

**Testimony to Senate Government Operations Committee re: S.305
By Ellen Kahler, Executive Director, Vermont Sustainable Jobs Fund
2.20.20**

Thank you for the opportunity to testify today. Since the Vermont Sustainable Jobs Fund (VSJF) is called out in S.305, I wanted to offer our perspective on why the VSJF should not be subject to the Vermont Public Records Act and to respectfully request that you strike us from the bill text.

VSJF believes there is already adequate oversight of its operations by its board of directors, two state agencies, and the Vermont Legislature. Members of the public are already able to request access to grant/contract reports filed with either ACCD or VAAFM, and may request access to VSJF's audited financial statement and IRS Form-990. Our two annual reports are available on our website for easy access. Here are more specifics to justify our request not to be covered under the Act:

- The Sustainable Jobs Fund Program was created by an act of the Vermont Legislature and signed into law effective April 20, 1995. VEDA was tasked with incorporating a nonprofit corporation for the purpose of administering the Sustainable Jobs Fund Program. IRS nonprofit incorporation status was received in March 1996 under the organization name of the Vermont Sustainable Jobs Fund, Inc. Thus, the VSJF has been a separate legal entity, with its own IRS legal status, as of March 1996 and has operated as such since that time.
- As an independent 501c3 organization we are managed by an 11 member Board of Directors. Eight of these Directors are independently selected, while two are members of the Administration and one is appointed by the Governor (who may or may not be a member of the Administration).
- Currently three out of eleven board members are members of the Administration. All board members attend quarterly board meetings, receive a written and oral report from our audit firm JMM & Associates each fall, participate in strategic planning work with the staff, approve the organization's annual budget and perform the standard legal and fiduciary responsibilities required under IRS rules for nonprofit organizations.
- In FY19, only 27% of the VSJF budget was provided by state sources (grants and contracts), whereas 73% comes from federal and philanthropic funding sources, fees for service income, corporate sponsorships and events. Any state funding support is requested or applied for and is not guaranteed year-over-year.
- Grant agreements and/or contracts are put in place between the VSJF and the granting/contracting agency which outlines the work plan – as it was proposed by the VSJF (not dictated from the state entity).
- Interim and final grant and contract reports are required by state agencies providing the grant support and/or contracts to the VSJF and thus these documents are already publically available, if requests are made to the appropriate agency.
- VSJF makes its audited financial statements and IRS Form 990 publicly available, upon request and via the website GuideStar.
- Annual Reports for the VSJF can be found here: <http://www.vsif.org/impact/> (scroll to bottom of page). Annual Reports for the Vermont Farm to Plate Investment Program can be found here: <http://www.vtfarmtoplate.com/getting-to-2020> (scroll to bottom of page)
- Up until FY15, the VSJF provided a set of audited financial statements to the Auditor of Accounts and the Office of Budget and Management for the purposes of inclusion in the state's CAFR. That year the Executive Director became aware of significantly outdated language that was being included in the CAFR, including erroneously listing our address as 58 E. State Street, which we had not been the

case since 2002. We then contacted John Becker at the Department and updated him on VSJF's statute changes from 2011. He then decided to undergo a review of the VSJF's status vis-à-vis the state and issued a finding that as of FY16, VSJF is no longer considered a component unit of the State of Vermont. As of FY16, VSJF no longer supplies its financial audit to the state for inclusion in its CAFR. Had Mr. Becker known of the VSJF statute change in 2011, we believe this determination would have been made shortly thereafter. [see attached 2017 letter from Office of Budget and Management]

