

BILL ANALYSIS

Senate Research Center

H.B. 2255
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Business & Commerce
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Engrossed

DIGEST AND PURPOSE

Periodically, state agencies undergo a review by the Sunset Advisory Commission (commission), which recommends changes to or abolishment of the agency. H.B. 2255 continues the State Securities Board for 12 years and makes changes to the statute that were recommended by the commission.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the State Securities Board in SECTIONS 1.03 and 2.08 (Sections 43 and 12-1, The Securities Act), of this bill.

SECTION BY SECTION ANALYSIS

ARTICLE 1. GENERAL OPERATIONS AND ADMINISTRATION OF THE STATE SECURITIES BOARD

SECTION 1.01. Amends Subsections A, B, D, E, F, L, and O, Section 2, The Securities Act (Article 581-2, V.T.C.S.), to read as follows:

- A. Provides that the State Securities Board (board) consists of five, rather than three, citizens of the state appointed by the governor with the advice and consent of the senate. Provides that members of the board serve for staggered terms of six years, with as near as possible to one-third of the members' terms expiring January 20 of each odd-numbered year. Requires that appointments to the board be made without regard to the race, color, disability, sex, religion, age, or national origin of the appointees.
- B. Provides that a person is not eligible for appointment as a board member if the person or the person's spouse meets certain requirements.
- D. Requires the governor to designate a member of the board as the presiding officer of the board to serve in that capacity at the will of the governor, rather than board members selecting their own chairman.
- E. Provides that it is a ground for removal from the board that a member does not meet or fulfill certain qualifications. Deletes language regarding Subsection C.
- F. Provides that the validity of an action of the board is not affected by the fact that it is taken when a ground for removal of a board member exists. Requires the commissioner, if the commissioner has knowledge that a potential ground for removal exists, to notify the presiding officer of the board of the potential ground. Requires the presiding officer to then notify the governor and the attorney general that a potential ground for removal exists. Requires the commissioner, if the potential ground for removal involves the presiding officer, to notify the next highest ranking officer of the board, who then notifies the governor and the attorney general that a potential ground for removal exists.

L. Requires that there be prominently displayed at all times in the place of business of each dealer, agent, investment adviser, or investment adviser representative regulated under this Act, a sign containing the name, mailing address, and telephone number of the board and a statement informing consumers that complaints against a dealer, agent, investment adviser, or investment adviser representative may be directed to the board.

O. Provides that unless continued in existence as provided by Chapter 325 (Texas Sunset Act), Government Code, the board is abolished and this Act expires September 1, 2013.

SECTION 1.02. Amends the Securities Act (Article 581-1 et seq., V.T.C.S.) by adding Sections 2-1, 2-2, 2-3, 2-4, 2-5, 2-6, 2-7, and 2-8, as follows:

Sec. 2-1. CONFLICT OF INTEREST. A. Defines "Texas trade association."

B. Prohibits certain persons from being a member of the board and being a board employee employed in a "bona fide executive, administrative, or professional capacity," as that phrase is used for purposes of establishing an exemption to the overtime provisions of the federal Fair Labor Standards Act of 1938 (29 U.S.C. Section 201 et seq.) and its subsequent amendments.

C. Prohibits a person from being a member of the board or acting as the general counsel to the board if the person is required to register as a lobbyist under Chapter 305 (Registration of Lobbyists), Government Code, because of the person's activities for compensation on behalf of a profession related to the operation of the board.

Sec. 2-2. INFORMATION ABOUT STANDARDS OF CONDUCT. Requires the commissioner or the commissioner's designee to provide to members of the board and to board employees, as often as necessary, information regarding the requirements for office or employment under this Act, including information regarding a person's responsibilities under applicable laws relating to standards of conduct for state officers or employees.

Sec. 2-3. TRAINING. A. Provides that a person who is appointed to and qualifies for office as a member of the board may not vote, deliberate, or be counted as a member in attendance at a meeting of the board until the person completes a training program that complies with this section.

B. Requires the training program to provide the person with information regarding certain information.

C. Provides that a person appointed to the board is entitled to reimbursement, as provided by the General Appropriations Act, for the travel expenses incurred in attending the training program regardless of whether the attendance at the program occurs before or after the person qualifies for office.

