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HOUSE OF REPRESENTATIVES
149th GENERAL ASSEMBLY

HOUSE BILL NO. 170
AS AMENDED BY
SENATE AMENDMENT NO. 1 AS AMENDED BY
SENATE AMENDMENT NO. 1 TO SENATE
AMENDMENT NO. 1

AN ACT TO AMEND TITLES 29 AND 30 OF THE DELAWARE CODE RELATING TO ANGEL INVESTOR JOB CREATION AND INNOVATION ACT.

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

Section 1. Amend Subchapter X, Chapter 87A, Title 29 of the Delaware Code by deleting Subchapter X in its entirety.

Section 2. Amend § 1116, Title 30 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 1116. ~~Delaware investment credit~~ Angel Investor Job Creation and Innovation Act credit.

(a) A resident ~~and or~~ nonresident individual ~~shall be allowed~~ is entitled to a credit against that individual's tax ~~otherwise due~~ under this chapter in an amount equal to 15% ~~of the individual's investment that is qualified under subchapter X of Chapter 87A of Title 29 ("Delaware Investment Tax Credit Program") and certified as such by the Director of the Division of Small Business, Development and Tourism to the Director of Revenue~~ the credit that has been calculated by the Director of the Division of Small Business, Development, and Tourism under Chapter 20C of this title. As provided by § 20C-106 of this title, the Division of Small Business, Development, and Tourism shall notify the Director of the Division Revenue of any and all tax credit certifications.

(b) Notwithstanding § 329 of this title to the contrary, determinations by the ~~Delaware Economic Development Authority~~ the Director of the Division of Small Business, Development, and Tourism as to the qualification of any investment ~~under the Delaware Investment Tax Credit Program shall not be~~ with respect to the Angel Investor Tax Credit under Chapter 20C of this title is not appealable to the Tax Appeal Board.

(c) ~~In no event shall~~ If the credit allowable under this section ~~exceed~~ exceeds the tax otherwise due under this chapter. ~~Unused credits under this section may be carried forward 4 years from the tax year in which they are certified~~

under the Delaware Investment Tax Credit Program chapter, such credit amounts in excess of the tax otherwise due under this chapter must be returned to the taxpayer in the form of a tax refund.

Section 3. Amend Part II, Title 30 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

Chapter 20C. ANGEL INVESTOR JOB CREATION AND INNOVATION ACT.

§ 20C-101. Definitions.

As used in this chapter:

(1) “Affiliated group” has the meaning provided in § 1504 of the Internal Revenue Code (26 U.S.C. § 1504), but includes for purposes of this chapter a pass-through entity that would be includible if the pass-through entity was classified as a corporation, the equity interests in the pass-through entity would be treated as stock, and the ownership of such equity interests would satisfy the stock ownership requirements of § 1504 of the Internal Revenue Code (26 U.S.C. § 1504).

(2) “Compensation” means that part of the sum reported on Form W-2, or equivalent form of the United States Department of Treasury, Internal Revenue Service as “Medicare wages and tips”.

(3) “Director” means the Director of the Division of Small Business, Development, and Tourism.

(4) “Division” means the Division of Small Business, Development, and Tourism.

(5) “Family” means a family member within the meaning of § 267(c)(4) of the Internal Revenue Code (26 U.S.C. § 267(c)(4)).

(6) “Individual”, when referring to a participant in an action or process, means a human being and does not mean any of the non-human being entities included in the definition of “person” in § 302 of Title 1.

(7) “Liquidation event” means a conversion of qualified investment for cash, cash and other consideration, or any other form of equity or debt interest.

(8) “Officer” means a person elected or appointed by the board of directors to manage the daily operations of the qualified small business;

(9) “Pass-through entity” means as defined in § 1601 of this title.

(10) “Principal” means a person having authority to act on behalf of the qualified small business.

(11) “Proprietary technology” means the technical innovations that are unique and legally owned or registered by a business and includes, without limitation, those innovations that are patented, patent pending, a subject of trade secrets, or copyrighted.

