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Section Chair's Corner

By Jimmy Milam

We are pleased to publish this Fall 2014 issue of the Mississippi Business Law Reporter, the first of at least three planned publications by the Business Law Section of the Mississippi Bar slated for this Bar year. It is my privilege to serve as this year's Chair of the Section's Executive Committee which is comprised of the following: Jason Bailey of Jones Walker LLP, Olive Branch, Vice-Chair; Tammra Cascio of Gulf Guaranty Life Insurance Company, Jackson, Secretary; Stan Smith, Jones Walker LLP, Jackson, Past Chair; Ryan Pratt of Pratt Law Firm, PLLC, Madison, Executive Committee; Drew Snyder, Mississippi Governor's Office, Jackson, Executive Committee; Neal Wise, Jones Walker LLP, Jackson, Executive Committee; and Mary Nichols, Hancock Bank, Gulfport, Reporter Editor.

With thanks and appreciation to immediate Past Chair Stan Smith (and last year's Committee members) for keeping the ship steaming in successful style during his term, we look forward to another productive year serving the members of the Section. Here are some highlights of what is to come, together with a few comments about matters that have already taken place:

1. As was the case last year, we plan to publish three issues of the Reporter (henceforth to be referred to as the Reporter rather than the Newsletter), i.e., Fall 2014, Spring 2015 and Summer 2015. We are in continuing need of articles for publication, so I urge you to contact Mary Nichols to make arrangements for contributions to the Reporter.
2. Somewhat sooner than last year, we held a well-attended joint social with the Mississippi Corporate Counsel Association at the Fairview Inn in Jackson on October 15th, 2014 where the Guest of Honor was State Treasurer Lynn Fitch, who made entertaining and highly informative impromptu remarks to the gathered group. Thanks to all who were able to attend, and we urge those we were not able to do so to watch for a similar event next year and mark your calendars at an early date.
3. We plan again this year to sponsor a one-hour CLE teleseminar, tentatively scheduled to occur before the end of February, 2015 on a topic of interest and with a speaker of note. We express our gratitude to David W. Houston, III, retired Chief Judge of the United States Bankruptcy Court for the Northern District of Mississippi, now of Mitchell McNutt & Sams of Tupelo, for speaking at the teleseminar last spring.
4. We again plan to offer a Legislative Update CLE program at the Bar Center in Jackson on April 29, 2015 (coincidentally the same date as last year) with key members of the Legislature speaking on various issues relating to the then-ended legislative session which will be of interest to Section members.
5. On June 9, 2015 we will co-sponsor, with the Mississippi Corporate Counsel Association, a lunch hour CLE program for ethics credit.
6. The Executive Board recently authorized contributions of \$1,000.00 each to (a) the University of Mississippi School of Law's Negotiation Board, and (b) Mississippi College School of Law's Moot Court to assist with the participation by each organization in important transactional law competitions. We also plan to continue our past awards of \$1,000.00 each to a deserving business law student

from each school during the spring of 2015.

7. We will of course continue to provide the weekday email distribution of Lexology news to our members. The service has been valuable to many, and we hope you will continue, or begin, to take advantage of the many opportunities it offers.
8. Finally, we are proud to have provided the substantive content for the Summer 2014 issue of The Mississippi Lawyer magazine. We attempted, successfully we hope and believe, to have a mix of different kinds of articles. While we have not yet undertaken to sponsor another issue of the magazine, the Committee maintains an interest in doing so again for a future occasion.

The Section's annual meeting will be held Thursday, July 11, 2015 at 10:00 a.m. during the Annual Meeting of the Mississippi Bar in Sandestin, Florida, where we plan to have a CLE seminar in conjunction with our meeting.

Please make an effort to attend some (or all) of the planned events. Rene Garner will send emails from time to time with specific information about the events. We strive to provide beneficial services and events our members will enjoy, and are always open to ideas for additional or different activities. Feel free to contact me at jtm@milamlawpa.com if you would like to propose an activity, event or simply talk through an idea. And remember to use our (underutilized) listserv.

Business Filing in the 21st Century

A New Era in Business Filings Arrives in Mississippi

By Thomas H. Riley, III, Assistant Secretary of State, Business Services Division

On August 25, 2014 the Mississippi Secretary of State implemented a new program for all business filings. This new system allows all business documents to be filed online. It also allows for online payment for those filings. The system is secure and user-friendly and represents a tremendous leap forward for business filings in Mississippi.

This new system, called BFOCUS (Business Filing Online-Corporate, UCC Services), places control of business filings into the hands of the business by better allowing them to determine the timing of their filings. It significantly speeds up turnaround times by allowing for payment and submission of all filings online. It allows businesses to review past filings quickly. It also eliminates the mountain of paper received each week at the office of the Secretary of State.

Paper, Paper Everywhere:

BFOCUS replaces the filing system first installed in 2002. That system, SOSKB (Secretary Of State Knowledge Base), was brought to Mississippi from North Carolina when the Mississippi Secretary of State became the central filing office in the state for UCC documents following the adoption of Revised Article 9 of the Uniform Commercial Code in 2001. It was adapted for corporate filings in 2004. SOSKB was developed as a complete filing system. Dozens of states adopted this software and paid the developers in North Carolina to make it compatible with the filing rules of their individual states. Mississippi originally used it only to file UCC documents. This was a fairly simple process as there were only five UCC forms which were identical across all of the states using SOSKB. The forms could be submitted in paper or filed online. The filing of corporate documents in this system, however, was more difficult. Each of the states adopting this software had a different number of

forms, collected different business information and had different business filing rules. Consequently, each state required a significantly different configuration to make the system compatible.

At the time of adoption, Mississippi had over 70 different business forms which needed to be configured into SOSKB. In addition, Mississippi law at the time allowed for parties to draft and submit nonstandard filings. Although SOSKB allowed online filings, only corporate annual reports were put online when the system went live. All of the documents were completed in paper and mailed to the Secretary of State with a fee. Thousands of forms were received each week. While this was an improvement over the previous system, SOSKB proved notoriously intractable. It did not allow Secretary of State personnel to change the forms or to add new forms as the laws were changed or amended. Every new form or alteration to an existing form required the state to pay the developers to make those changes.

