

2009 DRAFTING REQUEST

Bill

Received: **06/24/2009**

Received By: **agary**

Wanted: **As time permits**

Identical to LRB:

For: **Thomas Nelson (608) 266-2418**

By/Representing: **Ben**

This file may be shown to any legislator: **NO**

Drafter: **agary**

May Contact:

Addl. Drafters:

Subject: **Fin. Inst. - securities**

Extra Copies: **MDK**

Submit via email: **YES**

Requester's email: **Rep.Nelson@legis.wisconsin.gov**

Carbon copy (CC:) to: **aaron.gary@legis.wisconsin.gov**

Pre Topic:

No specific pre topic given

Topic:

Securities law violations, penalty enhancers and restitution

Instructions:

Wants 2007 LRB-1642 redrafted; has copy

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	agary 07/14/2009	wjackson 07/15/2009		_____			Crime
/1			mduchek 07/15/2009	_____	cduerst 07/15/2009		Crime
/2	agary 07/31/2009	wjackson 08/07/2009	phenry 08/10/2009	_____	lparisi 08/10/2009		Crime
/3	agary	wjackson	rschluet	_____	sbasford	mbarman	

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	08/17/2009	08/21/2009	08/24/2009	_____	08/24/2009	10/14/2009	

FE Sent For: *None*

<END>

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		1/3 Wlj 8/21	WD 8/21	_____			

Vers. Drafted Reviewed Typed Proofed Submitted Jacketed Required

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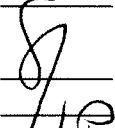
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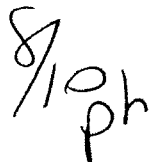
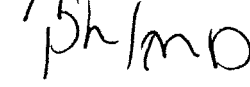
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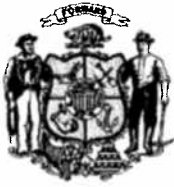
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/?	agary	1 WLJ 7/15	MD 7/15				

FE Sent For:

<END>



State of Wisconsin
2009 - 2010 LEGISLATURE

Soon

-3037/1

LRB-2881/1

ARG:wj:rs

in
7/14

stays
RMNR

2009 BILL

Regen

1 AN ACT to create 551.508 (1m) and 551.5085 of the statutes; relating to:
2 criminal violations of the Wisconsin Uniform Securities Law and providing a
3 penalty.

Analysis by the Legislative Reference Bureau

Current law includes numerous provisions prohibiting fraud, in various forms, in connection with securities transactions or the offering or sale of securities. These provisions include making any untrue statement of a material fact or omitting a material fact necessary to make a statement not misleading in connection with the offer, sale, or purchase of a security; engaging in market manipulation; publishing, circulating, or using false advertising; and making material false or misleading statements or misleading omissions in documents filed with the Division of Securities in the Department of Financial Institutions (division). Broker-dealers and investment advisers also may not engage in fraud or employ manipulative, deceptive, or fraudulent devices.

Under current law, a person who violates the state's securities laws may be subject to criminal liability or civil liability or both. A person who willfully violates the state's securities laws, with certain exceptions, is guilty of a Class H felony, punishable by a maximum fine of \$10,000 or a maximum term of imprisonment of six years or both. The division may refer violations for criminal prosecution to the attorney general or a district attorney.

This bill creates a penalty enhancer for certain criminal violations of the state's securities laws. If a person is convicted of a crime for violating the state's securities

BILL

laws and the crime is committed against another person who is at least 65 years of age, for each such offense the maximum fine may be increased by not more than \$5,000 and the maximum term of imprisonment may be increased by not more than five years. The fact that the person convicted did not know the age of the victim, or reasonably believed the victim was not at least 65 years of age, is not a defense to this penalty enhancement.

Under current law, after the filing of an indictment or information in a criminal proceeding, a party may file a motion to take the deposition of a prospective witness. If it appears that a prospective witness may be unable to attend, or prevented from attending, a criminal trial or hearing, that the prospective witness's testimony is material, and that it is necessary to take the prospective witness's deposition in order to prevent a failure of justice, the court may order that the prospective witness's testimony be taken by deposition and that nonprivileged documentary evidence be produced at the time and place for the deposition. The deposition may be video recorded. The moving party must give every other party reasonable notice of the time and place for taking the deposition. The notice must also contain other information, including the name and address of each witness to be examined. The notice must further inform the defendant that he or she must be present at the deposition or waive his or her right to confront the witness. If the defendant is in custody, the defendant's custodian must produce the defendant at the deposition. The deposition is taken like depositions in civil actions. At the trial or any hearing, a part or all of the deposition, to the extent otherwise admissible, may be used if any of the following conditions appears to have been met: 1) the witness is dead; 2) the witness is out of state, unless it appears that the absence of the witness was procured by the party offering the deposition; 3) the witness is unable to attend or testify because of sickness or infirmity; or 4) the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Evidentiary objections to deposition testimony may be made as in civil actions.

