

2011 Tex. Sess. Law Serv. Ch. 523 (H.B. 2342) (VERNON'S)

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CHAPTER 523

H.B. No. 2342

CERTAIN VIOLATIONS OF AND OFFENSES UNDER THE SECURITIES ACT; PROVIDING PENALTIES

AN ACT

relating to certain violations of and offenses under The Securities Act; providing penalties.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Subsections A and B, Section 23-1, The Securities Act (Article 581-23-1, Vernon's Texas Civil Statutes), are amended to read as follows:

<< TX CIV ST Art. 581-23-1 >>

A. After giving notice and opportunity for a hearing, the Commissioner may, **in addition to any other remedies**, issue an order which assesses an administrative fine against any person or company found to have:

(1) engaged in fraud or a fraudulent practice in connection with:

(A) the offer for sale or sale of a security; or

(B) the rendering of services as an investment adviser or investment adviser representative;

(2) made an offer containing a statement that is materially misleading or is otherwise likely to deceive the public; [~~or~~]

(3) engaged in an act or practice that violates this Act or a Board rule or order; **or**

(4) **with intent to deceive or defraud or with reckless disregard for the truth or the law, materially aided any person in engaging in an act or practice described by Subdivision (1), (2), or (3) of this subsection.**

B. Any administrative fine assessed under this Section, **together with the amount of any civil penalty already awarded under Subsection C of Section 32**, must be in an amount not to exceed:

(1) **the greater of:**

(A) \$20,000 per violation; **or**

(B) **the gross amount of any economic benefit gained by the person or company a result of the act or practice for which the fine was assessed; and**

(2) if the act or practice was committed against a person 65 years of age or older, an additional amount of not more than \$250,000 [that does not exceed \$10,000 for a single violation or \$100,000 for multiple violations in a single proceeding or a series of related proceedings].

SECTION 2. Section 29, The Securities Act (Article 581–29, Vernon's Texas Civil Statutes), is amended to read as follows:

<< TX CIV ST Art. 581–29 >>

Art. 581–29. PENAL PROVISIONS. Any person who shall:

A. Sell, offer for sale or delivery, solicit subscriptions or orders for, dispose of, invite offers for, or who shall deal in any other manner in any security or securities without being a registered dealer or agent as in this Act provided shall be deemed guilty of a felony of the third degree[, and upon conviction thereof shall be sentenced to pay a fine of not more than \$5,000 or imprisonment in the penitentiary for not less than two or more than 10 years, or by both such fine and imprisonment].

B. Sell, offer for sale or delivery, solicit subscriptions to and orders for, dispose of, invite orders for, or who shall deal in any other manner in any security or securities issued after September 6, 1955, unless said security or securities have been registered or granted a permit as provided in Section 7 of this Act, shall be deemed guilty of a felony of the third degree[, and upon conviction thereof shall be sentenced to pay a fine of not more than \$5,000 or imprisonment in the penitentiary for not less than two or more than 10 years, or by both such fine and imprisonment].

C. In connection with the sale, offering for sale or delivery of, the purchase, offer to purchase, invitation of offers to purchase, invitations of offers to sell, or dealing in any other manner in any security or securities, whether or not the transaction or security is exempt under Section 5 or 6 of this Act, or in connection with the rendering of services as an investment adviser or an investment adviser representative, directly or indirectly:

(1) engage in any fraud or fraudulent practice;

(2) employ any device, scheme, or artifice to defraud;

(3) knowingly make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

(4) engage in any act, practice or course of business which operates or will operate as a fraud or deceit upon any person, is [guilty of a felony and upon conviction shall be]:

(a) guilty of a felony of the third degree [imprisoned for not less than 2 or more than 10 years and fined not more than \$10,000], if the amount involved in the offense is less than \$10,000;

(b) guilty of a felony of the second degree [imprisoned for not less than 2 or more than 20 years and fined not more than \$10,000], if the amount involved in the offense is \$10,000 or more but less than \$100,000; or

(c) guilty of a felony of the first degree [imprisoned for life or for not less than 5 or more than 99 years and fined not more than \$10,000], if the amount involved is \$100,000 or more.

D. Knowingly violate a cease and desist order issued by the commissioner under the authority of Section 23A, 23B, or 23–2 of this Act shall be deemed guilty of a felony of the third degree[, and upon conviction thereof shall be sentenced to pay a fine of not more than \$5,000 or imprisonment in the penitentiary for not more than two years, or by both such fine and imprisonment].

E. Knowingly make or cause to be made, in any document filed with the commissioner or in any proceeding under this Act, whether or not such document or proceeding relates to a transaction or security exempt under the provisions of Sections 5 or 6 of this Act, any statement which is, at the time and in the light of the circumstances under which it is made, false or misleading in any material respect shall be deemed guilty of a felony of the third degree~~[-and upon conviction thereof shall be sentenced to pay a fine of not more than \$5,000 or imprisonment in the penitentiary for not less than two or more than 10 years, or by both such fine and imprisonment]~~.

F. Knowingly make any false statement or representation concerning any registration made or exemption claimed under the provisions of this Act shall be deemed guilty of a state jail felony~~[-and upon conviction thereof shall be sentenced to pay a fine of not more than \$5,000 or imprisonment in the penitentiary for not more than two years, or by both such fine and imprisonment]~~.

G. Make an offer of any security within this State that is not in compliance with the requirements governing offers set forth in Section 22 of this Act shall be deemed guilty of a state jail felony~~[-and upon conviction thereof, shall be sentenced to pay a fine of not more than \$5,000 or imprisonment in the penitentiary for not more than two years, or by both such fine and imprisonment]~~.