Sec. 2-4. DIVISION OF POLICY AND MANAGEMENT RESPONSIBILITIES. Requires the board to develop and implement policies that clearly separate the policymaking responsibilities of the board and the management responsibilities of the commissioner and employees of the board.

Sec. 2-5. PUBLIC TESTIMONY. Requires the board to develop and implement policies that provide the public with a reasonable opportunity to appear before the board and to speak on any issue under the jurisdiction of the board.

Sec. 2-6. COMPLAINTS INFORMATION. A. Requires the commissioner or the

commissioner's designee to maintain a file on each written complaint filed with the commissioner or board concerning an employee, former employee, or person registered under this Act. Requires the file to include certain information.

B. Requires the commissioner or the commissioner's designee to provide to the person filing the complaint and to each person who is a subject of the complaint a copy of the board's policies and procedures relating to complaint investigation and resolution.

C. Requires the commissioner or the commissioner's designee, at least quarterly until final disposition of the complaint, to notify the person filing the complaint and each person who is a subject of the complaint of the status of the investigation unless the notice would jeopardize an undercover investigation.

Sec. 2-7. EQUAL EMPLOYMENT OPPORTUNITY POLICY STATEMENT. A.

Requires the commissioner or the commissioner's designee to prepare and maintain a written policy statement that implements a program of equal employment opportunity to ensure that all personnel decisions are made without regard to race, color, disability, sex, religion, age, or national origin.

B. Requires the policy statement to meet certain requirements.

C. Requires the policy statement to be updated annually, be reviewed by the state Commission on Human Rights for compliance with Subsection B(1) of this section, and be filed with the governor's office.

Sec. 2-8. INFORMATION ABOUT STATE EMPLOYEE INCENTIVE PROGRAM.

Requires the commissioner or the commissioner's designee to provide to board employees information and training on the benefits and methods of participation in the state employee incentive program.

SECTION 1.03. Amends the Securities Act (Article 581-1 et seq., V.T.C.S.) by adding Section 43, as follows:

Sec. 43. INVESTOR EDUCATION. A. Requires the board by rule to develop and implement an investor education initiative to inform the public about the basics of investing in securities, with a special emphasis placed on the prevention and detection of securities fraud. Requires that materials developed for and distributed as part of the initiative be published in both Spanish and English.

B. Requires the board, in developing and implementing the initiative, to use its best efforts to collaborate with public or nonprofit entities with an interest in investor education.

C. Authorizes the board, subject to Chapter 575 (Acceptance of Gift by State Agency), Government Code, to accept grants and donations from a person who is not affiliated with the securities industry or from a nonprofit association, regardless of whether the entity is affiliated with the securities industry, for use by the investor education initiative.

SECTION 1.04. Requires the governor, as soon as possible after the effective date of this Act, to appoint one member to the board for a term expiring January 20, 2005, and another member to the board for a term expiring January 20, 2007. Requires the governor, as those terms expire, to appoint members to full six-year terms.

SECTION 1.05. Requires the board, not later than December 31, 2001, to implement the investor

education initiative as required by Section 43, The Securities Act (Article 581-43, V.T.C.S.), as added by this Act.

ARTICLE 2. REGULATORY PROVISIONS

SECTION 2.01. Amends Section 4, The Securities Act (Article 581-4, V.T.C.S.), by amending Subsections B, C, D, and E and adding Subsections N, O, P, and Q, as follows:

- B. Redefines “person.”
- C. Redefines “dealer.”
- D. Deletes the definition of “salesman.”
- E. Makes a conforming change.
- N. Defines “investment adviser.”
- O. Defines “federal covered investment adviser.”
- P. Defines “investment adviser representative,” or “representative of an investment adviser.”
- Q. Defines “registered investment adviser.”

SECTION 2.02. Amends Section 5, The Securities Act (Article 581-5, V.T.C.S.), to delete language regarding salesmen.

SECTION 2.03. Amends Section 6, The Securities Act (Article 581-6, V.T.C.S.), by replacing the term “salesman” with “agent.”

SECTION 2.04. Amends Section 7A, The Securities Act (Article 581-7, V.T.C.S.), to make a conforming change.

SECTION 2.05. Amends Section 10C, The Securities Act (Article 581-10, V.T.C.S.), to make a conforming change.

