

1 **SECURITIES AMENDMENTS**

2 2006 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: Curtis S. Bramble**

5 House Sponsor: John Dougall

6

LONG TITLE

7 **General Description:**

8 This bill modifies the Utah Uniform Securities Act.

9 **Highlighted Provisions:**

10 This bill:

- 11 ▶ requires a broker-dealer to notify the division of the failure to settle certain
- 12 securities transactions;
- 13 ▶ addresses liability for certain persons if the broker-dealer fails to give the required
- 14 notice;
- 15 ▶ defines "threshold security";
- 16 ▶ addresses what causes of action are created by the Utah Uniform Securities Act; and
- 17 ▶ makes technical changes.

18 **Monies Appropriated in this Bill:**

19 None

20 **Other Special Clauses:**

21 None

22 **Utah Code Sections Affected:**

23 AMENDS:

- 24 **61-1-5**, as last amended by Chapter 160, Laws of Utah 1997
- 25 **61-1-13**, as last amended by Chapter 257, Laws of Utah 2005
- 26 **61-1-22**, as last amended by Chapter 13, Laws of Utah 1998



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

Section 1. Section **61-1-5** is amended to read:

61-1-5. Postlicensing provisions.

(1) (a) Every licensed broker-dealer and investment adviser shall make and keep such accounts, correspondence, memoranda, papers, books, and other records as the division by rule prescribes, except as provided in:

(i) Section 15 of the Securities Exchange Act of 1934 in the case of a broker-dealer; and

(ii) Section 222 of the Investment Advisers Act of 1940 in the case of an investment adviser.

(b) All required records regarding an investment adviser shall be preserved for the period as the division prescribes by rule or order.

(2) (a) Every licensed broker-dealer shall, within 24 hours after demand, furnish to any customer or principal for whom the broker-dealer has executed any order for the purchase or sale of any securities, either for immediate or future delivery, a written statement showing:

(i) the time when[;] the securities were bought and sold;

(ii) the place where[;] the securities were bought and sold; and

(iii) the price at which the securities were bought and sold.

(b) With respect to investment advisers, the division may require that certain information be furnished or disseminated as necessary or appropriate in the public interest or for the protection of investors and advisory clients.

(c) To the extent determined by the director, information furnished to clients or prospective clients of an investment adviser who would be in compliance with the Investment Advisers Act of 1940 and the rules ~~[thereunder]~~ under the Investment Advisers Act of 1940 may be ~~[deemed]~~ considered to satisfy this requirement.

(d) (i) A licensed broker-dealer is subject to this Subsection (2)(d) if:

(A) the licensed broker-dealer is selling or purchasing for:

(I) a customer; or

(II) its own account;

(B) a trade fails to settle by delivery of securities of like kind and quality; and

- 59 (C) the trade is in a threshold security of an issuer:
60 (I) domiciled in this state; or
61 (II) with its principal office located in this state.
62 (ii) If the conditions of Subsection (2)(d)(i) are met, the licensed broker-dealer shall
63 notify the division:
64 (A) within 24 hours of the failure to settle;
65 (B) in writing or by a means that the division shall specify by rule made in accordance
66 with Title 63, Chapter 46a, Utah Administrative Rulemaking Act; and
67 (C) of:
68 (I) the name of the company whose shares were the subject of the settlement failure;
69 (II) the date of the trade that failed to settle;
70 (III) the amount of the shares not delivered to settle the trade; and
71 (IV) (Aa) in the case of a selling broker-dealer, the identity of the broker-dealer's
72 customer account or broker-dealer account for which the sell transaction is executed; or
73 (Bb) in the case of a broker-dealer purchasing the securities, the identity of the account
74 that failed to deliver the security in settlement of the trade.
75 (iii) The division shall make the information disclosed under Subsection (2)(d)(ii)
76 available to the public.
77 (iv) (A) A broker-dealer who materially fails to provide the notice required by
78 Subsection (2)(d)(ii) is liable to the company whose securities were the subject of the
79 settlement failure in the amount of:
80 (I) if the failure is for at least one business day but not more than five business days,
81 \$10,000 for each business day the broker-dealer fails to provide the required notice; or
82 (II) if the failure is for six or more business days, the greater of:
83 (Aa) \$10,000 for each business day; or
84 (Bb) the sum of the sales price for each securities share in the subject trade that has not
85 been delivered in settlement.
86 (B) The company described in this Subsection (2)(d)(iv) may sue at law or in equity to
87 enforce the payment of:
88 (I) the amount described in Subsection (2)(d)(iv)(A)(II);
89 (II) interest at 12% per year from the day on which the broker-dealer fails to provide

90 the notice required by Subsection (2)(d)(ii);

91 (III) costs; and

92 (IV) reasonable attorney's fees.

