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OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

Regular Session, 2001

ENROLLED

SENATE BILL NO. 520

(By Senators Wooten and Helmick)

PASSED April 13, 2001

In Effect 90 days from Passage

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Senate Bill No. 520

(BY SENATORS WOOTON AND HELMICK)

[Passed April 13, 2001; in effect ninety days from passage.]

AN ACT to amend and reenact sections four hundred one and four hundred seven, article four, chapter thirty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended, all relating to securities; including viaticals in the definition of a security; authorizing the appointment of special investigators; authorizing certain duties of the commissioner, deputy commissioners and investigators; requiring an oath of the commissioner, deputy commissioner and investigators; requiring the filing of the oaths; making the civil and criminal investigations of the securities commission exempt from requirements of article nine-a, chapter six of said code and chapter twenty-nine-b of said code; and providing that the commissioner, deputy commissioners and investigators of the securities commission not be allowed to carry guns or other firearms.

Be it enacted by the Legislature of West Virginia:

That sections four hundred one and four hundred seven, article four, chapter thirty-two of the code of West Virginia, one

thousand nine hundred thirty-one, as amended, be amended and reenacted, all to read as follows:

ARTICLE 4. GENERAL PROVISIONS.

§32-4-401. Definitions.

1 When used in this chapter, unless the context otherwise
2 requires:

3 (a) "Commissioner" means the auditor of the state of
4 West Virginia.

5 (b) "Agent" means any individual other than a broker-
6 dealer who represents a broker-dealer or issuer in effecting
7 or attempting to effect purchases or sales of securities.
8 "Agent" does not include an individual who represents an
9 issuer in: (1) Effecting transactions in a security exempted
10 by subdivision (1), (2), (3), (10) or (11), subsection (a),
11 section four hundred two of this article; (2) effecting
12 transactions exempted by subsection (b), section four
13 hundred two of this article; (3) effecting transactions in a
14 covered security as described in section 18(b)(3) and
15 section 18(b)(4)(d) of the Securities Act of 1933; (4) effect-
16 ing transactions with existing employees, partners or
17 directors of the issuer if no commission or other remunera-
18 tion is paid or given, directly or indirectly, for soliciting
19 any person in this state; or (5) effecting transactions in this
20 state limited to those transactions described in section
21 15(h)(2) of the Securities Exchange Act of 1934. A partner,
22 officer or director of a broker-dealer or issuer, or a person
23 occupying a similar status or performing similar functions,
24 is an agent only if he or she otherwise comes within this
25 definition.

26 (c) "Broker-dealer" means any person engaged in the
27 business of effecting transactions in securities for the
28 account of others or for his or her own account. "Broker-
29 dealer" does not include: (1) An agent; (2) an issuer; (3) a
30 bank, savings institution or trust company; or (4) a person
31 who has no place of business in this state if: (A) He or she

32 effects transactions in this state exclusively with or
33 through: (i) The issuers of the securities involved in the
34 transactions; (ii) other broker-dealers; or (iii) banks,
35 savings institutions, trust companies, insurance compa-
36 nies, investment companies as defined in the Investment
37 Company Act of 1940, pension or profit-sharing trusts or
38 other financial institutions or institutional buyers,
39 whether acting for themselves or as trustees; or (B) during
40 any period of twelve consecutive months he or she does not
41 direct more than fifteen offers to sell or buy into this state
42 in any manner to persons other than those specified in
43 subparagraph (A), paragraph (4) of this subdivision
44 whether or not the offeror or any of the offerees is then
45 present in this state.

46 (d) "Fraud", "deceit" and "defraud" are not limited to
47 common-law deceit.

48 (e) "Guaranteed" means guaranteed as to payment of
49 principal, interest or dividends.

50 (f) "Federal covered adviser" means a person who is: (1)
51 Registered under section 203 of the Investment Advisers
52 Act of 1940; or (2) is excluded from the definition of
53 "investment advisor" under section two hundred two-a
54 (11) of the Investment Advisers Act of 1940.

