



SPONSOR: Sen. Gay & Rep. Bush
Rep. Bolden

DELAWARE STATE SENATE
152nd GENERAL ASSEMBLY

SENATE BILL NO. 131

AN ACT TO AMEND TITLE 6, CHAPTER 73 OF THE DELAWARE CODE TO HARMONIZE WITH FEDERAL LAW, MODERNIZE, AND CLARIFY CERTAIN PROVISIONS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

1 Section 1. Amend § 73-101(b), Title 6 of the Delaware Code to add the following insertions as shown by underline
2 and deletions as shown by strike through:

3 (b) The purpose of the Delaware Securities Act is to prevent the public from being victimized by unscrupulous or
4 overreaching broker-dealers, agents, investment advisers or investment adviser representatives ~~agents~~ in the context of
5 effecting transactions in selling securities or giving investment advice, as well as to remedy any harm caused by securities
6 law violations. These is prophylactic and remedial purposes shall be deemed of paramount importance in the interpretation
7 of the provisions of this chapter and any rule or order hereunder, and particularly in any judicial review of sanctions or
8 penalties imposed by the Investor Protection Director and of motions or requests by persons affected to stay such sanctions
9 or penalties.

10 Section 2. Amend § 73-103, Title 6 of the Delaware Code to add the following insertions as shown by underline
11 and deletions as shown by strike through:

12 (a) *Generally*. When used in this chapter or any rule or order hereunder, unless the context otherwise requires:

13 (10) "Investment adviser" means any person who, for compensation, engages in the business of advising
14 others, either directly or through publications or writings, as to the value of securities or as to the advisability of
15 investing in, purchasing or selling securities, or who, for compensation and as a part of a regular business, issues
16 or promulgates analyses or reports concerning securities. "Investment adviser" also includes financial planners and
17 other persons who, as an integral component of other financially related services, provide the foregoing investment
18 advisory services to others for compensation and as part of a business or who hold themselves out as providing the
19 foregoing investment advisory services to others for compensation. "Investment adviser" does not include (A) an
20 investment adviser representative; (B) a bank, savings institution or trust company; (C) a lawyer, accountant,
21 engineer or teacher whose performance of these services is solely incidental to the practice of such person's
22 profession; (D) a broker-dealer or its agent whose performance of these services is solely incidental to the conduct

of its business as a broker-dealer and who receives no special compensation for them; (E) a publisher of any bona fide newspaper, news column, newsletter, news magazine or business or financial publication or service, whether communicated in hard copy form or by electronic means, or otherwise, that does not consist of the rendering of advice on the basis of the specific investment situation of each client; (F) any person who is a federal covered adviser; or (G) such other persons not within the intent of this subsection as the ~~Commissioner~~ Director may by rule or order designate.

(17) "Public interest" means that it shall appear to the ~~Commissioner~~ Director that the action taken or sanction imposed will further the purpose of this chapter.

(23) "Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract, including pyramid promotion which includes any plan or operation for the sale or distribution of property, services, or any other thing of value wherein a person for a consideration is offered an opportunity to obtain a benefit which is based in whole or in part on the inducement, by himself or herself or by others, of additional persons to purchase the same or a similar opportunity; voting-trust certificate; certificate of deposit for a security; certificate of interest of participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease; options on commodities; viatical settlement investment; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate, for, receipt for guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. "Security" does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or some other specified period. In determining whether an instrument is a security, the appropriate analysis is of the economic realities underlying a transaction and not the way the transaction is labelled.

(25) "Willful" or "willfully" means only that the underlying act constituting the violation was done deliberately, as opposed to accidentally or involuntarily. Evil motive or intent to violate the law, or knowledge that the law was being violated, is not required.

(c) In any proceeding under this chapter, the burden of proving an exemption or an exception from a definition is upon the person claiming it.

Section 3. Create a new § 73-104, Title 6 of the Delaware Code to add the following insertions as shown by underline:

53 73-104. False and misleading filings.

54 It is unlawful for any person to make or cause to be made, in any document filed with the Director or in any
55 proceeding under this chapter, or any rule or order hereunder, any statement which is, at the time and in light of the
56 circumstances under which it is made, false or misleading in any material respect.

57 Section 4. Amend § 73-201, Title 6 of the Delaware Code to add the following insertions as shown by underline
58 and deletions as shown by strike through:

59 § 73-201. ~~Fraud.~~ Employment of manipulative and deceptive devices.

