

# UTAH DIVISION OF SECURITIES ADMINISTRATIVE RULES

2009 EDITION



Published by the

State of Utah  
Department of Commerce  
Division of Securities

Updated: 01/2009

**RULES OF THE UTAH DIVISION OF SECURITIES**  
**Rule R164 Utah Administrative Code**

**TABLE OF CONTENTS**

R164-1. Fraudulent Practices. . . . .	1
R164-1-3. Fraudulent Practices of Broker-Dealers, Broker-Dealer Agents, and Issuer- Agents. . . . .	1
R164-2. Investment Adviser - Unlawful Acts. . . . .	4
R164-2-1. Investment Adviser Performance-Based Compensation Contracts. . . . .	4
R164-4. Licensing Requirements. . . . .	7
R164-4-1. Broker-Dealer, Broker-Dealer Agent, and Issuer-Agent Licensing Requirements	7
R164-4-2. Investment Adviser and Investment Adviser Representative Licensing Requirements. . . . .	9
R164-4-3. General Licensing Requirements. . . . .	12
R164-4-4. Minimum Financial Requirements and Financial Reporting Requirements of Licensed Broker-Dealers and Investment Advisers. . . . .	15
R164-4-5. Bonding Requirements for Broker-Dealers, Broker-Dealer Agents, Issuer- Agents, and Investment Advisers. . . . .	17
R164-4-6. Notice Filing Requirements for Federal Covered Advisers. . . . .	18
R164-4-7. Broker-dealers, Investment Advisers and Other Securities Personnel Using the Internet for General Dissemination of Information on Products and Services. . . . .	19
R164-4-8. Exclusion for Certain Canadian Brokers and Securities Exemption. . . . .	20
R164-5. Broker-Dealer and Investment Adviser Books and Records. . . . .	22
R164-5-1. Recordkeeping Requirements of Broker-Dealers and Investment Advisers. . . . . .	22
R164-5-3. Financial Reporting of Broker-Dealers and Investment Advisers. . . . .	22
R164-6. Denial, Suspension or Revocation of a License. . . . .	24
R164-6-1g. Dishonest or Unethical Business Practices. . . . .	24
R164-9. Registration by Coordination. . . . .	30
R164-9-1. Registration by Coordination. . . . .	30
R164-9-2. MJDS - Financial Statement Requirement. . . . .	31
R164-9-3b. MJDS - Review Period. . . . .	32
R164-10. Registration by Qualification. . . . .	34
R164-10-2. Registration Statements. . . . .	34
R164-11. Registration Statement. . . . .	44
R164-11-1. General Registration Provisions. . . . .	44

R164-11-2. ....	46
R164-11-7b. Fund Impound. ....	47
R164-12. Sales Commission. ....	49
R164-12-1f. Commissions on Sales of Securities. ....	49
R164-13. Definitions. ....	53
R164-13-1. Definitions. ....	53
R164-14. Exemptions From Registration. ....	54
R164-14-1g. Exchange Listing Exemption. ....	54
R164-14-2b. Manual Listing Exemption. ....	55
R164-14-2m. Secondary Trading Transactional Exemption. ....	58
R164-14-2n. Uniform Limited Offering Exemption. ....	61
R164-14-2p. Reorganization Exemption. ....	64
R164-14-2s. MJDS - Secondary Trading Exemption. ....	65
R164-14-21s. Solicitations of Interest Exemption. ....	65
R164-14-23s. Foreign Securities - Secondary Trading Exemption. ....	69
R164-14-24s. Internet Solicitations Exemption. ....	70
R164-14-25s. Accredited Investor Exemption. ....	70
R164-14-26s. Reorganization Exemption for Transactions Involving Certain Federal Covered Securities. ....	72
R164-14-27s. Compensatory Benefit Plan Exemption. ....	73
R164-15. Federal Covered Securities. ....	75
R164-15-1. Notice Filings for Offerings of Investment Company Securities. ....	75
R164-15-2. Notice Filings for Rule 506 Offerings. ....	76
R164-18. Procedures. ....	77
R164-18-6. Procedures for Administrative Actions. ....	77
R164-25. Record of Registration. ....	80
R164-25-5. Requests for Interpretive Opinions and No-action Letters. ....	80
R164-26. Consent to Service of Process. ....	81
R164-26-6. Consent to Service. ....	81
R164-31. Administrative Fines ....	82
R164-31-1. Guidelines for the Assessment of Administrative Fines ....	82

## Utah Division of Securities Fee Schedule

Securities Registration	
Qualification Registration	\$300.00
Coordinated Registration	\$300.00
Notification Registration	\$300.00
Securities Exemption	
Notice of Intent to Sell (Blue Chip Mutual Funds)	\$500.00
Other Securities Exemptions	\$60.00
Transactional Exemptions	
All Transactional Exemptions	\$60.00
Notice Filings	
Investment Companies	\$500.00
Regulation D, Rule 506	\$60.00
Regulation D, Rule 506 more than 15 days after first sale in Utah	\$500.00
Federal Covered Adviser	\$75.00
No-action and Interpretative Opinions	\$120.00
Licensing	
Agent (new and renewal)	\$50.00
Broker/Dealer (new and renewal)	\$100.00
Investment Advisor (new and renewal)	\$75.00
Investment Adviser Representative (new and renewal)	\$30.00
Certified Dealer	\$500.00
Fairness Hearings	\$1,500.00

**R164-1. Fraudulent Practices.**

**R164-1-3. Fraudulent Practices of Broker-Dealers, Broker-Dealer Agents, and Issuer-Agents.**

(A) Authority and purpose.

(1) The Division enacts this rule under authority granted by Subsection 61-1-1(3) and Section 61-1-24.

(2) This rule identifies practices by broker-dealers, broker-dealer agents, or issuer-agents which are generally associated with schemes to manipulate the securities markets.

(3) A broker-dealer, broker-dealer agent, or issuer-agent who engages in one or more of the practices listed below will be deemed to have engaged in an "act, practice or course of business which operates or would operate as a fraud" as used in Subsection 61-1-1(3).

(4) This rule is not intended to be all-inclusive. Thus, acts or practices not listed may also be deemed fraudulent.

(5) This rule does not preclude application of the anti-fraud provisions of Subsection 61-1-1(3) against anyone for practices similar in nature to the practices listed in Subsection (C).

(B) Definitions used in the rule.

(1) "Customer" means potential, current, or past clients.

(2) "Designated security" means any equity security other than a security

(2)(a) listed, or approved for listing upon notice of issuance, on a national securities exchange and makes transaction reports available as required under SEC Rule 11Aa3-1, Dissemination of transaction reports and last sale data with respect to transactions in reported securities, 17 CFR 240.11Aa3-1 (1992), which is adopted and incorporated by reference and available from the SEC;

(2)(b) listed, or approved for listing upon notice of issuance, on the NASDAQ system;

(2)(c) issued by an investment company registered under the Investment Company Act of 1940;

(2)(d) that is a put option or call option issued by The Options Clearing Corporation; or

(2)(e) whose issuer has net tangible assets in excess of \$4,000,000 as demonstrated by financial statements, dated less than fifteen months previous to the date of the transaction with the person, that you have reviewed and have a reasonable basis to believe are true and complete, and

(2)(e)(i) in the event the issuer is other than a foreign private issuer, are the most recent financial statements for the issuer that have been audited and reported on by an independent public accountant in accordance with SEC Rule 2-02, Accountant's reports, 17 CFR 210.2-02 (1992), which is adopted and incorporated by reference and available from the SEC; or

(2)(e)(ii) in the event the issuer is a foreign private issuer, are the most recent financial statements for the issuer that have been filed with the Commission; furnished to the Commission pursuant to SEC Rule 12g3-2(b), Exemptions for American depositary receipts and certain foreign securities, 17 CFR 240.12g3-2 (1992), which is adopted and incorporated by reference and available from the SEC; or prepared in accordance with generally accepted accounting principles in the country of incorporation, audited in compliance with the requirements of that jurisdiction, and reported on by an accountant duly registered and in good standing in accordance with the regulations of that jurisdiction.

(3) "Exempt transactions" under subparagraph (C)(1)(h) means:

(3)(a) transactions in which the price of the designated security is five dollars or more, exclusive of costs or charges; provided, however, that if the designated security is a unit composed of one or more securities, the unit price divided by the number of components of the unit other than warrants, options, rights, or similar securities must be five dollars or more, and any component of the unit that is a warrant,

option, right, or similar securities, or a convertible security must have an exercise price or conversion price of five dollars or more;

(3)(b) transactions that are not recommended by you or your agent;

(3)(c) transactions by you:

(3)(c)(i) where commissions, commission equivalents, and mark-ups from transactions in designated securities during each of the immediately preceding three months, and during eleven or more of the preceding twelve months, did not exceed five percent of your total commissions, commission-equivalents, and mark-ups from transactions in securities during those months; and

(3)(c)(ii) you have not executed principal transactions in connection with the solicitation to purchase the designated security that is the subject of the transaction in the immediately preceding twelve months.

(3)(d) transactions that, upon prior written request or upon its own motion, the Division conditionally or unconditionally exempts as not encompassed within this definition.

(4) "Division" means the Division of Securities, Utah Department of Commerce.

(5) "Market-maker" means a broker-dealer who, with respect to a particular security,

(5)(a) regularly publishes bona fide, competitive bid and ask quotations in a recognized inter-dealer quotation system, or

(5)(b) regularly furnishes bona fide competitive bid and offer quotations to other broker-dealers upon request; and

(5)(c) is ready, willing and able to effect transactions in reasonable quantities at his quoted price with other broker-dealers on a regular basis.

(6) "NASDAQ" means National Association of Securities Dealers Automatic Quotation System.

(7) "You" means broker-dealers, broker-dealer agents, or issuer-agents as applicable.

(C) Acts which will be deemed fraudulent.

(1) If you engage in any of the following acts you will be deemed to be violating the anti-fraud provisions of Subsection 61-1-1(3):

(1)(a) Effecting a transaction with a customer in any security at an unreasonable price or at a price not reasonably related to the current market price of the security.

(1)(b) Receiving an unreasonable commission or profit.

(1)(c) Contradicting or negating the importance of information contained in a prospectus or other offering materials with intent to deceive or mislead.

(1)(d) Using advertising or sales presentations in a deceptive or misleading manner.

(1)(e) Leading a customer to believe that you are in possession of material, non-public information which would impact on the value of a security whether or not you are in possession of the material non-public information.

(1)(f) Making contradictory recommendations to different customers of similar investment objective for some to sell and others to purchase the same security, at or about the same time, when not justified by the particular circumstance of each customer.

(1)(g) Failing to make a bona fide public offering of all the securities allotted to you for distribution by, among other things,

(1)(g)(i) transferring securities to a customer, another broker-dealer or a fictitious account with the understanding that those securities will be returned to you or your nominee, or;

(1)(g)(ii) parking or withholding securities.

(1)(h) in connection with the solicitation of a purchase of a designated security which is not an exempt transaction as defined above:

(1)(h)(i) failing to disclose to your customer the bid and ask price, at which you effect transactions with individual, retail customers, of the designated security as well as its spread in both percentage and dollar amounts at the time of solicitation and on the trade confirmation documents.

(1)(h)(ii) failing to advise your customer, both at the time of solicitation and on the confirmation, of any and all compensation related to a specific securities transaction to be paid to you, including commissions, sales charges, or concessions.

(1)(h)(iii) failing, to disclose, both at the time of solicitation and on the confirmation, your firm's short inventory position of more than 5%, or your firm's long inventory position of more than 10%, of the issued and outstanding shares of that class of securities of the issuer, if:

(1)(h)(iii)(aa) your firm is a market-maker at the time of the solicitation, and

(1)(h)(iii)(bb) the transaction is a principal transaction;

(1)(h)(iv) conducting or participating in sales contests in a particular designated security.

(1)(h)(v) failing to include with the confirmation, in a form satisfactory to the Division, a written explanation of the bid and ask price.

(1)(h)(vi) failing or refusing to execute sell orders from a customer from whom you or your firm solicited the purchase of the designated security in a principal transaction.

(1)(h)(vii) soliciting a secondary market transaction when there has not been a bona fide distribution in the primary market.

(1)(h)(viii) engaging in a pattern of compensating an agent in different amounts for effecting sales and purchases in the same designated security.

(1)(i) effecting transactions in, or inducing the purchase or sale of any security by means of any manipulative, deceptive or other fraudulent device or contrivance, including the use of boiler room tactics or use of fictitious or nominee accounts.

**KEY: securities, securities regulation, fraud**

**Date of Enactment or Last Substantive Amendment: 1991**

**Notice of Continuation: July 30, 2007**

**Authorizing, and Implemented or Interpreted Law: 61-1-1; 61-1-3; 61-1-24**

**R164-2. Investment Adviser - Unlawful Acts.**

**R164-2-1. Investment Adviser Performance-Based Compensation Contracts.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Sections 61-1-2 and 61-1-24.

(2) This rule sets the requirements whereby an investment adviser may receive performance-based compensation for investment advisory services rendered.

(B) Definitions

(1) "Affiliate" has the same definition as in Section 2(a)(3) of the Investment Company Act of 1940, which is adopted and incorporated by reference and available from the Division.

(2) "Division" means the Division of Securities, Utah Department of Commerce.

(3) "Company" means a corporation, partnership, association, joint stock company, trust, or any organized group of persons, whether incorporated or not; or any receiver, trustee in a case under title 11 of the United States Code, or similar official or any liquidating agent for any of the foregoing, in his capacity as such. "Company" shall not include:

(3)(a) a company required to be registered under the Investment Company Act of 1940, but which is not so registered;

(3)(b) a private investment company, for purposes of this subparagraph a private investment company is a company which would be defined as an investment company under Section 3(a) of the Investment Company Act of 1940 but for the exception from that definition provided by Section 3(c)(1) of that act;

(3)(c) an investment company registered under the Investment Company Act of 1940; or

(3)(d) a business development company as defined in Section 202(a)(22) of the Investment Advisers Act of 1940, which is adopted and incorporated by reference and available from the Division, unless each of the equity owners of any such company, other than the investment adviser entering into the contract, is a natural person or company within the meaning of subparagraph (B)(4) of this rule.

(4) "Interested person" means:

(4)(a) any member of the immediate family of any natural person who is an affiliated person of the investment adviser;

(4)(b) any person who knowingly has any direct or indirect beneficial interest in, or who is designated as trustee, executor, or guardian of any legal interest in, any security issued by the investment adviser or by a controlling person of the investment adviser if that beneficial or legal interest exceeds:

(4)(b)(i) 1/10 of 1% of any class of outstanding securities of the investment adviser or a controlling person of the investment adviser, or

(4)(b)(ii) 5% of the total assets of the person seeking to act as the client's independent agent; or,

(4)(c) any person or partner or employee of any person who, at any time since the beginning of the last two years, has acted as legal counsel for the investment adviser.

(5) "SEC" means the United States Securities and Exchange Commission.

(C) Performance-based contract exemption

(1) Notwithstanding Subsection 61-1-2(2), an investment adviser may enter into, extend or renew an investment advisory contract which provides for compensation to the investment adviser on the basis of a share of capital gains upon or capital appreciation of the funds, or any portion of the funds, of the client if the conditions in paragraphs (D) through (H) of this rule are met.

(D) Client requirements

(1) The client entering into the contract must be:

(1)(a) a natural person or a company who, immediately after entering into the contract, has at least \$750,000 under the management of the investment adviser;

(1)(b) a person who the investment adviser and its investment adviser representatives reasonably believe, immediately before entering into the contract, is a natural person or a company whose net worth, at the time the contract is entered into, exceeds \$1,500,000. The net worth of a natural person may include assets held jointly with that person's spouse;

(1)(c) a qualified purchaser as defined in section 2(a)(51)(A) of the Investment Company Act of 1940 at the time the contract is entered into; or

(1)(d) a natural person who immediately prior to entering into the contract is:

(1)(d)(i) An executive officer, director, trustee, general partner, or person serving in a similar capacity of the investment adviser; or

(1)(d)(ii) An employee of the investment adviser (other than an employee performing solely clerical, secretarial or administrative functions with regard to the investment adviser) who, in connection with his or her regular functions or duties, participated in the investment activities of such investment adviser, provided that such employee has been performing such functions and duties for or on behalf of the investment adviser, or substantially similar functions or duties for or on behalf of another company for at least 12 months.

(E) Compensation formula

(1) The compensation paid to the investment adviser with respect to the performance of any securities over a given period must be based on a formula with the following characteristics:

(1)(a) In the case of securities for which market quotations are readily available within the meaning of Rule 2a-4(a)(1) under the Investment Company Act of 1940, 17 C.F.R. 270.2a-4(a)(1) (1999) which is adopted and incorporated by reference and available from the Division, the formula must include the realized capital losses and unrealized capital depreciation of the securities over the period;

(1)(b) In the case of securities for which market quotations are not readily available within the meaning of Rule 2a-4(a)(1) under the Investment Company Act of 1940 the formula must include:

(1)(b)(i) the realized capital losses of securities over the period, and

(1)(b)(ii) if the unrealized capital appreciation of the securities over the period is included, the unrealized capital depreciation of the securities over the period; and,

(1)(c) the formula must provide that any compensation paid to the investment adviser under this rule is based on the gains less the losses, computed in accordance with subparagraphs (a) and (b) of this subparagraph (E), in the client's account for a period of not less than one year.

(F) Additional disclosure requirements

(1) Before entering into the advisory contract and in addition to the requirements of SEC Form ADV - Uniform Application for Investment Adviser Registration, the investment adviser must disclose in writing to the client all material information concerning the proposed advisory arrangement, including the following:

(1)(a) That the fee arrangement may create an incentive for the investment adviser to make investments that are riskier or more speculative than would be the case in the absence of a performance fee;

(1)(b) Where relevant, that the investment adviser may receive increased compensation with regard to unrealized appreciation as well as realized gains in the client's account;

(1)(c) The periods which will be used to measure investment performance throughout the contract and their significance in the computation of the fee;

(1)(d) The nature of any index which will be used as a comparative measure of investment performance, the significance of the index, and the reason the investment adviser believes that the index is appropriate; and,

(1)(e) Where the investment adviser's compensation is based in part on the unrealized appreciation of securities for which market quotations are not readily available within the meaning of Rule 2a-4(a)(1) under the Investment Company Act of 1940 how the securities will be valued and the extent to which the valuation will be independently determined.

(G) Arms length agreement

(1) The investment adviser, and any investment adviser representative, who enters into the contract must reasonably believe, immediately before entering into the contract that the contract represents an arm's length arrangement between the parties and that the client, or in the case of a client which is a company as defined in subparagraph (B)(3) of this rule, the person representing the company, understands the proposed method of compensation and its risks.

(2) The representative of a company may be a partner, director, officer or an employee of the company or the trustee, where the company is a trust, or any other person designated by the company or trustee.

(H) Unlawful acts

(1) Any person entering into or performing an investment advisory contract under this rule is not relieved of any obligations under Subsection 61-1-2(1) or any other applicable provision of the Utah Uniform Securities Act or any rule or order thereunder.

**KEY: securities, securities regulation**

**Date of Enactment or Last Substantive Amendment: March 20, 2000**

**Notice of Continuation: February 28, 2005**

**Authorizing, and Implemented or Interpreted Law: 61-1-2; 61-1-24**

#### **R164-4. Licensing Requirements.**

##### **R164-4-1. Broker-Dealer, Broker-Dealer Agent, and Issuer-Agent Licensing Requirements.**

###### (A) Authority and purpose

(1) The Division enacts this rule under authority granted by Sections 61-1-4, 61-1-5, 61-1-6, and 61-1-24.

(2) This rule sets forth the procedure and requirements to license as a broker-dealer, broker-dealer agent, or issuer-agent.

###### (B) Definitions

(1) "Division" means the Division of Securities, Utah Department of Commerce.

(2) "CRD" means the Central Registration Depository.

(3) "NASD" means the National Association of Securities Dealers.

(4) "NASAA" means the North American Securities Administrators Association, Inc.

(5) "SEC" means the United States Securities and Exchange Commission.

###### (C) Broker-dealer licensing, post licensing, renewal, and withdrawal requirements

###### (1) License requirements

(1)(a) To license as a broker-dealer, applicant must be a member of the NASD and submit to the CRD the following:

(1)(a)(i) SEC Form BD - Uniform Application for Broker-Dealer Registration;

(1)(a)(ii) application for a license as an agent in Utah, as specified in paragraph (D), for each principal, officer, agent or employee who directly supervises, or will directly supervise, any licensed agent associated with applicant in Utah; and

(1)(a)(iii) a license fee as specified in the Division's fee schedule, and in the form of payment prescribed by the CRD.

(1)(b) A certificate of license will not be issued. Proof of status is available from the CRD.

###### (2) Post-licensing requirements

(2)(a) Applicant must file amendments to SEC Form BD with the CRD only.

(2)(b) Applicant must file SEC Form X-17A-5, FOCUS reports in a timely manner with the NASD. However, the Division may request applicant to provide a copy of the FOCUS Report.

###### (3) License renewal requirements

(3)(a) All licenses expire on December 31 of each year.

(3)(b) To renew license, applicant must submit to the CRD the license fee specified in the Division's fee schedule before December 31.

###### (4) License or application withdrawal requirements

(4)(a) To withdraw a license or application, applicant must file with the CRD, or with the Division if not required by the CRD, SEC Form BDW - Uniform Request for Withdrawal from Registration as a Broker-Dealer.

(4)(b) A withdrawal is effective 30 days following receipt of SEC Form BDW, unless the Division notifies applicant otherwise.

###### (D) Broker-dealer agent licensing, renewal, and withdrawal requirements

###### (1) License requirements

(1)(a) To license as a broker-dealer agent, applicant or the sponsoring broker-dealer must submit to the CRD the following, in addition to any information required by the NASD, the CRD, or the SEC:

(1)(a)(i) NASD Form U-4 - Uniform Application for Securities Industry Registration or Transfer;

(1)(a)(ii) proof that applicant passed the Series 63, Uniform Securities Agent State Law Examination (Series 63 Exam), or the Series 66, Uniform Combined State Law Examination (Series 66 Exam), which are administered by the NASD, and any other exams required by the SEC or the NASD; and

(1)(a)(iii) a license fee as specified in the Division's fee schedule, and in the form of payment prescribed by the CRD.

(1)(b) A certificate of license will not be issued. Proof of status is available from the CRD.

(2) License renewal requirements

(2)(a) All licenses expire on December 31 of each year.

(2)(b) To renew license, applicant must submit to the CRD the license fee specified in the Divisions fee schedule before December 31.

(3) License or application withdrawal requirements

(3)(a) To withdraw a license or application, applicant must file with the CRD, NASD Form U-5 - Uniform Termination Notice for Securities Industry Registration.

(3)(b) A withdrawal is effective 30 days following receipt of NASD Form U-5, unless the Division notifies applicant otherwise.

(4) Miscellaneous provisions

(4)(a) Except as provided in subparagraph (D)(4)(b), applicant may associate with only one broker-dealer at a time.

(4)(b) A dual license may be allowed by the director if:

(4)(b)(i) applicant requests a dual license in writing to the Division which identifies the broker-dealers with which applicant will associate and sets forth the reasons for the dual license;

(4)(b)(ii) both broker-dealers with which applicant intends to associate represent in writing to the Division that each assumes full responsibility for applicant at all times; and

(4)(b)(iii) applicant discloses the dual license to each client.

(E) Issuer-agent licensing, renewal, and withdrawal requirements

(1) License requirements

(1)(a) To license as an issuer-agent, applicant or the sponsoring issuer must submit to the Division the following:

(1)(a)(i) NASD Form U-4 with original signatures;

(1)(a)(ii) proof that applicant passed the Series 63 Exam or the Series 66 Exam;

(1)(a)(iii) a license fee as prescribed in the Division's fee schedule; and

(1)(a)(iv) a surety bond if required by Section R164-11-1.

(2) License renewal requirements

(2)(a) All licenses expire on December 31 of each year.

(2)(b) To renew license, applicant must submit to the Division the following before December 31 of each year:

(2)(b)(i) NASD Form U-4 with original signatures; and

(2)(b)(ii) The license fee specified in the Division's fee schedule.

