

WEST VIRGINIA LEGISLATURE

2017 REGULAR SESSION

Committee Substitute

for

Senate Bill 341

BY SENATORS FERNS, PALUMBO, PLYMALE, MULLINS,

STOLLINGS, TAKUBO, CLINE, MARONEY AND UNGER

[Originating in the Committee on Economic

Development; reported on February 23, 2017]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
2 designated §11-13DD-1, §11-13DD-2, §11-13DD-3, §11-13DD-4, §11-13DD-5, §11-
3 13DD-6, §11-13DD-7, §11-13DD-8, §11-13DD-9 and §11-13DD-10, all relating to
4 establishing a West Virginia business growth in low-income communities tax credit;
5 providing title; defining terms; establishing amount of credit allowed; transferability;
6 certification of qualified equity investment; recapture of tax credits; notice of
7 noncompliance; letter rulings; new capital requirement; and reporting.

Be it enacted by the Legislature of West Virginia:

1 That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new
2 article, designated §11-13DD-1, §11-13DD-2, §11-13DD-3, §11-13DD-4, §11-13DD-5, §11-
3 13DD-6, §11-13DD-7, §11-13DD-8, §11-13DD-9 and §11-13DD-10, all to read as follows:

**ARTICLE 13DD. WEST VIRGINIA BUSINESS GROWTH IN LOW-INCOME
COMMUNITIES TAX CREDIT.**

§11-13DD-1. Title.

1 The provisions of this article shall be known as, and may be cited as, the “West Virginia
2 New Markets Jobs Act.”

§11-13DD-2. Definitions.

1 (a) Any term used in this article has the meaning ascribed by this section unless a different
2 meaning is clearly required by the context of its use or by definition in this article.

3 (b) For purposes of this article, the term:

4 (1) “Affiliate” means an entity that directly or indirectly through one or more intermediaries,
5 controls, or is controlled by, or is under common control with, the entity specified;

6 (2) “Applicable percentage” means zero percent for the first three credit allowance dates
7 and fifteen percent for the next four credit allowance dates;

8 (3) “Compliance period” means the period beginning on the date the qualified equity

9 investment is initially made and ending on the sixth anniversary of the date of the qualified equity
10 investment;

11 (4) "Credit allowance date" means with respect to any qualified equity investment:

12 (A) The date on which such investment is initially made; and

13 (B) Each of the six anniversary dates of such date thereafter.

14 (5) "Long-term debt security" means any debt instrument issued by a qualified community
15 development entity with an original maturity date of at least seven years from the date of its
16 issuance, with no repayment, amortization, or prepayment features prior to its original maturity
17 date. The qualified community development entity that issues the debt instrument may not make
18 cash interest payments on the debt instrument during the period beginning on the date of issuance
19 and ending on the final credit allowance date in an amount that exceeds the cumulative operating
20 income, as defined by regulations adopted under 26 U.S.C. § 45D, as amended, of the qualified
21 community development entity for that period prior to giving effect to the interest expense of such
22 long-term debt security. The foregoing shall in no way limit the holder's ability to accelerate
23 payments on the debt instrument in situations where the qualified community development entity
24 has defaulted on covenants designed to ensure compliance with this 26 U.S.C. § 45D, as
25 amended;

26 (6) "Purchase price" means the amount paid to the qualified community development
27 entity for a qualified equity investment, which may not exceed the amount of qualified equity
28 investment authority certified pursuant to section five of this article;

29 (7) "Qualified active low-income community business" has the meaning given such term
30 in 26 U.S.C. § 45D, as amended, and 26 C.F.R. Sec. 1.45D-1. Any business that is a nonprofit or
31 derives or projects to derive fifteen percent or more of its annual revenue from the rental or sale
32 of real estate is not considered to be a qualified active low-income community business. The real
33 estate exception does not apply to a business that is controlled by or under common control with
34 another business if the second business: (i) Does not derive or project to derive fifteen percent or