This bill establishes a specific procedure for depositions in criminal proceedings involving violations of the state's securities laws. At any time after the filing of an indictment or information in a criminal proceeding based upon a violation of the state's securities laws, the state or the defendant may move the court for an order that the testimony of a prospective witness in the proceeding be taken by deposition if the prospective witness's anticipated testimony is material and the prospective witness is about to leave the state; so sick or infirm as to provide reasonable grounds to believe that the witness will be unable to attend the trial; 65 years of age or older; or a dependent adult. The motion must be accompanied by an affidavit containing specified information, including the name and address of the prospective witness. If the court finds that preservation of the testimony of the prospective witness by taking his or her deposition is necessary, the court must order that the prospective witness's testimony be taken by deposition before a designated court commissioner at a specified time and place. The defendant has the right to be present in person and with counsel at the deposition. The court's order must inform the defendant that he or she must be present at the deposition or waive his or her right to confront the witness. If the defendant is in custody, the defendant's custodian must produce the

BILL

defendant at the deposition. The deposition may be video recorded. The deposition is taken like depositions in civil actions, except that the court commissioner must preside over the taking of the deposition and must rule on certain objections as the deposition is being taken. If a witness who has been deposed is unavailable at trial or any hearing in the criminal proceeding, a part or all of the deposition testimony, to the extent otherwise admissible, may be read into evidence or, if video recorded, shown by either party at the trial or hearing. The same objections may be made to a question or answer contained in the deposition as if the witness had been examined in court, except to the extent the objection has already been ruled upon by the court commissioner. This specific deposition procedure for criminal securities violations does not foreclose either party from using the general procedure under current law for taking depositions in criminal cases.

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 551.508 (1m) of the statutes is created to read:

2 551.508 **(1m)** ENHANCEMENT OF PENALTIES. (a) If a person is convicted of a crime
3 under sub. (1) and the crime is committed against another person who is at least 65
4 years of age when the crime is committed, for each such offense the maximum fine
5 prescribed under sub. (1) may be increased by not more than \$5,000 and the
6 maximum term of imprisonment prescribed under sub. (1) may be increased by not
7 more than 5 years.

8 (b) This subsection provides for the enhancement of the penalties applicable
9 for the underlying crime. The court shall direct that the trier of fact find a special
10 verdict as to the age of the victim at the time of the crime.

11 (c) It is no defense to the enhancement of penalties under this subsection that
12 the person convicted did not know the age of the victim or reasonably believed that
13 the victim was not at least 65 years of age.

BILL

1 **SECTION 2.** 551.5085 of the statutes is created to read:

2 **551.5085 Depositions in criminal securities violation proceedings. (1)**

3 In this section, “dependent adult” means any person who is not less than 18 nor more
4 than 65 years of age and who has physical or mental limitations that restrict his or
5 her ability to carry out normal activities or to protect his or her rights, including
6 persons who have physical or developmental disabilities or whose physical or mental
7 abilities have diminished because of age.

8 **(2)** At any time after the filing of an indictment or information in a criminal
9 proceeding based upon a violation under this chapter, the state or the defendant may
10 move the court for an order that the testimony of a prospective witness in the
11 proceeding be taken by deposition if the prospective witness’s anticipated testimony
12 is material and the prospective witness is any of the following:

13 (a) About to leave the state.

14 (b) So sick or infirm as to provide reasonable grounds to believe that the witness
15 will be unable to attend the trial.

16 (c) Sixty-five years of age or older.

17 (d) A dependent adult.

18 **(3)** A motion under sub. (2) shall be accompanied by an affidavit stating all of
19 the following:

20 (a) The nature of the offense charged.

21 (b) The state of the proceedings in the action.

22 (c) The name and residence address of the prospective witness, and that his or
23 her testimony is material to the defense or the prosecution of the action.

24 (d) That the prospective witness meets one or more of the criteria specified in
25 sub. (2) (a) to (d) and identifying any such criteria met.

BILL

1 **(4)** The motion under sub. (2) shall be made to the court in which the criminal
2 proceeding is pending. Notice of the motion shall be provided to any opposing party
3 and the prospective witness as provided by law, but in no event less than 3 days prior
4 to any hearing on the motion.

5 **(5)** If the court finds that preservation of the testimony of the prospective
6 witness by taking his or her deposition is necessary, the court shall order that the
7 prospective witness's testimony be taken by deposition before a designated court
8 commissioner. The court's order shall specify the time and place of the deposition.
9 Prior to issuing an order under this subsection, the court shall fully inform the
10 defendant, or satisfy itself that the defendant has already been fully informed, of his
11 or her right to counsel as provided in s. 970.02.↓

12 **(6)** The defendant has the right to be present in person and with counsel at the
13 deposition. The court's order shall inform the defendant that the defendant is
14 required to personally attend at the taking of the deposition and that the defendant's
15 failure to do so, unless a result of physical incapacity, is a waiver of the defendant's
16 right to face the witness whose deposition is to be taken. If the defendant is in
17 custody, the defendant's custodian shall be informed of the time and place of the
18 deposition, shall produce the defendant at the taking of the deposition, and shall
19 keep the defendant in the presence and hearing of the witness during the deposition.
20 If the defendant is in custody, leave to take a deposition on motion of the state shall
21 not be granted unless all states that the custodian will enter with the defendant in
22 going to the place the deposition is to be taken have conferred upon the officers of this
23 state the right to convey prisoners in and through them.

BILL

1 **(7)** The attendance of the witness at the taking of the deposition may be
2 enforced by a subpoena, issued by the court commissioner before whom the
3 deposition is to be taken.

4 **(8)** If, at the time and place of the deposition, the court commissioner finds that
5 the witness does not meet any criteria specified in sub. (2) (a) to (d) or that the motion
6 under sub. (2) was made to avoid the examination of the witness at trial, the court
7 commissioner may not permit the deposition to be taken.

8 **(9)** (a) Except as provided in par. (b), a deposition shall be taken as provided
9 in civil actions. At the request of a party, the court may order that a deposition be
10 taken on the record by telephone or live audiovisual means. The original copy of the
11 deposition shall be sealed and delivered to the court commissioner, who shall then
12 transmit it to the clerk of court in which the criminal proceeding is pending.

