

SB 513

FILED

2004 APR -5 P 3:55

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE  
*REGULAR SESSION, 2004*

**ENROLLED**

*COMMITTEE SUBSTITUTE FOR*  
SENATE BILL NO. 513

(By Senator McCABE, ET AL )

PASSED MARCH 13, 2004

In Effect 90 DAYS FROM Passage

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FOR

**Senate Bill No. 513**

(SENATORS MCCABE, MINARD AND UNGER, *original sponsors*)

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[Passed March 13, 2004; in effect ninety days from passage.]

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AN ACT to amend and reenact §12-7-4, §12-7-6, §12-7-8a and §12-7-11 of the code of West Virginia, 1931, as amended, all relating to the jobs investment trust board; expanding board powers; providing for sale or transfer of nonincentive tax credits; and providing that certain documents be available for public inspection.

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

That §12-7-4, §12-7-6, §12-7-8a and §12-7-11 of the code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

**ARTICLE 7. JOBS INVESTMENT TRUST FUND.**

**§12-7-4. Jobs investment trust board; composition; appointment, term of private members; chairman; quorum.**

1 (a) The jobs investment trust board is continued. The  
2 board is a public body corporate and established to  
3 improve and otherwise promote economic development in  
4 this state.

5 (b) The board consists of thirteen members, five of whom  
6 serve by virtue of their respective positions. These five are  
7 the president of West Virginia university or his or her  
8 designee; the president of Marshall university or his or her  
9 designee; the chancellor of the higher education policy  
10 commission or his or her designee; the executive director  
11 of the West Virginia housing development fund; and the  
12 executive director of the West Virginia development office.  
13 One member shall be appointed by the governor from a list  
14 of two names submitted by the board of directors of the  
15 housing development fund. One member shall be ap-  
16 pointed by the governor from a list of two names submit-  
17 ted by the commissioner of the division of tourism. The  
18 other six members shall be appointed from the general  
19 public by the governor. Of the members of the general  
20 public appointed by the governor, one shall be an attorney  
21 with experience in finance and investment matters, one  
22 shall be a certified public accountant, one shall be a  
23 representative of labor, one shall be experienced or  
24 involved in innovative business development and two shall  
25 be present or past executive officers of companies listed on  
26 a major stock exchange or large privately held companies:  
27 *Provided*, That all appointments made pursuant to the  
28 provisions of this article shall be by and with the advice  
29 and consent of the Senate.

30 (c) A vacancy on the board shall be filled by appointment  
31 by the governor for the unexpired term in the same  
32 manner as the original appointment. Any person ap-  
33 pointed to fill a vacancy serves only for the unexpired  
34 term.

35 (d) The governor may remove any appointed member in  
36 case of incompetency, neglect of duty, moral turpitude or  
37 malfeasance in office and the governor may declare the

38 office vacant and fill the vacancy as provided in other  
39 cases of vacancy.

40 (e) The chairman of the board shall be elected by the  
41 board from among the members of the board.

42 (f) Seven members of the board is a quorum. No action  
43 may be taken by the board except upon the affirmative  
44 vote of at least a majority of those members present or  
45 participating by any other means as described in subsec-  
46 tion (g) of this section, but in no event fewer than six of the  
47 members serving on the board.

48 (g) Members of the board may participate in a meeting  
49 of the board by means of conference telephone or similar  
50 communication equipment by means of which all persons  
51 participating in the meeting can hear each other and  
52 participation in a board meeting pursuant to this subsec-  
53 tion constitutes presence in person at the meeting.

54 (h) The members of the board, including the chairman,  
55 may receive no compensation for their services as members  
56 of the board, but are entitled to their reasonable and  
57 necessary expenses actually incurred in discharging their  
58 duties under this article.

59 (i) The board shall meet on a quarterly basis or more  
60 often if necessary.

61 (j) The governor shall appoint a member for a four-year  
62 term. Any member whose term has expired serves until his  
63 or her successor has been duly appointed and qualified.  
64 Any member is eligible for reappointment.