35 more of its annual revenue from the rental or sale of real estate, and (ii) is the primary tenant of
36 the real estate leased from the initial business. A business shall be considered a qualified active
37 low-income community business for the duration of the qualified community development entity's
38 investment in, or loan to, the business if the entity reasonably expects, at the time it makes the
39 investment or loan, that the business will continue to satisfy the requirements for being a qualified
40 active low-income community business, other than the size and net income standards, throughout
41 the entire period of the investment or loan;

42 (8) "Qualified community development entity" has the meaning given such term in Section
43 45D of the Internal Revenue Code of 1986, as amended: *Provided*, That such entity has entered
44 into an allocation agreement with the Community Development Financial Institutions Fund of the
45 U.S. Treasury Department with respect to credits authorized by Section 45D of the Internal
46 Revenue Code of 1986, as amended, which includes the State of West Virginia within the service
47 area set forth in such allocation agreement. An entity shall not be deemed to be controlled by
48 another entity solely as a result of such entity having made a direct or indirect equity investment
49 in the other entity that earns tax credits under Section 45D of the Internal Revenue Code of 1986,
50 as amended, or similar state program. The term shall include subsidiary community development
51 entities of any such qualified community development entity and transferees of qualified equity
52 investment authority pursuant to section five of this article;

53 (9) "Qualified Equity Investment" means any equity investment in, or long-term debt
54 security issued by, a qualified community development entity that:

55 (A) Is acquired after the effective date of this act at its original issuance solely in exchange
56 for cash;

57 (B) Has one hundred percent of its cash purchase price used by the qualified community
58 development entity to make qualified low-income community investments in qualified active low-
59 income community businesses located in this state by the first anniversary of the initial credit
60 allowance date; and

61 (C) Is designated by the qualified community development entity as a qualified equity
62 investment hereunder and is certified by the Tax Commissioner pursuant to section five of this
63 article.

64 This term shall include any qualified equity investment that does not meet the provisions
65 of paragraph (A) of this subdivision if such investment was a qualified equity investment in the
66 hands of a prior holder;

67 (10) "Qualified low-income community investment" means any capital or equity investment
68 in, or loan to, any qualified active low-income community business: *Provided*, That with respect
69 to any one qualified active low-income community business, the maximum amount of qualified
70 low-income community investments made in such business, on a collective basis with all of the
71 businesses' affiliates, with the proceeds of qualified equity investments certified under section five
72 of this article, shall be \$5 million, exclusive of qualified low-income community investments made
73 with repaid or redeemed qualified low-income community investments or interest or profits
74 realized thereon;

75 (11) "State premium tax liability" means any liability incurred by any entity under section
76 fourteen, article three, chapter thirty-three of this code, section fourteen-a, article three, chapter
77 thirty-three of this code, section fifteen, article three, chapter thirty-three of this code, section
78 sixteen, article three, chapter thirty-three of this code, section seventeen, article three, chapter
79 thirty-three of this code, ~~or section eight, article twenty-one b, chapter thirty-three of this code:~~
80 *Provided*, That if the tax liability imposed under section fourteen, article three, chapter thirty-three
81 of this code, section fourteen-a, article three, chapter thirty-three of this code, section fifteen,
82 article three, chapter thirty-three of this code, section sixteen, article three, chapter thirty-three of
83 this code, section seventeen, article three, chapter thirty-three of this code, ~~or section eight, article~~
84 ~~twenty-one b, chapter thirty-three of this code~~ is eliminated or reduced, the term state premium
85 tax liability shall also include any tax liability imposed by this state on an insurance company or
86 other person that had premium tax liability under the laws of this state for the purpose of making

87 up tax revenue lost by the state as a result of the elimination or reduction of the taxes imposed
88 under section fourteen, article three, chapter thirty-three of this code, section fourteen-a, article
89 three, chapter thirty-three of this code, section sixteen, article three, chapter thirty-three of this
90 code, section seventeen, article three, chapter thirty-three of this code, or section eight, article
91 twenty-one b, chapter thirty-three of this code; and

92 (12) "Tax commissioner" means the Tax Commissioner of the State of West Virginia or his
93 or her delegate.

§11-13DD-3. Amount of credit allowed.

