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SB 475
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OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

Regular Session, 2002

ENROLLED

Committee Substitute for
SENATE BILL NO. 475

(By Senators Wooten and George)

PASSED March 9, 2002

In Effect 90 days from Passage

FILED

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DEPT. OF VIRGINIA
SECRETARY OF STATE

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 475

(SENATORS WOOTON AND CRAIGO, *original sponsors*)

[Passed March 9, 2002; in effect ninety days from passage.]

AN ACT to amend and reenact sections two hundred one, two hundred two and two hundred four, article two, chapter thirty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend and reenact sections four hundred one, four hundred six and four hundred seven, article four of said chapter, all relating to revising the uniform securities act generally; eliminating requirement that investment advisers must also be registered as a broker-dealers without the imposition of certain restrictions; requiring applicants for registration as broker-dealer or agent to be registered in securities business in state where principal place of business is located; providing for a waiver in certain instances upon written application to the commissioner; exempting certain investment advisers from

requirement that federal-covered advisers must file certain documents with the commissioner; clarifying time limitations on filing certain civil actions; authorizing commissioner to place conditions upon a license; setting forth certain acts which constitute dishonest or unethical practices of broker-dealers and agents; setting forth further acts which constitute dishonest or unethical practices of agents; expanding authority of commissioner over applicants or registrants who have engaged in certain conduct; defining term "branch office"; increasing amount required to be on deposit in the operating fund before a transfer is made to the general revenue fund; and expanding authority of the commissioner to appoint special investigators.

Be it enacted by the Legislature of West Virginia:

That sections two hundred one, two hundred two and two hundred four, article two, chapter thirty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that sections four hundred one, four hundred six and four hundred seven, article four of said chapter be amended and reenacted, all to read as follows:

**ARTICLE 2. REGISTRATION OF BROKER-DEALERS, AND AGENTS;
REGISTRATION AND NOTICE FILING FOR INVESTMENT
ADVISERS.**

§32-2-201. Registration requirement.

1 (a) It is unlawful for any person to transact business in
2 this state as a broker-dealer or agent unless he or she is
3 registered under this chapter.

4 (b) It is unlawful for any broker-dealer or issuer to
5 employ an agent unless the agent is registered. The
6 registration of an agent is not effective during any period
7 when he or she is not associated with a particular broker-
8 dealer registered under this chapter or a particular issuer.
9 When an agent begins or terminates a connection with a
10 broker-dealer or issuer, or begins or terminates those
11 activities which make him or her an agent, the agent as

12 well as the broker-dealer or issuer shall promptly notify
13 the commissioner.

14 (c) It is unlawful for any person to transact business in
15 this state as an investment adviser unless: (1) He or she is
16 so registered under this chapter; (2) he or she is a federal-
17 covered adviser except that, until the tenth day of October,
18 one thousand nine hundred ninety-nine, a federal-covered
19 adviser for which a nonpayment or underpayment of a fee
20 has not been promptly remedied following written notifi-
21 cation to the adviser of such nonpayment or underpayment
22 shall be required to register under this article; or (3) he or
23 she has no place of business in this state and: (A) His or her
24 only clients in this state are investment companies as
25 defined in the Investment Company Act of 1940, other
26 investment advisers, federal-covered advisers, broker-
27 dealers, banks, trust companies, savings and loan associa-
28 tions, insurance companies, employee benefit plans with
29 assets of not less than one million dollars and governmen-
30 tal agencies or instrumentalities, whether acting for
31 themselves or as trustees with investment control, or other
32 institutional investors as are designated by rule or order of
33 the commissioner; or (B) during any period of twelve
34 consecutive months he or she does not have more than five
35 clients who are residents of this state, other than those
36 specified in this subsection, whether or not he or she or
37 any of the clients who are residents of this state is then
38 present in the state.

39 (d) Every registration or notice filing expires one year
40 from its effective date unless renewed. The commissioner
41 by rule or order may prepare an initial schedule for
42 renewals of registrations or notice filings so that subse-
43 quent renewals of registrations or notice filings effective
44 on the effective date of this chapter may be staggered by
45 calendar months. For this purpose the commissioner by
46 rule may reduce the registration or notice filing fee
47 proportionately.

