

**AMENDMENTS RELATED TO REGULATION OF
INSURANCE TYPE PRODUCTS**

2010 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Jim Bird

Senate Sponsor: J. Stuart Adams

LONG TITLE

General Description:

This bill modifies the Insurance Code and the Utah Uniform Securities Act to address the treatment of insurance and annuities.

Highlighted Provisions:

This bill:

- ▶ modifies the jurisdiction of the Insurance Department related to variable contracts;
- ▶ modifies the definition of securities to eliminate the exclusion of certain variable contracts from the definition of securities;
- ▶ exempts certain insurance related securities from registration; and
- ▶ makes technical and conforming amendments.

Monies Appropriated in this Bill:

None

Other Special Clauses:

This bill coordinates with H.B. 39, Insurance Related Amendments, to have certain amendments in this bill supersede certain language in H.B. 39.

Utah Code Sections Affected:

AMENDS:

31A-5-217.5, as enacted by Laws of Utah 1992, Chapter 230

31A-20-106, as enacted by Laws of Utah 1985, Chapter 242



28 61-1-13, as last amended by Laws of Utah 2009, Chapters 351 and 355

29 61-1-14, as last amended by Laws of Utah 2009, Chapter 351



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

32 Section 1. Section 31A-5-217.5 is amended to read:

33 **31A-5-217.5. Variable contract law.**

34 (1) This section applies to all separate accounts that are used to support any one or
35 more of the following:

36 (a) variable life insurance policies that satisfy the requirements of Section 817, Internal
37 Revenue Code;

38 (b) variable annuity contracts, including modified guaranteed annuities; or

39 (c) benefits under plans governed by the Employee Retirement Income Security Act of
40 1974.

41 (2) In the event of a conflict between this section and any other section of this title as it
42 relates to these accounts, this section prevails.

43 (3) A domestic life insurance company may establish one or more separate accounts,
44 and may allocate to those accounts amounts, which include proceeds applied under optional
45 modes of settlement or under dividend options, to provide for life insurance or annuities, and
46 benefits incidental to life insurance or annuities, payable in fixed or variable amounts or both,
47 subject to the following:

48 (a) The income, gains, and losses, realized or unrealized, from assets allocated to a
49 separate account shall be credited to or charged against the account, without regard to other
50 income, gains, or losses of the company.

51 (b) Except as may be provided with respect to reserves for guaranteed benefits and
52 funds referred to in Subsection (3)(c):

53 (i) amounts allocated to any separate account and accumulations on such amounts may
54 be invested and reinvested without regard to any requirements or limitations prescribed by the
55 laws of this state governing the investments of life insurance companies; and

56 (ii) the investments in any such separate account may not be taken into account in
57 applying the investment limitations that otherwise apply to the investments of the company.

58 (c) Except with the approval of the commissioner and under any conditions as to

59 investments and other matters as [he] the commissioner may prescribe, which shall recognize
60 the guaranteed nature of the benefits provided, reserves for benefits guaranteed as to dollar
61 amount and duration, and funds guaranteed as to principal amount or stated rate of interest may
62 not be maintained in a separate account.

63 (d) Unless otherwise approved by the commissioner, assets allocated to a separate
64 account shall be valued at their market value on the date of valuation, or if there is no readily
65 available market, then as provided under the terms of the contract or the rules or other written
66 agreement that applies to the separate account. However, unless otherwise approved by the
67 commissioner, the portion of any of the assets of the separate account equal to the company's
68 reserve liability with regard to the guaranteed benefits and funds referred to in Subsection
69 (3)(c) shall be valued in accordance with the rules that otherwise apply to the company's assets.

70 (e) Amounts allocated to a separate account in the exercise of the power granted by this
71 section shall be owned by the company, and the company may not be, nor hold itself out to be,
72 a trustee with respect to those amounts. If, and to the extent provided under the applicable
73 contracts, that portion of the assets of any separate account that is equal to the reserves and
74 other contract liabilities with respect to the account may not be chargeable with liabilities
75 arising out of any other business the company may conduct.

76 (f) A sale, exchange, or other transfer of assets may not be made by a company
77 between any of its separate accounts or between any other investment account and one or more
78 of its separate accounts unless, in case of a transfer into a separate account, the transfer is made
79 solely to establish the account or to support the operation of the contracts with respect to the
80 separate account to which the transfer is made, and unless the transfer, whether into or from a
81 separate account, is made by a transfer of cash, or by a transfer of securities having a readily
82 determinable market value, if the transfer of securities is approved by the commissioner. The
83 commissioner may approve other transfers among such accounts if, in his opinion, the transfers
84 would not be inequitable.

