

Georgia State University Law Review

Volume 30
Issue 1 *Fall* 2013

Article 4

January 2014

Seed Capital Fund SB 224 and HB 318

Georgia State University Law Review

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Recommended Citation

Georgia State University Law Review, *Seed Capital Fund SB 224 and HB 318*, 30 GA. ST. U. L. REV. (2014).
Available at: <https://readingroom.law.gsu.edu/gsulr/vol30/iss1/4>

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COMMERCE AND TRADE

Seed Capital Fund: Amend Chapter 10 of Title 10 of the Official Code of Georgia Annotated, Relating to the Seed-Capital Fund, so as to Create the Invest Georgia Fund; Provide for Legislative Findings; Provide for Definitions; Provide for a Fund Administrator; Provide for Reports; Provide for Conditions, Procedures, and Limitations; Amend Section 40.30 of Article 2 of Chapter 7 of Title 48 of the Official Code of Georgia Annotated, Relating to an Income Tax Credit for Certain Qualified Investments for a Limited Period of Time, so as to Extend Such Income Tax Credit; Amend Section 3 of Part 1 of Article 1 of Chapter 8 of Title 48 of the Official Code of Georgia Annotated, Relating to Exemptions from Sales and Use Taxes, so as to Provide a Sales Tax Exemption for Materials to be Used in Certain Construction Projects of Zoological Institutions; Amend Article 6 of Chapter 8 of Title 48 of the Official Code of Georgia Annotated, Relating to the “Georgia Tourism Development Act,” so as to Revise Certain Definitions; Provide for Procedures, Conditions, and Limitations; Provide for Related Matters; Provide for an Effective Date; Repeal Conflicting Laws; and for Other Purposes

CODE SECTIONS:	O.C.G.A. §§ 10-10-1, -9 (amended); 10-10-10, -20 (new)
BILL NUMBERS:	SB 224; HB 318
ACT NUMBER:	86
GEORGIA LAWS:	2013 Ga. Laws 243
SUMMARY:	The Act creates a venture capital fund to invest in Georgia-based technology, bioscience, manufacturing, marketing, agriculture, and information related companies. A board of three members oversees the fund and selects an administrator through an open bidding process. The Governor appoints one member of the board, the Lieutenant Governor appoints the second member,

and the Speaker of the House of Representatives appoints the third. The companies selected by the fund must be headquartered in the State of Georgia, maintain their principal business operations in Georgia for at least three years after receiving funds, and meet certain headcount and revenue criteria. The Act provides two types of funds: early or seed stage ventures and growth stage ventures.

EFFECTIVE DATE: July 1, 2013

History

Venture capital funding is key for new technology companies.¹ Inherent risk and large capital outlays make traditional funding structures, such as commercial loans, nearly an impossible financial strategy for high-tech startups.² In recent history, the absence of adequate venture capital funding has had a profound impact on retention of innovative firms in Georgia. Between 2002 and 2012, twenty-five high-tech companies left Georgia in search of better funding environments.³ Given the large support of venture capital funding elsewhere in the country, it is not surprising so many companies fled. Georgia companies receive only 1% annually of the total venture capital funding in the nation.⁴ In stark contrast,

1. Jesse M. Fried & Mira Ganor, *Agency Costs of Venture Capitalist Control in Startups*, 81 N.Y.U. L. REV. 967, 968 (2006) (“Venture capitalists (VCs) play a significant role in the financing of high-risk, technology-based startup companies, investing billions of dollars annually in these businesses.”); see also Duke K. Bristow et al., *Venture Capital Formation and Access: Lingering Impediments of the Investment Company Act of 1940*, 2004 COLUM. BUS. L. REV. 77, 80 (2004) (“[VCs] perform a vital function for the economy and for society[.]”).

2. See Steven L. Brooks, *The Venture Capital Investment Act of 2001: Arkansas’s Vision for Economic Growth*, 56 ARK. L. REV. 397, 410 (2003) (stating that entrepreneurs cannot always rely on traditional forms of financing such as bank loans).

3. See INVEST Georgia Spurring Business Growth & Job Creation Through Innovation (Jan. 2012) (on file with the Georgia State University Law Review).

4. WESLEY THARPE, GEORGIA BUDGET & POLICY INSTITUTE, “INVEST GEORGIA” HAS MERIT, CANNOT TAKE PRIORITY OVER OTHER NEEDS 1 (2013) [hereinafter GBPI Report], available at <http://gbpi.org/wp-content/uploads/2013/03/Invest-Georgia-FINAL.pdf>.