48 (e) It is unlawful for any:

49 (1) Person required to be registered as an investment
50 adviser under this article to employ an investment adviser
51 representative unless the investment adviser representa-
52 tive is registered under this article: *Provided*, That the
53 registration of an investment adviser representative is not
54 effective during any period when he or she is not employed
55 by an investment adviser registered under this article; or

56 (2) Federal-covered adviser to employ, supervise or
57 associate with an investment adviser representative having
58 a place of business located in this state, unless such
59 investment adviser representative is registered under this
60 article or is exempt from registration. When an invest-
61 ment adviser representative begins or terminates employ-
62 ment with an investment adviser, the investment adviser
63 (in the case of 401 (g)), or the investment adviser represen-
64 tative (in the case of 401 (f)), shall promptly notify the
65 commissioner.

66 (f) Except with respect to advisers whose only clients are
67 those described in subdivision (3), subsection (c) of this
68 section, it is unlawful for any federal-covered adviser to
69 conduct advisory business in this state unless such person
70 complies with the provisions of subsection (b), section two
71 hundred two of this article.

72 (g) An applicant must be registered or qualified in the
73 securities business in the state of the applicant's principal
74 place of business. The commissioner may waive this
75 requirement upon a finding that the applicant is registered
76 with the securities and exchange commission or any other
77 national securities exchange or national securities associa-
78 tion registered under the Securities Exchange Act of 1934.
79 A request to waive this requirement must be made upon
80 written application to the commissioner which includes
81 documentation upon which the applicant relies in request-
82 ing the waiver.

§32-2-202. Registration and notice filing procedure.

1 (a) A broker-dealer, agent or investment adviser may
2 obtain an initial or renewal registration by filing with the
3 commissioner an application together with a consent to
4 service of process pursuant to subsection (g), section four
5 hundred fourteen, article four of this chapter. The appli-
6 cation shall contain whatever information the commis-
7 sioner by rule requires concerning matters such as: (1) The
8 applicant's firm and place of organization; (2) the appli-
9 cant's proposed method of doing business; (3) the qualifi-
10 cations and business history of the applicant and in the
11 case of a broker-dealer or investment adviser, the qualifi-
12 cations and business history of any partner, officer or
13 director, any person occupying a similar status or perform-
14 ing similar functions or any person, directly or indirectly,
15 controlling the broker-dealer or investment adviser and, in
16 the case of an investment adviser, the qualifications and
17 business history of any employee; (4) any injunction or
18 administrative order or conviction of a misdemeanor
19 involving a security or any aspect of the securities business
20 and any conviction of a felony; and (5) subject to the
21 limitations of §15(h)(1) of the Securities Exchange Act of
22 1934, the applicant's financial condition and history. The
23 commissioner may by rule or order require an applicant
24 for initial registration to publish an announcement of the
25 application as a Class I legal advertisement in compliance
26 with the provisions of article three, chapter fifty-nine of
27 this code and the publication area or areas for the publica-
28 tion shall be specified by the commissioner. If no denial
29 order is in effect and no proceeding is pending under
30 section two hundred four of this article, registration
31 becomes effective at noon of the thirtieth day after an
32 application is filed. The commissioner may by rule or
33 order specify an earlier effective date and he or she may by
34 order defer the effective date until noon of the thirtieth
35 day after the filing of any amendment to an application.
36 Registration of a broker-dealer automatically constitutes
37 registration of any agent who is a partner, officer or
38 director, or a person occupying a similar status or per-

39 forming similar functions, as designated by the broker-
40 dealer in writing to the commissioner and approved in
41 writing by the commissioner. Registration of an invest-
42 ment adviser automatically constitutes registration of any
43 investment adviser representative who is a partner, officer
44 or director or a person occupying a similar status or
45 performing similar functions as designated by the invest-
46 ment adviser in writing to the commissioner and approved
47 in writing by the commissioner.

48 (b) Except with respect to federal-covered advisers
49 whose only clients are those described in paragraphs (A)
50 and (B), subdivision (3), subsection (c), section two hun-
51 dred one of this article, a federal-covered adviser shall file
52 with the commissioner, prior to acting as a federal-covered
53 adviser in this state, such documents as have been filed
54 with the securities and exchange commissioner as the
55 commissioner, by rule or order, may require along with
56 notice filing fees under subsection (c) of this section.

