

PUBLIC CHAPTER NO. 1142

SENATE BILL NO. 3049

By Overbey, Kelsey, Kyle, Henry, Marrero, Ford, Tate, Ketron, Faulk, Burks, Harper

Substituted for: House Bill No. 2927

By Sargent, McCormick; Mr. Speaker Williams; Cooper, Favors, Brown, Stewart, Lollar, Moore, Pruitt, McManus, Camper, Maddox, Sontany, Richardson, Eldridge, Jim Cobb, Montgomery, Barker, McDonald, Fitzhugh, Pitts, Towns, Naifeh, Swafford, Kevin Brooks, Harrison, Yokley, Shepard, Ulysses Jones, Todd, Armstrong, Ford, Roach, Faulkner, Hackworth, Ramsey, Hardaway, Gilmore, Marsh, White, Haynes, Dean, Shaw, Matheny, Phillip Johnson, Harry Brooks, Fincher, Ty Cobb, Watson

AN ACT to amend Tennessee Code Annotated, Title 4, Chapter 28 and Title 56, relative to the Tennessee Small Business Investment Company Credit Act.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 4-28-102(4), is amended by inserting the following language at the end of the subdivision:

provided, however, that a contract for payment of cash or cash equivalents over a specified period of time shall also be sufficient;

SECTION 2. Tennessee Code Annotated, Section 4-28-102(10)(A)(iv), is amended by inserting the following language at the end of the subdivision:

provided, however, that if the TNInvestco continues to fulfill its fiduciary duty to the program established by this chapter, then the business can be one in which the TNInvestco, its affiliates, or a separate fund managed by the managers of the TNInvestco was invested prior to the allocation of investment tax credits to the TNInvestco; and provided, further, that if the TNInvestco continues to fulfill its fiduciary duty to the program established by this chapter, then the business can be one in which a separate fund managed by the managers of the TNInvestco makes an investment after the investment by the TNInvestco;

SECTION 3. Tennessee Code Annotated, Section 4-28-102(10), is amended by redesignating current subdivision (B) as subdivision (C) and by inserting the following language as a new subdivision (B):

(B)(i) The requirements of subdivision (10)(A)(i) may, in the alternative, be met if the qualified TNInvestco represents in its application for funding approval that the business will, in the definitive purchase agreements to be executed upon closing, agree to:

(a) Commence locating its headquarters, its principal business operations, and at least sixty percent (60%) of its employees in Tennessee; and

(b) Complete all of the required elements of subdivision (10)(A)(i) within twelve (12) months after closing.

(ii) If the business fails to fulfill the commitments specified in subdivision (10)(B)(i), then the Commissioner of Economic and Community Development may, in the commissioner's sole discretion, impose on the TNInvestco the following penalty. Notwithstanding subdivision (9) of this section to the contrary, under the penalty authorized by this subdivision (10)(B)(ii), the profit share percentage, as otherwise defined in subdivision (9) of this section, shall be amended such that the fee paid to the state by the qualified TNInvestco in connection with the business shall equal eighty percent (80%), rather than fifty percent (50%), of any distributions arising from the TNInvestco's investment in the business, other than qualified distributions or distributions or repayments of capital contributions by the TNInvestco's equity owners who are not participating investors;

SECTION 4. Tennessee Code Annotated, Section 4-28-102(11), is amended by deleting the language prior to subdivision (A) in its entirety and by substituting instead the following:

(11) "Qualified distribution" means any distribution or payment by a qualified TNInvestco in connection with the following:

SECTION 5. Tennessee Code Annotated, Section 4-28-102(12), is amended by deleting the subdivision in its entirety and by substituting instead the following:

(12) "Qualified investment" means the investment of cash by a qualified TNInvestco in a qualified business for the purchase of equity, equity options, warrants, or debt convertible to equity. An investment by a qualified TNInvestco in a debt instrument whose terms are substantially equivalent to terms typically found in debt financing provided by banks to profitable companies, such as security interests in tangible assets with readily discernable orderly liquidation value in excess of the loan amount and/or personal guarantees, shall not be deemed as a qualified investment. Qualified investments determined to be seed or early-stage investments shall be increased by three hundred percent (300%) for purposes of determining if a qualified TNInvestco meets the investment thresholds in § 4-28-106;

SECTION 6. Tennessee Code Annotated, Section 4-28-103(b), is amended by deleting the subsection in its entirety and by substituting instead the following language:

(b) No participating investor's investment tax credit for any taxable year shall exceed the participating investor's state premium tax liability for such year. If the amount of the investment tax credit determined under this section for any taxable year exceeds the state premium tax liability, then the excess shall be an investment tax credit carryover to future taxable years until tax year 2037.

