

## HB0248S01 compared with HB0248

~~deleted text~~ shows text that was in HB0248 but was deleted in HB0248S01.

inserted text shows text that was not in HB0248 but was inserted into HB0248S01.

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Representative Jim Bird proposes the following substitute bill:

### DIVISION OF SECURITIES AMENDMENTS

2013 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Jim Bird**

Senate Sponsor: \_\_\_\_\_

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#### LONG TITLE

##### General Description:

This bill modifies the Utah Uniform Securities Act and related provisions to move the Division of Securities into the Insurance Department.

##### Highlighted Provisions:

This bill:

- ▶ removes the Division of Securities as a division within the Department of Commerce;
- ▶ changes references to the Division of Securities being in the Department of Commerce to being in the Insurance Department;
- ▶ modifies the definition provision in the Utah Uniform Securities Act;
- ▶ establishes the Division of Securities within the Insurance Department;
- ▶ provides for the commissioner to appoint the director;

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- ▶ provides for the employment of staff with the approval of the commissioner;
- ▶ requires the director to annually submit a budget and report to the commissioner;
- ▶ addresses agency review by the commissioner;
- ▶ addresses to whom members of the Security Commission submit certain disclosures;
- ▶ provides that the commissioner concur with the director's use of certain money;
- ▶ addresses review of final orders by the commissioner;
- ▶ provides for transition into the Insurance Department; and
- ▶ makes technical and conforming amendments.

### Money Appropriated in this Bill:

None

### Other Special Clauses:

This bill takes effect on July 1, 2013.

### Utah Code Sections Affected:

AMENDS:

**13-1-2**, as last amended by Laws of Utah 2010, Chapter 278

**51-7-3**, as last amended by Laws of Utah 2011, Chapter 342

**61-1-13**, as last amended by Laws of Utah 2011, Chapters 317, 319, and 354

**61-1-18**, as last amended by Laws of Utah 2009, Chapter 351

**61-1-18.2**, as last amended by Laws of Utah 2009, Chapter 351

**61-1-18.5**, as last amended by Laws of Utah 2011, Chapter 319

**61-1-18.7**, as last amended by Laws of Utah 2011, Chapter 318

**61-1-23**, as last amended by Laws of Utah 2009, Chapter 351

### Uncodified Material Affected:

ENACTS UNCODIFIED MATERIAL

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

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

**13-1-2. Creation and functions of department -- Divisions created -- Fees --**

### **Commerce Service Account.**

(1) (a) There is created the Department of Commerce.

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(b) The department shall execute and administer state laws regulating business activities and occupations affecting the public interest.

(2) Within the department the following divisions are created:

(a) the Division of Occupational and Professional Licensing;

(b) the Division of Real Estate;

~~[(c) the Division of Securities;]~~

~~[(d)]~~ (c) the Division of Public Utilities;

~~[(e)]~~ (d) the Division of Consumer Protection; and

~~[(f)]~~ (e) the Division of Corporations and Commercial Code.

(3) (a) Unless otherwise provided by statute, the department may adopt a schedule of fees assessed for services provided by the department by following the procedures and requirements of Section 63J-1-504.

(b) The department shall submit each fee established in this manner to the Legislature for its approval as part of the department's annual appropriations request.

(c) (i) There is created a restricted account within the General Fund known as the "Commerce Service Account."

(ii) The restricted account created in Subsection (3)(c)(i) consists of fees collected by each division and by the department.

(iii) At the end of each fiscal year, the director of the Division of Finance shall transfer into the General Fund any fee collections that are greater than the legislative appropriations from the Commerce Service Account for that year.

(d) The department may not charge or collect a fee or expend money from the restricted account without approval by the Legislature.

Section 2. Section **51-7-3** is amended to read:

### **51-7-3. Definitions.**

As used in this chapter:

(1) "Agent" means "agent" as defined in Section 61-1-13.

(2) "Certified dealer" means:

(a) a primary reporting dealer recognized by the Federal Reserve Bank of New York who is certified by the director as having met the applicable criteria of council rule; or

(b) a broker dealer who:

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- (i) has and maintains an office and a resident registered principal in the state;
- (ii) meets the capital requirements established by council rules;
- (iii) meets the requirements for good standing established by council rule; and
- (iv) is certified by the director as meeting quality criteria established by council rule.