57 (c) Every applicant for initial or renewal registration
58 shall pay a filing fee of two hundred fifty dollars in the
59 case of a broker-dealer and the agent of an issuer, fifty-
60 five dollars in the case of an agent, one hundred seventy
61 dollars in the case of an investment adviser and fifty
62 dollars for each investment adviser representative. When
63 an application is denied or withdrawn, the commissioner
64 shall retain all of the fee.

65 (d) A registered broker-dealer or investment adviser may
66 file an application for registration of a successor, whether
67 or not the successor is then in existence, for the unexpired
68 portion of the year. A filing fee of twenty dollars shall be
69 paid.

70 (e) The commissioner may, by rule or order, require a
71 minimum capital for registered broker-dealers, subject to
72 the limitations of section fifteen of the Securities Ex-
73 change Act of 1934 and establish minimum financial
74 requirements for investment advisers, subject to the

75 limitations of section 222 of the Investment Advisers Act
76 of 1940, which may include different requirements for
77 those investment advisers who maintain custody of clients'
78 funds or securities or who have discretionary authority
79 over same and those investment advisers who do not.

80 (f) The commissioner may, by rule or order, require
81 registered broker-dealers, agents and investment advisers
82 who have custody of or discretionary authority over client
83 funds or securities to post surety bonds in amounts as the
84 commissioner may prescribe, by rule or order, subject to
85 the limitations of section fifteen of the Securities Ex-
86 change Act of 1934 (for broker-dealers) and section 222 of
87 the Investment Advisers Act of 1940 (for investment
88 advisers), up to twenty-five thousand dollars and may
89 determine their conditions. Any appropriate deposit of
90 cash or securities shall be accepted in lieu of any bond so
91 required. No bond may be required of any registrant
92 whose net capital, or, in the case of an investment adviser,
93 whose minimum financial requirements, which may be
94 defined by rule, exceeds the amounts required by the
95 commissioner. Every bond shall provide for suit thereon
96 by any person who has a cause of action under section four
97 hundred ten, article four of this chapter and, if the com-
98 missioner by rule or order requires, by any person who has
99 a cause of action not arising under this chapter. Every
100 bond shall provide that no suit may be maintained to
101 enforce any liability on the bond unless brought within the
102 time limitations set forth in subsection (e), section four
103 hundred ten, article four of this chapter.

104 (g) Every applicant, whether registered under this
105 chapter or not, shall pay a fifty dollar fee for each name or
106 address change.

107 (h) Every broker-dealer and investment advisor regis-
108 tered under this chapter shall pay an annual fifty dollar
109 fee for each branch office located in West Virginia.

110 (i) Each agent, representative and associated person of a
111 broker-dealer or investment advisor when applying for an
112 initial license under section two hundred two of this
113 article or changing employers shall pay a compliance
114 assessment of twenty-five dollars. Each agent, representa-
115 tive and associated person, when applying for a renewal
116 license under section two hundred two of this article, shall
117 pay a compliance assessment of ten dollars.

**§32-2-204. Denial, revocation, suspension, otherwise condition,
cancellation and withdrawal of registration.**

1 (a) The commissioner may by order deny, suspend,
2 otherwise condition or revoke any registration if he or she
3 finds: (1) That the order is in the public interest; and (2)
4 that the applicant or registrant or, in the case of a broker-
5 dealer or investment adviser, any partner, officer or
6 director, any person occupying a similar status or perform-
7 ing similar functions, or any person directly or indirectly
8 controlling the broker-dealer or investment adviser:

9 (A) Has filed an application for registration which as of
10 its effective date, or as of any date after filing in the case
11 of an order denying effectiveness, was incomplete in any
12 material respect or contained any statement which was, in
13 light of the circumstances under which it was made, false
14 or misleading with respect to any material fact;

15 (B) Has willfully violated or willfully failed to comply
16 with any provision of this chapter or a predecessor act or
17 any rule or order under this chapter or a predecessor act;

18 (C) Has been convicted, within the past ten years, of any
19 misdemeanor involving a security or any aspect of the
20 securities business or any felony;

21 (D) Is permanently or temporarily enjoined by any court
22 of competent jurisdiction from engaging in or continuing
23 any conduct or practice involving any aspect of the
24 securities business;

25 (E) Is the subject of an order of the commissioner
26 denying, suspending or revoking registration as a broker-
27 dealer, agent or investment adviser;

