HOUSE BILL NO. HB0106

Small business investment credit.

Sponsored by: Representative(s) Pedersen, Anderson, R., Berger, Brown, Buchanan, Byrd, Cohee, Edmonds, Gingery, Goggles, Harshman, Illoway, Lubnau, Millin, Quarberg, Semlek, Shepperson, Simpson, Stubson, Teeters, Wallis, Zwonitzer, Dn. and Zwonitzer, Dv. and Senator(s) Anderson, J., Bebout, Burns, Coe, Hunnicutt, Larson, Martin, Massie, Peterson, Ross and Townsend

A BILL

for

AN ACT relating to economic development; providing definitions; providing requirements for certification as a small business investment company; providing requirements for participating investors; providing a credit against certain taxes for certain investments; requiring reports; amending related provisions; and providing for an effective date.

Be It Enacted by the Legislature of the State of Wyoming:

Section 1. W.S. 9-12-1301 through 9-12-1312 are created to read:

ARTICLE 13

WYOMING SMALL BUSINESS INVESTMENT CREDIT

9-12-1301. Short title.

This article shall be known and may be cited as the "Wyoming small business investment credit program".

9-12-1302. Definitions.

(a) As used in this article:

(i) "Affiliate" means any person who, directly or indirectly, owns, controls or holds power to vote fifteen percent (15%) or more of the outstanding voting securities or other voting ownership interest of a Wyoming small business investment company or insurance company licensed in this state and includes any person if fifteen percent (15%) or more of the outstanding voting securities or other voting ownership interest of that person are directly or indirectly owned, controlled or held with power to vote by a Wyoming small business investment company or insurance company licensed in this state. "Affiliate" does not include an investment by a participating investor in a Wyoming small business investment company pursuant to an allocation of premium tax credits under this article;

(ii) "Allocation date" means the date credits under W.S. 9-12-1305 are allocated to participating investors in a Wyoming small business investment company;

(iii) "Council" means the Wyoming business council or any designated subcommittee of its members;

(iv) "Designated capital" means an amount of money that:

(A) Is invested by a participating investor in a Wyoming small business investment company; and

(B) Fully funds the purchase price of a participating investor's qualified debt instrument issued by a Wyoming small business investment company.

(v) "Participating investor" means any insurer licensed in this state with a tax liability under W.S. 26-4-103;

(vi) "Qualified business" means a business which:

(A) Is independently owned and operated;

(B) Is headquartered in Wyoming, its principal operations are located in Wyoming, at least sixty percent (60%) of the employees are employed in Wyoming or the business has committed in writing to move to Wyoming as a condition of the investment;

(C) Has provided evidence acceptable to the council of its intent to remain in Wyoming after receipt of the qualified investment;

(D) Has one hundred (100) employees or less;

(E) Is not a franchise of and has no financial relationship with a Wyoming small business investment company or any affiliate of a Wyoming small business investment company prior to a Wyoming small business investment company's first qualified investment in the business; and

(F) Is not predominately engaged in:

(I) Professional services provided by accountants, doctors or lawyers;

(II) Banking or lending except a bank holding company as defined in W.S. 13-1-101(a)(iii) which is authorized to establish a small business investment company;

(III) Insurance;

(IV) Direct gambling activities; or

(V) Making loans to or investments in a Wyoming small business investment company or an affiliate.

(vii) "Qualified debt instrument" means a debt instrument issued by a Wyoming small business investment company which:

(A) Is issued at par value or a premium;

(B) Has an original maturity date of at least four (4) years from the date of issuance and a repayment schedule which is not faster than a level principal amortization over four (4) years; and

(C) Satisfies the rating criteria to qualify as "NAIC 1" as determined by the securities valuation office of the national association of insurance commissioners.