1 Any entity that makes a qualified equity investment shall be allowed an earned and vested
2 tax credit against the entity's state premium tax liability that may be utilized as follows:

3 (1) The amount of tax credit allowable on each credit allowance date to an entity that
4 makes a qualified equity investment, or to a subsequent holder of the qualified equity investment,
5 shall be annually computed by multiplying the purchase price paid to the qualified community
6 development entity for the qualified equity investment by the applicable percentage for the credit
7 allowance date;

8 (2) The annual credit allowance, computed pursuant to subdivision (1) of this section, may
9 be used to offset the entity's state premium tax liability for tax periods ending on or after the credit
10 allowance date; and

11 (3) The amount of the credit claimed by an entity shall not exceed the amount of such
12 entity's state premium tax liability for the tax year for which the credit is claimed. Any amount of
13 tax credit remaining, after the credit is used as provided in subdivision (2) of this section, may be
14 carried forward for use in any subsequent taxable year.

§11-13DD-4. Transferability.

1 No tax credit earned under this article shall be transferrable to another entity other than
2 an affiliate subject to state premium tax liability or saleable on the open market: *Provided, That*
3 tax credits earned by or allocated to a partnership, limited liability company or S-corporation may

4 be further allocated to the partners, members, or shareholders of such entity in accordance with
5 the provisions of any agreement among such partners, members, or shareholders. Such
6 allocation shall be not considered a sale for purposes of this article.

§11-13DD-5. Certification of qualified equity investments.

1 (a) A qualified community development entity that seeks to have an equity investment or
2 long-term debt security designated as a qualified equity investment and eligible for tax credits
3 under this article shall first file a credit application with the Tax Commissioner. The Tax
4 Commissioner shall begin accepting applications on July 1, 2017. The application filed by the
5 qualified community development entity shall include the following:

6 (1) The amount of qualified equity investment authority requested;

7 (2) The amount of qualified equity investment authority requested that the applicant agrees
8 to designate as a federal qualified equity investment with the Community Development Financial
9 Institutions Fund;

10 (3) Evidence of the applicant's certification as a qualified community development entity,
11 including evidence of the service area of the entity that includes this state;

12 (4) A copy of an allocation agreement executed by the applicant, or its controlling entity,
13 and the Community Development Financial Institutions Fund;

14 (5) A certificate executed by an executive officer of the applicant attesting that the
15 allocation agreement remains in effect and has not been revoked or cancelled by the Community
16 Development Financial Institutions Fund;

17 (6) A business plan that includes a revenue impact assessment projecting state and local
18 tax revenue to be generated by the applicant's proposed qualified low-income community
19 investments prepared by a nationally recognized third-party independent economic forecasting
20 firm using a dynamic economic forecasting model that analyzes the applicant's business plan over
21 the ten years following the date the application is submitted to the Tax Commissioner; and

22 (7) A nonrefundable application fee of \$5,000. This fee shall be paid to the Tax
23 Commissioner and shall be required of each application submitted.

24 (b) Within thirty days after receipt of a completed application containing the information
25 set forth in subsection (a) of this section, the Tax Commissioner shall grant or deny the application
26 in full or in part. The Tax Commissioner shall deny an application if the business plan submitted
27 with the application does not project revenue neutrality against the proposed tax credit utilization.
28 If the Tax Commissioner denies any part of the application, he or she shall inform the qualified
29 community development entity of the grounds for the denial. If the qualified community
30 development entity provides any additional information required by the Tax Commissioner or
31 otherwise completes its application within fifteen days of the notice of denial, the application shall
32 be considered completed as of the original date of submission. If the qualified community
33 development entity fails to provide the information or complete its application within the fifteen
34 day period, the application remains denied and must be resubmitted in full with a new submission
35 date.

36 (c) If the application is complete, the Tax Commissioner shall certify the proposed equity
37 investment or long-term debt security as a qualified equity investment that is eligible for tax credits
38 under this article, subject to the limitations contained in subsection (f) of this section. The Tax
39 Commissioner shall provide written notice of the certification to the qualified community
40 development entity.

41 (d) The Tax Commissioner shall certify qualified equity investments in the order
42 applications are received by the Tax Commissioner. Applications received on the same day shall
43 be deemed to have been received simultaneously.

