WEST VIRGINIA LEGISLATURE
Regular Session, 2002

ENROLLED
Committee Substitute for
SENATE BILL NO. 475

(By Senators Wooten and Coraggio)

PASSED March 9, 2002

In Effect 90 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 this state as a broker-dealer or agent unless he or she is registered under this chapter.

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

(c) It is unlawful for any person to transact business in
this state as an investment adviser unless: (1) He or she is
so registered under this chapter; (2) he or she is a federal-
covered adviser except that, until the tenth day of October,
one thousand nine hundred ninety-nine, a federal-covered
adviser for which a nonpayment or underpayment of a fee
has not been promptly remedied following written notifi-
cation to the adviser of such nonpayment or underpayment
shall be required to register under this article; or (3) he or
she has no place of business in this state and: (A) His or her
only clients in this state are investment companies as
defined in the Investment Company Act of 1940, other
investment advisers, federal-covered advisers, broker-
dealers, banks, trust companies, savings and loan associa-
tions, insurance companies, employee benefit plans with
assets of not less than one million dollars and governmen-
tal agencies or instrumentalities, whether acting for
themselves or as trustees with investment control, or other
institutional investors as are designated by rule or order of
the commissioner; 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 this subsection, whether or not he or she or
any of the clients who are residents of this state is then
present in the state.

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

(e) It is unlawful for any:
(1) Person required to be registered as an investment adviser under this article to employ an investment adviser representative unless the investment adviser representative is registered under this article: Provided, That the registration of an investment adviser representative is not effective during any period when he or she is not employed by an investment adviser registered under this article; or

(2) Federal-covered adviser to employ, supervise or associate with an investment adviser representative having a place of business located in this state, unless such investment adviser representative is registered under this article or is exempt from registration. When an investment adviser representative begins or terminates employment with an investment adviser, the investment adviser (in the case of 401 (g)), or the investment adviser representative (in the case of 401 (f)), shall promptly notify the commissioner.

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

(g) An applicant must be registered or qualified in the securities business in the state of the applicant's principal place of business. The commissioner may waive this requirement upon a finding that the applicant is registered with the securities and exchange commission or any other national securities exchange or national securities association registered under the Securities Exchange Act of 1934. A request to waive this requirement must be made upon written application to the commissioner which includes documentation upon which the applicant relies in requesting the waiver.

(a) A broker-dealer, agent or investment adviser may obtain an initial or renewal registration by filing with the commissioner an application together with a consent to service of process pursuant to subsection (g), section four hundred fourteen, article four of this chapter. The application shall contain whatever information the commissioner by rule requires concerning matters such as: (1) The applicant’s firm and place of organization; (2) the applicant’s proposed method of doing business; (3) the qualifications and business history of the applicant and in the case of a broker-dealer or investment adviser, the qualifications and business history of any partner, officer or director, any person occupying a similar status or performing similar functions or any person, directly or indirectly, controlling the broker-dealer or investment adviser and, in the case of an investment adviser, the qualifications and business history of any employee; (4) any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities business and any conviction of a felony; and (5) subject to the limitations of §15(h)(1) of the Securities Exchange Act of 1934, the applicant’s financial condition and history. The commissioner may by rule or order require an applicant for initial registration to publish an announcement of the application as a Class I legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code and the publication area or areas for the publication shall be specified by the commissioner. If no denial order is in effect and no proceeding is pending under section two hundred four of this article, registration becomes effective at noon of the thirtieth day after an application is filed. The commissioner may by rule or order specify an earlier effective date and he or she may by order defer the effective date until noon of the thirtieth day after the filing of any amendment to an application. Registration of a broker-dealer automatically constitutes registration of any agent who is a partner, officer or director, or a person occupying a similar status or per-
forming similar functions, as designated by the broker-dealer in writing to the commissioner and approved in writing by the commissioner. Registration of an investment adviser automatically constitutes registration of any investment adviser representative who is a partner, officer or director or a person occupying a similar status or performing similar functions as designated by the investment adviser in writing to the commissioner and approved in writing by the commissioner.

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

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

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

(e) The commissioner may, by rule or order, require a minimum capital for registered broker-dealers, subject to the limitations of section fifteen of the Securities Exchange Act of 1934 and establish minimum financial requirements for investment advisers, subject to the
limitations of section 222 of the Investment Advisers Act of 1940, which may include different requirements for those investment advisers who maintain custody of clients' funds or securities or who have discretionary authority over same and those investment advisers who do not.

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

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

(h) Every broker-dealer and investment advisor registered under this chapter shall pay an annual fifty dollar fee for each branch office located in West Virginia.
(i) Each agent, representative and associated person of a broker-dealer or investment advisor when applying for an initial license under section two hundred two of this article or changing employers shall pay a compliance assessment of twenty-five dollars. Each agent, representative and associated person, when applying for a renewal license under section two hundred two of this article, shall pay a compliance assessment of ten dollars.