65 (k) Additionally, one member of the West Virginia House  
66 of Delegates, to be appointed by the speaker of the House  
67 of Delegates, and one member of the West Virginia Senate,  
68 to be appointed by the president of the Senate, shall serve  
69 as advisory members of the jobs investment trust board  
70 and, as advisory members, shall be ex officio, nonvoting  
71 members.

**§12-7-6. Corporate powers.**

1 The board may:

2 (1)(i) Make loans to eligible businesses with or without  
3 interest secured if and as required by the board; and (ii)  
4 acquire ownership interests in eligible businesses. These  
5 investments may be made in eligible businesses that  
6 stimulate economic growth and provide or retain jobs in  
7 this state and shall be made only upon the determination  
8 by the board that the investments are prudent and meet  
9 the criteria established by the board;

10 (2) Accept appropriations, gifts, grants, bequests and  
11 devises and to use or dispose of them to carry out its  
12 corporate purposes;

13 (3) Make and execute contracts, releases, compromises,  
14 agreements and other instruments necessary or convenient  
15 for the exercise of its powers or to carry out its corporate  
16 purposes;

17 (4) Collect reasonable fees and charges in connection  
18 with making and servicing loans, notes, bonds, obligations,  
19 commitments and other evidences of indebtedness, in  
20 connection with making equity investments and in connec-  
21 tion with providing technical, consultative and project  
22 assistance services;

23 (5) Sue and be sued;

24 (6) Make, amend and repeal bylaws and rules consistent  
25 with the provisions of this article;

26 (7) Hire its own employees, whom shall be employees of  
27 the state of West Virginia for purposes of articles ten and  
28 sixteen, chapter five of this code, and to appoint officers  
29 and consultants and to fix their compensation and pre-  
30 scribe their duties;

31 (8) Acquire, hold and dispose of real and personal  
32 property for its corporate purposes;

33 (9) Enter into agreements or other transactions with any  
34 federal or state agency, college or university, any person  
35 and any domestic or foreign partnership, corporation,  
36 association or organization;

37 (10) Acquire real and personal property, or an interest in  
38 real or personal property, in its own name, by purchase or  
39 foreclosure when acquisition is necessary or appropriate  
40 to protect any loan in which the board has an interest; to  
41 sell, transfer and convey any real or personal property to  
42 a buyer; and, in the event a sale, transfer or conveyance  
43 cannot be effected with reasonable promptness or at a  
44 reasonable price, to lease real or personal property to a  
45 tenant;

46 (11) Purchase, sell, own, hold, negotiate, transfer or  
47 assign: (i) Any mortgage, instrument, note, credit, debenture,  
48 guarantee, bond or other negotiable instrument or  
49 obligation securing a loan, or any part of a loan; (ii) any  
50 security or other instrument evidencing ownership or  
51 indebtedness; or (iii) equity or other ownership interest.  
52 An offering of one of these instruments shall include the  
53 representation and qualification that the board is a public  
54 body corporate managing a venture capital fund that  
55 includes high-risk investments and, that in any transfer,  
56 sale or assignment of any interest, the transferee, purchaser  
57 or assignee accepts any risk without recourse to the  
58 jobs investment trust or to the state;

59 (12) Procure insurance against losses to its property in  
60 amounts, and from insurers, as is prudent;

61 (13) Consent, when prudent, to the modification of the  
62 rate of interest, time of maturity, time of payment of  
63 installments of principal or interest or any other terms of  
64 the investment, loan, contract or agreement in which the  
65 board is a party;

66 (14) Establish training and educational programs to  
67 further the purposes of this article;

68 (15) File its own travel rules;

69 (16) Borrow money to carry out its corporate purpose in  
70 principal amounts and upon terms as are necessary to  
71 provide sufficient funds for achieving its corporate  
72 purpose;

