

1 State of Arkansas
2 89th General Assembly
3 Regular Session, 2013
4

A Bill

SENATE BILL 665

5 By: Senator Rapert
6 By: Representatives Dale, Perry
7

For An Act To Be Entitled

9 AN ACT TO AMEND VARIOUS STATE SECURITIES LAWS; TO
10 REGULATE SECURITIES TRANSACTIONS AND CLARIFY THE
11 RIGHTS AND DUTIES OF PARTIES TO SECURITIES
12 TRANSACTIONS; AND FOR OTHER PURPOSES.
13

Subtitle

14
15 TO AMEND VARIOUS STATE SECURITIES LAWS;
16 AND TO REGULATE SECURITIES TRANSACTIONS
17 AND CLARIFY THE RIGHTS AND DUTIES OF
18 PARTIES TO SECURITIES TRANSACTIONS.
19
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21

22 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
23

24 SECTION 1. Arkansas Code § 23-42-102(1)(A), concerning the definition
25 of an agent under the Arkansas Securities Act, is amended to read as follows:

26 (1)(A) "Agent" means an individual, other than a broker-dealer,
27 who:

28 (i) Represents a broker-dealer or issuer in
29 effecting or attempting to effect purchases or sales of securities; ~~and~~ or

30 (ii) Supervises individuals who effect or attempt to
31 effect purchases or sales of securities for a broker-dealer.
32

33 SECTION 2. Arkansas Code § 23-42-102(1)(B)(i)(c), concerning the
34 definition of an agent under the Arkansas Securities Act, is amended to read
35 as follows:

36 (c) Effecting transactions in covered



1 securities exempted by:

2 ~~(1) section~~ Section 18(b)(3) or section
3 ~~18(b)(4)(C)~~ of the Securities Act of 1933, concerning sales to qualified
4 purchasers;

5 (2) Section 18(b)(4)(D) of the
6 Securities Act of 1933, concerning sales of securities exempt under Section
7 3(a) of the Securities Act of 1933; and or

8 ~~(3) any other transactions in a covered~~
9 ~~security which the commissioner may by rule~~ Rule or order prescribe of the
10 commissioner;

11
12 SECTION 3. The introductory language of Arkansas Code § 23-42-102(14),
13 concerning the definition of a representative under the Arkansas Securities
14 Act, is amended to read as follows:

15 (14) "Representative" means any partner, officer, director of an
16 investment adviser, or a person occupying a similar status or performing
17 similar functions, or other individual employed by or associated with an
18 investment adviser, except clerical or ministerial personnel, who for
19 compensation:

20
21 SECTION 4. Arkansas Code § 23-42-106 is amended to read as follows:

22 23-42-106. Civil liability.

23 (a)(1) ~~Any A person who commits the following acts is liable to the~~
24 ~~person buying the security from him or her, who may sue either at law or in~~
25 ~~equity to recover the consideration paid for the security, together with~~
26 ~~interest at six percent (6%) per year from the date of payment, costs, and~~
27 ~~reasonable attorney's fees, less the amount of any income received on the~~
28 ~~security, upon the tender of the security, or for damages if he or she no~~
29 ~~longer owns the security~~ a buyer of a security if the person offers or sells
30 the security:

31 (A) ~~Offers or sells a security in~~ In violation of § 23-42-
32 301, § 23-42-212(b), § 23-42-501(1) or (2), ~~or any a rule or order of~~ of the
33 Securities Commissioner under § 23-42-502 which requires the affirmative
34 approval of sales literature before it is used, or ~~in violation of~~ any
35 condition imposed under § 23-42-403(d), § 23-42-404(g), or § 23-42-404(i); or

36 (B) ~~Offers or sells a security by~~ By means of ~~any an~~

1 untrue statement of a material fact or ~~any omission~~ a failure to state a
2 material fact necessary in order to make the ~~statements~~ statement made, in
3 the light of circumstances under which ~~they are~~ it is made, not misleading,
4 if the buyer does not ~~knowing~~ know of the untruth or omission, and ~~who does~~
5 ~~not sustain~~ meets the burden of proof that he or she did not know, and in the
6 exercise of reasonable care could not have known, of the untruth or omission.