Time for a change:

Secretary Hosemann recognized early in his tenure that, for Mississippi to move forward as a business leader, a new filing system was necessary. After extensive research into the systems being used in other states, it was determined that the best course for Mississippi was to develop its own system. A software vendor was engaged and the first phase of the system, which updated UCC filings, was implemented in June of 2010. Unfortunately, that vendor suffered financial setbacks in the ensuing year and was unable to finish the system. A new vendor, Dorger Software Architects of Mobile, Alabama took up the challenge. The delay in implementation was used to revamp the scope of the project and update the functionality of the proposed system. The result is the system which went live on August 25.

This filing system differs significantly from its predecessor. Gone are the 85 separate paper forms. Data is now entered directly by the user into the system. Every action, from formation to annual reports to dissolution can be filed online. According to a recent survey sponsored by CT Corporation, the Mississippi filing system is the only one in the country which allows for 100% online filing.

User Accounts:

The first major change that users will notice is the requirement to set up a user account. These accounts are unique to the individual user and can be utilized from any computer. The account username is always an e-mail address while the password can be anything selected by the user. The system automatically saves incomplete filings in the user account so that they may be set aside and resumed at any time. Each individual filing documents should set up their own user account. While a single account can be set up for an office, is not recommended. Filed documents and notifications are sent via e-mail which would require an e-mail account accessible by multiple individuals. In addition, only one person may be logged in to an account at any time.

To file business documents the user logs in through the Secretary of State's website. This opens the "Business Filings" page. Rather than a series of forms with numbers, the new system gives the user choices of actions to be taken. Once an action is chosen, the user will be guided to a form which is specific for the entity type and the action desired. For example, someone seeking to start a new business would choose the button "Form a Corporation, Nonprofit, LLC, Partnership or Business Trust". He would then be asked to select a specific type of entity. This will open data fields necessary to collect the specific information required to form that entity. As the fields are completed, the system automatically performs numerous validations on the information provided. If the information is incorrect, warnings appear with guidance to fix the data. The user cannot submit the document unless all of the fields have been correctly completed. Because

of this, almost every filing submitted to the Secretary of State since August 25th has been accepted. The rate of rejection of submitted filings has dropped from 31% to 2% since the system was implemented.

New Payment Options:

Users may now pay for all filings online. Before August 25, the only online payment was for corporate annual reports. For online payments, the Secretary of State accepts Visa, MasterCard, American Express and Discover. There is a small fee for those payments which is set by the credit card companies. The user may also pay via electronic check. There is a fee of \$1.25 for utilizing this payment method. Finally, users may set up an ACH account with the Secretary of State. Individual filing accounts may be connected to a single ACH account so, for example, all members of a law firm filing documents with the Secretary of State may draw from the same payment source. ACH accounts are set up using the form available on the Secretary of State's website.

Filings completed in the system may also be printed off and mailed in with a check. The address for the Secretary of State is located on the bottom of each form. Checks should be made payable to the Mississippi Secretary of State.

Delivery to your Desktop:

Most filings that are submitted and paid for online are instantly filed. Once payment has been submitted electronically, the user receives an e-mail with a copy of the filed document and an invoice. The document is already in the system and will appear immediately on the Secretary of State's website. This usually occurs within 60 seconds of submission. Most formation documents for corporations, LLC's and partnerships require no review by the Secretary of State's staff.

Some documents must be reviewed by a staff member prior to approval. For example, registration of a foreign entity requires the attachment of a certificate of good standing from the entity's home

state. This certificate may be downloaded and submitted with the online filing but staff members at the Secretary of State's office must review it for accuracy before it is filed. This review usually occurs within 30 to 60 minutes of submission. If the document is accepted, the user will receive an e-mail with the filed document and the invoice. If there is an error in the filing, the user will receive an e-mail which specifically informs him of the error and contains instructions for correcting the error and resubmitting the document.

Documents that are printed and mailed with a check are all reviewed by the Secretary of State's staff. Since these documents arrive in the mail, turn-around time is significantly longer. The filing first goes to the Finance Department where the check is processed. It is then sent by hand to Filing Services for review. Since the document was prepared in the system, the information entered by the user is already in BFOCUS so it need not be reentered by the staff member. Rather, the document is checked for accuracy, attachments are reviewed and it is accepted or rejected. The document is then e-mailed back to the user in a fashion similar to the online filings.

As of this writing, 66% of corporate filings are submitted and paid online. Only 39% are completed in the system and mailed with a check. The Secretary of State still receiving 5% of the corporate filings using old paper forms. Starting January 1, 2015, any filings done outside the system and submitted on old paper forms will be returned unprocessed.

Increasing Data Accuracy:

The BFOCUS system is built on the concept of utilizing existing company data to complete filings. When filing a document on an existing company, such as an amendment, the user will first be asked for the business ID number (BID) for the company. Every company doing business in Mississippi has a unique business ID. This number was issued by the Secretary of State and is different from the tax ID number.

When the user enters the BID, forms will pre-populate with the information already in the system. This will prevent duplication of information and provide the user with the latest data on file with the Secretary of State. Company information may be edited as needed for the action required. The system will calculate the fee applicable to that action and the document can be filed online.

Users may also order certificates of good standing or certified copies of documents in BFOCUS. These orders are now submitted and paid online. The user will receive the certified documents via e-mail. If the documents are already in the system, they will be sent within minutes of the request. Requests for documents which are contained on microfilm are routed to a customer service representative who will scan the documents and e-mail them to the user. Even complicated copy requests can now be processed within a few days, a process which used to take up to two weeks.

User Account Security:

The BFOCUS system allows for increased security of business filings. All companies in Mississippi should have a business e-mail listed in the records with the Secretary of State. Whenever a document is filed on any company, an e-mail notification with a copy of the filing is automatically sent to all e-mail addresses associated with that company. Users may add their e-mail to the notification list for any company in the database. So, for example, an attorney or CPA may request notifications of filings for their clients' companies. The system makes it difficult, if not impossible, for an individual to surreptitiously file a fraudulent document against a company. In addition, the Secretary of State will have the user account information for anyone attempting to make such a filing.

User accounts are also useful to manage filings. Business filings which are not completed are saved in the user's account and can be picked up and finished at a later date. Completed documents may be saved and submitted together with one payment. The user may also review all previously filed

documents and any documents ordered. Filings which have been submitted but which require review by the Secretary of State's staff will also appear in the user's account. The user may check the status of those documents by logging in and choosing the "Pending Approval" option. Once documents are filed, they will appear under that heading in the users account.

