

AMENDED IN ASSEMBLY MARCH 17, 2005

CALIFORNIA LEGISLATURE—2005—06 REGULAR SESSION

ASSEMBLY BILL

No. 310

Introduced by Assembly Member Umberg

February 10, 2005

~~An act to add Section 21354.2 to the Government Code, relating to public employees' retirement. An act to add Sections 1714.12 and 1714.13 to the Civil Code, and to amend Section 25500 of the Corporations Code, relating to investments.~~

LEGISLATIVE COUNSEL'S DIGEST

AB 310, as amended, Umberg. ~~Public employees' retirement: school members~~ *Investment plans: defined contribution and other retirement plans: liability.*

Existing law provides for the licensing and regulation of broker-dealers and investment advisors by the Department of Corporations under the Corporate Securities Law of 1968. Existing law provides that any person who willfully participates in certain unlawful acts or transactions relative to securities transactions shall be liable to any other person who purchases or sells any security at a price that was affected by the act or transaction for damages sustained as a result of the act or transaction.

This bill would define the terms "willfully" and "participates" for purposes of these provisions, and would state the intent of the Legislature to abrogate certain appellate court holdings in that regard. The bill would also impose various qualifications and requirements on persons performing investment or management services in connection with a defined contribution plan or other retirement plan, including a requirement to be registered with the state. The bill would provide that those persons owe a fiduciary duty

to the plan beneficiaries, and would set forth the liability of those and other associated persons for a breach of that duty. The bill would enact other related provisions.

~~Under the Public Employees' Retirement Law, a member's retirement allowance is calculated as a percentage of the members' final compensation. School members, as defined, are generally subject to a 2% at age 55 benefit formula.~~

~~This bill would provide that school members, other than school safety members, who retire on and after January 1, 2006, shall be subject to a 2.5% at age 55 benefit formula.~~

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 ~~SECTION 1. Section 21354.2 is added to the Government~~
2 ~~Code, to read:~~

3 *SECTION 1. The Legislature finds and declares all of the*
4 *following:*

5 *(a) As part of their compensation and employee benefits, state*
6 *and local public employees are entitled to adequate, stable, and*
7 *secure retirement benefits. This right includes the right to*
8 *protection from the loss of retirement funds due to incompetent*
9 *investment advice or improper accounting of retirement funds.*
10 *Indeed, all California employees and retirees in both the private*
11 *and public sectors are entitled to minimum safeguards with*
12 *respect to their retirement investments.*

13 *(b) A defined contribution plan does not provide a guaranteed*
14 *benefit level at retirement and does not include disability or*
15 *death benefits. The balance in a defined contribution account*
16 *may be paid out as either a lump sum or a partial lump sum, in a*
17 *set number of installment payments, or it may be used to*
18 *purchase an annuity.*

19 *(c) Under a defined contribution plan, the employer is only*
20 *responsible for making the scheduled contributions, while the*
21 *employees bear all the investment risk.*

22 *SEC. 2. The Legislature further finds and declares all of the*
23 *following:*

24 *(a) Sections 25400 and 25500 of the Corporations Code are*
25 *intended to protect California residents and investors from*

1 *manipulation of the financial markets, including knowing or*
2 *reckless statements, concealments, or conduct, and California*
3 *pension funds are the primary beneficiaries of the protections*
4 *provided by these sections.*

5 *(b) Section 25400 of the Corporations Code makes various*
6 *acts unlawful that create a false or misleading impression*
7 *concerning securities transactions and prices. Section 25500 of*
8 *the Corporations Code provides a civil remedy for the willful*
9 *participation in an act or transaction in violation of Section*
10 *25400 of the Corporations Code.*

11 *(c) The California Court of Appeal for the Sixth Appellate*
12 *District, in Kamen v. Lindly (2001) 94 Cal.App.4th 197, held that*
13 *the phrase “willfully participates” in Section 25500 of the*
14 *Corporations Code does not apply to participants who are not*
15 *engaged in “market activity.” This holding incorrectly and*
16 *unfairly prevents California investors from seeking redress from*
17 *all perpetrators of corporate and securities fraud. It is the intent*
18 *of the Legislature to abrogate this holding.*

19 *(d) The California Court of Appeal for the Second Appellate*
20 *District, in California Amplifier, Inc. v. RLI Insurance Co.*
21 *(2001) 94 Cal.App.4th 102, held that the phrase “willfully*
22 *participates” in Section 25500 of the Corporations Code*
23 *requires that a participant in a violation of subdivision (d) of*
24 *Section 25400 of the Corporations Code, relating to intentionally*
25 *or recklessly making a false or misleading statement, must*
26 *knowingly and intentionally make a false or misleading*
27 *statement. This holding incorrectly and unfairly increases the*
28 *scienter standard required in cases of securities fraud or*
29 *manipulation. It is the intent of the Legislature to abrogate this*
30 *holding.*

