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Section Chair's Corner

Summer 2012 is upon us and I write my last Chair's Column with the wonder of how quickly the time passed. I hope that you all can join us at the Section's annual meeting in Sandestin, Florida on Thursday, July 12th at 10:00 AM. We have two outstanding programs in addition to our business meeting. Adam Kilgore, General Counsel for the Mississippi Bar, will present an ethics session on "Professionalism: The Lawyer's Creed" and Jet Hollingsworth of Butler Snow will present a session on "New Market Tax Credits." Both of these will be cutting edge sessions that you will not want to miss. I am sure we will have some door prizes that will lure you to the Business Law Section meeting. This year's annual meeting will be a great time for you to renew acquaintances in the Section, meet new lawyers, and receive quality instruction from our colleagues on various areas of law practice. We will affirm our new officers for the year at the meeting on Thursday.

I want to thank my fellow officers, Ken Farmer and Stan Smith, Past Chair, Bill McLeod, and members of the Executive Committee, Jason Bailey, Cheryn Baker and Jimmy Milam, for a fruitful year serving our members. Special thanks to Ryan Pratt for his leadership as our Newsletter editor and

as always, many thanks to Rene Garner for her valuable and tireless assistance from the Bar. Over the course of the year, we have provided scholarships to deserving business law students at Ole Miss and Mississippi College, provided CLE on recent case developments in business law, updated our members on the 2012 Legislative Session and partnered with the Corporate Counsel Association to provide an hour of ethics for business lawyers. We sponsored a social event in the Fall and provided valuable updates on business law topics through the Section's newsletter. We hope that you have taken advantage of these opportunities and will continue to support the Section's activities in the coming year. There will be opportunities to write articles for the Newsletter as well as develop and present CLE sessions.

Finally, thank you for the opportunity to serve as your Chair. I wish you all continued success in your practice and encourage you to continue to promote economic development in our State.

C. Joyce Hall
Watkins & Eager PLLC

Recent Developments from the Consumer Financial Protection Bureau

By Memrie M. Fortenberry, Esq., Butler, Snow, O'Mara, Stevens & Cannada, PLLC

The Consumer Financial Protection Bureau (the “CFPB”) has been a fully functioning regulatory agency for almost one year now, since July 21, 2011. The CFPB has already proceeded full speed with its bank regulatory and examination scheme. The CFPB has direct examination and enforcement authority for banks with \$10 billion in assets or more. The other federal financial institution regulators (the FDIC, the OCC, and the Federal Reserve Board) still retain examination and enforcement authority for financial institutions below the \$10 billion asset level. The regulation of nonbank financial entities, such as mortgage companies, check cashers, and other non-depository affiliated lenders, was put on hold until a Director of the CFPB could be named. Now that Richard Cordray has finally been appointed as Director, the pace of new developments and regulations has accelerated.

The CFPB’s nonbank supervision program will regulate and examine companies of all sizes in the mortgage, payday lending and private student lending markets, but for other financial companies, the CFPB will only have the authority to supervise those companies categorized as large participants in certain financial product markets such as debt collection, consumer reporting, money transmitting, check cashing, prepaid cards, and debt relief services. The definition of a “large participant” has yet to be finalized, but final rules must be issued no later than July 21, 2012.

One of the CFPB’s first official steps was to place each of the federal bank regulatory agencies under a Memorandum of Understanding, which requires that regulators share with the CFPB their exam procedures, as well as their examination results and the steps to be taken to correct any

violations of consumer financial protection laws or regulations detected during those examinations. That “MOU” exists not only as a direct result of actions by the CFPB, but it is also a direct result of the Dodd-Frank Act, which created the CFPB, making it virtually impossible for the CFPB to cut the bank regulatory agencies any slack.

In November 2011, the agency introduced its Examination Manual as guidance for examination staff to follow as they begin the process of examining larger financial institutions. The CFPB is insisting that regulators place the consumer at the center of all examinations. This consumer-driven approach will make Fair Lending, UDAAP, and product pricing even more of an issue than has been the case in the past.

It is also apparent that the CFPB will insist that examinations be much more statistically driven. New HMDA reporting requirements, when finalized, will add significant new data, including information about an applicant’s age and credit score, to the data currently reported. That data, according to the new CFPB exam procedures, will be subjected to a regression analysis that will form the basis for exam conclusions on a host of issues. Additional data will be required on small business loans to female and minority business owners. All of this new data reporting will place increasing pressure on a bank or other regulated entity to know in advance what information that loan data holds.

The CFPB exam procedures place a great emphasis on an entity’s consumer complaint process. Consumer complaint data will now be a source of information for inquiries during an examination. The CFPB has created a link on its website for consumers to register complaints. Every entity would be well advised to establish a

process for monitoring and dealing with complaints, remembering that all consumer complaints merit follow-up. Complaints from the Better Business Bureau, the Consumer Protection Division of the State Attorney General's Office, and other complaint sources, in addition to complaints received from regulators, should be considered.

More recently, the CFPB issued new Examination Procedures for Mortgage Origination. The emphasis is now on protecting the consumer rather than making sure that a lender uses all of the correct forms, crosses all "t's" and dots all of the "i's". An examination of these new guidelines reveals a number of things.

The CFPB has identified residential mortgage lending, all lenders and all products, as a primary area of focus. That is not surprising given the subprime mortgage crisis of only a few years ago, the underwriting deficiencies that took place, the resulting foreclosure rate for residential mortgages, and the severe impact those events had on the American consumer.

In response to the foregoing problems, and as result of demands from Congress and U.S. citizenry, the Federal Reserve, the Department of Housing and Urban Development, and other regulatory agencies enacted a number of changes aimed at better protecting consumers. Those late responses were not enough. The power to write and enforce those consumer protection regulations were given to the CFPB. The laws and regulations that relate to mortgage lending have been on the books for 35 or more years. They have been amended from time to time, but always with the same regulatory mindset.

