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*Bill Analysis*  
*Legislative Service Commission*

## **S.B. 180**

124th General Assembly  
(As Introduced)

**Sens. Armbruster, Harris, Fingerhut**

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### **BILL SUMMARY**

- Establishes an Ohio Venture Capital (OVC) Program to make seed and venture capital loans to and investments in 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 establish a lending and investment policy and permits it to designate one private, for-profit investment fund to serve as the OVC Program's administrative entity and 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 and the state personal income taxes, that the Authority may then sell to provide security against losses incurred under the OVC Program.
- Permits the original purchaser of such tax credit to sell or transfer it.
- Prohibits the Authority from selling more than \$20 million in tax credits in any one fiscal year, and from selling a credit that may be claimed after July 1, 2026.
- 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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## CONTENT AND OPERATION

### *Ohio Venture Capital Program and Authority*

#### *In general*

(R.C. 122.65 and 122.651(A))

The bill establishes the Ohio Venture Capital Program (the "OVC Program"), and creates the Ohio Venture Capital Authority (the "Authority") to oversee the OVC Program, for the 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:

- The lending to and investment of private moneys in seed and venture capital partnerships pursuant to a general "lending and investment policy" that must be prescribed by the Authority (see "*Authority's lending and investment policy*," below) and 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 Authority and that, through the proceeds from their sale, are available to

provide security against losses incurred by the investment fund, up to the amount of outstanding contracts to purchase those state tax credits, if the OVC Program's revenues are insufficient for that purpose.<sup>1</sup>

The bill 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, with certain exceptions, discussed below under "**Authority not subject to certain laws.**"

**Authority membership, terms of office, and operation**

(R.C. 122.651)

Under the bill, the Authority consists of seven members, no more than five of whom may be from the same political party. The Speaker of the House of Representatives and the President of the Senate each must designate a member of the Authority to serve as a co-chairperson.

The composition of the Authority is as follows:

(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, and one member to be appointed by the Senate President;

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

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

The three members initially appointed by the Governor are to 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 House Speaker and the Senate President expire on January 31, 2002, with their successors serving terms of two years. All Authority members are eligible for reappointment.

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

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 waived in writing). A vacancy on the Authority must be filled in the same manner as the original appointment, except that a person appointed to fill a vacancy will serve only for the remainder of the previous member's term.

A majority of the Authority constitutes a quorum, and the affirmative vote of a majority of the members present is necessary to take action. No vacancy in the Authority membership impairs the rights of a quorum to exercise all rights and perform all Authority duties.

### **Compensation and administrative expenses**

(R.C. 122.651)

Authority members must serve without compensation, but can be reimbursed for their reasonable and necessary expenses incurred in the conduct of Authority business. The bill requires the Department of Development to provide office space and technical assistance as the Authority requires.

### **Authority not subject to certain laws**

(R.C. 122.652 and 122.655)

The bill exempts the Authority 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 (R.C. 101.83, not in the bill). It also provides that the designation of a private, for-profit investment fund and a written agreement (discussed below) between the Authority and that 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.

The bill permits the Authority to hold executive sessions under different circumstances than those generally applicable to public bodies under the Sunshine Law. Specifically, if a majority of a quorum of the Authority 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 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.

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 generally is confidential and not subject to the Public Records Law (R.C. 149.43, not in the bill). But this confidentiality and the Public Records Law exception do not apply if the person that provides proprietary information or is its subject gives written consent to its disclosure. Similarly, an executive session cannot be held by the Authority in connection with proprietary information if written consent to disclosure has been given.

The bill provides that 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, which requires public notice and hearings.

### **The Authority's lending and investment policy**

#### **Loans and investments**

(R.C. 122.652 and 122.659)

Within 90 days after the bill's effective date, the Authority must establish, and may modify, a written, general lending and investment policy for the OVC Program. The policy must meet all of the following requirements:

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

(2) It must permit only private investments to be made in private, for-profit seed and venture capital partnerships that commit to maintain a significant focus in this state; demonstrate high historical levels of successful lending and investment performance; and 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 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 "**Issuance and sale of refundable tax credits**," below), (b) ensure compliance of the OVC Program Fund 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 purposes.

Under the bill, neither the State, nor any of the Authority's members or anyone that appointed a member is liable in damages in a civil action to any person for any loss incurred by the OVC Program Fund as a result of any loans or investments it makes.

