

HOUSE BILL NO. 1039

Introduced by

Legislative Council

(Commerce and Labor Committee)

1 A BILL for an Act to provide for a state venture capital fund.

2 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

3 **SECTION 1. North Dakota venture capital program - Purposes.** For the purposes of
4 mobilizing capital for loans and investments that provide significant potential to propel the
5 advancement of technology and build the entrepreneurial economy of this state and promoting
6 a strong, professional venture capital industry in this state, the North Dakota venture capital
7 program is created. The program must consist of the following general components:

- 8 1. The lending to and investment of private moneys in seed and venture capital
9 partnerships pursuant to a general lending and investment policy prescribed by the
10 North Dakota venture capital authority and implemented through a single,
11 designated, private, for-profit investment fund; and
12 2. The one-time issuance of state tax credits to the authority which, through the
13 proceeds from contractual commitments to purchase, is available to guarantee
14 losses incurred by the program fund up to the amount of outstanding contracts to
15 purchase if program revenues of the authority are insufficient for that purpose.

16 **SECTION 2. North Dakota venture capital authority - Membership.**

- 17 1. The North Dakota venture capital authority is created. The authority is subject to
18 all laws generally applicable to state agencies and public officials, to the extent
19 those laws do not conflict with this Act.
20 2. The authority consists of seven members, no more than five of whom may be of
21 the same political party. With the advice and consent of the senate, the governor
22 shall appoint two members who must have experience in the field of banking,
23 investments, or commercial law. The speaker of the house of representatives shall
24 appoint one member from each of the two main political parties in the house of

representatives. The president pro tempore of the senate shall appoint one member from each of the two main political parties in the senate. The director of the department of economic development and finance is an ex officio voting member. Initial gubernatorial appointees to the authority serve staggered terms, one term expiring as of May 1, 2003, and the other term expiring as of May 1, 2005. Thereafter, terms of office for gubernatorial appointees are for four years. The initial terms of the four legislative members expire as of May 1, 2003. Thereafter, legislative members shall serve two-year terms, provided that legislative members may continue to serve on the authority only if they remain members of the legislative assembly. A vacancy on the authority is filled in the same manner as the original appointment, except that an individual appointed to fill a vacancy is appointed to the remainder of the unexpired term. Any member of the authority is eligible for reappointment.

3. A member of the authority may be removed by the member's appointing authority for misfeasance, malfeasance, or willful neglect of duty or for other cause, after notice and a public hearing, unless the notice and hearing are waived in writing by the member.

4. Members of the authority must serve without compensation but are entitled to receive reasonable and necessary expenses incurred in the conduct of authority business. The speaker of the house of representatives and the president pro tempore of the senate shall each designate a member of the authority to cochair the authority.

5. The department of economic development and finance shall provide the authority with office space and technical assistance as the authority requires.

SECTION 3. North Dakota venture capital program - Policy. Within ninety days after the effective date of this Act, the North Dakota venture capital authority shall establish, and subsequently may modify as it considers necessary, a written, general lending and investment policy for the North Dakota venture capital program. The authority is not subject to chapter 28-32 with respect to the establishment or modification of the policy. The policy must meet all the following requirements:

1. It is consistent with the purposes of the program as stated in section 1 of this Act.

2. It permits the direction of only private moneys into private, for-profit seed and venture capital partnerships that commit to maintaining a significant focus in this state, demonstrate high historical levels of successful lending and investment performance, and, in the aggregate, reflect portfolios diversified by sector, stage of business development, management style, and geographic location.
3. It specifies the general conditions a private, for-profit investment fund must meet to be designated the program fund under section 5 of this Act.
4. It includes lending and investment standards and general limitations on allowable loans and investments the authority considers reasonable and necessary to achieve the purposes of the program under section 1 of this Act, minimizes the need for the authority to transfer tax credits under subsection 3 of section 7 of this Act, ensures compliance of the program fund with all applicable laws of this state and the United States, and ensures the safety and soundness of loans and investments made under the program.
5. It specifies the terms and conditions under which the North Dakota venture capital authority will extend guarantees, subject to section 4 of this Act, against losses under the North Dakota venture capital program by the program fund designated under section 5 of this Act. These terms and conditions must be consistent with the purposes of the program as stated in section 1 of this Act, must reflect the objective of achieving the maximum impact of guarantees authorized under this Act relative to those purposes, and must prohibit the extension or payment of such a guarantee relative to any loss on a loan or investment determined by the authority to be inconsistent with the policy.

SECTION 4. Guarantees.