(viii) "Qualified distribution" means any distribution or payment made by a Wyoming small business investment company in connection with:

(A) The costs and expenses of forming, syndicating and organizing the Wyoming small business investment company, including any fee paid for professional services, and the costs of financing and insuring the obligations of the Wyoming small business investment company;

(B) An annual management fee not to exceed three percent (3%) of designated capital on an annual basis to offset the costs and expenses of managing and operating a Wyoming small business investment company;

(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 Wyoming small business investment company;

(D) An increase or projected increase in federal or state taxes, including penalties and related interest, of the equity owners of a Wyoming small business investment company resulting from the earnings or other tax liability of a Wyoming small business investment company to the extent that the increase is related to the ownership, management or operation of a Wyoming small business investment company; and

(E) Payments of principal and interest to holders of qualified debt instruments issued by a Wyoming small business investment company.

(ix) "Qualified investment" means the investment of money by a Wyoming small business investment company in a qualified business for the purchase of any debt, debt participation, equity or hybrid security of any nature and description, including a debt instrument or security which has the characteristics of debt but provides for conversion into equity or equity participation instruments such as options or warrants, but shall not include any purchase of a guaranteed portion of a federally guaranteed loan;

(x) "State premium tax liability" means a liability incurred by an insurer under W.S. 26-4-103, or in the case of a repeal or reduction of the liability imposed by W.S. 26-4-103, any other tax liability imposed upon a participating investor by the state;

(xi) "Wyoming small business investment company" means a partnership, corporation, trust or limited liability company organized on a for-profit basis which is certified by the council pursuant to W.S. 9-12-1303.

9-12-1303. Certification.

(a) The Wyoming business council shall provide a form for applying for certification as a Wyoming small business investment company.

(b) An applicant to be certified as a Wyoming small business investment company shall:

(i) File an application with the council and pay a nonrefundable fee equal to the annual certification fee provided under W.S. 9-12-1308(b);

(ii) Submit as part of the application an audited balance sheet which contains an unqualified opinion of an independent certified public accountant issued not more than sixty (60) days before the application date and includes a statement that the applicant has an equity capitalization of five hundred thousand dollars ($500,000.00) or more in the form of unencumbered cash, marketable securities or other liquid assets; and

(iii) Have at least two (2) principals or persons, employed or engaged to manage the funds who each have a minimum of five (5) years of money management experience in the venture capital or private investment industry or five (5) years of experience as an officer in a commercial bank and acceptable business qualifications as determined by the council in consultation with the Wyoming state banking commissioner.

(c) The council may certify a partnership, corporation, trust or limited liability company which is organized on a for-profit basis and submits an application to be designated as a Wyoming small business investment company if:

(i) The applicant is located, headquartered and licensed or registered to conduct business in Wyoming;

(ii) The applicant has as its primary business the activity of investing cash in qualified businesses;

(iii) After a review of the organizational documents and the business history of each applicant the council determines that the officers and the board of directors, general partners, trustees, managers or members of the applicant are acquainted with the requirements of this article; and

(iv) The applicant has complied with the requirements set forth in subsection (b) of this section for a Wyoming small business investment company and is otherwise qualified pursuant to the provisions of this article.

(d) Not more than forty-five (45) days after the receipt of an application under this section, the council shall issue a certification as a Wyoming small business investment company or refuse to issue the certification and provide to the applicant the grounds for the refusal and any information that may allow the applicant to obtain certification.

(e) The council shall begin accepting applications for certification as a Wyoming small business investment company not later than January 1, 2011.

(f) The council may contract with an independent third party to review, investigate and certify that the applications under this section and requests under W.S. 9-12-1307(j) and 9-12-1310(c) comply with the provisions of this article.

9-12-1304. Requirements.

(a) An insurance company or affiliate of an insurance company or insurer shall not, directly or indirectly:

(i) 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 Wyoming small business investment company;

(ii) Manage a Wyoming small business investment company; or

(iii) Control the direction of investments for a Wyoming small business investment company.

(b) A Wyoming small business investment company may obtain one (1) or more guaranties, indemnities, bonds, insurance policies or other payment undertakings for the benefit of its participating investors from any entity, except that in no case shall more than one (1) participating investor of the Wyoming small business investment company, including any affiliates of the participating investor, be entitled to provide such guaranties, indemnities, bonds, insurance policies or other payment undertakings in favor of the participating investors of the Wyoming small business investment company and its affiliates.

