STATE OF NEW YORK

4873

2017-2018 Regular Sessions

IN ASSEMBLY

February 3, 2017

Introduced by M. of A. DINOWITZ -- read once and referred to the Committee on Corporations, Authorities and Commissions

AN ACT to amend the business corporation law, the limited liability company law, the partnership law, the public authorities law, the general business law, and the retirement and social security law, in relation to auditors' professional responsibility

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. This act shall be known and may be cited as the "integrity in auditing act".

§ 2. The business corporation law is amended by adding a new section 521 to read as follows:

§ 521. Applicability of general business law to business corporations issuing audited financial statements.

Every business corporation organized under this chapter and every foreign corporation (including every foreign professional service corporation) qualified to do business in this state pursuant to this chapter that issues audited financial statements shall be subject to paragraph (a) of subdivision three of section three hundred fifty-two-c of the general business law.

§ 3. The limited liability company law is amended by adding a new section 510 to read as follows:

§ 510. Applicability of general business law to limited liability companies issuing audited financial statements. Every limited liability company organized under this chapter and every foreign limited liability company (including every foreign professional service limited liability company) qualified to do business in this state pursuant to this chapter that issues audited financial statements shall be subject to paragraph (a) of subdivision three of section three hundred fifty-two-c of the general business law.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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§ 4. The partnership law is amended by adding a new section 44-a to read as follows:

§ 44-a. Applicability of general business law to partnerships issuing audited financial statements. Every partnership or limited partnership organized under this chapter and every foreign partnership or limited partnership doing business in or qualified to do business in this state pursuant to this chapter that issues audited financial statements shall be subject to paragraph (a) of subdivision three of section three hundred fifty-two-c of the general business law.

§ 5. The public authorities law is amended by adding a new section 2802-a to read as follows:

§ 2802-a. Applicability of general business law to public service corporations that issue audited financial statements. Every public service corporation organized under this chapter that issues audited financial statements shall be subject to paragraph (a) of subdivision three of section three hundred fifty-two-c of the general business law.

§ 6. Subdivision 1 of section 352 of the general business law, as amended by chapter 961 of the laws of 1960, is amended to read as follows:

1. Whenever it shall appear to the [~~attorney general~~] **attorney general**, either upon complaint or otherwise, that in the advertisement, investment advice, purchase, or sale within this state of any commodity dealt in on any exchange within the United States of America or the delivery of which is contemplated by transfer of negotiable documents of title all of which are hereinafter called commodities, or that in the issuance, exchange, purchase, sale, promotion, negotiation, advertisement, investment advice, or distribution within or from this state, of any stocks, bonds, notes, evidences of interest or indebtedness, or other securities, including oil and mineral deeds or leases and any interest therein, sold or transferred in whole or in part to the purchaser where the same do not effect a transfer of the title in fee simple to the land, or negotiable documents of title, or foreign currency orders, calls, or options therefor, hereinafter called security or securities, any person, partnership, corporation, company, **limited liability company,** trust, or association, or any agent or employee thereof, shall have employed, or employs, or is about to employ any device, scheme or artifice to defraud or for obtaining money or property by means of any false pretense, representation, or promise, or that any person, partnership, corporation, company, **limited liability company,** trust, or association, or any agent or employee thereof, shall have made, makes, or attempts to make within or from this state fictitious or pretended purchases or sales of securities or commodities, or that any person, partnership, corporation, company, **limited liability company,** trust, or association, or agent or employee thereof, shall have employed, or employs, or is about to employ, any deception, misrepresentation, concealment, suppression, fraud, false pretense, or false promise, or shall have engaged in, or engages in, or is about to engage in any practice or transaction or course of business relating to the purchase, exchange, investment advice, or sale of securities or commodities which is fraudulent or in violation of law and which has operated or which would operate as a fraud upon the purchaser, **or that any person, partnership, corporation, company, trust, or association, being either the issuer of any security, or any agent or employee thereof, shall have issued or caused to be issued any audited financial statement in connection with which the auditor engaged in professional misconduct, or that any auditor who knew or should have known that his or her**

