

HOUSE BILL 571

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CF 9lr2839

By: **Delegates Kramer, Ali, Barkley, Carter, Gilchrist, Heller, Kelly, Manno, McComas, Montgomery, Ramirez, Reznik, Shank, Simmons, Smigiel, and Valderrama**

Introduced and read first time: February 6, 2009

Assigned to: Economic Matters

A BILL ENTITLED

1 AN ACT concerning

2 **Senior Investment Protection Act**

3 FOR the purpose of prohibiting a person from using a senior-specific certification or
4 professional designation in such a way as to mislead a person in connection with
5 the offer, sale, or purchase of any security or in advising another person as to
6 the value, purchase, or sale of any security; specifying the factors that must be
7 considered in determining whether a person is using a senior-specific
8 certification or professional designation; establishing a rebuttable presumption
9 that a certifying or professional designating organization is not disqualified
10 under certain provisions of this Act under certain circumstances; providing that
11 a certification or professional designation does not include a job title within
12 certain organizations under certain circumstances; defining a certain term; and
13 generally relating to the Senior Investment Protection Act.

14 BY repealing and reenacting, with amendments,
15 Article – Corporations and Associations
16 Section 11–301 and 11–302
17 Annotated Code of Maryland
18 (2007 Replacement Volume and 2008 Supplement)

19 BY repealing and reenacting, without amendments,
20 Article – Corporations and Associations
21 Section 11–412
22 Annotated Code of Maryland
23 (2007 Replacement Volume and 2008 Supplement)

24 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF
25 MARYLAND, That the Laws of Maryland read as follows:

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



Article – Corporations and Associations

11-301.

(A) It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly to:

(1) Employ any device, scheme, or artifice to defraud;

(2) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; [or]

(3) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit on any person; **OR**

(4) USE A SENIOR-SPECIFIC CERTIFICATION OR PROFESSIONAL DESIGNATION IN A WAY THAT IS MISLEADING.

(B) (1) FOR PURPOSES OF SUBSECTION (A)(4) OF THIS SECTION, THE USE OF A SENIOR-SPECIFIC CERTIFICATION OR PROFESSIONAL DESIGNATION IN A WAY THAT IS MISLEADING INCLUDES:

(I) USING A CERTIFICATION OR PROFESSIONAL DESIGNATION WITHOUT HAVING EARNED OR BEING OTHERWISE ELIGIBLE TO USE THE CERTIFICATION OR PROFESSIONAL DESIGNATION;

(II) USING A NONEXISTENT OR SELF-CONFERRED CERTIFICATION OR PROFESSIONAL DESIGNATION;

(III) USING A CERTIFICATION OR PROFESSIONAL DESIGNATION THAT INDICATES OR IMPLIES A LEVEL OF OCCUPATIONAL QUALIFICATION OBTAINED THROUGH EDUCATION, TRAINING, OR EXPERIENCE WITHOUT COMPLETING THE QUALIFICATION; AND

(IV) USING A CERTIFICATION OR PROFESSIONAL DESIGNATION THAT WAS OBTAINED FROM A DESIGNATING OR CERTIFYING ORGANIZATION THAT:

1. IS PRIMARILY ENGAGED IN THE BUSINESS OF INSTRUCTION IN SALES OR MARKETING;

2. DOES NOT HAVE REASONABLE STANDARDS OR PROCEDURES FOR ASSURING THE COMPETENCY OF THOSE WHOM IT CERTIFIES OR DESIGNATES;

1 **3. DOES NOT HAVE REASONABLE STANDARDS OR**
2 **PROCEDURES FOR MONITORING AND DISCIPLINING THOSE WHOM IT CERTIFIES**
3 **OR DESIGNATES FOR IMPROPER OR UNETHICAL CONDUCT; OR**

4 **4. DOES NOT HAVE REASONABLE CONTINUING**
5 **EDUCATION REQUIREMENTS FOR THOSE WHOM IT CERTIFIES OR DESIGNATES**
6 **IN ORDER TO MAINTAIN THE CERTIFICATION OR PROFESSIONAL DESIGNATION.**

7 **(2) THERE IS A REBUTTABLE PRESUMPTION THAT A CERTIFYING**
8 **OR PROFESSIONAL DESIGNATING ORGANIZATION IS NOT DISQUALIFIED FOR**
9 **PURPOSES OF PARAGRAPH (1)(IV) OF THIS SUBSECTION IF THE ORGANIZATION**
10 **IS ACCREDITED BY:**