13 (b) The court commissioner shall preside at the taking of the deposition and
14 shall enforce compliance with any applicable provision of chs. 804, 885, and 887.
15 Notwithstanding ss. 804.05 (4) (b) and 885.44 (5), counsel may make objections and
16 the court commissioner shall make rulings thereon as at trial.

17 **(10)** If a witness has provided deposition testimony under this section and, at
18 the trial or any hearing in the criminal proceeding, the court finds that the witness
19 is unavailable as provided under s. 908.04, a part or all of the deposition testimony,
20 so far as it is otherwise admissible under the rules of evidence, may be read into
21 evidence or, if taken by audiovisual means, shown by either party at the trial or
22 hearing. The same objections may be made to a question or answer contained in the
23 deposition as if the witness had been examined in court, except to the extent the
24 objection has already been ruled upon by the court commissioner. If only part of a
25 deposition is offered into evidence by a party, an adverse party may require the

BILL

1 offering party to offer all of it which is relevant to the part offered and any party may
2 offer other parts.

3 (11) Nothing in this section prohibits a party, in a criminal proceeding based
4 upon a violation under this chapter, from pursuing the taking of a deposition as
5 provided under s. 967.04. ✓

6 (12) The procedure under this section is available in any criminal proceeding
7 in which any criminal violation under this chapter is charged, even if the defendant
8 is also charged with criminal violations not arising under this chapter.

SECTION 3. Initial applicability.

9
10 (1) The treatment of section 551.508 (1m) ✓ of the statutes first applies to
11 violations committed on the effective date of this subsection, but does not preclude
12 the counting of other violations as prior violations for purposes of sentencing a
13 person.

14 (END)

LCB-3037

7/23

He w/ Ben - Rep. Nelson

6-2401

civil penalties →

↑ to \$500,000 —

up from \$250,000

for violation against seniors

7/31/09

Ben - Rep. Nelson

LCB-3037

e-mail

\$5,000

6-2401

→ \$10,000

- restitution - available under s. 551.603(2)(b)3.
for civil enforcement in court; not available
under c/i for adm. enforcement under 551.604

Gary, Aaron

From: Gary, Aaron
Sent: Tuesday, July 28, 2009 1:01 PM
To: Nerad, Ben
Subject: LRB-3037 - securities violations against elderly persons

Ben,

I have made the changes to this draft per our last phone conversation. I just want to double check to make sure the changes reflect your intent.

Under current law, the maximum civil penalty for securities violations is \$5,000 for a single violation or \$250,000 for more than one violation. Per our conversation, I increased the \$250,000 to \$500,000 for multiple violations against seniors, but I did not change the \$5,000 single violation cap. Is this what you want?

Thanks. Aaron

Aaron R. Gary
Attorney, Legislative Reference Bureau
608.261.6926 (voice)
608.264.6948 (fax)
aaron.gary@legis.state.wi.us

7/31

also increase \$5K → \$10K

Gary, Aaron

From: Nerad, Ben
Sent: Friday, July 31, 2009 2:43 PM
To: Gary, Aaron
Subject: Link to Missouri securities law

Aaron,

Per our discussion, below is Missouri's law regarding security fraud against seniors. I'm not sure what the exact statutory citation is, but you can search for "restitution" within the document to find this provision:

(2) Order a person subject to the order to pay restitution for any loss, including the amount of any actual damages that may have been caused by the conduct and interest at the rate of eight percent per year from the date of the violation causing the loss or disgorge any profits arising from the violation;

<http://www.house.mo.gov/billtracking/bills091/biltxt/truly/HB0062T.HTM>

Ben

Ben Nerad
Office of Rep. Tom Nelson
Assembly Majority Leader
608-266-2418

*7/31 hold off on adm. enforcement
~~restitution~~ restitution - see
other note in file
from 7/31*



State of Wisconsin
2009 - 2010 LEGISLATURE

in 7/31

LRB-3037/2

ARG:wlj:md

5000

stays

AMA

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Insert ANACA *

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*

BILL

defendant at the deposition. The deposition may be video recorded. The deposition is taken like depositions in civil actions, except that the court commissioner must preside over the taking of the deposition and must rule on certain objections as the deposition is being taken. If a witness who has been deposed is unavailable at trial or any hearing in the criminal proceeding, a part or all of the deposition testimony, to the extent otherwise admissible, may be read into evidence or, if video recorded, shown by either party at the trial or hearing. The same objections may be made to a question or answer contained in the deposition as if the witness had been examined in court, except to the extent the objection has already been ruled upon by the court commissioner. This specific deposition procedure for criminal securities violations does not foreclose either party from using the general procedure under current law for taking depositions in criminal cases.

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

- 1 **SECTION 1.** 551.508 (1m) of the statutes is created to read:
- 2 **551.508 (1m) ENHANCEMENT OF PENALTIES.** (a) If a person is convicted of a crime
- 3 under sub. (1) and the crime is committed against another person who is at least 65
- 4 years of age when the crime is committed, for each such offense the maximum fine
- 5 prescribed under sub. (1) may be increased by not more than \$5,000 and the
- 6 maximum term of imprisonment prescribed under sub. (1) may be increased by not
- 7 more than 5 years.
- 8 (b) This subsection provides for the enhancement of the penalties applicable
- 9 for the underlying crime. The court shall direct that the trier of fact find a special
- 10 verdict as to the age of the victim at the time of the crime.
- 11 (c) It is no defense to the enhancement of penalties under this subsection that
- 12 the person convicted did not know the age of the victim or reasonably believed that
- 13 the victim was not at least 65 years of age.