The BFOCUS filing system is a significant step forward for the state of Mississippi. Business filings that used to take days or weeks may now be completed in minutes. The rejection rate for filings has dropped dramatically while the accuracy of the data submitted has improved significantly. This system is the state-of-the-art and represents the Secretary of State's commitment to making Mississippi the most business friendly state in the nation.

Editor's Note: State Treasurer Lynn Fitch was the guest of honor at the Business Law Section Fall Social on October 15, 2014. She was kind enough to offer some remarks on that occasion about the work of her Office which are generally set forth below.

Comments from State Treasurer, Lynn Fitch

By Lynn Fitch

As your State Treasurer, I employ my law degree and legal background in a non-traditional way—by leading your state bank. The Office of State Treasurer handles roughly \$25 billion in transactions annually. We invest and protect the public trust, which, after all, is your money. We also manage a number of programs that affect Mississippians on a personal level, including the State's unclaimed property fund and programs that help families save for college. The Office of State Treasurer plays a broad role in the State's finances, and our Unclaimed Property and College Savings Divisions have a significant impact on the economy and the business community in Mississippi.

2014 Is An Unclaimed Property Reporting Year

It is important that you encourage your business clients to examine their records to determine if they have any unclaimed property. State law requires that a business or organization unable to locate the rightful owners of intangible unclaimed property—like utility deposits, insurance proceeds, bank account balances, and stocks—turn that property over to the Office of State Treasurer after five years. Unclaimed property does not include tangible items such as equipment, jewelry, or land.

Holders of unclaimed property must file reports with the Unclaimed Property Division every three years. 2014 is a mandatory reporting year. Although the deadline to file reports was November 1, it is not too late to encourage your clients to submit their reports. Some of the most common examples of entities reporting unclaimed property are utility

companies, government agencies, retail businesses, insurance companies, banks and credit unions. Often, property is not returned to rightful owners because security procedures prevent mail from being forwarded, an institution does not have an up-to-date address, the owner's name has changed, the owner has died, or the owner has forgotten that the account exists.

We have adopted a business-friendly approach to both reporting unclaimed property and claiming it. The Office of State Treasurer recently filed administrative rules with the Secretary of State that clarify the procedures for both reporting by holders and for those claiming property. The new rules, which were final in October, codify current agency processes and make the law's requirements more transparent and understandable so that businesses are better able to comply.

We are working very hard to make it easier than ever for businesses and organizations to report unclaimed property. By visiting our website, www.TreasurerLynnFitch.com, businesses can go to our Unclaimed Property page to find out whether they are responsible for reporting unclaimed funds or securities. There are simple instructions and multiple methods to submit reports.

Although reporting every three years is required by law, many businesses choose to report every year. Once they have established the habit of reporting, it becomes easier to reconcile those accounts annually. Our staff stands ready to assist holders in

complying with Mississippi law, and we have made every effort to minimize the reporting burden while maximizing the return of unclaimed property to its rightful owners.

One in five Mississippians has unclaimed property in the Office of State Treasurer. Throughout the year we remind the public to search our website periodically to check their names for properties that are unclaimed. By law, the agency also publishes a list of unclaimed properties across the State. Those publications will appear in the spring of 2015 and will lead to a huge influx of search requests and claims. Although many Mississippians call our office or submit claims in hard copy, we provide the ability for anyone to search online from anywhere, anytime. We are working to streamline and drive the claims process through our website.

In fiscal year 2013, the Office of State Treasurer initiated 27,800 claims on behalf of our citizens and paid over 5,310 of those claims, which totaled almost \$10,000,000 in cash and stock value. Every one of those claims was handled by our four-person Division staff. This is a monumental task for the Office of State Treasurer, and we accomplish it with a smaller staff than our surrounding states.

Each time a dollar is returned to its rightful owner, that dollar turns over seven times in Mississippi's economy. That is why we work so hard to encourage businesses to report unclaimed properties and Mississippians to search to see if there is property in their names. The Mississippi Uniform Disposition of Unclaimed Property Act, Miss. Code Ann. §§ 89-12-1 *et seq.*, was passed in 1982. Since then, the Office of State Treasurer has returned over \$139 million to rightful owners. Since I began my term in 2012, we have returned over \$36 million to Mississippi's economy.

College Savings Plans Help Families Save

The Office of State Treasurer administers Mississippi's two 529 college savings plans, the Mississippi Prepaid Affordable College Tuition (MPACT) plan and the Mississippi Affordable College Savings (MACS) plan. These plans were established by Miss. Code Ann. §§ 37-155-1 to 37-155-125.

MPACT, which locks in college tuition rates at current pricing, is backed by the full faith and credit of the State of Mississippi. MACS covers a wider array of college expenses but is dependent upon how much an account holder saves and investment performance.

We deferred MPACT enrollment in 2012 so that we could evaluate whether the program is sustainable long-term. As it was, MPACT was facing a significant funding shortfall due to a number of reasons, including the economic recession. Deciding to defer enrollment in MPACT was not popular with everyone, but it was the right thing to do.

Because MPACT is a full faith and credit program, the burden of a funding shortfall could land squarely on taxpayers. To determine the sustainability of MPACT, an actuarial audit was performed—something that had never been done before. When we received the results in 2013, the College Savings Mississippi Board of Directors carefully analyzed the findings and studied ways to adjust pricing and streamline the program. Then, this spring, the Board decided that MPACT could be restructured and reopened so that it was both a viable tool for families saving for college *and* cost-neutral for taxpayers. After developing new program rules and pricing to mitigate future funding shortfalls, the Board voted to reopen MPACT to new enrollment, effective October 1.

A number of assumptions underlying MPACT's pricing and benefits were modified in the new plan. Although MPACT pricing has always been adjusted based on expected risks, tuition increases, and rates of return, the program was never evaluated based on actual utilization by students.

When it began, MPACT's pricing was based on an assumption that students would go immediately to college after high school and graduate in four years. That is less typical today. Students today delay matriculation more often, begin and interrupt their college enrollment, and may take a number of years to complete their degrees. The program was not initially priced to reflect that reality.