55 (g) "Investment adviser" means any person who, for
56 compensation, engages in the business of advising others,
57 either directly or through publications or writings, as to
58 the value of securities or as to the advisability of investing
59 in, purchasing or selling securities or who, for compensa-
60 tion and as a part of a regular business, issues or promul-
61 gates analyses or reports concerning securities. "Invest-
62 ment adviser" also includes financial planners and other
63 persons who, as an integral component of other financially
64 related services, provide the foregoing investment advisory
65 services to others for compensation and as part of a
66 business or who hold themselves out as providing the
67 foregoing investment advisory services to others for

68 compensation. "Investment adviser" does not include: (1)
69 A bank, savings institution or trust company; (2) a lawyer,
70 accountant, engineer or teacher whose performance of
71 those services is solely incidental to the practice of his or
72 her profession; (3) a broker-dealer whose performance of
73 these services is solely incidental to the conduct of his or
74 her business as a broker-dealer and who receives no
75 special compensation for them; (4) a publisher, employee
76 or columnist of a newspaper, news magazine or business or
77 financial publication or an owner, operator, producer or
78 employee of a cable, radio or television network, station or
79 production facility if, in either case, the financial or
80 business news published or disseminated is made available
81 to the general public and the content does not consist of
82 rendering advice on the basis of the specific investment
83 situation of each client; (5) a person whose advice, analyses
84 or reports relate only to securities exempted by subdivi-
85 sion (1), subsection (a), section four hundred two of this
86 article; (6) a person who has no place of business in this
87 state if: (A) His or her only clients in this state are other
88 investment advisers, broker-dealers, banks, savings
89 institutions, trust companies, insurance companies,
90 investment companies as defined in the Investment
91 Company Act of 1940, pension or profit-sharing trusts or
92 other financial institutions or institutional buyers,
93 whether acting for themselves or as trustees; or (B) during
94 any period of twelve consecutive months he or she does not
95 have more than five clients who are residents of this state
96 other than those specified in subparagraph (A), paragraph
97 (6), of this subdivision, whether or not he or she or any of
98 the persons to whom the communications are directed is
99 then present in this state; (7) an investment adviser
100 representative; (8) a "federal covered adviser"; or (9) such
101 other persons not within the intent of this paragraph as
102 the commissioner may by rule or order designate.

103 (h) "Investment adviser representative" means any
104 partner, officer, director of or a person occupying a similar
105 status or performing similar functions or other individual,

106 except clerical or ministerial personnel, who is employed
107 by or associated with an investment adviser that is regis-
108 tered or required to be registered under this chapter or
109 who has a place of business located in this state and is
110 employed by or associated with a federal covered adviser;
111 and including clerical or ministerial personnel, who does
112 any of the following: (1) Makes any recommendations or
113 otherwise renders advice regarding securities; (2) manages
114 accounts or portfolios of clients; (3) determines which
115 recommendation or advice regarding securities should be
116 given; (4) solicits, offers or negotiates for the sale of or sells
117 investment advisory services unless such person is regis-
118 tered as an agent pursuant to this article; or (5) supervises
119 employees who perform any of the foregoing unless such
120 person is registered as an agent pursuant to this article.

121 (i) "Issuer" means any person who issues or proposes to
122 issue any security, except that: (1) With respect to certifi-
123 cates of deposit, voting-trust certificates or collateral-trust
124 certificates or with respect to certificates of interest or
125 shares in an unincorporated investment trust not having a
126 board of directors or persons performing similar functions
127 or of the fixed, restricted management or unit type, the
128 term "issuer" means the person or persons performing the
129 acts and assuming the duties of depositor or manager
130 pursuant to the provisions of the trust or other agreement
131 or instrument under which the security is issued; and (2)
132 with respect to certificates of interest or participation in
133 oil, gas or mining titles or leases or in payments out of
134 production under such titles or leases, there is not consid-
135 ered to be any "issuer".

136 (j) "Nonissuer" means not, directly or indirectly, for the
137 benefit of the issuer.

138 (k) "Person" means an individual, a corporation, a
139 partnership, an association, a joint-stock company, a trust
140 where the interests of the beneficiaries are evidenced by a
141 security, an unincorporated organization, a government or
142 a political subdivision of a government.