60 Section 5. Amend § 73-207(15)(n), Title 6 of the Delaware Code to add the following insertions as shown by
61 underline and deletions as shown by strike through:

62 (n) Nothing in this exemption shall be construed to alleviate any person from the anti-fraud provisions at § 73-201
63 of this title, nor shall such exemption be construed to provide relief from any other provision of this chapter or any rule or
64 order hereunder, other than as expressly stated.

65 Section 6. Amend § 73-207(d), Title 6 of the Delaware Code to add the following insertions as shown by underline
66 and deletions as shown by strike through:

67 (d) In any proceeding under this chapter, the burden of proving an exemption ~~or an exception from a definition~~
68 from registration is upon the person claiming it.

69 Section 7. Amend § 73-208(g), Title 6 of the Delaware Code to add the following insertions as shown by underline
70 and deletions as shown by strike through:

71 (g) ~~Notwithstanding the provisions of this section, until October 10, 1999, the Director may require the registration~~
72 ~~of any federal covered security for which the fees required by this section have not been paid promptly following written~~
73 ~~notification from the Director regarding any nonpayment or underpayment of such fees. An issuer shall be considered to~~
74 ~~have promptly paid such fees if they are remitted to the Director within 15 days following such person's receipt of written~~
75 ~~notification from the Director.~~ [Repealed.]

76 Section 8. Amend § 73-209, Title 6 of the Delaware Code to add the following insertions as shown by underline
77 and deletions as shown by strike through:

78 § 73-209. ~~Misleading filings.~~ [Repealed.]

79 ~~It is unlawful for any person to make or cause to be made, in any document filed with the Director or in any~~
80 ~~proceeding under this chapter, any statement which is, at the time and in the light of the circumstances under which it was~~
81 ~~made, false or misleading in any material respect.~~

Section 9. Amend § 73-302(a)(6), Title 6 of the Delaware Code to add the following insertions as shown by underline and deletions as shown by strike through:

(a) A broker-dealer, agent, investment adviser or investment adviser representative may obtain an initial registration by filing with the Director or the Director's designee an application together with a consent to service of process pursuant to § 73-702 of this title. The application shall contain whatever information the Director by rule requires concerning such matters as:

(1) The applicant's form and place of ~~organization~~; organization.

(2) The applicant's proposed method of doing ~~business~~; business.

(3) The qualifications and business history of the applicant; in the case of the broker-dealer or investment adviser, the qualifications and business history of any partner, officer or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment ~~adviser~~; adviser.

(4) Any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities business and any conviction of a ~~felony~~; felony.

(5) Subject to the limitations of § 15 of the Securities Exchange Act of 1934 [15 U.S.C. § 78o] and § 222 of the Investment Advisers Act of 1940 [15 U.S.C. § 80b-18a], the applicant's financial condition and ~~history~~; and history.

(6) Any ~~any~~ information to be furnished or disseminated to any client or prospective client, if the applicant is an investment adviser.

The Director may by rule or order require an applicant to initial registration to publish an announcement of the application in 1 or more specified newspapers published in this State. ~~If no denial order is in effect and no proceeding is pending under § 73-304 of this title, registration becomes effective at noon of the thirtieth day after a complete application is filed. The Director may by rule or order specify an earlier effective date, and may by order defer the effective date until noon of the thirtieth day after the filing or any amendment.~~ In the event that an application for registration has not been acted on within 31 days after the completed application is received by the Unit, the applicant may petition the Director in writing for a default finding. If the Director takes no action 31 days after receipt of such petition, then registration shall become effective that day.

Section 10. Amend § 73-302(b), Title 6 of the Delaware Code to add the following insertions as shown by underline and deletions as shown by strike through:

(b) When an agent begins or terminates a connection with a broker-dealer or issuer, or begins or terminates those activities which make said person an agent, the agent as well as the broker-dealer or issuer shall promptly notify the Director. Every registration of an agent expires when the agent terminates the agent's connection with a broker-dealer or issuer, though the person may still be subject to disciplinary action by the Director under § 73-304(e) of this title. When such an agent begins a connection with another broker-dealer or another issuer, the agent shall file an application for initial registration as provided in subsection (a) of this section and shall pay a filing fee prescribed by subsection (1) of this section. ~~Unless the Director takes action under § 73-303 or § 73-304 of this title, the~~ The agent's registration shall become effective when marked as such in the applicable database, 30 days after receipt of a complete application by the Director (or by the Director's designee) and shall continue in effect until it expires under the provisions of subsection (e) of this section, or under the provisions of this subsection, whichever would earlier occur. The Director shall be empowered to waive the 30-day period at the Director's discretion. In the event that an application for registration has not been acted on for 31 days after the completed application is received by the Unit, the applicant may petition the Director in writing for a default finding. If the Director takes no action within 31 days after receipt of such petition, then registration shall become effective that day.

