

By: Senator(s) Morgan, King, Fillingane,
Albritton

To: Judiciary, Division A

SENATE BILL NO. 2905

1 AN ACT TO AMEND SECTION 75-71-105, MISSISSIPPI CODE OF 1972,
2 TO REVISE DEFINITIONS UNDER THE UNIFORM SECURITIES LAW; TO AMEND
3 SECTION 75-71-715, MISSISSIPPI CODE OF 1972, TO CLARIFY THE
4 AUTHORITY OF THE SECRETARY OF STATE TO ORDER RESTITUTION FOR
5 VIOLATIONS OF THE SECURITIES LAW; TO AMEND SECTION 75-71-735,
6 MISSISSIPPI CODE OF 1972, TO REVISE THE AUTHORITY FOR PROSECUTION
7 OF VIOLATIONS UNDER THE SECURITIES LAW; AND FOR RELATED PURPOSES.

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

9 **SECTION 1.** Section 75-71-105, Mississippi Code of 1972, is
10 amended as follows:

11 75-71-105. For the purposes of this chapter the following
12 words shall have the following meanings unless the context shall
13 prescribe otherwise:

14 (a) "Agent" means any individual other than a
15 broker-dealer who represents a broker-dealer or issuer in
16 effecting or attempting to effect purchases or sales of
17 securities. "Agent" does not include an individual who represents
18 (1) an issuer in: (A) effecting transactions in a security
19 exempted by clause (1), (2), (3), (10) or (11) of Section
20 75-71-201; (B) effecting transactions exempted by Section
21 75-71-203; (C) effecting transactions in a covered security as
22 described in Sections 18(b)(3) and 18(b)(4)(D) of the Securities
23 Act of 1933; or (D) effecting transactions with existing
24 employees, partners or directors of the issuer if no commission or
25 other remuneration is paid or given directly or indirectly for
26 soliciting any person in this state; or (2) a broker-dealer in
27 effecting transactions in this state limited to those transactions
28 described in Section 15(h)(2) of the Securities Exchange Act of
29 1934. A partner, officer or director of a broker-dealer or

30 issuer, or a person occupying a similar status or performing
31 similar functions, is an agent only if he otherwise comes within
32 this definition.

33 (b) "Broker-dealer" means any person engaged in the
34 business of effecting transactions in securities for the account
35 of others or for his own account. "Broker-dealer" does not
36 include (1) an agent, (2) an issuer, (3) a bank, savings
37 institution, or trust company, or (4) a person who has no place of
38 business in this state if (A) he effects transactions in this
39 state exclusively with or through (i) the issuers of the
40 securities involved in the transactions, (ii) other
41 broker-dealers, or (iii) banks, savings institutions, trust
42 companies, insurance companies, investment companies as defined in
43 the Investment Company Act of 1940, pension or profit-sharing
44 trusts, or other financial institutions or institutional buyers,
45 whether acting for themselves or as trustees, or (B) during any
46 period of twelve (12) consecutive months he does not direct more
47 than fifteen (15) offers to sell or buy into the State of
48 Mississippi in any manner to persons other than those specified in
49 clause (A) of this subsection, whether or not the offeror or any
50 of the offerees is then present in this state.

51 (c) "Federal covered adviser" means a person who is (1)
52 registered under Section 203 of the Investment Advisers Act of
53 1940; or (2) is excluded from the definition of "investment
54 adviser" under Section 202(a)(11) of the Investment Advisers Act
55 of 1940.

56 (d) "Federal covered security" means any security that
57 is a covered security under Section 18(b) of the Securities Act of
58 1933 or rules or regulations promulgated thereunder.

59 (e) "Fraud," "deceit" and "defraud" are not limited to
60 common-law deceit.

61 (f) "Guaranteed" means guaranteed as to payment of
62 principal, interest or dividends.

63 (g) "Investment adviser" means any person who, for
64 compensation, engages in the business of advising others, either
65 directly or through publications or writings, as to the value of
66 securities or as to the advisability of investing in, purchasing
67 or selling securities or who, for compensation and as a part of a
68 regular business, issues or promulgates analyses or reports
69 concerning securities. "Investment adviser" does not include (1)
70 an investment adviser representative; (2) a bank, savings
71 institution or trust company; (3) a lawyer, accountant, engineer
72 or teacher whose performance of these services is solely
73 incidental to the practice of his profession; (4) a broker-dealer
74 or his agent whose performance of these services is solely
75 incidental to the conduct of his business as a broker-dealer and
76 who receives no special compensation for them; (5) a publisher of
77 any bona fide newspaper, news magazine or business or financial
78 publication of general, regular and paid circulation; (6) a person
79 whose advice, analyses or reports relate only to securities
80 exempted by Section 75-71-201(1); (7) a person who is a federal
81 covered adviser; (8) a person who has no place of business in this
82 state if (A) his only clients in this state are other investment
83 advisers, federal covered advisers, broker-dealers, banks, savings
84 institutions, trust companies, insurance companies, investment
85 companies as defined in the Investment Company Act of 1940,
86 employee benefit plans with assets of not less than One Million
87 Dollars (\$1,000,000.00), governmental agencies or
88 instrumentalities, whether acting for themselves or as trustees
89 with investment control, or other financial institutions or
90 institutional buyers as are designated by rule or order of the
91 Secretary of State, or (B) during the preceding twelve-month
92 period he has had not more than five (5) clients, other than those
93 specified in clause (A) of this subsection, who are residents of
94 this state; or (8) such other persons not within the intent of

95 this subsection as the Secretary of State may by rule or order
96 designate.