(c) This section shall not be construed to preclude a participating investor, insurance company or other party from exercising its legal rights and remedies including, without limitation:

(i) Interim management of a Wyoming small business investment company in the event that a Wyoming small business investment company is in default of its statutory obligations or its contractual obligations to such participating investor, insurance company or other party;

(ii) Monitoring a Wyoming small business investment company to ensure its compliance with this section; or

(iii) Disallowing any investments that have not been approved by the council pursuant to this article.

9-12-1305. Wyoming small business investment credit.

(a) A participating investor under this article shall earn a credit against any state premium tax liability as provided in this section up to one hundred percent (100%) of the participating investor's investment of designated capital in a Wyoming small business investment company.

(b) A participating investor may claim in the year immediately following a credit under this section for tax years 2013, 2014, 2015, 2016, 2017, 2018 and 2019 in an amount equal to fourteen and two thousand eight hundred fifty-seven ten-thousandths percent (14.2857%) of the participating investor's investment of designated capital.

(c) The credit for any tax year shall not exceed the participating investor's state premium tax liability for that tax year. If the amount of the credit determined under this section for any tax year exceeds the liability for tax under this chapter, the credit may be carried forward to future tax years without limitation. The premium tax credits provided by W.S. 26-19-312, 26-42-111 and 26-43-105, and deposits to the volunteer firemen's pension account pursuant to W.S. 26-4-102(b)(ii), shall take priority over the premium tax credits provided by this section and shall be calculated using the gross premium tax before the credits provided by this section.

(d) A credit under this section may be used in connection with both final payments and prepayments of a participating investor's state premium tax liability.

(e) A participating investor claiming a credit under this section shall not be required to pay any additional tax or fee as a result of claiming a credit under this article.

(f) If the payment of state premium tax liability by a participating investor would result in a credit against or reduction in any other tax imposed by this state, the amount of such credit or reduction shall not be affected by the issuance of a credit under this section.

(g) Final decertification of a Wyoming small business investment company under W.S. 9-12-1310 shall result in the disallowance and the recapture of a credit under this section. The amount to be disallowed and recaptured shall be assessed as follows:

(i) If decertification of a Wyoming small business investment company is within four (4) years of its allocation date and prior to meeting the requirements of W.S. 9-12-1310(c), all credits under this section are disallowed. To the extent any credit had been taken, the tax shall be immediately due and payable and the collecting authority is authorized to collect the tax;

(ii) If decertification of a Wyoming small business investment company occurs after the company has met the requirements of W.S. 9-12-1310(c), no credits under this section are disallowed and no credits that were previously taken under this section shall be recaptured.

(h) A participating investor shall not transfer, agree to transfer, sell or agree to sell a credit under this section until one hundred eighty (180) days or more from the date on which the participating investor invested designated capital. One hundred eighty (180) days or more from the date of investment, a participating investor, or subsequent transferee, may transfer credits based upon rules adopted by the council in consultation with the department of insurance to facilitate such transfers. Any transfer or sale of credits shall not affect the time schedule for claiming a credit. Any tax credit required to be repaid under this section shall remain the liability of the participating investor that actually applied the credit towards its tax liability.

9-12-1306. Aggregate limitations on investment tax credits; allocation.

(a) The aggregate amount of investment tax credits to be allocated to all participating investors of Wyoming small business investment companies under this article shall not exceed thirty million dollars ($30,000,000.00). No Wyoming small business investment company, on an aggregate basis with its affiliates, shall file credit allocation claims that exceed thirty million dollars ($30,000,000.00).

(b) Tax credits shall be allocated to participating investors in the order that the credit allocation claims are filed with the council, provided that all credit allocation claims filed with the council on the same day shall be treated as having been filed contemporaneously. Any credit allocation claims filed with the council prior to the initial credit allocation claim filing date shall be deemed to have been filed on such initial credit allocation claim filing date. The council shall set the initial credit allocation claim filing date to be not less than ninety (90) days and not more than one hundred twenty (120) days after the council begins accepting applications for certification as a Wyoming small business investment company under W.S. 9-12-1303(e).