In the past, the bank regulators have looked at the consumer protection laws and regulations in much the same way that banks have, now the CFPB is taking a new approach. They are no longer just

looking at TILA requirements as a disclosure issue, RESPA requirements as a loan closing issue, and Fair Lending as a possible discriminatory loan underwriting or loan pricing issue. Instead, they are attempting to look at the entire process of obtaining mortgage loan financing (first lien, second lien, home equity, etc.) as it relates to the consumer and the protection of consumers in all areas.

These new exam procedures list the following exam objectives: to assess the quality of an entity's compliance management system and its mortgage origination business; to identify acts or practices that materially increase the risk of violations of federal consumer protection laws in connection with mortgage loan origination; to gather facts that help determine whether a bank engages in practices that are likely to violate consumer financial laws in connection with mortgage origination; and to decide whether further supervisory or enforcement action would be appropriate.

The new procedures then list seven different modules to be reviewed: the Company Business Module; the Advertising and Marketing Module; the Loan Disclosures and Terms Module; the Underwriting, Appraisals and Originator Compensation Module; the Closing Module; the Fair Lending Module; and the Privacy Module.

This is a new and more efficient way of looking at a number of traditional compliance requirements. It emphasizes all of the recent changes to regulations that have been made to protect consumers. And it looks at issues, such as business models and compensation arrangements, that have not traditionally been reviewed.

The foregoing is a brief summary of a few changes proposed by the CFPB. Many more are to come in the near future.

State and Local Tax Incentives Available in Mississippi

By Matthew P. McLaughlin, Esq., Balch & Bingham LLP

The State of Mississippi offers a multitude of state and local tax incentives, almost all of which require some degree of advanced planning and approval by various state and local authorities, such as the Mississippi Department of Revenue (the “Department of Revenue”), the Mississippi Business Finance Corporation (the “MBFC”) and the Mississippi Development Authority (the “MDA”). For any business considering locating in or expanding in Mississippi, it is critical to understand what incentives the business may qualify for and what approvals must be obtained in order to claim such. The following summarizes some of the most commonly used incentives available in Mississippi for the location of new or the expansion of existing projects.

Income Tax Credit Incentives

Ad Valorem Tax Credit

The Ad Valorem Tax Credit is an income tax credit equal to the ad valorem tax paid on the commodities, goods, wares or merchandise that the following types of businesses located in Mississippi hold for resale: manufacturers, processors, distributors, wholesalers, and retailers. The credit is limited to the lesser of the amount of the following: the ad valorem tax actually paid, \$5,000.00, or 100% of the income tax liability attributable to the income derived from that location. The Ad Valorem Tax Credit is available only for the year in which the ad valorem taxes are actually paid.

Broadband Technology Tax Credit

Broadband Technology Tax Credits are income and franchise tax credits that are available for certain telecommunications businesses. These credits are provided to entities to encourage the

deployment of high-speed internet access throughout the state, with an emphasis on rural areas. Broadband Technology Tax Credits are determined based on a percentage of the cost of equipment used in the deployment of broadband technology in Mississippi.

Export Port Charges Tax Credit

There is an income tax credit equal to charges a business pays for exporting cargo through certain ports in Mississippi.

Import Port Charges Tax Credit

There is also an income tax credit equal to the charges an eligible business pays for importing cargo through certain Mississippi ports.

Jobs Income Tax Credit

The Jobs Income Tax Credit is available for five years to manufacturing, processing, distributing, wholesaling, research/development and warehousing businesses that increase employment by constructing a new facility or expanding an existing facility. This credit is not available to businesses that maintain existing employment by modernizing or re-opening an existing facility, nor is it available to businesses that move from one location within the state to another location within the state without increasing employment.

The amount of the Jobs Income Tax Credit available is based upon the number of new jobs created and the Mississippi County where the jobs are created. The Department of Revenue ranks the counties in Mississippi each year into three tiers: Tier Three (less developed), Tier Two (moderately developed), and Tier One (developed). The credit is calculated using only full-time positions; part-time

jobs cannot be aggregated to add up to a full-time job. In addition, the employees must be employed in Mississippi and be subject to Mississippi withholding tax.

For a business to qualify in a Tier One county, it must increase its job count by at least twenty in the relevant year. The income tax credit in Tier One counties is equal to 2.5% of payroll. In Tier Two counties, the minimum annual increase of the number of jobs by an eligible business is fifteen, and the income tax credit is 5% of payroll. For Tier Three counties, the minimum annual increase in the number of jobs is ten, and the income tax credit is equal to 10% of payroll.

The credit is allowed each year for the jobs created, plus any unused credit that has been carried forward. The Jobs Tax Credit can only reduce up to 50% of the income tax due; otherwise, the unused portion must be carried forward. In addition, after the taxpayer has qualified for the credit, the credit is not allowed for a year if the net employment increase falls below the minimum required for qualification.

The Jobs Income Tax Credit is available for the following types of business but requires special designation from the MDA: air transportation and maintenance facilities, movie industry studios, telecommunication enterprises, data or information processing companies, computer software developers, any technology intensive facility, recreational facilities that impact tourism, and final destination or resort hotels with more than 150 guest rooms.

Manufacturing Investment Tax Credit

Existing manufacturers that have operated in Mississippi for two or more years may be eligible for investment tax credits that can be applied to the entity's state income tax liability. To qualify, an existing manufacturer must invest \$1,000,000 or more in additional buildings and/or equipment used in the manufacturing operation. The investment

credit is calculated as 5% of the eligible investment for a project.

