

SECOND REGULAR SESSION

SENATE BILL NO. 867

90TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR MAXWELL.

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TERRY L. SPIELER, Secretary.

AN ACT

To repeal sections 135.500, 135.503 and 135.516, RSMo Supp. 1999, relating to Missouri certified capital company law, and to enact in lieu thereof three new sections relating to the same subject.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Sections 135.500, 135.503 and 135.516, RSMo Supp. 1999, are repealed and three new sections enacted in lieu thereof, to be known as sections 135.500, 135.503 and 135.516, to read as follows:

135.500. 1. Sections 135.500 to 135.529 shall be known and may be cited as the "Missouri Certified Capital Company Law".

2. As used in sections 135.500 to 135.529, the following terms mean:

(1) "Affiliate of a certified company":

(a) Any person, directly or indirectly owning, controlling or holding power to vote ten percent or more of the outstanding voting securities or other ownership interests of the Missouri certified capital company;

(b) Any person ten percent or more of whose outstanding voting securities or other ownership interest are directly or indirectly owned, controlled or held with power to vote by the Missouri certified capital company;

(c) Any person directly or indirectly controlling, controlled by, or under common control with the Missouri certified capital company;

(d) A partnership in which the Missouri certified capital company is a general partner;

(e) Any person who is an officer, director or agent of the Missouri certified capital company

EXPLANATION--Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

or an immediate family member of such officer, director or agent;

(2) "Applicable percentage", one hundred percent;

(3) "Capital in a qualified Missouri business", any debt, equity or hybrid security, of any nature and description whatsoever, including a debt instrument or security which has the characteristics of debt but which provides for conversion into equity or equity participation instruments such as options or warrants which are acquired by a Missouri certified capital company as a result of a transfer of cash to a business. Capital in a qualified Missouri business shall not include secured debt instruments;

(4) "Certified capital", an investment of cash by an investor in a Missouri certified capital company;

(5) "Certified capital company", any partnership, corporation, trust or limited liability company, whether organized on a profit or not for profit basis, that is located, headquartered and registered to conduct business in Missouri that has as its primary business activity, the investment of cash in qualified Missouri businesses, and which is certified by the department as meeting the criteria of sections 135.500 to 135.529;

(6) "Department", the Missouri department of economic development;

(7) "Director", the director of the department of economic development or a person acting under the supervision of the director;

(8) "Investor", any insurance company that contributes cash;

(9) "Liquidating distribution", payments to investors or to the certified capital company from earnings;

(10) "Person", any natural person or entity, including a corporation, general or limited partnership, trust or limited liability company;

(11) "Qualified distribution", any distribution or payment to equity holders of a certified capital company in connection with the following:

(a) Reasonable costs and expenses of forming, syndicating, managing and operating the certified capital company. **For certified capital companies designated as certified capital companies after August 28, 2000, these costs shall not exceed ten percent of the certified capital of the certified capital company;**

(b) Management fees for managing and operating the certified capital company; and

(c) Any increase in federal or state taxes, penalties and interest, including those related to state and federal income taxes, of equity owners of a certified capital company which related to the ownership, management or operation of a certified capital company;

(12) "Qualified investment", the investment of cash by a Missouri certified capital company in such a manner as to acquire capital in a qualified Missouri business;

(13) "Qualified Missouri business", an independently owned and operated business, which is headquartered and located in Missouri and which is in need of venture capital and cannot obtain

