WEST VIRGINIA LEGISLATURE
Regular Session, 2001

ENROLLED

SENATE BILL NO. 520

(By Senators Wooton 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 requires:

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

5 (b) "Agent" means any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities.

7 "Agent" does not include an individual who represents an issuer in: (1) Effecting transactions in a security exempted by subdivision (1), (2), (3), (10) or (11), subsection (a), section four hundred two of this article; (2) effecting transactions exempted by subsection (b), section four hundred two of this article; (3) effecting transactions in a covered security as described in section 18(b)(3) and section 18(b)(4)(d) of the Securities Act of 1933; (4) effecting transactions with existing employees, partners or directors of the issuer if no commission or other remuneration is paid or given, directly or indirectly, for soliciting any person in this state; or (5) effecting transactions in this state limited to those transactions described in section 15(h)(2) of the Securities Exchange Act of 1934. A partner, officer or director of a broker-dealer or issuer, or a person occupying a similar status or performing similar functions, is an agent only if he or she otherwise comes within this definition.

26 (c) "Broker-dealer" means any person engaged in the business of effecting transactions in securities for the account of others or for his or her own account. "Broker-dealer" does not include: (1) An agent; (2) an issuer; (3) a bank, savings institution or trust company; or (4) a person who has no place of business in this state if: (A) He or she
effects transactions in this state exclusively with or through: (i) The issuers of the securities involved in the transactions; (ii) other broker-dealers; or (iii) banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, pension or profit-sharing trusts or other financial institutions or institutional buyers, whether acting for themselves or as trustees; or (B) during any period of twelve consecutive months he or she does not direct more than fifteen offers to sell or buy into this state in any manner to persons other than those specified in subparagraph (A), paragraph (4) of this subdivision whether or not the offeror or any of the offerees is then present in this state.

(d) “Fraud”, “deceit” and “defraud” are not limited to common-law deceit.

(e) “Guaranteed” means guaranteed as to payment of principal, interest or dividends.

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

(g) “Investment adviser” means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. “Investment adviser” also includes financial planners and other persons who, as an integral component of other financially related services, provide the foregoing investment advisory services to others for compensation and as part of a business or who hold themselves out as providing the foregoing investment advisory services to others for
compensation. “Investment adviser” does not include: (1) A bank, savings institution or trust company; (2) a lawyer, accountant, engineer or teacher whose performance of those services is solely incidental to the practice of his or her profession; (3) a broker-dealer whose performance of these services is solely incidental to the conduct of his or her business as a broker-dealer and who receives no special compensation for them; (4) a publisher, employee or columnist of a newspaper, news magazine or business or financial publication or an owner, operator, producer or employee of a cable, radio or television network, station or production facility if, in either case, the financial or business news published or disseminated is made available to the general public and the content does not consist of rendering advice on the basis of the specific investment situation of each client; (5) a person whose advice, analyses or reports relate only to securities exempted by subdivision (1), subsection (a), section four hundred two of this article; (6) a person who has no place of business in this state if: (A) His or her only clients in this state are other investment advisers, broker-dealers, banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, pension or profit-sharing trusts or other financial institutions or institutional buyers, whether acting for themselves or as trustees; or (B) during any period of twelve consecutive months he or she does not have more than five clients who are residents of this state other than those specified in subparagraph (A), paragraph (6), of this subdivision, whether or not he or she or any of the persons to whom the communications are directed is then present in this state; (7) an investment adviser representative; (8) a “federal covered adviser”; or (9) such other persons not within the intent of this paragraph as the commissioner may by rule or order designate.

(h) “Investment adviser representative” means any partner, officer, director of or a person occupying a similar status or performing similar functions or other individual,
except clerical or ministerial personnel, who is employed
by or associated with an investment adviser that is regis-
tered or required to be registered under this chapter or
who has a place of business located in this state and is
employed by or associated with a federal covered adviser;
and including clerical or ministerial personnel, who does
any of the following: (1) Makes any recommendations or
otherwise renders advice regarding securities; (2) manages
accounts or portfolios of clients; (3) determines which
recommendation or advice regarding securities should be
given; (4) solicits, offers or negotiates for the sale of or sells
investment advisory services unless such person is regis-
tered as an agent pursuant to this article; or (5) supervises
employees who perform any of the foregoing unless such
person is registered as an agent pursuant to this article.

