



Jon Honeck

*Bill Analysis*  
*Legislative Service Commission*

### **Sub. S.B. 301\***

123rd General Assembly

(As Reported by S. Economic Development, Technology, & Aerospace)

**Sen. Horn**

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#### **BILL SUMMARY**

- Establishes an Ohio Venture Capital (OVC) Program to make seed and venture capital loans and investments involving only private moneys with entities committing to maintain a significant focus in Ohio.
- Creates an Ohio Venture Capital Authority (Authority) to oversee the OVC Program.
- Directs the Authority to prescribe a lending and investment policy and to designate a private, for-profit investment fund to serve as the OVC Program's administrative entity and to carry out that policy.
- Provides for the one-time issuance to the Authority of a total of \$100 million in refundable tax credits against the corporate franchise tax and the state personal income tax, that the Authority may sell to provide security against losses incurred under the OVC Program.
- Prohibits the Authority from selling more than \$20 million in tax credits in any one fiscal year to provide security against losses under the OVC Program.
- Specifies that the transfer of tax credits to or use of the proceeds received from the sale of tax credits by the Authority does not constitute an obligation of the state.

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\* *This analysis was prepared before the report of the Senate Economic Development, Technology, & Aerospace Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

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## CONTENT AND OPERATION

### Ohio Venture Capital Authority

#### In general

The bill establishes the Ohio Venture Capital Program (the "OVC Program") for the stated purposes of (1) mobilizing capital for loans and investments that have a significant potential of propelling the advancement of technology and building the entrepreneurial economy of the state and (2) promoting a strong, professional venture capital industry in Ohio. The OVC Program must consist of two general components, a lending and investment component and a provision of security against losses--state tax credits component as follows (sec. 122.65):

- The lending to and investment of *private moneys* in seed and venture capital partnerships pursuant to a general "lending and investment policy" that is prescribed by the Ohio Venture Capital Authority (see below) and that is implemented through a single, designated, *private*, for-profit investment fund;
- The one-time issuance of state tax credits that are to be transferred to the Ohio Venture Capital Authority and that, through the proceeds from their sale, are available to provide security against losses incurred by the OVC Program's fund mentioned above up to the amount of outstanding contracts to purchase the state tax credits, if the OVC Program's revenues are insufficient for that purpose.<sup>1</sup>

The bill creates the Ohio Venture Capital Authority (the "Authority") to oversee the OVC Program and specifies that the exercise by the Authority of its powers is an essential state governmental function and that the Authority is subject to all laws generally applicable to state agencies and public officials to the extent that they do not conflict with the provisions of the OVC Program Law (sec. 122.651(A)).<sup>2</sup> A few of those "conflicting" provisions are discussed below under "Authority not subject to certain laws."

#### Membership and terms of office

The Authority must consist of seven members, no more than five of whom may be from the same political party (sec. 122.651(B)). The Speaker of the House

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<sup>1</sup> *These components are referred to in this analysis and throughout the bill as the "purposes" of the OVC Program.*

<sup>2</sup> *The OVC Program Law will be located in proposed sections 122.65 to 122.6510 of the Revised Code.*

of Representatives and the President of the Senate each must designate a member of the Authority to serve as a co-chairperson (sec. 122.651(C)).

The composition of the Authority is required to be as follows (sec. 122.651(B)):

(1) Three members from the general public, to be appointed by the Governor with the advice and consent of the Senate, who have experience in banking, investments, commercial law, or industry that is relevant to the purposes of the OVC Program;

(2) One member, to be appointed by the Speaker of the House of Representatives (no experience qualifications are specified);

(3) One member, to be appointed by the President of the Senate (again no experience qualifications are specified);

(4) The Auditor of State, or a designee, as an ex officio voting member;

(5) The Attorney General, or a designee, as an ex officio voting member.

The three members initially appointed by the Governor must serve staggered terms, with one term ending on January 31, 2002, another on January 31, 2003, and another on January 31, 2004. Subsequent gubernatorial appointees will serve terms of four years. The initial terms of the two members appointed by the Speaker of the House of Representatives and the President of the Senate expire on January 31, 2002, with their successors serving terms of two years. All appointed Authority members are eligible for reappointment. (Sec. 122.651(B).)

Authority members may be removed by their appointing authority for misfeasance, malfeasance, willful neglect of duty, or other cause, following notice and a public hearing (unless the latter are waived in writing). A vacancy on the Authority arising from a member's removal or otherwise (e.g., death or resignation) must be filled in the same manner as the original appointment, except that a member appointed to fill a vacancy will serve only for the remainder of the previous member's term. (Sec. 122.651(B).)

