

SECURITIES AMENDMENTS

2006 THIRD SPECIAL SESSION

STATE OF UTAH

Chief Sponsor: Curtis S. Bramble

House Sponsor: John Dougall

LONG TITLE

General Description:

This bill modifies the Utah Uniform Securities Act.

Highlighted Provisions:

This bill:

- ▶ requires a broker-dealer to notify the division of the failure to settle certain securities transactions occurring on or after October 1, 2006;
- ▶ addresses liability for failure to file the notice including waiver of penalties or amounts owed for reasonable cause;
- ▶ addresses liability for certain persons if the broker-dealer fails to give the required notice;
- ▶ defines "threshold security";
- ▶ addresses what causes of action are created by the Utah Uniform Securities Act; and
- ▶ makes technical changes.

Monies Appropriated in this Bill:

None

Other Special Clauses:

This bill provides an immediate effective date.

Utah Code Sections Affected:

AMENDS:

61-1-5, as last amended by Chapter 160, Laws of Utah 1997

61-1-13, as last amended by Chapter 257, Laws of Utah 2005

61-1-22, as last amended by Chapter 13, Laws of Utah 1998

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:

58 (I) a customer; or

59 (II) its own account;

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

61 (C) the trade is in a threshold security of an issuer;

62 (I) domiciled in this state; or

63 (II) with its principal office located in this state; and

64 (D) the failure to settle described in this Subsection (2)(d) occurs on or after October 1,
65 2006.

66 (ii) If the conditions of Subsection (2)(d)(i) are met, the licensed broker-dealer shall
67 notify the division:

68 (A) within 24 hours of the failure to settle;

69 (B) in writing or by a means that the division shall specify by rule made in accordance
70 with Title 63, Chapter 46a, Utah Administrative Rulemaking Act; and

71 (C) of:

72 (I) the name of the company whose shares were the subject of the settlement failure;

73 (II) the date of the trade that failed to settle;

74 (III) the amount of the shares not delivered to settle the trade; and

75 (IV) (Aa) in the case of a selling broker-dealer, the identity of the broker-dealer's
76 customer account or broker-dealer account for which the sell transaction is executed; or

77 (Bb) in the case of a broker-dealer purchasing the securities, the identity of the account
78 that failed to deliver the security in settlement of the trade.

79 (iii) The division shall make the information disclosed under Subsection (2)(d)(ii)
80 available to the public.

81 (iv) (A) Subject to Subsection (2)(d)(iv)(C), a broker-dealer who materially fails to
82 provide the notice required by Subsection (2)(d)(ii) is liable to the company whose securities
83 were the subject of the settlement failure in the amount of:

84 (I) if the failure is for at least one business day but not more than five business days,
85 \$10,000 for each business day the broker-dealer fails to provide the required notice; or

(II) if the failure is for six or more business days, the greater of:
(Aa) \$10,000 for each business day; or
(Bb) the sum of the sales price for each securities share in the subject trade that has not
been delivered in settlement.

(B) Subject to Subsection (2)(d)(iv)(C), the company described in this Subsection
(2)(d)(iv) may sue at law or in equity to enforce the payment of:

(I) the amount described in Subsection (2)(d)(iv)(A);
(II) interest at 12% per year from the day on which the broker-dealer fails to provide
the notice required by Subsection (2)(d)(ii);

(III) costs; and
(IV) reasonable attorney's fees.

(C) The court in an action brought under this Subsection (2)(d)(iv) may waive the
amounts owed under this Subsection (2)(d)(iv), upon a showing by the licensed broker-dealer
who is subject to this Subsection (2)(d) or any person listed in Subsection (2)(d)(v) of
reasonable cause including for any exception provided in Regulation SHO, 17 C.F.R. 242.200
et seq.

(v) Each of the following is liable jointly and severally with and to the same extent as a
broker-dealer is liable under Subsection (2)(d)(iv):

(A) a principal of the broker-dealer;
(B) a person who directly or indirectly controls the broker-dealer;
(C) a partner, officer, or director of the broker-dealer;
(D) a person occupying a similar status or performing a similar function to a partner,
officer, or director of the broker-dealer; and

(E) an employee of the broker-dealer who:
(I) has a duty to assure the filing of the notice required by Subsection (2)(d)(ii); and
(II) recklessly fails in that duty.

