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OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

Regular Session, 2001

ENROLLED

Committee Substitute for
SENATE BILL NO. 123

(By Senator Tomblin, Mr. President, and
Sprouse, By Request of the Executive)

PASSED April 14, 2001

In Effect 90 days from Passage

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OFFICE WEST VIRGINIA
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COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 123

(SENATORS TOMBLIN, MR. PRESIDENT, AND SPROUSE,
BY REQUEST OF THE EXECUTIVE)

[Passed April 14, 2001; in effect ninety days from passage.]

AN ACT to amend and reenact sections four, six, seven, eight, ten, twelve, thirteen and twenty, article one, chapter five-e of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to further amend said chapter by adding thereto a new article, designated article two, all relating to the West Virginia economic development authority; defining terms; qualifications and minimum standards of West Virginia capital companies; submission of small business administration capital certificates; authorizing tax credits; application requirements; qualified investments; restrictions on investments; limitations on financial institutions; creating West Virginia venture capital act; defining terms; rule-making authority; and authorizing tax credits.

Be it enacted by the Legislature of West Virginia:

That sections four, six, seven, eight, ten, twelve, thirteen and twenty, 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 chapter be further amended by adding thereto a new article, designated article two, 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 have the
2 meanings ascribed to them in this section, unless the
3 context in which the term is used clearly requires another
4 meaning or a specific different definition is provided:

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

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

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

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

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

17 (d) "Qualified investment" means a debt or equity
18 financing of a West Virginia business, but only if the
19 business is engaged in one or more of the following
20 activities: Manufacturing; agricultural production or
21 processing; forestry production or processing; mineral
22 production or processing, except for conventional oil and
23 gas exploration; service industry; transportation; research
24 and development of products or processes associated with
25 any of the activities previously enumerated above; tour-
26 ism; computer software development companies engaged
27 in the creation of computer software; and wholesale or

28 retail distribution activities within the state. The invest-
29 ment by a West Virginia capital company in purchases of
30 property to be leased by it, as lessor, through a capital
31 lease to a West Virginia business lessee engaged in one of
32 the above enumerated activities is a qualified investment.

33 (e) “Qualified West Virginia capital company” means a
34 West Virginia capital company that has been designated
35 by the authority as a qualified capital company under the
36 provisions of section six of this article.

37 (f) “Small business investment company” means a small
38 business investment company licensed by the United
39 States small business investment administration under the
40 federal small business investment act of 1958, 15 U.S.C. SS
41 661 et seq., as amended.

42 (g) “State” means the state of West Virginia.

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

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

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

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

57 (4) For federal income tax purposes, the parties are
58 required to treat payments as amortization of principal
59 and interest.

§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 shall make written application
5 to the authority on forms provided by the authority. The
6 application shall contain the information required by
7 section ten of this article. Further, the application shall
8 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) An applicant which is not a small business invest-
15 ment company shall establish an escrow account located
16 in West Virginia, into which funds invested in the appli-
17 cant shall be deposited and held for the period of time
18 between their receipt by the applicant and the designation
19 of the applicant as a qualified company. Small business
20 investment company applicants shall submit small busi-
21 ness administration capital certificates totaling the funds
22 to be invested. The funds shall not be invested by the
23 applicant until it is designated by the authority as a
24 qualified company. In the case of companies which are
25 not small business investment companies, where the
26 authority does not designate the applicant a qualified
27 company, the funds shall be returned to the investors, if
28 requested by the investors.

29 (e) A West Virginia capital company may not qualify or
30 be issued a certification under this article unless the
31 company holds a valid business registration certificate
32 issued pursuant to article twelve, chapter eleven of this
33 code. A company exempt from registration under article
34 twelve may qualify and be certified under this article upon
35 proof of its exemption.

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

1 The following requirements apply to all qualified
2 companies:

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

5 (b) A qualified company shall have a reasonably accessi-
6 ble business office located within the state of West Vir-
7 ginia, which office has a listed telephone number and is
8 open to the public during normal business hours.

