

Amendment No. 1 to HB2085

Fitzhugh
Signature of Sponsor

AMEND Senate Bill No. 1203*

House Bill No. 2085

by deleting all of the language after the enacting clause and by substituting instead the following:

SECTION 1. Tennessee Code Annotated, Title 4, is amended by adding Sections 2 through 13 of this act as a new chapter.

SECTION 2. This chapter shall be known and may be cited as the “Tennessee Small Business Investment Company Credit Act”.

SECTION 3. As used in this chapter:

(1) “Affiliate” means:

(A)

(i) Any person who, directly or indirectly, beneficially owns, controls, or holds power to vote fifteen percent (15%) or more of the outstanding voting securities or other voting ownership interest of a TNInvestco or insurance company; or

(ii) Any person, fifteen percent (15%) or more of whose outstanding voting securities or other voting ownership interests are directly or indirectly beneficially owned, controlled, or held with power to vote by a TNInvestco or insurance company;

(B) Notwithstanding this subdivision, an investment by a participating investor in a TNInvestco pursuant to an allocation of investment tax credits under this section does not cause that TNInvestco to become an affiliate of that participating investor;

(2) “Allocation amount” means the total amount of tax credits allocated to the participating investors in a qualified TNInvestco pursuant to this Act.

(3) "Allocation date" means the date on which investment tax credits under section 6 are allocated to the participating investor of a qualified TNInvestco under this chapter;

(4) "Base investment amount" means fourteen million dollars (\$14,000,000) in the case of a qualified TNInvestco receiving one allocation of tax credits and twenty eight million dollars (\$28,000,000) in the case of a qualified TNInvestco receiving two allocations of tax credits, which must be available in cash or cash equivalents immediately following the investment by a TNInvestco's participating investors and its owners;

(5) "Designated capital" means an amount of money that is invested by a participating investor in a qualified TNInvestco;

(6) "Investment Period" means the period January 1, 2010 through December 31, 2019;

(7) "Participating investor" means any insurance company required to pay the gross premiums tax pursuant to § 56-4-205 that contributes designated capital pursuant to this chapter;

(8) "Person" means any natural person or entity, including, but not limited to, a corporation, general or limited partnership, trust, or limited liability company;

(9) "Profit Share Percentage" means a fee paid to the state by a qualified TNInvestco as provided in Section 10 in an amount equal to fifty percent (50%) of all distributions or payments made by a qualified TNInvestco that are not classified as qualified distributions, other than distributions or repayments of capital contributions by the TNInvestco's equity owners who are not participating investors;

(10)(A) "Qualified business" means a business that is independently owned and operated and meets all of the following requirements:

(i) It is headquartered in Tennessee, its principal business operations are located in this state, and at least sixty percent (60%) of its employees are located in Tennessee;

(ii) It has not more than one hundred (100) employees;

(iii) It is not principally engaged in:

(a) professional services provided by accountants, doctors, or lawyers;

(b) banking or lending;

(c) real estate development;

(d) insurance;

(e) oil and gas exploration; or

(f) direct gambling activities; and

(iv) It is not a franchise of and has no financial relationship with a TNInvestco or any affiliate of a TNInvestco prior to a TNInvestco's first qualified investment in the business;

(B) A business classified as a qualified business at the time of the first qualified investment in the business will remain classified as a qualified business and may receive continuing qualified investments from any TNInvestco; provided, that the business continues to meet the requirements of (10)(A)(i);

(11) "Qualified distribution" means any distribution or payment not made to a participating investor or affiliate of a participating investor or to the state by a qualified TNInvestco in connection with the following:

(A) Costs and expenses of forming, syndicating, and organizing the qualified TNInvestco, including fees paid for professional services; provided, however, that start up costs shall not exceed one hundred twenty-five thousand \$125,000;