(vi) An action may not be maintained to enforce any liability under Subsection
(2)(d)(iv) or (v) unless it is brought before the sooner of the expiration of:

114 (A) four years after the day on which the broker-dealer fails to provide the notice
115 required by Subsection (2)(d)(ii); or

116 (B) two years after the day on which the company bringing the enforcement action
117 discovers the facts constituting the violation of Subsection (2)(d)(ii).

118 (vii) The rights and remedies provided in this Subsection (2)(d) are in addition to any
119 other rights or remedies that may exist at law or in equity.

120 (viii) With regard to any enforcement action the division may take to enforce this
121 Subsection (2)(d), the division may waive any penalty or amounts owed upon a showing by the
122 licensed broker-dealer who is subject to this Subsection (2)(d) or any person listed in
123 Subsection (2)(d)(v) of reasonable cause including for any exception provided in Regulation
124 SHO, 17 C.F.R. 242.200 et seq.

125 (3) Every licensed broker-dealer and investment adviser shall file financial reports as
126 the division by rule prescribes, except as provided in:

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

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

131 (4) If the information contained in any document filed with the division is or becomes
132 inaccurate or incomplete in any material respect, the licensee or federal covered adviser shall
133 promptly file a correcting amendment if the document is filed with respect to a licensee, or
134 when such amendment is required to be filed with the Securities and Exchange Commission if
135 the document is filed with respect to a federal covered adviser, unless notification of the
136 correction has been given under Section 61-1-3.

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

141 (b) For the purpose of avoiding unnecessary duplication of examination, the division

may cooperate with:

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

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

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

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

61-1-13. Definitions.

(1) As used in this chapter:

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

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

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

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

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

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

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

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

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

(iii) A partner, officer, or director of a broker-dealer or issuer, or a person occupying a similar status or performing similar functions, is an agent only if [~~he~~] the partner, officer,

170 director, or person otherwise comes within [~~this~~] the definition[~~:-~~] of "agent."

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

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

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

175 (A) an agent;

176 (B) an issuer;

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

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

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

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

181 (Bb) other broker-dealers; or

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

186 (II) during any period of 12 consecutive months the person does not direct more than
187 15 offers to sell or buy into this state in any manner to persons other than those specified in
188 Subsection (1)(c)(ii)(D)(I), whether or not the offeror or any of the offerees is then present in
189 this state;

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

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

195 (G) a person who is a real estate broker licensed in this state and who effects
196 transactions in a bond or other evidence of indebtedness secured by a real or chattel mortgage
197 or deed of trust, or by an agreement for the sale of real estate or chattels, if the entire mortgage,

198 deed or trust, or agreement, together with all the bonds or other evidences of indebtedness
199 secured thereby, is offered and sold as a unit;

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

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

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

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

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

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

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

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

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

215 (v) any foreign currency; and

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

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

225 (ii) Any commodity contract offered or sold shall, in the absence of evidence to the

contrary, be presumed to be offered or sold for speculation or investment purposes.

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

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

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

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

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

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

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

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

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

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

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

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

(l) "Federal covered security" means any security that is a covered security under

Section 18(b) of the Securities Act of 1933 or rules or regulations promulgated under Section 18(b) of the Securities Act of 1933.

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

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

(o) (i) "Investment adviser" means any person who[;]:

(A) for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities[;]; or [~~who~~]

(B) for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities.

(ii) "Investment adviser" [~~also~~] includes financial planners and other persons who[;]:

(A) as an integral component of other financially related services, provide the investment advisory services described in Subsection (1)(o)(i) to others for compensation and as part of a business; or [~~who~~]

(B) hold themselves out as providing the investment advisory services described in Subsection (1)(o)(i) to others for compensation.

(iii) "Investment adviser" does not include:

(A) an investment adviser representative;

(B) a bank, savings institution, or trust company;

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

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

(E) a publisher of any bona fide newspaper, news column, news letter, news magazine, or business or financial publication or service, of general, regular, and paid circulation, whether communicated in hard copy form, or by electronic means, or otherwise, that does not consist of

the rendering of advice on the basis of the specific investment situation of each client;

(F) any person who is a federal covered adviser;

(G) a person described in Subsection (3); or

(H) such other persons not within the intent of this Subsection (1)(o) as the division may by rule or order designate.

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

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

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

(B) does any of the following:

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

(II) manages accounts or portfolios of clients;

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

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

or

(V) supervises employees who perform any of the acts described in this Subsection (1)(p)(i)(B).

