

Chapter 701: SMALL ENTERPRISE GROWTH PROGRAM (Amendment 6)

Summary: This Rule establishes the procedures and standards applicable to the Small Enterprise Growth Program, a program that provides for the administration of one or more funds that invest in eligible small Maine-based businesses demonstrating potential for high growth and significant public benefit.

1. Definitions

A. **Reference to Act Definitions.** Certain terms used in this rule, which are defined in 10 M.R.S.A. §381 and following (the "Act"), shall have the meanings set forth in the Act, unless clearly specified otherwise or unless the context clearly indicates otherwise.

B. Defined Terms

1. "Administrative contract" means a contract between the Board and a service provider to administer specified aspects of the program.
2. "Applicant" means an individual or entity which has submitted a complete application to the Board.
3. "Authority" means the Finance Authority of Maine, or as the context requires, the Chief Executive Officer and employees of the Authority.
4. "Board" means the Small Enterprise Growth Board.
5. *[Repealed effective July 25, 2002]*
6. *[Repealed effective July 25, 2002]*
7. "Fund manager" means an individual or entity that has entered into an agreement with the Board to administer the program and the Program Funds, including but not limited to, the review and analysis of applications, meeting with applicants, providing analysis of the status of the Program Funds, publicizing the Program Funds, executing documents and taking other actions on behalf of the Board.
8. "Initial investment" means a disbursement from the SEGF of up to \$500,000, which may be made in a single payment or in a series of payments to the qualifying small business pursuant to one or more disbursement agreements.
9. "Investment agreement" means an agreement between the recipient and the Board setting out the terms on which the Board will invest in the recipient and on which the recipient will repay the Program Funds or otherwise provide a return to the Board on its investment.

10. "Program" means the Small Enterprise Growth Program, which shall encompass administration of the Small Enterprise Growth Fund and any and all Side Funds.
11. "Program Funds" means the Small Enterprise Growth Fund and any and all Side Funds.
12. "Public benefit" means that the disbursement will advance and assist the people of the State of Maine.
13. "Qualifying small business" means
 - (A) For the purpose of an initial investment by the Board, a business which employs the full time equivalent of 50 or fewer individuals at the time of application or has gross sales not exceeding \$5,000,000 within the most recent 12 months for which financial statements meeting the Board's requirements are available; or
 - (B) For the purpose of a subsequent investment by the Board, a business that has previously received an investment from the Board and that, in the judgment of the Board, evidences continued potential for high growth.
14. "Recipient" means a qualified small business in which the Board makes an investment from the Funds and includes a prospective recipient where the context requires, and also includes any related entity having 50% or greater common ownership or beneficial interest with the recipient or any individual or entity having a 50% or greater ownership or beneficial interest in the recipient.
15. "SEGF" means the Small Enterprise Growth Fund.
16. "Side Fund(s)" means a fund or funds, created and administered by the Board, from sources other than monies appropriated to the SEGF (and earnings thereon) which co-invests alongside the SEGF, or makes independent investments in select qualifying small businesses.
17. "Side Fund Investments" means investments in qualifying businesses by the Board from one or more Side Funds.
18. "Subsequent investment" means, an investment by the SEGF which, together with any initial investment, is in an amount which does not exceed ten percent (10%) of the capitalization of the SEGF from all appropriations received for application to the SEGF, plus any funds received from repayment, interest, royalties, equities or other interests in business enterprises, products or services to the extent the repayment, interest, royalties or equities or other interests are in excess of the amount initially invested in the recipient, as determined on the date of approval of the subsequent investment, which may be made in a single disbursement or a series of disbursements to the qualifying small business.

2. Administration

- A. The Board has the power to approve investments to qualifying small businesses from the Program Funds. The Board may not delegate the final authority to approve investments, but once having authorized a potential investment from the Program Funds within designated parameters approved by it, the Board may delegate to a subcommittee of the Board the authority to negotiate and agree to terms of the investment within those designated parameters.
- B. The Board may delegate to one or more subcommittees the authority to review applications. The subcommittee may be given the authority to deny applications for investments. The Board may determine in advance that such a denial will be final agency action, not subject to appeal to the full Board.
- C. The Board may create such other subcommittees as it may deem necessary for the administration of the Board's business.
- D. The Board may enter into administrative contracts with one or more individuals or entities to perform the administrative functions necessary to the efficient conduct of the program and the administration of the Program Funds. Without limitation, services contracted for may include development of rules, procedures, documentation, financial reporting, publicity, analysis and recommendations with respect to applications received. The contracts may provide compensation for services rendered and reasonable expenses.