7 (2) In a successful action under subdivision (a)(1) of this
8 section, the buyer may recover costs and reasonable attorney’s fees plus:

9 (A) Upon tender of the security, the consideration paid
10 for the security and interest at six percent (6%) per year from the date of
11 payment, less the amount of any income received from owning the security; or

12 (B)(i) Damages if the buyer no longer owns the security.

13 (ii) Damages are the amount that would be
14 recoverable upon a tender of the security less the value of the security when
15 the buyer disposed of ~~it and~~ the security plus interest at six percent (6%)
16 per year from the date of disposition of the security.

17 (b)(1) ~~Any~~ A person who purchases a security in violation of §§ 23-42-
18 301, 23-42-307, 23-42-507, and 23-42-508, or otherwise by means of ~~any an~~ an
19 untrue statement of a material fact or ~~any omission~~ a failure to state a
20 material fact necessary in order to make the ~~statements~~ statement made, in
21 light of the circumstances under which ~~they are~~ it is made, not misleading,
22 the is liable to a seller of the security if the seller does not knowing know
23 of the untruth or omission, and ~~who shall not sustain~~ meets the burden of
24 proof that ~~he or she~~ the seller did not know, and in the exercise of
25 reasonable care could not have known, of the untruth or omission, ~~shall be~~
26 ~~liable to the person selling the security to him or her, who may sue either~~
27 ~~at law or in equity to.~~

28 (2)(A) In a successful action under subdivision (b)(1) of this
29 section, the seller may recover costs and reasonable attorney’s fees plus:

30 (i) Upon tender of the consideration the seller
31 received in a transaction under subdivision (b)(1) of this section:

32 (a) ~~either the~~ The security; or

33 (b) ~~the~~ The security plus any income or other
34 distributions in cash or other property received directly or indirectly by
35 the purchaser, or

36 (ii)(a) ~~upon tender of the consideration the seller~~

1 ~~received or for damages~~ Damages together with interest at six percent (6%)
2 per year from the date of purchase ~~plus costs and reasonable attorney's fees.~~

3 ~~(2)(b)~~ Damages may be for include out-of-
4 pocket losses or losses for the benefit of the bargain.

5 ~~(3)(B)~~ Notice of willingness to pay the amount specified in
6 exchange for the security shall constitute is a valid tender under
7 subdivision (b)(2)(A)(i) of this section pending acceptance ~~thereof~~ of the
8 tender by the purchaser.

9 (c)(1) ~~Every person who controls a seller liable under subsection (a)~~
10 ~~of this section or a purchaser liable under subsection (b) of this section;~~
11 ~~every partner, officer, or director of such a seller or purchaser; every~~
12 ~~person occupying a similar status or performing a similar function; every~~
13 ~~employee of such a seller or purchaser who materially aids in the sale; and~~
14 ~~every broker-dealer or agent who materially aids in the sale are also liable~~
15 ~~jointly and severally with, and to the same extent as, the seller or~~
16 ~~purchaser, unless the nonseller or nonpurchaser who is so liable sustains the~~
17 ~~burden of proof that he or she did not know, and in the exercise of~~
18 ~~reasonable care could not have known, of the existence of the facts by reason~~
19 ~~of which the liability is alleged to exist. There is contribution as in cases~~
20 ~~of contract among the several persons so liable. A person that directly or~~
21 indirectly receives consideration for providing investment advice to another
22 party:

23 (A) In violation of § 23-42-301 is liable to the other
24 party for the consideration paid for the advice, interest at the rate of six
25 percent (6%) per year from the date of payment, costs, and a reasonable
26 attorney's fee; or

27 (B) By employing a device, scheme, or artifice to defraud
28 the other party or engages in an act, practice, or course of business that
29 operates or would operate as a fraud or deceit upon the other party is liable
30 to the other party for:

31 (i) The consideration paid for the advice plus
32 interest at the rate of six percent (6%) per year from the date of payment;

33 (ii) Damages caused by the fraudulent or deceitful
34 conduct less the amount of any income received as a result of the fraudulent
35 or deceitful conduct;

36 (iii) Costs; and

1 (iv) A reasonable attorney's fee.

