

1-1 By: Truitt (Senate Sponsor - Watson) H.B. No. 2342
1-2 (In the Senate - Received from the House April 28, 2011;
1-3 May 4, 2011, read first time and referred to Committee on Business
1-4 and Commerce; May 10, 2011, reported favorably by the following
1-5 vote: Yeas 9, Nays 0; May 10, 2011, sent to printer.)

1-6 A BILL TO BE ENTITLED
1-7 AN ACT

1-8 relating to certain violations of and offenses under The Securities
1-9 Act; providing penalties.

1-10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-11 SECTION 1. Subsections A and B, Section 23-1, The
1-12 Securities Act (Article 581-23-1, Vernon's Texas Civil Statutes),
1-13 are amended to read as follows:

1-14 A. After giving notice and opportunity for a hearing, the
1-15 Commissioner may, in addition to any other remedies, issue an order
1-16 which assesses an administrative fine against any person or company
1-17 found to have:

1-18 (1) engaged in fraud or a fraudulent practice in
1-19 connection with:

1-20 (A) the offer for sale or sale of a security; or

1-21 (B) the rendering of services as an investment
1-22 adviser or investment adviser representative;

1-23 (2) made an offer containing a statement that is
1-24 materially misleading or is otherwise likely to deceive the public;
1-25 [~~or~~]

1-26 (3) engaged in an act or practice that violates this
1-27 Act or a Board rule or order; or

1-28 (4) with intent to deceive or defraud or with reckless
1-29 disregard for the truth or the law, materially aided any person in
1-30 engaging in an act or practice described by Subdivision (1), (2),
1-31 or (3) of this subsection.

1-32 B. Any administrative fine assessed under this Section,
1-33 together with the amount of any civil penalty already awarded under
1-34 Subsection C of Section 32, must be in an amount not to exceed:

1-35 (1) the greater of:

1-36 (A) \$20,000 per violation; or

1-37 (B) the gross amount of any economic benefit
1-38 gained by the person or company a result of the act or practice for
1-39 which the fine was assessed; and

1-40 (2) if the act or practice was committed against a
1-41 person 65 years of age or older, an additional amount of not more
1-42 than \$250,000 [~~that does not exceed \$10,000 for a single violation~~
1-43 or ~~\$100,000 for multiple violations in a single proceeding or a~~
1-44 series of related proceedings].

1-45 SECTION 2. Section 29, The Securities Act (Article 581-29,
1-46 Vernon's Texas Civil Statutes), is amended to read as follows:

1-47 Art. 581-29. PENAL PROVISIONS. Any person who shall:

1-48 A. Sell, offer for sale or delivery, solicit subscriptions
1-49 or orders for, dispose of, invite offers for, or who shall deal in
1-50 any other manner in any security or securities without being a
1-51 registered dealer or agent as in this Act provided shall be deemed
1-52 guilty of a felony of the third degree [~~, and upon conviction~~
1-53 ~~thereof shall be sentenced to pay a fine of not more than \$5,000 or~~
1-54 ~~imprisonment in the penitentiary for not less than two or more than~~
1-55 ~~10 years, or by both such fine and imprisonment].~~

1-56 B. Sell, offer for sale or delivery, solicit subscriptions
1-57 to and orders for, dispose of, invite orders for, or who shall deal
1-58 in any other manner in any security or securities issued after
1-59 September 6, 1955, unless said security or securities have been
1-60 registered or granted a permit as provided in Section 7 of this Act,
1-61 shall be deemed guilty of a felony of the third degree [~~, and upon~~
1-62 ~~conviction thereof shall be sentenced to pay a fine of not more than~~
1-63 ~~\$5,000 or imprisonment in the penitentiary for not less than two or~~
1-64 ~~more than 10 years, or by both such fine and imprisonment].~~

2-1 C. In connection with the sale, offering for sale or delivery
 2-2 of, the purchase, offer to purchase, invitation of offers to
 2-3 purchase, invitations of offers to sell, or dealing in any other
 2-4 manner in any security or securities, whether or not the
 2-5 transaction or security is exempt under Section 5 or 6 of this Act,
 2-6 or in connection with the rendering of services as an investment
 2-7 adviser or an investment adviser representative, directly or
 2-8 indirectly:

2-9 (1) engage in any fraud or fraudulent practice;

2-10 (2) employ any device, scheme, or artifice to defraud;

2-11 (3) knowingly make any untrue statement of a material
 2-12 fact or omit to state a material fact necessary in order to make the
 2-13 statements made, in the light of the circumstances under which they
 2-14 are made, not misleading; or

2-15 (4) engage in any act, practice or course of business
 2-16 which operates or will operate as a fraud or deceit upon any person,
 2-17 is [~~guilty of a felony and upon conviction shall be~~]:

