

Senate Bill 495

Sponsored by Senator BONAMICI (Pre-session filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Requires court or arbitrator to award reasonable attorney fees to prevailing plaintiff in action for fraud or based on untrue statement or omission of material fact in connection with sale or purchase of security.

Provides that condition, stipulation or provision that binds person to waive compliance with Oregon Securities Law or rule adopted or order issued under Oregon Securities Law is void.

Permits Director of Department of Consumer and Business Services to recover costs and reasonable attorney fees in action for violation of Oregon Securities Law or rule adopted or order issued under Oregon Securities Law. Prohibits court from requiring director to post bond in connection with action.

A BILL FOR AN ACT

1
2 Relating to sales of securities subject to the Oregon Securities Law; creating new provisions; and
3 amending ORS 59.115, 59.127, 59.137 and 59.255.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 59.115 is amended to read:

6 59.115. (1) A person is liable as provided in subsection (2) of this section to a purchaser of a
7 security if the person:

8 (a) Sells or successfully solicits the sale of a security, other than a federal covered security, in
9 violation of the Oregon Securities Law or of *[any]* a condition, limitation or restriction imposed upon
10 a registration or license under the Oregon Securities Law; or

11 (b) Sells or successfully solicits the sale of a security:

12 (A) In violation of ORS 59.135 (1) or (3); or

13 (B) By means of an untrue statement of a material fact or an omission to state a material fact
14 necessary *[in order to make the statements made, in light of the circumstances under which they are*
15 *made,]* **to make the statements** not misleading, **in light of the circumstances under which the**
16 **statements were made, if:**

17 (i) *[(The buyer [not knowing] does not know of the untruth or omission),]*; and

18 (ii) **The person** *[who]* does not sustain the burden of proof that the person did not know, and
19 in the exercise of reasonable care could not have known, of the untruth or omission.

20 (2) The purchaser may recover:

21 (a) Upon tender of the security, the consideration paid for the security, and interest from the
22 date of payment equal to the greater of the rate of interest specified in ORS 82.010 for judgments
23 for the payment of money or the rate provided in the security if the security is an interest-bearing
24 obligation, less any amount received on the security; or

25 (b) If the purchaser no longer owns the security, damages in the amount that would be recov-
26 erable upon a tender, less the value of the security when the purchaser disposed of *[it]* **the security**
27 and less interest on *[such]* **the** value at the rate of interest specified in ORS 82.010 for judgments

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted.
New sections are in **boldfaced** type.

1 for the payment of money from the date of disposition.

2 (3) *[Every person who]* **A person that** directly or indirectly controls a seller liable under sub-
 3 section (1) of this section, every partner, limited liability company manager, including a member who
 4 is a manager, officer or director of *[such]* **the** seller, every person occupying a similar status or
 5 performing similar functions, and every person *[who]* **that** participates or materially aids in the sale
 6 is also liable jointly and severally with and to the same extent as the seller, unless the nonseller
 7 sustains the burden of proof that the nonseller did not know, and, in the exercise of reasonable care,
 8 could not have known, of the existence of facts on which the liability is based. *[Any]* **A person held**
 9 liable under this section *[shall be]* **is** entitled to contribution from *[those]* **a person that is** jointly
 10 and severally liable with *[that]* **the person that is held liable.**

11 (4) Notwithstanding the provisions of subsection (3) of this section, a person whose sole function
 12 in connection with the sale of a security is to provide ministerial functions of escrow, custody or
 13 deposit services in accordance with applicable law is liable only if the person participates or mate-
 14 rially aids in the sale and the purchaser sustains the burden of proof that the person knew of the
 15 existence of facts on which liability is based or that the person's failure to know of the existence
 16 of *[such]* **the** facts was the result of the person's recklessness or gross negligence.

17 (5) *[Any]* **A** tender specified in this section may be made at any time before entry of judgment.

18 (6) Except as otherwise provided in this subsection, *[no]* **an** action or suit may **not** be com-
 19 menced under this section more than three years after the sale. An action under this section for a
 20 violation of subsection (1)(b) of this section or ORS 59.135 may be commenced within three years
 21 after the sale or two years after the person *[bringing]* **that brings** the action discovered or should
 22 have discovered the facts on which the action is based, whichever is later. Failure to commence an
 23 action on a timely basis is an affirmative defense.

