

**SECURITIES AMENDMENTS**

2015 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Brian M. Greene**

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

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**LONG TITLE**

**General Description:**

This bill modifies the Utah Uniform Securities Act to address securities issues.

**Highlighted Provisions:**

This bill:

- ▶ modifies the definition of "security";
- ▶ repeals provisions related to the burden of proving an exemption or an exception from a definition; and
- ▶ makes technical amendments.

**Money Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

AMENDS:

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

REPEALS:

**61-1-14.5**, as enacted by Laws of Utah 1983, Chapter 284

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

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



28           **61-1-13. Definitions.**

29           (1) As used in this chapter:

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

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

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

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

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

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

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

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

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

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

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

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

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

53           (A) an agent;

54           (B) an issuer;

55           (C) a depository institution or trust company;

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

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

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

- 59 (Bb) other broker-dealers;
- 60 (Cc) a depository institution, whether acting for itself or as a trustee;
- 61 (Dd) a trust company, whether acting for itself or as a trustee;
- 62 (Ee) an insurance company, whether acting for itself or as a trustee;
- 63 (Ff) an investment company, as defined in the Investment Company Act of 1940,
- 64 whether acting for itself or as a trustee;
- 65 (Gg) a pension or profit-sharing trust, whether acting for itself or as a trustee; or
- 66 (Hh) another financial institution or institutional buyer, whether acting for itself or as a
- 67 trustee; or
- 68 (Ii) during any period of 12 consecutive months the person does not direct more than
- 69 15 offers to sell or buy into this state in any manner to persons other than those specified in
- 70 Subsection (1)(c)(ii)(D)(I), whether or not the offeror or an offeree is then present in this state;
- 71 (E) a general partner who organizes and effects transactions in securities of three or
- 72 fewer limited partnerships, of which the person is the general partner, in any period of 12
- 73 consecutive months;
- 74 (F) a person whose participation in transactions in securities is confined to those
- 75 transactions made by or through a broker-dealer licensed in this state;
- 76 (G) a person who is a principal broker or associate broker licensed in this state and
- 77 who effects transactions in a bond or other evidence of indebtedness secured by a real or chattel
- 78 mortgage or deed of trust, or by an agreement for the sale of real estate or chattels, if the entire
- 79 mortgage, deed of trust, or agreement, together with all the bonds or other evidences of
- 80 indebtedness secured thereby, is offered and sold as a unit;
- 81 (H) a person effecting transactions in commodity contracts or commodity options;
- 82 (I) a person described in Subsection (3); or
- 83 (J) other persons as the division, by rule or order, may designate, consistent with the
- 84 public interest and protection of investors, as not within the intent of this Subsection (1)(c).
- 85 (d) "Buy" or "purchase" means a contract for purchase of, contract to buy, or
- 86 acquisition of a security or interest in a security for value.
- 87 (e) "Commission" means the Securities Commission created in Section [61-1-18.5](#).
- 88 (f) "Commodity" means, except as otherwise specified by the division by rule:
- 89 (i) an agricultural, grain, or livestock product or byproduct, except real property or a

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

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

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

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

97 (v) a foreign currency; and

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

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

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

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

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

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

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

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

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

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

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

128 (j) "Director" means the director of the division appointed in accordance with Section  
129 61-1-18.

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

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

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

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

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

136 (n) "Federal covered security" means a security that is a covered security under Section  
137 18(b) of the Securities Act of 1933 or rules or regulations promulgated under Section 18(b) of  
138 the Securities Act of 1933.

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

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

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

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

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

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

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

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

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

155 (A) an investment adviser representative;

156 (B) a depository institution or trust company;

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

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

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

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

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

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

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

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

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

177 (B) does any of the following:

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

179 (II) manages accounts or portfolios of clients;

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

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

182 or

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

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

187 (s) "Investment contract" includes:

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

190 (ii) an investment by which:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

222 (A) a policy; or

223 (B) the death benefit under a policy.

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

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

227 (x) "Person" means:

228 (i) an individual;

229 (ii) a corporation;

230 (iii) a partnership;

231 (iv) a limited liability company;

232 (v) an association;

233 (vi) a joint-stock company;

234 (vii) a joint venture;

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

236 (ix) an unincorporated organization;

237 (x) a government; or

238 (xi) a political subdivision of a government.

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

240 (i) silver;

241 (ii) gold;

242 (iii) platinum;

243 (iv) palladium;

244 (v) copper; and



- 245 (vi) such other substances as the division may specify by rule.
- 246 (z) "Promoter" means a person who, acting alone or in concert with one or more  
247 persons, takes initiative in founding or organizing the business or enterprise of a person.
- 248 (aa) (i) Except as provided in Subsection (1)(aa)(ii), "record" means information that  
249 is:
- 250 (A) inscribed in a tangible medium; or
- 251 (B) (I) stored in an electronic or other medium; and
- 252 (II) retrievable in perceivable form.
- 253 (ii) This Subsection (1)(aa) does not apply when the context requires otherwise,  
254 including when "record" is used in the following phrases:
- 255 (A) "of record";
- 256 (B) "official record"; or
- 257 (C) "public record."
- 258 (bb) (i) "Sale" or "sell" includes a contract for sale of, contract to sell, or disposition of,  
259 a security or interest in a security for value.
- 260 (ii) "Offer" or "offer to sell" includes an attempt or offer to dispose of, or solicitation of  
261 an offer to buy, a security or interest in a security for value.
- 262 (iii) The following are examples of the definitions in Subsection (1)(bb)(i) or (ii):
- 263 (A) a security given or delivered with or as a bonus on account of a purchase of a  
264 security or any other thing, is part of the subject of the purchase, and is offered and sold for  
265 value;
- 266 (B) a purported gift of assessable stock is an offer or sale as is each assessment levied  
267 on the stock;
- 268 (C) an offer or sale of a security that is convertible into, or entitles its holder to acquire  
269 or subscribe to another security of the same or another issuer is an offer or sale of that security,  
270 and also an offer of the other security, whether the right to convert or acquire is exercisable  
271 immediately or in the future;
- 272 (D) a conversion or exchange of one security for another constitutes an offer or sale of  
273 the security received in a conversion or exchange, and the offer to buy or the purchase of the  
274 security converted or exchanged;
- 275 (E) securities distributed as a dividend wherein the person receiving the dividend

