

UTAH VENTURE CAPITAL ENHANCEMENT

ACT AMENDMENTS

2008 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Scott K. Jenkins

House Sponsor: David Clark

Cosponsors:	Dan R. Eastman	Patricia W. Jones
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LONG TITLE

General Description:

This bill modifies provisions of the Utah Venture Capital Enhancement Act related to the ability of the Utah Capital Investment Corporation to receive loans and issue debt obligations on behalf of the Utah fund of funds and the amount of aggregate outstanding contingent tax credit certificates that can be issued by the Utah Capital Investment Board.

Highlighted Provisions:

This bill:

- ▶ modifies definitions in the Utah Venture Capitol Enhancement Act;
- ▶ authorizes the Utah Capital Investment Corporation to receive loans and issue debt obligation on behalf of the Utah fund of funds;
- ▶ increases the ceiling on the amount of aggregate outstanding contingent tax credit certificates that can be issued by the Utah Capital Investment Board from \$100,000,000 to \$300,000,000;
- ▶ increases the ceiling on the redemption reserve from \$100,000,000 to \$300,000,000;
- ▶ exempts the corporation from certain statutes governing state agencies; and
- ▶ makes certain technical changes.

Monies Appropriated in this Bill:

None

30 **Other Special Clauses:**

31 None

32 **Utah Code Sections Affected:**

33 AMENDS:

34 **63-38f-1203**, as last amended by Laws of Utah 2006, Chapter 223

35 **63-38f-1205**, as last amended by Laws of Utah 2006, Chapter 14

36 **63-38f-1206**, as last amended by Laws of Utah 2006, Chapter 52

37 **63-38f-1207**, as renumbered and amended by Laws of Utah 2005, Chapter 148

38 **63-38f-1213**, as renumbered and amended by Laws of Utah 2005, Chapter 148

39 **63-38f-1214**, as renumbered and amended by Laws of Utah 2005, Chapter 148

40 **63-38f-1216**, as renumbered and amended by Laws of Utah 2005, Chapter 148

41 **63-38f-1218**, as last amended by Laws of Utah 2005, Chapter 14 and renumbered and
42 amended by Laws of Utah 2005, Chapter 148

43 **63-38f-1224**, as last amended by Laws of Utah 2006, Chapter 14



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

46 Section 1. Section **63-38f-1203** is amended to read:

47 **63-38f-1203. Definitions.**

48 As used in this part:

49 (1) "Board" means the Utah Capital Investment Board.

50 (2) "Certificate" means a contract between the board and a designated investor under
51 which a contingent tax credit is available and issued to the designated investor.

52 (3) (a) Except as provided in Subsection (3)(b), "claimant" means a resident or
53 nonresident person.

54 (b) "Claimant" does not include an estate or trust.

55 (4) "Commitment" means a written commitment by a designated purchaser to purchase
56 from the board certificates presented to the board for redemption by a designated investor.

57 Each commitment shall state the dollar amount of contingent tax credits that the designated

58 purchaser has committed to purchase from the board.

59 (5) "Contingent tax credit" means a contingent tax credit issued under this part that is
60 available against tax liabilities imposed by Title 59, Chapter 7, Corporate Franchise and Income
61 Taxes, or Title 59, Chapter 10, Individual Income Tax Act, if there are insufficient funds in the
62 redemption reserve and the board has not exercised other options for redemption under
63 Subsection 63-38f-1220(3)(b).

64 (6) "Corporation" means the Utah Capital Investment Corporation created under
65 Section 63-38f-1207.

66 (7) "Designated investor" means:

67 (a) a person who [~~purchases an equity interest in the Utah fund of funds~~] makes a
68 private investment; or

69 (b) a transferee of a certificate or contingent tax credit.

70 (8) "Designated purchaser" means:

71 (a) a person who enters into a written undertaking with the board to purchase a
72 commitment; or

73 (b) a transferee who assumes the obligations to make the purchase described in the
74 commitment.