73 (17) Take options in or warrants for, subscribe to,  
74 acquire, purchase, own, hold, transfer, sell, vote, employ,  
75 mortgage, pledge, assign, pool or syndicate: (i) Any loans,  
76 notes, mortgages or securities; (ii) debt instruments,  
77 ownership certificates or other instruments evidencing  
78 loans or equity; or (iii) securities or other ownership  
79 interests of or in domestic or foreign corporations, associa-  
80 tions, partnerships, limited partnerships, limited liability  
81 partnerships, limited liability companies, joint ventures or  
82 other private enterprise to foster economic growth, jobs  
83 preservation and creation in the state of West Virginia and  
84 all other acts that carry out the board's purpose;

85 (18) Contract with either Marshall university or West  
86 Virginia university, or both, for the purpose of retaining  
87 the services of, and paying the reasonable cost of, services  
88 performed by the institution for the board in order to  
89 effectuate the purposes of this article;

90 (19) Enter into collaborative arrangements or contracts  
91 with private venture capital companies when considered  
92 advisable by the board;

93 (20) Provide equity financing for any eligible business  
94 that will stimulate economic growth and provide or retain  
95 jobs in this state and to hold, transfer, sell, assign, pool or  
96 syndicate, or participate in the syndication of, any loans,  
97 notes, mortgages, securities, debt instruments or other  
98 instruments evidencing loans or equity interest in further-  
99 ance of the board's corporate purposes;

100 (21) Form partnerships, create subsidiaries or take all  
101 other actions necessary to qualify as a small business

102 investment company under the United States Small  
103 Business Investment Act, PL 85-699, as amended;

104 (22) Provide for staff payroll and make purchases in the  
105 same manner as the housing development fund;

106 (23) Indemnify its members, directors, officers, employ-  
107 ees and agents relative to actions and proceedings to which  
108 they have been made parties and make advances for  
109 expenses relative thereto and purchase and maintain  
110 liability insurance on behalf of those persons all to the  
111 same extent as authorized for West Virginia business  
112 corporations under present or future laws of the state  
113 applicable to business corporations generally; and

114 (24) Contract for the provision of legal services by  
115 private counsel and, notwithstanding the provisions of  
116 article three, chapter five of this code, counsel may, but is  
117 not limited to, represent the board in court, negotiate  
118 contracts and other agreements on behalf of the board,  
119 render advice to the board on any matter relating thereto,  
120 prepare contracts and other agreements and provide any  
121 other legal services requested by the board.

**§12-7-8a. New millennium fund; new millennium fund promis-  
sory notes; nonincentive tax credits; rulemaking.**

1 (a) The new millennium fund is continued to permit the  
2 board to better fulfill its mission to mobilize financing and  
3 capital for emerging, expanding and restructuring busi-  
4 nesses in the state. New millennium fund moneys are to  
5 consist of all appropriations for use by the jobs investment  
6 trust board made by the Legislature subsequent to the  
7 thirty-first day of December, one thousand nine hundred  
8 ninety-nine, and funds borrowed from private or institu-  
9 tional lenders by the board through the issuance of  
10 promissory notes. Fund moneys may be held in a separate  
11 account or accounts by or at the West Virginia housing  
12 development fund for the board until the board disburses  
13 any portion of the funds. Fund moneys that are not set

14 aside or otherwise designated for paying interest on the  
15 promissory notes may be used by the board in accordance  
16 with and to effectuate the purposes of this article. The  
17 board may impose reasonable fees and charges associated  
18 with its investment of funds from the new millennium  
19 fund in eligible businesses to be paid in any combination  
20 of money, warrants or equity interests.

