



1997 Senate Bill 333

Date of enactment: **April 28, 1998**
Date of publication*: **May 12, 1998**

1997 WISCONSIN ACT 215

AN ACT to create 20.143 (1) (hm), 76.635 and subchapter II of chapter 560 [precedes 560.30] of the statutes; **relating to:** creating a certified capital company program for companies that make certain types of investments, providing tax credits to persons who make certain investments in certified capital companies, granting rule-making authority and making an appropriation.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 20.143 (1) (hm) of the statutes is created to read:

20.143 (1) (hm) *Certified capital companies.* All moneys received under subch. II of ch. 560 for the cost of administering subch. II of ch. 560.

SECTION 2. 76.635 of the statutes is created to read:
76.635 Credit. (1) **DEFINITIONS.** In this section:

- (a) "Certified capital company" has the meaning given in s. 560.30 (2).
- (b) "Certified capital investment" has the meaning given in s. 560.30 (4).
- (c) "Investment date" has the meaning given in s. 560.30 (6).
- (d) "Investment pool" has the meaning given in s. 560.30 (7).
- (e) "Qualified investment" has the meaning given in s. 560.30 (11).

(2) **CREDIT.** An insurer that makes a certified capital investment may credit against the fees due under s. 76.60, 76.63, 76.65 or 76.66, for 10 years beginning with the year of the investment, either 10% of that investment or the amount by which the sum of the insurer's certified capital investments and the insurer's qualified invest-

ments exceeds the insurer's qualified investments in the taxable year before the insurer first claimed the credit under this section, whichever is less.

(3) **CARRY-FORWARD.** If the credit under sub. (2) is not entirely offset against the fees under s. 76.60, 76.63, 76.65 or 76.66 otherwise due, the unused balance may be carried forward and credited against those fees in the following years to the extent that it is not offset by those fees otherwise due in all the years between the year in which the investment was made and the year in which the carry-forward credit is claimed.

(4) **RECAPTURE.** (a) If a certified capital company is decertified, or an investment pool is disqualified, under s. 560.37 before the certified capital company fulfills the investment requirement under s. 560.34 (1m) (a) 1. with respect to the investment pool, any insurer that has received a credit under this section with respect to that investment pool shall repay that credit to the commissioner of insurance, for deposit in the general fund, and may not claim more credit in respect to that investment pool.

(b) If a certified capital company fulfills the investment requirement under s. 560.34 (1m) (a) 1. with respect to an investment pool but the certified capital company is decertified, or an investment pool is disqualified, under s. 560.37 before the certified capital company fulfills the investment requirement under s. 560.34 (1m) (a) 2. for

* Section 991.11, WISCONSIN STATUTES 1995-96: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication as designated" by the secretary of state [the date of publication may not be more than 10 working days after the date of enactment].

that investment pool, any insurer that has received a credit under this section with respect to that investment pool shall repay all credits that were claimed for taxable years after the taxable year that includes the 3rd anniversary of the investment date of the investment pool and may claim no more credits for taxable years after the taxable year that includes the 3rd anniversary of the investment date of the investment pool.

(5) **SALE OF CREDIT.** An insurer may sell a credit under this section to another insurer that is subject to taxation under this subchapter if the insurer notifies the commissioner of insurance of the sale and includes with that notification a copy of the transfer documents.

(6) **NULLIFICATION OF CREDIT PRECLUDED.** This state may not impose a new tax or change an existing tax in order to nullify the credit created under this section.

SECTION 3. Subchapter II of chapter 560 [precedes 560.30] of the statutes is created to read:

CHAPTER 560

SUBCHAPTER II

CERTIFIED CAPITAL COMPANIES

560.30 Definitions. In this subchapter:

(1) "Affiliate" means, with respect to a certified capital company or a certified investor, any of the following:

(a) A person who, directly or indirectly, owns, controls, or holds power to vote, 10% or more of the outstanding voting securities or other voting ownership interests of the certified capital company or certified investor.

(b) A person, 10% of whose outstanding voting securities or other voting ownership interests are directly or indirectly owned, controlled or held with power to vote by the certified capital company or certified investor.

(c) A person directly or indirectly controlling, controlled by, or under common control with, the certified capital company or certified investor.

(d) A partnership in which the certified capital company or certified investor is a general partner.

(e) A person who is an officer, director or agent of the certified capital company or certified investor, or is an immediate family member of such an officer, director or agent.