certification or opinion would be used in connection with such financial statement, or any agent or employee thereof, permitted the issuance of such financial statement intending that any person rely on such audited financial statement, or that any broker, dealer, or [~~salesman~~] salesperson, as defined by section three hundred fifty-nine-e of this article, or any agent or employee thereof, has sold or offered for sale or is attempting to sell or is offering for sale any security or securities in violation of the provisions of said section or section three hundred fifty-nine-ee, or that any other section of this article has been violated, any one or all of which devices, schemes, artifices, fictitious or pretended purchases or sales of securities or commodities, deceptions, misrepresentations, concealments, suppressions, frauds, false pretenses, false promises, practices, transactions, and courses of business are hereby declared to be and are hereinafter referred to as a fraudulent practice or fraudulent practices or he or she believes it to be in the public interest that an investigation be made, he or she may, in his or her discretion, either require or permit such person, partnership, corporation, company, limited liability company, trust, or association, or any agent or employee thereof, to file with him or her a statement in writing, under oath or otherwise, as to all the facts and circumstances concerning the subject matter which he or she believes it is to the public interest to investigate, and, for that purpose, may prescribe forms upon which such statements shall be made. The [~~attorney-general~~] attorney general may also require such other data and information as he or she may deem relevant and may make such special and independent investigations as he or she may deem necessary in connection with the matter.

§ 7. Section 352 of the general business law is amended by adding a new subdivision 1-a to read as follows:

1-a. As used in this section:

(a) The term "financial statement" means any balance sheet, income or loss statement, any attachments or exhibits thereto, or any other presentation of financial information concerning a business enterprise, however denominated, that is intended to portray the financial position of such business enterprise or any significant portion thereof.

(b) The term "audited", when used in connection with a financial statement means accompanied by an opinion, report, or certificate issued by a licensed public accountant or certified public accountant acting within the practice of public accountancy as defined in section seventy-four hundred one of the education law.

(c) The term "auditor" means the licensed public accountant or certified public accountant, and his or her firm, which issued the opinion, report, or certificate applicable to the financial statements that are audited.

(d) The term "firm" means a partnership, corporation, company, limited liability company, firm, or other organization engaged in whole or in part in the practice of public accountancy.

(e) The term "professional misconduct" has the meaning assigned to it by the education law, or any regulations adopted by the board of regents or the commissioner of education with the approval of the board of regents pursuant to section sixty-five hundred nine of the education law; provided, however, that, in the absence of any such regulations, the term "professional misconduct" means, as a minimum, a situation:

(1) where an auditor or his or her firm has a conflict of interest, meaning any interest, financial or otherwise, direct or indirect, which

is in substantial conflict with the proper performance of an audit and issuance of a proper report, opinion, or certificate; or

(2) where an auditor or his or her firm has provided to any publicly traded company any non-audit services after the effective date of this subdivision; provided, however, that it is an affirmative defense to any charge of professional misconduct under this subdivision that the amount or value of non-audit services rendered by the auditor or his or her firm is so small in relation to the audit relationship with the publicly traded company that no reasonable person could believe that a conflict of interest would exist.

(f) The term "publicly traded company" means any business organization, regardless of the form of organization, that issues or has issued securities as defined in this section.

(g) The term "non-audit services" includes, but is not limited to, business consulting, bookkeeping services, appraisal or valuation services, fairness opinions, contribution-in-kind reporting, actuarial services, internal audit outsourcing, management functions, broker-dealer services, investment advisement, investment banking, expert services, risk consulting, tax services, corporate financing services, human capital consulting, legal services, business internet services, assurance services, and outsourcing services.

§ 8. The opening paragraph of subdivision 3 of section 352-c of the general business law is designated paragraph (b) and a new paragraph (a) is added to read as follows:

(a) It is illegal and prohibited for any person, partnership, corporation, company, limited liability company, trust, or association, being either the issuer of any security, or any agent or employee thereof, knowingly to issue or cause to be issued any audited financial statement in connection with which the auditor engaged in professional misconduct, or for any auditor who knew or should have known that his or her certification or opinion would be used in connection with such financial statement, or any agent or employee thereof, to permit the issuance of any such audited financial statement intending that any person rely on such audited financial statement; provided, however, that this paragraph shall not apply to any person, partnership, corporation, company, limited liability company, trust, or association that is a small business concern as defined in section one hundred sixty of the state finance law, except in a case where such small business concern issues an audited financial statement for the purpose of obtaining credit or any state benefit. In addition to the penalties provided in subdivisions four, five, and six of this section, any violator of this paragraph is subject to the civil penalties provided in section three hundred fifty-two-cc of this article.