85 (g) To the extent a company considers it necessary to comply with any applicable
86 federal or state laws, the company, with respect to any separate account, including any separate
87 account which is a management investment company or a unit investment trust, may provide
88 for persons having an interest in the account appropriate voting and other rights and special
89 procedures for the conduct of the business of the account, including special rights and

90 procedures relating to investment policy, investment advisory services, selection of
91 independent public accountants, and the selection of a committee, the members of which need
92 not be otherwise affiliated with the company, to manage the business of the account.

93 (4) Any contract providing benefits payable in variable amounts delivered or issued for
94 delivery in this state shall contain a statement of the essential features of the procedures to be
95 followed by the insurance company in determining the dollar amount of the variable benefits.
96 Any contract under which the benefits vary to reflect investment experience, including a group
97 contract and any certificate in evidence of variable benefits issued under a group contract, shall
98 state that the dollar amount will vary according to investment experience. The contract shall
99 contain on its first page a statement to the effect that the benefits under the contract are on a
100 variable basis.

101 (5) (a) A company may not deliver or issue for delivery within this state variable
102 contracts unless it is licensed or organized to do a life insurance or annuity business in this
103 state, and the commissioner is satisfied that its condition or method of operation in connection
104 with the issuance of such contracts will not render its operation hazardous to the public or its
105 policyholders in this state. In this connection, the commissioner shall consider among other
106 things:

107 (i) the history and financial condition of the company;

108 (ii) the character, responsibility, and fitness of the officers and directors of the
109 company; and

110 (iii) (A) the law and regulation under which the company is authorized in the state of
111 domicile to issue variable contracts.

112 (B) The state of entry of an alien company shall be considered its place of domicile for
113 the purposes of Subsection (5)(iii)(A).

114 (b) If the company is a subsidiary of an admitted life insurance company, or affiliated
115 with such a company through common management or ownership, it may be considered by the
116 commissioner to have met the provisions of this section if either it or the parent or the affiliated
117 company meets the requirements of this section.

118 ~~[(6) Notwithstanding any other provision of law, the commissioner shall have sole~~
119 ~~authority to regulate the issuance and sale of variable contracts, and to make rules necessary~~
120 ~~and appropriate to carry out the purposes and provisions of this chapter.]~~

121 ~~[(7)]~~ (6) (a) Except for Sections 31A-22-402, 31A-22-407, and 31A-22-409, in the case
 122 of a variable annuity contract and Sections 31A-22-402, 31A-22-407, and 31A-22-408 in the
 123 case of a variable life insurance policy, and except as otherwise provided in this chapter, all
 124 pertinent provisions of this title apply to separate accounts and contracts relating to the separate
 125 accounts. Any individual variable life insurance contract, delivered or issued for delivery in
 126 this state shall contain grace, reinstatement, and nonforfeiture provisions appropriate to the
 127 contract.

128 (b) The reserve liability for variable contracts shall be established in accordance with
 129 actuarial procedures that recognize the variable nature of the benefits provided and any
 130 mortality guarantees.

131 Section 2. Section **31A-20-106** is amended to read:

132 **31A-20-106. Variable contracts.**

133 ~~[No]~~ (1) (a) An insurer may not deliver within this state any contract providing life or
 134 annuity benefits in variable amounts until the insurer has satisfied the commissioner that its
 135 condition and methods of operation in connection with those types of contracts do not render
 136 its operation hazardous to the public or its policyholders in Utah.

137 (b) Notwithstanding any other provision of law, the commissioner has exclusive
 138 authority to:

139 (i) regulate the issuance of a variable insurance policy or contract; and

140 (ii) make rules necessary to carry out this title in relation to a variable insurance policy
 141 or contract.

142 (2) In determining the qualification of an insurer requesting authority to deliver those
 143 contracts in Utah, the commissioner shall consider:

144 ~~[(1)]~~ (a) the history and financial condition of the insurer;

145 ~~[(2)]~~ (b) the character, responsibility, and general fitness of the insurer's officers and
 146 directors; and

147 ~~[(3)]~~ (c) in the case of a foreign insurer, whether the regulation provided by the state of
 148 its domicile or the jurisdiction in which its head office is located provides protection to
 149 policyholders and the public substantially equal to that provided by ~~[the Insurance Code]~~ this
 150 title and the rules issued under ~~[it]~~ this title.

151 Section 3. Section **61-1-13** is amended to read:

152 **61-1-13. Definitions.**

153 (1) As used in this chapter:

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

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

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

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

163 (I) in securities exempted by Subsection 61-1-14(1)(a), (b), (c), or (g);

164 (II) exempted by Subsection 61-1-14(2);

165 (III) in a covered security as described in Sections 18(b)(3) and 18(b)(4)(D) of the
166 Securities Act of 1933; or

167 (IV) with existing employees, partners, officers, or directors of the issuer; or

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

170 (iii) A partner, officer, or director of a broker-dealer or issuer, or a person occupying a
171 similar status or performing similar functions, is an agent only if the partner, officer, director,
172 or person otherwise comes within the definition of "agent."