(2) "Certified capital company" means a person that has been certified by the department under s. 560.31 and that has not been decertified under s. 560.37 (3) or (3m).

(3) "Certified capital company tax credit" means the tax credit under s. 76.635.

(4) "Certified capital investment" means an investment in a certified capital company that is certified under s. 560.32 (2) and that fully funds either the investor's equity interest in a certified capital company, a qualified debt instrument that a certified capital company issues, or both.

(5) "Certified investor" means a person who makes a certified capital investment.

(6) "Investment date" means, with respect to each investment pool, the date on which the last certified capital that is part of that investment pool was invested in the certified capital company.

(7) "Investment pool" means the aggregate of all investments of certified capital in a certified capital company that are made as part of the same transaction, except that investments received more than 30 days apart may not be considered part of the same investment pool.

(8) "Qualified business" means a business which is a qualified business under s. 560.33.

(9) "Qualified debt instrument" means a debt instrument that a certified capital company issues at par value or at a premium; that has an original maturity date of at least 5 years from the date on which it was issued; that has a repayment schedule that is no faster than a level principal amortization and, until the certified capital company may make distributions other than qualified distributions, the interest, distribution or payment features of which are not related to the certified capital company's profitability or the performance of its investment portfolio.

(10) "Qualified distribution" means a distribution or payment by a certified capital company to its equity holders for any of the following:

(a) The costs of forming, syndicating, managing or operating the certified capital company.

(b) An annual management fee that does not exceed 2.5% of the certified capital company's total certified capital.

(c) Reasonable and necessary fees paid for professional services related to the operation of the certified capital company.

(d) A projected increase in federal or state taxes, including penalties and interest on those taxes, of the equity owners of the certified capital company if those amounts are related to the certified capital company's ownership, management or operation.

(11) "Qualified investment" means an investment in a qualified business by a certified capital company that meets the requirements under s. 560.34 (1).

560.31 Certification of certified capital companies.

(1) **APPLICATION.** The department shall promulgate rules establishing procedures under which a person may apply to become a certified capital company. The department shall grant or deny an application for certification under this section within 30 days of the date of application. If the department denies certification, the department shall include with the denial a detailed description of the grounds for the refusal, including suggestions for removal of those grounds.

(2) **REQUIREMENTS FOR CERTIFICATION.** The department shall certify a person as a certified capital company if the department determines that all of the following conditions have been met:

(a) The person is a partnership, corporation, trust or limited liability company, whether organized for profit or not for profit, that has as its primary business activity the investment of cash in qualified businesses.

(b) The person has a net worth, at the time of application, of at least \$500,000 and has at least \$500,000 in cash, cash equivalents and marketable securities.

(c) The directors, officers, general partners, trustees, managers or members or persons having a similar function are familiar with the requirements of this subchapter.

(d) At least 2 officers, directors, general partners, trustees, managers or members each have at least 2 years of experience in the venture capital industry.

(e) The person has included, in any offering material involving the sale of securities, the statement required under s. 560.32 (1).

(f) The person has paid a nonrefundable application fee of \$7,500.

560.32 Investments in certified capital companies.

(1) REQUIRED DISCLOSURES IN SECURITIES OFFERINGS. Any offering material involving the sale of securities of a certified capital company shall include all of the following statements:

(a) "By authorizing the formation of a certified capital company, the state does not necessarily endorse the quality of management or the potential for earnings of the company and is not liable for damages or losses to a certified investor in the company. Use of the word "certified" in an offering is not a recommendation or endorsement of the investment by the State of Wisconsin Department of Commerce."

(b) "Investments in a prospective certified capital company prior to the time the company is certified are not eligible for a certified capital company investment credit under section 76.635 of the Wisconsin Statutes. Investments in a certified capital company are not eligible for a certified capital company investment credit under section 76.635 of the Wisconsin Statutes unless the proposed investment is certified under section 560.32 (2) of the Wisconsin Statutes before the investment is made. In the event that certain statutory provisions are violated, the state may require forfeiture of unused certified capital company investment credits and repayment of used certified capital company investment credits."

(2) CERTIFICATION OF CERTIFIED CAPITAL INVESTMENTS. (a) A person may apply to make a certified capital investment in a certified capital company by providing notice under this paragraph to the department on a form specified by the department. The notice shall include the name of the person, the name of the certified capital company, the amount of the investment and any other information specified by the department. The notice shall also include an undertaking by the person to make the investment within 5 days after the department notifies the person that the investment has been certified.