We changed utilization assumptions to reflect actual usage and made other prudent changes. We focused on enforcing existing rules. The College Savings Board also adopted a funding policy and other best practices for existing MPACT contracts that will help monitor funding levels and guide the program's liquidity.

While MPACT contract prices are higher for plans going forward, the cost of an MPACT plan is still a great value in most circumstances when considering the rising costs of a college education. It was not an easy decision to defer enrollment, but it was the fiscally responsible thing to do. The deferral and retooling of MPACT preserves the program as a viable savings tool.

By comparison, MACS is a 529 savings plan designed to meet the college savings needs of any Mississippi family budget. There is a lot of flexibility in a MACS account. The MACS plan offers a generous state tax deduction (\$10,000 annually for single filers; \$20,000 for joint) and tax free earnings under both state and federal tax laws. You can choose from seven different investment options when enrolling. MACS can be used for a range of college expenses such as tuition, room and board, and books, and the funds can be used at colleges nationwide.

One way employers can partner with MACS and help their employees realize the benefits of saving for higher education is to offer MACS through payroll deduction. The minimum contribution amount with payroll deduction is just \$15. Our College Savings Division has prioritized payroll deduction as a way to grow both MACS participation and college preparation. Our staff is dedicated to helping businesses set up this benefit to their employees, so we encourage them to contact us.

Treasurer's Education About Money (TEAM)

It is important that we more of our children finish college. It is perhaps even more important to increase our state's financial literacy. Both college and knowledge about handling money lead to a stronger workforce, more jobs, and a stronger economy. That means a stronger future for all of

us. Financial literacy is a priority for me, and I need your help.

The Financial Industry Regulatory Authority has named Mississippi among the least financially capable states in the country. That is unacceptable. We must change Mississippi's financial culture. I hear it when we go to the rating agencies to discuss whether Mississippi will continue to receive our solid bond ratings. I hear it when I talk to teachers and students. I hear it when we are competing for economic development and jobs.

Just consider these numbers. The average Mississippian has credit card debt in excess of \$15,000. Students are graduating from college with an average student loan debt of over \$33,000. And 67% of Mississippians claim to have no savings whatsoever. We must improve these statistics. That is why this school year, we launched the Treasurer's Education About Money, or TEAM. Through a first-of-its-scope statewide public-private partnership, TEAM aims to leverage private dollars to provide enhanced K-12 teacher training and personal finance tools for students in every high school in the state.

TEAM relies on the Mississippi Council for Economics Education (MCEE), a Mississippi-based nonprofit, and EverFi, Inc., a private company based in Washington, DC, for implementation. MCEE, with a proven track record of training teachers, will develop enhanced financial literacy professional development seminars that encourage teachers to incorporate personal finance into both their own lives and their lesson plans. EverFi, which has a successful track record nationwide of implementing its computer-based financial education program, will work with schools to make its program available to all high school students. The EverFi program consists of nine personal finance modules, which students can complete on computers at school, or on their iPads or smartphones. It is an easy, portable and proven way for students to learn personal finance.

This program has already been piloted in about 100 Mississippi schools, with great results. Students

who have used the EverFi program have shown a 40% knowledge gain in their financial literacy. Students learn basic concepts such as how to build good credit, how to save for college, how to get a mortgage, and how to invest. They learn to avoid common personal finance mistakes so many Mississippians make when they overuse credit cards, fail to plan long term, and neglect to save for the inevitable rainy day.

I have been encouraged as I travel the state and talk to teachers and students who have participated in this program. Teachers are grateful to have another way to teach their students how to become better managers of their own finances. Students are surprised to learn how many of these financial lessons truly impact their lives.

Businesses, educators, and parents are all important TEAM members. While we are about 75% of the way to fully funding both teacher training and deployment of the EverFi program to all schools, we have plenty of room for additions to our TEAM

roster. For information on how you or your clients can join the TEAM, visit our website and click on the TEAM page. Together, we can change our financial culture and build another top-ranked Mississippi TEAM!

It is vital that we do so. Improving our financial capability means preparing Mississippi's future workforce and leaders. By being better managers of their own finances, our students will be better positioned to lead the businesses that are your clients.

As your State Treasurer, I am so honored to serve you. I am dedicated to running the Office of State Treasurer like a business, applying fiscally conservative principles. In the process, we are working hard to change Mississippi's financial culture, help families save for college, and implement business-friendly practices. I hope you will take advantage of the programs we have to offer and work with us to strengthen Mississippi's financial future.

Securities Offering Registrations and Notice Filings Update

From the Securities Division of the Secretary of State's Office

By Cheryn Netz, Assistant Secretary of State, Securities Division

Reg D Rule 506(c) General Solicitation Notice Filings. One year ago in October 2013 the Division received its first Notice Filing of a Regulation D Rule 506(c) limited offering. This new federal exemption enacted by the Federal JOBS Act which went into effect in August 2013 allows qualified issuers of limited or private placement offerings (with no dollar limit on offering size) to advertise their offerings to the public, such as over the internet, also known as general solicitation. However, the exemption requires that all purchasers must be "accredited investors."

This exemption differs from the traditional Rule 506(b) offerings (also no limit on offering size and for qualified issuers only) which cannot use general solicitation, but in which non-accredited investors can be purchasers. This exemption also differs from the proposed Federal Crowdfunding rules and state crowdfunding exemptions in that non-accredited investors can be purchasers in crowdfunding offerings. Crowdfunding offerings also have a limit on their dollar amount, depending on the state exemption, with a \$1 Million cap on the proposed Federal Rules.

Issuers were excited about the possibility of being able to use Rule 506(c) to publicly advertise their offerings which would make it easier for them to raise capital. Securities regulators were concerned that this exemption would make securities law enforcement much more difficult. Unscrupulous persons would be able to cast a wider net and would use this exemption to commit investment fraud, as under this Rule the issuer can advertise the offering before it makes any offering filings with a securities regulator.

However one year later this exemption has seen little use in Mississippi and in other states. In fact, of the 262 Reg D notice filings the Division

received in the past year, less than 5% or 13 of them have been Reg D Rule 506(c) offerings. No one knows why for sure, but it may be because of the uncertainty of relying on a new and untested exemption has deterred issuers (likely on the recommendation of counsel) from using it.