93 (v) Each of the following is liable jointly and severally with and to the same extent as a

94 broker-dealer is liable under Subsection (2)(d)(iv):

95 (A) a principal of the broker-dealer;

96 (B) a person who directly or indirectly controls the broker-dealer;

97 (C) a partner, officer, or director of the broker-dealer;

98 (D) a person occupying a similar status or performing a similar function to a partner,

99 officer, or director of the broker-dealer; and

100 (E) an employee of the broker-dealer who:

101 (I) has a duty to assure the filing of the notice required by Subsection (2)(d)(ii); and

102 (II) recklessly fails in that duty.

103 (vi) An action may not be maintained to enforce any liability under Subsection

104 (2)(d)(iv) or (v) unless it is brought before the sooner of the expiration of:

105 (A) four years after the day on which the broker-dealer fails to provide the notice

106 required by Subsection (2)(d)(ii); or

107 (B) two years after the day on which the company bringing the enforcement action

108 discovers the facts constituting the violation of Subsection (2)(d)(ii).

109 (vii) The rights and remedies provided in this Subsection (2)(d) are in addition to any

110 other rights or remedies that may exist at law or in equity.

111 (3) Every licensed broker-dealer and investment adviser shall file financial reports as

112 the division by rule prescribes, except as provided in:

113 (a) Section 15 of the Securities Exchange Act of 1934 in the case of a broker-dealer;

114 and

115 (b) Section 222 of the Investment Advisers Act of 1940 in the case of an investment

116 adviser.

117 (4) If the information contained in any document filed with the division is or becomes

118 inaccurate or incomplete in any material respect, the licensee or federal covered adviser shall

119 promptly file a correcting amendment if the document is filed with respect to a licensee, or

120 when such amendment is required to be filed with the Securities and Exchange Commission if

121 the document is filed with respect to a federal covered adviser, unless notification of the
122 correction has been given under Section 61-1-3.

123 (5) (a) All the records referred to in Subsection (1) are subject at any time or from time
124 to time to reasonable periodic, special, or other examinations by representatives of the division,
125 within or without this state, as the division [~~deems~~] considers necessary or appropriate in the
126 public interest or for the protection of investors.

127 (b) For the purpose of avoiding unnecessary duplication of examination, the division
128 may cooperate with:

129 (i) the securities administrators of other states[;];

130 (ii) the Securities and Exchange Commission[;]; and

131 (iii) national securities exchanges or national securities associations registered under
132 the Securities Exchange Act of 1934.

133 Section 2. Section **61-1-13** is amended to read:

134 **61-1-13. Definitions.**

135 (1) As used in this chapter:

136 (a) "Affiliate" means a person that, directly or indirectly, through one or more
137 intermediaries, controls or is controlled by, or is under common control with a person
138 specified.

139 (b) (i) "Agent" means any individual other than a broker-dealer who represents a
140 broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities.

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

142 (A) an issuer, who receives no commission or other remuneration, directly or
143 indirectly, for effecting or attempting to effect purchases or sales of securities in this state, and
144 who effects transactions:

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

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

148 (III) [~~effects transactions~~] in a covered security as described in Sections 18(b)(3) and
149 18(b)(4)(D) of the Securities Act of 1933; or

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

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

154 (iii) A partner, officer, or director of a broker-dealer or issuer, or a person occupying a
155 similar status or performing similar functions, is an agent only if ~~[he]~~ the partner, officer,
156 director, or person otherwise comes within ~~[this]~~ the definition~~[-]~~ of "agent."

157 (iv) "Agent" does not include a person described in Subsection (3).