3. SEGF Administration

- A. The Authority shall maintain and invest the cash balances of the SEGF at the direction of the Board and shall report regularly to the Board regarding the balance of the SEGF.
- B. Appropriations, interest on investments, interest on investments to recipients, principal repayments, grants, endowments and gifts will be added to the SEGF. The SEGF will be used to make investments to recipients and to pay costs and expenses associated with maintaining, servicing and administering the SEGF and the program.

3A. Side Fund Administration

- A. The Board may enter into agreements or contracts with third parties to create and fund Side Funds. Ownership interests in Side Funds may be allocated or issued by the Board in accordance with such agreements, and monies in the Side Funds, whether principal, interest, investment income, investment repayment, or profit, may be distributed by the Board to third parties in accordance with such agreements. Such agreements may also provide that the Board be entitled to receive and retain profits or other returns on investments by the Side Fund. Any amounts definitively earned by the Board in a Side Fund shall be transferred to the SEGF at such time as the Board may direct, but in no event later than the closing of such Side Fund.
- B. Monies for the creation or funding of Side Funds may come from any lawful source, including public entities and private individuals or entities, and may be structured as

revolving or non-revolving funds, and all or a portion of such monies may be returned to the contributor or investor in accordance with the terms of the agreements governing the creation of such Side Funds.

- C. Interest on investments of Side Fund monies, interest on investments by Side Funds into Recipients, principal repayments, grants, endowments and gifts will be added to such Side Fund as directed by the Board. Such Side Funds may be used to make investments to Recipients and to pay costs and expenses associated with maintaining, servicing and administering the Side Funds and the program.
- D. The Board may charge and accept management fees, or carried interest for management, from the Side Funds, or from third parties, for management and administration of monies in the Side Funds, provided that in no event shall any such management fees be charged to or paid from monies appropriated by the state to the SEGF.
- E. The Authority shall maintain and invest any and all Side Funds for which it is given direction to do so by the Board and shall report regularly to the Board regarding the balance of such Side Funds.

4. Eligibility

To be eligible to receive an investment from the Funds an applicant must meet each of the criteria in A-C below:

- A. Must be engaged in or involve at least one of the following:
 - 1. Marine Sciences
 - 2. Biotechnology
 - 3. Manufacturing
 - 4. Export of goods or services to locations outside the State or activities that result in significant amounts of capital being imported into the State
 - 5. Software development
 - 6. Provision or development of environmental services or technologies
 - 7. Provision or development of financial or insurance products or services
 - 8. Production of value-added goods from natural resources
 - 9. Other enterprises that the Board determines will further the purposes and intent of the program, including, but not limited to, retail sales, tourism and agricultural production.

- B. The qualifying small business must demonstrate that it has the potential for high growth and that it will provide public benefit.
- C. The qualifying small business must provide evidence of its need for financial assistance from the fund to realize its projected growth and achievement of public benefit.

5. Application Procedure and Contents

- A. Prior to being considered for an investment from the Program Funds, a company seeking investment must supply, at a minimum, the following information:
 - 1. A description of the applicant, which identifies the business of the applicant, including the legal form of the business entity.
 - 2. A statement of how the investment will be used.
 - 3. The background and experience of all individuals essential to the applicant. (Resumes may be attached to fulfill this requirement.)
 - 4. A description of the goal and/or opportunity, which inspired the applicant.
 - 5. A description of the current status of the applicant, including an assessment of the stage it is at in its effort to achieve its goal or opportunity.
 - 6. A description of all previous investments received by the applicant.
 - 7. An assessment of the current value of the applicant.
 - 8. An estimate of the amount of capital needed to achieve the goal or opportunity of the applicant.
 - 9. A description of the competition of the applicant.
 - 10. A statement of how the applicant will obtain the required matching funds.
 - 11. A description of the potential of the applicant for high growth and public benefit.
 - 12. The profit and loss statement, balance sheet and statement of cash flows for the most recent two years or such shorter time as the applicant has conducted the business.
 - 13. The applicant's projected financial statements for the next three years, including a profit and loss statement, balance sheet, statement of cash flows and any other projections the Board requests.
 - 14. A disclosure of any actions, suits, proceedings or investigations pending against or, to the knowledge of the applicant or the individuals managing the applicant,