31 *(e) It is also the intent of the Legislature to abrogate the*
32 *holding of the California Court of Appeal for the Second*
33 *Appellate District, in California Amplifier, Inc. v. RLI Insurance*
34 *Co. (2001) 94 Cal.App.4th 102, to the extent that it holds that*
35 *willful participation in a violation of subdivision (d) of Section*
36 *25400 of the Corporations Code requires that the participant*
37 *knowingly and intentionally make a false or misleading*
38 *statement.*

39 *SEC. 3. Section 1714.12 is added to the Civil Code, to read:*

1 1714.12. (a) In order to be eligible to perform investment or
2 management services in connection with a defined contribution
3 plan or other retirement plan, a person shall be registered with
4 the Commissioner of Corporations or another agency of the State
5 of California and satisfy all of the following conditions:
6 (1) Have and maintain a minimum of 10 or more consecutive
7 quarters of positive returns.
8 (2) Limit its management and service fees for employee
9 retirement plans to one-half percent of total investments.
10 (3) Provide monthly statements itemizing all fees charged to
11 an employee retirement account.
12 (4) Purchase insurance to cover any and all potential liability
13 occurring by reason of any act or omission in rendering services
14 in connection with a defined contribution plan or other
15 retirement plan.
16 (5) Eliminate all fees for opening of new defined contribution
17 plan accounts or other new retirement plan accounts, for
18 transferring defined contribution plan accounts or other
19 retirement plan accounts, or for closing any of those accounts.
20 (6) Offer an education program to all customers with defined
21 contribution plan accounts or other retirement plan accounts.
22 (b) All persons qualified to provide investment or management
23 services as defined under this section shall provide evidence of
24 financial strength and stability, as may be applicable, pursuant
25 to rating assigned by nationally recognized rating services that
26 evaluate financial strength of those providers of investment or
27 management services.
28 (c) All investments made in a defined contribution plan or
29 other retirement plan shall be rated as AAA, AA, A, BBB, or
30 “investment grade” by either Fitch, Moody’s, or Standard &
31 Poor’s rating services or a similar statistical rating service that
32 is nationally recognized for rating the creditworthiness of
33 investments.
34 (d) All persons qualified to provide investment or management
35 services as defined under this section shall offer investment
36 education services at their own expense to all customers with a
37 defined contribution plan account or other retirement plan
38 account. Investment education services shall include, but are not
39 limited to, disseminating educational materials, providing
40 retirement planning education, explaining the differences

1 *between the defined benefit retirement plan and the defined*
2 *contribution retirement plan, and offering financial planning*
3 *guidance on matters such as investment diversification,*
4 *investment risks, investment costs, and asset allocation.*

5 *(e) All persons qualified to provide investment or management*
6 *services as defined under this section shall provide written*
7 *disclosure of expenses paid directly or indirectly by customers*
8 *with a defined contribution or other retirement plan, including,*
9 *but not limited to, penalties for early withdrawals, presence of*
10 *two-tier annuity features, declining or fixed withdrawal charges,*
11 *and surrender or deposit charges, to those customers.*

12 *(f) All persons qualified to provide investment or management*
13 *services as defined under this section shall provide disclosure of*
14 *the range of administrative and customer services provided,*
15 *including, but not limited to, asset allocation, accounting and*
16 *administration of benefits for individual participants,*
17 *recordkeeping for individual participants, asset purchase,*
18 *control, and safekeeping, execution of a participant's*
19 *instructions as to asset and contribution allocation, calculation*
20 *of daily net asset values, direct access for participants to their*
21 *account information, periodic reporting to participants, not less*
22 *than quarterly, on their account balances and transactions, and*
23 *compliance with the standard of care applicable in the provision*
24 *of investment services and consistent with federal law, to*
25 *customers with a defined contribution or other retirement plan.*

26 *SEC. 4 Section 1714.13 is added to the Civil Code, to read:*

27 *1714.13. (a) Any person, including a broker-dealer, as*
28 *defined in Section 25004 of the Corporations Code, or an*
29 *investment advisor, as defined in Section 25009 of the*
30 *Corporations Code, who performs services in connection with a*
31 *defined contribution plan or other contribution plan owes*
32 *fiduciary duties to the plan beneficiary.*

