

1 **REAL ESTATE TRANSACTIONS AND**
2 **SECURITIES**

3 2005 GENERAL SESSION

4 STATE OF UTAH

5 **Sponsor: L. Alma Mansell**

7 **LONG TITLE**

8 **General Description:**

9 This bill modifies the Utah Uniform Securities Act and Real Estate provisions to
10 address certain real estate transactions.

11 **Highlighted Provisions:**

12 This bill:

- 13 ▶ exempts certain real estate transactions from the definition of securities;
- 14 ▶ provides a process for treating real estate transactions as security including
15 disclosures;
- 16 ▶ exempts real estate brokers or agents from the definition of agent, broker-dealer,
17 investment advisor, or investor adviser representative when the real estate broker or
18 agent receives compensation for offer or sale, referral, or other services;
- 19 ▶ defines terms;
- 20 ▶ directs the Division of Real Estate to make rules regarding required disclosures in
21 the offer or sale of an undivided fractionalized long-term estate;
- 22 ▶ addresses investigatory powers of the Division of Real Estate;
- 23 ▶ addresses remedies and actions for violations; and
- 24 ▶ makes technical changes.

25 **Monies Appropriated in this Bill:**

26 None

27 **Other Special Clauses:**



28 None

29 **Utah Code Sections Affected:**

30 AMENDS:

31 **61-1-13**, as last amended by Chapter 81, Laws of Utah 2003

32 **61-2-2**, as last amended by Chapter 264, Laws of Utah 2003

33 **61-2-5.5**, as last amended by Chapters 102 and 243, Laws of Utah 1996

34 **61-2-11**, as last amended by Chapter 351, Laws of Utah 1997

35 **61-2-21**, as last amended by Chapter 173, Laws of Utah 1999

36 ENACTS:

37 **61-2-26**, Utah Code Annotated 1953



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

40 Section 1. Section **61-1-13** is amended to read:

41 **61-1-13. Definitions.**

42 (1) As used in this chapter:

43 ~~[(1)]~~ (a) "Affiliate" means a person that, directly or indirectly, through one or more
44 intermediaries, controls or is controlled by, or is under common control with a person
45 specified.

46 ~~[(2)]~~ (b) (i) "Agent" means any individual other than a broker-dealer who represents a
47 broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities.

48 (ii) "Agent" does not include an individual who represents:

49 ~~[(a)]~~ (A) an issuer, who receives no commission or other remuneration, directly or
50 indirectly, for effecting or attempting to effect purchases or sales of securities in this state, and
51 who:

52 ~~[(i)]~~ (I) effects transactions in securities exempted by Subsection 61-1-14(1)(a), (b),
53 (c), (i), or (j);

54 ~~[(ii)]~~ (II) effects transactions exempted by Subsection 61-1-14(2);

55 ~~[(iii)]~~ (III) effects transactions in a covered security as described in Sections 18(b)(3)
56 and 18(b)(4)(D) of the Securities Act of 1933; or

57 ~~[(iv)]~~ (IV) effects transactions with existing employees, partners, officers, or directors
58 of the issuer; or

59 ~~(b)~~ (B) a broker-dealer in effecting transactions in this state limited to those
60 transactions described in Section 15(h)(2) of the Securities Exchange Act of 1934.

61 ~~(iii)~~ (iii) A partner, officer, or director of a broker-dealer or issuer, or a person occupying a
62 similar status or performing similar functions, is an agent only if he otherwise comes within
63 this definition.

64 ~~(iv)~~ (iv) "Agent" does not include a person described in Subsection (4).

65 ~~(3)~~ (c) (i) "Broker-dealer" means any person engaged in the business of effecting
66 transactions in securities for the account of others or for ~~his~~ the person's own account.

67 ~~(ii)~~ (ii) "Broker-dealer" does not include:

68 ~~(a)~~ (A) an agent;

69 ~~(b)~~ (B) an issuer;

70 ~~(c)~~ (C) a bank, savings institution, or trust company;

71 ~~(d)~~ (D) a person who has no place of business in this state if:

72 ~~(i)~~ (I) the person effects transactions in this state exclusively with or through:

73 ~~(A)~~ (Aa) the issuers of the securities involved in the transactions;

74 ~~(B)~~ (Bb) other broker-dealers; or

75 ~~(C)~~ (Cc) banks, savings institutions, trust companies, insurance companies,

76 investment companies as defined in the Investment Company Act of 1940, pension or

77 profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for

78 themselves or as trustees; or

79 ~~(ii)~~ (II) during any period of 12 consecutive months the person does not direct more

80 than 15 offers to sell or buy into this state in any manner to persons other than those specified

81 in Subsection ~~(3)(d)(i)~~ (1)(c)(ii)(D)(I), whether or not the offeror or any of the offerees is then

82 present in this state;

83 ~~(e)~~ (E) a general partner who organizes and effects transactions in securities of three

84 or fewer limited partnerships, of which the person is the general partner, in any period of 12

85 consecutive months;

86 ~~(f)~~ (F) a person whose participation in transactions in securities is confined to those

87 transactions made by or through a broker-dealer licensed in this state;

88 ~~(g)~~ (G) a person who is a real estate broker licensed in this state and who effects

89 transactions in a bond or other evidence of indebtedness secured by a real or chattel mortgage

90 or deed of trust, or by an agreement for the sale of real estate or chattels, if the entire mortgage,
91 deed or trust, or agreement, together with all the bonds or other evidences of indebtedness
92 secured thereby, is offered and sold as a unit;

93 ~~[(h)]~~ (H) a person effecting transactions in commodity contracts or commodity options;

94 (I) a person described in Subsection (4); or

95 ~~[(i)]~~ (J) other persons as the division, by rule or order, may designate, consistent with
96 the public interest and protection of investors, as not within the intent of this Subsection ~~[(3)]~~
97 (1)(c).