28 (F) Is the subject of an order entered within the past five
29 years by the securities administrator of any other state or
30 by the securities and exchange commission denying or
31 revoking registration as a broker-dealer, agent or invest-
32 ment adviser, or the substantial equivalent of those terms
33 as defined in this chapter, or is the subject of an order of
34 the securities and exchange commission suspending or
35 expelling him or her from a national securities exchange
36 or national securities association registered under the
37 Securities Exchange Act of 1934, or is the subject of a
38 United States post-office-fraud order; but: (i) The commis-
39 sioner may not institute a revocation or suspension
40 proceeding under this subdivision more than one year from
41 the date of the order relied on; and (ii) he or she may not
42 enter an order under this subdivision on the basis of an
43 order under another state act unless that order was based
44 on facts which would currently constitute a ground for an
45 order under this section;

46 (G) Has engaged in dishonest or unethical practices in
47 the securities business.

48 (H) Is insolvent, either in the sense that his or her
49 liabilities exceed his or her assets or in the sense that he or
50 she cannot meet his or her obligations as they mature; but
51 the commissioner may not enter an order against a broker-
52 dealer or investment adviser under this subdivision
53 without a finding of insolvency as to the broker-dealer or
54 investment adviser; or

55 (I) Is not qualified on the basis of such factors as train-
56 ing, experience and knowledge of the securities business,
57 except as otherwise provided in subsection (b).

58 The commissioner may by order deny, suspend or revoke
59 any registration if he or she finds: (1) That the order is in
60 the public interest; and (2) that the applicant or registrant:

61 (J) Has failed reasonably to supervise his or her agents if
62 he or she is a broker-dealer or his or her employees if he or
63 she is an investment adviser; or

64 (K) Has failed to pay the proper filing fee; but the
65 commissioner may enter only a denial order under this
66 subdivision and he or she shall vacate any such order when
67 the deficiency has been corrected.

68 The commissioner may not institute a suspension or
69 revocation proceeding on the basis of a fact or transaction
70 known to him or her when registration became effective
71 unless the proceeding is instituted within the next thirty
72 days.

73 (b) With regard to broker-dealers and agents, dishonest
74 or unethical practices in the securities business includes,
75 but is not limited to:

76 (1) Causing any unreasonable and unjustifiable delay or
77 engaging in a pattern of unreasonable and unjustifiable
78 delays, in the delivery of securities purchased by any of the
79 customers or in the payment upon request of free credit
80 balances reflecting completed transactions of any of the
81 customers;

82 (2) Inducing trading in a customer's account which is
83 excessive in size or frequency in view of the financial
84 resources and character of the account;

85 (3) Recommending to a customer the purchase, sale or
86 exchange of any security without reasonable grounds to
87 believe that the transaction or recommendation is suitable
88 for the customer based upon reasonable inquiry concern-
89 ing the customer's investment objectives, financial situa-
90 tion and needs and any other relevant information known
91 by the broker-dealer and/or agent;

92 (4) Executing a transaction on behalf of a customer
93 without authorization;

94 (5) Exercising any discretionary power in effecting a
95 transaction for a customer's account without first obtain-
96 ing written authority from the customer, unless the
97 discretionary power relates solely to the time and/or price
98 for the execution of orders;

99 (6) Extending, arranging for or participating in arrang-
100 ing for credit to a customer in violation of the regulations
101 of the securities and exchange commission or the regula-
102 tions of the federal reserve board;

103 (7) Executing any transaction in a margin account
104 without obtaining from the customer a written margin
105 agreement prior to settlement date for the initial transac-
106 tion in the account;

107 (8) Failing to segregate customers' free securities or
108 securities in safekeeping;

109 (9) Hypothecating a customer's securities without having
110 a lien thereon unless a properly executed written consent
111 of the customer is first obtained, except as otherwise
112 permitted by rules of the securities and exchange commis-
113 sion;

114 (10) Charging unreasonable and inequitable fees for
115 services performed, including miscellaneous services such
116 as collection of moneys due for principal, dividends or
117 interest, exchange or transfer of securities, appraisals,
118 safekeeping or custody of securities and other services
119 related to its securities business;

120 (11) Entering into a transaction for its own account with
121 a customer in a security at a price not reasonably related
122 to the current market price of the security, or charging a
123 commission which is not reasonable;

124 (12) Entering into a transaction with or for a customer at
125 a price not reasonably related to the current market price
126 of the security or receiving an unreasonable or indetermi-
127 nate commission or profit;