State Electronic Filing of Regulation D Offerings. Another change on the horizon for Reg D filers is electronic filing. Currently issuers relying on Reg D must file their offerings with the Securities and Exchange Commission, and then must also file individually with each state in which the issuer will be selling the offering securities. These state filings are not electronic. Rather the issuer must mail the forms and fees separately to each state. The national association of state securities regulators, called NASAA (the North American Securities Administrators Association) has been working very hard on an electronic filing system for state filings of Form Ds. This is expected to be launched by the end of this year.

Issuers filing their Reg D offerings with the SEC will be notified of the option to use this electronic system called EFD to submit their state filings when they file with the SEC. Issuers will be able to submit one filing on the EFD, which will be electronically disseminated to each state it selects, along with a dissemination of the related filings fees to the states. This system will speed up the filing process for issuers significantly, as well as cut down on paper costs, and shipping costs. EFD will also allow issuers to file around the clock, even on weekends and not be limited to weekdays and regular business hours. And importantly, the system will automatically reject incomplete or incorrect filings, which will allow the issuer to make the necessary corrections much sooner, rather than waiting to hear from a regulator days or weeks later that there was a problem with the filing.

State Crowdfunding Exemption. In addition to electronic filing and the new Rule 506(c) general solicitation offering exemption, one of the most talked about changes in the securities area is crowdfunding which has also appeared because of the JOBS Act. Many small businesses and entrepreneurs are excited about and welcome the idea of using crowdfunding in MS as an efficient way to raise capital.

For those of you who are not familiar with this term “crowdfunding is the practice of when a person or business raises relatively small amounts of money from a large number of people by advertising a project or venture, typically via the internet. Most crowdfunding happens online- through special websites called “portals”- such as Kickstarter, IndieGoGo and others. However this methodology was being used as a means to fund projects as long ago as 1884, long before the internet. Joseph Pulitzer used this method in 1884 to raise \$100,000 from over 100,000 Americans to complete the pedestal for the Statue of Liberty.¹

In 2013 the crowdfunding industry grew to be over \$5.1 Billion worldwide.² Until recently crowdfunding was used just to solicit donations or to pre-sell products, as using crowdfunding to sell actual ownership interests in the business was not allowed by the securities laws. However that is changing as states have been amending their securities laws to allow businesses to use the crowdfunding concept to raise a limited amount of capital small increments from a large amount of investors.

Over half of the states have decided to adopt or are considering their own state crowdfunding statutes or rules rather than wait on the SEC to finalize the Federal Crowdfunding rule under the JOBS Act. The Securities Division is working with the Policy and Research Division to adopt a state crowdfunding vehicle in Mississippi. A study group has been organized to review other states’ rules and to recommend an exemption for Mississippi. While

it is too early to predict what the terms of this new exemption will be, they will allow small businesses to raise capital over the internet by way of an intermediary or portal. Which basically means investors will have to go to a special dedicated website portal (not the website of the small business) to invest in the offering.

“Regular Joes and Janes” who live in Mississippi who are not accredited investors, will be able to purchase an investment in their favorite Mississippi startup, such as a small business coffee shop, organic farm, etc., using this exemption. This amount may be as little as \$500. Aspiring entrepreneurs and small businesses will be able to efficiently raise money to get their business started, which may be only \$10,000 or \$30,000 to get off the ground and going. There will be some type of annual cap on the amount of the purchaser’s investment to reduce the opportunity for investment fraud and to ensure the regular Joe can afford to lose his entire investment, because in many cases investors may never see a return on their crowdfunding investment. Issuers will be required to make a filing of their offering with the Securities Division which the Division will approve before sales can be made. The exemption will require certain types of information to be provided to investors about the company. In addition, there will be restrictions on the ability of the purchaser to resell their crowdfunding stock.

This exemption should be in place sometime in 2015.

While the primary goal of the Securities Division is the protection of investors (which often includes small businesses that are also investors themselves), the Division is also working hard to improve the ability of small businesses in Mississippi to raise capital. Crowdfunding and electronic filing are examples of things the Division is doing in this area. For more information about Rule 506(c) filings, electronic filings of Form Ds and crowdfunding please contact the Securities Division at 601-359-1334.

¹ <http://www.bbc.com/news/magazine-21932675>

²

<http://www.forbes.com/sites/hsbc/2014/08/05/crowdfundings-untapped-potential-in-emerging-markets/>

***Loughrin v. United States*: Clarifying the Reach of the Federal Bank Fraud Statute**

By Austin Jackson

The U.S. Supreme Court recently held that an individual can commit bank fraud without actually intending to defraud a bank.¹ In a unanimous ruling supported by split reasoning, the Court explained that mere intent to obtain property held by the bank while attempting to defraud someone else is sufficient for conviction under the statute.² This holding has far-reaching effects as it may substantially expand both the scope of bank fraud prosecutions and federal jurisdiction over traditional state criminal charges—a longstanding pattern that is likely to continue. Without necessarily extending the statute’s reach to every fraud scheme that involves payment by check, this holding nevertheless increases the tools available to prosecutors in white-collar crimes.

The factual narrative of *Loughrin* involves a fairly unsophisticated check-cashing scheme. Kevin Loughrin, the Petitioner, stole checks from residential mailboxes as he went door-to-door pretending to be a Mormon missionary.³ Over several months, he altered the checks and eventually used them to purchase merchandise at a Target store for amounts

as much as \$250.⁴ This routine state-like criminal activity remarkably resulted in federal criminal charges. Federal authorities indicted Loughrin and charged him with six counts under 18 U.S.C. § 1344(2)—one for each of the altered checks tendered to Target—under the federal bank statute, which makes it a crime to knowingly execute a scheme to acquire property owned by or under the custody of a bank “by means of false or fraudulent pretenses.”⁵

Loughrin argued that a conviction for bank fraud under Section 1344(2) requires proof of specific intent to defraud the banks on which the checks were drawn.⁶ He maintained that the statute did not apply to his conduct because he intended to defraud Target, rather than a bank.⁷ Loughrin claimed support in (1) similar language in the mail fraud statute and (2) federalism principles.⁸ The district court rejected his argument and instructed the jury that it could convict Loughrin if it found that in offering the fraudulent checks to the mer-

¹ *Loughrin v. United States*, 134 S.Ct. 2384, 2397 (2014).

² *Id.* at 2389.