98 ~~[(4)]~~ (d) "Buy" or "purchase" means every contract for purchase of, contract to buy, or
99 acquisition of a security or interest in a security for value.

100 ~~[(5)]~~ (e) "Commodity" means, except as otherwise specified by the division by rule:

101 ~~[(a)]~~ (i) any agricultural, grain, or livestock product or byproduct, except real property
102 or any timber, agricultural, or livestock product grown or raised on real property and offered or
103 sold by the owner or lessee of the real property;

104 ~~[(b)]~~ (ii) any metal or mineral, including a precious metal, except a numismatic coin
105 whose fair market value is at least 15% greater than the value of the metal it contains;

106 ~~[(c)]~~ (iii) any gem or gemstone, whether characterized as precious, semi-precious, or
107 otherwise;

108 ~~[(d)]~~ (iv) any fuel, whether liquid, gaseous, or otherwise;

109 ~~[(e)]~~ (v) any foreign currency; and

110 ~~[(f)]~~ (vi) all other goods, articles, products, or items of any kind, except any work of art
111 offered or sold by art dealers, at public auction or offered or sold through a private sale by the
112 owner of the work.

113 ~~[(6)]~~ (f) (i) "Commodity contract" means any account, agreement, or contract for the
114 purchase or sale, primarily for speculation or investment purposes and not for use or
115 consumption by the offeree or purchaser, of one or more commodities, whether for immediate
116 or subsequent delivery or whether delivery is intended by the parties, and whether characterized
117 as a cash contract, deferred shipment or deferred delivery contract, forward contract, futures
118 contract, installment or margin contract, leverage contract, or otherwise.

119 ~~[(a)]~~ (ii) Any commodity contract offered or sold shall, in the absence of evidence to
120 the contrary, be presumed to be offered or sold for speculation or investment purposes.

121 ~~[(b)-(i)]~~ (iii) (A) A commodity contract shall not include any contract or agreement
122 which requires, and under which the purchaser receives, within 28 calendar days from the
123 payment in good funds any portion of the purchase price, physical delivery of the total amount
124 of each commodity to be purchased under the contract or agreement.

125 ~~[(i)-(b)]~~ (B) The purchaser is not considered to have received physical delivery of the total
126 amount of each commodity to be purchased under the contract or agreement when the
127 commodity or commodities are held as collateral for a loan or are subject to a lien of any
128 person when the loan or lien arises in connection with the purchase of each commodity or
129 commodities.

130 ~~[(7)-(a)]~~ (g) (i) "Commodity option" means any account, agreement, or contract giving
131 a party to the option the right but not the obligation to purchase or sell one or more
132 commodities or one or more commodity contracts, or both whether characterized as an option,
133 privilege, indemnity, bid, offer, put, call, advance guaranty, decline guaranty, or otherwise.

134 ~~[(b)-(f)]~~ (ii) "Commodity option" does not include an option traded on a national
135 securities exchange registered with the United States Securities and Exchange Commission or
136 on a board of trade designated as a contract market by the Commodity Futures Trading
137 Commission.

138 ~~[(8)]~~ (h) "Director" means the director of the Division of Securities charged with the
139 administration and enforcement of this chapter.

140 ~~[(9)]~~ (i) "Division" means the Division of Securities established by Section 61-1-18.

141 ~~[(10)]~~ (j) "Executive director" means the executive director of the Department of
142 Commerce.

143 ~~[(11)]~~ (k) "Federal covered adviser" means a person who:

144 (i) is registered under Section 203 of the Investment Advisers Act of 1940; or

145 (ii) is excluded from the definition of "investment adviser" under Section 202(a)(11) of
146 the Investment Advisers Act of 1940.

147 ~~[(12)]~~ (l) "Federal covered security" means any security that is a covered security under
148 Section 18(b) of the Securities Act of 1933 or rules or regulations promulgated ~~[thereunder]~~
149 under Section 18(b) of the Securities Act of 1933.

150 ~~[(13)]~~ (m) "Fraud," "deceit," and "defraud" are not limited to their common-law
151 meanings.

152 ~~[(14)]~~ (n) "Guaranteed" means guaranteed as to payment of principal or interest as to
153 debt securities, or dividends as to equity securities.

154 ~~[(15)(a)]~~ (o)(i) "Investment adviser" means any person who, for compensation,
155 engages in the business of advising others, either directly or through publications or writings,
156 as to the value of securities or as to the advisability of investing in, purchasing, or selling
157 securities, or who, for compensation and as a part of a regular business, issues or promulgates
158 analyses or reports concerning securities.

159 ~~[(b)]~~ (ii) "Investment adviser" also includes financial planners and other persons who,
160 as an integral component of other financially related services, provide the ~~[foregoing]~~
161 investment advisory services described in Subsection (1)(o)(i) to others for compensation and
162 as part of a business or who hold themselves out as providing the ~~[foregoing]~~ investment
163 advisory services described in Subsection (1)(o)(i) to others for compensation.

