

## **BILL ANALYSIS**

C.S.H.B. 3769  
By: Fletcher  
Criminal Jurisprudence  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Recently there has been a series of high-profile Ponzi schemes that cost investors millions of dollars. Texas currently does not have a definition of a Ponzi scheme that would give the attorney general the ability to prosecute this type of white collar crime. Texas needs more stringent laws against people who commit these crimes.

C.S.H.B. 3769 establishes that a person who engages in a fraudulent Ponzi scheme or employs a fraudulent Ponzi scheme is guilty of a felony, sets forth degrees of punishment for the offense, and grants investigative and injunctive authority regarding Ponzi schemes to certain state entities.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

### **ANALYSIS**

C.S.H.B. 3769 amends The Securities Act to define "fraudulent Ponzi scheme" to mean any fraudulent investment operation that is managed in a manner that provides investors with returns derived substantially from investments made by other investors rather than from profits. The bill establishes that any person who, in connection with the sale, offering for sale or delivery of, 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 certain provisions of the Securities Act, directly or indirectly engages in a fraudulent Ponzi scheme or employs a fraudulent Ponzi scheme to defraud, is guilty of a felony and requires the person on conviction to be 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 \$5,000; 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 \$5,000 or more but less than \$50,000; or 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 \$50,000 or more. The bill provides that if an action constitutes an offense under provisions relating to securities fraud and a fraudulent Ponzi scheme offense, the action may be prosecuted only as a fraudulent a Ponzi scheme.

C.S.H.B. 3769 authorizes the attorney general or the district or county attorney of a county in which a violation is alleged to have occurred, on the request of the securities commissioner or on the respective attorney's own motion, when it appears to the commissioner or the attorney that a person has engaged or is about to engage in a fraudulent Ponzi scheme in connection with the sale or issuance of a security, to, in addition to any other remedies, bring an action against the person 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 the person and any other person or persons concerned in or in any way participating in or about to

participate in that scheme, to enjoin the person and any other person from continuing that scheme or doing any act in furtherance of that scheme. The bill requires the individual applying for an injunction to verify the facts contained in an application for injunction and authorizes the attorney general or the district or county attorney of a county in which a violation is alleged to have occurred, in any court proceedings brought alleging a fraudulent Ponzi scheme, to request a subpoena requiring the appearance of a defendant and the defendant's employees or agents and the production of documents, books, and records, to testify in regard to the injunction. The bill grants jurisdiction for an action alleging a fraudulent Ponzi scheme to the district court of any county where the scheme was conducted or is about to be conducted, or to a Travis County district court, and establishes that this provision controls over any other provision establishing the jurisdiction or venue with regard to suits for injunction. The bill establishes that no bond for injunction shall be required of the commissioner, attorney general, or the district or county attorney in any proceeding relating to a fraudulent Ponzi scheme. The bill authorizes the attorney general to seek equitable relief, including restitution, for a victim of fraudulent Ponzi scheme practices.

C.S.H.B. 3769 authorizes the attorney general, on request of the commissioner or on the attorney general's own motion, to bring an action for the appointment of a receiver for a person or company or the assets of the person or company whenever it appears to the commissioner or the attorney general, either on complaint or otherwise, that the following circumstances exist:

- the person or company acting as a dealer, agent, investment adviser, investment adviser representative, or issuer, or an affiliate of any of those whether or not required to be registered by the commissioner under the Securities Act, has engaged in an act, transaction, practice, or course of conduct that is a fraudulent Ponzi scheme;
- the person or company has acted as a dealer, agent, investment adviser, investment adviser representative, or issuer or an affiliate of any of those in connection with the fraudulent Ponzi scheme; and
- the appointment of a receiver for the person or company, or the assets of the person or company is necessary in order to conserve and protect the assets of the person or company for the benefit of customers, security holders, and other actual and potential claimants of the person or company.

C.S.H.B. 3769 authorizes the attorney general to conduct an investigation of a transaction subject to the Securities Act involving a person indicted for a fraudulent Ponzi scheme offense. The bill authorizes the attorney general to require, by subpoena or summons, the attendance and testimony of witnesses and the production of all records, whether maintained by electronic or other means, relating to such a transaction, and to sign subpoenas, administer oaths and affirmations, examine witnesses and receive evidence. The bill requires information received in connection with an investigation and all internal notes, memoranda, reports, or communications made in connection with the investigation to be treated as confidential by the attorney general and prohibits the information from being disclosed to the public except under court order for good cause. The bill authorizes the attorney general, in case of disobedience of any subpoena, to request the district court within whose jurisdiction a witness may be found to issue an order requiring the person subpoenaed to obey the subpoena or give evidence or produce books, accounts, records, papers, and correspondence involving the matter in question. The bill authorizes the court to hold a person who fails to obey the subpoena in contempt of court.