9 (c) A qualified company which is not a small business
10 investment company shall maintain all of its capital base,
11 except that which has been invested to meet the purposes
12 of this article, in bank accounts and financial institutions
13 which are located in the state of West Virginia or in any
14 other interest bearing instruments with a maturity of less
15 than one year which are obtained from and managed by a
16 West Virginia corporation.

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

25 (e) No more than twenty-five percent of each separate
26 capital base of a qualified company which is not a small
27 business investment company shall be in the form of full
28 recourse, interest bearing demand notes, backed by an
29 irrevocable letter of credit or bond from a reputable
30 source, as determined by the authority.

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

34 (g) A qualified company which is not a small business
35 investment company, seeking to establish a separate
36 capital base or increase its capital base, shall establish an
37 escrow account located in West Virginia, into which funds
38 invested in the qualified company shall be deposited and
39 held for the period of time between their receipt by the
40 qualified company and the designation as qualified of a
41 separate capital base or an increase to capital base. A
42 small business investment company qualified company,
43 seeking to establish a separate capital base or increase its
44 capital base, shall submit small business administration
45 capital certificates totaling the amount of the separate
46 capital base or increased capital base. The funds may not
47 be invested by the qualified company until the designation
48 by the authority. In the case of companies which are not
49 small business investment companies, where the authority
50 does not designate as qualified a separate capital base or
51 an increase to capital base, the funds shall be returned to
52 the investors, if requested by the investors.

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

§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 rule of the authority.

5 (b) (1) The total credits authorized by the authority for
6 all companies may not exceed a total of ten million dollars
7 each fiscal year: *Provided*, That for the fiscal year begin-
8 ning on the first day of July, one thousand nine hundred
9 ninety-nine, the total credits authorized for all companies
10 may not exceed a total of six million dollars: *Provided*,

11 *however*, That for the fiscal year beginning on the first day
12 of July, two thousand, the total credits authorized for all
13 companies may not exceed a total of four million dollars:
14 *Provided further*, That for the fiscal year beginning on the
15 first day of July, two thousand one, the total credits
16 authorized for all companies may not exceed a total of
17 four million dollars: *And provided further*, That the capital
18 base of any qualified company shall be invested in accor-
19 dance with the provisions of this article. The authority
20 shall allocate these credits to qualified companies in the
21 order that the companies are qualified.

22 (2) Not more than two million dollars of the credits
23 allowed under subdivision (1) of this subsection may be
24 allocated by the authority during each fiscal year to one or
25 more small business investment companies described in
26 this subdivision. The remainder of the tax credits allowed
27 during the fiscal year shall be allocated by the authority
28 under the provisions of section four, article two of this
29 chapter. The portion of the tax credits allowed for small
30 business investment companies described in this subdivi-
31 sion shall be allowed only if allocated by the authority
32 during the first thirty days of the fiscal year, and may only
33 be allocated to companies that: (A) Were organized on or
34 after the first day of January, one thousand nine hundred
35 ninety-nine; (B) are licensed by the small business admin-
36 istration as a small business investment company under
37 the small business investment act; and (C) have certified in
38 writing to the authority on the application for credits
39 under this act that the company will diligently seek to
40 obtain and thereafter diligently seek to invest leverage
41 available to the small business investment companies
42 under the small business investment act. These credits
43 shall be allocated by the authority in the order that the
44 companies are qualified. Any credits which have not been
45 allocated to qualified companies meeting the requirements
46 of this subdivision relating to small business investment
47 companies during the first thirty days of the fiscal year
48 shall be made available and allocated by the authority

49 under the provisions of section four, article two of this
50 chapter.

51 (c) Any investor, including an individual, partnership,
52 limited liability company, corporation or other entity who
53 makes a capital investment in a qualified West Virginia
54 capital company, is entitled to a tax credit equal to fifty
55 percent of the investment, except as otherwise provided in
56 this section or in this article. The credit allowed by this
57 article shall be taken after all other credits allowed by
58 chapter eleven of this code. It shall be taken against the
59 same taxes and in the same order as set forth in subsec-
60 tions (c) through (i), inclusive, section five, article thir-
61 teen-c, chapter eleven of this code. The credit for invest-
62 ments by a partnership, limited liability company, a
63 corporation electing to be treated as a subchapter S
64 corporation or any other entity which is treated as a pass
65 through entity under federal and state income tax laws
66 may be divided pursuant to election of the entity's part-
67 ners, members, shareholders or owners.

