

BILL ANALYSIS

Senate Research Center
82R9572 CLG-F

S.B. 1281
By: Watson
Business & Commerce
4/2/2011
As Filed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Since its inception in 1957, the Securities Act has provided for criminal penalties and fines. In 1989 and 1991, respectively, the amount for criminal fines was increased for some violations from \$1,000 to \$5,000 and then from \$5,000 to \$10,000. However, not all of the fines are yet in line with those provided for in the Penal Code.

In 1995, the securities commissioner (commissioner) was authorized to assess administrative fines at \$10,000 per violation with a \$100,000 cap. That amount has remained unchanged since that time.

Current law does not provide the authority to assess civil fines for a violation of the Securities Act.

S.B. 1281 allows the State Securities Board to increase fines for financial fraud, to better reflect the complexity and size of today's financial markets, and to deter fraud particularly against older investors. The current fine structure is over 15 years old and it is not sufficient to deter companies that are able to gain sizable profits through fraudulent schemes.

S.B. 1281 updates the classification terminology for criminal penalties provided for in the Securities Act, and reconciles the amounts of the fines with the penalties called for in the Penal Code.

S.B. 1281 also updates the administrative fines and adds civil fines that are more consistent with the authority granted to other oversight agencies, and provides the commissioner the authority to assess a greater fine when the victim of fraud is an investor over 65 years old.

As proposed, S.B. 1281 amends current law relating to certain violations of and offenses under The Securities Act and provides penalties.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Subsections A and B, Section 23-1, The Securities Act (Article 581-23-1, V.T.C.S.), as follows:

A. Authorizes the securities commissioner (commissioner), after giving notice and opportunity for a hearing, to, 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;

(3) engaged in an act or practice that violates this Act or a State Securities Board (SSB) 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.

Makes nonsubstantive changes.

B. Requires that any administrative fine assessed under this section 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

Deletes existing text requiring that any administrative fine assessed under this section be in an amount 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. Amends Section 29, The Securities Act (Article 581-29, V.T.C.S.), as follows:

Art. 581-29. PENAL PROVISIONS. Provides that 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. Deletes existing text requiring a person, upon such a conviction, to 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 (Permit or Registration for Issue by Commissioner; Information for Issuance of Permit or Registration) of this Act, shall be deemed guilty of a felony of the third degree. Deletes existing text requiring the person, upon conviction thereof, to 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 (Exempt Transactions) or 6 (Exempt Securities) of this Act, or in connection with the rendering of services as an investment adviser or an investment adviser representative, directly or indirectly:

(1)-(3) Makes no changes to these subdivisions; 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:

(a) guilty of a felony of the third degree, rather than guilty of a felony and upon conviction shall be imprisoned for not less than two 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, rather than guilty of a felony and upon conviction shall be imprisoned for not less than two 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, rather than guilty of a felony and upon conviction shall be imprisoned for life or for not less than five 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 (relating to cease and desist orders), 23B (relating to cease and desist orders), or 23-2 (Emergency Cease and Desist Order) of this Act shall be deemed guilty of a felony of the third degree, rather than guilty of a 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.

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, rather than guilty of a 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 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, rather than guilty of a 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 (Regulation of Offers) of this Act shall be deemed guilty of a state jail felony, rather than guilty of a 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 (relating to cease publication orders) of this Act shall be deemed guilty of a state jail felony,

rather than guilty of a 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, rather than guilty of a felony 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. Authorizes a conviction of an offense under this section to be enhanced as provided by Section 12.42 (Penalties for Repeat and Habitual Felony Offenders), Penal Code.

SECTION 3. Amends Section 32, The Securities Act (Article 581-32, V.T.C.S.), as follows:

Art. 581-32. New heading: INJUNCTIONS, RESTITUTION, AND CIVIL PENALTIES. A. Authorizes the attorney general to, on request by the commissioner, and in addition to any other remedies, 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 SSB rule or order, 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.

B. Authorizes the attorney general, in addition to any other remedies, to, 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 to 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. Authorizes the court to grant any equitable relief that the court considers appropriate and to 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, rather than the person defrauded, the amount of money or the property that the defendant obtained from the victim, rather than the person by the fraudulent practice, 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.

C. Authorizes the attorney general, in addition to any other remedies, to, 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 not to exceed:

(1) the greater of \$20,000 per violation, or 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. Creates this subsection from existing text. Authorizes the attorney general, in an action brought under this section, the attorney general to recover reasonable costs and expenses incurred by the attorney general in bringing the action. Deletes existing text authorizing the attorney general, for fraud or a fraudulent practice in connection with the sale of a security, to 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. Deletes existing text authorizing the attorney general to recover from an order of disgorgement obtained under this subsection reasonable costs and expenses incurred by the attorney general in bringing the action.

SECTION 4. (a) Makes application of this Act prospective.

(b) Provides that 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. Effective date: September 1, 2011.