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**ENGROSSED SUBSTITUTE SENATE BILL 6172**

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**State of Washington**

**53rd Legislature**

**1994 Regular Session**

**By** Senate Committee on Labor & Commerce (originally sponsored by Senators Moore, Loveland, Quigley, Sheldon, Franklin and Fraser)

Read first time 02/01/94.

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 individual customer  
12 prepared by the broker-dealer or investment adviser for use regarding  
13 investment 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) A broker-dealer, salesperson, investment  
23 adviser, or investment adviser representative who violates:

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

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

29 (ii) Costs; and

30 (iii) Attorneys' fees.

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

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

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

37 (ii) Costs; and

1 (iii) Attorneys' fees.

2 (2) A person who, directly or indirectly, controls a broker-dealer,  
3 salesperson, investment adviser, or investment adviser representative  
4 liable under subsection (1) of this section is also liable jointly and  
5 severally with and to the same extent as the broker-dealer,  
6 salesperson, investment adviser, or investment adviser representative  
7 to that customer if the person:

8 (a) Knew or should have known that the broker-dealer, salesperson,  
9 investment adviser, or investment adviser salesperson was engaging in  
10 the violation; or

11 (b) Failed to establish, maintain, or enforce compliance procedures  
12 reasonably designed to detect the violation and that failure  
13 contributed to the violation.

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

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

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

22 **Sec. 4.** RCW 21.20.430 and 1986 c 304 s 1 are each amended to read  
23 as follows:

24 (1) Any person, who offers or sells a security in violation of any  
25 provisions of RCW 21.20.010 or 21.20.140 through 21.20.230, is liable  
26 to the person buying the security from him or her, who may sue either  
27 at law or in equity to recover the consideration paid for the security,  
28 together with interest at eight percent per annum from the date of  
29 payment, costs, and reasonable attorneys' fees, less the amount of any  
30 income received on the security, upon the tender of the security, or  
31 for damages if he or she no longer owns the security. Damages are the  
32 amount that would be recoverable upon a tender less (a) the value of  
33 the security when the buyer disposed of it and (b) interest at eight  
34 percent per annum from the date of disposition.

35 (2) Any person who buys a security in violation of the provisions  
36 of RCW 21.20.010 is liable to the person selling the security to him or  
37 her, who may sue either at law or in equity to recover the security,  
38 together with any income received on the security, upon tender of the

1 consideration received, costs, and reasonable attorneys' fees, or if  
2 the security cannot be recovered, for damages. Damages are the value  
3 of the security when the buyer disposed of it, and any income received  
4 on the security, less the consideration received for the security, plus  
5 interest at eight percent per annum from the date of disposition,  
6 costs, and reasonable attorneys' fees.

7 (3) Every person who directly or indirectly controls a seller or  
8 buyer liable under subsection (1) or (2) above, every partner, officer,  
9 director or person who occupies a similar status or performs a similar  
10 function of such seller or buyer, every employee of such a seller or  
11 buyer who materially aids in the transaction, and every broker-dealer,  
12 salesperson, or person exempt under the provisions of RCW 21.20.040 who  
13 materially aids in the transaction is also liable jointly and severally  
14 with and to the same extent as the seller or buyer, unless such person  
15 sustains the burden of proof that he or she did not know, and in the  
16 exercise of reasonable care could not have known, of the existence of  
17 the facts by reason of which the liability is alleged to exist. There  
18 is contribution as in cases of contract among the several persons so  
19 liable.

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

22 (b) No person may sue under this section more than (~~three~~) five  
23 years after the contract of sale for any violation of the provisions of  
24 RCW 21.20.140 through 21.20.230, or more than (~~three~~) five years  
25 after a violation of the provisions of RCW 21.20.010, either was  
26 discovered by such person or would have been discovered by him or her  
27 in the exercise of reasonable care. No person may sue under this  
28 section if the buyer or seller receives a written rescission offer,  
29 which has been passed upon by the director before suit and at a time  
30 when he or she owned the security, to refund the consideration paid  
31 together with interest at eight percent per annum from the date of  
32 payment, less the amount of any income received on the security in the  
33 case of a buyer, or plus the amount of income received on the security  
34 in the case of a seller.

35 (5) No person who has made or engaged in the performance of any  
36 contract in violation of any provision of this chapter or any rule or  
37 order hereunder, or who has acquired any purported right under any such  
38 contract with knowledge of the facts by reason of which its making or  
39 performance was in violation, may base any suit on the contract. Any

1 condition, stipulation, or provision binding any person acquiring any  
2 security to waive compliance with any provision of this chapter or any  
3 rule or order hereunder is void.

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

6 (7) Notwithstanding subsections (1) through (6) of this section, if  
7 an initial offer or sale of securities that are exempt from  
8 registration under RCW 21.20.310 is made by this state or its agencies,  
9 political subdivisions, municipal or quasi-municipal corporations, or  
10 other instrumentality of one or more of the foregoing and is in  
11 violation of RCW 21.20.010(2), and any such issuer, member of the  
12 governing body, committee member, public officer, director, employee,  
13 or agent of such issuer acting on its behalf, or person in control of  
14 such issuer, member of the governing body, committee member, public  
15 officer, director, employee, or agent of such person acting on its  
16 behalf, materially aids in the offer or sale, such person is liable to  
17 the purchaser of the security only if the purchaser establishes  
18 scienter on the part of the defendant. The word "employee" or the word  
19 "agent," as such words are used in this subsection, do not include a  
20 bond counsel or an underwriter. Under no circumstances whatsoever  
21 shall this subsection be applied to require purchasers to establish  
22 scienter on the part of bond counsels or underwriters. The provisions  
23 of this subsection are retroactive and apply to any action commenced  
24 but not final before July 27, 1985. In addition, the provisions of  
25 this subsection apply to any action commenced on or after July 27,  
26 1985.

27 NEW SECTION. **Sec. 5.** (1) A broker-dealer owes a fiduciary duty to  
28 a customer when:

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

31 (b) The broker-dealer has substantial control and influence over  
32 the exercise of investment decision making and judgment by the  
33 customer.

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

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

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

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

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

7 NEW SECTION. **Sec. 6.** A new section is added to chapter 21.20 RCW  
8 to read as follows:

9 It is the fundamental policy of the state of Washington that any  
10 provision in an agreement between a broker-dealer and a customer that  
11 restricts venue in a judicial or arbitration proceeding to a place  
12 other than this state shall be of no force and effect.

13 NEW SECTION. **Sec. 7.** Sections 1, 3, and 5 of this act are each  
14 added to chapter 21.20 RCW.

15 NEW SECTION. **Sec. 8.** If any provision of this act or its  
16 application to any person or circumstance is held invalid, the  
17 remainder of the act or the application of the provision to other  
18 persons or circumstances is not affected.

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