(3) License or application withdrawal requirements

(3)(a) To withdraw a license or application, applicant must file with the Division a written request for withdrawal or NASD Form U-5.

(3)(b) A withdrawal is effective thirty days following receipt of the written request for withdrawal, unless the Division notifies applicant otherwise.

(4) Miscellaneous provisions

(4)(a) If applicant applies for a license two or more times in a twelve-month period, the Division deems applicant to be a broker-dealer. Applicant must then license as a broker-dealer.

#### **R164-4-2. Investment Adviser and Investment Adviser Representative Licensing Requirements.**

(A) Authority and Purpose

(1) The Division enacts this rule under authority granted by Sections 61-1-4, 61-1-5, 61-1-6, and 61-1-24.

(2) This rule sets forth the procedure and requirements to license as an investment adviser and investment adviser representative.

(B) Definitions

(1) "CRD" means the Central Registration Depository.

(2) "Designated Official" means a person that is a partner, officer, director, sole proprietor, or a person occupying a similar status or performing similar functions in an investment adviser firm.

(3) "Division" means the Division of Securities, Utah Department of Commerce.

(4) "Fee" means any remuneration received, directly or indirectly, for investment advice given or investment advisory services rendered, including, among other things, charges for a publication which includes investment advice and commissions paid or received when securities are purchased or sold as a result of investment advice given or investment advisory services rendered. License fees referred to in this rule are not included.

(5) "IARD" means the Investment Adviser Registration Depository.

(6) "Investment advice" or "investment advisory services" means advice given or services rendered concerning the value of securities or as to the advisability of investing in, or purchasing or selling securities.

(7) "NASAA" means the North American Securities Administrators Association, Inc.

(8) "NASD" means the National Association of Securities Dealers.

(9) "SEC" means the United States Securities and Exchange Commission.

(10) "SIPC" means the Securities Investor Protection Corporation.

(C) Investment adviser and investment adviser representative licensing requirements

(1) Investment adviser licensing requirements. To license as an investment adviser, applicant must submit the following:

(1)(a) To the IARD:

(1)(a)(i) SEC Form ADV - Uniform Application for Investment Adviser Registration, including applicant's audited balance sheet if required under item 14 of part II of Form ADV; and

(1)(a)(ii) a license fee as specified in the Division's fee schedule. (This fee includes the fee for one designated official.)

(1)(b) To the CRD:

(1)(b)(i) NASD Form U-4 - Uniform Application for Securities Industry Registration or Transfer for applicant's designated official; and

(1)(b)(ii) proof that applicant's designated official has passed the Series 65 or both the Series 66 Exam and Series 7 Exam.

- (1)(c) To the Division:
- (1)(c)(i) Part II of SEC Form ADV - Uniform Application for Investment Adviser Registration;
- and
- (1)(c)(ii) Division Form 4-5BIA - Indemnity Bond of Investment Adviser, if required by Section R164-4-5, or proof of membership in SIPC.
- (2) Investment Adviser Representative Licensing Requirements. To license as an investment adviser representative, the investment adviser or federal covered adviser with which the applicant will associate must submit the following:
- (2)(a) To the CRD:
- (2)(a)(i) NASD Form U-4; and
- (2)(a)(ii) proof applicant passed the Series 65 Exam or both the Series 66 Exam and Series 7 Exam.
- (2)(b) To the IARD, a license fee as specified in the Division's fee schedule.
- (3) Miscellaneous provisions
- (3)(a) Except as provided in Subparagraph (C)(3)(b), applicant may associate with only one investment adviser or federal covered adviser at a time.
- (3)(b) A dual license may be allowed by the director if:
- (3)(b)(i) Applicant requests a dual license in writing to the Division which identifies the investment advisers or federal covered advisers with which applicant intends to associate and sets forth the reasons for the dual license;
- (3)(b)(ii) Both investment advisers or federal covered advisers with which applicant intends to associate represent in writing to the Division that each assumes full responsibility for applicant at all times; and
- (3)(b)(iii) Applicant discloses the dual license to each client.
- (D) Investment adviser and associated investment adviser representative renewal requirements
- (1) All licenses expire on December 31 of each year.
- (2) To renew licenses of the investment adviser and associated investment adviser representatives, the investment adviser must submit the following to the IARD before December 31:
- (2)(a) a copy of applicant's most recent SEC Form ADV - Uniform Application for Investment Adviser Registration;
- (2)(b) a license fee for the investment adviser and a license fee for each associated investment adviser representative as specified in the Division's fee schedule (the license fee for the investment adviser includes the fee for one designated official);
- (2)(c) Division Form 4-5BIA, Indemnity Bond of Investment Adviser, if required by Section R164-4-5;
- (2)(d) the investment adviser's most recently audited balance sheet, if the investment adviser requires payment of advisory fees six months or more in advance and in excess of \$500 per client, or if the investment adviser has custody or possession of clients' funds or securities; and
- (2)(e) a copy of the alternate disclosure brochure given or offered if the investment adviser delivered or offered to deliver a written disclosure statement in lieu of Part II of Form ADV during the last calendar year of the licensing period.
- (E) Investment adviser representatives of federal covered advisers
- (1) All licenses expire on December 31 of each year.

(2) To renew licenses of the investment adviser representatives of a federal covered adviser, the federal covered adviser must submit to the IARD before December 31, a license fee for each investment adviser representative as specified in the Division's fee schedule.

(F) Investment adviser and investment adviser representative withdrawal requirements

(1) Investment adviser withdrawal requirements

(1)(a) To withdraw a license or application, applicant must file with the IARD, SEC Form ADV-W - Notice of Withdrawal from Registration as Investment Adviser.

(1)(b) A withdrawal is effective thirty days following receipt of SEC Form ADV-W, unless the Division notifies applicant otherwise.

(2) Investment adviser representative withdrawal requirements

(2)(a) To withdraw a license or application, applicant must file with the CRD, a completed NASD Form U-5.

(2)(b) A withdrawal is effective thirty days following receipt of applicant's NASD Form U-5, unless the Division notifies applicant otherwise.

(G) Acts or practices which require licensing as an investment adviser and compliance with statutes and rules pertaining thereto

(1) Lawyers, accountants, engineers or teachers

(1)(a) A lawyer, accountant, engineer or teacher (professional) must be licensed as an investment adviser or investment adviser representative if the professional provides investment advice or investment advisory services to the professional's clients for a fee, if the advice is not "solely incidental" to the professional's regular professional practice with respect to clients.

(1)(b) For purposes of this subparagraph (1), providing investment advice under ANY of the following circumstances would NOT be considered to be "solely incidental":

(1)(b)(i) The investment advice the professional or the investment advisory service the professional renders clients is the primary professional advice for which the professional charges or is paid a fee;

(1)(b)(ii) The professional advertises or otherwise holds himself out to the public as a provider of investment advice; or

(1)(b)(iii) The professional holds funds for clients pursuant to discretionary authority to invest such funds.

(1)(c) Following are examples to assist in understanding the meaning of "solely incidental":

(1)(c)(i) If the primary professional advice for which the professional receives a fee involves business or tax planning and the professional neither advertises or otherwise holds himself out as a provider of investment advice, nor holds funds which the professional invests for clients. The professional may also provide investment advice to clients in connection with the planning or other professional services, without being required to become licensed as an investment adviser.

(1)(c)(ii) If the professional advertises or otherwise holds himself out as a provider of investment advice, the professional must be licensed as an investment adviser whether or not the professional actually provides investment advice.

(1)(c)(iii) If the professional holds client funds which the professional invests for the client, the professional must be licensed as an investment adviser whether or not the professional actually provides investment advice.

(2) Broker-dealers and broker-dealer agents

(2)(a) A broker-dealer or broker-dealer agent must be licensed as an investment adviser or investment adviser representative if for a fee, the securities broker-dealer or sales agent of the securities broker-dealer provides investment advice to clients if the investment advice is not "solely incidental" to the conduct of business as a broker-dealer or broker-dealer agent.

(2)(b) For purposes of this subparagraph, providing investment advice under ANY of the following circumstances would NOT be considered "solely incidental":

(2)(b)(i) Providing investment advice to a client for a fee in addition to any commission received in connection with transactions in which the client either purchases or sells securities;

(2)(b)(ii) Providing investment advice, for a fee, to clients who are not clients of the broker-dealer with which the agent is licensed; or

(2)(b)(iii) Receiving compensation from an investment adviser to whom the broker-dealer or agent refers clients.

(3) Insurance agents

(3)(a) An insurance agent who, for a fee, provides investment advice to a client, must be licensed as an investment adviser or investment adviser representative.

(3)(b) An insurance agent who, performs an analysis of a client's estate, for a fee, which recommends that the client purchases or sells either specific securities or specific types of securities must be licensed as an investment adviser or investment adviser representative.

(3)(c) An insurance agent who, receives a commission from the sale of insurance to a client who makes such purchase with the proceeds of securities the insurance agent recommended be sold, must be licensed as an investment adviser or investment adviser representative.

(4) Others

(4)(a) One must be licensed as an investment adviser or investment adviser representative, as appropriate, whether or not described in subparagraphs (1), (2), or (3) of paragraph (E) if:

(4)(a)(i) Providing, advertising, or otherwise holding oneself out as a provider of investment advice;

(4)(a)(ii) Publishing a newspaper, news column, news letter, news magazine, or business or financial publication, which, for a fee, gives investment advice based upon the specific investment situations of the clients; or

(4)(a)(iii) Receiving a fee from an investment adviser for client referrals.

### **R164-4-3. General Licensing Requirements.**

(A) Authority and Purpose

(1) The Division enacts this rule under authority granted by Sections 61-1-4, 61-1-5, 61-1-6, and 61-1-24.

(2) This rule applies to the licensing of broker-dealers, broker-dealer agents, issuer-agents, investment advisers, and investment adviser representatives.

(B) Definitions

(1) "CRD" means the Central Registration Depository operated by the NASD.

(2) "Division" means the Division of Securities, Utah Department of Commerce.

(3) "IARD" means the Investment Adviser Registration Depository operated by the NASD.

(4) "NASAA" means the North American Securities Administrators Association, Inc.

(5) "NASD" means the National Association of Securities Dealers.

(6) "SEC" means the United States Securities and Exchange Commission.

(7) "Termination" means the date on which the NASD processes NASD Form U-5 - Uniform Termination Notice for Securities Industry Registration.

(C) Examination requirements

(1) A broker-dealer agent must pass the Series 63, Uniform Securities Agent State Law Examination (Series 63 Exam) or the Series 66, Uniform Combined State Law Examination (Series 66 Exam). If the broker-dealer agent's most recent license terminated two or more years before the date of receipt by the Division of a new application, the agent will be required to retake the examination.

(2) An issuer-agent must pass the Series 63 Exam or the Series 66 Exam. If the issuer-agent's most recent license terminated two or more years before the date of receipt by the Division of a new application, the agent will be required to retake the examination.

(3) Investment advisers and investment adviser representatives

(3)(a) Examination requirements. An individual applying to be licensed as an investment adviser or investment adviser representative shall provide the Division with proof of obtaining a passing score on one of the following examinations:

(3)(a)(i) Series 65, Uniform Investment Adviser Law Examination (Series 65 Exam); or

(3)(a)(ii) Series 7, General Securities Representative Examination (Series 7 Exam) and Series 66 Exam.

(3)(b) If an investment adviser or investment adviser representative has not been licensed in any jurisdiction for a period of two (2) years, the investment adviser or investment adviser representative will be required to retake the examination.

(3)(c) Waivers. The investment adviser or investment adviser representative may request a waiver of the examination requirement if such individual currently holds one of the following professional designations:

(3)(c)(i) Certified Financial Planner (CFP) awarded by the Certified Financial Planner Board of Standards, Inc.;

(3)(c)(ii) Chartered Financial Consultant (ChFC) awarded by the American College, Bryn Mawr, Pennsylvania;

(3)(c)(iii) Personal Financial Specialist (PFS) awarded by the American Institute of Certified Public Accountants;

(3)(c)(iv) Chartered Financial Analyst (CFA) awarded by the Institute of Chartered Financial Analysts;

(3)(c)(v) Chartered Investment Counselor (CIC) awarded by the Investment Counsel Association of America, Inc.; or

(3)(c)(vi) Such other professional designation as the Division may recognize by order.

(D) Electronic Filing

(1) The Division designates and authorizes the web-based CRD to receive and store filings and collect related fees on behalf of the Division whenever this rule requires filings to be submitted to the CRD.

(2) The Division designates and authorizes the web-based IARD to receive and store filings and collect related fees on behalf of the Division whenever this rule requires filings to be submitted to the IARD.

(3) Unless otherwise provided, all broker-dealer, agent, investment adviser, and investment adviser representative applications, amendments, reports, notices, related filings and fees required to be filed with the Division pursuant to this rule, shall be filed electronically with and transmitted to either the CRD or the IARD as designated in this rule. The following additional conditions relate to such electronic filings:

(3)(a) When a signature or signatures are required by the particular instruction of any filing to be made through the CRD or the IARD, a duly authorized officer of the applicant or the applicant him or herself, as required, shall affix his or her electronic signature to the filing by typing his or her name in the appropriate fields and submitting the filing to the CRD or the IARD. Submission of a filing in this manner shall constitute irrefutable evidence of legal signature by any individuals whose names are typed on the filing.

(3)(b) Solely for purposes of a filing made through the CRD or the IARD, a document is considered filed with the Division when all fees are received and the filing is accepted by the CRD or the IARD on behalf of the state.

(4) Notwithstanding Subparagraph (D)(3), the electronic filing of any particular document shall not be required until such time as the CRD or the IARD provides for receipt of such filings. Any documents required to be filed with the Division, the CRD or the IARD that are not permitted to be filed with or cannot be accepted by the CRD or the IARD shall be filed directly with the Division in either a paper format or as an attachment to an email to the Division in a format that can be viewed by the Division.

(5) This Subparagraph provides two "hardship exemptions" from the requirements to make electronic filings as required by this rule.

(5)(a) Temporary Hardship Exemption.

(5)(a)(i) Investment advisers licensed or required to be licensed under the Act who experience unanticipated technical difficulties that prevent submission of an electronic filing to the IARD may request a temporary hardship exemption from the requirements to file electronically.

(5)(a)(ii) To request a temporary hardship exemption, the investment adviser must:

(5)(a)(ii)(aa) File Form ADV-H in paper format with the state securities agency where the investment adviser's principal place of business is located, no later than one business day after the filing that is the subject of the Form ADV-H was due; and

(5)(a)(ii)(bb) Submit the filing that is the subject of the Form ADV-H in electronic format to the IARD no later than seven business days after the filing was due.

(5)(a)(iii) The temporary hardship exemption will be deemed effective upon receipt by the Division of the complete Form ADV-H. Multiple temporary hardship exemption requests within the same calendar year may be disallowed by the Division.

(5)(b) Continuing Hardship Exemption.

(5)(b)(i) A continuing hardship exemption will be granted only if the investment adviser is able to demonstrate that the electronic filing requirements of this rule are prohibitively burdensome.

(5)(b)(ii) To apply for a continuing hardship exemption, the investment adviser must:

(5)(b)(ii)(aa) File Form ADV-H in paper format with the Division at least twenty business days before a filing is due; and

(5)(b)(ii)(bb) If a filing is due to more than one state securities agency, the Form ADV-H must be filed with the state securities agency where the investment adviser's principal place of business is

located. The state securities agency who receives the application will grant or deny the application within ten business days after the filing of Form ADV-H.

(5)(b)(iii) The exemption is effective upon approval by the Division. The time period of the exemption may be no longer than one year after the date on which the Form ADV-H is filed. If the Division approves the application, the investment adviser must, no later than five business days after the exemption approval date, submit filings to the Division in paper format along with the appropriate processing fees for the period of time for which the exemption is granted.

(5)(c) The decision to grant or deny a request for a hardship exemption will be made by the state securities agency where the investment adviser's principal place of business is located, which decision will be followed by the state securities agency in the other state(s) where the investment adviser is licensed.

(E) Correcting amendments

(1) At a time when a material change occurs:

(1)(a) a broker-dealer must promptly file amendments to SEC Form BD - Uniform Application for Broker-Dealer Registration with the CRD;

(1)(b) a broker-dealer agent must promptly file amendments to NASD Form U-4 - Uniform Application for Securities Industry Registration or Transfer with the CRD;

(1)(c) an issuer-agent must promptly file amendments to NASD Form U-4 - Uniform Application for Securities Industry Registration or Transfer with the Division;

(1)(d) an investment adviser must promptly file amendments to SEC Form ADV - Uniform Application for Investment Adviser Registration with the IARD;

(1)(e) an investment adviser representative must promptly file amendments to NASD Form U-4 - Uniform Application for Securities Industry Registration or Transfer with the CRD; and

(1)(f) a federal covered adviser must promptly file amendments to SEC Form ADV - Uniform Application for Investment Adviser Registration with the IARD.

(2) Amendments should be filed in accordance with the instructions on the respective forms.

(F) Service of process

(1) The requirement in Subsection 61-1-4(1) that requires filing a consent to service of process may be fulfilled by execution of SEC Form BD, NASD Form U-4, or SEC Form ADV, as applicable.

(G) License transfer

(1) A broker-dealer or broker-dealer agent may transfer a license by following CRD procedures. The Division recognizes and participates in the NASAA/CRD Temporary Agent Transfer ("TAT") program and will honor transfers effected through TAT procedures.

#### **R164-4-4. Minimum Financial Requirements and Financial Reporting Requirements of Licensed Broker-Dealers and Investment Advisers.**

(A) Authority and Purpose

(1) The Division enacts this rule under authority granted by Sections 61-1-4, 61-1-5, 61-1-6, and 61-1-24.

(2) This rule provides the minimum financial requirements and financial reporting requirements for broker-dealers and investment advisers.

(B) Definitions

(1) "Act" means Title 61, Chapter 1, Utah Uniform Securities Act.

(2) "Division" means the Division of Securities, Utah Department of Commerce.

(3) "Net worth" means an excess of assets over liabilities, as determined by generally accepted accounting principles, but shall not include as assets: prepaid expenses (except as to items properly classified as current assets under generally accepted accounting principles), deferred charges, goodwill, franchise rights, organizational expenses, patents, copyrights, marketing rights, unamortized debt discount and expense, all other assets of intangible nature; home, home furnishing, automobile(s), and any other personal items not readily marketable in the case of an individual; advances or loans to stockholders and officers in the case of a corporation; and advances or loans to partners in the case of a partnership.

(4) "SEC" means the United States Securities and Exchange Commission.

(C) Broker-Dealer - Minimum Financial Requirements

(1) Each broker-dealer licensed or required to be licensed under the Act shall comply with SEC Rules 15c3-1 (17 CFR 240.15c3-1(1996)), 15c3-2 (17 CFR 240.15c3-2(1996)), and 15c3-3 (17 CFR 240.15c3-3(1996)), which are adopted and incorporated by reference.

(2) Each broker-dealer licensed or required to be licensed under the Act shall comply with SEC Rule 17a-11 (17 CFR 240.17a-11(1996)) and shall file with the Division upon request copies of notices and reports required under SEC Rules 17a-5 (17 CFR 240.17a-5(1996)), 17a-10 (17 CFR 240.17a-10(1996)), and 17a-11 (17 CFR 240.17a-11(1996)), which are adopted and incorporated by reference.

(3) To the extent the SEC promulgates changes to the above referenced rules, broker-dealers in compliance with such rules as amended shall not be subject to enforcement action by the Division for violation of this rule to the extent that the violation results solely from the broker-dealer's compliance with the amended SEC rule.

(D) Investment Adviser - Minimum Financial Requirements

(1) Except as provided in subparagraph (D)(4), unless an investment adviser posts a bond pursuant to Section R164-4-5, an investment adviser licensed or required to be licensed under the Act who has custody of client funds or securities shall maintain at all times a minimum net worth of \$35,000, and every investment adviser licensed or required to be licensed under the Act who has discretionary authority over client funds or securities but does not have custody of client funds or securities, shall maintain at all times a minimum net worth of \$10,000.

(2) An investment adviser registered or required to be registered who accepts prepayment of more than \$500 per client and six or more months in advance shall maintain at all times a positive net worth.

(3) Unless otherwise exempted, as a condition of the right to continue to transact business in this state, every investment adviser licensed or required to be licensed under the Act shall by the close of business on the next business day notify the Division if such investment adviser's net worth is less than the minimum required. After transmitting such notice, each investment adviser shall file by the close of business on the next business day a report with the Division of its financial condition, including the following:

(3)(a) A trial balance of all ledger accounts;

(3)(b) A statement of all client funds or securities which are not segregated;

(3)(c) A computation of the aggregate amount of client ledger debit balances; and

(3)(d) A statement as to the number of client accounts.

(4) The Division may require that a current appraisal be submitted in order to establish the worth of any asset.

(5) Every investment adviser that has its principal place of business in a state other than this state shall maintain such minimum capital as required by the state in which the investment adviser maintains its principal place of business, provided the investment adviser is licensed in such state and is in compliance with such state's minimum capital requirements.

**R164-4-5. Bonding Requirements for Broker-Dealers, Broker-Dealer Agents, Issuer-Agents, and Investment Advisers.**

(A) Authority and Purpose

(1) The Division enacts this rule under authority granted by Sections 61-1-4 and 61-1-24.

(2) This rule sets the surety-bond requirements for broker-dealers, broker-dealer agents, issuer-agents, and investment advisers.

(B) Definitions

(1) "Division" means the Division of Securities, Utah Department of Commerce.

(2) "SEC" means the United States Securities and Exchange Commission.

(3) "SIPC" means the Securities Investor Protection Corporation.

(C) Bonding requirements for broker-dealers

(1) A broker-dealer who is a member of SIPC and is not excluded from membership assessments need not provide a bond.

(2) Every broker-dealer licensed or required to be licensed under this Act whose business is exclusively intrastate, who does not make use of any facility of a national securities exchange and who is not registered under section 15 of the Securities Exchange Act of 1934, shall be bonded in an amount of not less than \$100,000 by a bonding company qualified to do business in this state.

(D) Bonding requirements for broker-dealer agents

(1) A broker-dealer agent need not provide a bond.

(E) Bonding requirements for issuer-agents

(1) An issuer-agent need not provide a bond unless otherwise required by Section R164-11-1.

(2) If an issuer-agent must provide a bond, it must be:

(2)(a) issued by a corporate bonding company qualified to do business in Utah;

(2)(b) on or in substantially the same form as Division Form 4-5BI, "Corporate Indemnity Bond of Issuer"; and

(2)(c) be in the amount of \$25,000.

(3) Upon written request the Division may waive the bond requirement and accept instead the escrow of funds.

(3)(a) The issuer or issuer-agent must place in escrow at least \$25,000.

(3)(b) The issuer or issuer-agent may place the money in escrow at any federal or state bank or savings institution, only.

(3)(c) The term of the escrow must extend for a period terminating no earlier than four years after expiration of the issuer's registration statement.

(3)(d) The escrow must be on or in substantially the same form as Division Form 4-5EIA, "Escrow Agreement", which is available from the Division.

(3)(e) The funds in escrow may be released only by an order of the Division, in accordance with the following:

(3)(e)(i) If claims have been made against the issuer-agent in a court of competent jurisdiction and the court has finally adjudicated the dispute, or the claimant and the issuer-agent have agreed in writing to resolve the dispute, the amount of funds at issue may be ordered released by the Division in accordance with the order or agreement, up to the amount placed in escrow; or

(3)(e)(ii) The issuer's registration statement expired not less than four (4) years ago.

(F) Bonding requirements for certain investment advisers

(1) Except as provided in subparagraphs (F)(2) and (3), every investment adviser having custody of or discretionary authority over client funds or securities shall be bonded:

(1)(a) in an amount determined by the Division based upon the number of clients and the total assets under management of the investment adviser, which shall be at a minimum of \$10,000;

(1)(b) issued by a bonding company qualified to do business in this state;

(1)(c) on or in substantially the same form as Division Form 4-5BIA, Corporate Indemnity Bond of Investment Adviser.

(2) The requirements of subparagraph (F)(1) shall not apply to those applicants or licensees who comply with the requirements of Section R164-4-4.

(3) An investment adviser that has its principal place of business in a state other than this state shall be exempt from the requirements of subparagraph (F)(1), provided that the investment adviser is licensed as an investment adviser in the state where it has its principal place of business and is in compliance with such state's requirements relating to bonding.