68 (d) The tax credit allowed under this section is to be
69 credited against the taxpayer's tax liability for the taxable
70 year in which the investment in a qualified West Virginia
71 capital company is made. If the amount of the tax credit
72 exceeds the taxpayer's tax liability for the taxable year,
73 the amount of the credit which exceeds the tax liability for
74 the taxable year may be carried to succeeding taxable
75 years until used in full, or until forfeited: *Provided, That:*
76 (i) Tax credits may not be carried forward beyond fifteen
77 years; and (ii) tax credits may not be carried back to prior
78 taxable years. Any tax credit remaining after the fifteenth
79 taxable year is forfeited.

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

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

87 (g) Notwithstanding any provision in this code to the
88 contrary, the tax commissioner shall publish in the state
89 register the name and address of every taxpayer and the
90 amount, by category, of any credit asserted under this
91 article. The categories by dollar amount of credit received
92 are as follows:

93 (1) More than \$1.00, but not more than \$50,000;

94 (2) More than \$50,000, but not more than \$100,000;

95 (3) More than \$100,000, but not more than \$250,000;

96 (4) More than \$250,000, but not more than \$500,000;

97 (5) More than \$500,000, but not more than \$1,000,000;

98 and

99 (6) More than \$1,000,000.

§5E-1-10. Application requirements.

1 (a) Each company shall make application to the author-
2 ity on forms provided by the authority, which shall set
3 forth:

4 (1) The capitalization level of capital company;

5 (2) The purpose of the company;

6 (3) The names of investors;

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

13 (5) The location of the escrow account, if applicable,
14 which has been established for investors for the period of

15 time between the investment and the qualification of the
16 capital company by the authority;

17 (6) If applicable, evidence that the company is licensed
18 as a small business investment company; and

19 (7) That the capital company will diligently seek to
20 obtain and thereafter diligently seek to invest leverage
21 available to the small business investment companies.

22 (b) An applicant submitting an application pursuant to
23 this section shall continually supplement the application
24 if any material fact contained in the application changes.
25 The authority shall determine if the change constitutes an
26 amendment requiring the consent of the authority pursu-
27 ant to subdivision (c) of this section.

28 (c) An applicant may not amend an application submit-
29 ted pursuant to this section without the written consent of
30 the authority for good cause shown.

§5E-1-12. Qualified investments; liquidation or dissolution.

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

4 (1) At least thirty-five percent of its capital base within
5 the first year of the date on which the capital company
6 which is not a small business investment company was
7 designated as qualified by the authority;

8 (2) At least fifty-five percent of its capital base within
9 two years of the date on which the capital company which
10 is not a small business investment company was desig-
11 nated as qualified by the authority; and

12 (3) At least seventy-five percent of its capital base
13 within three years of the date on which the capital com-
14 pany which is not a small business investment company
15 was designated as qualified by the authority.

16 (b) A qualified West Virginia capital company which is
17 not a small business investment company shall maintain
18 its qualified investments for a period of at least five years,
19 except that a qualified West Virginia capital company
20 receiving repayment or return of a qualified investment
21 (exclusive of interest, dividends or other earnings on the
22 investment) shall reinvest the company's repaid or re-
23 turned cost basis in the investment in a qualified invest-
24 ment which remains outstanding for a period of time at
25 least equal to the remainder of the initial five-year term,
26 the reinvestment to be made within twenty-four months
27 from the date of repayment or return, unless a waiver is
28 obtained from the authority prior to the end of the
29 twenty-four month period: *Provided*, That the returned
30 amounts may be accumulated for six months before the
31 twenty-four month period commences.

