



700 NORTH STREET
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STATE OF MISSISSIPPI
SECRETARY OF STATE
DELBERT HOSEMANN
DIVISION OF POLICY AND RESEARCH

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2008 BUSINESS REFORM COMMITTEES
MEETING OF THE SECURITIES COMMITTEE

Tuesday, June 10, 2008
11:00 A.M.

Secretary of State's Office
700 North Street
Jackson, Mississippi

AGENDA

1. Welcome – Cheryn Baker
2. Roll Call of Persons Attending by Teleconference – Cheryn Baker
3. Introductory Remarks, Introduction of Committee Co-Chairs -- Cliff Hodge
4. Introduction of Secretary of State Policy and Research Division Staff – Cheryn Baker
5. Discussion of Purpose and Mission of the Business Reform Committees – Cory Wilson
6. Overview of Business Regulation and Enforcement Division – Dave Scott
7. Introduction of Professor Mercer Bullard by Cliff Hodge
8. Speaker Presentation – Mercer Bullard “The Role of State Securities Law in Creating a Business-Friendly Environment”
9. Introduction of Other Issues for Committee to Cover – Co-Chairs
 - a. Adoption of the Uniform Securities Act and Timing
 - b. Revisions or Enhancements to BRE Enforcement Powers
 - c. Variable and Indexed Annuities: Whether to define as a “security”
10. Reminder of Upcoming Meetings: Dates and Future Programs
11. Other Business
12. Adjourn 1:00 P.M



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Biography of Mercer Bullard

Professor Bullard is an Assistant Professor of Law at the University of Mississippi School of Law, where he teaches courses on securities, banking, corporations, corporate finance, and law and economics. He is also the Founder and President of Fund Democracy, an advocacy group for mutual fund shareholders. Professor Bullard has testified before House, Senate, Department of Labor and State committees on mutual funds, 529 plans, 401(k) plans and other regulatory issues. He has appeared on NBC Nightly News with Tom Brokaw, CBS Evening News, CNBC, CNN, Wall Street Week, and the NewsHour with Jim Lehrer; been featured in Business Week, Money Magazine and other publications; and quoted in most major newspapers and financial publications on securities-related matters. He was named by Investment News as one of the most powerful voices in the financial services industry in 2001, by a mutual fund trade publication as one of four "Fund Titans" for 2003, and by Registered Rep. magazine as one of "Ten to Watch" for 2004. Professor Bullard was formerly an Assistant Chief Counsel at the Securities and Exchange Commission. He previously clerked for a federal judge and practiced securities law in Washington, DC. He has a law degree from the University of Virginia School of Law, a masters degree from Georgetown University, and a B.A. from Yale.



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Securities Committee

Meeting Schedule:

June 26th

July 24th

August 7th

August 21st

All meetings will be held at the MS Secretary of State's Office located at 700 North Street, Jackson, MS in the 2nd floor conference room. All Meetings will be from 11:00am until 1:00 pm.



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Division of Policy and Research

Conference Call Instructions

Conference Call Number: 1-866-212-0875

Conference Passcode: 553955#

Upon calling the toll free number, you will be prompted to enter your passcode followed by the pound key. This will join you to the conference.

Replay Instructions

Conference Call Number: 1-866-212-0875

Replay Passcode: 169178#

The record number of the recording is always the date of the conference (MMDDYY)
Ex. May 20, 2008 = record number is 052008

Call the conference call number as though you were joining a conference. Enter the replay passcode followed by the pound key. After logging on, press *3 and you will be prompted to enter the record number which is always the date of the meeting.

The system will prompt you to enter the number of minutes you wish to skip from the beginning of the recording, followed by the # key. (If you do not wish to skip any minutes then press 0 followed by the # key.)

If you have any problems or questions, please call the Division of Policy and Research at 601-359-3101 or e-mail Phillips Strickland at pstrickland@sos.state.ms.us.



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Mississippi Secretary of State
Division of Policy and Research



Business Reform Committees

Securities Committee Meeting
June 10, 2008

700 North Street
Jackson, Mississippi

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I. AN OVERVIEW OF SECURITIES REGULATION AND THE SECRETARY OF STATE

In Mississippi, the Secretary of State's Office (the "SOS") regulates the sale of non-exempt, non-preempted securities and requires the registration of the issuers of those securities. The Division of Business Regulation and Enforcement ("BRE") is responsible for the enforcement of three state regulatory statutes: the Mississippi Securities Act, the Charitable Solicitations Act and the Pre-Need Cemetery and Funeral Regulations Act. Of course the primary focus of this Committee is the Mississippi Securities Act (the "MSA"). BRE gets involved when a company wants to expand and raises capital to finance that expansion through the sale of stock or other securities within the state. Generally, the securities a company issues and the people selling them must be registered with the SOS, but there are certain statutory exceptions.

