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SECRETARY OF STATE

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FOR

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FOR

**Senate Bill No. 204**

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

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[Passed March 13, 2004; to take effect July 1, 2004.]

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AN ACT to amend and reenact §11-13R-6, §11-13R-11 and §11-13R-12 of the code of West Virginia, 1931, as amended, all relating to the strategic research and development tax credit; providing that the credit may be refundable for small qualified research and development companies; specifying limitations on credit; requiring certain reporting and providing an effective date.

*Be it enacted by the Legislature of West Virginia:*

That §11-13R-6, §11-13R-11 and §11-13R-12 of the code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

**ARTICLE 13R. STRATEGIC RESEARCH AND DEVELOPMENT TAX CREDIT.**

**§11-13R-6. Application of credit.**

1 (a) *Credit allowed.* – Beginning in the year that the  
2 annual combined qualified research and development  
3 expenditure is paid or incurred, eligible taxpayers and  
4 owners of eligible taxpayers described in subsections (d)  
5 and (f) of this section are allowed a credit against the taxes  
6 imposed by articles twenty-three, twenty-four and twenty-  
7 one of this chapter, in that order, as specified in this  
8 section.

9 (b) *Business franchise tax.* – The credit is first applied to  
10 reduce the taxes imposed by article twenty-three of this  
11 chapter for the taxable year, determined after application  
12 of the credits against tax provided in section seventeen of  
13 said article, but before application of any other allowable  
14 credits against tax.

15 (c) *Corporation net income taxes.* – After application of  
16 subsection (b) of this section, any unused credit is next  
17 applied to reduce the taxes imposed by article twenty-four  
18 of this chapter for the taxable year, determined before  
19 application of allowable credits against tax.

20 (d) If the eligible taxpayer is a limited liability company,  
21 small business corporation or a partnership, then any  
22 unused credit after application of subsections (b) and (c) of  
23 this section is allowed as a credit against the taxes im-  
24 posed by article twenty-four of this chapter on owners of  
25 the eligible taxpayer on the conduit income directly  
26 derived from the eligible taxpayer by its owners. Only  
27 those portions of the tax imposed by article twenty-four of  
28 this chapter that are imposed on income directly derived  
29 by the owner from the eligible taxpayer are subject to  
30 offset by this credit.

31 (1) Small business corporations, limited liability compa-  
32 nies, partnerships and other unincorporated organizations  
33 shall allocate the credit allowed by this article among their

34 members in the same manner as profits and losses are  
35 allocated for the taxable year.

36 (2) No credit is allowed under this article against any  
37 withholding tax imposed by, or payable under, article  
38 twenty-one of this chapter.

39 (e) *Personal income tax taxes.* – After application of  
40 subsections (b), (c) and (d) of this section, any unused  
41 credit is next applied to reduce the taxes imposed by  
42 article twenty-one of this chapter for the taxable year  
43 determined before application of allowable credits against  
44 tax of the eligible taxpayer.

45 (f) If the eligible taxpayer is a limited liability company,  
46 small business corporation or a partnership, then any  
47 unused credit after application of subsections (b), (c), (d)  
48 and (e) of this section is allowed as a credit against the  
49 taxes imposed by article twenty-one of this chapter on  
50 owners of the eligible taxpayer on the conduit income  
51 directly derived from the eligible taxpayer by its owners.  
52 Only those portions of the tax imposed by article twenty-  
53 one of this chapter that are imposed on income directly  
54 derived by the owner from the eligible taxpayer are  
55 subject to offset by this credit.

56 (1) Small business corporations, limited liability compa-  
57 nies, partnerships and other unincorporated organizations  
58 shall allocate the credit allowed by this article among their  
59 members in the same manner as profits and losses are  
60 allocated for the taxable year.

61 (2) No credit is allowed under this article against any  
62 withholding tax imposed by, or payable under, article  
63 twenty-one of this chapter.

64 (g) The total amount of tax credit that may be used in  
65 any taxable year by any eligible taxpayer in combination  
66 with the owners of the eligible taxpayer under subsections  
67 (d) and (f) of this section, and including any refundable

68 credit claimed under subsection (i) of this section, may not  
69 exceed two million dollars.

70 (h) *Unused credit carry forward.* – Except to the extent  
71 excess credit is refunded as provided in subsection (i) of  
72 this section, if the credit allowed under this article in any  
73 taxable year exceeds the sum of the taxes enumerated in  
74 subsections (b), (c), (d), (e) and (f) of this section for that  
75 taxable year, the eligible taxpayer and owners of eligible  
76 taxpayers described in subsections (d) and (f) of this  
77 section may apply the excess as a credit against those  
78 taxes, in the order and manner stated in this section, for  
79 succeeding taxable years until the earlier of the following:

80 (1) The full amount of the excess credit is used; or

81 (2) The expiration of the tenth taxable year after the  
82 taxable year in which the annual combined qualified  
83 research and development expenditure was paid or  
84 incurred. Credit remaining thereafter is forfeited.