(12) “Qualified expenditure” means an expenditure on any of the following: real property such as buildings, warehouses or factories in this State; personal property, such as equipment, machinery, or supplies, for use only in this State; intangible property developed in this State such as copyrights, trademarks, or patents; proof of concept or prototype manufacturing in this State; and payroll and compensation paid for work performed in this State.

(13) “Qualified fund” means a pooled angel investment network fund that has been certified by the Director under § 20C-104 of this title.

(14) “Qualified high-technology field” includes aerospace, agricultural processing, renewable energy, energy efficiency and conservation, environmental engineering, food technology, cellulosic ethanol, information technology, financial technology, materials science technology, nanotechnology, telecommunications, biotechnology, medical device products, pharmaceuticals, diagnostics, biologicals, chemistry, veterinary science, and similar fields.

(15) “Qualified investment” means a cash investment in a qualified small business of a minimum of \$10,000 in a calendar year by a qualified investor or \$30,000 in a calendar year by a qualified fund, that is made in exchange for common stock, a partnership or membership interest, preferred stock, debt with mandatory conversion to equity, or an equivalent ownership interest as determined by the Director.

(16) “Qualified investor” means an investor who has been certified by the Director under § 20C-103 of this title.

(17) “Qualified small business” means a business that has been certified by the Director under § 20C-102 of this title.

§ 20C-102 Certification of qualified small businesses.

(a) Businesses may apply to the Director for certification as a qualified small business for a calendar year.

(1) The application must be in the form and be made under the procedures specified by the Director, accompanied by an application fee established by the Director, not to exceed \$500.

(2) Application fees must be deposited in the Angel Investor Job Creation and Innovation Act Administration Fund.

(3) The application for certification for calendar year 2019 must be made available on the Division’s web site by November 1, 2018. The application for certification for subsequent calendar years must be made available on the Division’s web site by November 1 of the preceding calendar year.

(b)(1) Within 30 days of receiving an application for certification under this section, the Director must do one of the following:

a. Certify the business as satisfying the conditions required of a qualified small business.

b. Request additional information from the business.

c. Reject the application for certification.

(2) If the Director requests additional information from the business, the Director must either certify the business or reject the application within 30 days of receiving the additional information.

(3) If the Director neither certifies the business nor rejects the application within 30 days of receiving the original application or within 30 days of receiving the additional information requested, whichever is later, then the application is deemed rejected, and the Director must refund the application fee.

(4) A business that applies for certification and is rejected may reapply.

(c) To receive certification under this section, a business must meet all of the following conditions:

(1) Be a legal entity qualified to do business in this State that has its headquarters in this State.

(2) Have at least 51% of its common law employees be employed in this State and 51% of its total compensation paid be compensation for work provided in this State.

(3) Be engaged in, or be committed to engage in, innovation in this State in one of the following as its primary business activity:

a. Using proprietary technology to add value to a product, process, or service in a qualified high-technology field.

b. Researching, developing, or producing a proprietary product, process, or service in a qualified high-technology field.

c. Researching, developing, or producing a proprietary product, process, service, or technology in or for use in the fields of agriculture, manufacturing, environmental science, or transportation.

(4) Other than the activities specifically listed in paragraph (c)(3) of this section, not be engaged in real estate development, insurance, lobbying, political consulting, wholesale or retail trade, leisure, hospitality, construction, or professional services provided by attorneys, accountants, business consultants, physicians, or health care consultants.

(5) Have fewer than 25 employees.

(6) Has not been in operation for more than one of the following:

a. Ten years.

b. Twenty years, if the business is engaged in the research, development, or production of medical devices or pharmaceuticals for which United States Food and Drug Administration approval is required for use in the treatment or diagnosis of a disease or condition.

(7) Has not previously received private equity investments of more than \$4,000,000.

(8) Has not issued securities that are traded on a public exchange.

(9) Any other condition the Director establishes by regulation.