164 ~~[(c)]~~ (iii) "Investment adviser" does not include:

165 ~~[(i)]~~ (A) an investment adviser representative;

166 ~~[(ii)]~~ (B) a bank, savings institution, or trust company;

167 ~~[(iii)]~~ (C) a lawyer, accountant, engineer, or teacher whose performance of these
168 services is solely incidental to the practice of his profession;

169 ~~[(iv)]~~ (D) a broker-dealer or its agent whose performance of these services is solely
170 incidental to the conduct of its business as a broker-dealer and who receives no special
171 compensation for them;

172 ~~[(v)]~~ (E) a publisher of any bona fide newspaper, news column, news letter, news
173 magazine, or business or financial publication or service, of general, regular, and paid
174 circulation, whether communicated in hard copy form, or by electronic means, or otherwise,
175 that does not consist of the rendering of advice on the basis of the specific investment situation
176 of each client;

177 ~~[(vi)]~~ (F) any person who is a federal covered adviser;

178 (G) a person described in Subsection (4); or

179 ~~[(vii)]~~ (H) such other persons not within the intent of this Subsection ~~[(15)]~~ (1)(o) as
180 the division may by rule or order designate.

181 ~~[(16)]~~ (p)(i) "Investment adviser representative" means any partner, officer, director
182 of, or a person occupying a similar status or performing similar functions, or other individual,

183 except clerical or ministerial personnel, who:

184 ~~[(a)(i)]~~ (A) (I) is employed by or associated with an investment adviser who is licensed
185 or required to be licensed under this chapter; or

186 ~~[(ii)]~~ (II) has a place of business located in this state and is employed by or associated
187 with a federal covered adviser; and

188 ~~[(b)]~~ (B) does any of the following:

189 ~~[(i)]~~ (I) makes any recommendations or otherwise renders advice regarding securities;

190 ~~[(ii)]~~ (II) manages accounts or portfolios of clients;

191 ~~[(iii)]~~ (III) determines which recommendation or advice regarding securities should be
192 given;

193 ~~[(iv)]~~ (IV) solicits, offers, or negotiates for the sale of or sells investment advisory
194 services; or

195 ~~[(v)]~~ (V) supervises employees who perform any of the ~~[foregoing]~~ acts described in
196 this Subsection (1)(p)(i)(B).

197 (ii) "Investment advisor representative" does not include a person described in
198 Subsection (4).

199 ~~[(17)(a)]~~ (q) (i) "Issuer" means any person who issues or proposes to issue any security
200 or has outstanding a security that it has issued.

201 ~~[(b)]~~ (ii) With respect to a preorganization certificate or subscription, "issuer" means
202 the promoter or the promoters of the person to be organized.

203 ~~[(c) With respect to:]~~

204 ~~[(i) interests in trusts, including but not limited to collateral trust certificates, voting~~
205 ~~trust certificates, and certificates of deposit for securities; or]~~

206 ~~[(ii) shares in an investment company without a board of directors, "issuer"]~~

207 (iii) "Issuer" means the person or persons performing the acts and assuming duties of a
208 depositor or manager under the provisions of the trust or other agreement or instrument under
209 which the security is issued[-] with respect to:

210 (A) interests in trusts, including collateral trust certificates, voting trust certificates, and
211 certificates of deposit for securities; or

212 (B) shares in an investment company without a board of directors.

213 ~~[(d)]~~ (iv) With respect to an equipment trust certificate, a conditional sales contract, or

214 similar securities serving the same purpose, "issuer" means the person by whom the equipment
215 or property is to be used.

216 ~~[(e)]~~ (v) With respect to interests in partnerships, general or limited, "issuer" means the
217 partnership itself and not the general partner or partners.

218 ~~[(f)]~~ (vi) With respect to certificates of interest or participation in oil, gas, or mining
219 titles or leases or in payment out of production under the titles or leases, "issuer" means the
220 owner of the title or lease or right of production, whether whole or fractional, who creates
221 fractional interests therein for the purpose of sale.

222 (r) "Master lease" means the main lease that governs leases or subleases that follow the
223 main lease.

224 ~~[(18)]~~ (s) "Nonissuer" means not directly or indirectly for the benefit of the issuer.

225 ~~[(19)]~~ (t) "Person" means an individual, a corporation, a partnership, a limited liability
226 company, an association, a joint-stock company, a joint venture, a trust where the interests of
227 the beneficiaries are evidenced by a security, an unincorporated organization, a government, or
228 a political subdivision of a government.

229 ~~[(20)]~~ (u) "Precious metal" means the following, whether in coin, bullion, or other
230 form:

231 ~~[(a)]~~ (i) silver;

232 ~~[(b)]~~ (ii) gold;

233 ~~[(c)]~~ (iii) platinum;

234 ~~[(d)]~~ (iv) palladium;

235 ~~[(e)]~~ (v) copper; and

236 ~~[(f)]~~ (vi) such other substances as the division may specify by rule.

237 ~~[(21)]~~ (v) "Promoter" means any person who, acting alone or in concert with one or
238 more persons, takes initiative in founding or organizing the business or enterprise of a person.

239 ~~[(22)(a)]~~ (w)(i) "Sale" or "sell" includes every contract for sale of, contract to sell, or
240 disposition of, a security or interest in a security for value.

241 ~~[(b)]~~ (ii) "Offer" or "offer to sell" includes every attempt or offer to dispose of, or
242 solicitation of an offer to buy, a security or interest in a security for value.