(3) "Certified investment adviser" means a federal covered adviser, as defined in Section 61-1-13, or an investment adviser, as defined in Section 61-1-13, who is certified by the director as having met the applicable criteria of council rule.

(4) "Commissioner" means the commissioner of financial institutions.

(5) "Council" means the State Money Management Council created by Section 51-7-16.

(6) "Director" means the director of the [~~Utah State~~] Division of Securities of the [~~Department of Commerce~~] Insurance Department.

(7) (a) "Endowment funds" means gifts, devises, or bequests of property of any kind donated to a higher education institution from any source.

(b) "Endowment funds" does not mean money used for the general operation of a higher education institution that is received by the higher education institution from:

- (i) state appropriations;
- (ii) federal contracts;
- (iii) federal grants;
- (iv) private research grants; and
- (v) tuition and fees collected from students.

(8) "First tier commercial paper" means commercial paper rated by at least two nationally recognized statistical rating organizations in the highest short-term rating category.

(9) "Funds functioning as endowments" means funds, regardless of source, whose corpus is intended to be held in perpetuity by formal institutional designation according to the institution's policy for designating those funds.

(10) "GASB" or "Governmental Accounting Standards Board" means the Governmental Accounting Standards Board that is responsible for accounting standards used by public entities.

(11) "Hard put" means an unconditional sell-back provision or a redemption provision applicable at issue to a note or bond, allowing holders to sell their holdings back to the issuer

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or to an equal or higher-rated third party provider at specific intervals and specific prices determined at the time of issuance.

(12) "Higher education institution" means the institutions specified in Section 53B-1-102.

(13) "Investment adviser representative" means "investment adviser representative" as defined in Section 61-1-13.

(14) (a) "Investment agreement" means any written agreement that has specifically negotiated withdrawal or reinvestment provisions and a specifically negotiated interest rate.

(b) "Investment agreement" includes any agreement to supply investments on one or more future dates.

(15) "Local government" means a county, municipality, school district, local district under Title 17B, Limited Purpose Local Government Entities - Local Districts, special service district under Title 17D, Chapter 1, Special Service District Act, or any other political subdivision of the state.

(16) "Market value" means market value as defined in the Master Repurchase Agreement.

(17) "Master Repurchase Agreement" means the current standard Master Repurchase Agreement approved by the Public Securities Association or by any successor organization.

(18) "Maximum amount" means, with respect to qualified depositories, the total amount of:

(a) deposits in excess of the federal deposit insurance limit; and

(b) nonqualifying repurchase agreements.

(19) "Money market mutual fund" means an open-end managed investment fund:

(a) that complies with the diversification, quality, and maturity requirements of Rule 2a-7 or any successor rule of the Securities and Exchange Commission applicable to money market mutual funds; and

(b) that assesses no sales load on the purchase of shares and no contingent deferred sales charge or other similar charges, however designated.

(20) "Nationally recognized statistical rating organization" means an organization that has been designated as a nationally recognized statistical rating organization by the Securities and Exchange Commission's Division of Market Regulation.

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(21) "Nonqualifying repurchase agreement" means a repurchase agreement evidencing indebtedness of a qualified depository arising from the transfer of obligations of the United States Treasury or other authorized investments to public treasurers that is:

- (a) evidenced by a safekeeping receipt issued by the qualified depository;
- (b) included in the depository's maximum amount of public funds; and
- (c) valued and maintained at market value plus an appropriate margin collateral requirement based upon the term of the agreement and the type of securities acquired.

(22) "Operating funds" means current balances and other funds that are to be disbursed for operation of the state government or any of its boards, commissions, institutions, departments, divisions, agencies, or other similar instrumentalities, or any county, city, school district, political subdivision, or other public body.

(23) "Permanent funds" means funds whose principal may not be expended, the earnings from which are to be used for purposes designated by law.

(24) "Permitted depository" means any out-of-state financial institution that meets quality criteria established by rule of the council.

(25) "Public funds" means money, funds, and accounts, regardless of the source from which the money, funds, and accounts are derived, that are owned, held, or administered by the state or any of its boards, commissions, institutions, departments, divisions, agencies, bureaus, laboratories, or other similar instrumentalities, or any county, city, school district, political subdivision, or other public body.

(26) (a) "Public money" means "public funds."