SECTION 2.06. Amends Section 11, The Securities Act (Article 581-11, V.T.C.S.), to require the commissioner to maintain a record, which shall be open for public inspection, upon which shall be entered the names and addresses of all registered dealers, registered agents, registered investment advisers, registered investment adviser representatives, and persons who have submitted a notice filing under this Act, and all orders of the commissioner denying, suspending or revoking registration.

SECTION 2.07. Amends Section 12, The Securities Act (Article 581-12, V.T.C.S.), as follows:

Sec. 12. New heading: REGISTRATION OF PERSONS SELLING A SECURITY OR RENDERING INVESTMENT ADVICE.

- A. Makes a conforming change.
- B. Prohibits a person, except as provided by Section 5 of this Act, directly or through an investment adviser representative, from rendering services as an investment adviser in this state unless the person holds a certificate of authority issued under Section 15 of this Act, submits a proper notice filing as provided by Section 12-1 of this Act, or is otherwise exempt under this Act. Prohibits a person from acting or rendering services as an investment adviser representative for a certain investment adviser in this state

unless the person is registered or submits a proper notice filing as an investment adviser representative for that particular investment adviser as provided in Section 18 or 12-1 of this Act.

C. Authorizes the board to adopt rules and regulations exempting certain classes of persons from the dealer, agent, investment adviser, and investment adviser representative registration requirements, or providing conditional exemptions from registration, if the board determines that such rules and regulations are consistent with the purposes of this Act.

SECTION 2.08. Amends The Securities Act (Article 581-1 et seq., V.T.C.S.) by adding Section 12-1, as follows:

Sec. 12-1. NOTICE FILING FOR FEDERAL COVERED INVESTMENT ADVISER AND REPRESENTATIVE OF FEDERAL COVERED INVESTMENT ADVISER. A. Provides that this section does not apply to an investment adviser or investment adviser representative that is exempt from registration under this Act or board rule.

B. Requires the board by rule to authorize a federal covered investment adviser or a representative of a federal covered investment adviser to engage in the business of rendering investment advice in this state on submission to and receipt by the commissioner of certain notices and fees.

C. Provides that after the notice filing fee is paid and all the requirements for a proper notice filing under Subsection B of this section are met, a notice filing submitted under this section takes effect and is valid for one year. Authorizes a federal covered investment adviser or federal covered investment adviser representative to renew a notice filing on or before its expiration date on submission to and receipt by the commissioner of a renewal notice and a renewal fee in the amount determined under Section 35 of this Act.

SECTION 2.09. Amends Section 13, The Securities Act (Article 581-13, V.T.C.S.), as follows:

Sec. 13. New heading: METHOD AND CONDITION OF REGISTRATION REQUIRED FOR DEALER, AGENT, INVESTMENT ADVISER, OR INVESTMENT ADVISER REPRESENTATIVE. A. Requires a dealer or investment adviser to be registered to submit a sworn application therefor to the commissioner, which shall be in such form as the commissioner may determine and which states certain requirements.

B. Requires an application filed by a dealer or investment adviser to also contain such additional information as to the applicant's previous history, record, associations and present financial condition as may be required by the commissioner, or as is necessary to enable the commissioner to determine whether the sale of any securities proposed to be issued or dealt in by such applicant would result in fraud.

D. Makes a conforming change.

E. Requires the board, not later than the 30th day after the date a person takes a registration examination under this Act, to notify the person of the results of the examination. Provides that if the examination is graded or reviewed by a testing service certain requirements must be met.

F. Authorizes the board to require a testing service to notify a person of the results of the person's examination. Requires the board, if requested in writing by a person who fails a registration examination administered under this Act, to furnish the person with an

analysis of the person's performance on the examination.

J. Makes a conforming change.

SECTION 2.10. Amends Section 15, The Securities Act (Article 581-15, V.T.C.S.), as follows:

Sec. 15. New heading: ISSUANCE OF REGISTRATION CERTIFICATES TO DEALERS AND INVESTMENT ADVISERS. Makes a conforming change.