(B) An annual management fee to offset the costs and expenses of managing and operating a qualified TNInvestco; provided, however, that in the first four (4) years following its allocation date, a qualified TNInvestco's management fee shall not exceed two percent (2%) of its base investment amount per annum and in the fifth (5th) through tenth (10th) years following its

allocation date, a qualified TNInvestco's management fee per annum shall not exceed two percent (2%) of the lesser of its base investment amount or its qualified investments;

(C) Reasonable and necessary fees in accordance with industry custom for ongoing professional services, including, but not limited to, legal and accounting services related to the operation of a qualified TNInvestco not including any lobbying or governmental relations; provided, however, professional service fees shall not exceed fifty thousand dollars (\$50,000) annually;

(D) An increase or projected increase in federal or state taxes of the equity owners of a TNInvestco resulting from the earnings or other tax liability of a TNInvestco to the extent that the increase is related to the ownership, management, or operation of a TNInvestco; provided, however, that such distributions shall not exceed that actual tax liability due and payable on such investor's actual return. Documents supporting such payments must be provided to the Commissioner of Revenue upon request; or

(E) Payments to participating investors, provided that no such payments shall reduce the base amount for other purposes of this Chapter without regard to the early or seed stage multiplier;

(12) "Qualified investment" means the investment of cash by a qualified TNInvestco in a qualified business for the purchase of any debt, debt participation, equity, or hybrid security of any nature and description whatsoever, including a debt instrument or security that has the characteristics of debt but which provides for conversion into equity or equity participation instruments such as options or warrants. 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 Section 7;

(13) "Qualified TNInvestco" means a TNInvestco that has been approved to receive an investment tax credit allocation;

(14) "Seed or early stage investment" means an investment in a company that has a product or service in testing or pilot production that may or may not be commercially available. The company may or may not be generating revenues and may have been in business less than three (3) years at the time of investment;

(15) "State premium tax liability" means any liability incurred by an insurance company under the provisions of § 56-4-205 or in the case of a repeal or a reduction by the state of the liability imposed § 56-4-205, any other tax liability imposed upon an insurance company by the state; and

(16) "TNInvestco" means a partnership, corporation, trust, or limited liability company, whether organized on a for-profit or not-for-profit basis that completes the application process in Section 5 and that is certified by the department of economic and community development as meeting the established criteria.

SECTION 4.

(a) A participating investor shall earn an investment tax credit against its state premium tax liability equal to one hundred percent (100%) of the investment tax credit allocated to the participating investor under Section 6. The participating investor's investment tax credit shall be earned and vested upon making its investment in the qualified TNInvestco. Beginning January 1, 2012, a participating investor may claim the investment tax credit as follows:

(1) In tax years 2012, 2013, 2014, and 2015, an amount equal to fifteen percent (15%) of the investment tax credit allocated to the participating investor; and

(2) In tax years 2016, 2017, 2018 and 2019, an amount equal to ten percent (10%) of the investment tax credit allocated to the participating investor.

(b) A participating investor's investment tax credit for any taxable year must not 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, the excess shall be an investment tax credit carryover to future taxable years without limitation. 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 transferred by a participating investor to affiliates and all such transfers shall be subject to regulations promulgated by the department of revenue.

(c) A participating investor claiming an investment tax credit under this section is not required to pay any additional retaliatory tax levied as a result of claiming the investment tax credit.

(d) A participating investor is not required to reduce the amount of tax pursuant to the state premium tax liability included by the participating investor in connection with ratemaking for any insurance contract written in this state because of a reduction in the participating investor's tax liability based on the investment tax credit allowed under this section.

(e) If the taxes paid by a participating investor with respect to its state premium tax liability constitute a credit against any other tax that is imposed by this state, the participating investor's credit against the other tax shall not be reduced by virtue of the reduction in the participating investor's tax liability based on the investment tax credit allowed under this section.

SECTION 5.

(a) The department of economic and community development in consultation with the department of revenue shall provide a standardized format for persons attempting to qualify as a TNInvestco.