44 (e) For applications that are complete and received on the same day, the Tax
45 Commissioner shall first certify applications by applicants that agree to designate qualified equity
46 investments as federal qualified equity investments in proportionate percentages based upon the

47 ratio of the amount of qualified equity investments requested in an application to be designated
48 as a federal qualified equity investment to the total amount of qualified equity investments to be
49 designated as federal qualified equity investments in all applications in which applicants agree to
50 designate qualified equity investments. Thereafter, the Tax Commissioner shall certify the
51 qualified equity investments of all other applicants, including the remaining qualified equity
52 investment authority requested by applicants not designated as federal qualified equity
53 investments, in proportionate percentages based upon the ratio of the amount of qualified equity
54 investments not requested in an application to be designated as a federal qualified equity
55 investment to the total amount of qualified equity investments not requested in applications to be
56 designated as federal qualified equity investments.

57 (f) The Tax Commissioner shall certify no more than \$60 million in qualified equity
58 investments pursuant to this article.

59 (g) An approved applicant may transfer all or a portion of its certified qualified equity
60 investment authority to its controlling entity or any subsidiary qualified community development
61 entity of the controlling entity: *Provided*, That the applicant and the transferee notify the Tax
62 Commissioner of such transfer with the notice set forth in subsection (h) of this section and include
63 the information required in the application with respect to such transferee with such notice.

64 (h) Within one calendar year of the applicant receiving notice of certification, the qualified
65 community development entity shall issue the qualified equity investment and receive cash in the
66 amount of the certified amount, and, if applicable, designate the required amount of qualified
67 equity investment authority as a federal qualified equity investment. The qualified community
68 development entity must provide the Tax Commissioner with evidence of the receipt of the cash
69 investment and designation as a federal qualified equity investment, if applicable, within one
70 calendar year and five days of the applicant receiving notice of certification. If the qualified
71 community development entity does not receive the cash investment, issue the qualified equity
72 investment and, if applicable, designate the qualified equity investment as a federal qualified

73 equity investment within such time period following receipt of the certification notice, the
74 certification shall lapse and the entity may not issue the qualified equity investment without
75 reapplying to the Tax Commissioner for certification. Lapsed certifications revert back to the Tax
76 Commissioner and shall be reissued:

77 (1) First, pro rata to applicants whose qualified equity investment allocations were reduced
78 pursuant to subsection (e) with a preference to applicants who have agreed to designate qualified
79 equity investments as federal qualified equity investments; and

80 (2) Thereafter, in accordance with the provisions of this section, a qualified community
81 development entity that issues qualified equity investments must notify the Tax Commissioner of
82 the names of the entities that are eligible to utilize tax credits provided under section three of this
83 article, pursuant to an allocation of tax credits or change in allocation of tax credits or due to a
84 transfer of a qualified equity investment upon such allocation, change or transfer.

§11-13DD-6. Recapture of tax credits.

1 (a) The Tax Commissioner may recapture, from the entity that claimed the credit on a
2 return, the tax credit allowed under this article if:

3 (1) Any amount of a federal tax credit available with respect to a qualified equity investment
4 that is eligible for a credit under this article is recaptured under Section 45D of the Internal
5 Revenue Code of 1986, as amended. In such case the Tax Commissioner's recapture shall be
6 proportionate to the federal recapture with respect to such qualified equity investment;

7 (2) The qualified community development entity redeems or makes principal repayment
8 with respect to a qualified equity investment prior to the seventh anniversary of the issuance of
9 such qualified equity investment. In such case the Tax Commissioner's recapture shall be
10 proportionate to the amount of the redemption or repayment with respect to such qualified equity
11 investment;

12 (3) The qualified community development entity fails to invest an amount equal to one
13 hundred percent of the purchase price of the qualified equity investment in qualified low-income

