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SENATE BILL 6172

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State of Washington                      53rd Legislature                      1994 Regular Session

By Senators Moore, Loveland, Quigley, Sheldon, Franklin and Fraser

Read first time 01/14/94. Referred to Committee on Labor & Commerce.

1            AN ACT Relating to securities; amending RCW 21.20.135 and  
2 21.20.430; and adding new sections to chapter 21.20 RCW.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4            NEW SECTION.    **Sec. 1.**    (1) A broker-dealer or investment adviser  
5 may not fail to provide a customer with copies of the following  
6 documents within seven days of the execution of those documents:

7            (a) The customer's new account form;

8            (b) A contract between the broker-dealer or investment adviser and  
9 the customer; or

10           (c) Any other document describing the investment objectives,  
11 financial position, and financial needs of the customer prepared by the  
12 broker-dealer or investment adviser for use regarding investment  
13 recommendations for the customer.

14           (2) Except as provided under subsection (3) of this section, a  
15 broker-dealer, salesperson, investment adviser, or investment adviser  
16 salesperson may not:

17           (a) Charge a customer a fee based on the lack of or low number of  
18 transactions in a customer's account; or

1 (b) Charge a customer a fee for transferring securities or closing  
2 or transferring an account.

3 (3) A broker-dealer, salesperson, investment adviser, or investment  
4 adviser salesperson may impose a fee specified in subsection (2) of  
5 this section if the customer has previously signed a separate document  
6 that authorizes that fee, including the dollar amount, to be charged.  
7 The separate document must contain a disclosure in at least ten-point  
8 type that contains the following or similar language: "Your  
9 authorization is necessary for the following fees to be charged. If  
10 you do not sign this authorization, state law prohibits these fees."

11 **Sec. 2.** RCW 21.20.135 and 1979 ex.s. c 68 s 10 are each amended to  
12 read as follows:

13 (1) No suit or action shall be brought for the collection of a  
14 commission for the sale of a security, as defined within this chapter  
15 without alleging and proving that the plaintiff was a duly licensed  
16 salesperson for an issuer or a broker-dealer, or exempt under the  
17 provisions of RCW 21.20.040, or a duly licensed broker-dealer in this  
18 state or another state at the time the alleged cause of action arose.

19 (2) A broker-dealer or investment adviser may not bring an action  
20 against a customer for a fee charged the customer in violation of  
21 section 1 of this act.

22 NEW SECTION. **Sec. 3.** (1) The resolution of a dispute arising from  
23 a contract between a broker-dealer and a customer is governed, at the  
24 customer's election, by either:

25 (a) A civil action in a court in any state; or

26 (b) Arbitration according to the national association of securities  
27 dealers standard practice, or other arbitration procedure, if available  
28 under the terms of the written contract.

29 (2) If the customer elects to have the dispute arbitrated under  
30 subsection (1)(b) of this section and the written contract does not  
31 provide for customer participation in the selection of arbitrators, the  
32 customer may choose to have the arbitration panel selected as follows:

33 (a) One person selected by the customer;

34 (b) One person selected by the broker-dealer; and

35 (c) One person selected by mutual agreement of the customer and  
36 broker-dealer.

1        NEW SECTION.    **Sec. 4.**    (1) A broker-dealer, salesperson, investment  
2    adviser, or investment adviser representative who violates:

3        (a) RCW 21.20.035, is liable to that customer, who may sue to  
4    recover:

5        (i) Damages, including, if appropriate, commissions, interest,  
6    losses suffered, and profit that would have been realized under proper  
7    management of the customer's account;

8        (ii) Costs; and

9        (iii) Attorneys' fees.

10    In addition, in an action for a violation of RCW 21.20.035, the court  
11    may award up to three times the damages sustained; or

12        (b) RCW 21.20.702 is liable to that customer, who may sue for:

13        (i) Rescission, or in the event that the customer no longer owns  
14    the security, for damages. Damages are the amount that would be  
15    recoverable upon a tender of the security less: (A) The value of the  
16    security when the buyer disposed of it; and (B) interest at eight  
17    percent per annum from the date of disposition;

18        (ii) Costs; and

19        (iii) Attorneys' fees.

20        (2) A person who, directly or indirectly, controls a broker-dealer,  
21    salesperson, investment adviser, or investment adviser representative  
22    liable under subsection (1) of this section is also liable jointly and  
23    severally with and to the same extent as the broker-dealer,  
24    salesperson, investment adviser, or investment adviser representative  
25    to that customer if the person:

26        (a) Knew or should have known that the broker-dealer, salesperson,  
27    investment adviser, or investment adviser salesperson was engaging in  
28    the violation; or

29        (b) Failed to establish, maintain, or enforce compliance procedures  
30    reasonably designed to detect the violation and that failure  
31    contributed to the violation.

32        (3)(a) A cause of action under this section survives the death of  
33    a customer.

34        (b) A customer may not sue under this section more than three years  
35    after a violation of RCW 21.20.035 or 21.20.702 was discovered by the  
36    customer or would have been discovered by the customer in the exercise  
37    of reasonable care.

38        (4) Remedies provided under this section do not supplant other  
39    remedies available under the common law or another statute.