(b) An applicant for qualification is required to:

(1) File an application with the department of economic and community development;

(2) Pay a nonrefundable application fee of seven thousand five hundred dollars (\$7,500) at the time of filing the application; and

(3) Submit as part of its application an audited balance sheet that contains an unqualified opinion of an independent certified public accountant issued not more than sixty (60) days before the application date that states that the applicant has an equity capitalization of five hundred thousand (\$500,000) or more in the form of unencumbered cash, marketable securities, or other liquid assets.

(c) The department of economic and community development and the department of revenue must review the organizational documents of each applicant for certification and determine whether the applicant has satisfied the requirements of this chapter.

(d) Within thirty (30) days after the receipt of an application, the department of economic and community development shall issue the certification or refuse the certification and communicate in detail to the applicant the grounds for refusal, including suggestions for the removal of such grounds.

(e) The department of economic and community development must begin accepting applications to become a TNInvestco by August 1, 2009. All applications must be submitted to the department of economic and community development no later than the close of business on October 1, 2009.

SECTION 6.

(a) The department of economic and community development in consultation with the department of revenue must provide a standardized format for a TNInvestco to apply for the investment tax credits.

(b) Applications shall contain such information as required by the department of revenue and the department of economic and community development, including statements regarding the ability to obtain the required investment commitments. Each TNInvestco shall submit irrevocable investment commitments from participating

investors and TNInvestco owners in an aggregate amount equal to at least the base investment amount not later than November 30, 2009. TNInvestco's that are awarded investment tax credits under this chapter based on the asserted ability to raise the required capital shall be subject to a fifty thousand dollar (\$50,000) penalty for failure to perform. The proceeds from any such penalty shall be deposited into the Tennessee Rural Opportunity Fund to further the state's economic development efforts.

(c)

(1) The department of revenue and the department of economic and community development, in consultation with the Tennessee Technology Development Corporation, shall review the applications and award the investment tax credits based on the overall strength of the application using the following criteria:

(A)

(i) The applicant has at least two (2) investment managers with five (5) or more years of investment experience;

(ii) The applicant has been based, as defined by having a principal office, in the state of Tennessee for at least five (5) years or has at least five (5) years of experience in investing primarily in Tennessee domiciled companies;

(iii) The applicant's proposed investment strategy for achieving transformational economic development outcomes through focused investments of capital in seed or early stage companies with high-growth potential; and

(iv) The applicant's demonstrated ability to lead investment rounds, advise and mentor entrepreneurs, and facilitate follow-on investments;

(B) TNInvestcos that do not meet the criteria in subdivision

(c)(1)(A)(ii) may submit a joint application with an entity that meets the

criteria set out in subdivision (c)(1)(A)(ii) and such application shall be judged based on the combined attributes of the joint application.

(2) The awarding of investment tax credits shall be in the sole discretion of the commissioner of revenue and the commissioner of economic and community development.

(d) The aggregate amount of investment tax credits to be allocated to all participating investors of qualified TNInvestcos under this chapter shall not exceed one hundred twenty million dollars (\$120,000,000). The investment tax credits will be awarded in twenty million dollar (\$20,000,000) allocations. No TNInvestco, on an aggregate basis with its joint applicants, may apply for more than two (2) twenty million dollar (\$20,000,000) allocations. No participating investor, on an aggregate basis with its affiliates, may be allocated more than twenty five percent (25%) of the maximum amount of investment tax credits authorized hereunder, regardless of whether such claim is made in connection with one (1) or more qualified TNInvestcos.

(e) The TNInvestco will receive, no later than December 31, 2009, a written notice from the department of economic and community development stating whether or not it has been approved as a qualified TNInvestco and, if applicable, stating the amount of its investment tax credit allocation.

SECTION 7.