(4) Upon request and for good cause shown, the Division may waive the bond requirement and accept instead the escrow of funds.

(4)(a) The investment adviser must place in escrow an amount determined by the Division based upon the number of clients and the total assets under management of the investment adviser, which shall be at a minimum of \$10,000.

(4)(b) The investment adviser may place the money in escrow at any federal or state bank or savings institution, only.

(4)(c) The term of the escrow must extend for a period terminating no earlier than three years after expiration of the investment adviser's license.

(4)(d) The escrow must be on, or in substantially the same form as, Division Form 4-5EIA, Escrow Agreement.

(4)(e) The funds in escrow may be released only by an order of the Division, in accordance with the following:

(4)(e)(i) Where claims have been made against the investment adviser in a court of competent jurisdiction and the court has finally adjudicated the dispute, or the claimant and the investment adviser have agreed in writing to resolve the dispute, the amount of funds at issue may be ordered released by the division in accordance with the order or agreement, up to the amount placed in escrow; or

(4)(e)(ii) The investment adviser has not been licensed by the Division for a period of at least four years.

#### **R164-4-6. Notice Filing Requirements for Federal Covered Advisers.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Sections 61-1-4 and 61-1-24.

(2) This rule provides the notice filing requirements for federal covered advisers.

(B) Definitions

(1) "Division" means the Division of Securities, Utah Department of Commerce.

(2) "SEC" means the United States Securities and Exchange Commission.

(C) Notice Filings

Federal covered advisers required to file notice filings pursuant to Subsection 61-1-4(2), must file with IARD the following:

(1) an executed SEC Form ADV - Uniform Application for Investment Adviser Registration;

and

(2) a filing fee as specified in the Division's fee schedule.

(D) Notice filing renewals

(1) All notice filings expire on December 31 of each year.

(2) To renew notice filings, a federal covered adviser must submit the following to IARD before December 31:

(2)(a) a copy of the federal covered adviser's most recent SEC Form ADV; and

(2)(b) a filing fee as specified in the Division's fee schedule.

(E) Until IARD provides for the filing of Part 2 of Form ADV, the Division will deem filed Part 2 of Form ADV if a federal covered adviser provides, within 5 days of a request, Part 2 of Form ADV to the Division. Because the Division deems Part 2 of the Form ADV to be filed, a federal covered adviser is not required to submit Part 2 of Form ADV to the Division unless requested.

**R164-4-7. Broker-dealers, Investment Advisers and Other Securities Personnel Using the Internet for General Dissemination of Information on Products and Services.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Sections 61-1-13 and 61-1-24.

(2) This rule clarifies when broker-dealers, investment advisers, broker-dealer agents and investment adviser representatives are transacting business in this state for purposes of Section 61-1-4 by distributing information on available products and services through Internet Communications available to persons in this state.

(B) Definitions

(1) "Division" means the Division of Securities, Utah Department of Commerce.

(2) "Internet" means the global information system comprised of independent computer networks which are interconnected and share information without the use of a central processing center by use of the Transmission Control Protocol/Internet Protocol (TCP/IP) suite, to include without limitation, the World Wide Web, proprietary or "common carrier" electronic delivery systems, or similar medium.

(3) "Internet Communications" means a communication made on the Internet which is directed generally to anyone who has access to the Internet, including persons in Utah, to include without limitation, postings on Bulletin Boards, displays on "Home Pages" or similar methods.

(C) Licensing Exclusion

Broker-dealers, investment advisers, broker-dealer agents ("BD agents") and investment adviser representatives ("IA reps") who use the Internet to distribute information on available products and services through Internet Communications shall not be deemed to be "transacting business" in this state for purposes of Subsections 61-1-3(1) and 61-1-3(3) based solely on that fact if the following conditions are observed:

(1) The Internet Communication contains a legend in which it is clearly stated that:

(1)(a) the broker-dealer, investment adviser, BD agent or IA rep in question may only transact business in this state if first licensed, excluded or exempted from state broker-dealer, investment adviser, BD agent or IA rep licensing requirements, as may be; and

(1)(b) follow-up, individualized responses to persons in this state by such broker-dealer, investment adviser, BD agent or IA rep that involve either the effecting or attempting to effect transactions in securities, or the rendering of personalized investment advice for compensation, as may be, will not be made absent compliance with state broker-dealer, investment adviser, BD agent or IA rep licensing requirements, or an applicable exemption or exclusion;

(2) The Internet Communication contains a mechanism, including and without limitation, technical "firewalls" or other implemented policies and procedures, designed reasonably to ensure that prior to any subsequent, direct communication with prospective customers or clients in this state, said broker-dealer, investment adviser, BD agent or IA rep is first licensed in this state or qualifies for an exemption or exclusion from such requirement. Nothing in this subparagraph shall be construed to relieve a state licensed broker-dealer, investment adviser, BD agent or IA rep from any applicable securities registration requirement in this state;

(3) The Internet Communication does not involve either effecting or attempting to effect transactions in securities, or the rendering of personalized investment advice for compensation, as may be, in this state over the Internet, but is limited to the dissemination of general information on products and services; and

(4) In the case of a BD agent or IA rep:

(4)(a) the affiliation with the broker-dealer or investment adviser of the BD agent or IA rep is prominently disclosed within the Internet Communication;

(4)(b) the broker-dealer or investment adviser with whom the BD agent or IA rep is associated retains responsibility for reviewing and approving the content of any Internet Communication by a BD agent or IA rep;

(4)(c) the broker-dealer or investment adviser with whom the BD agent or IA rep is associated first authorizes the distribution of information on the particular products and services through the Internet Communication; and

(4)(d) in disseminating information through the Internet Communication, the BD agent or IA rep acts within the scope of the authority granted by the broker-dealer or investment adviser.

(D) Limitations of Exclusion

(1) The exclusion provided in paragraph (C) extends to state broker-dealer, investment adviser, BD agent and IA rep licensing requirements only, and does not excuse compliance with applicable securities registration, antifraud or related provisions.

(2) Nothing in this exclusion shall be construed to affect the activities of any broker-dealer, investment adviser, BD agent and IA rep engaged in business in this state that is not subject to the jurisdiction of the Division as a result of the National Securities Markets Improvements Act of 1996, as amended.

#### **R164-4-8. Exclusion for Certain Canadian Brokers and Securities Exemption.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Subsections 61-1-13(3)(i) and 61-1-14(2)(s) and Section 61-1-24.

(2) This rule provides an exclusion from the definition of "Broker-dealer" for certain Canadian brokers and provides an exemption for transactions effectuated by these certain Canadian brokers.

(B) Definitions

(1) "Division" means the Division of Securities, Utah Department of Commerce.

(C) Broker-Dealer Exclusion

"Broker-dealer" as defined in Section 61-1-13(3) excludes a person who is resident in Canada, has no office or other physical presence in this state, and complies with the following conditions:

(1) Only effects or attempts to effect transactions in securities:

(1)(a) with or through the issuers of the securities involved in the transactions, broker-dealers, banks, saving institutions, trust companies, insurance companies, investment companies defined in the Investment Company Act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees;

(1)(b) with or for a person from Canada who is temporarily present in this state, with whom the Canadian person had a bona fide business-client relationship before the person entered this state; or

(1)(c) with or for a person from Canada who is in this state, whose transactions are in a self-directed tax advantaged retirement plan in Canada of which the person is the holder or contributor;

(2) files a notice in the form of his current application required by the jurisdiction in which their head office is located and a consent to service of process;

(3) is a member of a self-regulatory organization or stock exchange in Canada;

(4) Maintains his provincial or territorial registration and his membership in a self-regulatory organization or stock exchange in good standing;

(5) Discloses to his clients in this state that he is not subject to the full regulatory requirements of the Utah Uniform Securities Act; and

(6) Is not in violation of Section 61-1-1 and all rules promulgated thereunder.

(D) Transactional Securities Exemption

The Division finds that registration is not necessary or appropriate for the protection of investors in connection with an offer or sale of a security in a transaction effected by a person excluded from the definition of broker-dealer under Paragraph (C)

**KEY: securities, securities regulation**

**Date of Enactment or Last Substantive Amendment: October 16, 2002**

**Notice of Continuation: July 30, 2007**

**Authorizing, and Implemented or Interpreted Law: 61-1-3; 61-1-4; 61-1-5; 61-1-6; 61-1-13; 61-1-14; 61-1-24**

**R164-5. Broker-Dealer and Investment Adviser Books and Records.**

**R164-5-1. Recordkeeping Requirements of Broker-Dealers and Investment Advisers.**

(A) Authority and Purpose

(1) The Division enacts this rule under authority granted by Sections 61-1-5 and 61-1-24.

(2) This rule specifies the books and records a broker-dealer and an investment adviser must maintain.

(B) Definitions

(1) "Act" means Title 61, Chapter 1, Utah Uniform Securities Act.

(2) "Division" means the Division of Securities, Utah Department of Commerce.

(3) "SEC" means the United States Securities and Exchange Commission.

(C) Broker-dealer requirements

(1) Unless otherwise provided by order of the SEC, each broker-dealer licensed or required to be licensed under this Act shall make, maintain and preserve books and records in compliance with SEC Rules 17a-3 (17 CFR 240.17a-3(1996)), 17a-4 (17 CFR 240.17a-4(1996)), 15c2-6 (17 CFR 240.15c2-6(1991)) and 15c2-11 (17 CFR 240.15c2-11(1996)), which are adopted and incorporated by reference.

(2) To the extent that the SEC promulgates changes to the above referenced rules, broker-dealers in compliance with such rules as amended shall not be subject to enforcement action by the Division for violation of this rule to the extent that the violation results solely from the broker-dealer's compliance with the amended rule.

(D) Investment adviser requirements

(1) Except as provided in subparagraph (D)(3), unless otherwise provided by order of the SEC, each investment adviser licensed or required to be licensed under the Act shall make, maintain and preserve books and records in compliance with SEC Rule 204-2 (17 CFR 275.204-2(1996)), which is adopted and incorporated by reference, notwithstanding the fact that such investment adviser is not registered or required to be registered under section 203 of the Investment Advisers Act of 1940.

(2) To the extent that the SEC promulgates changes to the above-referenced rules, investment advisers in compliance with such rules as amended shall not be subject to enforcement action by the Division for violation of this rule to the extent that the violation results solely from the investment adviser's compliance with the amended rule.

(3) Every investment adviser that has its principal place of business in a state other than this state shall be exempt from the requirements of subparagraph (D), provided the investment adviser is licensed or registered in such state and is in compliance with such state's record keeping requirements.

**R164-5-3. Financial Reporting of Broker-Dealers and Investment Advisers.**

(A) Authority and Purpose

(1) The Division enacts this rule under authority granted by Sections 61-1-5 and 61-1-24.

(2) This rule specifies the annual financial reports required of a broker-dealer and an investment adviser.

(B) Definitions

(1) "Division" means the Division of Securities, Utah Department of Commerce.

(C) Broker-Dealer required financial statements

(1) Upon request, each broker-dealer must file with the Division audited financial statements as of the end of its fiscal year. The statements must meet the requirements of Paragraph (E).

(D) Investment Adviser required financial statements

(1) Except as provided in subparagraph (D)(2), each investment adviser who has custody or possession of client's funds or securities or requires payment of advisory fees six months or more in advance and in excess of \$500 per client shall file with the Division audited financial statements as of the end of the investment adviser's fiscal year. The statements must meet the requirements of Paragraph (E).

(2) Every investment adviser that has its principal place of business in a state other than this state shall be exempt from the requirements of subparagraph (D), provided the investment adviser is licensed or registered in such state, is in compliance with such state's financial reporting requirements, and annually files with the Division a copy of any financial reports filed with such state.

(E) Financial statement requirements

The financial statements filed pursuant to this rule must:

(1) include a balance sheet, a statement of income or operations, a statement of shareholder equity, and a statement of cash flows, accompanied by appropriate notes stating the accounting principles and practices followed in their preparation, the basis at which securities are included and other notes as may be necessary for an understanding of the statements.

(2) be prepared in accordance with generally accepted accounting principles.

(3) be audited by an independent certified public accountant. The audit must:

(a) be made in accordance with generally accepted auditing standards;

(b) include a review of the accounting system, the internal accounting controls and procedures for the safeguarding of securities and funds including appropriate tests thereof since the prior examination.

(4) be accompanied by an unqualified opinion of the auditor as to the report of financial condition. In addition, the auditor shall submit as a supplementary opinion any comments, based upon the audit, as to any material inadequacies found to exist in the accounting system, the internal accounting controls and procedures for safeguarding securities and funds, and shall indicate any corrective action taken or proposed.

(5) The financial statements shall be filed with the Division within 90 days following the end of the investment adviser's fiscal year.

**KEY: securities, securities regulation**

**Date of Enactment or Last Substantive Amendment: March 4, 1998**

**Notice of Continuation: July 30, 2007**

**Authorizing, and Implemented or Interpreted Law: 61-1-5; 61-1-24**

**R164-6. Denial, Suspension or Revocation of a License.**

**R164-6-1g. Dishonest or Unethical Business Practices.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Sections 61-1-6 and 61-1-24.

(2) This rule identifies certain acts and practices which the Division deems violative of Subsection 61-1-6(1)(g). The list contained herein should not be considered to be all-inclusive of acts and practices which violate that subsection, but rather is intended to act as a guide to broker-dealers, agents, investment advisers, and federal covered advisers as to the types of conduct which are prohibited.

(3) Conduct which violates Section 61-1-1 may also be considered to violate Subsection 61-1-6(1)(g).

(4) This rule is patterned after well-established standards in the industry which have been adopted by the SEC, the NASD, NASAA, the national securities exchanges and various courts. It represents one of the purposes of the securities laws: to create viable securities markets in which those persons involved are held to a high standard of fairness with respect to their dealings with the public.

(5) The provisions of this rule apply to federal covered advisers to the extent that the conduct alleged is fraudulent or deceptive, or to the extent permitted by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290).

(6) The federal statutory and regulatory provisions referenced in Paragraph (E) shall apply to investment advisers and federal covered advisers, regardless of whether the federal provision limits its application to advisers subject to federal registration.

(B) Definitions

(1) "Division" means the Division of Securities, Utah Department of Commerce.

(2) "Market maker" means a broker-dealer who, with respect to a particular security:

(2)(a) regularly publishes bona fide, competitive bid and ask quotations in a recognized inter-dealer quotation system, or

(2)(b) regularly furnishes bona fide competitive bid and offer quotations to other broker-dealers upon request; and

(2)(c) is ready, willing and able to effect transactions in reasonable quantities at his quoted price with other broker-dealers on a regular basis.

(3) "NASAA" means the North American Securities Administrators Association, Inc.

(4) "NASD" means the National Association of Securities Dealers.

(5) "NASDAQ" means National Association of Securities Dealers Automated Quotation System.

(6) "OTC" means over-the-counter.

(7) "SEC" means the United States Securities and Exchange Commission.

(C) Broker-Dealers

In relation to Broker-Dealers, as used in Subsection 61-1-6(1)(g) "dishonest or unethical practices" shall include:

(1) engaging in a pattern of unreasonable and unjustifiable delays in the delivery of securities purchased by any of its customers or in the payment, upon request, of free credit balances reflecting completed transactions of any of its customers, or both.

(2) inducing trading in a customer's account which is excessive in size or frequency in view of the financial resources and character of the account.

(3) recommending to a customer the purchase, sale or exchange of any security without reasonable grounds to believe that such transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the customer's investment objectives, financial situation and needs, and any other relevant information known by the broker-dealer.

(4) executing a transaction on behalf of a customer without prior authorization to do so.

(5) exercising any discretionary power in effecting a transaction for a customer's account without first obtaining written discretionary authority from the customer, unless the discretionary power relates solely to the time or price for the execution of orders, or both.

(6) executing any transaction in a margin account without securing from the customer a properly executed written margin agreement promptly after the initial transaction in the account.

(7) failing to segregate a customer's free securities or securities held in safekeeping.

(8) hypothecating a customer's securities without having a lien thereon unless the broker-dealer secures from the customer a properly executed written consent promptly after the initial transaction, except as permitted by the rules and regulations of the SEC.

(9) entering into a transaction with or for a customer at a price not reasonably related to the current market price of the security or receiving an unreasonable commission or profit.

(10) failing to furnish to a customer purchasing securities in an offering, no later than the date of confirmation of the transaction, either a final prospectus or a preliminary prospectus and an additional document, which together include all information set forth in the final prospectus.

(11) charging fees for services without prior notification to a customer as to the nature and amount of the fees.

(12) charging unreasonable and inequitable fees for services performed, including miscellaneous services such as collection of monies due for principal, dividends or interest, exchange or transfer of securities, appraisals, safekeeping, or custody of securities and other services related to its securities business.

(13) offering to buy from or sell to any person any security at a stated price unless the broker-dealer is prepared to purchase or sell, as the case may be, at the price and under the conditions as are stated at the time of the offer to buy or sell.

(14) representing that a security is being offered to a customer "at the market" or a price relevant to the market price unless the broker-dealer knows or has reasonable grounds to believe that a market for the security exists other than that made, created or controlled by the broker-dealer, or by any person for whom the broker-dealer is acting or with whom the broker-dealer is associated in the distribution, or any person controlled by, controlling or under common control with the broker-dealer.

(15) effecting any transaction in, or inducing the purchase or sale of, any security by means of any manipulative, deceptive or fraudulent device, practice, plan, program, design or contrivance, which may include but not be limited to:

(15)(a) effecting any transaction in a security which involves no change in the beneficial ownership thereof;

(15)(b) entering an order or orders for the purchase or sale of a security with the knowledge that an order or orders of substantially the same size, at substantially the same time and substantially the same price, for the sale of the security, has been or will be entered by or for the same or different parties for the purpose of creating a false or misleading appearance of active trading in the security or a false or misleading appearance with respect to the market for the security; provided, however, nothing in this

subparagraph shall prohibit a broker-dealer from entering bona fide agency cross transactions for its customers; or

(15)(c) effecting, alone or with one or more other persons, a series of transactions in any security creating actual or apparent active trading in a security or raising or depressing the price of a security, for the purpose of inducing the purchase or sale of the security by others.

(16) guaranteeing a customer against loss in any securities account of the customer carried by the broker-dealer or in any securities transaction effected by the broker-dealer with or for the customer.

(17) publishing or circulating, or causing to be published or circulated, any notice, circular, advertisement, newspaper article, investment service, or communication of any kind which:

(17)(a) purports to report any transaction as a purchase or sale of any security unless the broker-dealer believes that the transaction was a bona fide purchase or sale of the security; or

(17)(b) purports to quote the bid price or asked price for any security, unless the broker-dealer believes that the quotation represents a bona fide bid for, or offer of, the security.

(18) using any advertising or sales presentation in such a fashion as to be deceptive or misleading. An example of the prohibited practice would be distribution of any nonfactual data, material or presentation based on conjecture, unfounded or unrealistic claims or assertions in any brochure, flyer, or display by words, pictures, graphs or otherwise designed to supplement, detract from, supersede or defeat the purpose or effect of any prospectus or disclosure.

(19) failing to disclose to a customer that the broker-dealer is controlled by, controlling, affiliated with or under common control with the issuer of any security before entering into any contract with or for a customer for the purchase or sale of the security, and if the disclosure is not made in writing, it shall be supplemented by the giving or sending of written disclosure at or before the completion of the transaction.

(20) failing to make a bona fide public offering of all of the securities allotted to a broker-dealer for distribution, whether acquired as an underwriter, a selling group member, or from a member participating in the distribution as an underwriter or selling group member.

(21) failure or refusal to furnish a customer, upon reasonable request, information to which the customer is entitled, or to respond to a formal written request or complaint.

(22) permitting a person to open an account for another person or transact business in the account unless there is on file written authorization for the action from the person in whose name the account is carried.

(23) permitting a person to open or transact business in a fictitious account.

(24) permitting an agent to open or transact business in an account other than the agent's own account, unless the agent discloses in writing to the broker-dealer or issuer with which the agent associates the reason therefor.

(25) in connection with the solicitation of a sale or purchase of an OTC, non-NASDAQ security, failing to promptly provide the most current prospectus or the most recently filed periodic report filed under Section 13 of the Securities Exchange Act of 1934, when requested to do so by a customer.

(26) marking any order tickets or confirmations as "unsolicited" when in fact the transaction is solicited.

(27) for any month in which activity has occurred in a customer's account, but in no event less than every three months, failing to provide each customer with a statement of account which, with respect to all OTC non-NASDAQ equity securities in the account, contains a value for each security based on

the closing market bid on a date certain; provided that, this subsection shall apply only if the firm has been a market maker in the security at any time during the month in which the monthly or quarterly statement is issued.

(28) failing to comply with any applicable provision of the Conduct Rules of the NASD or any applicable fair practice or ethical standard promulgated by the SEC or by a self-regulatory organization to which the broker-dealer is subject and which is approved by the SEC.

(29) any acts or practices enumerated in Section R164-1-3.

(30) failing to comply with a reasonable request from the Division for information or testimony, or an examination request made pursuant to Subsection 61-1-5(5), or a subpoena of the Division.

(D) Agents.

In relation to agents of broker-dealers or agents of issuers, as used in Subsection 61-1-6(1)(g) "dishonest or unethical practices" shall include:

(1) engaging in the practice of lending or borrowing money or securities from a customer, or acting as a custodian for money, securities or an executed stock power of a customer.

(2) effecting securities transactions not recorded on the regular books or records of the broker-dealer which the agent represents, in the case of agents of broker-dealers, unless the transactions are authorized in writing by the broker-dealer prior to execution of the transaction.

(3) establishing or maintaining an account containing fictitious information in order to execute transactions which would otherwise be prohibited.

(4) sharing directly or indirectly in profits or losses in the account of any customer without the prior written authorization of the customer and the broker-dealer which the agent represents.

(5) dividing or otherwise splitting the agent's commissions, profits or other compensation from the purchase or sale of securities with any person not also licensed as an agent for the same broker-dealer, or for a broker-dealer under direct or indirect common control.

(6) for agents who are dually under Rule R164-4-1(D)(4)(b), failing to disclose the dual license to a client.

(7) engaging in conduct specified in subsections (C)(2), (C)(3), (C)(4), (C)(5), (C)(6), (C)(9), (C)(10), (C)(15), (C)(16), (C)(17), (C)(18), (C)(24), (C)(25), (C)(26), (C)(28), (C)(29) or (C)(30) of Rule R164-6-1g.

(E) Investment Advisers and Federal Covered Advisers

In relation to investment advisers, as used in Subsection 61-1-6(1)(g) "dishonest or unethical practices" shall include the following listed practices. In relation to federal covered advisers, as used in Subsection 61-1-6(1)(g), "dishonest or unethical practices" shall include the following, but only if such conduct involves fraud or deceit:

(1) Recommending to a client to whom investment supervisory, management or consulting services are provided the purchase, sale or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished by the client after reasonable inquiry concerning the client's investment objectives, financial situation and needs, and any other information known by the investment adviser.

(2) Exercising any discretionary power in placing an order for the purchase or sale of securities for a client without obtaining written discretionary authority from the client within ten (10) business days after the date of the first transaction placed pursuant to oral discretionary authority, unless the

discretionary power relates solely to the price at which, or the time when, an order involving a definite amount of a specified security shall be executed, or both.

(3) Inducing trading in a client's account that is excessive in size or frequency in view of the financial resources, investment objectives and character of the account if that an adviser in such situations can directly benefit from the number of securities transactions effected in a client's account. The rule appropriately forbids an excessive number of transaction orders to be induced by an adviser for a "customer account."

(4) Placing an order to purchase or sell a security for the account of a client without authority to do so.

(5) Placing an order to purchase or sell a security for the account of a client upon instruction of a third party without first having obtained a written third-party trading authorization from the client.

(6) Borrowing money or securities from a client unless the client is a broker-dealer, an affiliate of the investment adviser, or a financial institution engaged in the business of loaning funds.

(7) Loaning money to a client unless the investment adviser is a financial institution engaged in the business of loaning funds or the client is an affiliate of the investment adviser.

