

UTAH VENTURE CAPITAL ENHANCEMENT

ACT AMENDMENTS

2003 SECOND SPECIAL SESSION

STATE OF UTAH

Sponsor: Peggy Wallace

LONG TITLE

General Description:

This bill modifies the Utah Venture Capital Enhancement Act.

Highlighted Provisions:

This bill:

- ▶ modifies the definition of the Utah fund of funds;
- ▶ modifies the terms of members on the Utah Capital Investment Board and the board members of the Utah Capital Investment Corporation;
- ▶ provides that a contingent tax credit may not be issued unless agreed to be treated as a loan;
- ▶ provides that the board may not issue contingent tax credits prior to July 1, 2004;
- ▶ provides that public money may not be invested in the Utah fund of funds;
- ▶ provides that any amount in the redemption reserve in excess of \$100,000,000 shall be reinvested in the Utah fund of funds;
- ▶ directs where assets of the corporation shall be distributed upon dissolution; and
- ▶ makes certain technical changes.

Monies Appropriated in this Bill:

None

Other Special Clauses:

This bill provides a severability clause.

This bill provides an immediate effective date.

Utah Code Sections Affected:

AMENDS:

- 9-2-1902, as enacted by Chapter 291, Laws of Utah 2003
 - 9-2-1903, as enacted by Chapter 291, Laws of Utah 2003
 - 9-2-1905, as enacted by Chapter 291, Laws of Utah 2003
 - 9-2-1906, as enacted by Chapter 291, Laws of Utah 2003
 - 9-2-1909, as enacted by Chapter 291, Laws of Utah 2003
 - 9-2-1912, as enacted by Chapter 291, Laws of Utah 2003
 - 9-2-1913, as enacted by Chapter 291, Laws of Utah 2003
 - 9-2-1914, as enacted by Chapter 291, Laws of Utah 2003
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Be it enacted by the Legislature of the state of Utah:

Section 1. Section **9-2-1902** is amended to read:

9-2-1902. Findings -- Purpose.

- (1) The Legislature finds that:
 - (a) fundamental changes have occurred in national and international financial markets and in the state's financial markets;
 - (b) a critical shortage of seed and venture capital resources exists in the state, and that shortage is impairing the growth of commerce in the state;
 - (c) a need exists to increase the availability of venture equity capital for emerging, expanding, and restructuring enterprises in Utah, including enterprises in the life sciences, advanced manufacturing, and information technology; ~~and~~
 - (d) increased venture equity capital investments in emerging, expanding, and restructuring enterprises in Utah will:
 - (i) create new jobs in the state; and
 - (ii) help to diversify the state's economic base~~[-]; and~~
 - (e) a well-trained work force is critical for the maintenance and development of Utah's economy.
- (2) This part is enacted to:
 - (a) mobilize private investment in a broad variety of venture capital partnerships in

diversified industries and locales;

(b) retain the private-sector culture of focusing on rate of return in the investing process;

(c) secure the services of the best managers in the venture capital industry, regardless of location;

(d) facilitate the organization of the Utah fund of funds to seek private investments and to ~~[create interest]~~ serve as a catalyst in those investments by offering state incentives for private persons to make investments in the Utah fund of funds;

(e) enhance the venture capital culture and infrastructure in the state so as to increase venture capital investment within the state and to promote venture capital investing within the state; and

(f) accomplish the purposes referred to in Subsections (2)(a) through (e) in a manner that would maximize the direct economic impact for the state ~~[while minimizing any appropriations by the state]~~.

Section 2. Section **9-2-1903** is amended to read:

9-2-1903. 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) "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.

(4) "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, and 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 9-2-1920(3)(b).

(5) "Corporation" means the Utah Capital Investment Corporation created under Section 9-2-1907.

(6) "Designated investor" means:

- (a) a person who purchases an equity interest in the Utah fund of funds; or
- (b) a transferee of a certificate or contingent tax credit.

(7) "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 commitment.

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

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

(10) "Utah fund of funds" means a [~~private, for-profit~~] limited partnership or limited liability company established under Section 9-2-1913 in which a designated investor purchases an equity interest.

Section 3. Section **9-2-1905** is amended to read:

9-2-1905. Board members -- Meetings -- Expenses.

(1) (a) The board shall consist of five members.

(b) Of the five members:

- (i) one shall be the state treasurer;
- (ii) one shall be the director; and
- (iii) three shall be appointed by the governor and confirmed by the Senate.

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

(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 the governor determines that an additional term is in the best interest of the state.

(4) Three members of the board constitute 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 state treasurer.

(5) (a) Members of the board may not receive compensation or benefits for their services, but may receive per diem and expenses incurred in the performance of the members' official duties at rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

(b) Members of the board may decline to receive per diem and expenses for their services.

(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) 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 63, Chapter 30, Utah [~~Government~~] Governmental Immunity Act.

(8) Meetings of the board, except to the extent necessary to protect confidential information with respect to investments in the Utah fund of funds, are subject to Title 52, Chapter 4, Open and Public Meetings.

Section 4. Section **9-2-1906** is amended to read:

9-2-1906. 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 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) enter into contracts;

(iv) insure against loss; and

(v) perform any other act necessary to carry out its purpose; and

(g) (i) make, amend, and revoke rules for the conduct of its affairs, consistent with this part and in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act;

(ii) all rules made by the board under Subsection (1)(g)(i) are subject to review by the

Legislative Management Committee:

(A) whenever made, modified, or revoked; and

(B) in each even-numbered year; and

(iii) Subsection (1)(g)(ii) does not preclude the Legislature's Administrative Rules Review Committee from reviewing and taking appropriate action on any rule made, amended, or revoked by the board.