- As a small staff of 10, without any standard administrative support, it would fall on the Executive Director to manage all public information requests. We do not have the capacity to manage additional requests outside of what we already make available. Doing so would represent a significant burden that we do not believe is justified given the amount of information and reporting already provided by us as an independent 501c3 organization.
- S.305 also tries to subject any subsidiary of the VSJF to the PRA. To state for the record, the VSJF does not own a subsidiary entity. The VSJF has a minority equity investment in the Flexible Capital Fund, L3C (the "Flex Fund"), a separate for-profit company (with a 21.67% ownership stake). As a for-profit company with its own governance Board of Managers, 38 accredited investors, and 16 for-profit portfolio companies, the Flexible Capital Fund, L3C would be exempt from the Act (1 V.S.A. § 317(c)(9), which applies to "confidential business . . . information,") . Additionally, the Flex Fund is certified as a Community Development Financial Institution (CDFI) with the US Treasury, which requires for certification purposes that there is no state control over Flexible Capital Fund's decision making. All decisions about the Flex Fund are made exclusively by the Flex Fund's Board of Managers.
- The VSJF has a contractual agreement with the Flex Fund to provide fund management services – a fee for service arrangement. The VSJF as an organization and all its Board of Directors and staff have signed confidentiality agreements that prevents it from disclosing financial information about the Flexible Capital Fund, or information about the Fund's investors and portfolio companies.
- If VSJF were subject to the Public Records Act, any Flexible Capital Fund financial audits in its possession would be protected from public disclosure by 1 V.S.A. § 317(c)(9), which applies to "confidential business . . . information," which "gives its . . . owner an opportunity to obtain business advantage over competitors." The Vermont Supreme Court has applied this exemption to private financial information. *Springfield Terminal Railway Company v. Agency of Transportation, et al.*, 174 Vt. 341 (2002). The Flex Fund's financial audits and management letters are confidential business information belonging to the Flex Fund.

Exemptions similar to or that we believe would apply to the Flexible Capital Fund:

- 32 V.S.A. § 5930a(h): Information submitted by a business to the Economic Progress Council regarding tax information or confidential business information. [SIMILAR TO FLEX FUND RE: THE KIND OF INFORMATION PROVIDED BY PORTFOLIO COMPANIES]
- 1 V.S.A. § 317(c)(9): Trade secrets
- 1 V.S.A. § 317(c)(10): Lists of names, disclosure of which violates a right to privacy or produces public or private gain.
- 11 V.S.A. § 3058(g): LLCs; member right to information limited in the case of trade secrets or other information the disclosure of which the managers in good faith believe is not in the best interest of the company.

Attachments: 2017 Letter from John Becker, Office of Budget and Management



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February 10, 2017

Dear, Ellen:

In the past the State has reported the Vermont Sustainable Jobs Fund Inc. (VSJF) as a component unit in our annual Comprehensive Annual Financial Report (CAFR). The State reported the VSJF in this manner because when the VSJF was originally created the State appointed a majority of the Board of Directors. Having a majority of Directors appointed by the State, gave the State the potential to assert control over the VSJF, and under Governmental Accounting Standards Board (GASB) rules this required VSJF to be reported as a component unit of the State.

In recent years there has been legislative changes made to the structure of the VSJF board. In Act 52 of 2011 changes were made to the makeup and how appointments were made to the VSJF's board. The new structure is a 11-member board, and the State appoints 3 of the 11 members, and the remaining 8 are independent directors. Because of this change, the State no longer appoints a majority of the VSJF board or has the ability to assert control over the board. In addition, the VSJF does not meet the fiscal dependency and financial benefit/burden criteria has defined by GASB, nor would it be misleading to exclude the VSJF as a component unit of the State.

Given the changes to the structure of the VSJF board, Finance & Management has determined that the VSJF no longer is required to be reported as a component unit of the State. We made this change effective for the State's FY16 CAFR. I have attached our analysis memo, that provides more details of the determination.

If new GASB rules or legislation changes are enacted that could potentially change this determination, we will review the State's relationship with VSJF at that time based on the new circumstances and let you know if any reporting changes are warranted.

If you have any questions on this matter, please feel free to contact me.

Sincerely;

A handwritten signature in black ink that reads "John M. Becker".

John M. Becker, CPA
Assistant Director of Statewide Financial Reporting



Analysis of Vermont Sustainable Jobs Fund Inc. as a Component Unit of the State of Vermont.

The Vermont Sustainable Jobs Fund Inc. (VSJF) was created by Act 46 of 1995 when the legislature directed the Vermont Economic Development Authority to incorporate a nonprofit corporation to administer the sustainable job fund program under 10 VSA 326-330. The original board of directors of the VSJF was made up of 3 members appointed by VEDA, the Secretary of Agency of Commerce and Community Development (ACCD), and 7 members appointed by the Governor. The VSJF was reported as a component unit of the State of Vermont since the State appointed the majority of the board and was able to impose its will on the VSJF by controlling the board per GASB 14 para. 21(a).