SECTION 2.11. Amends Section 16, The Securities Act (Article 581-16, V.T.C.S.), as follows:

Sec. 16. New heading: CONSENT TO SUIT IN THIS STATE BY CERTAIN DEALERS OR INVESTMENT ADVISERS. Requires that every company organized under the laws of any other state or of any foreign country, or having its principal office therein, and every non-resident individual, to file with its or his application for registration as a dealer or investment adviser or any notice filing submitted by an investment adviser under this Act an irrevocable written consent that actions growing out of any transaction subject to this Act may be commenced against the person or company, rather than the applicant, in the proper court of any county of this state in which the cause of action may arise, or in which the plaintiff may reside, by a service of process upon the commissioner as the person's or company's agent, rather than applicant, for that service.

SECTION 2.12. Amends Section 17, The Securities Act (Article 581-17, V.T.C.S.), as follows:

Sec. 17. New heading: FORM OF CERTIFICATES TO DEALERS AND INVESTMENT ADVISERS. Makes a conforming change.

SECTION 2.13. Amends Section 18, The Securities Act (Article 581-18, V.T.C.S.), as follows:

Sec. 18. New heading: REGISTRATION OF AGENTS OF DEALERS OR OF REPRESENTATIVES OF INVESTMENT ADVISERS. Makes conforming changes.

SECTION 2.14. Amends Section 19D, The Securities Act (Article 581-19, V.T.C.S.), as follows:

D. Authorizes the board to recognize, prepare, or administer continuing education programs for a person who is registered under this Act. Provides that if participation is required by the Board as a condition of maintaining the certificate or evidence of registration, a person who is registered under this Act must participate in the continuing education programs. Deletes language regarding dealers, salesmen, agents and participation in the program.

SECTION 2.15. Amends Section 20, The Securities Act (Article 581-20, V.T.C.S.), to make a conforming change.

SECTION 2.16. Amends Section 21, The Securities Act (Article 581-21, V.T.C.S.), to make a conforming change.

SECTION 2.17. Amends Sections 22A and B, The Securities Act (Article 581-22, V.T.C.S.), to make conforming changes.

SECTION 2.18. Amends Section 26, The Securities Act (Article 581-26, V.T.C.S.), to make conforming changes.

SECTION 2.19. Amends Section 35, The Securities Act (Article 581-35, V.T.C.S.), to make a conforming change.

SECTION 2.20. Amends Section 41(a), The Securities Act (Article 581-41, V.T.C.S.), to make a conforming change.

SECTION 2.21. Amends Section 42, The Securities Act (Article 581-42, V.T.C.S.), as follows:

Sec. 42. REDUCED FEES. A and B. Makes conforming changes.

C. Requires that a person, notwithstanding Sections 35 and 41 of this Act, pay only one fee required under those sections to engage in business in this state concurrently for the same person or company as a dealer and an investment adviser or an agent and investment adviser representative.

SECTION 2.22. Provides that the changes in law made by this Act apply only to a fee that becomes due on or after the effective date of this Act. Provides that a fee that becomes due before the effective date of this Act is governed by the law in effect on the date the fee is due, and the former law is continued in effect for that purpose.

ARTICLE 3. ENFORCEMENT PROVISIONS

SECTION 3.01. Amends The Securities Act (Article 581-1 et seq., V.T.C.S.), by adding Section 13-1, as follows:

Sec. 13-1. INSPECTION. A. Authorizes the commissioner, without notice, to inspect a registered dealer or registered investment adviser as necessary to ensure compliance with this Act and rules adopted under this Act.

B. Authorizes the commissioner, during regular business hours, to enter the business premises of a registered dealer or registered investment adviser and examine and copy books and records pertinent to the inspection.

C. Requires that during the inspection, the dealer or investment adviser to provide to the commissioner or the commissioner's authorized representative immediate and complete access to the person's office, place of business, files, safe, and any other location in which books and records pertinent to the inspection are located and allow the commissioner or the commissioner's authorized representative to make photostatic or electronic copies of books or records subject to inspection.

D. Prohibits a dealer or investment adviser from charging a fee for copying information under this section.

E. Provides that information obtained under this section and any intra-agency or interagency notes, memoranda, reports, or other communications consisting of advice, analyses, opinions, or recommendations that are made in connection with the inspection are confidential and may not be disclosed to the public or released by the commissioner except to the same extent provided for the release or disclosure of confidential documents or other information made or obtained in connection with an investigation under Section 28 of this Act.