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

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

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

(iii) "Issuer" means the person or persons performing the acts and assuming duties of a depositor or manager under the provisions of the trust or other agreement or instrument under

310 which the security is issued with respect to:

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

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

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

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

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

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

324 (s) "Person" means:

325 (i) an individual[;];

326 (ii) a corporation[;];

327 (iii) a partnership[;];

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

329 (v) an association[;];

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

331 (vii) a joint venture[;];

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

333 (ix) an unincorporated organization[;];

334 (x) a government[;]; or

335 (xi) a political subdivision of a government.

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

337 (i) silver;

(ii) gold;

(iii) platinum;

(iv) palladium;

(v) copper; and

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) a good faith gift;

(B) a transfer by death;

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

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

(E) a securities split or reverse split; or

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

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

(x) (i) "Security" means any:

(A) note;

(B) stock;

(C) treasury stock;

(D) bond;

(E) debenture;

(F) evidence of indebtedness;

(G) certificate of interest or participation in any profit-sharing agreement;

(H) collateral-trust certificate;

(I) preorganization certificate or subscription;

(J) transferable share;

(K) investment contract;

(L) burial certificate or burial contract;

(M) voting-trust certificate;

(N) certificate of deposit for a security;

(O) certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease;

(P) commodity contract or commodity option;

(Q) interest in a limited liability company;

(R) viatical settlement interest; or

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

(ii) "Security" does not include any:

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

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

(C) (I) a whole long-term estate in real property;

(II) an undivided fractionalized long-term estate in real property that consists of ten or fewer owners; or

(III) an undivided fractionalized long-term estate in real property that consists of more than ten owners if, when the real property estate is subject to a management agreement:

(Aa) the management agreement permits a simple majority of owners of the real property estate to not renew or to terminate the management agreement at the earlier of the end of the management agreement's current term, or 180 days after the day on which the owners

give notice of termination to the manager;

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

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

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

(y) "State" means any state, territory, or possession of the United States, the District of Columbia, and Puerto Rico.

(z) "Threshold security" means a security that is a threshold security under Regulation SHO, 17 C.F.R. 242.200 et seq.

~~[(z)]~~ (aa) (i) "Undivided fractionalized long-term estate" means an ownership interest in real property by two or more persons that is a:

(A) tenancy in common; or

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

(I) a fee estate;

(II) a life estate; or

(III) other long-term estate.

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

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

(A) a life insurance policy; or

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

(ii) "Viatical settlement interest" does not include the initial purchase from the viator by a provider of viatical settlements.

450 ~~[(bb)]~~ (cc) "Whole long-term estate" means a person or persons through joint tenancy
451 owns real property through:

- 452 (i) a fee estate;
- 453 (ii) a life estate; or
- 454 (iii) other long-term estate.

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

457 (2) A term not defined in this section shall have the meaning as established by division
458 rule. The meaning of a term neither defined in this section nor by rule of the division shall be
459 the meaning commonly accepted in the business community.

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

- 461 (i) the offer or sale of a real property estate exempted from the definition of security
462 under Subsection (1)(x)(ii)(C); or
- 463 (ii) the offer or sale of an undivided fractionalized long-term estate that is the offer of a
464 security.

465 (b) A person who, directly or indirectly receives compensation in connection with the
466 offer or sale as provided in this Subsection (3) of a real property estate is not an agent,
467 broker-dealer, investment adviser, or investor adviser representative under this chapter if that
468 person is licensed under Chapter 2, Division of Real Estate, as:

- 469 (i) a principal real estate broker;
- 470 (ii) an associate real estate broker; or
- 471 (iii) a real estate sales agent.

472 (4) The list of real property estates excluded from the definition of securities under
473 Subsection (1)(x)(ii)(C) is not an exclusive list of real property estates or interests that are not a
474 security.

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

476 **61-1-22. Sales and purchases in violation -- Remedies -- Limitation of actions.**

477 (1) (a) A person who offers or sells a security in violation of Subsection 61-1-3(1),

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 4. **Effective date.**

If approved by two-thirds of all the members elected to each house, this bill takes effect upon approval by the governor, or the day following the constitutional time limit of Utah

534 Constitution Article VII, Section 8, without the governor's signature, or in the case of a veto,
535 the date of veto override.