

# WEST VIRGINIA CODE: §32B-1-4

## §32B-1-4. Exempt transactions.

(a) The prohibitions in section two of this article do not apply to the following:

(1) An account, agreement or transaction within the exclusive jurisdiction of the commodity futures trading commission as granted under the Commodity Exchange Act;

(2) A commodity contract for the purchase of one or more precious metals which requires, and under which the purchaser receives, within twenty-eight calendar days from the payment in good funds of any portion of the purchase price, physical delivery of the quantity of the precious metals purchased by the payment: Provided, That for purposes of this subdivision, physical delivery occurs if, within the twenty-eight day period, the quantity of precious metals purchased by the payment is delivered, whether in specifically segregated or fungible bulk form, into the possession of a depository, other than the seller, that is:

(A) A financial institution;

(B) A depository in which the warehouse receipts are recognized for delivery purposes for any commodity on a contract market designated by the commodity futures trading commission;

(C) A storage facility licensed or regulated by the United States or any agency thereof; or

(D) A depository designated by the commissioner in which the depository, or other person which itself qualifies as a depository, or a qualified seller issues and the purchaser receives, a certificate, document of title, confirmation or other instrument evidencing that the quantity of precious metals has been delivered to the depository and is being and will continue to be held by the depository on the purchaser's behalf, free and clear of all liens and encumbrances, other than liens of the purchaser, tax liens, liens agreed to by the purchaser or liens of the depository for fees and expenses, which have previously been disclosed to the purchaser;

(3) A commodity contract solely between persons engaged in producing, processing, using commercially or handling as merchants, each commodity subject to the contract, or any by-product of the commodity; or

(4) A commodity contract under which the offeree or the purchaser is a person referred to in section three of this article, an insurance company, an investment company as defined in the Investment Company Act of 1940, or an employee pension and profit sharing or benefit plan other than a self-employed individual retirement plan or individual retirement account.

(b) For the purposes of subdivision (2), subsection (a) of this section, a qualified seller is a person who:

(1) Is a seller of precious metals and has a tangible net worth of at least \$5 million, or has an affiliate who has unconditionally guaranteed the obligations and liabilities of the seller and the affiliate has a tangible net worth of at least \$5 million;

(2) Has stored precious metals with one or more depositories on behalf of customers for at least the previous three years;

(3) Prior to any offer, and annually thereafter, files with the commissioner a sworn notice of intent to act as a qualified seller under subdivision (2), subsection (a) of this section, containing:

(A) The seller's name and address, and the names of the seller's directors, officers, controlling shareholders, partners, principals and other controlling persons;

(B) The address of the seller's principal place of business and date of incorporation or organization, and the name and address of seller's registered agent in this state;

(C) A statement that the seller, or a person affiliated with the seller who has guaranteed the obligations and liabilities of the seller, has a tangible net worth of at least \$5 million;

(D) Depository information including:

(i) The name and address of each depository that the seller intends to use;

(ii) The name and address of each depository where the seller has stored precious metals on behalf of customers for the previous three years; and

(iii) Independent verification from each depository named by the seller stating that the depository has stored precious metals on behalf of the seller's customers for the previous three years and the total deposits made by the seller during this period;

(E) Financial statements from the seller, or the person affiliated with the seller who has guaranteed the obligations and liabilities of the seller, for the past three years, audited by an independent certified public accountant, including the accountant's report;

(F) A statement describing the details of all civil, criminal or administrative proceedings currently pending or adversely resolved against the seller or its directors, officers, controlling shareholders, partners, principals or other controlling persons during the past ten years including:

(i) Civil litigation and administrative proceedings involving securities or commodities violations or fraud;

(ii) Criminal proceedings;

(iii) Denials, suspensions or revocations of securities or commodities, licenses or

registrations;

(iv) Suspensions or expulsions from membership in, or associations with, self-regulatory organizations registered under the Securities Exchange Act of 1934, or the Commodities Exchange Act; or

(v) A statement that there were no such proceedings;

(4) Notifies the commissioner within fifteen days of any material changes in the information provided in the notice of intent; and

(5) Annually furnishes to each purchaser for whom the seller is then storing precious metals, and furnishes to the commissioner a report by an independent certified public accountant of the accountant's examination of the seller's precious metals storage program.

(c) The commissioner may, upon request by the seller, waive any of the exemption requirements in subsection (b) of this section, conditionally or unconditionally.

(d) The commissioner may, by order, deny, suspend, revoke or place limitations on the authority to engage in business as a qualified seller under the provisions of subdivision (2), subsection (a) of this section, if the commissioner finds that the order is in the public interest and that the person, the person's officers, directors, partners, agents, servants or employees, any person occupying a similar status or performing similar functions, any person who directly or indirectly controls or is controlled by the seller or the seller's affiliates or subsidiaries:

(1) Has filed a notice of exemption under the provisions of subsection (c) of this section with the commissioner or the designee of the commissioner which was incomplete in any material respect or contained any statement which was, in light of the circumstances under which it was made, false or misleading with respect to any material fact;

(2) Has, within the last ten years, pled guilty or nolo contendere to, or has been convicted of any crime indicating a lack of fitness to engage in the investment commodity business;

(3) Has been permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practice which injunction indicates a lack of fitness to engage in the investment commodities business;

(4) Is the subject of an order of the commissioner denying, suspending or revoking the person's license as a securities broker-dealer, sales representative or investment advisor;

(5) Is the subject of any of the following orders which are currently effective and which were issued within the last five years:

(A) An order by the securities agency or commissioner of another state, Canadian province or territory, the securities and exchange commission, or the commodity futures trading

commission, entered after notice and opportunity for hearing, denying, suspending or revoking the person's registration as a futures commission merchant, commodity trading adviser, commodity pool operator, securities broker-dealer, sales representative or investment adviser or the substantial equivalent of those terms;

(B) Suspension or expulsion from membership in, or association with, a self-regulatory organization registered under the Securities Exchange Act of 1934 or the Commodity Exchange Act;

(C) A United States postal service fraud order;

(D) A cease and desist order entered after notice and opportunity of hearing by the commissioner or the securities agency or commissioner of another state, Canadian province or territory, the securities and exchange commission, or the commodity futures trading commission;

(E) An order entered by the commodity futures trading commission denying, suspending or revoking registration under the Commodity Exchange Act;

(6) Has engaged in an unethical or dishonest act or practice in the investment commodities or securities business; or

(7) Has failed reasonably to supervise sales representatives or employees.

(e) If the public interest or the protection of investors so requires, the commissioner may, by order, summarily deny or suspend the exemption for a qualified seller. Upon the entry of the order, the commissioner shall promptly notify the person claiming this status that an order has been entered, the reasons for the order and that within thirty days after the receipt of a written request the matter will be set for hearing. The provisions of section ten, article two of this chapter apply with respect to all subsequent proceedings.

(f) If the commissioner finds that any applicant or qualified seller is no longer in existence, has ceased to do business, is subject to an adjudication of mental incompetence or to the control of a committee, conservator or guardian or cannot be located after reasonable search, then the commissioner may, by order, deny or revoke the exemption for a qualified seller.

(g) The commissioner may issue rules or orders prescribing the terms and conditions of all transactions and contracts covered by the provisions of this chapter that are not within the exclusive jurisdiction of the commodity futures trading commission as granted by the Commodity Exchange Act, exempting, conditionally or unconditionally, and implementing the provisions of this chapter for the protection of purchasers and sellers of commodities.