California companies receive 48% and Massachusetts companies receive 10%.⁵

Georgia has struggled with retaining high-tech companies for decades.⁶ In response, Georgia passed a constitutional amendment in 1989 to create the Seed Capital Fund, which invests in small startup companies.⁷ The Advanced Technological Development Center currently administers the Fund, but investment is limited to bioscience and advanced technology companies.⁸ Each company can receive up to \$1 million in venture capital funding.⁹

However, even with this investment scheme in place, venture capital funding in Georgia was still inadequate.¹⁰ High-potential companies continued leaving Georgia in search of cities and states with more concentrated venture capital financing.¹¹ One study conducted by the Georgia Institute of Technology found that 40% of high-tech startups in Atlanta leave within three years, and 60% leave within five years.¹² This 2009 study occurred almost twenty years *after* the creation of the Seed Capital Fund.¹³ Despite the state-sponsored program, Georgia continues to hemorrhage high-tech startups.

In response to this problem, in the 2013 Legislative Session, two bills were introduced—House Bill (HB) 285 and Senate Bill (SB) 224—to replace the Seed Capital Fund with an “ambitious new economic development program.”¹⁴ The House bill provided for a funding mechanism,¹⁵ but failed to make it off the House floor.¹⁶ The Senate bill lacked a clear funding mechanism, but nevertheless survived Crossover Day.¹⁷ Once in the House, the Senate bill found a

5. *Id.*

6. *See generally* D. Whiting-Pack, *Commerce and Trade*, 6 GA. ST. U. L. REV. 155 (1989) (explaining the rationale for legislation creating the original State Seed-Capital Fund in 1989).

7. *Id.* at 156–57.

8. O.C.G.A. § 10-10-1(2) (Supp. 2013); O.C.G.A. § 10-10-2 (2009).

9. O.C.G.A. § 10-10-4(a)(3) (2009).

10. GBPI Report, *supra* note 4 at 1.

11. *Id.*

12. *Id.* at 2.

13. *Id.*

14. *Id.* at 1.

15. *Id.*

16. State of Georgia Final Composite Status Sheet, HB 285, May 9, 2013.

17. GBPI Report, *supra* note 4, at 1.

similar fate as the House bill, and it never passed.¹⁸ However, in an effort to give the legislation another chance at success,¹⁹ the Senate included the text of the original SB 224 in another bill the House had already passed, HB 318.²⁰ In that version, with the help of lobbying efforts by Lieutenant Governor Casey Cagle (R) and Senator Tim Golden (R-8th), the new program passed.²¹

This Peach Sheet focuses on the content of the original SB 224. It references HB 318 as needed, but does not discuss the tourism components or additional content outside the provisions related to the Invest Georgia Fund.

Bill Tracking of SB 224

Consideration and Passage by the Senate

Senator Tim Golden (R-8th), as well as the two highest-ranking Senators, President Pro Tempore David Shafer (R-48th) and Majority Leader Ronnie Chance (R-16th), sponsored SB 224.²² The Senate read the bill for the first time on February 27, 2013.²³ Lieutenant Governor Casey Cagle (R) assigned the bill to the Senate Insurance and Labor Committee, which favorably reported the bill on March 1, 2013.²⁴ The Senate read the bill for the second time on March 4, 2013,²⁵ and for the third time on March 5, 2013.²⁶ Following the third reading, the Senate passed the bill by a vote of 49 to 3.²⁷

Consideration by the House

Representative Bruce Williamson (R-115th) sponsored SB 224 in the House, and the House first read the bill on March 7, 2013.²⁸ The

18. State of Georgia Final Composite Status Sheet, SB 224, May 9, 2013.

19. See Interview with Sen. Tim Golden (R-8th) (Mar.27, 2013) [hereinafter Golden Interview].

20. State of Georgia Final Composite Status Sheet, HB 318, May 9, 2013.

21. *Id.*; see also Golden Interview, *supra* note 20.

22. SB 224, as introduced, 2013 Ga. Gen. Assem.

23. State of Georgia Final Composite Status Sheet, SB 224, May 9, 2013.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

House read the bill for the second time on March 7, 2013.²⁹ Speaker of the House David Ralston (R-7th) assigned the bill to the House Ways and Means Committee, which favorably reported a Committee substitute on March 21, 2013.³⁰ This substitute amended three sections of the Senate version of the bill.³¹ First, section 5 removed the timeline for funding by the state.³² The Senate's bill required the state to provide the Invest Georgia Fund with \$10 million in the first year, \$15 million in the second and third year, \$25 million in the fourth year, and \$35 million in the fifth year.³³ The substitute also removed two sections related to the minimum and maximum amount a fund was allowed to receive.³⁴ For the growth stage venture capital funds, the Senate's bill allowed for a minimum of \$10 million and a maximum of \$15 million in funding.³⁵ The early stage venture capital funds had a minimum funding of \$10 million.³⁶ The House postponed a vote on the bill on March 22, 2013.³⁷ On March 25, 2013, the House withdrew the bill and recommitted it to the Rules Committee.³⁸ The bill never left the Committee but instead reappeared in HB 318 while it was under consideration by the Senate.³⁹

