

**Mississippi Secretary of State
2008 Business Reform Committees
Minutes of Securities Committee
June 10, 2008**

The first meeting of the Securities Committee was called to order on Tuesday, June 10, 2008 at 11:00 A.M. at the Office of the Secretary of State, 700 North Street, Jackson, Mississippi.

The persons who were present in person or by telephone are listed in Exhibit A.

Assistant Secretary of State Cheryn Baker welcomed the committee along with those joining by teleconference.

Cliff Hodge, Chair, made introductory remarks concerning the goals of the committee and announced the Committee Vice-Chairs: Professors Mercer Bullard of the University of Mississippi Law School and Celie Edwards of Mississippi College School of Law. Professor Edwards was not in attendance.

Mr. Hodge stated that the goal of this meeting was primarily organization. His desire was that the Committee would “float” a number of ideas. After the meeting the Committee would formulate and prioritize those ideas and return with an agenda and specific objectives. Mr. Hodge stated that given the diverse backgrounds of the Committee members it seemed a good idea to hear what the members had on their minds. Mr. Hodge also commended Secretary of State Hosemann on his initiative in creating the various reform committees.

Cheryn Baker introduced the Policy and Research Division staff. The Secretary of State Staff members who were present at the meeting are listed at Exhibit B.

Next, Chief of Staff Cory Wilson discussed the purpose and mission of the six business reform committees. The Securities Committee consists of securities industry and securities law experts and will be focused on substance-oriented work with an end result of formulating policy proposals to take to Legislature next session. Wilson expressed that the agency would set goals and mileposts so as not to impose on the Committee by meeting just for the sake of meeting. Wilson concluded by expressing the desire that the Committee take a comprehensive look at the securities law by the end of summer.

Secretary Hosemann welcomed and thanked the members of the committee for their attendance and participation. He characterized the Committee as part of a coordinated effort to change the way Mississippi does business. He noted that from this committee would emerge the securities portion of that effort. Secretary Hosemann stated that the overall effort consisted of an LLC Committee, a Non-profit and Charities Committee, a Trademark Committee, a Corporations Committee, an Intellectual Property Committee, and a Business Court Committee; with the Business Court Committee

proposing the first changes to Court system since 1890, with the exception of Drug Courts and the Mississippi Court of Appeals. Secretary Hosemann expressed his desire that the Business Court system as proposed would have mandatory jurisdiction over Mississippi securities law. Secretary Hosemann stated that each study committee is comprised of about thirty members and noted that less than half are attorneys signifying his desire that the committees would reflect a “user” basis as well as a legal basis.

The Secretary also noted that all the minutes of meetings will be on the website, and that committee members would be able to keep up with the activities of all the committees through the summer. The Secretary noted that there had been a tremendous positive response from Legislature to the formation of these study groups. He stated that the Committee’s goal is to make securities laws competitive with the world, not just neighboring states. He expressed the desire to have the most comprehensive, business-friendly laws in country.

After an introduction by Secretary Hosemann, Dave Scott, Assistant Secretary of State, Business Regulation and Enforcement (“BRE”), gave a brief overview of the role and duties of BRE, the securities compliance and enforcement department within the agency. Scott stated that one of BRE’s primary responsibilities is the administration and enforcement of the Mississippi Securities Act (“MSA”), but that in addition to securities regulation, BRE also oversees the registration and regulation of over 3,000 charities in the state. Scott noted also that BRE oversees the professional fundraisers that charitable organizations contract with to raise funds on behalf of charitable organizations, and also oversees funeral registration and administration of the Pre-Need Act (regulating the portion of the funeral industry that sells pre-need products). In addition, BRE is presently preparing to assume oversight for metal dealers pursuant to the new metal theft legislation.

BRE employs six securities examiners with securities backgrounds. These examiners examine broker/dealer firms and investment advisor firms throughout the state for compliance. Scott noted that most investigations were complaint-driven, but also noted that BRE routinely conducted exams on the broker/dealer firms the agency is charged with regulating.