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

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

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

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

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

(D) Is permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practice involving any aspect of the securities business;
(E) Is the subject of an order of the commissioner denying, suspending or revoking registration as a broker-dealer, agent or investment adviser;

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

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

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

(I) Is not qualified on the basis of such factors as training, experience and knowledge of the securities business, except as otherwise provided in subsection (b).

The commissioner may by order deny, suspend or revoke any registration if he or she finds: (1) That the order is in the public interest; and (2) that the applicant or registrant:
(J) Has failed reasonably to supervise his or her agents if he or she is a broker-dealer or his or her employees if he or she is an investment adviser; or

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

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

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

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

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

(3) Recommending to a customer the purchase, sale or exchange of any security without reasonable grounds to believe that the transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the customer's investment objectives, financial situation and needs and any other relevant information known by the broker-dealer and/or agent;

(4) Executing a transaction on behalf of a customer without authorization;
(5) Exercising any discretionary power in effecting a transaction for a customer's account without first obtaining written authority from the customer, unless the discretionary power relates solely to the time and/or price for the execution of orders;

(6) Extending, arranging for or participating in arranging for credit to a customer in violation of the regulations of the securities and exchange commission or the regulations of the federal reserve board;

(7) Executing any transaction in a margin account without obtaining from the customer a written margin agreement prior to settlement date for the initial transaction in the account;

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

(9) Hypothecating a customer's securities without having a lien thereon unless a properly executed written consent of the customer is first obtained, except as otherwise permitted by rules of the securities and exchange commission;

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

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

(12) Entering into a transaction with or for a customer at a price not reasonably related to the current market price of the security or receiving an unreasonable or indeterminate commission or profit;
(13) Executing orders for the purchase by a customer of securities not registered under the provisions of this chapter, unless the securities or transaction are exempt from registration under this chapter;

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

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

(16) Unreasonably or unjustifiably failing to furnish to a customer purchasing securities in an offering, no later than the date of confirmation of the transaction, either a final prospectus or a preliminary prospectus and an additional document, which together include all information set forth in the final prospectus;

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

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

(19) Effecting any transaction in, or inducing the purchase or sale of, any security by means of any manipulative, deceptive or fraudulent device, practice, plan, pro-
gram, design or contrivance, which may include, but is not limited to: (A) Effecting any transaction in a security which involves no change in the beneficial ownership; (B) entering an order or orders for the purchase or sale of any security with the knowledge that an order or orders of substantially the same size, at substantially the same time and substantially the same price, for sale of any security, has been or will be entered by or for the same or different parties for the purpose of creating a false or misleading appearance with respect to the market for the security: Provided, That nothing in this paragraph prohibits a broker-dealer or agent from entering into a bona fide agency cross transaction for its customers; and (C) effecting, alone or with one or more other persons, a series of transactions in any security creating actual or apparent active trading in the security or raising or depressing the price of the security, for the purpose of inducing the purchase or sale of the security by others;

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

(21) Publishing or circulating, or causing to be published or circulated, any notice, circular, advertisement, newspaper article, investment service or communication of any kind which purports to report any transaction as a purchase or sale of any security unless the broker-dealer or agent believes that the transaction was a bona fide purchase or sale of the security, or which purports to quote the bid price or asked price for any security, unless the broker-dealer or agent believes the quotation represents a bona fide bid for or offer of the security;

(22) Using any advertising or sales presentation which is deceptive or misleading, such as the distribution of any nonfactual data, material or presentation based on conjecture, unfounded or unrealistic claims or assertions in any brochure, flyer or display by works, pictures, graphs or
(23) Failing to disclose to the customer that the broker-dealer or agent is controlled by, affiliated with or under common control with the issuer of any contract with or for a customer for the purchase or sale of the security and if the disclosure is not made in writing, it shall be supplemented by the giving or sending of written disclosure at or before the completion of the transaction;

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

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

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

(27) Sharing directly or indirectly in profits or losses in the account of any customer without the written authorization of the customer;

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

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

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

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

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

(c) With regard to agents, dishonest or unethical prac-
tices in the securities business also includes, but is not
limited to:
(1) Borrowing or engaging in the practice of borrowing money or securities from a customer (other than any institution or organization whose normal business activities include lending of moneys), or lending or engaging in the practice of lending money or securities to a customer;

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

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

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

(5) Sharing directly or indirectly in profits or losses in the account of any customer without the written authorization of the customer and broker-dealer which the agent represents;

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

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

(8) Entering in a course of conduct constituting an egregious violation of the rules of a national securities exchange or national securities association of which the agent is a member with respect to any customer, transaction or business; and

(9) Holding oneself out as representing any person other than the broker-dealer for whom the agent is registered and, in the case of an agent whose normal place of busi-
ness is not on the premises of the broker-dealer, failing to conspicuously disclose the name of the broker-dealer for whom the agent is registered, when representing the broker-dealer in effecting or attempting to effect purchases or sales of securities.

(d) The commissioner may deny, suspend, otherwise condition or revoke the registration of an applicant or registrant or take any other action authorized by the provisions of this chapter if the commissioner determines the person has engaged in the conduct of forgery, embezzlement, nondisclosure, incomplete disclosure or misstatement of material facts or manipulative or fraudulent practices.