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

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

78 (11) "Private investment" means:

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

80 (b) a loan to or other debt obligation from the Utah fund of funds.

81 [~~(11)~~] (12) "Redemption reserve" means the reserve established by the corporation to
82 facilitate the cash redemption of certificates.

83 [~~(12)~~] (13) "Taxpayer" means a taxpayer:

84 (a) of an investor; and

85 (b) if that taxpayer is a:

- 86 (i) claimant;
- 87 (ii) estate; or
- 88 (iii) trust.

89 [~~(13)~~] (14) "Trust" means a nonresident trust or a resident trust.

90 [~~(14)~~] (15) "Utah fund of funds" means a limited partnership or limited liability
91 company established under Section 63-38f-1213 in which a designated investor purchases an
92 equity interest.

93 Section 2. Section **63-38f-1205** is amended to read:

94 **63-38f-1205. Board members -- Meetings -- Expenses.**

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

96 (b) Of the five members:

97 (i) one shall be the state treasurer;

98 (ii) one shall be the director or the director's designee; and

99 (iii) three shall be appointed by the governor and confirmed by the Senate.

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

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

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

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

107 (3) Appointed members of the board may not serve more than two full consecutive
108 terms except where the governor determines that an additional term is in the best interest of the
109 state.

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

114 (5) (a) Members of the board may not receive compensation or benefits for their
115 services, but may receive per diem and expenses incurred in the performance of the members'
116 official duties at rates established by the Division of Finance under Sections 63A-3-106 and
117 63A-3-107.

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

120 (6) Members of the board shall be selected on the basis of demonstrated expertise and
121 competence in:

122 (a) the supervision of investment managers;

123 (b) the fiduciary management of investment funds; or

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

125 (7) The board and its members are considered to be a governmental entity with all of
126 the rights, privileges, and immunities of a governmental entity of the state, including all of the
127 rights and benefits conferred under Title 63, Chapter 30d, Governmental Immunity Act of Utah.

128 (8) Meetings of the board, except to the extent necessary to protect [~~confidential~~] the
129 information [with respect to investments in the Utah fund of funds] identified in Subsection
130 63-38f-1224(3), are subject to Title 52, Chapter 4, Open and Public Meetings Act.

131 Section 3. Section **63-38f-1206** is amended to read:

132 **63-38f-1206. Board duties and powers.**

133 (1) The board shall:

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

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

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

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

- 142 (i) criteria and procedures for evaluating the value of investments made by the Utah
143 fund of funds; and
- 144 (ii) the returns from the Utah fund of funds;
- 145 (c) establish criteria and procedures for registering and redeeming contingent tax credits
146 by designated investors holding certificates issued by the board;
- 147 (d) establish a target rate of return or range of returns on venture capital investments of
148 the Utah fund of funds;
- 149 (e) establish criteria and procedures governing commitments obtained by the board
150 from designated purchasers including:
- 151 (i) entering into commitments with designated purchasers; and
- 152 (ii) drawing on commitments to redeem certificates from designated investors;
- 153 (f) have power to:
- 154 (i) expend funds;
- 155 (ii) invest funds;
- 156 (iii) issue debt and borrow funds;
- 157 [~~(iii)~~] (iv) enter into contracts;
- 158 [~~(iv)~~] (v) insure against loss; and
- 159 [~~(v)~~] (vi) perform any other act necessary to carry out its purpose; and
- 160 (g) make, amend, and repeal rules for the conduct of its affairs, consistent with this part
161 and in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.
- 162 (2) (a) All rules made by the board under Subsection (1)(g) are subject to review by the
163 Legislative Management Committee:
- 164 (i) whenever made, modified, or repealed; and
- 165 (ii) in each even-numbered year.
- 166 (b) Subsection (2)(a) does not preclude the legislative Administrative Rules Review
167 Committee from reviewing and taking appropriate action on any rule made, amended, or
168 repealed by the board.
- 169 (3) (a) The criteria and procedures established by the board for the allocation and

170 issuance of contingent tax credits shall:

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

173 (A) issued by the board;

174 (B) transferred by a designated investor; and

175 (C) redeemed by a designated investor in order to receive a contingent tax credit; and

176 (ii) tie the contingencies for redemption of certificates to:

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

179 (B) the scheduled principal and interest payments payable to designated investors that
180 have made loans or other debt obligations to the Utah fund of funds.

