HOUSE BILL 290

50TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2011

INTRODUCED BY

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AN ACT

RELATING TO FINANCE; ENACTING THE SMALL BUSINESS DEVELOPMENT BANK ACT; CREATING THE NEW MEXICO SMALL BUSINESS DEVELOPMENT BANK; ESTABLISHING THE SMALL BUSINESS DEVELOPMENT BANK 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 NEW MEXICO SMALL BUSINESS DEVELOPMENT BANK; 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 Bank Act".

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

A. The legislature finds that:
(1) it is important for government to promote, support and assist in developing a thriving economic base within the state; increase opportunities for gainful employment and improved living conditions; assist in promoting a balanced and productive economy; encourage the flow of private capital for investment in productive enterprises; and otherwise improve the prosperity, health and general welfare of the people of the state;

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

(3) New Mexico can best provide necessary capital to direct economic development policy initiatives in a responsive and efficient manner with a state business development bank at its disposal.

B. The purpose of the Small Business Development Bank Act is to:

(1) create a state-owned, -controlled and -operated business development bank; and

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

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

A. "bank" means the New Mexico small business development bank;
B. "board" means the small business development bank board;

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

D. "community bank note holder" means a community bank that has entered into a loan participation agreement with the bank pursuant to Section 7 of the Small Business Development Bank Act;

E. "customer" means any person who is pursuing the services of, transacting business with or has used the services of the bank, including a community bank note holder;

F. "economic development project" means land, buildings, improvements, machinery and equipment, operating capital and other personal property for use in providing:
   (1) assistance to rural or underserved areas designed to increase business activity;
   (2) retention and expansion of existing business enterprises;
   (3) attraction of new business enterprises; or
   (4) creation and promotion of an environment suitable for the support of start-up and emerging business enterprises within the state; and

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

SECTION 4. [NEW MATERIAL] NEW MEXICO SMALL BUSINESS DEVELOPMENT BANK CREATED--OPERATION OF THE BANK--LIMITATIONS--LOCATION.--

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

B. The board shall operate, manage and control the bank, including creation and enforcement of rules for the transaction of the bank's business.

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

D. The bank shall not be subject to the supervision or control of any other board, bureau, department or agency of the state except as specifically provided in the Small Business Development Bank Act. No use of the terms "state agency" or...
"instrumentality" in any other law of the state shall be deemed to refer to the bank unless the bank is specifically referred to in the law. The bank is a governmental instrumentality for purposes of the Tort Claims Act.

E. The business and financial transactions of the bank are limited to those expressly provided for in the Small Business Development Bank Act.

F. The bank's principal place of business shall be in Santa Fe, New Mexico.

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

A. The "small business development bank board" is created.

B. The board is composed of seven members. The governor and the New Mexico legislative council shall each appoint three members of the board, who shall be residents of the state with expertise in banking, lending and finances and who shall not hold other public office. No more than two of the members appointed by the governor or by the New Mexico legislative council shall be from the same political party. By majority vote, the governor, attorney general, commissioner of public lands, speaker of the house of representatives and president pro tempore of the senate shall appoint a person to serve as chair of the board for a four-year term. The chair shall have expertise in banking, lending and financial
investment and shall not hold other public office. The members of the board shall receive no compensation for their services, but they shall be reimbursed for actual and necessary expenses at the same rate and on the same basis as provided for public officers in the Per Diem and Mileage Act.

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

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

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

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

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

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

F. The board shall appoint and prescribe the duties of a president of the bank and other officers as the board
deems necessary. The president and other officers of the bank shall not hold other public office. The members of the board shall not be officers or employees of the bank. The board may, for the purpose of carrying out the provisions of the Small Business Development Bank Act, employ attorneys other than and in addition to the attorney general of the state, accountants, investment officers, financial experts, loan specialists, bankers and such other advisors, consultants and agents as may be necessary in its judgment. The board shall fix the compensation of officers and employees. Officers and employees of the bank are not subject to the Personnel Act.