(8) To misrepresent to any advisory client, or prospective advisory client, the qualifications of the investment adviser or any employee of the investment adviser, or to misrepresent the nature of the advisory services being offered or fees to be charged for such service, or to omit to state a material fact necessary to make the statements made regarding qualifications, services or fees, in light of the circumstances under which they are made, not misleading.

(9) Providing a report or recommendation to any advisory client prepared by someone other than the adviser without disclosing that fact. (This prohibition does not apply to a situation where the adviser uses published research reports or statistical analyses to render advice or where an adviser orders such a report in the normal course of providing service.)

(10) Charging a client an unreasonable advisory fee.

(11) Failing to disclose to clients in writing before any advice is rendered any material conflict of interest relating to the adviser or any of its employees which could reasonably be expected to impair the rendering of unbiased and objective advice including:

(11)(a) Compensation arrangements connected with advisory services to clients which are in addition to compensation from such clients for such services; and

(11)(b) Charging a client an advisory fee for rendering advice when a commission for executing securities transactions pursuant to such advice will be received by the adviser or its employees.

(12) Guaranteeing a client that a specific result will be achieved (gain or no loss) with advice which will be rendered.

(13) Publishing, circulating or distributing any advertisement which does not comply with Rule 206(4)-1 under the Investment Advisers Act of 1940.

(14) Disclosing the identity, affairs, or investments of any client unless required by law to do so, or unless consented to by the client.

(15) Taking any action, directly or indirectly, with respect to those securities or funds in which any client has any beneficial interest, where the investment adviser has custody or possession of such securities or funds when the adviser's action is subject to and does not comply with the requirements of Reg. 206(4)-2 under the Investment Advisers Act of 1940.

(16) Entering into, extending or renewing any investment advisory contract unless such contract is in writing and discloses, in substance, the services to be provided, the term of the contract, the advisory fee, the formula for computing the fee, the amount of prepaid fee to be returned in the event of contract termination or non-performance, whether the contract grants discretionary power to the adviser and that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract.

(17) Failing to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information in violation of Section 204A of the Investment Advisers Act of 1940.

(18) Entering into, extending, or renewing any advisory contract which would violate section 205 of the Investment Advisers Act of 1940. This provision shall apply to all advisers registered or required to be registered under this Act, notwithstanding whether such adviser would be exempt from federal registration pursuant to section 203(b) of the Investment Advisers Act of 1940.

(19) To indicate, in an advisory contract, any condition, stipulation, or provisions binding any person to waive compliance with any provision of this act or of the Investment Advisers Act of 1940, or any other practice that would violate section 215 of the Investment Advisers Act of 1940.

(20) Engaging in any act, practice, or course of business which is fraudulent, deceptive, or manipulative in contravention of section 206(4) of the Investment Advisers Act of 1940 notwithstanding the fact that such investment adviser is not registered or required to be registered under section 203 of the Investment Advisers Act of 1940.

(21) Engaging in conduct or any act, indirectly or through or by any other person, which would be unlawful for such person to do directly under the provisions of this act or any rule or regulation thereunder.

**KEY: securities regulation**

**Date of Enactment or Last Substantive Amendment: March 4, 1998**

**Notice of Continuation: July 30, 2007**

**Authorizing, and Implemented or Interpreted Law: 61-1-6(1)(g); 61-1-24**

**R164-9. Registration by Coordination.**

**R164-9-1. Registration by Coordination.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Sections 61-1-9, 61-1-11 and 61-1-24.

(2) This rule sets forth the procedure and requirements to be met when applying for registration by coordination in Utah. Any security for which a registration statement under the Securities Act of 1933 or a notification under Regulation A, 17 C.F.R. sections 230.251 through 230.263 (1994), has been filed with the SEC in connection with the same offering may be registered by coordination under Section 61-1-9.

(3) The rule also authorizes optional electronic filing of registration statements and allows an optional modification of the term of effectiveness to facilitate simultaneous electronic filing.

(4) Offerings which are registered, as opposed to being exempt from registration, in less than 20 states, including the state of Utah, are subject to the requirements of Section R164-11-1. Failure to comply with the requirements of Section R164-11-1 may be grounds for denial, suspension or revocation of effectiveness of a registration statement filed under Section 61-1-9.

(B) Definitions

(1) "Designee" means any person or entity authorized and recognized by the Division in this rule to accept filings on behalf of the Division by electronic or other means of communication.

(2) "Division" means the Division of Securities, Utah Department of Commerce.

(3) "NASAA" means the North American Securities Administrators Association, Inc.

(4) "Registration Statement" means the registration statement filed under the Securities Act of 1933 or the notification filed under Regulation A, 17 C.F.R. sections 230.251 through 230.263 (1994).

(5) "SEC" means the United States Securities and Exchange Commission.

(6) "SRD" means the Securities Registration Depository, Inc.

(C) Registration requirements

(1) An issuer may register securities by submitting to the Division or its designee the following:

(1)(a) One original application on NASAA Form U-1 - Uniform Application to Register Securities;

(1)(b) One copy of the registration statement, including exhibits, together with all amendments as filed with the SEC under the Securities Act of 1933 or SEC Regulation A;

(1)(c) One original NASAA Form U-2 - Uniform Consent to Service of Process;

(1)(d) A fee as specified in the Division's fee schedule; and

(1)(e) Any additional documents or information which the Division requests.

(2) No document or application shall be deemed to be filed, and the ten working day period referred to in Subsection 61-1-9(3)(b) shall not begin, until all items required by Subparagraph (C)(1) have been received by the Division or its designee.

(3) Where the Division notifies the registrant in writing of any missing or incomplete documents or information, or other deficiencies in the registration statement, registrant must respond promptly. If the registrant does not respond to the Division in writing within 30 calendar days of the mailing date of the Division's letter, the registration statement will be deemed incomplete and action may be taken to deny the effectiveness of the registration statement, and to impose a fine.

(D) Additional notification to the Division

The registrant shall notify the Division within two business days upon the receipt of any stop order, denial, order to show cause, suspension or revocation order, injunction or restraining order, or similar order entered or issued by any state or other regulatory authority or by any court, concerning the securities covered by this application or other securities of the issuer currently being offered to the public.

(E) Effective date

(1) The registration statement becomes effective as set forth in Subsection 61-1-9(3).

(2) The registration statement is effective for one year from its effective date with the Division.

(3) A registration statement which does not become effective within one year from the filing date may be deemed materially incomplete and action may be taken to deny effectiveness to the registration statement.

(4) To facilitate the coordination of expiration dates with other states, the issuer may request a specific term of effectiveness which does not exceed one year.

(F) Post effective amendments

A registration statement may be amended by filing with the Division or its designee an amended NASAA Form U-1 - Uniform Application to Register Securities, and an amended registration statement. The amendment becomes effective when the Division so orders.

(G) Re-registration

The registrant may re-register securities, for which a registration statement is about to expire, by submitting to the Division or its designee, a NASAA Form U-1, an updated registration statement and the filing fee specified in the Division's fee schedule.

(H) Closing report

Within 30 days of the close of the offering or the expiration of the registration statement, whichever occurs first, the registrant shall file a closing report. The closing report must be filed on Division Form 9-1.

(I) Recognized designee

(1) The Division authorizes and recognizes the SRD as designee to receive filings under this rule on behalf of the Division, including but not limited to applications, registration statements and fees.

(2) The designation provided in this rule is for the sole purpose of receiving filings on behalf of the Division and then transmitting those documents to the Division, or for any other purpose which the Division may prescribe by order or release.

**R164-9-2. MJDS - Financial Statement Requirement.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Sections 61-1-9 and 61-1-24.

(2) This rule clarifies that financial statements and other financial information which have been prepared in accordance with Canadian generally accepted accounting principles, consistently applied, will be permitted in registration statements filed by Canadian issuers with the Division under Section 61-1-9 and with the SEC under MJDS.

(B) Definitions

(1) "Division" means the Division of Securities, Utah Department of Commerce.

(2) "MJDS" means the multijurisdictional disclosure system with Canada as adopted by the SEC in Securities Act Release No. 6902, effective July 1, 1991.

(3) "SEC" means the United States Securities and Exchange Commission.

(C) Canadian generally accepted accounting principles

(1) Financial statements and other financial information which have been prepared in accordance with Canadian generally accepted accounting principles, consistently applied, may be contained in a registration statement filed with the Division under Section 61-1-9 and with the SEC under MJDS on SEC Forms F-7, F-8, F-9 or F-10, Securities Act of 1933 Release No. 6902, effective July 1, 1991, 56 F.R. 30036; amended in Securities Act of 1933 Release No. 6902A, effective July 1, 1991, 57 F.R. 10614, which are available from the SEC, and:

(1)(a) The securities which are the subject of a registration statement filed with the Division on SEC Form F-7 are offered for cash upon the exercise of rights granted to existing security holders.

(1)(b) The securities which are the subject of a registration statement filed with the Division on SEC Form F-8 are securities to be issued in an exchange offer, merger or other business combination.

(1)(c) The securities which are the subject of the registration statement filed with the Division on SEC Form F-9 are either non-convertible preferred stock or non-convertible debt which are to be rated in one of the four highest rating categories by one or more nationally recognized statistical rating organizations.

(1)(d) The securities which are the subject of a registration statement filed with the Division on Form F-10 are offered and sold pursuant to a prospectus in which the SEC has not required reconciliation to United States generally accepted accounting principles with respect to the financial information presented therein.

(D) Preferred stock and certain debt securities

(1) For purposes of this rule, preferred stock and debt securities which are not convertible for at least one year from the date of effectiveness of the registration statement will be deemed to meet the requirement of Subparagraph (C)(1)(c).

**R164-9-3b. MJDS - Review Period.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Subsection 61-1-9(6) and Section 61-1-24.

(2) This rule provides a shorter review period for registration statements filed by Canadian issuers with the Division under Section 61-1-9 and with the SEC under its multijurisdictional disclosure system.

(B) Definitions

(1) "Division" means the Division of Securities, Utah Department of Commerce.

(2) "MJDS" means the multijurisdictional disclosure system with Canada as adopted by the SEC in Securities Act Release No. 6902, effective July 1, 1991.

(3) "SEC" means the United States Securities and Exchange Commission.

(C) Review period

(1) The ten-working day disclosure statement filing requirement set forth in Subsection 61-1-9(3)(b) shall be reduced to seven working days for a registration statement filed with the Division and with the SEC under MJDS on SEC Forms F-7, F-8, F-9 or F-10, Securities Act of 1933 Release No. 6902, effective July 1, 1991, 56 F.R. 30036; amended in Securities Act of 1933 Release No. 6902A, effective July 1, 1991, 57 F.R. 10614, which are available from the SEC.

**KEY: securities, securities regulation**

**Date of Enactment or Last Substantive Amendment: July 3, 1997**

**Notice of Continuation: July 30, 2007**

**Authorizing, and Implemented or Interpreted Law: 61-1-9; 61-1-11; 61-1-24**

**R164-10. Registration by Qualification.**

**R164-10-2. Registration Statements.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Sections 61-1-10, 61-1-11, and 61-1-24.

(2) This rule sets forth the procedure and requirements to be met when applying for registration by qualification in Utah. It is available for registration of securities by any person who proposes to issue or sell any security.

(3) This rule requires that the registration statement must contain certain information. The issuer, issuer-agent and broker-dealer should be aware that information not specifically required by this rule or by the Division prior to effectiveness may be necessary to be included so as to meet the disclosure requirements of Section 61-1-1. Review of the registration statement by the Division does not imply that the disclosure requirements of Section 61-1-1 have been met.

(4) Section 61-1-12 enables the Director of the Division to deny effectiveness to, or revoke or suspend effectiveness of, any securities registration statement, and to impose a fine. Applicant should be aware that criteria contained in Section 61-1-12 will be applied in addition to the requirements of this rule.

(5) This rule requires that certain actions be taken by the issuer after the effective date of the registration statement. See paragraph (C) of this rule. Effectiveness of the registration statement may be suspended or revoked, and a fine imposed, for failure to comply with these requirements.

(6) Section 61-1-16 prohibits the filing of false or misleading documents with the Division. Documents and information filed with the Division should be closely scrutinized prior to signing and filing to insure their accuracy.

(7) Any security may be registered by qualification.

(8) Qualifying companies may utilize NASAA Form U-7 to satisfy the prospectus information requirements set forth in subparagraphs (E)(1) and (E)(2) this rule.

(B) Definitions used in this rule

(1) "Development stage company" means a company that is devoting substantially all of its efforts to acquiring or establishing a new business and either of the following conditions exists:

(1)(a) planned principal operations have not commenced; or

(1)(b) planned principal operations have commenced, but there has been no significant revenue therefrom.

(2) "Director" means the Director of the Division of Securities, Utah Department of Commerce.

(3) "Division" means the Division of Securities, Utah Department of Commerce.

(4) "Expert" means any person referred to in Subsection 61-1-10(2)(o), whose opinion, appraisal, report, name or similar information, is used in the registration statement or provides information which is used in the registration statement.

(5) "Financial statements" means a balance sheet, an income statement or statement of operations, a statement of cash flows, a statement of stockholders' equity or partners' capital, and appropriate notes to the financial statements.

(6) "NASAA" means the North American Securities Administrators Association, Inc.

(7) "SEC" means the United States Securities and Exchange Commission.

(C) Registration requirements

(1) The issuer must file with the Division the documents and information required by paragraphs (C) and (D) of this rule, and pay a fee as specified in the Division's fee schedule.

(2) The registration statement must

(2)(a) contain the documents required by paragraph (D) of this rule,

(2)(b) comply with the merit requirements of paragraph (G) of this rule,

(2)(c) comply with the requirements of Section R164-11-1,

(2)(d) comply with the fund impound requirements of Section R164-11-7b, and

(2)(e) comply with the sales commission requirements of Section R164-12-1f.

(3) Within ten working days after the effective date of the registration statement, issuer must file with the Division two copies of the final prospectus.

(4) Within ten working days after the expiration of the effectiveness of the registration statement, sale of the entire amount of the securities registered in the offering, or termination of the offering, whichever occurs first, issuer must file with the Division a completed and executed closing report on Division Form 10-2-1A.

(5) Within ten working days after the expiration of effectiveness of the registration statement, sale of the entire amount of the securities registered in the offering, or termination of the offering, whichever occurs first, issuer must file with the Division a list of persons who have purchased or subscribed to the offering, including the residential address of each purchaser, the dates of and amount of securities purchased or subscribed to, and the consideration paid by each purchaser or subscriber.

(6) Subsequent to the filing date of the registration statement, issuer must file with the Division financial statements which meet the requirements of paragraph (H) of this rule.

(7) Where the Division has notified issuer in writing of any missing or incomplete documents, deficiencies in the registration statement, or changes required in the prospectus, issuer must respond promptly. If issuer does not respond to the Division's deficiency letter within 30 calendar days of the mailing date of its deficiency letter, the registration statement may be deemed incomplete and appropriate action may be taken to deny effectiveness to the registration statement, and to impose a fine.

(D) Documents to be filed with the Division

The registration statement must contain the following:

(1) One original Division Form 10-2-1 which has been manually executed by all officers, directors, or partners;

(2) One original Division Form 10-2-1B certification for each officer, director, promoter, holder of 10% of the outstanding stock, broker-dealer or issuer-agent, and attorney;

(3) One original NASAA Form U-2, Uniform Consent to Service of Process, which is available from NASAA or the Division, appointing the Director, Utah Division of Securities as issuer's agent for service;

(4) Two copies of the preliminary prospectus containing the information required by paragraph (E) of this rule;

(5) Two copies of financial statements conforming to the requirements of paragraph (F) of this rule;

(6) One original opinion of counsel as required by Subsection 61-1-10(2)(n);

(7) One original NASAA Form U-2A, Uniform Corporate Resolution, which is available from NASAA or the Division, of the issuer where the registration statement is filed by or on behalf of a person other than an individual;

(8) One copy of the organizational documents as required by paragraph (I) of this rule;  
(9) One copy of the subscription agreement, if any, to be used in connection with the offering;  
(10) One original specimen security as required by paragraph (J) of this rule;  
(11) One copy of the executed selling documents as required by paragraph (K) of this rule;  
(12) One original of completed and executed documents required by Section R164-11-7b;  
(13) One copy of any order, judgment or decree described in subparagraph (E)(2)(d)(ix) of this rule;

(14) At the time of filing the registration statement or not less than five days prior to use, one copy of any item, other than the prospectus, intended to be used to advertise or solicit interest in the offering; except no filing shall be required for notices and advertisements used after the effective date of a registration statement which contains only statements allowed by SEC Rule 134, Communications Not Deemed a Prospectus, 17 CFR 230.134, 1993, which is adopted and incorporated by reference and available from the SEC or the Division;

(15) Original written consents as required by paragraph (L) of this rule;

(16) One copy of each material contract or agreement with an affiliate of the issuer and one copy of any other material contract;

(17) One original of documents supporting the value of assets as shown on the financial statements such as appraisals, assays, reserve reports, engineer reports and similar expert evaluations as discussed in the prospectus; and

(18) Other material documents or information as requested by the Division. The provisions of subparagraph (C)(7) of this rule apply to such requests.

(E) Prospectus information requirements

The prospectus must contain at least the following information:

(1) Facing pages

(1)(a) Title of document;

(1)(b) Number and class of shares or units offered;

(1)(c) Par or stated value;

(1)(d) Entity description, including:

(1)(d)(i) name,

(1)(d)(ii) address,

(1)(d)(iii) type,

(1)(d)(iv) state and date of incorporation or organization;

(1)(e) Statement as to whether or not a public market exists or will exist;

(1)(f) Statement as to how the securities are registered or exempt at both the federal and state level;

(1)(g) Statement that registration with the Division is neither a recommendation or endorsement of any security, individual, firm or corporation;

(1)(h) Statement as to whom offering is made;

(1)(i) In chart form, including:

(1)(i)(i) shares or units offered,

(1)(i)(ii) price per share,

(1)(i)(iii) commissions,

(1)(i)(iv) net proceeds to the issuer, and

- (1)(i)(v) minimums and maximums sought;
- (1)(j) Footnotes including:
  - (1)(j)(i) consideration sought,
  - (1)(j)(ii) manner of offering,
  - (1)(j)(iii) amount and type of sales commissions to be paid, and
  - (1)(j)(iv) the maximum amount of offering expenses;
- (1)(k) Broker-dealer or agent name, address, and telephone number;
- (1)(l) Statement that no person is authorized to make any statements not contained in the disclosure document and that practices to the contrary may be a criminal offense;
- (1)(m) Effective date of the prospectus.
- (2) Subsequent pages
  - (2)(a) The issuer:
    - (2)(a)(i) history,
    - (2)(a)(ii) purpose,
    - (2)(a)(iii) intentions,
    - (2)(a)(iv) predecessors;
  - (2)(b) Risk factors;
  - (2)(c) Conflicts of interest;
  - (2)(d) With respect to every director and officer of the issuer, the following information:
    - (2)(d)(i) Name, age, residential address;
    - (2)(d)(ii) Occupation and business experience during the past five years;
    - (2)(d)(iii) The number of shares or partnership interests of the issuer owned as of a specified date within 30 days of the filing of the registration statement, the approximate date of purchase and the consideration paid for those shares or interests;
    - (2)(d)(iv) The amount of the securities covered by the registration statement to which an intention to subscribe has been indicated;
    - (2)(d)(v) Any material interest in any material transaction with the issuer or any significant subsidiary effected within the past three years or proposed to be effected;
    - (2)(d)(vi) Any family relationship between any director or officer;
    - (2)(d)(vii) Any other director or officer or similar position held in any other non-public company;
    - (2)(d)(viii) Any previous involvement in a public company as an officer, director or promoter, including a complete description of the company and affiliation with the company, the dates of and amounts raised in public offerings of the company and, if the company has undergone a reorganization, merger or an acquisition of assets in which an amount of stock representing more than 50% of the company's outstanding stock was issued, the consideration per share received by the company and the book value per share of the company immediately before and after the reorganization, merger or acquisition of assets;
    - (2)(d)(ix) Involvement in any material legal proceeding;
    - (2)(d)(x) Any remuneration paid directly or indirectly by the issuer, its predecessors, parents, or subsidiaries, during the past twelve months and estimated to be paid during the succeeding twelve months;

(2)(e) With respect to any person owning of record, or beneficially, 10% of the outstanding shares of any class of equity security of the issuer, the same information specified in subparagraphs (E)(2)(d)(i) and (iii)-(x) of this rule.

(2)(f) With respect to every promoter, if the issuer was organized within the past three years, the same information as specified in subparagraph (E)(2)(d) of this rule and any amount paid by the issuer within the past three years as well as the consideration given for such payments.

(2)(g) With respect to any person on whose behalf any part of the offering is to be made in a nonissuer distribution the following information:

(2)(g)(i) The information required in subparagraph (E)(2)(d)(i) of this rule;

(2)(g)(ii) The amount of securities of the issuer held as of the date the registration statement was filed with the Division;

(2)(g)(iii) The information required in subparagraph (E)(2)(d)(v) of this rule;

(2)(g)(iv) Statement of reasons for making the offering.

(2)(h) Dilution, share ownership and capital contributions: narrative discussion and graphic or tabular illustration, such as bar graphs or pie charts;

(2)(i) Fund impound:

(2)(i)(i) amount,

(2)(i)(ii) duration,

(2)(i)(iii) location, and

(2)(i)(iv) statement that funds will be released only upon order of the Division;

(2)(j) Material litigation which affects the offering;

(2)(k) Summary of the Opinion of Counsel required by Subsection 61-1-10(2)(n);

(2)(l) The substance of reports, findings, appraisals and valuations provided by persons who are named as having prepared or certified such reports or valuations pursuant to Subsection 61-1-10(2)(o);

(2)(m) With respect to Limited Partnerships, net worth of each individual general partner exclusive of home, automobile and home furnishings or, in the alternative, a representation that the general partner meets the net worth requirements of subparagraph (G)(3)(b)(iii) of this rule;

(2)(n) Definition section, where material;

(2)(o) Substance of material contracts and agreements;

(2)(p) The amount of shares subject to transferability restrictions, contractual or otherwise, and the nature of said restriction;

(2)(q) Statement as to the issuer's fiscal year-end date;

(2)(r) Financial statements as required by this rule;

(2)(s) Statement of the intended use of proceeds of the offering as required by Subsection 61-1-10(2)(i);

(2)(t) Transfer agent's name and street address;

(2)(u) Statement that any and all amendments to the prospectus will be promptly filed with the Division, distributed to purchasers in the offering, and made a part of any prospectus used thereafter;

(2)(v) Statement that the Division, market makers, and security holders will be promptly notified in writing of any change in the management, purpose, and control of the issuer, or any material or adverse condition affecting the issuer.

(3) Small Company Offering Registration (SCOR)

(3)(a) A company issuing securities exempt from federal registration under Rule 504 of Regulation D, Regulation A, or Section 3(a)(11) of the Securities Act of 1933, may utilize the NASAA Form U-7, which is available from NASAA or the Division, as the prospectus for the offering to satisfy subparagraph (D)(4) of this rule, provided that the issuer:

(3)(a)(i) complies with each of the requirements set forth in Part I(1) of the NASAA SCOR Issuer's Manual;

(3)(a)(ii) complies with all conditions set forth in, and provides all information required by Part I(2) of the NASAA SCOR Issuer's Manual; and,

(3)(a)(iii) in all material respects complies with all other requirements of this rule.

(3)(b) The filing of one original NASAA Form U-1, Uniform Application to Register Securities, which has been manually executed by all officers and directors of the issuer, satisfies subparagraph (D)(1).

(F) Financial statements

The financial statements contained in the registration statement and the prospectus must meet the requirements of this paragraph (F).

(1) Financial statements of the issuer, or the issuer and its predecessors or any business to which the issuer is a successor, which are to be filed as part of the registration statement must be prepared in accordance with generally accepted accounting principles (GAAP).

(2) Audited financial statements required herein must be accompanied by an unqualified opinion report by an independent certified public accountant.

(3) Consolidated financial statements must be prepared for an issuer that has majority-owned subsidiaries.

(4) The Division may permit the omission of one or more of the financial statements required under this rule and in substitution thereof permit appropriate comparable financial statements, upon the written request of issuer and where consistent with the protection of Utah investors.