conventional financing. Such business shall have no more than two hundred employees, eighty percent of which are employed in Missouri. Such business shall be involved in commerce for the purpose of manufacturing, processing or assembling products, conducting research and development, or providing services in interstate commerce, but excluding retail, real estate, real estate development, insurance and professional services provided by accountants, lawyers or physicians. If such business has been in existence for three years or less, its gross sales during its most recent complete fiscal years shall not have exceeded four million dollars. **Notwithstanding the two immediately preceding sentences, a business with gross sales during its most recent complete fiscal year in excess of four million or three million dollars, as applicable, but not more than seven million five hundred thousand dollars, will also be a qualified Missouri business provided that it receives an investment from a certified capital company that, within four years after the date on which it was designated as a certified capital company, invests at least fifty percent of the amount required by subdivision (3) of subsection 1 of section 135.516 to be placed in qualified investments in businesses which are qualified Missouri development stage businesses. Failure of the certified capital company to place, within four years after the date on which it was designated as a certified capital company, at least fifty percent of the amount required by subdivision (3) of subsection 1 of section 135.516 in qualified Missouri development stage businesses will cause the subsequent disqualification as a qualified Missouri business of any business which had qualified under the exception contained in the immediately preceding sentence.** If such business has been in existence for longer than three years, its gross sales during its most recent complete fiscal year shall not have exceeded three million dollars. Any business which is classified as a qualified Missouri business at the time of the first investment in such business by a Missouri certified capital company shall, for a period of seven years from the date of such first investment, remain classified as a qualified Missouri business and may receive follow-on investments from any Missouri certified capital company and such follow-on investments shall be qualified investments even though such business may not meet the other qualifications of this subsection at the time of such follow-on investments;

(14) **"Qualified Missouri development stage business", a business that either:**

(a) Meets all of the requirements contained in subdivision (13) of this subsection for a qualified Missouri business, except that its gross sales during its most recent complete fiscal year shall not have exceeded two million dollars; or

(b) Is certified by the department as being involved in a Missouri emerging industry, as defined by the department;

(15) "State premium tax liability", any liability incurred by an insurance company pursuant to the provisions of section 148.320, 148.340, 148.370 or 148.376, RSMo, and any other related provisions, which may impose a tax upon the premium income of insurance companies

after January 1, 1997.

135.503. 1. Any investor that makes an investment of certified capital shall, in the year of investment, earn a vested credit against state premium tax liability equal to the applicable percentage of the investor's investment of certified capital. An investor shall be entitled to take up to ten percent of the vested credit in any taxable year of the investor. Any time after three years after August 28, [1996] **2002**, the director, with the approval of the commissioner of administration, may reduce the applicable percentage on a prospective basis. Any such reduction in the applicable percentage by the director shall not have any effect on credits against state premium tax liability which have been claimed or will be claimed by any investor with respect to credits which have been earned and vested pursuant to an investment of certified capital prior to the effective date of any such change.

2. An insurance company claiming a state premium tax credit earned through an investment in a certified capital company shall not be required to pay any additional retaliatory tax levied pursuant to section 375.916, RSMo, as a result of claiming such credit.

3. The credit against state premium tax liability which is described in subsection 1 of this section may not exceed the state premium tax liability of the investor for any taxable year. All such credits against state premium tax liability may be carried forward indefinitely until the credits are utilized. The maximum amount of certified capital in one or more certified capital companies for which earned and vested tax credits will be allowed in any year to any one investor or its affiliates shall be limited to ten million dollars.

4. Except as provided in subsection 5 of this section, the aggregate amount of certified capital for which earned and vested credits against state premium tax liability are allowed for all persons pursuant to sections 135.500 to 135.529 shall not exceed the following amounts: for calendar year 1996, \$0.00; for calendar year 1997, an amount which would entitle all Missouri certified capital company investors to take aggregate credits of five million dollars; [and for any year thereafter, an additional amount to be determined by the director but not to exceed aggregate credits of ten million dollars for any year with the approval of the commissioner of administration and reported to the general assembly as provided in subsection 2 of section 33.282, RSMo, provided that the amount so determined shall not impair the ability of an investor with earned and vested credits which have been allowed in previous years to take them, pursuant to subsection 1 of this section] **with incremental amounts as follows: in calendar year 1998, five million dollars; and for calendar year 2000, ten million dollars. Thereafter, the aggregate amount of earned and vested certified capital company credits that may be taken on an annual basis by all Missouri certified capital company investors shall not exceed an amount equal to ten percent of the cumulative credits earned by certified capital companies in previous years.** During any calendar year in which the limitation described in this subsection will limit the amount of certified capital for which earned and vested credits against state

premium tax liability are allowed, certified capital for which credits are allowed will be allocated in order of priority based upon the date of filing of information described in subdivision (1) of subsection 5 of section 135.516. Certified capital limited in any calendar year by the application of the provisions of this subsection shall be allowed and allocated in the immediately succeeding calendar year in the order of priority set forth in this subsection. The department shall make separate allocations of certified capital for which credits are allowed under the limitations described in this subsection and under the limitations described in subsection 5 of this section.

