SECOND DRAFT:
Prepared by the Legislative Council staff for the
Political Subdivision Taxation Committee
September 2016

Sixty-fifth
Legislative Assembly
of North Dakota

Introduced by

A BILL for an Act to amend and reenact sections 57-38-01.26 and 57-38.5-02 of the North Dakota Century Code, relating to investments in qualified businesses for purposes of the angel fund investment tax credit and publication of a list of qualified businesses; and to provide an effective date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 57-38-01.26 of the North Dakota Century Code is amended and reenacted as follows:

57-38-01.26. Angel fund investment tax credit.

1. A taxpayer is entitled to a credit against state income tax liability under section 57-38-30 or 57-38-30.3 for an investment made after December 31, 2017, in an angel fund that is a domestic organization created under the laws of this state~~.~~ which is invested by the angel fund in a "qualified business." The amount of the credit to which a taxpayer is entitled is ~~forty-five~~thirty-five percent of the amount remitted by the taxpayer to an angel fund and invested by the angel fund in a qualified business during the taxable year. For purposes of this section, "qualified business" has the meaning provided in section 57-38.5-01. The aggregate annual credit for which a taxpayer may obtain a tax credit is not more than forty-five thousand dollars. The aggregate lifetime credits under this section that may be obtained by an individual, married couple, passthrough entity and its affiliates, or other taxpayer is five hundred thousand dollars. The investment used to calculate the credit under this section may not be used to calculate any other income tax deduction or credit allowed by law.
2. To be eligible for the credit, the investment must be ~~at risk in the angel fund for at least three years~~invested by the angel fund in a qualified business. An investment made in a qualified business from the assets of a retirement plan is deemed to be the retirement

plan participant's investment for the purpose of this section if a separate account is maintained for the plan participant and the participant directly controls where the account assets are invested. Investments placed in escrow do not qualify for the credit. The credit must be claimed in the taxable year in which the investment in the angel fund was received by ~~the angel fund~~a qualified business. The credit allowed may not exceed the liability for tax under this chapter. If the amount of credit determined under this section exceeds the liability for tax under this chapter, the excess may be carried forward to each of the seven succeeding taxable years. A taxpayer claiming a credit under this section may not claim any credit available to the taxpayer as a result of an investment made by the angel fund in a qualified business under chapter 57-38.5 or 57-38.6. A taxpayer that invests in an angel fund before January 1, 2018, is subject to the credit provisions and reporting requirements in place at the time the investment was remitted by the taxpayer to the angel fund.

3. An angel fund must:

a. Be a partnership, limited partnership, corporation, limited liability company, limited liability partnership, limited liability limited partnership, trust, or estate organized on a for-profit basis which is headquartered in this state.

b. Be organized for the purpose of investing in a portfolio of at least three ~~primary sector companies that are early-stage and mid-stage private, nonpublicly traded enterprises with strong growth potential. For purposes of this section, an early-stage entity means an entity with annual revenues of up to two million dollars and a mid-stage entity means an entity with annual revenues over two million dollars not to exceed ten million dollars~~qualified businesses. Investments in real estate or real estate holding companies are not eligible investments by certified angel funds. Any angel fund certified before January 1, 2013, which has invested in real estate or a real estate holding company is not eligible for recertification.

c. Consist of at least six accredited investors as defined by securities and exchange commission regulation D, rule 501.

d. Not have more than twenty-five percent of its capitalized investment assets owned by an individual investor.

e. Have at least five hundred thousand dollars in commitments from accredited investors and that capital must be subject to call to be invested over an unspecified number of years to build a portfolio of investments in enterprises that include at least three qualified businesses.

f. Be member-managed or a manager-managed limited liability company and the investor members or a designated board that includes investor members must make decisions as a group on which enterprises are worthy of investments.

g. Be certified as an angel fund that meets the requirements of this section by the department of commerce.