(b) "Public money," as used in Article VII, Sec. 15, Utah Constitution, means the same as "state funds."

(27) "Public treasurer" includes the state treasurer and the official of any state board, commission, institution, department, division, agency, or other similar instrumentality, or of any county, city, school district, political subdivision, or other public body who has the responsibility for the safekeeping and investment of any public funds.

(28) "Qualified depository" means a Utah depository institution or an out-of-state depository institution, as those terms are defined in Section 7-1-103 that is authorized to conduct business in this state under Section 7-1-702 or Title 7, Chapter 19, Acquisition of Failing Depository Institutions or Holding Companies, whose deposits are insured by an

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agency of the federal government and that has been certified by the commissioner of financial institutions as having met the requirements established under this chapter and the rules of the council to be eligible to receive deposits of public funds.

(29) "Qualifying repurchase agreement" means a repurchase agreement evidencing indebtedness of a financial institution or government securities dealer acting as principal arising from the transfer of obligations of the United States Treasury or other authorized investments to public treasurers only if purchased securities are:

(a) delivered to the public treasurer's safekeeping agent or custodian as contemplated by Section 7 of the Master Repurchase Agreement; and

(b) valued and maintained at market value plus an appropriate margin collateral requirement based upon the term of the agreement and the type of securities acquired.

(30) "Securities division" means Utah's Division of Securities created within the ~~[Department of Commerce by Section 13-1-2]~~ Insurance Department.

(31) "State funds" means:

(a) public money raised by operation of law for the support and operation of the state government; and

(b) all other money, funds, and accounts, regardless of the source from which the money, funds, or accounts are derived, that are owned, held, or administered by the state or any of its boards, commissions, institutions, departments, divisions, agencies, bureaus, laboratories, or other similar instrumentalities.

Section 3. 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 an 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

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who effects transactions:

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

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

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

(IV) 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 the partner, officer, director, or person otherwise comes within the definition of "agent."

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

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

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

(A) an agent;

(B) an issuer;

(C) a depository institution or trust company;

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

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

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

(Bb) other broker-dealers;

(Cc) a depository institution, whether acting for itself or as a trustee;

(Dd) a trust company, whether acting for itself or as a trustee;

(Ee) an insurance company, whether acting for itself or as a trustee;

(Ff) an investment company, as defined in the Investment Company Act of 1940,

whether acting for itself or as a trustee;

(Gg) a pension or profit-sharing trust, whether acting for itself or as a trustee; or

(Hh) another financial institution or institutional buyer, whether acting for itself or as a trustee; or

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



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15 offers to sell or buy into this state in any manner to persons other than those specified in Subsection (1)(c)(ii)(D)(I), whether or not the offeror or an offeree is then present in this state;

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

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

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

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

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

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

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

(e) "Commission" means the Securities Commission created in Section 61-1-18.5.

(f) "Commissioner" means the insurance commissioner appointed under Section 31A-2-102.

~~(f)~~ (g) "Commodity" means, except as otherwise specified by the division by rule:

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

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

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

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

(v) a foreign currency; and

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

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

(ii) A 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 may not include a contract or agreement that 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) A 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.

~~[(h)]~~ (i) (i) "Commodity option" means an 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 Securities and Exchange Commission; or

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

~~[(i)]~~ (j) "Depository institution" is as defined in Section 7-1-103.

~~[(j)]~~ (k) "Director" means the director of the division appointed in accordance with

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Section 61-1-18.

~~[(\*)]~~ (l) "Division" means the Division of Securities established by Section 61-1-18.

~~[(†) "Executive director" means the executive director of the Department of Commerce.]~~

(m) "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.

(n) "Federal covered security" means a 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.

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

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

(q) (i) "Investment adviser" means a 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

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

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

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

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

(iii) "Investment adviser" does not include:

(A) an investment adviser representative;

(B) a depository institution or trust company;

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

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(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 the services;

(E) a publisher of a 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) a 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)(q) as the division may by rule or order designate.

(r) (i) "Investment adviser representative" means a 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 a recommendation 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)(r)(i)(B).

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

(s) "Investment contract" includes:

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

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(ii) an investment by which:

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

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

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

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

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

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

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

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

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

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

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

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

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

(v) (i) "Life settlement interest" means the entire interest or a fractional interest in any

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of the following that is the subject of a life settlement:

(A) a policy; or

(B) the death benefit under a policy.

