

SECURITIES BUREAU

M E M O R A N D U M

TO: HON. LOUIS J. LEFKOWITZ
Attorney General

FROM: MEYER H. MENCHER
Assistant Attorney General in Charge
Bureau of Securities

May 14, 1965

Re: Proposed Penal Law Revision

An examination of the proposed Penal Law and transfers of sections concerning securities transactions from the old Penal Law to the General Business Law discloses the following:

1. New Article 21-a designated "Fraudulent Transactions in Securities" and new Article 23 entitled "Bucket Shops" have been added to the General Business Law, with no provision contained therein for jurisdiction by or authorization for the Attorney General to prosecute for the crimes therein set forth. The failure to include these sections within 23-a (the Martin Act) could raise a question as to whether the Attorney General would have the right under the Martin Act to prosecute for the crimes listed in the new articles added to the General Business Law without specific provision in the Martin Act so as to specifically confer jurisdiction over these new articles.

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If these sections are to be added to the General Business Law they should be included as part of Article 23-a so that there would be no question but that the Attorney General has jurisdiction in the matters set forth.

2. The particular sections have in the transfer lost a good part of their force and effect in that the transfers in some instances eliminated language making officers, directors, partners, etc. culpable for the crimes of the brokerage firm, and in practically every instance, with the exception of those sections relating to Bucket Shops, have reduced the penalty heretofore set for the crimes designated by these specific sections.

These sections were enacted into statute due to a special message from Governor William Sulzer dated January 27, 1913 and an emergency message dated April 30, 1913 requesting prompt passage of the remaining bills covered by the original message. The decrease in the prescribed punishment could have the effect of indicating that the Legislature by reducing the crimes from felonies to misdemeanors does not look upon these crimes in the same serious vein as heretofore, with the possible loss of the salutary effect of these statutes.

3. I recommend that all of the following sections, if it be essential that they be transferred and removed from the Penal

Law, be transferred to Article 23-a of the General Business Law without any change in language.

4. The following are the sections and the manner in which they have been changed to which I respectfully note objection:

A.

Penal Law

§ 951 Reporting or publishing fictitious transactions in securities.

The proposed change to §339 of the General Business Law reduces the crime from a felony, imprisonment for two years, \$5,000 fine or both, to a "misdemeanor". This would be a Class A misdemeanor with one year imprisonment and a fine up to \$1,000.

B.

§952 False statement or advertisement as to securities.

This section presently provides that the crime is a felony, imprisonment of not more than three years, fine \$5,000 or both. The proposed transfer of §339A of the General Business Law reduces the crime to a misdemeanor.

C.

§953. Manipulation of prices of securities

The statute designates the crime to be a felony, \$5,000 fine, imprisonment not more than two years or both. Proposed transfer to 339-b of the General Business Law reduces the crime to a misdemeanor.

D.

Penal Law

§ 954 Trading by brokers against customers' orders

The present statute designates the crime to be a felony with a fine of not more than \$5,000, imprisonment of not more than one year or both. It further provides

"Every member of a firm of brokers, who either does, or consents or assents to the doing of any act which by the provisions of this section is made a felony, shall be guilty of a violation thereof."

Proposed §339-c of the General Business Law reduces the crime to a misdemeanor and omits this sentence which makes all members and the brokerage firm culpable.

Conversation with Mr. William McQuillan, Chief Assistant Counsel to the Revision Commission discloses that this omission was in error.

E.

§ 955 Transactions by brokers and dealers after insolvency

Present statute designates the crime as a felony, imprisonment of not more than two years, \$5,000 fine or both.

The proposed 399-b of the General Business Law reduces the crime to a misdemeanor.

F.

Penal Law

§ 956 Hypothecation of customer's securities

This section presently provides that this crime is a felony punishable by a fine of not more than \$5,000 or by imprisonment for not more than two years or both.

It further provides

"Every member of a firm of brokers or dealers and every officer or member of the board of directors of an association or corporation engaged in the business of purchasing and selling securities as broker or dealer, who either does, or consents or assents to the doing of any act which by the provisions of this or the last preceding section is made a felony, shall be guilty thereof."

The proposed section 339-e of the General Business Law reduces the crime to a misdemeanor and omits the above quoted sentence. Mr. McQuillan has also stated that this omission was in error.

G.

§ 957 Delivery to customers of memoranda of transactions by brokers

This section designates the crime as a misdemeanor with imprisonment for one year, \$500 fine or both.

The proposed §339-f of the General Business Law designates the crime as a misdemeanor which would increase the fine to \$1,000.