158 (c) (i) "Broker-dealer" means any person engaged in the business of effecting
159 transactions in securities for the account of others or for the person's own account.

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

161 (A) an agent;

162 (B) an issuer;

163 (C) a bank, savings institution, or trust company;

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

165 (I) the person effects transactions in this state exclusively with or through:

166 (Aa) the issuers of the securities involved in the transactions;

167 (Bb) other broker-dealers; or

168 (Cc) banks, savings institutions, trust companies, insurance companies, investment
169 companies as defined in the Investment Company Act of 1940, pension or profit-sharing trusts,
170 or other financial institutions or institutional buyers, whether acting for themselves or as
171 trustees; or

172 (II) during any period of 12 consecutive months the person does not direct more than
173 15 offers to sell or buy into this state in any manner to persons other than those specified in
174 Subsection (1)(c)(ii)(D)(I), whether or not the offeror or any of the offerees is then present in
175 this state;

176 (E) a general partner who organizes and effects transactions in securities of three or
177 fewer limited partnerships, of which the person is the general partner, in any period of 12
178 consecutive months;

179 (F) a person whose participation in transactions in securities is confined to those
180 transactions made by or through a broker-dealer licensed in this state;

181 (G) a person who is a real estate broker licensed in this state and who effects
182 transactions in a bond or other evidence of indebtedness secured by a real or chattel mortgage

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

186 (H) a person effecting transactions in commodity contracts or commodity options;

187 (I) a person described in Subsection (3); or

188 (J) other persons as the division, by rule or order, may designate, consistent with the
189 public interest and protection of investors, as not within the intent of this Subsection (1)(c).

190 (d) "Buy" or "purchase" means every contract for purchase of, contract to buy, or
191 acquisition of a security or interest in a security for value.

192 (e) "Commodity" means, except as otherwise specified by the division by rule:

193 (i) any agricultural, grain, or livestock product or byproduct, except real property or
194 any timber, agricultural, or livestock product grown or raised on real property and offered or
195 sold by the owner or lessee of the real property;

196 (ii) any metal or mineral, including a precious metal, except a numismatic coin whose
197 fair market value is at least 15% greater than the value of the metal it contains;

198 (iii) any gem or gemstone, whether characterized as precious, semi-precious, or
199 otherwise;

200 (iv) any fuel, whether liquid, gaseous, or otherwise;

201 (v) any foreign currency; and

202 (vi) all other goods, articles, products, or items of any kind, except any work of art
203 offered or sold by art dealers, at public auction or offered or sold through a private sale by the
204 owner of the work.

205 (f) (i) "Commodity contract" means any account, agreement, or contract for the
206 purchase or sale, primarily for speculation or investment purposes and not for use or
207 consumption by the offeree or purchaser, of one or more commodities, whether for immediate
208 or subsequent delivery or whether delivery is intended by the parties, and whether characterized
209 as a cash contract, deferred shipment or deferred delivery contract, forward contract, futures
210 contract, installment or margin contract, leverage contract, or otherwise.

211 (ii) Any commodity contract offered or sold shall, in the absence of evidence to the
212 contrary, be presumed to be offered or sold for speculation or investment purposes.

213 (iii) (A) A commodity contract shall not include any contract or agreement which

214 requires, and under which the purchaser receives, within 28 calendar days from the payment in
215 good funds any portion of the purchase price, physical delivery of the total amount of each
216 commodity to be purchased under the contract or agreement.

217 (B) The purchaser is not considered to have received physical delivery of the total
218 amount of each commodity to be purchased under the contract or agreement when the
219 commodity or commodities are held as collateral for a loan or are subject to a lien of any
220 person when the loan or lien arises in connection with the purchase of each commodity or
221 commodities.

222 (g) (i) "Commodity option" means any account, agreement, or contract giving a party
223 to the option the right but not the obligation to purchase or sell one or more commodities or
224 one or more commodity contracts, or both whether characterized as an option, privilege,
225 indemnity, bid, offer, put, call, advance guaranty, decline guaranty, or otherwise.

226 (ii) "Commodity option" does not include an option traded on a national securities
227 exchange registered;

228 (A) with the United States Securities and Exchange Commission; or

229 (B) on a board of trade designated as a contract market by the Commodity Futures
230 Trading Commission.