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

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

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

177 (A) an agent;

178 (B) an issuer;

179 (C) a depository institution or trust company;

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

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

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

- 183 (Bb) other broker-dealers;
- 184 (Cc) a depository institution, whether acting for itself or as a trustee;
- 185 (Dd) a trust company, whether acting for itself or as a trustee;
- 186 (Ee) an insurance company, whether acting for itself or as a trustee;
- 187 (Ff) an investment company, as defined in the Investment Company Act of 1940,
188 whether acting for itself or as a trustee;
- 189 (Gg) a pension or profit-sharing trust, whether acting for itself or as a trustee; or
- 190 (Hh) another financial institution or institutional buyer, whether acting for itself or as a
191 trustee; or
- 192 (Ii) during any period of 12 consecutive months the person does not direct more than
193 15 offers to sell or buy into this state in any manner to persons other than those specified in
194 Subsection (1)(c)(ii)(D)(I), whether or not the offeror or an offeree is then present in this state;
- 195 (E) a general partner who organizes and effects transactions in securities of three or
196 fewer limited partnerships, of which the person is the general partner, in any period of 12
197 consecutive months;
- 198 (F) a person whose participation in transactions in securities is confined to those
199 transactions made by or through a broker-dealer licensed in this state;
- 200 (G) a person who is a real estate broker licensed in this state and who effects
201 transactions in a bond or other evidence of indebtedness secured by a real or chattel mortgage
202 or deed of trust, or by an agreement for the sale of real estate or chattels, if the entire mortgage,
203 deed or trust, or agreement, together with all the bonds or other evidences of indebtedness
204 secured thereby, is offered and sold as a unit;
- 205 (H) a person effecting transactions in commodity contracts or commodity options;
- 206 (I) a person described in Subsection (3); or
- 207 (J) other persons as the division, by rule or order, may designate, consistent with the
208 public interest and protection of investors, as not within the intent of this Subsection (1)(c).
- 209 (d) "Buy" or "purchase" means a contract for purchase of, contract to buy, or
210 acquisition of a security or interest in a security for value.
- 211 (e) "Commission" means the Securities Commission created in Section 61-1-18.5.
- 212 (f) "Commodity" means, except as otherwise specified by the division by rule:
- 213 (i) an agricultural, grain, or livestock product or byproduct, except real property or a

214 timber, agricultural, or livestock product grown or raised on real property and offered or sold
215 by the owner or lessee of the real property;

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

218 (iii) a gem or gemstone, whether characterized as precious, semi-precious, or
219 otherwise;

220 (iv) a fuel, whether liquid, gaseous, or otherwise;

221 (v) a foreign currency; and

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

225 (g) (i) "Commodity contract" means an account, agreement, or contract for the
226 purchase or sale, primarily for speculation or investment purposes and not for use or
227 consumption by the offeree or purchaser, of one or more commodities, whether for immediate
228 or subsequent delivery or whether delivery is intended by the parties, and whether characterized
229 as a cash contract, deferred shipment or deferred delivery contract, forward contract, futures
230 contract, installment or margin contract, leverage contract, or otherwise.

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

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

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

242 (h) (i) "Commodity option" means an account, agreement, or contract giving a party to
243 the option the right but not the obligation to purchase or sell one or more commodities or one
244 or more commodity contracts, or both whether characterized as an option, privilege, indemnity,

245 bid, offer, put, call, advance guaranty, decline guaranty, or otherwise.

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

248 (A) with the Securities and Exchange Commission; or

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

251 (i) "Depository institution" is as defined in Section 7-1-103.

252 (j) "Director" means the director of the division appointed in accordance with Section
253 61-1-18.

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

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

256 (m) "Federal covered adviser" means a person who:

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

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

260 (n) "Federal covered security" means a security that is a covered security under Section
261 18(b) of the Securities Act of 1933 or rules or regulations promulgated under Section 18(b) of
262 the Securities Act of 1933.

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

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

266 (q) (i) "Investment adviser" means a person who:

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

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

272 (ii) "Investment adviser" includes a financial planner or other person who:

273 (A) as an integral component of other financially related services, provides the
274 investment advisory services described in Subsection (1)(q)(i) to others for compensation and
275 as part of a business; or

276 (B) holds the person out as providing the investment advisory services described in
277 Subsection (1)(q)(i) to others for compensation.