11 **(I) THE AMERICAN NATIONAL STANDARDS INSTITUTE;**

12 **(II) THE NATIONAL COMMISSION FOR CERTIFYING**
13 **AGENCIES; OR**

14 **(III) 1. AN ORGANIZATION THAT IS ON THE U.S.**
15 **DEPARTMENT OF EDUCATION'S LIST "ACCREDITING AGENCIES RECOGNIZED**
16 **FOR TITLE IV PURPOSES"; AND**

17 **2. THE CERTIFICATION OR PROFESSIONAL**
18 **DESIGNATION DOES NOT APPLY PRIMARILY TO SALES OR MARKETING.**

19 **(3) IN DETERMINING WHETHER A PERSON IS USING A**
20 **SENIOR-SPECIFIC CERTIFICATION OR PROFESSIONAL DESIGNATION, THE**
21 **FOLLOWING FACTORS SHALL BE CONSIDERED:**

22 **(I) USE OF THE WORDS "SENIOR", "RETIREMENT",**
23 **"ELDER", OR SIMILAR WORDS, COMBINED WITH "CERTIFIED", "REGISTERED",**
24 **"CHARTERED", "ADVISER", "SPECIALIST", "CONSULTANT", "PLANNER", OR**
25 **SIMILAR WORDS IN THE NAME OF THE PROFESSIONAL CERTIFICATION OR**
26 **PROFESSIONAL DESIGNATION; AND**

27 **(II) THE MANNER IN WHICH THE WORDS IN ITEM (I) OF THIS**
28 **PARAGRAPH ARE COMBINED.**

29 **(4) (I) IN THIS PARAGRAPH, "FEDERAL FINANCIAL SERVICES**
30 **REGULATORY AGENCY" INCLUDES AN AGENCY THAT REGULATES**
31 **BROKER-DEALERS, INVESTMENT ADVISERS, OR INVESTMENT COMPANIES AS**
32 **DEFINED UNDER THE INVESTMENT COMPANY ACT OF 1940.**

(II) A CERTIFICATION OR PROFESSIONAL DESIGNATION DOES NOT INCLUDE A JOB TITLE WITHIN AN ORGANIZATION THAT IS LICENSED OR REGISTERED BY A STATE OR FEDERAL FINANCIAL SERVICES REGULATORY AGENCY IF THE JOB TITLE:

1. INDICATES SENIORITY OR STANDING WITHIN THE ORGANIZATION; OR

2. SPECIFIES AN INDIVIDUAL'S AREA OF SPECIALIZATION WITHIN THE ORGANIZATION.

11-302.

(a) It is unlawful for any person who receives, directly or indirectly, any consideration from another person for advising the other person as to the value of securities or their purchase or sale, or for acting as an investment adviser or representative under § 11-101(h) and (i) of this title, whether through the issuance of analyses, reports, or otherwise, to:

(1) Employ any device, scheme, or artifice to defraud the other person;

(2) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit on the other person;

(3) Engage in dishonest or unethical practices as the Commissioner may define by rule; [or]

(4) When acting as principal for the person's own account knowingly sell any security to or purchase any security from a client, or when acting in an agency capacity for a person other than such client knowingly effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which the person is acting and obtaining the consent of the client to such transaction; OR

(5) USE A SENIOR-SPECIFIC CERTIFICATION OR PROFESSIONAL DESIGNATION IN A WAY THAT IS MISLEADING.

(b) The prohibitions of subsection (a)(4) of this section do not apply to any transaction with a customer of a broker-dealer if the broker-dealer is not acting as an investment adviser in relation to the transaction or to transactions by a federal covered adviser who is otherwise subject to the limitations on principal trades under the federal securities laws.

(c) In the solicitation of or in dealings with advisory clients, it is unlawful for any person knowingly to make any untrue statement of a material fact, or omit to

1 state a material fact necessary in order to make the statements made, in light of the
2 circumstances under which they are made, not misleading.

3 (d) (1) The Commissioner by rule or order may require that certain
4 information be furnished or disseminated by investment advisers as appropriate in the
5 public interest or for the protection of investors and advisory clients.

