Senate Bill No. 419

(By Senators Browning, Plymale and Kirkendoll)

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[Introduced January 25, 2012; referred to the Committee on Economic Development; and then to the Committee on Finance.]

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A BILL to amend and reenact §11-13U-2, §11-13U-3, §11-13U-4, §11-13U-5, §11-13U-8, §11-13U-9 and §11-13U-10 of the Code of West Virginia, 1931, as amended, all relating to revising the high-growth business investment tax credit; permitting eligible start-up, early-stage or growth-oriented taxpayers to take the credit; lowering certain gross receipt and payroll requirements; increasing the amount of credit available; requiring the Economic Development Authority to assist in preparing legislative reports; requiring new rules to be promulgated; redefining terms; and changing effective dates.

Be it enacted by the Legislature of West Virginia:

That §11-13U-2, §11-13U-3, §11-13U-4, §11-13U-5, §11-13U-8, §11-13U-9 and §11-13U-10 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

ARTICLE 13U. HIGH-GROWTH BUSINESS INVESTMENT TAX CREDIT.

§11-13U-2. Legislative finding and purpose.

The Legislature finds the encouragement of investment in potentially high-growth ~~research and development~~ businesses in this state is in the public interest and promotes economic growth and development for the people of this state. In order to encourage investment in start-up, early stage growth-oriented, research and development businesses in this state and thereby increase employment and economic development, there is hereby provided a high-growth business investment tax credit.

§11-13U-3. 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:

(1) "Alter ego" means a qualified start-up, early stage, growth oriented or research and development company where one or more of the following criteria are satisfied in relation to the eligible taxpayer:

(A) The ownership of the business is "substantially related" to the ownership of the eligible taxpayer. "Substantially related" means a five percent or more common ownership interest; or

(B) The board of directors of the qualified research and development company is controlled by the eligible taxpayer*: Provided,* That an eligible taxpayer is deemed to have control of the board of directors of a qualified research and development company if it controls a simple majority of the board of directors.

(2) "Corporate headquarters" means the place at which the corporation has its commercial domicile and from which the business of the corporation is primarily conducted.

(3) "Eligible taxpayer" means a person that has received certification from the economic development authority that a portion of the annual available high growth business investment credit has been allocated to it, that is subject to the tax imposed by either article twenty-three, article twenty-four or article twenty-one of this chapter, and that has made a qualified investment in a qualified start-up, early stage, growth oriented or research and development credit company.

(4) "Person" includes any natural person, corporation, limited liability company, or partnership.

(5) "Qualified investment" means an equity financing of a West Virginia qualified ~~strategic~~ start-up, early stage, growth oriented or research and development company. The investment must be in cash or cash equivalents and may not be an exchange of in-kind property.

(6) "Qualified start-up, early stage, growth oriented or research and development company" for purposes of the high growth business investment tax credit means an entity that has been certified by the ~~State Tax Commissioner~~ economic development

authority as eligible for the ~~West Virginia research and development tax credit set forth in article thirteen-r, chapter eleven of this code~~ tax credit authorized in this article, that has annual gross receipts of less than ~~twenty million dollars~~ $5 million and has annual payroll of less ~~then two million five hundred thousand dollars~~ than $1.5 million.

(7) "Tax credit" means the high-growth business development tax credit authorized by this article.

(8) "Taxable year" means the tax year of the eligible taxpayer.

§11-13U-4. High-growth business investment tax credit.

(a) *Credit allowed.* -- There shall be allowed to each eligible taxpayer in a qualified start-up, early stage, growth oriented or research and development company that maintains its corporate headquarters or other significant operations in West Virginia a tax credit for the taxable year in which the investment was made. The total tax credit that may be used by an eligible taxpayer shall be equal to fifty percent of the total value of the qualified investment in the taxable year the qualified investment was actually made.

(b) No more than ~~one million dollars~~ $3 million of the tax credits allowed under subsection (a) of this section shall be allocated by the Economic Development Authority during any fiscal year. The Economic Development Authority shall allocate the tax credits in the order the applications therefor are received.

(c) *Business franchise tax.* -- The tax credit is first applied to reduce the taxes imposed upon the eligible taxpayer by article twenty-three of this chapter for the taxable year (determined after application of the credits against tax provided in section seventeen of said article, but before application of any other allowable credits against tax).

(d) *Corporation net income taxes.* -- After application of subsection (c) of this section, any unused tax credit is next applied to reduce the taxes imposed upon the eligible taxpayer by article twenty-four of this chapter for the taxable year (determined before application of allowable credits against tax).

(e) If the eligible taxpayer is a limited liability company, an electing small business corporation (as defined in Section 1361 of the United States Internal Revenue Code of 1986, as amended), or a partnership, any unused tax credit remaining after application of subsections (c) and (d) of this section is allowed as a tax credit against the taxes imposed by article twenty-four of this chapter on owners of the eligible taxpayer.

(1) Electing small business corporations (as defined above in subsection (e)), limited liability companies, and partnerships shall allocate the tax credit allowed by this article among their members in the same manner as profits and losses are allocated for the taxable year.

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

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

(g) If the eligible taxpayer is a limited liability company, an electing small business corporation (as defined in subsection (e) of this section) or a partnership, any unused tax credit remaining after application of subsections (c), (d), (e) and (f) of this section is allowed as a tax credit against the taxes imposed by article twenty-one of this chapter on owners of the eligible taxpayer.

