

# House Bill 3227

Sponsored by Representatives BAILEY, READ; Representatives BARNHART, BREWER

## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Creates Certified Capital Company Act.

Requires certified capital company to be certified by Oregon Business Development Department. Permits investments by certified capital companies in qualified businesses that are Oregon green energy and conservation businesses. Establishes minimum amounts of qualified investments as percentage of certified capital invested in certified capital company.

Allows tax credits to certified investors. Limits total tax credits allowed to \$30 million per year.

Requires department to make biennial report to Legislative Assembly. Requires department to adopt rules to implement Act.

Takes effect on 91st day following adjournment sine die.

## A BILL FOR AN ACT

1  
2 Relating to certified capital companies; creating new provisions; amending ORS 314.752 and 318.031;  
3 and prescribing an effective date.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1. Sections 2 to 10 of this 2011 Act shall be known and may be cited as the**  
6 **“Certified Capital Company Act.”**

7 **SECTION 2. As used in sections 2 to 10 of this 2011 Act:**

8 (1) **“Affiliate” means:**

9 (a) **Any person who, directly or indirectly, controls, is controlled by or is under common**  
10 **control with a certified capital company or an insurance company;**

11 (b) **A partnership in which a certified capital company or an insurance company is a**  
12 **general partner; or**

13 (c) **Any person who is an officer, director, manager, employee or agent of a certified**  
14 **capital company or an insurance company, or an immediate family member of an officer,**  
15 **director, manager, employee or agent of a certified capital company or an insurance com-**  
16 **pany.**

17 (2) **“Certified capital” means cash invested by a certified investor in a certified capital**  
18 **company that fully funds the purchase price of the investor’s equity interest in a certified**  
19 **capital company or a qualified debt instrument issued by a certified capital company, or both.**

20 (3) **“Certified capital company” means a corporation, partnership or limited liability**  
21 **company that:**

22 (a) **Is certified by the Oregon Business Development Department under section 3 of this**  
23 **2011 Act;**

24 (b) **Receives investments of certified capital from two or more certified investors; and**

25 (c) **Has as its primary activity the making of qualified investments.**

26 (4) **“Certified investor” means an insurance company subject to corporate tax liability**  
27 **under ORS chapter 317 or 318 that invests certified capital.**

**NOTE:** Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 (5) “Green energy” means a technology, product, process or innovation that involves so-  
 2 lar energy, green building products and services, biofuels, biomass energy, bio-based products  
 3 or other renewable and sustainable energy as defined by the Oregon Business Development  
 4 Department by rule.

5 (6) “Insurance company” means an association, corporation, fraternal or mutual benefit  
 6 organization, whether or not for profit, that is engaged in providing insurance coverage, in-  
 7 cluding accident, burial, casualty, workers’ compensation, credit life, contract performance,  
 8 dental, fidelity, fire, health, hospitalization, illness, life (including endowments and annui-  
 9 ties), malpractice, marine, mortgage, surety and wage protection insurance.

10 (7) “Oregon green energy and conservation business” means a business composed of an  
 11 individual, association of individuals, joint venture, partnership, limited liability company,  
 12 nonprofit entity, corporation, firm, association or other entity, that has the capacity, upon  
 13 obtaining appropriate capital, to generate significant high skill, high wage employment and  
 14 that provides a service or produces a product that:

15 (a) Increases energy efficiency and conservation;

16 (b) Uses or produces green energy;

17 (c) Stimulates research and development in green energy;

18 (d) Prevents, reduces or mitigates environmental degradation;

19 (e) Cleans up and restores the natural environment; or

20 (f) Provides education, consultation, policy promotion, accreditation, trading and offsets  
 21 or similar supporting services for any of the activities identified in this subsection.

22 (8)(a) “Qualified business” means an Oregon green energy and conservation business that  
 23 meets the following criteria:

24 (A) Has its principal place of business and principal business operations located in this  
 25 state;

26 (B) Intends to keep its principal place of business and principal business operations in  
 27 this state after receipt of a certified capital company’s investment;

28 (C) Has 500 or fewer employees and:

29 (i) Employs at least 80 percent of its employees in this state; or

30 (ii) Pays 80 percent of its payroll to employees in this state; and

31 (D) Is unable to obtain or cannot reasonably be expected to qualify for financing from a  
 32 commercial or private lender.