14 community investments in West Virginia within twenty-four months of the issuance of the qualified
15 equity investment and maintain such level of investment in qualified low-income community
16 investments in West Virginia until the last credit allowance date for the qualified equity investment.
17 For purposes of this article, an investment shall be considered held by a qualified community
18 development entity even if the investment has been sold or repaid, if the qualified community
19 development entity reinvests an amount equal to the capital returned to or recovered by the
20 qualified community development entity from the original investment, exclusive of any profits
21 realized, in another qualified low-income community investment within twelve months of the
22 receipt of such capital. Periodic amounts received as repayment of principal pursuant to regularly
23 scheduled amortization payments on a loan that is a qualified low-income community investment
24 shall be treated as continuously invested in a qualified low-income community investment if the
25 amounts are reinvested in one or more qualified low-income community investments by the end
26 of the following calendar year. A qualified community development entity shall not be required to
27 reinvest capital returned from qualified low-income community investments after the sixth
28 anniversary of the issuance of the qualified equity investment, and the qualified low-income
29 community investment shall be considered held by the qualified community development entity
30 through the seventh anniversary of the qualified equity investment's issuance; or

31 (4) As a result of any violation of section nine of this article.

32 (b) Recaptured tax credits and the related qualified equity investment authority are eligible
33 for reissuance to qualified community development entities under the provisions of this article and
34 recaptured tax credits shall be reissued:

35 (1) First, pro rata to applicants whose qualified equity investment allocations were reduced
36 pursuant to subsection (e), section five of this article, with a preference to applicants who agreed
37 to designate qualified equity investments as federal qualified equity investments; and

38 (2) Thereafter, in accordance with the provisions of section five of this article.

§11-13DD-7. Notice of noncompliance.

1 Enforcement of the recapture provisions set forth in section six of this article shall be
2 subject to a six-month cure period. No recapture shall occur until the qualified community
3 development entity shall have been given notice of noncompliance and afforded six months from
4 the date of such notice to cure the noncompliance.

§11-13DD-8. Letter rulings.

1 In rendering letter rulings and making other determinations under this chapter, to the
2 extent applicable, the Tax Commissioner shall look for guidance to Section 45D of the Internal
3 Revenue Code of 1986, as amended, and the rules and regulations issued thereunder.

§11-13DD-9. New capital requirement.

1 No qualified active low-income community business that receives a qualified low-income
2 community investment from a qualified community development entity that issues qualified equity
3 investments under this article, or any affiliates of such a qualified active low-income community
4 business, may directly or indirectly, (1) own or have the right to acquire an ownership interest in
5 a qualified community development entity or member or affiliate of a qualified community
6 development entity (including, but not limited to, a holder of a qualified equity investment issued
7 by the qualified community development entity), or (2) loan to or invest in a qualified community
8 development entity or member or affiliate of a qualified community development entity (including,
9 but not limited to, a holder of a qualified equity investment issued by a qualified community
10 development entity) where the proceeds of such loan or investment are directly or indirectly used
11 to fund or refinance the purchase of a qualified equity investment hereunder. For purposes of
12 this section, a qualified community development entity shall not be considered an affiliate of a
13 qualified active low-income community business solely as a result of its qualified low-income
14 community investment in such business.

§11-13DD-10. Reporting.

1 (a) Qualified community development entities shall submit a report to the Tax
2 Commissioner within the first five business days after the second anniversary of the initial credit

3 allowance date that provides documentation as to the investment of one hundred percent of the
4 purchase price of such qualified equity investment in qualified low-income community investments
5 in qualified active low-income community businesses located in West Virginia. Such report shall
6 include:

7 (1) The location of the qualified active low-income community business;

8 (2) A bank statement of such qualified community development entity evidencing each
9 qualified low-income community investment;

10 (3) Evidence that such business was a qualified active low-income community business
11 at the time of such qualified low-income community investment; and

12 (4) Such other information required by the Tax Commissioner.

13 (b) Thereafter, the qualified community development entity will submit an annual report to
14 the Tax Commissioner within forty-five days of the beginning of each calendar year during the
15 compliance period. No annual report shall be due prior to the first anniversary of the initial credit
16 allowance date. The report shall include, but is not limited to the following:

17 (1) Number of employment positions created and retained as a result of qualified low-
18 income community investments.

19 (2) Average annual salary of employment positions described in this subsection.

NOTE: The purpose of this bill is to establish a West Virginia business growth in low-income communities tax credit.

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