C.S.H.B. 3769 establishes that the attorney general, in conducting an investigation relating to a fraudulent Ponzi scheme, shall have free access to all records and reports of and to any department or agency of the state government. The bill authorizes the attorney general, at the attorney general's discretion, to disclose any confidential information in the attorney general's possession to any governmental or regulatory authority or to any receiver appointed under the bills' provisions, and establishes that the disclosure does not violate any other provision of the Securities Act or the general law on disclosure of public information. The bill requires the commissioner to deny or revoke a registration issued to a person under the Securities Act if the person has engaged in a fraudulent Ponzi scheme.

## **EFFECTIVE DATE**

September 1, 2009.

## **COMPARISON OF ORIGINAL AND SUBSTITUTE**

C.S.H.B. 3769 differs from the original by adding provisions on fraudulent Ponzi schemes to different statutory schemes. The substitute amends provisions of the Securities Act, whereas the original amends provisions of the Business & Commerce Code. The substitute and original, in addressing similar issues in relation to a fraudulent Ponzi scheme, contain nonsubstantive differences and conforming changes reflective of the drafting conventions of each respective statute set.

C.S.H.B. 3769 differs from the original in the provision assessing criminal penalties relating to a fraudulent Ponzi scheme offense by making it a felony, whereas the original makes it a felony of the first degree. The substitute adds provisions not in the original setting forth terms of confinement and amount of fines based on the amount of money involved in the offense and removes provisions in the original defining "promoting a fraudulent Ponzi scheme" and establishing minimum bail for such an offense.

C.S.H.B. 3769 adds provisions not in the original establishing that its provisions granting jurisdiction controls over other provision establishing jurisdiction or venue with regard to suits for injunction and prohibiting a bond for injunction from being required of the securities commissioner, attorney general, or the district or county attorney in any related proceeding.

C.S.H.B. 3769 differs from the original by authorizing the attorney general to bring an action for the appointment of a receiver for a person or company or the assets of a person or company whenever it appears to the commissioner or the attorney general, either on complaint or otherwise, that the person or company has engaged in certain conduct pertaining to a fraudulent Ponzi scheme and that the appointment is necessary, whereas the original authorizes a court, on proper showing, to issue a restraining order, an order freezing assets, a preliminary or permanent injunction, or a writ of mandate, or to appoint a receiver for the defendant or the defendant's assets. The substitute removes provisions in the original specifying the powers and duties of a receiver.

C.S.H.B. 3769 differs from the original by authorizing the attorney general to conduct an investigation of a transaction involving a person indicted for a fraudulent Ponzi scheme offense, whereas the original authorizes the attorney general to investigate any transaction involving a person charged with a fraudulent Ponzi scheme violation that occurred up to six months before the indictment of the person. The substitute adds provisions not in the original granting the attorney general certain subpoena and other authority to be exercised in the course of an investigation, requiring information received in connection with an investigation to be treated as confidential, and authorizing the court to punish a failure to obey the order of the district court regarding a subpoena as contempt of court. The substitute removes provisions in the original authorizing the attorney general to seize and liquidate an asset of a person convicted of a fraudulent Ponzi scheme violation that is located in any state if the asset was purchased with funds derived substantially from investments in the fraudulent Ponzi scheme by residents of Texas or any assets transferred or sold to a third party with the intent to evade, hinder, delay, or prevent the seizure and liquidation of assets by a person convicted of a fraudulent Ponzi scheme violation.

C.S.H.B. 3769 adds provisions not in the original requiring the attorney general conducting an investigation to have free access to all records and reports of and to any department or agency of the state government, authorizing the attorney general to disclose any confidential information in the attorney general's possession to any governmental or regulatory authority or to any receiver

appointed, establishing that the disclosure does not violate any other provision of the Securities Act or any Government Code provisions regarding public information, and requiring the securities commissioner to deny or revoke a registration issued to a person under the Securities Act if the person has engaged in a fraudulent Ponzi scheme.