33 (b) “Qualified business” does not include a business that is predominantly engaged in:

34 (A) Retail sales, real estate development, insurance, banking, lending or oil and gas ex-  
 35 ploration; or

36 (B) Professional services provided by accountants, lawyers or physicians.

37 (9) “Qualified debt instrument” means a debt instrument issued by a certified capital  
 38 company at par value or a premium with an original maturity date of at least five years after  
 39 the date of issuance, a repayment schedule that is no faster than a level principal amorti-  
 40 zation over five years, and interest, distribution or payment features that are not related to  
 41 the profitability of a certified capital company or the performance of a certified capital  
 42 company’s investment portfolio.

43 (10) “Qualified investment” means the investment of cash by a certified capital company  
 44 in a qualified business for the purchase of any debt, debt participation, equity or hybrid se-  
 45 curity of any kind, including a debt instrument or security that has the characteristics of

1 debt but that provides for conversion into equity or equity participation instruments such  
2 as options or warrants.

3 **SECTION 3.** (1) A certified capital company must be certified by the Oregon Business  
4 Development Department as provided in this section and in rules adopted by the department.

5 (2) An applicant for certification must file an application in the form prescribed by the  
6 department accompanied by a nonrefundable application fee of \$7,500. The application must  
7 include, at a minimum:

8 (a) The name of the applicant and the addresses of its principal place of business, prin-  
9 cipal business operations and any other office located in this or any other state;

10 (b) The applicant's relevant organizational documents and bylaws, and amendments  
11 thereto;

12 (c) Documents evidencing the applicant's financial condition and history, including an  
13 audit report on the company's financial statements prepared in accordance with generally  
14 accepted accounting principles; and

15 (d) Copies of any offering material used or proposed to be used by the applicant in solici-  
16 ting investments of certified capital from certified investors.

17 (3) To qualify as a certified capital company, the applicant must have, at the time of ap-  
18 plication for certification:

19 (a) An equity capitalization of at least \$500,000 in unencumbered cash, marketable secu-  
20 rities or other liquid assets;

21 (b) At least two principals or two managers employed with the applicant who each have  
22 at least two years of money management experience in the venture capital industry, with  
23 at least one full-time principal or manager located in an office of the applicant that is located  
24 in this state; and

25 (c) The ability to satisfy any additional requirement imposed by the department by rule.

26 (4) As part of the certification process, the department shall certify in writing the  
27 amount of tax credits to be allowed to the certified investors of the company upon certif-  
28 ication as provided in section 12 of this 2011 Act.

29 (5) Within 60 days after receipt of an application under this section, the department shall  
30 grant or deny certification of the applicant as a certified capital company and provide the  
31 applicant with information regarding the grounds for any denial of certification, including  
32 suggestions for correcting the grounds for the denial.

33 (6) Upon certification, any offering material involving the sale of securities of the certi-  
34 fied capital company shall include the following statement: "By certifying a certified capital  
35 company, the State of Oregon does not endorse the quality of management or the potential  
36 for earnings of the company and is not liable for damages or losses to a certified investor in  
37 the company. Use of the word 'certified' in an offering does not constitute a recommendation  
38 or endorsement of the investment by the State of Oregon. Investments in a certified capital  
39 company prior to the time a company is certified are not eligible for tax credits under sec-  
40 tion 12 of this 2011 Act. If applicable provisions of sections 2 to 10 of this 2011 Act are vio-  
41 lated, the state may require forfeiture of unused tax credits and repayment of used tax  
42 credits by the certified investor."

43 (7) Except as provided in this subsection, not later than December 31 of each year, each  
44 certified capital company shall pay a nonrefundable renewal fee of \$5,000 to the department.  
45 If a certified capital company fails to pay the renewal fee on or before December 31, the

1 company must pay, in addition to the renewal fee, a late fee of \$5,000 on or before January  
2 31 of the succeeding year in order to continue the company's certification. No renewal fees  
3 are required to be paid within six months after the date of initial certification of a certified  
4 capital company.