### **Compensation and administrative expenses**

Authority members will serve without compensation but must be reimbursed for their reasonable and necessary expenses incurred in the conduct of Authority business, although the bill does not specify who will pay the expenses (sec. 122.651(C)). The bill does require the Department of Development, however, to provide office space and technical assistance required by the Authority (sec. 122.651(D)).

**Authority not subject to certain laws**

The bill exempts the Authority from certain laws that generally apply to state agencies. **First**, it is exempted from the operation of the State Agency Sunset Law, which causes covered state agencies to expire four years after their creation or renewal unless renewed in a specified manner by the General Assembly (sec. 122.655(A); sec. 101.84, not in the bill).<sup>3</sup> **Second**, the designation of a specified OVC Program *fund* pursuant to the bill and the agreement discussed below between the Authority and that private, for-profit investment fund do not constitute a purchase of services by a state agency that otherwise would be subject to the requirements of the Department of Administrative Services--Competitive Selection and Other Purchases of Supplies and Services Law (sec. 122.655(B)). (See **COMMENT 1**.)

**Third**, the bill permits the Authority to hold *executive sessions* under circumstances not authorized by the Sunshine Law (see **COMMENT 2**). Specifically, if a majority of a quorum of the Authority (a "quorum" is a majority of all Authority members) agrees, by a roll call vote, to hold an executive session at a regular or special Authority meeting, the Authority may hold the session (1) to present, discuss, or review "confidential" *proprietary information* under certain circumstances (see below) or (2) to prepare for, conduct, or review *negotiating sessions* with a private, for-profit investment fund for the purpose of designating it as the OVC Program fund and entering into an agreement with it (secs. 122.651(C) and 122.655(D)).

**Fourth**, information with respect to the marketing plans, financial statements, trade secrets, research concepts, production methods, or products, or any other *proprietary information*, submitted to or compiled by the Authority for the purpose of developing the lending and investment policy required by the bill (see below) generally is *confidential* and not subject to the Public Records Law. But this confidentiality and the Public Records Law exception do not apply if the person that provides proprietary information or is its subject gives a *written consent* to its disclosure. Similarly, an executive session cannot be held by the Authority in connection with proprietary information if it is the subject of such a written consent to disclosure. (Sec. 122.655(C) and (D); sec. 149.43, not in the bill.) (See **COMMENT 3**.)

**Fifth**, the Authority's activities necessary to determine or modify the OVC Program's lending and investment policy are not subject to the rule-making procedures of the Administrative Procedure Act (sec. 122.652). The bill seems to imply by that provision that the Authority may adopt the lending and investment

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<sup>3</sup> *If Sub. H.B. 548 of the 123rd General Assembly becomes law, it will be necessary to change Sub. S.B. 301's cross-references to the relevant provisions of the "new" State Agency Sunset Law.*

policy by rule under section 111.15 or in another manner. If the Authority were to adopt the lending and investment policy by "section 111.15 rule," it would not be required to give public notice and to conduct public hearings on a proposed rule, although the rule would be subject to the JCARR and legislative review and invalidation process specified in the Administrative Procedure Act.

### **Lending and investment policy**

#### **Loans and investments**

Within 90 days after the bill's effective date, the Authority must establish a written, general lending and investment policy for the OVC Program (sec. 122.652). The Authority may modify the policy when necessary, and it must meet all of the following requirements (sec. 122.652 (A) to (D)):

(1) It must be consistent with the purposes of the OVC Program stated in the bill.

(2) It must permit only *private investments* to be made in private, for-profit seed and venture capital partnerships that (a) commit to maintain a significant focus in this state, (b) demonstrate high historical levels of successful lending and investment performance, and (c) reflect portfolios that are, in the aggregate, diversified by sector, stage of business development, management style, and geographic location.

(3) It must specify the general conditions that a private, for-profit investment fund must meet to be designated the OVC Program's fund.

(4) It must include standards for and general limitations on allowable loans and investments that (a) minimize the need for the Authority to sell tax credits under the bill (see below), (b) ensure the compliance of the OVC Program with all applicable state and federal laws, (c) ensure the safety and soundness of loans and investments made under the OVC Program, and (d) are reasonable and necessary in the Authority's judgment to achieve the OVC Program's stated purposes.

Under the bill, neither the State, nor an appointing authority of any member of the Authority, nor any of the Authority's members is liable in damages in a civil action to any person for any loss incurred by the OVC Program's fund as a result of any of its loans or investments (sec. 122.659).