threatened against or affecting the applicant or the individuals managing the applicant.

- B. The applicant shall provide such additional information related to the business or the individuals managing the business as the Board may reasonably request.

6. Board Action

- A. Five (5) Board members shall constitute a quorum of the Board. If five (5) Board members are present at the beginning of any meeting, then a quorum exists for the transaction of the business. If any Board member(s) leaves a meeting at which a quorum was originally present, so that less than five (5) Board members remain, a quorum shall be deemed to continue to exist. Notwithstanding the foregoing, a majority of those present and voting is necessary for approval of an application or other action, and the affirmative vote of at least four (4) Board members is required to approve an investment.
- B. No Board member may participate in a vote on an application where that member has a direct or indirect pecuniary interest in the outcome of the vote. Every interest of a Board member in any matter before the Board must be disclosed to the Board.
- C. In cases where the Board approves an investment, the Board or an authorized subcommittee may issue a term sheet outlining the terms and conditions of the investment. In cases where the application for an investment from the Program Funds are denied, the Board shall issue (or cause to be issued) a letter of denial, which includes an explanation for the denial.
- D. The Board shall have a physical location for each meeting at which members of the public may attend. Board members may participate in meetings by teleconference. Board members participating in the meeting by teleconference shall not be entitled to vote nor be deemed present for the purposes of determining a quorum, except in cases when the Chair of the Board determines the allowance of votes by those members participating by teleconference, and the counting of such members towards a quorum is necessary to avoid undue hardship to an applicant for an investment.

7. Delegation of Application Review to Subcommittee

- A. Affirmative action by the Board is necessary to delegate to a subcommittee authority to review applications or authority to negotiate and agree to terms of an approved investment within designated parameters set by the Board.
- B. Each subcommittee shall be composed of 1 or more members, except that a subcommittee with delegated authority to negotiate or approve a portfolio company investment shall have at least 3 members.
- C. Each decision of a subcommittee must be approved by a majority of all members of the subcommittee.

- D. Subcommittees may meet and take action by means of teleconference.

8. Terms and Conditions of Investments

- A. Initial investments, subsequent investments, and Side Fund Investments shall be made in an amount which is reasonable as shown by materials submitted by the qualified small business.
- B. Investments from the Program Funds may be in a form determined by the Board in recognition of the degree of risk of the proposal. The investment agreement may require royalties or additional payments based on sales, net cash flow or other financial measures, or rights to equity in the enterprise in the form of debentures, warrants, stock ownership or similar rights.
- C. With respect to investments from the SEGF, the qualifying small business must provide the Board satisfactory evidence that it has obtained other cash funds in an amount at least equal to the investment. The matching cash may be in the form of debt or equity, but must be at risk in the qualifying small business for a term at least equal to the Board's investment, must be invested no later than the date of the Board's investment and may be invested prior to the Board's investment as approved by the Board. If the Board approves an investment made prior to the Board's investment as the matching investment, it must remain at risk in the recipient for at least as long as the Board's investment. Side Fund investments may, in the discretion of the Board, count as matching investments to investments from the SEGF.
- D. The Board may make incremental investments to the recipient based on specific events or conditions established at the time of approval.
- E. The recipient will be required to report to the Board at least quarterly on each of the following performance measures:
 - 1. Financial performance;
 - 2. Job creation;
 - 3. Technological progress;
 - 4. Market progress; and
 - 5. Any other measures the Board requires.
- F. The recipient may not use the investment to make distributions to or for the benefit of an owner of the recipient or a related entity.
- G. No member, employee or agent of the Board may disclose to any person the contents of any business or marketing plan for any application, any financial statements or reports pertaining to any recipient, or any other records which may be confidential pursuant to

1 M.R.S.A. §401 and following and 10 M.R.S.A. §391 or any successor or similar provisions.

9. Fees and Other Charges

A. *[Repealed Effective October 1, 1999]*

The Board may require the recipient to be responsible for costs and expenses of closing, administering and collecting on the investment.