Section 11. Amend § 73-302(c), Title 6 of the Delaware Code to add the following insertions as shown by underline and deletions as shown by strike through:

(c) When an investment adviser representative begins or terminates employment with an investment adviser, the investment adviser representative, as well as the investment adviser, shall promptly notify the Director. Every registration of an investment adviser representative expires when the investment adviser representative terminates the investment adviser's ~~adviser representative's~~ connection an investment adviser, though the person may still be subject to disciplinary action by the Director under § 73-304(e) of this title. When such an investment adviser representative begins a connection with another investment adviser or federal covered adviser, the representative shall, unless exempt from registration, file an application for initial registration as provided in subsection (a) of this section and shall pay a filing fee prescribed in subsection (1) of this section. ~~Unless the Director takes action under § 73-303 or § 73-304 of this title, the~~ The said investment adviser representative registration shall become effective 30 days after receipt of a complete application by the Director (or by the director's designee) when marked as such in the applicable database, and shall continue in effect until it expires under the provisions of subsection (e) of this section, or under the provisions of this subsection, whichever would occur earlier. The Director shall be empowered to waive the 30-day period at the Director's discretion. In the event that an application for registration has not been acted on for 31 days after the completed application is received by the Unit, the

applicant may petition the Director in writing for a default finding. If the Director takes no action within 31 days after receipt of such petition, then registration shall become effective that day.

Section 12. Amend § 73-302(d), Title 6 of the Delaware Code to add the following insertions as shown by underline and deletions as shown by strike through:

(d) When an investment adviser representative for a federal covered adviser begins or terminates employment with the federal covered adviser, the investment adviser representative shall promptly notify the Director. Every registration of such an investment adviser representative expires when the investment adviser representative terminates his or her connection with the federal covered adviser, though the person may still be subject to disciplinary action by the Director under § 73-304(e) of this title chapter. When such an investment adviser representative begins a connection with another federal covered adviser or investment adviser, the representative shall, unless exempt from registration, file an application for initial registration as provided in subsection (a) of this section and shall pay a filing fee prescribed by subsection (1) of this section. ~~Unless the Director takes action under § 73-303 or § 73-304 of this title, the~~ The said investment adviser representative registration shall become effective when marked as such in the applicable database ~~30 days after the receipt of a complete application by the Director (or by the Director's designee)~~ and shall continue in effect until it expires under the provisions of subsection (e) of this section, or under the provisions of this subsection, whichever would earlier occur. ~~The Director shall be empowered to waive the 30-day period at the Director's discretion. In the event that an application for registration has not been acted on for 31 days after the completed application is received by the Unit, the applicant may petition the Director in writing for a default finding. If the Director takes no action within 31 days after receipt of such petition, then registration shall become effective that day.~~

Section 13. Amend § 73-304(a), Title 6 of the Delaware Code to add the following insertions as shown by underline and deletions as shown by strike through:

(a) The Director may by order deny, suspend or revoke any registration or take such other action authorized by the Act if the Director finds that the order is in the public interest and that the applicant or registrant or, in the case of a broker-dealer or investment adviser, any partner, officer, director or any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment ~~adviser; adviser, any of the~~ following:

(1) Has filed an application for registration which as of its effective date, or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained any statement which was, in light of the circumstances under which it was made, false or misleading with respect to any material ~~fact; or fact.~~

(2) Has ~~willfully~~ willfully violated or ~~willfully~~ willfully failed to comply with any provision of this chapter
~~or any rule or order hereunder.~~

(3) Has been convicted of a felony, infamous crime, or other crime involving moral ~~turpitude;~~ turpitude.

(4) Is permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or
continuing any conduct or practice involving any aspect of the securities ~~business;~~ business.

(5) Is the subject of a cease and desist order of the Director or of an order of the Director denying,
suspending or revoking registration as a broker-dealer, agent, investment adviser or investment adviser
~~representative;~~ representative.

(6) Is the subject of an order entered within the past 10 years by the securities administrator of any other
state or country, by a self-regulatory organization, or by the Securities and Exchange Commission either ordering
the person to cease and desist from engaging in or continuing any conduct or practice involving any aspect of the
securities business, or suspending, denying or revoking registration as a broker-dealer, agent, investment adviser,
or investment adviser representative, or the substantial equivalent of those terms as defined in this chapter, or is
suspended or expelled from a national securities exchange or national securities association registered under the
Securities Exchange Act of 1934 [15 U.S.C. § 78a et seq.] either by action of a national securities exchange or
national securities association, the effect of which action has not been stayed by administrative or judicial order; or
is the subject of a United States post office fraud ~~order;~~ order.

