

# HB0243S01 compared with HB0243

~~text~~ shows text that was in HB0243 but was deleted in HB0243S01.

text shows text that was not in HB0243 but was inserted into HB0243S01.

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Representative Jon E. Stanard proposes the following substitute bill:

## AMENDMENTS TO THE FUND OF FUNDS

2014 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Jim Bird**

Senate Sponsor: \_\_\_\_\_

Cosponsors:

Jacob L. Anderegg

Johnny Anderson

Stewart Barlow

Melvin R. Brown

Susan Duckworth

James A. Dunnigan

Gage Froerer

John Knotwell

Curtis Oda

Dixon M. Pitcher

Larry B. Wiley

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### LONG TITLE

#### General Description:

This bill amends Title 63M, Chapter 1, Part 12, the Utah Venture Capital Enhancement Act.

#### Highlighted Provisions:

This bill:

- ▶ amends the membership of the Utah Capital Investment Board by adding a member

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of the Senate and a member of the House of Representatives;

- ▶ amends the quorum requirements of the Utah Capital Investment Board;
- ▶ requires that the annual report and the annual audit for the Utah fund of funds be completed on or before ~~July~~September 1 for the previous calendar year;
- ▶ describes additional information required in the annual report;
- ~~{~~ → ~~modifies the amount of money required in the redemption reserve before returns may be reinvested in the Utah fund of funds;~~
- ‡ ▶ provides that the aggregate outstanding certificates may not exceed a total of ~~{~~\$150,000,000 ~~{of contingent tax credits}~~for a loan guarantee;
- ▶ provides that ~~{additional}~~the aggregate outstanding certificates may not ~~{be issued after July 1, 2014}~~exceed a total of \$150,000,000 for a guarantee for equity investments in the Utah fund of funds;
- ▶ provides that ~~{the Utah Capital Investment Corporation is no longer exempt from the requirements of Title 52, Chapter 4, Open and Public Meetings Act, and Title 63G, Chapter 2, Government Records Access and Management Act}~~tax-credit certificates may only guarantee up to 50% of equity investments; and
- ▶ makes technical changes.

### Money Appropriated in this Bill:

None

### Other Special Clauses:

None

### Utah Code Sections Affected:

AMENDS:

63M-1-1203, as last amended by Laws of Utah 2008, Chapter 18 and renumbered and amended by Laws of Utah 2008, Chapter 382

63M-1-1205, as last amended by Laws of Utah 2010, Chapter 286

63M-1-1206, as last amended by Laws of Utah 2012, Chapter 242

63M-1-1214, as last amended by Laws of Utah 2008, Chapter 18 and renumbered and amended by Laws of Utah 2008, Chapter 382

63M-1-1217, as renumbered and amended by Laws of Utah 2008, Chapter 382

63M-1-1218, as last amended by Laws of Utah 2011, Chapter 342

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~~{ 63M-1-1224, as last amended by Laws of Utah 2008, Chapter 18 and renumbered and amended by Laws of Utah 2008, Chapter 382~~

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*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section 63M-1-1203 is amended to read:

### **63M-1-1203. Definitions.**

As used in this part:

- (1) "Board" means the Utah Capital Investment Board.
- (2) "Certificate" means a contract between the board and a designated investor under which a contingent tax credit is available and issued to the designated investor.
- (3) (a) Except as provided in Subsection (3)(b), "claimant" means a resident or nonresident person.
  - (b) "Claimant" does not include an estate or trust.
- (4) "Commitment" means a written commitment by a designated purchaser to purchase from the board certificates presented to the board for redemption by a designated investor. Each commitment shall state the dollar amount of contingent tax credits that the designated purchaser has committed to purchase from the board.
- (5) "Contingent tax credit" means a contingent tax credit issued under this part that is available against tax liabilities imposed by Title 59, Chapter 7, Corporate Franchise and Income Taxes, or Title 59, Chapter 10, Individual Income Tax Act, if there are insufficient funds in the redemption reserve and the board has not exercised other options for redemption under Subsection 63M-1-1220(3)(b).
- (6) "Corporation" means the Utah Capital Investment Corporation created under Section 63M-1-1207.
- (7) "Designated investor" means:
  - (a) a person who makes a private investment; or
  - (b) a transferee of a certificate or contingent tax credit.
- (8) "Designated purchaser" means:
  - (a) a person who enters into a written undertaking with the board to purchase a commitment; or
  - (b) a transferee who assumes the obligations to make the purchase described in the

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commitment.