Scott stated that there are about 1,600 broker/dealer firms in the state, employing approximately 75,000 agents, and about 830 investment advisor firms managing portfolios in excess of \$25 million. These entities register with the Securities Exchange Commission (the “SEC”) but also register with the state through a sort of “me too” registration. In addition, sixty-two investment advisor firms that handle portfolios of less than \$25 million are regulated solely by the state. BRE has two persons who work only in registration and four staff attorneys.

Scott noted that while Mississippi was not perceived as big player in financial markets, the staff has achieved national recognition through active participation in the National Association of Securities Administrators Association (“NASAA”), with two of BRE’s attorneys heavily involved in the arena of state securities administrators.

Next, Chair Cliff Hodge introduced the meeting's keynote speaker, Vice-Chair Mercer Bullard, and described his background. Hodge expressed how fortunate the University was to have him as a professor and how fortunate the Committee was to have Professor Bullard participating.

Next was featured speaker Mercer Bullard, speaking on the topic, "The Role of State Securities Law in Creating a Business-Friendly Environment." A summary of Professor Bullard's presentation and a copy of his biography are set forth in Exhibit C.

Next, Chairman Hodge thanked Professor Bullard for his presentation and stated that the most likely result of the Committee's action in the long run may well be the adoption of the Revised Uniform Securities Act ("RUSA"). Hodge warned the Committee that the desire for adoption of a uniform act with huge changes simply meant that the goal of uniformity would not be accomplished. Professor Bullard agreed, urging the Committee that in his experience when adoption committees found problems, the solutions were often worse than problems found in the uniform acts. He reminded the Committee that uniformity has intrinsic value- and that the Committee must "keep our eye on that ball."

Hodge continued the discussion of the RUSA, stating that since its adoption in 2002 there has not been much negative feedback. Hodge then recommended that the RUSA be divided up into small work groups, with members stating their preferences for the area of the RUSA they wanted to review. Cheryn Baker added that if a Committee member did not express a preference he or she would be assigned to a section.

Hodge then opened the floor for discussion of additional issues. A discussion ensued, primarily about the problems in connection with the formation of a business court system that may be caused by mandatory arbitration in securities contracts.

Chairman Hodge next asked Dave Scott with BRE about any repetitive problems that BRE was experiencing, and Scott replied that the sale of certain insurance products to unsuitable investors, specifically variable annuities, were a consistent problem.

Having no further business, the meeting was adjourned at 12:20 P.M.

Respectfully submitted,

Cheryn Baker
Assistant Secretary of State
Policy and Research Division

Exhibit A
to the Minutes of Securities Committee Meeting 1

In Attendance:

Cliff Hodge
Mercer Bullard
Charles Adams
Matt Ballew
Charlie Banks
Tom Bertaut
Jeremy Chalmers
David Clark
Roger Davis
Felice Dowd-Wicks
John Flynt (by telephone)
Greg Frascogna (by telephone)
Charles McBride
Keith Parsons
Marc Porter
Hugh Potts (by telephone)
J. Ramsey
William Ray
Jane Shaw-Jackson
Rita Parker

Exhibit B
to the Minutes of Securities Committee Meeting 1

Delbert Hosemann, Secretary of State

Cory Wilson, Chief of Staff

Cheryn Baker, Assistant Secretary of State, Policy and Research

Doug Jennings, Senior Attorney, Policy and Research

Phillips Strickland, Division Coordinator

Brian Bledsoe, Intern

Jeff Lee, Intern

Exhibit C
to the Minutes of Securities Committee Meeting 1

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.

Professor Bullard began by acknowledging his federal securities law background. He stated that he has been primarily focused on federal law, but he recognizes that over the past fifteen years or so, federal law has largely affected the evolution of state law.

Bullard remarked that his presentation for this meeting was not to necessarily to focus on Mississippi’s securities law, but instead, to think about ways to make Mississippi’s securities laws contribute to Mississippi being seen as more business friendly. Normally, Bullard said, we think of other areas of law as contributing more to a business friendly climate; tort law, corporate law, but we typically do not look to securities law outside the financial services industry.