(c) If two (2) or more Wyoming small business investment companies which are qualified under the provisions of this act file credit allocation claims with the council on behalf of their respective participating investors on the same day and the aggregate amount of credit allocation claims exceeds the lesser of the aggregate limit of investment tax credits under this section or the amount of credits that remain unallocated on that day, the credits shall be allocated among the participating investors who filed on that day on a pro rata basis with respect to the amounts claimed. The pro rata allocation for any one (1) participating investor is the product obtained by multiplying a fraction, the numerator of which is the amount of the credit allocation claim filed on behalf of a participating investor and the denominator of which is the total of all credit allocation claims filed on behalf of all participating investors on that day, by the lesser of the aggregate limit of credits under this section or the amount of credits that remain unallocated on that day.

(d) Not more than ten (10) business days after the council receives a credit allocation claim filed by a Wyoming small business investment company on behalf of one (1) or more of its participating investors, the council shall notify the Wyoming small business investment company of the amount of credits allocated to each of the participating investors of that Wyoming small business investment company. In the event a Wyoming small business investment company does not receive an investment of designated capital from each participating investor required to earn the amount of credits allocated to such participating investor within ten (10) business days of the Wyoming small business investment company's receipt of a notice of allocation, it shall notify the council on or before the next business day and the credits allocated to such participating investor of the Wyoming small business investment company shall be forfeited. The council shall reallocate credits forfeited under this subsection among the participating investors of the other Wyoming small business investment companies on a pro rata basis with respect to the credit allocation claims filed on behalf of the participating investors.

(e) The council may impose a civil penalty of not more than fifty thousand dollars ($50,000.00) upon a participating investor which does not invest the full amount of designated capital required to fund the credits allocated to it by the council in accordance with the credit allocation claim filed on its behalf. The council shall provide by rule, notice and opportunity for hearing prior to imposing a civil penalty under this subsection. In determining the amount of the penalty the council shall consider the direct and indirect cost to the state as a result of the investor's failure to invest the full amount of designated capital.

(f) No participating investor, individually or on an aggregate basis with its affiliates, shall file an allocation claim for more than twenty-five percent (25%) of the maximum amount of investment tax credits authorized under this article regardless of whether such claim is made in connection with one (1) or more Wyoming small business investment companies.

(g) The council shall annually certify by January 31, the amount of investment tax credits for which each participating investor qualifies under this article as of December 31 of the previous year. The certification shall be made to the insurance commissioner, and to the entity otherwise authorized to collect the tax due if the credit is allowed against another tax liability to the state.

9-12-1307. Requirements for continuance of certification.

(a) To maintain certification under this article, a Wyoming small business investment company shall make qualified investments as follows:

(i) Within two (2) years after the allocation date, a Wyoming small business investment company shall invest an amount equal to at least twenty-five percent (25%) of its designated capital in qualified investments; and

(ii) Within four (4) years after the allocation date, a Wyoming small business investment company shall invest an amount equal to at least fifty percent (50%) of its designated capital in qualified investments.

(b) Before making a proposed qualified investment in a specific business, a Wyoming small business investment company shall request from the council a written determination that the proposed investment is a qualified investment in a qualified business. The council shall notify a Wyoming small business investment company within ten (10) business days from the receipt of a request of its determination and an explanation thereof. If the council does not notify the Wyoming small business investment company of its determination within ten (10) business days, the proposed investment is deemed to be a qualified investment in a qualified business.

(c) Any designated capital not invested in qualified investments by a Wyoming small business investment company shall be held or invested in such manner as the Wyoming small business investment company, in its discretion, deems appropriate.

(d) Designated capital and proceeds of designated capital returned to a Wyoming small business investment company after being originally invested in qualified investments may be invested again in qualified investments and such investment shall be considered under the requirements of subsections (a), (e) and (f) of this section for the purposes of making investments of designated capital in qualified investments.

(e) If, within six (6) years after its allocation date, a Wyoming small business investment company has not invested at least seventy percent (70%) of its designated capital in qualified investments, neither the Wyoming small business investment company nor its affiliates shall be permitted to receive management fees.