6 (2) To the extent determined by the Commissioner in the
7 Commissioner's discretion, information furnished to clients or prospective clients of an
8 investment adviser that would be in compliance with the disclosure requirements of
9 the Investment Advisers Act of 1940 and the rules thereunder may be used in whole or
10 partial satisfaction of this requirement.

11 (e) (1) Except as permitted by rule or order of the Commissioner, it is
12 unlawful for any investment adviser to enter into, extend, or renew any investment
13 advisory contract, unless it provides in writing that:

14 (i) The investment adviser shall not be compensated on the
15 basis of a share of capital gains on or capital appreciation of the funds or any portion
16 of the funds of the client;

17 (ii) An assignment of the contract may not be made by the
18 investment adviser without the consent of the other party to the contract; and

19 (iii) The investment adviser, if a partnership, shall notify the
20 other party to the contract of any change in the membership of the partnership within
21 a reasonable time after the change.

22 (2) Paragraph (1)(i) of this subsection does not prohibit an investment
23 advisory contract which provides for compensation based on the total value of a fund
24 averaged over a definite period or as of definite dates or taken as of a definite date.

25 (3) "Assignment", as used in paragraph (1)(ii) of this subsection,
26 includes any direct or indirect transfer or hypothecation of an investment advisory
27 contract by the assignor or of controlling block of the assignor's outstanding voting
28 securities by a security holder of the assignor, but, if the investment adviser is a
29 partnership, an assignment of an investment advisory contract is not considered to
30 result from the death or withdrawal of a minority of the members of the investment
31 adviser having only a minority interest in the business of the investment adviser, or
32 from the admission to the investment adviser of one or more members who, after
33 admission, will be only a minority of the members and will have only a minority
34 interest in the business.

35 (f) It is unlawful for any investment adviser to take or have custody of any
36 securities or funds of any client if:

37 (1) The Commissioner by rule prohibits custody; or

(2) In the absence of a rule, the investment adviser fails to notify the Commissioner that he has or may have custody.

(g) The Commissioner by rule or order may adopt exemptions from subsections (a)(4), and (e)(1)(i), (ii), and (iii) of this section, where such exemptions are consistent with the public interest and within the purposes fairly intended by the policy and provisions of this title.

(H) (1) FOR PURPOSES OF SUBSECTION (A)(5) OF THIS SECTION, THE USE OF A SENIOR-SPECIFIC CERTIFICATION OR PROFESSIONAL DESIGNATION IN A WAY THAT IS MISLEADING INCLUDES:

(I) USING A CERTIFICATION OR PROFESSIONAL DESIGNATION WITHOUT HAVING EARNED OR BEING OTHERWISE ELIGIBLE TO USE THE CERTIFICATION OR PROFESSIONAL DESIGNATION;

(II) USING A NONEXISTENT OR SELF-CONFERRED CERTIFICATION OR PROFESSIONAL DESIGNATION;

(III) USING A CERTIFICATION OR PROFESSIONAL DESIGNATION THAT INDICATES OR IMPLIES A LEVEL OF OCCUPATIONAL QUALIFICATION OBTAINED THROUGH EDUCATION, TRAINING, OR EXPERIENCE WITHOUT COMPLETING THE QUALIFICATION; AND

(IV) USING A CERTIFICATION OR PROFESSIONAL DESIGNATION THAT WAS OBTAINED FROM A DESIGNATING OR CERTIFYING ORGANIZATION THAT:

1. IS PRIMARILY ENGAGED IN THE BUSINESS OF INSTRUCTION IN SALES OR MARKETING;

2. DOES NOT HAVE REASONABLE STANDARDS OR PROCEDURES FOR ASSURING THE COMPETENCY OF THOSE WHOM IT CERTIFIES OR DESIGNATES;

3. DOES NOT HAVE REASONABLE STANDARDS OR PROCEDURES FOR MONITORING AND DISCIPLINING THOSE WHOM IT CERTIFIES OR DESIGNATES FOR IMPROPER OR UNETHICAL CONDUCT; OR

4. DOES NOT HAVE REASONABLE CONTINUING EDUCATION REQUIREMENTS FOR THOSE WHOM IT CERTIFIES OR DESIGNATES IN ORDER TO MAINTAIN THE CERTIFICATION OR PROFESSIONAL DESIGNATION.