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

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

(x) "Person" means:

(i) an individual;

(ii) a corporation;

(iii) a partnership;

(iv) a limited liability company;

(v) an association;

(vi) a joint-stock company;

(vii) a joint venture;

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

(ix) an unincorporated organization;

(x) a government; or

(xi) a political subdivision of a government.

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

(i) silver;

(ii) gold;

(iii) platinum;

(iv) palladium;

(v) copper; and

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

(z) "Promoter" means a 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.

(aa) (i) Except as provided in Subsection (1)(aa)(ii), "record" means information that is:

(A) inscribed in a tangible medium; or

(B) (I) stored in an electronic or other medium; and

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(II) retrievable in perceivable form.

(ii) This Subsection (1)(aa) does not apply when the context requires otherwise, including when "record" is used in the following phrases:

(A) "of record";

(B) "official record"; or

(C) "public record."

(bb) (i) "Sale" or "sell" includes a 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 an 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)(bb)(i) or (ii):

(A) a security given or delivered with or as a bonus on account of a purchase of a security or any other thing, is part of the subject of the purchase, and is 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) a conversion or exchange of one security for another constitutes 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 constitutes the offer or sale of the security issued as well as the offer to buy or the purchase of a security surrendered in connection therewith, unless the sole purpose of the transaction is to change the issuer's

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domicile.

(iv) The terms defined in Subsections (1)(bb)(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)(bb)(iii)(E) or (F); or

(E) a securities split or reverse split.

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

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

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

(A) note;

(B) stock;

(C) treasury stock;

(D) bond;

(E) debenture;

(F) evidence of indebtedness;

(G) certificate of interest or participation in a 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;



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(R) life settlement interest; or

(S) in general, an interest or instrument commonly known as a "security," or a certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase an item listed in Subsections (1)(ee)(i)(A) through (R).

(ii) "Security" does not include:

(A) an 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) an 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, 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 10 or fewer owners; or

(III) an undivided fractionalized long-term estate in real property that consists of more than 10 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 a 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 61-2f-103.

(iii) For purposes of Subsection (1)(ee)(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, may not establish, without more, that all members are actively engaged in the management of the limited liability company.

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

(gg) (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) a fee estate.

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

(hh) "Undue influence" means that a person uses a relationship or position of authority, trust, or confidence:

(i) that is unrelated to a relationship created:

(A) in the ordinary course of making investments regulated under this chapter; or

(B) by a licensee providing services under this chapter;

(ii) that results in:

(A) an investor perceiving the person as having heightened credibility, personal trustworthiness, or dependability; or

(B) the person having special access to or control of an investor's financial resources, information, or circumstances; and

(iii) to:

(A) exploit the trust, dependence, or fear of the investor;

(B) knowingly assist or cause another to exploit the trust, dependence, or fear of the investor; or

(C) gain control deceptively over the decision making of the investor.

(ii) "Vulnerable adult" means an individual whose age or mental or physical impairment substantially affects that individual's ability to:

(i) manage the individual's resources; or

(ii) comprehend the nature and consequences of making an investment decision.

(jj) "Whole long-term estate" means a person owns or persons through joint tenancy own real property through a fee estate.

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

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

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rule. The meaning of a term neither defined in this section nor by rule of the division shall be the meaning commonly accepted in the business community.

(3) (a) This Subsection (3) applies to the offer or sale of a real property estate exempted from the definition of security under Subsection (1)(ee)(ii)(C).

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

- (i) a principal broker;
- (ii) an associate broker; or
- (iii) a sales agent.

Section 4. Section **61-1-18** is amended to read:

### **61-1-18. Division of Securities established -- Director -- Investigators.**

(1) (a) There is established within the [~~Department of Commerce~~] Insurance Department a Division of Securities.

(b) The division is under the direction and control of a director. The [~~executive director~~] commissioner shall appoint the director [~~with the governor's approval~~].

(c) Subject to Section 61-1-18.5, the division shall administer and enforce this chapter.

(d) The director shall hold office at the pleasure of the governor.

(2) The director, with the approval of the [~~executive director~~] commissioner, may employ the staff necessary to discharge the duties of the division or commission at salaries to be fixed by the director according to standards established by the Department of Human Resource Management.