Senate's Inclusion of SB 224 in HB 318

The House passed HB 318 on March 7, 2013,⁴⁰ which focused on tourism, and had no text relating to the Invest Georgia Fund.⁴¹ The Senate first read the bill on March 11, 2013, and assigned it to the

29. State of Georgia Final Composite Status Sheet, SB 224, May 9, 2013.

30. *Id.*

31. *Compare* SB 224 (HCS), 2013 Ga. Gen. Assem., *with* SB 224, as introduced, 2013 Ga. Gen. Assem.

32. *Compare* SB 224 (HCS), § 5, p. 13, 2013 Ga. Gen. Assem., *with* SB 224, as passed Senate, § 5, p. 13, ln. 430–34, 2013 Ga. Gen. Assem.

33. SB 224, as passed Senate, § 5, p. 13, ln. 430–34, 2013 Ga. Gen. Assem.

34. SB 224 (HCS), 2013 Ga. Gen. Assem.

35. SB 224, as passed Senate, 2013 Ga. Gen. Assem.

36. *Id.*

37. State of Georgia Final Composite Status Sheet, SB 224, May 9, 2013.

38. *Id.*

39. *Id.*; HB 318 (SCS), 2013 Ga. Gen. Assem.

40. State of Georgia Final Composite Status Sheet, HB 318, May 9, 2013.

41. HB 318, as introduced, 2013 Ga. Gen. Assem.

Senate Finance Committee.⁴² The Committee reported a substitute on March 20, 2013.⁴³ It was in this substitute that the Senate introduced the provisions incorporating the Invest Georgia Fund into HB 318.⁴⁴ The Senate added the language of SB 224 in its entirety, as it existed when it passed the Senate, not including the modifications offered by the House.⁴⁵ The Senate then read the substituted version of the bill for the first time on March 21, 2013.⁴⁶ On March 22, 2013, the Senate read it for a second time, voted to engross, and then passed the bill by a margin of 42 to 4.⁴⁷

Consideration by the House of HB 318

The House considered the amended bill on March 25, 2013.⁴⁸ Representative Ron Stephens (R-164th), Chairman of the Economic Development & Tourism Committee, brought a motion to the floor to pass the Senate's substitute of HB 318.⁴⁹ Only one question was asked, which was voiced by House Minority Leader Stacey Abrams (D-89th).⁵⁰ Representative Abrams wanted to know whether the initial \$100 million funding was allocated for the current fiscal year.⁵¹ Representative Stephens (R-164th) informed her it was not, and then asked for favorable consideration by the House.⁵² Immediately thereafter the House voted and passed the modified bill, by a vote of 135 to 28.⁵³

The Act

The Act amends Title 10 of the Official Code of Georgia Annotated, creating the Invest Georgia Fund for the purpose of

42. State of Georgia Final Composite Status Sheet, HB 318, May 9, 2013.

43. *Id.*

44. HB 318 (SCS), 2013 Ga. Gen. Assem.

45. *Id.*

46. State of Georgia Final Composite Status Sheet, HB 318, May 9, 2013.

47. *Id.*; Georgia Senate Voting Record, HB 318 (Apr. 14, 2013).

48. State of Georgia Final Composite Status Sheet, HB 318, May 9, 2013.

49. Video Recording of House Proceedings, Mar. 25, 2013 at 33 min., 23 sec. (remarks by Rep. Ron Stephens (R-164th)), <http://www.gpb.org/lawmakers/2013/day-38> [hereinafter House Video].

50. *Id.* at 35 min., 58 sec. (remarks by Rep. Stacey Abrams (D-89th)).

51. *Id.*

52. *Id.* at 36 min., 34 sec. (remarks by Rep. Ron Stephens (R-164th)).

