

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

HOUSE BILL 240

51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013

INTRODUCED BY

Brian F. Egolf and Peter Wirth

AN ACT

RELATING TO FINANCE; ENACTING THE SMALL BUSINESS DEVELOPMENT
FUND ACT; CREATING THE SMALL BUSINESS DEVELOPMENT FUND;
ESTABLISHING THE SMALL BUSINESS DEVELOPMENT FUND BOARD;
PROVIDING POWERS AND DUTIES; AUTHORIZING LOAN PARTICIPATION
AGREEMENTS WITH COMMUNITY BANKS FOR ECONOMIC DEVELOPMENT
PROJECTS; PROVIDING FOR THE INVESTMENT OF A PORTION OF THE
SEVERANCE TAX PERMANENT FUND IN THE SMALL BUSINESS DEVELOPMENT
FUND; PROVIDING PENALTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. ~~[NEW MATERIAL]~~ SHORT TITLE.--Sections 1
through 13 of this act may be cited as the "Small Business
Development Fund Act".

SECTION 2. ~~[NEW MATERIAL]~~ FINDINGS AND PURPOSE.--

A. The legislature finds that:

underscoring material = new
~~[bracketed material] = delete~~

underscored material = new
[bracketed material] = delete

1 (1) it is important for government to promote,
2 support and assist in developing a thriving economic base
3 within the state; increase opportunities for gainful employment
4 and improved living conditions; assist in promoting a balanced
5 and productive economy; encourage the flow of private capital
6 for investment in productive enterprises; and otherwise improve
7 the prosperity, health and general welfare of the people of the
8 state;

9 (2) access to capital is vital for the well-
10 being of the economic base of the state; and

11 (3) New Mexico can best provide necessary
12 capital to direct economic development policy initiatives in a
13 responsive and efficient manner with a small business
14 development fund at its disposal.

15 B. The purpose of the Small Business Development
16 Fund Act is to:

17 (1) create a state-owned, state-controlled and
18 state-operated business development fund; and

19 (2) stimulate economic development by
20 providing capital to the residents and small businesses of the
21 state.

22 SECTION 3. [NEW MATERIAL] DEFINITIONS.--As used in the
23 Small Business Development Fund Act:

24 A. "board" means the small business development
25 fund board;

.191428.3

1 B. "community bank" means a federally insured
2 depository institution organized under the laws of New Mexico
3 that has been granted a state of New Mexico or federal bank
4 charter;

5 C. "community bank note holder" means a community
6 bank that has entered into a loan participation agreement with
7 the development fund pursuant to Section 7 of the Small
8 Business Development Fund Act;

9 D. "customer" means any person who is pursuing the
10 services of, transacting business with or has used the services
11 of the development fund, including a community bank note
12 holder;

13 E. "development fund" means the small business
14 development fund;

15 F. "economic development project" means land,
16 buildings, improvements, machinery and equipment, operating
17 capital and other personal property for use in providing:

18 (1) assistance to rural or underserved areas
19 designed to increase business activity;

20 (2) retention and expansion of existing
21 business enterprises;

22 (3) attraction of new business enterprises; or

23 (4) creation and promotion of an environment
24 suitable for the support of start-up and emerging business
25 enterprises within the state; and

underscored material = new
[bracketed material] = delete

1 G. "New Mexico business" means, in the case of a
2 corporation or limited liability company, a business with its
3 principal office and a majority of its full-time employees
4 located in New Mexico or, in the case of a limited partnership,
5 a business with its principal place of business and eighty
6 percent of its assets located in New Mexico.

7 SECTION 4. [NEW MATERIAL] SMALL BUSINESS DEVELOPMENT FUND
8 CREATED--OPERATION OF THE DEVELOPMENT FUND--LIMITATIONS--
9 LOCATION.--

10 A. For the purpose of encouraging and promoting
11 economic development, commerce and industry, there is created a
12 public body politic and corporate, separate and apart from the
13 state, constituting a governmental instrumentality to be known
14 as the "small business development fund".

15 B. The board shall operate, manage and control the
16 development fund, including creation and enforcement of rules
17 for the transaction of the development fund's business.

18 C. The development fund is not created or
19 organized, and its operations shall not be conducted, for the
20 purpose of making a profit. No part of the revenues or assets
21 of the development fund shall benefit, or be distributable to,
22 its board members or other private persons.

23 D. The development fund shall not be subject to the
24 supervision or control of any other board, bureau, department
25 or agency of the state except as specifically provided in the

.191428.3

underscoring material = new
~~[bracketed material] = delete~~

1 Small Business Development Fund Act. No use of the terms
2 "state agency", "instrumentality" or "fund" in any other law of
3 the state shall be deemed to refer to the development fund
4 unless the development fund is specifically referred to in the
5 law. The development fund is a governmental instrumentality
6 for purposes of the Tort Claims Act.