(d) In applying the condition under paragraph (c)(5) of this section, the employees in all members of the affiliated group must be included.

(e) In order for a qualified investment in a business to be eligible for tax credits, all of the following must apply:

(1) The business must be certified under this section for the calendar year in which the investment was made before the date on which the qualified investment was made.

(2) The business must not have ever issued securities that are traded on a public exchange.

(3) The business must not issue securities that are traded on a public exchange within 180 days after the date on which the qualified investment was made.

(4) The business must not have a liquidation event within 180 days after the date on which the qualified investment was made.

(5) The business must use qualified investments for qualified expenditures.

(f) The Director must maintain a list of businesses certified under this chapter for the calendar year and must make the list accessible to the public on the Division's web site.

§ 20C-103. Certification of qualified investors.

(a) An investor may apply to the Director for certification as a qualified investor for a calendar year.

(1) The application must be in the form and be made under the procedures specified by the Director, accompanied by an application fee established by the Director, not to exceed \$500.

(2) Application fees must be deposited in the Angel Investor Job Creation and Innovation Act Administration Fund.

(3) The application for certification for calendar year 2019 must be made available on the Division's web site by November 1, 2018. The application for certification for subsequent calendar years must be made available on the Division's web site by November 1 of the preceding calendar year.

(b)(1) Within 30 days of receiving an application for certification under this section, the Director must do one of the following:

a. Certify the investor as satisfying the conditions required of a qualified investor.

b. Request additional information from the investor.

c. Reject the application for certification.

(2) If the Director requests additional information from the investor, the Director must either certify the investor or reject the application within 30 days of receiving the additional information.

(3) If the Director neither certifies the investor nor rejects the application within 30 days of receiving the original application or within 30 days of receiving the additional information requested, whichever is later, then the application is deemed rejected, and the Director must refund the application fee.

(4) An investor who applies for certification and is rejected may reapply.

(c) To receive certification under this section, a qualified investor must be an individual.

(d)(1) For a qualified investment in a qualified small business to be eligible for tax credits, a qualified investor who makes the investment must be certified under this section for the calendar year before making the qualified investment.

(2) Notwithstanding paragraph (d)(1) of this section, if an investor is not an “accredited investor” as defined in the United States Securities and Exchange Commission’s Regulation D, 17 C.F.R. § 230.501(a), application for certification under this section may be made within 30 days after making the qualified investment.

§ 20C-104. Certification of qualified funds.

(a) A pass-through entity may apply to the Director for certification as a qualified fund for a calendar year.

(1) The application must be in the form and be made under the procedures specified by the Director, accompanied by an application fee set by the Director, not to exceed \$1,500.

(2) Application fees must be deposited in the Angel Investor Job Creation and Innovation Act Administration Fund.

(3) The application for certification for calendar year 2019 must be made available on the Division’s web site by November 1, 2018. The application for certification for subsequent calendar years must be made available on the Division’s web site by November 1 of the preceding calendar year.

(b)(1) Within 30 days of receiving an application for certification under this section, the Director must do one of the following:

a. Certify the pass-through entity as satisfying the conditions required of a qualified fund.

b. Request additional information from the pass-through entity.

c. Reject the application for certification.

(2) If the Director requests additional information from the pass-through entity, the Director must either certify the pass-through entity or reject the application within 30 days of receiving the additional information.

(3) If the Director neither certifies the pass-through entity nor rejects the application within 30 days of receiving the original application or within 30 days of receiving the additional information requested, whichever is later, then the application is deemed rejected, and the Director must refund the application fee.

(4) A pass-through entity that applies for certification and is rejected may reapply.

(c) To receive certification under this section, a pass-through entity must meet all of the following conditions:

(1) Invest or intend to invest in a qualified small business.

(2) Be organized as a pass-through entity.

(3) Have at least 3 separate investors, at least 3 of whom intend to invest in a qualified small business and satisfy the condition in § 20C-103(c) of this title.

(d) Investments by the pass-through entity may consist of equity investments or notes that pay interest or other fixed amounts, or any combination of both.

