

SB 185-FN – AS INTRODUCED

2011 SESSION

11-0416

01/10

SENATE BILL ***185-FN***

AN ACT establishing a restitution fund for victims of financial fraud and continually appropriating a special fund.

SPONSORS: Sen. D'Allesandro, Dist 20; Rep. Schlachman, Rock 13; Rep. Gidge, Hills 24

COMMITTEE: Executive Departments and Administration

ANALYSIS

This bill establishes a process for restitution assistance for victims of financial fraud. Under this bill, the financial fraud restitution committee shall award assistance from the financial fraud restitution fund for such victims.

Explanation: Matter added to current law appears in ***bold italics***.
 Matter removed from current law appears [~~in brackets and struck through.~~]
 Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

1 VIII. “Victim” means an individual who suffers monetary injury as a result of financial
2 fraud.

3 359-K:2 Fund Established.

4 I. There is hereby established the financial fraud restitution fund. The fund shall be
5 nonlapsing and continually appropriated to the committee.

6 II. The fund shall consist of the following amounts:

7 (a) Moneys contributed by the department of justice, banking department, insurance
8 department, and bureau of securities regulation which amount to 20 percent of all fines and
9 penalties for financial fraud violations collected by each agency per annum; and

10 (b) Moneys appropriated by the general court.

11 III. The fund shall be used for awarding restitution assistance pursuant to this chapter and
12 any administration costs of this chapter.

13 IV. If the fund is reduced below \$100,000 by payment in full of all awards that become final
14 in a month, payment shall be suspended of the claims that become final during such month and the
15 following 2 months. At the end of the suspension period, the suspended claims shall be paid;
16 provided, that if the fund becomes exhausted, the amount paid to each claimant shall be prorated.

17 359-K:3 Eligibility for Restitution Assistance.

18 I. Restitution assistance shall not be awarded under this chapter unless:

19 (a) The financial fraud was adjudicated or otherwise determined or ordered in a state or
20 federal court or a regulatory agency administrative proceeding;

21 (b) A final order has been entered ordering restitution to the victim in a proceeding
22 described in subparagraph (a); and

23 (c) The party ordered to pay restitution has not paid the full amount.

24 II. Except as otherwise provided in this chapter, the following persons shall be eligible for
25 restitution assistance under this chapter:

26 (a) A resident of New Hampshire who is a victim of a financial fraud committed in:

27 (1) New Hampshire; or

28 (2) A jurisdiction other than New Hampshire, including a foreign country, if the
29 jurisdiction in which the financial fraud occurred does not offer to New Hampshire residents who are
30 victims of financial fraud in that jurisdiction assistance that is substantially similar to the
31 assistance offered under this chapter.

32 (b) A nonresident of New Hampshire who is a victim of financial fraud committed in
33 New Hampshire.

34 (c) A surviving spouse or dependent child of a victim described in subparagraph (a) or
35 (b).

36 (d) Any other person legally dependent for principal support upon a victim described in
37 subparagraph (a) or (b).

1 359-K:4 Committee Established.

2 I. There is established the financial fraud restitution fund committee. The committee shall
3 consist of the following members:

4 (a) The commissioner of the banking department, or designee.

5 (b) The commissioner of the insurance department, or designee.

6 (c) The attorney general, or designee.

7 (d) The secretary of state, or designee.

8 II. The first meeting of the committee shall be held within 45 days of the effective date of
9 this section and shall be called by the secretary of state or designee, who shall initially serve as
10 chairperson of the committee. Thereafter, annually the committee chairperson shall be chosen from
11 the department that in the previous fiscal year contributed the most moneys to the fund.

12 III. The committee shall review applications for assistance submitted pursuant to this
13 chapter and make awards of assistance in accordance with the procedures of this chapter.

14 IV. In the event of a tie vote on any matter, the chairperson's vote shall break the tie.

15 V. The committee shall make an annual report, beginning on November 1, 2011, relative to
16 its work to the governor, president of the senate, and the speaker of the house of representatives.

17 359-K:5 Restitution Assistance.

18 I. A person eligible for restitution assistance under RSA 359-K:3 may file an application for
19 restitution assistance with the committee.

20 II. The application shall be received not more than 180 days after the date of the order. An
21 extension of time may be granted for good cause shown by the claimant. However, an application
22 that is received more than 2 years after the date of the final order shall not be accepted.

23 III. All applications filed in compliance with this chapter shall be accepted. Processing of an
24 application shall begin upon receipt of a complete application. All applications shall be reviewed by
25 the committee to ensure that the applications are complete. If an application is not complete, it shall
26 be returned to the claimant with a brief statement of the additional information required. The
27 application shall be denied if the applicant does not furnish additional information or additional time
28 is not granted for good cause.

29 IV. Each claimant shall produce a copy of a court order or an administrative order that
30 demonstrates that restitution has been awarded to the claimant.