(b) The department may certify an investment under this subsection only if, after the certification, the department will not have certified a total of more than \$50,000,000 in investments under this subsection.

(c) Prior to the first day of the 13th month beginning after the effective date of this paragraph [revisor inserts date], the department may not certify an investment under this subsection if, after the certification, the investor, together with all affiliates of the investor, would have more than \$10,000,000 in certified capital investments.

(d) If, as a result of the limitations under par. (b) or (c), the department may not certify the full amount requested in applications for certified capital investments submitted under par. (a), the department shall allocate the amounts available for certification in order of priority based on the date on which the application was filed. If the amounts available for certification are insufficient to certify the full amount of all applications for certified capital investments that are submitted on the same day, the department shall prorate the available amount on the basis of the amount that the investor has committed to invest in the certified capital company under par. (a).

(3) LIMITATION ON CERTIFIED INVESTOR INVESTMENT. A certified investor may not, individually, or with or through one or more affiliates, own 10% or more of the equity securities in, be a general partner or manager of, or otherwise control the investments of the certified capital company. This subsection does not preclude a certified investor from exercising its legal rights and remedies, including interim management of a certified capital company, in the event that a certified capital company is in default of its statutory or contractual obligations to the certified investor.

560.33 Qualified businesses. (1) QUALIFICATIONS. A business is a qualified business if all of the following requirements are met as of the time that a certified capital company, or any affiliate of the certified capital company, makes its first investment in the business:

(a) The business is headquartered in this state and its principal business operations are located in this state.

(am) The business is in need of venture capital and is unable to obtain conventional financing, as defined by the department by rule.

(b) The business has no more than 100 employees, at least 75% of whom are employed in this state.

(c) During its 2 most recent fiscal years, the business had, together with all of its consolidated affiliates, an average annual net income, after federal income taxes and excluding any carry-over losses, of not more than \$2,000,000, as determined in accordance with generally accepted accounting principles.

(d) The business has, together with its consolidated affiliates, a net worth that is not in excess of \$5,000,000.

(e) The business is not predominantly engaged in professional services provided by accountants, lawyers or physicians.

(f) The business is not engaged in the development of real estate for resale.

(g) The business is not engaged in banking or lending and does not make any loans to, or investments in, certified capital companies.

(2) DEPARTMENT OPINIONS AND EXCEPTIONS. A certified capital company may, prior to making an investment in a specific business, request a written opinion from the department that a business in which it proposes to invest is a qualified business. If the department determines that the business meets the requirements under sub. (1), the department shall issue a written opinion stating that the business is a qualified business.

560.34 Operation of certified capital companies.

(1) QUALIFIED INVESTMENTS REQUIREMENTS. In order for a certified capital company to prevent disqualification under s. 560.37 of an investment pool, the certified capital company shall ensure that the investment pool makes qualified investments in accordance with the schedule under sub. (1m). An investment is a qualified investment if the investment meets all of the following requirements:

(a) The investment is a cash investment in a qualified business for the purchase of any of the following:

1. An equity security of the qualified business.
2. A debt security of the qualified business if the debt has a maturity of at least 5 years and if one of the following conditions is met:

- a. The debt is unsecured.
- b. The debt is convertible into equity securities or equity participation instruments such as options or warrants.

(b) As a condition of the investment, the qualified business agrees not to use the proceeds from the investment for the purpose of relocating its operations.

(c) As a condition of the investment, the qualified business agrees, as long as the certified capital corporation continues to hold the investment, not to relocate its headquarters out of this state.

(d) As a condition of the investment, the qualified business agrees, as long as the certified capital corporation continues to hold the investment, to maintain at least 75% of its employees in this state.

(e) As a condition of the investment, the qualified business agrees, as long as the certified capital corporation continues to hold the investment, to maintain at least 75% of its employees at work sites that were maintained by the qualified business at the time that the investment was made, unless the qualified business obtains an exemption from the department under this paragraph. The department may grant an exemption unless it determines that the qualified business is locating the employees at new sites to take advantage of lower wage rates in the areas where the new sites are located.