128 (13) Executing orders for the purchase by a customer of
129 securities not registered under the provisions of this
130 chapter, unless the securities or transaction are exempt
131 from registration under this chapter;

132 (14) Engaging in a course of conduct constituting an
133 egregious violation of the rules of a national securities
134 association of which the broker-dealer is a member with
135 respect to any customer, transaction or business;

136 (15) Introducing customer transactions on a fully
137 disclosed basis to another broker-dealer or agent that is
138 not registered under section 32-2-201 unless the customer
139 is a person described in section 32-4-402(b)(8);

140 (16) Unreasonably or unjustifiably failing to furnish to
141 a customer purchasing securities in an offering, no later
142 than the date of confirmation of the transaction, either a
143 final prospectus or a preliminary prospectus and an
144 additional document, which together include all informa-
145 tion set forth in the final prospectus;

146 (17) Offering to buy from or sell to any person any
147 security at a stated price unless the broker-dealer or agent
148 is prepared to purchase or sell, as the case may be, at the
149 price and under the conditions as are stated at the time of
150 the offer to buy or sell;

151 (18) Representing that a security is being offered to a
152 customer "at the market" or for a price relevant to the
153 market price unless such broker-dealer or agent knows or
154 has reasonable grounds to believe that a market for the
155 security exists other than that made, created or controlled
156 by the broker-dealer or agent, or by any person for whom
157 he or she is acting or with whom he or she is associated in
158 the distribution, or any person controlled by, controlling
159 or under common control with the broker-dealer or agent;

160 (19) Effecting any transaction in, or inducing the pur-
161 chase or sale of, any security by means of any manipula-
162 tive, deceptive or fraudulent device, practice, plan, pro-

163 gram, design or contrivance, which may include, but is not
164 limited to: (A) Effecting any transaction in a security
165 which involves no change in the beneficial ownership; (B)
166 entering an order or orders for the purchase or sale of any
167 security with the knowledge that an order or orders of
168 substantially the same size, at substantially the same time
169 and substantially the same price, for sale of any security,
170 has been or will be entered by or for the same or different
171 parties for the purpose of creating a false or misleading
172 appearance with respect to the market for the security:
173 *Provided*, That nothing in this paragraph prohibits a
174 broker-dealer or agent from entering into a bona fide
175 agency cross transaction for its customers; and (C) effect-
176 ing, alone or with one or more other persons, a series of
177 transactions in any security creating actual or apparent
178 active trading in the security or raising or depressing the
179 price of the security, for the purpose of inducing the
180 purchase or sale of the security by others;

181 (20) Guaranteeing a customer against market loss in any
182 securities account of the customer carried by the broker-
183 dealer or agent or in any securities transaction effected by
184 the broker-dealer or agent with or for the customer;

185 (21) Publishing or circulating, or causing to be published
186 or circulated, any notice, circular, advertisement, newspa-
187 per article, investment service or communication of any
188 kind which purports to report any transaction as a pur-
189 chase or sale of any security unless the broker-dealer or
190 agent believes that the transaction was a bona fide pur-
191 chase or sale of the security, or which purports to quote
192 the bid price or asked price for any security, unless the
193 broker-dealer or agent believes the quotation represents a
194 bona fide bid for or offer of the security;

195 (22) Using any advertising or sales presentation which is
196 deceptive or misleading, such as the distribution of any
197 nonfactual data, material or presentation based on conjec-
198 ture, unfounded or unrealistic claims or assertions in any
199 brochure, flyer or display by works, pictures, graphs or

200 otherwise designed to supplement, detract from, supersede
201 or defeat the purpose or effect of any prospectus or
202 disclosure;

203 (23) Failing to disclose to the customer that the bro-
204 ker-dealer or agent is controlled by, affiliated with or
205 under common control with the issuer of any contract with
206 or for a customer for the purchase or sale of the security
207 and if the disclosure is not made in writing, it shall be
208 supplemented by the giving or sending of written disclo-
209 sure at or before the completion of the transaction;

210 (24) Failing to make a bona fide public offering of all of
211 the securities allotted to a broker-dealer or agent for
212 distribution, whether acquired as an underwriter, a selling
213 group member, or from a member participating in the
214 distribution as an underwriter or selling group member;

215 (25) Failing or refusing to furnish a customer, upon
216 reasonable request, information to which he or she is
217 entitled, or to respond to a formal written request or
218 complaint;