H. Knowingly make an offer of any security within this State prohibited by a cease publication order issued by the Commissioner under Section 23C of this Act shall be deemed guilty of a state jail felony~~[-and upon conviction thereof, shall be sentenced to pay a fine of not more than \$5,000 or imprisonment in the penitentiary for not more than two years, or by both such fine and imprisonment]~~.

I. Render services as an investment adviser or an investment adviser representative without being registered as required by this Act shall be deemed guilty of a felony of the third degree ~~[and on conviction of the felony shall be sentenced to pay a fine of not more than \$5,000 or imprisonment in the penitentiary for not less than two or more than 10 years, or by both the fine and imprisonment]~~.

J. A conviction of an offense under this section may be enhanced as provided by Section 12.42, Penal Code.

SECTION 3. Section 32, The Securities Act (Article 581–32, Vernon's Texas Civil Statutes), is amended to read as follows:

<< TX CIV ST Art. 581–32 >>

Art. 581–32. INJUNCTIONS, ~~[AND]~~ RESTITUTION, AND CIVIL PENALTIES. A. Whenever it shall appear to the Commissioner either upon complaint or otherwise, that any person has engaged, is engaging, or is about to engage in fraud or a fraudulent practice in connection with the sale of a security, has engaged, is engaging, or is about to engage in fraud or a fraudulent practice in the rendering of services as an investment adviser or investment adviser representative, has made an offer containing a statement that is materially misleading or is otherwise likely to deceive the public, or has engaged, is engaging, or is about to engage in an act or practice that violates this Act or a Board rule or order, the Attorney General may, on request by the Commissioner, and in addition to any other remedies, bring action in the name and on behalf of the State of Texas against such person or company and any person who, with intent to deceive or defraud or with reckless disregard for the truth or the law, has materially aided, is materially aiding, or is about to materially aid such person and any other person or persons heretofore concerned in or in any way participating in or about to participate in such acts or practices, to enjoin such person or company and such other person or persons from continuing such acts or practices or doing any act or acts in furtherance thereof. The Commissioner shall verify, on information and belief, the facts contained in an application for injunction under this section. In any such court proceedings, the Attorney General may apply for and on due showing be entitled to have issued the court's subpoena requiring the forthwith appearance of any defendant and the defendant's employees or agents and the production of documents, books and records as may appear necessary for the hearing of such petition, to testify and give evidence concerning the acts or conduct or things complained of in such application for injunction. The District Court of any county, wherein it is shown that the acts complained of have been or are about to be committed, or a district court in Travis County shall have

jurisdiction of any action brought under this section, and this provision shall be superior to any provision fixing the jurisdiction or venue with regard to suits for injunction. No bond for injunction shall be required of the Commissioner or Attorney General in any such proceeding.

B. In addition to any other remedies, the [The] Attorney General may, on the request of the Commissioner, either in an action under Subsection A of this section or in a separate action in District Court, seek equitable relief, including restitution, for a victim of fraudulent practices and may seek the disgorgement of any economic benefit gained by a defendant through an act or practice that violates this Act or for which this Act provides the Commissioner or the Attorney General with a remedy. The court may grant any equitable relief that the court considers appropriate and may order the defendant to deliver to each victim of any act or practice that violates this Act or for which this Act provides the Commissioner or the Attorney General with a remedy [the person defrauded] the amount of money or the property that the defendant obtained from the victim, including any bonus, fee, commission, option, proceeds, or profit from or loss avoided through the sale of the security or through the rendering of services as an investment adviser or investment adviser representative, or any other tangible benefit [person by the fraudulent practices].

C. In addition to any other remedies, the Attorney General may, on the request of the Commissioner, either in an action under Subsection A of this section or in a separate action in District Court, seek a civil penalty to be paid to the State in an amount, together with the amount of any administrative fine already assessed under Subsection B of Section 23-1, not to exceed:

(1) the greater of:

(A) \$20,000 per violation; or

(B) the gross amount of any economic benefit gained by the person or company as a result of the commission of the act or practice; and

(2) if the act or practice was committed against a person 65 years of age or older, an additional amount of not more than \$250,000.

D. In an action brought under this section, the [for fraud or a fraudulent practice in connection with the sale of a security, the Attorney General may seek, for an aggrieved person, the disgorgement of any economic benefit gained by the defendant through the violation, including a bonus, fee, commission, option, proceeds, profit from or loss avoided through the sale of the security, or any other tangible benefit. The] Attorney General may recover [from an order of disgorgement obtained under this subsection] reasonable costs and expenses incurred by the Attorney General in bringing the action.

<< Note: TX CIV ST Art. 581-23-1 >>

SECTION 4. (a) The changes in law made by this Act apply only to a violation that occurs or an offense committed on or after the effective date of this Act. A violation that occurs or an offense committed before the effective date of this Act is governed by the law in effect on the date the violation occurred or the offense was committed, and the former law is continued in effect for that purpose.

(b) For purposes of Subsection (a) of this section, a violation occurred or an offense was committed before the effective date of this Act if any element of the violation or offense occurred before that date.

SECTION 5. This Act takes effect September 1, 2011.

Passed by the House on April 27, 2011: Yeas 146, Nays 1, 1 present, not voting; passed by the Senate on May 18, 2011: Yeas 31, Nays 0.

Approved June 17, 2011.
Effective September 1, 2011.

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