

Senator L. Alma Mansell proposes the following substitute bill:

REAL ESTATE TRANSACTIONS AND

SECURITIES

2005 GENERAL SESSION

STATE OF UTAH

Sponsor: L. Alma Mansell

LONG TITLE

General Description:

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

Highlighted Provisions:

This bill:

- ▶ exempts certain real estate transactions from the definition of securities;
- ▶ provides a process for treating real estate transactions as security including disclosures;
- ▶ exempts real estate brokers or agents from the definition of agent, broker-dealer, investment advisor, or investor adviser representative when the real estate broker or agent receives compensation in connection with an offer or sale;
- ▶ defines terms;
- ▶ addresses the Division of Real Estate making rules:
 - regarding required disclosures in the offer or sale of an undivided fractionalized long-term estate; and
 - imposing requirements of management agreements;
- ▶ addresses investigatory powers of the Division of Real Estate;
- ▶ addresses remedies and actions for violations; and



26 ▶ makes technical changes.

27 **Monies Appropriated in this Bill:**

28 None

29 **Other Special Clauses:**

30 None

31 **Utah Code Sections Affected:**

32 AMENDS:

33 **61-1-13**, as last amended by Chapter 81, Laws of Utah 2003

34 **61-2-2**, as last amended by Chapter 264, Laws of Utah 2003

35 **61-2-5.5**, as last amended by Chapters 102 and 243, Laws of Utah 1996

36 **61-2-21**, as last amended by Chapter 173, Laws of Utah 1999

37 ENACTS:

38 **61-2-11.5**, Utah Code Annotated 1953

39 **61-2-26**, Utah Code Annotated 1953



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

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

43 **61-1-13. Definitions.**

44 (1) As used in this chapter:

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

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

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

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

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

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

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

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

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

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

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

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

69 (ii) "Broker-dealer" does not include:

70 ~~[(a)]~~ (A) an agent;

71 ~~[(b)]~~ (B) an issuer;

72 ~~[(c)]~~ (C) a bank, savings institution, or trust company;

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

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

75 ~~[(A)]~~ (Aa) the issuers of the securities involved in the transactions;

76 ~~[(B)]~~ (Bb) other broker-dealers; or

77 ~~[(C)]~~ (Cc) banks, savings institutions, trust companies, insurance companies,

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

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

80 themselves or as trustees; or

81 ~~[(i)]~~ (II) during any period of 12 consecutive months the person does not direct more

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

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

84 present in this state;

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

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

87 consecutive months;

88 ~~[(f)]~~ (F) a person whose participation in transactions in securities is confined to those
89 transactions made by or through a broker-dealer licensed in this state;

90 ~~[(g)]~~ (G) a person who is a real estate broker licensed in this state and who effects
91 transactions in a bond or other evidence of indebtedness secured by a real or chattel mortgage
92 or deed of trust, or by an agreement for the sale of real estate or chattels, if the entire mortgage,
93 deed or trust, or agreement, together with all the bonds or other evidences of indebtedness
94 secured thereby, is offered and sold as a unit;

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

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

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

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

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

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

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

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

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

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

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

115 ~~[(6)]~~ (f) (i) "Commodity contract" means any account, agreement, or contract for the
116 purchase or sale, primarily for speculation or investment purposes and not for use or
117 consumption by the offeree or purchaser, of one or more commodities, whether for immediate
118 or subsequent delivery or whether delivery is intended by the parties, and whether characterized

119 as a cash contract, deferred shipment or deferred delivery contract, forward contract, futures
120 contract, installment or margin contract, leverage contract, or otherwise.

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

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

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

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

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

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

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

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

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

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

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

149 ~~[(12)]~~ (l) "Federal covered security" means any security that is a covered security under

150 Section 18(b) of the Securities Act of 1933 or rules or regulations promulgated [~~thereunder~~]
151 under Section 18(b) of the Securities Act of 1933.

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

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

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

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

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

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

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

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

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

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

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

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

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

183 ~~[(16)]~~ (p)(i) "Investment adviser representative" means any partner, officer, director
 184 of, or a person occupying a similar status or performing similar functions, or other individual,
 185 except clerical or ministerial personnel, who:

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

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

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

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

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

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

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

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

199 (ii) "Investment adviser representative" does not include a person described in
 200 Subsection (4).