#### **Security against losses**

The Authority's lending and investment policy also must specify the terms and conditions under which the Authority will use the proceeds received from the sale of specified tax credits (see below) to *provide security against losses* under the OVC Program that its fund sustains. The terms and conditions (1) must be consistent with

the OVC Program's stated purposes, (2) must aim to achieve the maximum impact of transfers of those tax credits as authorized by the bill, and (3) must prohibit any otherwise authorized use of the proceeds received from the sale of those tax credits to provide security against a loss on a loan or investment determined by the Authority to be inconsistent with its lending and investment policy. (Sec. 122.653(A).)

The bill specifies that a transfer of those tax credits to or use of the proceeds received from their sale by the Authority does *not constitute an obligation of the state*, and the bill relatedly *places restrictions* on the Authority's provision of security against losses incurred by the OVC Program's fund (sec. 122.653(A), (B), and (C)). The first restriction is that the Authority cannot provide security against losses to the OVC Program's fund in an aggregate amount that exceeds the proceeds that the Authority receives *from the sale of the tax credits* under the bill's provisions (see "Issuance of refundable tax credits," below) (sec. 122.653(B)(2)(a)). The second and third restrictions relate to the application of the proceeds received from the sale of the tax credits. To provide security against a loss to the OVC Program's fund, the Authority first must use moneys available in the *Ohio Venture Capital Fund* (OVCF) to the extent that the use of these moneys does not "adversely affect" the continued viability of the OVC Program; the OVCF is to be comprised of fees paid by the OVC Program's fund to the Authority under the OVC Program's fund agreement, and of any remaining portion of previous payments made by the Authority that are returned to the Authority by the OVC Program's fund because they could not be fully applied to provide security against losses, plus all interest earned on moneys of the OVCF (secs. 122.653(B)(2)(b) and 122.658(A)).<sup>4</sup> If the moneys in the OVCF are insufficient for the Authority to provide security against a loss to the OVC Program's fund due to an "adverse effect" determination, the Authority may provide security against the loss by using the proceeds from the sale of the tax credits deposited into the *Ohio Venture Capital Security Against Losses Fund*, another fund created by the bill in the state treasury (secs. 122.653(B)(2)(b) and 122.658(B)).

A fourth restriction is that the Authority is not permitted to provide security against losses to the OVC Program's fund unless the amount of the proceeds contractually obligated to the Authority from sales of the tax credits is sufficient to fully provide the security against the losses at the time. The Authority also may not sell tax credits in an aggregate amount exceeding the amount necessary to fully cover the requisite security against losses. (Sec. 122.653(C).)

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<sup>4</sup> *The Ohio Venture Capital Fund, a fund in the state treasury, should not be confused with the OVC Program's private, for-profit investment fund that is the administrative entity for carrying out the OVC Program's lending and investment policy.*

### Designation of the OVC Program's fund and the OVC Program's fund agreement

The Authority must designate one private, for-profit investment fund as the "program fund of the Authority" to carry out the lending and investment policy of the OVC Program. This entity is required to be incorporated or organized as a for-profit corporation, limited liability company, partnership, limited partnership, or limited partnership association and to be capitalized in accordance with any state or federal laws applicable to the issuance or sale of securities. (Sec. 122.65(A) and 122.654(A).)

The Authority must designate the entity by entering into a *written agreement* with it. The "written program fund agreement" must contain the following elements (sec. 122.654(A) and (B)):

(1) A *requirement* that the entity's lending and investment will comply with the Authority's lending and investment policy in effect at the time that a loan or investment is made, and a *prohibition* against the entity's engaging in any lending or investment activities other than activities to carry out *exclusively* the lending and investment component of the OVC Program;

(2) A *requirement of periodic financial reporting* by the entity to the Authority, which must include an annual audit by an independent auditor and other financial reporting as specified in the agreement or otherwise required by the Authority for the purpose of ensuring compliance with the lending and investment component of the OVC Program;

(3) A specification of additional or further standards for or general limitations on allowable loans and investments that minimize the need for the Authority to sell tax credits to provide security against losses to the OVC Program's fund, that ensure the compliance of the entity with applicable Ohio and federal laws, and that ensure the safety and soundness of loans and investments made under the OVC Program;

(4) A requirement of *payment* by the entity to the Authority of any *fees* that are prescribed in the agreement;

(5) A specification of the procedures under which the entity will certify immediately to the Authority that *a loss* on a loan or investment has been incurred under the OVC Program, thereby creating a need for the Authority to *sell tax credits* under contract to a purchaser in order to provide revenues for the Authority to use to provide security against the loss, and the consequences to the entity of failing to so certify;