Investment tax credits may be used in connection with both final payments and prepayments of a participating investor's state premium tax liability. Investment tax credits may be sold or otherwise transferred by a participating investor to another entity, which can likewise resell or transfer the tax credits, provided that the Department of Revenue receives written notification within thirty (30) days of any sale or transfer.

SECTION 7. Tennessee Code Annotated, Section 4-28-104, is amended by adding the following language as a new subsection (f):

(f)(1) Any information received, created, or promulgated by the Department of Economic and Community Development or the Department of Revenue pursuant to this section on or after July 9, 2009, shall constitute a public record, as defined in § 10-7-503, and shall be open for personal inspection by any citizen of this state.

(2) Any information received, created, or promulgated by the Department of Economic and Community Development or the Department of Revenue pursuant to this section shall not:

(A) Constitute "tax information" or "tax administration information", as defined in § 67-1-1701, and shall not be subject to the provisions of Title 67, Chapter 1, Part 17; or

(B) Be subject to the provisions of § 4-3-730.

SECTION 8. Tennessee Code Annotated, Section 4-28-105(d), is amended by deleting the last sentence of the subsection in its entirety.

SECTION 9. Tennessee Code Annotated, Section 4-28-105, is amended by adding the following language as a new subsection (f):

(f) Notwithstanding subsection (d) of this section, the Commissioner of Revenue and the Commissioner of Economic and Community Development are authorized to allocate additional investment tax credits in the total amount of eighty million dollars (\$80,000,000) such that the aggregate amount of investment tax credits to be allocated under this chapter shall not exceed two hundred million dollars (\$200,000,000). Such additional investment tax credits shall consist of four (4) twenty million dollar (\$20,000,000) allocations, which shall be awarded, respectively, to the four (4) TNInvestcos, chosen as finalists by the Commissioner of Revenue and the Commissioner of Economic and Community Development during the selection process set out in subsections (a) through (e) of this section, that did not receive an allocation of investment tax credits under subsection (d). Final allocation of such tax credits to such TNInvestcos shall occur after the TNInvestcos have obtained irrevocable investment commitments from participating investors and TNInvestco owners in an aggregate amount equal to at least the base investment amount. The tax credits awarded pursuant to this section shall be syndicated in a manner approved by the state treasurer and the Commissioner of Economic and Community Development. Any contract to sell tax credits, entered on or after the

effective date of this act, in a manner that has not been approved by the state treasurer and the Commissioner of Economic and Community Development shall be voidable in the sole discretion of the state treasurer.

SECTION 10. Tennessee Code Annotated, Section 4-28-106(a)(1), is amended by deleting the subdivision in its entirety and by substituting instead the following language:

(1)(A) To maintain its certification, a qualified TNInvestco shall make qualified investments, as follows:

(i) Within two (2) years after the allocation date, a qualified TNInvestco shall have invested an amount equal to at least fifty percent (50%) of its base investment amount in qualified investments;

(ii) Within three (3) years after the allocation date, a qualified TNInvestco shall have invested an amount equal to at least seventy percent (70%) of its base investment amount in qualified investments;

(iii) Within four (4) years after the allocation date, a qualified TNInvestco shall have invested an amount equal to at least eighty percent (80%) of its base investment amount in qualified investments; and

(iv) Within six (6) years or any year thereafter the allocation date, a qualified TNInvestco shall have invested an amount equal to at least ninety percent (90%) of its base investment amount in qualified investments.

(B) Not more than twenty-five percent (25%) of the investment amounts required by subdivisions (a)(1)(A)(i) through (iv) of this section shall be attributable to the three hundred percent (300%) seed or early-stage multiplier.