231 (h) "Director" means the director of the Division of Securities charged with the
232 administration and enforcement of this chapter.

233 (i) "Division" means the Division of Securities established by Section 61-1-18.

234 (j) "Executive director" means the executive director of the Department of Commerce.

235 (k) "Federal covered adviser" means a person who:

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

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

239 (l) "Federal covered security" means any security that is a covered security under
240 Section 18(b) of the Securities Act of 1933 or rules or regulations promulgated under Section
241 18(b) of the Securities Act of 1933.

242 (m) "Fraud," "deceit," and "defraud" are not limited to their common-law meanings.

243 (n) "Guaranteed" means guaranteed as to payment of principal or interest as to debt
244 securities, or dividends as to equity securities.

- 245 (o) (i) "Investment adviser" means any person who[;]:
246 (A) for compensation, engages in the business of advising others, either directly or
247 through publications or writings, as to the value of securities or as to the advisability of
248 investing in, purchasing, or selling securities[;]; or [~~who~~];
249 (B) for compensation and as a part of a regular business, issues or promulgates
250 analyses or reports concerning securities.
- 251 (ii) "Investment adviser" [~~also~~] includes financial planners and other persons who[;]:
252 (A) as an integral component of other financially related services, provide the
253 investment advisory services described in Subsection (1)(o)(i) to others for compensation and
254 as part of a business; or [~~who~~]
255 (B) hold themselves out as providing the investment advisory services described in
256 Subsection (1)(o)(i) to others for compensation.
- 257 (iii) "Investment adviser" does not include:
258 (A) an investment adviser representative;
259 (B) a bank, savings institution, or trust company;
260 (C) a lawyer, accountant, engineer, or teacher whose performance of these services is
261 solely incidental to the practice of his profession;
262 (D) a broker-dealer or its agent whose performance of these services is solely
263 incidental to the conduct of its business as a broker-dealer and who receives no special
264 compensation for [~~them~~] the services;
265 (E) a publisher of any bona fide newspaper, news column, news letter, news magazine,
266 or business or financial publication or service, of general, regular, and paid circulation, whether
267 communicated in hard copy form, or by electronic means, or otherwise, that does not consist of
268 the rendering of advice on the basis of the specific investment situation of each client;
269 (F) any person who is a federal covered adviser;
270 (G) a person described in Subsection (3); or
271 (H) such other persons not within the intent of this Subsection (1)(o) as the division
272 may by rule or order designate.
- 273 (p) (i) "Investment adviser representative" means any partner, officer, director of, or a
274 person occupying a similar status or performing similar functions, or other individual, except
275 clerical or ministerial personnel, who:

276 (A) (I) is employed by or associated with an investment adviser who is licensed or
277 required to be licensed under this chapter; or

278 (II) has a place of business located in this state and is employed by or associated with a
279 federal covered adviser; and

280 (B) does any of the following:

281 (I) makes any recommendations or otherwise renders advice regarding securities;

282 (II) manages accounts or portfolios of clients;

283 (III) determines which recommendation or advice regarding securities should be given;

284 (IV) solicits, offers, or negotiates for the sale of or sells investment advisory services;

285 or

286 (V) supervises employees who perform any of the acts described in this Subsection

287 (1)(p)(i)(B).

288 (ii) "Investment advisor representative" does not include a person described in
289 Subsection (3).

290 (q) (i) "Issuer" means any person who issues or proposes to issue any security or has
291 outstanding a security that it has issued.

292 (ii) With respect to a preorganization certificate or subscription, "issuer" means the
293 promoter or the promoters of the person to be organized.

294 (iii) "Issuer" means the person or persons performing the acts and assuming duties of a
295 depositor or manager under the provisions of the trust or other agreement or instrument under
296 which the security is issued with respect to:

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

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

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

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

305 (vi) With respect to certificates of interest or participation in oil, gas, or mining titles or
306 leases or in payment out of production under the titles or leases, "issuer" means the owner of

307 the title or lease or right of production, whether whole or fractional, who creates fractional
308 interests therein for the purpose of sale.

309 (r) "Nonissuer" means not directly or indirectly for the benefit of the issuer.