243 ~~[(c)]~~ (iii) The following are examples of the definitions in ~~[Subsections (22)(a) and (b)]~~
244 Subsection (1)(w)(i) or (ii):

245 [(i)] (A) any security given or delivered with or as a bonus on account of any purchase
246 of a security or any other thing, is part of the subject of the purchase, and has been offered and
247 sold for value;

248 [(ii)] (B) a purported gift of assessable stock is an offer or sale as is each assessment
249 levied on the stock;

250 [(iii)] (C) an offer or sale of a security that is convertible into, or entitles its holder to
251 acquire or subscribe to another security of the same or another issuer is an offer or sale of that
252 security, and also an offer of the other security, whether the right to convert or acquire is
253 exercisable immediately or in the future;

254 [(iv)] (D) any conversion or exchange of one security for another shall constitute an
255 offer or sale of the security received in a conversion or exchange, and the offer to buy or the
256 purchase of the security converted or exchanged;

257 [(v)] (E) securities distributed as a dividend wherein the person receiving the dividend
258 surrenders the right, or the alternative right, to receive a cash or property dividend is an offer or
259 sale;

260 [(vi)] (F) a dividend of a security of another issuer is an offer or sale; or

261 [(vii)] (G) the issuance of a security under a merger, consolidation, reorganization,
262 recapitalization, reclassification, or acquisition of assets shall constitute the offer or sale of the
263 security issued as well as the offer to buy or the purchase of any security surrendered in
264 connection therewith, unless the sole purpose of the transaction is to change the issuer's
265 domicile.

266 [(d)] (iv) The terms defined in Subsections [~~(22)(a) and (b)~~] (1)(w)(i) and (ii) do not
267 include:

268 [(i)] (A) a good faith gift;

269 [(ii)] (B) a transfer by death;

270 [(iii)] (C) a transfer by termination of a trust or of a beneficial interest in a trust;

271 [(iv)] (D) a security dividend not within Subsection [~~(22)(c)(v) or (vi)~~] (1)(w)(iii)(E) or
272 (F);

273 [(v)] (E) a securities split or reverse split; or

274 [(vi)] (F) any act incident to a judicially approved reorganization in which a security is
275 issued in exchange for one or more outstanding securities, claims, or property interests, or

276 partly in such exchange and partly for cash.

277 ~~[(23)]~~ (x) "Securities Act of 1933," "Securities Exchange Act of 1934," "Public Utility
278 Holding Company Act of 1935," and "Investment Company Act of 1940" mean the federal
279 statutes of those names as amended before or after the effective date of this chapter.

280 ~~[(24)-(a)]~~ (y) (i) "Security" means any:

281 ~~[(i)]~~ (A) note;

282 ~~[(ii)]~~ (B) stock;

283 ~~[(iii)]~~ (C) treasury stock;

284 ~~[(iv)]~~ (D) bond;

285 ~~[(v)]~~ (E) debenture;

286 ~~[(vi)]~~ (F) evidence of indebtedness;

287 ~~[(vii)]~~ (G) certificate of interest or participation in any profit-sharing agreement;

288 ~~[(viii)]~~ (H) collateral-trust certificate;

289 ~~[(ix)]~~ (I) preorganization certificate or subscription;

290 ~~[(x)]~~ (J) transferable share;

291 ~~[(xi)]~~ (K) investment contract;

292 ~~[(xii)]~~ (L) burial certificate or burial contract;

293 ~~[(xiii)]~~ (M) voting-trust certificate;

294 ~~[(xiv)]~~ (N) certificate of deposit for a security;

295 ~~[(xv)]~~ (O) certificate of interest or participation in an oil, gas, or mining title or lease or
296 in payments out of production under such a title or lease;

297 ~~[(xvi)]~~ (P) commodity contract or commodity option;

298 ~~[(xvii)]~~ (Q) interest in a limited liability company;

299 ~~[(xviii)]~~ (R) viatical settlement interest; or

300 ~~[(xix)]~~ (S) in general, any interest or instrument commonly known as a "security," or
301 any certificate of interest or participation in, temporary or interim certificate for, receipt for,
302 guarantee of, or warrant or right to subscribe to or purchase any of the foregoing.

303 ~~[(b)]~~ (ii) "Security" does not include any:

304 ~~[(i)]~~ (A) insurance or endowment policy or annuity contract under which an insurance
305 company promises to pay money in a lump sum or periodically for life or some other specified
306 period; ~~[or]~~

307 [(†)] (B) interest in a limited liability company in which the limited liability company
308 is formed as part of an estate plan where all of the members are related by blood or marriage,
309 there are five or fewer members, or the person claiming this exception can prove that all of the
310 members are actively engaged in the management of the limited liability company[~~-Evidence~~];

311 or

312 (C) except as provided in Subsection (3), any whole long-term estate or undivided
313 fractionalized long-term estate in real property:

314 (I) if, when the real property estate is subject to a management agreement or master
315 lease:

316 (Aa) the management agreement is subject to a term of no longer than one year;

317 (Bb) the master lease is subject to a term of no longer than one year;

318 (Cc) the management agreement permits a simple majority of owners of the real
319 property estate to not renew or terminate the management agreement at the end of the
320 management agreement's current term; and

321 (Dd) the master lease permits a simple majority of owners of the real property estate to
322 not renew or terminate the master lease at the end of the master lease's current term; and

323 (II) even if:

324 (Aa) the real property is managed by a person other than an owner of the real property
325 estate;

326 (Bb) a manager of the real property is affiliated with any owner, lessee, or seller of the
327 real property;

328 (Cc) the real property is subject to a lease with a person other than an owner of the real
329 property estate;

330 (Dd) a lessee of the real property is affiliated with any owner, lessee, or seller of the
331 real property estate;

332 (Ee) a lessee of the real property subleases the real property to one or more sublessees;

333 (Ff) the lease rental paid to an owner of the real property estate by a lessee of the real
334 property is not linked in amount or time to the sublease rentals paid to the lessee by its
335 sublessees;

336 (Gg) the lease contract associated with the real property provides for the lessee to pay
337 the operating costs and other expenses of the real property subject to the lease agreement or

338 applicable costs over the base rent that are associated with the real property;

339 (Hh) the management contract associated with the real property provides for the
340 manager paying the operating costs and other expenses of the real property subject to the
341 management agreement, including debt service, or to pay applicable costs over the base rent
342 that are associated with the real property;

343 (Ii) the ability of an owner of an undivided fractionalized real property estate to transfer
344 or convey that real property estate to another or to compel a legal partition of that real property
345 estate from the other fractionalized estates is subject to contractually imposed restrictions or
346 conditions such as a first right of refusal in the other fractionalized estate owners, a first right
347 of offer to the other fractionalized estate owners, or other option or restriction similar to those
348 described in this Subsection (1)(y)(ii)(C)(II)(Ii); and

349 (Jj) the real property is located within the state or outside the state.