5 (8) The department may deny certification or decertify a certified capital company if:

6 (a) The grounds for denial or decertification are not corrected within 90 days after notice  
7 of the denial or decertification is received by the company;

8 (b) The company fails to maintain common stock or paid-in capital of at least \$500,000;  
9 or

10 (c) The department determines that the company, or any principal, director or manager  
11 of the company:

12 (A) Has violated any provision of sections 2 to 10 of this 2011 Act;

13 (B) Has made a material misrepresentation or false statement or concealed any essential  
14 or material fact during the application process or with respect to information and reports  
15 required of certified capital companies under sections 2 to 10 of this 2011 Act;

16 (C) Has been convicted of, or entered a plea of guilty or nolo contendere to, a crime  
17 against the laws of this state or any other state or of the United States or any other coun-  
18 try, including a fraudulent act in connection with the operation of a certified capital company  
19 or in connection with the performance of fiduciary duties in another capacity;

20 (D) Has been adjudicated liable in a civil action on grounds of fraud, embezzlement,  
21 misrepresentation or deceit; or

22 (E) Has been the subject of:

23 (i) Any adverse decision, finding, injunction, suspension, prohibition, revocation, denial,  
24 judgment or administrative order by any court of competent jurisdiction, administrative law  
25 judge, any state or federal agency or any national securities, commodities or option ex-  
26 change; or

27 (ii) Any injunction or adverse administrative order by a state or federal agency regulat-  
28 ing banking, insurance, finance or small loan companies, real estate, mortgage brokers or  
29 other related or similar industries.

30 (9)(a) Upon decertification of a certified capital company under subsection (8) of this  
31 section, the Oregon Business Development Department shall determine the tax liability of  
32 the certified investors due by reason of the decertification and send notice of the decertifi-  
33 cation and tax liability to the Department of Revenue and the certified capital company. The  
34 decertified company shall provide notice of the decertification and the requirement for re-  
35 payment of used tax credits by certified investors of the company within 30 days after re-  
36 ceiving notice of decertification.

37 (b) Thirty days after receipt of notice of the decertification and tax liability from the  
38 Oregon Business Development Department under this subsection, the Department of Re-  
39 venue shall begin collection of any taxes due by reason of the decertification. No assessment  
40 of taxes is necessary and no statute of limitations precludes the collection of taxes due under  
41 this section.

42 (10) For a certified capital company that has made qualified investments in an amount  
43 that is cumulatively equal to 100 percent of the total certified capital invested in the com-  
44 pany, any tax credit claimed or to be claimed by a certified investor is not subject to repay-  
45 ment or forfeiture under this section.

1       **SECTION 4.** (1) An insurance company or any affiliate of an insurance company may not,  
 2 directly or indirectly, own, whether through rights, options, convertible interests or other-  
 3 wise, 15 percent or more of the voting equity interests of, or manage or control the direction  
 4 of investments of a certified capital company. This prohibition does not preclude a certified  
 5 investor, insurance company or any other party from exercising its legal rights and reme-  
 6 dies, which may include interim management of a certified capital company, if a certified  
 7 capital company is in default of its obligation under law or its contractual obligations to the  
 8 certified investor, insurance company or other party.

9       (2) Nothing in this section limits an insurance company’s ownership of nonvoting equity  
 10 interests in a certified capital company.

11       **SECTION 5.** If a qualified business moves its principal place of business or principal  
 12 business operations from this state within 90 days after the date a certified capital company  
 13 makes an investment in the business, the investment may not be considered a qualified in-  
 14 vestment for purposes of sections 2 to 10 of this 2011 Act.

15       **SECTION 6.** (1) Before the third anniversary of the date of certification of a certified  
 16 capital company under section 3 of this 2011 Act, the company must make qualified invest-  
 17 ments in an amount cumulatively equal to at least 25 percent of the total certified capital  
 18 invested in the company.

19       (2) Before the fifth anniversary of the date of certification of a certified capital company  
 20 under section 3 of this 2011 Act, the company must make qualified investments in an amount  
 21 cumulatively equal to at least 50 percent of the total certified capital invested in the com-  
 22 pany.