h. Be in compliance with the securities laws of this state.

i. Within thirty days after the date on which an investment in an angel fund is ~~made~~ invested by the angel fund in a qualified business, the angel fund shall file with the tax commissioner and provide to the investor completed forms prescribed by the tax commissioner which show as to each investment made by the investor in the angel fund the following:

(1) The name, address, and social security number or federal employer identification number of the taxpayer or passthrough entity that made the investment;

(2) The dollar amount remitted to the angel fund by the taxpayer or passthrough entity; ~~and~~

(3) The date ~~the payment was received by the angel fund for the investment~~all or a portion of the investment remitted by the taxpayer or passthrough entity to the angel fund was invested by the angel fund in a qualified business;

(4) The name and principal place of business of the qualified business that received the investment from the angel fund; and

(5) The amount of the investment received by the qualified business.

~~j. Within thirty days after the end of a calendar year, the angel fund shall file with the tax commissioner a report showing the name and principal place of business of each enterprise in which the angel fund has an investment.~~

4. The tax commissioner ~~may~~, upon request of the legislative management, shall disclose to the legislative management the reported information described under

paragraphs 2 ~~and 3~~through 5 of subdivision i of subsection 3 ~~and the reported information described under subdivision j of subsection 3~~.

5. Angel fund investors may be actively involved in the enterprises in which the angel fund invests but the angel fund may not invest in any enterprise if any one angel fund investor owns directly or indirectly more than forty-nine percent of the ownership interests in the enterprise. The angel fund may not invest in an enterprise if any one partner, shareholder, or member of a passthrough entity ~~that~~ directly or indirectly owns more than forty-nine percent of the ownership interests in the enterprise.

6. Investors in one angel fund may not receive more than five million dollars in aggregate credits under this section during the life of the angel fund but this provision may not be interpreted to limit additional investments in that angel fund.

7. ~~a.~~ A passthrough entity entitled to the credit under this section must be considered to be the taxpayer for purposes of this section, and the amount of the credit allowed must be determined at the passthrough entity level and must be passed through to the partners, shareholders, or members in proportion to their respective interests in the passthrough entity.

~~b. For the first two taxable years beginning after December 31, 2010, if a passthrough entity does not elect to sell, transfer, or assign the credit as provided under this subsection and subsection 8, the amount of the total credit determined at the entity level must be passed through to the partners, shareholders, or members in proportion to their respective interests in the passthrough entity.~~

~~c. For the first two taxable years beginning after December 31, 2010, if a passthrough entity elects to sell, transfer, or assign a credit as provided under this subsection and subsection 8, the passthrough entity shall make an irrevocable election to sell, transfer, or assign the credit on the return filed by the entity for the taxable year in which the credit was earned. A passthrough entity that makes a valid election to sell, transfer, or assign a credit shall sell one hundred percent of the credit earned, may sell the credit to only one purchaser, and shall comply with the requirements of this subsection and subsection 8.~~

8. ~~For the first two taxable years beginning after December 31, 2010, a taxpayer may elect to sell, transfer, or assign all of the earned or excess tax credit earned under this~~

~~section for investment in an angel fund established after July 31, 2011, subject to the following:~~

~~a.~~ ~~A taxpayer's total credit sale, transfer, or assignment under this section may not exceed one hundred thousand dollars over any combination of taxable years. The cumulative credits transferred by all investors in an angel fund may not exceed fifty percent of the aggregate credits under this section during the life of the angel fund under subsection 6.~~

~~b.~~ ~~If the taxpayer elects to sell, assign, or transfer a credit under this subsection, the tax credit transferor and the tax credit purchaser jointly shall file with the tax commissioner a copy of the purchase agreement and a statement containing the names, addresses, and taxpayer identification numbers of the parties to the transfer, the amount of the credit being transferred, the gross proceeds received by the transferor, and the taxable year or years for which the credit may be claimed. The taxpayer and the purchaser also shall file a document allowing the tax commissioner to disclose tax information to either party for the purpose of verifying the correctness of the transferred tax credit. The purchase agreement, supporting statement, and waiver must be filed within thirty days after the date the purchase agreement is fully executed.~~