1. A guarantee extended by the authority pursuant to this Act is not an obligation of this state.
2. Nothing in this Act authorizes the guarantee of losses to the program fund under the program:
 - a. In an aggregate amount exceeding the proceeds received by the authority from the transfer of tax credits under subsection 3 of section 7 of this Act.
 - b. On any basis other than the following:

- (1) The application first of moneys of the North Dakota venture capital fund created under section 9 of this Act which the authority determines may be expended without adversely affecting the program's continued viability; and
 - (2) Only to the extent moneys under paragraph 1 are insufficient to fulfill a guarantee extended by the authority due to a determination under paragraph 1 of an adverse effect or effects, the application of moneys in the North Dakota venture capital guarantee fund created under section 9 of this Act.
- c. The authority may not extend any guarantee under this Act unless the authority assures that, at the time the guarantee is extended, sufficient contracts under subsection 2 of section 7 of this Act exist to fully cover the guarantee. The authority may not transfer tax credits under subsection 3 of section 7 of this Act in an aggregate amount exceeding the amount necessary to fully cover a guarantee extended by the authority under the program.

SECTION 5. Lending and investing.

1. The North Dakota venture capital authority may designate, as the program fund of the authority, one private, for-profit investment fund to carry out the lending and investment component of the North Dakota venture capital program as stated in subsection 1 of section 1 of this Act and further prescribed in the lending and investment policy established by the authority in accordance with sections 3 and 4 of this Act, provided the investment fund is incorporated or organized under the laws of this state and is capitalized in accordance with any state or federal laws applicable to the issuance or sale of securities. The authority shall so designate the program fund by entering a written program fund agreement, in accordance with subsection 2, with the investment fund.
2. The written program fund agreement under subsection 1 must include:
 - a. A requirement that lending and investing by the program fund will be in compliance with the lending and investment policy established pursuant to the versions of sections 3 and 4 of this Act in effect at the time the loan or investment is made and a prohibition against the program fund engaging in

- 1 any lending or investment activities other than activities to carry out
2 exclusively the lending and investment component of the program;
- 3 b. A requirement of periodic financial reporting by the program fund to the
4 authority which must include an annual audit by an independent auditor and
5 other financial reporting as is specified in the agreement or otherwise required
6 by the authority for the purpose of ensuring that the program fund is carrying
7 out the lending and investing component of the program;
- 8 c. Specification of any like standards or general limitations that are in addition to
9 or furtherance of standards or limitations that apply pursuant to subsection 4
10 of section 3 of this Act;
- 11 d. A requirement of payment to the authority by the program fund of guarantee
12 fees prescribed in the agreement, pursuant to a schedule or terms and
13 conditions specified in the agreement;
- 14 e. Specification of the procedures under which the program fund must certify
15 immediately to the authority the necessity for a transfer of tax credits under a
16 contract entered into pursuant to section 7 of this Act and of the
17 consequences to the program fund of failing to so certify;
- 18 f. Requirements that any amount paid by the authority to the program fund
19 pursuant to a guarantee extended by the authority under this Act be fully
20 applied by the program fund to fulfilling that guarantee and that, if a guarantee
21 could not be applied for any reason, the program fund will return in a specified
22 timely manner to the authority any amount not applied;
- 23 g. Specification of any general limitations regarding the employment of a fund
24 manager by the program fund, in addition to an express limitation that the
25 fund manager be a person with demonstrated, substantial, successful
26 experience in the design and management of state-sponsored seed and
27 venture capital investment programs and in capital formation;
- 28 h. Specification that a guarantee extended by the authority under this Act is not
29 an obligation of the state and that the program fund may not represent or
30 permit the representation of any such guarantee as such an obligation;

- i. Specification of any other terms and conditions of the program fund's designation and operation that the authority and program fund consider consistent with the purposes of the program as stated in section 1 of this Act and necessary to achieve those purposes; and
- j. Specification of the terms and conditions under which the authority or the program fund may terminate the agreement or under which guarantees extended by the authority pursuant to this Act may be revoked.

SECTION 6. Confidentiality - Executive sessions.

1. Information with respect to the marketing plans, financial statements, trade secrets, research concepts, production methods, or products, or any other proprietary information concerning any person which is submitted to or compiled by the North Dakota venture capital authority for the purpose of developing the policy required by sections 3 and 4 of this Act is confidential under section 44-04-18.4, except to the extent that the person that provides the information or that is the subject of the information consents in writing to disclosure.
2. Pursuant to section 44-04-19.2, the authority may hold an executive session for:
 - a. Presenting, reviewing, or discussing information described in subsection 1, but only if consent to disclosure has not been given as provided in subsection 1; or
 - b. Preparing for, conducting, or reviewing negotiating sessions with the program fund for the purpose of designating the program fund and entering into the agreement under section 5 of this Act.

SECTION 7. Tax credits.

