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Bill Analysis
Legislative Service Commission

Sub. S.B. 180

124th General Assembly
(As Passed by the Senate)

Sens. Armbruster, Harris, Fingerhut, Spada, Ryan, Roberts, Amstutz, Austria, Blessing, Brady, Carnes, Coughlin, DiDonato, Finan, Randy Gardner, Robert Gardner, Goodman, Hagan, Herington, Hottinger, Jacobson, Mead, Mumper, Nein, Oelslager, White, Prentiss, Mallory, Espy, Wachtmann

BILL SUMMARY

- Establishes an Ohio Venture Capital (OVC) Program to make loans to and invest in seed and venture capital partnerships and provide security against losses incurred by OVC Program lenders and investors.
- Creates an Ohio Venture Capital Authority (Authority) to oversee the OVC Program.
- Directs the Authority to establish a lending and investment policy and requires it to designate one private, for-profit investment fund to serve as the OVC Program's administrator and carry out that policy.
- Provides that the Authority may grant to lenders and investors of the OVC Program up to a total of \$100 million in refundable tax credits against the premium tax on domestic or foreign insurance companies or the corporation franchise or personal income tax to provide security against losses incurred by them.
- Prohibits the Authority from granting more than \$20 million in tax credits in any one fiscal year, and from granting a credit that may be claimed during the first four years of the OVC Program or after July 1, 2026.

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CONTENT AND OPERATION

Ohio Venture Capital Program and Authority

In general

(R.C. 150.01(B) and 150.02)

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 provide significant potential to propel the advancement of technology and build the entrepreneurial economy throughout the state, and (2) promoting a strong, professional venture capital industry throughout Ohio. The OVC Program consists of two general components (referred to in this analysis and throughout the bill as the OVC Program's "purposes"):

- The lending to and investment of private moneys in seed and venture capital partnerships pursuant to a general "lending and investment policy" prescribed by the Authority (see "*Authority's lending and investment policy*," below) and administered through a single, private, for-profit investment fund;
- The granting of tax credits by the Authority to provide security against losses on loans and investments incurred under the OVC Program, up to the

amount of outstanding contracts for those tax credits, if the OVC Program's revenues are insufficient for that purpose.

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 and public officials, with certain exceptions, discussed below under "**Authority not subject to certain laws.**"

Authority membership, terms of office, and operation

(R.C. 150.02)

Under the bill, the Authority consists of nine members, not more than seven 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 from the general public to be appointed by the House Speaker, and one member from the general public to be appointed by the Senate President, subject to the same experience requirements as the gubernatorial appointments;

(3) The Auditor of State, Attorney General, Director of Development, and Tax Commissioner, or their designees, as ex officio, non-voting members.

The three members initially appointed by the Governor are to serve staggered terms, with one term ending on January 31, 2004, another on January 31, 2005, and another on January 31, 2006. The initial terms of the two members appointed by the House Speaker and the Senate President expire on January 31, 2004. Subsequent appointees will serve terms of four years. All appointed Authority members are eligible for reappointment.

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.

Authority members must serve without compensation, but must 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. 150.03 and 150.06)

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 an OVC Program administrator and the written agreement (discussed below) between the Authority and the administrator do not constitute a purchase of services by a state agency that otherwise would be subject to the requirements of state law governing government purchasing and competitive bidding.

The bill permits the Authority to hold executive sessions under different circumstances than those generally applicable to public bodies under the existing Sunshine Law, which provides that meetings of a public body generally are to be open to the public. Specifically, if a majority of a quorum of the Authority agrees, by a roll call vote, to hold an executive (i.e., closed) 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 administrator 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 providing proprietary information or who is the subject of such information 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 any of the Authority's activities necessary to establish 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. 150.03 and 150.09)

Within 90 days after the bill's effective date, the Authority must establish, and subsequently may modify, a written 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.
- (2) It must permit only private investments to be made in private, for-profit seed and venture capital partnerships, including funds of funds (partnerships organized to invest in other partnerships), that commit to maintain a significant focus in this state; demonstrate the potential to generate high levels of successful lending and investment performance; and reflect portfolios that are, in the aggregate, diversified by sector, stage of business development with a heavy emphasis on seed and early stage 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 administrator.
- (4) It must include lending and investment standards and general limitations on allowable loans and investments that (a) minimize the need for the Authority to grant tax credits under the bill (see "**Refundable tax credits**," below), (b) ensure compliance of the OVC Program administrator 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.
- (5) It must specify the criteria the Authority must consider when making the determination of whether moneys in the Ohio Venture Capital Fund (see "**Security against losses**," below) may be expended without adversely affecting the OVC Program's continued viability.

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 in a civil action for any loss incurred by the OVC Program administrator as a result of any loans or investments it makes.

Security against losses

(R.C. 150.04 and 150.08)

The Authority's lending and investment policy also must specify the terms and conditions under which the Authority may grant tax credits (see "**Refundable tax credits**," below) to provide security against losses on loans or investments under the OVC Program. (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 bill places restrictions on the Authority's provision of security against losses incurred by lenders or investors under the OVC Program. 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, as determined by the Authority under the criteria in its lending and investment policy. The OVCF is to be comprised of fees paid by the OVC Program administrator to the Authority under the OVC Program administrator agreement, plus all interest earned on OVCF moneys. Money in the OVCF must be used exclusively to provide security against losses.