278 (iii) "Investment adviser" does not include:

279 (A) an investment adviser representative;

280 (B) a depository institution or trust company;

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

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

286 (E) a publisher of a bona fide newspaper, news column, news letter, news magazine, or
287 business or financial publication or service, of general, regular, and paid circulation, whether
288 communicated in hard copy form, or by electronic means, or otherwise, that does not consist of
289 the rendering of advice on the basis of the specific investment situation of each client;

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

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

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

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

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

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

301 (B) does any of the following:

302 (I) makes a recommendation or otherwise renders advice regarding securities;

303 (II) manages accounts or portfolios of clients;

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

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

306 or

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

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

311 (s) "Investment contract" includes:

312 (i) an investment in a common enterprise with the expectation of profit to be derived
313 through the essential managerial efforts of someone other than the investor; or

314 (ii) an investment by which:

315 (A) an offeree furnishes initial value to an offerer;

316 (B) a portion of the initial value is subjected to the risks of the enterprise;

317 (C) the furnishing of the initial value is induced by the offerer's promises or
318 representations that give rise to a reasonable understanding that a valuable benefit of some kind
319 over and above the initial value will accrue to the offeree as a result of the operation of the
320 enterprise; and

321 (D) the offeree does not receive the right to exercise practical or actual control over the
322 managerial decisions of the enterprise.

323 (t) "Isolated transaction" means not more than a total of two transactions that occur
324 anywhere during six consecutive months.

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

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

329 (iii) "Issuer" means the one or more persons performing the acts and assuming duties
330 of a depositor or manager under the provisions of the trust or other agreement or instrument
331 under which the security is issued with respect to:

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

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

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

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

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

344 (v) (i) "Life settlement interest" means the entire interest or a fractional interest in any
345 of the following that is the subject of a life settlement:

346 (A) a policy; or

347 (B) the death benefit under a policy.

348 (ii) "Life settlement interest" does not include the initial purchase from the owner by a
349 life settlement provider.

350 (w) "Nonissuer" means not directly or indirectly for the benefit of the issuer.

351 (x) "Person" means:

352 (i) an individual;

353 (ii) a corporation;

354 (iii) a partnership;

355 (iv) a limited liability company;

356 (v) an association;

357 (vi) a joint-stock company;

358 (vii) a joint venture;

359 (viii) a trust where the interests of the beneficiaries are evidenced by a security;

360 (ix) an unincorporated organization;

361 (x) a government; or

362 (xi) a political subdivision of a government.

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

364 (i) silver;

365 (ii) gold;

366 (iii) platinum;

367 (iv) palladium;

368 (v) copper; and

- 369 (vi) such other substances as the division may specify by rule.
- 370 (z) "Promoter" means a person who, acting alone or in concert with one or more
371 persons, takes initiative in founding or organizing the business or enterprise of a person.
- 372 (aa) (i) Except as provided in Subsection (1)(aa)(ii), "record" means information that
373 is:
- 374 (A) inscribed in a tangible medium; or
375 (B) (I) stored in an electronic or other medium; and
376 (II) retrievable in perceivable form.
- 377 (ii) This Subsection (1)(aa) does not apply when the context requires otherwise,
378 including when "record" is used in the following phrases:
- 379 (A) "of record";
380 (B) "official record"; or
381 (C) "public record."
- 382 (bb) (i) "Sale" or "sell" includes a contract for sale of, contract to sell, or disposition of,
383 a security or interest in a security for value.
- 384 (ii) "Offer" or "offer to sell" includes an attempt or offer to dispose of, or solicitation of
385 an offer to buy, a security or interest in a security for value.
- 386 (iii) The following are examples of the definitions in Subsection (1)(bb)(i) or (ii):
- 387 (A) a security given or delivered with or as a bonus on account of a purchase of a
388 security or any other thing, is part of the subject of the purchase, and is offered and sold for
389 value;
- 390 (B) a purported gift of assessable stock is an offer or sale as is each assessment levied
391 on the stock;
- 392 (C) an offer or sale of a security that is convertible into, or entitles its holder to acquire
393 or subscribe to another security of the same or another issuer is an offer or sale of that security,
394 and also an offer of the other security, whether the right to convert or acquire is exercisable
395 immediately or in the future;
- 396 (D) a conversion or exchange of one security for another constitutes an offer or sale of
397 the security received in a conversion or exchange, and the offer to buy or the purchase of the
398 security converted or exchanged;
- 399 (E) securities distributed as a dividend wherein the person receiving the dividend

400 surrenders the right, or the alternative right, to receive a cash or property dividend is an offer or
401 sale;

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

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

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

409 (A) a good faith gift;

410 (B) a transfer by death;

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

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

413 (E) a securities split or reverse split.

414 (cc) "Securities Act of 1933," "Securities Exchange Act of 1934," and "Investment
415 Company Act of 1940" mean the federal statutes of those names as amended before or after the
416 effective date of this chapter.

417 (dd) "Securities Exchange Commission" means the United States Securities Exchange
418 Commission created by the Securities Exchange Act of 1934.