SECTION 11. Tennessee Code Annotated, Section 4-28-106(c), is amended by deleting the subsection in its entirety and by substituting instead the following:

(c) All designated capital not invested in qualified investments by a qualified TNInvestco shall be held in an escrow account maintained by the state and administered through the Department of Economic and Community Development.

SECTION 12. Tennessee Code Annotated, Section 4-28-106, is amended by adding the following language as new subsections (e) and (f):

(e) Any amounts that have not been invested by the TNInvestco at the end of the investment period shall be forfeited and paid to the state to support the Tennessee rural opportunity fund.

(f) No qualified TNInvestco shall sell any interest in a qualified business to an affiliate unless the TNInvestco has first obtained written authorization for the sale from the Department of Economic and Community Development.

SECTION 13. Tennessee Code Annotated, Section 4-28-110, is amended by adding the following language as a new subsection (d):

(d)(1) For the purposes of this subsection, "key person" means:

(A) The TNInvestco investment managers listed in Part II, Item 6, of such TNInvestco's application under § 4-28-105; or

(B) A list of investment managers as has been previously approved by the Department of Economic and Community Development under subdivision (2) of this subsection or otherwise.

(2) A TNInvestco's success shall be deemed to depend, in particular, on the TNInvestco's key person or persons. On or before July 1, 2010, each qualified TNInvestco shall provide to the Department of Economic and Community Development a description of the TNInvestco's procedure for choosing a successor should any key person die, become legally incapacitated, or cease to be involved in the management of the TNInvestco for more than ninety (90) consecutive days. In the event that a majority of key persons do die, become legally incapacitated, or cease to be involved in the management of the TNInvestco for more than ninety (90) consecutive days for any reason, the Commissioner of Economic and Community Development, in consultation with the Commissioner of Revenue, the Tennessee Technology Development Corporation, or any other appropriate professional advisors, shall determine whether a new individual or individuals will be able to assume the role of key person so that the TNInvestco's performance will remain unimpaired. If the Commissioner of Economic and Community Development determines, in the commissioner's sole discretion, that the key person cannot be adequately replaced and the TNInvestco's performance therefore will be impaired, then any funds not already invested by the TNInvestco shall be deposited into the general fund unless the Department of Finance and Administration has certified, pursuant to § 4-28-109, that the total amount of payments deposited in the general fund under this chapter equals or exceeds the total amount of revenue forgone pursuant to the credits used as provided in § 4-28-103. If the Department of Finance and Administration has made such a determination, then any funds not already invested by the TNInvestco shall be deposited into the Tennessee rural opportunity fund to further support the state's economic development efforts.

SECTION 14. Tennessee Code Annotated, Title 4, Chapter 28, is amended by adding the following language as a new section:

§ 4-28-113.

(a) Within ninety (90) days after the Department of Economic and Community Development provides notice to a TNInvestco, the Commissioner of Economic and Community Development and the Commissioner of Revenue, working with the TNInvestco, shall cause to be created an investment strategy "scorecard" for the TNInvestco. Said "scorecard" shall contain not more than six (6) objective metrics or measures that will be used to reflect the investment strategy approved by the state, which strategy may, in the sole discretion of the Commissioner of Economic and Community Development, be modified from time to time upon written request of the TNInvestco to the Commissioner of Economic and Community Development.

(b) The Commissioner of Economic and Community Development, in consultation with the Commissioner of Revenue or any other appropriate professional advisors, shall conduct an annual review of each qualified TNInvestco, at the conclusion of each fiscal year, to determine whether the investment strategy used by the TNInvestco is in substantial compliance with the TNInvestco's scorecard.

(c)(1) If the Commissioner of Economic and Community Development reasonably determines that the investment strategy actually used by the TNInvestco is not in substantial compliance with the scorecard, then the Commissioner of Economic and Community Development shall provide the qualified TNInvestco a summary of findings including the areas of noncompliance. Within sixty (60) days of receiving the commissioner's findings, the TNInvestco shall provide to the Commissioner of Economic and Community Development a written statement that shall describe in detail the TNInvestco's plan for curing all areas of noncompliance before the next annual review. Said plan may include a request for modification of the strategy with corresponding changes in the scorecard which, if approved, shall become the scorecard against which future compliance will be measured.