97 (h) "Investment adviser representative" means any
98 partner, officer, director of (or a person occupying a similar
99 status or performing similar functions) or other individual,
100 except clerical or ministerial personnel, who is employed by or
101 associated with an investment adviser that is registered or
102 required to be registered under this chapter, or who has a place
103 of business located in this state and is employed by or associated
104 with a federal covered adviser; and who does any of the following:
105 (1) makes any recommendations or otherwise renders advice
106 regarding securities, (2) manages accounts or portfolios of
107 clients, (3) determines which recommendation or advice regarding
108 securities should be given, (4) solicits, offers or negotiates for
109 the sale of or sells investment advisory services, or (5)
110 supervises employees who perform any of the foregoing.

111 (i) "Issuer" means any person who issues or proposes to
112 issue any security, except that (1) with respect to certificates
113 of deposit, voting-trust certificates, or collateral-trust
114 certificates, or with respect to certificates of interest or
115 shares in an unincorporated investment trust not having a board of
116 directors or persons performing similar functions or of the fixed,
117 restricted management or unit type, the term "issuer" means the
118 person or persons performing the acts and assuming the duties of
119 depositor or manager pursuant to the provisions of the trust or
120 other agreement or instrument under which the security is issued;
121 and (2) with respect to certificates of interest or participation
122 in oil, gas or mining titles or leases or in payments out of
123 production under such titles or leases, there is not considered to
124 be any "issuer." With respect to a fractional or pooled interest
125 in a viatical settlement investment contract, "issuer" means the
126 person who creates, for the purpose of sale, the fractional or
127 pooled interest. The issuer of a viatical settlement investment

128 contract that is not fractionalized or pooled means the person
129 effecting the transactions with the investors in such contracts.

130 (j) "Nonissuer" means not directly or indirectly for
131 the benefit of the issuer.

132 (k) "Person" means an individual, a corporation, a
133 partnership, an association, a joint-stock company, a trust where
134 the interests of the beneficiaries are evidenced by a security, an
135 unincorporated organization, a government, or a political
136 subdivision of a government.

137 (l) (i) "Sale" or "sell" includes every contract of
138 sale of, contract to sell, or disposition of, a security or
139 interest in a security for value.

140 (ii) "Offer" or "offer to sell" includes every
141 attempt or offer to dispose of, or solicitation of an offer to
142 buy, a security or interest in a security for value.

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

147 (iv) A purported gift of assessable stock is
148 considered to involve an offer and sale.

149 (v) Every sale or offer of a warrant or right to
150 purchase or subscribe to another security of the same or another
151 issuer, as well as every sale or offer of a security which gives
152 the holder a present or future right or privilege to convert into
153 another security of the same or another issuer, is considered to
154 include an offer of the other security.

155 (vi) The terms defined in this subsection do not
156 include (A) any bona fide pledge or loan; (B) any stock dividend,
157 whether the corporation distributing the dividend is the issuer of
158 the stock or not, if nothing of value is given by stockholders for
159 the dividend other than the surrender of a right to a cash or
160 property dividend when each stockholder may elect to take the

161 dividend in cash or property or in stock; (C) any act incident to
162 a class vote by stockholders, pursuant to the certificate of
163 incorporation or the applicable corporation statute, on a merger,
164 consolidation, reclassification of securities, or sale of
165 corporate assets in consideration of the issuance of securities of
166 another corporation; or (D) any act incident to a judicially
167 approved reorganization in which a security is issued in exchange
168 for one or more outstanding securities, claims or property
169 interests, or partly in such exchange and partly for cash.

170 (m) "Securities Act of 1933," "Securities Exchange Act
171 of 1934," "Public Utility Holding Company Act of 1935," and
172 "Investment Company Act of 1940" mean the federal statutes of
173 those names as amended before or after the effective date of this
174 chapter.

175 (n) "Security" means any note; stock; treasury stock;
176 bond; debenture; evidence of indebtedness; certificate of interest
177 or participation in any profit-sharing agreement; collateral-trust
178 certificate; preorganization certificate or subscription;
179 transferable share; investment contract; voting-trust certificate;
180 certificate of deposit for a security; certificate of interest or
181 participation in an oil, gas or mining title or lease or in
182 payments out of production under such a title or lease; interest
183 in a limited partnership; viatical settlement investment contract
184 or a fractionalized or pooled interest therein; real property
185 investment contract or interest therein; or, in general, any
186 interest or instrument commonly known as a "security," or any
187 certificate of interest or participation in, temporary or interim
188 certificate for, receipt for, guarantee of, or warrant or right to
189 subscribe to or purchase, any of the foregoing. "Security" does
190 not include any insurance or endowment policy or annuity contract
191 under which an insurance company promises to pay a fixed or
192 variable sum of money, or both, either in a lump sum or
193 periodically for life or some other specified period.