24 (7) An action may not be commenced under this section solely because an offer was made prior
 25 to registration of the securities.

26 (8) *[Any person having]* **A person that has** a right of action **under this section** against a
 27 broker-dealer[,] **or** state investment adviser, or against a salesperson or investment adviser repre-
 28 sentative acting within the course and scope or apparent course and scope of authority of the
 29 salesperson or investment adviser representative, *[under this section shall have]* **has** a right of action
 30 under the bond or irrevocable letter of credit provided in ORS 59.175.

31 (9) Subsection (4) of this section *[shall]* **does** not limit the liability of *[any]* **a** person:

32 (a) For conduct other than in the circumstances described in subsection (4) of this section; or

33 (b) Under any other law, including any other provisions of the Oregon Securities Law.

34 (10) *[Except as provided in subsection (11) of this section, the court may award reasonable attorney*
 35 *fees to the prevailing party in an action under this section]* **The court or the arbitrator shall award**
 36 **reasonable attorney fees to the prevailing plaintiff in an action under this section.**

37 *[(11) The court may not award attorney fees to a prevailing defendant under the provisions of*
 38 *subsection (10) of this section if the action under this section is maintained as a class action pursuant*
 39 *to ORCP 32.]*

40 **SECTION 2.** ORS 59.127 is amended to read:

41 59.127. (1) A person is liable as provided in subsection (2) of this section to *[the person selling*
 42 *the]* **another person that sells a** security, if the person:

43 (a) Purchases or successfully solicits the purchase of a security, other than a federal covered
 44 security, in violation of *[any]* **a** condition, limitation or restriction imposed upon a registration under
 45 the Oregon Securities Law; or

1 (b) Purchases or successfully solicits the purchase of a security:

2 (A) In violation of ORS 59.135 (1) or (3); or

3 (B) By means of an untrue statement of a material fact or an omission to state a material fact
4 necessary [in order to make the statements made, in light of the circumstances under which they were
5 made,] **to make the statements** not misleading, **in light of the circumstances under which the**
6 **statements were made, if:**

7 (i) [(The seller **does** not [knowing] **know** of the untruth or omission),]; and [if]

8 (ii) The person does not sustain the burden of proof that the person did not know, and in the
9 exercise of reasonable care could not have known, of the untruth or omission.

10 (2) The seller may recover:

11 (a) Upon a tender of the consideration paid for the security, the security plus interest from the
12 date of purchase equal to the greater of the rate of interest specified in ORS 82.010 for judgments
13 for the payment of money, or the rate provided in the security if the security is an interest-bearing
14 obligation;

15 (b) Damages in the amount that would be recoverable upon a tender, plus any amount received
16 on the security, less the consideration paid for the security; or

17 (c) If the purchaser no longer owns the security, damages equal to the value of the security
18 when the purchaser disposed of [it] **the security** plus interest on [such] **the** value at the rate of
19 interest specified in ORS 82.010 for judgments for the payment of money from the date of disposition,
20 less the consideration paid for the security.

21 (3) [Every person who] **A person that** directly or indirectly controls a purchaser liable under
22 subsection (1) of this section, every partner, limited liability company manager, including a member
23 who is a manager, officer or director of [such] **the** purchaser, every person occupying a similar
24 status or performing similar functions, and every person [who] **that** participates or materially aids
25 in the purchase is also liable jointly and severally with and to the same extent as the purchaser,
26 unless the nonpurchaser sustains the burden of proof that the nonpurchaser did not know, and, in
27 the exercise of reasonable care, could not have known, of the existence of facts on which the li-
28 ability is based. [Any] **A** person held liable under this section [shall be] **is** entitled to contribution
29 from [those] **a person that is** jointly and severally liable with the person **that is held liable**.

30 (4) Notwithstanding the provisions of subsection (3) of this section, a person whose sole function
31 in connection with the purchase of a security is to provide ministerial functions of escrow, custody
32 or deposit services in accordance with applicable law is liable only if the person participates or
33 materially aids in the purchase and the seller sustains the burden of proof that the person knew of
34 the existence of facts on which liability is based or that the person's failure to know of the existence
35 of [such] **the** facts was the result of the person's recklessness or gross negligence.