BRE addresses violations of Mississippi's securities laws including non-registration of the securities with the SOS, the sale of securities by persons who are not licensed to sell securities in Mississippi, and the sale of securities in investments that do not even exist (outright scams). Typically, BRE is alerted to potential violations through investor complaints. The Division also monitors state newspapers, looking for advertisements that appear suspicious: no risk investments; high rates of returns; and guaranteed returns.

The primary focus of BRE as it concerns the MSA is the protection of investors who are at an informational disadvantage. BRE aims to guarantee the type of disclosure that will allow these public investors to make informed decisions about the securities they purchase.

A. The Mississippi Securities Act

While the Securities Exchange Commission (the “SEC”) directly, and through its oversight of the National Association of Securities Dealers (“NASD”) and the various Securities Exchanges, is the main enforcer of the nation's securities laws, each individual state has its own securities laws and rules. These state laws and rules are commonly known as “Blue Sky Laws.” In Mississippi, the “Blue Sky Laws” are the MSA and the rules and regulations promulgated under it. Before a security is sold in Mississippi, there must be a registration or an exemption in place to cover the transaction, and the brokerage firm and the salesperson must each be registered in the state, or otherwise exempt from the registration requirements.

With few exceptions, before any security is offered or sold in Mississippi, it must be registered or exempt from registration under the MSA. Similarly, every brokerage firm, every issuer selling its own securities and any individual broker or issuer representative engaged in selling securities in Mississippi must also be registered in the state, or otherwise exempt from such registration requirements.

The MSA is modeled after the Uniform Securities Act of 1956. It was enacted in Mississippi in 1981 and has been subsequently amended as necessary since, with the last such amendments enacted in 2001.

B. Preemption of Federal Law

The National Securities Markets Improvement Act of 1996 (“NSMIA”) was enacted in October 1996 to facilitate uniformity among the states concerning certain types of national securities offerings.¹ Among other changes, NSMIA amended Section

¹ Alvarez, Richard I. and Mark J. Astarita, “Introduction to the Blue Sky Laws”
<http://www.seclaw.com/bluesky.htm>.

18 of the Securities Act of 1933 (“the 1933 Act”), thereby creating a class of securities - referred to as “covered securities” - the offer and sale of which (through licensed broker-dealers) are no longer subject to state securities law registration requirements.¹ In short, a covered security is one that enjoys a federally-imposed exemption from state securities registration. Covered securities include: securities listed (or approved for listing) on the NYSE, AMEX and the Nasdaq/National Market, and securities of the same issuer which are equal in rank or senior to such listed securities; mutual fund shares; securities sold to certain qualified purchasers (as yet not defined by the SEC); certain securities exempt under Section 3(a) of the 1933 Act (including government or municipal securities, bank securities and commercial paper); and securities exempt from registration under the 1933 Act if sold in transactions complying with Rule 506 of Regulation D under the 1933 Act.² Although NSMIA preempts state securities registration requirements, NSMIA preserves the right of the states to investigate and prosecute fraud.³

As a result of NSMIA, states may no longer require the registration of covered securities; however, states may, as permitted under NSMIA, require filings and the payment of fees for offers and sales in their state of covered securities other than those which are listed (or approved for listing) on the designated exchanges or securities senior to such securities (i.e., preferred shares or debt securities of an issuer with common stock listed on the designated exchanges).⁴ However, while NSMIA preempts state securities registration requirements for covered securities, NSMIA does not preempt state broker-dealer and agent/salesperson registration requirements (applicable to individuals engaged

¹ *Id.*

² *Id.*

³ *Id.*

⁴ *Id.*

in the offer and sale of covered securities) in connection with a particular offering or transaction.¹ Therefore, although covered securities are no longer subject to substantive state review, other blue sky laws with respect to offerings of covered securities apply.²

II. REPETITIVE ISSUES – VARIABLE ANNUITIES

The variable annuity contract is a hybrid investment containing both securities and insurance features. The securities feature of variable annuities provides the investor with an opportunity to participate in potential capital appreciation and income through investments with a minimum guaranteed investment return in the securities markets (usually mutual funds). However, the securities feature also subjects the investor to market risks. The insurance feature of variable annuities permits the investor to receive a series of periodic payments from the investment over time after a certain event such as retirement. It also provides a death benefit to the beneficiary if the investor dies during the accumulation phase and the account value is less than the “basis” (principal plus gains) at the time of death.

