

HOUSE BILL NO. 81

INTRODUCED BY D. ROBERTS

BY REQUEST OF THE STATE AUDITOR

A BILL FOR AN ACT ENTITLED: "AN ACT CREATING A SECURITIES RESTITUTION ASSISTANCE FUND; SPECIFYING A MAXIMUM AWARD AND ELIGIBILITY REQUIREMENTS FOR CLAIMANTS; PROVIDING PENALTIES FOR FALSE, INCOMPLETE, OR MISLEADING APPLICATIONS; GRANTING RULEMAKING AUTHORITY TO THE SECURITIES COMMISSIONER; AMENDING SECTIONS 17-7-502 AND 30-10-103, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Short title.** [Sections 1 through 8] may be cited as the "Securities Restitution Assistance Fund Act of Montana".

NEW SECTION. **Section 2. Purpose.** The purpose of [sections 1 through 8] is to provide restitution assistance to victims who:

- (1) were awarded restitution in a final order issued by the commissioner or were awarded restitution in the final order in a legal action initiated by the commissioner; and
- (2) have not received the full amount of restitution ordered before the application for restitution assistance is due.

NEW SECTION. **Section 3. Definitions.** As used in [sections 1 through 8], the following definitions apply:

- (1) "Claimant" means a person who files an application for restitution assistance under this part on behalf of a victim. The claimant and the victim may be the same but do not have to be the same. The term includes the named party in a restitution award in a final order, the executor of a named party in a restitution award in a final order, and the heirs and assigns of a named party in a restitution award in a final order.
- (2) "Department" means the office of the securities commissioner as established in 2-15-1901.
- (3) "Final order" means a final order issued by the commissioner or a final order in a legal action initiated

1 by the commissioner.

2 (4) "Fund" means the securities restitution assistance fund created under [section 3].

3 (5) "Securities violation" means a violation of Title 30, chapter 10, and any related administrative rules.

4 (6) "Victim" means a person who was awarded restitution in a final order.

5

6 **NEW SECTION. Section 4. Creation of securities restitution assistance fund.** (1) There is an
7 account in the state special revenue fund to the credit of the commissioner for use only for securities restitution
8 assistance. This account may be referred to as the "securities restitution assistance fund" or "fund". The money
9 in the fund is statutorily appropriated, as provided in 17-7-502, to the commissioner for the purposes provided
10 in subsection (4).

11 (2) (a) The fund consists of amounts received by the commissioner from persons who have committed
12 securities violations and from persons who have voluntarily contributed to the fund.

13 (b) Amounts received by the commissioner for deposit in the fund do not include administrative penalties
14 or fines imposed under Title 30, chapter 10, and as referenced under the Montana Administrative Procedure Act,
15 Title 2, chapter 4, part 6.

16 (c) The amounts received for the fund may not be placed in the general fund.

17 (3) Amounts received by the commissioner for deposit in the fund must be promptly turned over to the
18 state treasurer for deposit in the fund created under subsection (1).

19 (4) The fund may be used by the commissioner only to pay awards of restitution assistance under
20 [sections 1 through 8].

21

22 **NEW SECTION. Section 5. Eligibility.** (1) The following victims are eligible for restitution assistance:

23 (a) a natural person who is a resident of Montana; or

24 (b) a person, other than a natural person, domiciled in Montana.

25 (2) The commissioner may not award securities restitution assistance under [sections 1 through 8]:

26 (a) to more than one claimant per victim;

27 (b) unless the person ordered to pay restitution has not paid the full amount of restitution owed to the
28 victim before the application for restitution assistance from the fund is due; or

29 (c) if there was no award of restitution in the final order.

30 (3) If an award of restitution in a final order is overturned on appeal, the commissioner may not award

1 restitution assistance under [sections 1 through 8].

2 (4) If, after the commissioner has made a securities restitution assistance award from the fund under
3 [sections 1 through 8], the restitution award in the final order is overturned on appeal and all legal remedies have
4 been exhausted, the claimant shall forfeit the restitution assistance awarded under [sections 1 through 8].

5
6 **NEW SECTION. Section 6. Application for restitution assistance -- maximum amount of**
7 **restitution assistance award.** (1) A person who is eligible for restitution assistance under [sections 1 through
8 8] may submit an application, in a manner and form prescribed by the commissioner, to the department.

9 (2) An application must be received by the department within 2 years after the deadline for payment of
10 restitution established in the final order.