36 (5) [Any] **A** tender specified in this section may be made at any time before entry of judgment.

37 (6) Except as otherwise provided in this subsection, [no] **an** action or suit may **not** be com-
38 menced under this section more than three years after the purchase. An action under this section
39 for a violation of subsection (1)(b) of this section or ORS 59.135 may be commenced within three
40 years after the purchase or two years after the person [bringing] **that brings** the action discovered
41 or should have discovered the facts on which the action is based, whichever is later. Failure to
42 commence an action on a timely basis is an affirmative defense.

43 (7) [Any person having] **A person that has** a right of action **under this section** against a
44 broker-dealer[,] **or** state investment adviser, or against a salesperson or investment adviser repre-
45 sentative acting within the course and scope or apparent course and scope of the authority of the

1 salesperson or investment adviser representative, *[under this section shall have]* **has** a right of action
 2 under the bond or irrevocable letter of credit provided in ORS 59.175.

3 (8) Subsection (4) of this section *[shall]* **does** not limit the liability of *[any persons]* **a person**:

4 (a) For conduct other than in the circumstances described in subsection (4) of this section; or

5 (b) Under any other law, including any other provisions of the Oregon Securities Law.

6 (9) *[Except as provided in subsection (10) of this section, the court may award reasonable attorney*
 7 *fees to the prevailing party in an action under this section.]* **The court or the arbitrator shall award**
 8 **reasonable attorney fees to the prevailing plaintiff in an action under this section**

9 *[(10) The court may not award attorney fees to a prevailing defendant under the provisions of*
 10 *subsection (9) of this section if the action under this section is maintained as a class action pursuant*
 11 *to ORCP 32.]*

12 **SECTION 3.** ORS 59.137 is amended to read:

13 59.137. (1) *[Any]* **A person** *[who]* **that** violates or materially aids in a violation of ORS 59.135 (1),
 14 (2) or (3) is liable to *[any]* **a purchaser or seller** of the security for the actual damages caused by
 15 the violation, including the amount of any commission, fee or other remuneration paid, together with
 16 interest at the rate specified in ORS 82.010 for judgments for the payment of money, unless the
 17 person *[who]* **that** materially aids in the violation sustains the burden of proof that the person did
 18 not know, and~~[,]~~ in the exercise of reasonable care~~[,]~~ could not have known, of the existence of the
 19 facts on which the liability is based.

20 (2) *[Any person who]* **A person that** directly or indirectly controls a person liable under sub-
 21 section (1) of this section and every partner, limited liability company manager, including a member
 22 who is a manager, officer or director or a person occupying a status or performing functions of a
 23 person liable under subsection (1) of this section, is jointly and severally liable to the same extent
 24 as a person liable under subsection (1) of this section, unless the person *[who]* **that** may be liable
 25 under this subsection sustains the burden of proof that the person did not know, and~~[,]~~ in the exer-
 26 cise of reasonable care~~[,]~~ could not have known, of the existence of the facts on which the liability
 27 is based.

28 (3) *[Any]* **A person** held liable under this section is entitled to contribution from *[those persons]*
 29 **a person that is** jointly and severally liable with *[that]* **the person that is held liable.**

30 (4) *[Except as provided in subsection (5) of this section, the court may award reasonable attorney*
 31 *fees to the prevailing party in an action under this section.]* **The court or the arbitrator shall award**
 32 **reasonable attorney fees to the prevailing plaintiff in an action under this section.**

33 *[(5) The court may not award attorney fees to a prevailing defendant under the provisions of sub-*
 34 *section (4) of this section if the action under this section is maintained as a class action pursuant to*
 35 *ORCP 32.]*

36 *[(6)]* **(5)** An action or suit may be commenced under this section within the later of:

37 (a) Three years after the date of the purchase or sale of a security to which the action or suit
 38 relates; or

39 (b) Two years after the person *[bringing]* **that brings** the action or suit discovered or should
 40 have discovered the facts on which the action or suit is based.

41 *[(7)]* **(6)** Failure to commence an action or suit under this section on a timely basis is an affir-
 42 mative defense.