32 (c) A qualified West Virginia capital company which is
33 not a small business investment company may be dissolved
34 or liquidated only after notice and approval of the dissolu-
35 tion or liquidation by the authority. The authority shall
36 provide by rule a procedure for application for approval to
37 dissolve or liquidate a capital company and the approval
38 shall not be unreasonably withheld, the intention of this
39 subsection being to ensure compliance with subsection (b)
40 of this section. Unless waived by the authority, no dissolu-
41 tion or liquidation of any qualified West Virginia capital
42 company may be made if the dissolution or liquidation
43 would cause the provisions of subsection (b) of this section
44 to be violated.

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

50 (e) A qualified West Virginia capital company that fails
51 to make or maintain qualified investments pursuant to this
52 section shall pay to the tax commissioner a penalty equal

53 to all of the tax credits allowed to the taxpayers investing
54 in the company with interest at the rate of one and one-
55 half percent per month, compounded monthly, from the
56 date the tax credits were certified as allocated to the
57 qualified West Virginia capital company. The tax commis-
58 sioner shall give notice to the company of any penalties
59 under this section. The tax commissioner may abate the
60 penalty upon written request if the capital company
61 establishes reasonable cause for the failure to make
62 qualified investments. The tax commissioner shall deposit
63 any amounts received under this subsection in the state
64 general revenue fund.

§5E-1-13. Restrictions on investment.

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

4 (b) No portion of the capital base of a West Virginia
5 capital company may be invested in a business that is the
6 “alter ego” of that West Virginia capital company.
7 Furthermore, after the effective date of this article no
8 investments shall be made by a West Virginia capital
9 company to a business that is an “alter ego” of the West
10 Virginia capital company: *Provided*, That this restriction
11 on investments shall not effect any contracts entered into
12 prior to the effective date of this article. For purposes of
13 this subsection, a business is an “alter ego” of the West
14 Virginia capital company if any one or more of the follow-
15 ing criteria are satisfied:

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

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

22 (c) No owner, director, officer or employee of a West
23 Virginia capital company may occupy any management

24 position in any business in which that capital company has
25 invested, unless that person is filling that management
26 position in an effort to remedy problems arising from a
27 lack of profitability of the business or from dishonesty of
28 the persons otherwise managing the business.

29 (d) West Virginia capital companies that are small
30 business investment companies are not governed by the
31 restrictions described in sections (b) and (c) of this section
32 but shall conform the rules and regulations promulgated
33 by the small business administration.

34 (e) Each qualified West Virginia capital company may
35 not invest any of its capital base in any of the following
36 businesses:

37 (1) Banks;

38 (2) Savings and loan associations;

39 (3) Credit companies;

40 (4) Financial or investment advisors;

41 (5) Brokerage or financial firms;

42 (6) Other capital companies;

43 (7) Charitable and religious institutions;

44 (8) Conventional oil and gas exploration;

45 (9) Insurance companies;

46 (10) Residential housing or development; or

47 (11) Any other business which the authority determines
48 to be against the public interest, the purposes of this
49 article or in violation of any law.

50 The authority, by the promulgation of rules in accor-
51 dance with section five of this article, may designate, in
52 addition to those listed in this subsection, other businesses
53 in which capital companies may not invest any of their
54 capital base.

§5E-1-20. Limitation on financial institutions.

1 Not more than forty-nine percent of the total capital
2 base of any capital company which is not a small business
3 investment company may be owned by banks, savings and
4 loan associations, savings banks or other financial institu-
5 tions, or any affiliate thereof, as investors. No officer,
6 employee or director of any such financial institution may
7 vote as a member of the board of any capital company
8 formed under the provisions of this article if the matter
9 being voted upon affects the financial institution for which
10 the board member serves as an officer, employee or
11 director.

ARTICLE 2. WEST VIRGINIA VENTURE CAPITAL ACT.

§5E-2-1. Short title.

1 The article may be cited as the “West Virginia Venture
2 Capital Act”.

§5E-2-2. Definitions.

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

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

8 (b) “State” means the state of West Virginia.