31 V. An award under this chapter shall not exceed the lesser of the following:

32 (a) \$500,000.

33 (b) 50 percent of the amount of the out-of-pocket loss.

34 VI. Regardless of the number of claims or claimants involved, payments for claims shall be
35 limited in the aggregate to \$5,000,000 against any one financial institution or its representative. If
36 the total claims exceed the aggregate limit of \$5,000,000, the payment shall be prorated based upon
37 the ratio that the person's claim bears to the total claims filed.

1 VII. Individual claims filed by persons owning the same joint account, or claims stemming
2 from any other type of account maintained by a particular financial company on which more than
3 one name appears, shall be treated as the claims of one eligible claimant with respect to payment
4 from the fund.

5 VIII. If a claimant who has obtained a judgment which qualifies for disbursement under this
6 chapter has maintained more than one account with the financial institution or its representative
7 that is the subject of the claims, for purposes of disbursements from the fund, all such accounts,
8 whether joint or individual, shall be considered as one account and shall entitle such claimant to
9 only one distribution from the fund not to exceed the amounts prescribed under subparagraph V(a)
10 or (b).

11 IX. To the extent that a claimant obtains more than one judgment against a financial
12 institution or its representative, arising out of the same transactions, occurrences, or conduct or out
13 of the financial institution's or representative's handling of the claimant account, such judgments
14 shall be consolidated for purposes of this chapter and shall entitle the claimant to only one
15 disbursement from the fund not to exceed the amounts prescribed under subparagraph V(a) or (b) of
16 this section.

17 359-K:6 Awards of Restitution Assistance on Appeal.

18 I. Restitution assistance shall not be awarded under this chapter on behalf of a victim whose
19 award of restitution under a court or administrative order is pending an appeal or overturned on
20 appeal.

21 II. If restitution assistance is awarded under this chapter and after such award of
22 restitution assistance, the victim's award of restitution under a court or administrative order is
23 overturned on appeal, the claimant shall forfeit the restitution assistance received under this
24 chapter.

25 III. If an award is made under this chapter and a claimant receives a sum required to be
26 deducted under subparagraph V(c) the claimant shall refund to the state the amount of
27 overpayment.

28 IV. The state is subrogated to the rights of the person awarded restitution under this
29 chapter to the extent of the award. The subrogation rights shall be against the person who
30 committed the financial fraud or a person liable for the pecuniary loss.

31 V.(a) In addition to the subrogation rights under paragraph IV, the state shall be entitled to
32 a lien in the amount of the award on a recovery made by or on behalf of the victim.

33 (b) The state may:

34 (1) Recover the amount under subparagraph (a) in a separate action; or

35 (2) Intervene in an action brought by or on behalf of the victim.

36 (c) If a claimant brings an action described in subparagraph (b)(2), the claimant may
37 deduct from the money owed to the state under the lien, the state's pro rata share of the reasonable

1 expenses for the court suit, including attorney's fees. The amount the claimant deducts for the
2 state's pro rata share of the expenses shall not be more than 15 percent of the money owed under the
3 lien.

4 VI. The amount of any award made under this chapter shall be set off against any other
5 recovery sources, including but not limited to awards from private suits, arbitration, or other sources
6 of recovery.

7 359-K:7 Restitution Assistance Prohibited.

8 I.(a) Subject to paragraph II, restitution assistance shall not be awarded if the victim:

9 (1) Sustained the monetary injury as a result of participating or assisting in or
10 attempting to commit or committing financial fraud; or

11 (2) Profited or would have profited from the financial fraud.

12 (b) If the victim is a dependent child or dependent parent of the person who commits
13 financial fraud, restitution assistance may be awarded if justice requires.

14 II. An award of restitution assistance under this chapter shall be denied if a court or
15 administrative order does not contain an award of restitution to the victim.

16 III.(a) In determining the amount of restitution assistance to award under this chapter, a
17 determination shall be made of whether a victim contributed to the infliction of the victim's
18 monetary injury.

19 (b) If it is found that the victim contributed to the infliction of the victim's monetary
20 injury, an award of restitution assistance may be denied.

21 359-K:8 Award Not Subject to Other Processes. An award made under this chapter shall not be
22 subject to execution, attachment, garnishment, or other process. A claimant convicted of forgery,
23 fraud, or deception in connection with a claim under this chapter shall forfeit an award paid to the
24 claimant under this chapter. The attorney general may file a civil action to recover funds against
25 such a claimant.

26 359-K:9 Rulemaking. The commissioners of the banking department and the insurance
27 department, with input from the attorney general and the secretary of state, shall jointly adopt rules
28 pursuant to RSA 541-A, relative to:

29 I. The application process for the awards made pursuant to the chapter.

30 II. Content and format of all forms required under this chapter.

31 III. The manner in which moneys are distributed from the fund established in RSA 359-K:2.

32 359-K:10 Liability of State. The state shall not be liable for any written determination made
33 under this chapter except to the extent that money is available in the fund on the date the award is
34 computed.

