

WEST VIRGINIA LEGISLATURE

2022 REGULAR SESSION

Introduced

House Bill 4314

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WESTFALL, D. JEFFRIES, HOTT, CRISS, AND MANDT

[Introduced January 21, 2022; referred to the
Committee on the Judiciary]

1 A BILL to amend and reenact §32-4-401 of the Code of West Virginia, 1931, as amended, relating
2 to the Uniform Securities Act; general provisions; and excluding a solicitor from the
3 definition of “investor adviser”.

Be it enacted by the Legislature of West Virginia:

ARTICLE 4. GENERAL PROVISIONS.

§32-4-401. Definitions.

1 When used in this chapter, unless the context otherwise requires:

2 (a) “Commissioner” means the Auditor of the State of West Virginia.

3 (b) “Agent” means any individual other than a broker-dealer who represents a broker-
4 dealer or issuer in effecting or attempting to effect purchases or sales of securities. “Agent” does
5 not include an individual who represents an issuer in: (1) Effecting transactions in a security
6 exempted by subdivision (1), (2), (3), (10) or (11), subsection (a), section 402 of this article; (2)
7 effecting transactions exempted by subsection (b), section 402 of this article; (3) effecting
8 transactions in a covered security as described in section 18(b)(3) and section 18(b)(4)(d) of the
9 Securities Act of 1933; (4) effecting transactions with existing employees, partners or directors of
10 the issuer if no commission or other remuneration is paid or given, directly or indirectly, for
11 soliciting any person in this state; or (5) effecting transactions in this state limited to those
12 transactions described in section 15(h)(2) of the Securities Exchange Act of 1934. A partner,
13 officer or director of a broker-dealer or issuer, or a person occupying a similar status or performing
14 similar functions, is an agent only if he or she otherwise comes within this definition.

15 (c) “Broker-dealer” means any person engaged in the business of effecting transactions
16 in securities for the account of others or for his or her own account. “Broker-dealer” does not
17 include: (1) An agent; (2) an issuer; (3) a bank, savings institution or trust company; or (4) a person
18 who has no place of business in this state if: (A) He ~~or she~~ or she effects transactions in this state
19 exclusively with or through: (i) The issuers of the securities involved in the transactions; (ii) other
20 broker-dealers; or (iii) banks, savings institutions, trust companies, insurance companies,

21 investment companies as defined in the Investment Company Act of 1940, pension or profit-
22 sharing trusts or other financial institutions or institutional buyers, whether acting for themselves
23 or as trustees; or (B) during any period of 12 consecutive months he or she does not direct more
24 than 15 offers to sell or buy into this state in any manner to persons other than those specified in
25 subparagraph (A), paragraph (4) of this subdivision, whether or not the offeror or any of the
26 offerees is then present in this state.

27 (d) "Fraud", "deceit" and "defraud" are not limited to common-law deceit.

28 (e) "Guaranteed" means guaranteed as to payment of principal, interest or dividends.

29 (f) "Federal-covered adviser" means a person who is: (1) Registered under section 203 of
30 the Investment Advisers Act of 1940 or (2) is excluded from the definition of "investment advisor"
31 under section 202a (11) of the Investment Advisers Act of 1940.

32 (g) "Investment adviser" means any person who, for compensation, engages in the
33 business of advising others, either directly or through publications or writings, as to the value of
34 securities or as to the advisability of investing in, purchasing or selling securities or who, for
35 compensation and as a part of a regular business, issues or promulgates analyses or reports
36 concerning securities. "Investment adviser" also includes financial planners and other persons
37 who, as an integral component of other financially related services, provide the foregoing
38 investment advisory services to others for compensation and as part of a business or who hold
39 themselves out as providing the foregoing investment advisory services to others for
40 compensation. "Investment adviser" does not include: (1) A bank, savings institution or trust
41 company; (2) a lawyer, accountant, engineer or teacher whose performance of those services is
42 solely incidental to the practice of his or her profession; (3) a broker-dealer whose performance
43 of these services is solely incidental to the conduct of his or her business as a broker-dealer and
44 who receives no special compensation for them; (4) a publisher, employee or columnist of a
45 newspaper, news magazine or business or financial publication or an owner, operator, producer
46 or employee of a cable, radio or television network, station or production facility if, in either case,

47 the financial or business news published or disseminated is made available to the general public
48 and the content does not consist of rendering advice on the basis of the specific investment
49 situation of each client; (5) a person whose advice, analyses or reports relate only to securities
50 exempted by subdivision (1), subsection (a), section 402 of this article; (6) a person who has no
51 place of business in this state if: (A) His ~~or her~~ or her only clients in this state are other investment
52 advisers, broker-dealers, banks, savings institutions, trust companies, insurance companies,
53 investment companies as defined in the Investment Company Act of 1940, pension or profit-
54 sharing trusts or other financial institutions or institutional buyers, whether acting for themselves
55 or as trustees; or (B) during any period of 12 consecutive months he or she does not have more
56 than five clients who are residents of this state other than those specified in subparagraph (A),
57 paragraph (6), of this subdivision, whether or not he or she or any of the persons to whom the
58 communications are directed is then present in this state; (7) an investment adviser
59 representative; (8) a "federal-covered adviser"; ~~or~~ (9) such other persons not within the intent of
60 this paragraph as the commissioner may by rule or order designate ~~or~~ (10) a solicitor who directly
61 or indirectly solicits a prospective client for, or refers a prospective client to an investment adviser.