310 (s) "Person" means:

311 (i) an individual[;];

312 (ii) a corporation[;];

313 (iii) a partnership[;];

314 (iv) a limited liability company[;];

315 (v) an association[;];

316 (vi) a joint-stock company[;];

317 (vii) a joint venture[;];

318 (viii) a trust where the interests of the beneficiaries are evidenced by a security[;];

319 (ix) an unincorporated organization[;];

320 (x) a government[;]; or

321 (xi) a political subdivision of a government.

322 (t) "Precious metal" means the following, whether in coin, bullion, or other form:

323 (i) silver;

324 (ii) gold;

325 (iii) platinum;

326 (iv) palladium;

327 (v) copper; and

328 (vi) such other substances as the division may specify by rule.

329 (u) "Promoter" means any person who, acting alone or in concert with one or more
330 persons, takes initiative in founding or organizing the business or enterprise of a person.

331 (v) (i) "Sale" or "sell" includes every contract for sale of, contract to sell, or disposition
332 of, a security or interest in a security for value.

333 (ii) "Offer" or "offer to sell" includes every attempt or offer to dispose of, or
334 solicitation of an offer to buy, a security or interest in a security for value.

335 (iii) The following are examples of the definitions in Subsection (1)(v)(i) or (ii):

336 (A) any security given or delivered with or as a bonus on account of any purchase of a
337 security or any other thing, is part of the subject of the purchase, and has been offered and sold

338 for value;

339 (B) a purported gift of assessable stock is an offer or sale as is each assessment levied
340 on the stock;

341 (C) an offer or sale of a security that is convertible into, or entitles its holder to acquire
342 or subscribe to another security of the same or another issuer is an offer or sale of that security,
343 and also an offer of the other security, whether the right to convert or acquire is exercisable
344 immediately or in the future;

345 (D) any conversion or exchange of one security for another shall constitute an offer or
346 sale of the security received in a conversion or exchange, and the offer to buy or the purchase
347 of the security converted or exchanged;

348 (E) securities distributed as a dividend wherein the person receiving the dividend
349 surrenders the right, or the alternative right, to receive a cash or property dividend is an offer or
350 sale;

351 (F) a dividend of a security of another issuer is an offer or sale; or

352 (G) the issuance of a security under a merger, consolidation, reorganization,
353 recapitalization, reclassification, or acquisition of assets shall constitute the offer or sale of the
354 security issued as well as the offer to buy or the purchase of any security surrendered in
355 connection therewith, unless the sole purpose of the transaction is to change the issuer's
356 domicile.

357 (iv) The terms defined in Subsections (1)(v)(i) and (ii) do not include:

358 (A) a good faith gift;

359 (B) a transfer by death;

360 (C) a transfer by termination of a trust or of a beneficial interest in a trust;

361 (D) a security dividend not within Subsection (1)(v)(iii)(E) or (F);

362 (E) a securities split or reverse split; or

363 (F) any act incident to a judicially approved reorganization in which a security is issued
364 in exchange for one or more outstanding securities, claims, or property interests, or partly in
365 such exchange and partly for cash.

366 (w) "Securities Act of 1933," "Securities Exchange Act of 1934," "Public Utility
367 Holding Company Act of 1935," and "Investment Company Act of 1940" mean the federal
368 statutes of those names as amended before or after the effective date of this chapter.

- 369 (x) (i) "Security" means any:
- 370 (A) note;
- 371 (B) stock;
- 372 (C) treasury stock;
- 373 (D) bond;
- 374 (E) debenture;
- 375 (F) evidence of indebtedness;
- 376 (G) certificate of interest or participation in any profit-sharing agreement;
- 377 (H) collateral-trust certificate;
- 378 (I) preorganization certificate or subscription;
- 379 (J) transferable share;
- 380 (K) investment contract;
- 381 (L) burial certificate or burial contract;
- 382 (M) voting-trust certificate;
- 383 (N) certificate of deposit for a security;
- 384 (O) certificate of interest or participation in an oil, gas, or mining title or lease or in
- 385 payments out of production under such a title or lease;
- 386 (P) commodity contract or commodity option;
- 387 (Q) interest in a limited liability company;
- 388 (R) viatical settlement interest; or
- 389 (S) in general, any interest or instrument commonly known as a "security," or any
- 390 certificate of interest or participation in, temporary or interim certificate for, receipt for,
- 391 guarantee of, or warrant or right to subscribe to or purchase any of the foregoing.
- 392 (ii) "Security" does not include any:
- 393 (A) insurance or endowment policy or annuity contract under which an insurance
- 394 company promises to pay money in a lump sum or periodically for life or some other specified
- 395 period;
- 396 (B) interest in a limited liability company in which the limited liability company is
- 397 formed as part of an estate plan where all of the members are related by blood or marriage,
- 398 there are five or fewer members, or the person claiming this exception can prove that all of the
- 399 members are actively engaged in the management of the limited liability company; or

