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# UTAH STATE SENATE

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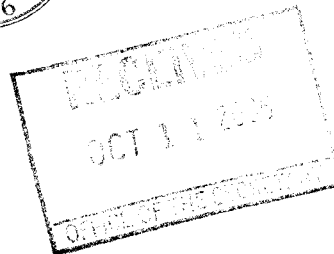
SENATOR  
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The Honorable Christopher Cox, Chairman  
Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549



September 7, 2006

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Dear Chairman Cox:

I am concerned with the impact that abusive naked short selling has on our capital markets, public companies, and innocent shareholders. To this end, I recently sponsored legislation in Utah that requires more transparency in the system (see the enclosed copy of the legislation). That legislation went into effect on May 25, 2006 with an October 1, 2006 enforcement date.

The Securities Industry Association (SIA) then filed a lawsuit against the State of Utah seeking to enjoin enforcement of the law based on a federal preemption argument. Given the SEC's willingness to consider changes to Regulation SHO, the State of Utah agreed to postpone enforcement of the law. However, I believe that it is imperative that the SEC adopted changes that go beyond what in the SEC's current proposals to amend Regulation SHO (i.e., repeal of the grandfather provision and narrowing the options market maker exception) in order to stop the persistent fails to deliver and other associated abuses. Thus, I welcome this opportunity to provide further ideas for modifications to Regulation SHO.

I suggest that the SEC make two important modifications to Regulation SHO beyond the current proposed modifications:

1. Disclose the Volume of Fails. The SEC should amend Regulation SHO so that the aggregate volume of failures to deliver is reported daily for each threshold security. This was the purpose of the Utah law that I sponsor. Sunshine is a great disinfectant and I believe that more transparency will lead to the elimination of abuses and to more investor confidence and security. Without this full disclosure, it is difficult to know the level of "naked shorting" and its risk to the capital markets.
2. Require a Pre-Borrow for All Short Sales. The SEC should require that before any seller can short sell a stock, that seller must either have the stock in his possession (and have the right to sell it) or have entered into a bona fide contract to borrow the stock in advance of the sale. This step alone should prevent the majority of purposeful and strategic fails to deliver. The current rules that allow the stock to be located (but not borrowed) allow for one share to be "located" multiple times without it actually ever being borrowed. These loose rules allow abusive short-sellers to frequently never deliver stocks they sell, but rather postpone trade closures indefinitely.

The SEC must continue to protect innocent investors and public companies by minimizing the manipulation of our capital markets. The interests of abusive short-selling hedge funds must not be placed ahead of investors and employees who often depend on these companies for their livelihood and retirement.

Sincerely,

Curtis S. Bramble

Enclosure



30

31 *Be it enacted by the Legislature of the state of Utah:*32 Section 1. Section **61-1-5** is amended to read:33 **61-1-5. Postlicensing provisions.**34 (1) (a) Every licensed broker-dealer and investment adviser shall make and keep such  
35 accounts, correspondence, memoranda, papers, books, and other records as the division by rule  
36 prescribes, except as provided in:37 (i) Section 15 of the Securities Exchange Act of 1934 in the case of a broker-dealer;  
38 and39 (ii) Section 222 of the Investment Advisers Act of 1940 in the case of an investment  
40 adviser.41 (b) All required records regarding an investment adviser shall be preserved for the  
42 period as the division prescribes by rule or order.43 (2) (a) Every licensed broker-dealer shall, within 24 hours after demand, furnish to any  
44 customer or principal for whom the broker-dealer has executed any order for the purchase or  
45 sale of any securities, either for immediate or future delivery, a written statement showing:46 (i) the time when~~[-]~~ the securities were bought and sold;47 (ii) the place where~~[-]~~ the securities were bought and sold; and

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

49 (b) With respect to investment advisers, the division may require that certain  
50 information be furnished or disseminated as necessary or appropriate in the public interest or  
51 for the protection of investors and advisory clients.52 (c) To the extent determined by the director, information furnished to clients or  
53 prospective clients of an investment adviser who would be in compliance with the Investment  
54 Advisers Act of 1940 and the rules ~~[thereunder]~~ under the Investment Advisers Act of 1940  
55 may be ~~[deemed]~~ considered to satisfy this requirement.56 (d) (i) A licensed broker-dealer is subject to this Subsection (2)(d) if:57 (A) the licensed broker-dealer is selling or purchasing for:

58           (I) a customer; or  
59           (II) its own account;  
60           (B) a trade fails to settle by delivery of securities of like kind and quality;  
61           (C) the trade is in a threshold security of an issuer:  
62           (I) domiciled in this state; or  
63           (II) with its principal office located in this state; and  
64           (D) the failure to settle described in this Subsection (2)(d) occurs on or after October 1,  
65           2006.  
66           (ii) If the conditions of Subsection (2)(d)(i) are met, the licensed broker-dealer shall  
67           notify the division:  
68           (A) within 24 hours of the failure to settle;  
69           (B) in writing or by a means that the division shall specify by rule made in accordance  
70           with Title 63, Chapter 46a, Utah Administrative Rulemaking Act; and  
71           (C) of:  
72           (I) the name of the company whose shares were the subject of the settlement failure;  
73           (II) the date of the trade that failed to settle;  
74           (III) the amount of the shares not delivered to settle the trade; and  
75           (IV) (Aa) in the case of a selling broker-dealer, the identity of the broker-dealer's  
76           customer account or broker-dealer account for which the sell transaction is executed; or  
77           (Bb) in the case of a broker-dealer purchasing the securities, the identity of the account  
78           that failed to deliver the security in settlement of the trade.  
79           (iii) The division shall make the information disclosed under Subsection (2)(d)(ii)  
80           available to the public.  
81           (iv) (A) Subject to Subsection (2)(d)(iv)(C), a broker-dealer who materially fails to  
82           provide the notice required by Subsection (2)(d)(ii) is liable to the company whose securities  
83           were the subject of the settlement failure in the amount of:  
84           (I) if the failure is for at least one business day but not more than five business days,  
85           \$10,000 for each business day the broker-dealer fails to provide the required notice; or

86 (II) if the failure is for six or more business days, the greater of:  
87 (Aa) \$10,000 for each business day; or  
88 (Bb) the sum of the sales price for each securities share in the subject trade that has not  
89 been delivered in settlement.  
90 (B) Subject to Subsection (2)(d)(iv)(C), the company described in this Subsection  
91 (2)(d)(iv) may sue at law or in equity to enforce the payment of:  
92 (I) the amount described in Subsection (2)(d)(iv)(A);  
93 (II) interest at 12% per year from the day on which the broker-dealer fails to provide  
94 the notice required by Subsection (2)(d)(ii);  
95 (III) costs; and  
96 (IV) reasonable attorney's fees.  
97 (C) The court in an action brought under this Subsection (2)(d)(iv) may waive the  
98 amounts owed under this Subsection (2)(d)(iv), upon a showing by the licensed broker-dealer  
99 who is subject to this Subsection (2)(d) or any person listed in Subsection (2)(d)(v) of  
100 reasonable cause including for any exception provided in Regulation SHO, 17 C.F.R. 242.200  
101 et seq.  
102 (v) Each of the following is liable jointly and severally with and to the same extent as a  
103 broker-dealer is liable under Subsection (2)(d)(iv):  
104 (A) a principal of the broker-dealer;  
105 (B) a person who directly or indirectly controls the broker-dealer;  
106 (C) a partner, officer, or director of the broker-dealer;  
107 (D) a person occupying a similar status or performing a similar function to a partner,  
108 officer, or director of the broker-dealer; and  
109 (E) an employee of the broker-dealer who:  
110 (I) has a duty to assure the filing of the notice required by Subsection (2)(d)(ii); and  
111 (II) recklessly fails in that duty.  
112 (vi) An action may not be maintained to enforce any liability under Subsection  
113 (2)(d)(iv) or (v) unless it is brought before the sooner of the expiration of:

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

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

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

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

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

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

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

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

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

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

142 may cooperate with;

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

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

145 (iii) national securities exchanges or national securities associations registered under

146 the Securities Exchange Act of 1934.

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

148 **61-1-13. Definitions.**

149 (1) As used in this chapter:

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

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

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

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

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

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

162 (III) [~~effects transactions~~] in a covered security as described in Sections 18(b)(3) and  
163 18(b)(4)(D) of the Securities Act of 1933; or

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

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

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

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

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

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

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

175 (A) an agent;

176 (B) an issuer;

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

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

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

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

181 (Bb) other broker-dealers; or

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

215 (v) any foreign currency; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

254 Section 18(b) of the Securities Act of 1933 or rules or regulations promulgated under Section  
255 18(b) of the Securities Act of 1933.

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

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

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

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

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

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

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

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

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

272 (A) an investment adviser representative;

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

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

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

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

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

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

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

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

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

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

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

294 (B) does any of the following:

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

296 (II) manages accounts or portfolios of clients;

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

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

299 or

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

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

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

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

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

310 which the security is issued with respect to:

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

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

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

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

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

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

324 (s) "Person" means:

325 (i) an individual[?];

326 (ii) a corporation[?];

327 (iii) a partnership[?];

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

329 (v) an association[?];

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

331 (vii) a joint venture[?];

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

333 (ix) an unincorporated organization[?];

334 (x) a government[?]; or

335 (xi) a political subdivision of a government.