SECTION 3.02. Amends Section 14, The Securities Act (Article 581-14, V.T.C.S.), as follows:

Sec. 14. New heading: DENIAL, SUSPENSION OR REVOCATION OF REGISTRATION AS DEALER, AGENT, INVESTMENT ADVISER, OR INVESTMENT ADVISER REPRESENTATIVE. A. Deletes language regarding a written complaint filed with the commissioner. Makes conforming changes.

SECTION 3.03. Amends Section 23, The Securities Act (Article 581-23, V.T.C.S.), to authorize the commissioner to hold a hearing, if it appears to the commissioner at any time that the sale or proposed sale or method of sale of any securities, whether exempt or not, is a fraudulent practice. Makes conforming changes.

B. Authorizes the commissioner to serve a proposed cease and desist order on an investment adviser that the commissioner believes is engaging or is likely to engage in fraud or a fraudulent practice with respect to rendering services as an investment adviser or investment adviser representative or on a person acting as an investment adviser or investment adviser representative in violation of this Act. Requires the order to be sent by personal delivery or registered or certified mail, return receipt requested, to the investment adviser's, investment adviser representative's or unauthorized person's last known address and to state the acts or practices alleged to be fraudulent or other specific charges. Requires the commissioner to hold a hearing not later than the 30th day after the date on which the notice is served on the investment advisor or investment adviser representative. Requires the commissioner, after the hearing, to issue or decline to issue a cease and desist order. Sets forth certain requirements of the order issued under this subsection.

SECTION 3.04. Amends The Securities Act (Article 581-1 et seq., V.T.C.S.), by adding Section 23-2, as follows:

Sec. 23-2. EMERGENCY CEASE AND DESIST ORDER. A. Authorizes the commissioner, on the commissioner's determination that the conduct, act, or practice threatens immediate and irreparable public harm, to issue an emergency cease and desist order to a person under certain circumstances.

B. Sets forth certain requirements of the order.

C. Provides that the emergency order is final and nonappealable as to a person, unless a person against whom the emergency order is directed requests a hearing in writing before the 31st day after the date it is served on that person. Sets forth the requirements for a request for a hearing.

D. Requires the commissioner, on receiving a request for a hearing, to serve notice of the time and place of the hearing by personal delivery or registered or certified mail, return receipt requested. Requires the hearing to be held not later than the 10th day after the date the commissioner receives the request for a hearing unless the parties agree to a later hearing date. Provides that the commissioner, at the hearing, has the burden of proof and is required to present evidence in support of the order.

E. Requires the commissioner, after the hearing, to affirm, modify, or set aside in whole or part the emergency order. Provides that an order affirming or modifying the emergency order is immediately final for purposes of enforcement and appeal.

F. Provides that an emergency order continues in effect unless the order is stayed by the commissioner. Authorizes the commissioner to impose any condition before granting a stay of the order.

SECTION 3.05. Amends Section 24A, The Securities Act (Article 581-24, V.T.C.S.), to make conforming changes.

SECTION 3.06. Amends Section 25, The Securities Act (Article 581-25, V.T.C.S.), as follows:

Sec. 25. New heading: REVOCATION OF REGISTRATION OF ANY DEALER, AGENT, INVESTMENT ADVISER, OR INVESTMENT ADVISER REPRESENTATIVE.

Makes conforming changes.

SECTION 3.07. Amends Sections 25-1A and B, The Securities Act (Article 581-25-1, V.T.C.S.), to make conforming changes.

SECTION 3.08. Amends Section 29, The Securities Act (Article 581-29, V.T.C.S.), to make conforming changes.

SECTION 3.09. Amends The Securities Act (Article 581-1 et seq., V.T.C.S.), by adding Section 29-3 as follows:

Sec. 29-3. CRIMINAL RESPONSIBILITY OF CORPORATION OR ASSOCIATION.

A. Defines “association,” “corporation,” and “high managerial agent.

B. Provides that a corporation or association is criminally responsible for an offense, if conduct constituting an offense under Section 29 of this Act is performed by an agent acting in behalf of a corporation or association and within the scope of the person's office or employment, only if its commission was authorized, requested, commanded, performed, or recklessly tolerated by certain entities or individuals.

C. Sets forth the conditions for an affirmative defense to prosecution of a corporation or association under Subsection B of this section.