(9) "Estate" means a nonresident estate or a resident estate.

(10) "Person" means an individual, partnership, limited liability company, corporation, association, organization, business trust, estate, trust, or any other legal or commercial entity.

(11) "Private investment" means:

(a) an equity interest in the Utah fund of funds; or

(b) a loan to ~~[or other debt obligation from the Utah fund of funds]~~ the Utah fund of funds initiated before July 1, 2014, including a loan refinanced on or after July 1, 2014, that was originated before July 1, 2014.

(12) "Redemption reserve" means the reserve established by the corporation to facilitate the cash redemption of certificates.

(13) "Taxpayer" means a taxpayer:

(a) of an investor; and

(b) if that taxpayer is a:

(i) claimant;

(ii) estate; or

(iii) trust.

(14) "Trust" means a nonresident trust or a resident trust.

(15) "Utah fund of funds" means a limited partnership or limited liability company established under Section 63M-1-1213 in which a designated investor purchases an equity interest.

Section ~~{1}~~2. Section **63M-1-1205** is amended to read:

### **63M-1-1205. Board members -- Meetings -- Expenses.**

(1) (a) The board shall consist of ~~[five]~~ the following seven members~~[-(b) Of the five members]:~~

(i) ~~[one shall be]~~ the state treasurer;

(ii) ~~[one shall be]~~ the director or the director's designee; ~~[and]~~

(iii) three ~~[shall be]~~ members appointed by the governor and confirmed by the Senate~~[-];~~

(iv) a member of the Senate appointed by the president of the Senate; and

(v) a member of the House of Representatives appointed by the speaker of the House of

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### Representatives.

~~[(c)]~~ (b) The three members appointed by the governor shall serve four-year staggered terms with the initial terms of the first three members to be four years for one member, three years for one member, and two years for one member.

(c) The governor shall appoint members of the board based on demonstrated expertise and competence in:

(i) the supervision of investment managers;

(ii) the fiduciary management of investment funds; or

(iii) the management and administration of tax credit allocation programs.

(2) When a vacancy occurs in the membership of the board for any reason, the vacancy shall be:

(a) filled in the same manner as the appointment of the original member; and

(b) for the unexpired term of the board member being replaced.

(3) Appointed members of the board may not serve more than two full consecutive terms except ~~[where]~~ when the ~~[governor]~~ appointing authority determines that an additional term is in the best interest of the state.

(4) ~~[Three]~~ (a) Four members of the board ~~[constitute]~~ constitutes a quorum for conducting business and exercising board power~~[-, provided that a minimum of three affirmative votes is required for board action and at least one of the affirmative votes is cast by either the director or the director's designee or the state treasurer].~~

(b) If a quorum is present, the action of a majority of members present is the action of the board.

(5) (a) A member who is not a legislator may not receive compensation or benefits for the member's service, but ~~{ a member who is not also a member of the Legislature }~~ may receive per diem and travel expenses in accordance with:

~~[(a)]~~ (i) Section 63A-3-106;

~~[(b)]~~ (ii) Section 63A-3-107; and

~~[(c)]~~ (iii) rules made by the Division of Finance ~~[pursuant]~~ according to Sections 63A-3-106 and 63A-3-107.

(b) Compensation and expenses of a board member who is a legislator are governed by Section 36-2-2 and Legislative Joint Rules, Title 5, Legislative Compensation and Expenses.