419 (ee) (i) "Security" means a:

420 (A) note;

421 (B) stock;

422 (C) treasury stock;

423 (D) bond;

424 (E) debenture;

425 (F) evidence of indebtedness;

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

427 (H) collateral-trust certificate;

428 (I) preorganization certificate or subscription;

429 (J) transferable share;

430 (K) investment contract;

- 431 (L) burial certificate or burial contract;
- 432 (M) voting-trust certificate;
- 433 (N) certificate of deposit for a security;
- 434 (O) certificate of interest or participation in an oil, gas, or mining title or lease or in
435 payments out of production under such a title or lease;
- 436 (P) commodity contract or commodity option;
- 437 (Q) interest in a limited liability company;
- 438 (R) life settlement interest; or
- 439 (S) in general, an interest or instrument commonly known as a "security," or a
440 certificate of interest or participation in, temporary or interim certificate for, receipt for,
441 guarantee of, or warrant or right to subscribe to or purchase an item listed in Subsections
442 (1)(ee)(i)(A) through (R).
- 443 (ii) "Security" does not include:
- 444 (A) an insurance or endowment policy or annuity contract under which an insurance
445 company promises to pay a fixed amount of money;
- 446 (I) in a lump sum; or
- 447 (II) periodically for life or some other specified period;
- 448 (B) an interest in a limited liability company in which the limited liability company is
449 formed as part of an estate plan where all of the members are related by blood or marriage, or
450 the person claiming this exception can prove that all of the members are actively engaged in the
451 management of the limited liability company; or
- 452 (C) (I) a whole long-term estate in real property;
- 453 (II) an undivided fractionalized long-term estate in real property that consists of 10 or
454 fewer owners; or
- 455 (III) an undivided fractionalized long-term estate in real property that consists of more
456 than 10 owners if, when the real property estate is subject to a management agreement:
- 457 (Aa) the management agreement permits a simple majority of owners of the real
458 property estate to not renew or to terminate the management agreement at the earlier of the end
459 of the management agreement's current term, or 180 days after the day on which the owners
460 give notice of termination to the manager;
- 461 (Bb) the management agreement prohibits, directly or indirectly, the lending of the

462 proceeds earned from the real property estate or the use or pledge of its assets to a person or
463 entity affiliated with or under common control of the manager; and

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

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

470 (ff) "State" means a state, territory, or possession of the United States, the District of
471 Columbia, and Puerto Rico.

472 (gg) (i) "Undivided fractionalized long-term estate" means an ownership interest in real
473 property by two or more persons that is a:

474 (A) tenancy in common; or

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

476 (I) a fee estate;

477 (II) a life estate; or

478 (III) other long-term estate.

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

480 (hh) "Whole long-term estate" means a person owns or persons through joint tenancy
481 own real property through:

482 (i) a fee estate;

483 (ii) a life estate; or

484 (iii) other long-term estate.

485 (ii) "Working days" means 8 a.m. to 5 p.m., Monday through Friday, exclusive of legal
486 holidays listed in Section 63G-1-301.

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

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

491 (i) the offer or sale of a real property estate exempted from the definition of security
492 under Subsection (1)(ee)(ii)(C); or

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

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

499 (i) a principal real estate broker;

500 (ii) an associate real estate broker; or

501 (iii) a real estate sales agent.

502 (4) The list of real property estates excluded from the definition of securities under
503 Subsection (1)(ee)(ii)(C) is not an exclusive list of real property estates or interests that are not
504 a security.

505 Section 4. Section **61-1-14** is amended to read:

506 **61-1-14. Exemptions.**

507 (1) The following securities are exempt from Sections 61-1-7 and 61-1-15:

508 (a) a security, including a revenue obligation, issued or guaranteed by the United
509 States, a state, a political subdivision of a state, or an agency or corporate or other
510 instrumentality of one or more of the foregoing, or a certificate of deposit for any of the
511 foregoing;

512 (b) a security issued or guaranteed by Canada, a Canadian province, a political
513 subdivision of a Canadian province, an agency or corporate or other instrumentality of one or
514 more of the foregoing, or another foreign government with which the United States currently
515 maintains diplomatic relations, if the security is recognized as a valid obligation by the issuer
516 or guarantor;

517 (c) a security issued by and representing an interest in or a debt of, or guaranteed by, a
518 depository institution organized under the laws of the United States, or a depository institution
519 or trust company supervised under the laws of a state;

520 (d) a security issued or guaranteed by a public utility or a security regulated in respect
521 of its rates or in its issuance by a governmental authority of the United States, a state, Canada,
522 or a Canadian province;

523 (e) (i) a federal covered security specified in the Securities Act of 1933, Section

524 18(b)(1), 15 U.S.C. Section 77r(b)(1), or by rule adopted under that provision;

525 (ii) a security listed or approved for listing on another securities market specified by

526 rule under this chapter;

527 (iii) any of the following with respect to a security described in Subsection (1)(e)(i) or

528 (ii):