(7) Has engaged in dishonest or unethical practices within or outside this ~~State;~~ State.

(8) Is insolvent, either in the sense that the person's liabilities exceed the person's assets or in the sense
that the person cannot meet the person's obligations as they ~~mature;~~ mature.

(9) Is not qualified on the basis of such factors as training, experience, and knowledge of the securities
business, except as otherwise provided in subsection (b) of this ~~section;~~ section.

(10) Has failed reasonably to supervise (A) the person's agents or employees if the person is a broker-
dealer or broker-dealer agent with supervisory responsibilities, or (B) the person's adviser representatives or
employees if the person is an investment adviser or investment adviser representative with supervisory
responsibilities, and the Director may infer such failure from an agent's, investment adviser representative's or
employee's ~~violations;~~ violations.

(11) Has failed to pay the proper filing fee, but the Director shall vacate any denial or suspension order
when the deficiency has been ~~corrected;~~ correct.

(12) Has violated or failed to comply with any lawful order issued by the ~~Director~~; or Director.

(13) Has within the past 10 years been a partner, officer, director, controlling person or any person occupying a similar status or performing similar functions in a broker-dealer or investment adviser whose registration in this State or any state, or with the Securities and Exchange Commission, has been revoked for disciplinary reasons, or whose membership in a national securities exchange or national securities association has been terminated for disciplinary reasons.

Section 14. Amend § 73-304(c) Title 6 of the Delaware Code to add the following insertions as shown by underline and deletions as shown by strike through:

(c) The Director may by order summarily postpone or suspend registration or take such other action authorized by the Act pending final determination of any proceeding under this section. Upon the entry of an order, the Director shall promptly notify the applicant or registrant, as well as the employer or prospective employer if the applicant or registrant is an agent or investment adviser representative, that it has been entered and of the reasons therefore and that the subject of the order may request a hearing on an application to set aside, limit, or suspend the summary order by filing with the Director (1) a written request for a hearing and (2) a written answer addressing specifically the factual and legal findings of the order, within the time provided by rule or order. The opportunity to be heard is waived if the subject of the order fails to timely file a written answer and written request for a hearing, and the order will remain in effect until modified or vacated by the Director. To the extent a hearing is properly requested and an answer properly filed, a hearing shall be noticed within 15 days from the date the request is received. ~~within 15 days after the receipt of a written request the matter will be set down for a hearing. If a hearing is requested or ordered, the Director, after notice and opportunity for hearing, may modify or vacate the order or extend it until final determination.~~

Section 15. Amend § 73-305(c), Title 6 of the Delaware Code to add the following insertions as shown by underline and deletions as shown by strike through:

(c) It is unlawful for any investment adviser or investment adviser representative to enter into, extend or renew any investment advisory contract unless it provides in ~~writing~~; writing all of the following:

(1) That the investment adviser or investment adviser representative shall not be compensated on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client, except as provided by rule or order of the Director.

(2) That no assignment of a contract may be made by the investment adviser or investment adviser representative without the consent of the other party to the ~~contract~~; and contract.

(3) That the investment adviser or investment adviser representative, if a partnership, shall notify the other party to the contract of any change in the membership or the partnership within a reasonable time after the change.

Section 16. Amend § 73-501, Title 6 of the Delaware Code to add the following insertions as shown by underline and deletions as shown by strike through:

The Investor Protection Unit, under the direction of the Director, shall have the authority to prosecute administrative proceedings to enforce the provisions of this chapter or any rule or order hereunder.

Section 17. Amend § 73-601, Title 6 of the Delaware Code to add the following insertions as shown by underline and deletions as shown by strike through:

(a) In any administrative proceeding before the Director, the Director may issue orders providing for the following remedies: cease and desist; ~~fine~~; fine; assessment of costs; restitution to investors; conditional or probationary registration; suspension or bar from registration; censure or reprimand; special reporting requirements; freezing of accounts in which it is believed that fraud has occurred, may be occurring, or is likely to occur; or other remedies which the Director determines to be in the public interest.

(b) In addition to the remedies set forth in subsection (a) of this section, the Director may order the payment of fines and other monetary sanctions for any violation of any provision of this chapter or any rule or order hereunder in an amount not to exceed \$10,000 for each and every violation, plus the costs of investigation and prosecution. Each independent violation of the Act counts as a separate instance for purposes of calculating penalties.

(c) Whenever it appears that a person has violated or is about to violate this chapter or any rule or order hereunder by failing to register or engaging in fraud or other prohibited conduct, the Director may summarily issue a cease and desist order against that person.