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

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

184 (b) The fee shall:

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

186 (ii) not exceed .5% of the [~~equity~~] private investment of the designated investor.

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

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

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

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

193 (ii) by making demand on designated purchasers consistent with the requirements of
194 Section 63-38f-1221.

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

- 198 (b) The annual report shall:
- 199 (i) include a copy of the audit of the Utah fund of funds and a valuation of the assets of
200 the Utah fund of funds;
- 201 (ii) review the progress of the investment fund allocation manager in implementing its
202 investment plan; and
- 203 (iii) describe any redemption or transfer of a certificate issued under this part.
- 204 (c) The annual report may not identify any specific designated investor who has
205 redeemed or transferred a certificate.
- 206 (d) (i) Beginning July 1, 2006, and thereafter every two years, the board shall publish a
207 progress report which shall evaluate the progress of the state in accomplishing the purposes
208 stated in Section 63-38f-1202.
- 209 (ii) The board shall give a copy of the report to the Legislature.
- 210 Section 4. Section **63-38f-1207** is amended to read:
- 211 **63-38f-1207. Utah Capital Investment Corporation -- Powers and purposes.**
- 212 (1) (a) There is created an independent quasi-public nonprofit corporation known as the
213 Utah Capital Investment Corporation.
- 214 (b) The corporation:
- 215 (i) may exercise all powers conferred on independent corporations under Section
216 63E-2-106;
- 217 (ii) is subject to the prohibited participation provisions of Section 63E-2-107; and
- 218 (iii) is subject to the other provisions of Title 63E, Chapter 2, Independent
219 Corporations Act, except as otherwise provided in this part.
- 220 (c) The corporation shall file with the Division of Corporations and Commercial Code:
- 221 (i) articles of incorporation; and
- 222 (ii) any amendment to its articles of incorporation.
- 223 (d) In addition to the articles of incorporation, the corporation may adopt bylaws and
224 operational policies that are consistent with this chapter.
- 225 (e) Except as otherwise provided in this part, this part does not exempt the corporation

226 from the requirements under state law which apply to other corporations organized under Title
227 63E, Chapter 2, Independent Corporations Act.

228 (2) The purposes of the corporation are to:

229 (a) organize the Utah fund of funds;

230 (b) select a venture capital investment fund allocation manager to make venture capital
231 fund investments by the Utah fund of funds;

232 (c) negotiate the terms of a contract with the venture capital investment fund allocation
233 manager;

234 (d) execute the contract with the selected venture capital investment fund manager on
235 behalf of the Utah fund of funds;

236 (e) receive funds paid by designated investors for the issuance of certificates by the
237 board for private investment in the Utah fund of funds;

238 (f) receive investment returns from the Utah fund of funds; and

239 (g) establish the redemption reserve to be used by the corporation to redeem
240 certificates.

241 (3) The corporation may not:

242 (a) exercise governmental functions;

243 (b) have members;

244 (c) pledge the credit or taxing power of the state or any political subdivision of the
245 state; or

246 (d) make its debts payable out of any moneys except those of the corporation.

247 (4) The obligations of the corporation are not obligations of the state or any political
248 subdivision of the state within the meaning of any constitutional or statutory debt limitations,
249 but are obligations of the corporation payable solely and only from the corporation's funds.