53. Georgia House of Representatives Voting Record, HB 318 (Apr. 14, 2013).

“increase[ing] the amount of private investment capital available in this state” to technology, bioscience, manufacturing, marketing, agriculture, and information related businesses.⁵⁴

Section 1 of the Act labels Code sections 10-10-1 through 10-10-7 as Article 1.⁵⁵ Further, section 2 makes minor modifications to existing Code definitions, primarily changing references from “this chapter” to “this article.”⁵⁶ The Act made similar changes to Code section 10-10-3 in section 3⁵⁷ and 10-10-6 in section 4.⁵⁸ Section 5 amends Chapter 10 of Title 10 of the Code by adding a second Article.⁵⁹ Article 2 creates Code sections 10-10-10 through 10-10-20.⁶⁰ Code section 10-10-10 provides the constitutional authority for the creation of the Fund.⁶¹

Code section 10-10-11 defines many of the article’s terms, including two that set forth the types of funds that the Act recognizes. The first fund is the “early stage venture capital fund.”⁶² This fund requires at least one principal,⁶³ and requires all principals to have at least five years of experience in venture capital, angel capital, or private equity in Georgia.⁶⁴ The principals are tasked with investing the fund’s capital in seed or early stage businesses that have high-growth potential.⁶⁵ The Act further defines a “qualified early stage” or “seed” business as a business that: 1) is headquartered in Georgia;⁶⁶ 2) has its principal operations in Georgia;⁶⁷ 3) intends to maintain its operations in Georgia;⁶⁸ 4) has no more than twenty employees;⁶⁹ 5) has less than \$1 million in gross revenues;⁷⁰ 6) has not obtained more than \$2 million in either debt or equity

54. O.C.G.A. § 10-10-10 (Supp. 2013).

55. 2013 Ga. Laws 243.

56. *See* O.C.G.A. § 10-10-1, -1(3), -1(4)(B) (Supp. 2013).

57. O.C.G.A. § 10-10-3(a) (Supp. 2013).

58. O.C.G.A. § 10-10-6 (Supp. 2013).

59. 2013 Ga. Laws 243.

60. *Id.*

61. O.C.G.A. § 10-10-10 (Supp. 2013).

62. O.C.G.A. § 10-10-11(6) (Supp. 2013).

63. O.C.G.A. § 10-10-11(6)(A) (Supp. 2013).

64. O.C.G.A. § 10-10-11(6)(B) (Supp. 2013).

65. O.C.G.A. § 10-10-11(6)(D) (Supp. 2013).

66. O.C.G.A. § 10-10-11(11)(A) (Supp. 2013).

67. O.C.G.A. § 10-10-11(11)(B) (Supp. 2013).

68. *Id.*

69. O.C.G.A. § 10-10-11(11)(C) (Supp. 2013).

70. O.C.G.A. § 10-10-11(11)(D) (Supp. 2013).

investments;⁷¹ and 7) does not engage substantially in certain enumerated business activities.⁷² Finally, at least 10% of the fund's committed capital must be committed by institutional investors, the fund principals, or other accredited investors.⁷³

The second fund type, "growth stage venture capital fund", is very similar to the early stage fund.⁷⁴ The principals of a growth stage venture capital fund must have at least five years of experience with venture capital, angel capital, or private equity in Georgia,⁷⁵ and the fund must also have its principal office and the majority of its employees in Georgia.⁷⁶ The primary difference between the two funds is the underlying investment strategy. While early stage funds focus on businesses with high *growth* potential, growth stage venture capital funds invest in businesses with high *return* potential.⁷⁷ The committed capital requirement is also increased from 10% to 50%.⁷⁸ Code section 10-10-11(12) defines a "growth stage business" as a business that: 1) is headquartered in Georgia;⁷⁹ 2) is a corporation, limited liability company, general partnership, or limited partnership located in Georgia;⁸⁰ 3) has and will maintain its principal place of business within Georgia;⁸¹ 4) has neither more than 100 employees⁸² nor more than \$1 million in gross revenue;⁸³ and 5) does not engage in certain enumerated activities.⁸⁴

Section 12 of the Act creates the Invest Georgia Board (the "Board"), to be comprised of three members, one appointed by each

71. O.C.G.A. § 10-10-11(11)(E) (Supp. 2013).

72. O.C.G.A. § 10-10-11(11)(F) (Supp. 2013) (enumerating prohibited business activities as 1) retail sales; 2) real estate development; 3) entertainment, amusement, recreation, or athletic or fitness activity when admission is charged; 4) insurance, banking, lending, financial, brokerage, or investments activities; 5) natural resource extraction; 6) and professional services by accountants, attorneys, or physicians).