143 (1) "Sale" or "sell" includes every contract of sale of,
144 contract to sell, or disposition of a security or interest in a
145 security for value;

146 (2) "Offer" or "offer to sell" includes every attempt or
147 offer to dispose of, or solicitation of an offer to buy, a
148 security or interest in a security for value;

149 (3) Any security given or delivered with, or as a bonus on
150 account of, any purchase of securities or any other thing is
151 considered to constitute part of the subject of the purchase
152 and to have been offered and sold for value;

153 (4) A purported gift of assessable stock is considered to
154 involve an offer and sale;

155 (5) Every sale or offer of a warrant or right to purchase
156 or subscribe to another security of the same or another
157 issuer, as well as every sale or offer of a security which
158 gives the holder a present or future right or privilege to
159 convert into another security of the same or another issuer,
160 is considered to include an offer of the other security;

161 (6) The terms defined in this subdivision do not include:
162 (A) Any bona fide pledge or loan; (B) any stock dividend,
163 whether the corporation distributing the dividend is the
164 issuer of the stock or not, if nothing of value is given by
165 stockholders for the dividend other than the surrender of
166 a right to a cash or property dividend when each stock-
167 holder may elect to take the dividend in cash or property
168 or in stock; (C) any act incident to a class vote by stock-
169 holders, pursuant to the certificate of incorporation or the
170 applicable corporation statute, on a merger, consolidation,
171 reclassification of securities or sale of corporate assets in
172 consideration of the issuance of securities of another
173 corporation; or (D) any act incident to a judicially ap-
174 proved reorganization in which a security is issued in
175 exchange for one or more outstanding securities, claims or
176 property interests or partly in such exchange and partly
177 for cash.

178 (m) “Securities Act of 1933”, “Securities Exchange Act
179 of 1934”, “Public Utility Holding Company Act of 1935”
180 and “Investment Company Act of 1940” means the federal
181 statutes of those names as amended before the effective
182 date of this chapter. The National Securities Markets
183 Improvement Act of 1996 (“NSMIA”) means the federal
184 statute which makes certain amendments to the Securities
185 Act of 1933, the Securities Exchange Act of 1934, the
186 Investment Company Act of 1940 and the Investment
187 Advisers Act of 1940.

188 (n) “Security” means any note; stock; treasury stock;
189 bond; debenture; evidence of indebtedness; certificate of
190 interest or participation in any profit-sharing agreement;
191 collateral-trust certificate; preorganization certificate or
192 subscription; transferable share; investment contract;
193 voting-trust certificate; certificate of deposit for a secu-
194 rity; viatical settlement contract; certificate of interest or
195 participation in an oil, gas, or mining title or lease or in
196 payments out of production under such a title or lease; or,
197 in general, any interest or instrument commonly known as
198 a “security” or any certificate of interest or participation
199 in, temporary or interim certificate for, receipt for,
200 guarantee of or warrant or right to subscribe to or pur-
201 chase any of the foregoing. “Security” does not include
202 any insurance or endowment policy or annuity contract
203 under which an insurance company promises to pay money
204 either in a lump sum or periodically for life or some other
205 specified period: *Provided*, That “security” does include
206 insurance or endowment policies or annuity contracts that
207 are viatical settlement contracts or agreements for the
208 purchase, sale, assignment, transfer, devise or bequest of
209 any portion of a death benefit or ownership of a life
210 insurance policy or certificate that is less than the ex-
211 pected death benefit of the life insurance policy or certifi-
212 cate.

213 (o) “Federal covered security” means any security that
214 is a covered security under section 18(b) of the Securities
215 Act of 1933, as amended by the National Securities

216 Markets Improvement Act of 1996, or rules promulgated
217 thereunder.

218 (p) "State" means any state, territory or possession of
219 the United States, the District of Columbia and Puerto
220 Rico.

§32-4-407. Sworn investigator, investigations and subpoenas.

1 (a) *Sworn Investigators.* –

2 (1) The commissioner may appoint special investigators
3 to aid in investigations conducted pursuant to chapter
4 thirty-two-b of this code.