A. High Potential for Abuse

Sales practice abuses associated with variable annuity contracts include churning³, failures to make disclosures, inadequate training, lack of supervision, living

¹ *Id.*

² *Id.*

³ Churning refers to the excessive buying and selling of securities in an individual’s account by that individual’s broker, for the purpose of generating commissions and without regard to investment objectives. For churning to occur, the broker must exercise control over the investment decisions in the account, either through a formal written discretionary agreement or otherwise. For example, if the investor relied on the broker's advice because she was unable to evaluate the broker's recommendations and exercise her own judgment, the broker may have exercised control over the account. Churning can be a violation of SEC Rule 15c1-7 and other securities laws.

trust mills¹, market timing schemes, unauthorized trades, unsuitable variable product recommendations, unsuitable switching or replacement, and violations of books and records requirements. Some abuses involve the principle of suitability, under which a broker-dealer who recommends a variable product to a customer must assess the customer's financial status, investment objectives, and other relevant information to determine if the product is suitable to the customer. This is a primary concern in Mississippi, with unsophisticated dealers making the determination of suitability. The obligation to recommend only securities that are suitable for the investor arises from the antifraud provisions of the federal securities laws and from rules of the self-regulatory organizations. A broker-dealer must have a reasonable basis for believing that the securities recommendations are suitable for the customer in light of the customer's financial needs, objectives, and circumstances.

B. Regulation in Mississippi

In Mississippi, variable annuities are regulated as an insurance product by the Department of Insurance. In some states, both the state securities commissioner and the state insurance commissioner have concurrent jurisdiction over variable annuity contracts and the persons involved in their issuance and sale. Specifically, the insurance commissioner oversees insurers, the contract itself, and salespersons. The securities commissioner oversees broker-dealers, salespersons, and sales practice abuses. There is concurrent enforcement over salespersons. Even though, between the two, the suitability issues appear to be in the realm of securities, not insurance, the Mississippi Legislature

¹ Living trust mills entail a practice of multiple, unknowledgeable, unlicensed representatives selling boilerplate trusts (in the same manner as selling an insurance policy) to the elderly with a few attorneys signing all the trusts. Often the attorney is not even licensed in the state in which the trusts are being sold.

has chosen to exclude BRE from regulating annuity contracts.¹ One question for this committee is whether or not the laws should be changed to permit BRE to have concurrent jurisdiction over these investments.

III. COMPARISON

A. A Tabular Comparison of the Mississippi and Uniform Securities Acts

BRE is preparing a side-by-side comparison of the Mississippi Securities Act and the newest Uniform Securities Act adopted in 2002 (the “USA”) to assist the committee in their decision of whether to adopt the USA. The comparison should be ready soon and will be distributed to the committee as soon as possible.

¹ MCA § 75-71-105 (n) specifically excludes annuities (including variable annuities) from types of investments that are defined as a security.

B. Fee Comparison with Other States

Securities Filings

Filing	MS	AL	AR	LA	TN	Average	Difference between MS and Average
Broker/Dealer Registration	\$200	\$200	\$300	\$250	\$200	\$238	<i>MS is \$38 less</i>
Broker/Dealer Renewal	\$200	\$200	\$300	\$250	\$200	\$238	<i>MS is \$38 less</i>
Investment Advisor Registration	\$200	\$200	\$300	\$150	\$200	\$213	<i>MS is \$13 less</i>
Investment Advisor Renewal	\$200	\$200	\$300	\$150	\$200	\$213	<i>MS is \$13 less</i>
Agent Registration	\$50	\$50	\$75	\$60	\$50	\$59	<i>MS is \$9 less</i>
Agent Renewal	\$50	\$50	\$75	\$60	\$50	\$59	<i>MS is \$9 less</i>
Exemption Application	\$300	\$250	No filing*	No filing	No filing	\$250	<i>MS is \$50 more</i>
TOTAL	\$1,200	\$1,150	\$1,350	\$920	\$900	\$1,104	MS is \$96 more