(e) For a qualified investment in a qualified small business to be eligible for tax credits, a qualified fund that makes the investment must be certified under this section for the calendar year before making the qualified investment.

§ 20C-105. Tax credit allowed.

(a) A qualified investor or qualified fund is eligible for a tax credit equal to 25% of the qualified investment in a qualified small business.

(1) The qualified investor or qualified fund must maintain its investment in the qualified small business for 180 days before claiming the tax credit.

(2) Notwithstanding the foregoing, if the qualified investor or qualified fund fails to maintain its investment in the qualified small business for at least 3 years, consisting of the calendar year in which the investment was made and the 2 following calendar years, the qualified investor or qualified fund must repay the tax credit previously claimed as provided in § 20C-108 of this title. The 3-year holding period does not apply if any of the following apply:

a. The qualified small business becomes worthless or liquidates and dissolves after the investment has been held for 180 days, but before the end of the 3-year period.

b. 80% or more of the assets owned or the equity issued by the qualified small business is sold to an unrelated third party before the end of the 3-year period.

c. The qualified small business's common stock begins trading on a public exchange before the end of the 3-year period.

d. The qualified investor dies before the end of the 3-year period.

(b) Investments made by a pass-through entity qualify for a tax credit only if the entity is a qualified fund.

(c)(1) The Director may not approve tax credits that exceed the following total maximum amounts for any calendar year for an individual:

a. \$250,000 for spouses electing to file a joint return under § 1162 of this title.

b. \$125,000 for individuals filing a return utilizing any other filing status.

(2) The total maximum amount in tax credits allowed under paragraph (c)(1) of this section applies to a qualified investor's cumulative qualified investments as an individual qualified investor and as an investor in a qualified fund.

(d) The Director may not approve more than \$5,000,000 in tax credits for each calendar year beginning after December 31, 2018, and before January 1, 2024. The Director may not approve more than a total of \$500,000 in credits for qualified investments in any 1 qualified small business.

(e) The Director may not approve a tax credit to a qualified investor either as an individual qualified investor or as an investor in a qualified fund if, at the time the investment is proposed, the investor meets any of the following:

(1) Is an officer or principal of the qualified small business.

(2) Either individually or in combination with 1 or more members of the investor's family, owns, controls, or holds the power to vote 20% or more of the outstanding securities of the qualified small business.

a. A member of the family of an individual disqualified by paragraph (e)(2) of this section is not eligible for a tax credit under this chapter.

b. For a married couple filing a joint return, the limitations in paragraph (e)(2) of this section apply collectively to the investor and spouse.

c. For purposes of determining the ownership interest of an investor under paragraph (e)(2) of this section, the rules under § 267(c) and (e) of the Internal Revenue Code (26 U.S.C. § 267(c) and (e)) apply.

(f) The application for tax credits to be approved for calendar year 2019 must be made available on the Division's web site by January 1, 2019, and the Division must begin accepting applications by January 1, 2019. The application for tax credits to be approved for subsequent years must be made available on the Division's web site by November 1 of the preceding calendar year.

(g) Qualified investors and qualified funds must apply to the Director for tax credits under this section.

(1) The Director must allocate tax credits to qualified investors or qualified funds in the order that the tax credit applications are filed with the Division.

(2) The Director must approve or reject tax credit applications within 15 days of receiving the application.

(3) The investment specified in the application must be made within 60 days of the approval of the tax credit.

a. If the investment is not made within 60 days, the tax credit approval is revoked and the tax credit is available for allocation to another qualified investor or qualified fund.

b. A qualified investor or qualified fund that fails to invest as specified in the application within 60 days of approval of the tax credits must notify the Director of the failure to invest within 5 business days of the expiration of the 60-day investment period.

c. The investment specified in the application must be made in the same calendar year in which the tax credit certification is received, regardless of whether the 60-day investment period continues into a subsequent calendar year.

(h) The Division must treat tax credit applications filed on the same day as having been filed contemporaneously.