73. O.C.G.A. § 10-10-11(6)(D) (Supp. 2013).

74. O.C.G.A. § 10-10-11(8) (Supp. 2013).

75. O.C.G.A. § 10-10-11(8)(B) (Supp. 2013).

76. O.C.G.A. § 10-10-11(8)(A) (Supp. 2013).

77. O.C.G.A. § 10-10-11(8)(C) (Supp. 2013).

78. *Id.*

79. O.C.G.A. § 10-10-11(12)(A) (Supp. 2013).

80. O.C.G.A. § 10-10-11(12)(B) (Supp. 2013).

81. O.C.G.A. § 10-10-11(12)(C) (Supp. 2013).

82. O.C.G.A. § 10-10-11(12)(D) (Supp. 2013).

83. O.C.G.A. § 10-10-11(12)(E) (Supp. 2013).

84. O.C.G.A. § 10-10-11(12)(F) (listing the same activities set forth by O.C.G.A. § 10-10-11(11)(F) (Supp. 2013)).

of: the Lieutenant Governor, the Speaker of the House of Representatives, and the Governor.⁸⁵ The Commissioner of Economic Development and a member of the OneGeorgia Authority⁸⁶ each serve on the Board as nonvoting members.⁸⁷ Each appointed Board member, however, must be a resident of Georgia, and have experience in early stage, angel, or venture capital investing, growth stage venture capital investing, fund management, or entrepreneurship.⁸⁸ Further, Board members will serve four-year terms⁸⁹ without compensation.⁹⁰ The Board has many of the same powers as a normal private corporation,⁹¹ including the ability to buy and sell real estate,⁹² appoint officers,⁹³ and enter into contracts.⁹⁴

The five primary responsibilities of the Board are enumerated in Code section 10-10-13.⁹⁵ The Board's first responsibilities are to establish the investment policy for the fund administrator⁹⁶ and the policy for the use of capital and profits returned to the state.⁹⁷ Second, the Board must select a fund administrator.⁹⁸ The Board is also responsible for the final approval of the fund allocations.⁹⁹ Finally, the Board is tasked with overseeing the contracts of the fund administrator to ensure the fund's compliance with the Act.¹⁰⁰

85. O.C.G.A. § 10-10-12(b) (Supp. 2013).

86. The OneGeorgia Authority serves the interests of rural Georgian communities through various activities, including "land acquisition, infrastructure development, airport enhancements and broadband creation to machinery purchases, business relocation assistance and entrepreneur support, [and] . . . provid[ing] grants and loans for these economic development activities[.]" *OneGeorgia Authority*, ONEGEORGIA.ORG, <http://www.onegeorgia.org> (last visited July 19, 2013).

87. O.C.G.A. § 10-10-12(c) (Supp. 2013).

88. O.C.G.A. § 10-10-12(b) (Supp. 2013).

89. O.C.G.A. § 10-10-12(d) (Supp. 2013). The initial term is abbreviated to create a staggered expiration period of each member. *Id.* The term of one of the Governor's appointees, the Lieutenant Governor's appointee, and the Speaker of the House of Representative's appointee expires on December 31, 2016. *Id.* The remaining appointees' terms expire on December 31, 2018. *Id.*

90. O.C.G.A. § 10-10-12(f) (Supp. 2013).

91. O.C.G.A. § 10-10-12(g)(8) (Supp. 2013) (specifically granting the Board the ability "[t]o exercise any power usually possessed by private corporations performing similar functions . . .").

92. O.C.G.A. § 10-10-12(g)(2), (g)(3) (Supp. 2013).

93. O.C.G.A. § 10-10-12(g)(4) (Supp. 2013).

94. O.C.G.A. § 10-10-12(g)(5) (Supp. 2013).

95. O.C.G.A. § 10-10-13 (Supp. 2013).

96. O.C.G.A. § 10-10-13(1) (Supp. 2013).

97. O.C.G.A. § 10-10-13(5) (Supp. 2013).

98. O.C.G.A. § 10-10-13(2) (Supp. 2013).

99. O.C.G.A. § 10-10-13(3) (Supp. 2013).

100. O.C.G.A. § 10-10-13(4) (Supp. 2013).

Code section 10-10-14 requires the fund administrator to be selected through an open bidding process.¹⁰¹ Similarly, both the early stage¹⁰² and growth stage venture capital funds are required to be selected in the same manner.¹⁰³ This section also sets forth the guidelines administrators should use in selecting the funds.¹⁰⁴ These guidelines focus on the management structure,¹⁰⁵ the investment strategy,¹⁰⁶ the commitment to making investments,¹⁰⁷ and the fund's commitment to Georgia.¹⁰⁸

Under Code section 10-10-15, the funds selected by the administrators are to be funded through the Invest Georgia Fund.¹⁰⁹ The Invest Georgia Fund is a separate fund maintained by the Board and "capitalized through grants from the Seed-Capital fund, designated appropriations to the center, and private contributions to the board."¹¹⁰ Code section 10-10-16 further permits the state to provide a total of \$100 million in funding appropriated over a five-year period.¹¹¹ Once the Board receives the contributed capital, Code section 10-10-17 specifies that it is required to enter into a contract with each venture capital fund that has allocated designated capital so the funds may be invested pursuant to the newly created article.¹¹² Forty-percent of the capital must be allocated to early stage venture capital funds,¹¹³ while the remaining sixty-percent is allocated to growth stage venture capital funds.¹¹⁴ Within these allocations, each early stage fund is eligible for allocations between \$10 million and \$15 million.¹¹⁵ Growth stage funds are eligible for contributions