43 **SECTION 4.** ORS 59.255 is amended to read:

44 59.255. (1) *[Whenever it appears to]* **If** the Director of the Department of Consumer and Business
 45 Services **believes** that a person has engaged, is engaging or is about to engage in an act or practice

1 constituting a violation of *[any]* a provision of the Oregon Securities Law or *[any rule or order of*
 2 *the director]* **a rule adopted or an order issued under the Oregon Securities Law**, the director
 3 may bring suit in the name and on behalf of the State of Oregon in the circuit court of *[any county*
 4 *of]* this state to enjoin the acts or practices and to enforce compliance with the Oregon Securities
 5 Law or *[such]* **the rule or order. The court**, upon a proper showing, **shall grant** a permanent or
 6 temporary injunction, restraining order or writ of mandamus *[shall be granted]*. **The court may not**
 7 **require the director to post a bond to obtain the injunction, order or writ.**

8 (2) The court may fine the person against whom the **court enters the order** *[is entered]* not
 9 more than \$20,000 for each violation¹, *which*. **The fine** shall be entered as a judgment and paid to
 10 the General Fund of the State Treasury. Each violation is a separate offense. In the case of a con-
 11 tinuing violation, each day's continuance is a separate violation, but the maximum penalty for
 12 *[any]* a continuing violation *[shall]* **may** not exceed \$100,000. If the court finds that the defendant
 13 has violated *[any]* a provision of the Oregon Securities Law or *[any such]* **a rule adopted or an or-**
 14 **der issued under the Oregon Securities Law**, the court may appoint a receiver, who may be the
 15 director, for the defendant or the defendant's assets. The court may not require the director to post
 16 a **receiver** bond.

17 (3) *[The court may award reasonable attorney fees to the director if the director prevails in an*
 18 *action under this section. The court may award reasonable attorney fees to a defendant who prevails*
 19 *in an action under this section if the court determines that the director had no objectively reasonable*
 20 *basis for asserting the claim or no reasonable basis for appealing an adverse decision of the trial*
 21 *court.]* **If the director prevails in the action, the director is entitled to costs and reasonable**
 22 **attorney fees at trial and on appeal in an amount that the court shall specify.**

23 (4) The director may include in *[any]* **an** action authorized by this section:

24 (a) A claim for restitution or damages under ORS 59.115, 59.127 or 59.137², on behalf of *[the*
 25 *persons]* **a person** injured by the act or practice constituting the subject matter of the action. The
 26 court *[shall have]* **has** jurisdiction to award appropriate relief to *[such persons]* **the person**, if the
 27 court finds that *[enforcement of]* **enforcing** the rights of *[such persons]* **the person** by private civil
 28 action, whether by class action or otherwise, would be so burdensome or expensive as to be im-
 29 practical; or

30 (b) A claim for disgorgement of illegal gains or profits derived. *[Any]* **A** recovery under this
 31 paragraph *[shall]* **must** be turned over to the General Fund of the State Treasury unless the court
 32 requires other disposition.

33 (5) The provisions of this section do not apply to:

34 (a) A failure to file a notice and pay a fee pursuant to ORS 59.049 (1), (2) or (3);

35 (b) A failure to file a notice and pay a fee pursuant to ORS 59.165 (7);

36 (c) A failure to pay a fee pursuant to ORS 59.175 (8); or

37 (d) A violation of *[any]* **a rule** *[adopted by]* the director *[pursuant to]* **adopts under** ORS 59.049
 38 (1), (2) or (3), 59.165 (7) or 59.175 ³ *[(8)]*.

39 **SECTION 5. Section 6 of this 2011 Act is added to and made a part of the Oregon Secu-**
 40 **rities Law.**

41 **SECTION 6. A condition, stipulation or provision that binds a person that participates in**
 42 **the sale of a security or that receives investment advice to waive compliance with the**
 43 **Oregon Securities Law, or a rule adopted or order issued under the Oregon Securities Law,**
 44 **is void.**

45 **SECTION 7. Section 6 of this 2011 Act and the amendments to ORS 59.115, 59.127, 59.137**

1 **and 59.255 by sections 1 to 4 of this 2011 Act apply to sales and purchases of securities that**
2 **occur on or after the effective date of this 2011 Act.**

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