7 E. The business and financial transactions of the
8 development fund are limited to those expressly provided for in
9 the Small Business Development Fund Act.

10 F. The development fund's principal place of
11 business shall be in Santa Fe, New Mexico.

12 SECTION 5. [NEW MATERIAL] BOARD CREATED--MEMBERSHIP--
13 TERMS--CHAIR AND VICE CHAIR--OFFICERS.--

14 A. The "small business development fund board" is
15 created.

16 B. The board is composed of seven members. The
17 governor and the New Mexico legislative council shall each
18 appoint three members of the board, who shall be residents of
19 the state with expertise in banking, lending and finances and
20 who shall not hold other public office. No more than two of
21 the members appointed by the governor or by the New Mexico
22 legislative council shall be from the same political party. By
23 majority vote, the board shall elect a person to serve as chair
24 of the board for a four-year term. The chair shall have
25 expertise in banking, lending and financial investment and

.191428.3

underscoring material = new
~~[bracketed material] = delete~~

1 shall not hold other public office. The members of the board
2 shall receive no compensation for their services, but they
3 shall be reimbursed for actual and necessary expenses at the
4 same rate and on the same basis as provided for public officers
5 in the Per Diem and Mileage Act.

6 C. Board members shall be appointed for four-year
7 terms. To provide for staggered terms, the members of the
8 board initially appointed, other than the chair, shall serve
9 staggered terms from the date of their appointment as follows:

10 (1) two members, one appointed by the governor
11 and one appointed by the New Mexico legislative council, for
12 four-year terms;

13 (2) two members, one appointed by the governor
14 and one appointed by the New Mexico legislative council, for
15 three-year terms; and

16 (3) two members, one appointed by the governor
17 and one appointed by the New Mexico legislative council, for
18 two-year terms.

19 D. Vacancies shall be filled by the appointing
20 entity for the remainder of the unexpired term. Board members
21 shall be eligible for reappointment.

22 E. The board shall annually elect one of its
23 members as vice chair.

24 F. The board shall appoint and prescribe the duties
25 of an executive director of the development fund and other

.191428.3

underscoring material = new
~~[bracketed material] = delete~~

1 officers as the board deems necessary. The executive director
2 and other officers of the development fund shall not hold other
3 public office. The members of the board shall not be officers
4 or employees of the development fund. The board may, for the
5 purpose of carrying out the provisions of the Small Business
6 Development Fund Act, employ attorneys other than and in
7 addition to the attorney general of the state, accountants,
8 investment officers, financial experts, loan specialists,
9 bankers and such other advisors, consultants and agents as may
10 be necessary in its judgment. The board shall fix the
11 compensation of officers and employees. Officers and employees
12 of the development fund are not subject to the Personnel Act.

13 SECTION 6. [NEW MATERIAL] POWERS OF THE BOARD.--The board
14 shall have all the powers necessary or convenient to carry out
15 and effectuate the purposes and provisions of the Small
16 Business Development Fund Act, including the power to:

- 17 A. sue and be sued;
- 18 B. have a seal and alter it at its pleasure;
- 19 C. make and alter bylaws for its organization and
20 internal management;
- 21 D. acquire, hold, improve, mortgage, lease and
22 dispose of real and personal property for its public purpose;
- 23 E. make, service and administer loans for the
24 purposes and in the manner set forth in Section 7 of the Small
25 Business Development Fund Act;

underscoring material = new
~~[bracketed material] = delete~~

1 F. subject to any agreement with a community bank
2 note holder or loan recipient:

3 (1) renegotiate any loan in default, provided
4 that the development fund shall not forgive any debt;

5 (2) consent to the modification of the terms
6 of any loan and otherwise exercise all powers with respect to
7 its loans that any private creditor may exercise under
8 applicable law; and

9 (3) commence, prosecute and enforce a judgment
10 in any action or proceeding to protect or enforce any right
11 conferred upon it by law, loan agreement, contract or other
12 agreement; and in connection with any such proceeding, bid for
13 and purchase the property or acquire or take possession of it
14 and, in such event, complete, administer, pay the principal of
15 and interest on any obligations incurred in connection with the
16 property and operate or dispose of and otherwise deal with the
17 property in such manner as the board may deem advisable to
18 protect its interests in the property;

19 G. make and execute contracts for the
20 administration, servicing or collection of any loan and pay the
21 reasonable value of services rendered to the development fund
22 pursuant to such contracts;

23 H. fix, revise from time to time, charge and
24 collect fees and other charges in connection with the making of
25 a loan and any other services rendered by the development fund;