(1) Any person who is the subject of ~~such an~~ a cease and desist order shall be given notice of it as soon as practicable and may request a hearing before the Director; on an application to set aside, limit, modify or suspend the order by filing (1) a written request for a hearing and (2) a written answer addressing the factual and legal findings of the order. The opportunity to be heard is waived if the subject of the order fails to timely file a written answer and a written request for a hearing, in which case the order will remain in effect until it is modified or vacated by the Director. To the extent a hearing is properly requested and an answer properly filed, a which hearing shall be scheduled noticed within 15 days from the date the request is received.

Section 17. Amend § 73-604, Title 6 of the Delaware Code to add the following insertions as shown by underline and deletions as shown by strike through:

259 (a) *Fraud of \$50,000 or more; class E felony.* – Any person who ~~wilfully~~ willfully violates § 73-201 of this title,
260 thereby causing any investor or investors to lose \$50,000 or more, shall upon conviction be fined not more than \$200,000
261 or imprisoned not more than 5 years at Level V incarceration, or both, per violation.

262 (b) *Fraud of \$10,000 or more; class F felony.* – Any person who ~~wilfully~~ willfully violates § 73-201 of this title,
263 thereby causing any investor or investors to lose \$10,000 or more, though less than \$50,000, shall upon conviction be fined
264 not more than \$100,000 or imprisoned not more than 3 years at Level V incarceration, or both, per violation.

265 (c) *Other violations; class G felony.* – Any person who ~~wilfully~~ willfully violates any provision of this chapter or
266 any rule hereunder and whose offense is not covered by subsection (a) or (b) of this section, shall upon conviction be fined
267 not more than \$100,000 or imprisoned not more than 2 years at Level V incarceration, or both, per violation.

SYNOPSIS

This bill updates and clarifies certain provisions that have been confusing or otherwise problematic in the Investor Protection Unit's enforcement efforts, or have otherwise become out-of-synch with federal securities law.

The term "Commissioner" is a holdover from when the Investor Protection Unit was called the Securities Unit, and is no longer the correct term. It is replaced with "Director" to be consistent throughout the Act.

In order to ensure consistency throughout the Act and create certainty as the applicability of rules issued pursuant to the Act, the phrase "or any rule or order hereunder" has been added after "this chapter" where it was missing. This clarifies that the Rules and orders are enforceable regardless of which statutory provision is implicated by an administrative action.

This bill provides a definition of "willful" that tracks the federal definition as used in federal law and in the 1956 Uniform Securities Act, on which the Delaware Securities Act was originally patterned. The Uniform Securities Act of 1956, as amended, explains in the official code comment that "As the federal courts and the SEC have construed the term "willfully" in § 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b): all that is required is proof that the person acted intentionally in the sense that he was aware of what he was doing. Proof of evil motive or intent to violate the law, or knowledge that the law was being violated, is not required. The principal function of the word "willfully" is thus to serve as a legislative hint of self-restraint to the Administrator."

Similarly, the definition of "security" is revised to clarify that an analysis of whether an instrument is a security should be a substance over form analysis, following the approach under federal law.

Section 73-209, concerning false filings, was moved to new section 73-104 to clarify its applicability to the entire Delaware Securities Act.

The heading of Section 73-201 was changed from "Fraud" to "Employment of manipulative and deceptive devices" to harmonize with that of a similar provision from the Securities Act of 1934.

Section 73-207(d) was amended to clarify its applicability to securities exemptions.

Section 73- 208(g) was removed as it is no longer effective.

Various subsections of Section 73-302 were amended to establish clarity as to the timeline for registrations and to prevent the inadvertent approval of a registration under review by the Investor Protection Unit.

Section 73-304(a)(6) is being revised to add additional securities regulators to the list of entities whose orders can be considered when determining whether to take action concerning a registrant or applicant's registration status.

Section 73-305(c)(1), which prohibits investment adviser fees based on a percentage of capital gains, is amended to allow for such fees if approved by a rule or order of the Director. This brings Delaware into harmony with federal

practice, since the SEC has started allowing such a fee structure under certain circumstances, subject to periodic review of the policy.

Section 73-601 is amended to clarify that there is no aggregation of violations when determining the imposition of fines; that a party seeking a hearing on a summary order must provide an answer in writing; and adds freezing accounts to the list of actions the Unit may take, which may be helpful in dealing with the increase in cryptocurrency fraud.

This Act also makes technical corrections to conform existing law to the standards of the Delaware Legislative Drafting Manual.

Author: Senator Gay