23       (3) Capital of a certified capital company that is not invested in qualified investments  
 24 may only be invested in:

- 25       (a) Cash deposited with a federally insured financial institution;
- 26       (b) Certificates of deposit in a federally insured financial institution;
- 27       (c) Investment securities that are:
  - 28           (A) Obligations of the United States or agencies or instrumentalities of the United States;
  - 29           or
  - 30           (B) Obligations that are guaranteed fully as to principal and interest by the United
  - 31           States;
  - 32           (d) Debt instruments rated at least “A” or the equivalent by a nationally recognized
  - 33           credit rating organization, or issued by, or guaranteed with respect to payment by, an entity
  - 34           whose unsecured indebtedness is rated at least “A” or the equivalent by a nationally recog-  
 35           nized credit rating organization, and which indebtedness is not subordinated to other unse-  
 36           cured indebtedness of the issuer or the guarantor;
  - 37           (e) Obligations of this state or a municipality or other political subdivision of this state;
  - 38           or
  - 39           (f) Any other investment approved by rule adopted by the Oregon Business Development  
 40           Department.

41       (4) A certified capital company may not make a qualified investment at a cost to the  
 42 company that is greater than 15 percent of the total certified capital invested in the company  
 43 at the time of investment.

44       **SECTION 7.** (1) As used in this section, “qualified distribution” means:

- 45       (a) The reasonable costs and expenses of forming a certified capital company, including

1 reasonable and necessary fees paid for professional services, including but not limited to le-  
 2 gal and accounting services related to the formation of the company and the cost of financ-  
 3 ing and insuring the obligations of the company;

4 (b) The reasonable costs and expenses of managing and operating a certified capital  
 5 company, including an annual management fee in an amount that does not exceed two and  
 6 one-half percent of certified capital invested in the company, except that:

7 (A) Costs or expenses may not be paid to a certified investor or an affiliate of a certified  
 8 investor;

9 (B) Costs or expenses may not be paid for federal or state taxes, including penalties and  
 10 interest related to state and federal income taxes, of the equity owners of the certified cap-  
 11 ital company resulting from a tax liability of the certified capital company; and

12 (C) Costs and expenses in the aggregate may not exceed five percent of certified capital  
 13 invested in the company in any one year; and

14 (c) Reasonable and necessary fees paid for professional services, including but not limited  
 15 to legal and accounting services related to the operation of a certified capital company.

16 (2) A certified capital company may make a qualified distribution at any time.

17 (3) To make a distribution to its equity holders other than a qualified distribution, a  
 18 certified capital company must have made qualified investments in an amount that is cu-  
 19 mulatively equal to 100 percent of the total certified capital invested in the company.

20 (4) Payments to creditors of a certified capital company may be made without restriction  
 21 for the repayment of principal and interest on indebtedness owed to the creditors by the  
 22 company, including indebtedness of the company on which certified investors earned tax  
 23 credits. A creditor that is also a certified investor or equity holder of the certified capital  
 24 company may receive payments with respect to such debt without restrictions.

25 (5) The Oregon Business Development Department may direct that an audit of a certified  
 26 capital company be conducted, at the expense of the company, by a nationally recognized  
 27 certified public accounting firm acceptable to the department. The audit shall determine  
 28 whether aggregate cumulative distributions made by the certified capital company to its  
 29 certified investors and equity holders, other than qualified distributions, have equaled or  
 30 exceeded the sum of the certified capital invested in the company and any additional capital  
 31 contributions to the company. If at the time of any distribution made by the certified capital  
 32 company, a distribution taken together with all other distributions made by the company,  
 33 other than qualified distributions, exceeds in the aggregate the sum of the certified capital  
 34 invested in the company and any additional capital contributions to the company, as deter-  
 35 mined by the audit, the company shall pay to the Department of Revenue 10 percent of the  
 36 portion of the distribution in excess of the aggregate amount. Payments to the Department  
 37 of Revenue by a certified capital company under this subsection may not exceed the aggre-  
 38 gate amount of tax credits claimed by all certified investors in the company.

39 **SECTION 8.** The Oregon Business Development Department shall conduct an annual re-  
 40 view of each certified capital company to determine whether the company is complying with  
 41 the requirements of sections 2 to 10 of this 2011 Act, to advise the company as to the eligi-  
 42 bility status of its qualified investments and to ensure that no investment has been made in  
 43 violation of sections 2 to 10 of this 2011 Act. The cost of the annual review shall be paid by  
 44 the certified capital company.