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

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

~~[(i)]~~ (A) issued by the board;

~~[(ii)]~~ (B) transferred by a designated investor; and

~~[(iii)]~~ (C) redeemed by a designated investor in order to receive a contingent tax credit;

and

~~[(b)]~~ (ii) tie the contingencies for redemption of certificates to the targeted rates of return and scheduled redemptions of equity interests purchased by designated investors in the Utah fund of funds.

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

(3) (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 equity investment of the designated investor.

(4) 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 9-2-1921.

(5) (a) The board shall, in consultation with the corporation, publish an annual report of the activities conducted by the Utah fund of funds, and present the report to the governor and the Executive Appropriations Committee of the Legislature.

(b) The annual report shall:

(i) include a copy of the audit of the Utah fund of funds and a valuation of the assets of the Utah fund of funds;

(ii) review the progress of the investment fund allocation manager in implementing its investment plan; and

(iii) describe any redemption or transfer of a certificate issued under this part.

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

(d) (i) Beginning July 1, 2005, 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 9-2-1902.

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

Section 5. Section **9-2-1909** is amended to read:

9-2-1909. Board of directors.

(1) The initial board of directors of the corporation shall consist of five members.

(2) The persons elected to the initial board of directors by the appointment committee shall include persons who have an expertise, as considered appropriate by the appointment committee, in the areas of:

- (a) the selection and supervision of investment managers;
- (b) fiduciary management of investment funds; and
- (c) other areas of expertise as considered appropriate by the appointment committee.

(3) After the election of the initial board of directors, vacancies in the board of directors

of the corporation shall be filled by election by the remaining directors of the corporation.

(4) (a) Board members shall serve [~~three~~] four-year terms, except that of the five initial members:

- (i) two shall serve [~~three~~] four-year terms;
- (ii) two shall serve [~~two~~] three-year terms; and
- (iii) one shall serve a [~~one~~] two-year term.

(b) Board members shall serve until their successors are elected and qualified and may serve successive terms.

(c) A majority of the board members may remove a board member for cause.

(d) (i) The board shall select a chair by majority vote.

(ii) The chair's term is for one year.

(5) Three members of the board are a quorum for the transaction of business.

(6) Members of the board of directors:

(a) are subject to any restrictions on conflicts of interest specified in the organizational documents of the corporation; and

(b) may have no interest in any:

(i) venture capital investment fund allocation manager selected by the corporation under this part; or

(ii) investments made by the Utah fund of funds.

(7) Directors of the corporation:

(a) shall be compensated for direct expenses and mileage; and

(b) may not receive a director's fee or salary for service as directors.

Section 6. Section **9-2-1912** is amended to read:

9-2-1912. Dissolution.

(1) Upon the dissolution of the Utah fund of funds, the corporation shall be liquidated and dissolved.

(2) Upon dissolution or privatization of the corporation, any assets owned by the corporation shall be distributed to [~~the state~~] one or more Utah nonprofit tax exempt

organizations to be designated by the Legislature for the purposes listed in Section 9-2-1902 as provided in Title 63E, Chapter 1, Independent Entities Act.

Section 7. Section **9-2-1913** is amended to read:

9-2-1913. Organization of Utah fund of funds.

- (1) The corporation shall organize the Utah fund of funds.
- (2) The Utah fund of funds shall make investments in private seed and venture capital partnerships or entities in a manner and for the following purposes:
 - (a) to encourage the availability of a wide variety of venture capital in the state;
 - (b) to strengthen the economy of the state;
 - (c) to help business in the state gain access to sources of capital;
 - (d) to help build a significant, permanent source of capital available to serve the needs of businesses in the state; and
 - (e) to accomplish all these benefits in a way that minimizes the use of contingent tax credits.
- (3) The Utah fund of funds shall be organized:
 - (a) as a [~~private, for-profit,~~] limited partnership or limited liability company under Utah law having the corporation as the general partner or manager; and
 - (b) to provide for equity interests for designated investors which provide for a designated scheduled rate of return and a scheduled redemption in accordance with rules made by the board pursuant to Title 63, Chapter 46a, Utah Administrative Rulemaking Act.
- (4) Public money may not be invested in the Utah fund of funds.

Section 8. Section **9-2-1914** is amended to read:

**9-2-1914. Compensation from the Utah fund of funds to the corporation --
Redemption reserve.**

- (1) The corporation shall be compensated for its [~~investment~~] involvement in the Utah fund of funds through the payment of the management fee described in Section 9-2-1911.
- (2) (a) 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 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 \$100,000,000.

(c) If at the end of any calendar year the redemption reserve exceeds the \$100,000,000 limitation referred to in Subsection (2)(b), the excess shall be [~~deposited in the General Fund no later than April 1, of the following year~~] reinvested in the Utah fund of funds.

(3) Funds held by the corporation in the redemption reserve shall be invested in accordance with Title 51, Chapter 7, State Money Management Act.

Section 9. Severability clause.

If any provision of this bill, or the application of any provision to any person or circumstance, is held invalid, the remainder of this bill shall be given effect without the invalid provision or application.

Section 10. Effective date.

If approved by two-thirds of all the members elected to each house, this bill takes effect upon approval by the governor, or the day following the constitutional time limit of Utah Constitution Article VII, Section 8, without the governor's signature, or in the case of a veto, the date of veto override.