85 (i) *Refundable credit for “small qualified research and*  
86 *development company”.* – If the eligible taxpayer,  
87 including the controlled group, if a member of a controlled  
88 group, has gross revenues of not more than twenty million  
89 dollars and a payroll of not more than two million five  
90 hundred thousand dollars, and the credit allowed under  
91 this article in any taxable year exceeds the sum of taxes  
92 enumerated in subsections (b), (c), (d), (e), and (f) of this  
93 section for that taxable year, the eligible taxpayer and  
94 owners of the eligible taxpayers described in subsections  
95 (d) and (f) of this section may claim for that year the excess  
96 amount as a refundable credit, not to exceed one hundred  
97 thousand dollars per taxpayer, including owners and the  
98 controlled group, if applicable: *Provided*, That not more  
99 than one million dollars of the unused credits described in  
100 this subsection may be approved for refundable credit by  
101 the tax commissioner during any fiscal year. Priority for  
102 approval of refundable credit is determined based on the

103 filing date of the claim for refund with earlier claims  
104 having priority over later claims.

105 (j) *Application for certification.* – No credit is allowed or  
106 may be applied under this article until the person seeking  
107 to claim the credit has filed a written application for  
108 certification of the proposed research and development  
109 program or project with the tax commissioner and has  
110 received certification of the research and development  
111 program or project from the tax commissioner pursuant to  
112 that written application. The certification of the program  
113 or project must be received by the eligible taxpayer from  
114 the tax commissioner prior to any credit being claimed or  
115 allowed for any annual combined qualified research and  
116 development expenditure for any research activity or  
117 project. This application shall be filed, in the form  
118 prescribed by the tax commissioner, no later than the last  
119 day for filing the tax returns, determined by including any  
120 authorized extension of time for filing the return, required  
121 under article twenty-one or twenty-four of this chapter for  
122 the taxable year in which the property to which the credit  
123 relates is placed in service or use, or the qualified research  
124 and development expenses to which the credit relates are  
125 incurred by the taxpayer, and all information required by  
126 the form shall be provided by the taxpayer.

127 (1) In the case of owners of eligible taxpayers described  
128 in subsection (d) or (f) of this section, the application for  
129 certification filed under this section by the limited liability  
130 company, small business corporation or partnership owned  
131 by the person is considered to be filed on behalf of the  
132 owner and no separate filing of the application is required  
133 of the owner.

134 (2) *Form of application.* – The application for certifica-  
135 tion must be filed in the form as the tax commissioner  
136 prescribes and shall contain the information as the tax  
137 commissioner requires to determine whether the project  
138 should be certified as eligible for credit under this article.

139 (3) *Time period covered by certification.* – The applica-  
140 tion may request certification of the research and develop-  
141 ment program for one taxable year or multiple taxable  
142 years, as applicable, based on the nature and character of  
143 the program or project plan for the particular research and  
144 development project or activity.

145 (4) *Requirements for application.* – The application shall  
146 specifically set forth a written research and development  
147 program plan generally describing the nature of the  
148 research and development to be undertaken, the number  
149 and types of jobs, if any, created by the applicant as a  
150 direct result of the research and development program and  
151 the average wages and benefits paid to those employees,  
152 the projected time period over which the research and  
153 development shall be carried out, the period of time for  
154 which the applicant seeks certification of the program or  
155 project and other information as the tax commissioner  
156 requires.

157 (5) *Certification.* – The tax commissioner may issue  
158 certification of a research and development program or  
159 project if it appears to the tax commissioner that the  
160 applicant intends to engage in a bona fide research and  
161 development activity, as described in this article, and will  
162 otherwise comply with the requirements of this article and  
163 all rules and requirements applicable thereto.

164 (6) *Time period covered by certification.* – The tax  
165 commissioner may issue certification for the period of time  
166 for which the eligible taxpayer seeks certification or a  
167 different period of time, within the discretion of the tax  
168 commissioner. In his or her discretion, the tax commis-  
169 sioner may require that a separate application be filed for  
170 each tax year in which qualified research and development  
171 activity is to be undertaken or in which qualified research  
172 and development property is to be placed in service or use.

173 (7) *Failure to file.* – The failure to timely file the applica-  
174 tion for certification of a research and development

175 program or project under this section results in forfeiture  
176 of one hundred percent of the annual credit otherwise  
177 allowable under this article. This penalty applies annually  
178 until the application is filed.

179 (8) *Research and development undertaken without*  
180 *certification.* – If a person has filed an application for  
181 certification of a research and development program or  
182 project and has failed to receive certification of the plan or  
183 program from the tax commissioner, no credit is allowed  
184 under this article for the research and development  
185 activity or investment relating thereto.