5 (2) The commissioner, deputy commissioners and each
6 investigator, prior to entering upon the discharge of his or
7 her duties, shall take an oath before any justice of the West
8 Virginia supreme court of appeals, circuit judge or magis-
9 trate which is to be in the following form:

10 State of West Virginia

11 County of, to wit: I,,

12 do solemnly swear that I will support the Constitution of
13 the United States, the Constitution of the State of West
14 Virginia, and I will honestly and faithfully perform the
15 duties imposed upon me under the provisions of law as a
16 member of the securities commission of West Virginia to
17 the best of my skill and judgment.

18 (Signed).....

19 Taken, subscribed and sworn to before me, this
20 day of2001.

21 (3) The oaths of the commissioner, deputy commissioner
22 or commissioners and investigators of the West Virginia
23 securities commission are to be filed and preserved in the
24 office of the state auditor.

25 (b) *Investigations and subpoenas.* –

26 (1) The commissioner in his or her discretion: (A) May
27 make such public or private investigations within or
28 outside of this state as he or she deems necessary to

29 determine whether any person has violated or is about to
30 violate any provision of this chapter or any rule or order
31 hereunder, or to aid in the enforcement of this chapter or
32 in the prescribing of rules and forms hereunder; (B) may
33 require or permit any person to file a statement in writing,
34 under oath or otherwise as the commissioner determines,
35 as to all the facts and circumstances concerning the matter
36 to be investigated; and (C) may publish information
37 concerning any violation of this chapter or any rule or
38 order hereunder.

39 (2) For the purpose of any investigation or proceeding
40 under this chapter, the commissioner, deputy commis-
41 sioner or commissioners, if any, and special investigators
42 appointed pursuant to this section may administer oaths
43 and affirmations, subpoena witnesses, compel attendance
44 of witnesses, take and store evidence in compliance with
45 the policies and procedures of the West Virginia state
46 police and require the production of any books, papers,
47 correspondence, memoranda, agreements or other docu-
48 ments or records which the commissioner finds relevant or
49 material to the inquiry.

50 (3) In case of contumacy by, or refusal to obey a sub-
51 poena issued to, any person, the circuit court of Kanawha
52 County, upon application by the commissioner, may issue
53 to the person an order requiring him or her to appear
54 before the commissioner, or the officer designated by him
55 or her, to produce documentary evidence if so ordered or
56 to give evidence touching the matter under investigation
57 or in question. Failure to obey the order of the court may
58 be punished by the court as a contempt of court.

59 (4) No person is excused from attending and testifying
60 or from producing any document or record before the
61 commissioner, or in obedience to the subpoena of the
62 commissioner or any officer designated by him or her, or
63 in any proceeding instituted by the commissioner on the
64 ground that the testimony or evidence (documentary or
65 otherwise) required of him or her may tend to incriminate

66 him or her or subject him or her to a penalty or forfeiture;
67 but no individual may be prosecuted or subjected to any
68 penalty or forfeiture for or on account of any transaction,
69 matter or thing concerning which he or she is compelled,
70 after claiming his or her privilege against self- incrimina-
71 tion to testify or produce evidence (documentary or
72 otherwise), except that the individual testifying is not
73 exempt from prosecution and punishment for perjury or
74 contempt committed in testifying.

75 (5) Civil and criminal investigations undertaken by the
76 West Virginia securities commission are not subject to the
77 requirements of article nine-a, chapter six of this code and
78 chapter twenty-nine-b of this code.

79 (6) Nothing in this chapter may be construed to autho-
80 rize the commissioner, a deputy commissioner, a special
81 investigator appointed pursuant to this section or any
82 other employee of the state auditor to carry or use a hand
83 gun or other firearm in the discharge of his or her duties
84 under this article.

85 (7) Nothing in this chapter limits the power of the state
86 to punish any person for any conduct which constitutes a
87 crime.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

[Signature]
.....
Chairman Senate Committee

[Signature]
.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

[Signature]
.....
Clerk of the Senate

[Signature]
.....
Clerk of the House of Delegates

[Signature]
.....
President of the Senate

[Signature]
.....
Speaker House of Delegates

The within is approved this the 2nd
Day of May, 2001.
[Signature]
.....
Governor

PRESENTED TO THE

GOVERNOR,

Date 5/1/01

Time 2:25 pm