350 (iii) For purposes of Subsection (1)(y)(ii)(B), evidence that members vote or have the
351 right to vote, or the right to information concerning the business and affairs of the limited
352 liability company, or the right to participate in management, shall not establish, without more,
353 that all members are actively engaged in the management of the limited liability company.

354 ~~[(25)]~~ (z) "State" means any state, territory, or possession of the United States, the
355 District of Columbia, and Puerto Rico.

356 (aa) "Undivided fractionalized long-term estate" means an ownership interest in real
357 property by two or more persons that is a:

358 (i) tenancy in common;

359 (ii) joint tenancy; or

360 (iii) any other recognized undivided estate in real property including:

361 (A) a fee estate;

362 (B) a life estate; or

363 (C) other long-term estate.

364 ~~[(26)(a)]~~ (bb) (i) "Viatical settlement interest" means the entire interest or any
365 fractional interest in any of the following that is the subject of a viatical settlement:

366 ~~[(†)]~~ (A) a life insurance policy; or

367 ~~[(††)]~~ (B) the death benefit under a life insurance policy.

368 ~~[(†††)]~~ (ii) "Viatical settlement interest" does not include the initial purchase from the

369 viator by a provider of viatical settlements.

370 (cc) "Whole long-term estate" means a single person owns real property through:

371 (i) a fee estate;

372 (ii) a life estate; or

373 (iii) other long-term estate.

374 ~~[(27)]~~ (dd) "Working days" means 8 a.m. to 5 p.m., Monday through Friday, exclusive
375 of legal holidays listed in Section 63-13-2.

376 (2) A term not defined in [Section 61-1-13] this section shall have the meaning as
377 established by division rule. The meaning of a term neither defined in this section nor by rule
378 of the division shall be the meaning commonly accepted in the business community.

379 (3) (a) Notwithstanding Subsection (1)(x)(ii)(C), the offer or sale of a whole long-term
380 estate or an undivided fractionalized long-term estate in real property becomes the offer or sale
381 of a security for purposes of this chapter if a person that owns the real property estate being
382 offered for sale files with the division a written election to have the offer and sale of that real
383 property estate governed by this chapter.

384 (b) If a person offering a real property estate for sale files a written election with the
385 division in accordance with Subsection (3)(a):

386 (i) any disclosure or literature related to the offer or sale of the real property estate
387 shall:

388 (A) disclose that the offer or sale is governed by this chapter; and

389 (B) comply with this chapter; and

390 (ii) the person shall make the disclosures required by Section 61-2-26 and rules made
391 by the Real Estate Commission under Section 61-2-26.

392 (4) (a) This Subsection (4) applies to:

393 (i) a real property estate exempted from the definition of security under Subsection
394 (1)(y)(ii)(C); or

395 (ii) a real property estate that is the offer of a security under Subsection (3).

396 (b) For purposes of a real property estate described in Subsection (4)(a), a person who
397 receives compensation in connection with the offer or sale as provided in this Subsection (4) of
398 a real property estate may not be considered an agent, broker-dealer, investment adviser, or
399 investor adviser representative under this chapter if that person:

- 400 (i) is licensed under Chapter 2, Division of Real Estate, as:
401 (A) a principal real estate broker;
402 (B) an associate real estate broker; or
403 (C) a real estate sales agent; and
404 (ii) (A) offers or sells the real property estate described in Subsection (4)(a);
405 (B) refers a purchaser to an agent or broker-dealer who is participating in the offer and
406 sale of the real property estate described in Subsection (4)(a); or
407 (C) provides information related to the real property estate described in Subsection
408 (4)(a) to a purchaser.

409 Section 2. Section **61-2-2** is amended to read:

410 **61-2-2. Definitions.**

411 As used in this chapter:

412 (1) "Associate real estate broker" and "associate broker" means any person employed
413 or engaged as an independent contractor by or on behalf of a licensed principal real estate
414 broker to perform any act set out in Subsection (12) for valuable consideration, who has
415 qualified under ~~[the provisions of]~~ this chapter as a principal real estate broker.

416 (2) "Branch office" means a principal broker's real estate brokerage office other than
417 ~~[his]~~ the principal broker's main office.

418 (3) "Commission" means the Real Estate Commission established under this chapter.

419 (4) "Concurrence" means the entities given a concurring role must jointly agree for
420 action to be taken.

421 (5) "Condominium" or "condominium unit" is as defined in Section 57-8-3.

422 (6) "Condominium homeowners' association" means all of the condominium unit
423 owners acting as a group in accordance with declarations and bylaws.

424 (7) (a) "Condominium hotel" means one or more condominium units that are operated
425 as a hotel.

426 (b) "Condominium hotel" does not mean a hotel consisting of condominium units, all
427 of which are owned by a single entity.

428 (8) "Director" means the director of the Division of Real Estate.

429 (9) "Division" means the Division of Real Estate.