186 (9) *Failure to comply with terms of certification.* – If a  
187 person has filed an application for certification of a  
188 research and development program or project and has  
189 received certification of the plan or program from the tax  
190 commissioner, but fails to conform to the terms of the  
191 certification, no credit is allowed under this article for the  
192 research and development activity or for investment in the  
193 research and development activity by the eligible tax-  
194 payer. This restriction may be waived by the tax commis-  
195 sioner upon a finding that the research and development  
196 undertaken was within the requirements of this article and  
197 that there was no intent to defraud the state or willful  
198 neglect in the applicant's failure to conform to the terms  
199 of the certification.

200 (10) *Failure to comply with certification time restric-*  
201 *tions.* – If a person has filed an application for certifica-  
202 tion of a research and development program or project and  
203 has received certification of the plan or program from the  
204 tax commissioner, but fails to conform to the time periods  
205 specified therein for the certified research and develop-  
206 ment program or project, or fails to renew the certification  
207 so as to cover ongoing or subsequent research and develop-  
208 ment activity, the research and development activity is out  
209 of compliance with the terms of the certification and no  
210 credit is allowed under this article for, or relating to, the  
211 research and development activity by any person or

212 taxpayer. This restriction may be waived by the tax  
213 commissioner upon a finding that the research and devel-  
214 opment thus undertaken was within the requirements of  
215 this article and that there was no intent to defraud the  
216 state or willful neglect in the applicant's failure to con-  
217 form to the terms of the certification.

**§11-13R-11. Tax credit review and accountability.**

1 (a) Beginning on the first day of February, two thousand  
2 six, and on the first day of February every third year  
3 thereafter, the commissioner shall submit to the governor,  
4 the president of the Senate and the speaker of the House  
5 of Delegates a tax credit review and accountability report  
6 evaluating the cost effectiveness of the credit allowed  
7 under this article during the most recent three-year period  
8 for which information is available. The criteria to be  
9 evaluated includes, but is not limited to, for each year of  
10 the three-year period:

11 (1) The numbers of taxpayers claiming the credit;

12 (2) The net number, type and duration of new jobs  
13 created by all taxpayers claiming the credit and wages and  
14 benefits paid;

15 (3) The cost of the credit;

16 (4) The cost of the credit per new job created;

17 (5) Comparison of employment trends for the industry  
18 and for taxpayers within the industry that claim the  
19 credit; and

20 (6) The amount of excess credit refunded to small  
21 qualified research and development companies pursuant  
22 to subsection (i), section six of this article.

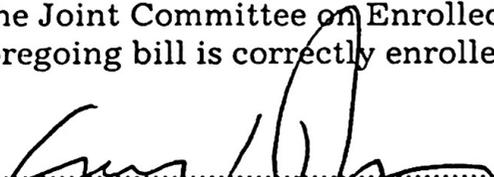
23 (b) Taxpayers claiming the credit shall provide informa-  
24 tion as the tax commissioner requires to prepare the  
25 report: *Provided*, That the information shall be subject to

26 the confidentiality and disclosure provisions of sections  
27 five-d and five-s, article ten of this chapter.

**§11-13R-12. Effective date.**

1 The provisions of this article become effective on the  
2 first day of January, two thousand three, and apply only to  
3 qualified investment made on or after that date, except  
4 that the amendments to this article enacted in two thou-  
5 sand four shall become effective for taxable years begin-  
6 ning on or after the first day of July, two thousand four,  
7 and apply only to unused credit attributable to qualified  
8 investment made on or after that date and prior to the first  
9 day of January, two thousand eight.

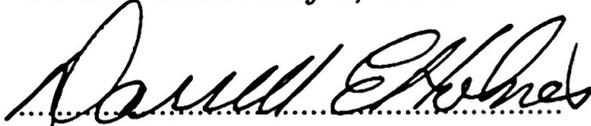
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

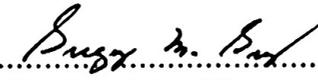
  
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Chairman Senate Committee

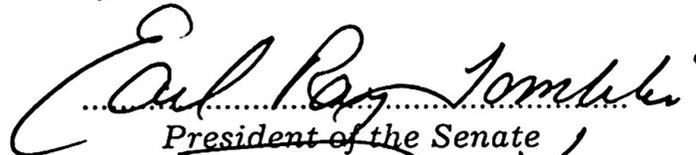
  
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Chairman House Committee

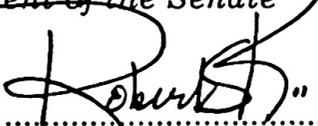
Originated in the Senate.

To take effect July 1, 2004.

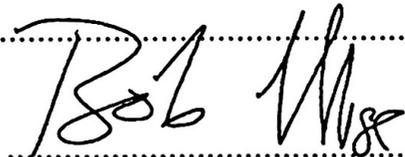
  
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Clerk of the Senate

  
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Clerk of the House of Delegates

  
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President of the Senate

  
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Speaker House of Delegates

The within is approved this the 1st  
Day of April, 2004.

  
.....  
Governor

PRESENTED TO THE  
GOVERNOR  
DATE 3.31.04  
TIME 10.45 AM