§ 9. The general business law is amended by adding a new section 352-cc to read as follows:

§ 352-cc. Civil penalties resulting from violations of paragraph (a) of subdivision three of section three hundred fifty-two-c of this article. Any issuer of any security or any auditor (in addition to any other sanction for professional misconduct under the education law) that violates the provisions of paragraph (a) of subdivision three of section three hundred fifty-two-c of this article is subject to the following:

1. Each such violator is jointly and severally liable to stockholders, members, partners, lenders, purchasers, or other investors in an individual or class action for damages resulting from such violation. If any plaintiff is unable to prove any actual damages resulting from such violation, such plaintiff is entitled to nominal damages set by the

court, but not less than fifty dollars. Any successful plaintiff is entitled to recover reasonable attorney's fees.

2. Each person convicted of a misdemeanor or a felony under paragraph (a) of subdivision three of section three hundred fifty-two-c of this article, or who has entered into any consent order, judgment, or decree as a result of allegations of a violation of paragraph (a) of subdivision three of section three hundred fifty-two-c of this article, whether or not such consent order, judgment, or decree admits any such violation, shall be barred for a period of five years, or such other period established in such consent order, judgment, or decree, from receiving any economic development grants, any waivers or rebates of taxes, or other similar benefits from the state or any political subdivision or public benefit corporation of the state, or any contract to sell goods, services, or both, of any kind or description, to the state or any political subdivision or public benefit corporation of the state.

3. The attorney general shall give notice of any conviction or any consent order, judgment, or decree with respect to any violation of paragraph (a) of subdivision three of section three hundred fifty-two-c of this article to the governor, the temporary president of the senate, the speaker of the assembly, the chief executive officers of all political subdivisions and public benefit corporations of the state, and the trustees of all public pension funds subject to section one hundred seventy-seven-e of the retirement and social security law. The violator shall, in addition to all other fines, penalties, and costs, pay the reasonable costs of preparing and giving such notices.

§ 10. Paragraph (c) of subdivision 1 of section 359-e of the general business law, as added by chapter 692 of the laws of 1959, is amended to read as follows:

(c) A [~~"salesman" shall mean~~] "salesperson" means and [~~include~~] includes every person employed by a broker or dealer as said terms are defined in this section, for the purpose of representing such broker or dealer in the sale or purchase of securities to or from the public within or from this state.

§ 11. The retirement and social security law is amended by adding a new section 177-e to read as follows:

§ 177-e. Investment barred in certain securities. 1. The trustee or trustees of a fund are authorized not to make any investment in any security or securities issued by any person convicted of a misdemeanor or a felony under paragraph (a) of subdivision three of section three hundred fifty-two-c of the general business law, or who has entered into any consent order, judgment, or decree as a result of allegations of a violation of such section, whether or not such consent order, judgment, or decree admits any such violation, for a period of five years or such other period as may be established in such consent order, judgment, or decree from the date when such trustee or trustees shall receive notice of such conviction or consent order, judgment, or decree from the attorney general or from the time when such trustee or trustees shall have actual knowledge of such conviction or consent order, judgment, or decree, whichever is earlier.

2. In the event that at the time of receiving the notice from the attorney general described in subdivision one of this section or of receiving actual knowledge of the conviction or consent order, judgment, or decree described in such subdivision one, the trustee or trustees of a fund hold on behalf of the fund any security or securities issued by a violator of paragraph (a) of subdivision three of section three hundred fifty-two-c of the general business law, such trustee or trustees are

authorized to divest themselves of such securities, unless, in the judgment of such trustee or trustees of such fund, such divestment would not be in the best interest of the beneficiaries of such fund.

§ 12. If any item, clause, sentence, subparagraph, subdivision, section, or other part of this act, or the application thereof to any person or circumstances, is held to be invalid, such holding shall not affect, impair, or invalidate the remainder of this act, or the application of such section or part of a section held invalid, to any other person or circumstances, but shall be confined in its operation to the item, clause, sentence, subparagraph, subdivision, section, or other part of this act directly involved in such holding, or to the person and circumstances therein involved.

§ 13. This act shall take effect on the first of April next succeeding the date on which it shall have become a law.