National or Regional Headquarters Tax Credit

The National or Regional Headquarters Tax Credit is an income tax credit available for a five year period. The credit amount ranges from \$500.00 to \$2,000.00 for each position assigned to the national or regional headquarters of a business created in or transferred to Mississippi. A minimum of twenty new headquarters jobs must be created to receive this credit. In addition, these jobs must include officers and other high level employees as well as the support staff normally associated with a business headquarters.

Generally, the amount of the National or Regional Headquarters Tax Credit is equal to \$500.00 for each full-time position. However, the credit is greater if salaries for the positions created are higher than the average annual state wage. For each new, full-time position whose salary is 125% of the average annual state wage, the credit is \$1,000.00. For each new, full-time position whose salary is 200% of the average annual state wage, the credit is \$2,000.00.

The National or Regional Headquarters Tax Credit is capped at 50% of the income tax liability due. Any unused portion of the credit can be carried forward for up to five years beyond the original year in which the excess credit exceeded 50% of the income tax liability due.

Research and Development Skills Tax Credit

The Research and Development Skills Tax Credit is available for a five year period. The credit available is equal to \$1,000.00 per year for manufacturing, processing, distributing, wholesaling, research/development and warehousing businesses (as well as other businesses determined by MDA). The credit applies to each position requiring research or development skills, and employees in these positions must be engaged in research and development activity. In addition,

qualifications for the positions must include a bachelor's degree in a scientific or technical field from an accredited four year college or university. Finally, the position must be in the employee's area of expertise and offer compensation at a professional level.

The Research and Development Skills Tax Credit is for full-time positions only and part-time jobs cannot be aggregated to add up to a full-time job. In addition, the employees must be employed in Mississippi and be subject to Mississippi Withholding Tax.

The Research and Development Skills Tax Credit is capped at 50% of the income tax liability due. Any unused portion of the credit can be carried forward for up to five years beyond the original year in which the excess credit exceeded 50% of the income tax liability due.

RED (Rural Economic Development) Tax Credit – MBFC Revenue Bond Debt Service

The RED Tax Credit is an income tax credit equal to the debt service paid on industrial revenue bonds issued by the MBFC for approved businesses that receive the proceeds of such bonds. The MBFC was created to finance economic development projects to induce the location of economic development projects in Mississippi.

The RED Tax Credit is equal to the total amount paid to service the debt but limited to 80% of the income tax liability attributable to income generated by the economic development project. Under the RED credit, a business' income is determined by a formula adopted by the MBFC. Currently, excess RED Tax Credits may be carried forward to three years following the year in which the credit is earned.

Skill Training Tax Credit

The Skill Training Tax Credit is an incentive for a business to offer training to their Mississippi employees. The credit equals 50% of the amount of

expenses the business incurs in implementing the training. The credit is allowed up to 50% of the income tax liability attributable to the income derived from the operations in Mississippi for that year. The amount of training credit cannot exceed \$2,500 per Mississippi employee per year. The credit is not refundable. It can only be used against the income tax liability. Any excess credit amount can be carried forward for up to five years from the original year in which the excess credit could not be used. It is more advantageous to use the oldest year's unexpired credit first.

Entertainment District Credit

An income tax incentive in the form of a five year accelerated depreciation period is provided for construction and renovation projects of an entertainment facility in a Mississippi entertainment district. A Mississippi entertainment district is an area designated by a local government in which entertainment services are centered. For purposes of this incentive, entertainment facility means any structure that provides entertainment services and shall include a: theater, amphitheater, golf course, automobile racetrack, museum, zoo, arena, stadium or similar venue. Gaming establishments licensed under the Mississippi Gaming Control Act are not eligible for this incentive. In addition, the qualifying project must collect \$2.00 per ticket, pass or admission.

A county may establish an entertainment district within its boundaries and must submit such to the Department of Revenue for approval. Once the county receives approval from the Department of Revenue for an entertainment district, businesses may apply to participate in the entertainment district program and receive the accelerated depreciation benefit. In order to qualify the entertainment facility must be: (1) located in a Mississippi entertainment district as confirmed by the local government, (2) have construction or renovation of the entertainment facility starting on or after the entertainment district was established, (3) submit an Application for Certification of Economic Incentives to the

Department of Revenue, and (4) be approved by the Department of Revenue.

Economic Development Incentives

Income Tax Exemption for Growth and Prosperity Areas

The Growth and Prosperity Program is an incentive that provides an exemption from income tax for certain businesses that locate in growth and prosperity areas. For a county to receive a GAP designation the county must have an unemployment rate that is 200% of the state's annual unemployment rate or 30% or more of its population must be below the federal poverty rate.

Once MDA has certified an area as a growth and prosperity area, eligible businesses can be approved by MDA for benefits under the Growth and Prosperity Program. The businesses eligible to seek approval from MDA include new or expanded: (1) industry for the manufacturing, processing, assembling, storing, warehousing, servicing, distributing or selling of any products or goods, including products of agriculture; (2) enterprises for research and development, including, but not limited to, scientific laboratories; or (3) such other businesses or industry as will be in furtherance of the public purposes of this chapter as determined by the MDA and which creates a minimum of ten jobs; provided however that business enterprise does not include retail or gaming businesses or electrical generation facilities.

Advantage Jobs Incentive Program

The Advantage Jobs Incentive Program is a rebate program designed to encourage businesses that create new quality jobs to locate in Mississippi. The program provides for a rebate of a percentage of the company's payroll to qualified companies for a period up to ten years. Jobs must meet or exceed the average annual wage of the state or the county in which the company locates, whichever is lower. Data or information processing enterprises are eligible for the incentive if they provide an average

annual wage of 100% of the lesser of the average county or state wage. In conjunction with the wage requirements, such data or information processing enterprises must also create 200 new jobs. In addition, any business except retailers, certain services, and gaming establishments that provide an average annual wage of 110% of the lesser of the average county or state wage and creates twenty-five new jobs is also eligible for the incentive.

