

**H. B. 3169**

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(By Delegates Kominar, White, Pasdon and Varner)  
[Introduced February 17, 2011; referred to the  
Committee on Finance.]

**FISCAL  
NOTE**

10 A BILL to amend and reenact §11-13U-2, §11-13U-3, §11-13U-4,  
11 §11-13U-5, §11-13U-8 and §11-13U-10 of the Code of West  
12 Virginia, 1931, as amended, all relating to reinstating the  
13 high-growth business investment tax credit; broadening the  
14 definition of "eligible companies" to include start-up, early  
15 stage, growth-oriented businesses that may not otherwise  
16 qualify for the tax credit; extending the expiration to five  
17 years with a provision for reauthorization; and increasing the  
18 annual allocation for credits from \$1 million to \$2 million.

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

20 That §11-13U-2, §11-13U-3, §11-13U-4, §11-13U-5, §11-13U-8 and  
21 §11-13U-10 of the Code of West Virginia, 1931, as amended, be  
22 amended and reenacted, all to read as follows:

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

24 **§11-13U-2. Legislative finding and purpose.**

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

9 **§11-13U-3. Definitions.**

10       As used in this article, the following terms have the meanings  
11 ascribed to them in this section, unless the context in which the  
12 term is used clearly requires another meaning or a specific  
13 different definition is provided:

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

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

21       (B) The board of directors of the qualified start-up, early  
22 stage, growth oriented or research and development company is  
23 controlled by the eligible taxpayer: *Provided,* That an eligible  
24 taxpayer is deemed to have control of the board of directors of a  
25 qualified research and development company if it controls a simple

1 majority of the board of directors.

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

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

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

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

20 (6) "Qualified start-up, early stage, growth oriented or  
21 research and development company" for purposes of the high growth  
22 business investment tax credit means an entity that has been  
23 certified by ~~the State Tax Commissioner~~ Economic Development  
24 Authority as eligible for the ~~West Virginia research and~~  
25 ~~development tax credit set forth in article thirteen-r, chapter~~

1 ~~eleven of this code~~ tax credit authorized in this article, that has  
2 annual gross receipts of less than ~~twenty million dollars~~ \$5  
3 million and has annual payroll of less than ~~two million five~~  
4 ~~hundred thousand dollars~~ than \$1.5 million.

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

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

9 **§11-13U-4. High-growth business investment tax credit.**

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

19 (b) No more than ~~one million dollars~~ \$2 million of the tax  
20 credits allowed under subsection (a) of this section shall be  
21 allocated by the Economic Development Authority during any fiscal  
22 year. The Economic Development Authority shall allocate the tax  
23 credits in the order the applications therefor are received.

24 (c) *Business franchise tax.* -- The tax credit is first applied  
25 to reduce the taxes imposed upon the eligible taxpayer by article

1 twenty-three of this chapter for the taxable year (determined after  
2 application of the credits against tax provided in section  
3 seventeen of said article, but before application of any other  
4 allowable credits against tax).

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

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

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

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

25 (f) *Personal income tax taxes.* -- After application of

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

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

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

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

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

1 taxpayers in any taxable year is \$1 million.

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

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

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

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

16       (1) Filed with the Economic Development Authority a written  
17 application for the tax credit;

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

23       ~~(3)~~ (2) Filed with the Economic Development Authority the  
24 certificate of incorporation for the qualified start-up, early  
25 stage, growth oriented or research and development company that

1 will benefit from the investment; and

2 ~~(4)~~ (3) Received from the Economic Development Authority  
3 certification of the amount of tax credit to be allocated to the  
4 eligible taxpayer.

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

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

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

19 **§11-13U-8. Tax credit review and accountability.**

20 (a) Beginning on February 1, ~~2006~~ 2012, and on February 1  
21 every third year thereafter, the Tax Commissioner shall submit to  
22 the Governor, the President of the Senate and the Speaker of the  
23 House of Delegates a tax credit review and accountability report  
24 evaluating the cost effectiveness of the tax credit allowed under  
25 this article during the most recent three-year period for which



1 information is available: *Provided*, That the requirement to file  
 2 the credit review and accountability report terminates June 30,  
 3 2011, unless the termination of entitlement to the tax credit as  
 4 stated in section ten of this article terminates. The criteria to  
 5 be evaluated includes, but is not limited to, for each year of the  
 6 three-year period:

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

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

12 (3) The cost of the tax credit;

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

14 (5) Comparison of employment trends for the industry and for  
 15 taxpayers within the industry that claim the tax credit.

16 (b) Eligible taxpayers claiming the tax credit shall provide  
 17 any information required by the Tax Commissioner or Economic  
 18 Development Authority for the purpose of preparing the report:

19 *Provided*, That such information shall be subject to the  
 20 confidentiality and disclosure provisions of sections five-d and  
 21 five-s, article ten of this chapter.

22 **§11-13U-10. Effective date; expiration of credit.**

23 The provisions of this article become effective ~~on July 1,~~  
 24 ~~2005~~ from date of passage, and apply only to qualified investment  
 25 made on or after that date: *Provided*, That no entitlement to the

1 tax credit shall result from any qualified investment made after  
2 June 30, ~~2008~~ 2016: *Provided, however,* That unless sooner  
3 terminated by law, the high growth business investment tax credit  
4 act will terminate on July 1, ~~2008~~ 2016 unless reauthorized by the  
5 Legislature prior to the termination date. Taxpayers who have  
6 gained entitlement to the tax credit pursuant to qualified  
7 investment prior to the earlier of July 1, ~~2008~~ 2016, or  
8 termination of the tax credit prior to that date shall retain that  
9 entitlement and apply the credit in due course pursuant to the  
10 requirements and limitations of this article.

NOTE: The purpose of this bill is to reinstate the high-growth business investment tax credit. The bill broadens the definition of "eligible companies" to include start-up, early stage, growth-oriented businesses that may not otherwise qualify for the tax credit. The bill extends the expiration to five years with a provision for reauthorization. The bill also increases the annual allocation for credits from \$1 million to \$2 million.

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