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

(j) “Nonissuer” means not, directly or indirectly, for the
benefit of the issuer.

(k) “Person” means an individual, a corporation, a
partnership, an association, a joint-stock company, a trust
where the interests of the beneficiaries are evidenced by a
security, an unincorporated organization, a government or
a political subdivision of a government.
(1) "Sale" or "sell" includes every contract of sale of, contract to sell, or disposition of a security or interest in a security for value;

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

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

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

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

(6) The terms defined in this subdivision do not include: (A) Any bona fide pledge or loan; (B) any stock dividend, whether the corporation distributing the dividend is the issuer of the stock or not, if nothing of value is given by stockholders for the dividend other than the surrender of a right to a cash or property dividend when each stockholder may elect to take the dividend in cash or property or in stock; (C) any act incident to a class vote by stockholders, pursuant to the certificate of incorporation or the applicable corporation statute, on a merger, consolidation, reclassification of securities or sale of corporate assets in consideration of the issuance of securities of another corporation; or (D) any act incident to a judicially approved reorganization in which a security is issued in exchange for one or more outstanding securities, claims or property interests or partly in such exchange and partly for cash.

(n) "Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting-trust certificate; certificate of deposit for a security; viatical settlement contract; certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease; or, in general, any interest or instrument commonly known as a "security" or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of or warrant or right to subscribe to or purchase any of the foregoing. "Security" does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or some other specified period: Provided, That "security" does include insurance or endowment policies or annuity contracts that are viatical settlement contracts or agreements for the purchase, sale, assignment, transfer, devise or bequest of any portion of a death benefit or ownership of a life insurance policy or certificate that is less than the expected death benefit of the life insurance policy or certificate.

(o) "Federal covered security" means any security that is a covered security under section 18(b) of the Securities Act of 1933, as amended by the National Securities
Markets Improvement Act of 1996, or rules promulgated thereunder.

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

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

(a) Sworn Investigators. -

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

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

State of West Virginia
County of ................................, to wit: I, ........................................,

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

(Signed)....................................................

Taken, subscribed and sworn to before me, this ................ day of ......................................... 2001.

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

(b) Investigations and subpoenas. -

(1) The commissioner in his or her discretion: (A) May make such public or private investigations within or outside of this state as he or she deems necessary to
determine whether any person has violated or is about to violate any provision of this chapter or any rule or order hereunder, or to aid in the enforcement of this chapter or in the prescribing of rules and forms hereunder; (B) may require or permit any person to file a statement in writing, under oath or otherwise as the commissioner determines, as to all the facts and circumstances concerning the matter to be investigated; and (C) may publish information concerning any violation of this chapter or any rule or order hereunder.

(2) For the purpose of any investigation or proceeding under this chapter, the commissioner, deputy commissioner or commissioners, if any, and special investigators appointed pursuant to this section may administer oaths and affirmations, subpoena witnesses, compel attendance of witnesses, take and store evidence in compliance with the policies and procedures of the West Virginia state police and require the production of any books, papers, correspondence, memoranda, agreements or other documents or records which the commissioner finds relevant or material to the inquiry.

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

(4) No person is excused from attending and testifying or from producing any document or record before the commissioner, or in obedience to the subpoena of the commissioner or any officer designated by him or her, or in any proceeding instituted by the commissioner on the ground that the testimony or evidence (documentary or otherwise) required of him or her may tend to incriminate
him or her or subject him or her to a penalty or forfeiture; but no individual may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he or she is compelled, after claiming his or her privilege against self-incrimination to testify or produce evidence (documentary or otherwise), except that the individual testifying is not exempt from prosecution and punishment for perjury or contempt committed in testifying.

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

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

(7) Nothing in this chapter limits the power of the state to punish any person for any conduct which constitutes a crime.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker House of Delegates

The within was approved this the 2nd Day of May, 2001.

Governor
PRESENTED TO THE
GOVERNOR
Date 5/16/01
Time 3:25 PM