³ *Id.*

⁴ *Id.*

⁵ 18 U.S.C. § 1344(2).

⁶ *Loughrin*, 134 S.Ct. at 2388.

⁷ *Id.*

⁸ *Id.* at 2390.

chant, he knowingly executed (or attempted to execute) a scheme to obtain money or property from the banks on which the checks were drawn.⁹ The jury convicted Loughrin on all six counts and the Tenth Circuit affirmed, reasoning that a finding of intent to defraud a bank is only necessary under Section 1344(1) of the federal statute, but not Section 1344(2).¹⁰

Federal courts have been split on the intent to defraud a bank issue.¹¹ The First, Sixth, Ninth, Tenth, and Eleventh Circuits have found that intent to defraud a bank is unnecessary for a 1344(2) conviction.¹² The Second, Third, Fifth, Seventh, and Eighth Circuits have required proof of an intent to (1) defraud a bank and/or (2) harm the bank to be a prerequisite for a conviction under Section 1344.¹³ This circuit split likely led to the Court taking this case.

The sole issue on appeal was whether an individual could commit bank fraud without intending to defraud a financial institution.¹⁴ The Court relied heavily on the statutory text in ruling that proof of intent to defraud a bank is not required for

a 1344(2) conviction.¹⁵ The Court explained that while Section 1344(1) clearly requires an intent to defraud a financial institution, “to read [Section 1344(2)], following the word ‘or,’ as somehow repeating that requirement even while using different words, is to disregard what ‘or’ customarily means.”¹⁶ The Court found that interpreting Section 1344(2) to require intent to defraud a bank would be redundant. Simply intending to defraud a store (or any non-bank) is sufficient. Thus, the necessary proof of “fraudulent, pretenses, representations or promises” was not limited to banks. Section 1344(2) requires the government to show that the money was to be obtained by means of the fraud, not that the bank must be defrauded. Because checking accounts are under the custody or control of a financial institution, check fraud committed without specific intent to defraud a bank is actionable under the statute. In his concurrence, Justice Alito agreed that intent to defraud need not be proved, but would have gone even further, stating there is no intent requirement at all because Congress clearly intended “knowingly” to serve as the relevant mens rea.¹⁷

The Court rejected Loughrin’s argument that the interpretation of Section 1344 interpretation should be analogous to the Court’s interpretation of similar language in the mail fraud statute, which enumerates only one offense that requires proof of specific intent to defraud. Justice Kagan explained that “notable textual differences” between the statutes prohibit such a reading because, in this case, the legislature’s organization of Subsection (1) and (2) “indicat[es] that they have separate meanings.”¹⁸

The Court also rejected Loughrin’s federalism argument that the Government’s broad reading of Section 1344 converts every fraud involving a

⁹ *Id.* at 2388.

¹⁰ *Id.*

¹¹ *See United States v. Nkansah*, 699 F.3d 743, 762 (2d Cir. 2012) (discussing the difference of opinion among Circuits).

¹² *See United States v. McNeil*, 320 F.3d 1034, 1038 (9th Cir. 2003); *United States v. De La Manta*, 266 F.3d 1275, 1298 (11th Cir. 2001); *United States v. Everett*, 270 F.3d 986, 991 (6th Cir. 2001); *United States v. Kenrick*, 221 F.3d 19, 27 (1st Cir. 2000) (en banc); *United States v. Sapp*, 53 F.3d 1100, 1103 (10th Cir. 1995).

¹³ *See United States v. Staples*, 435 F.3d 860 (8th Cir. 2006); *United States v. Thomas*, 315 F.3d 190, 200 (3d Cir. 2002); *United States v. Odioidio*, 244 F.3d 398, 401 (5th Cir. 2001); *United States v. Laliye*, 184 F.3d 180, 189 (2d Cir. 1999); *United States v. Davis*, 989 F.2d 244, 246-47 (7th Cir. 1993).

¹⁴ *Loughrin*, 134 S.Ct. at 2389.

¹⁵ *Id.*

¹⁶ *Id.* at 2390.

¹⁷ *Id.* at 2397.

¹⁸ *Id.* at 2391.

check into a federal offense and encroaches on the criminal jurisdiction of the states. The Court explained that the “by means of” term in the provision narrows the scope of Section 1344(2) and prevents such a conversion.¹⁹ The defendant must acquire (or attempt to acquire) the bank’s property “by means of” the misrepresentation.²⁰ This requirement is satisfied when the false statement or misrepresentation “is the mechanism naturally inducing a bank (or custodian of bank property) to part with its money.”²¹ Thus, not every instance of fraud involving a check is actionable under the statute. A Section 1344(2) violation is triggered when the false statement induces the bank to part with its property.

The Court presented the following scenario in explanation: a fraudster sells something to a customer by misrepresenting its value (*e.g.*, the fraudster sells a cheap knock-off as a Louis Vuitton handbag).²² The customer then uses a valid check to purchase the handbag, which the fraudster cashes. In such a case, the fraudster obtained property in the bank’s control (the money in the customer’s checking account) and made false representations (misrepresenting the value of the handbag).²³ However, the Court explained, this scenario does not violate Section 1344(2) because the “by means of” requirement is not met (*i.e.*, the means by which the bank parted with its property was a valid check and the fraudster’s misrepresentation about the value of the handbag did not induce the bank to part with its money).²⁴ Therefore, federal bank fraud has not been committed.

¹⁹ *Id.* at 2393.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 2392.

²³ *Id.*

²⁴ *Id.* at 2393.

Not all of the Justices shared this limited interpretation of the “by means of” requirement. Justice Scalia (joined by Justice Thomas) did not think it was necessary to narrow the scope of Section 1344(2). He used the Louis Vuitton example to prove his point. He argued that because the handbag fraudster obtained the property in the bank’s control, the fraudster’s deceit could be viewed as a “means of” obtaining bank’s property. However, under the Court’s analysis the deceit would not be deemed the “means” of obtaining the property “because tricking a buyer into swapping a check for a counterfeit carryall is not a ‘mechanism naturally inducing a bank . . . to part with money in its control.’”²⁵ Justice Scalia agreed that Section 1344(2) should not expand to every fraud involving a check, but insisted that determining the proper scope of the “by means of” requirement to prevent intrusion on states’ rights is best reserved for future cases.²⁶

The primary takeaway of *Loughrin*’s six-justice majority ruling is that the bank fraud statute has been expanded, and at least three justices would expand it even further. This decision will substantially impact future bank fraud prosecutions. By eliminating the intent to defraud a bank requirement from Section 1344(2), the holding allows prosecutors to bring more cases under that provision. Now, cases involving fake checks used to pay merchants for goods can be brought in some circuits where they could not be brought before. Additionally, the *Loughrin* holding increases federal caseloads by expanding federal jurisdiction over criminal cases. The concurrences not only support this expansion, but also suggest that further expansion may be in the works.