- 400 (C) (I) a whole long-term estate in real property;
- 401 (II) an undivided fractionalized long-term estate in real property that consists of ten or
- 402 fewer owners; or
- 403 (III) an undivided fractionalized long-term estate in real property that consists of more
- 404 than ten owners if, when the real property estate is subject to a management agreement:
- 405 (Aa) the management agreement permits a simple majority of owners of the real
- 406 property estate to not renew or to terminate the management agreement at the earlier of the end
- 407 of the management agreement's current term, or 180 days after the day on which the owners
- 408 give notice of termination to the manager;
- 409 (Bb) the management agreement prohibits, directly or indirectly, the lending of the
- 410 proceeds earned from the real property estate or the use or pledge of its assets to any person or
- 411 entity affiliated with or under common control of the manager; and
- 412 (Cc) the management agreement complies with any other requirement imposed by rule
- 413 by the Real Estate Commission under Section 61-2-26.
- 414 (iii) For purposes of Subsection (1)(x)(ii)(B), evidence that members vote or have the
- 415 right to vote, or the right to information concerning the business and affairs of the limited
- 416 liability company, or the right to participate in management, shall not establish, without more,
- 417 that all members are actively engaged in the management of the limited liability company.
- 418 (y) "State" means any state, territory, or possession of the United States, the District of
- 419 Columbia, and Puerto Rico.
- 420 (z) "Threshold security" means a security that is a threshold security under regulations
- 421 issued under the Securities and Exchange Act of 1934.
- 422 [~~(z)~~] (aa) (i) "Undivided fractionalized long-term estate" means an ownership interest
- 423 in real property by two or more persons that is a:
- 424 (A) tenancy in common; or
- 425 (B) any other legal form of undivided estate in real property including:
- 426 (I) a fee estate;
- 427 (II) a life estate; or
- 428 (III) other long-term estate.
- 429 (ii) "Undivided fractionalized long-term estate" does not include a joint tenancy.
- 430 [~~(aa)~~] (bb) (i) "Viatical settlement interest" means the entire interest or any fractional

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

432 (A) a life insurance policy; or

433 (B) the death benefit under a life insurance policy.

434 (ii) "Viatical settlement interest" does not include the initial purchase from the viator

435 by a provider of viatical settlements.

436 [~~(bb)~~] (cc) "Whole long-term estate" means a person or persons through joint tenancy

437 owns real property through:

438 (i) a fee estate;

439 (ii) a life estate; or

440 (iii) other long-term estate.

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

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

443 (2) A term not defined in this section shall have the meaning as established by division

444 rule. The meaning of a term neither defined in this section nor by rule of the division shall be

445 the meaning commonly accepted in the business community.

446 (3) (a) This Subsection (3) applies to:

447 (i) the offer or sale of a real property estate exempted from the definition of security

448 under Subsection (1)(x)(ii)(C); or

449 (ii) the offer or sale of an undivided fractionalized long-term estate that is the offer of a
450 security.

451 (b) A person who, directly or indirectly receives compensation in connection with the

452 offer or sale as provided in this Subsection (3) of a real property estate is not an agent,

453 broker-dealer, investment adviser, or investor adviser representative under this chapter if that

454 person is licensed under Chapter 2, Division of Real Estate, as:

455 (i) a principal real estate broker;

456 (ii) an associate real estate broker; or

457 (iii) a real estate sales agent.