H.

Penal Law§§390-395
Incl.

Article 36 of the Penal Law entitled "Bucket Shops" comprising §§ 390-395 inclusive has been transferred bodily to new Article 23 of the General Business Law, §§351, 351a, 351b, 351c and 351d and 351 e. With the exception of §351e which will replace 395 of the present Penal Law all other sections have been transferred verbatim. Section 351e refers to witness' immunity. In view of the present provision in the Martin Act providing for the production of books and records and the testimony of witnesses and the authorization to grant immunity (§§359 GBL) I suggest that if these sections be transferred to the General Business Law that this section be omitted because it would destroy the authorization of the Attorney General to grant immunity as it provides that only a Court, Magistrate, or Grand Jury can confer such immunity.

It should also be noted that the proposed §351 of the General Business Law designates the crime as a felony, punishable by fine of not more than \$5,000 for each offense for a corporation, \$1,000 for an individual, or by imprisonment of not more than 5 years or both. The five year prison term could be in conflict with §55.10 of the proposed new Penal Law which provides that an undesignated

Penal Law

§§390-395
incl.
(cont'd) felony in a separate statute would be deemed a Class E felony under which imprisonment is limited to only four years (§70.00).

I

§926 False rumors as to stocks, bonds or public funds
This section specifically referring to securities, providing that a violation is punishable by a fine of not more than \$500 or by imprisonment for not more than three years or both, has been omitted from the new Penal Law. It is the contention of the Commission that subdivision 1 of §926 is included within §170.05 of the new Penal Law designated "forgery in the third degree," and that subdivision 2 is included within section 170.20 designated "criminal possession of a forged instrument in the third degree." Subdivision 3 reading:

"Knowingly circulates any false statement, rumor, or intelligence"

has been omitted and has not been carried forward into any new proposed legislation.

The proposed section provides for a fine of not more than \$5,000 or imprisonment of not more than three years or both, whereas the proposed new sections reduces the crime to a Class A misdemeanor.

J

Penal Law

§ 890 Officer of corporation selling fraudulent shares

This section dealing specifically with securities has not been carried forward into any new legislation, it being contended that the same is included within §70.10 designated "forgery in the second degree."

K

§ 660 Frauds in the organization of corporations

This section dealing specifically with securities has not been carried forward, it being contended that this is included within §170.05 designated "forgery in the third degree."

L

§ 661 Frauds in procuring organization of corporations, or in increase of capital stock

This section dealing specifically with securities and providing for imprisonment not exceeding ten years has not been carried forward, it being contended that the crime set forth is included within §170.20 entitled "criminal possession of a forged instrument in the third degree" which reduces the crime to a misdemeanor.

M

Penal Law

§ 662

Fraudulent issue of stocks and bonds

This section providing for imprisonment of seven years, a fine of \$3,000 or both has not been carried forward, it being contended that the crime is included within the general provisions of §170.25 entitled "criminal possession of a forged instrument in the second degree" which is designated as a Class B felony.

N

§421

Untrue and misleading advertisements

This section has been transferred to §190.20 entitled "false advertising" which sets forth the bare facts which comprises false advertising without specifying particular types of goods including securities as set forth in the original section. This decreases the salutary effect of the original section.

Proposed §190.20 creates a defense to any prosecution under §352-c of the General Business Law, as it provides that "it is an affirmative defense that an allegedly false or misleading statement was not knowingly or recklessly made or caused to be made" whereas § 352-c specifically provides punishment for (c) Any representation or statement which is false, where the person who made such representation or statement, (i) knew the truth; or (ii) with reasonable effort could have known the truth;

Hon. Louis J. Lefkowitz

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Penal Law

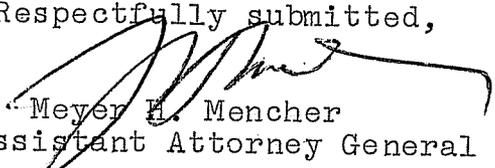
§421
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or (iii) made no reasonable effort to ascertain the truth; or (iv) did not have knowledge concerning the representation of statement made; * * *

It would appear that this affirmative defense to be created by statute conflicts with §352-c and would make it impossible to obtain a conviction under this statute.

I also call attention to §5.00 of the proposed new Penal Law providing that this new penal statute shall not be strictly construed which would seem to violate the basic rules of construction.

Respectfully submitted,


Meyer H. Mencher
Assistant Attorney General

MHM:rr

cc: Hon. Samuel A. Hirshowitz
First Assistant Attorney General