101. O.C.G.A. § 10-10-14 (Supp. 2013).

102. O.C.G.A. § 10-10-14(c) (Supp. 2013).

103. O.C.G.A. § 10-10-14(d) (Supp. 2013).

104. O.C.G.A. § 10-10-14(e) (Supp. 2013).

105. O.C.G.A. § 10-10-14(e)(1) (Supp. 2013).

106. O.C.G.A. § 10-10-14(e)(2) (Supp. 2013).

107. O.C.G.A. § 10-10-14(e)(3) (Supp. 2013).

108. O.C.G.A. § 10-10-14(e)(4) (Supp. 2013).

109. O.C.G.A. § 10-10-15(a) (Supp. 2013).

110. O.C.G.A. § 10-10-15(b) (Supp. 2013).

111. O.C.G.A. § 10-10-16 (Supp. 2013). This section also provides for the payment schedule of \$10 million in the first year, \$15 million in the second and third year, \$25 million in the fourth year, and finally, \$35 million in the fifth year. *Id.* However, the section does not prescribe where these funds are derived from. *Id.*

112. O.C.G.A. § 10-10-17(a) (Supp. 2013).

113. O.C.G.A. § 10-10-17(b)(1) (Supp. 2013).

114. O.C.G.A. § 10-10-17(b)(2) (Supp. 2013).

115. O.C.G.A. § 10-10-17(b)(1)(A) (Supp. 2013).

starting at \$10 million, with no corresponding maximum limit.¹¹⁶ However, both types of funds are required to obtain independent investors that will supplement the contributed capital.¹¹⁷

Under Code section 10-10-18, each venture capital fund must report the following metrics to the Board by the end of each year:¹¹⁸

1) the amount of designated capital that remains uninvested;¹¹⁹ 2) all qualified investments made during the year;¹²⁰ 3) the number of employees in any company for which funding was terminated during the year;¹²¹ and 4) any other information the Board requires.¹²² In addition, the funds must provide audited financial statements within 180 days of the fund's fiscal year-end.¹²³ Finally, the funds must disclose the sale of any interest in a qualified investment, including the amount of the interest and the consideration received.¹²⁴ While the investment returns are reported under Code section 10-10-18, section 10-10-19 allows the returns to be retained and used for additional investments.¹²⁵ The funds are only allowed to retain the investment returns after the Invest Georgia Fund has completely received the principal of its initial contribution, and 80% of any excess investment returns.¹²⁶

In addition to the reporting required under Code section 10-10-18, section 10-10-20 requires an annual report by the first day of each year.¹²⁷ This report provides information concerning each venture capital fund,¹²⁸ the amount invested and received by the Invest

116. O.C.G.A. § 10-10-17(b)(2)(A) (Supp. 2013).

117. Early stage funds must obtain 10% or more additional capital, while growth stage funds must obtain 50% additional capital. O.C.G.A. § 10-10-17(b)(1)(B) (Supp. 2013).

118. O.C.G.A. § 10-10-18(a) (Supp. 2013).

119. O.C.G.A. § 10-10-18(a)(1) (Supp. 2013).

120. O.C.G.A. § 10-10-18(a)(2) (Supp. 2013).

121. O.C.G.A. § 10-10-18(a)(3) (Supp. 2013).

122. O.C.G.A. § 10-10-18(a)(4) (Supp. 2013).

123. O.C.G.A. § 10-10-18(b) (Supp. 2013).

124. O.C.G.A. § 10-10-18(c) (Supp. 2013).

125. O.C.G.A. § 10-10-19 (Supp. 2013).

126. *Id.*

127. O.C.G.A. § 10-10-20(a)(1) (Supp. 2013). The report must be sent to the Governor, Lieutenant Governor, Speaker of the House of Representatives, and chairpersons of both the Senate Finance Committee and House Committee on Ways and Means. *Id.* The report must also be publicly available on the center's website. O.C.G.A. § 10-10-20(a)(2) (Supp. 2013).