11 (3) The maximum award from the fund for each claimant is the lesser of \$25,000 or 25% of the amount
12 of unpaid restitution awarded in a final order.

13
14 **NEW SECTION. Section 7. False application -- penalties -- statute of limitations.** (1) A claimant who
15 knowingly files or causes to be filed an application for restitution assistance or documents supporting the
16 application any of which contain false, incomplete, or misleading information in any material aspect shall forfeit
17 all restitution assistance provided from the fund.

18 (2) The commissioner may levy a fine of up to \$10,000 on a claimant found to be in violation of
19 subsection (1).

20 (3) A proceeding to determine a violation of subsection (1) must be in accordance with the contested
21 case proceedings in the Montana Administrative Procedure Act, Title 2, chapter 4, parts 6 and 7.

22 (4) Notwithstanding the statutes of limitations provided in 30-10-305 through 30-10-307, any proceeding
23 to determine a violation of subsection (1) must be initiated within 2 years of the date on which the department
24 discovers the violation or, through the use of reasonable diligence, should have discovered the violation,
25 whichever occurs later. Regardless of when the department discovers a violation or should have discovered a
26 violation through the use of reasonable diligence, the department may not initiate a proceeding under this
27 subsection more than 5 years after the date of the violation.

28
29 **NEW SECTION. Section 8. Rulemaking authority.** The commissioner may adopt rules to implement
30 [sections 1 through 8], including but not limited to rules regarding the department's processes for:

- 1 (1) reviewing applications for securities restitution assistance awards;
 2 (2) making recommendations to the commissioner; and
 3 (3) suspending awards or making a proportional payment of awards if the fund balance approaches zero.

4

5 **Section 9.** Section 17-7-502, MCA, is amended to read:

6 **"17-7-502. Statutory appropriations -- definition -- requisites for validity.** (1) A statutory
 7 appropriation is an appropriation made by permanent law that authorizes spending by a state agency without the
 8 need for a biennial legislative appropriation or budget amendment.

9 (2) Except as provided in subsection (4), to be effective, a statutory appropriation must comply with both
 10 of the following provisions:

11 (a) The law containing the statutory authority must be listed in subsection (3).

12 (b) The law or portion of the law making a statutory appropriation must specifically state that a statutory
 13 appropriation is made as provided in this section.

14 (3) The following laws are the only laws containing statutory appropriations: 2-17-105; 5-11-120;
 15 5-11-407; 5-13-403; 7-4-2502; 10-1-108; 10-1-1202; 10-1-1303; 10-2-603; 10-3-203; 10-3-310; 10-3-312;
 16 10-3-314; 10-4-301; 15-1-121; 15-1-218; 15-31-906; 15-35-108; 15-36-332; 15-37-117; 15-39-110; 15-65-121;
 17 15-70-101; 15-70-369; 15-70-601; 16-11-509; 17-3-106; 17-3-112; 17-3-212; 17-3-222; 17-3-241; 17-6-101;
 18 18-11-112; 19-3-319; 19-6-404; 19-6-410; 19-9-702; 19-13-604; 19-17-301; 19-18-512; 19-19-305; 19-19-506;
 19 19-20-604; 19-20-607; 19-21-203; 20-8-107; 20-9-534; 20-9-622; 20-26-1503; 22-3-1004; 23-4-105; 23-5-306;
 20 23-5-409; 23-5-612; 23-7-301; 23-7-402; [section 3]; 37-43-204; 37-51-501; 39-71-503; 41-5-2011; 42-2-105;
 21 44-4-1101; 44-12-206; 44-13-102; 50-4-623; 53-1-109; 53-9-113; 53-24-108; 53-24-206; 60-11-115; 61-3-415;
 22 69-3-870; 75-1-1101; 75-5-1108; 75-6-214; 75-11-313; 77-1-108; 77-2-362; 80-2-222; 80-4-416; 80-11-518;
 23 81-10-103; 82-11-161; 87-1-230; 87-1-603; 87-1-621; 90-1-115; 90-1-205; 90-1-504; 90-3-1003; 90-6-331; and
 24 90-9-306.