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~~[(6) Members of the board shall be selected on the basis of demonstrated expertise and competence in:]~~

~~[(a) the supervision of investment managers;]~~

~~[(b) the fiduciary management of investment funds; or]~~

~~[(c) the management and administration of tax credit allocation programs.]~~

~~[(7)]~~ (6) The board and its members are considered to be a governmental entity with all of the rights, privileges, and immunities of a governmental entity of the state, including all of the rights and benefits conferred under Title 63G, Chapter 7, Governmental Immunity Act of Utah.

~~[(8)]~~ (7) Meetings of the board ~~[(f)]~~, except to the extent necessary to protect the information identified in Subsection 63M-1-1224(3), ~~[(f)]~~ are subject to Title 52, Chapter 4, Open and Public Meetings Act.

Section ~~[(2)]~~3. Section **63M-1-1206** is amended to read:

### **63M-1-1206. Board duties and powers.**

(1) The board shall:

(a) establish criteria and procedures for the allocation and issuance of contingent tax credits to designated investors by means of certificates issued by the board, provided that a contingent tax credit may not be issued unless the Utah fund of funds:

(i) first agrees to treat the amount of the tax credit redeemed by the state as a loan from the state to the Utah fund of funds; and

(ii) agrees to repay the loan upon terms and conditions established by the board;

(b) establish criteria and procedures for assessing the likelihood of future certificate redemptions by designated investors, including:

(i) criteria and procedures for evaluating the value of investments made by the Utah fund of funds; and

(ii) the returns from the Utah fund of funds;

(c) establish criteria and procedures for registering and redeeming contingent tax credits by designated investors holding certificates issued by the board;

(d) establish a target rate of return or range of returns on venture capital investments of the Utah fund of funds;

(e) establish criteria and procedures governing commitments obtained by the board

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from designated purchasers including:

- (i) entering into commitments with designated purchasers; and
- (ii) drawing on commitments to redeem certificates from designated investors;
- (f) have power to:
  - (i) expend funds;
  - (ii) invest funds;
  - (iii) issue debt and borrow funds;
  - (iv) enter into contracts;
  - (v) insure against loss; and
  - (vi) perform any other act necessary to carry out its purpose; and
- (g) make, amend, and repeal rules for the conduct of its affairs, consistent with this part

and in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

(2) (a) All rules made by the board under Subsection (1)(g) are subject to review by the Legislative Management Committee:

- (i) whenever made, modified, or repealed; and
- (ii) in each even-numbered year.

(b) Subsection (2)(a) does not preclude the legislative Administrative Rules Review Committee from reviewing and taking appropriate action on any rule made, amended, or repealed by the board.

(3) (a) The criteria and procedures established by the board for the allocation and issuance of contingent tax credits shall:

(i) include the contingencies that must be met for a certificate and its related tax credits to be:

- (A) issued by the board;
- (B) transferred by a designated investor; and
- (C) redeemed by a designated investor in order to receive a contingent tax credit; and
- (ii) tie the contingencies for redemption of certificates to:

(A) the targeted rates of return and scheduled redemptions of equity interests purchased by designated investors in the Utah fund of funds; and

(B) the scheduled principal and interest payments payable to designated investors that have made loans ~~[or other debt obligations]~~ initiated before July 1, 2014, including a loan

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refinanced on or after July 1, 2014, that was originated before July 1, 2014, to the Utah fund of funds.

(b) The board may not issue contingent tax credits under this part ~~[prior to]~~ before July 1, 2004.

(4) (a) The board may charge a placement fee to the Utah fund of funds for the issuance of a certificate and related contingent tax credit to a designated investor.

(b) The fee shall:

(i) be charged only to pay for reasonable and necessary costs of the board; and

(ii) not exceed .5% of the private investment of the designated investor.

(5) The board's criteria and procedures for redeeming certificates:

(a) shall give priority to the redemption amount from the available funds in the redemption reserve; and

(b) to the extent there are insufficient funds in the redemption reserve to redeem certificates, shall grant the board the option to redeem certificates:

(i) by certifying a contingent tax credit to the designated investor; or

(ii) by making demand on designated purchasers consistent with the requirements of Section 63M-1-1221.

