

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

To: Judiciary, Division A

COMMITTEE SUBSTITUTE  
FOR  
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; AND FOR RELATED PURPOSES.

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

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

9 75-71-105. For the purposes of this chapter the following  
10 words shall have the following meanings unless the context shall  
11 prescribe otherwise:

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

29 similar functions, is an agent only if he otherwise comes within  
30 this definition.

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

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

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

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

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

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

93 this subsection as the Secretary of State may by rule or order  
94 designate.

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

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

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

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

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

135 (l) "Real property investment contract" means a  
136 contract for the sale or purchase of a promissory note secured  
137 directly or collaterally by a mortgage, deed of trust or other  
138 lien on real property, or any agreement, arrangement or  
139 understanding in connection with such note, lien or contract in  
140 which a person agrees, implies to do or does any of the following:

141 (i) Guarantee the note, lien or contract against  
142 loss at any time.

143 (ii) Promise to provide a market for the sale of  
144 the note, lien or contract in connection with a sale or purchase.

145 (iii) Offer to accept or accept funds for  
146 investment in notes or contracts secured directly or indirectly by  
147 a lien on real property, where the real property is unspecified at  
148 the time of investment.

149 (iv) Pay an interest or premium for a period  
150 before actual purchase and delivery of the note or contract.

151 (v) Pay any money to an investor if the note or  
152 contract is in arrears.

153 (vi) Guarantee that principal or interest will be  
154 paid in conformity with the terms of the note or contract.

155 (vii) Promise to repurchase the note or contract  
156 in connection with sale or purchase.

157           (m) (i) "Sale" or "sell" includes every contract of  
158 sale of, contract to sell, or disposition of, a security or  
159 interest in a security for value.

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

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

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

169           (v) Every sale or offer of a warrant or right to  
170 purchase or subscribe to another security of the same or another  
171 issuer, as well as every sale or offer of a security which gives  
172 the holder a present or future right or privilege to convert into  
173 another security of the same or another issuer, is considered to  
174 include an offer of the other security.

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

190           (n) "Securities Act of 1933," "Securities Exchange Act  
191 of 1934," "Public Utility Holding Company Act of 1935," and  
192 "Investment Company Act of 1940" mean the federal statutes of  
193 those names as amended before or after the effective date of this  
194 chapter.

195           (o) "Security" means any note; stock; treasury stock;  
196 bond; debenture; evidence of indebtedness; certificate of interest  
197 or participation in any profit-sharing agreement; collateral-trust  
198 certificate; preorganization certificate or subscription;  
199 transferable share; investment contract; voting-trust certificate;  
200 certificate of deposit for a security; certificate of interest or  
201 participation in an oil, gas or mining title or lease or in  
202 payments out of production under such a title or lease; interest  
203 in a limited partnership; viatical settlement investment contract  
204 or a fractionalized or pooled interest therein; real property  
205 investment contract or interest therein; or, in general, any  
206 interest or instrument commonly known as a "security," or any  
207 certificate of interest or participation in, temporary or interim  
208 certificate for, receipt for, guarantee of, or warrant or right to  
209 subscribe to or purchase, any of the foregoing. "Security" does  
210 not include any insurance or endowment policy or annuity contract  
211 under which an insurance company promises to pay a fixed or  
212 variable sum of money, or both, either in a lump sum or  
213 periodically for life or some other specified period.

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

216           (q) "Viatical settlement investment contract" means any  
217 agreement, regardless of title or caption, for the purchase, sale,  
218 assignment, transfer, devise or bequest of any portion of the  
219 death benefit or ownership of a life insurance policy or  
220 certificate for consideration that is less than the expected death  
221 benefit of the life insurance policy or certificate. "Viatical  
222 settlement investment contract" does not include:

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

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

230 (iii) The exercise of accelerated benefits under  
231 the terms of a life insurance policy issued in accordance with the  
232 insurance laws of this state.

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

235 75-71-715. Whenever it appears to the Secretary of State  
236 that any person has engaged or is about to engage in any act or  
237 practice constituting a violation of any provision of this chapter  
238 or any rule or order hereunder, he may, in his discretion, seek  
239 any or all of the following remedies:

240 (a) Issue a cease and desist order, with or without a  
241 prior hearing against the person or persons engaged in the  
242 prohibited activities, directing them to cease and desist from  
243 further illegal activity;

244 (b) (i) Issue an order in the case of an issuer of  
245 registered securities, broker-dealer, investment advisor, agent,  
246 investment adviser representative, or other person who violated  
247 this chapter, imposing an administrative penalty up to a maximum  
248 of Twenty-five Thousand Dollars (\$25,000.00) for each offense and  
249 each violation shall be considered as a separate offense in a  
250 single proceeding or a series of related proceedings; to be paid  
251 to the Secretary of State and requiring reimbursement to the  
252 Secretary of State for all costs and expenses incurred in the  
253 investigation of the violation(s) and in the institution of  
254 administrative proceedings, if any, as a result thereof;



255                   (ii) For the purpose of determining the amount or  
256 extent of a sanction, if any, to be imposed under subparagraph  
257 (2)(a) of this section, the Secretary of State shall consider,  
258 among other factors, the frequency, persistence, and willfulness  
259 of the conduct constituting a violation of this chapter or a rule  
260 promulgated thereunder or an order of the Secretary of State, the  
261 number of persons adversely affected by the conduct, and the  
262 resources of the person committing the violation; \* \* \*

263                   (c) Bring an action in chancery court to enjoin the  
264 acts or practices to enforce compliance with this chapter or any  
265 rule or order hereunder. Upon a proper showing a permanent or  
266 temporary injunction, restraining order or writ of mandamus shall  
267 be granted and a receiver or conservator may be appointed for the  
268 defendant or the defendant's assets. In addition, upon a proper  
269 showing by the Secretary of State the court may enter an order of  
270 rescission, restitution or disgorgement directed to any person who  
271 has engaged in any act constituting a violation of any provision  
272 of this chapter or any rule or order hereunder or the court may  
273 impose a civil penalty up to a maximum of Twenty-five Thousand  
274 Dollars (\$25,000.00) for each offense and each violation shall be  
275 considered as a separate offense in a single proceeding or a  
276 series of related proceedings. The court may not require the  
277 Secretary of State to post a bond; or

278                   (d) Require the person or persons engaged in the  
279 prohibited activities to provide restitution as prescribed by  
280 rules of the Office of the Secretary of State.

281                   **SECTION 3.** This act shall take effect and be in force from  
282 and after July 1, 2007.