25 (4) There is a statutory appropriation to pay the principal, interest, premiums, and costs of issuing,
 26 paying, and securing all bonds, notes, or other obligations, as due, that have been authorized and issued
 27 pursuant to the laws of Montana. Agencies that have entered into agreements authorized by the laws of Montana
 28 to pay the state treasurer, for deposit in accordance with 17-2-101 through 17-2-107, as determined by the state
 29 treasurer, an amount sufficient to pay the principal and interest as due on the bonds or notes have statutory
 30 appropriation authority for the payments. (In subsection (3): pursuant to sec. 10, Ch. 360, L. 1999, the inclusion

1 of 19-20-604 terminates when the amortization period for the teachers' retirement system's unfunded liability is
2 10 years or less; pursuant to sec. 10, Ch. 10, Sp. L. May 2000, secs. 3 and 6, Ch. 481, L. 2003, and sec. 2, Ch.
3 459, L. 2009, the inclusion of 15-35-108 terminates June 30, 2019; pursuant to sec. 17, Ch. 593, L. 2005, and
4 sec. 1, Ch. 186, L. 2009, the inclusion of 15-31-906 terminates January 1, 2015; pursuant to sec. 73, Ch. 44, L.
5 2007, the inclusion of 19-6-410 terminates upon the death of the last recipient eligible under 19-6-709(2) for the
6 supplemental benefit provided by 19-6-709; pursuant to sec. 14, Ch. 374, L. 2009, the inclusion of 53-9-113
7 terminates June 30, 2015; pursuant to sec. 8, Ch. 427, L. 2009, the inclusion of 87-1-230 terminates June 30,
8 2013; and pursuant to sec. 5, Ch. 442, L. 2009, the inclusion of 90-6-331 terminates June 30, 2019.)"

9

10 **Section 10.** Section 30-10-103, MCA, is amended to read:

11 **"30-10-103. Definitions.** When used in parts 1 through 3 of this chapter and [sections 1 through 8],
12 unless the context requires otherwise, the following definitions apply:

13 (1) (a) "Broker-dealer" means any person engaged in the business of effecting transactions in securities
14 for the account of others or for the person's own account.

15 (b) The term does not include:

16 (i) a salesperson, issuer, bank, savings institution, trust company, or insurance company; or

17 (ii) a person who does not have a place of business in this state if the person effects transactions in this
18 state exclusively with or through the issuers of the securities involved in the transactions, other broker-dealers,
19 or banks, savings institutions, trust companies, insurance companies, investment companies as defined in the
20 Investment Company Act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional
21 buyers, whether acting for themselves or as trustee.

22 (2) "Commissioner" means the securities commissioner ~~of this state~~ provided for in 2-15-1901.

23 (3) (a) "Commodity" means:

24 (i) any agricultural, grain, or livestock product or byproduct;

25 (ii) any metal or mineral, including a precious metal, or any gem or gem stone, whether characterized as
26 precious, semiprecious, or otherwise;

27 (iii) any fuel, whether liquid, gaseous, or otherwise;

28 (iv) foreign currency; and

29 (v) all other goods, articles, products, or items of any kind.

30 (b) Commodity does not include:

- 1 (i) a numismatic coin with a fair market value at least 15% higher than the value of the metal it contains;
- 2 (ii) real property or any timber, agricultural, or livestock product grown or raised on real property and
3 offered and sold by the owner or lessee of the real property; or
- 4 (iii) any work of art offered or sold by an art dealer at public auction or offered or sold through a private
5 sale by the owner.
- 6 (4) "Commodity Exchange Act" means the federal statute of that name.
- 7 (5) "Commodity futures trading commission" means the independent regulatory agency established by
8 congress to administer the Commodity Exchange Act.
- 9 (6) (a) "Commodity investment contract" means any account, agreement, or contract for the purchase
10 or sale, primarily for speculation or investment purposes and not for use or consumption by the offeree or
11 purchaser, of one or more commodities, whether for immediate or subsequent delivery or whether delivery is
12 intended by the parties and whether characterized as a cash contract, deferred shipment or deferred delivery
13 contract, forward contract, futures contract, installment or margin contract, leverage contract, or otherwise. Any
14 commodity investment contract offered or sold, in the absence of evidence to the contrary, is presumed to be
15 offered or sold for speculation or investment purposes.
- 16 (b) A commodity investment contract does not include a contract or agreement that requires, and under
17 which the purchaser receives, within 28 calendar days after the payment in good funds of any portion of the
18 purchase price, physical delivery of the total amount of each commodity to be purchased under the contract or
19 agreement. The purchaser is not considered to have received physical delivery of the total amount of each
20 commodity to be purchased under the contract or agreement when the commodity or commodities are held as
21 collateral for a loan or are subject to a lien of any person when the loan or lien arises in connection with the
22 purchase of each commodity or commodities.
- 23 (7) (a) "Commodity option" means any account, agreement, or contract giving a party to the account,
24 agreement, or contract the right but not the obligation to purchase or sell one or more commodities or one or more
25 commodity contracts, whether characterized as an option, privilege, indemnity, bid, offer, put, call, advance
26 guaranty, decline guaranty, or otherwise.
- 27 (b) The term does not include an option traded on a national securities exchange registered with the U.S.
28 securities and exchange commission.
- 29 (8) (a) "Federal covered adviser" means a person who is registered under section 203 of the Investment
30 Advisers Act of 1940.