(5) The Division may require the filing of other financial statements in addition to or in substitution for the financial statements herein required where such financial statements are necessary or appropriate for an adequate presentation of the issuer's financial condition or the financial condition of any person considered necessary, where consistent with the protection of Utah investors.

(6) Issuer must file audited financial statements for the most recent fiscal year, or as of a date within four months of the date the registration statement is filed with the Division if the issuer, including predecessors, has existed for a period of less than one fiscal year.

(7) When the filing date of the registration statement falls after a date four months subsequent to the issuer's most recent fiscal year end, unaudited interim financial statements dated within four months of the filing date must also be included in the registration statement.

(8) Unaudited financial statements must be filed for the two fiscal years preceding the most recent fiscal year or for such shorter period as the issuer and any predecessors have been in existence if less than three years.

(9) If the financial statements required herein are as of a date more than four months prior to the date that the registration statement is expected to become effective, the financial statements must be updated as of a date within four months of the expected effective date and include the entire period since the last fiscal year end. Such interim financial statements need not be audited.

(10) If any part of the proceeds of the offering is to be applied to the purchase of any business, the same financial statements shall be required of that business as if it were the issuer.

(11) An issuer which is a limited partnership shall also be required to file the balance sheets of the general partners as described below.

(11)(a) Where a general partner of the limited partnership is a corporation there must be filed an audited balance sheet of such corporation as of the end of its most recently completed fiscal year.

(11)(b) Where a general partner of the limited partnership is a partnership there must be filed an audited balance sheet of such partnership as of the end of its most recently completed fiscal year.

(11)(c) Where a general partner of the limited partnership is a natural person there must be filed, only as supplemental information, an unaudited balance sheet of such natural person as of a date no more than four months prior to the date the registration statement was filed.

(G) Merit requirements

(1) Minimum offering amount for a development stage company

(1)(a) The minimum offering amount for a development stage company shall not be less than an amount such that immediately following the close of the offering the net tangible asset value of the company is equal to or greater than \$75,000, based on the net tangible asset value of the most recent balance sheet included in the prospectus as adjusted to give effect to the minimum net proceeds of the offering and, at the discretion of the Division, any value not recognized for financial statement purposes as supported by independent appraisal or other recognized authority.

(2) Dilution

(2)(a) The maximum dilution to the net tangible asset value of the securities offered in a public offering pursuant to Section 61-1-10 shall not exceed 33 1/3% of the public offering price for a development stage company or 50% for all other companies.

(2)(b) This subparagraph (G)(2) of this rule shall apply to all offerings of preferred or common corporate stock.

(2)(c) Dilution shall be equal to the difference between the offering price of the shares and the net tangible asset value per share based on the most recent balance sheet included in the prospectus as adjusted to give effect to the maximum net proceeds of the offering. The net tangible asset value of the shares at the close of the offering shall be determined by dividing the net tangible asset value of the corporation by the total number of shares outstanding at the close of the offering. The net tangible asset value of the corporation shall be equal to the total assets of the corporation less the intangible assets and the liabilities of the corporation.

(2)(d) In the event that not all shares offered are sold, the shareholders, other than those purchasing in the offering, shall be required to contribute to the company a sufficient number of shares or tangible assets so that dilution, based on the most recent balance sheet included in the prospectus and receipt of the net proceeds from the shares actually sold, does not exceed the maximum dilution allowed.

(2)(e) Registration will not be permitted to close, and will not be issued a closing letter, where the dilution at the close of the offering is greater than the maximum dilution allowed and such violation has not been remedied.

(3) Equity

(3)(a) Corporate Equity and Debt Offering.

(3)(a)(i) Prior to and during the effectiveness of a registration statement pertaining to an offering of securities which are corporate equity securities, rights to obtain corporate equity securities, securities

convertible into corporate equity securities, or corporate debt securities, the corporation must have equity equal to at least 10% of the maximum aggregate offering price of the securities which are registered or to be registered. Equity shall be equal to the sum of stated capital, capital surplus which was contributed in cash, and retained earnings. Retained deficits will not reduce the equity of the corporation for purposes of this subparagraph (G)(3)(a) of this rule. In no event shall capital contributed in the form of services or any evidence of indebtedness qualify as any portion of equity in order to meet the requirements of this subparagraph (G)(3)(a) of this rule.

(3)(a)(ii) Tangible property may be considered to satisfy this requirement, in the discretion of the Division, only where the value of such property is ascertained and supported by the issuer, where the value substantially exceeds the necessary equity requirement and where clear title to the property is held by the issuer.

(3)(b) Limited Partnership and Trust Certificate Offering. Prior to the effectiveness of a registration statement relating to limited partnership units, issuer must meet one of the following requirements:

(3)(b)(i) The general partner, promoter, or manager has paid, in cash, at least an amount equal to 5% of the maximum aggregate offering price of the securities to be registered to the issuer for equity interests in the issuer;

(3)(b)(ii) The general partner, promoter, or manager has the ability to pay and commit themselves to pay, in cash, 5% of the maximum aggregate offering price of the securities to be registered into the fund impound prior to the release of the impound and in addition to any other impound which may be required by the rules of the Division; or,

(3)(b)(iii) The general partner, promoter, or manager has an aggregate net tangible asset value exclusive of home, automobile, and home furnishings equal to 10% of the maximum aggregate offering price of the securities to be registered. Where a general partner, promoter or manager is also a general partner, promoter or manager of another partnership or trust for which this subparagraph was used to satisfy the equity requirements for a registered offering of that partnership or trust, the aggregate net tangible asset value will be reduced by the amount required to satisfy the equity requirements of the previous offering.

#### (4) Offering Expenses

The maximum offering expenses, not including commissions on the sales of the securities, which shall be paid from the proceeds of the public offering or by the issuer in connection with the public offering is the greater of \$6,000 or 8% of the minimum aggregate offering price of the securities registered.

#### (H) Post filing financial statement requirements

(1) The financial statements required by this paragraph (H) of this rule must be prepared in accordance with the requirements set forth in paragraph (F) of this rule.

(2) Subsequent to the filing date of a registration statement, the following financial statements must be filed:

(2)(a) After the end of each fiscal year, through and including the year in which 80% of the offering proceeds will have been used, audited financial statements for the previous fiscal year must be filed with the Division within 90 days after the end of the applicant fiscal year.

(2)(b) If an effective registered offering has not been completely sold at a date six months after the end of the issuer's last fiscal year, unaudited interim financial statements must be filed with the

Division within 30 days of that date for the period ending six months from the fiscal year end. Financial statements required by this subparagraph (H)(2) of this rule shall not be required where interim financial statements are filed pursuant to the requirements in paragraph (F) of this rule which cover at least the same period covered by this subparagraph (H)(2).

(3) If an effective registered offering has not been completely sold, the financial statements required by this paragraph (H) of this rule must be appended to every prospectus used thereafter.

(I) Organizational documents

(1) Corporation. A registration statement for the proposed sale of securities of a corporation must contain:

(1)(a) one copy of the certificate and articles of incorporation and all amendments thereto; and

(1)(b) By-laws.

(2) Limited Partnership. A registration statement for the proposed sale of securities of a limited partnership must contain:

(2)(a) one copy of the limited partnership agreement, and

(2)(b) the documentation of the managing general partner which would be required by this paragraph (I) of this rule if the managing general partner was the issuer of the securities.

(3) Others. As the Division specifies in each instance.

(J) Specimen Security

The registration statement must contain either:

(1) An original specimen security which conforms to the description of the security in the registration statement; or

(2)(a) A letter, signed by a director of the issuer, or a person of similar responsibility for an unincorporated issuer, stating that a specimen security meeting the requirements of subparagraph (J)(1) of this rule will be delivered prior to the release of impounded funds, and

(2)(b) A notation on Item 12 of Division Form 11-7B that it shall be a condition of release of such impounded funds for the issuer to provide a specimen security meeting the requirements of subparagraph (J)(1) of this rule.

(K) Selling documents

The registration statement must contain the following documents with respect to the persons who propose to offer or sell the securities pursuant to the registration statement:

(1) Where the securities are to be offered through a licensed agent or broker-dealer, one copy of the signed agreement between the agent OR broker-dealer and the issuer setting forth the compensation each person will receive in connection with such distribution, and a description of any transactions between such person and the issuer within the twelve months preceding the filing of the registration statement.

(2) Where the securities are to be offered through any person not licensed with the Division as a broker-dealer or agent, the broker-dealer or agent application and supporting documents and information, as required in Section R164-4-1, for such person must accompany the registration statement at the time of the original filing.

(3) No registration statement shall become effective where

(3)(a) the only person participating in the distribution is a broker-dealer which is a member of the NASD, and

(3)(b) the Division has not received written confirmation or oral confirmation to be followed by written confirmation that the NASD has no objection to the compensation arrangements set forth in the registration statement.

(4) No registration statement shall be effective or become effective without complete compliance with Section R164-4-1 by at least one person participating in the distribution.

(L) Consent of expert

(1) Where any information provided by an expert is used in the registration statement or prospectus, the registration statement must include the consent of the expert to the specific use of the information in the prospectus or registration statement.

(2) Where the name of an expert is used in the registration statement or prospectus, the registration statement or prospectus must contain the consent of the expert as to the specific use of the expert's name.

(M) Amendments

(1) Whenever there is a material change in any information or document filed with the Division, the issuer must file a correcting amendment with the Division within ten working days after the material change.

(2) There is no charge for filing a correcting amendment.

**KEY: financial statements, securities, securities regulation**

**Date of Enactment or Last Substantive Amendment: July 3, 1997**

**Notice of Continuation: July 30, 2007**

**Authorizing, and Implemented or Interpreted Law: 61-1-10; 61-1-24**

## **R164-11. Registration Statement.**

### **R164-11-1. General Registration Provisions.**

#### **A. Preliminary Notes**

(1) This R164-11-1 applies to public offerings registered by notification, coordination or qualification pursuant to Sections 8, 9 and 10 of the Utah Uniform Securities Act (the "Act"), except this rule shall not apply to offerings which are registered in twenty or more states, including the state of Utah.

(2) The purpose of the rule is to ensure full disclosure of material information, prohibit offerings which tend to work a fraud on purchasers and prohibit unreasonable amounts of promoters' profits.

(3) Failure to comply with the provisions of this rule shall be grounds for denial, suspension or revocation of the effectiveness of a registration statement.

(4) For purposes of this rule "development stage companies" shall mean those companies that devote substantially all of their efforts to acquiring or establishing a new business and in which either: 1) planned principal operations have not commenced or 2) there have been no significant revenues therefrom.

(5) Selected requirements of this rule may be waived by the Utah Securities Division ("Division") where an applicant makes a specific request for a waiver and the Division finds that such requirement(s) is/are not necessary or appropriate for the protection of investors.

(6) This rule applies to all registration statements filed on or after February 15, 1986.

#### **B. NASAA Statements of Policy**

All registration statements for oil and gas programs, church bonds, real estate investment trusts, publicly-offered cattle-feeding programs, real estate programs and equipment programs must satisfy the provisions of the appropriate statements of policy adopted by the North American Securities Administrators Association ("NASAA").

Offerings which are required under this paragraph B to satisfy, and do satisfy, the provisions of a NASAA statement of policy shall not be required to satisfy the provisions of paragraphs C and D of this R164-11-1.

#### **C. Promoters' Investment in Development Stage Companies**

An investment by promoters and shareholders in a development stage company shall be required as follows:

##### **(1) Corporate Equity and Debt Offerings.**

Prior to and during the effectiveness of a registration statement, where the registrant is the issuer, pertaining to an offering of securities which are corporate equity securities, which are securities convertible into corporate equity securities or which are corporate debt securities, the corporation shall have equity equal to at least the lesser of: 1) ten percent (10%) of the aggregate offering price of the securities which are registered or to be registered or 2) fifty thousand dollars (\$50,000). Equity shall be equal to the sum of stated capital, capital surplus which was contributed in cash and retained earnings. Retained deficits will not reduce the equity of the company for purposes of this subparagraph. In no event shall capital contributed in the form of services or any evidence of indebtedness qualify as any portion of equity in order to meet the requirements of this subparagraph.

NOTE: Tangible property may be considered to satisfy this requirement, in the discretion of the Division, only where the value of such property is ascertained and supported by the registrant, where the value substantially exceeds the necessary equity requirement and where clear title to the property is held by the issuer.

(2) Partnership and Trust Certificate Offerings.

Prior to the effectiveness of a registration statement relating to partnership units, the registrant shall meet one of the following requirements:

(a) The general partner(s), promoter(s), and/or manager(s) have paid, in cash, at least an amount equal to five percent (5%) of the aggregate offering price of the securities to be registered to the issuer for equity interests in the issuer; or

(b) The general partner(s), promoter(s), and/or manager(s) have the ability to pay and commit themselves to pay, in cash, the lesser of: 1) five percent (5%) of the aggregate offering price of the securities to be registered or 2) fifty thousand dollars (\$50,000); or

(c) The general partner(s), promoter(s), and/or manager(s) have an aggregate net tangible asset value exclusive of home, automobile, and home furnishings equal to ten percent (10%) of the aggregate offering price of the securities to be registered. Where a general partner, promoter or manager is also a general partner, promoter or manager of another partnership or trust for which this subparagraph was used to satisfy the equity requirements for a registered offering of that partnership or trust, the aggregate net tangible asset value will be reduced by the amount required to satisfy the equity requirements of the previous offering.

D. Business Plan and Use of Proceeds for Development State Companies

In a development stage company the business plan and the use of offering proceeds must be disclosed with specificity in the offering prospectus.

Where eighty percent (80%) or more of the net offering proceeds (total offering proceeds less offering expenses and commissions) is not specifically allocated for the purchase, construction or development of identified properties or products, discharge of indebtedness, payment of overhead, etc., the registrant shall comply with the following provisions:

(1) Eighty percent (80%) of the net offering proceeds shall be escrowed in a manner approved by the Division. The escrow shall continue until the registrant can specifically allocate the use of the proceeds, at which time the registrant shall amend or supplement the registration statement to disclose all material information concerning the proposed use of proceeds. Such disclosure shall be in the same form and quality as required in a registration statement.

(2) At the time of the amendment or supplement to the registration statement, the investors in the offering must be given no less than twenty (20) days to ratify or rescind his/her investments. Investors who choose to rescind his/her investments shall receive a pro rata refund of all offering proceeds. However, should enough investors request a refund such that the net tangible asset value of the company after the refund would be less than seventy-five thousand dollars (\$75,000) the registrant shall make a pro rata refund of all unused offering proceeds to investors.

(3) The registrant shall not issue stock, deliver stock certificates or allow secondary trading of the stock until the offering proceeds have been released to the registrant.

E. Employment of Agents by Issuers

An issuer shall not employ agents to sell securities which are the subject of the registration statement until: 1) such agent is registered with the Division as an agent of the issuer; and 2) the issuer has filed with the Division a surety bond in the amount of twenty-five thousand dollars (\$25,000) conditioned on the agents compliance with the Utah Uniform Securities Act and the rules of the Securities Division of the Utah Department of Commerce and covering the effective period of the issuer's registration statement.

**R164-11-2. Hearings for Certain Exchanges of Securities.**

(A) Authority and purpose.

(1) The Division enacts this rule under authority granted by Sections 61-1-11.1 and 61-1-24.

(2) This rule sets forth the procedure and requirements to be met when seeking a fairness hearing for certain exchanges of securities.

(3) A finding of fairness under Section 61-1-11.1 does not constitute a registration or exemption except as provided by Paragraph (H).

(B) Definitions.

(1) "Director" means the Director of the Division of Securities, Utah Department of Commerce.

(2) "Division" means the Division of Securities, Utah Department of Commerce.

(3) "Interested person" means any officer, director or security holder of either party involved in the transaction, or any other person as the Division may permit.

(C) Parties.

The Division will only consider an application under Section 61-1-11.1 for a transaction where:

(1) Either party to the transaction is a domestic business entity formed, organized or incorporated under the laws of Utah;

(2) Either party to the transaction is a business entity whose headquarters or principal place of business is located in Utah; or

(3) Thirty percent (30 %) or more of the persons to whom it is proposed to issue securities or to deliver other consideration in an exchange under Subsection 61-1-11.1(1) are persons who are Utah residents.

(D) Application Requirements.

An application may be made to the Division under Subsections 61-1-11.1(1) and 61-1-11.1(5) by filing with the Division:

(1) Division Form 11--Application for Hearing for Certain Exchanges of Securities;

(2) NASAA Form U-2, Uniform Consent to Service of Process;

(3) A fee as specified in the Division's fee schedule; and

(4) Other documents as the Division may request.

(E) Notice.

(1) At least twenty (20) calendar days prior to the hearing, the applicant must provide written notice of the hearing, as approved by the Division, to any person to whom it is proposed to issue securities or to deliver other consideration in an exchange under Subsection 61-1-11.1(1). Such notice shall be effective pursuant to Subsection 16-10a-103(5). Such notice period may be waived upon the demonstration of good cause by the applicant.

(2) The notice must contain the following information:

(a) A brief statement of the facts that give rise to the hearing, including an outline of the terms and conditions of the proposed transaction;

(b) A statement of the issues to be considered at the hearing, together with the relevant statutes and rules;

(c) The time and place of the hearing as specified by the Division;

(d) The procedures for participating in the hearing by telephone or affidavit as approved by the Division; and

(e) Any other information requested by the Division.

(3) Prior to or at the hearing, the applicant must file an affidavit with the Division stating that a notice has been sent, in compliance with Subparagraphs (E)(1) and (E)(2), to all persons to whom it is proposed to issue securities or to deliver other consideration in an exchange under Subsection 61-1-11.1(1), including a description of how and when the notice was sent.

(F) Hearing.

(1) Within a reasonable time after the receipt of an application meeting the requirements of Section 61-1-11.1 and this rule, the Division may schedule a hearing to be conducted under Subsection 61-1-11.1(2).

(2) A hearing under Section 61-1-11.1 shall be conducted by a hearing officer designated by the Director.

(3) Any interested person may attend a hearing under Section 61-1-11.1.

(4) Any interested person may participate in the hearing by giving written notice to the Division at least two (2) days prior to the hearing, indicating such person's intention to appear and participate in the hearing. Interested persons may participate:

(a) In person;

(b) By telephone; or

(c) By affidavit.

(5) The hearing shall be recorded electronically and transcribed by the Division. The transcription costs will be assessed to the Applicant. Upon request, the Division will hire a court reporter at the requester's expense.

(G) Findings and Order.

Within a reasonable time after completion of the hearing, the Director shall issue an order pursuant to Subsection 61-1-11.1(3).

(H) Exemptions.

The Issuer may request that the Division determine that the transaction is exempt from registration under Subsection 61-1-14(2)(s).

### **R164-11-7b. Fund Impound.**

A. Preliminary Notes

(1) R164-11-7b applies only to public offerings which are registered by qualification pursuant to Section 10 of the Utah Uniform Securities Act (the "Act") and the rules thereunder.

(2) This R164-11-7b and R164-10-2 both require certain documents to be filed and provide that failure to comply with these requirements is cause for denial, suspension or revocation of the effectiveness of a registration statement.

(3) This rule R164-11-7b is a statement of what has been the position of the Utah Securities Division (the "Division") in the past under Rule A67-03-12 and applies to all registration statements which become effective on or after May 10, 1983.

B. Term of Impound

(1) The applicant for registration by qualification under Section 10 of the Act and the rules thereunder may choose a term of not less than one month and not more than one year from the effective date of the registration statement.

(2) The term of the impound shall be expressed by the number of months and shall not be expressed by the number of days.

C. Amount to be Impounded

(1) The amount to be impounded shall be the greater of:

(a) Twenty-five percent of the aggregate offering price of the securities to be registered plus offering expenses; OR

(b) The minimum amount required to sustain the business proposed by the registrant for one full year from the release of the impound; OR

(c) The minimum amount proposed to be sold by the applicant pursuant to the registration statement.

D. Where Funds are to be Impounded

Funds may be impounded at any federal or state bank or savings institution.

E. Conditions of Impound

(1) The applicant shall file a completed FORM 11-7b with the Division as part of the registration statement.

(2) The conditions of impound are stated on FORM 11-7b and are herein incorporated as requirements of this R164-11-7b.

F. Release of Impounded Funds

(1) The impounded funds shall be released only by an ORDER OF THE DIVISION.

(2) The impounded funds shall be released to the registrant where:

(a) All registration requirements which, pursuant to the rules of the Division needed to be met by such date, have been met;

(b) The registrant requests the release in writing; and

(c) The Division receives written confirmation from the financial institution impounding the funds of the amount which has been deposited into the impound.

G. Certain Registrants

Where the registrant in a registration by qualification is a security holder who is not conducting a public offering for or on behalf of the issuer of the securities which are to be sold in the offering, no fund impound is required by this R164-11-7b; provided, however, that where an offering has a "minimum" required to be sold in order to consummate the transaction, a fund impound is required.

**KEY: securities regulation**

**Date of Enactment or Last Substantive Amendment: January 5, 2004**

**Notice of Continuation: July 30, 2007**

**Authorizing, and Implemented or Interpreted Law: 61-1-11(7)(b)**

## **R164-12. Sales Commission.**

### **R164-12-1f. Commissions on Sales of Securities.**

#### **A. Preliminary Notes**

(1) This R164-12-1f regulates the compensation which may be received by any person in connection with a public offering of securities pursuant to a registration by qualification under Section 10 of the Utah Uniform Securities Act (the "Act"). The Rule does not effect offerings which are registered by notification or coordination or offerings which are sold pursuant to an exemption from the Act.

(2) This R164-12-1f does not effect the requirements of the Act and the rules thereunder as to registration, supervision and termination of agents.

(3) This R164-12-1f is an extended version of the standards that the Utah Securities Division (the "Division") has in the past required to be met. The standards herein are based upon reasonableness, the NASAA guidelines as to options and warrants issued to underwriters, and the NASD's interpretations of fair compensation. The percentage of cash commissions that is permitted under this R164-12-1f is unchanged from the former Rule A67-03-12.

#### **B. Persons Subject to this Rule**

(1) This R164-12-1f regulates compensation to participants in a distribution of securities which are registered by qualification pursuant to Section 10 of the Act and the rules and regulations thereunder.

(2) No registrant, affiliate of a registrant, or person acting on behalf of a registrant in connection with a public offering registered pursuant to Section 10 of the Act may give, directly or indirectly, compensation which is in violation of this R164-12-1f.

(3) No agent, underwriter or affiliate of an agent or underwriter may receive, directly or indirectly in connection with a public offering registered pursuant to Section 10 of the Act, compensation which is in violation of this R164-12-1f.

#### **C. Definitions**

As used in this R164-12-1f, the following terms shall have the indicated meanings:

(1) "Compensation" includes all cash; the value of all options, warrants, rights and other securities; the gross amount of the underwriter's discount; total expenses payable by the issuer, whether accountable or non-accountable, to or on behalf of the participant in the distribution which would normally be paid by the participant in the distribution; counsel's fees and expenses of the participant in the distribution payable by the issuer; finder's fees; financial consulting and advisory fees; and the value of all contracts and agreements with respect to the issuer or its affiliates which are connected with the distribution or with the negotiation of compensation in the distribution.

(2) "Corporate equity security" means any security which presently represents an ownership interest in a corporate entity and which includes common stock and preferred stock but does not include a security which is not presently, but is at some future time convertible into, a corporate equity security.

(3) "Participant in the distribution" means any person offering, selling, delivering, distributing, soliciting interest in or otherwise involved in the distribution, offer or sale of securities to the public or to any member of the public and includes persons commonly known as underwriters, agents and finders.

#### **D. Maximum Compensation**

(1) Distributions of Corporate Equity Securities: the maximum compensation that shall be given, directly or indirectly, to the participants in a distribution of corporate equity securities is an amount equal to 15% of that portion of the public offering price of the securities being distributed which is actually

received by or on behalf of the registrant; provided, however, that any securities issued in connection with such distribution comply with paragraph F of this R164-12-1f.

(2) All Other Distributions: the maximum compensation that shall be given, directly or indirectly, to the participants in a distribution of securities other than corporate equity securities shall be 20% of that portion of the public offering price of the securities being sold which is actually received by or on behalf of the registrant; provided, however, that any securities issued also comply with paragraph F of this R164-12-1f.