(1) If 2 or more qualified investors or qualified funds file tax credit applications on the same day, and the aggregate amount of the tax credit applications exceeds the aggregate limit of tax credits authorized under this chapter or the lesser amount of credits that remain unallocated on that day, then the credits must be allocated among the qualified investors or qualified funds who filed on that day on a pro rata basis with respect to the amounts claimed.

(2) The pro rata allocation for any one qualified investor or qualified fund is the product obtained by multiplying a fraction, the numerator of which is the amount of the tax credit applications filed on behalf of such qualified investor or qualified fund and the denominator of which is the total of all tax credit applications filed on behalf of all applicants on that day, by the amount of credits that remain unallocated on that day for the calendar year.

(i)(1) A qualified investor or qualified fund, or a qualified small business acting on their behalf, must notify the Director when an investment for which tax credits were approved has been made, and the calendar year in which the investment was made.

(2) A qualified fund must also provide the Director with a statement indicating the amount invested by each investor in the qualified fund based on each investor's share of the assets of the qualified fund at the time of the qualified investment.

§ 20C-106. Issuance of tentative and final tax credit certificates.

(a) After receiving notification that an investment was made, the Director shall issue a tentative tax credit certificate to a qualified investor or, for an investment made by a qualified fund, to each qualified investor who is an investor in the qualified fund. The tentative tax credit certificate must state that the tax credit is available to the qualified investor if the qualified investor or qualified fund, as the case may be, holds the investment in the qualified small business for at least 180 days.

(b) The Director must notify the Director of the Division of Revenue of all tentative tax credit certificates issued under this section by the end of the month in which the Director issues tentative tax credit certificates.

(c)(1) Upon receipt of a report required from the qualified investor or qualified fund under § 20C-107(b) of this title, the Director shall confirm that the qualified small business has filed any annual reports required under § 20C-107(a) of this title and continues to qualify under this chapter.

(2) After the Director makes the confirmation required under paragraph (c)(1) of this section, the Director shall issue a final tax credit certificate to the qualified investor or, for an investment made by a qualified fund, to each qualified investor who is an investor in the qualified fund. The tax credit reflected on the final tax credit certificate may be claimed on any tax return required to be filed by the qualified investor on or after the date on which the final tax credit certificate is issued.

(d) A final tax credit certificate expires if the tax credit is not reflected on a timely-filed tax return within 3 years of the date on which the final tax credit certificate was issued.

(e) The Director must notify the Director of the Division of Revenue of all final tax credit certificates issued under this section by the end of the month in which the Director issues final tax credit certificates.

§ 20C-107 Required reports.

(a) By February 1 of each year, a qualified small business that received an investment that qualified for a tax credit under this chapter must submit an annual report to the Director and pay a filing fee of \$100. A qualified small business must submit reports for 5 years following the year in which it received an investment that qualified for a tax credit under this chapter. All filing fees collected must be deposited in the Angel Investor Job Creation and Innovation Act Administration Fund. A qualified small business's report must certify that the qualified small business meets all of the following:

(1) Is a legal entity qualified to do business in this State that has its headquarters in this State.

(2) Has at least 51% of its common law employees employed in this State and 51% of its total compensation paid is compensation for work provided in this State.

(3) Section 20C-102(c)(3) of this title.

(4) Used the qualified investment for a qualified expenditure.

(b) A qualified investor or a qualified fund that made an investment that qualified for a tax credit under this chapter must submit a report certifying that 180 days have passed and the qualified investor or qualified fund remains invested in the qualified small business as required by § 20C-106 of this title.

(1) Qualified investors are deemed to have not remained invested in a qualified small business if, within 180 days after the qualified investment was made, the qualified small business ceases all operations and becomes insolvent or if the investment is deemed to be worthless.

(2) The Director shall prescribe the form of the report required under this subsection. A qualified investor or a qualified fund must submit the report required under this subsection in the form prescribed by the Director.