Bullard noted that in the last thirteen years, there has been significant change in role of state securities laws, and he drew two conclusions that may not be so obvious:

- 1.) The law in Mississippi will be more business friendly based on what it *refrains* from doing more than by what it *does* (by how the state refrains from what other states are doing).
- 2.) Being seen as more business friendly depends on how we handle the public relations aspect. Often there may be what seems to be minor changes to securities law, but if these changes are driven by desire to make the state more business friendly that will often determine whether the state is viewed as having a business friendly environment. By analogy, Bullard referenced the clean-up graffiti campaign in New York City. In and of itself, he noted, there’s not much threat from graffiti, but the campaign sent a message of taking care of little things.

Bullard noted that in the last thirteen years, there have been two important strands of development in securities law: one strand that diminished the role of states' securities law, and one strand that enhanced that role.

Bullard stated that near the beginning of this thirteen-year timeline would be National Securities Market Improvement Act of 1996 ("NSMIA"). NSMIA federalized an enormous amount of state security law. In the 1930's, federal law was viewed as "filling gaps" in state securities law, but now the relationship is completely inverted with states creating some problems in the application of securities law nationwide. NSMIA provided for a federal regulation of national securities offerings, federal licensing of brokers, the split between small and large investment advisors between the federal government and the states, leaving the states with anti-fraud enforcement over most securities activities.

According to Professor Bullard, the impact of NSMIA, as a general matter, is that state securities laws have been limited in their ability to play a role in regulating securities activities, especially as to non-financial services firms.

Bullard stated that likewise, this committee should keep in mind uniformity (and efficiency) in the law. When the committee studies the Uniform Securities Act ("USA") for potential adoption, uniformity will be accomplished by suppressing the "statist" tendency to find parts of the USA that we really don't think are right for our state and adjust them accordingly. Invariably, states will find statutes in the USA that justifiably do not fit their understanding of how they want to apply securities laws. Those states forget that the flip-side of that tendency is a message to the business community that uniformity is not quite as important. The overall goal of NSMIA is uniformity. Bullard stated that to the extent that we face state-specific issues, we should standardize them as much as possible to the other states' approach to the same issue or to even adopt federal standards.

Bullard then introduced a separate topic. He stated that we should always be asking the industry (especially the financial services industry) how we can take away their "headaches." Bullard noted that these problems were usually not substantive, but were usually the result of having to file another form with the state that is only slightly different from the federal form. Bullard felt this was critical and should be ingrained in a securities office; a policy of communicating with the industry and asking them, "How can we make investing cheaper for your clients?" For Bullard, this is an example of looking for innovative ways to standardize problem areas. This is one area where the Committee must be willing to give up "state peculiarities."

Bullard next recognized a "flip side." He asked, "What about states' continuing role in fraud enforcement?" Bullard used an example of a California case against Capital Research, the manager of the largest mutual fund complex in the world, and explained that the issue was whether the California Attorney General could bring a claim based on a misleading prospectus. As most know, NSMIA provides that states are "out of the business" of regulating prospectuses, but NSMIA had expressed a "carve-out" for

basically fraud-based actions. Bullard stated that NSMIA does not address what should be done with respect to enforcement when a prospectus is misleading nor does NSMIA address by whom it should be done, the state or federal government. Bullard expressed that it is important that Mississippi keep apprised of similar developments, because most cases will arise out of areas where the SEC has not filled gaps in the law. The answer to the California case, Bullard explained, and to others like it, as to whether state law should be applied, is answered by another question: has the SEC occupied the field?

Bullard noted that rather than bringing cases themselves, the states can play a much more constructive role by alerting the federal government to gaps in federal regulation that are simply inviting action by state attorneys general (who are elected to be responsive to the constituents) and working with the SEC to fill those gaps. States can also become leaders that recognize the problems and work to develop a solution that is consistent with uniformity while providing enforcement.