35 359-K:11 Claims Prior to January 1, 2006. Claims for restitution assistance shall not be
36 accepted for any losses that occurred prior to January 1, 2006 due to financial fraud.

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1 2 New Subparagraph; Financial Fraud Restitution Fund. Amend RSA 6:12, I(b) by inserting
2 after subparagraph (304) the following new subparagraph:

3 (305) Moneys deposited under the financial fraud restitution fund, established in
4 RSA 359-K:2.

5 3 Effective Date. This act shall take effect 60 days after its passage.

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SB 185 FISCAL NOTE

AN ACT establishing a restitution fund for victims of financial fraud and continually appropriating a special fund.

FISCAL IMPACT:

The Department of Justice, Bureau of Securities Regulation, Banking Department, and Insurance Department, state this bill will have an indeterminable fiscal impact on state general fund and restricted revenue and expenditures in FY 2012 and each year thereafter. This bill will have no fiscal impact on county and local revenue or expenditures.

METHODOLOGY:

The Department of Justice states this bill creates a financial fraud restitution committee consisting of representatives from the Department of Justice, Insurance Department, Banking Department, and Bureau of Securities Regulation and establishes a nonlapsing, continually appropriated restitution fund for victims of financial fraud. The Department states under this bill, 20 percent of all fines and penalties for financial fraud violations collected by the Department of Justice, Insurance Department, Banking Department, and Bureau of Securities Regulation would go to the fund. The Department of Justice states over 2008, 2009, and 2010 the Department received an average of \$446,781 in fines and penalties. The Department states the court may order some funds returned to the entity represented by the Department; the remainder is used to partially fund six positions in the Consumer Protection and Antitrust Bureau. Under this bill a portion of fines and penalties used to fund those six positions would be diverted to the financial fraud restitution fund; however, because the amount of fines and penalties varies greatly from one fiscal year to the next and because the court may order funds be returned to the entity represent by the Department, the exact fiscal impact cannot be determined at this time. The Department also states this bill would provide for the establishment of a lien and a right of recovery by any victim of financial fraud or a right to intervene in any action brought by a victim. The Department assumes it would be responsible for investigating and filing any such lawsuits which would require the participation of an assistant attorney general and a paralegal. Additionally, the Department estimates participation in the financial fraud restitution committee may require up to ten percent of one attorney's time. Finally, this bill may increase state restricted expenditures of the financial fraud restitution fund in FY 2012 and each year thereafter. However, because the Department

cannot estimate the number and nature of claims that would arise as a result of this bill's passage the exact fiscal impact cannot be determined at this time.

The Bureau of Securities Regulation states this bill would redirect an indeterminable amount of state general fund revenues to the financial fraud restitution fund. The Bureau states fines and penalties from financial fraud vary widely from year to year (\$749,012 in 2005, \$5,778,579 in 2006, \$528,260 in 2007, \$3,866,192 in 2008, and \$2,733,461 in 2009), with an average annual revenue of \$2,731,101. The Bureau states under this bill approximately \$546,220 ($\$2,731,101 * 20\%$) would be diverted from the state general fund to the financial fraud restitution fund in FY 2012 and each year thereafter. The Bureau does not anticipate this bill will divert a significant amount of employee time for the financial fraud restitution committee.

The Banking Department states it collected an average of \$1,093,190 in fines and penalties in FY 2009 and 2010 ($\$1,512,591 \text{ FY } 2009 + \$673,789 \text{ FY } 2010 = \$2,186,380 / 2 = \$1,093,190$). The Department estimates approximately one percent of fines and penalties are due to financial fraud. The Department is self-funded, therefore, under this bill approximately \$2,186 would be diverted from state restricted revenues to the financial fraud restitution fund in FY 2012 ($\$1,093,190 * 1\% = \$10,932 * 20\% = \$2,186$). The Department assumes fines and penalties may increase by one percent per fiscal year, diverting \$2,208 in FY 2013, \$2,230 in FY 2014, and \$2,252 in FY 2015. The Department states this bill may require approximately five percent of one employee's time for the financial fraud restitution committee, assuming the committee meets once per month. Because the Department is self-funded, fees, fines, and/or assessments would be increased to cover the loss of diverted funds which impact the Department's revenues.

The Insurance Department states under this bill approximately \$250 would be diverted from the Department to the financial fraud restitution fund in FY 2012 and each year thereafter (approximately \$1,250 paid in financial fraud fines and penalties annually $* 20\% = \$250$). The Department does not anticipate this bill will divert a significant amount of employee time for the financial fraud restitution committee.