1 (b) ~~The term does not include a person who would be exempt from the definition of investment adviser~~
2 ~~pursuant to subsection (11)(c)(i), (11)(c)(ii), (11)(c)(iii), (11)(c)(iv), (11)(c)(v), (11)(c)(vi), (11)(c)(vii), or (11)(c)(ix).~~
3 A federal covered adviser is not an investment adviser as defined in subsection (11).

4 (9) "Federal covered security" means a security that is a covered security under section 18(b) of the
5 Securities Act of 1933 or rules promulgated by the commissioner.

6 (10) "Guaranteed" means guaranteed as to payment of principal, interest, or dividends.

7 (11) (a) "Investment adviser" means a person who, for compensation, engages in the business of
8 advising others, either directly or through publications or writings, as to the value of securities or as to the
9 advisability of investing in, purchasing, or selling securities or who, for compensation and as a part of a regular
10 business, issues or promulgates analyses or reports concerning securities.

11 (b) The term includes a financial planner or other person who:

12 (i) as an integral component of other financially related services, provides the investment advisory
13 services described in subsection (11)(a) to others for compensation, as part of a business; or

14 (ii) represents to any person that the financial planner or other person provides the investment advisory
15 services described in subsection (11)(a) to others for compensation.

16 (c) Investment adviser does not include:

17 (i) an investment adviser representative;

18 (ii) a bank, savings institution, trust company, or insurance company;

19 (iii) a lawyer or accountant whose performance of these services is solely incidental to the practice of the
20 person's profession or who does not accept or receive, directly or indirectly, any commission, payment, referral,
21 or other remuneration as a result of the purchase or sale of securities by a client, does not recommend the
22 purchase or sale of specific securities, and does not have custody of client funds or securities for investment
23 purposes;

24 (iv) a registered broker-dealer whose performance of services described in subsection (11)(a) is solely
25 incidental to the conduct of business and for which the broker-dealer does not receive special compensation;

26 (v) a publisher of any newspaper, news column, newsletter, news magazine, or business or financial
27 publication or service, whether communicated in hard copy form or by electronic means or otherwise, that does
28 not consist of the rendering of advice on the basis of the specific investment situation of each client;

29 (vi) a person whose advice, analyses, or reports relate only to securities exempted by 30-10-104(1);

30 (vii) an engineer or teacher whose performance of the services described in subsection (11)(a) is solely

1 incidental to the practice of the person's profession;

2 (viii) a federal covered adviser; or

3 (ix) other persons not within the intent of this subsection (11) as the commissioner may by rule or order
4 designate.

5 (12) (a) "Investment adviser representative" means:

6 (i) any partner of, officer of, director of, or a person occupying a similar status or performing similar
7 functions, or other individual, except clerical or ministerial personnel, employed by or associated with an
8 investment adviser who:

9 (A) makes any recommendation or otherwise renders advice regarding securities to clients;

10 (B) manages accounts or portfolios of clients;

11 (C) solicits, offers, or negotiates for the sale or sells investment advisory services; or

12 (D) supervises employees who perform any of the foregoing; and

13 (ii) with respect to a federal covered adviser, any person who is an investment adviser representative with
14 a place of business in this state as those terms are defined by the securities and exchange commission under
15 the Investment Advisers Act of 1940.

16 (b) The term does not include a salesperson registered pursuant to 30-10-201(1) whose performance
17 of the services described in subsection (12)(a) is solely incidental to the conduct of business as a salesperson
18 and for which the salesperson does not receive special compensation other than fees relating to the solicitation
19 or offering of investment advisory services of a registered investment adviser or of a federal covered adviser who
20 has made a notice filing under parts 1 through 3 of this chapter and [sections 1 through 8].

