The authority shall, by the promulgation of rules, determine which records, reports, or information obtained from any person or entity under this article are to be treated by the agency as confidential and not subject to disclosure, except as hereinafter provided in subsection (c) of this section: Provided, That notwithstanding any other provision of law to the contrary, the authority shall make available to the public the name of any business or company receiving a qualified investment from a capital company and the name of the capital company so investing.

(b) Any other records, reports, or information obtained from any person or entity under this article shall be made available to the public, except that upon a showing at the time of submission, satisfactory to the authority, by any person or entity, that records, reports or information, or a particular part thereof, to which the authority or any officer, employee or representative thereof has or will have access under this section, if made public, would divulge information entitled to protection under Section 1905 of Title 18 of the United States Code as said section reads on the twentieth day of December, one thousand nine hundred ninety, such information or particular portion thereof is confidential in accordance with the purposes of this section. In submitting data under this article, a person required to provide such data may designate the data which he or she believes is entitled to protection under this subsection and submit such designated data separately from other data submitted under this article. A designation under this subsection shall be made in writing and in such manner as the authority may prescribe.

(c) Notwithstanding the foregoing provisions of this section, any record, report, document, or information may be disclosed to other officers, employees, or authorized representatives of this state charged with administering the provisions of this article and may be
disclosed pursuant to proceeding under subsection (b), section sixteen of this article. Notwithstanding the previous sentence, and notwithstanding any provision of this article, the provisions of this code regarding confidentiality and the disclosure of tax returns and tax information, including specifically section five-d, article ten, chapter eleven of this code apply to the authority, its agents and employees and to information submitted to the authority under this article.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Thomas Heck  
Chairman Senate Committee

Ernest T. Moore  
Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

William D. Goodwin  
Clerk of the Senate

Donald D. Kopp  
Clerk of the House of Delegates

Robert C. Bonfigli  
President of the Senate

Willard Culver  
Speaker of the House of Delegates

The within is approved this the 15th day of April, 1991.

Winston Caperton  
Governor