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

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

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

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

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

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

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

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

215 ~~(d)~~ (iv) With respect to an equipment trust certificate, a conditional sales contract, or
216 similar securities serving the same purpose, "issuer" means the person by whom the equipment
217 or property is to be used.

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

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

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

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

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

231 ~~(20)~~ (u) "Precious metal" means the following, whether in coin, bullion, or other
232 form:

233 ~~(a)~~ (i) silver;

234 ~~(b)~~ (ii) gold;

235 ~~(c)~~ (iii) platinum;

236 ~~(d)~~ (iv) palladium;

237 ~~(e)~~ (v) copper; and

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

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

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

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

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

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

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

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

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

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

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

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

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

270 ~~[(i)]~~ (A) a good faith gift;

271 ~~[(ii)]~~ (B) a transfer by death;

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

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

274 (F);

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

276 ~~[(vi)]~~ (F) any act incident to a judicially approved reorganization in which a security is

277 issued in exchange for one or more outstanding securities, claims, or property interests, or

278 partly in such exchange and partly for cash.

279 ~~[(23)]~~ (x) "Securities Act of 1933," "Securities Exchange Act of 1934," "Public Utility

280 Holding Company Act of 1935," and "Investment Company Act of 1940" mean the federal

281 statutes of those names as amended before or after the effective date of this chapter.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

297 ~~[(xv)]~~ (O) certificate of interest or participation in an oil, gas, or mining title or lease or

298 in payments out of production under such a title or lease;

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

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

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

302 ~~[(xix)]~~ (S) in general, any interest or instrument commonly known as a "security," or

303 any certificate of interest or participation in, temporary or interim certificate for, receipt for,

304 guarantee of, or warrant or right to subscribe to or purchase any of the foregoing.

305 ~~(b)~~ (ii) "Security" does not include any:

306 ~~(t)~~ (A) insurance or endowment policy or annuity contract under which an insurance
307 company promises to pay money in a lump sum or periodically for life or some other specified
308 period; ~~(r)~~

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

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

316 (I) the real property estate is not subject to a master lease; and

317 (II) when the real property estate is subject to a management agreement:

318 (Aa) 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 or terminate the management agreement 180 days after
321 the day on which the owners give notice of termination to the manager;

322 (Bb) the management agreement prohibits, directly or indirectly, the lending of the
323 proceeds earned from the real property estate or the use or pledge of its assets to any person or
324 entity affiliated with or under common control of the manager;

325 (Cc) the interests in the real property estate are only sold by persons listed in
326 Subsection (4)(b); and

327 (Dd) the management agreement complies with any other requirement imposed by rule
328 by the Real Estate Commission under Section 61-2-26.

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

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

335 (aa) (i) "Undivided fractionalized long-term estate" means an ownership interest in real

336 property by two or more persons that is a:

337 (A) tenancy in common; or

338 (B) any other legal form of undivided estate in real property including:

339 (I) a fee estate;

340 (II) a life estate; or

341 (III) other long-term estate.

342 (ii) "Undivided fractionalized long-term estate" does not include a joint tenancy.

343 ~~[(26)-(a)]~~ (bb) (i) "Viatical settlement interest" means the entire interest or any

344 fractional interest in any of the following that is the subject of a viatical settlement:

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

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

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

348 viator by a provider of viatical settlements.

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

350 (i) a fee estate;

351 (ii) a life estate; or

352 (iii) other long-term estate.

353 ~~[(27)]~~ (dd) "Working days" means 8 a.m. to 5 p.m., Monday through Friday, exclusive

354 of legal holidays listed in Section 63-13-2.

355 (2) A term not defined in ~~[Section 61-1-13]~~ this section shall have the meaning as

356 established by division rule. The meaning of a term neither defined in this section nor by rule

357 of the division shall be the meaning commonly accepted in the business community.

358 (3) (a) Notwithstanding Subsection (1)(y)(ii)(C), the offer or sale of a whole long-term

359 estate or an undivided fractionalized long-term estate in real property becomes the offer or sale

360 of a security for purposes of this chapter if a person that owns the real property estate being

361 offered for sale files with the division a written election to have the offer and sale of that real

362 property estate governed by this chapter.