BILL

1 **SECTION 2.** 551.5085 of the statutes is created to read:

2 **551.5085 Depositions in criminal securities violation proceedings. (1)**

3 In this section, "dependent adult" means any person who is not less than 18 nor more
4 than 65 years of age and who has physical or mental limitations that restrict his or
5 her ability to carry out normal activities or to protect his or her rights, including
6 persons who have physical or developmental disabilities or whose physical or mental
7 abilities have diminished because of age.

8 **(2)** At any time after the filing of an indictment or information in a criminal
9 proceeding based upon a violation under this chapter, the state or the defendant may
10 move the court for an order that the testimony of a prospective witness in the
11 proceeding be taken by deposition if the prospective witness's anticipated testimony
12 is material and the prospective witness is any of the following:

13 (a) About to leave the state.

14 (b) So sick or infirm as to provide reasonable grounds to believe that the witness
15 will be unable to attend the trial.

16 (c) Sixty-five years of age or older.

17 (d) A dependent adult.

18 **(3)** A motion under sub. (2) shall be accompanied by an affidavit stating all of
19 the following:

20 (a) The nature of the offense charged.

21 (b) The state of the proceedings in the action.

22 (c) The name and residence address of the prospective witness, and that his or
23 her testimony is material to the defense or the prosecution of the action.

24 (d) That the prospective witness meets one or more of the criteria specified in
25 sub. (2) (a) to (d) and identifying any such criteria met.

BILL

1 (4) The motion under sub. (2) shall be made to the court in which the criminal
2 proceeding is pending. Notice of the motion shall be provided to any opposing party
3 and the prospective witness as provided by law, but in no event less than 3 days prior
4 to any hearing on the motion.

5 (5) If the court finds that preservation of the testimony of the prospective
6 witness by taking his or her deposition is necessary, the court shall order that the
7 prospective witness's testimony be taken by deposition before a designated court
8 commissioner. The court's order shall specify the time and place of the deposition.
9 Prior to issuing an order under this subsection, the court shall fully inform the
10 defendant, or satisfy itself that the defendant has already been fully informed, of his
11 or her right to counsel as provided in s. 970.02.

12 (6) The defendant has the right to be present in person and with counsel at the
13 deposition. The court's order shall inform the defendant that the defendant is
14 required to personally attend at the taking of the deposition and that the defendant's
15 failure to do so, unless a result of physical incapacity, is a waiver of the defendant's
16 right to face the witness whose deposition is to be taken. If the defendant is in
17 custody, the defendant's custodian shall be informed of the time and place of the
18 deposition, shall produce the defendant at the taking of the deposition, and shall
19 keep the defendant in the presence and hearing of the witness during the deposition.
20 If the defendant is in custody, leave to take a deposition on motion of the state shall
21 not be granted unless all states that the custodian will enter with the defendant in
22 going to the place the deposition is to be taken have conferred upon the officers of this
23 state the right to convey prisoners in and through them.

BILL

1 (7) The attendance of the witness at the taking of the deposition may be
2 enforced by a subpoena, issued by the court commissioner before whom the
3 deposition is to be taken.

4 (8) If, at the time and place of the deposition, the court commissioner finds that
5 the witness does not meet any criteria specified in sub. (2) (a) to (d) or that the motion
6 under sub. (2) was made to avoid the examination of the witness at trial, the court
7 commissioner may not permit the deposition to be taken.

8 (9) (a) Except as provided in par. (b), a deposition shall be taken as provided
9 in civil actions. At the request of a party, the court may order that a deposition be
10 taken on the record by telephone or live audiovisual means. The original copy of the
11 deposition shall be sealed and delivered to the court commissioner, who shall then
12 transmit it to the clerk of court in which the criminal proceeding is pending.

13 (b) The court commissioner shall preside at the taking of the deposition and
14 shall enforce compliance with any applicable provision of chs. 804, 885, and 887.
15 Notwithstanding ss. 804.05 (4) (b) and 885.44 (5), counsel may make objections and
16 the court commissioner shall make rulings thereon as at trial.

17 (10) If a witness has provided deposition testimony under this section and, at
18 the trial or any hearing in the criminal proceeding, the court finds that the witness
19 is unavailable as provided under s. 908.04, a part or all of the deposition testimony,
20 so far as it is otherwise admissible under the rules of evidence, may be read into
21 evidence or, if taken by audiovisual means, shown by either party at the trial or
22 hearing. The same objections may be made to a question or answer contained in the
23 deposition as if the witness had been examined in court, except to the extent the
24 objection has already been ruled upon by the court commissioner. If only part of a
25 deposition is offered into evidence by a party, an adverse party may require the

BILL

1 offering party to offer all of it which is relevant to the part offered and any party may
2 offer other parts.

3 (11) Nothing in this section prohibits a party, in a criminal proceeding based
4 upon a violation under this chapter, from pursuing the taking of a deposition as
5 provided under s. 967.04.

6 (12) The procedure under this section is available in any criminal proceeding
7 in which any criminal violation under this chapter is charged, even if the defendant
8 is also charged with criminal violations not arising under this chapter.

msl
7-8 ✓

9 **SECTION 3. Initial applicability.** 5510603 (4) and 5510604 (4)

10 (1) The treatment of section 551.508 (1m) of the statutes first applies to
11 violations committed on the effective date of this subsection, but does not preclude
12 the counting of other violations as prior violations for purposes of sentencing a
13 person.

14 (END)

1 **INSERT ANAL-A:**

(no 4)

A person may also be subject to a civil enforcement proceeding for violating the state's securities laws. The division may bring a civil enforcement action in circuit court for securities law violations or may refer the matter to the attorney general or a district attorney to bring such an action. The division may also issue an order relating to securities law violations and, upon request, must conduct an administrative hearing on the order in which findings of fact and conclusions of law are recorded. In a civil enforcement proceeding, the court in a circuit court proceeding or the division in an administrative proceeding may impose a civil penalty of not more than \$5,000 for a single violation or not more than \$250,000 for more than one violation.