(c)(1) In each of the 3 years after the date on which the qualified investment was made, each qualified investor or qualified fund must submit a report on which the qualified investor or qualified fund must certify that the qualified investor or qualified fund remains invested in the qualified small business.

(2) The Director shall prescribe the form of the report required under this subsection. A qualified investor or a qualified fund must submit the report required under this subsection in the form prescribed by the Director.

(d) A qualified small business that ceases all operations and becomes insolvent must file a final annual report documenting its insolvency.

(1) In subsequent years following the qualified small business's insolvency, the business is exempt from requirements of this section related to filing an annual report, paying a filing fee, and subjecting the business to a fine for its failure to file a report.

(2) If the business ceases all operations and becomes insolvent after 3 years from the date of the qualified investment, the business is not subject to the repayment obligation specified in § 20C-108 of this title.

(3) The Director shall prescribe the form of the report required under this subsection. A qualified small business must submit the report required under this subsection in the form prescribed by the Director.

(e) A qualified small business, qualified investor, or qualified fund that fails to file an annual report as required under this subdivision is subject to a \$500 fine.

(f) The Division shall include in its annual report to be issued on or before December 1 of each year, the number of businesses and investors qualifying for the Angel Investor Job Credit, the total credits allocated, and any other data as may be required to determine the success of this program.

§ 20C-108. Revocation of tax credits.

(a) If the Director determines that a qualified investor or qualified fund did not meet the 3-year holding periods set forth in § 20C-105(a) of this title, any final tax credit certificate issued to the qualified investor or qualified fund under § 20C-106 of this section may be revoked.

(1) If the Director makes a determination under this subsection, the qualified investor or qualified fund will must repay the full amount of the tax credit previously claimed.

(2) The qualified investor or qualified fund must pay any amounts due under this subsection within 30 days after being notified by the Director that repayment is required under this subsection.

(b) If the Director determines that a business that was initially approved as a qualified small business failed to meet the employment requirements in § 20C-102(c)(2) of this section or the qualified expenditure requirements in § 20C-102(e)(5) of this section in the 3 calendar years following the year in which a qualified investment was made, the business must repay the percentage of the tax credits allowed and claimed for qualified investments in the qualified small business as follows:

(1) 100% of the tax credit, if the failure occurred in the first year following the year in which the investment was made.

(2) 66% of the tax credit, if the failure occurred in the second year following the year in which the investment was made.

(3) 33% of the tax credit, if the failure occurred in the third year following the year in which the investment was made.

(c) The Director must notify the Director of the Division Revenue of every tax credit revoked by the Director that is subject to repayment under this section.

(d) For the repayment of tax credits required under this section, a qualified small business must file the form prescribed by the Director of the Division of Revenue and pay any amounts due within 30 days after being notified by the Director that it is subject to repayment under this section.

§ 20C-109. Data privacy.

(a) This chapter is subject to the nondisclosure requirements imposed under § 368 of this title. Any and all data received, processed, or transmitted by the Director is deemed to be information from tax returns for the purposes of § 368 of this title.

(b) Notwithstanding subsection (a) of this section, to facilitate investment in qualified small businesses, upon approval of the application and certification by the Director under § 20C-102 of this title, the Director may publish each qualified small business's name, mailing address, telephone number, e-mail address, contact person's name, and industry type.

§ 20C-110. Angel Investor Job Creation and Innovation Act Administration Fund.

The Division may maintain an appropriated special fund account with the State Treasurer, which account is to be known as the Angel Investor Job Creation and Innovation Act Administration Fund. All fees imposed under §§ 20C-102,

20C-103, 20C-104, and 20C-107 must be deposited into this Fund and must be used by the Director for personnel and administrative expenses related to administering this chapter.

Section 4. This Act takes effect for qualified investments made in calendar years beginning after December 31, 2018, and claimed on returns filed after December 31, 2019.

Section 5. This Act expires for tax years commencing on or after January 1, 2022, unless otherwise provided by a subsequent act of the General Assembly.