(a)

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

(A) 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;

(B) 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;

(C) 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;

(D) Within six (6) years or any year thereafter, a qualified TNInvestco shall have invested an amount equal to ninety percent (90%) of its base investment amount in qualified investments provided that, either:

(i) not more than twenty five percent (25%) can be attributable to the three hundred percent (300%) seed or early stage multiplier; or

(ii) 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 Rural Opportunity Fund.

(2) Failure to meet the performance measures set out in subdivision (a)(1) during any calendar year shall result in a two hundred fifty thousand dollar (\$250,000) penalty fee against the qualified TNInvestco. The proceeds from any such penalty fee shall be deposited into the Tennessee Rural Opportunity Fund to further the state's economic development efforts. Funds related to the investment tax credit shall not be used to pay the penalty fee imposed under this subdivision (a)(2).

(b) Prior to making a proposed qualified investment in a specific business, a qualified TNInvestco must request from the department of economic and community development a written determination that the proposed investment will qualify as a qualified investment in a qualified business or, if applicable, a seed or early stage investment. The department shall notify a qualified TNInvestco within ten (10) business days from the receipt of a request of its determination. If the department fails to notify the qualified TNInvestco of its determination within ten (10) business days, the proposed investment will be deemed to be a qualified investment in a qualified business and, if

applicable, a seed or early stage investment. If the department determines that the proposed investment does not meet the definition of a qualified investment, qualified business, or seed or early stage investment, the department may nevertheless consider the proposed investment a qualified investment, or a seed or early stage investment, and if necessary, the business a qualified business, if the department determines that the proposed investment will further state economic development.

(c) All designated capital not invested in qualified investments by a qualified TNInvestco shall be held or invested in such manner as the qualified TNInvestco, in its discretion, deems appropriate.

(d) A qualified TNInvestco may not invest more than fifteen percent (15%) of its designated capital in any one qualified business without the specific approval of the department of economic and community development.

SECTION 8.

An insurance company or affiliate of an insurance company shall not, directly or indirectly:

- (1) Beneficially own, whether through rights, options, convertible interest, or otherwise, fifteen percent (15%) or more of the voting securities or other voting ownership interest of a TNInvestco;
- (2) Manage a TNInvestco (other than exercising remedies for default); or
- (3) Control the direction of investments for a TNInvestco.

SECTION 9. Qualified distributions from a qualified TNInvestco may be made at any time. Distributions other than qualified distributions from a qualified TNInvestco may be paid out annually or upon designated liquidity events as established by the qualified TNInvestco. Any such distributions other than qualified distributions may not reduce the base investment amount during any calendar year. The profit share percentage shall be paid to the state in the same time and manner as all other distributions as provided in Section 10. Any such payments shall be deposited into the Rural Opportunity Fund to further support the state's economic

development efforts. Investment capital liquidated during a liquidity event will be given a one-year “redeployment period” for purposes of calculating the investment thresholds in Section 7.

SECTION 10.

(a) At any time that the TNInvestco makes distributions, other than qualified distributions or distributions representing repayments of capital contributions, to its equity investors, the qualified TNInvestco shall pay to the state the profit share percentage. All such fees paid shall be deposited into the Rural Opportunity Fund to further support the state’s economic development efforts. Following the seventh anniversary of the fund, investment returns (profits and the portion of the base investment amount) may be distributed as liquidity permits, provided that no more than 25% of the TNInvestco’s base amount may be distributed in any one year until the end of the investment period at which time all of the fund’s proceeds may be distributed as liquidity permits.

(b) The TNInvestco and the state shall structure the qualified distributions and final payments in a manner that minimizes any related federal tax obligation. To the extent that the profit share distribution to qualified TNInvestco investors is less than the state’s share, pursuant to the profit share percentage, due to federal income tax liabilities, the final payments may be adjusted to equalize the post-tax profit share payments made during the investment period.

SECTION 11.