2 **INSERT ANAL-B:**

(no 4)

In a civil enforcement proceeding, the court in a circuit court proceeding or the division in an administrative proceeding may impose a civil penalty of not more than \$10,000 for a single violation, or not more than \$500,000 for more than one violation, if the violation is against another person who is at least 65 years of age when the violation occurs.

3

4 **INSERT 7-8:**

5 **SECTION ~~7~~ 551.603 (4)** of the statutes is created to read:

6 **551.603 (4) ENHANCEMENT OF CIVIL PENALTIES.** (a) In any action under this
7 section, if the court imposes a civil penalty under sub. (2) (b) 3. for any violation
8 against another person who is at least 65 years of age when the violation occurs, for
9 each such violation the civil penalty prescribed under sub. (2) (b) 3. for a single
10 violation may be increased by not more than \$5,000 and the maximum civil penalty
11 for more than one violation may be increased by not more than \$250,000.

1 (b) This subsection provides for the enhancement of the civil penalties
2 applicable for any underlying violation. If the court is not the trier of fact, the court
3 shall direct that the trier of fact find a special verdict as to the age of any victim at
4 the time of the violation.

5 (c) It is no defense to the enhancement of civil penalties under this subsection
6 that the defendant did not know the age of the victim or reasonably believed that the
7 victim was not at least 65 years of age.

8
9 SECTION ~~5~~ 551.604 (4) of the statutes is amended to read:

10 551.604 (4) CIVIL PENALTY. In a final order under sub. (3), the administrator
11 may impose a civil penalty in the form of an administrative assessment up to \$5,000
12 for a single violation or up to \$250,000 for more than one violation except that, if the
13 violation is committed against another person who is at least 65 years of age when
14 the violation occurs, for each such violation the civil penalty may be up to \$10,000
15 for a single violation or up to \$500,000 for more than one violation. It is no defense
16 to the enhancement of civil penalties under this subsection that the defendant did
17 not know the age of the victim or reasonably believed that the victim was not at least
18 65 years of age.

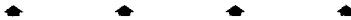
History: 2007 a. 196.



State of Wisconsin
LEGISLATIVE REFERENCE BUREAU

RESEARCH APPENDIX -
PLEASE DO NOT REMOVE FROM DRAFTING FILE

Date Transfer Requested: 08/17/2009 (Per: ARG)



Appendix A

The 2009 drafting file for LRB-3037/2 (For: Rep Nelson)

has been copied/added to the drafting file for

2009 LRB-3291 (For: Rep Nelson)

Are These "Companion Bills" ?? ... No

If yes, who in the initial requestor's office authorized the copy/transfer of the drafting history ("guts") from the original file: _____

Ⓜ The attached 2009 draft was incorporated into the new 2009 draft listed above. For research purposes, the cover sheet and the attached drafting file were copied and added, as an appendix, to the new 2009 drafting file. If introduced this section will be scanned and added, as a separate appendix, to the electronic drafting file folder.

Ⓜ The cover sheet was added to rear of the original 2009 drafting file. The drafting file was then returned, intact, to its folder and filed.

STATE OF WISCONSIN - LEGISLATIVE REFERENCE BUREAU

LRB

Research (608-266-0341)

Library (608-266-7040)

Legal (608-266-3561)

LRB

8/13

file w/ Ben

LB ~~3732~~ 3037

- put depo stuff in a separate bill

- penalty enhanced

- allows DEI to go after restit

- will send MO law

Gary, Aaron

From: Nerad, Ben
Sent: Thursday, August 13, 2009 11:45 AM
To: Gary, Aaron
Subject: LRB 3037 change

Aaron,

Please add:

(2) Order a person subject to the order to pay restitution for any loss, including the amount of any actual damages that may have been caused by the conduct and interest at the rate of eight percent per year from the date of the violation causing the loss or disgorge any profits arising from the violation;

(see: <http://www.house.mo.gov/billtracking/bills091/biltxt/truly/HB0062T.HTM> for the entire Missouri bill that includes the above provision).

to LRB 3037/2.

Thanks,

Ben

Ben Nerad
Office of Rep. Tom Nelson
Assembly Majority Leader
608-266-2418



501

2/8/17

stays RMR

2009 BILL

Tuesday,
please

B-note

Regen

1 AN ACT *to amend* 551.604 (4); and *to create* 551.508 (1m), 551.5085 and 551.603
 2 (4) of the statutes; **relating to:** violations of the Wisconsin Uniform Securities
 3 Law and providing a penalty.

Analysis by the Legislative Reference Bureau

Current law includes numerous provisions prohibiting fraud, in various forms, in connection with securities transactions or the offering or sale of securities. These provisions include making any untrue statement of a material fact or omitting a material fact necessary to make a statement not misleading in connection with the offer, sale, or purchase of a security; engaging in market manipulation; publishing, circulating, or using false advertising; and making material false or misleading statements or misleading omissions in documents filed with the Division of Securities in the Department of Financial Institutions (division). Broker-dealers and investment advisers also may not engage in fraud or employ manipulative, deceptive, or fraudulent devices.