(2) THERE IS A REBUTTABLE PRESUMPTION THAT A CERTIFYING OR PROFESSIONAL DESIGNATING ORGANIZATION IS NOT DISQUALIFIED FOR

PURPOSES OF PARAGRAPH (1)(IV) OF THIS SUBSECTION IF THE ORGANIZATION IS ACCREDITED BY:

(I) THE AMERICAN NATIONAL STANDARDS INSTITUTE;

(II) THE NATIONAL COMMISSION FOR CERTIFYING AGENCIES; OR

(III) 1. AN ORGANIZATION THAT IS ON THE U.S. DEPARTMENT OF EDUCATION'S LIST "ACCREDITING AGENCIES RECOGNIZED FOR TITLE IV PURPOSES"; AND

2. THE CERTIFICATION OR PROFESSIONAL DESIGNATION DOES NOT APPLY PRIMARILY TO SALES OR MARKETING.

(3) IN DETERMINING WHETHER A PERSON IS USING A SENIOR-SPECIFIC CERTIFICATION OR PROFESSIONAL DESIGNATION, THE FOLLOWING FACTORS SHALL BE CONSIDERED:

(I) USE OF THE WORDS "SENIOR", "RETIREMENT", "ELDER", OR SIMILAR WORDS, COMBINED WITH "CERTIFIED", "REGISTERED", "CHARTERED", "ADVISER", "SPECIALIST", "CONSULTANT", "PLANNER", OR SIMILAR WORDS IN THE NAME OF THE PROFESSIONAL CERTIFICATION OR PROFESSIONAL DESIGNATION; AND

(II) THE MANNER IN WHICH THE WORDS IN ITEM (I) OF THIS PARAGRAPH ARE COMBINED.

(4) (I) IN THIS PARAGRAPH, "FEDERAL FINANCIAL SERVICES REGULATORY AGENCY" INCLUDES AN AGENCY THAT REGULATES BROKER-DEALERS, INVESTMENT ADVISERS, OR INVESTMENT COMPANIES AS DEFINED UNDER THE INVESTMENT COMPANY ACT OF 1940.

(II) A CERTIFICATION OR PROFESSIONAL DESIGNATION DOES NOT INCLUDE A JOB TITLE WITHIN AN ORGANIZATION THAT IS LICENSED OR REGISTERED BY A STATE OR FEDERAL FINANCIAL SERVICES REGULATORY AGENCY IF THE JOB TITLE:

1. INDICATES SENIORITY OR STANDING WITHIN THE ORGANIZATION; OR

2. SPECIFIES AN INDIVIDUAL'S AREA OF SPECIALIZATION WITHIN THE ORGANIZATION.

1 11-412.

2 (a) The Commissioner by order may deny, suspend, or revoke any
3 registration if the Commissioner finds that the order is in the public interest and that
4 the applicant or registrant or, in the case of a broker-dealer or investment adviser,
5 any partner, officer, or director, any person occupying a similar status or performing
6 similar functions, or any person directly or indirectly controlling the broker-dealer or
7 investment adviser:

8 (1) Has filed an application for registration which, as of its effective
9 date or as of any date after filing in the case of an order denying effectiveness, was
10 incomplete in any material respect or contained any statement which was, in light of
11 the circumstances under which it was made, false or misleading with respect to any
12 material fact;

13 (2) Has willfully violated or willfully failed to comply with any
14 provisions of this title, a predecessor act, or any rule or order under this title or a
15 predecessor act;

16 (3) Has been convicted, within the last 10 years, of a felony, or of an
17 offense that:

18 (i) Involves the taking of a false oath, the making of a false
19 report, bribery, perjury, burglary, or attempt or conspiracy to commit any of those
20 offenses;

21 (ii) Arises out of the conduct of business as, or employment by or
22 association with, a broker-dealer, municipal or government securities broker or
23 dealer, investment adviser, bank, savings institution, trust company, credit union,
24 savings and loan association, insurance company or insurance producer, fiduciary,
25 investment company, accountant, or real estate agent or broker, or any entity or
26 person required to be registered under the Commodity Exchange Act; or

27 (iii) Involves the larceny, theft, robbery, extortion, forgery,
28 counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or
29 misappropriation of funds or securities, or an attempt or conspiracy to commit any of
30 those offenses;

31 (4) Is permanently or temporarily enjoined by any court of competent
32 jurisdiction from engaging in or continuing any conduct or practices involving any
33 aspect of the securities or investment advisory or any other financial services business;