33 *(b) Any person who breaches his, her, or its fiduciary duty in*
34 *connection with the performance of services shall be liable to the*
35 *plan beneficiary. If the breach was intentional or reckless, the*
36 *fiduciary shall be liable for an amount up to treble damages for*
37 *losses sustained as a result of the intentional or reckless conduct.*

38 *(c) Every person who directly or indirectly controls a person*
39 *liable under this section, every partner in a firm so liable, every*
40 *principle executive officer or director of a corporation so liable,*

1 every person occupying a similar status or performing similar
2 functions, every employee of a person so liable who materially
3 aids in the act or transaction constituting the violation, and every
4 agent who materially aids in the act or transaction constituting
5 the violation are also liable jointly and severally with and to the
6 same extent as that person, unless the other person shows that he
7 or she acted in good faith.

8 (d) Every person who materially assists in any breach of duty
9 set forth in this section with the intent to deceive or defraud is
10 jointly and severally liable with any other person liable under
11 this section.

12 (e) All state and local government retirement systems and
13 state and local government employers shall have standing to
14 assert claims under this provision on behalf of one or more
15 employees or retirees.

16 SEC. 5. Section 25500 of the Corporations Code is amended
17 to read:

18 25500. (a) Any person who willfully participates in any act
19 ~~or~~, transaction, scheme, or course of conduct in violation of
20 Section 25400 shall be liable to any other person who purchases
21 or sells any security at a price ~~which was~~ affected by ~~such that~~
22 ~~act or~~, transaction, scheme, or course of conduct for the damages
23 sustained by the latter as a result of ~~such that~~ ~~act or~~, transaction,
24 scheme, or course of conduct. ~~Such~~ The damages shall be the
25 difference between the price at which ~~such the~~ other person
26 purchased or sold securities and the market value ~~which such that~~
27 the securities would have had at the time of his or her purchase
28 or sale in the absence of ~~such the~~ ~~act or~~, transaction, scheme, or
29 course of conduct, plus interest at the legal rate.

30 (b) For the purposes of this section, “participates” does not
31 require that a person to be a market participant, to purchase or
32 sell a security, or to make a statement, in order for liability to
33 attach under this section.

34 (c) For the purposes of this section, “willfully” does not
35 require a person to act knowingly and intentionally. Willful
36 means volitional, and it is sufficient that a person speak or act in
37 a reckless manner in order for liability to attach under this
38 section.

39 (d) The amendments to this section enacted pursuant to the act
40 that amended this section in the first year of the 2005-06 Regular

1 *Session shall apply to all cases pending or filed on or after*
2 *enactment of that act.*

3 ~~21354.2. The combined current and prior service pensions for~~
4 ~~a school member is a pension derived from the contributions of~~
5 ~~the employer sufficient, when added to the service retirement~~
6 ~~annuity that is derived from the accumulated normal~~
7 ~~contributions of the member at the date of retirement, to equal~~
8 ~~the fraction of one-fiftieth of the member's final compensation~~
9 ~~set forth opposite the member's age at retirement, taken to the~~
10 ~~preceding completed quarter year, in the following table,~~
11 ~~multiplied by the number of years of current and prior service~~
12 ~~except service in a category of membership other than that of~~
13 ~~school member with which the member is entitled to be credited~~
14 ~~at retirement:~~

15		
16	Age at	
17	Retirement	Fraction
18	—50	1.0000
19	—50 1/4	1.0125
20	—50 1/2	1.0250
21	—50 3/4	1.0375
22	—51	1.0500
23	—51 1/4	1.0625
24	—51 1/2	1.0750
25	—51 3/4	1.0875
26	—52	1.1000
27	—52 1/4	1.1125
28	—52 1/2	1.1250
29	—52 3/4	1.1375
30	—53	1.1500
31	—53 1/4	1.1625
32	—53 1/2	1.1750
33	—53 3/4	1.1875
34	—54	1.2000
35	—54 1/4	1.2125
36	—54 1/2	1.2250
37	—54 3/4	1.2375
38	—55 and over	1.2500
39		

1 ~~(b) The fraction specified in the above table shall be reduced~~
2 ~~by one-third as applied to that part of final compensation that~~
3 ~~does not exceed four hundred dollars (\$400) per month for all~~
4 ~~service of a member any of whose service has been included in~~
5 ~~the federal system. This subdivision shall not apply to school~~
6 ~~members whose service is included in the federal system with~~
7 ~~respect to service performed on or after January 1, 2006.~~
8 ~~(e) This section shall supersede Sections 21353 and 21354.1~~
9 ~~with respect to a school member who retires on or after January~~
10 ~~1, 2006. This section shall not apply to a school safety member.~~