Under current law, a person who violates the state's securities laws may be subject to criminal liability or civil liability or both. A person who willfully violates the state's securities laws, with certain exceptions, is guilty of a Class H felony, punishable by a maximum fine of \$10,000 or a maximum term of imprisonment of six years or both. The division may refer violations for criminal prosecution to the attorney general or a district attorney. A person may also be subject to a civil enforcement proceeding for violating the state's securities laws. The division may bring a civil enforcement action in circuit court for securities law violations or may

BILL

refer the matter to the attorney general or a district attorney to bring such an action. The division may also issue an order relating to securities law violations and, upon request, must conduct an administrative hearing on the order in which findings of fact and conclusions of law are recorded. In a civil enforcement proceeding, the court in a circuit court proceeding or the division in an administrative proceeding may impose a civil penalty of not more than \$5,000 for a single violation or not more than \$250,000 for more than one violation.

This bill creates a penalty enhancer for violations of the state's securities laws. If a person is convicted of a crime for violating the state's securities laws and the crime is committed against another person who is at least 65 years of age, for each such offense the maximum fine may be increased by not more than \$5,000 and the maximum term of imprisonment may be increased by not more than five years. In a civil enforcement proceeding, the court in a circuit court proceeding or the division in an administrative proceeding may impose a civil penalty of not more than \$10,000 for a single violation, or not more than \$500,000 for more than one violation, if the violation is against another person who is at least 65 years of age when the violation occurs. The fact that the defendant did not know the age of the victim, or reasonably believed the victim was not at least 65 years of age, is not a defense to this penalty enhancement.

Insert ANAL

~~Under current law, after the filing of an indictment or information in a criminal proceeding, a party may file a motion to take the deposition of a prospective witness. If it appears that a prospective witness may be unable to attend, or prevented from attending, a criminal trial or hearing, that the prospective witness's testimony is material, and that it is necessary to take the prospective witness's deposition in order to prevent a failure of justice, the court may order that the prospective witness's testimony be taken by deposition and that nonprivileged documentary evidence be produced at the time and place for the deposition. The deposition may be video recorded. The moving party must give every other party reasonable notice of the time and place for taking the deposition. The notice must also contain other information, including the name and address of each witness to be examined. The notice must further inform the defendant that he or she must be present at the deposition or waive his or her right to confront the witness. If the defendant is in custody, the defendant's custodian must produce the defendant at the deposition. The deposition is taken like depositions in civil actions. At the trial or any hearing, a part or all of the deposition, to the extent otherwise admissible, may be used if any of the following conditions appears to have been met: 1) the witness is dead; 2) the witness is out of state, unless it appears that the absence of the witness was procured by the party offering the deposition; 3) the witness is unable to attend or testify because of sickness or infirmity; or 4) the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Evidentiary objections to deposition testimony may be made as in civil actions.~~

~~This bill establishes a specific procedure for depositions in criminal proceedings involving violations of the state's securities laws. At any time after the filing of an indictment or information in a criminal proceeding based upon a violation of the state's securities laws, the state or the defendant may move the court for an order~~

BILL

that the testimony of a prospective witness in the proceeding be taken by deposition if the prospective witness's anticipated testimony is material and the prospective witness is about to leave the state; so sick or infirm as to provide reasonable grounds to believe that the witness will be unable to attend the trial; 65 years of age or older; or a dependent adult. The motion must be accompanied by an affidavit containing specified information, including the name and address of the prospective witness. If the court finds that preservation of the testimony of the prospective witness by taking his or her deposition is necessary, the court must order that the prospective witness's testimony be taken by deposition before a designated court commissioner at a specified time and place. The defendant has the right to be present in person and with counsel at the deposition. The court's order must inform the defendant that he or she must be present at the deposition or waive his or her right to confront the witness. If the defendant is in custody, the defendant's custodian must produce the defendant at the deposition. The deposition may be video recorded. The deposition is taken like depositions in civil actions, except that the court commissioner must preside over the taking of the deposition and must rule on certain objections as the deposition is being taken. If a witness who has been deposed is unavailable at trial or any hearing in the criminal proceeding, a part or all of the deposition testimony, to the extent otherwise admissible, may be read into evidence or, if video recorded, shown by either party at the trial or hearing. The same objections may be made to a question or answer contained in the deposition as if the witness had been examined in court, except to the extent the objection has already been ruled upon by the court commissioner. This specific deposition procedure for criminal securities violations does not foreclose either party from using the general procedure under current law for taking depositions in criminal cases.

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

- 1 **SECTION 1.** 551.508 (1m) of the statutes is created to read:
- 2 551.508 (1m) ENHANCEMENT OF PENALTIES. (a) If a person is convicted of a crime
- 3 under sub. (1) and the crime is committed against another person who is at least 65
- 4 years of age when the crime is committed, for each such offense the maximum fine
- 5 prescribed under sub. (1) may be increased by not more than \$5,000 and the

BILL**SECTION 1**

1 maximum term of imprisonment prescribed under sub. (1) may be increased by not
2 more than 5 years.

3 (b) This subsection provides for the enhancement of the penalties applicable
4 for the underlying crime. The court shall direct that the trier of fact find a special
5 verdict as to the age of the victim at the time of the crime.

6 (c) It is no defense to the enhancement of penalties under this subsection that
7 the person convicted did not know the age of the victim or reasonably believed that
8 the victim was not at least 65 years of age.

9 **SECTION 2.** 551.5085 of the statutes is created to read:

10 **551.5085 Depositions in criminal securities violation proceedings. (1)**

11 In this section, "dependent adult" means any person who is not less than 18 nor more
12 than 65 years of age and who has physical or mental limitations that restrict his or
13 her ability to carry out normal activities or to protect his or her rights, including
14 persons who have physical or developmental disabilities or whose physical or mental
15 abilities have diminished because of age.

16 (2) At any time after the filing of an indictment or information in a criminal
17 proceeding based upon a violation under this chapter, the state or the defendant may
18 move the court for an order that the testimony of a prospective witness in the
19 proceeding be taken by deposition if the prospective witness's anticipated testimony
20 is material and the prospective witness is any of the following:

21 (a) About to leave the state.