(6) (a) The board shall, in consultation with the corporation, publish an annual ~~{written}~~ report of the activities conducted by the Utah fund of funds on or before {July}September 1{,}, {}} and submit the report to the governor ~~[and]~~; the Business, Economic Development, and Labor Appropriations Subcommittee~~[-]~~; the Business and Labor Interim Committee; and the Retirement and Independent Entities Committee.~~{}~~

(b) The annual report shall:

~~{(i)}~~ (i) be designed to provide clear, accurate, and accessible information to the public, the governor, and the Legislature;

~~[(ii)]~~ (ii) include a copy of the audit of the Utah fund of funds {described in Section 63M-1-1217} [and a valuation of the assets of the Utah fund of funds {

~~(ii) include the}]~~ described in Section 63M-1-1217;

(iii) include a detailed balance sheet, revenue and expenses statement, and cash flow statement;

(iv) include detailed information regarding new investments acquired during the year,

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including the amount of money invested:

(v) include the net annual rate of return of the Utah fund of funds, inclusive of, for the reported year, and each previous year, after accounting for all expenses, including administrative and financing costs, for the reported year and each previous year;

(vi) include detailed information regarding:

(A) realized gains from investments and any realized losses; and

(B) estimated returns and any estimated losses based on the net present value of ongoing investments;

(vii) include detailed information regarding all yearly expenditures, including:

(A) administrative, operating, and financing costs;

(B) aggregate compensation information separated by full- and part-time employees, including benefit and travel expenses; and

(C) expenses related to the allocation manager;

(viii) include detailed information regarding all funding sources for administrative, operations, and financing expenses, including expenses charged by or to the Utah fund of funds, including management and placement fees;

~~[(ii)]~~ ~~(iii)~~ (ix) review the progress of the investment fund allocation manager in implementing its investment plan; ~~and~~

~~[(iii)]~~ ~~(iv)~~ and provide a general description of the investment plan; and

(x) for each individual fund that the Utah fund of funds is invested in, include the name of the fund, the total value of the fund, the amount of money the Utah fund of funds has invested in the fund, and the percentage of the total value of the fund held by the Utah fund of funds;

(xi) include a list of each company in the state where an investment was made from a fund that the Utah fund of funds is invested in, and provide an aggregate count of new full-time employees in the state added by all companies where investments were made by funds that the Utah fund of funds is invested in;

(xii) include an aggregate total value for all funds the Utah fund of funds is invested in, and an aggregate total amount of money invested in the state by the funds the Utah fund of funds is invested in;

~~[(iii)]~~ (xiii) describe any redemption or transfer of a certificate issued under this part[-];

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(xiv) include actual and estimated potential appropriations the Legislature will be required to provide as a result of redeemed certificates or tax credits during the following five years:

(~~fv~~xv) include an evaluation of the state's progress in accomplishing the purposes stated in Section 63M-1-1202; and

(~~vi~~xvi) be directly accessible to the public via a link from the main page of the Utah fund of fund's website.

(c) The annual report may not identify [any] a specific designated investor who has [redeemed or] transferred a certificate.

~~[(d) (i) Beginning July 1, 2006, and thereafter every two years, the board shall publish a progress report which shall evaluate the progress of the state in accomplishing the purposes stated in Section 63M-1-1202.]~~

~~[(ii) The board shall give a copy of the report to the Legislature.]~~

Section ~~{3}~~4. Section **63M-1-1214** is amended to read:

**63M-1-1214. Compensation from the Utah fund of funds to the corporation --  
Redemption reserve.**

(1) The corporation shall be compensated for its involvement in the Utah fund of funds through the payment of the management fee described in Section 63M-1-1211.