(1m) QUALIFIED INVESTMENT SCHEDULE. (a) A certified capital company shall ensure that each of its investment pools makes qualified investments according to the following schedule:

1. Within 3 years after the investment date for a particular investment pool, at least 30% of the investment pool shall be placed in qualified investments.

2. Within 5 years after the investment date for a particular investment pool, at least 50% of the investment pool shall be placed in qualified investments.

(b) The proceeds of all capital of a qualified investment returned to a certified capital company by a qualified business may be placed in new qualified investments, which shall count toward the percentage requirements under par. (a) and s. 560.36 (3). The department shall promulgate rules governing the extent to which a reinvestment of proceeds from the sale of a qualified investment in a qualified business may be counted toward the percentage requirements under par. (a) and ss. 560.36 (3) and 560.37 (3m) (a) 2. These rules may provide that reinvested proceeds from the sale of short-term investments shall be only partially counted toward the percentage requirements under par. (a) and ss. 560.36 (3) and 560.37 (3m) (a) 2. The rules may also provide that proceeds from the sale of an investment in a qualified business that are reinvested in that qualified business, or an affiliate of that qualified business, shall be only partially counted toward the percentage requirements under par. (a) and ss. 560.36 (3) and 560.37 (3m) (a) 2.

(2) NONQUALIFIED INVESTMENTS. All certified capital investments in a certified capital company that are not invested in qualified investments may be held or invested by the certified capital company as it considers appropriate, except that a certified capital company may not invest certified capital investments in an insurance company or in an affiliate of an insurance company.

(3) DIVERSIFICATION REQUIREMENT. A certified capital company may not make a qualified investment in a person if, at the time of the investment, more than 15% of the total certified capital of the certified capital company would be invested in that person and affiliates of that person.

(4) RESTRICTIONS ON MANAGEMENT. No certified capital company may be managed or controlled by, or have a general partner that is, an insurance company or an affiliate of an insurance company.

560.35 Reporting requirements and fees. (1) RECEIPTS OF CERTIFIED CAPITAL. As soon as practicable after the receipt of a certified capital investment, a certified capital company shall report all of the following to the department:

(a) The name of the certified investor from which the certified capital was received, including the certified investor's tax identification number.

(b) The amount of the certified capital investment.

(c) The date on which the certified capital investment was received by the certified capital company.

(d) The investment date for the investment pool of which the certified capital will be a part.

(1m) VIOLATION OF AGREEMENTS BY QUALIFIED BUSINESSES. As soon as practicable after the receipt of information by the certified capital company that a qualified business has violated an agreement made under s. 560.34 (1) (b) to (e), the certified capital company shall notify the department of the violation and the facts giving rise to the violation.

(2) ANNUAL REPORTS. On or before January 31 annually, a certified capital company shall report all of the following to the department:

(a) The amount of the certified capital company's certified capital at the end of the preceding year.

(b) Whether the certified capital company has invested more than 15% of its total certified capital in any one person.

(c) All qualified investments that the certified capital company has made during the previous calendar year and the investment pool from which each qualified investment was made.

(3) FINANCIAL STATEMENTS. Within 90 days of the end of the certified capital company's fiscal year, the certified capital company shall provide to the department a copy of its annual audited financial statements, including the opinion of an independent certified public accountant. The audit shall address the methods of operation and conduct of the business of the certified capital company to determine whether the certified capital company is complying with this subchapter and the rules promulgated under this subchapter, including whether certified capital has been invested in the manner required under s. 560.34. The financial statements provided under this subsection shall be segregated by investment pool and shall be separately audited on that basis to allow the department to determine whether the certified capital company is in compliance with s. 560.34 (1m).

(4) FEES. On or before January 31 annually, a certified capital company shall pay a nonrefundable certification fee of \$5,000 to the department, unless January 31 falls within 6 months of the date on which the certified capital company was certified under s. 560.31.

(5) EXEMPTION FROM RIGHTS OF INSPECTION AND COPYING. If the department determines that a document submitted by a certified capital company under this section contains a trade secret, as defined in s. 134.90 (1) (c) or a business secret, that document is not subject to the right of inspection and copying under s. 19.35.

560.36 Distributions. A certified capital company may make a distribution only if one of the following conditions is met:

(1) QUALIFIED DISTRIBUTION. The distribution is a qualified distribution.

(2) WRITTEN DETERMINATION. The department made a written determination that the distribution may be made without adversely affecting the ability of the certified capital company to place, in qualified investments, an amount equal to 100% of the certified capital in the investment pool from which the distribution is to be made.