22 (b) So sick or infirm as to provide reasonable grounds to believe that the witness
23 will be unable to attend the trial.

24 (c) Sixty-five years of age or older.

25 (d) A dependent adult.

BILL

1 **(3)** A motion under sub. (2) shall be accompanied by an affidavit stating all of
2 the following:

3 (a) The nature of the offense charged.

4 (b) The state of the proceedings in the action.

5 (c) The name and residence address of the prospective witness, and that his or
6 her testimony is material to the defense or the prosecution of the action.

7 (d) That the prospective witness meets one or more of the criteria specified in
8 sub. (2) (a) to (d) and identifying any such criteria met.

9 **(4)** The motion under sub. (2) shall be made to the court in which the criminal
10 proceeding is pending. Notice of the motion shall be provided to any opposing party
11 and the prospective witness as provided by law, but in no event less than 3 days prior
12 to any hearing on the motion.

13 **(5)** If the court finds that preservation of the testimony of the prospective
14 witness by taking his or her deposition is necessary, the court shall order that the
15 prospective witness's testimony be taken by deposition before a designated court
16 commissioner. The court's order shall specify the time and place of the deposition.
17 Prior to issuing an order under this subsection, the court shall fully inform the
18 defendant, or satisfy itself that the defendant has already been fully informed, of his
19 or her right to counsel as provided in s. 970.02.

20 **(6)** The defendant has the right to be present in person and with counsel at the
21 deposition. The court's order shall inform the defendant that the defendant is
22 required to personally attend at the taking of the deposition and that the defendant's
23 failure to do so, unless a result of physical incapacity, is a waiver of the defendant's
24 right to face the witness whose deposition is to be taken. If the defendant is in
25 custody, the defendant's custodian shall be informed of the time and place of the

BILL**SECTION 2**

1 deposition, shall produce the defendant at the taking of the deposition, and shall
2 keep the defendant in the presence and hearing of the witness during the deposition.

3 If the defendant is in custody, leave to take a deposition on motion of the state shall
4 not be granted unless all states that the custodian will enter with the defendant in
5 going to the place the deposition is to be taken have conferred upon the officers of this
6 state the right to convey prisoners in and through them.

7 (7) The attendance of the witness at the taking of the deposition may be
8 enforced by a subpoena, issued by the court commissioner before whom the
9 deposition is to be taken.

10 (8) If, at the time and place of the deposition, the court commissioner finds that
11 the witness does not meet any criteria specified in sub. (2) (a) to (d) or that the motion
12 under sub. (2) was made to avoid the examination of the witness at trial, the court
13 commissioner may not permit the deposition to be taken.

14 (9) (a) Except as provided in par. (b), a deposition shall be taken as provided
15 in civil actions. At the request of a party, the court may order that a deposition be
16 taken on the record by telephone or live audiovisual means. The original copy of the
17 deposition shall be sealed and delivered to the court commissioner, who shall then
18 transmit it to the clerk of court in which the criminal proceeding is pending.

19 (b) The court commissioner shall preside at the taking of the deposition and
20 shall enforce compliance with any applicable provision of chs. 804, 885, and 887.
21 Notwithstanding ss. 804.05 (4) (b) and 885.44 (5), counsel may make objections and
22 the court commissioner shall make rulings thereon as at trial.

23 (10) If a witness has provided deposition testimony under this section and, at
24 the trial or any hearing in the criminal proceeding, the court finds that the witness
25 is unavailable as provided under s. 908.04, a part or all of the deposition testimony,

BILL

1 so far as it is otherwise admissible under the rules of evidence, may be read into
2 evidence or, if taken by audiovisual means, shown by either party at the trial or
3 hearing. The same objections may be made to a question or answer contained in the
4 deposition as if the witness had been examined in court, except to the extent the
5 objection has already been ruled upon by the court commissioner. If only part of a
6 deposition is offered into evidence by a party, an adverse party may require the
7 offering party to offer all of it which is relevant to the part offered and any party may
8 offer other parts.

9 (11) Nothing in this section prohibits a party, in a criminal proceeding based
10 upon a violation under this chapter, from pursuing the taking of a deposition as
11 provided under s. 967.04.

12 (12) The procedure under this section is available in any criminal proceeding
13 in which any criminal violation under this chapter is charged, even if the defendant
14 is also charged with criminal violations not arising under this chapter.

15 **SECTION 3.** 551.603 (4) of the statutes is created to read:

16 551.603 (4) ENHANCEMENT OF CIVIL PENALTIES. (a) In any action under this
17 section, if the court imposes a civil penalty under sub. (2) (b) 3. for any violation
18 against another person who is at least 65 years of age when the violation occurs, for
19 each such violation the civil penalty prescribed under sub. (2) (b) 3. for a single
20 violation may be increased by not more than \$5,000 and the maximum civil penalty
21 for more than one violation may be increased by not more than \$250,000.

22 (b) This subsection provides for the enhancement of the civil penalties
23 applicable for any underlying violation. If the court is not the trier of fact, the court
24 shall direct that the trier of fact find a special verdict as to the age of any victim at
25 the time of the violation.

BILL

1 (c) It is no defense to the enhancement of civil penalties under this subsection
 2 that the defendant did not know the age of the victim or reasonably believed that the
 3 victim was not at least 65 years of age.