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

337 (i) silver;

- 338 (ii) gold;
- 339 (iii) platinum;
- 340 (iv) palladium;
- 341 (v) copper; and
- 342 (vi) such other substances as the division may specify by rule.
- 343 (u) "Promoter" means any person who, acting alone or in concert with one or more
- 344 persons, takes initiative in founding or organizing the business or enterprise of a person.
- 345 (v) (i) "Sale" or "sell" includes every contract for sale of, contract to sell, or disposition
- 346 of, a security or interest in a security for value.
- 347 (ii) "Offer" or "offer to sell" includes every attempt or offer to dispose of, or
- 348 solicitation of an offer to buy, a security or interest in a security for value.
- 349 (iii) The following are examples of the definitions in Subsection (1)(v)(i) or (ii):
- 350 (A) any security given or delivered with or as a bonus on account of any purchase of a
- 351 security or any other thing, is part of the subject of the purchase, and has been offered and sold
- 352 for value;
- 353 (B) a purported gift of assessable stock is an offer or sale as is each assessment levied
- 354 on the stock;
- 355 (C) an offer or sale of a security that is convertible into, or entitles its holder to acquire
- 356 or subscribe to another security of the same or another issuer is an offer or sale of that security,
- 357 and also an offer of the other security, whether the right to convert or acquire is exercisable
- 358 immediately or in the future;
- 359 (D) any conversion or exchange of one security for another shall constitute an offer or
- 360 sale of the security received in a conversion or exchange, and the offer to buy or the purchase
- 361 of the security converted or exchanged;
- 362 (E) securities distributed as a dividend wherein the person receiving the dividend
- 363 surrenders the right, or the alternative right, to receive a cash or property dividend is an offer or
- 364 sale;
- 365 (F) a dividend of a security of another issuer is an offer or sale; or

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

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

372 (A) a good faith gift;

373 (B) a transfer by death;

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

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

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

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

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

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

384 (A) note;

385 (B) stock;

386 (C) treasury stock;

387 (D) bond;

388 (E) debenture;

389 (F) evidence of indebtedness;

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

391 (H) collateral-trust certificate;

392 (I) preorganization certificate or subscription;

393 (J) transferable share;

- 394 (K) investment contract;
- 395 (L) burial certificate or burial contract;
- 396 (M) voting-trust certificate;
- 397 (N) certificate of deposit for a security;
- 398 (O) certificate of interest or participation in an oil, gas, or mining title or lease or in
- 399 payments out of production under such a title or lease;
- 400 (P) commodity contract or commodity option;
- 401 (Q) interest in a limited liability company;
- 402 (R) viatical settlement interest; or
- 403 (S) in general, any interest or instrument commonly known as a "security," or any
- 404 certificate of interest or participation in, temporary or interim certificate for, receipt for,
- 405 guarantee of, or warrant or right to subscribe to or purchase any of the foregoing.
- 406 (ii) "Security" does not include any:
  - 407 (A) insurance or endowment policy or annuity contract under which an insurance
  - 408 company promises to pay money in a lump sum or periodically for life or some other specified
  - 409 period;
  - 410 (B) interest in a limited liability company in which the limited liability company is
  - 411 formed as part of an estate plan where all of the members are related by blood or marriage,
  - 412 there are five or fewer members, or the person claiming this exception can prove that all of the
  - 413 members are actively engaged in the management of the limited liability company; or
  - 414 (C) (I) a whole long-term estate in real property;
  - 415 (II) an undivided fractionalized long-term estate in real property that consists of ten or
  - 416 fewer owners; or
  - 417 (III) an undivided fractionalized long-term estate in real property that consists of more
  - 418 than ten owners if, when the real property estate is subject to a management agreement:
    - 419 (Aa) the management agreement permits a simple majority of owners of the real
    - 420 property estate to not renew or to terminate the management agreement at the earlier of the end
    - 421 of the management agreement's current term, or 180 days after the day on which the owners



422 give notice of termination to the manager;

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

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

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

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

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

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

438 (A) tenancy in common; or

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

440 (I) a fee estate;

441 (II) a life estate; or

442 (III) other long-term estate.

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

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

446 (A) a life insurance policy; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

531 Section 4. **Effective date.**

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

**S.B. 3004**

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