§5E-2-3. Rules.

1 The authority shall propose rules for promulgation in
2 accordance with article three, chapter twenty-nine-a of
3 this code to carry out the policy and purposes of this
4 article, to provide any necessary clarification of the
5 provisions of this article and to efficiently provide for the
6 general administration of this article.

§5E-2-4. Tax credits.

1 (a) The total amount of tax credits which may be
2 allocated by the authority pursuant to this article during
3 any fiscal year is equal to the tax credits authorized by
4 section eight, article one of this chapter but unallocated by
5 the authority to qualified West Virginia capital companies
6 during the first thirty days of the fiscal year.

7 (b) Any investor, including an individual, partnership,
8 limited liability company, corporation or other entity, who
9 makes an investment in a fund authorized by the authority
10 for the investment of capital in the West Virginia economy,
11 which is independently operated by qualified managers
12 and is not directly or indirectly operated or managed by
13 the investors, is entitled to a tax credit equal to no more
14 than fifty percent of the investment in the fund. The
15 percentage and other terms and conditions of the credit
16 shall be established by the authority pursuant to rules
17 promulgated in accordance with section three of this
18 article.

19 (c) The tax credits allowed by this article shall be taken
20 after all other credits allowed by chapter eleven of this
21 code. They shall be taken against the same taxes and in
22 the same order as set forth in subsections (c) through (i),
23 inclusive, section five, article thirteen-c, chapter eleven of
24 this code. The credit for investments by a partnership, a
25 limited liability company, a corporation electing to be
26 treated as a subchapter S corporation or any other entity
27 which is treated as a pass through entity under federal and
28 state income tax laws may be divided pursuant to election
29 of the partners, members, shareholders or owners.

30 (d) The tax credit allowed under this section is to be
31 credited against the taxpayer's tax liability for the taxable
32 year in which the investment is made. If the amount of the
33 tax credit exceeds the taxpayer's tax liability for the
34 taxable year, the amount of the credit which exceeds the
35 tax liability for the taxable year may be carried to suc-

36 ceeding taxable years until used in full, or until forfeited:
37 *Provided*, That: (i) Tax credits may not be carried forward
38 beyond fifteen years; and (ii) tax credits may not be
39 carried back to prior taxable years. Any tax credit
40 remaining after the fifteenth taxable year is forfeited.

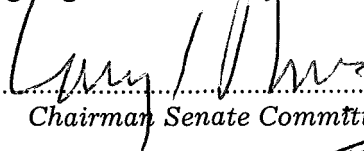
41 (e) The tax credit provided for in this section is available
42 only to those taxpayers whose investment occurs after the
43 first day of July, two thousand one.

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

47 (g) Notwithstanding any provision in this code to the
48 contrary, the tax commissioner shall publish in the state
49 register the name and address of every taxpayer and the
50 amount, by category, of any credit asserted under this
51 article. The categories by dollar amount of credit received
52 are as follows:

- 53 (1) More than \$1.00, but no more than \$50,000;
54 (2) More than \$50,000, but no more than \$100,000;
55 (3) More than \$100,000, but no more than \$250,000;
56 (4) More than \$250,000, but no more than \$500,000;
57 (5) More than \$500,000, but no more than \$1,000,000;
58 and
59 (6) More than \$1,000,000.

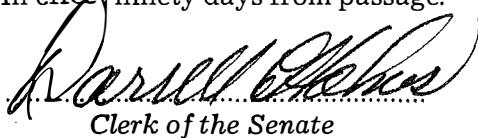
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.



.....
Chairman Senate Committee


.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

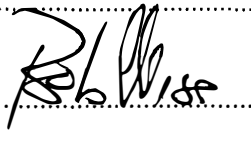

.....
Clerk of the Senate


.....
Clerk of the House of Delegates


.....
President of the Senate


.....
Speaker House of Delegates

The within is approved this the 30th
Day of April....., 2001.


.....
Governor

PRESENTED TO THE

GOVERNOR

Date 4/27/01

Time 4:15 pm