21 (13) "Issuer" means any person who issues or proposes to issue any security, except that with respect
22 to certificates of deposit, voting-trust certificates, or collateral-trust certificates or with respect to certificates of
23 interest or shares in an unincorporated investment trust not having a board of directors, or persons performing
24 similar functions, or of the fixed, restricted management, or unit type, the term "issuer" means the person or
25 persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the
26 trust or other agreement or instrument under which the security is issued.

27 (14) "Nonissuer" means not directly or indirectly for the benefit of the issuer.

28 (15) "Offer" or "offer to sell" includes each attempt or offer to dispose of or solicitation of an offer to buy
29 a security or interest in a security for value.

30 (16) "Person", ~~for the purpose of parts 1 through 3 of this chapter,~~ means an individual, a corporation,

1 a partnership, an association, a joint-stock company, a trust in which the interests of the beneficiaries are
2 evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government.

3 (17) "Precious metal" means the following, in coin, bullion, or other form:

4 (a) silver;

5 (b) gold;

6 (c) platinum;

7 (d) palladium;

8 (e) copper; and

9 (f) other items as the commissioner may by rule or order specify.

10 (18) "Registered broker-dealer" means a broker-dealer registered pursuant to 30-10-201.

11 (19) "Sale" or "sell" includes each contract of sale of, contract to sell, or disposition of a security or
12 interest in a security for value.

13 (20) (a) "Salesperson" means an individual other than a broker-dealer who represents a broker-dealer
14 or issuer in effecting or attempting to effect sales of securities. A partner, officer, or director of a broker-dealer
15 or issuer is a salesperson only if the person otherwise comes within this definition.

16 (b) Salesperson does not include an individual who represents:

17 (i) an issuer in:

18 (A) effecting a transaction in a security exempted by 30-10-104(1), ~~(2)~~, through (3); or (8), ~~(9)~~, ~~(10)~~, ~~or~~
19 through (11);

20 (B) effecting transactions exempted by 30-10-105, except when registration as a salesperson, pursuant
21 to 30-10-201, is required by 30-10-105 or by any rule promulgated under 30-10-105;

22 (C) effecting transactions in a federal covered security described in section 18(b)(4)(D) of the Securities
23 Act of 1933 if a commission or other remuneration is not paid or given directly or indirectly for soliciting a
24 prospective buyer; or

25 (D) effecting transactions with existing employees, partners, or directors of the issuer if no commission
26 or other remuneration is paid or given directly or indirectly for soliciting any person in this state; or

27 (ii) a broker-dealer in effecting in this state solely those transactions described in section 15(h)(2) of the
28 Securities Exchange Act of 1934.

29 (21) "Securities Act of 1933", "Securities Exchange Act of 1934", "Public Utility Holding Company Act of
30 1935", "Investment Advisors Act of 1940", and "Investment Company Act of 1940" mean the federal statutes of

1 those names.

2 (22) (a) "Security" means any note, stock, treasury stock, bond, commodity investment contract,
3 commodity option, debenture, evidence of indebtedness, certificate of interest or participation in any
4 profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable
5 shares, investment contract, voting-trust certificate, certificate of deposit for a security, viatical settlement
6 purchase agreement, certificate of interest or participation in an oil, gas, or mining title or lease or in payments
7 out of production under a title or lease, or, in general, any interest or instrument commonly known as a security,
8 any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities,
9 including any interest in a security or based on the value of a security, or any certificate of interest or participation
10 in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase
11 any of the foregoing.

12 (b) Security does not include an insurance or endowment policy or annuity contract under which an
13 insurance company promises to pay a fixed sum of money either in a lump sum or periodically for life or some
14 other specified period.

15 (23) "State" means any state, territory, or possession of the United States, as well as the District of
16 Columbia and Puerto Rico.

17 (24) "Transact", "transact business", or "transaction" includes the meanings of the terms "sale", "sell",
18 and "offer".

19
20 **NEW SECTION. Section 11. Codification instruction.** [Sections 1 through 8] are intended to be
21 codified as an integral part of Title 30, chapter 10, and the provisions of Title 30, chapter 10, apply to [sections
22 1 through 8].

23
24 **NEW SECTION. Section 12. Severability.** If a part of [this act] is invalid, all valid parts that are
25 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications,
26 the part remains in effect in all valid applications that are severable from the invalid applications.

27
28 **NEW SECTION. Section 13. Effective date.** [This act] is effective on passage and approval.

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30 **NEW SECTION. Section 14. Applicability.** [This act] applies to final orders issued on or after [the

1 effective date of this act].

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