February 1, 2013

HOUSE BILL No. 1179

DIGEST OF HB 1179 (Updated January 30, 2013 2:09 pm - DI 101)

Citations Affected: IC 23-19.

Synopsis: Securities matters. Requires that certain financial statements that are submitted with a registration statement for securities that: (1) are registered by qualification; and (2) are to be offered in Indiana with a maximum aggregate offering price in excess of $1,000,000; be audited in accordance with generally accepted accounting principles by an independent certified public accountant. Makes it unlawful for a person to violate an agreement that is: (1) entered into between the securities division and the person; and (2) ordered by the securities commissioner under the Indiana Uniform Securities Act. Provides that a violation of an agreement does not subject the person to liability to a purchaser or seller.

Effective: July 1, 2013.

Heaton, Hale, Moed, DeVon

January 10, 2013, read first time and referred to Committee on Financial Institutions.
January 31, 2013, amended, reported — Do Pass.

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February 1, 2013

First Regular Session 118th General Assembly (2013)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type.~~

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~*this style type*~~ reconciles conflicts between statutes enacted by the 2012 Regular Session of the General Assembly.

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HOUSE BILL No. 1179

A BILL FOR AN ACT to amend the Indiana Code concerning business and other associations.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 23-19-3-4, AS ADDED BY P.L.27-2007, SECTION 23, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2013]: Sec. 4. (a) A security may be registered by qualification under this section.

(b) A registration statement under this section must contain the information or records specified in section 5 of this chapter, a consent to service of process complying with IC 23-19-6-11, and, if required by rule adopted under this article, the following information or records:

(1) With respect to the issuer and any significant subsidiary, its name, address, and form of organization; the state or foreign jurisdiction and date of its organization; the general character and location of its business; a description of its physical properties and equipment; and a statement of the general competitive conditions in the industry or business in which it is or will be engaged.

(2) With respect to each director and officer of the issuer, and other person having a similar status or performing similar

functions, the person's name, address, and principal occupation for the previous five (5) years; the amount of securities of the issuer held by the person as of the thirtieth day before the filing of the registration statement; the amount of the securities covered by the registration statement to which the person has indicated an intention to subscribe; and a description of any material interest of the person in any material transaction with the issuer or a significant subsidiary effected within the previous three (3) years or proposed to be effected.

(3) With respect to persons covered by subdivision (2), the aggregate sum of the remuneration paid to those persons during the previous twelve (12) months and estimated to be paid during the next twelve (12) months, directly or indirectly, by the issuer, and all predecessors, parents, subsidiaries, and affiliates of the issuer.

(4) With respect to a person owning of record or owning beneficially, if known, ten percent (10%) or more of the outstanding shares of any class of equity security of the issuer, the information specified in subdivision (2) other than the person's occupation.

(5) With respect to a promoter, if the issuer was organized within the previous three (3) years, the information or records specified in subdivision (2), any amount paid to the promoter within that period or intended to be paid to the promoter, and the consideration for the payment.

(6) With respect to a person on whose behalf any part of the offering is to be made in a nonissuer distribution, the person's name and address; the amount of securities of the issuer held by the person as of the date of the filing of the registration statement; a description of any material interest of the person in any material transaction with the issuer or any significant subsidiary effected within the previous three (3) years or proposed to be effected; and a statement of the reasons for making the offering.

(7) The capitalization and long term debt, on both a current and pro forma basis, of the issuer and any significant subsidiary, including a description of each security outstanding or being registered or otherwise offered, and a statement of the amount and kind of consideration, whether in the form of cash, physical assets, services, patents, goodwill, or anything else of value, for which the issuer or any subsidiary has issued its securities within the previous two (2) years or is obligated to issue its securities.

(8) The kind and amount of securities to be offered; the proposed

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offering price or the method by which it is to be computed; any variation at which a proportion of the offering is to be made to a person or class of persons other than the underwriters, with a specification of the person or class; the basis on which the offering is to be made if otherwise than for cash; the estimated aggregate underwriting and selling discounts or commissions and finders' fees, including separately cash, securities, contracts, or anything else of value to accrue to the underwriters or finders in connection with the offering or, if the selling discounts or commissions are variable, the basis of determining them and their maximum and minimum amounts; the estimated amounts of other selling expenses, including legal, engineering, and accounting charges; the name and address of each underwriter and each recipient of a finder's fee; a copy of any underwriting or selling group agreement under which the distribution is to be made or the proposed form of any such agreement whose terms have not yet been determined; and a description of the plan of distribution of any securities that are to be offered otherwise than through an underwriter.

(9) The estimated monetary proceeds to be received by the issuer from the offering; the purposes for which the proceeds are to be used by the issuer; the estimated amount to be used for each purpose; the order or priority in which the proceeds will be used for the purposes stated; the amounts of any funds to be raised from other sources to achieve the purposes stated; the sources of the funds; and, if a part of the proceeds is to be used to acquire property, including goodwill, otherwise than in the ordinary course of business, the names and addresses of the vendors, the purchase price, the names of any persons that have received commissions in connection with the acquisition, and the amounts of the commissions and other expenses in connection with the acquisition, including the cost of borrowing money to finance the acquisition.