62 (h) "Investment adviser representative" means any partner, officer, director of or a person
63 occupying a similar status or performing similar functions or other individual, except clerical or
64 ministerial personnel, who is employed by or associated with an investment adviser that is
65 registered or required to be registered under this chapter or who has a place of business located
66 in this state and is employed by or associated with a federal-covered adviser; and including
67 clerical or ministerial personnel, who does any of the following: (1) Makes any recommendations
68 or otherwise renders advice regarding securities; (2) manages accounts or portfolios of clients;
69 (3) determines which recommendation or advice regarding securities should be given; (4) solicits,
70 offers or negotiates for the sale of or sells investment advisory services unless the person is
71 registered as an agent pursuant to this article; or (5) supervises employees who perform any of
72 the foregoing unless the person is registered as an agent pursuant to this article.

73 (i) "Issuer" means any person who issues or proposes to issue any security, except that:
74 (1) With respect to certificates of deposit, voting-trust certificates or collateral-trust certificates or
75 with respect to certificates of interest or shares in an unincorporated investment trust not having
76 a board of directors or persons performing similar functions or of the fixed, restricted management
77 or unit type, the term "issuer" means the person or persons performing the acts and assuming the
78 duties of depositor or manager pursuant to the provisions of the trust or other agreement or
79 instrument under which the security is issued; and (2) with respect to certificates of interest or
80 participation in oil, gas or mining titles or leases or in payments out of production under such titles
81 or leases, there is not considered to be any "issuer".

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

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

86 (l) (1) "Sale" or "sell" includes every contract of sale of, contract to sell, or disposition of a
87 security or interest in a security for value;

88 (2) "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of
89 an offer to buy, a security or interest in a security for value;

90 (3) Any security given or delivered with, or as a bonus on account of, any purchase of
91 securities or any other thing is considered to constitute part of the subject of the purchase and to
92 have been offered and sold for value;

93 (4) A purported gift of assessable stock is considered to involve an offer and sale;

94 (5) Every sale or offer of a warrant or right to purchase or subscribe to another security of
95 the same or another issuer, as well as every sale or offer of a security which gives the holder a
96 present or future right or privilege to convert into another security of the same or another issuer,
97 is considered to include an offer of the other security;

98 (6) The terms defined in this subdivision do not include: (A) Any bona fide pledge or loan;
99 (B) any stock dividend, whether the corporation distributing the dividend is the issuer of the stock
100 or not, if nothing of value is given by stockholders for the dividend other than the surrender of a
101 right to a cash or property dividend when each stockholder may elect to take the dividend in cash
102 or property or in stock; (C) any act incident to a class vote by stockholders, pursuant to the
103 certificate of incorporation or the applicable corporation statute, on a merger, consolidation,
104 reclassification of securities or sale of corporate assets in consideration of the issuance of
105 securities of another corporation; or (D) any act incident to a judicially approved reorganization in
106 which a security is issued in exchange for one or more outstanding securities, claims or property
107 interests, or partly in such exchange and partly for cash.

108 (m) "Securities Act of 1933", "Securities Exchange Act of 1934", "Public Utility Holding
109 Company Act of 1935" and "Investment Company Act of 1940" mean the federal statutes of those
110 names as amended before the effective date of this chapter. The National Securities Markets
111 Improvement Act of 1996 ("NSMIA") means the federal statute which makes certain amendments
112 to the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act
113 of 1940 and the Investment Advisers Act of 1940.

114 (n) "Security" means any note; stock; treasury stock; bond; debenture; evidence of
115 indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-
116 trust certificate; preorganization certificate or subscription; transferable share; investment
117 contract; voting-trust certificate; certificate of deposit for a security; viatical settlement contract;
118 certificate of interest or participation in an oil, gas or mining title or lease or in payments out of
119 production under such a title or lease; or, in general, any interest or instrument commonly known
120 as a "security" or any certificate of interest or participation in, temporary or interim certificate for,
121 receipt for, guarantee of or warrant or right to subscribe to or purchase any of the foregoing.
122 "Security" does not include any insurance or endowment policy or annuity contract under which
123 an insurance company promises to pay money either in a lump sum or periodically for life or some

124 other specified period: *Provided*, That “security” does include insurance or endowment policies or
125 annuity contracts that are viatical settlement contracts or agreements for the purchase, sale,
126 assignment, transfer, devise or bequest of any portion of a death benefit or ownership of a life
127 insurance policy or certificate that is less than the expected death benefit of the life insurance
128 policy or certificate.

129 (o) “Federal-covered security” means any security that is a covered security under section
130 18(b) of the Securities Act of 1933, as amended by the National Securities Markets Improvement
131 Act of 1996, or rules promulgated thereunder.

132 (p) “State” means any state, territory or possession of the United States, the District of
133 Columbia and Puerto Rico.

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

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

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

NOTE: The purpose of this bill is to exclude a “solicitor” from the definition of “investor
adviser” under the definitions in the Uniform Securities Act.

Strike-throughs indicate language that would be stricken from a heading or the present law,
and underscoring indicates new language that would be added.