Corporate Franchise Tax Exemptions

In-Lieu Fee for Major Economic Projects

Under the Major Economic Impact Act, an incentive in the form of a negotiated fee-in-lieu of franchise tax is available for businesses operating a major capital project.

Exemption for Growth and Prosperity Areas

The Growth and Prosperity Act provides an exemption from the corporate franchise tax for those particular businesses discussed herein that locate in growth and prosperity areas.

Property Tax Incentives

Industrial Exemptions

In Mississippi, a county board of supervisors may grant a ten year exemption of ad valorem property taxes for certain projects. The exemption applies to all ad valorem property taxes except state ad valorem property taxes and taxes used for school purposes.

For certain projects that involve an investment of \$100,000,000 or more, a county and an eligible business may enter into a fee-in-lieu of ad valorem property taxes. The fee-in-lieu can be granted for up to ten years and cannot be less than one-third of the ad valorem tax levy that would otherwise be levied against the project.

Free Port Warehouse Exemption

Warehouses or other storage facilities can apply to the local governing authority for a license to operate a free port warehouse. After receiving the license, the recipient can apply to same local governing authority to be exempt from all ad valorem property taxes on part or all of the assessed value of the personal property with is consigned or transferred to such warehouse or storage facility.

Exemption for Growth and Prosperity Areas

The Growth and Prosperity Act provides an exemption from the ad valorem property tax for those particular businesses discussed herein that locate in growth and prosperity areas.

Sales and Use Tax Incentives

Exemption for Construction or Expansion

This sales and/or use tax incentive was created in order to encourage construction or expansion of manufacturing facilities, processing facilities, technology intensive enterprises and data or information processing enterprises within the State of Mississippi. Businesses that construct or expand such facilities are eligible for an exemption from some sales and/or use taxes on eligible machinery, equipment purchases and the component materials used in the construction, addition or improvement to a building and on the machinery and equipment used therein. To be eligible for the exemption, the relevant items must be sold directly to, billed directly to and paid for directly by the business received the exemption.

The exemption applies to a period beginning with the date such items are purchased for the expansion or construction and running through three months after the initial start date. The amount of the exemption depends on where the facility is located within Mississippi. For Tier One and Tier Two counties, the exemption is 50% of the sales and/or use tax on eligible machinery and equipment. The exemption is 100% for Tier Three counties and

also includes an exemption for component building materials.

The contractor's tax is imposed at a rate of 3.5% on the contractor who performs the construction or expansion work on the relevant facility. The tax covers the gross proceeds of commercial construction activities and is not passed on to the customer except as part of overhead costs. The contractor's tax must be built into the contract amount computed by the contractor and cannot be broken out as a separate item. If the component materials or the machinery and equipment (purchases covered by the exemption) are purchased through the contractor within the construction contract and not purchased directly through the business receiving the exemption, then the exemption is lost on any items included in the construction contract.

National or Regional Headquarters

A sales and/or use tax incentive is also available for eligible business that create or transfer its national or regional headquarters to Mississippi. The same rules which apply to the income tax credit for a transfer of a national or regional headquarters apply to this sale and/or use tax exemption. In short, businesses that construct or expand headquarters facilities are eligible for an exemption of sales and/or use taxes only on the component materials used in the construction, addition or improvement to a building and on the machinery and equipment used therein.

Sales/Use Tax Exemptions for Bond Financing

The MBFC administers a variety of financing programs that are intended to promote economic growth and increase employment in Mississippi. Through these programs, certain qualified businesses may obtain bond financing for construction or expansion in Mississippi. Businesses that use bond proceeds to purchase items such as machinery and equipment and/or component building materials may be exempt from the sales and/or use tax on such items.

To be eligible for the exemption, the relevant items must be sold directly to, billed directly to and paid for directly by the business receiving the exemption. The exemption applies to the retail rate of machinery and equipment - either the 7% general rate or the 1½% manufacturing rate, as applicable. The exemption does not cover tagged vehicles, ongoing expenses, supply items or the contractor's tax.

Exemption for Business in Growth and Prosperity Areas

The Growth and Prosperity Act provides an exemption from certain sales and use taxes for those particular businesses discussed herein that locate in growth and prosperity areas.

Health Care Industry Zone Act

Governor Phil Bryant recently signed the Health Care Industry Zone Act which offers tax incentives to various types of health care businesses to stimulate investment in Mississippi by supporting existing acute care hospitals.

Any qualified business that constructs or renovates a health care facility in its designated Health Care Zone will qualify for a 10-year accelerated state income tax depreciation deduction; a sales tax exemption for equipment and materials purchased from the date of the project's certification until three months after the facility is completed; and a property tax fee-in-lieu if certain minimum investment is made or, at the county's discretion, an ad valorem tax exemption for ten years. Qualified businesses may also take advantage of additional

incentives, including the Advantage Jobs Credit, the Jobs Tax Credit, and Infrastructure Assistance.

Designated Health Care Zones will include those areas certified by MDA within designated counties with more than 375 certified acute care hospital beds and/or in a county having a hospital with a minimum capital investment of \$250,000,000 constructed before July 1, 2017. A health care industry facility seeking to benefit from the Act's incentives must be located within a five-mile radius of an acute care hospital and must be on real property zoned for the facility's operation.

A "health care industry facility" means a business engaged in the research and development of pharmaceuticals, biologics, biotechnology, diagnostic imaging, medical supplies, medical equipment or medicine and related manufacturing or processing, medical service providers, medical product distribution, or laboratory testing. The facility must create a minimum of 25 new full-time jobs and/or have \$10,000,000 of capital investment after July 1, 2012. If the required number of new jobs is not created at the end of five years, the MDA may revoke the business's health care industry zone certification.

