

SENATE No. 1470

The Commonwealth of Massachusetts

PRESENTED BY:

Eileen M. Donoghue

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to access to capital for business growth in economically distressed communities.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
<i>Eileen M. Donoghue</i>	<i>First Middlesex</i>
<i>Harriette L. Chandler</i>	<i>First Worcester</i>
<i>Robert M. Koczera</i>	<i>11th Bristol</i>
<i>Michael O. Moore</i>	<i>Second Worcester</i>
<i>Thomas M. McGee</i>	<i>Third Essex</i>
<i>Eric P. Lesser</i>	<i>First Hampden and Hampshire</i>
<i>Jason M. Lewis</i>	<i>Fifth Middlesex</i>
<i>Benjamin B. Downing</i>	<i>Berkshire, Hampshire, Franklin and Hampden</i>
<i>Anne M. Gobi</i>	<i>Worcester, Hampden, Hampshire and Middlesex</i>
<i>Barbara L'Italien</i>	<i>Second Essex and Middlesex</i>
<i>Stephen L. DiNatale</i>	<i>3rd Worcester</i>
<i>James T. Welch</i>	<i>Hampden</i>
<i>Linda Dorcena Forry</i>	<i>First Suffolk</i>
<i>Bruce E. Tarr</i>	<i>First Essex and Middlesex</i>
<i>Donald F. Humason, Jr.</i>	<i>Second Hampden and Hampshire</i>
<i>Jennifer L. Flanagan</i>	<i>Worcester and Middlesex</i>

SENATE No. 1470

By Ms. Donoghue, a petition (accompanied by bill, Senate, No. 1470) of Eileen M. Donoghue, Harriette L. Chandler, Robert M. Koczera, Michael O. Moore and other members of the General Court for legislation relative to access to capital for business growth in economically distressed communities. Revenue.

The Commonwealth of Massachusetts

**In the One Hundred and Eighty-Ninth General Court
(2015-2016)**

An Act relative to access to capital for business growth in economically distressed communities.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Chapter 63 of the General Laws is hereby amended by inserting after
2 section 38FF the following section:-

3 Section 38GG. MASSACHUSETTS NEW MARKETS TAX CREDIT

4 (a) For the purposes of this section, the following words shall have the following
5 meanings unless the context clearly requires otherwise:

6 "Applicable percentage", means zero percent for the first two credit allowance dates,
7 eight percent for the third through sixth credit allowance dates and seven percent for the seventh
8 credit allowance date.

9 "Department", means the department of housing and economic development.

10 "Credit allowance date", with respect to any qualified equity investment:

11 (i) the date on which such investment is initially made; and

12 (ii) each of the six anniversary dates of such date thereafter.

13 "Long-term debt security", any debt instrument issued by a qualified community
14 development entity at par value with an original maturity date of at least seven years from the
15 date of its issuance, with no acceleration of repayment, amortization, or prepayment features
16 prior to its original maturity date. The qualified community development entity that issues the
17 debt instrument shall not make cash interest payments on the debt instrument during the period
18 beginning on the date of issuance and ending on the final credit allowance date in an amount that
19 exceeds the cumulative operating income, as defined by regulations adopted under Section 45D,
20 Internal Revenue Code of 1986, as amended, of the qualified community development entity for
21 that period prior to giving effect to the expense of such cash interest payments. The foregoing
22 shall in no way limit the holder's ability to accelerate payments on the debt instrument in
23 situations where the issuer has defaulted on covenants designed to ensure compliance with this
24 Chapter or Section 45D of the Internal Revenue Code of 1986, as amended.

25 "Purchase price", the amount paid to the issuer of a qualified equity investment for such
26 qualified equity investment.

27 "Qualified active low-income community business", as defined in Section 45D of the
28 Internal Revenue Code of 1986, as amended, and 26 C.F.R. Sec. 1.45D-1. A business shall be
29 considered a qualified active low-income community business for the duration of the qualified
30 community development entity's investment in, or loan to, the business if the entity reasonably
31 expects, at the time it makes the investment or loan, that the business will continue to satisfy the
32 requirements for being a qualified active low-income community business, throughout the entire

33 period of the investment or loan. The term shall exclude any business that derives or projects to
34 derive fifteen percent or more of its annual revenue from the rental or sale of real estate. This
35 exclusion shall not apply to a business that is controlled by, or under common control with,
36 another business if the second business: (i) does not derive or project to derive 15 percent or
37 more of its annual revenue from the rental or sale of real estate; and (ii) is the primary tenant of
38 the real estate leased from the first business.