(3) PLACEMENT OF 100% OF INVESTMENTS IN QUALIFIED INVESTMENTS. The certified capital company has placed in qualified investments an amount equal to 100% of the certified capital investments in the investment pool.

(4) DEBT PAYMENTS. The distribution is a payment of principal or interest owed to a debt holder of a certified capital company, even if the debt holder is also a holder of equity and even if the indebtedness is a certified capital investment.

560.37 Compliance reviews; decertification; disqualification. **(1) ANNUAL COMPLIANCE REVIEW.** The department shall conduct an annual review of each certified capital company to determine if the certified capital company is complying with the requirements of this subchapter, to advise the certified capital company regarding the status of its investments as qualified investments and to ensure that no investment has been made in violation of this subchapter. The cost of the annual review shall be paid by each certified capital company according to a reasonable fee schedule adopted by the department.

(2) DISQUALIFICATION OF AN INVESTMENT POOL. Any material violation of s. 560.34 (1m) is a ground for disqualification of the noncomplying investment pool. If the department determines that the certified capital company is not in compliance with s. 560.34 (1m) with respect to an investment pool, it shall send a written notice to the certified capital company and the commissioner of insurance stating that the investment pool has been disqualified.

(3) DECERTIFICATION OF A CERTIFIED CAPITAL COMPANY. Any material violation of s. 560.34 (2), (3) or (4) or 560.35 (1), (2), (3) or (4) is a ground for decertification of the noncomplying certified capital company. If the department determines that the certified capital company is not in compliance with s. 560.34 (2), (3) or (4) or 560.35 (1), (2), (3) or (4), the department shall send a written notice to the certified capital company that the certified capital company may be subject to decertification in 120 days from the date on which the notice was mailed, unless the certified capital company brings itself into full compliance with ss. 560.34 (2), (3) or (4) and 560.35 (1), (2), (3) and (4). If at the end of the 120-day period the certified capital company is not in compliance with ss. 560.34 (2), (3) or (4) and 560.35 (1), (2), (3) and (4), the department shall send a notice to the certified capital company and the commissioner of insurance stating that the certified capital company has been decertified.

(3m) VOLUNTARY DECERTIFICATION. (a) A certified capital company may voluntarily decertify itself as a certified capital company if any of the following conditions are met:

1. It has been at least 10 years since the last certified capital investment was made in the certified capital company.

2. The certified capital company has placed in qualified investments an amount equal to 100% of the certified capital investment in the certified capital company.

(b) A certified capital company wishing to decertify itself under this subsection shall send a notice to the department certifying that it is eligible for decertification under par. (a). The decertification is effective on the date that the notice under this paragraph is received by the department.

(4) EFFECT OF DECERTIFICATION. Decertification of a certified capital company or an investment pool has the effects specified in s. 76.635 (4).

(5) NOTICES TO CERTIFIED INVESTORS. The department shall notify a certified investor when the certified capital company tax credit arising from a certified investment is no longer subject to recapture and forfeiture under s. 76.635 (4).

560.38 Department evaluation of program. Beginning on March 31, 2000, and on March 31 of each even-numbered year thereafter, the department shall submit a report to the legislature under s. 13.172 (2) re-

garding the program under this subchapter. The report shall include all of the following:

(1) The total amount of certified capital investments made during the previous 2 calendar years, as well as the total amount of certified capital investments made since the effective date of this subsection [revisor inserts date].

(2) Statistical information on the qualified investments made by certified capital companies during the previous 2 calendar years.

(3) The department's assessment of the number of jobs created in this state during the previous 2 calendar years as a result of the certified capital company program under this subchapter.

SECTION 4. Nonstatutory provisions.

(1) RULE MAKING. The department of commerce shall submit in proposed form the rules required under sections 560.31 (1) and 560.34 of the statutes, as created by this act, to the legislative council staff under section 227.15 (1) of the statutes no later than the first day of the 4th month after the effective date of this subsection.

(2) POSITION AUTHORIZATIONS. The authorized FTE positions for the department of commerce are increased by 2.0 PR positions to be funded from the appropriation under section 20.143 (1) (hm) of the statutes, for the purpose of administering the program under subchapter II of chapter 560.

SECTION 6. Effective date.

(1f) This act takes effect on July 1, 1999.