(f) If, within eight (8) years after its allocation date, a Wyoming small business investment company has not invested one hundred percent (100%) of its designated capital in qualified investments, neither the Wyoming small business investment company nor its affiliates shall be permitted to receive management fees.

(g) A Wyoming small business investment company shall not invest more than twenty percent (20%) of its designated capital in any one (1) qualified business without the specific approval of the council.

(h) For purposes of calculating the investment percentages in this section, the cumulative amount of all qualified investments made by a Wyoming small business investment company from the allocation date shall be considered.

(j) A Wyoming small business investment company may, at any time but not more than once every two (2) years, request that the council determine if the Wyoming small business investment company is in compliance with the requirements of this section. Upon a request under this subsection, the council shall, not later than sixty (60) days after receipt of a request under this subsection, certify that the Wyoming small business investment company has satisfied the requirements of this section as of the date of the request or provide notice of noncompliance and an explanation of the deficiencies. If the council does not provide such notification within the sixty (60) day period, the Wyoming small business investment company shall be deemed to have met the applicable requirements of this section as of the date of the request.

9-12-1308. Wyoming small business investment company reporting requirements.

(a) Each Wyoming small business investment company shall report the following to the council:

(i) As soon as practicable 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 national association of insurance commissioners (NAIC) 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.

(ii) On or before January 31 of each year:

(A) The amount of the Wyoming small business investment company's remaining uninvested designated capital at the end of the immediately preceding fiscal year;

(B) Whether the Wyoming small business investment company has invested more than twenty percent (20%) of its total designated capital in any one (1) business;

(C) All qualified investments that the Wyoming small business investment company has made in the previous fiscal 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 fiscal year; and

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

(iii) Any information that the council may require by rule and regulation:

(A) Which will help the council ascertain the impact of the Wyoming small business investment company program directly and indirectly on the economy of the state of Wyoming including, without limitation, the number of jobs created by qualified businesses that have received qualified investments; or

(B) Information on the operations of the Wyoming small business investment company that the council requires to determine compliance with the requirements of this article.

(iv) Within ninety (90) days of the close of its fiscal year, annual audited financial statements of the Wyoming small business investment company which shall include the opinion of an independent certified public accountant.

(b) The business council shall set annual certification fees through rule and regulation in the manner provided in W.S. 33-1-201(a). A Wyoming small business investment company shall submit to the council the annual, nonrefundable certification fee on or before April 1 of each year. The annual certification fee shall not be required for the year if the payment date under this subsection is within six (6) months of the date a Wyoming small business investment company is first certified by the council under W.S. 9-12-1303.

9-12-1309. Distributions.

(a) A Wyoming small business investment company may make a qualified distribution at any time. In order for a Wyoming small business investment company to make a distribution other than a qualified distribution to its equity holders, the cumulative amount of all qualified investments of the Wyoming small business investment company shall equal or exceed one hundred percent (100%) of its designated capital.

(b) A Wyoming small business investment company shall transfer to the state treasurer for deposit into the general fund an amount equal to ten percent (10%) of all distributions to the equity holders of the Wyoming small business investment company, other than qualified distributions and distributions of paid-in capital contributed to a Wyoming small business investment company by the equity holders. A Wyoming small business investment company shall make all contributions required under this subsection concurrently with distributions to its equity owners by payment to the Wyoming business council. The council shall upon receiving payment from the Wyoming small business investment company transmit the funds to the state treasurer for deposit into the general fund. Nothing in this subsection shall be construed to affect qualified distributions.

(c) If, more than ten (10) years after the allocation date, a Wyoming small business investment company has failed to cumulatively invest an amount equal to at least one hundred percent (100%) of its designated capital in qualified investments, the percentage of distributions that a Wyoming small business investment company is required to contribute to the state of Wyoming general fund under subsection (b) of this section shall be twenty-five percent (25%) of all distributions to the equity holders of the Wyoming small business investment company, other than qualified distributions and distributions of paid-in capital contributed to a Wyoming small business investment company by the equity holders.

9-12-1310. Decertification; certification of compliance.