39 "Qualified community development entity", (i) the meaning given such term in Section
40 45D of the Internal Revenue Code of 1986, as amended; provided that such entity has entered
41 into, for the current year or any prior year, an allocation agreement with the Community
42 Development Financial Institutions Fund of the U.S. Treasury department with respect to credits
43 authorized by Section 45D of the Internal Revenue Code of 1986, as amended, which includes
44 Massachusetts within the service area set forth in such allocation agreement. The term shall
45 include subsidiary community development entities or affiliates of any such qualified community
46 development entity, all of which shall be treated as a single applicant for purposes of subsection
47 (d) of this section. (ii) The term "qualified community development entity" shall not include any
48 regulated financial institution that is subject to the provisions of the Community Reinvestment
49 Act of 1977 (12 U.S.C. Ch. 30), or any subsidiary or affiliate thereof. (iii) Subparagraph (ii) shall
50 not apply to a regulated financial institution, or subsidiary or affiliate thereof, if such regulated
51 financial institution is chartered by, or headquartered in, the Commonwealth of Massachusetts
52 and the regulated financial institution otherwise meets the requirements of subparagraph (i).

53 "Qualified Equity Investment", any equity investment in, or long-term debt security
54 issued by, a qualified community development entity that: (i) is acquired after September 1, 2015
55 at its original issuance solely in exchange for cash; (ii) has at least eighty-five percent of its cash

56 purchase price used by the issuer to make qualified low-income community investments in
57 qualified active low-income community businesses located in this state by the first anniversary
58 of the initial credit allowance date; and (iii) is designated by the issuer as a qualified equity
59 investment under this subsection and is certified by the department as not exceeding the
60 limitation contained in clause (v) of subsection (d); provided, however, that notwithstanding the
61 restrictions on transferability contained in subsection (c) of this section, “qualified equity
62 investment” shall include any qualified equity investment that does not meet the provisions of
63 this subsection if such investment: (1) is transferred to a subsequent holder; and (2) was a
64 qualified equity investment in the hands of any prior holder;

65 "Qualified low-income community investment", a capital or equity investment in, or loan
66 to, any qualified active low-income community business; provided, however, that with respect to
67 any one qualified active low-income community business, the maximum amount of qualified
68 low-income community investments that may be made in the business, on a collective basis with
69 all of its affiliates, with the proceeds of qualified equity investments that have been certified
70 under subsection (d) of this section shall be \$5,000,000 whether made by one or several qualified
71 community development entities;

72 "State premium tax liability", any liability incurred by any entity under applicable
73 General Laws regarding state premium tax.

74 “Refundable performance fee”, a fee that a qualified community development entity
75 seeking to have an equity investment or long-term debt security designated as a qualified equity
76 investment and eligible for tax credits under subsection (d) of this section shall pay to the
77 department as assurance of compliance with certain requirements of this section; provided,

78 however, that the amount of the fee shall be equal to one-half of one percent of the amount of
79 the equity investment or long-term debt security requested to be designated as a qualified equity
80 investment.

81 “Affiliate”, any entity, without regard to whether such entity otherwise constitutes a
82 qualified community development entity under this subsection that is the initial holder, either
83 directly or through one or more special purpose entities, of a qualified equity investment in such
84 qualified community development entity and any entity, without regard to whether such entity
85 otherwise constitutes a qualified community development entity under this subsection that
86 provides insurance or any other form of guaranty to the ultimate recipient of tax credits under
87 subsection (b) with respect to a recapture or forfeiture of such tax credits under subsection (e),
88 either directly or through the guaranty of any other economic benefit that is paid in lieu of the tax
89 credits allowable under subsection (b); provided, however, that for purposes of this section, the
90 determination of whether an entity is an affiliate shall be made by taking into account all relevant
91 facts and circumstances, including the description of the proposed amount, structure and initial
92 purchaser of the qualified equity investment required by clause (iv) of subsection (d) and such
93 determination shall assume that the information provided pursuant to said clause (iv) is true and
94 complete as of the date an application is submitted pursuant to said subsection (d).

95 (b) Any entity that makes a qualified equity investment earns a vested right to credit
96 against the entity’s state premium tax liability on a premium tax report filed under this subtitle
97 that may be utilized as follows:

98 (1) On each credit allowance date of such qualified equity investment the entity, or
99 subsequent holder of the qualified equity investment, shall be entitled to utilize a portion of such
100 credit during the taxable year including such credit allowance date.