²⁵ *Id.*

²⁶ *Id.* at 2397.

OVERVIEW OF 2014 BUSINESS LEGISLATION

By **J. Andrew Gipson, Esq., Chairman, House Judiciary B Committee**

The 2014 Regular Session of the Mississippi Legislature came to a close on April 2, 2014. While the theme of this Session was the issue of public safety, a number of business-related bills became law. This article outlines some of the more significant pieces of legislation that may impact the practice of business law. Unless otherwise indicated, each bill discussed below became effective July 1, 2014

House Bill 32 amends Miss. Code Ann. § 11-21-15 by clarifying that no more than three freeholders shall be appointed when a partition of land is ordered by a court.

House Bill 96 created a new code section, Miss. Code Ann. § 75-2-316, to provide clarification for the exclusion or modification to express warranties, implied warranties of merchantability and implied warranties of fitness, and how such warranties may be applied to remedies for any alleged breach, including application of specific rules of construction.

Effective January 1, 2015, House Bill 487 creates a uniform statewide system for filing notices of tax liens, which are in favor of or enforced by the Mississippi Department of Revenue (the Department). The Department is required to maintain the system. The scope of this bill was limited to tax liens in real property and personal property, tangible and intangible, of taxpayers or other persons against whom the Mississippi Department of Revenue has liens pursuant to law for unpaid finally determined tax liabilities administered by the Department. This bill also establishes a tax lien registry, in which the Commissioner of Revenue is authorized to enroll a notice of tax lien in the tax lien registry for the finally determined tax liabilities due when any person refuses to pay any finally determined tax liabilities.

House Bill 680 amended Miss. Code Ann. § 11-1-63 to include designers in the provisions of law regarding conditions necessary to establish products liability.

House Bill 696 amended Miss. Code Ann. § 89-5-24 to clarify requiring the name, mailing address and telephone number of each grantor, grantee or other party to the instrument. The prior language had been confusing or ambiguous as to whether mailing or business address was required for parties to the instrument.

House Bill 928 provides that for purposes of an agency's costs for search, review, and duplication charges under Section 25-61-7 of the Mississippi Public Records Act, "Any staff time or contractual services included in actual cost shall be at the pay scale of the lowest level employee or contractor competent to respond to the request."

Effective January 1, 2015, Senate Bill 2322 creates a single-step process to change a business entity form (known as conversion) or change location by moving to Mississippi (known as domestication) that is simple, efficient and inexpensive. Under prior Mississippi law, business entities faced complex and cumbersome steps to carry out either of these objectives. Most other states already have statutory provisions authorizing domestication or conversion or both, and Mississippi joins the mainstream with this act codified at Section 79-37-101 *et seq.*

Senate Bill 2511 amended Miss. Code Ann. § 79-4-4.02 to provide that for name reservations, the one-hundred-eighty-day name reservation period may be renewed once by the

applicant by filing a renewal application within thirty (30) days before the expiration of the initial one-hundred-eighty-day period. The bill also conforms the fee sections for business corporations, nonprofit corporations, limited partnerships and limited liability companies. Finally, the bill repeals Sections 79-4-4.03 and 79-11-161, which provided for the registration of corporate names.

Effective April 11, 2014, Senate Bill 2622 revises Mississippi's lien law to grant protections to licensed contractors, first and second tier subcontractors, and materialmen, as well as registered architects, engineers and surveyors. It provides lien rights on private jobs that are the same in scope as the protections subcontractors and materialmen have on bonded public jobs. Coverage of claimants has been conformed to coverage in the Little Miller Act. The bill was codified at Miss. Code Ann. § 85-7-401, *et seq.*

Senate Bill 2727 enacts the Mississippi Uniform Trust Code, which is adapted from a uniform act proposed by the Uniform Law

Commission for enactment by all the states. The uniform act is divided into 11 articles, and the Mississippi law generally follows that format. Article 9 of the uniform act already exists in Mississippi law as the Uniform Prudent Investor Act, which is codified in Sections 91-9-601 through 91-9-627. Article 5 of the uniform act addresses creditors' rights and was not adopted in this bill; Mississippi will instead rely on the current creditors' rights laws. The bill also adds an Article 12, which addresses trust advisors and trust protectors. The Uniform Trust Code is intended to be supplemental to the common law of trusts and principles of equity; therefore, it does not contain language on every trust issue. It does not attempt to incorporate detailed rules for every conceivable kind of trust, nor does it incorporate all of the kinds of trusts there are. The law, codified at Miss. Code Ann. § 91-8-101, does provide a set of basic default rules that are intended to fairly, consistently and clearly govern voluntary trusts. It is a default statute for the most part, because the terms of a trust instrument will govern even if inconsistent with the statutory rules.

Andy Gipson serves as State Representative in the Mississippi Legislature, representing the citizens of Simpson, Smith, and Rankin Counties. He currently serves as Chairman of the House Judiciary B Committee, as well as serving on the House Ways and Means, Rules, Banking, Insurance, and Legislative and Congressional Reapportionment Committees. He is a practicing attorney with the Jones Walker law firm.

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Thomas H. Riley, III

Tom is a native of Chicago but has lived in Mississippi since 2002. He is a graduate of The University of Notre Dame and The John Marshall Law School.

Tom spent 20 years as a successful trial attorney representing individuals, businesses and insurers. He was the lead partner in The Law Firm of Riley & Riley in Chicago and was later a partner in the Jackson, Mississippi firm of Wilkins, Tipton. Since April of 2008 he has served as the Assistant Secretary of State in charge of the Business Services Division

He is licensed to practice law in Illinois and Mississippi and is a member of the ABA as well as local bar associations in Hinds and Madison counties and in Illinois.