(2) ~~{(a) Any returns}~~ Before any returns may be reinvested in the Utah fund of funds:

(a) [Any] any returns shall be payed to designated investors, including the repayment by the Utah fund of funds of any outstanding loans:

(b) any returns in excess of those payable to designated investors shall be deposited in the redemption reserve and held by the corporation as a first priority reserve for the redemption of certificates~~[-]~~:

~~[(b) Any]~~ (c) any returns received by the corporation from investment of amounts held in the redemption reserve shall be added to the redemption reserve until it has reached a total of ~~{}~~\$300,000,000~~[-]~~ ~~{ \$125,000,000}~~, and ~~{}~~

~~[(c) If]~~ (d) if at the end of a calendar year the redemption reserve exceeds the ~~{}~~\$300,000,000 ~~{ \$125,000,000}~~ limitation referred to in Subsection (2) ~~[(b)]~~ (c), the corporation ~~[shall]~~ may reinvest the excess in the Utah fund of funds.

(3) Funds held by the corporation in the redemption reserve shall be invested in

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accordance with Title 51, Chapter 7, State Money Management Act.

Section ~~{4}~~5. Section **63M-1-1217** is amended to read:

### **63M-1-1217. Annual audits.**

(1) Each calendar year, an audit of the activities of the Utah fund of funds shall be made as described in this section.

(2) (a) The audit shall be conducted by:

(i) the state auditor; or

(ii) an independent auditor engaged by the state auditor.

(b) An independent auditor used under Subsection (2)(a)(ii) must have no business, contractual, or other connection to:

(i) the corporation; or

(ii) the Utah fund of funds.

(3) The corporation shall pay the costs associated with the annual audit.

(4) The annual audit report shall:

(a) be delivered to:

(i) the corporation; and

(ii) the board; [~~and~~]

(b) include a valuation of the assets owned by the Utah fund of funds as of the end of the reporting year[-];

~~(c) audit the accuracy of the information provided in the annual report described in Subsection 63M-1-1206(6); and~~

~~(d)~~ be completed on or before July 1 for the previous calendar year so that it may be included in the annual report described in Section 63M-1-1206.

Section ~~{5}~~6. Section **63M-1-1218** is amended to read:

### **63M-1-1218. Certificates and contingent tax credits.**

(1) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the board, in consultation with the State Tax Commission, shall make rules governing the form, issuance, transfer, and redemption of certificates.

(2) The board's issuance of certificates and related contingent tax credits to designated investors is subject to the following:

(a) the aggregate outstanding certificates may not exceed a total of [~~\$300,000,000~~]

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~~\$125~~;

(i) \$150,000,000 of contingent tax credits ~~[-]~~ used as collateral or a guarantee on loans for the debt-based financing of investments in the Utah fund of funds; and

(ii) \$150,000,000 used as a guarantee on equity investments in the Utah fund of funds;

(b) the board shall issue a certificate contemporaneously with an investment in the Utah fund of funds by a designated investor;

(c) the board shall issue contingent tax credits in a manner that not more than \$20,000,000 ~~[of contingent tax credits for each \$100,000,000 increment]~~ of contingent tax credits may be redeemable in [any] a fiscal year; ~~[and]~~

(d) the credits are certifiable if there are insufficient funds in the redemption reserve to make a cash redemption and the board does not exercise its other options under Subsection 63M-1-1220(3)(b)~~[-]~~;

(e) the board may not issue additional certificates as collateral or a guarantee on a loan for the debt-based financing of investments in the Utah fund of funds that is initiated after July 1, 2014, except for a loan refinanced on or after July 1, 2014, that was originated before July 1, 2014;

(f) after July 1, 2014, and on or before December 31, 2017, the board may issue certificates that represent a guarantee of no more than 50% of the principal of each equity investment in the Utah fund of funds; and

~~(f)g~~ the board may not issue ~~{additional}~~ certificates after ~~{July 1}~~ December 31, 2017.

(3) In determining the ~~[\$300,000,000 { \$125,000,000}]~~ maximum limit in Subsection maximum limits in Subsections (2)(a)(i) and (ii) and the \$20,000,000 limitation ~~[for each \$100,000,000 increment of contingent tax credits]~~ in Subsection (2)(c):

(a) the board shall use the cumulative amount of scheduled aggregate returns on certificates issued by the board to designated investors;

(b) certificates and related contingent tax credits ~~[which]~~ that have expired may not be included; and

(c) certificates and related contingent tax credits ~~[which]~~ that have been redeemed shall be included only to the extent of tax credits actually allowed.