E. Determination of Amount Received by or on Behalf of the Registrant

The amount of the public offering price which is actually received shall be determined as follows:

(1) The following shall be included:

(a) Cash received;

(b) Fair market value of any securities received; and

(c) Fair market value of any tangible property received excluding items listed in subparagraph E(2) of this R164-12-1f.

(2) The following shall be excluded:

(a) Promissory notes or similar promises to provide cash or property in the future;

(b) Assessments, whether conditional or obligatory; and

(c) Intangible property such as patents, royalties, etc.

F. Securities Issued to Participants in a Distribution

(1) Options or Warrants:

Options or warrants issued to participants in a distribution must be justified by the applicant. Options or warrants will be considered justified if all of the conditions of this paragraph F are met.

(a) The options or warrants are issued only to a broker-dealer registered with this Division and are not transferable except in cases where the broker-dealer is a partnership and then only within the partnership.

(b) The number of shares covered by all options or warrants does not exceed ten percent of the shares to be outstanding upon completion of the offering.

(c) The options or warrants do not exceed five years in duration and are exercisable no sooner than one year after issuance.

(d) The initial exercise price of the options or warrants is at least equal to the public offering price plus a step-up of said public offering price of either seven per cent each year they are outstanding, so that the exercise price throughout the second year is one hundred seven per cent, throughout the third year one hundred fourteen per cent, throughout the fourth year one hundred twenty-one per cent, throughout the fifth year one hundred twenty-eight per cent; or in the alternative, twenty per cent at any time after one year from the date of issuance; provided that an election as to either alternative must be made by the broker-dealer at the time that the options or warrants are issued.

(e) The options or warrants are issued by a relatively small company, which is in the promotional stage, or which, because of its size, lacks public ownership of its shares, or other facts and circumstances make it appear that the issuance of options is necessary to obtain competent investment banking services.

(f) The prospectus used in connection with the offering fully discloses the terms and the reason for the issuance of such options or warrants; provided that if such reason relates to future advisory services to be performed by the broker-dealer without compensation in consideration for the issuance of such options or warrants, a statement to that effect is placed in the prospectus.

(g) The total amount of options and warrants issued or reserved for issuance at the date of the public offering shall be reasonable. The amount of options and warrants shall be presumed reasonable if the number of shares represented by such options and warrants does not exceed a number equal to ten per cent of the number of shares outstanding during the period the registration is in effect. The number of options and warrants reserved for issuance may be disregarded if the issuer files an undertaking or states in the prospectus that the amount of outstanding options and warrants shall not exceed the above limitation during the period the registration is in effect.

(2) The value of any securities received, which value shall be included in determining the amount of compensation for the purposes of paragraph D of this R164-12-1f shall be as follows:

(a) Options/Warrants: The market value of such options or warrants, if any, shall be used. In cases where no market value exists, a presumed fair value of twenty per cent of the public offering price of the shares to which the options or warrants pertain shall be used, unless evidence indicates that a contrary valuation exists.

(b) Stock: The amount of compensation received when stock is issued shall be the difference between the cost of such stock and the proposed public offering price or, in the case of securities with a bona fide independent market, the cost of such stock and price of the stock on the market on the date of purchase. If, however, there is a binding obligation to hold such stock for a substantial period of time, an adjustment in such valuation may be made.

(c) Convertible Securities: The amount of compensation received when convertible securities are issued shall be the difference between the conversion price and the proposed public offering price or, in the case of securities with a bona fide independent market, the conversion price and the price of the stock on the market on the date of purchase.

(3) Equity Securities Issued to Participants in a Distribution:

Equity securities or securities convertible into equity securities, when combined with securities issued pursuant to subsection (F)(1) of this Rule, acquired by a participant in a distribution, whether acquired prior to, at the time of, or after, but which are determined to be in connection with or related to, the offering shall not in the aggregate be more than ten percent of the total number of units being offered in the proposed offering. The maximum limitation in the case of "best efforts" underwritings or participations shall be on the basis of no more than one unit received for every ten units actually sold. For the purposes of this paragraph:

(a) No securities shall be issued to a participant in a distribution where such participant is not a broker-dealer registered with this Division;

(b) Over-allotment shares and shares underlying warrants, options, or convertible securities which are part of the proposed offering are not to be counted as part of the aggregate number of shares being offered against which the ten percent limitation is to be applied.

(c) In an exceptional or unusual case involving an offering of convertible securities of a company whose stock already has a public market and where the circumstances require, taking into consideration the conversion terms of the securities to be received by the above persons, the receipt of underlying shares by such persons aggregating the above referred to ten percent limitation may be considered improper and a lesser amount considered more appropriate.

(d) In an exceptional or unusual case, where a large number of shares of a company are already outstanding and/or the purchase price of the securities, risk involved or the time factor as to acquisition

or other circumstances justify, a variation from the above limitations may be permitted but in all cases the burden of demonstrating justification for such shall be upon the person seeking the variation.

**KEY: securities regulation**

**Date of Enactment or Last Substantive Amendment: 1987**

**Notice of Continuation: July 30, 2007**

**Authorizing, and Implemented or Interpreted Law: 61-1-12(1)(f)**

**R164-13. Definitions.**

**R164-13-1. Definitions.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Sections 61-1-13 and 61-1-24.

(2) This rule defines several terms used in Title 61, Chapter 1, Utah Uniform Securities Act.

(B) Terms defined

In addition to the definitions in Section 61-1-13, as used in Title 61, Chapter 1:

(1) "Investment contract" includes:

(1)(a) any 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

(1)(b) any investment by which:

(1)(b)(i) an offeree furnishes initial value to an offerer;

(1)(b)(ii) a portion of this initial value is subjected to the risks of the enterprise;

(1)(b)(iii) the furnishing of the initial value is induced by the offerer's promises or representations which 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

(1)(b)(iv) the offeree does not receive the right to exercise practical or actual control over the managerial decisions of the enterprise.

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

**KEY: securities, securities regulation**

**Date of Enactment or Last Substantive Amendment: July 3, 1997**

**Notice of Continuation: July 30, 2007**

**Authorizing, and Implemented or Interpreted Law: 61-1-13; 61-1-24**

**R164-14. Exemptions.**

**R164-14-1g. Exchange Listing Exemption.**

(A) Authority and Purpose

(1) The Division enacts this rule under authority granted by Subsection 61-1-14(1)(g) and Section 61-1-24.

(2) The rule identifies additional exchanges for which the exemption under Subsection 61-1-14(1)(g) is available.

(3) The rule also states the procedure whereby confirmation of the availability of the exemption can be obtained.

(B) Definitions

(1) "Confirmation" means written confirmation of the exemption from registration from the Division.

(2) "Division" means the Division of Securities, Utah Department of Commerce.

(3) "Exchange Tiers" means the different levels, groups or markets within an exchange or medium, whereby each level requires substantively different, as opposed to alternate and comparable, listing and maintenance criteria.

(4) "Exemption" means the exemption provided in Subsection 61-1-14(1)(g).

(C) Recognized exchanges

(1) As specifically provided in Subsection 61-1-14(1)(g), a security listed on one of the following exchanges or mediums is exempt from registration:

(1)(a) New York Stock Exchange

(1)(b) American Stock Exchange

(1)(c) National Association of Securities Dealers Automated Quotation System ("NASDAQ").

(2) In addition, a security listed on one of the following exchanges or mediums is exempt from registration:

(2)(a) Chicago Board Options Exchange

(2)(b) Pacific Stock Exchange

(2)(c) Philadelphia Stock Exchange

(3) A security listed on one of the following exchanges or mediums is exempt from registration for the limited purpose of nonissuer transactions effected by or through a licensed broker-dealer:

(3)(a) Boston Stock Exchange

(3)(b) Chicago Stock Exchange

(3)(c) NASDAQ Small Cap Market

(3)(d) Pacific Stock Exchange/Tier II

(3)(e) Philadelphia Stock Exchange/Tier II

(D) Listed securities

(1) As to securities listed with a recognized exchange or medium, the exemption is self-executing.

(2) If desired, any person may request confirmation of the exemption in the manner described below.

(E) Securities approved for listing

(1) A security which is "approved for listing upon notice of issuance" on a recognized exchange or medium enumerated in Subparagraph (C)(1) or (2) of this rule qualifies for the exemption. The exemption is self-executing.

(2) If desired, any person may request confirmation of the exemption in the manner described below.

(F) Senior or substantially equal rank securities

(1) An unlisted security of the same issuer which is of senior or substantially equal rank to the security listed on a recognized exchange or medium enumerated in Subparagraph (C)(1) or (2) of this rule qualifies for the exemption. The exemption is self-executing.

(2) If desired, any person may request confirmation of the exemption in the manner described below.

(G) Delisted or suspended securities

(1) If a listed security becomes delisted or suspended, the exemption is not available to the security or a senior or substantially equal rank security for the period during which the security is delisted or suspended.

(H) Requests for confirmation

(1) A confirmation from the Division may be requested by any person.

(2) The request for confirmation must include documentary proof of the listing or approval for listing upon notice of issuance with the recognized exchange or medium which is relied upon as the basis for the exemption.

(3) The required documentary proof must indicate, where applicable, that the listing is current and must include:

(3)(a) a signed copy of the listing agreement;

(3)(b) a copy of the receipt for payment; or

(3)(c) a signed copy of a letter from the recognized exchange or medium with which the security is listed which acknowledges listing and the effective date thereof, or acknowledges approval for listing upon notice of issuance.

(4) Each request for confirmation must include a filing fee as specified in the Division's fee schedule.

(5) In response to a complete request for confirmation, the Division will issue a letter confirming the availability of the exemption.

(6) The Division will issue a copy of the letter confirming the availability of the exemption to any person so requesting in writing or in person for the cost of the photocopying.

(I) Exchange tiers

(1) Except as provided in Subparagraph (I)(2) of this rule, where a recognized exchange or medium has more than one tier, the exemption applies only to the highest tier.

(2) The exemption applies to a lower tier of a recognized exchange or medium if the lower tier is specifically named in this rule.

#### **R164-14-2b. Manual Listing Exemption.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Subsection 61-1-14(2)(b) and Section 61-1-24.

(2) The rule specifies recognized securities manuals.  
(3) The rule prescribes the information upon which each listing must be based to qualify for the exemption.

(4) The rule sets forth the exclusive method of claiming the transactional exemption contained in Subsection 61-1-14(2)(b).

(4)(a) Except as provided in Paragraph (H), the exemption is not self-executing and may not be relied upon until the Division confirms the exemption as provided below.

(4)(b) A confirmation may only be requested by a broker-dealer licensed with the Division or by the issuer of the securities for which the exemption is sought.

(B) Definitions

(1) "Blank-check company" means a development stage company that:

(1)(a) has no business plan or purpose;

(1)(b) has not fully disclosed its business plan or purpose; or

(1)(c) has only indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies.

(2) "Blind-pool company" means a development stage company that has generally disclosed its business plan or purpose, but such business plan or purpose has not identified specific properties or products to be purchased, constructed or developed.

(3) "Confirmation" means written confirmation of the exemption from registration from the Division.

(4) "Development stage company" means a company that is devoting substantially all of its efforts to acquiring or establishing a new business and either of the following conditions exists:

(4)(a) planned principal operations have not commenced; or

(4)(b) planned principal operations have commenced, but there has been no significant revenues therefrom.

(5) "Division" means the Division of Securities, Utah Department of Commerce.

(6) "Dormant company" means a company which does not pursue nor has the financial capacity to pursue a business plan or purpose, whether or not it is a development stage company.

(7) "Exemption" means the exemption provided in Subsection 61-1-14(2)(b) of the Act.

(8) "Financial statements" means a balance sheet, an income statement or statement of operations, a statement of cash flows, a statement of stockholders' equity, if a corporation or partners' capital, if a partnership, and appropriate notes to the financial statements.

(9) "Shell company" means a company which does not pursue nor has the financial capacity to pursue a business plan or purpose, whether or not it is a development stage company.

(10) "Significant change" means any change involving a reorganization, merger, acquisition, or other change which causes the issuer to increase its issued and outstanding shares of stock by at least 40% of the issued and outstanding shares before the change.

(C) Recognized securities manuals

(1) The Division recognizes the following securities manuals:

(1)(a) Standard and Poor's Corporation Records

(1)(b) Mergent's Industrial Manual

(1)(c) Mergent's Bank and Finance Manual

(1)(d) Mergent's Transportation Manual

- (1)(e) Mergent's OTC Industrial Manual
- (1)(f) Mergent's Public Utility Manual
- (1)(g) Mergent's OTC Unlisted Manual
- (1)(h) Mergent's International Manual
- (D) Information upon which listing must be based
  - (1) A listing must be based upon the following information, which must be filed with the selected recognized securities manual:
    - (1)(a) the issuer's name, current street and mailing address and telephone number;
    - (1)(b) the names and titles of the executive officers and members of the board of directors of the issuer;
    - (1)(c) a description of the issuer's business;
    - (1)(d) the number of shares of each class of stock outstanding at the balance sheet date; and
    - (1)(e) the issuer's annual financial statements as of a date within 18 months which have been prepared in accordance with generally accepted accounting principles, and audited by an independent certified public accountant who has issued an unqualified opinion; if the issuer has been organized for less than one year, the financial statements must be for the period from inception.
- (E) Confirmation requirement
  - (1) Except as provided in Paragraph (H), confirmation must be obtained prior to relying upon the exemption.
    - (2) A request for confirmation must include:
      - (2)(a) all information filed with the selected recognized securities manual;
      - (2)(b) a copy of the listing with the recognized securities manual which is based upon the information filed under paragraph (D); and
      - (2)(c) a filing fee as specified in the Division's fee schedule.
    - (3) In response to a request for confirmation which complies with this rule, the Division will issue a letter confirming the exemption.
    - (4) The Division will issue a copy of the letter confirming the exemption to any person so requesting in writing or in person for the cost of the photocopying, and mailing if necessary.
- (F) Term of exemption
  - (1) Except as provided in Subparagraph (F)(2), the exemption becomes effective on the date confirmed by the Division.
    - (2) The exemption for the securities of an issuer which qualify under Paragraph (H) becomes effective on the date a listing, based upon the information required under Paragraph (D), is published in a recognized securities manual.
    - (3) The exemption shall expire upon the earliest of:
      - (3)(a) A date 18 months from the date of the annual financial statements required under paragraph (D);
      - (3)(b) The date of a new annual issue or edition of the recognized securities manual which does not contain a listing based upon the information required under paragraph (D);
      - (3)(c) A date 45 calendar days from a change in the Chairman of the Board of Directors or a change in any two other members of the Board of Directors unless the recognized securities manual has published this information within the 45 days; or

(3)(d) A date 90 calendar days after a significant change in the issuer unless the recognized securities manual has published, at a minimum, an audited balance sheet and income statement reflecting the significant change within the 90 days.

(G) Blank-check, blind-pool, dormant, or shell company

(1) The exemption is not available to a blank-check, blind-pool, dormant, or shell company which has not previously registered its securities with the Division.

(2) A company which has not previously registered its securities with the Division which, within the past three fiscal years of the company, has merged with or been acquired by a blank-check, blind-pool, dormant, or shell company, which has not previously registered its securities with the Division, must file:

(2)(a) with the recognized securities manual, the information required under paragraph (D), as to all parties to such transaction;

(2)(b) with the Division, the shareholders list reflecting the initial public offering of the blank-check, blind-pool, dormant or shell company; and

(2)(c) with the Division, the shareholders list of the company, current within thirty days of the request for confirmation of the exemption.

(H) Exceptions to confirmation requirement

(1) Confirmation prior to relying upon the exemption shall not be required for any security if at the time of the transaction:

(1)(a) the security is sold at a price reasonably related to the current market price of such security;

(1)(b) the security does not constitute the whole or part of an unsold allotment to, or subscription or participation by, a broker-dealer as an underwriter of the security;

(1)(c) the security has been outstanding in the hands of the public for at least 90 days;

(1)(d) the issuer of the security is a going concern, actually engaged in business and is not in the development stage, in bankruptcy or receivership;

(1)(e) the issuer of the security has been in continuous operation for at least five years; and

(1)(f) the information required by Paragraph (D) is contained in a recognized securities manual listed in Paragraph (C).

#### **R164-14-2m. Secondary Trading Transactional Exemption.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Subsection 61-1-14(2)(m) and Section 61-1-24.

(2) The rule sets forth the exclusive method of claiming the transactional exemption contained in Subsection 61-1-14(2)(m).

(2)(a) The exemption is not self-executing. It may not be relied upon until the Division confirms the exemption as provided below.

(2)(b) A confirmation may only be requested by a broker-dealer licensed with the Division or by the issuer of the securities for which the exemption is sought.

(2)(c) The exemption is available only for transactions effected by or through a broker-dealer licensed with the Division.

(B) Definitions

(1) "Blank-check company" means a development stage company that:

(1)(a) has no business plan or purpose;

(1)(b) has not fully disclosed its business plan or purpose; or  
(1)(c) has only indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies.

(2) "Blind-pool company" means a development stage company that has generally disclosed its business plan or purpose, but such business plan or purpose has not identified specific properties or products to be purchased, constructed or developed.

(3) "Confirmation" means written confirmation of the exemption from registration from the Division.

(4) "Development stage company" means a company that is devoting substantially all of its efforts to acquiring or establishing a new business and either of the following conditions exists:

(4)(a) planned principal operations have not commenced; or

(4)(b) planned principal operations have commenced, but there has been no significant revenues therefrom.

(5) "Division" means the Division of Securities, Utah Department of Commerce.

(6) "Dormant company" means a company which does not pursue nor has the financial capacity to pursue a business plan or purpose, whether or not it is a development stage company.

(7) "Exemption" means the exemption provided in Subsection 61-1-14(2)(m).

(8) "Financial statements" means a balance sheet, an income statement or statement of operations, a statement of cash flows, a statement of stockholders' equity, if a corporation or partners' capital, if a partnership, and appropriate notes to the financial statements.

(9) "Shell company" means a company which does not pursue nor has the financial capacity to pursue a business plan or purpose, whether or not it is a development stage company.

(C) Request for confirmation

(1) The broker-dealer or issuer should file a request for confirmation with the Division in advance of the expiration of the previous registration statement or exemption to provide the Division a reasonable period of time in which to review the request.

(2) A request for confirmation must include the information required in paragraph (D).

(3) A request for confirmation must include a fee as specified in the Division's fee schedule.

(4) In response to a request for confirmation which complies with this rule, the Division will issue a letter confirming the exemption.

(5) The Division will issue a copy of the letter confirming the exemption to any person so requesting in writing or in person for the cost of the photocopying, and mailing if necessary.

(D) Required information

(1) A reporting company which is required to file reports pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the preceding year must file one copy of the registration statement or the most recent Form 10-K which was filed with the Securities and Exchange Commission and containing financial statements dated not more than 15 months prior to this filing.

(2) A non-reporting company must file:

(2)(a) The following information:

(2)(a)(i) The exact name of the issuer and its predecessor(s), if any;

(2)(a)(ii) The street address of the issuer's principal executive offices;

(2)(a)(iii) The state of and date of incorporation or organization of the issuer;

(2)(a)(iv) The exact title and class of security for which the exemption is sought;

- (2)(a)(v) The par or stated value of the security for which the exemption is sought;
  - (2)(a)(vi) The number of public, and restricted securities outstanding as of the end of the issuer's most recent fiscal year and a statement as to the date of the last fiscal year end;
  - (2)(a)(vii) The name and street address of the transfer agent for the securities for which the exemption is sought;
  - (2)(a)(viii) A description of the nature of the issuer's business;
  - (2)(a)(ix) A description of the products or services offered by the issuer;
  - (2)(a)(x) A description of the nature and extent of the issuer's facilities;
  - (2)(a)(xi) The names, titles and terms of office of the executive officers and members of the board of directors;
  - (2)(a)(xii) The names and street addresses of broker-dealers in Utah or associated person affiliated, directly or indirectly, with the issuer of the securities for which the exemption is sought.
  - (2)(b) Financial statements for the issuer's most recent fiscal year which meet all of the following requirements:
    - (2)(b)(i) be audited or reviewed by an independent Certified Public Accountant (CPA);
    - (2)(b)(ii) be prepared in conformity with Generally Accepted Accounting Principles (GAAP);
    - (2)(b)(iii) be prepared in conformity with Generally Accepted Auditing Standards (GAAS), Statements on Standards for Accounting and Review Services (SSARS), or both;
    - (2)(b)(iv) contain an unqualified audit opinion, where an audit is performed, except that certain qualifications may be allowed in certain circumstances at the discretion of the Division;
    - (2)(b)(v) contain an accountant's report stating that no material modifications are necessary for the financial statements to conform with GAAP, where a review is performed;
    - (2)(b)(vi) contain the signature of the preparer of the financial statements;
  - (2)(c) Financial statements of the issuer for the two fiscal years preceding the most recent fiscal year or for the time the issuer or its predecessor(s) has been in existence. The requirements of paragraph (D)(2)(b) also apply to these financial statements;
  - (2)(d) Financial statements, dated within 30 days before the merger or acquisition, of the corporation, partnership, or proprietorship which was acquired by or merged with the issuer during the issuer's most recent fiscal year. The requirements of paragraph (D)(2)(b) also apply to these financial statements;
  - (2)(e) A statement that the person submitting the information has read all of the information submitted and that to the best of his knowledge the information is accurate and complete;
  - (2)(f) If a broker-dealer is submitting the information, the original signature of the licensed official of the broker-dealer beneath the statement required by item (e) of this paragraph (D)(2) and the signatory's name and street address typed or printed beneath it;
  - (2)(g) If an issuer is submitting the information, the original signature of a current executive officer or director of the issuer beneath the statement required by item (e) of this paragraph(D)(2) and the signatory's name and street address typed or printed beneath it;
  - (2)(h) Copies of all complaints and orders with respect to material litigation that occurred during the past five years involving the issuer, the assets, liabilities, or both of the issuer, the securities of the issuer, or any officer or director of the issuer; and
  - (2)(i) Other documents as the Division may request.
- (E) Amended information

(1) The required information filed pursuant to paragraph (D) may be amended by forwarding the correct information to the Division and requesting that the file be amended accordingly.

(2) If the amended information indicates that the issuer has changed its fiscal year, an amendment will not be permitted and the information will be treated as a new request for exemption.

(3) No fee is required for an amendment.

(F) Term of exemption

(1) The exemption becomes effective upon the date confirmed by the Division to the earliest of:

(1)(a) A date three months after the issuer's next fiscal year end; or

(1)(b) A date ten working days from the date of any shareholders meeting unless all material changes resulting from the meeting have been filed pursuant to paragraph (E); or

(1)(c) A date 30 calendar days from the date of any material change, not resulting from a shareholder vote, unless information with respect to the material change has been filed pursuant to paragraph (E).

(G) Blank-check, blind-pool, dormant, or shell company

(1) A blank-check, blind-pool, dormant, or shell company which has not previously registered its securities with the Division may not rely upon the exemption.

(2) A company which has not previously registered its securities with the Division which, within the past three fiscal years of the company, has merged with or been acquired by a blank-check, blind-pool, dormant, or shell company, which has not previously registered its securities with the Division, must file:

(2)(a) the information specified in paragraph (D), as to all parties to the transaction;

(2)(b) the shareholders list reflecting the initial public offering of the blank-check, blind-pool, dormant, or shell company; and

(2)(c) the shareholders list of the company current within thirty days of the request for confirmation of the exemption.

(H) Miscellaneous

(1) The information contained in broker-dealers' files and the information which they use to solicit transactions relying upon the exemption must be kept current.

(2) In no event does compliance with the requirements of this rule relieve broker-dealers or their agents from any obligations imposed by Section 61-1-1 or 61-1-6 or the rules thereunder.

#### **R164-14-2n. Uniform Limited Offering Exemption.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Subsection 61-1-14(2)(n) and Section 61-1-24.

(2) Nothing in this rule is intended to or should be construed as in any way relieving issuers or persons acting on behalf of issuers from providing disclosure to prospective investors adequate to satisfy the anti-fraud provisions of Section 61-1-1.

(3) In view of the objective of this rule and the purposes and policies underlying Section 61-1-1 et seq., the safe-harbor exemption is not available to any issuer with respect to any transaction which, although in technical compliance with this rule, is part of a plan or scheme to evade registration or the conditions or limitations explicitly stated in this rule.