5. In addition to the maximum amount pursuant to subsection 4 of this section, the aggregate amount of certified capital for which earned and vested credits against state premium tax liability are allowed for persons pursuant to sections 135.500 to 135.529 shall be the following: for calendar year 1999 and for any year thereafter, an amount to be determined by the director which would entitle all Missouri certified capital company investors to take aggregate credits not to exceed four million dollars for any year with the approval of the commissioner of administration and reported to the general assembly as provided in subsection 2 of section 33.282, RSMo, provided that the amount so determined shall not impair the ability of an investor with earned and vested credits which have been allowed in previous years or pursuant to the provisions of subsection 4 of this section to take them, pursuant to subsection 1 of this section. For purposes of any requirement regarding the schedule of qualified investments for certified capital for which earned and vested credits against state premium tax liability are allowed pursuant to this subsection only, the definition of a "qualified Missouri business" as set forth in subdivision (13) of subsection 2 of section 135.500 means a Missouri business that is located in a distressed community as defined in section 135.530, and meets all of the requirements of subdivision (13) of subsection 2 of section 135.500, except that its gross sales during its most recent complete fiscal year shall not have exceeded five million dollars. During any calendar year in which the limitation described in this subsection limits the amount of additional certified capital for which earned and vested credits against state premium tax liability are allowed, additional certified capital for which credits are allowed shall be allocated in order of priority based upon the date of filing of information described in subdivision (1) of subsection 5 of section 135.516 with respect to such additional certified capital. The department shall make separate allocations of certified capital for which credits are allowed under the limitations described in this subsection and under the limitations described in subsection 4 of this section. No limitation applicable to any certified capital company with respect to certified capital for which credits are allowed pursuant to subsection 4 of this section shall limit the amount of certified capital for which credits are allowed pursuant to this subsection. No limitation applicable to any certified capital company with respect to certified capital for which credits are allowed pursuant to this subsection shall limit the amount of certified capital for which credits are allowed pursuant to subsection 4 of this section.

6. The department shall advise any Missouri certified capital company, in writing, within

fifteen days after receiving the filing described in subdivision (1) of subsection 5 of section 135.516 whether the limitations of subsection [3] 4 of this section then in effect will be applicable with respect to the investments and credits described in such filing with the department.

135.516. 1. To continue to be certified, a Missouri certified capital company shall make qualified investments according to the following schedule:

(1) Within two years after the date on which a Missouri certified capital company is designated as a Missouri certified capital company at least twenty-five percent of its certified capital shall be, or have been, placed in qualified investments;

(2) Within three years after the date on which a Missouri certified capital company is designated as a Missouri certified capital company at least forty percent of its certified capital shall be, or have been, placed in qualified investments;

(3) Within four years after the date on which a Missouri certified capital company is designated as a Missouri certified capital company, at least fifty percent of its total certified capital shall be, or have been, placed in qualified investments. A Missouri certified capital company may not make an investment in an affiliate of the certified capital company. For the purposes of this subsection, if a legal entity is not an affiliate before a certified capital company initially invests in the entity, it will not be an affiliate if a certified capital company provides additional investment in such entity subsequent to its initial investment;