219 (26) Establishing, maintaining or operating an account
220 under fictitious name or containing fictitious information;

221 (27) Sharing directly or indirectly in profits or losses in
222 the account of any customer without the written authori-
223 zation of the customer;

224 (28) Utilizing an agent or subagent in effecting or
225 attempting to effect purchases or sales of securities where
226 the agent or subagent is not registered as an agent pursu-
227 ant to section 32-2-201;

228 (29) Associating, affiliating or entering into any arrange-
229 ment with any person not registered as a broker-dealer or
230 agent pursuant to section 32-2-201 for the purpose of
231 engaging in the business of effecting transactions in
232 securities, where the employees of such person assisting
233 the broker-dealer or agent in effecting the transactions in

234 securities are not either registered as an agent of the
235 broker-dealer or the activities of the employees are not
236 limited to duties that are exclusively clerical in nature for
237 which the broker-dealer or agent has provided adequate
238 supervision including instruction, training and safeguards
239 against a violation of this chapter;

240 (30) Associating, affiliating or entering into any arrange-
241 ment with any person not registered as a broker-dealer or
242 agent pursuant to section 32-2-201 for the purpose of
243 engaging in the business of effecting transactions in
244 securities, where the person fails to conspicuously disclose
245 to all customers in any advertisement or literature pub-
246 lished or distributed by the person: (A) The identity of the
247 registered broker-dealer or agency; (B) that a person is not
248 subject to regulation by the securities commissioner of the
249 state of West Virginia; and (C) the manner, form and
250 amount of compensation, commission or remuneration to
251 be received by the person;

252 (31) Representing the availability of financial or invest-
253 ment capabilities when the representation does not
254 accurately describe the nature of the services offered, the
255 qualifications of the person offering the services and
256 method of compensation for the services;

257 (32) Engaging in any act or a course of conduct which
258 resulted in the issuance by a securities agency or adminis-
259 trator of any state of an order to cease and desist the
260 violation of the provisions of any state's securities laws or
261 rules(or the equivalent of any such order); or

262 (33) Engaging in any other act or practice which the
263 commissioner determines to constitute dishonest or
264 unethical practices in the securities business.

265 (c) With regard to agents, dishonest or unethical prac-
266 tices in the securities business also includes, but is not
267 limited to:

268 (1) Borrowing or engaging in the practice of borrowing
269 money or securities from a customer (other than any
270 institution or organization whose normal business activi-
271 ties include lending of moneys), or lending or engaging in
272 the practice of lending money or securities to a customer;

273 (2) Acting as a custodian for money, securities or an
274 executed stock power of a customer;

275 (3) Effecting securities transactions with a customer not
276 recorded on the regular books or records of a broker-
277 dealer which an agent represents, unless the transactions
278 are disclosed to and authorized in writing by the broker-
279 dealer prior to execution of the transactions;

280 (4) Establishing, maintaining or operating an account
281 under a fictitious name or which contains fictitious
282 information;

283 (5) Sharing directly or indirectly in profits or losses in
284 the account of any customer without the written authori-
285 zation of the customer and broker-dealer which the agent
286 represents;

287 (6) Dividing or otherwise splitting commissions, profits
288 or other compensation from the purchase or sale of
289 securities in this state with any person not also registered
290 as an agent for the same broker-dealer, or for a broker-
291 dealer under direct or indirect common control;

292 (7) Entering into a transaction for agent's own account
293 with a customer in which a commission is charged;

294 (8) Entering in a course of conduct constituting an
295 egregious violation of the rules of a national securities
296 exchange or national securities association of which the
297 agent is a member with respect to any customer, transac-
298 tion or business; and

299 (9) Holding oneself out as representing any person other
300 than the broker-dealer for whom the agent is registered
301 and, in the case of an agent whose normal place of busi-

302 ness is not on the premises of the broker-dealer, failing to
303 conspicuously disclose the name of the broker-dealer for
304 whom the agent is registered, when representing the
305 broker-dealer in effecting or attempting to effect pur-
306 chases or sales of securities.

307 (d) The commissioner may deny, suspend, otherwise
308 condition or revoke the registration of an applicant or
309 registrant or take any other action authorized by the
310 provisions of this chapter if the commissioner determines
311 the person has engaged in the conduct of forgery, embez-
312 zlement, nondisclosure, incomplete disclosure or misstate-
313 ment of material facts or manipulative or fraudulent
314 practices.