(4) Nothing in this rule is intended to relieve a licensed broker-dealer or broker-dealer agent from the due diligence, suitability, know-your-customer standards, or any other requirements of state or federal law otherwise applicable to such licensed persons.

(B) Definitions

(1) "Division" means the Division of Securities, Utah Department of Commerce.

(2) "Safe-harbor exemption" means the exemption provided in this rule.

(3) "SEC" means the United States Securities and Exchange Commission.

(C) Safe-harbor exemption

Any offer or sale of securities offered or sold in compliance with SEC Rule 505, Exemption for Limited Offers and Sales of Securities Not Exceeding \$5,000,000, 17 CFR 230.505 (1993), including any offer or sale made exempt by application of SEC Rule 508, Insignificant Deviations from a Term, Condition or Requirement of Regulation D, 17 CFR 230.508 (1993), which are adopted and incorporated by reference and available from the SEC and the Division, and which offer or sale of securities satisfies the following further conditions and limitations is determined to be exempt from the registration requirement of Section 61-1-7:

(1) No commission, fee, or other remuneration shall be paid or given, directly or indirectly, to any person for soliciting any prospective purchaser in this state unless such person is appropriately licensed with the Division.

(a) It is a defense to a violation of this paragraph if the issuer sustains the burden of proof to establish that it did not know and in the exercise of reasonable care could not have known that the person who received a commission, fee, or other remuneration was not appropriately licensed with the Division.

(2) The safe-harbor exemption shall not be available for the securities of any issuer if any of the parties described in SEC Rule 262, Disqualification Provisions, 17 CFR 230.262 (1994), which is adopted and incorporated by reference and available from the Division:

(a) Has filed a registration statement which is the subject of a currently effective registration stop order entered pursuant to any state's securities law.

(b) Has been convicted within five years prior to the filing of the notice required under this rule of any felony or misdemeanor in connection with the offer, purchase, or sale of any security or any felony involving fraud or deceit, including forgery, embezzlement, obtaining money under false pretenses, larceny, or conspiracy to defraud.

(c) Is currently subject to any state administrative enforcement order or judgment entered by that state's securities administrator within five years prior to the filing of the notice required under this rule or is subject to any state's administrative enforcement order or judgment in which fraud or deceit, including making untrue statements of material facts or omitting to state material facts, was found and the order or judgment was entered within five years prior to the filing of the notice required under this rule.

(d) Is subject to any state's administrative enforcement order or judgment which prohibits, denies, or revokes the use of any exemption from registration in connection with the offer, purchase, or sale of securities.

(e) Is currently subject to any order, judgment, or decree of any court of competent jurisdiction temporarily or preliminarily restraining or enjoining, or is subject to any order, judgment or decree of any court of competent jurisdiction, permanently restraining or enjoining, such party from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or involving

the making of any false filing with the state entered within five years prior to the filing of the notice required under this rule.

(f) The prohibitions of Subparagraphs (a) through (c) and (e) above shall not apply if the person subject to the disqualification is licensed or registered to conduct securities-related business in the state in which the administrative order or judgment was entered against such person or if the broker-dealer employing such party is licensed with the Division and SEC Form BD - Uniform Application for Broker-Dealer Registration, July 1988, filed with the CRD discloses the order, conviction, judgment or decree relating to such person. No person disqualified under this paragraph may act in a capacity other than that for which the person is licensed.

(g) Any disqualification caused by this paragraph is automatically waived if the state securities administrator or agency of the state which created the basis for disqualification determines that it is not necessary that the safe-harbor exemption be denied.

(h) It is a defense to a violation of this paragraph if issuer sustains the burden of proof to establish that it did not know and in the exercise of reasonable care could not have known that a disqualification under this paragraph existed.

(D) Notice requirement

(1) The issuer shall file with the Division:

(a) One manually-signed copy of SEC Form D, 17 CFR 239.500 (1993), no later than 15 days after the first sale of securities in Utah in reliance upon this safe-harbor exemption and at such other times and in the form required to be filed with the Securities and Exchange Commission under SEC Rule 503, Filing of Notice of Sales, 17 CFR 230.503 (1993);

(b) One copy of the information furnished by the issuer to offerees located within the state;

(c) NASAA Form U-2 - Uniform Consent to Service of Process, which is available from NASAA or the Division; and

(d) A fee as specified in the Division's fee schedule.

(2) Within 30 days after termination of the offering the issuer shall file with the Division one completed Division Form 14-2n, Uniform Limited Offering Exemption Final Report.

(E) Sales to nonaccredited investors

(1) In all sales to nonaccredited investors in this state one of the following conditions must be satisfied or the issuer and any person acting on its behalf shall have reasonable grounds to believe and after making reasonable inquiry shall believe that one of the following conditions is satisfied:

(a) The investment is suitable for the purchaser upon the basis of the facts, if any, disclosed by the purchaser as to the purchaser's other security holdings, financial situation and needs. For the purpose of this condition only, it may be presumed that if the investment does not exceed 10% of the investor's net worth, it is suitable.

(b) The purchaser either alone or with a representative has such knowledge and experience in financial and business matters that the purchaser is capable of evaluating the merits and risks of the prospective investment.

(F) Effect upon exemption from Section 61-1-7 of failure to comply with certain provisions

A failure to comply with a term, condition or requirement of Subparagraph (C)(1) or Paragraphs (D) or (E) of this rule will not result in loss of the exemption from the requirements of Section 61-1-7 for any offer or sale to a particular individual or entity if the person relying on the exemption shows:

(1) the failure to comply did not pertain to a term, condition, or requirement directly intended to protect that particular individual or entity; and

(2) the failure to comply was insignificant with respect to the offering as a whole; and

(3) a good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements of Subparagraph (C)(1), or Paragraphs (D) or (E) of this rule.

(G) Limitation of exemption established in reliance upon Paragraph (F)

Where an exemption is established only through reliance upon Paragraph (F) of this rule, the failure to comply shall nonetheless be actionable by the director under Section 61-1-14 or 61-1-20.

(H) Prohibition against combining exemption with other exemptions

Transactions which are exempt under this rule may not be combined with offers and sales exempt under any other rule or section; however, nothing in this limitation shall act as an election. Should for any reason the offer and sale fail to comply with all of the conditions of this safe-harbor exemption, the issuer may claim the availability of any other applicable exemption.

(I) Authority to modify or waive conditions

The director may, by order, increase the number of purchasers or waive any other conditions of this safe-harbor exemption.

(J) Title

The safe-harbor exemption authorized by this rule shall be known and may be cited as the "Uniform Limited Offering Exemption."

#### **R164-14-2p. Reorganization Exemption.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Subsection 61-1-14(2)(p) and Section 61-1-24.

(2) The rule sets forth the exclusive method of claiming the exemption contained in Subsection 61-1-14(2)(p). The exemption is not self-executing.

(B) Definitions

(1) "Division" means the Division of Securities, Utah Department of Commerce.

(2) "Exemption" means the exemption provided in Subsection 61-1-14(2)(p).

(3) "SEC" means the United States Securities and Exchange Commission.

(C) Filing Requirements

Persons whose security holders are to consent, vote or resolve as to a transaction or series of transactions involving a merger, consolidation, reorganization, recapitalization, reclassification, or sale of assets may claim the exemption by filing with the Division, not less than ten business days prior to any necessary vote or action on any necessary consent or resolution, all of the following:

(1) the proxy or informational materials required by Paragraph (D);

(2) NASAA Form U-2, Uniform Consent to Service of Process;

(3) a fee as specified in the Division's fee schedule; and

(4) other documents as the Division may request.

(D) Proxy or informational materials

The Proxy or informational materials to be filed with the Division pursuant to Subparagraph (C)(1) and distributed to all securities holders entitled to vote in the transaction or series of transactions shall be:

(1) the proxy or informational materials filed under Section 14(a) or (c) of the Securities Exchange Act of 1934 if any person involved in the transaction is required to file proxy or informational materials under Section 14(a) or (c) of the Securities Exchange Act of 1934 and has so filed;

(2) the proxy or informational materials filed with the appropriate regulatory agency or official of its domiciliary state if any person involved in the transaction is an insurance company who is exempt from filing under Section 12(g)(2)(G) of the Securities Exchange Act of 1934; or

(3) one manually signed Form 14-2p and the information specified in SEC Schedule 14A, Form S-4, or Form F-4 if all persons involved in the transaction are exempt from filing under Section 12(g)(1) of the Securities Exchange Act of 1934.

(E) Transactions eligible for exemption

For purposes of Subsection 61-1-14(2)(p)(i), "each person involved" includes each person whose securities are offered or sold to or purchased from the securities holders of such persons.

### **R164-14-2s. MJDS - Secondary Trading Exemption.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Subsection 61-1-14(2)(s) and Section 61-1-24.

(2) This rule provides a secondary trading exemption for securities offered by Canadian issuers which have been offered in the United States pursuant to MJDS through a registration statement on SEC Form F-8, F-9 or F-10 declared effective by the SEC.

(B) Definitions

(1) "Division" means the Division of Securities, Utah Department of Commerce.

(2) "MJDS" means the multijurisdictional disclosure system with Canada as adopted by the SEC in Securities Act Release No. 6902, effective July 1, 1991.

(3) "SEC" means the United States Securities and Exchange Commission.

(C) Exemption

(1) The Division finds that continued registration is not necessary or appropriate for the protection of investors in any class of a Canadian issuer's security which has been offered pursuant to Section 61-1-9 and MJDS through a registration statement on SEC Form F-8, F-9 or F-10 declared effective by the SEC and the Division.

(2) Accordingly, any non-issuer transaction, effected by or through a licensed broker-dealer, involving such a security shall be exempt from registration.

### **R164-14-21s. Solicitations of Interest Exemption.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Subsection 61-1-14(2)(s) and Section 61-1-24.

(2) The rule enables an issuer to solicit indications of interest in a future offering of securities by the issuer to determine the likelihood of success of the offering before incurring costs associated with registering the offering.

(3) All communications made in reliance on this rule are subject to the anti-fraud provisions of Section 61-1-1.

(4) The Division may or may not review the materials filed pursuant to this rule. Materials filed, if reviewed, will be judged under anti-fraud principles. Any discussion in the offering documents of the potential rewards of the investment must be balanced by a discussion of possible risks.

(5) Any offer effected in violation of this rule may constitute an unlawful offer of an unregistered security for which civil liability attaches under Section 61-1-22. Likewise any misrepresentation or omission may give rise to civil liability. Under the Act, a subsequent registration of the security for the sale of the security does not "cure" the previous unlawful offer. Only a rescission offer made in accordance with the provisions of the Act can accomplish such a "cure."

(B) Definitions

(1) "Act" means Title 61, Chapter 1, Utah Uniform Securities Act.

(2) "Director" means the director of the Division of Securities, Utah Department of Commerce.

(3) "Division" means the Division of Securities, Utah Department of Commerce.

(4) "SEC" means the United States Securities and Exchange Commission.

(C) Requirements

(1) An offer, but not a sale, of a security made by or on behalf of an issuer for the sole purpose of soliciting an indication of interest in receiving a prospectus, or its equivalent, for such security is exempt from Section 61-1-7, if all of the following conditions are satisfied:

(1)(a) The issuer is or will be a business entity organized under the laws of one of the states or possessions of the United States or one of the provinces or territories of Canada;

(1)(b) The issuer is engaged in or proposes to engage in a business other than petroleum exploration or production or mining or other extractive industries and is not a "blind pool" offering or other offering for which the specific business or properties cannot now be described;

(1)(c) The offerer intends to register the security in this state and conduct its offering pursuant to either SEC Regulation A, Conditional Small Issues Exemption, 17 CFR 230.251 through 17 CFR 230.263 (1995), SEC Rule 504, Exemption for Limited Offerings and Sales of Securities Not Exceeding \$1,000,000, 17 CFR 230.504 (1995), or SEC Rule 147, "Part of an Issue," "Person Resident," and "Doing Business Within" for Purposes of Section 3(a)(11), 17 CFR 230.147 (1995), which are incorporated by reference;

(1)(d) Ten (10) business days prior to the initial solicitation of interest under this rule, the offerer files with the Division, Form 14-21s, Solicitation of Interest Form, any other materials to be used to conduct solicitations of interest, including, but not limited to, the script of any broadcast to be made and a copy of any notice to be published, and a fee as specified in the Division's fee schedule;

(1)(e) Five (5) business days prior to usage, the offerer files with the Division any amendments to the foregoing materials or additional materials to be used to conduct solicitations of interest, except for materials provided to a particular offeree pursuant to a request by that offeree;

(1)(f) No Solicitation of Interest Form, script, advertisement or other material can be used to solicit indications of interest unless approved by the Division;

(1)(g) Except for scripted broadcasts and published notices, the offerer does not communicate with any offeree about the contemplated offering unless the offeree is provided with the most current Solicitation of Interest Form at or before the time of the communication or within five (5) calendar days from the communication;

(1)(h) During the solicitation of interest period, the offerer does not solicit or accept money or a commitment to purchase securities;

(1)(i) No sale is made until seven (7) calendar days after delivery to the purchaser of a final prospectus or in those instances in which delivery of a preliminary prospectus is allowed, a preliminary prospectus; and

(1)(j) The offerer does not know, and in the exercise of reasonable care, could not know that the issuer or any of the issuer's officers, directors, ten percent shareholders or promoters:

(1)(j)(i) Has filed a registration statement which is the subject of a currently effective registration stop order entered pursuant to any federal or state securities law within five years prior to the filing of the Solicitation of Interest Form;

(1)(j)(ii) Has been convicted within five years prior to the filing of the Solicitation of Interest Form of any felony or misdemeanor in connection with the offer, purchase or sale of any security or any felony involving fraud or deceit, including, but not limited to, forgery, embezzlement, obtaining money under false pretenses, larceny, or conspiracy to defraud;

(1)(j)(iii) Is currently subject to any federal or state administrative enforcement order or judgment entered by any state securities administrator or the SEC within five years prior to the filing of the Solicitation of Interest Form or is subject to any federal or state administrative enforcement order or judgment entered within five years prior to the filing of the Solicitation of Interest Form in which fraud or deceit, including, but not limited to, making untrue statements of material facts and omitting to state material facts, was found;

(1)(j)(iv) Is subject to any federal or state administrative enforcement order or judgment which prohibits, denies, or revokes the use of any exemption from registration in connection with the offer, purchase or sale of securities; or

(1)(j)(v) Is currently subject to any order, judgment, or decree of any court of competent jurisdiction temporarily or preliminarily restraining or enjoining, or is subject to any order, judgment or decree of any court of competent jurisdiction, permanently restraining or enjoining, such party from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or involving the making of any false filing with the state entered within five years prior to the filing of the Solicitation of Interest Form.

(2) The prohibitions listed in Subparagraph (C)(1)(j) shall not apply if the person subject to the disqualification is duly licensed or registered to conduct securities related business in the state in which the administrative order or judgment was entered against such person or if the broker-dealer employing the party is licensed in this state and the SEC Form BD - Uniform Application for Broker-Dealer Registration, filed with this state discloses the order, conviction, judgment or decree relating to the person. No person disqualified under subparagraph (C)(1)(j) may act in a capacity other than that for which the person is licensed or registered. Any disqualification caused by subparagraph (C)(1)(j) is automatically waived if the agency which created the basis for disqualification determines upon a showing of good cause that it is not necessary under the circumstances that the exemption be denied.

(3)(a) A failure to comply with any condition of Subparagraph (C)(1) will not result in the loss of the exemption from the requirements of Section 61-1-7 for any offer to a particular individual or entity if the offerer shows:

(3)(a)(i) the failure to comply did not pertain to a condition directly intended to protect that particular individual or entity;

(3)(a)(ii) the failure to comply was insignificant with respect to the offering as a whole; and

(3)(a)(iii) a good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements of Subparagraph (C)(1).

(3)(b) Where an exemption is established only through reliance on Subparagraph (C)(3)(a), the failure to comply shall nonetheless be actionable as a violation of the Act by the Director under Section 61-1-20 and constitute grounds for denying or revoking the exemption as to a specific security or transaction.

(4) The offerer shall comply with the requirements set forth below. Failure to comply will not result in the loss of the exemption from the requirements of Section 61-1-7, but shall be a violation of the Act, be actionable by the Director under Section 61-1-20, and constitute grounds for denying or revoking the exemption as to a specific security or transaction.

(4)(a) Any published notice or script for broadcast must contain at least the identity of the chief executive officer of the issuer, a brief and general description of its business and products, and the following legends:

(4)(a)(i) NO MONEY OR OTHER CONSIDERATION IS BEING SOLICITED AND NONE WILL BE ACCEPTED;

(4)(a)(ii) NO SALES OF THE SECURITIES WILL BE MADE OR COMMITMENT TO PURCHASE ACCEPTED UNTIL DELIVERY OF A PROSPECTUS THAT INCLUDES COMPLETE INFORMATION ABOUT THE ISSUER AND THE OFFERING;

(4)(a)(iii) AN INDICATION OF INTEREST MADE BY A PROSPECTIVE INVESTOR INVOLVES NO OBLIGATION OR COMMITMENT OF ANY KIND; and

(4)(a)(iv) THIS OFFER IS BEING MADE PURSUANT TO THE REQUIREMENTS OF FEDERAL AND STATE SECURITIES LAWS. NEITHER THE FEDERAL NOR THE STATE AUTHORITIES HAVE CONFIRMED THE ACCURACY OR DETERMINED THE ADEQUACY OF THIS DOCUMENT OR ANY OTHER DOCUMENT PRESENTED TO YOU IN CONNECTION WITH THIS OFFER. NO SALE MAY BE MADE UNTIL THE OFFERING STATEMENT IS QUALIFIED BY THE SECURITIES AND EXCHANGE COMMISSION IF MADE PURSUANT TO REGULATION A, AND IS REGISTERED IN THIS STATE;

(4)(b) All communications with prospective investors made in reliance on this rule must cease after a registration statement is filed in this state, and no sale may be made until at least twenty (20) calendar days after the last communication made in reliance on this rule; and

(4)(c) A preliminary prospectus, or its equivalent, may only be used in connection with an offering for which indications of interest have been solicited under this rule if the offering is conducted by a registered broker-dealer.

(5) The Director may waive any condition of this exemption in writing, upon application by the offerer and cause having been shown. Neither compliance nor attempted compliance with this rule, nor the absence of any objection or order by the Director with respect to any offer of securities undertaken pursuant to this rule, shall be deemed to be a waiver of any condition of the rule or deemed to be a confirmation by the Director of the availability of this rule.

(6) Offers made in reliance on this rule will not result in a violation of Section 61-1-7 by virtue of being integrated with subsequent offers or sales of securities unless such subsequent offers and sales would be integrated under federal securities laws.

(7) Issuers on whose behalf indications of interest are solicited under this rule may not make offers or sales in reliance on Subsections 61-1-14(2)(i), 61-1-14(2)(n) or 61-1-14(2)(q) until six (6) months after the last communication with a prospective investor made pursuant to this rule.

**R164-14-23s. Foreign Securities - Secondary Trading Exemption.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Subsection 61-1-14(2)(s) and Section 61-1-24.

(2) This rule provides an exemption for secondary market transactions in securities offered by foreign issuers satisfying the requirements of this rule.

(B) Definitions

(1) "Division" means the Division of Securities, Utah Department of Commerce.

(C) Exemption

(1) The Division finds that continued registration is not necessary or appropriate for the protection of investors in an outstanding security issued by any corporation organized under the laws of a foreign country with which the United States currently maintains diplomatic relations (or an American Depository Receipt relating to such a security), provided either:

(1)(a) the security appears in the most recent Federal Reserve Board List of Foreign Margin Stocks;

(1)(b) the issuer is currently required to file with the Securities and Exchange Commission information and reports pursuant to Sections 13 or 15(d) of the Securities Exchange Act of 1934 and is not delinquent in such filing; or

(1)(c) the issuer is not subject to the reporting requirements of Sections 13 or 15(d) of the Securities Exchange Act of 1934 and all of the following conditions are met:

(1)(c)(i) the issuer, including any predecessors, has been in continuous operation for at least 5 years and is a going concern actually engaged in business and neither in the organization stage nor in bankruptcy or receivership;

(1)(c)(ii) the number of shares outstanding is at least 2,500,000 and the number of shareholders is at least 5,000;

(1)(c)(iii) the market value of the outstanding shares, other than debt securities and preferred stock, is at least U.S. \$100 million;

(1)(c)(iv) the issuer, as of the date of its most recent financial statement, which may not be more than 18 months old and which has been audited in accordance with the generally accepted accounting principles of its country of domicile, has net tangible assets of at least U.S. \$100 million;

(1)(c)(v) the issuer had net income after all charges, including taxes and extraordinary losses, and excluding extraordinary gains, of either

(1)(c)(v)(aa) at least U.S. \$50 million in total for its last three fiscal years, or

(1)(c)(v)(bb) at least U.S. \$20 million in each of its last two fiscal years; and

(1)(c)(vi) if the security is a debt security or preferred stock, the issuer has not during the past 5 years, or during the period of its existence if shorter, defaulted in the payment of any dividend, principal, interest or sinking fund installment thereon.

(2) Accordingly, any non-issuer transaction, effected by or through a licensed broker-dealer, involving such a security shall be exempt from registration.

**R164-14-24s. Internet Solicitations Exemption.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Subsection 61-1-14(2)(s) and Section 61-1-24.

(2) This rule provides an exemption for offers effected through the Internet which do not result in sales in Utah.

(B) Definitions

(1) "Division" means the Division of Securities, Utah Department of Commerce.

(2) "Internet" means the global information system comprised of independent computer networks which are interconnected and share information without the use of a central processing center by use of the Transmission Control Protocol/Internet Protocol (TCP/IP) suite, to include without limitation, the World Wide Web, proprietary or "common carrier" electronic delivery systems, or similar medium.

(3) "Internet Offer" means a communication, regarding the offering of securities within the meaning of Subsection 61-1-13(2)(b), made on the Internet and directed generally to anyone who has access to the Internet, including persons in Utah.

(C) Exemption

(1) The Division finds that registration is not necessary or appropriate for the protection of investors in connection with Internet Offers, provided:

(1)(a) an offer is not specifically directed to any person in Utah;

(1)(b) the Internet Offer indicates that the securities are not being offered to and sales will not be effected with persons in Utah; and

(1)(c) no sales of the issuer's securities are made in Utah as a result of the Internet Offer.

**R164-14-25s. Accredited Investor Exemption.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Subsection 61-1-14(2)(s) and Section 61-1-24.

(2) This rule provides an exemption for offers and sales to accredited investors. The rule also permits a limited use advertisement.

(B) Definitions

(1) "Accredited Investor" means an accredited investor as defined in 17 CFR 230.501(a) which is incorporated by reference.

(2) "Division" means the Division of Securities, Utah Department of Commerce.

(3) "Exemption" means the exemption provided in Subsection 61-1-14(2)(s).

(C) Exemption

The Division finds that registration is not necessary or appropriate for the protection of investors pursuant to Section 61-1-14(2)(s) in connection with any offer or sale of a security by an issuer in a transaction that meets the requirements of this rule.

(D) Purchaser qualifications

Sales of securities shall be made only to persons who are or the issuer reasonably believes are accredited investors.

(E) Issuer Limitations

The exemption is not available to an issuer that is in the development stage that either has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person.

(F) Investment Intent

The issuer reasonably believes that all purchasers are purchasing for investment and not with the view to or for sale in connection with a distribution of the security. Any resale of a security sold in reliance on this exemption within 12 months of sale shall be presumed to be with a view to distribution and not for investment, except a resale pursuant to a registration statement effective under Section 61-1-8, 61-1-9, or 6-1-10 or to an accredited investor pursuant to an exemption under Section 61-1-14.