(a) Each qualified TNInvestco shall report the following to the department of economic and community development:

(1) As soon as practicable but no later than thirty (30) days after the receipt of designated capital:

(A) The name of each participating investor from which the designated capital was received, including such participating investor’s insurance tax identification number;

(B) The amount of each participating investor's investment of designated capital; and

(C) The date on which the designated capital was received;

(2) On an annual basis, on or before January 31 of each year:

(A) The amount of the qualified TNInvestco's remaining uninvested designated capital at the end of the immediately preceding taxable year;

(B) Whether or not the qualified TNInvestco has invested more than fifteen percent (15%) of its total designated capital in any one business;

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

(D) For any qualified business where the qualified TNInvestco no longer has an investment, the qualified TNInvestco must provide employment figures for that company as of the last day before the investment was terminated;

(3) Other information that the department may reasonably request that will help the department ascertain the impact of the TNInvestco program both directly and indirectly on the economy of the state of Tennessee;

(4) Within one hundred eighty (180) days of the close of its fiscal year, annual audited financial statements of the qualified TNInvestco, which must include the opinion of an independent certified public accountant; and

(5) An "agreed upon procedures report" or equivalent regarding the operations of the qualified TNInvestco.

(b) A qualified TNInvestco must pay to the department of economic and community development an annual, nonrefundable certification fee of five thousand dollars (\$5,000) on or before April 1, or ten thousand dollars (\$10,000) if later. No annual certification fee is required if the payment date for such fee is within six (6) months of the date a qualified TNInvestco is first certified by the department.

(c) Upon satisfying each of the requirements of subdivision (a)(1) of Section 7, a qualified TNInvestco shall provide notice to the department of economic and community development and the department shall, within sixty (60) days of receipt of such notice, either confirm that the qualified TNInvestco has satisfied such requirement of subdivision (a)(1) of Section 7 as of such date or provide notice of non-compliance and an explanation of any existing deficiencies. If the department does not provide such notification within sixty (60) days, the qualified TNInvestco shall be deemed to have met such requirement of subdivision (a)(1) of Section 7.

SECTION 12.

(a) The department of economic and community development shall conduct an annual review of each qualified TNInvestco to determine if the qualified TNInvestco is abiding by the requirements of the program and to ensure that no investments have been made in violation of this chapter. The cost of the annual review shall be paid by each qualified TNInvestco according to a reasonable fee schedule adopted by the department.

(b) The department shall provide the qualified TNInvestco a summary of findings including any areas of noncompliance. The qualified TNInvestco shall have sixty (60) days to cure any areas of noncompliance. Failure to cure the areas of noncompliance within sixty (60) days shall result in a penalty of ten thousand dollars (\$10,000) per day until the noncompliance is cured. The proceeds from any such penalty shall be deposited into the Tennessee Rural Opportunity Fund to further the state's economic development efforts. Funds related to the investment tax credit shall not be used to pay the penalty imposed under this section.

SECTION 13. 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. The report must include:

- (a) The number of qualified TNInvestcos holding designated capital;
- (b) The amount of designated capital invested in each qualified TNInvestco;
- (c) The cumulative amount that each qualified TNInvestco has invested as of January 1, 2011, and the cumulative total each year thereafter;
- (d) The cumulative amount of follow-on capital that the investments of each qualified TNInvestco have created in terms of capital invested in qualified businesses at the same time or subsequent to investments made by a qualified TNInvestco in such businesses by sources other than qualified TNInvestcos;
- (e) The total amount of investment tax credits applied under this section for each year;
- (f) The performance of each qualified TNInvestco with regard to the requirements for continued certification;
- (g) The classification of the companies in which each qualified TNInvestco has invested according to industrial sector and size of company;
- (h) The gross number of jobs created by investments made by each qualified TNInvestco and the number of jobs retained;
- (i) The location of the companies in which each qualified TNInvestco has invested;
- (j) Those qualified TNInvestcos that have been decertified, including the reasons for decertification; and
- (k) Other related information as necessary to evaluate the effect of this section on economic development.

SECTION 14. This act shall take effect upon becoming a law, the public welfare requiring it.