529 (A) a put or a call option contract;

530 (B) a warrant; or

531 (C) a subscription right on or with respect to the security;

532 (iv) an option or similar derivative security on a security or an index of securities or

533 foreign currencies issued by a clearing agency that is:

534 (A) registered under the Securities Exchange Act of 1934; and

535 (B) listed or designated for trading on a national securities exchange, or a facility of a

536 national securities association registered under the Securities Exchange Act of 1934;

537 (v) an offer or sale, of the underlying security in connection with the offer, sale, or

538 exercise of an option or other security that was exempt when the option or other security was

539 written or issued; or

540 (vi) an option or a derivative security designated by the Securities and Exchange

541 Commission under Securities Exchange Act of 1934, Section 9(b), 15 U.S.C. Section 78i(b);

542 (f) (i) a security issued by a person organized and operated not for private profit but

543 exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, or

544 reformatory purposes, or as a chamber of commerce or trade or professional association; and

545 (ii) a security issued by a corporation organized under Title 3, Chapter 1, General

546 Provisions Relating to Agricultural Cooperative Associations, and a security issued by a

547 corporation to which that chapter is made applicable by compliance with Section 3-1-21;

548 (g) an investment contract issued in connection with an employees' stock purchase,

549 option, savings, pension, profit-sharing, or similar benefit plan;

550 (h) a security issued by an investment company that is registered, or that has filed a

551 registration statement, under the Investment Company Act of 1940; ~~and~~

552 (i) a security issued by an insurer authorized to do business in this state that:

553 (A) represents an interest in the insurer;

554 (B) represents a debt of the insurer; or

555 (C) is insured or guaranteed by the insurer; and
556 [(†)] (j) a security as to which the director, by rule or order, finds that registration is not
557 necessary or appropriate for the protection of investors.

558 (2) The following transactions are exempt from Sections 61-1-7 and 61-1-15:

559 (a) an isolated nonissuer transaction, whether effected through a broker-dealer or not;

560 (b) a nonissuer transaction in an outstanding security, if as provided by rule of the
561 division:

562 (i) information about the issuer of the security as required by the division is currently
563 listed in a securities manual recognized by the division, and the listing is based upon such
564 information as required by rule of the division; or

565 (ii) the security has a fixed maturity or a fixed interest or dividend provision and there
566 is no default during the current fiscal year or within the three preceding fiscal years, or during
567 the existence of the issuer and any predecessors if less than three years, in the payment of
568 principal, interest, or dividends on the security;

569 (c) a nonissuer transaction effected by or through a registered broker-dealer pursuant to
570 an unsolicited order or offer to buy;

571 (d) a transaction between the issuer or other person on whose behalf the offering is
572 made and an underwriter, or among underwriters;

573 (e) a transaction in a bond or other evidence of indebtedness secured by a real or
574 chattel mortgage or deed of trust, or by an agreement for the sale of real estate or chattels, if the
575 entire mortgage, deed of trust, or agreement, together with all the bonds or other evidences of
576 indebtedness secured thereby, is offered and sold as a unit;

577 (f) a transaction by an executor, administrator, sheriff, marshal, receiver, trustee in
578 bankruptcy, guardian, or conservator;

579 (g) a transaction executed by a bona fide pledgee without a purpose of evading this
580 chapter;

581 (h) an offer or sale to one of the following whether the purchaser is acting for itself or
582 in a fiduciary capacity:

583 (i) a depository institution;

584 (ii) a trust company;

585 (iii) an insurance company;

- 586 (iv) an investment company as defined in the Investment Company Act of 1940;
- 587 (v) a pension or profit-sharing trust;
- 588 (vi) other financial institution or institutional investor; or
- 589 (vii) a broker-dealer;
- 590 (i) an offer or sale of a preorganization certificate or subscription if:
- 591 (i) no commission or other remuneration is paid or given directly or indirectly for
- 592 soliciting a prospective subscriber;
- 593 (ii) the number of subscribers acquiring a legal or beneficial interest therein does not
- 594 exceed 10;
- 595 (iii) there is no general advertising or solicitation in connection with the offer or sale;
- 596 and
- 597 (iv) no payment is made by a subscriber;
- 598 (j) subject to Subsection (6), a transaction pursuant to an offer by an issuer of its
- 599 securities to its existing securities holders, if:
- 600 (i) no commission or other remuneration, other than a standby commission is paid or
- 601 given directly or indirectly for soliciting a security holder in this state; and
- 602 (ii) the transaction constitutes:
- 603 (A) the conversion of convertible securities;
- 604 (B) the exercise of nontransferable rights or warrants;
- 605 (C) the exercise of transferable rights or warrants if the rights or warrants are
- 606 exercisable not more than 90 days after their issuance;
- 607 (D) the purchase of securities under a preemptive right; or
- 608 (E) a transaction other than one specified in Subsections (2)(j)(ii)(A) through (D) if:
- 609 (I) the division is furnished with:
- 610 (Aa) a general description of the transaction;
- 611 (Bb) the disclosure materials to be furnished to the issuer's securities holders in the
- 612 transaction; and
- 613 (Cc) a non-refundable fee; and
- 614 (II) the division does not, by order, deny or revoke the exemption within 20 working
- 615 days after the day on which the filing required by Subsection (2)(j)(ii)(E)(I) is complete;
- 616 (k) an offer, but not a sale, of a security for which a registration statement is filed under