4 **SECTION 4.** 551.604 (4) of the statutes is amended to read:

5 551.604 (4) CIVIL PENALTY. In a final order under sub. (3), the administrator
 6 may impose a civil penalty in the form of an administrative assessment up to \$5,000
 7 for a single violation or up to \$250,000 for more than one violation except that, if the
 8 violation is committed against another person who is at least 65 years of age when
 9 the violation occurs, for each such violation the civil penalty may be up to \$10,000
 10 for a single violation or up to \$500,000 for more than one violation. It is no defense
 11 to the enhancement of civil penalties under this subsection that the defendant did
 12 not know the age of the victim or reasonably believed that the victim was not at least
 13 65 years of age.

14 **SECTION 5. Initial applicability.**

15 (1) ^{This act} ~~The treatment of sections 551.508 (1m), 551.603 (4), and 551.604 (4) of the~~
 16 ~~statutes~~ first applies to violations committed on the effective date of this subsection,
 17 but does not preclude the counting of other violations as prior violations for purposes
 18 of sentencing a person.

19 (END)

D-Note ✓

Insert
8-3

Insert
8-13

change
component

**2009-2010 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-3037/3ins
ARG:.....

1

2

INSERT ANAL:

Under current law, in a civil enforcement proceeding before the circuit court, the court may order a person who violates the state's securities laws to pay restitution, to disgorge profits, and to pay prejudgment and postjudgment interest, in addition to imposing a civil penalty. This bill allows the division, in an administrative civil enforcement proceeding, to also include in its orders the payment of restitution, the disgorgement of profits, and the payment of interest at the legal rate.

3

INSERT 8-3:

4

SECTION ~~#~~ 551.604 (2) of the statutes is amended to read:

5

551.604 (2) SUMMARY PROCESS. An order under sub. (1) is effective on the date

6

of issuance. Upon issuance of the order, the administrator shall promptly serve each

7

person subject to the order with a copy of the order and a notice that the order has

8

been entered. The order must include a statement of any civil penalty, restitution,

9

disgorgement, interest, or costs of investigation the administrator will seek, a

10

statement of the reasons for the order, and notice that, within 15 days after receipt

11

of a request in a record from the person, the matter will be scheduled for a hearing.

12

If a person subject to the order does not request a hearing and none is ordered by the

13

administrator within 30 days after the date of service of the order, the order,

14

including the imposition of a civil penalty or requirement for payment of restitution,

15

disgorgement, interest, or the costs of investigation sought in a statement in the

16

order, becomes final as to that person by operation of law. If a hearing is requested

17

or ordered, the administrator, after notice of and opportunity for hearing to each

1 person subject to the order, may modify or vacate the order or extend it until final
2 determination.

History: 2007 a.196.

3 **INSERT 8-13:**

4 **SECTION ~~8~~** 551.604 (4m) of the statutes is created to read:

5 551.604 (4m) RESTITUTION, DISGORGEMENT, AND INTEREST. In a final order under
6 sub. (3), in addition to any civil penalty under sub. (4) or costs under sub. (5), the
7 administrator may order a person subject to the order to do any of the following:

- 8 (a) Pay restitution to any person ^{suffering} ~~suffering~~ loss as a result of the violation.
- 9 (b) Disgorge any profits received as a result of the violation.
- 10 (c) Pay interest at the legal rate under s. 138.04 from the date of the violation.

11
12
13

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-3037/3dn

ARG:.....

WLj

Date

ATTN: Ben Nerad

As requested, I have split LRB-3037/2 into two drafts: LRB-3037/3 and LRB-3291/1.

I have attempted to incorporate the provisions of Missouri law provided to me while remaining consistent with similar provisions of Wisconsin law. Created s. 551.604 (4m) in this draft (specifying the permissible contents of a DFI order in a civil administrative proceeding before DFI) is similar to s. 551.603 (2) (b) 3. and 4. (specifying the permissible contents of a court order in a civil proceeding before a circuit court). In addition, I also reviewed the provisions of Act 2, which provide new authorization for DFI to impose orders of restitution in administrative proceedings involving mortgage bankers, mortgage brokers, and mortgage loan originators. The language in this draft is also consistent with the language in Act 2. There is a general interest provision under current law, see s. 138.04, and I have used that as the basis for the bill rather than the slightly higher legal rate of interest in the Missouri provision. Please let me know if any of this is not consistent with your intent.

Aaron R. Gary
Legislative Attorney
Phone: (608) 261-6926
E-mail: aaron.gary@legis.wisconsin.gov

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-3037/3dn
ARG:wlj:md

August 21, 2009

ATTN: Ben Nerad

As requested, I have split LRB-3037/2 into two drafts: LRB-3037/3 and LRB-3291/1.

I have attempted to incorporate the provisions of Missouri law provided to me while remaining consistent with similar provisions of Wisconsin law. Created s. 551.604 (4m) in this draft (specifying the permissible contents of a DFI order in a civil administrative proceeding before DFI) is similar to s. 551.603 (2) (b) 3. and 4. (specifying the permissible contents of a court order in a civil proceeding before a circuit court). In addition, I also reviewed the provisions of Act 2, which provide new authorization for DFI to impose orders of restitution in administrative proceedings involving mortgage bankers, mortgage brokers, and mortgage loan originators. The language in this draft is also consistent with the language in Act 2. There is a general interest provision under current law, see s. 138.04, and I have used that as the basis for the bill rather than the slightly higher legal rate of interest in the Missouri provision. Please let me know if any of this is not consistent with your intent.

Aaron R. Gary
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Parisi, Lori

From: Nerad, Ben

Sent: Tuesday, October 13, 2009 4:46 PM

To: LRB.Legal

Subject: Draft Review: LRB 09-3037/3 Topic: Securities law violations, penalty enhancers and restitution

Please Jacket LRB 09-3037/3 for the ASSEMBLY.