21 (b) Without limiting the powers otherwise enumerated  
22 in this article, the board may: (1) Sell and transfer portions  
23 of the nonincentive tax credits created, issued and trans-  
24 ferred to the board pursuant to the provisions of this  
25 section to contracting taxpayers and/or their assigns in  
26 return for the payments described in subsection (f) of this  
27 section; (2) issue or provide promissory notes on loans  
28 made to the board having terms of up to ten years on a  
29 zero-coupon basis or otherwise; (3) enter into put options  
30 or similar commitment contracts with taxpayers that  
31 would be for terms of up to ten years committing, at the  
32 board's option, to sell and transfer to the contracting  
33 taxpayers or their assigns at the end of the term and as  
34 soon after the term as is reasonable under the circum-  
35 stances portions of the nonincentive tax credits created,  
36 issued and transferred to the board pursuant to this  
37 section; (4) grant, transfer and assign the benefits of the  
38 put options or similar commitment contracts as collateral  
39 to secure the board's obligations pursuant to its promis-  
40 sory notes; (5) satisfy the board's payment obligations  
41 under its promissory notes from assets of the board, other  
42 than the benefits of the put options or similar commitment  
43 contracts, then to effect a corresponding cancellation of  
44 the board's related nonincentive tax credit commitment;  
45 and (6) satisfy the board's payment obligations under its  
46 promissory notes from the benefits of the put options or  
47 similar commitment contracts, then to effect a correspond-  
48 ing sale and transfer of nonincentive tax credits. The  
49 terms and conditions of the promissory notes, put options  
50 or similar commitment contracts shall be consistent with

51 the purposes of this section, and approved by board  
52 resolution, and may be different for separate transactions.

53 (c) Without limiting the powers otherwise enumerated in  
54 this article and with regard to the new millennium fund,  
55 the board has and may exercise all powers necessary to  
56 further the purposes of this section, including, but not  
57 limited to, the power to commit, sell and transfer  
58 nonincentive tax credits up to the total amount of thirty  
59 million dollars.

60 (d) The board may issue its promissory notes pursuant to  
61 this section in amounts totaling no more than six million  
62 dollars in each of the fiscal years ending in two thousand  
63 one, two thousand two, two thousand three, two thousand  
64 four and two thousand five and may issue its nonincentive  
65 tax credit commitments in amounts totaling no more than  
66 six million dollars in each of the fiscal years ending in two  
67 thousand one, two thousand two, two thousand three, two  
68 thousand four and two thousand five. The board may  
69 agree to sell and transfer, at its option, nonincentive tax  
70 credits to taxpayers ten years after the date of its commit-  
71 ments and as soon thereafter as it is reasonable under the  
72 circumstances.

73 (e) Prior to committing to the sale and transfer of any  
74 nonincentive tax credits, the board shall first determine  
75 that:

76 (1) The new millennium fund moneys to be received in  
77 relationship to the commitment shall be used for the  
78 development, promotion and expansion of the economy of  
79 the state; and

80 (2) The existence and pledge of a put option or similar  
81 commitment contract that is supported by the  
82 nonincentive tax credits that are committed by the board  
83 is a material inducement to the private or institutional  
84 lender transferring moneys to the board to be placed in the  
85 new millennium fund.

86 (f) The board may sell and transfer nonincentive tax  
87 credits only in conjunction with the satisfaction of its  
88 obligations under its promissory notes issued pursuant to  
89 this section. Each original sale and transfer of  
90 nonincentive tax credits by the board shall be consum-  
91 mated upon payment to the board, or for its benefits, of an  
92 amount equal to the dollar amount of the nonincentive tax  
93 credits sold and transferred. The nonincentive tax credits  
94 sold and transferred by the board pursuant to this section  
95 shall be claimed as a credit on the tax returns for the year  
96 or years in which the nonincentive tax credits are sold and  
97 transferred by the board. The amount of the nonincentive  
98 tax credit that exceeds the taxpayer's tax liability for the  
99 taxable year in the year of the purchase may be carried to  
100 succeeding taxable years until used in full up to two years  
101 after the year of purchase and may not be carried back to  
102 prior taxable years. Any nonincentive tax credit sold and  
103 transferred by the board that remains outstanding after  
104 the third taxable year subsequent to and including the  
105 year of the transfer is forfeited.