101 (2) The credit amount shall be equal to the applicable percentage for such credit
102 allowance date multiplied by the purchase price paid to the issuer of such qualified equity
103 investment.

104 (3) The amount of the credit claimed by an entity shall not exceed the amount of such
105 entity's state premium tax liability for the tax year for which the credit is claimed. Any amount of
106 tax credit that the entity is prohibited from claiming in a taxable year as a result of this section
107 may be carried forward for use in any subsequent taxable year.

108 (4) An entity claiming a credit under this section is not required to pay any additional
109 retaliatory tax levied under section 159 of chapter 175 as a result of claiming that credit. An
110 entity claiming a credit under this section shall not be required to pay any additional tax that may
111 arise as a result of claiming that credit.

112 (5) The total amount of tax credits that may be awarded by the department pursuant to
113 this section shall be limited to an appropriate level of investment to be determined. Once the
114 department has certified a cumulative amount of qualified equity investments that can result in
115 the utilization of this total amount of tax credits in a fiscal year, the department shall not certify
116 any more qualified equity investments. This limitation on qualified equity investments shall be
117 based on scheduled utilization of tax credits without regard to the potential for taxpayers to carry
118 forward tax credits to subsequent tax years.

119 (c) No tax credit claimed under this section shall be refundable or saleable on the open
120 market; provided, however, that a participating investor may transfer credits to an affiliated
121 insurance company if it gives prior written notice to the department. Tax credits earned by a
122 partnership, limited liability company, S-corporation, or other pass-through entity may be
123 allocated to the partners, members, or shareholders of such entity for their direct use in
124 accordance with the provisions of any agreement among such partners, members, or
125 shareholders. Any allocation of tax credits made to a partner, member, or shareholder in
126 accordance with this subsection shall not be considered a sale of such tax credits for purposes of
127 this subsection.

128 (d) (1) A qualified community development entity that seeks to have an equity
129 investment or long term debt security designated as a qualified equity investment and eligible for
130 tax credits under this section shall apply to the department. The department shall begin accepting
131 applications on September 1, 2015. As its application, the qualified community development
132 entity shall submit the following:

133 (i) evidence of the applicant's certification as a qualified community development entity,
134 including evidence of the service area of the entity that includes Massachusetts;

135 (ii) a copy of the allocation agreement executed by the applicant, or its controlling entity,
136 and the Community Development Financial Institutions Fund;

137 (iii) a certificate executed by an executive officer of the applicant attesting that the
138 allocation agreement remains in effect and has not been revoked or cancelled by the Community
139 Development Financial Institutions Fund'

140 (iv) evidence that the applicant or its controlling entity has received more than one
141 allocation of qualified equity investment authority from the Community Development Financial
142 Institutions Fund, at least one of which shall have been received on or after January 1, 2014;

143 (v) evidence that the applicant, its controlling entity, and subsidiary qualified community
144 development entities of the controlling entity have collectively made at least \$50,000,000 in
145 qualified low-income community investments under the Federal New Markets Tax Credit
146 Program and/or other states new markets tax credit programs with a maximum qualified low-
147 income community investment size of \$5,000,000 per business;

148 (vi) a description of the proposed amount, structure, and initial purchaser of the qualified
149 equity investment including, but not limited to, a description of any insurance or guaranties that
150 are anticipated to be provided to the purchaser of the qualified equity investment or the direct or
151 indirect members of such purchaser, and the identity of the entity providing such insurance or
152 guaranty;

153 (vii) the minimum amount of qualified equity investment the qualified community
154 development is willing to accept in the event the amount proposed to be certified pursuant to
155 paragraph (4) is less than the applicant's proposed amount of qualified equity investment;

156 (viii) a plan describing the proposed investment of the proceeds of the qualified equity
157 investment, including the types of qualified active low income businesses in which the applicant
158 expects to invest. Applicants shall not be required to identify qualified active low-income
159 community businesses in which they will invest when submitting an application;

160 (ix) a nonrefundable application fee of \$5,000, which shall be paid to the department and
161 shall be required of each application submitted; and

162 (x) the refundable performance fee required by clause (i) of subsection (g).

163 Clauses (iv) and (v) above shall not apply to a qualified community development entity
164 incorporated or headquartered in the Commonwealth of Massachusetts.