315 (e) The following provisions govern the application of
316 section 204(a)(2)(I):

317 (1) The commissioner may not enter an order against a
318 broker-dealer on the basis of the lack of qualification of
319 any person other than: (A) The broker-dealer himself or
320 herself if he or she is an individual; or (B) an agent of the
321 broker-dealer.

322 (2) The commissioner may not enter an order against an
323 investment adviser on the basis of the lack of qualification
324 of any person other than: (A) The investment adviser
325 himself or herself if he or she is an individual; or (B) any
326 other person who represents the investment adviser in
327 doing any of the acts which may make him or her an
328 investment adviser.

329 (3) The commissioner may not enter an order solely on
330 the basis of lack of experience if the applicant or regis-
331 trant is qualified by training or knowledge or both.

332 (4) The commissioner shall consider that an agent who
333 will work under the supervision of a registered broker-
334 dealer need not have the same qualifications as a broker-
335 dealer.

336 (5) The commissioner shall consider that an investment
337 adviser is not necessarily qualified solely on the basis of
338 experience as a broker-dealer or agent. When he or she
339 finds that an applicant for initial or renewal registration
340 as a broker-dealer is not qualified as an investment
341 adviser, he or she may by order condition the applicant's
342 registration as a broker-dealer upon his or her not trans-
343 acting business in this state as an investment adviser.

344 (6) The commissioner may by rule provide for an exami-
345 nation, which may be written or oral or both, to be taken
346 by any class of or all applicants, as well as persons who
347 represent or will represent an investment adviser in doing
348 any of the acts which make him or her an investment
349 adviser.

350 (f) The commissioner may by order summarily postpone
351 or suspend registration pending final determination of any
352 proceeding under this section. Upon the entry of the order,
353 the commissioner shall promptly notify the applicant or
354 registrant, as well as the employer or prospective employer
355 if the applicant or registrant is an agent, that it has been
356 entered and of the reasons therefor and that within fifteen
357 days after the receipt of a written request the matter will
358 be set down for hearing. If no hearing is requested and
359 none is ordered by the commissioner, the order will remain
360 in effect until it is modified or vacated by the commis-
361 sioner. If a hearing is requested or ordered, the commis-
362 sioner, after notice of and opportunity for hearing, may
363 modify or vacate the order or extend it until final determi-
364 nation.

365 (g) If the commissioner finds that any registrant or
366 applicant for registration is no longer in existence or has
367 ceased to do business as a broker-dealer, agent or invest-
368 ment adviser, or is subject to an adjudication of mental
369 incompetence or to the control of a committee, conservator
370 or guardian, or cannot be located after reasonable search,
371 the commissioner may by order cancel the registration or
372 application.

373 (h) Withdrawal from registration as a broker-dealer,
374 agent or investment adviser becomes effective thirty days
375 after receipt of an application to withdraw or within such
376 shorter period of time as the commissioner may determine,
377 unless a revocation or suspension proceeding is pending
378 when the application is filed or a proceeding to revoke or
379 suspend or to impose conditions upon the withdrawal is
380 instituted within thirty days after the application is filed.
381 If a proceeding is pending or instituted, withdrawal
382 becomes effective at a time and upon the conditions as the
383 commissioner by order determines. If no proceeding is
384 pending or instituted and withdrawal automatically
385 becomes effective, the commissioner may nevertheless
386 institute a revocation or suspension proceeding under
387 section 204(a)(2)(B) within one year after withdrawal
388 became effective and enter a revocation or suspension
389 order as of the last date on which registration was effec-
390 tive.

391 (i) No order may be entered under any part of this
392 section except the first sentence of subsection (f) without:
393 (1) Appropriate prior notice to the applicant or registrant
394 (as well as the employer or prospective employer if the
395 applicant or registrant is an agent); (2) opportunity for
396 hearing; and (3) written findings of fact and conclusions of
397 law.

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 the person is regis-
118 tered as an agent pursuant to this article; or (5) supervises
119 employees who perform any of the foregoing unless the
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 (l) (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" mean 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.