250 (5) The corporation may:

251 (a) engage consultants and legal counsel;

252 (b) expend funds;

253 (c) invest funds;

- 254 (d) issue debt and borrow funds;
- 255 [~~(d)~~] (e) enter into contracts;
- 256 [~~(e)~~] (f) insure against loss;
- 257 [~~(f)~~] (g) hire employees; and
- 258 [~~(g)~~] (h) perform any other act necessary to carry out its purposes.

259 Section 5. Section **63-38f-1213** is amended to read:

260 **63-38f-1213. Organization of Utah fund of funds.**

- 261 (1) The corporation shall organize the Utah fund of funds.
- 262 (2) The Utah fund of funds shall make investments in private seed and venture capital
- 263 partnerships or entities in a manner and for the following purposes:
- 264 (a) to encourage the availability of a wide variety of venture capital in the state;
- 265 (b) to strengthen the economy of the state;
- 266 (c) to help business in the state gain access to sources of capital;
- 267 (d) to help build a significant, permanent source of capital available to serve the needs
- 268 of businesses in the state; and

269 (e) to accomplish all these benefits in a way that minimizes the use of contingent tax
270 credits.

271 (3) The Utah fund of funds shall be organized:

- 272 (a) as a limited partnership or limited liability company under Utah law having the
- 273 corporation as the general partner or manager; [~~and~~]
- 274 (b) to provide for equity interests for designated investors which provide for a
- 275 designated scheduled rate of return and a scheduled redemption in accordance with rules made
- 276 by the board pursuant to Title 63, Chapter 46a, Utah Administrative Rulemaking Act[-]; and

277 (c) to provide for loans by or the issuance of debt obligations to designated investors
 278 which provide for designated payments of principal, interest, or interest equivalent in
 279 accordance with rules made by the board pursuant to Title 63, Chapter 46a, Utah
 280 Administrative Rulemaking Act.

281 (4) Public money may not be invested in the Utah fund of funds.

282 Section 6. Section **63-38f-1214** is amended to read:

283 **63-38f-1214. Compensation from the Utah fund of funds to the corporation --**
284 **Redemption reserve.**

285 (1) The corporation shall be compensated for its involvement in the Utah fund of funds
286 through the payment of the management fee described in Section 63-38f-1211.

287 (2) (a) Any returns in excess of those payable to designated investors shall be deposited
288 in the redemption reserve and held by the corporation as a first priority reserve for the
289 redemption of certificates.

290 (b) Any returns received by the corporation from investment of amounts held in the
291 redemption reserve shall be added to the redemption reserve until it has reached a total of
292 ~~[\$100,000,000]~~ \$300,000,000.

293 (c) If at the end of ~~[any]~~ a calendar year the redemption reserve exceeds the
294 ~~[\$100,000,000]~~ \$300,000,000 limitation referred to in Subsection (2)(b), the corporation shall
295 reinvest the excess ~~[shall be reinvested]~~ in the Utah fund of funds.

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

298 Section 7. Section **63-38f-1216** is amended to read:

299 **63-38f-1216. Powers of Utah fund of funds.**

300 (1) The Utah fund of funds may:

301 (a) engage consultants and legal counsel;

302 (b) expend funds;

303 (c) invest funds;

304 (d) issue debt and borrow funds;

305 ~~[(d)]~~ (e) enter into contracts;

306 ~~[(e)]~~ (f) insure against loss;

307 ~~[(f)]~~ (g) hire employees;

308 ~~[(g)]~~ (h) issue equity interests to designated investors that have purchased equity
309 interest certificates from the board; and

310 ~~[(h)]~~ (i) perform any other act necessary to carry out its purposes.

311 (2) (a) The Utah fund of funds shall engage a venture capital investment fund allocation
312 manager.

313 (b) The compensation paid to the fund manager shall be in addition to the management
314 fee paid to the corporation under Section 63-38f-1211.