.191428.3

underscoring material = new
~~[bracketed material]~~ = delete

1 I. subject to any agreement with community bank
2 note holders, sell any loans at public or private sale at such
3 prices and on such terms as the board determines;

4 J. arrange for and pay any premiums associated with
5 guarantees or other security, liquidity or credit enhancements
6 in connection with its notes or other obligations by the
7 federal government or by any private insurer or other provider;

8 K. subject to any agreement with a community bank
9 note holder, invest money of the development fund not required
10 for immediate use in any way determined to be in the best
11 interest of the development fund;

12 L. make surveys and monitor on a continuing basis
13 the adequacy of the supply of funds available in the private
14 banking system in the state for economic development loans;

15 M. make and execute agreements, contracts and other
16 instruments necessary or convenient in the exercise of the
17 powers and functions of the board under the Small Business
18 Development Fund Act;

19 N. contract for and accept any state, federal or
20 private gifts, grants, loans of funds or property or financial
21 or other aid in any form, subject to the terms and conditions
22 of the Small Business Development Fund Act;

23 O. make, alter or repeal rules addressing its
24 operations, properties and facilities as are necessary to carry
25 out its functions and duties in the administration of the Small

.191428.3

underscoring material = new
[bracketed material] = delete

1 Business Development Fund Act; and

2 P. do any and all things necessary to carry out its
3 purposes and exercise the power given and granted in the Small
4 Business Development Fund Act; provided that the development
5 fund shall not accept or hold public or private deposits.

6 SECTION 7. [NEW MATERIAL] ECONOMIC DEVELOPMENT LOANS.--

7 A. The development fund may make and contract to
8 make loans on terms and conditions as it determines and in
9 accordance with the provisions of this section.

10 B. All loans made by the development fund shall:

11 (1) be to a New Mexico resident or a New
12 Mexico business;

13 (2) be in the form of loan participation
14 agreements with community banks for up to forty-nine percent of
15 the total individual economic development project financing;

16 (3) have an interest rate equal to the rate
17 charged by a community bank, unless a lower rate may be charged
18 in accordance with the laws of the state;

19 (4) provide that the development fund has an
20 equal security interest with a community bank note holder;

21 (5) if the loan is for real estate, have a
22 maximum term of twenty-five years;

23 (6) if the loan is for personal property,
24 including operating capital, have a maximum term of ten years;

25 and

.191428.3

underscoring material = new
[bracketed material] = delete

1 (7) be for an economic development project.

2 C. The development fund shall require as a
3 condition of any loan such representations and warranties as it
4 determines to be necessary to secure the loan and carry out the
5 purposes of this section.

6 D. The community bank entering into the loan
7 participation agreement with the development fund shall process
8 and service the loan.

9 E. The development fund shall adopt rules to
10 implement this section.

11 SECTION 8. [NEW MATERIAL] CONFLICTS OF INTEREST--
12 DISCLOSURE--PENALTY.--

13 A. Notwithstanding any other provision of this
14 section, the development fund shall not make any loan or
15 otherwise give its credit to a member of the board during the
16 member's term. Prior to taking office, a member of the board
17 shall file a statement with the development fund and the board
18 indicating any personal interest that the member has in any
19 loan or loan application in existence or pending at any time
20 during the member's term on the board.

21 B. If any member, officer or employee of the
22 development fund has an interest, either direct or indirect, in
23 any contract to which the development fund is or is to be a
24 party, the interest shall be disclosed to the board in writing
25 and shall be set forth in the minutes of the board. The

.191428.3

underscored material = new
[bracketed material] = delete

1 member, officer or employee having the interest shall not
2 participate in any action by the development fund or the board
3 with respect to the contract.

4 C. The development fund shall not make any loan or
5 otherwise give its credit to any person or entity that makes a
6 gift, grant or loan of funds to the development fund during the
7 fiscal year in which the gift, grant or loan of funds is made
8 to the development fund. Any person or entity making a gift,
9 grant or loan of funds to the development fund shall disclose
10 the gift, grant or loan to the development fund any time the
11 person or entity has any interest in a loan or loan application
12 pending at the development fund.

13 D. Any person having a conflict of interest as
14 defined in this section and participating in any transaction
15 involving the conflict of interest or failing to notify the
16 development fund or the board as required by this section is
17 guilty of a misdemeanor and shall be sentenced in accordance
18 with the provisions of Section 31-19-1 NMSA 1978.