221 (q) “Branch office” means any location other than the
222 main office, identified to the public, customers or clients
223 as a location where a broker-dealer or investment adviser
224 or federal-covered adviser conducts a securities or invest-
225 ment adviser business. Branch office does not include:

226 (1) A location identified solely in a telephone directory
227 line listing or on a business card or letterhead if: (A) The

228 listing, card or letterhead also includes the address and
229 telephone number of the broker-dealer or investment
230 adviser or federal covered adviser where the individuals
231 conducting business from the location are directly super-
232 vised; and (B) no more than one agent or investment
233 adviser representative transacts business on behalf of the
234 broker-dealer or investment adviser or federal-covered
235 adviser from an identified location; or

236 (2) Any other location as the commissioner may deter-
237 mine.

**§32-4-406. Administration of chapter; operating fund for securi-
ties department.**

1 (a) This chapter shall be administered by the auditor of
2 this state and he or she is hereby designated, and shall be,
3 the commissioner of securities of this state. He or she has
4 the power and authority to appoint or employ such
5 assistants as are necessary for the administration of this
6 chapter.

7 (b) The auditor shall set up a special operating fund for
8 the securities division in his or her office. The auditor
9 shall pay into the fund twenty percent of all fees collected
10 as provided for in this chapter. If, at the end of any fiscal
11 year, the balance in the operating fund exceeds three
12 hundred fifty thousand dollars, the excess shall be with-
13 drawn from the special fund and transferred to the general
14 revenue fund.

15 The special operating fund shall be used by the auditor
16 to fund the operation of the securities division located in
17 his or her office. The special operating fund shall be
18 appropriated by line item by the Legislature.

19 (c) Moneys payable for assessments established by
20 section four hundred seven-a of this article shall be
21 collected by the commissioner and deposited into the
22 general revenue fund.

23 (d) It is unlawful for the commissioner or any of his or
24 her officers or employees to use for personal benefit any
25 information which is filed with or obtained by the com-
26 missioner and which is not made public. No provision of
27 this chapter authorizes the commissioner or any of his or
28 her officers or employees to disclose any information
29 except among themselves or when necessary or appropri-
30 ate in a proceeding or investigation under this chapter. No
31 provision of the chapter either creates or derogates from
32 any privilege which exists at common law or otherwise
33 when documentary or other evidence is sought under a
34 subpoena directed to the commissioner or any of his or her
35 officers or employees.

§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, thirty-two-a or 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 day
20 of 2

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 considers 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.

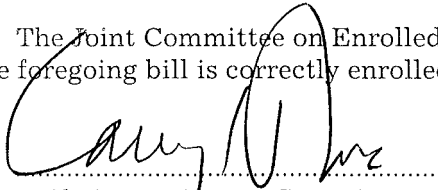
59 (4) No person is excused from attending and testifying or
60 from producing any document or record before the com-
61 missioner, or in obedience to the subpoena of the commis-
62 sioner or any officer designated by him or her, or in any
63 proceeding instituted by the commissioner on the ground
64 that the testimony or evidence (documentary or otherwise)
65 required of him or her may tend to incriminate him or her
66 or subject him or her to a penalty or forfeiture; but no
67 individual may be prosecuted or subjected to any penalty
68 or forfeiture for or on account of any transaction, matter
69 or thing concerning which he or she is compelled, after
70 claiming his or her privilege against self-incrimination to
71 testify or produce evidence (documentary or otherwise),
72 except that the individual testifying is not exempt from
73 prosecution and punishment for perjury or contempt
74 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.

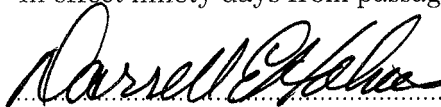
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.


.....
Chairman Senate Committee

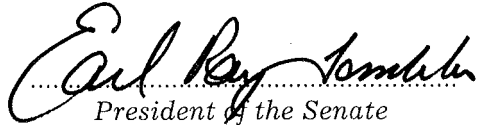

.....
Chairman House Committee

Originated in the Senate.

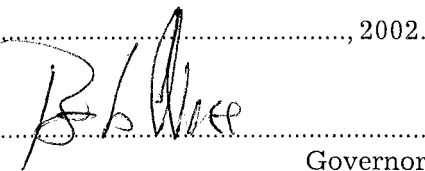
In effect ninety days from passage.


.....
Clerk of the Senate


.....
Clerk of the House of Delegates


.....
President of the Senate


.....
Speaker House of Delegates

The within *is approved* this the *2nd*
Day of *April*, 2002.

.....
Governor

PRESENTED TO THE

GOVERNOR

Date 3/25/02

Time 11:15 am