

**STATEMENT OF POLICY THAT ISSUERS OF A PRIMARY OFFERING OF
SECURITIES MAY BE CONSIDERED A SELLER WITHIN THE MEANING OF
ALABAMA CODE § 8-6-19.**

The Alabama Securities Commission ("ASC") has reviewed and considered the question of whether an issuer of a primary offering of securities should be considered a seller within the meaning of Alabama Code Section 8-6-19 where the form of the underwriting or distribution prevents strict privity between the issuer and buyer. The ASC has determined that, dependent upon the nature and materiality of the misrepresentation(s) or omission(s) in a registration, prospectus, or other offering materials, that issuers who are found to be responsible for the origination or use of such misrepresentations or omissions are "sellers" for purpose of this section.

The preface to the Alabama Securities Act ("Act") states that its purpose is to guard against securities fraud and to preserve legitimate capital markets. This purpose is achieved by, among others, providing civil remedies for violations of the Act, and by providing administrative, civil and criminal penalties for those who violate the Act.

Section 8-6-17(a)(2) states, "It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly, to: ... (2) Make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading...". The purpose of this section is to prohibit all fraudulent schemes in connection with a securities transaction. This is true whether the scheme or action is of a garden variety or whether the deception is novel or atypical. Atypical or novel methods should not provide immunity from the Act. *Buffo v. State*, 415 So.2d 1158 (Ala. 1982).

Further, section 8-6-19(a)(2), provides civil liability for violations of the anti-fraud provisions stating that any person who: "Sells or offers to sell a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know and in the exercise of reasonable care could not have known of the untruth or omission, is liable to the person buying the security from him."

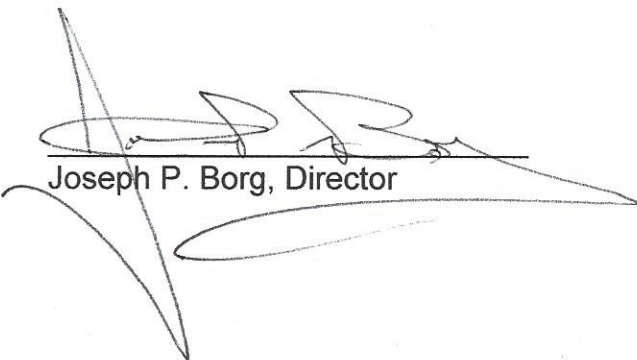
While this section creates liability for direct sales relating to any secondary sale of a security, it also creates a defense from liability if the person selling did not know of the misstatement or omission and in the exercise of reasonable care could not have known of the misstatement or omission. This circumstance may occur when the initial purchaser is himself a victim of the misrepresentation or omission. In this situation, the subsequent buyer may not have a cause of action in fraud against the person from whom he or she purchased the security in question. The section is silent on whether, in cases of immunity from liability for a secondary seller, liability would or should pass through to the previous seller or issuer, if that previous seller or issuer is the person who caused the misstatement or omission.

The immunity extended to subsequent sellers under this section is intended to protect those who are innocent of fraudulent intent, not to foreclose civil remedies to subsequent purchasers. Likewise, the section was not designed to insulate any person who makes a material misrepresentation or omission from subsequent liability just because the material misrepresentation or omission was not made directly to the person ultimately harmed. To interpret the statute in such a way would clearly create an atypical or novel immunity from prosecution for fraud under the Act.

In fact, the language of section 8-6-17(a)(2) specifically addresses such issues by providing anti-fraud liability to any person who "directly or indirectly" (emphasis added) makes a material misrepresentation or omission. Any argument that would interpret section 8-6-19(a)(2) to exclude indirect misrepresentations and omissions simply because the section does not specifically include the "directly or indirectly" language is defeated by the previous subsection (a)(1), which incorporates civil liability for any person who offers or sells "a security in violation of any provision" of the Act.

Based on the foregoing analysis, the ASC has determined that an issuer may be considered a seller under the Act, even in transactions for which the issuer does not have strict privity with the buyer.

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