363 (b) If a person offering a real property estate for sale files a written election with the

364 division in accordance with Subsection (3)(a) any disclosure or literature related to the offer or

365 sale of the real property estate shall:

366 (i) disclose that the offer or sale is governed by this chapter; and

367 (ii) comply with this chapter.

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

369 (i) the offer or sale of a real property estate exempted from the definition of security
370 under Subsection (1)(y)(ii)(C); or

371 (ii) the offer or sale of a real property estate that is the offer of a security under
372 Subsection (3).

373 (b) A person who, directly or indirectly receives compensation in connection with the
374 offer or sale as provided in this Subsection (4) of a real property estate is not an agent,
375 broker-dealer, investment adviser, or investor adviser representative under this chapter if that
376 person is licensed under Chapter 2, Division of Real Estate, as:

377 (i) a principal real estate broker;

378 (ii) an associate real estate broker; or

379 (iii) a real estate sales agent.

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

381 **61-2-2. Definitions.**

382 As used in this chapter:

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

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

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

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

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

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

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

397 (b) "Condominium hotel" does not mean a hotel consisting of condominium units, all

398 of which are owned by a single entity.

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

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

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

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

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

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

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

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

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

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

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

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

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

428 (ii) collecting, agreeing, offering, or otherwise attempting to collect rent for the real

429 estate and accounting for and disbursing the money collected; or

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

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

432 (i) hotel or motel management;

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

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

439 (14) "Real estate" includes leaseholds and business opportunities involving real
440 property.

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

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

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

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

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

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

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

457 (i) tenancy in common; or

458 (ii) any other legal form of undivided estate in real property including:

459 (A) a fee estate;

- 460 (B) a life estate; or
- 461 (C) other long-term estate.
- 462 (b) "Undivided fractionalized long-term estate" does not include a joint tenancy.

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

464 **61-2-5.5. Real Estate Commission created -- Functions -- Appointment --**
465 **Qualification and terms of members -- Expenses -- Meetings.**

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

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

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

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

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

476 (iv) property management; ~~and~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

520 Section 4. Section **61-2-11.5** is enacted to read:

521 **61-2-11.5. Investigations related to an undivided fractionalized long-term estate.**

522 In addition to any action authorized by Section 61-2-11, in relationship to the offer or
523 sale of an undivided fractionalized long-term estate:

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

527 (2) to aid in the enforcement of this chapter or in the prescribing of rules and forms
528 under this chapter, the division may require or permit any person to file a statement in writing,
529 under oath or otherwise as to all facts and circumstances concerning the matter to be
530 investigated; and

531 (3) for the purpose of the investigation described in Subsection (1), the division or any
532 employee designated by the division may:

533 (a) administer oaths and affirmation; or

534 (b) take any action permitted by Section 61-2-11 including:

535 (i) subpoena witnesses and compel their attendance;

536 (ii) take evidence; and

537 (iii) require the production of any books, papers, correspondence, memoranda,
538 agreement, or other documents or records relevant or material to the investigation.

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

540 **61-2-21. Remedies and action for violations.**

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

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

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

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

550 (2) (a) After the hearing, if the commission and the director agree that the acts of the
551 person violate this chapter, the director:

552 (i) shall issue an order making the ~~[cease and desist]~~ order issued under Subsection (1)

553 permanent[-]; and

554 (ii) may impose a fine.

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

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

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

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

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

565 (iii) enter a declaratory judgment;

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

567 (v) order disgorgement;

568 (vi) order rescission;

569 (vii) impose a fine of not more than \$500 for each violation of this chapter; and

570 (viii) enter any other relief the court considers just.

571 (e) The court may not require the division to post a bond in an action brought under
572 this Subsection (2).

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

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

576 **61-2-26. Rulemaking required for offer or sale of an undivided fractionalized**
577 **long-term estate -- Disclosures -- Management agreement.**

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

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

584 (2) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the
585 commission shall make rules imposing requirements for a management agreement related to an
586 undivided fractionalized long-term estate that makes the offer or sale of the undivided
587 fractionalized long-term estate treated as a real estate transaction and not treated as an offer or
588 sale of a security under Chapter 1, Utah Uniform Securities Act.

Fiscal Note
Bill Number SB0064s01

Real Estate Transactions and Securities

17-Feb-05

3:38 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