165 (2) Within 30 days after receipt of a completed application containing the information set
166 forth in paragraph (1), including the payment of the application fee and the refundable
167 performance fee, the department shall grant or deny the application in full or in part. If the
168 department denies any part of the application, it shall inform the qualified community
169 development entity of the grounds for the denial. If the qualified community development entity
170 provides any additional information required by the department or otherwise completes its
171 application within 15 days of the notice of denial, the application shall be considered completed
172 as of the original date of submission. If the qualified community development entity fails to
173 provide the information or complete its application within the 15 day period, the application shall
174 remain denied and shall be resubmitted in full with a new submission date.

175 (3) If the application is complete, the department shall certify the proposed equity
176 investment or long-term debt security as a qualified equity investment that is eligible for tax
177 credits under this section, subject to the limitations contained in paragraph (5). The department
178 shall provide written notice of the certification to the qualified community development entity.
179 The notice shall include the name of the initial purchaser of the qualified equity investment and
180 the credit amount. Before any tax credits are claimed under this section, the qualified community
181 development entity shall provide written notice to the department of the names of the entities
182 eligible to claim such credits as a result of holding a qualified equity investment. If the names of
183 the entities that are eligible to utilize the credits change due to a transfer of a qualified equity

184 investment or an allocation or affiliate transfer pursuant to subsection (c) of this section, the
185 qualified community development entity shall notify the department of such change.

186 (4) The department shall certify qualified equity investments in the order applications are
187 received by the department. Applications received on the same day shall be deemed to have been
188 received simultaneously. For applications that are complete and received on the same day, the
189 department shall certify, consistent with remaining qualified equity investment capacity, the
190 qualified equity investments in proportionate percentages based upon the ratio of the amount of
191 qualified equity investment requested in an application to the total amount of qualified equity
192 investments requested in all applications received on the same day. If any amount of qualified
193 equity investment that would be certified pursuant to this subsection is less than the acceptable
194 minimum amount specified in the application as required by clause (v) of paragraph (1) of this
195 subsection, such application shall be deemed withdrawn and such amount of qualified equity
196 investment shall be proportionately allocated among the other applicants pursuant to this
197 paragraph.

198 (5) An approved applicant may transfer all or a portion of its certified qualified equity
199 investment authority to its controlling entity or any subsidiary qualified community development
200 entity of the controlling entity, provided that the applicant provides the information required in
201 the application with respect to such transferee and the applicant notifies the department of such
202 transfer within 30 days of the transfer.

203 (6) Within 60 days of the applicant receiving notice of certification, the qualified
204 community development entity or any transferee under paragraph (5) shall issue the qualified
205 equity investment and receive cash in the amount of the certified amount. The qualified

206 community development entity or transferee under paragraph (5) shall provide the department
207 with evidence of the receipt of the cash investment within 10 business days after receipt. If the
208 qualified community development entity or any transferee under paragraph (5) does not receive
209 the cash investment and issue the qualified equity investment within 60 days following receipt of
210 the certification notice, the certification shall lapse and the entity may not issue the qualified
211 equity investment without reapplying to the department for certification. Lapsed certifications
212 revert back to the department and shall be reissued, first, pro rata to other applicants whose
213 qualified equity investment allocations were reduced under paragraph (4) and, thereafter, in
214 accordance with application process.

215 (e) The department shall recapture tax credits earned as a result of holding a qualified
216 equity investment, if:

217 (1) any amount of federal tax credit that might be available with respect to the qualified
218 equity investment that generated the tax credit under this section is recaptured under 26 U.S.C.
219 sec. 45D. In such case, the department's recapture shall be proportionate to the federal recapture
220 with respect to the qualified equity investment;

221 (2) the issuer redeems or makes principal repayment with respect to a qualified equity
222 investment prior to the seventh anniversary of the issuance of such qualified equity investment.
223 In such case the department's recapture of tax credits shall be proportionate to the amount of the
224 redemption or repayment with respect to such qualified equity investment;

225 (3) The issuer fails to invest an amount equal to eighty-five percent of the purchase price
226 of the qualified equity investment in qualified low-income community investments in the
227 Massachusetts within 12 months of the issuance of the qualified equity investment and maintain

228 at least 100 percent of such level of investment in qualified low-income community investments
229 in Massachusetts until the last credit allowance date for the qualified equity investment. For
230 purposes of this section, an investment shall be considered held by an issuer even if the
231 investment has been sold or repaid if the issuer reinvests an amount equal to the capital returned
232 to or recovered by the issuer from the original investment, exclusive of any profits realized, in
233 another qualified low-income community investment within 12 months of the receipt of such
234 capital. An issuer shall not be required to reinvest capital returned from qualified low-income
235 community investments after the sixth anniversary of the issuance of the qualified equity
236 investment, the proceeds of which were used to make the qualified low-income community
237 investment, and the qualified low-income community investment shall be considered held by the
238 issuer through the seventh anniversary of the qualified equity investment's issuance.