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

A. sue and be sued;
B. have a seal and alter it at pleasure;
C. make and alter bylaws for its organization and internal management;
D. acquire, hold, improve, mortgage, lease and dispose of real and personal property for its public purpose;
E. make, service and administer loans for the purposes and in the manner set forth in Section 7 of the Small Business Development Bank Act;
F. subject to any agreement with a community bank
note holder or loan recipient:

(1) renegotiate any loan in default, provided that the bank shall not forgive any debt;

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

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

G. make and execute contracts for the administration, servicing or collection of any loan and pay the reasonable value of services rendered to the bank pursuant to such contracts;

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

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

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

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

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

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

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

O. make, alter or repeal rules addressing its
operations, properties and facilities as are necessary to carry
out its functions and duties in the administration of the Small
Business Development Bank Act; and

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P. do any and all things necessary to carry out its purposes and exercise the power given and granted in the Small Business Development Bank Act; provided that the bank shall not accept or hold public or private deposits.

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

A. The bank may make and contract to make loans on terms and conditions as it determines and in accordance with the provisions of this section.

B. All loans made by the bank shall:

   (1) be with a New Mexico resident or a New Mexico business;

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

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

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

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

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

   (7) be for an economic development project.
C. The bank shall require as a condition of any loan such representations and warranties as it determines to be necessary to secure the loan and carry out the purposes of this section.

D. The community bank entering into the loan participation agreement with the bank shall process and service the loan.

E. The bank shall adopt rules to implement this section.

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

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

B. If any member, officer or employee of the bank has an interest, either direct or indirect, in any contract to which the bank is or is to be a party, the interest shall be disclosed to the board in writing and shall be set forth in the minutes of the board. The member, officer or employee having the interest shall not participate in any action by the bank or
the board with respect to the contract.

C. The bank shall not make any loan or otherwise give its credit to any person or entity that makes a gift, grant or loan of funds to the bank during the fiscal year in which the gift, grant or loan of funds is made to the bank. Any person or entity making a gift, grant or loan of funds to the bank shall disclose the gift, grant or loan to the bank any time the person or entity has any interest in a loan or loan application pending at the bank.

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

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

A. The state auditor shall contract with an independent certified public accounting firm for an annual audit of the bank in accordance with generally accepted government auditing standards. The auditor shall report the results of the audit to the board and to the legislature.

B. The state investment council shall select an independent third party to examine the bank at least once every twenty-four months and conduct any investigation of the bank...
that may be necessary. The chair of the state investment
council shall report the examination results, and the results
of any necessary investigation, to the board and to the
legislature as soon as practicable.

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

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

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

SECTION 12. [NEW MATERIAL] CORPORATE EXISTENCE.--The bank
and its corporate existence shall continue until terminated by
law, provided that no such law shall take effect so long as the
bank has notes or loans outstanding unless adequate provision
has been made for the satisfaction or payment of those loans or
notes. Upon termination of the existence of the bank, all its
rights and properties in excess of its obligations shall pass
SECTION 13. [NEW MATERIAL] CONFIDENTIALITY--PROPRIETARY INFORMATION--PENALTY.--

A. The following records of the bank are confidential and are not subject to inspection pursuant to the Inspection of Public Records Act:

(1) proprietary technical information and business information of a customer, including financial and commercial information, whether obtained directly or indirectly, and including information obtained during discussions between the bank and the customer prior to the filing of a loan application;

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

(3) information contained in or related to examination, operating or condition reports prepared by, on behalf of or for the use of a state or federal agency responsible for the regulation or supervision of any bank activity; and

(4) any report by a bank officer or member of the board concerning personal financial statements of a customer.

B. It is unlawful for any employee of the bank or the board, or any former employee of the bank or the board, to
reveal to any person other than another employee of the bank or
the board any confidential information obtained by the bank or
the board that is proprietary technical or business information
of a customer, including financial and commercial information.

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

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

"[NEW MATERIAL] INVESTMENT IN THE NEW MEXICO SMALL
BUSINESS DEVELOPMENT BANK.--

A. The severance tax permanent fund may be invested
in the New Mexico small business development bank. The amount
invested shall not exceed one hundred million dollars
($100,000,000). Not more than five million dollars
($5,000,000) of the amount authorized for investment pursuant
to this subsection shall be used to establish the New Mexico
small business development bank, including construction of a
facility to house the bank and operating the bank. The
remainder of the amount authorized for investment pursuant to
this subsection shall be used to fund the loan program
administered by the New Mexico small business development bank
as set forth in the Small Business Development Bank Act.

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

SECTION 15. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2011.