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HOUSE BILL 28

**52ND LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2015**

INTRODUCED BY

Brian F. Egolf, Jr.

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 12 of this act may be cited as the "Small Business  
Development Fund Act".

SECTION 2. [NEW MATERIAL] DEFINITIONS.--As used in the  
Small Business Development Fund Act:

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1           A. "board" means the small business development  
2 fund board;

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

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

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

15           E. "development fund" means the small business  
16 development fund;

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

20                   (1) assistance to rural or underserved areas  
21 designed to increase business activity;

22                   (2) retention and expansion of existing  
23 business enterprises;

24                   (3) attraction of new business enterprises; or

25                   (4) creation and promotion of an environment

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1 suitable for the support of start-up and emerging business  
2 enterprises within the state; and

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

9 SECTION 3. ~~[NEW MATERIAL]~~ SMALL BUSINESS DEVELOPMENT FUND  
10 CREATED--OPERATION OF THE DEVELOPMENT FUND--LIMITATIONS--  
11 LOCATION.--

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

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

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

25 D. The development fund shall not be subject to the

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1 supervision or control of any other board, bureau, department  
2 or agency of the state except as specifically provided in the  
3 Small Business Development Fund Act. No use of the terms  
4 "state agency", "instrumentality" or "fund" in any other law of  
5 the state shall be deemed to refer to the "small business  
6 development fund" unless that fund is specifically referred to  
7 in the law. The development fund is a governmental  
8 instrumentality for purposes of the Tort Claims Act.

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

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

14 SECTION 4. [NEW MATERIAL] BOARD CREATED--MEMBERSHIP--  
15 TERMS--CHAIR AND VICE CHAIR--OFFICERS.--

16 A. The "small business development fund board" is  
17 created.

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

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1 of the board for a four-year term. The chair shall have  
2 expertise in banking, lending and financial investment and  
3 shall not hold other public office. The members of the board  
4 shall receive no compensation for their services, but they  
5 shall be reimbursed for actual and necessary expenses at the  
6 same rate and on the same basis as provided for public officers  
7 in the Per Diem and Mileage Act.

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

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

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

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

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

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

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

15           SECTION 5. [NEW MATERIAL] POWERS OF THE BOARD.--The board  
16 shall have all the powers necessary or convenient to carry out  
17 and effectuate the purposes and provisions of the Small  
18 Business Development Fund Act, including the power to:

- 19           A. sue and be sued;
- 20           B. have a seal and alter it at its pleasure;
- 21           C. make and alter bylaws for its organization and  
22 internal management;
- 23           D. acquire, hold, improve, mortgage, lease and  
24 dispose of real and personal property for its public purpose;
- 25           E. make, service and administer loans for the

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1 purposes and in the manner set forth in Section 6 of the Small  
2 Business Development Fund Act;

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

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

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

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

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

25 H. fix, revise from time to time, charge and

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1 collect fees and other charges in connection with the making of  
2 a loan and any other services rendered by the development fund;

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

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

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

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

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

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

25 O. make, alter or repeal rules addressing its

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1 operations, properties and facilities as are necessary to carry  
2 out its functions and duties in the administration of the Small  
3 Business Development Fund Act; and

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

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

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

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

13 (1) be to a New Mexico resident or a New  
14 Mexico business;

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

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

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

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

25 (6) if the loan is for personal property,

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1 including operating capital, have a maximum term of ten years;  
2 and

3 (7) be for an economic development project.

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

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

11 E. The development fund shall adopt rules to  
12 implement this section.

13 SECTION 7. [NEW MATERIAL] CONFLICTS OF INTEREST--  
14 DISCLOSURE--PENALTY.--

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

23 B. If any member, officer or employee of the  
24 development fund has an interest, either direct or indirect, in  
25 any contract to which the development fund is or is to be a

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1 party, the interest shall be disclosed to the board in writing  
2 and shall be set forth in the minutes of the board. The  
3 member, officer or employee having the interest shall not  
4 participate in any action by the development fund or the board  
5 with respect to the contract.

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

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

21 **SECTION 8. [NEW MATERIAL] AUDIT--REVIEW BY STATE**  
22 **INVESTMENT COUNCIL.--**

23 A. The state auditor shall contract with an  
24 independent certified public accounting firm for an annual  
25 audit of the development fund in accordance with generally

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1 accepted government auditing standards. The auditor shall  
2 report the results of the audit to the board and to the  
3 legislature.

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

12 SECTION 9. [NEW MATERIAL] LIMITATION OF LIABILITY.--  
13 Neither the members of the board nor any person acting on the  
14 board's behalf, while acting within the scope of the members'  
15 or person's authority, shall be subject to any personal  
16 liability for any action taken or omitted within that scope of  
17 authority.

18 SECTION 10. [NEW MATERIAL] CIVIL ACTIONS.--Any action or  
19 proceeding brought against the state of New Mexico in which a  
20 question arises regarding the operations or actions of the  
21 development fund or the validity of the Small Business  
22 Development Fund Act may be brought in the same manner, and is  
23 subject to the same provisions of law, as other civil actions.  
24 In such actions, the state must be designated as "the State of  
25 New Mexico, doing business as the small business development

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1 fund".

2 SECTION 11. [NEW MATERIAL] CORPORATE EXISTENCE.--The  
3 development fund and its corporate existence shall continue  
4 until terminated by law, provided that no such law shall take  
5 effect so long as the development fund has notes or loans  
6 outstanding unless adequate provision has been made for the  
7 satisfaction or payment of those loans or notes. Upon  
8 termination of the existence of the development fund, all its  
9 rights and properties in excess of its obligations shall pass  
10 to and be vested in the state.

11 SECTION 12. [NEW MATERIAL] CONFIDENTIALITY--PROPRIETARY  
12 INFORMATION--PENALTY.--

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

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

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

25 (3) information contained in or related to

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1 examination, operating or condition reports prepared by, on  
2 behalf of or for the use of a state or federal agency  
3 responsible for the regulation or supervision of any  
4 development fund activity; and

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

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

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

20 SECTION 13. A new section of the Severance Tax Bonding  
21 Act is enacted to read:

22 "[NEW MATERIAL] INVESTMENT IN THE SMALL BUSINESS  
23 DEVELOPMENT FUND.--

24 A. The severance tax permanent fund may be invested  
25 in the small business development fund. The amount invested

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1 shall not exceed one hundred million dollars (\$100,000,000).  
2 Not more than five million dollars (\$5,000,000) of the amount  
3 authorized for investment pursuant to this subsection shall be  
4 used to establish the small business development fund,  
5 including construction of a facility to house the development  
6 fund and operating the development fund. The remainder of the  
7 amount authorized for investment pursuant to this subsection  
8 shall be used to fund the loan program administered by the  
9 small business development fund as set forth in the Small  
10 Business Development Fund Act.

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

19 SECTION 14. EFFECTIVE DATE.--The effective date of the  
20 provisions of this act is July 1, 2015.