45 **SECTION 9.** The Oregon Business Development Department shall prepare a biennial re-

1 port to an appropriate committee of the Legislative Assembly regarding the results of the  
2 implementation of sections 2 to 10 of this 2011 Act. The report must include:

3 (1) The number of certified capital companies holding certified capital;

4 (2) The amount of certified capital invested in each certified capital company;

5 (3) The amount of certified capital each certified capital company invested in qualified  
6 businesses each year and the cumulative total amount of qualified investments.

7 (4) The total amount of tax credits granted under section 12 of this 2011 Act for each  
8 year that credits have been granted;

9 (5) The performance of each certified capital company with respect to renewal and re-  
10 porting requirements imposed under sections 2 to 10 of this 2011 Act;

11 (6) With respect to the qualified businesses in which certified capital companies have  
12 invested:

13 (a) The classification of each qualified business according to the industrial sector and size  
14 of the business;

15 (b) The total number of jobs created by the qualified investments in the business and the  
16 average wage paid for the jobs; and

17 (c) The total number of jobs retained as a result of the qualified investments in the  
18 business and the average wage paid for the jobs;

19 (7) A list of the certified capital companies that have been decertified or that have failed  
20 to renew the certification and the reason for any decertification; and

21 (8) The total amount of tax credits that have been recaptured or forfeited under section  
22 3 of this 2011 Act.

23 **SECTION 10.** (1) The Oregon Business Development Department shall adopt rules to im-  
24 plement the provisions of sections 2 to 10 of this 2011 Act.

25 (2) The Department of Revenue shall adopt rules to implement the provisions of sections  
26 3, 7 and 12 of this 2011 Act.

27 **SECTION 11.** Section 12 of this 2011 Act is added to and made a part of ORS chapter 315.

28 **SECTION 12.** (1) A credit against the taxes otherwise due under ORS chapter 317 or 318  
29 shall be allowed during the tax year to a certified investor that makes an investment of  
30 certified capital.

31 (2) The total amount of tax credit allowed under this section each tax year shall be cer-  
32 tified in writing by the Oregon Business Development Department as provided in subsection  
33 (3) of this section and in rules adopted by the department.

34 (3) The total amount certified for tax credit under this section for the tax year, when  
35 added to all amounts previously certified for tax credit under this section, may not exceed  
36 the amount that would entitle all certified investors in all certified capital companies to take  
37 total credits of \$30 million for the tax year in which certification of the tax credit is made.

38 (4)(a) A tax credit claimed under this section may not exceed the tax liability of the  
39 taxpayer.

40 (b) Any tax credit otherwise allowable under this section that is not used by the taxpayer  
41 in a particular tax year may be carried forward and offset against the taxpayer's tax liability  
42 for the next succeeding tax year continuing thereafter for 10 years from the date on which  
43 the credit may first be taken.

44 (5) A taxpayer that has received a tax credit certificate under this section may sell the  
45 certificate to another taxpayer. The sale is effective only if a notice of tax credit certificate

1 sale is filed with the Department of Revenue. The notice must be filed, on a form prescribed  
 2 by the department, on or before the date on which the buyer's income or corporate excise  
 3 tax return for the first year for which the credit could be claimed is filed or due, whichever  
 4 is earlier. The notice form shall include the following information:

- 5 (a) The name and taxpayer identification number of the seller;
- 6 (b) The name and taxpayer identification number of the buyer;
- 7 (c) The amount of the tax credit certificate that is being sold to the buyer;
- 8 (d) The amount of the tax credit certificate that is being retained by the seller; and
- 9 (e) Any other information required by the department.

10 (6) If requested by the Department of Revenue, the Oregon Business Development De-  
 11 partment shall supply a list of taxpayers that have obtained tax credit certification under  
 12 this section and for each listed taxpayer disclose the amount of certified capital invested by  
 13 the taxpayer and the amount certified for tax credit under this section.

14 (7) If the amount of certified capital for which a tax credit is claimed is allowed as a  
 15 deduction for federal tax purposes, the amount of the credit shall be added to federal taxable  
 16 income for Oregon tax purposes.