(6) A requirement that any amount paid by the Authority to the OVC Program's fund to provide security against losses must be fully applied by the entity to provide that security and that, if that amount cannot be so applied for any reason,

the entity will return any of that amount not so applied to the Authority in a timely manner;

(7) A specification of general limitations regarding the employment of a *fund manager* by the entity, in addition to an express limitation that the fund manager be a person with "demonstrated, substantial, successful" experience in the design and management of state-sponsored seed and venture capital investment programs and in capital formation;

(8) A specification that no transfer of tax credits to or use of the proceeds received from the sale of tax credits by the Authority constitutes an obligation of the state and that the entity is prohibited from representing or permitting the representation of such a transfer or use as such an obligation;

(9) Specifications of any other terms and conditions that the Authority considers necessary to achieve the purposes of the OVC Program;

(10) A specification of the terms and conditions under which the Authority or the OVC Program's fund may terminate the agreement or cease the use of the proceeds received from the sale of tax credits to provide security against losses incurred by the OVC Program's fund.

### **Issuance of refundable tax credits**

#### **Nature of credits**

Under the bill, a combined total of \$100 million *in credits against the corporate franchise tax and the state personal income tax* generally are to be issued by the state and transferred to the Authority. The amount of each credit so transferred cannot exceed the amount of either tax that must otherwise be credited under specified statutes to the Local Government Fund, the Local Government Revenue Assistance Fund, the Library and Local Government Support Fund, the Ohio Political Party Fund, or the General Revenue Fund. (Sec. 122.656(A).) These tax credits are for the second stated purpose of the OVC Program—the provision of security against losses incurred by the OVC Program's fund (sec. 122.65(B)).

#### **Contracts**

Upon the transfer of the tax credits, the Authority may enter into written contracts for the sale of the credits by any purchaser, including the OVC Program's fund, at a future time specified in a contract. The Authority is directed to enter into contracts that are expected to result in maximum effectiveness in achieving the OVC Program's purposes. The Authority is prohibited from entering into a contract that would preclude a purchaser from using a tax credit for its intended purpose. (Sec. 122.656(B).)

### **Limitations**

The Authority's sale of a tax credit is subject to the following limitations (sec. 122.656(C)):

(1) The Authority must sell the credit solely pursuant to a contract consistent with the OVC Program Law.

(2) The sale of the credit must take place only as a result of a loss on a loan or investment made under the OVC Program, as certified to the Authority by the OVC Program's fund.

(3) The Authority may not sell a credit that may be claimed after July 1, 2026.

(4) The Authority is not permitted to sell tax credits of more than a total of \$20 million in any fiscal year (see below).

(5) The Authority must sell the tax credit for at least its full face value, except under conditions specified in its lending and investment policy, but the conditions must specify that, at a minimum, the Authority must seek the terms most favorable to the OVC Program.

### **Registration and sales of tax credits**

The Authority is required to develop a system of registration and a system of certificates in conjunction with the Tax Commissioner to verify that a tax credit is one properly sold in accordance with the bill and one properly claimed (sec. 122.656(D)). To this end, a tax credit certificate (or other document selling a tax credit) must show on its face the principal amount of the credit and the year or years for which the credit may be claimed (sec. 122.656(C)(4)).

The bill also permits a subsequent sale or other transfer of tax credits by their original purchasers (sec. 122.656(E)).

### **Purchaser's use of a tax credit**

Under the bill, a taxpayer subject to the state's personal income tax or corporate franchise tax must be allowed a refundable credit against the tax using tax credits purchased from the Authority. The taxpayer must claim a tax credit in the order specified by section 5733.98 if the credit is claimed against the corporate franchise tax or by section 5747.98 if the credit is claimed against the state personal income tax. Under the bill, the "refundable OVC Program Credit" is the final credit that a taxpayer may claim against both taxes. (See **COMMENT 4.**) If, after the application of all other preceding credits, the amount of the tax credit exceeds the

tax due, the taxpayer is entitled to a *refund of the excess*. (Secs. 122.657, 5733.98(A)(24) and (B), and 5747.98(A)(31) and (B).)

### **Biennial reports**

Starting on January 1 of the second year after entering into an OVC Program fund agreement, and on January 1 of every other year thereafter, the Authority is required to file a report with the Clerk of the House of Representatives, the Clerk of the Senate, and the chairpersons of the House and Senate committees that are primarily concerned with economic development. The report must contain the following information (sec. 122.6510(A)):

- (1) A description of the details of the Authority's lending and investment policy;
- (2) The Authority's assessment of the OVC Program's achievement of its statutorily prescribed purposes;
- (3) The use of the proceeds received from the sale of tax credits by the Authority to provide security against losses incurred by the OVC Program's fund;
- (4) The amount of tax credits that the Authority sold;
- (5) The amount of tax credits claimed against the state income tax and the corporate franchise tax;
- (6) The financial status of the Ohio Venture Capital Fund;
- (7) Any recommendations for modifying the OVC Program to better achieve its statutorily prescribed purposes.