SECTION 3.10. Amends Section 30, The Securities Act (Article 581-30, V.T.C.S.) to make conforming changes.

SECTION 3.11. Amends Section 32A, The Securities Act (Article 581-32, V.T.C.S.) to set forth the conditions of fraudulent practices whenever it shall appear to the commissioner either upon complaint or otherwise, in the business of rendering investment advice, directly or on another person's behalf. Makes conforming changes.

SECTION 3.12. Amends the heading of Section 33, The Securities Act (Article 581-33, V.T.C.S.), to read as follows:

Sec. 33. CIVIL LIABILITY WITH RESPECT TO ISSUANCE OR SALE OF A SECURITY.

SECTION 3.13. Amends Section 33D, The Securities Act (Article 581-33, V.T.C.S.), as follows:

D. Requires a buyer to recover, in damages, the consideration the buyer paid for the security plus interest thereon at the legal rate from the date of payment by the buyer, less the greater of certain values.

SECTION 3.14. Amends Section 33L, The Securities Act (Article 581-33, V.T.C.S.), to make a conforming change.

SECTION 3.15. Amends Section 33A, The Securities Act (Article 581-33, V.T.C.S.), to make a conforming change.

SECTION 3.16. Amends The Securities Act (Article 581-1 et seq., V.T.C.S.) by adding Section 33-1 as follows:

Sec. 33-1. CIVIL LIABILITY OF INVESTMENT ADVISER AND INVESTMENT ADVISER REPRESENTATIVE. A. Liability of Investment Adviser and Investment Adviser Representative. Provides that an investment adviser or investment adviser representative who

renders investment advice in violation of Section 12 or an order under Section 23B or 23-2 of this Act is liable to the purchaser, who may sue at law or in equity, for damages in the amount of any consideration paid for that advice. Provides that, except as provided by Subsection C of this section, an investment adviser or investment adviser representative who commits fraud or engages in a fraudulent practice in rendering investment advice is liable to the purchaser, who may sue at law or in equity, for damages.

B. Damages. Provides that in damages under Subsection A(2) of this section, the purchaser is entitled to recover certain monies.

C. Untruth or Omission. Provides that an investment adviser or investment adviser representative who in rendering investment advice makes a false statement of a material fact or omits to state a material fact necessary in order to make the statement made, in light of the circumstances under which the statement is made, not misleading, may not be found liable under Subsection A(2) of this section if the adviser or representative proves certain items.

D. Statute of Limitations. (1) Prohibits a person from suing under Subsection A(1) of this section more than three years after the violation occurred. Prohibits a person from suing under Subsection A(2) of this section more than five years after the violation occurs or more than three years after the person knew or should have known, by the exercise of reasonable diligence, of the occurrence of the violation.

E. Liability of Control Persons and Assistants. (1) Provides that a person who directly or indirectly controls an investment adviser is jointly and severally liable with the investment adviser under this section, and to the same extent as the investment adviser, unless the controlling 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 the facts by reason of which liability is alleged to exist.

(2) Provides that a person who directly or indirectly with intent to deceive or defraud or with reckless disregard for the truth or the law materially aids an investment adviser in conduct for which a cause of action is authorized by this section is jointly and severally liable with the investment adviser in an action to recover damages under this section.

SECTION 3.17. (a) and (b) Make application of this Act prospective.

ARTICLE 4. CONFORMING AMENDMENTS

SECTION 4.01. Amends Section 54.6385, Education Code, to make a conforming change.

SECTION 4.02. Reenacts Section 153.117(a), Finance Code, as amended by Chapters 62, 344, and 356, Acts of the 76th Legislature, Regular Session, 1999, and amends it by deleting language regarding bank holding companies and making a conforming change.

SECTION 4.03. Amends Chapter 182A, Finance Code, by adding Section 182.0211, as follows:

Sec. 182.0211. CONFORMANCE WITH SECURITIES ACT. Provides that for the purposes of Section 182.021(7), "salesman" includes "agent" and "adviser" includes "investment adviser."

SECTION 4.04. Amends Section 2051.005, Occupations Code, to make a conforming change.

SECTION 4.05. Amends Section 452.107(c), Transportation Code, to make a conforming change.

ARTICLE 5. EFFECTIVE DATE

SECTION 5.01. Effective date: September 1, 2001.