(3) An investigator employed pursuant to Subsection (2) who meets the training requirements of Subsection 53-13-105(3) may be designated a special function officer, as defined in Section 53-13-105, by the director, but is not eligible for retirement benefits under the Public Safety Employee's Retirement System.

Section 5. Section **61-1-18.2** is amended to read:

### **61-1-18.2. Budget -- Annual report.**

The director shall annually prepare and submit to the [~~executive director~~] commissioner:

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(1) a budget for the expenses of the division and commission for the administration and enforcement of this chapter for the next fiscal year; and

(2) a report outlining the division's and commission's work for the preceding fiscal year.

Section 6. Section **61-1-18.5** is amended to read:

### **61-1-18.5. Securities Commission -- Transition.**

(1) (a) There is created a Securities Commission.

(b) The division shall provide staffing to the commission.

(2) (a) The commission shall:

(i) formulate and make recommendations to the director regarding policy and budgetary matters;

(ii) submit recommendations regarding registration requirements;

(iii) formulate and make recommendations to the director regarding the establishment of reasonable fees;

(iv) act in an advisory capacity to the director with respect to the exercise of the director's duties, powers, and responsibilities;

(v) conduct an administrative hearing under this chapter that is not:

(A) delegated by the commission to an administrative law judge or the division relating to a violation of this chapter; or

(B) expressly delegated to the division under this chapter;

(vi) except as provided in Subsection (2)(b), and consistent with Section 61-1-20, impose a sanction as provided in this chapter;

(vii) review rules made by the division for purposes of concurrence in accordance with Section 61-1-24; and

(viii) perform other duties as this chapter provides.

(b) (i) The commission may delegate to the division the authority to impose a sanction under this chapter.

(ii) If under Subsection (2)(b)(i) the commission delegates to the division the authority to impose a sanction, a person who is subject to the sanction may petition the commission for review of the sanction.

(iii) A person who is sanctioned by the division in accordance with this Subsection

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(2)(b) may seek agency review by the [~~executive director~~] commissioner only after the commission reviews the division's action.

(3) (a) The governor shall appoint five members to the commission with the consent of the Senate as follows:

(i) two members from the securities brokerage community:

(A) who are not from the same broker-dealer or affiliate; and

(B) who have at least five years prior experience in securities matters;

(ii) one member from the securities section of the Utah State Bar:

(A) whose practice primarily involves:

(I) corporate securities; or

(II) representation of plaintiffs in securities cases;

(B) who does not routinely represent clients involved in:

(I) civil or administrative litigation with the division; or

(II) criminal cases brought under this chapter; and

(C) who has at least five years prior experience in securities matters;

(iii) one member who is an officer or director of a business entity not subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934; and

(iv) one member from the public at large who has no active participation in the securities business.

(b) A member may not serve more than two consecutive terms.

(4) (a) Except as required by Subsection (4)(b) and subject to Subsection (4)(c), as terms of current members expire, the governor shall appoint a new member or reappointed member to a four-year term.

(b) Notwithstanding Subsection (4)(a), the governor shall, at the time of appointment or reappointment, adjust the length of terms to ensure that the terms of commission members are staggered so that approximately half of the commission is appointed every two years.

(c) For purposes of making an appointment to the commission, the governor:

(i) shall as of May 12, 2009:

(A) appoint all five members of the commission; and

(B) stagger the terms of the five members of the commission to comply with Subsection (4)(b); and

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(ii) may not consider the commission an extension of the previous Securities Advisory Board.

(d) When a vacancy occurs in the membership for any reason, the governor shall appoint a replacement member for the unexpired term.

(e) A member shall serve until the member's respective successor is appointed and qualified.

(f) The commission shall annually select one member to serve as chair of the commission.

(5) (a) The commission shall meet:

(i) at least quarterly on a regular date to be fixed by the commission; and

(ii) at such other times at the call of:

(A) the director; or

(B) any two members of the commission.

(b) A majority of the commission shall constitute a quorum for the transaction of business.

(c) An action of the commission requires a vote of a majority of members present.

(6) A member of the commission shall, by sworn and written statement filed with the [~~Department of Commerce~~] Insurance Department and the lieutenant governor, disclose any position of employment or ownership interest that the member has with respect to an entity or business subject to the jurisdiction of the division or commission. This statement shall be filed upon appointment and must be appropriately amended whenever significant changes occur in matters covered by the statement.