~~c.~~ ~~The purchaser of the tax credit shall claim the credit beginning with the taxable year in which the credit purchase agreement was fully executed by the parties. A purchaser of a tax credit under this section has only such rights to claim and use the credit under the terms that would have applied to the tax credit transferor. This subsection does not limit the ability of the tax credit purchaser to reduce the tax liability of the purchaser, regardless of the actual tax liability of the tax credit transferor.~~

~~d.~~ ~~A sale, assignment, or transfer of a tax credit under this section is irrevocable and the purchaser of the tax credit may not sell, assign, or otherwise transfer the credit.~~

~~e.~~ ~~If the amount of the credit available under this section is changed as a result of an amended return filed by the transferor, or as the result of an audit conducted by the internal revenue service or the tax commissioner, the transferor shall~~

~~report to the purchaser the adjusted credit amount within thirty days of the amended return or within thirty days of the final determination made by the internal revenue service or the tax commissioner. The tax credit purchaser shall file amended returns reporting the additional tax due or claiming a refund as provided in section 57-38-38 or 57-38-40, and the tax commissioner may audit these returns and assess or issue refunds, even though other time periods prescribed in these sections may have expired for the purchaser.~~

~~f.~~ ~~Gross proceeds received by the tax credit transferor must be assigned to North Dakota. The amount assigned under this subsection cannot be reduced by the taxpayer's income apportioned to North Dakota or any North Dakota net operating loss of the taxpayer.~~

~~g.~~ ~~The tax commissioner has four years after the date of the credit assignment to audit the returns of the credit transferor and the purchaser to verify the correctness of the amount of the transferred credit and if necessary assess the credit purchaser if additional tax is found due. This subdivision does not limit or restrict any other time period prescribed in this chapter for the assessment of tax.~~

~~h.~~ The tax commissioner may adopt rules to establish necessary administrative provisions for the credit under this section~~, including provisions to permit verification of the validity and timeliness of the transferred tax credit~~.

SECTION 2. AMENDMENT. Section 57-38.5-02 of the North Dakota Century Code is amended and reenacted as follows:

57-38.5-02. Certification - Investment reporting by qualified businesses - Maximum investments in qualified businesses.

1. The director shall certify whether a business that has requested to become a qualified business meets the requirements of subsection 5 of section 57-38.5-01. <u>The director shall make publicly available a list of all businesses certified or recertified as a qualified business and shall update the list on a monthly basis.</u> The director shall establish the necessary forms and procedures for certifying qualified businesses.
2. A qualified business may apply to the director for a recertification. Only one recertification is available to a qualified business. The application for recertification must be filed with the director within ninety days before the original certification expiry

date. The recertification issued by the director must comply with the provisions of subsection 3.

3. A certification letter must be issued by the director to the qualified business. The certification letter must include:

   a. The certification effective date.

   b. The certification expiry date. The expiry date may not be more than four years from the certification effective date.

4. The maximum aggregate amount of qualified investments a qualified business may receive for all tax years is limited to five hundred thousand dollars under this chapter. The tax credit allowed on qualified investments in a qualified business must be allowed to taxpayers in the chronological order of the taxpayer's qualified investments as determined from the forms filed under section 57-38.5-07. The limitation on investments under this subsection may not be interpreted to limit additional investment by a taxpayer for which that taxpayer is not applying for a credit.

5. By February first in each of the five years following a year in which a qualified business receives a qualified investment, the qualified business shall file with the director completed forms prescribed by the director which show the qualified business meets the requirements under section 57-38.5-01.

SECTION 3. EFFECTIVE DATE. This Act is effective for taxable years after December 31, 2017.