(4) Contingent tax credits are subject to the following:

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(a) a contingent tax credit may not be redeemed except by a designated investor in accordance with the terms of a certificate from the board;

(b) a contingent tax credit may not be redeemed prior to the time the Utah fund of funds receives full payment from the designated investor for the certificate;

(c) a contingent tax credit shall be claimed for a tax year that begins during the calendar year maturity date stated on the certificate;

(d) an investor who redeems a certificate and the related contingent tax credit shall allocate the amount of the contingent tax credit to the taxpayers of the investor based on the taxpayer's pro rata share of the investor's earnings; and

(e) a contingent tax credit shall be claimed as a refundable credit.

(5) In calculating the amount of a contingent tax credit:

(a) the board shall certify a contingent tax credit only if the actual return, or payment of principal and interest for a loan initiated before July 1, 2014, including a loan refinanced on or after July 1, 2014, that was originated before July 1, 2014, to the designated investor is less than that targeted at the issuance of the certificate;

(b) the amount of the contingent tax credit for a designated investor with an equity interest may not exceed the difference between ~~{~~

~~\_\_\_\_\_ } (i) the sum of: {~~

~~\_\_\_\_\_ } (A) the initial private investment of the designated investor in the Utah fund of funds; and {~~

~~\_\_\_\_\_ } (B) the scheduled aggregate return to the designated investor at rates of return authorized by the board at the issuance of the certificate; and {~~

~~\_\_\_\_\_ } (ii) 50% of the initial private investment of the designated investor in the Utah fund of funds and the aggregate actual return received by the designated investor and any predecessor in interest of the initial equity investment and interest on the initial equity investment;~~

(c) the rates, whether fixed rates or variable rates, shall be determined by a formula stipulated in the certificate; and

(d) the amount of the contingent tax credit for a designated investor with ~~[a loan or other debt obligation from]~~ an outstanding loan to the Utah fund of funds initiated before July 1, 2014, including a loan refinanced on or after July 1, 2014, that was originated before July 1,

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2014, shall be equal to the amount of any principal, interest, or interest equivalent unpaid at the redemption of the loan or other obligation, as stipulated in the certificate.

(6) The board shall clearly indicate on the certificate:

(a) the targeted return on the invested capital, if the private investment is an equity interest;

(b) the payment schedule of principal, interest, or interest equivalent, if the private investment is a loan ~~[or other debt obligation]~~ initiated before July 1, 2014, including a loan refinanced on or after July 1, 2014, that was originated before July 1, 2014;

(c) the amount of the initial private investment;

(d) the calculation formula for determining the scheduled aggregate return on the initial equity investment, if applicable; and

(e) the calculation formula for determining the amount of the contingent tax credit that may be claimed.

(7) Once money is invested by a designated investor, ~~[the]~~ a certificate ~~{ issued before July 1, 2014}~~:

(a) is binding on the board; and

(b) may not be modified, terminated, or rescinded.

(8) Funds invested by a designated investor for a certificate shall be paid to the corporation for placement in the Utah fund of funds.

(9) The State Tax Commission may, in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, and in consultation with the board, make rules to help implement this section.

~~{ Section 6. Section 63M-1-1224 is amended to read:~~

~~63M-1-1224. Exemption from certain statutes.~~

~~[(1)] Except as otherwise provided in this part, the corporation is exempt from statutes governing state agencies[,] as provided in Section 63E-2-109.~~

~~[(2) The corporation is exempt from:]~~

~~[(a) Title 52, Chapter 4, Open and Public Meetings Act; and]~~

~~[(b) Title 63G, Chapter 2, Government Records Access and Management Act.]~~

~~[(3) The board is exempt from the requirement to report fund performance of venture firms and private equity firms set forth in Title 63G, Chapter 2, Government Records Access~~

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~~and Management Act.]~~

~~Legislative Review Note~~

~~\_\_\_\_\_ as of 12-4-13 1:48 PM~~

~~\_\_\_\_\_ Office of Legislative Research and General Counsel]~~