1. For the purpose of the guarantee component of the North Dakota venture capital program, there is issued by this state and transferred to the North Dakota venture capital authority credits against income taxes imposed under chapter 57-38 in the combined aggregate amount of five million dollars.
2. Upon the transfer of credits to the authority under subsection 1, the authority may enter written contracts for the transfer and purchase of tax credits with any purchaser, including the program fund designated under section 5 of this Act. The contract must be consistent with this Act and contain the terms and conditions for

the authority to transfer, and the purchaser to purchase, at a specified future time the tax credits issued to the authority under subsection 1 as the contract specifies. The authority shall seek to enter contracts that are expected to result in a program guarantee of maximum effectiveness in achieving the purposes of the program as stated in section 1 of this Act. This subsection does not preclude or prohibit a tax credit transferred under subsection 3 from being applied as authorized under section 8 of this Act, and a contract may not be entered pursuant to this subsection which, by its terms and conditions, would preclude or prohibit this use.

3. The authority may transfer any tax credit transferred to it pursuant to subsection 1, subject to all the following limitations:
 - a. The authority transfers the credit solely pursuant to a contract entered under subsection 2.
 - b. The authority transfers the credit as a result of a loss on a loan or investment made under the North Dakota venture capital program, as the loss is certified to the authority pursuant to subdivision e of subsection 2 of section 5 of this Act.
 - c. The authority does not transfer any credit that may be claimed after July 1, 2026.
 - d. The authority does not transfer more than a total of one million dollars in credits that may be claimed and used to reduce the state income taxes imposed for any one fiscal year. To this end, the authority shall cause the face of the certificate or other document transferring the credit to state the principal amount of the credit and the taxable year or years for which the credit may be claimed.
 - e. The authority sells the tax credit for at least its full face value except under the conditions the authority shall specify in the lending and investment policy it establishes in accordance with sections 3 and 4 of this Act, which conditions shall provide at least that the authority shall seek terms most favorable to the program.
4. The authority, in conjunction with the tax commissioner, shall develop a system of registration and a system of certificates for any credits transferred to the authority

under subsection 1, for the purposes of permitting verification that any credit claimed upon a tax return is a credit transferred pursuant to subsection 3 and is properly taken in the year of claim and in compliance with subdivisions c and d of subsection 3.

5. This Act does not limit the subsequent sale or other transfer of a tax credit that has been transferred by the authority pursuant to subsection 3.

SECTION 8. Use of tax credits.

1. A taxpayer subject to tax under chapter 57-38 is allowed a credit against the tax equal to the amounts of any credit properly taken under this section as verified under subsection 4 of section 7 of this Act. If the tax commissioner determines that the credit claimed equals the amount of the eligible credit under this section, the tax commissioner shall credit that amount against the total taxes to be due from the taxpayer for the current year and shall refund the amount of any overpayment of taxes resulting from the application of the credit.
2. If the amount of the income tax credit for a tax year exceeds the tax otherwise due after allowing for any other credit, the taxpayer is not entitled to a refund of the excess.

SECTION 9. North Dakota venture capital fund - North Dakota venture capital guarantee fund.

1. All moneys received by the North Dakota venture capital authority pursuant to subdivisions d and f of subsection 2 of section 5 of this Act and all interest earned on moneys of the fund must be deposited in the North Dakota venture capital fund in the state treasury.
2. All moneys received by the authority pursuant to a transfer under subsection 3 of section 7 of this Act and all interest earned on moneys of the fund must be deposited in the North Dakota venture capital guarantee fund in the state treasury.
3. Moneys in the North Dakota venture capital fund and in the North Dakota venture capital guarantee fund must be used exclusively to cover any guarantees extended by the authority under this Act, subject to subsection 2 of section 4 of this Act.

SECTION 10. Liability. Neither the state nor an appointing authority under section 2 of this Act or a member of the North Dakota venture capital authority is liable in damages to any

1 person in any claim for relief for any loss incurred by the program fund as a result of any loan or
2 investment made by the program fund.

3 **SECTION 11. Reports.** The North Dakota venture capital authority shall report
4 annually to the governor and to the legislative council on the North Dakota venture capital
5 program, including:

- 6 1. A description of the details of the lending and investment policy established in
7 accordance with sections 3 and 5 of this Act.
- 8 2. The authority's assessment of the program's achievement of its purposes as stated
9 in section 1 of this Act.
- 10 3. The amount of outstanding guarantees extended by the authority under this Act.
- 11 4. The amount of tax credits that have been transferred by the authority under
12 subsection 3 of section 7 of this Act.
- 13 5. The amounts of tax credits claimed pursuant to section 8 of this Act, as to the
14 respective taxes involved.
- 15 6. The financial status of the North Dakota venture capital fund.
- 16 7. Any recommendations for modifying the program to better achieve the purposes
17 stated in section 1 of this Act.