128. O.C.G.A. § 10-10-20(b)(1) (Supp. 2013). The report must include the: 1) address of the venture capital fund or the private equity organization; 2) names of investors; 3) amount of designated capital invested; 4) amount of designated capital received; 5) names of businesses invested in; and 6) other items. *Id.*

Georgia Fund,¹²⁹ and information on each business in which a venture capital fund has invested.¹³⁰

Analysis

Constitutionality

Prior to the Senate voting on the modified version of HB 318, which included the Invest Georgia Fund provisions, Senator Bill Heath (R-31st) took the floor and questioned the constitutionality of the bill.¹³¹ In his address to the Senate, Senator Heath explained that Legislative Counsel sent him an opinion letter in which they noted the Invest Georgia provisions might not be constitutional, but the basis for questioning its constitutionality was not specifically mentioned during his address.¹³² Following Senator Heath's comments, Senator Charlie Bethel (R-54th) spoke and rebutted the constitutional challenges.¹³³ Senator Bethel noted that the 1989 amendment to the Georgia Constitution, which provided for the creation of the Seed-Capital Fund, was the constitutional basis for the Invest Georgia Fund.¹³⁴ He explained that, “[the Senate is] amending existing law with respect to [the Seed-Capital Fund] and making it better for investment in Georgia.”¹³⁵

Funding

The original proposal for Invest Georgia included using the OneGeorgia Authority as a means for funding.¹³⁶ However, this

129. O.C.G.A. § 10-10-20(b)(2) (Supp. 2013).

130. O.C.G.A. § 10-10-20(b)(3) (Supp. 2013).

131. Video Recording of Senate Proceedings, Mar. 22, 2013 at 40 min., 47 sec. (remarks by Sen. Bill Heath (R-31st)), <http://www.gpb.org/lawmakers/2013/day-37>.

132. *Id.*

133. *Id.* at 50 min., 40 sec. (remarks by Sen. Charlie Bethel (R-54th)).

134. *Id.* (highlighting the fact that lines 125–30 of the Invest Georgia Fund provisions cite directly to article III, section 9, paragraph 6(g) of the Georgia Constitution, which provides that “the General Assembly is authorized by law for the creation of a Seed-Capital fund[.]”).

135. *Id.*

136. Dave Williams, *Georgia Senate Panel Earmarks \$10M for Venture Capital*, ATLANTA BUS. CHRON., Mar. 21, 2013, available at 2013 WLNR 7115102. Through the sale of insurance premium tax credits, the Board would have the ability to raise up to \$100 million to capitalize the Invest Georgia Fund. HB 285, as introduced, § 5, pg. 13, ln. 445–48, 2013 Ga. Gen. Assem.

proposal, contained in HB 285, would not survive that bill's death.¹³⁷ SB 224 reincarnated Invest Georgia, but it lacked any funding mechanism, including the use of the OneGeorgia Authority.¹³⁸ Although SB 224 passed the Senate, it too died in the House.¹³⁹ With SB 224 languishing in the House, the Senate added the Invest Georgia proposal to HB 318.¹⁴⁰ Once again, this version lacked the funding mechanism of the original proposal.¹⁴¹ Instead, the Senate allowed for capitalization of the fund through grants, designated appropriations, and private contributions.¹⁴² The main reason for the removal of the funding mechanism was ministerial—tax bills must originate in the House.¹⁴³ This results in the Fund being at the mercy of the state budget appropriations process,¹⁴⁴ and the 2014 budget earmarked \$10 million for the program.¹⁴⁵

In addition, the disassociation from the tax code reduced many of the concerns with the program.¹⁴⁶ While tax credits are not necessarily reviewed annually, the budget process is, and it provides another level of transparency.¹⁴⁷

State Model

Invest Georgia was introduced as a response to the existence of similar funds in other states¹⁴⁸ and was also modeled after many of

137. State of Georgia Final Composite Status Sheet, SB 224, May 9, 2013. HB 285 failed to have a third reading, and never received a full vote. *Id.*

138. See SB 224, as introduced, 2013 Ga. Gen. Assem.; see also Dave Williams, *Georgia Senate Panel Earmarks \$10M for Venture Capital*, ATLANTA BUS. CHRON., Mar. 21, 2013, available at 2013 WLNR 7115102.

139. State of Georgia Final Composite Status Sheet, SB 224, May 9, 2013.

140. See *id.* It is worth noting that the Senate included the Invest Georgia provisions in its committee substitute to HB 318 while the House was actively considering SB 224. *Id.*

141. HB 318, as introduced, 2013 Ga. Gen. Assem.

142. O.C.G.A. § 10-10-15 (Supp. 2013). This same language appeared in HB 285. However, HB 285 also provided for the only tangible means of funding: the sale of insurance premium credits. *Id.*

143. See Golden Interview, *supra* note 20.

144. *Id.*

145. *The Technology Association of Georgia Applauds Passage of VC Bill*, TECH. ASS'N OF GA., Mar. 28, 2013, <http://www.tagonline.org/news-press/the-technology-association-of-georgia-applauds-passage-of-vc-bill/>.