(7) A member may not receive compensation or benefits for the member's service, but may receive per diem and travel expenses in accordance with:

(a) Section 63A-3-106;

(b) Section 63A-3-107; and

(c) rules made by the Division of Finance pursuant to Sections 63A-3-106 and 63A-3-107.

(8) (a) A rule or form made by the division under this section that is in effect on May 11, 2009, is considered to have been concurred with by the commission as of May 12, 2009, until the commission acts on the rule or form.

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(b) For a civil or administrative action pending under this chapter as of May 12, 2009, brought under the authority of division under this chapter as in effect May 11, 2009, that may be brought only by the commission under this chapter as in effect on May 12, 2009:

- (i) the action shall be considered brought by the commission; and
- (ii) the commission may take any act authorized under this chapter regarding that action.

Section 7. Section **61-1-18.7** is amended to read:

### **61-1-18.7. Funding of securities investor education, training, and enforcement.**

(1) (a) There is created a restricted special revenue fund known as the "Securities Investor Education, Training, and Enforcement Fund" to provide revenue for the purposes stated in this section.

(b) For purposes of this section, "fund" means the Securities Investor Education, Training, and Enforcement Fund.

(2) Money received by the state by reason of civil penalties ordered and administrative fines collected pursuant to this chapter shall be deposited in the fund, and is subject to the requirements of Title 51, Chapter 5, Funds Consolidation Act.

(3) A fine collected by the division after July 1, 1989, pursuant to a voluntary settlement or administrative order shall be deposited into the fund.

(4) (a) The fund shall earn interest.

(b) Interest earned on fund money shall be deposited into the fund.

(5) Notwithstanding Title 63J, Chapter 1, Budgetary Procedures Act, the director may use money in the fund, upon concurrence of the commission and the ~~[executive director of the Department of Commerce]~~ commissioner, in a manner consistent with the duties of the division and commission under this chapter and only for any or all of the following and the expense of providing them:

(a) education and training of Utah residents in matters concerning securities laws and investment decisions, by publications or presentations;

(b) education of registrants and licensees under this chapter, by:

(i) publication of this chapter and rules and policy statements and opinion letters issued under this chapter; and

(ii) sponsorship of seminars or meetings to educate registrants and licensees as to the

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requirements of this chapter;

(c) investigation and litigation; and

(d) to pay an award to a reporter as provided in Part 1, Securities Fraud Reporting Program Act.

(6) If the balance in the fund exceeds \$500,000 at the close of any fiscal year, the excess shall be transferred to the General Fund.

Section 8. Section **61-1-23** is amended to read:

### **61-1-23. Review of orders.**

A person aggrieved by a final order under this chapter determining all of the issues of an adjudicative proceeding may obtain review of the order by the [~~executive director~~] commissioner in accordance with Title 63G, Chapter 4, Administrative Procedures Act.

Section 9. **Transition.**

(1) By no later than January 1, 2014, the Division of Securities shall renumber its rules to be located with the rules of the Insurance Department and make other necessary changes consistent with this bill.

~~(2) (a) The Division of Securities and Insurance Department shall coordinate with the necessary state agencies, including the Department of Human Resource Management, Department of Facilities Construction and Management, Department of Commerce, Department of Technology Services, Capital Preservation Board, Department of Administrative Services, Division of Finance, and Office of the Attorney General, to physically move the Division of Securities to be housed with the Insurance Department.~~

~~(b) By no later than January 1, 2014, the coordinating agencies described in Subsection (2)(a) shall submit a detailed plan to the Business and Labor Interim Committee, Office of the Legislative Fiscal Analyst, and Governor's Office of Planning and Budget that at a minimum provides for the design, cost estimation, funding source, and required space to implement the physical relocation of the Division of Securities with the Insurance Department.~~

~~(3) } Cases under Title 61, Chapter 1, Utah Uniform Securities Act, pending before the executive director of the Department of Commerce as of June 30, 2013, shall be transferred to the insurance commissioner.~~

Section 10. **Effective date.**

This bill takes effect on July 1, 2013.



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**Legislative Review Note**

~~as of 1-14-13 2:55 PM~~

~~Office of Legislative Research and General Counsel}~~