If the moneys in the OVCF are insufficient for the Authority to provide security against a loss due to an "adverse effect" determination, the Authority may provide security against the loss by granting tax credits to lenders and investors.

Designation of the OVC Program administrator by written agreement

(R.C. 150.01(B)(1) and 150.05)

Under the bill, the Authority must designate, as the OVC Program administrator, one private, for-profit investment fund 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 administrator by entering into a written agreement with it. The agreement must contain the following elements:

(1) Specification that borrowing and investing by the OVC Program administrator will be budgeted to guarantee that no tax credits will be granted during the first four years of the OVC Program;

(2) A requirement that lending and investment by the OVC Program administrator 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 administrator engaging in any lending or investment activities other than activities to carry out exclusively the lending and investment component of the OVC Program;

(3) A requirement of periodic financial reporting by the OVC Program administrator 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;

(4) Specification of additional or further standards or general limitations on allowable loans and investments that minimize the need for the Authority to grant tax credits to provide security against losses, that ensure the compliance of the OVC Program administrator with applicable Ohio and federal laws, and that ensure the safety and soundness of loans and investments made under the OVC Program;

(5) A requirement that the OVC Program administrator pay to the Authority any fees prescribed in the agreement;

(6) Specification of the procedures under which the OVC Program administrator 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 grant tax credits under a contract between a lender or an investor and the Authority;

(7) Specification of any general limitations regarding the employment of a fund manager by the OVC Program administrator, in addition to an express limitation that the fund manager be a person with "demonstrated, substantial, successful" experience in the design and management of seed and venture capital investment programs and in capital formation;

(8) Specification of any other terms and conditions that the Authority and OVC Program administrator consider consistent with and necessary to achieve the purposes of the OVC Program;

(9) Specification of the terms and conditions under which the Authority or the OVC Program administrator may terminate the agreement or the Authority cease granting tax credits to provide security against losses.

Refundable tax credits

Nature of credits

(R.C. 150.01(B)(2) and 150.07(A))

Under the bill, a combined total of \$100 million in refundable credits against the premium tax on domestic or foreign insurance companies, corporation franchise tax, and state personal income tax may be granted by the Authority to a lender or an investor under the OVC Program. These tax credits are for the second component of the OVC Program--the provision of security against losses incurred under the OVC Program.

Contracts for the tax credits

(R.C. 150.07(A))

To grant a tax credit, the Authority must enter into a written contract to grant the credit at a future time to a lender or an investor (including the OVC Program administrator) if the lender or investor incurs a loss under the OVC Program. The contract must be consistent with the OVC Program and contain the terms and conditions under which the Authority will grant the credit, including specifying the amount of loss the lender or investor must first incur before the credit is granted.

Limitations

(R.C. 150.07(B))

The Authority may grant a tax credit, subject to the following limitations:

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

(2) The Authority grants the credit 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 administrator.

(3) The Authority does not grant any credit that may be claimed during the first four years of the OVC Program or after July 1, 2026.

(4) The Authority does not grant tax credits totaling more than \$20 million in any fiscal year.

(5) The Authority grants the tax credit in an amount that does not exceed the amount of loss incurred and under conditions specified in its lending and investment policy.

Issuance of tax certificates

(R.C. 150.07(C))

The Authority is required to develop a system for issuing tax certificates, in conjunction with the Tax Commissioner, to verify that a tax credit is one properly issued and claimed in accordance with the bill. To this end, the tax certificate must state the principal amount of the credit granted and the year in which the credit may be claimed.

Use of a tax credit

(R.C. 5725.19, 5729.08, 5733.49, 5733.98, 5747.80, and 5747.98)

Under the bill, a taxpayer subject to the premium tax on domestic or foreign insurance companies, personal income tax, or corporation franchise tax may claim a refundable credit against the tax using the tax credit granted by the Authority. The taxpayer must claim the tax credit in the calendar, tax, or taxable year specified in the tax certificate (depending on which tax applies to it), and, for the corporation franchise or state personal income tax, in the same order existing law prescribes for claiming tax credits. Under the bill, the "refundable OVC Program Credit" is the final credit listed in the order of credits that a taxpayer may claim against the corporation franchise or personal income tax. 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.

For purposes of making tax payments under either the corporation franchise or personal income tax, taxes equal to the amount of the refundable credit must be considered paid to Ohio on the first day of the tax or taxable year. (This reduces the amount of tax withholding or estimated taxes payable throughout the year.)

Credits against the premium tax on domestic or foreign insurance companies also are refundable.

Biennial reports

(R.C. 150.10)

Starting on January 1 of the second year after entering into an OVC Program administrator agreement, and on January 1 of every other year thereafter, the Authority is required to file a written 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 amount of tax credits that the Authority granted;
- (4) The amount of tax credits claimed against the premium tax on domestic or foreign insurance companies and the state income and corporation franchise taxes;
- (5) The financial status of the Ohio Venture Capital Fund;
- (6) 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.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	10-16-01	p. 975
Reported, S. Ways & Means	03-13-02	p. 1573
Passed Senate (32-0)	03-13-02	p. 1576

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