146. Interview with Alan Essig and Wesley Tharpe, The Georgia Budget & Policy Institute (Apr. 3, 2013) [hereinafter Essig Interview].

147. *Id.*

148. See Golden Interview, *supra* note 20 (noting that all of Georgia's sister states other than Alabama have a similar fund).

those funds.¹⁴⁹ States used as models include Florida, Maryland, Michigan, Tennessee, and North Carolina.¹⁵⁰ Of these, the Maryland program became the primary model.¹⁵¹

Maryland Governor Martin O'Malley signed the Invest Maryland program into law on May 19, 2011.¹⁵² In August 2011, the Governor appointed a nine-member panel to select the venture capital funds,¹⁵³ the firsts of which were selected in June 2012.¹⁵⁴ In March 2012, the first premium tax credit auction was held, generating \$84 million for the program.¹⁵⁵ The venture capital firm selected the first company, Brainscope, in September 2012, to receive \$250,000.¹⁵⁶ While the program is more senior than the Georgia program, with the first investment occurring less than a year before the passage of Invest Georgia, the ultimate success of the Maryland program has yet to be determined.

The similarities between the Invest Maryland and Invest Georgia programs are numerous.¹⁵⁷ First, both programs target technology-focused companies¹⁵⁸ and have boards appointed by state officials.¹⁵⁹ Both boards are authorized to select venture capital firms¹⁶⁰ that will in turn choose companies to invest in.¹⁶¹ Further, each program segments the market, focusing a portion of the investment on early stage companies and another portion on mid-stage companies.¹⁶²

149. *Id.*

150. *Id.*

151. *Id.*; see Essig Interview, *supra* note 147; see also Wesley Tharpe, *CAPCO: A Bad Investment for Georgians*, GA. BUDGET & POLICY INST., Jan. 2012, http://gbpi.org/wp-content/uploads/2012/01/capco_a_bad_investment_for_georgia01102012t.pdf (recommending Georgia look to Invest Maryland as a model for its venture capital fund).

152. *Invest Maryland: Fueling Innovation + Creating Jobs*, MD. DEP'T OF BUS. & ECON. DEV., <http://choosmaryland.org/businessresources/Pages/InvestMaryland.aspx> (last visited June 27, 2012); see also HB 173, 2011 Leg., 429th Sess. (Md. 2011).

153. See MD. DEP'T OF BUS. & ECON. DEV., *supra* note 152.

154. *Id.*

155. *Id.*

156. *Id.*

157. See generally O.C.G.A. § 10-10-1, *et seq.* (Supp. 2013); MD. CODE ANN., ECON. DEV. § 6 (West 2013).

158. O.C.G.A. § 10-10-1(3) (Supp. 2013); MD. CODE ANN., ECON. DEV. § 6-518(a)(3) (West 2013).

159. O.C.G.A. § 10-10-12 (Supp. 2013); MD. CODE ANN., ECON. DEV. § 6-505(a) (West 2013).

160. O.C.G.A. § 10-10-13 (Supp. 2013); MD. CODE ANN., ECON. DEV. § 6-517(c) (West 2013).

161. O.C.G.A. § 10-10-14 (Supp. 2013); MD. CODE ANN., ECON. DEV. § 6-518 (West 2013).

162. See O.C.G.A. § 10-10-11 (Supp. 2013); see also MD. DEP'T OF BUS. & ECON. DEV., *supra* note 152.

The largest difference between the two programs is the funding mechanism. While Georgia initially copied Maryland's tax credit auction, this mechanism was dropped before final passage, and the program¹⁶³ is now dependent upon the annual budget process. The 2014 budget initially apportioned \$10 million for Invest Georgia,¹⁶⁴ but ultimately did not include any provisions for it.¹⁶⁵

The Invest Georgia Fund is an ambitious initiative with the potential to bring jobs, economic growth, and tax revenue to the state. Because Georgia is home to some of the nation's leading universities, state leaders hope Invest Georgia will ensure some of the innovation harvested in those universities remains local. Although the success of the program has yet to be determined, Georgia is now in a better position to compete with neighboring states for retention of startup technology firms and the benefits they foster.

Matthew Littlefield & Holland King

163. See Golden Interview, *supra* note 20.

164. TECH. ASS'N OF GA., *supra* note 146.

165. See generally THE GOVERNOR'S BUDGET REPORT FISCAL YEAR 2014, http://opb.georgia.gov/sites/opb.georgia.gov/files/related_files/document/Governors%20Budget%20Report%20FY%202014.pdf.