106 (g) Nonincentive tax credits are created, issued and  
107 transferred by the state to the board in a total amount of  
108 thirty million dollars to be used by taxpayers, including  
109 persons, firms, corporations and all other business entities,  
110 to reduce the tax liabilities imposed upon them pursuant  
111 to articles twelve-a, thirteen, thirteen-a, thirteen-b,  
112 twenty-one, twenty-three and twenty-four, chapter eleven  
113 of this code. The total amount of nonincentive tax credits  
114 that are created, issued and transferred to the board is  
115 thirty million dollars. The nonincentive tax credits are  
116 freely transferable to subsequent transferees. The board  
117 shall immediately notify the president of the Senate, the  
118 speaker of the House of Delegates and the governor in  
119 writing if and when any nonincentive tax credits are sold  
120 and transferred by the board.

121 (h) In conjunction with the department of tax and  
122 revenue, the board shall develop a system for: (i) Register-

123 ing nonincentive tax credits, commitments for the sale and  
 124 transfer of nonincentive tax credits, the assignments of the  
 125 commitments and the assignments of the nonincentive tax  
 126 credits; and (ii) certifying nonincentive tax credits so that  
 127 when nonincentive tax credits are claimed on a tax return,  
 128 they may be verified as validly issued by the board,  
 129 properly taken in the year of claim and in accordance with  
 130 the requirements of this section.

131 (i) The board may promulgate, repeal, amend and change  
 132 rules consistent with the provisions of this article to carry  
 133 out the purposes of this section. These rules are not  
 134 subject to the provisions of chapter twenty-nine-a of this  
 135 code, but shall be filed with the secretary of state.

**§12-7-11. Documentary materials concerning trade secrets;  
 commercial, financial or personal information;  
 confidentiality.**

1 Any documentary material or data made or received by  
 2 the board for the purpose of furnishing assistance, to the  
 3 extent that the material or data consists of trade secrets,  
 4 commercial, financial or personal information regarding  
 5 the financial position or activities of such business or  
 6 person, shall not be considered public records and shall be  
 7 exempt from disclosure pursuant to the provisions of  
 8 chapter twenty-nine-b of this code. Any discussion or  
 9 consideration of the trade secrets, commercial, financial or  
 10 personal information may be held by the board in execu-  
 11 tive session closed to the public, notwithstanding the  
 12 provisions of article nine-a, chapter six of this code:  
 13 *Provided*, That the board shall make public the following  
 14 information regarding executed investments: (1) The  
 15 names and addresses of the principals of the business and  
 16 its board of directors; (2) the location or locations of the  
 17 projects; (3) the amount of the investment or financial  
 18 assistance provided by the board; (4) the purpose of the  
 19 investment or financial assistance; (5) the maturity,  
 20 interest rate and other pertinent terms of the investment;  
 21 (6) the fixed assets which serve as security for the invest-

22 ment; and (7) the names and addresses of all persons  
23 holding twenty-five percent or more of the equity of the  
24 entity receiving investment assistance: *Provided, however,*  
25 That the board shall keep available in its offices for  
26 inspection by any citizen of this state the annual report  
27 prepared pursuant to the requirements of section twelve of  
28 this article and the annual audit report prepared pursuant  
29 to the requirements of sections nine and fourteen of this  
30 article.

13) [Enr. Com. Sub. for S. B. No. 513

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

*[Signature]*  
.....  
Chairman Senate Committee

*Greg Butcher*  
.....  
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

*Darrin Clarke*  
.....  
Clerk of the Senate

*Bryan M. Boy*  
.....  
Clerk of the House of Delegates

*Carl Ray Tomblin*  
.....  
President of the Senate

*Robert G....*  
.....  
Speaker House of Delegates

The within is approved this the 5<sup>th</sup>  
Day of April, 2004.  
*Bob Wise*  
.....  
Governor

PRESENTED TO THE

GOVERNOR

DATE 3.31.01

TIME 10.45 AM