2-18 (a) guilty of a felony of the third degree
 2-19 [~~imprisoned for not less than 2 or more than 10 years and fined not~~
 2-20 ~~more than \$10,000~~], if the amount involved in the offense is less
 2-21 than \$10,000;

2-22 (b) guilty of a felony of the second degree
 2-23 [~~imprisoned for not less than 2 or more than 20 years and fined not~~
 2-24 ~~more than \$10,000~~], if the amount involved in the offense is \$10,000
 2-25 or more but less than \$100,000; or

2-26 (c) guilty of a felony of the first degree
 2-27 [~~imprisoned for life or for not less than 5 or more than 99 years and~~
 2-28 ~~fined not more than \$10,000~~], if the amount involved is \$100,000 or
 2-29 more.

2-30 D. Knowingly violate a cease and desist order issued by the
 2-31 commissioner under the authority of Section 23A, 23B, or 23-2 of
 2-32 this Act shall be deemed guilty of a felony of the third degree [~~,~~
 2-33 ~~and upon conviction thereof shall be sentenced to pay a fine of not~~
 2-34 ~~more than \$5,000 or imprisonment in the penitentiary for not more~~
 2-35 ~~than two years, or by both such fine and imprisonment].~~

2-36 E. Knowingly make or cause to be made, in any document filed
 2-37 with the commissioner or in any proceeding under this Act, whether
 2-38 or not such document or proceeding relates to a transaction or
 2-39 security exempt under the provisions of Sections 5 or 6 of this Act,
 2-40 any statement which is, at the time and in the light of the
 2-41 circumstances under which it is made, false or misleading in any
 2-42 material respect shall be deemed guilty of a felony of the third
 2-43 degree [~~, and upon conviction thereof shall be sentenced to pay a~~
 2-44 ~~fine of not more than \$5,000 or imprisonment in the penitentiary for~~
 2-45 ~~not less than two or more than 10 years, or by both such fine and~~
 2-46 ~~imprisonment].~~

2-47 F. Knowingly make any false statement or representation
 2-48 concerning any registration made or exemption claimed under the
 2-49 provisions of this Act shall be deemed guilty of a state jail
 2-50 felony [~~, and upon conviction thereof shall be sentenced to pay a~~
 2-51 ~~fine of not more than \$5,000 or imprisonment in the penitentiary for~~
 2-52 ~~not more than two years, or by both such fine and imprisonment].~~

2-53 G. Make an offer of any security within this State that is
 2-54 not in compliance with the requirements governing offers set forth
 2-55 in Section 22 of this Act shall be deemed guilty of a state jail
 2-56 felony [~~, and upon conviction thereof, shall be sentenced to pay a~~
 2-57 ~~fine of not more than \$5,000 or imprisonment in the penitentiary for~~
 2-58 ~~not more than two years, or by both such fine and imprisonment].~~

2-59 H. Knowingly make an offer of any security within this State
 2-60 prohibited by a cease publication order issued by the Commissioner
 2-61 under Section 23C of this Act shall be deemed guilty of a state jail
 2-62 felony [~~, and upon conviction thereof, shall be sentenced to pay a~~
 2-63 ~~fine of not more than \$5,000 or imprisonment in the penitentiary for~~
 2-64 ~~not more than two years, or by both such fine and imprisonment].~~

2-65 I. Render services as an investment adviser or an investment
 2-66 adviser representative without being registered as required by this
 2-67 Act shall be deemed guilty of a felony of the third degree [~~and on~~
 2-68 ~~conviction of the felony shall be sentenced to pay a fine of not~~
 2-69 ~~more than \$5,000 or imprisonment in the penitentiary for not less~~

3-1 ~~than two or more than 10 years, or by both the fine and~~
 3-2 ~~imprisonment].~~

3-3 J. A conviction of an offense under this section may be
 3-4 enhanced as provided by Section 12.42, Penal Code.

3-5 SECTION 3. Section 32, The Securities Act (Article 581-32,
 3-6 Vernon's Texas Civil Statutes), is amended to read as follows:

3-7 Art. 581-32. INJUNCTIONS, [AND] RESTITUTION, AND CIVIL
 3-8 PENALTIES. A. Whenever it shall appear to the Commissioner either
 3-9 upon complaint or otherwise, that any person has engaged, is
 3-10 engaging, or is about to engage in fraud or a fraudulent practice in
 3-11 connection with the sale of a security, has engaged, is engaging, or
 3-12 is about to engage in fraud or a fraudulent practice in the
 3-13 rendering of services as an investment adviser or investment
 3-14 adviser representative, has made an offer containing a statement
 3-15 that is materially misleading or is otherwise likely to deceive the
 3-16 public, or has engaged, is engaging, or is about to engage in an act
 3-17 or practice that violates this Act or a Board rule or order, the
 3-18 Attorney General may, on request by the Commissioner, and in
 3-19 addition to any other remedies, bring action in the name and on
 3-20 behalf of the State of Texas against such person or company and any
 3-21 person who, with intent to deceive or defraud or with reckless
 3-22 disregard for the truth or the law, has materially aided, is
 3-23 materially aiding, or is about to materially aid such person and any
 3-24 other person or persons heretofore concerned in or in any way
 3-25 participating in or about to participate in such acts or practices,
 3-26 to enjoin such person or company and such other person or persons
 3-27 from continuing such acts or practices or doing any act or acts in
 3-28 furtherance thereof. The Commissioner shall verify, on information
 3-29 and belief, the facts contained in an application for injunction
 3-30 under this section. In any such court proceedings, the Attorney
 3-31 General may apply for and on due showing be entitled to have issued
 3-32 the court's subpoena requiring the forthwith appearance of any
 3-33 defendant and the defendant's employees or agents and the
 3-34 production of documents, books and records as may appear necessary
 3-35 for the hearing of such petition, to testify and give evidence
 3-36 concerning the acts or conduct or things complained of in such
 3-37 application for injunction. The District Court of any county,
 3-38 wherein it is shown that the acts complained of have been or are
 3-39 about to be committed, or a district court in Travis County shall
 3-40 have jurisdiction of any action brought under this section, and
 3-41 this provision shall be superior to any provision fixing the
 3-42 jurisdiction or venue with regard to suits for injunction. No bond
 3-43 for injunction shall be required of the Commissioner or Attorney
 3-44 General in any such proceeding.

3-45 B. In addition to any other remedies, the [The] Attorney
 3-46 General may, on the request of the Commissioner, either in an action
 3-47 under Subsection A of this section or in a separate action in
 3-48 District Court, seek equitable relief, including restitution, for a
 3-49 victim of fraudulent practices and may seek the disgorgement of any
 3-50 economic benefit gained by a defendant through an act or practice
 3-51 that violates this Act or for which this Act provides the
 3-52 Commissioner or the Attorney General with a remedy. The court may
 3-53 grant any equitable relief that the court considers appropriate and
 3-54 may order the defendant to deliver to each victim of any act or
 3-55 practice that violates this Act or for which this Act provides the
 3-56 Commissioner or the Attorney General with a remedy [the person
 3-57 defrauded] the amount of money or the property that the defendant
 3-58 obtained from the victim, including any bonus, fee, commission,
 3-59 option, proceeds, or profit from or loss avoided through the sale of
 3-60 the security or through the rendering of services as an investment
 3-61 adviser or investment adviser representative, or any other tangible
 3-62 benefit [person by the fraudulent practices].

3-63 C. In addition to any other remedies, the Attorney General
 3-64 may, on the request of the Commissioner, either in an action under
 3-65 Subsection A of this section or in a separate action in District
 3-66 Court, seek a civil penalty to be paid to the State in an amount,
 3-67 together with the amount of any administrative fine already
 3-68 assessed under Subsection B of Section 23-1, not to exceed:

3-69 (1) the greater of:

4-1 (A) \$20,000 per violation; or
4-2 (B) the gross amount of any economic benefit
4-3 gained by the person or company as a result of the commission of the
4-4 act or practice; and

4-5 (2) if the act or practice was committed against a
4-6 person 65 years of age or older, an additional amount of not more
4-7 than \$250,000.

4-8 D. In an action brought under this section, the [~~for fraud or~~
4-9 ~~a fraudulent practice in connection with the sale of a security, the~~
4-10 ~~Attorney General may seek, for an aggrieved person, the~~
4-11 ~~disgorgement of any economic benefit gained by the defendant~~
4-12 ~~through the violation, including a bonus, fee, commission, option,~~
4-13 ~~proceeds, profit from or loss avoided through the sale of the~~
4-14 ~~security, or any other tangible benefit. The] Attorney General may
4-15 recover [~~from an order of disgorgement obtained under this~~
4-16 ~~subsection] reasonable costs and expenses incurred by the Attorney
4-17 General in bringing the action.~~~~

4-18 SECTION 4. (a) The changes in law made by this Act apply
4-19 only to a violation that occurs or an offense committed on or after
4-20 the effective date of this Act. A violation that occurs or an
4-21 offense committed before the effective date of this Act is governed
4-22 by the law in effect on the date the violation occurred or the
4-23 offense was committed, and the former law is continued in effect for
4-24 that purpose.

4-25 (b) For purposes of Subsection (a) of this section, a
4-26 violation occurred or an offense was committed before the effective
4-27 date of this Act if any element of the violation or offense occurred
4-28 before that date.

4-29 SECTION 5. This Act takes effect September 1, 2011.

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