430 (10) "Executive director" means the director of the Department of Commerce.

431 (11) "Main office" means the address which a principal broker designates with the
432 division as ~~his~~ the principal broker's primary brokerage office.

433 (12) "Principal real estate broker" and "principal broker" means any person:

434 (a) (i) who sells or lists for sale, buys, exchanges, or auctions real estate, options on
435 real estate, or improvements on real estate with the expectation of receiving valuable
436 consideration; or

437 (ii) who advertises, offers, attempts, or otherwise holds himself out to be engaged in
438 the business described in Subsection (12)(a)(i);

439 (b) employed by or on behalf of the owner of real estate or by a prospective purchaser
440 of real estate who performs any of the acts described in Subsection (12)(a), whether ~~his~~ the
441 person's compensation is at a stated salary, a commission basis, upon a salary and commission
442 basis, or otherwise;

443 (c) who, with the expectation of receiving valuable consideration, manages property
444 owned by another person or who advertises or otherwise holds himself out to be engaged in
445 property management;

446 (d) who, with the expectation of receiving valuable consideration, assists or directs in
447 the procurement of prospects for or the negotiation of the transactions listed in Subsections
448 (12)(a) and (c); and

449 (e) except for mortgage lenders, title insurance agents, and their employees, who assists
450 or directs in the closing of any real estate transaction with the expectation of receiving valuable
451 consideration.

452 (13) (a) "Property management" means engaging in, with the expectation of receiving
453 valuable consideration, the management of property owned by another person or advertising or
454 otherwise claiming to be engaged in property management by:

455 (i) advertising for, arranging, negotiating, offering, or otherwise attempting or
456 participating in a transaction calculated to secure the rental or leasing of real estate;

457 (ii) collecting, agreeing, offering, or otherwise attempting to collect rent for the real
458 estate and accounting for and disbursing the money collected; or

459 (iii) authorizing expenditures for repairs to the real estate.

460 (b) "Property management" does not include:

461 (i) hotel or motel management;

462 (ii) rental of tourist accommodations, including hotels, motels, tourist homes,
463 condominiums, condominium hotels, mobile home park accommodations, campgrounds, or
464 similar public accommodations for any period of less than 30 consecutive days, and the
465 management activities associated with these rentals; or

466 (iii) the leasing or management of surface or subsurface minerals or oil and gas
467 interests, if the leasing or management is separate from a sale or lease of the surface estate.

468 (14) "Real estate" includes leaseholds and business opportunities involving real
469 property.

470 (15) "Real estate sales agent" and "sales agent" mean any person affiliated with a
471 licensed principal real estate broker, either as an independent contractor or an employee as
472 provided in Section 61-2-25, to perform for valuable consideration any act set out in
473 Subsection (12).

474 (16) (a) "Regular salaried employee" means an individual who performs a service for
475 wages or other remuneration, whose employer withholds federal employment taxes under a
476 contract of hire, written or oral, express or implied.

477 (b) "Regular salaried employee" does not include a person who performs services on a
478 project-by-project basis or on a commission basis.

479 (17) "Reinstatement" means restoring a license that has expired or has been suspended.

480 (18) "Reissuance" means the process by which a licensee may obtain a license
481 following revocation of the license.

482 (19) "Renewal" means extending a license for an additional licensing period on or
483 before the date the license expires.

484 (20) "Undivided fractionalized long-term estate" means an ownership interest in real
485 property by two or more persons that is a:

486 (a) tenancy in common;

487 (b) joint tenancy; or

488 (c) any other recognized undivided estate in real property including:

489 (i) a fee estate;

490 (ii) a life estate; or

491 (iii) other long-term estate.

492 Section 3. Section **61-2-5.5** is amended to read:

493 **61-2-5.5. Real Estate Commission created -- Functions -- Appointment --**
494 **Qualification and terms of members -- Expenses -- Meetings.**

495 (1) There is created within the division a Real Estate Commission. The commission
496 shall:

497 (a) make rules for the administration of this chapter which are not inconsistent with
498 this chapter, including:

499 (i) licensing of principal brokers, associate brokers, sales agents, real estate companies,
500 and branch offices;

501 (ii) prelicensing and postlicensing education curricula, examination procedures, and the
502 certification and conduct of real estate schools, course providers, and instructors;

503 (iii) proper handling of funds received by real estate licensees, and brokerage office
504 procedures and recordkeeping requirements;

505 (iv) property management; [~~and~~]

506 (v) standards of conduct for real estate licensees; and

507 (vi) disclosure requirements for the offer or sale of an undivided fractionalized
508 long-term estate;

509 (b) establish, with the concurrence of the division, all fees as provided in this chapter
510 and Title 61, Chapter 2a, Real Estate Recovery Fund Act;

511 (c) conduct all administrative hearings not delegated by it to an administrative law
512 judge relating to the licensing of any applicant, conduct of any licensee, or the certification or
513 conduct of any real estate school, course provider, or instructor regulated under this chapter;

514 (d) with the concurrence of the director, impose sanctions against licensees and
515 certificate holders as provided in Section 61-2-11;

516 (e) advise the director on the administration and enforcement of any matters affecting
517 the division and the real estate sales and property management industries;

518 (f) advise the director on matters affecting the division budget;

519 (g) advise and assist the director in conducting real estate seminars; and

520 (h) perform other duties as provided by this chapter and Title 61, Chapter 2a, Real
521 Estate Recovery Fund Act.

522 (2) (a) The commission shall be comprised of five members appointed by the governor
523 and approved by the Senate.