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

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

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

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

285 (A) a good faith gift;

286 (B) a transfer by death;

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

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

289 (E) a securities split or reverse split.

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

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

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

296 (A) note if the conditions of Subsection (1)(ee)(ii)(E) are met;

297 (B) stock;

298 (C) treasury stock;

299 (D) bond;

300 (E) debenture;

301 (F) evidence of indebtedness;

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

303 (H) collateral-trust certificate;

304 (I) preorganization certificate or subscription;

305 (J) transferable share;

306 (K) investment contract;

- 307 (L) burial certificate or burial contract;
- 308 (M) voting-trust certificate;
- 309 (N) certificate of deposit for a security;
- 310 (O) certificate of interest or participation in an oil, gas, or mining title or lease or in
- 311 payments out of production under such a title or lease;
- 312 (P) commodity contract or commodity option;
- 313 (Q) interest in a limited liability company if the condition in Subsection (1)(ee)(ii)(B)
- 314 or (C) is met;
- 315 (R) life settlement interest; or
- 316 (S) in general, an interest or instrument commonly known as a "security," or a
- 317 certificate of interest or participation in, temporary or interim certificate for, receipt for,
- 318 guarantee of, or warrant or right to subscribe to or purchase an item listed in Subsections
- 319 (1)(ee)(i)(A) through (R).
- 320 (ii) "Security" does not include:
- 321 (A) an insurance or endowment policy or annuity contract under which an insurance
- 322 company promises to pay money in a lump sum or periodically for life or some other specified
- 323 period;
- 324 (B) an interest in a limited liability company in which the limited liability company is
- 325 formed as part of an estate plan [~~where~~] when all of the members are related by blood or
- 326 marriage[~~, or the person claiming this exception can prove that all of the members are actively~~
- 327 ~~engaged in the management of the limited liability company; or~~];
- 328 (C) an interest in a limited liability company unless it can be established that it is a
- 329 common enterprise between members and that the member holding the interest in the limited
- 330 liability company does so with the expectation of profit and is not actively engaged in the
- 331 management of the limited liability company so that the expectation of profits to be derived
- 332 from the limited liability company is primarily from the efforts of a person other than the
- 333 member holding the interest in the limited liability company;
- 334 [(€)] (D) (I) a whole long-term estate in real property;
- 335 (II) an undivided fractionalized long-term estate in real property that consists of 10 or
- 336 fewer owners; or
- 337 (III) an undivided fractionalized long-term estate in real property that consists of more

338 than 10 owners if, when the real property estate is subject to a management agreement:

339 (Aa) the management agreement permits a simple majority of owners of the real  
340 property estate to not renew or to terminate the management agreement at the earlier of the end  
341 of the management agreement's current term, or 180 days after the day on which the owners  
342 give notice of termination to the manager;

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

346 (Cc) the management agreement complies with any other requirement imposed by rule  
347 by the Real Estate Commission under Section 61-2f-103[~~7~~]; or

348 [~~(iii) For purposes of Subsection (1)(ee)(ii)(B), evidence that members vote or have~~  
349 ~~the right to vote, or the right to information concerning the business and affairs of the limited~~  
350 ~~liability company, or the right to participate in management, may not establish, without more,~~  
351 ~~that all members are actively engaged in the management of the limited liability company.]~~

352 (E) a note, unless it is established that it is an investment after considering the  
353 following factors:

354 (I) the motivation for a reasonable seller and buyer to enter into the transaction is to  
355 raise money for the general use of a business enterprise or to finance substantial investments;

356 (II) the plan of distribution of the note involves common trading for speculation or  
357 investment;

358 (III) the investing public's reasonable expectations are that the note is an investment;  
359 and

360 (IV) there is no other regulatory scheme other than this chapter that reduces the risk of  
361 the instrument.

362 (iii) For purposes of Subsection (1)(ee)(ii)(C), factors to consider include the  
363 distribution of power, whether the member is so inexperienced and unknowledgeable in the  
364 business affairs that the member is incapable of exercising power in the limited liability  
365 company, and whether there is a manager who is not the member upon which the limited  
366 liability company is dependent and who cannot be replaced.

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

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

371 (A) a tenancy in common; or

372 (B) a fee estate.

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

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

376 (i) that is unrelated to a relationship created:

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

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

379 (ii) that results in:

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

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

384 (iii) to:

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

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

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

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

391 (i) manage the individual's resources; or

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

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

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

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

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

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

406 (i) a principal broker;

407 (ii) an associate broker; or

408 (iii) a sales agent.

409 Section 2. **Repealer.**

410 This bill repeals:

411 Section **61-1-14.5, Burden of proving exemption.**

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**Legislative Review Note**

**as of 12-11-14 1:28 PM**

**Office of Legislative Research and General Counsel**