458 (4) The list of real property estates excluded from the definition of securities under

459 Subsection (1)(x)(ii)(C) is not an exclusive list of real property estates or interests that are not a

460 security.

461 Section 3. Section **61-1-22** is amended to read:

462 **61-1-22. Sales and purchases in violation -- Remedies -- Limitation of actions.**

463 (1) (a) A person who offers or sells a security in violation of Subsection 61-1-3(1),
464 Section 61-1-7, Subsection 61-1-17(2), any rule or order under Section 61-1-15, which requires
465 the affirmative approval of sales literature before it is used, any condition imposed under
466 Subsection 61-1-10(4) or 61-1-11(7), or offers, sells, or purchases a security in violation of
467 Subsection 61-1-1(2) is liable to the person selling the security to or buying the security from
468 him, who may sue either at law or in equity to recover the consideration paid for the security,
469 together with interest at 12% per year from the date of payment, costs, and reasonable
470 attorney's fees, less the amount of any income received on the security, upon the tender of the
471 security or for damages if he no longer owns the security.

472 (b) Damages are the amount that would be recoverable upon a tender less the value of
473 the security when the buyer disposed of it and interest at 12% per year from the date of
474 disposition.

475 (2) The court in a suit brought under Subsection (1) may award an amount equal to
476 three times the consideration paid for the security, together with interest, costs, and attorney's
477 fees, less any amounts, all as specified in Subsection (1) upon a showing that the violation was
478 reckless or intentional.

479 (3) A person who offers or sells a security in violation of Subsection 61-1-1(2) is not
480 liable under Subsection (1)(a) if the purchaser knew of the untruth or omission, or the seller did
481 not know and in the exercise of reasonable care could not have known of the untrue statement
482 or misleading omission.

483 (4) (a) Every person who directly or indirectly controls a seller or buyer liable under
484 Subsection (1), every partner, officer, or director of such a seller or buyer, every person
485 occupying a similar status or performing similar functions, every employee of such a seller or
486 buyer who materially aids in the sale or purchase, and every broker-dealer or agent who
487 materially aids in the sale are also liable jointly and severally with and to the same extent as the
488 seller or purchaser, unless the nonseller or nonpurchaser who is so liable sustains the burden of
489 proof that he did not know, and in exercise of reasonable care could not have known, of the
490 existence of the facts by reason of which the liability is alleged to exist.

491 (b) There is contribution as in cases of contract among the several persons so liable.

492 (5) Any tender specified in this section may be made at any time before entry of

493 judgment.

494 (6) A cause of action under this section survives the death of any person who might
495 have been a plaintiff or defendant.

496 (7) (a) No action shall be maintained to enforce any liability under this section unless
497 brought before the expiration of four years after the act or transaction constituting the violation
498 or the expiration of two years after the discovery by the plaintiff of the facts constituting the
499 violation, whichever expires first.

500 (b) No person may sue under this section if:

501 (i) the buyer or seller received a written offer, before suit and at a time when he owned
502 the security, to refund the consideration paid together with interest at 12% per year from the
503 date of payment, less the amount of any income received on the security, and he failed to
504 accept the offer within 30 days of its receipt; or

505 (ii) the buyer or seller received such an offer before suit and at a time when he did not
506 own the security, unless he rejected the offer in writing within 30 days of its receipt.

507 (8) No person who has made or engaged in the performance of any contract in violation
508 of this chapter or any rule or order hereunder, or who has acquired any purported right under
509 any such contract with knowledge of the facts by reason of which its making or performance
510 was in violation, may base any suit on the contract.

511 (9) A condition, stipulation, or provision binding a person acquiring a security to waive
512 compliance with this chapter or a rule or order hereunder is void.

513 (10) (a) The rights and remedies provided by this chapter are in addition to any other
514 rights or remedies that may exist at law or in equity.

515 (b) This chapter does not create any cause of action not specified in this section [~~or~~],
516 Subsection 61-1-4(6), or Subsection 61-1-5(2).

Legislative Review Note
as of 2-9-06 2:54 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 SB0269

Securities Amendments

13-Feb-06

12:54 PM

State Impact

No fiscal impact.

Individual and Business Impact

Enforcement is by private right of action.

Office of the Legislative Fiscal Analyst