Each year that a report is issued, the co-chairpersons of Authority, or another member of the Authority designated by the co-chairpersons as the Authority's representative, must appear in person before the standing committees of the House and Senate that are predominantly concerned with economic development to give testimony concerning the status of the OVC Program (sec. 122.6510(B)).

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## **COMMENT**

1. The Department of Administrative Services--Competitive Selection and Other Purchases of Supplies and Services Law in Chapter 125. of the Revised Code specifies, among its other provisions, when *competitive sealed bidding* or *competitive sealed proposal* procedures must or may be followed in a state agency's purchase of supplies or services and when those competitive selection procedures need not be followed. Generally, a state agency only may purchase

services without competitive selection if they cost \$50,000 or less or purchase supplies without competitive selection if they cost \$25,000 or less. When competitive selection procedures must be followed, purchases of supplies or services generally must be made by a state agency from or through the Department of Administrative Services. When competitive selection procedures need not be followed, a state agency may directly purchase supplies or services or may make a purchase from or through the Department of Administrative Services. (Sec. 125.05, not in the bill.) These provisions are among the provisions from whose operation the bill exempts the Ohio Venture Capital Authority (sec. 122.655(B)).

2. The Sunshine Law in section 121.22 of the Revised Code generally provides that all meetings of any public body are to be public meetings *open to the public* at all times. A "public body" includes any board, commission, committee, council, or *similar decision-making body* of a state agency, institution, or *authority*--therefore, probably including the Ohio Venture Capital Authority created by the bill. (Sec. 121.22(B)(1) and (C), not in the bill.)

The Sunshine Law requires any regular or special prearranged discussion of the public business of a public body by a majority of its members (a "meeting") to be open to the public unless an *executive session* is authorized by the Sunshine Law. Its current executive session provisions do not appear to authorize closed sessions by the Ohio Venture Capital Authority for the purposes described in the bill--thus, necessitating the bill's special executive session provisions that "notwithstanding" the Sunshine Law (sec. 122.655(D)). However, the current Sunshine Law does contain a few executive session provisions similar to those proposed by the bill. For example, it permits the Controlling Board, the Development Financing Advisory Council, the Industrial Technology and Enterprise Advisory Council, the Tax Credit Authority, and the Minority Development Financing Advisory Board, when meeting to consider granting certain state assistance and in order to protect the interest of an applicant or the possible investment of public funds, by unanimous vote of all members present, to close the meeting during consideration of confidentially received *marketing plans*, specific business strategy, *production techniques* and *trade secrets*, *financial projections*, and personal *financial statements* of an applicant. The current Sunshine Law also permits other public bodies to conduct executive sessions under specified circumstances, including (a) to prepare for, conduct, or review *negotiations* or bargaining sessions with public employees concerning their compensation or other terms and conditions of their employment or (b) to, in the case of a county hospital, consider trade secrets. (Sec. 121.22(E) and (G)(4) and (7).)

3. The Public Records Law requires that public records be promptly prepared and made available for inspection and copying in accordance with specified rules and procedures. A "public record" is any record that is kept by any public office, and a "public office" includes any state agency established by Ohio law for the exercise of any governmental function. The Public Records Law and numerous other Revised

Code sections carve exceptions to the Public Records Law's inspection and copying requirements. (Secs. 149.011(A) and 149.43, not in the bill.)

The bill declares the Ohio Venture Capital Authority to be exercising an "essential governmental function" and thereby clearly makes the Authority a "public office" whose records normally would be subject to the Public Records Law's inspection and copying requirements. Consequently, because no existing exception to the Public Records Law seems to apply to the Authority, the bill includes its special confidentiality and Public Records Law exemption provisions (sec. 122.655(C)).

4. When claiming credits against the corporate franchise tax and the state personal income tax, a taxpayer must apply the credits against the tax in an order specified by law. Under the bill, the refundable OVC Program tax credit is the 24th and final credit that may be claimed against the corporate franchise tax, and one of only two credits against that tax that are refundable (sec. 5733.98). It is the 31st and final credit that may be claimed against the state personal income tax, and one of only four credits against that tax that are refundable (sec. 5747.98).

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## HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	05-16-00	p. 1710
Reported, S. Economic Development, Technology, & Aerospace	---	---

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