Businesses and health care industry facilities seeking incentives must apply to the MDA for certification as a qualified business. Certification must be obtained prior to beginning construction on the facility or hiring employees for the facility.

12 for 12: A Dozen Business Bills from the 2012 Legislative Session

By Drew Snyder, Esq., Assistant Secretary of State, Mississippi Secretary of State's Office

In reviewing the 440 bills Governor Bryant signed in 2012, I have identified 12 noteworthy business bills to discuss. In general, these bills aimed to eliminate ambiguity, modernize antiquated concepts, ease regulation, and encourage capital investment.

The first six bills were developed in part through Secretary of State Delbert Hosemann's Business Law Reform Study Groups. Established in 2008, these groups of legislators, attorneys, accountants, and businesspeople examine business law topics and recommend legislative proposals.

1. **HB 789: Amendments to the Mississippi Business Corporation Act**

After adopting the Revised Limited Liability Company Act in 2010 and Nonprofit Corporations Act in 2011, lawmakers used the 2012 session to make significant amendments to the Mississippi Business Corporation Act. The Act was amended to conform to the ABA's Model Business Corporation Act and the Mississippi's Revised LLC Act. The amendments authorize a company's board of directors to allow remote participation in shareholder meetings. A "force the vote" mechanism is also permitted. The new law adopts a "reasonably attentive director" standard whereas previously oversight was not a specified role of the board. Under the new law, the penalty for signing a false document is increased from \$500 to \$1000. The bill also gives corporations the ability to cancel a name reservation and clarifies that a corporation's name must be distinguishable from LLCs and other business entities, not just other corporations. Representative Angela Cockerham sponsored the bill. The law takes effect January 1, 2013.

2. **HB 1162: Mississippi Registered Agents Act**

Based on the Model Registered Agents drafted by the Uniform Laws Commission in 2006, the Mississippi Registered Agents Act ("MoRAA") creates one filing process and one set of forms and fees to govern the registered agent process for Mississippi's seven business entities: Corporations, Partnerships, Limited Partnerships, Foreign Investment Trusts, Foreign Business Trusts, Nonprofit Corporations, and LLCs. The Act also harmonizes service of process procedures for all business entities. Additionally, MoRAA creates two types of registered agents: commercial and non-commercial agents. By choosing to be a commercial registered agent and paying the nominal fee to be listed as a commercial agent, a commercial registered agent will be able to make one filing with the Secretary of State's office when it changes its address. This filing will count for all the entities it represents, making it easier for agents with hundreds or thousands of clients to change their address. Currently, when changing addresses for multiple clients, a registered agent has to file a separate form for each client. To make fees consistent across all entities, Limited Partnerships and Limited Liability Companies now have to pay only \$10 instead of \$25 when a registered agent changes its address, and a statement of resignation is now free instead of \$5. Representative Angela Cockerham sponsored the bill. Members of Secretary of State Delbert Hosemann's Model Registered Agents Act Study Group assisted in drafting this proposal. The law takes effect January 1, 2013.

3. **HB 1261: Amendments to the Public Improvement District Act**

A Public Improvement District (“PID”) is a financing vehicle for economic development projects. First authorized by the Public Improvement District Act in 2002, PIDs have been created for various notable real estate developments in Metro Jackson, including Reunion, Colony Park, and Lost Rabbit. Amendments to the 2002 Act will provide greater transparency for PID bond issues and greater accountability to the public. Under amended voting procedures, board members’ terms are extended from 4 to 6 years, public hearing deadlines are extended from 45 to 60 days, the county can select a member of a 5-member PID governing board, and members missing three consecutive meetings can be removed. Further, notice is now required to every landowner prior to issuing bonds, and a public hearing and independent appraisal are required before a contribution agreement is considered valid. When the legislation was introduced this year, PIDs were to be subject to oversight from a state agency, but that provision was removed prior to passage. Members of Secretary of State Delbert Hosemann’s Public Finance Study Group assisted in drafting this proposal. Representative Jeff Smith sponsored the bill. The law takes effect July 1, 2012.

4. **HB 1104: Uniform Prudent Management of Institutional Funds Act (UPMIFA)**

Modeled after the 2006 Uniform Law Commission act of the same name, UPMIFA replaces Mississippi’s longstanding Uniform Management of Institutional Funds Act of 1972 (UMIFA). UPMIFA is intended to provide more guidance and flexibility to institutions managing and investing institutional funds with a charitable purpose. Under the new law, an institution can spend from the principal of an endowment if it is deemed prudent by the governing board. This is a significant departure from current Mississippi law which prohibits a nonprofit from tapping into endowment funds and limits spending to only the

net appreciation of the endowment over its historic dollar value (HDV). These limitations have hamstrung institutions whose gift funds dropped below their original worth during the global financial crisis. The increasing number of these “underwater” gift funds accelerated efforts at the state level to enact modern management rules for charitable institutions. The Mississippi version of UPMIFA was sponsored by Representative Angela Cockerham. Members of Secretary of State Delbert Hosemann’s Trust Laws Study Group assisted in drafting this proposal. The law takes effect July 1, 2012.

5. **HB 416: Limited Liability Company Fee Repealer**

House Bill 416 extends the repealer on limited liability fees from July 1, 2012 to July 1, 2015. In practice, however, the fee repealer will be in effect only until January 1, 2013 when the Mississippi Registered Agents Act takes effect. MoRAA provides for fees for all business entities and includes no repealers. Representative Mark Formby sponsored the bill.