19 SECTION 9. [NEW MATERIAL] AUDIT--REVIEW BY STATE
20 INVESTMENT COUNCIL.--

21 A. The state auditor shall contract with an
22 independent certified public accounting firm for an annual
23 audit of the development fund in accordance with generally
24 accepted government auditing standards. The auditor shall
25 report the results of the audit to the board and to the

.191428.3

underscored material = new
[bracketed material] = delete

1 legislature.

2 B. The state investment council shall select an
3 independent third party to examine the development fund at
4 least once every twenty-four months and conduct any
5 investigation of the development fund that may be necessary.
6 The chair of the state investment council shall report the
7 examination results, and the results of any necessary
8 investigation, to the board and to the legislature as soon as
9 practicable.

10 SECTION 10. [NEW MATERIAL] LIMITATION OF LIABILITY.--

11 Neither the members of the board nor any person acting on the
12 board's behalf, while acting within the scope of the members'
13 or person's authority, shall be subject to any personal
14 liability for any action taken or omitted within that scope of
15 authority.

16 SECTION 11. [NEW MATERIAL] CIVIL ACTIONS.--Any action or
17 proceeding brought against the state of New Mexico in which a
18 question arises regarding the operations or actions of the
19 development fund or the validity of the Small Business
20 Development Fund Act may be brought in the same manner, and is
21 subject to the same provisions of law, as other civil actions.
22 In such actions, the state must be designated as "the State of
23 New Mexico, doing business as the small business development
24 fund".

25 SECTION 12. [NEW MATERIAL] CORPORATE EXISTENCE.--The

.191428.3

underscored material = new
[bracketed material] = delete

1 development fund and its corporate existence shall continue
2 until terminated by law, provided that no such law shall take
3 effect so long as the development fund has notes or loans
4 outstanding unless adequate provision has been made for the
5 satisfaction or payment of those loans or notes. Upon
6 termination of the existence of the development fund, all its
7 rights and properties in excess of its obligations shall pass
8 to and be vested in the state.

9 SECTION 13. [NEW MATERIAL] CONFIDENTIALITY--PROPRIETARY
10 INFORMATION--PENALTY.--

11 A. The following records of the development fund
12 are confidential and are not subject to inspection pursuant to
13 the Inspection of Public Records Act:

14 (1) proprietary technical information and
15 business information of a customer, including financial and
16 commercial information, whether obtained directly or
17 indirectly, and including information obtained during
18 discussions between the development fund and the customer prior
19 to the filing of a loan application;

20 (2) internal or interagency memoranda or
21 letters that would not be available by law to a party other
22 than in litigation with the development fund;

23 (3) information contained in or related to
24 examination, operating or condition reports prepared by, on
25 behalf of or for the use of a state or federal agency

.191428.3

underscored material = new
[bracketed material] = delete

1 responsible for the regulation or supervision of any
2 development fund activity; and

3 (4) any report by a development fund officer
4 or member of the board concerning personal financial statements
5 of a customer.

6 B. It is unlawful for any employee of the
7 development fund or the board, or any former employee of the
8 development fund or the board, to reveal to any person other
9 than another employee of the development fund or the board any
10 confidential information obtained by the development fund or
11 the board that is proprietary technical or business information
12 of a customer, including financial and commercial information.

13 C. Any employee or former employee of the
14 development fund or the board who reveals to another person any
15 information that is prohibited from disclosure in this section
16 is guilty of a misdemeanor and shall be sentenced in accordance
17 with the provisions of Section 31-19-1 NMSA 1978.

18 SECTION 14. A new section of the Severance Tax Bonding
19 Act is enacted to read:

20 "[NEW MATERIAL] INVESTMENT IN THE SMALL BUSINESS
21 DEVELOPMENT FUND.--

22 A. The severance tax permanent fund may be invested
23 in the small business development fund. The amount invested
24 shall not exceed one hundred million dollars (\$100,000,000).
25 Not more than five million dollars (\$5,000,000) of the amount

.191428.3

underscoring material = new
~~[bracketed material] = delete~~

1 authorized for investment pursuant to this subsection shall be
2 used to establish the small business development fund,
3 including construction of a facility to house the development
4 fund and operating the development fund. The remainder of the
5 amount authorized for investment pursuant to this subsection
6 shall be used to fund the loan program administered by the
7 small business development fund as set forth in the Small
8 Business Development Fund Act.

9 B. The council may work with the small business
10 development fund to invest the funds authorized for investment
11 in the development fund pursuant to Subsection A of this
12 section. Such investments shall be made and administered by
13 the council, state investment officer and small business
14 development fund board in accordance with laws governing
15 investment of public money, including, but not limited to,
16 Sections 6-10-10 and 6-10-24.1 NMSA 1978."

17 SECTION 15. EFFECTIVE DATE.--The effective date of the
18 provisions of this act is July 1, 2013.