(10) A description of any stock options or other security options outstanding, or to be created in connection with the offering, and the amount of those options held or to be held by each person required to be named in subdivision (2), (4), (5), (6), or (8) and by any person that holds or will hold ten percent (10%) or more in the aggregate of those options.

(11) The dates of, parties to, and general effect concisely stated of each managerial or other material contract made or to be made otherwise than in the ordinary course of business to be performed

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in whole or in part at or after the filing of the registration statement or that was made within the previous two (2) years, and a copy of the contract.

(12) A description of any pending litigation, action, or proceeding to which the issuer is a party and that materially affects its business or assets, and any litigation, action, or proceeding known to be contemplated by governmental authorities.

(13) A copy of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature intended as of the effective date to be used in connection with the offering and any solicitation of interest used in compliance with IC 23-19-2-2(17)(B).

(14) A specimen or copy of the security being registered, unless the security is uncertificated; a copy of the issuer's articles of incorporation and bylaws or their substantial equivalents, in effect; and a copy of any indenture or other instrument covering the security to be registered.

(15) A signed or conformed copy of an opinion of counsel concerning the legality of the security being registered, with an English translation if it is in a language other than English, which states whether the security when sold will be validly issued, fully paid, and nonassessable and, if a debt security, a binding obligation of the issuer.

(16) A signed or conformed copy of a consent of any accountant, engineer, appraiser, or other person whose profession gives authority for a statement made by the person, if the person is named as having prepared or certified a report or valuation, other than an official record that is public, which is used in connection with the registration statement.

(17) A balance sheet of the issuer as of a date within four (4) months before the filing of the registration statement; a statement of income and a statement of cash flows for each of the three (3) fiscal years preceding the date of the balance sheet and for any period between the close of the immediately previous fiscal year and the date of the balance sheet, or for the period of the issuer's and any predecessor's existence if less than three (3) years; and, if any part of the proceeds of the offering is to be applied to the purchase of a business, the financial statements that would be required if that business were the registrant. **If the maximum aggregate offering price at which the securities registered under this section are to be offered in Indiana is in excess of one million dollars ($1,000,000), the balance sheet, statement**

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of income, statement of cash flows, and any other financial statement required under this subdivision must be audited in accordance with generally accepted accounting principles by an independent certified public accountant.

(18) Any additional information or records required by rule adopted or order issued under this article.

(c) A registration statement under this section becomes effective thirty (30) days, or any shorter period provided by rule adopted or order issued under this article, after the date the registration statement or the last amendment other than a price amendment is filed, if:

(1) a stop order is not in effect and a proceeding is not pending under section 6 of this chapter;

(2) the commissioner has not issued an order under section 6 of this chapter delaying effectiveness; and

(3) the applicant or registrant has not requested that effectiveness be delayed.

(d) The commissioner may delay effectiveness once for not more than ninety (90) days if the commissioner determines the registration statement is not complete in all material respects and promptly notifies the applicant or registrant of that determination. The commissioner may also delay effectiveness for a further period of not more than thirty (30) days if the commissioner determines that the delay is necessary or appropriate.

(e) A rule adopted or order issued under this article may require as a condition of registration under this section that a prospectus containing a specified part of the information or record specified in subsection (b) be sent or given to each person to which an offer is made, before or concurrently with the earliest of:

(1) the first offer made in a record to the person otherwise than by means of a public advertisement, by or for the account of the issuer or another person on whose behalf the offering is being made or by an underwriter or broker-dealer that is offering part of an unsold allotment or subscription taken by the person as a participant in the distribution;

(2) the confirmation of a sale made by or for the account of the person;

(3) payment under such a sale; or

(4) delivery of the security under such a sale.

SECTION 2. IC 23-19-5-9, AS ADDED BY P.L.27-2007, SECTION 23, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2013]: Sec. 9. (a) **Except as provided in section 11 of this chapter,** a person is liable to the purchaser if the person sells a security

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in violation of this article, including a violation of IC 23-19-4-12(d)(9) or IC 23-19-4-12(d)(13). It is a defense if the person selling the security sustains the burden of proof that either the person did not know, and in the exercise of reasonable care could not have known, of the violation or the purchaser knowingly participated in the violation. An action under this subsection is governed by the following:

(1) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at the greater of eight percent (8%) per annum or the rate provided for in the security from the date of the purchase, costs, and reasonable attorney's fees determined by the court or arbitrator, upon the tender of the security, or for actual damages as provided in subdivision (3).

(2) The tender referred to in subdivision (1) may be made any time before entry of judgment. Tender requires only notice in a record of ownership of the security and willingness to exchange the security for the amount specified. A purchaser that no longer owns the security may recover actual damages as provided in subdivision (3).