6. **HB 732: Principal and Income Act of 2013**

The Uniform Principal and Income Act of 2013 (UPAIA) provides procedures for trustees administering an estate in separating principal from income. The revisions better ensure the intention of the person who created the trust is the guiding principle for trustees. The Act allows a trustee to make adjustments between principal and income in the event the trust’s income in a particular year is too low. This provides a way to ensure the trustee is treating income and remainder beneficiaries in an impartial manner. The Act conforms our Principal and Income Act with the State’s adoption of the Uniform Prudent Investor Act which was signed into law in 2006. The Uniform Prudent Investor Act allows trustees to maximize trust value by investing for total return. The 1962 version of the UPAIA had conflicted with the Uniform Prudent

Investor Act by requiring trustees to allocate assets to maximize trust income at the expense of total return. Furthermore, The UPAIA clears up confusion about whether certain types of receipts should be allocated to principal or to income. Representative Angela Cockerham sponsored the bill. Members of Secretary of State Delbert Hosemann's Trust Laws Study Group assisted in drafting this proposal. The law takes effect January 1, 2013.

The next two bills were key initiatives of Governor Phil Bryant's Mississippi Works legislative agenda.

7. HB 1537: Mississippi Health Care Industry Zone Act

The Blueprint Mississippi 2011 Report recommended that Mississippi "design new initiatives to support leading clusters¹, especially health care which is emerging as a powerful economic driver." The Health Care Industry Zone Act ("Zone Act") was the first step to support a leading health care cluster. Modeled in part on Minnesota's Biotechnology and Health Sciences Industry Zone Act and a major component of Governor Bryant's Mississippi Works agenda, the Zone act aims to attract medical innovation businesses to specific areas using economic incentives.

Under the Zone Act, an area is eligible to be certified as a health care zone if it located within three contiguous counties which have certificates of needs of more than 375 acute care hospital beds, it is located within a five-mile radius of a facility with a need for hospital beds, and the local government zoning permits it. While the bill as introduced focused on the 5-6 "clusters" that had a large health care presence, amendments expanded eligibility to approximately 70 counties.

Health care facilities that locate within the Zone can receive accelerated 10-year depreciation, a sales tax exemption, a fee-in-lieu-of taxes, and an

ad valorem tax exemption. To qualify for these incentives, the business must be engaged in the research and development of pharmaceuticals, biologics, biotechnology, diagnostic imaging, medical supplies, medical equipment or medicine and related manufacturing or processing, medical service providers, medical product distribution, or laboratory testing that creates a minimum 25 new full-time jobs and/or \$10,000,000 of capital investment. There is, however, some debate as to whether businesses who do not meet the 25 full-time jobs / \$10 million capital investment threshold can qualify for the same incentives. These questions are expected to be resolved in Mississippi Development Authority's administrative rules for the Health Care Industry Zone program. The bill was sponsored by Representatives Jeff Smith, David Myers, and Deborah Butler Dixon. The law takes effect July 1, 2012.

8. SB 2398: Mississippi Small Business Regulatory Flexibility Act

Another major component of Governor Bryant's Mississippi Works agenda, the Mississippi Small Business Regulatory Flexibility Act ("MS RFA") creates a 12-member regulatory review committee of former and current small business owners that reviews proposed and existing state agency regulations affecting businesses employing less than 100 full-time employees. Under the new law, the Governor, Lieutenant Governor, Speaker each select four nominees submitted by 8 business lobbying organizations and local chambers of commerce. The MS RFA also requires state agencies to issue an economic impact statement that describes the cost, justification, and potential alternatives for proposed and existing state regulations. Additionally, MS RFA authorizes state agencies to waive penalties and fines in connections with violations committed by small businesses if that business cures the violation within 30 days, misunderstood the rule that they violated, or is acting in good faith to comply with statute, ordinance, or rule at issue. Senator Chris McDaniel and 26 other senators sponsored the bill.

Mississippi's Small Business Regulatory Flexibility Act is loosely based on the federal government's Regulatory Flexibility Act ("US RFA"). Unlike the US RFA, Mississippi's regulatory flexibility act uses private-sector business owners to review regulations and does not apply to nonprofits or small government jurisdictions that may be impacted by agency regulations.

The final four bills discussed address capital investment, tax reduction, workers' compensation, and statutory privileges for bankers. The committee will be appointed within 60 days of the July 1, 2012 effective date.

9. SB 2659: Amendments to the Mississippi Small Business Investment Act

Originally passed in 2011, the Mississippi Small Business Investment Act (also known as the CAPCO bill) allows insurance companies to set up small business investment companies that provide money to early-stage and start-up Mississippi businesses. In exchange for this venture capital, these companies receive deferred insurance premium tax credits from the State of Mississippi. Approximately a dozen states have enacted similar legislation. In Wisconsin, the lawmakers are deciding whether to renew the program after it was discovered that a company had used \$16.6 million dollars in insurance premium tax credits but had only invested \$8.6 million dollars in the qualifying start-up businesses. An analysis also found that \$247,000 in tax credits were provided for each job the program created in Wisconsin. In 2012, Mississippi lawmakers provided more protections and less restriction on these small business investment companies. SBICs now can recover 100% of their investment with tax credits. The 2011 bill allowed 80% of the investment to be recovered. The new law also reduces the amount of capital that must be invested by a certain date. Now, at least 35% of designated capital must be invested with two years of the allocation date and 50% within four years. The previous law required 50% and 85% investment by years two and four, respectively. The

new amendments also remove MDA's authority to prioritize projects. Previously, MDA could disburse tax credits in the order of projects it deemed most beneficial to job creation. Now, tax credits are disbursed on a first-come, first-serve basis. Senator Joey Fillingane sponsored the bill. The law takes effect July 1, 2012.