524 (b) Four of the commission members shall have at least five years' experience in the
525 real estate business and shall hold an active principal broker, associate broker, or sales agent
526 license.

527 (c) One commission member shall be a member of the general public.

528 (d) No more than one commission member may be appointed from any given county in
529 the state.

530 (3) (a) Except as required by Subsection (3)(b), as terms of current commission
531 members expire, the governor shall appoint each new member or reappointed member to a
532 four-year term ending June 30.

533 (b) Notwithstanding the requirements of Subsection (3)(a), the governor shall, at the
534 time of appointment or reappointment, adjust the length of terms to ensure that the terms of
535 commission members are staggered so that approximately half of the commission is appointed
536 every two years.

537 (c) A commission member may not serve more than one consecutive term.

538 (d) Members of the commission shall annually select one member to serve as chair.

539 (4) When a vacancy occurs in the membership for any reason, the replacement shall be
540 appointed for the unexpired term.

541 (5) (a) Members shall receive no compensation or benefits for their services, but may
542 receive per diem and expenses incurred in the performance of the member's official duties at
543 the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

544 (b) Members may decline to receive per diem and expenses for their service.

545 (6) The commission shall meet at least monthly. The director may call additional
546 meetings at his discretion or upon the request of the chair or upon the written request of three
547 or more commission members. Three members constitute a quorum for the transaction of
548 business.

549 Section 4. Section **61-2-11** is amended to read:

550 **61-2-11. Investigations -- Subpoena power of division -- Grounds for disciplinary**
551 **action.**

552 (1) The division may investigate or cause to be investigated the actions of:

553 (a) any of the following licensed or certified by the state:

554 (i) principal broker[;];

- 555 (ii) associate broker[;];
 556 (iii) sales agent[;];
 557 (iv) real estate school[;];
 558 (v) course provider[;]; or
 559 (vi) school instructor [~~licensed or certified by this state, or of~~];
 560 (b) any applicant for licensure or certification[;]; or [of]
 561 (c) any person who acts in any of [~~those~~] the capacities described in Subsection (1)(a)
 562 or (b) within this state.

563 (2) (a) The division [~~is empowered to~~] may subpoena witnesses, take evidence, and
 564 require by subpoena duces tecum the production of books, papers, contracts, records, other
 565 documents, or information considered relevant to the investigation described in Subsection (1).

566 (b) The division may serve subpoenas by certified mail.

567 (c) Each failure to respond to a subpoena is considered as a separate violation of this
 568 chapter.

569 (d) In relationship to the offer or sale of an undivided fractionalized long-term estate:

570 (i) the division may make any public or private investigation within or outside of this
 571 state as the division considers necessary to determine whether any person has violated, is
 572 violating, or is about to violate this chapter or any rule or order under this chapter;

573 (ii) to aid in the enforcement of this chapter or in the prescribing of rules and forms
 574 under this chapter, the division may require or permit any person to file a statement in writing,
 575 under oath or otherwise as to all the facts and circumstances concerning the matter to be
 576 investigated; and

577 (iii) for the purpose of the investigation described in Subsection (2)(d)(i), the division
 578 or any employee designated by it may:

579 (A) administer oaths and affirmations; or

580 (B) take any other action permitted by this Subsection (2) including:

581 (I) subpoena witnesses and compel their attendance;

582 (II) take evidence; and

583 (III) require the production of any books, papers, correspondence, memoranda,
 584 agreements, or other documents or records relevant or material to the investigation.

585 (3) (a) The commission, with the concurrence of the director, may take the following

586 actions if at any time a licensee or certificate holder, whether acting as an agent or on the
587 licensee's or certificate holder's own account, is guilty of an act described in Subsection (3)(b):

588 (i) impose a civil penalty in an amount not to exceed \$500 per violation[;];
589 (ii) impose educational requirements[;]; and
590 (iii) suspend, revoke, place on probation, or deny renewal, reinstatement, or reissuance
591 of any license or any certification.

592 (b) Subsection (3)(a) applies if at any time the licensee or certificate holder, whether
593 acting as an agent or on [~~his~~] the licensee or certificate holder's own account, is found guilty of:

594 [~~(1)~~] (i) making any substantial misrepresentation;

595 [~~(2)~~] (ii) making any false promises of a character likely to influence, persuade, or
596 induce;

597 [~~(3)~~] (iii) pursuing a continued and flagrant course of misrepresentation, or of making
598 false promises through agents, sales agents, advertising, or otherwise;

599 [~~(4)~~] (iv) acting for more than one party in a transaction without the informed consent
600 of all parties;

601 [~~(5)~~] (v) (A) acting as an associate broker or sales agent while not licensed with a
602 licensed principal broker[;];

603 (B) representing or attempting to represent a broker other than the principal broker
604 with whom [~~he~~] the person is affiliated[;]; or

605 (C) representing as sales agent or having a contractual relationship similar to that of
606 sales agent with other than a licensed principal broker;

607 [~~(6)~~] (vi) (A) failing, within a reasonable time, to account for or to remit any monies
608 coming into [~~his~~] the person's possession that belong to others[~~, or~~];

609 (B) commingling [~~those~~] the funds described in Subsection (3)(b)(vi)(A) with [~~his~~] the
610 person's own[;]; or

611 (C) diverting [~~those~~] the funds described in Subsection (3)(b)(vi)(A) from the purpose
612 for which they were received;

613 [~~(7)~~] (vii) paying or offering to pay valuable consideration, as defined by the
614 commission, to any person not licensed under this chapter, except that valuable consideration
615 may be shared with a licensed principal broker of another jurisdiction or as provided under the
616 Professional Corporation Act or the Limited Liability Company Act;