(a) The council shall conduct an annual review of each Wyoming small business investment company to determine if each Wyoming small business investment company is abiding by the requirements of this article and to ensure that no investment has been made in violation of this article. The cost of the annual review and other determinations under this article including certifications requested under W.S. 9-12-1307(j) and subsection (c) of this section shall be paid by each Wyoming small business investment company according to a fee schedule adopted by the council sufficient to cover actual direct and indirect costs of the review or certification.

(b) Any material violation of this article, including any material misrepresentation made to the council in connection with the application process, is a basis for decertification of a Wyoming small business investment company and the disallowance of credits under W.S.

9-12-1305, provided that in all instances the council shall provide notice to the Wyoming small business investment company of the grounds of a proposed decertification and the opportunity to cure any violation of this article before the decertification becomes effective.

(c) A Wyoming small business investment company may request that the council certify that the company has invested an amount cumulatively equal to one hundred percent (100%) of its designated capital in qualified investments as provided in W.S. 9-12-1307 and has complied with all other requirements provided under this article. Upon a request under this subsection, the council shall notify a Wyoming small business investment company not later than sixty (60) days after receipt of a request under this subsection:

(i) That it has achieved certification under this subsection; or

(ii) That it has not met the requirements of this article, provide a reason for the determination that the company has been determined not to have met the requirements of this article and decertify the company if applicable under subsection (b) of this section.

(d) If the council certifies a Wyoming small business investment company under subsection (c) of this section, the company shall no longer be subject to regulation by the council and shall not be subject to the reporting requirements under W.S. 9-12-1308. If the council does not provide notification within the sixty (60) day period as required in subsection (c) of this section, the Wyoming small business investment company shall be deemed to be certified as provided in subsection (c) of this section.

(e) The council shall provide written notice of any decertification proceedings under this section to the insurance commissioner and to the address of each participating investor whose tax credit may be subject to recapture or forfeiture, using the address shown on the last filing submitted to the council.

9-12-1311. Registration requirements.

Each investment by a participating investor for which a tax credit is awarded under this article shall be registered or specifically exempt from registration in accordance with applicable state or federal law.

9-12-1312. Reports to the governor and legislature.

(a) The council shall make an annual report to the governor, the joint appropriations interim committee and the joint minerals, business and economic development interim committee for review and comment. The report shall include:

(i) The number of Wyoming small business investment companies holding designated capital;

(ii) The amount of designated capital invested in each Wyoming small business investment company;

(iii) The cumulative amount that each Wyoming small business investment company has invested;

(iv) The cumulative amount of follow-on capital that the investments of each Wyoming small business investment company have created in terms of capital invested in qualified businesses at the same time or subsequent to investments made by a Wyoming small business investment company in such businesses by sources other than Wyoming small business investment companies;

(v) The total amount of investment tax credits applied under this article for each year;

(vi) The performance of each Wyoming small business investment company with regard to the requirements for continued certification;

(vii) The classification of the companies in which each Wyoming small business investment company has invested according to industrial sector and size of company;

(viii) The gross number of jobs created by investments made by each Wyoming small business investment company and the number of jobs retained;

(ix) The location of the companies in which each Wyoming small business investment company has invested;

(x) Those Wyoming small business investment companies that have been decertified, including the reasons for decertification; and

(xi) Other related information as necessary to evaluate the effect of this article on economic development.

Section 2. W.S. 9-12-102(a)(viii) and 26-4-103 by creating a new subsection (m) are amended to read:

9-12-102. Definitions.

(a) As used in this act, the following terms have the following meanings, except where the context clearly indicates otherwise:

(viii) "This act" means W.S. 9-12-101 through ~~9-12-1203~~ 9-12-1312.

26-4-103. Premium taxes; generally; preemption by state.

(m) The amount of tax credits for which an insurer qualifies under W.S. 9-12-1301 through 9-12-1312 shall be allowed as a credit against premium tax owed by the insurer under this section.

Section 3. This act is effective immediately upon completion of all acts necessary for a bill to become law as provided by Article 4, Section 8 of the Wyoming Constitution.

(END)