(1) Electing small business corporations (as defined in subsection (e) of this section), limited liability companies, and partnerships shall allocate the tax credit allowed by this article among their members in the same manner as profits and losses are allocated for the taxable year.

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

(h) The total amount of tax credit that may be used in any taxable year by any eligible taxpayer in combination with the owners of the eligible taxpayer under subsections (e) and (g) of this section may not exceed $50,000. The total amount of qualified investment that a qualified start-up, early stage, growth oriented or research and development company may accept from all eligible taxpayers in any taxable year is $1 million.

(i) *Unused credit carry forward.* -- If the tax credit allowed under this article in any taxable year exceeds the sum of the taxes enumerated in subsections (c), (d), (e), (f) and (g) of this section for that taxable year, the eligible taxpayer and owners of eligible taxpayers described in subsections (e) and (g) of this section may apply the excess as a tax credit against those taxes, in the order and manner stated in this section, for succeeding taxable years until the earlier of the following:

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

(2) The expiration of the ~~fourth~~ fifth taxable year after the taxable year in which the investment was made. The tax credit remaining thereafter is forfeited.

(j) No tax credit is allowed or may be applied under this article until the taxpayer seeking to claim the tax credit has:

(1) Filed with the Economic Development Authority a written application for the tax credit and any other information required by the Economic Development Authority to determine the eligibility of the applicant for the tax credit;

~~(2) Filed with the economic development authority the research and development program or project certification issued pursuant to section six, article thirteen-r of this chapter for the qualified research and development company that will benefit from the investment;~~

~~(3)~~ (2) Filed with the Economic Development Authority the certificate of incorporation for the qualified start-up, early stage, growth oriented or research and development company that will benefit from the investment; and

~~(4)~~ (3) Received from the economic development authority certification of the amount of tax credit to be allocated to the eligible taxpayer.

§11-13U-5. Restrictions on investment.

(a) No qualified investment may be made in a qualified start-up, early stage, growth oriented or research and development company that is the alter ego of the eligible taxpayer.

(b) The eligible taxpayer shall maintain its qualified investment for a minimum period of five years or until the company is sold: *Provided,* That an eligible taxpayer receiving repayment or return of a qualified investment (exclusive of interest, dividends or other earnings on the investment) shall within three calendar months from the date of repayment or return reinvest the repaid or returned amount of the initial investment in another qualified start-up, early stage, growth oriented or research and development company for a period of time at least equal to the remainder of the initial five-year term.

§11-13U-8. Tax credit review and accountability.

(a) Beginning on February 1, ~~2006~~ 2013, and on February 1 every third year thereafter, the Tax Commissioner in conjunction with the Economic Development Authority shall submit to the Governor, the President of the Senate and the Speaker of the House of Delegates a tax credit review and accountability report evaluating the cost effectiveness of the tax credit allowed under this article during the most recent three-year period for which information is available: *Provided,* That the requirement to file the credit review and accountability report terminates June 30, 2011, unless the termination of entitlement to the tax credit as stated in section ten of this article terminates. The criteria to be evaluated includes, but is not limited to, for each year of the three-year period:

(1) The numbers of eligible taxpayers claiming the tax credit;

(2) The net number, type, and duration of new jobs created by all qualified research and development companies in which taxpayers claiming the credit made investment in and the wages and benefits paid by such companies;

(3) The cost of the tax credit;

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

(5) Comparison of employment trends for the industry and for

taxpayers within the industry that claim the tax credit.

(b) Eligible taxpayers claiming the tax credit shall provide any information required by the Tax Commissioner or Economic Development Authority for the purpose of preparing the report: *Provided,* That such information shall be subject to the confidentiality and disclosure provisions of sections five-d and five-s, article ten of this chapter.

§11-13U-9. Rules.

The State Tax Department and the Economic Development Authority ~~may~~ shall promulgate new legislative rules in accordance with article three, chapter twenty-nine-a of this code to carry out the policy and purposes of this article, to determine the eligibility requirements for qualifying for a tax credit under this article to provide any necessary clarification of the provisions of this article and to efficiently provide for the general administration of this article.

§11-13U-10. Effective date; expiration of credit.

The provisions of this article become effective on July 1, ~~2005~~ 2012, and apply only to qualified investment made on or after that date: *Provided,* That no entitlement to the tax credit shall result from any qualified investment made after June 30, ~~2008~~ 2017: *Provided, however,* That unless sooner terminated by law, the high growth business investment tax credit act will terminate on July 1, ~~2008~~ 2017 unless reauthorized by the Legislature prior to the

<ins>termination date.</ins> Taxpayers who have gained entitlement to the tax credit pursuant to qualified investment prior to the earlier of July 1, ~~2008~~ <ins>2017,</ins> or termination of the tax credit prior to that date shall retain that entitlement and apply the credit in due course pursuant to the requirements and limitations of this article.

NOTE: The purpose of this bill is to revise the high-growth business investment tax credit. The bill permits eligible start up, early stage or growth oriented taxpayers to take the credit. The bill lowers certain gross receipt and payroll requirements. The bill also increases the amount of credit available. Further, the bill requires the economic development authority to assist in preparing legislative reports. The bill requiring new rules to be promulgated. Additionally, the bill redefines terms and changes effective dates.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.