239 (f) Enforcement of recapture provisions shall be subject to a 6-month cure period. No
240 recapture shall occur until the qualified community development entity has been given notice of
241 noncompliance and afforded six months from the date of such notice to cure the noncompliance.

242 (g) (1) A qualified community development entity that seeks to have an equity
243 investment or long-term debt security designated as a qualified equity investment and eligible for
244 tax credits under this section shall pay a refundable performance fee to the department for
245 deposit in the New Markets Performance Guarantee Account, which is hereby established. The
246 entity shall forfeit:

247 (i) the performance fee in its entirety if the qualified community development entity and
248 its subsidiary qualified community development entities fail to issue the total amount of qualified

249 equity investments certified by the department and receive cash in the total amount certified
250 under paragraph (3) of subsection (d) of this section; or

251 (ii) such amount of the performance fee equal to the product of the original amount of the
252 refundable performance fee multiplied by the percentage of the remaining amount of the
253 proceeds of the qualified equity investment not used to make qualified low-income equity
254 investments if the qualified community development entity or any subsidiary qualified
255 community development entity that issues a qualified equity investment certified under this
256 section fails to meet the investment requirement under paragraph (2) of subsection (e) of this
257 section by the second credit allowance date of such qualified equity investment. Forfeiture of the
258 fee or any portion thereof under this subsection shall be subject to the 6-month cure period
259 established under subsection (f); or

260 (2) the fee required under paragraph (1) shall be paid to the department and held in the
261 New Markets Performance Guarantee Account until such time as compliance with the provisions
262 of this subsection shall have been established. The qualified community development entity may
263 request a refund of the fee from the department no sooner than 30 days after having met all the
264 requirements of paragraph (1). The department shall have 30 days to comply with such request
265 or give notice of noncompliance.

266 (h) Before making a proposed qualified low-income community investment, a qualified
267 community development entity may request from the department a written determination that the
268 proposed investment will qualify as a qualified low-income community investment and will
269 satisfy all applicable provisions of the this section. The department shall notify a qualified
270 community development entity within 10 business days from the receipt of a request of its

271 determination and an explanation thereof. Any determination made by the department pursuant
272 to this subsection shall be binding on the department.

273 (i) A qualified community development entity, its controlling entity, and its affiliates
274 shall not contract with or otherwise use any third party or its affiliates to manage, control the
275 direction of, or source qualified low income community investments into qualified low income
276 community businesses that is approved for qualified investment pursuant to this program, if such
277 third party is another qualified community development entity or otherwise performing such
278 functions for another qualified community development entity.

279 (j) (1) A qualified community development entity that issues qualified equity investments
280 shall submit a report to the department within the first 5 business days after the first anniversary
281 of the initial credit allowance that provides documentation as to the investment of 100 percent of
282 the purchase price in qualified low-income community investments in qualified active low-
283 income community businesses located in the Commonwealth. The report shall include:

284 (i) A bank statement of the qualified community development entity evidencing each
285 qualified low-income community investment; and

286 (ii) Evidence that the business was a qualified active low-income community business at
287 the time of the qualified low-income community investment.

288 (2) After the initial report under paragraph (1), a qualified community development shall
289 submit a report annually to the department each year during the compliance period. An annual
290 report shall not be due before the first anniversary of the initial credit allowance date. The annual
291 report shall include:

292 (i) A list of all qualified active low-income community businesses in which it has made a
293 qualified low-income community investment;

294 (ii) the type and amount of investment in each business, the address of the principal
295 location of each business and the industry of the business as identified by the North American
296 Industry Classification System Code;

297 (iii) the number of employment positions created and retained as a result of qualified low-
298 income community investments along with the average salary of such positions; and

299 (iv) the certification from the qualified community development entity that the grounds
300 for recapture under subsection (e) of this section have not occurred.

301 SECTION 2. This act shall apply only to a premium tax return originally due on or after
302 the effective date of this act.

303 SECTION 3. This act shall take effect September 1, 2015.