(2) If the Commissioner of Economic and Community Development reasonably determines, at the next annual review conducted pursuant to this section, that the TNInvestco has failed to cure such areas of noncompliance, a penalty in the amount of two-hundred fifty thousand dollars (\$250,000) shall be imposed, and an additional penalty of two-hundred fifty thousand dollars (\$250,000) shall be imposed for each year in which such noncompliance remains uncured.

(3) The proceeds from any penalty imposed pursuant to subdivision (2) of this subsection shall be deposited into the Tennessee rural opportunity fund to further the state's economic development efforts. Such penalty shall not be paid out of monies generated by the sale of investment tax credits under this chapter or any gain thereon.

SECTION 15. Tennessee Code Annotated, Section 4-28-102(11)(E), is amended by deleting the language "Payments to participating investors" and by substituting instead the language "Payments to the TNInvestco's equity owners who are not participating investors".

SECTION 16. Tennessee Code Annotated, Section 4-28-110, is amended by adding the following as a new, appropriately designated subsection:

() To promote openness and transparency, a copy of each annual report received by the Department of Economic and Community Development pursuant to this section shall be posted on the Tennessee TNInvestco Web site that is maintained by the Department of Economic and Community Development.

SECTION 17. Tennessee Code Annotated, Section 4-28-111, is amended by adding the following as a new subsection:

(c) The Department of Economic and Community Development shall provide the comptroller of the treasury and the state treasurer, upon request, a copy of any written findings made in connection with the annual review required under subsection (a) and a copy of the summary of findings provided to the qualified TNInvestco pursuant to subsection (b).

SECTION 18. Tennessee Code Annotated, Section 4-28-112, is amended by deleting the following language:

The Department of Economic and Community Development must make an annual report to the governor and the chairs and ranking minority members of the committees having jurisdiction over taxes and economic development.

and by substituting instead the following language:

The Department of Economic and Community Development shall make an annual report to the governor, the comptroller of the treasury, the state treasurer, and the chairs and ranking minority members of the committees having jurisdiction over taxes and economic development.

SECTION 19. Tennessee Code Annotated, Section 4-28-112, is amended by designating the current language as subsection (a) and by adding the following as a new subsection (b):

(b) To promote openness and transparency, a copy of each annual report made by the Department of Economic and Community Development pursuant to this section shall be posted on the Tennessee TNInvestco Web site that is maintained by the Department of Economic and Community Development.

SECTION 20. Tennessee Code Annotated, Section 4-28-113, is amended by adding the following as a new subsection:

(d) The Department of Economic and Community Development shall provide the comptroller of the treasury, upon request, a copy of any written

findings made in connection with the annual review required under subsection (b).

SECTION 21. Tennessee Code Annotated, Title 4, Chapter 28, is amended by adding the following as a new, appropriately designated section:

4-28-____.

(a) Any qualified TNInvestco that has received an allocation of investment tax credits pursuant to this chapter shall be required to maintain a Web site that provides information to the general public about the biographical and professional background of each member of the executive management team of the TNInvestco and of each member of the board or other governing body of the TNInvestco. The qualified TNInvestco shall also provide information to the general public on its Web site concerning the availability of capital pursuant to the program established by this chapter.

(b) The Department of Economic and Community Development shall maintain at least one Web page that provides information to the general public about the TNInvestco program, including Internet links to the Web sites of each qualified TNInvestco. Each qualified TNInvestco shall maintain an Internet link on its Web site to the TNInvestco program Web page of the Department of Economic and Community Development.

SECTION 22. Tennessee Code Annotated, Section 4-28-113(a), is amended by deleting the language "the commissioner of economic development and the commissioner of revenue," and by substituting instead the following:

the Commissioner of Economic Development and the Commissioner of Revenue, in consultation with the state treasurer,

SECTION 23. Tennessee Code Annotated, Section 4-28-113(b), is amended by deleting the language ", in consultation with the commissioner of revenue" and by substituting instead the following:

, in consultation with the Commissioner of Revenue and the state treasurer,

SECTION 24. Tennessee Code Annotated, Section 4-28-102(10)(A)(iii)(f), is amended by deleting the language "Direct gambling activities" and by substituting instead the language "Gambling activities".