(3) Actual damages in an action arising under this subsection are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it, and interest at the greater of eight percent (8%) per annum or the rate provided for in the security from the date of the purchase, costs, and reasonable attorneys' fees determined by the court or arbitrator.

(b) **Except as provided in section 11 of this chapter,** a person is liable to the seller if the person buys a security in violation of this article, including a violation of IC 23-19-4-12(d)(9) or IC 23-19-4-12(d)(13). It is a defense if the person purchasing the security sustains the burden of proof that either the person did not know, and in the exercise of reasonable care could not have known, of the conduct constituting the violation or the seller knowingly participated in the violation. An action under this subsection is governed by the following:

(1) The seller may maintain an action to recover the security, and any income received on the security, costs, and reasonable attorney's fees determined by the court or arbitrator, upon the tender of the purchase price, or for actual damages as provided in subdivision (3).

(2) The tender referred to in subdivision (1) may be made any time before entry of judgment. Tender requires only notice in a record of the present ability to pay the amount tendered and

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willingness to take delivery of the security for the amount specified. If the purchaser no longer owns the security, the seller may recover actual damages as provided in subdivision (3).

(3) Actual damages in an action arising under this subsection are the difference between the price at which the security was sold and the value the security would have had at the time of the sale in the absence of the purchaser's conduct causing liability, and interest at the greater of eight percent (8%) per annum or the rate provided for in the security from the date of the sale of the security, costs, and reasonable attorney's fees determined by the court or arbitrator.

(c) A person acting as an investment adviser or investment adviser representative that provides investment advice for compensation in violation of this article is liable to the client. An action under this subsection shall be governed by the following:

(1) For a violation of section 1 or 2 of this chapter, the client may maintain an action to recover the consideration paid for the advice and the amount of any actual damages caused by the fraudulent conduct, interest at the greater of eight percent (8%) per annum or the rate provided for in the security from the date of the fraudulent conduct, costs, and reasonable attorney's fees determined by the court less the amount of any income received as a result of the fraudulent conduct.

(2) For a violation of any other section of this article, the client may maintain an action to recover the consideration paid for the advice, interest at the greater of eight percent (8%) per annum or the rate provided for in the security from the date of payment, costs, and reasonable attorney's fees determined by the court or arbitrator.

(3) This subsection does not apply to a broker-dealer or its agents if the investment advice provided is solely incidental to transacting business as a broker-dealer and no special compensation is received for the investment advice.

(d) The following persons are liable jointly and severally with and to the same extent as persons liable under subsections (a) through (c):

(1) A person that directly or indirectly controls a person liable under subsections (a) and (b), unless the controlling person sustains the burden of proof that the controlling person did not know, and in the exercise of reasonable care could not have known, of the existence of the conduct by reason of which the liability is alleged to exist.

(2) An individual who is a managing partner, executive officer, or

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director of a person liable under subsections (a) through (c), including an individual having a similar status or performing similar functions, unless the individual sustains the burden of proof that the individual did not know, and in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist.

(3) An individual who is an employee of or associated with a person liable under subsections (a) through (c) and who materially aids the conduct giving rise to the liability, unless the individual sustains the burden of proof that the individual did not know, and in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist.

(4) A person that is a broker-dealer, agent, investment adviser, or investment adviser representative that materially aids the conduct giving rise to the liability under subsections (a) through (c), unless the person sustains the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the existence of conduct by reason of which liability is alleged to exist.

(e) A person liable under this section has a right of contribution as in cases of contract against any other person liable under this section for the same conduct.

(f) A cause of action under this section survives the death of an individual who might have been a plaintiff or defendant.

(g) Action under this section shall be commenced within three (3) years after discovery by the person bringing the action of a violation of this article, and not afterwards.

(h) A person that has made, or has engaged in the performance of, a contract in violation of this article or a rule adopted or order issued under this article, or that has acquired a purported right under the contract with knowledge of conduct by reason of which its making or performance was in violation of this article, may not base an action on the contract.

(i) A condition, stipulation, or provision binding a person purchasing or selling a security or receiving investment advice to waive compliance with this article or a rule adopted or order issued under this article is void.

(j) The rights and remedies provided by this article are in addition to any other rights or remedies that may exist.

SECTION 3. IC 23-19-5-11 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY

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1, 2013]: **Sec. 11. (a) It is unlawful for a person to violate any agreement that is:**

(1) entered into between the securities division and the person; and

(2) ordered by the commissioner under this article.

(b) A person is not liable under section 9(a) or 9(b) of this chapter for a violation of this section.

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COMMITTEE REPORT

Mr. Speaker: Your Committee on Financial Institutions, to which was referred House Bill 1179, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill be amended as follows:

Page 4, line 42, delete "five million dollars ($5,000,000)," and insert "**one million dollars ($1,000,000),**".

and when so amended that said bill do pass.

(Reference is to HB 1179 as introduced.)

BURTON, Chair

Committee Vote: yeas 13, nays 0.

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