2 (2) Subdivision (c)(1) of this section does not apply to a
 3 broker-dealer or its agents if:

4 (A) The investment advice provided is solely incidental to
 5 transacting business as a broker-dealer; and

6 (B) No special compensation is paid for the investment
 7 advice.

8 (d)(1) A secondary offender has joint and several liability with a
 9 right of contribution for the actions of a primary offender unless the
 10 secondary offender satisfies the burden of proving that the secondary
 11 offender did not know, and in the exercise of reasonable care could not have
 12 known, of the existence of the actions of a primary offender that give rise
 13 to liability under this section.

14 (2) As used in subdivision (d)(1) of this section:

15 (A) "Primary offender" means a person that is liable under
 16 subsection (a), subsection (b), or subsection (c) of this section; and

17 (B) "Secondary offender" means:

18 (i) A person that controls a primary offender;

19 (ii) A partner, officer, or director of a primary
 20 offender and any other person occupying a similar status or performing a
 21 similar function with respect to the primary offender;

22 (iii) An employee of a primary offender who
 23 materially aids in the actions of a primary offender that give rise to
 24 liability under this section; and

25 (iv) A broker-dealer, agent, investment adviser, or
 26 investment adviser representative that materially aids in the actions of a
 27 primary offender that give rise to liability under this section.

28 ~~(d)(e)~~ Any A tender specified in required by this section may be made
 29 at any time before entry of judgment.

30 ~~(e)(f)~~ Every cause of action under this section survives the death of
 31 any a person who might have been a plaintiff or defendant.

32 ~~(f)(g)~~ No A person may not sue under this section after unless the
 33 action is instituted within three (3) years from the effective date of the
 34 contract of sale after the violation occurred.

35 (h) No A person may not sue under this section:

36 (1) If the buyer received a written offer, before suit and at a

1 time when he or she owned the security, to refund the consideration paid
2 together with interest at six percent (6%) per year from the date of payment
3 less the amount of any income received on the security, and he or she failed
4 to accept the offer within thirty (30) days of its receipt; or

5 (2) If the buyer received such an offer before suit and at a
6 time when he or she did not own the security unless he or she rejected the
7 offer in writing within thirty (30) days of its receipt.

8 ~~(g)(i) No~~ A person who has made or engaged in the performance of ~~any a~~
9 contract in violation of ~~any provision~~ of this chapter or any rule or order
10 ~~hereunder~~ of the commissioner, or who has acquired any purported right under
11 ~~any such~~ the contract with knowledge of the facts by reason of which its
12 making or performance was in violation, ~~may base any suit~~ not sue on the
13 contract.

14
15 SECTION 5. Arkansas Code § 23-42-213(c), concerning the funding of the
16 Investor Education Fund and the Securities Department Fund, is amended to
17 read as follows:

18 ~~(c)(1) The Investor Education Fund shall be funded initially by the~~
19 ~~transfer of one hundred thousand dollars (\$100,000) from the Securities~~
20 ~~Department Fund.~~

21 ~~(2) All funds~~ Funds in excess of one hundred fifty thousand
22 dollars (\$150,000) collected in any one (1) fiscal year shall be designated
23 as special revenues and deposited into the Securities Department Fund.

24
25 SECTION 6. Arkansas Code § 23-42-301(b)(4), concerning concurrent
26 registration under the Arkansas Securities Act, is repealed.

27 ~~(4) The commissioner may by rule establish provisions for~~
28 ~~concurrent registration with more than one (1) broker-dealer or issuer.~~

29
30 SECTION 7. Arkansas Code § 23-42-301(c), concerning registered
31 investment advisors with the Securities and Exchange Commission, is amended
32 to read as follows:

33 (c) It is unlawful for a person to transact business in this state as
34 an investment adviser or investment adviser representative without first
35 being registered under this chapter unless the person:

36 (1) Is registered as an investment adviser with the Securities

1 and Exchange Commission under Section 203 of the Investment Advisers Act of
 2 1940, 15 U.S.C. § 80b-1 et seq., as it existed on ~~January 1, 2011~~ January 1,
 3 2013, and has filed with the commissioner or the commissioner's designee a
 4 notice filing consisting of:

5 (A) A copy of documents on file with the Securities and
 6 Exchange Commission that the commissioner may by rule or order prescribe; and

7 (B) The fee set forth in § 23-42-304(a)(3); ~~and~~

8 ~~(C) A consent to service of process;~~

9 (2) ~~Is a "representative" of an investment adviser registered~~
 10 ~~with the Securities and Exchange Commission under Section 203 of the~~
 11 ~~Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 et seq., as it existed on~~
 12 ~~January 1, 2011, and has no place of business located in this state; or~~

13 ~~(3) Is not registered as an investment adviser with the~~
 14 ~~Securities and Exchange Commission under Section 203 of the Investment~~
 15 ~~Advisers Act of 1940, 15 U.S.C. § 80b-1 et seq., as it existed on ~~January 1,~~~~
 16 ~~2011 January 1, 2013, because the person is not an investment adviser under~~
 17 ~~Section 202(a)(11) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1~~
 18 ~~et seq., as it existed on ~~January 1, 2011.~~ January 1, 2013;~~

19 (3) Is a "representative" of an investment adviser registered
 20 with the United States Securities and Exchange Commission under Section 203
 21 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 et seq., as it
 22 existed on January 1, 2013, and has no place of business located in this
 23 state; or

24 (4) Is a supervised person of an investment adviser registered
 25 with the United States Securities and Exchange Commission, but is not an
 26 investment adviser representative as defined by Rule 203A-3 of the rules and
 27 regulations of the Investment Advisers Act of 1940, 17 C.F.R. § 275, as they
 28 existed on January 1, 2013.

29
 30 SECTION 8. Arkansas Code § 23-42-301(f)(2)(B), concerning the
 31 requirement of a broker-dealer to appoint qualified agents to supervise its
 32 business in this state, is amended to read as follows:

33 (B) Appointment of at least one (1) agent of the broker-
 34 dealer, who is registered in Arkansas and ~~shall meet~~ meets the qualifications
 35 and ~~carry out~~ performs the supervisory responsibilities of the broker-dealer
 36 for activities in this state under rules established by the commissioner.

1
2 SECTION 9. Arkansas Code § 23-42-301(g)(2)(B), concerning the
3 requirement of an investment adviser to appoint qualified representatives to
4 supervise its business in this state, is amended to read as follows:

5 (B) Appointment of at least one (1) representative of the
6 investment adviser, who is registered in Arkansas and ~~shall meet~~ meets the
7 qualifications and ~~carry out~~ performs the supervisory responsibilities of the
8 investment adviser for activities in this state under rules established by
9 the commissioner.

10
11 SECTION 10. Arkansas Code § 23-42-301, concerning registration and
12 supervision requirements of broker-dealers, agents, and investment advisers
13 under the Arkansas Securities Act, is amended to add an additional subsection
14 to read as follows:

15 (h) The commissioner may by rule establish concurrent registration
16 with a broker-dealer, issuer, or investment adviser or any combination of
17 broker-dealers, issuers, and investment advisers.

18
19 SECTION 11. Arkansas Code § 23-42-308(a)(2)(F)(i), concerning the
20 action against a registration under the Arkansas Securities Act, is amended
21 to add an additional subdivision to read as follows:

22 (g) The insurance administrator of any state.

23
24 SECTION 12. Arkansas Code § 23-42-308(d), concerning actions by the
25 Arkansas Securities Commissioner, is amended to read as follows:

26 (d) ~~If the~~ The commissioner may by summary order cancel a registration
27 or application if he or she finds that any registrant or applicant:

28 (1) is Is no longer in existence, ~~or;~~

29 (2) has Has ceased to do business as a broker-dealer, agent,
30 investment adviser, or representative, ~~;~~ or

31 (3) is Is subject to an adjudication of mental incompetence or
32 to the control of a committee, conservator, or guardian, ~~or cannot be located~~
33 after a reasonable search, ~~then the commissioner may by order cancel the~~
34 ~~registration or application.~~

35
36 SECTION 13. Arkansas Code § 23-42-504(a)(7), concerning transactions

1 by exempt registrants, is amended to read as follows:

2 (7) ~~Any transactions~~ A transaction by a person exempted from
3 registration under § 23-42-102(3)(B)(v), ~~provided that~~ if the transaction
4 would be lawful in the place of residence of the offeree or purchaser had it
5 occurred there instead of in this state;

6
7 SECTION 14. Arkansas Code § 23-42-509(c) – (g), concerning covered
8 securities, are amended to read as follows:

9 (c)(1) With respect to ~~any security that is~~ a covered security under
10 ~~Section 18(b)(4)(D)~~ Section 18(b)(4)(E) of the Securities Act of 1933, the
11 commissioner, ~~by rule or order,~~ may by rule or order require that the issuer
12 no later than fifteen (15) days after the first sale of a covered security,
13 the issuer:

14 (A) ~~to file~~ File a notice on ~~SEC~~ United States Securities
15 and Exchange Commission Form D; ~~and~~

16 (B) Submit a consent to service of process signed by the
17 issuer ~~no later than fifteen (15) days after the first sale of a such covered~~
18 ~~security in this state, together with;~~ and

19 (C)(i) Pay a fee in the amount of one-tenth percent (0.1%)
20 of the maximum aggregate offering price at which the securities are to be
21 offered in this state,

22 (ii) ~~but the~~ The fee shall ~~in no case be less than be~~
23 at least one hundred dollars (\$100) ~~or~~ and no more than five hundred dollars
24 (\$500).

25 (2) After the initial offer of ~~such the~~ covered securities
26 security in this state, any amendment to ~~SEC~~ United States Securities and
27 Exchange Commission Form D filed with the Securities and Exchange Commission
28 under the Securities Act of 1933 shall be filed concurrently with the
29 commissioner.

30 (3) Unless an issuer conducts a continuous offering and files
31 concurrent amendments as required by subdivision (c)(2) of this section, an
32 offering under subdivision (c)(1) of this section is effective for twelve
33 (12) months from the date of the filing.

34 (d) ~~The commissioner, by rule or order, may require the filing of any~~
35 ~~document filed with the Securities and Exchange Commission under the~~
36 ~~Securities Act of 1933 with respect to a covered security under Section~~

1 ~~18(b)(3) or (b)(4) of the Securities Act of 1933, other than those securities~~
 2 ~~under subsection (c) of this section, together with a fee in the amount of~~
 3 ~~one hundred dollars (\$100). With respect to a covered security under Section~~
 4 ~~18(b)(4)(C) of the Securities Act of 1933, if the issuer's principal place of~~
 5 ~~business is located in this state or purchasers of fifty percent (50%) or~~
 6 ~~greater of the aggregate amount of the offering are residents of this state,~~
 7 ~~the commissioner may by rule or order require the issuer to:~~

8 (1) File concurrently with the commissioner the information
 9 required to be filed with the United States Securities and Exchange
 10 Commission under Section 4A(b) of the Securities Act of 1933; and

11 (2)(A) Except as provided in subdivision (d)(2)(B) of this
 12 section, pay a fee in the amount of one-tenth percent (0.1%) of the maximum
 13 aggregate offering price at which the securities are to be offered in this
 14 state.

15 (B) The fee shall be at least one hundred dollars (\$100)
 16 and no more than five hundred dollars (\$500).

17 (e) In addition to a filing required by subsection (c) or subsection
 18 (d) of this section, the commissioner may by rule or order require:

19 (1) The concurrent filing of any document filed with the
 20 Securities and Exchange Commission under the Securities Act of 1933
 21 concerning a covered security under Section 18(b)(3) or Section 18(b)(4) of
 22 the Securities Act of 1933 as it existed on January 1, 2013; and

23 (2) A fee of one hundred dollars (\$100) for the filing.

24 ~~(e)(f)~~ (f) The commissioner may issue a stop order suspending the offer
 25 and sale of a covered security, except a covered security under ~~section~~
 26 Section 18(b)(1) of the Securities Act of 1933, if he or she finds that:

27 (1) The order is in the public interest; and

28 (2) ~~There is a~~ A failure to comply with ~~any condition~~
 29 ~~established under~~ this section exists.

30 ~~(f)(g)~~ (g) The commissioner, by rule or order, may waive any or all of the
 31 provisions of this section.

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