617 both this chapter and the Securities Act of 1933 if no stop order or refusal order is in effect and
618 no public proceeding or examination looking toward such an order is pending;

619 (l) a distribution of securities as a dividend if the person distributing the dividend is the
620 issuer of the securities distributed;

621 (m) a nonissuer transaction effected by or through a registered broker-dealer where the
622 broker-dealer or issuer files with the division, and the broker-dealer maintains in the
623 broker-dealer's records, and makes reasonably available upon request to a person expressing an
624 interest in a proposed transaction in the security with the broker-dealer information prescribed
625 by the division under its rules;

626 (n) a transaction not involving a public offering;

627 (o) an offer or sale of "condominium units" or "time period units" as those terms are
628 defined in Title 57, Chapter 8, Condominium Ownership Act, whether or not to be sold by
629 installment contract, if the following are complied with:

630 (i) Title 57, Chapter 8, Condominium Ownership Act, or if the units are located in
631 another state, the condominium act of that state;

632 (ii) Title 57, Chapter 11, Utah Uniform Land Sales Practices Act;

633 (iii) Title 57, Chapter 19, Timeshare and Camp Resort Act; and

634 (iv) Title 70C, Utah Consumer Credit Code;

635 (p) a transaction or series of transactions involving a merger, consolidation,
636 reorganization, recapitalization, reclassification, or sale of assets, if the consideration for
637 which, in whole or in part, is the issuance of securities of a person or persons, and if:

638 (i) the transaction or series of transactions is incident to a vote of the securities holders
639 of each person involved or by written consent or resolution of some or all of the securities
640 holders of each person involved;

641 (ii) the vote, consent, or resolution is given under a provision in:

642 (A) the applicable corporate statute or other controlling statute;

643 (B) the controlling articles of incorporation, trust indenture, deed of trust, or
644 partnership agreement; or

645 (C) the controlling agreement among securities holders;

646 (iii) (A) one person involved in the transaction is required to file proxy or
647 informational materials under Section 14(a) or (c) of the Securities Exchange Act of 1934 or

648 Section 20 of the Investment Company Act of 1940 and has so filed;

649 (B) one person involved in the transaction is an insurance company that is exempt from
650 filing under Section 12(g)(2)(G) of the Securities Exchange Act of 1934, and has filed proxy or
651 informational materials with the appropriate regulatory agency or official of its domiciliary
652 state; or

653 (C) all persons involved in the transaction are exempt from filing under Section
654 12(g)(1) of the Securities Exchange Act of 1934, and file with the division such proxy or
655 informational material as the division requires by rule;

656 (iv) the proxy or informational material is filed with the division and distributed to all
657 securities holders entitled to vote in the transaction or series of transactions at least 10 working
658 days prior to any necessary vote by the securities holders or action on any necessary consent or
659 resolution; and

660 (v) the division does not, by order, deny or revoke the exemption within 10 working
661 days after filing of the proxy or informational materials;

662 (q) subject to Subsection (7), a transaction pursuant to an offer to sell securities of an
663 issuer if:

664 (i) the transaction is part of an issue in which there are not more than 15 purchasers in
665 this state, other than those designated in Subsection (2)(h), during any 12 consecutive months;

666 (ii) no general solicitation or general advertising is used in connection with the offer to
667 sell or sale of the securities;

668 (iii) no commission or other similar compensation is given, directly or indirectly, to a
669 person other than a broker-dealer or agent licensed under this chapter, for soliciting a
670 prospective purchaser in this state;

671 (iv) the seller reasonably believes that all the purchasers in this state are purchasing for
672 investment; and

673 (v) the transaction is part of an aggregate offering that does not exceed \$1,000,000, or a
674 greater amount as prescribed by a division rule, during any 12 consecutive months;

675 (r) a transaction involving a commodity contract or commodity option;

676 (s) a transaction in a security, whether or not the security or transaction is otherwise
677 exempt if:

678 (i) the transaction is:

679 (A) in exchange for one or more outstanding securities, claims, or property interests; or

680 (B) partly for cash and partly in exchange for one or more outstanding securities,

681 claims, or property interests; and

682 (ii) the terms and conditions are approved by the director after a hearing under Section

683 ~~[61-1a-408]~~ 61-1-11.1;

684 (t) a transaction incident to a judicially approved reorganization in which a security is

685 issued:

686 (i) in exchange for one or more outstanding securities, claims, or property interests; or

687 (ii) partly for cash and partly in exchange for one or more outstanding securities,

688 claims, or property interests;

689 (u) a nonissuer transaction by a federal covered investment adviser with investments

690 under management in excess of \$100,000,000 acting in the exercise of discretionary authority

691 in a signed record for the account of others; and

692 (v) a transaction as to which the division finds that registration is not necessary or

693 appropriate for the protection of investors.