**Security against losses**

(R.C. 122.653 and 122.658)

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 "**Issuance and sale of refundable tax credits**," below) to provide security against losses under the OVC Program that its Fund sustains (by authorizing the use of state money to provide security against losses, the bill may conflict with Article VIII, §4, Ohio Constitution, which states that "[t]he credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever. . . ."). The terms and conditions must (1) be consistent with the OVC Program's purposes, (2) aim to achieve the maximum impact of transfers of those tax credits, and (3) 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.

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 places restrictions on the Authority's provision of security against losses incurred by the OVC Program Fund. The first restriction is that the Authority cannot provide security against losses of the OVC Program Fund in an aggregate amount that exceeds the proceeds that the Authority receives from the sale of the tax credits. 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 Fund, the Authority first must use moneys available in the Ohio Venture Capital Fund (OVCF) created by the bill, to the extent that the use of those moneys does not "adversely affect" the OVC Program's continued viability. The OVCF is to be comprised of fees paid by the OVC Program Fund to the Authority under the OVC Program Fund agreement, and of any remaining portion of previous payments made by the Authority that are returned to the Authority by the OVC Program Fund because they could not be

fully applied to provide security against losses, plus all interest earned on OVCF moneys.<sup>2</sup>

If the moneys in the OVCF are insufficient for the Authority to provide security against a loss to the OVC Program Fund due to an "adverse effect" determination, the Authority may provide security against the loss by using the proceeds, and interest earned thereon, from the sale of tax credits deposited into the Ohio Venture Capital Security Against Losses Fund, another fund created by the bill in the state treasury.

A fourth restriction is that the Authority is not permitted to provide security against losses to the OVC Program 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.

**Designation of the OVC Program Fund by written agreement**

(R.C. 122.65(A) and 122.654)

The Authority may 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 capitalized in accordance with any state or federal laws applicable to the issuance or sale of securities.

The Authority must designate the entity that is the OVC Program Fund by entering into a written agreement with it. The agreement must contain the following elements:

(1) A requirement that the OVC Program Fund'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 Fund'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 OVC Program Fund to the Authority, which must include an annual audit by an independent

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<sup>2</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.*

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 Fund, that ensure the compliance of the Fund 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 OVC Program Fund to the Authority of any fees that are prescribed in the agreement;

(5) A specification of the procedures under which the OVC Program Fund 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 for security against the loss, and the consequences to the Fund of failing to so certify;

(6) Requirements that any amount paid by the Authority to the OVC Program Fund to provide security against losses must be fully applied by the Fund to provide that security and that, if that amount cannot be so applied for any reason, the Fund 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 OVC Program Fund, 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 OVC Program Fund 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 and OVC Program Fund 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 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 Fund.

**Issuance and sale of refundable tax credits**

**Nature of credits**

(R.C. 122.65(B) and 122.656(A))

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, but the amount of each credit so transferred cannot exceed the amount of either tax revenues that must otherwise be credited under specified statutes to the General Revenue Fund, Local Government Fund, Local Government Revenue Assistance Fund, Library and Local Government Support Fund, or Ohio Political Party Fund. These tax credits are for the second component of the OVC Program--the provision of security against losses incurred by the OVC Program Fund.

**Contracts for the sale of tax credits**

(R.C. 122.656(B))

Upon the transfer of the tax credits, the Authority may enter into written contracts for the sale of the credits, with any purchaser, including the OVC Program Fund, at a future time specified in the contracts. 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.

**Limitations**

(R.C. 122.656(C))

The Authority's sale of a tax credit is subject to the following limitations:

(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 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.

(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 sale of tax credits**

(R.C. 122.656(C)(4), (D), and (E))

The Authority is required to develop a system of registration and certificates in conjunction with the Tax Commissioner to verify that a tax credit is one properly sold and claimed in accordance with the bill. 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.

The bill permits a subsequent sale or other transfer of tax credits by their original purchasers.

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

(R.C. 122.657, 5733.98, and 5747.98)

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 the tax credit purchased from the Authority. The taxpayer must claim the tax credit in the same order existing law prescribes for claiming nonrefundable and refundable corporate franchise or state personal income tax credits. Under the bill, the "refundable OVC Program Credit" is the final credit listed in the order that a taxpayer may claim against those taxes. 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.

**Biennial reports**

(R.C. 122.6510)

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:

(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 Fund;

(4) The amount of tax credits that the Authority sold;

(5) The amount of tax credits claimed against the state income and corporate franchise taxes;

(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 the 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.

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## HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	10-16-01	p. 975

s0180-i.124/kl