WEST VIRGINIA LEGISLATURE
Regular Session, 2001

ENROLLED
Committee Substitute for
SENATE BILL NO. 123

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

PASSED April 14, 2001

In Effect 90 days from Passage
ENROLLED
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.

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.


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

(h) "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-1-6. 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 shall make written application to the authority on forms provided by the authority. The application shall contain the information required by section ten of this article. Further, the application shall 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 which is not a small business investment company shall establish an escrow account located in West Virginia, into which 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. Small business investment company applicants shall submit small business administration capital certificates totaling the funds to be invested. The funds shall not be invested by the applicant until it is designated by the authority as a qualified company. In the case of companies which are not small business investment companies, where the authority does not designate the applicant a qualified company, the 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 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 has a listed telephone number and is open to the public during normal business hours.

(c) A qualified company which is not a small business investment 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 any 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 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, the 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 which is not a small business investment 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 shall be to encourage and assist in the creation, development or expansion of West Virginia businesses.
(g) A qualified company which is not a small business investment company, seeking to establish a separate capital base or increase its capital base, shall establish an escrow account located in West Virginia, into which 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. A small business investment company qualified company, seeking to establish a separate capital base or increase its capital base, shall submit small business administration capital certificates totaling the amount of the separate capital base or increased capital base. The funds may not be invested by the qualified company until the designation by the authority. In the case of companies which are not small business investment companies, where the authority does not designate as qualified a separate capital base or an increase to capital base, the funds shall be returned to the investors, if requested by the investors.

(h) A qualified company, when soliciting funds for its capital base, shall 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) (1) The total credits authorized by the authority for all companies may not exceed a total of ten million dollars each fiscal year: Provided, That for the fiscal year beginning on the first day of July, one thousand nine hundred ninety-nine, the total credits authorized for all companies may not exceed a total of six million dollars: Provided,
However, that for the fiscal year beginning on the first day of July, two thousand, the total credits authorized for all companies may not exceed a total of four million dollars: Provided further, that for the fiscal year beginning on the first day of July, two thousand one, the total credits authorized for all companies may not exceed a total of four million dollars: And provided further, that the capital base of any qualified company shall be invested in accordance with the provisions of this article. The authority shall allocate these credits to qualified companies in the order that the companies are qualified.

(2) Not more than two million dollars of the credits allowed under subdivision (1) of this subsection may be allocated by the authority during each fiscal year to one or more small business investment companies described in this subdivision. The remainder of the tax credits allowed during the fiscal year shall be allocated by the authority under the provisions of section four, article two of this chapter. The portion of the tax credits allowed for small business investment companies described in this subdivision shall be allowed only if allocated by the authority during the first thirty days of the fiscal year, and may only be allocated to companies that: (A) Were organized on or after the first day of January, one thousand nine hundred ninety-nine; (B) are licensed by the small business administration as a small business investment company under the small business investment act; and (C) have certified in writing to the authority on the application for credits under this act that the company will diligently seek to obtain and thereafter diligently seek to invest leverage available to the small business investment companies under the small business investment act. These credits shall be allocated by the authority in the order that the companies are qualified. Any credits which have not been allocated to qualified companies meeting the requirements of this subdivision relating to small business investment companies during the first thirty days of the fiscal year shall be made available and allocated by the authority
under the provisions of section four, article two of this chapter.

(c) Any investor, including an individual, partnership, limited liability company, corporation or other entity 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, except as otherwise provided in this section or in this article. 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), inclusive, section five, article thirteen-c, chapter eleven of this code. The credit for investments by a partnership, limited liability company, a corporation electing to be treated as a subchapter S corporation or any other entity which is treated as a pass through entity under federal and state income tax laws may be divided pursuant to election of the entity's partners, members, shareholders or owners.

(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. The categories by dollar amount of credit received are 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-1-10. Application requirements.

(a) Each company shall make application to the authority on forms provided by the authority, which shall set forth:

(1) The capitalization level of capital company;

(2) The purpose of the company;

(3) The names of investors;

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

(5) The location of the escrow account, if applicable, which has been established for investors for the period of
time between the investment and the qualification of the capital company by the authority;

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

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

(b) An applicant submitting an application pursuant to this section shall continually supplement the application if any material fact contained in the application changes. The authority shall determine if the change constitutes an amendment requiring the consent of the authority pursuant to subdivision (c) of this section.

(c) An applicant may not amend an application submitted pursuant to this section without the written consent of the authority for good cause shown.

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

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

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

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

(3) At least seventy-five percent of its capital base within three years of the date on which the capital company which is not a small business investment company was designated as qualified by the authority.
(b) A qualified West Virginia capital company which is not a small business investment company shall 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 the 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, the 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 the twenty-four month period: Provided, That the returned amounts may be accumulated for six months before the twenty-four month period commences.

(c) A qualified West Virginia capital company which is not a small business investment company may be dissolved or liquidated only after notice and approval of the 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 the approval shall not be unreasonably withheld, the intention of this subsection 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 the 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 the 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 the 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 the 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 revenue 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 affect 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 that person is filling that management
position in an effort to remedy problems arising from a
lack of profitability of the business or from dishonesty of
the persons otherwise managing the business.

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

(e) 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 loan associations;
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 acord-
dance 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-1-20. Limitation on financial institutions.

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

ARTICLE 2. WEST VIRGINIA VENTURE CAPITAL ACT.

§5E-2-1. Short title.

1 The article may be cited as the "West Virginia Venture Capital Act".

§5E-2-2. Definitions.

1 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) "State" means the state of West Virginia.


1 The authority shall propose rules for promulgation 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-2-4. Tax credits.

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

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

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

(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 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 suc-
ceeding 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 occurs after the first day of July, two thousand one.

(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. The categories by dollar amount of credit received are as follows:

(1) More than $1.00, but no more than $50,000;
(2) More than $50,000, but no more than $100,000;
(3) More than $100,000, but no more than $250,000;
(4) More than $250,000, but no more than $500,000;
(5) More than $500,000, but no more than $1,000,000; and
(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