SECTION 25. Tennessee Code Annotated, Section 4-28-102, is amended by adding the following language as new, appropriately designated subdivisions:

() "Minority-owned business" means a business that is wholly owned, or at least fifty-one percent (51%) of the assets or outstanding stock of which is owned, by one (1) or more individuals who are members of any racial or ethnic minority within the state and whose management and daily business operations are under the control of one (1) or more members of any racial or ethnic minority within the state;

() "Woman-owned business" means a business that is wholly owned, or at least fifty-one percent (51%) of the assets or outstanding stock of which is owned, by one (1) or more women and whose management and daily business operations are under the control of one (1) or more women;

SECTION 26. Tennessee Code Annotated, Section 4-28-106, is amended by adding the following language as a new, appropriately designated subsection:

() (1) All qualified TNInvestcos, and the qualified businesses in which they invest, shall strive to maximize the participation of minority-owned businesses and woman-owned businesses to reflect the racial, ethnic and gender diversity of Tennessee's population.

(2) The Department of Economic and Community Development shall promote awareness of the program established by this chapter among minority-owned businesses and woman-owned businesses.

(3) The Department of Economic and Community Development shall undertake training programs and other educational activities to increase diversity of participation by encouraging minority-owned businesses and woman-owned businesses to apply, compete and qualify for investments under this chapter.

(4) Each TNInvestco shall coordinate its efforts to strive to maximize participation in minority-owned businesses and woman-owned businesses with the efforts of the Department of Economic and Community Development.

(5) Each TNInvestco shall provide information on its Web site concerning this program and the availability of capital to businesses including minority-owned businesses and woman-owned businesses.

SECTION 27. Tennessee Code Annotated, Section 4-28-108, is amended by inserting the language "and the small and minority-owned business assistance program fund" immediately following the language "rural opportunity fund".

SECTION 28. Tennessee Code Annotated, Section 4-28-109(a)(1), is amended by inserting the language "and the small and minority-owned business assistance program fund" immediately following the language "Tennessee rural opportunity fund".

SECTION 29. Tennessee Code Annotated, Section 4-28-109(a)(2), is amended by deleting the language "shall be transferred from the general fund to the Tennessee rural opportunity fund" and by substituting instead the language "shall be transferred from the general fund and seventy-five percent (75%) of such amount shall be transferred to the Tennessee rural opportunity fund and twenty-five percent (25%) of such amount shall be transferred to the small and minority-owned business assistance program fund".

SECTION 30. Tennessee Code Annotated, Section 4-28-110(a)(2), is amended by deleting subdivision (C) in its entirety and by substituting instead the following:

(C) All qualified investments that the qualified TNInvestco has made in the previous taxable year and the number of employees, including the number of minority and women employees, of each such qualified business at the time of such investment and as of December 1 of the preceding taxable year; and

SECTION 31. Tennessee Code Annotated, Section 4-28-104, is amended by adding the following language as a new, appropriately designated subsection:

() If the general assembly subsequently authorizes an allocation of investment tax credits in addition to the two hundred million dollars (\$200,000,000) authorized by this act and by Chapter 610 of the Public Acts of 2009, the Department of Revenue and the Department of Economic and Community Development, in reviewing the organizational documents of each applicant for certification and determining whether the applicant has satisfied the requirements of this chapter pursuant to subsection (c), shall additionally take into consideration the applicant's involvement of women and minorities.

SECTION 32. Tennessee Code Annotated, Section 4-28-105, is amended by adding the following language as a new, appropriately designated subsection:

() If the general assembly subsequently authorizes an allocation of investment tax credits in addition to the two hundred million dollars (\$200,000,000) authorized by this act and by Chapter 610 of the Public Acts of 2009, in reviewing applications and awarding such credits, the Commissioner of Revenue and the Commissioner of Economic and Community Development shall strive to select applicants whose investment team membership is reflective of the racial, ethnic and gender diversity of Tennessee's population.

SECTION 33. This act shall take effect upon becoming a law and shall apply to any entity certified as a TNInvestco, and to tax credits awarded, on or after July 9, 2009, the public welfare requiring it.

PASSED: June 5, 2010



RON RAMSEY
SPEAKER OF THE SENATE



KENT WILLIAMS, SPEAKER
HOUSE OF REPRESENTATIVES

APPROVED this 30th day of June 2010



PHIL BREDESEN, GOVERNOR