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

196 (p) "Viatical settlement investment contract" means any
197 agreement, regardless of title or caption, for the purchase, sale,
198 assignment, transfer, devise or bequest of any portion of the
199 death benefit or ownership of a life insurance policy or
200 certificate for consideration that is less than the expected death
201 benefit of the life insurance policy or certificate. "Viatical
202 settlement investment contract" does not include:

203 (i) The assignment, transfer, sale, devise or
204 bequest of a death benefit, life insurance policy or certificate
205 of insurance by the viator to the viatical settlement provider
206 under Sections 83-7-201 through 83-7-223;

207 (ii) The assignment of a life insurance policy to
208 a bank, savings bank, savings and loan association, credit union
209 or other licensed lending institution as collateral for a loan; or

210 (iii) The exercise of accelerated benefits under
211 the terms of a life insurance policy issued in accordance with the
212 insurance laws of this state.

213 **SECTION 2.** Section 75-71-715, Mississippi Code of 1972, is
214 amended as follows:

215 75-71-715. Whenever it appears to the Secretary of State
216 that any person has engaged or is about to engage in any act or
217 practice constituting a violation of any provision of this chapter
218 or any rule or order hereunder, he may, in his discretion, seek
219 any or all of the following remedies:

220 (a) Issue a cease and desist order, with or without a
221 prior hearing against the person or persons engaged in the
222 prohibited activities, directing them to cease and desist from
223 further illegal activity;

224 (b) (i) Issue an order in the case of an issuer of
225 registered securities, broker-dealer, investment advisor, agent,
226 investment adviser representative, or other person who violated

227 this chapter, imposing an administrative penalty up to a maximum
228 of Twenty-five Thousand Dollars (\$25,000.00) for each offense and
229 each violation shall be considered as a separate offense in a
230 single proceeding or a series of related proceedings; to be paid
231 to the Secretary of State and requiring reimbursement to the
232 Secretary of State for all costs and expenses incurred in the
233 investigation of the violation(s) and in the institution of
234 administrative proceedings, if any, as a result thereof;

235 (ii) For the purpose of determining the amount or
236 extent of a sanction, if any, to be imposed under subparagraph
237 (2)(a) of this section, the Secretary of State shall consider,
238 among other factors, the frequency, persistence, and willfulness
239 of the conduct constituting a violation of this chapter or a rule
240 promulgated thereunder or an order of the Secretary of State, the
241 number of persons adversely affected by the conduct, and the
242 resources of the person committing the violation; * * *

243 (c) Bring an action in chancery court to enjoin the
244 acts or practices to enforce compliance with this chapter or any
245 rule or order hereunder. Upon a proper showing a permanent or
246 temporary injunction, restraining order or writ of mandamus shall
247 be granted and a receiver or conservator may be appointed for the
248 defendant or the defendant's assets. In addition, upon a proper
249 showing by the Secretary of State the court may enter an order of
250 rescission, restitution or disgorgement directed to any person who
251 has engaged in any act constituting a violation of any provision
252 of this chapter or any rule or order hereunder or the court may
253 impose a civil penalty up to a maximum of Twenty-five Thousand
254 Dollars (\$25,000.00) for each offense and each violation shall be
255 considered as a separate offense in a single proceeding or a
256 series of related proceedings. The court may not require the
257 Secretary of State to post a bond; or

258 (d) Require the person or persons engaged in the
259 prohibited activities to provide restitution as prescribed by
260 rules of the commission.

261 **SECTION 3.** Section 75-71-735, Mississippi Code of 1972, is
262 amended as follows:

263 75-71-735. (1) Any person who willfully violates any
264 provision of this chapter, except Section 75-71-115, or who
265 willfully violates any rule or order under this chapter, or who
266 willfully violates Section 75-71-115 knowing the statement made to
267 be false or misleading in any material respect, shall upon
268 conviction be fined not more than Twenty-five Thousand Dollars
269 (\$25,000.00) or imprisoned not more than five (5) years, or both;
270 but no person may be imprisoned for the violation of any rule or
271 order if he proves that he had no knowledge of the rule or order.
272 No indictment or information may be returned under this chapter
273 more than five (5) years after the alleged violation.

274 (2) The enforcement of the provisions of this Article 13
275 shall be vested in the Securities Commission. It shall be the
276 duty of the commission to see that its provisions are at all times
277 obeyed and to take such measures and to make such investigations
278 as will prevent or detect the violation of any provision hereof.
279 The commission shall at once lay before the district attorney of
280 the proper county any evidence which shall come to its knowledge
281 of criminality under this article. In the event of the neglect or
282 refusal of the district attorney to institute and prosecute the
283 violation, the commission shall be authorized to proceed thereon
284 with all the rights, privileges and powers conferred by law upon
285 district attorneys, including the power to appear before grand
286 juries and to interrogate witnesses before grand juries.

287 **SECTION 4.** This act shall take effect and be in force from
288 and after July 1, 2007.