10. Advisory Rulings

The Board is authorized to issue nonbonding advisory rulings as to the applicability of the program or the Board's rules to the applicant. Requests for advisory rulings must be in writing and must specifically identify the section or provision of the statute or rule on which the ruling is sought. The Board may decline to issue any ruling if the request is not sufficiently specific, is not accompanied by adequate information, does not adequately identify the applicant or the purpose for which the ruling is sought, or if the Board determines that issuance of a ruling would not assist the applicant or would be contrary to the purposes of the program. All rulings shall be in writing. Rulings shall not be binding upon the Board. The Board may charge an applicant for a ruling the Board's actual, out-of-pocket costs and expenses, if any, in preparing any ruling.

11. Hearing Procedures

In any case, where applicable law or rule requires the Board to conduct a hearing, the hearing shall be conducted substantially as follows:

- A. The proponent shall make a statement in support of its position, addressing the findings required to be made by the Board in considering the application. The Board may ask questions of the applicant. The Board may allow others to ask questions of the proponent through the chair.
- B. Opponents shall be given an opportunity to state the basis of their opposition to the matter before the Board.
- C. The proponent shall be given an opportunity to respond to the opposition presented.
- D. The Board may require additional information, and may continue the hearing to a later date or specify a period within which it will accept further evidence, but shall not be obligated to do so.

The Board may, in its discretion, retain a court reporter or otherwise make a record of the hearing, and the proponent shall be responsible for any costs and expenses of making the record.

BASIS STATEMENT

Amendment 6

The rule amendment adds provisions to allow the Board to establish and maintain so-called "Side Funds" from sources other than State appropriations, which would be a more flexible investment vehicle than the Small Enterprise Growth Fund. The ability to establish and manage these side funds was added by PL 2010, Chapter 475.

A public hearing was not held and no other comments were received.

Economic Impact Analysis Statement/Fiscal Impact Note

- A. There should be no costs associated with this Rule amendment.
- B. The Rule amendment will enable the Board to obtain the most timely financial information available regarding an applicant.
- C. The Rule amendment should not affect competition and the employment market.
- D. The above statements were made based on the experience of the members of the Board in administering this program.

The proposed Rule amendment will not impose any costs on municipalities or counties.

STATUTORY AUTHORITY: 10 M.R.S.A. §385

EFFECTIVE DATE:
June 14, 1997

AMENDED:

November 2, 1998 (Amendment 1) - Section VI
October 1, 1999 (Amendment 2) - changes to Sections 1.B.5., 1.B.6, 1.B.10, 3.B, 4.C., 5.A. 1-14, including the addition of a new Section 5.A.13, and the renaming of the prior 5.A.13 to 5.A.14, 5.B., 8.A., 8.B., 8.C., 8.D., 8.E., 8.F., 8.G.,9.A. and 9.B.

NON-SUBSTANTIVE CHANGE:

January 17, 2002 - moved from umbrella-unit number 94-457 to 95-592

AMENDED:

July 25, 2002 (Amendment 3) - the addition of Sections 1.B.7A., 1B.7B., 1.B.7C.,1.B.11., 1.B.12., changes to Sections 1.B.8., 1.B.10., 2.A., 2.B., 2.C., 3.B., 4., 5.A., 5.A.2., 5.A.12., 5.A.13, 6.A., 6.C., 8., 8.A., 8.B., 8.D., 8.E., 8.F., 9., and the deletion of Sections 1.B.5, 1.B.6.
December 10, 2003 (Amendment 4), filing 2003-463 - Section 1.B.10.(A).

NON-SUBSTANTIVE CORRECTION:

February 18, 2004 - capitalization of "Board" on page 2

November 15, 2008 (Amendment 5)