(4) A certified capital company, at least fifteen working days prior to making what it determines to be an initial qualified investment in a specific qualified Missouri business, shall certify to the department that the company in which it proposes to invest meets the definition of a qualified Missouri business pursuant to subdivision (14) of subsection 2 of section 135.500. The certified capital company shall state the amount of capital it intends to invest and the name of the business in which it intends to invest. The certified capital company shall also provide to the department an explanation of its determination that the business meets the definition of a qualified Missouri business. If the department determines that the business does not meet the definition of a qualified Missouri business, it shall, within the fifteen-working-day period prior to the making of the proposed investment, notify the certified capital company of its determination and an explanation thereof. If the department fails to notify the certified capital company with respect to the proposed investment within the fifteen-working-day period prior to the making of the proposed investment, the company in which the certified capital company proposes to invest shall be deemed to be a qualified Missouri business. If a certified capital company fails to notify the department prior to making an initial investment in a business, the department may subsequently determine that the business in which the certified capital company invested was not a qualified Missouri business even though the business, at the time of the investment, met the requirements of subdivision (14) of subsection 2 of section 135.500;

(5) All certified capital which is not required to be placed in qualified investments or which

has been placed in qualified investments and can be received by the company, may be held or invested in such manner as the Missouri certified capital company, in its discretion, deems appropriate. The proceeds of all certified capital which is received by a certified capital company after it was originally placed in qualified investments may be placed again in qualified investments and shall count toward any requirement in sections 135.500 to 135.529 with respect to placing certified capital in qualified investments, **except that a certified capital company designated as a certified capital company after January 1, 2000, shall not invest more than five percent of its certified capital in any security or policy issued by an insurance company or an affiliate of an insurance company or any account maintained by an insurance company or an affiliate of an insurance company.**

2. A certified capital company may make qualified distributions at any time. In order to make distributions **from certified capital**, other than qualified distributions, a certified capital company must have placed an amount cumulatively equal to one hundred percent of its certified capital in qualified investments. Cumulative distributions to equity holders, other than qualified distributions, in excess of the certified capital company's original certified capital and any additional capital contributions to the certified capital company shall be subject to audit by a nationally recognized certified public accounting firm acceptable to the department, at the expense of the certified capital company. The audit shall determine whether aggregate cumulative distributions to all investors and equity holders, other than qualified distributions, when combined with all tax credits utilized by investors pursuant to sections 135.500 to 135.529, have resulted in an annual internal rate of return of fifteen percent computed on the sum of total original certified capital of the certified capital company and any additional capital contributions to the certified capital company. Twenty-five percent of distributions made, other than qualified distributions, in excess of the amount required to produce a fifteen percent annual internal rate of return, as determined by the audit, shall be payable by the certified capital company to the Missouri development finance board. Distributions or payments to debt holders of a certified capital company, however, may be made without restriction with respect to debt owed to them by a certified capital company. A debt holder that is also an investor or equity holder of a certified capital company may receive distributions or payments with respect to such debt without restriction.

3. No qualified investment may be made at a cost to a Missouri certified capital company greater than fifteen percent of the total certified capital under management of the Missouri certified capital company at the time of investment.

4. Documents and other materials submitted by Missouri certified capital companies or by businesses for purposes of the continuance of certification may be deemed "closed records" pursuant to the provisions of section 620.014, RSMo.

5. Each Missouri certified capital company shall report the following to the department:

(1) As soon as practicable after the receipt of certified capital, the name of each investor from which the certified capital was received, the amount of each investor's investment of certified capital and tax credits computed without regard to any limitations under subsection [3] 4 of section 135.503, and the date on which the certified capital was received;

(2) On a quarterly basis, the amount of the Missouri certified capital company's certified capital at the end of the quarter, whether or not the Missouri certified capital company has invested more than fifteen percent of the total certified capital under management in any one company, and all qualified investments that the Missouri certified capital company has made;

(3) Each Missouri certified capital company shall provide annual audited financial statements to the department which include an opinion of an independent certified public accountant to the department within ninety days of the close of the fiscal year. The audit shall address the methods of operation and conduct of the business of the Missouri certified capital company to determine if the Missouri certified capital company is complying with the statutes and program rules and that the funds received by the Missouri certified capital company have been invested as required within the time limits provided by sections 135.500 to 135.529.

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