1       **Sec. 5.** RCW 21.20.430 and 1986 c 304 s 1 are each amended to read  
2 as follows:

3       (1) Any person, who offers or sells a security in violation of any  
4 provisions of RCW 21.20.010 or 21.20.140 through 21.20.230, is liable  
5 to the person buying the security from him or her, who may sue either  
6 at law or in equity to recover the consideration paid for the security,  
7 together with interest at eight percent per annum from the date of  
8 payment, costs, and reasonable attorneys' fees, less the amount of any  
9 income received on the security, upon the tender of the security, or  
10 for damages if he or she no longer owns the security. Damages are the  
11 amount that would be recoverable upon a tender less (a) the value of  
12 the security when the buyer disposed of it and (b) interest at eight  
13 percent per annum from the date of disposition.

14       (2) Any person who buys a security in violation of the provisions  
15 of RCW 21.20.010 is liable to the person selling the security to him or  
16 her, who may sue either at law or in equity to recover the security,  
17 together with any income received on the security, upon tender of the  
18 consideration received, costs, and reasonable attorneys' fees, or if  
19 the security cannot be recovered, for damages. Damages are the value  
20 of the security when the buyer disposed of it, and any income received  
21 on the security, less the consideration received for the security, plus  
22 interest at eight percent per annum from the date of disposition,  
23 costs, and reasonable attorneys' fees.

24       (3) Every person who directly or indirectly controls a seller or  
25 buyer liable under subsection (1) or (2) above, every partner, officer,  
26 director or person who occupies a similar status or performs a similar  
27 function of such seller or buyer, every employee of such a seller or  
28 buyer who materially aids in the transaction, and every broker-dealer,  
29 salesperson, or person exempt under the provisions of RCW 21.20.040 who  
30 materially aids in the transaction is also liable jointly and severally  
31 with and to the same extent as the seller or buyer, unless such person  
32 sustains the burden of proof that he or she did not know, and in the  
33 exercise of reasonable care could not have known, of the existence of  
34 the facts by reason of which the liability is alleged to exist. There  
35 is contribution as in cases of contract among the several persons so  
36 liable.

37       (4)(a) Every cause of action under this statute survives the death  
38 of any person who might have been a plaintiff or defendant.

1 (b) No person may sue under this section more than (~~three~~) five  
2 years after the contract of sale for any violation of the provisions of  
3 RCW 21.20.140 through 21.20.230, or more than (~~three~~) five years  
4 after a violation of the provisions of RCW 21.20.010, either was  
5 discovered by such person or would have been discovered by him or her  
6 in the exercise of reasonable care. No person may sue under this  
7 section if the buyer or seller receives a written rescission offer,  
8 which has been passed upon by the director before suit and at a time  
9 when he or she owned the security, to refund the consideration paid  
10 together with interest at eight percent per annum from the date of  
11 payment, less the amount of any income received on the security in the  
12 case of a buyer, or plus the amount of income received on the security  
13 in the case of a seller.

14 (5) No person who has made or engaged in the performance of any  
15 contract in violation of any provision of this chapter or any rule or  
16 order hereunder, or who has acquired any purported right under any such  
17 contract with knowledge of the facts by reason of which its making or  
18 performance was in violation, may base any suit on the contract. Any  
19 condition, stipulation, or provision binding any person acquiring any  
20 security to waive compliance with any provision of this chapter or any  
21 rule or order hereunder is void.

22 (6) Any tender specified in this section may be made at any time  
23 before entry of judgment.

24 (7) Notwithstanding subsections (1) through (6) of this section, if  
25 an initial offer or sale of securities that are exempt from  
26 registration under RCW 21.20.310 is made by this state or its agencies,  
27 political subdivisions, municipal or quasi-municipal corporations, or  
28 other instrumentality of one or more of the foregoing and is in  
29 violation of RCW 21.20.010(2), and any such issuer, member of the  
30 governing body, committee member, public officer, director, employee,  
31 or agent of such issuer acting on its behalf, or person in control of  
32 such issuer, member of the governing body, committee member, public  
33 officer, director, employee, or agent of such person acting on its  
34 behalf, materially aids in the offer or sale, such person is liable to  
35 the purchaser of the security only if the purchaser establishes  
36 scienter on the part of the defendant. The word "employee" or the word  
37 "agent," as such words are used in this subsection, do not include a  
38 bond counsel or an underwriter. Under no circumstances whatsoever  
39 shall this subsection be applied to require purchasers to establish

1 scientist on the part of bond counsels or underwriters. The provisions  
2 of this subsection are retroactive and apply to any action commenced  
3 but not final before July 27, 1985. In addition, the provisions of  
4 this subsection apply to any action commenced on or after July 27,  
5 1985.

6 NEW SECTION. **Sec. 6.** (1) A broker-dealer owes a fiduciary duty to  
7 a customer when:

8 (a) The broker-dealer has discretionary authority over the  
9 customer's account; or

10 (b) The broker-dealer has substantial control and influence over  
11 the exercise of investment decision making and judgment by the  
12 customer.

13 (2) An investment adviser owes a fiduciary duty to a customer when:

14 (a) The investment adviser has discretionary authority over the  
15 customer's account; or

16 (b) The investment adviser is providing individualized investment  
17 advice to the customer for which the customer has paid a fee.

18 (3) The fiduciary duty owed to customers under subsections (1) and  
19 (2) of this section includes the duty to act with loyalty, in good  
20 faith, and with a high degree of care.

21 (4) This section does not detract from any duties, fiduciary or  
22 otherwise, owed by broker-dealers or investment advisers to customers  
23 under other statutes or at common law.

24 NEW SECTION. **Sec. 7.** Sections 1, 3, 4, and 6 of this act are each  
25 added to chapter 21.20 RCW.

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