694 (3) A person filing an exemption notice or application shall pay a filing fee as

695 determined under Section 61-1-18.4.

696 (4) Upon approval by a majority of the commission, the director, by means of an

697 adjudicative proceeding conducted in accordance with Title 63G, Chapter 4, Administrative

698 Procedures Act, may deny or revoke an exemption specified in Subsection (1)(f) or (g) or in

699 Subsection (2) with respect to:

700 (a) a specific security, transaction, or series of transactions; or

701 (b) a person or issuer, an affiliate or successor to a person or issuer, or an entity

702 subsequently organized by or on behalf of a person or issuer generally and may impose a fine if

703 the director finds that the order is in the public interest and that:

704 (i) the application for or notice of exemption filed with the division is incomplete in a

705 material respect or contains a statement which was, in the light of the circumstances under

706 which it was made, false or misleading with respect to a material fact;

707 (ii) this chapter, or a rule, order, or condition lawfully imposed under this chapter has

708 been willfully violated in connection with the offering or exemption by:

709 (A) the person filing an application for or notice of exemption;

710 (B) the issuer, a partner, officer, or director of the issuer, a person occupying a similar
711 status or performing similar functions, or a person directly or indirectly controlling or
712 controlled by the issuer, but only if the person filing the application for or notice of exemption
713 is directly or indirectly controlled by or acting for the issuer; or

714 (C) an underwriter;

715 (iii) subject to Subsection (8), the security for which the exemption is sought is the
716 subject of an administrative stop order or similar order, or a permanent or temporary injunction
717 or a court of competent jurisdiction entered under another federal or state act applicable to the
718 offering or exemption;

719 (iv) the issuer's enterprise or method of business includes or would include activities
720 that are illegal where performed;

721 (v) the offering has worked, has tended to work, or would operate to work a fraud upon
722 purchasers;

723 (vi) the offering is or was made with unreasonable amounts of underwriters' and sellers'
724 discounts, commissions, or other compensation, or promoters' profits or participation, or
725 unreasonable amounts or kinds of options;

726 (vii) an exemption is sought for a security or transaction that is not eligible for the
727 exemption; or

728 (viii) the proper filing fee, if required, has not been paid.

729 (5) (a) An order under Subsection (4) may not operate retroactively.

730 (b) A person may not be considered to have violated Section 61-1-7 or 61-1-15 by
731 reason of an offer or sale effected after the entry of an order under this Subsection (5) if the
732 person sustains the burden of proof that the person did not know, and in the exercise of
733 reasonable care could not have known, of the order.

734 (6) The exemption created by Subsection (2)(j) is not available for an offer or sale of a
735 security to an existing securities holder who has acquired the holder's security from the issuer
736 in a transaction in violation of Section 61-1-7.

737 (7) As to a security, a transaction, or a type of security or transaction, the division may:

738 (a) withdraw or further condition the exemption described in Subsection (2)(q); or

739 (b) waive one or more of the conditions described in Subsection (2)(q).

740 (8) (a) The director may not institute a proceeding against an effective exemption under

741 Subsection (4)(b) more than one year from the day on which the order or injunction on which
742 the director relies is issued.

743 (b) The director may not enter an order under Subsection (4)(b) on the basis of an order
744 or injunction entered under another state act unless that order or injunction is issued on the
745 basis of facts that would constitute a ground for a stop order under this section at the time the
746 director enters the order.

747 Section 5. **Coordinating H.B. 65 with H.B. 39.**

748 If this H.B. 65 and H.B. 39, Insurance Related Amendments, both pass, it is the intent
749 of the Legislature that the Office of Legislative Research and General Counsel in preparing the
750 Utah Code database for publication, treat the language in Subsection 31A-20-106(1)(b) in this
751 bill as superseding the language in Subsection 31A-20-106(1)(b) in H.B. 65.

Legislative Review Note

as of 11-19-09 2:36 PM

Office of Legislative Research and General Counsel

H.B. 65 - Amendments Related to Regulation of Insurance Type Products

Fiscal Note

2010 General Session

State of Utah

State Impact

Enactment of this bill will not require additional appropriations.

Individual, Business and/or Local Impact

Enactment of this bill likely will not result in direct, measurable costs and/or benefits for individuals, businesses, or local governments.