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

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

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

(3) The commissioner may not enter an order solely on the basis of lack of experience if the applicant or registrant is qualified by training or knowledge or both.

(4) The commissioner shall consider that an agent who will work under the supervision of a registered broker-dealer need not have the same qualifications as a broker-dealer.
(5) The commissioner shall consider that an investment adviser is not necessarily qualified solely on the basis of experience as a broker-dealer or agent. When he or she finds that an applicant for initial or renewal registration as a broker-dealer is not qualified as an investment adviser, he or she may by order condition the applicant’s registration as a broker-dealer upon his or her not transacting business in this state as an investment adviser.

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

(f) The commissioner may by order summarily postpone or suspend registration pending final determination of any proceeding under this section. Upon the entry of the order, the commissioner shall promptly notify the applicant or registrant, as well as the employer or prospective employer if the applicant or registrant is an agent, that it has been entered and of the reasons therefor and that within fifteen days after the receipt of a written request the matter will be set down for hearing. If no hearing is requested and none is ordered by the commissioner, the order will remain in effect until it is modified or vacated by the commissioner. If a hearing is requested or ordered, the commissioner, after notice of and opportunity for hearing, may modify or vacate the order or extend it until final determination.

(g) If the commissioner finds that any registrant or applicant for registration is no longer in existence or has ceased to do business as a broker-dealer, agent or investment adviser, or is subject to an adjudication of mental incompetence or to the control of a committee, conservator or guardian, or cannot be located after reasonable search, the commissioner may by order cancel the registration or application.
Withdrawal from registration as a broker-dealer, agent or investment adviser becomes effective thirty days after receipt of an application to withdraw or within such shorter period of time as the commissioner may determine, unless a revocation or suspension proceeding is pending when the application is filed or a proceeding to revoke or suspend or to impose conditions upon the withdrawal is instituted within thirty days after the application is filed. If a proceeding is pending or instituted, withdrawal becomes effective at a time and upon the conditions as the commissioner by order determines. If no proceeding is pending or instituted and withdrawal automatically becomes effective, the commissioner may nevertheless institute a revocation or suspension proceeding under section 204(a)(2)(B) within one year after withdrawal became effective and enter a revocation or suspension order as of the last date on which registration was effective.

(i) No order may be entered under any part of this section except the first sentence of subsection (f) without:

(1) Appropriate prior notice to the applicant or registrant (as well as the employer or prospective employer if the applicant or registrant is an agent); (2) opportunity for hearing; and (3) written findings of fact and conclusions of law.

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. “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.

(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 registered 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 the person is registered as an agent pursuant to this article; or (5) supervises employees who perform any of the foregoing unless the person is registered as an agent pursuant to this article.
(j) "Issuer" means any person who issues or proposes to issue any security, except that: (1) With respect to certificates 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 considered 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.

(l) (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.

(q) "Branch office" means any location other than the main office, identified to the public, customers or clients as a location where a broker-dealer or investment adviser or federal-covered adviser conducts a securities or investment adviser business. Branch office does not include:

(1) A location identified solely in a telephone directory line listing or on a business card or letterhead if: (A) The
listing, card or letterhead also includes the address and telephone number of the broker-dealer or investment adviser or federal covered adviser where the individuals conducting business from the location are directly supervised; and (B) no more than one agent or investment adviser representative transacts business on behalf of the broker-dealer or investment adviser or federal-covered adviser from an identified location; or

(2) Any other location as the commissioner may determine.

§32-4-406. Administration of chapter; operating fund for securities department.

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

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

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

(c) Moneys payable for assessments established by section four hundred seven-a of this article shall be collected by the commissioner and deposited into the general revenue fund.
(d) It is unlawful for the commissioner or any of his or her officers or employees to use for personal benefit any information which is filed with or obtained by the commissioner and which is not made public. No provision of this chapter authorizes the commissioner or any of his or her officers or employees to disclose any information except among themselves or when necessary or appropriate in a proceeding or investigation under this chapter. No provision of the chapter either creates or derogates from any privilege which exists at common law or otherwise when documentary or other evidence is sought under a subpoena directed to the commissioner or any of his or her officers or employees.

§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, thirty-two-a or 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 ........................................ 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
26 (b) Investigations and subpoenas.
27
28 (1) The commissioner in his or her discretion: (A) May
29 make such public or private investigations within or
30 outside of this state as he or she considers 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.
39 (2) For the purpose of any investigation or proceeding
under this chapter, the commissioner, deputy commis-
sioner 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 docu-
ments or records which the commissioner finds relevant or
material to the inquiry.
50 (3) In case of contumacy by, or refusal to obey a sub-
poena 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 com-
missioner, or in obedience to the subpoena of the commis-
sioner 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 autho-
rize 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 bill is approved this the 1st Day of April, 2002.

Governor
PRESENTED TO THE
GOVERNOR
3/25/67
Date 11:15 AM
Time