(G) Disqualifications

(1) The exemption is not available to an issuer if the issuer, any of the issuer's predecessors, any affiliated issuer, any of the issuer's directors, officers, general partners, beneficial owners of 10% or more of any class of its equity securities, any of the issuer's promoters presently connected with the issuer in any capacity, any underwriter of the securities to be offered, or any partner, director or officer of such underwriter:

(1)(a) within the last five years, has filed a registration statement which is the subject of a currently effective registration stop order entered by any state securities administrator or the United States Securities and Exchange Commission;

(1)(b) within the last five years, has been convicted of any criminal offense in connection with the offer, purchase or sale of any security, or involving fraud or deceit;

(1)(c) is currently subject to any state or federal administrative enforcement order or judgment, entered within the last five years, finding fraud or deceit in connection with the purchase or sale of any security; or

(1)(d) is currently subject to any order, judgment or decree of any court of competent jurisdiction, entered within the last five years, temporarily, preliminarily or permanently restraining or enjoining such party from engaging in or continuing to engage in any conduct or practice involving fraud or deceit in connection with the purchase or sale of any security.

(2) Subparagraph (G)(1) shall not apply if:

(2)(a) the party subject to the disqualification is licensed or registered to conduct securities related business in the state in which the order, judgment or decree creating the disqualification was entered against such party;

(2)(b) before the first offer under this exemption, the state securities administrator, or the court or regulatory authority that entered the order, judgment, or decree, waives the disqualification; or

(2)(c) the issuer establishes that it did not know and in the exercise of reasonable care could not have known that a disqualification existed under Paragraph (G).

(H) General Announcement

(1) A general announcement of the proposed offering may be made by any means.

(2) The general announcement shall include only the following information, unless additional information is specifically permitted by the Division:

(2)(a) The name, address and telephone number of the issuer of the securities;

(2)(b) The name, a brief description and price (if known) of any security to be issued;

(2)(c) A brief description of the business of the issuer in 25 words or less;

(2)(d) The type, number and aggregate amount of securities being offered;

(2)(e) The name, address and telephone number of the person to contact for additional information; and

(2)(f) A statement that:

(2)(f)(i) sales will only be made to accredited investors;

(2)(f)(ii) no money or other consideration is being solicited or will be accepted by way of this general announcement; and

(2)(f)(iii) the securities have not been registered with or approved by any state securities agency or the U.S. Securities and Exchange Commission and are being offered and sold pursuant to an exemption from registration.

(I) Additional Information

The issuer, in connection with an offer, may provide information in addition to the general announcement under paragraph (H), if such information:

(1) is delivered through an electronic database that is restricted to persons who have been prequalified as accredited investors; or

(2) is delivered after the issuer reasonably believes that the prospective purchaser is an accredited investor.

(J) Telephone Solicitations

No telephone solicitation shall be permitted unless prior to placing the call, the issuer reasonably believes that the prospective purchaser to be solicited is an accredited investor.

(K) Effect of dissemination of general announcement to nonaccredited investors

Dissemination of the general announcement of the proposed offering to persons who are not accredited investors shall not disqualify the issuer from claiming the exemption under this rule.

(L) Filing Requirements

The issuer shall file with the Division, within 15 days after the first sale in Utah:

(1) one manually signed Form 14-25s, Accredited Investor Exemption Uniform Notice of Transaction Form;

(2) NASAA Form U-2, Uniform Consent to Service of Process;

(3) a copy of the general announcement; and

(4) a fee as specified in the Division's fee schedule.

#### **R164-14-26s. Reorganization Exemption for Transactions Involving Certain Federal Covered Securities.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Subsection 61-1-14(2)(s) and Section 61-1-24.

(2) This rule provides an exemption for any transaction involving a reorganization where the securities issued in the transaction are, or will be upon completion of the transaction, covered securities pursuant to section 18(b)(1) of the Securities Act of 1933.

(3) While the Division is preempted by federal law from requiring registration of a covered security, there is no such preemption of licensing requirements for issuer agents which offer or sell covered securities.

(4) By providing this exemption, issuers that participate in a reorganization whose securities are, or will be upon completion of the transaction, covered securities pursuant to Section 18(b)(1) of the

Securities Act of 1933, will not be required to license agents which meet the exclusion requirements of Subsection 61-1-13(2).

(5) This exemption is self-executing and requires no filing with the Division.

(B) Definitions

(1) "Division" means the Division of Securities, Utah Department of Commerce.

(C) Exemption

The Division finds that registration is not necessary or appropriate for the protection of investors in connection with any transaction or series of transactions involving a merger, consolidation, reorganization, recapitalization, reclassification, or sale of assets where the securities issued in connection with the transaction are, or will be upon completion of the transaction, covered securities pursuant to Section 18(b)(1) of the Securities Act of 1933.

#### **R164-14-27s. Compensatory Benefit Plan Exemption.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Subsection 61-1-14(2)(s) and Section 61-1-24.

(2) This rule provides an exemption from the registration requirements of Section 61-1-7 for securities issued in compensatory circumstances. The exemption is not available for plans or schemes to circumvent this purpose, such as to raise capital. This exemption also is not available for any transaction that is in technical compliance with this rule but is part of a plan or scheme to evade the registration provisions of Section 61-1-7. In any of these cases, registration under the Act is required unless another exemption is available.

(3) Nothing in this rule is intended to be or should be construed as in any way relieving issuers or persons acting on behalf of issuers from providing disclosure to employees or other persons within the scope of the rule adequate to satisfy the antifraud provisions of Section 61-1-1.

(4) Attempted compliance with the rule does not act as an exclusive election. The issuer can also claim the availability of any other applicable exemption.

(5) This exemption is self-executing and requires no filing with the Division.

(B) Definitions

(1) "Division" means the Division of Securities, Utah Department of Commerce.

(C) Compensatory Benefit Plan Exemption

(1) Offers and sales made in compliance with SEC Rule 701, Exemption for Offers and Sales of Securities Pursuant to Certain Compensatory Benefit Plans and Contracts Relating to Compensation, 17 CFR 230.701 (1999), which is adopted and incorporated by reference and available from the Division, are determined to be exempt from the registration requirements of Section 61-1-7.

(D) Resale limitations

The resale of securities issued pursuant to this rule must be in compliance with the registration requirements of Section 61-1-7 or an exemption therefrom.

(E) Disqualification

(1) The exemption is not available to an issuer if the issuer, any of the issuer's predecessors, any affiliated issuer, any of the issuer's directors, officers, general partners, beneficial owners of 10% or more of any class of its equity securities, any of the issuer's promoters presently connected with the issuer in

any capacity, any underwriter of the securities to be offered, or any partner, director or officer of such underwriter:

(1)(a) within the last five years, has filed a registration statement which is the subject of a currently effective registration stop order entered by any state securities administrator or the United States Securities and Exchange Commission;

(1)(b) within the last five years, has been convicted of any criminal offense in connection with the offer, purchase or sale of any security, or involving fraud or deceit;

(1)(c) is currently subject to any state or federal administrative enforcement order or judgment, entered within the last five years, finding fraud or deceit in connection with the purchase or sale of any security; or

(1)(d) is currently subject to any order, judgment or decree of any court of competent jurisdiction, entered within the last five years, temporarily, preliminarily or permanently restraining or enjoining such party from engaging in or continuing to engage in any conduct or practice involving fraud or deceit in connection with the purchase or sale of any security.

(2) Subparagraph (E)(1) shall not apply if:

(2)(a) the party subject to the disqualification is licensed or registered to conduct securities related business in the state in which the order, judgment or decree creating the disqualification was entered against such party;

(2)(b) before the first offer under this exemption, the state securities administrator, or the court or regulatory authority that entered the order, judgment, or decree, waives the disqualification; or

(2)(c) the issuer establishes that it did not know and in the exercise of reasonable care could not have known that a disqualification existed under Paragraph (E).

**KEY: securities, securities regulation**

**Date of Enactment or Last Substantive Amendment: March 20, 2000**

**Notice of Continuation: July 30, 2007**

**Authorizing, and Implemented or Interpreted Law: 61-1-7; 61-1-8; 61-1-9; 61-1-10; 61-1-20; 61-1-22; 61-1-24**

## **R164-15. Federal Covered Securities.**

### **R164-15-1. Notice Filings for Offerings of Investment Company Securities.**

#### (A) Authority and purpose.

(1) The Division enacts this rule under authority granted by Sections 61-1-15.5 and 61-1-24.

(2) The rule requires a notice filing prior to the offer or sale of securities described in Subsection 61-1-15.5(1) and sets forth the filing procedure.

(3) The rule also authorizes optional electronic filing of notices.

#### (B) Definitions

(1) "Designee" means any person or entity authorized and recognized by the Division in this rule to accept filings on behalf of the Division by electronic or other means of communication.

(2) "Division" means the Division of Securities, Utah Department of Commerce.

(3) "NASAA" means the North American Securities Administrators Association, Inc.

(4) "SEC" means the United States Securities and Exchange Commission.

#### (C) Filing requirements

(1) Prior to the offer or sale of a security which is a covered security under Section 18(b)(2) of the Securities Act of 1933, the issuer must submit to the Division or its designee the following:

(1)(a) A completed manually signed NASAA Form NF;

(1)(b) A completed manually signed NASAA Form U-2 - Uniform Consent to Service of Process;  
and

(1)(c) A fee as specified in the Division's fee schedule.

(2) The issuer may submit a copy of all documents that are part of the federal registration statement filed with the SEC as a substitute for NASAA Form NF.

(3) Upon written request of the Division and within the time period set forth in the request, the issuer must submit to the Division a copy of any document, identified in the request, that is part of the federal registration statement filed with the SEC or is part of an amendment to such federal registration statement.

(4) All securities included in the same prospectus may be covered under a single notice filing.

(5) An issuer who has filed a Form U-2 in connection with a previous notice filing need not file another.

#### (D) Term of notice filing

(1) Except as provided in Subparagraph (D)(2), a notice filing under Paragraph (C) is effective for one year from the date filed with the Division or its designee.

(2) A notice filing under Paragraph (C) for a unit investment trust is for an indefinite period of time from the date filed with the Division or its designee.

(3) To facilitate the coordination of expiration dates with other states, the issuer may request a specific term of effectiveness which does not exceed one year.

#### (E) Renewal

A notice filing, for which the term is about to expire, may be renewed by submitting to the Division or its designee, another notice and payment of the applicable fee in accordance with Paragraph (C).

#### (F) Amendments

(1) The materials filed pursuant to Paragraph (C) may be amended by forwarding the corrected information to the Division or its designee and requesting that the file be amended accordingly.

(2) No fee is required for an amendment.

(G) Recognized designee

(1) The Division authorizes and recognizes the Securities Registration Depository, Inc. as a designee to receive notice filings under this rule on behalf of the Division, including but not limited to notices, fees, and all documents that are part of a federal registration statement filed with the SEC under the Securities Act of 1933.

(2) The designation provided in this rule is for the sole purpose of receiving filings on behalf of the Division and then transmitting those documents to the Division, or for any other purpose which the Division may prescribe by order or release.

(H) Sales Report

Within 30 days of the close of the offering or when the issuer ceases to rely upon the notice, whichever occurs first, unit investment trusts shall file a sales report on NASAA Form NF. No sales report is required for open-end management investment companies.

**R164-15-2. Notice Filings for Rule 506 Offerings.**

(A) Authority and purpose.

(1) The Division enacts this rule under authority granted by Sections 61-1-15.5 and 61-1-24.

(2) The rule requires a notice filing within 15 days after the first sale in this state of securities described in Subsection 61-1-15.5(2) and sets forth the filing procedure.

(B) Definitions

(1) "Division" means the Division of Securities, Utah Department of Commerce.

(2) "NASAA" means the North American Securities Administrators Association, Inc.

(3) "SEC Form D" means the document, as adopted by the United States Securities and Exchange Commission and in effect on September 1, 1996, as may be amended by the SEC from time to time, entitled "Form D; Notice of Sale of Securities pursuant to Regulation D, Section 4(6), and/or Uniform Limited Offering Exemption", including Part E and the Appendix.

(C) Filing requirements

(1) An issuer offering a security that is a covered security under section 18(b)(4)(D) of the Securities Act of 1933 must submit to the Division, no later than 15 days after the first sale of such federal covered security in this state, the following:

(1)(a) A manually signed notice on SEC Form D;

(1)(b) A completed manually signed NASAA Form U-2 - Uniform Consent to Service of Process; and

(1)(c) A fee as specified in the Division's fee schedule.

(2) An issuer who has filed a Form U-2 in connection with a previous notice filing need not file another.

**KEY: mutual funds, securities, securities regulation**

**Date of Enactment or Last Substantive Amendment: September 3, 1997**

**Notice of Continuation: July 30, 2007**

**Authorizing, and Implemented or Interpreted Law: 61-1-15.5; 61-1-24**

**R164-18. Procedures.**

**R164-18-6. Procedures for Administrative Actions.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Sections 63-46b-4, 63-46b-5, 63-46b-21, and 61-1-24.

(2) The purpose of this rule is to:

(a) designate those actions which the Division shall deem to be requests for initial agency action;  
(b) designate those categories of adjudicative proceedings which will be conducted on an informal basis, in accordance with the Utah Administrative Procedures Act and the Rules of Procedure for Adjudicative Proceedings before the Department of Commerce;

(c) set forth circumstances in which hearings shall be required or permitted; and

(d) clarify certain Division policies regarding declaratory orders.

(B) Definitions

(1) "Act" means Title 61, Chapter 1, Utah Uniform Securities Act.

(2) "CRD" means the Central Registration Depository, Inc.

(3) "Director" means the Director of the Division of Securities, Utah Department of Commerce.

(4) "Division" means Division of Securities, Utah Department of Commerce.

(C) Categorization of Adjudicative Proceedings

All adjudicative proceedings under the Act are designated as informal adjudicative proceedings, except that the director may convert proceedings to formal adjudicative proceedings in accordance with the provisions of Subsection 63-46b-4(3).

(D) Commencement of Adjudicative Proceedings

Filing of the following documents with the Division shall be deemed to be a request for initial Division action:

(1) SEC Form BD - Uniform Application for Broker-Dealer Registration pursuant to Sections 61-1-4 and R164-4-1 (whether filed with the division or the CRD);

(2) NASD Form U-4 - Uniform Application for Securities Industry Registration or Transfer pursuant to Sections 61-1-4 and R164-4-1 (whether filed with the division or the CRD);

(3) SEC Form ADV - Uniform Application for Investment Adviser Registration pursuant to Sections 61-1-4 and R164-4-2 (whether filed with the division or the CRD);

(4) Application for Registration by Notification - Filed pursuant to Section 61-1-8;

(5) NASAA Form U-1 - Uniform Application to Register Securities pursuant to Sections 61-1-9 and R164-9-1;

(6) Form 10-2-1 - Application for Registration by Qualification pursuant to Sections 61-1-10 and R164-10-2;

(7) Request for declaratory order designating a person as not being within the definition of "broker-dealer" as defined in Subsection 61-1-13(3), or "agent" as defined in Subsection 61-1-13(2);

(8) Request for declaratory order designating a person as not being within the definition of "investment adviser" as defined in Subsection 61-1-13(15), or "investment adviser representative" as defined in Subsection 61-1-13(16);

(9) Request for order finding that registration is not necessary or appropriate pursuant to Subsection 61-1-14(1)(l) (exempt securities);

(10) Request for order finding that registration is not necessary or appropriate pursuant to Subsection 61-1-14(2)(s) (exempt transactions);

(11) Request for order releasing impounded funds pursuant to Section R164-11-7b;

(12) Request for confirmation of exchange listing exemption pursuant to Section R164-14-1g;

(13) Request for confirmation of blue chip fund exemption pursuant to Subsection 61-1-14(1)(k);

(14) Request for confirmation of manual listing exemption pursuant to Section R164-14-2b;

(15) Request for confirmation of secondary trading exemption pursuant to Section R164-14-2m;

(16) Request for confirmation of reorganization exemption pursuant to Section R164-14-2p.

(E) Procedures for Informal Adjudicative Proceedings

A hearing will be held only if required by the Act or by the provisions of this section. When a hearing is permitted but not required, a hearing will be held only if requested by a party within 30 days from the date a notice of agency action is mailed.

(F) Hearings: When Held

(1) Under the Act, a hearing is not required and will not be held in the following adjudicative proceedings:

(a) Licensing of broker-dealer, agent, investment adviser, or investment adviser representative pursuant to Section 61-1-4;

(b) Order requiring applicant to publish announcement of application pursuant to Subsection 61-1-4(1)(c);

(c) Cancellation of registration or application of broker-dealer, agent, investment adviser, or investment adviser representative pursuant to Subsection 61-1-6(5);

(d) Grant of registration by notification pursuant to Section 61-1-8;

(e) Grant of registration by coordination pursuant to Section 61-1-9;

(f) Stop order based on failure to file price amendments pursuant to Subsection 61-1-9(5);

(g) Grant of registration by qualification pursuant to Section 61-1-10;

(h) Order requiring additional information or verification pursuant to Subsection 61-1-10(2)(q);

(i) Order imposing conditions of registration pursuant to Subsection 61-1-11(7);

(j) Order vacating or modifying stop order pursuant to Subsection 61-1-12(2);

(k) Order designating a person as not being within the definition of a "broker-dealer" pursuant to Subsection 61-1-13(3), or "agent" pursuant to Subsection 61-1-13(2);

(l) Order designating a person as not being within the definition of "investment advisor" pursuant to Subsection 61-1-13(15), or "investment adviser representative" pursuant to Subsection 61-1-13(16);

(m) Order finding that registration is not necessary or appropriate pursuant to Subsection 61-1-14(1)(l) (exempt securities);

(n) Order finding that registration is not necessary or appropriate pursuant to Subsection 61-1-14(2)(s) (exempt transactions);

(o) Order requiring filing of prospectus, sales literature, etc. pursuant to Section 61-1-15;

(p) Order releasing impounded funds pursuant to Section R164-11-7b;

(q) Order to show cause pursuant to Subsection 61-1-20(1)(a);

(r) Confirmation of exchange listing exemption pursuant to Section R164-14-1g;

(s) Confirmation of blue chip fund exemption pursuant to Subsection 61-1-14(1)(k);

(t) Confirmation of manual listing exemption pursuant to Section R164-14-2b;

(u) Confirmation of secondary trading exemption pursuant to Section R164-14-2m;

- (v) Confirmation of reorganization exemption pursuant to R164-14-2p.
- (2) In the following proceedings, a hearing will be held only if timely requested:
  - (a) Petition for order denying, suspending or revoking registration of broker-dealer, agent, investment adviser, or investment adviser representative pursuant to Section 61-1-6;
  - (b) Petition for stop order denying, suspending or revoking effectiveness of a securities registration statement pursuant to Section 61-1-12;
  - (c) Order denying or revoking exemption under Subsection 61-1-14(2)(p)(v);
  - (d) Petition for order denying or revoking exemption from registration pursuant to Subsection 61-1-14(4);
- (G) Declaratory Orders
  - (1) The Division will not issue declaratory orders when a petition requests a ruling with respect to the applicability of Section 61-1-1.
  - (2) A request for a "no-action" letter under Section R164-25-5 shall be deemed to be a petition for a declaratory order.

**KEY: securities regulation, adjudicative procedure**

**Date of Enactment or Last Substantive Amendment: July 3, 1997**

**Notice of Continuation: July 30, 2007**

**Authorizing, and Implemented or Interpreted Law: 61-1-18.3; 61-1-4; 61-1-11**

**R164-25. Record of Registration.**

**R164-25-5. Requests for Interpretive Opinions and No-action Letters.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Subsection 61-1-25(5) and Section 61-1-24.

(2) When requested, the Division may interpret the statutes and rules administered by the Division for members of the general public, prospective registrants, attorneys, and others.

(3) When requested, the Division also may render "no-action" letters in which the Division advises the person soliciting its views that under a described set of facts, the Division staff will not recommend that the Director take any action, such as enjoining a proposed transaction, if the transaction is carried out as described.

(4) As to the requesting party, the Division is bound by an interpretive opinion or no-action letter. However, because of the fact-specific nature of each request, other parties may not rely upon an interpretive opinion or no-action letter addressed to another party. Moreover, an interpretive opinion or no-action letter is no bar to civil or criminal action by other parties.

(B) Request procedure

(1) Requesting parties must file two written copies of the request for interpretive opinions or no-action letters.

(2) Requests must include the following:

(2)(a) a brief summary of the statutory and rule sections to which the request pertains;

(2)(b) a detailed factual representation concerning every relevant aspect of the proposed transaction, event or circumstance;

(2)(c) a discussion of current statutes, rules and legal principles relevant to the facts set forth;

(2)(d) a statement by the person requesting the interpretive opinion or no-action letter which indicates why the person thinks the circumstances call for an interpretive opinion or no-action letter, the person's own opinion in the matter, and the basis for the opinion;

(2)(e) a representation that there is no legal action, judicial or administrative, which relates, directly or indirectly, to the facts set forth;

(2)(f) a representation that the transaction in question has not been commenced or, if it has commenced, the present status of the transaction.

(2)(g) a fee as specified in the Division's fee schedule.

(C) Areas of no comment

The Division will not respond to requests for interpretive opinions or no-action letters that:

(1) involve the anti-fraud provisions of the Utah Uniform Securities Act or the rules thereunder.

(2) involve transactions which have already taken place.

(3) attempt to include every possible type of situation which may arise in the future such that the request is overly broad or calls for a speculative response.

**KEY: securities regulation**

**Date of Enactment or Last Substantive Amendment: 1994**

**Notice of Continuation: July 30, 2007**

**Authorizing, and Implemented or Interpreted Law: 61-1-24; 61-1-25(5)**

**R164-26. Consent to Service of Process.**

**R164-26-6. Consent to Service.**

(A) Authority and purpose

(1) The Division enacts this rule under authority granted by Sections 61-1-26 and 61-1-24.

(2) This rule designates the form to be used for consents to service of process.

(B) Definitions

(1) "Act" means Title 61, Chapter 1, Utah Uniform Securities Act.

(2) "Division" means the Division of Securities, Utah Department of Commerce.

(C) Form

(1) Except as provided in subparagraph (C)(2), for the purposes of all rules, regulations, orders of the Division, or the Act, the Consent to Service of Process which is to be used, is the NASAA Form U-2 - Uniform Consent to Service of Process.

(2) A Form U-4, Uniform Application for Securities Industry Registration or Transfer, Form ADV, Uniform Application for Investment Adviser Registration, and Form BD, Uniform Application for Broker-Dealer Registration, may be used in lieu of the Form U-2 provided that an originally executed copy of such form is filed with the Division

(D) Agent

All consents to service of process filed with the Division shall appoint the "Director, Utah Division of Securities" as agent for service of process.

(E) Incorporation by reference

For purposes of consents to service of process required to be filed under the Act, a broker-dealer, agent, federal covered adviser, investment adviser, investment adviser representative, or issuer may incorporate by reference in a current application any consent to service of process previously filed with the Division by such person or entity.

**KEY: securities regulation**

**Date of Enactment or Last Substantive Amendment: March 4, 1998**

**Notice of Continuation: July 30, 2007**

**Authorizing, and Implemented or Interpreted Law: 61-1-24; 61-1-26(6)**

**R164-31. Administrative Fines.**

**R164-31-1. Guidelines for the Assessment of Administrative Fines.**

(A) Authority and purpose.

(1) The Division enacts this rule under authority granted by Sections 61-1-6, 61-1-12, 61-1-14, 61-1-20 and 61-1-24.

(2) This rule identifies guidelines for the assessment of administrative fines. The guidelines should not be considered all-inclusive but rather are intended to provide factors to be considered when imposing a fine.

(B) Guidelines.

(1) For the purpose of determining the amount of an administrative fine assessed against a person under the Utah Uniform Securities Act, the Division Director shall consider the following factors:

(a) the seriousness, nature, circumstances, extent, and persistence of the conduct constituting the violation;

(b) the harm to other persons resulting either directly or indirectly from the violation;

(c) cooperation by the person in any inquiry conducted by the Division concerning the violation, efforts to prevent future occurrences of the violation, and efforts to mitigate the harm caused by the violation, including any restitution made to other persons injured by the acts of the person;

(d) the history of previous violations by the person;

(e) the need to deter the person or other persons from committing such violations in the future; and

(f) such other matters as justice may require.

**KEY: securities regulation**

**Date of Enactment or Last Substantive Amendment: August 26, 2008**

**Notice of Continuation:**

**Authorizing, and Implemented or Interpreted Law: 61-1-6; 61-1-12; 61-1-14; 61-1-20; 61-1-24**