617 ~~[(8)]~~ (viii) being unworthy or incompetent to act as a principal broker, associate broker,
618 or sales agent in such manner as to safeguard the interests of the public;

619 ~~[(9)]~~ (ix) failing to voluntarily furnish copies of all documents to all parties executing
620 the documents;

621 ~~[(10)]~~ (x) failing to keep and make available for inspection by the division a record of
622 each transaction, including:

623 (A) the names of buyers and sellers or lessees and lessors~~[-];~~;

624 (B) the identification of the property~~[-];~~;

625 (C) the sale or rental price~~[-];~~;

626 (D) any monies received in trust~~[-];~~;

627 (E) any agreements or instructions from buyers and sellers or lessees and lessors~~[-];~~ and

628 (F) any other information required by rule;

629 ~~[(11)]~~ (xi) failing to disclose, in writing, in the purchase, sale, or rental of property,
630 whether the purchase, sale, or rental is made for himself or for an undisclosed principal;

631 ~~[(12)]~~ (xii) regardless of whether the crime was related to real estate, being convicted
632 of a criminal offense involving moral turpitude within five years of the most recent application,
633 including a conviction based upon a plea of nolo contendere, or a plea held in abeyance to a
634 criminal offense involving moral turpitude;

635 ~~[(13)]~~ (xiii) advertising the availability of real estate or the services of a licensee in a
636 false, misleading, or deceptive manner;

637 ~~[(14)]~~ (xiv) in the case of a principal broker or a licensee who is a branch manager,
638 failing to exercise reasonable supervision over the activities of ~~[his]~~ the principal broker's or
639 branch manager's licensees and any unlicensed staff;

640 ~~[(15)]~~ (xv) violating or disregarding this chapter, an order of the commission, or the
641 rules adopted by the commission and the division;

642 ~~[(16)]~~ (xvi) breaching a fiduciary duty owed by a licensee to his principal in a real
643 estate transaction;

644 ~~[(17)]~~ (xvii) any other conduct ~~[which]~~ that constitutes dishonest dealing;

645 ~~[(18)]~~ (xviii) unprofessional conduct as defined by statute or rule; or

646 ~~[(19)]~~ (xix) suspension, revocation, surrender, or cancellation of a real estate license
647 issued by another jurisdiction, or of another professional license issued by this or another

648 jurisdiction, based on misconduct in a professional capacity that relates to character, honesty,
649 integrity, or truthfulness.

650 Section 5. Section **61-2-21** is amended to read:

651 **61-2-21. Remedies and action for violations.**

652 (1) (a) If the director has reason to believe that any person has been [or], is engaging in,
653 or is about to engage in acts constituting violations of this chapter, and if it appears to the
654 director that it would be in the public interest to stop such acts, [he] the director shall issue and
655 serve upon the person an order directing that person to cease and desist from those acts.

656 (b) Within ten days after receiving the order, the person upon whom the order is served
657 may request an adjudicative proceeding.

658 (c) Pending the hearing, [the] any cease and desist order shall remain in effect.

659 (d) If a request for a hearing is made, the division shall follow the procedures and
660 requirements of Title 63, Chapter 46b, Administrative Procedures Act.

661 (2) (a) After the hearing, if the commission and the director agree that the acts of the
662 person violate this chapter, the director;

663 (i) shall issue an order making the [cease and desist] order issued under Subsection (1)
664 permanent[-]; and

665 (ii) may impose a fine.

666 (b) If no hearing is requested and if the person fails to cease the acts, or after
667 discontinuing the acts, again commences the acts, the director shall file suit in the name of the
668 Department of Commerce and the Division of Real Estate, in the district court in the county in
669 which the acts occurred or where the person resides or carries on business, to enjoin and
670 restrain the person from violating this chapter.

671 (c) The district courts of this state shall have jurisdiction of these suits.

672 (d) Upon a proper showing in an action brought under this section related to an
673 undivided fractionalized long-term estate, the court may:

674 (i) issue a permanent or temporary, prohibitory or mandatory injunction;

675 (ii) issue a restraining order or writ of mandamus;

676 (iii) enter a declaratory judgment;

677 (iv) appoint a receiver or conservator for the defendant or the defendant's assets;

678 (v) order disgorgement;

679 (vi) order rescission;
 680 (vii) impose a fine of not more than \$500 for each violation of this chapter; and
 681 (viii) enter any other relief the court considers just.
 682 (e) The court may not require the division to post a bond in an action brought under
 683 this Subsection (2).

684 (3) The remedies and action provided in this section may not interfere with, or prevent
 685 the prosecution of, any other remedies or actions including criminal proceedings.

686 Section 6. Section **61-2-26** is enacted to read:

687 **61-2-26. Disclosures required for offer or sale of an undivided fractionalized**
 688 **long-term estate.**

689 (1) A licensee or certificate holder under this chapter who sells or offers to sell an
 690 undivided fractionalized long-term estate shall comply with the disclosure requirements
 691 imposed by rules made by the commission under this section.

692 (2) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the
 693 commission shall make rules as to the timing, form, and substance of disclosures required to be
 694 made by a licensee or certificate holder under this section.

Legislative Review Note
as of 1-31-05 2:37 PM

Based on a limited legal review, this legislation has not been determined to have a high probability of being held unconstitutional.

Office of Legislative Research and General Counsel

Fiscal Note
Bill Number SB0064

Real Estate Transactions and Securities

08-Feb-05

4:57 PM

State Impact

Implementation of this bill can be handled within existing budgets.

Individual and Business Impact

No estimate of individual or business impacts is made.

Office of the Legislative Fiscal Analyst