10. SB 2934: Inventory Tax Reduction

Mississippi businesses have long bemoaned the inventory tax, and in 2012, the legislature provided some relief. Senate Bill 2934 increases the state income tax credit on inventory taxes from the current \$5,000 to \$10,000 in 2014, \$15,000 in 2015, and to the lesser of the amount of state income taxes owed or the amount of inventory taxes paid beginning in 2006. It also extends the credit to ad valorem taxes paid on "raw materials" and "works-in-process." It allows for a 5-year carry forward period for credits that are claimed but not issued. Now, the credit can be used during the years the business incurs tax liability. Finally, the bill allows owners of LLCs to take advantage of the same pass-through provisions available to S corporations and partnerships. Senator Joey Fillingane sponsored the bill. The law takes effect July 1, 2012.

11. SB 2576: Workers' Compensation Reform

Perhaps the most contentious of the twelve business bills discussed here is the modification made to the Workers' Compensation Act. Under the new law – which goes into effect July 1, 2012 – a claimant is required to provide medical proof supporting his claim for benefits due to a work-related injury or occupational disease. Medical records must be provided to the employer within sixty (60) days after the claimant files her petition to controvert. The law will now allow pre-existing conditions to be apportioned so employers are only considered responsible for the permanent effects of a new injury and not a pre-existing one, unless medical evidence shows causal relation. New language removes the ambiguity surrounding the

claimant's chosen physician. In addition to other statutory provisions as to choice of physician, choice is now established once an employee either (1) receives surgery from a physician, or (2) receives treatment from a physician for a period of more than six months. For the first time since 1948, when Mississippi's current statute took effect, benefits will be increased. The surviving spouse and funeral benefits will both increase, from \$250 to \$1000 and \$2000 to \$5000, respectively. The disfigurement benefit will double, from \$2000 to \$5000, and the weekly benefit for vocational rehab will increase from \$10 to \$25 dollars.

An update has also been added regarding post-accident drug and alcohol testing. While employer testing is already admissible in workers' compensation proceedings, outside testing – such as testing by a hospital or healthcare provider – could be disregarded. Under the new law, drug and alcohol testing is admissible in workers' compensation proceedings whether the test is administered by the employer “or otherwise.” A final addition made to the Workers' Compensation Act provides that “[a]ttorneys may not recover attorney's fees based upon benefits voluntarily paid to an injured employee for temporary or permanent disability. Any settlement negotiated by an attorney shall not be considered a voluntary payment. Other statutory provisions related to the maximum contingency fee chargeable remain in place. Senator Will Longwitz sponsored the bill. The law takes effect July 1, 2012.

12. **HB 1460: Bankers' Self-Assessment Privilege**

Effective July 1, 2012, House Bill 1460 grants a privilege to banking self-assessment reports. Under the new law, a voluntary self-assessment report, which is submitted to a bank regulator but not to other third parties, is privileged and inadmissible in any civil or administrative proceeding and not subject to discovery. The law sets forth exceptions under which the protections do not apply. The protections do not apply if the bank was not in compliance with a material provision of banking law, did not initiate efforts to achieve compliance within a reasonable time, and caused material harm to a bank or customer. The bank also may agree to expressly waive the privilege. A party seeking disclosure of a self-assessment report has the burden of proving that the privilege does not exist. Representative Hank Zuber sponsored the bill. The law takes effect July 1, 2012. However, the validity of the new statutory privilege is in question given that the Mississippi Supreme Court has held that statutory privileges were abrogated by the adoption of Miss. R. Evid. 501. *See Hughes v. Tupelo Oil Co.*, 510 So.2d 501 (Miss. 1987).

¹ Industry clusters are a geographic concentration of interconnected businesses, suppliers, and associated institutions in a particular field. According to industry cluster advocates, public and private companies benefit from location in proximity to research institutions and the many faculties, students, and other intellectual and physical structures of these institutions.

About the Editor

Ryan Pratt is the founding attorney of Pratt Law Firm PLLC, located in Ridgeland, Mississippi. He focuses on Collaborative Law to help spouses peacefully resolve the dissolution of marriage and to minimize the negative effects of divorce. His practice includes Collaborative Divorce, estate planning, and government affairs representation. A native of Jackson, Ryan received a Bachelor of Arts degree in Psychology from the University of Mississippi and a Juris Doctorate *cum laude* from the University of Mississippi School of Law, where he was Managing Editor of the *Mississippi Law Journal*. Ryan is a former adjunct professor of legal writing at the Mississippi College School of Law, and is a 2010 graduate of Leadership Mississippi. Ryan and his wife Loren live in Madison County.



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The Mississippi Business Law Reporter is a publication of The Business Law Section of The Mississippi Bar. The Reporter is intended to provide general information of interest to lawyers involved in Mississippi's business law community, and nothing contained herein should be construed as legal advice.

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How to Contribute

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, Ryan Pratt, at ryanpratt@prattlawfirm.net. All news, proposals and articles are subject to review and approval by the Editor and Section Leadership.

When submitting an article, the article should be the original work of the author and must not have been previously published (unless proof of consent to reproduction can be provided). Articles shall not, to the best of the author's knowledge, contain anything which is libelous, illegal, or otherwise infringes upon anyone's copyright or other rights. Authors are responsible for the accuracy of all citations and quotations.

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.

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C. Joyce Hall is an attorney at Watkins & Eager PLLC in Jackson, Mississippi. She was admitted to the Mississippi Bar in 1987 and the Louisiana Bar in 1995. Her experience includes commercial transactions, public finance, corporate and health care law. Joyce has been recognized as one of Mississippi's 50 Leading Business Women and is a past recipient of Mississippi's Outstanding Young Lawyer. She is an active member of the American Bar Association, where she serves on the Health Law Section Council, and The Mississippi Bar where she is the chair of the Business Law Section.