34 (5) Is the subject of an order of the Commissioner denying,
35 suspending, or revoking registration as a broker-dealer, agent, investment adviser, or
36 investment adviser representative;

37 (6) Is the subject of an order entered within the past five years by the
38 securities administrator or any other financial services regulator of any state or by the

1 Securities and Exchange Commission denying or revoking registration as a
2 broker-dealer, investment adviser, investment adviser representative, or agent or the
3 substantial equivalent of those terms as defined in this title, or any other financial
4 services license or registration, or is the subject of an order by the Commodity Futures
5 Trading Commission denying, suspending, or revoking registration under the
6 Commodity Exchange Act, or is suspended or expelled from a national securities
7 exchange or national securities association registered under the Securities Exchange
8 Act of 1934 either by action of a national securities exchange or national securities
9 association, the effect of which action has not been stayed by appeal or otherwise, or
10 by order of the Securities and Exchange Commission, or is the subject of a United
11 States post office fraud order, but:

12 (i) The Commissioner may not institute a revocation or
13 suspension proceeding under this item (6) more than one year from the date of the
14 order or action relied on; and

15 (ii) The Commissioner may not enter an order under this item
16 (6) on the basis of an order under another state act unless that order was based on
17 facts which would currently constitute a ground for an order under this section;

18 (7) Has engaged in dishonest or unethical practices in the securities or
19 investment advisory or any other financial services business;

20 (8) Is insolvent, either in the sense that the person's liabilities exceed
21 assets or in the sense that the person cannot meet obligations as they mature, but the
22 Commissioner may not enter an order against a broker-dealer or investment adviser
23 under this item (8) without a finding of insolvency as to the broker-dealer or
24 investment adviser;

25 (9) Is not qualified on the basis of factors such as training, experience,
26 and knowledge of the securities or investment advisory or any other financial services
27 business, except as otherwise provided in subsection (c) of this section;

28 (10) Has failed reasonably to supervise the broker-dealer's agents, if
29 the person is a broker-dealer, or the investment adviser's representatives, if the
30 person is an investment adviser; or

31 (11) Has failed to pay the proper fee, but the Commissioner may enter
32 only a denial order under this item (11), and the Commissioner shall vacate the order
33 when the deficiency is corrected.

34 (b) (1) In this subsection, "final administrative order" does not include an
35 order that is stayed or subject to further review or appeal.

36 (2) If an applicant for initial registration discloses the existence of a
37 final judicial or administrative order to the Commissioner before the effective date of
38 the initial registration, the Commissioner may not institute a suspension or revocation
39 proceeding based solely on the judicial or administrative order unless the proceeding is

1 initiated within 90 days immediately following the effective date of the applicant's
2 initial registration.

3 (c) The following provisions govern the application of subsection (a)(9) of this
4 section:

5 (1) The Commissioner may not enter an order against a broker-dealer
6 on the basis of the lack of qualification of any person other than that broker-dealer if
7 the broker-dealer is an individual, or an agent of the broker-dealer;

8 (2) The Commissioner may not enter an order against an investment
9 adviser on the basis of the lack of qualification of any person other than that
10 investment adviser if the investment adviser is an individual, or an investment
11 adviser representative of the investment adviser;

12 (3) The Commissioner may not enter an order solely on the basis of
13 lack of experience if the applicant or registrant is qualified by training or knowledge or
14 both;

15 (4) The Commissioner shall consider that an agent who will work
16 under the supervision of a registered broker-dealer need not have the same
17 qualifications as a broker-dealer and that an investment adviser representative who
18 will work under the supervision of a registered investment adviser need not have the
19 same qualifications as an investment adviser;

20 (5) The Commissioner shall consider that an investment adviser is not
21 necessarily qualified solely on the basis of experience as a broker-dealer or agent.
22 When the Commissioner finds that an applicant for initial or renewal registration as a
23 broker-dealer is not qualified as an investment adviser, the Commissioner by order
24 may condition the applicant's registration as a broker-dealer upon the broker-dealer
25 not transacting business in this State as an investment adviser; and

26 (6) The Commissioner by rule may provide for an examination, which
27 may be written, oral, or both, to be taken by any class of or all applicants. The
28 Commissioner by rule or order may waive the examination requirement as to a person
29 or class of persons if the Commissioner determines that the examination is not
30 necessary or appropriate in the public interest or for the protection of investors.

31 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect
32 October 1, 2009.