In Act 52 of 2011 changes were made to the makeup and how appointments were made to the VSJF's board. The board now would consist of 11 members, 1 appointed by the Governor, the Secretary of ACCD, the Secretary of the Agency of Agriculture, Food and Markets (AAFM), and 8 independent directors. The 8 independent directors, of which no more than two of whom can be State government employees or officials, were selected as vacancies occurred by vote of the existing directors from a list of names offered by a nominating committee of the Board. As time has passed, the original board members appointed by VEDA and the Governor have been replaced by independent directors, and governmental appointees no longer constitute a majority of the board.

The standards for determining component units are established in GASB 14 as amended by GASB 61; and GASB 39. The flowchart for evaluating components units included with GASB 61 was used to evaluate whether or not the VSJF should still be considered a component unit of the State of Vermont for FY16 CAFR.

Analysis

Is the potential component unit (PCU) legally separate?

Yes, the VSIF is incorporate as a nonprofit corporation in the State of Vermont.

Does the Primary Government (PG) appoint the voting majority of the PCU's board?

No, the State appoints only 3 of an 11-member board.

Does the PCU meet the fiscal dependency and financial benefit/burden criteria?

No, this is a two-part test and must meet both parts to be considered a component unit, the VSJF does not meet the fiscal dependency or the financial benefit/burden criteria.

- **Fiscal Dependency**

- A special-purpose government is fiscally independent if it has the authority to do all three of the following:
 1. Determine its budget without another government's having the authority to approve and modify that budget.
 2. Levy taxes or set rates or charges without approval by another government.
 3. Issue bonded debt without approval by another government.

There are no limitations or controls in statute related to the above three fiscally independent criteria for VSJF in regards to the State having authority over these items, hence VSJF is fiscally independent from the State.

- **Financial benefit/burden**

- An organization has a financial benefit or burden relationship with the primary government if, for example, any one of these conditions exists:
 1. The primary government is legally entitled to or can otherwise access the organization's resources.
 2. The primary government is legally obligated or has otherwise assumed the obligation to finance the deficits of, or provide financial support to, the organization.
 3. The primary government is obligated in some manner for the debt of the organization.

There is no authority listed in statute or any past practice that the State is legally entitled to or can otherwise access the VSJF's resources, or is obligated in some manner for their debt. There is no authority listed in statute that the State is legally obligated to finance the deficits of, or provide financial support to the VSJF. The determination if the State has otherwise assumed the obligation to finance the deficits of, or provide financial support to the VSJF is a matter decided by professional judgement in reviewing the facts and circumstances. GASB 14 para 27 excludes exchange transactions as part of the financial benefit/burden relationship. In the 2013-2014 question 4.21.3 states, exchange-like transactions will also apply to the meaning of exchange transaction as discussed in GASB 14. The State has provided annual support to the VSJF over the years, which could possibly be indicative of a financial benefit/ burden relationship. However, when I reviewed the grant agreement between the State and VSJF, I believe the substance of the agreement makes it an exchange-like transaction, for which can be excluded when evaluating the financial benefit/ burden relationship. I come to this conclusion because the grant agreement lists services to be performed by grantee, targeted areas to focus on, performance measures, and the State will own all work product produced by the grantee. Because of this I conclude there isn't a financial benefit/ burden relationship between the State and VSJF. While this determination is a matter of judgement, even if this was considered a financial benefit/ burden relationship the VSJF still wouldn't qualify to be a component unit of the State since it is not fiscally dependent on the State.

Would it be misleading to exclude the PCU?

No, the VSJF is not financially integrated or closely related State as it operates independently of the State guided by the Statute that created it. In addition, any grant support the State provides the VSJF is included in the State's financials, and the overall assets, liabilities, revenues, and expenses of the VSJF are immaterial to the State's financials.

Conclusion

VSIF is not a component unit of the State of Vermont for FY16 CAFR