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Memrie M. Fortenberry is a member of the Banking, Real Estate and Financial Services Group at Butler, Snow, O'Mara, Stevens and Cannada, PLLC. She concentrates her practice in the areas of banking and financial institutions, banking regulations, commercial lending, fair lending, regulation, bank secrecy act and deposit compliance reviews. Memrie is a graduate of the University of Mississippi where she earned a B.B.A. in 2003. She then earned her M.B.A. from Millsaps College in 2003. Memrie received her Juris Doctor, *magna cum laude*, from Mississippi College School of Law in 2009. While in law school, she was on the *Mississippi College Law Review*, received Am Jur Awards in Ethics and Child Advocacy and participated in an externship for United States Bankruptcy Court Judge Neil P. Olack. Memrie is admitted to practice in Mississippi and is a member of the American Bar Association, Capital Area Bar Association and the Jackson Young Lawyers.



Matthew P. McLaughlin

Matthew P. McLaughlin is a partner with Balch & Bingham LLP and concentrates a significant portion of his practice in addressing federal and state tax issues in the context of business formation, planning, capitalization and operation. He also advises existing businesses and emerging companies on financing issues and economic development incentives available under federal law and in Mississippi.



Drew Snyder

Drew Snyder is the Assistant Secretary of State of Policy and Research. Before joining the Secretary of State's Office in January 2012, Snyder was an associate at the law firm Hollingsworth LLP in Washington D.C. A Eupora native, Snyder graduated *summa cum laude* from the University of Mississippi with a Bachelor of Business Administration, with an emphasis in Management and Managerial Finance. Snyder received his J.D. from the University of Virginia School of Law.



Member News and Announcements

Volume 18 of the Mississippi Code Annotated

To purchase your copy of Volume 18 of the Mississippi Code Annotated, call the Lexis Nexis customer service line at 800-833-9844. The cost is approximately \$27.00, plus shipping and handling. Updates to the single volume cost approximately \$10.00 each year.

2012 Annual Bar Convention and Summer School – Business Section Meeting

When: Thursday, July 12th (10 a.m. – 12 p.m.)
 Where: Sandestin Beach Hilton in Destin, Florida
 Speakers: Adam Kilgore, The Mississippi Bar, General Counsel – “Professionalism: The Lawyer’s Creed”
 Jetson G. Hollingsworth, Butler Snow – “New Markets Tax Credits”

University of Alabama School of Law LL.M. Program

The University of Alabama School of Law offers LL.M programs in business transactions and taxation. Both are 24-credit-hour programs. More information can be found by visiting www.AlabamaLLM.com.

Business Law Section Contributes \$2,500 to the Mississippi Volunteer Lawyers Project



The officers and executive committee of the Business Law Section met Thursday, June 21st, to discuss the upcoming annual meeting and to make a financial contribution to the Mississippi Volunteer Lawyers Project.



The Business Law Section donated \$2,500 to the Mississippi Volunteer Lawyers Project. Joyce Hall delivered the check to Tiffany Graves, MVLP General Counsel. To volunteer, donate or learn more about MVLP, visit <http://mvlp.net>.

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The Business Law Section of the Mississippi Bar is on facebook!

If you are a facebook member go to our group page entitled “Business Law Section of the Mississippi Bar” which is at the following address:

http://www.facebook.com/home.php?sk=group_169138153115599&ap=1

and join. If you are not on facebook, you must first become a facebook member (which is free) before you may join. To join go to facebook.com or click on the image below which will take you to the website.

We will post news, announcements, and upcoming events on the page as well as pictures. We hope to see you there soon!



**The Business Law Section
of the Mississippi Bar has a
listserv.**



**As a member of the
Business Law Section you
are automatically a member
of the listserv.**

**To send a message to the
following listserv email address:**

BusinessLaw@listbox.com

LISTSERV RULES AND ETIQUETTE

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Please review the listserve rules, etiquette and legal disclaimer below. This email is forwarded to participants on all MB listserves on a periodic basis to remind everyone of the rules and etiquette of MB listserves.

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By joining and using The Mississippi Bar's listserves, you agree that you have read and will follow the rules and guidelines set for this listserve. You also agree to reserve list discussions for topics intended for discussion on this listserve.

As with any community, there are guidelines governing behavior on the listserves. Please take a moment to acquaint yourself with these important guidelines. MB reserves the right to suspend or terminate membership on all lists for members who violate these rules.

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- **Do not post commercial messages.** The cyberspace term for this is "spamming". Contact people directly with products, programs and services that you believe would be of interest to them.
- **Stick to the topics intended for discussion on the listserve.**
- **Be polite, professional and civil.** Do not challenge or attack others. The discussions on MB listserves are meant to stimulate conversation, not to create contention. If you have a conflict with an individual, please settle it by private email.
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- **Warn other list subscribers of lengthy messages.** Either in the subject line or at the beginning of the message body with a line that says "Long Message."
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- **All defamatory, abusive, profane, threatening, offensive, or illegal materials are strictly prohibited.**
- **Don't send meaningless messages with no content.** Messages such as "thanks for the information" or "me, too" to individuals--not to the entire list. Do this by using your e-mail application's forwarding option and typing in or cutting and pasting in the e-mail address of the individual to whom you want to respond.
- **Do not send administrative messages through the listserve.** Messages such as "remove me from the list", should be directed to Rene' Garner at rgarner@msbar.org
- **Use caution when discussing products.** Information posted on the listserve is available for all to see, and comments are subject to libel, slander, and antitrust laws.
- **Use virus detection/protection software.** Make sure you have and use virus detection/protection software on your PC. If you receive a email that has a virus please post a message to the listserve immediately with "WARNING VIRUS" in the subject line followed by an explanation.

- **Do not send attachments through MB Listserves.** Many virus are spread by way of attachments. If you wish to send an attachment to someone please email directly and DO NOT POST to listserve .

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