Lynn Fitch

State Treasurer Lynn Fitch was sworn in as Mississippi's 54th Treasurer in January 2012. Since taking office, she has saved the taxpayers more than \$33 million by refinancing state bonds, returned more than \$36 million in unclaimed property to its rightful owners, and restructured the Mississippi Prepaid Affordable College Tuition Program to make it more fiscally sustainable. Treasurer Fitch is a champion of financial literacy, establishing the Treasurer's Education About Money initiative (TEAM), a statewide public-private partnership making personal finance education available to every high school in the state. For more information on Mississippi Office of the State Treasurer programs, visit www.treasurerlynnfitch.com.

Cheryn Netz

Cheryn L. Netz re-joined the Mississippi Secretary of State's Office in October 2012 as the Assistant Secretary of State for the newly-organized Securities Division after previously serving as the Assistant Secretary of State for the Division of Policy and Research from 2008 to 2010. Except for a brief practice in Gulfport, Mississippi from December 2010 to October 2012 as Corporate Counsel for Hancock Bank, Ms. Netz has been practicing law in the Jackson area since she graduated from the University of Denver College of Law in 1991. A magna cum laude graduate of the University of Mississippi, Ms. Netz's legal background includes serving in private practice and as in-house counsel for other Mississippi companies in the areas of banking law and consumer regulatory compliance, business and corporate law, mergers and acquisitions, securities law, health care law and gaming law. Active in many bar, civic and community groups, Ms. Netz currently serves as the President of the Mississippi Corporate Counsel Association, on the Board of Directors of the Mississippi Volunteer Lawyers Project and as a member of the Professionalism Committee of the Mississippi Bar. She also is a State liaison to the ABA Committee on Corporate Laws. From Lexington, Mississippi, Cheryn is a competitive ballroom dancer, acts as the legal adviser to the Magnolia Ballroom Dancers Association and travels around the Southeast competing in dance events.



Austin Jackson



Austin Jackson is a second-year law student from Clinton, MS. In addition to serving on the Ole Miss Business Law Reporter, he also is also a member of the Ole Miss Moot Court Board, the Dean's Leadership Council and the Black Law Student Association. Austin graduated with honors from the University of Southern Mississippi with a B.A. degree in English and was inducted into the 2012-2013 Southern Miss Hall of Fame. Upon graduation, Austin plans to practice corporate law.

J. Andrew Gipson

J. Andrew ("Andy") Gipson is a practicing business attorney with the Jones Walker law firm in Jackson, Mississippi. He also serves as State Representative for House District 77 in the Mississippi Legislature. Rep. Gipson is Chairman of the Judiciary B Committee and a member of the House Ways and Means, Rules, Insurance, and Banking Committees. He and his wife Leslie reside on their small farm near Braxton where they enjoy gardening, reading, and raising their family. The Gipsons have two boys, Joseph and Benjamin, and two daughters, Abigail and Sarah.





About the Editor

Mary A. Nichols

Mary A. Nichols joined Hancock Bank, Gulfport Mississippi, in 2003 where she is presently serving as Corporate Counsel. A native of Bay Springs, MS, Mary obtained a degree in Marketing from Florida State University in 1975, a Bachelor's in Music from Mississippi College in 1980 and her Juris Doctorate from the University of Mississippi, College of Law, in 1990. Prior to joining Hancock Bank, Mary clerked for Circuit Judge Stephen Simpson and was associated with the law firm of Page, Mannino, Peresich and McDermott in Biloxi, MS. Mary is a member of St. Mark's Episcopal Church, Gulfport MS, where she presently serves on the Vestry and as a Lay Eucharistic Minister.

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Persons interested in submitting news, a proposal, or an article for publication in The Mississippi Business Law Reporter should submit it by e-mail to the editor Mary A. Nichols at mary.nichols@hancockbank.com. All news, proposals and articles are subject to review and approval by the Editor and Section Leadership.

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Articles should be arranged in the following order: (i) article title, (ii) author's name, (iii) acknowledgement of assistance, if applicable or desired, and (iv) text of the article. All contributions should be submitted in MS Word format.

A short biographical statement should also be provided at the time the article is submitted. The statement should include, at a minimum, the author's (i) current position, (ii) practice areas, (iii) professional affiliations. A head and shoulder photograph of the author(s) in color is requested but not required.

Section News & Announcements – Save the Date(s)

Legislative Update CLE Program April 29

The Business Section's Legislative Update CLE program will be held at the Mississippi Bar Center on April 29, 2015, Jackson MS. Registration begins at 8 a.m. with the first presenter beginning at 8:30 a.m. and program will end by noon.

Ethics Hour CLE Program June 9 at River Hills

The Business Section's Ethics Hour CLE, co-sponsored with the Mississippi Corporate Counsel Association, will be held June 9, 2015 at River Hills Club located at 3600 Ridgewood Road, Jackson, MS. Registration begins at 11:00 a.m. followed by lunch at 11:30 a.m. The Business Law Ethics CLE seminar will begin at noon. The cost is \$50 for both lunch and one hour of ethics CLE credit.

2015 Annual Meeting and Summer School July 6-11

The 2015 Summer School for Lawyers will be held at the Linkside Conference Center in Sandestin Resort July 6-8. The 2015 Annual Meeting will be held at the Sandestin Hilton July 9-11.

CLE Seminar at Bar Convention July 9, 10 a.m.

The Business Law Section will be holding a meeting and CLE seminar at the 2015 Bar convention in Sandestin, Florida. The meeting is scheduled for Thursday, July 9, 2015, from 10 a.m. through 12 noon.

Mississippi Business Law Reporter -- Submission Deadline

For those who are considering submitting an article for publication in the Mississippi Business Law Reporter, the submission deadline for the next edition of the Mississippi Business Law Reporter is tentatively set for February 27, 2015. Any questions? Please contact mary.nichols@hancockbank.com

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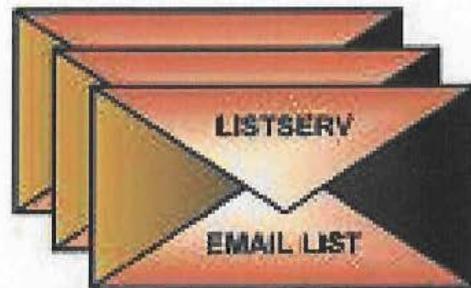
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