315 (3) The Utah fund of funds may:

316 ~~[(a) issue debt and borrow the funds needed to accomplish its goals;]~~

317 ~~[(b) not secure its debt with contingent tax credits issued by the board;]~~

318 ~~[(c)]~~ (a) open and manage bank and short-term investment accounts as considered
319 necessary by the venture capital investment fund allocation manager; and

320 ~~[(d)]~~ (b) expend moneys to secure investment ratings for investments by designated
321 investors in the Utah fund of funds.

322 Section 8. Section **63-38f-1218** is amended to read:

323 **63-38f-1218. Certificates and contingent tax credits.**

324 (1) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the
325 board, in consultation with the State Tax Commission, shall make rules governing the form,
326 issuance, transfer, and redemption of certificates.

327 (2) The board's issuance of certificates and related contingent tax credits to designated
328 investors ~~[shall be]~~ is subject to the following:

329 (a) the aggregate outstanding certificates may not exceed a total of ~~[\$100,000,000]~~
330 \$300,000,000 of contingent tax credits;

331 (b) the ~~[certificates shall be issued]~~ board shall issue a certificate contemporaneously
332 with an investment in the Utah fund of funds by a designated investor;

333 (c) the board shall issue contingent tax credits ~~[shall be issued]~~ in a manner that not
334 more than \$20,000,000 of contingent tax credits may be initially redeemable in any fiscal year;
335 and

336 (d) the credits are certifiable if there are insufficient funds in the redemption reserve to
337 make a cash redemption and the board does not exercise its other options under Subsection

338 63-38f-1220(3)(b).

339 (3) In determining the [~~\$100,000,000~~] \$300,000,000 maximum limit in Subsection
340 (2)(a) and the \$20,000,000 limitation in Subsection (2)(c):

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

343 (b) certificates and related contingent tax credits which have expired may not be
344 included; and

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

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

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

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

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

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

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

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

359 (a) a contingent tax credit shall be certified by the board only if the actual return or
360 payment of principal and interest to the designated investor is less than [~~the return~~] that [~~was~~]
361 targeted at the issuance of the certificate;

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

364 (i) the sum of:

365 (A) the initial [~~equity~~] private investment of the designated investor in the Utah fund of

366 funds; and

367 (B) the scheduled aggregate return to the designated investor at rates of return
368 authorized by the board at the issuance of the certificate; and

369 (ii) the aggregate actual return received by the designated investor and any predecessor
370 in interest of the initial equity investment and interest on the initial equity investment; ~~and~~

371 (c) the rates, whether fixed rates or variable rates, shall be determined by a formula
372 stipulated in the certificate~~[-];~~ and

373 (d) the amount of the contingent tax credit for a designated investor with a loan or
374 other debt obligation from the Utah fund of funds shall be equal to the amount of any principal,
375 interest, or interest equivalent unpaid at the redemption of the loan or other obligation, as
376 stipulated in the certificate.

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

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

380 (b) the payment schedule of principal, interest, or interest equivalent, if the private
381 investment is a loan or other debt obligation;

382 ~~(b)~~ (c) the amount of the initial ~~[equity]~~ private investment;

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

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

387 (7) Once moneys are invested by a designated investor, the certificate:

388 (a) ~~[shall be]~~ is binding on the board; and

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

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

392 (9) The State Tax Commission may, in accordance with Title 63, Chapter 46a, Utah
393 Administrative Rulemaking Act, and in consultation with the board, make rules to help

394 implement this section.

395 Section 9. Section **63-38f-1224** is amended to read:

396 **63-38f-1224. Exemption from certain statutes.**

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

399 (2) The corporation [~~shall be subject to~~] is exempt from:

400 (a) Title 52, Chapter 4, Open and Public Meetings Act; and

401 (b) [~~except as provided in Subsection (3),~~] Title 63, Chapter 2, Government Records
402 Access and Management Act.

403 (3) The [~~corporation and the~~] board [~~are~~] is exempt from the requirement to report fund
404 performance of venture firms and private equity firms set forth in Title 63, Chapter 2,
405 Government Records Access and Management Act.