17 (8) As used in this section, "certified capital," "certified capital company" and "certified  
 18 investor" have the meaning given those terms in section 2 of this 2011 Act.

19 **SECTION 13.** ORS 314.752, as amended by section 26, chapter 76, Oregon Laws 2010, is  
 20 amended to read:

21 314.752. (1) Except as provided in ORS 314.740 (5)(b), the tax credits allowed or allowable to a  
 22 C corporation for purposes of ORS chapter 317 or 318 shall not be allowed to an S corporation. The  
 23 business tax credits allowed or allowable for purposes of ORS chapter 316 shall be allowed or are  
 24 allowable to the shareholders of the S corporation.

25 (2) In determining the tax imposed under ORS chapter 316, as provided under ORS 314.734, on  
 26 income of the shareholder of an S corporation, there shall be taken into account the shareholder's  
 27 pro rata share of business tax credit (or item thereof) that would be allowed to the corporation (but  
 28 for subsection (1) of this section) or recapture or recovery thereof. The credit (or item thereof), re-  
 29 capture or recovery shall be passed through to shareholders in pro rata shares as determined in the  
 30 manner prescribed under section 1377(a) of the Internal Revenue Code.

31 (3) The character of any item included in a shareholder's pro rata share under subsection (2)  
 32 of this section shall be determined as if such item were realized directly from the source from which  
 33 realized by the corporation, or incurred in the same manner as incurred by the corporation.

34 (4) If the shareholder is a nonresident and there is a requirement applicable for the business tax  
 35 credit that in the case of a nonresident the credit be allowed in the proportion provided in ORS  
 36 316.117, then that provision shall apply to the nonresident shareholder.

37 (5) As used in this section, "business tax credit" means a tax credit granted to personal income  
 38 taxpayers to encourage certain investment, to create employment, economic opportunity or incentive  
 39 or for charitable, educational, scientific, literary or public purposes that is listed under this sub-  
 40 section as a business tax credit or is designated as a business tax credit by law or by the Depart-  
 41 ment of Revenue by rule and includes but is not limited to the following credits: ORS 285C.309  
 42 (tribal taxes on reservation enterprise zones and reservation partnership zones), ORS 315.104 (fore-  
 43 station and reforestation), ORS 315.134 (fish habitat improvement), ORS 315.138 (fish screening, by-  
 44 pass devices, fishways), ORS 315.156 (crop gleanings), ORS 315.164 and 315.169 (farmworker housing),  
 45 ORS 315.204 (dependent care assistance), ORS 315.208 (dependent care facilities), ORS 315.213 (con-



1 tributions for child care), ORS 315.304 (pollution control facility), ORS 315.324 (plastics recycling),  
 2 ORS 315.354 and 469.207 (energy conservation facilities), ORS 315.507 (electronic commerce), ORS  
 3 315.511 (advanced telecommunications facilities), ORS 315.604 (bone marrow transplant expenses),  
 4 ORS 317.115 (fueling stations necessary to operate an alternative fuel vehicle) and ORS 315.141  
 5 (biomass production for biofuel) **and section 12 of this 2011 Act (investments of certified capital  
 6 by certified investors of certified capital company).**

7 **SECTION 14.** ORS 318.031 is amended to read:

8 318.031. It being the intention of the Legislative Assembly that this chapter and ORS chapter  
 9 317 shall be administered as uniformly as possible (allowance being made for the difference in im-  
 10 position of the taxes), ORS 305.140 and 305.150, ORS chapter 314 and the following sections are in-  
 11 corporated into and made a part of this chapter: ORS 285C.309, 315.104, 315.134, 315.141, 315.156,  
 12 315.204, 315.208, 315.213, 315.304, 315.507, 315.511 and 315.604 **and section 12 of this 2011 Act** (all  
 13 only to the extent applicable to a corporation) and ORS chapter 317.

14 **SECTION 15.** **Notwithstanding ORS 315.050, section 12 of this 2011 Act applies to tax**  
 15 **years beginning on or after January 1, 2011.**

16 **SECTION 16.** **This 2011 Act takes effect on the 91st day after the date on which the**  
 17 **Seventy-sixth Legislative Assembly adjourns sine die.**

18