Bullard offered for an example the recent mutual fund scandal. He noted that the SEC was well aware of gaps in the federal law concerning this area, but had taken no action; waiting for a state to lead the cause. The New York Attorney General, as a result, basically established federal policy hand-in-hand with the SEC while the SEC stood in the background. Bullard expressed that it is the job of states that don't want to serve in such a role—who don't want to necessarily pander to the sort of populist aspect of such cases—to get out in front; to be aggressive with federal regulators and say, “You're not doing your job. You should be on top of these issues; you should be taking the lead as to the rules that are promulgated.” The appearance that New York is leading the SEC by the nose—that the SEC is promulgating rules only after consulting with the New York Attorney General as to what it should say—is a result of the SEC's inaction. Bullard characterized this as an absurd set of affairs and that the reason for it is that it takes concerted action by the states who then run the risk of being seen as “not business friendly.” But the way for a state to be the leader is to say, “There's a reason they are getting away with bringing these cases. The SEC is not doing its job.”

Bullard summed up the proper role of states: working with SEC, putting pressure on them, but not being renegades and going off and bringing cases that make the law a nightmare for practicing lawyers by amounting to a circuit split on the important issues (with every state handling the issues differently).

Bullard noted that NSMIA is not the only strand. Bullard stated that there was a second strand—the evolution of federal law. The Private Securities Litigation Reform Act of 1995 (“PSLRA”) substantially narrowed private rights of action under federal securities law from a substantive point of view, as well as a procedural point of view. The reaction among the plaintiff's bar of moving more and more cases to state court was not surprising. Following, Bullard noted, we had the Securities Litigation Uniform Standards Act (“SLUSA”), a statute to specifically address a problem of cases that were previously federal class actions that were now state class actions, by essentially causing these class actions to be removed to federal court.

The problem created by that action was if, at the same time you want to be removing cases to federal court to achieve uniformity, and you are limiting private rights of action under those federal statutes (PSLRA and SLUSA), you are creating the situation that you are trying to avoid—which is to try to get some of these cases that are setting federal policy out of the state courts. Plaintiff’s lawyers are thinking about nothing but how to design state cases. PSLRA and SLUSA have created an enormous incentive to bring cases not just in state court, but under strictly state law. This leads to a worsening of uniformity of the treatment of private causes of action, because instead of those cases being brought under 10b-5 federal law, you have them being brought under many different state laws, by many different judges, the majority of whom are elected. These cases are removed from the federal Article III judges’ jurisdiction with respect to a single statute with a fairly consistent interpretation to a situation with elected judges in fifty jurisdictions—essentially as many jurisdictions as there are areas in which judges are elected—applying fifty different sets of statutes to the same types of problems. This is the worst headache for our clients.

Next, Bullard noted enforcement of arbitration clauses was another whole world of interpretation of state law. This proposition entails a jurisdiction that chooses the law it wants to bring. Bullard noted that in talking with arbitration lawyers, plaintiffs bring only state cases in that forum as well. This world is governed by the idiosyncrasies of how panels are chosen and leads to a lot of arbitors “splitting the baby” rather than coming down on one side or the other and giving a clear interpretation of applicable law.

In conclusion, Professor Bullard noted that the two strands mentioned create an incentive for states to make their laws more uniform in terms of their content and application- particularly with respect to financial services firms. But on the other hand these two strands create a tremendous pressure on state securities law substantively to become more uniform because it is becoming the cause of action of choice for plaintiff’s lawyers. The question is, how do you want those claims brought? How much uniformity can be achieved? Bullard noted that there is not really much discussion going on at North American Securities Administrators Association (“NASAA”) about the way in which these cases are progressing through the courts and there was certainly no discussion by NASAA about the role that states should have—not in bringing claims on their own where there are gaps in federal law, but rather restraining themselves and working as a group to fill those gaps across the board.

Bullard stated that this gave the Committee some general themes to think about along the lines of trying to establish more uniformity. He suggested that the Secretary of State’s Office might need to change its culture to be proactive. The mutual fund lobby (for example) never goes to SEC and says, “Here’s how we can make this cheaper.” Usually if they come to SEC, it’s for some substantive reason. If we become proactive, then we go to them before they can ask, or on issues about which they won’t ask, and appear more “business –friendly.”

