WEST VIRGINIA CODE CHAPTER 32B ARTICLE 1

WV Legislature

§32B-1-1. Definitions.

(a) "Commissioner" means the Auditor of the State of West Virginia.

(b) "Board of trade" means any person or group of persons engaged in buying or selling any commodity or receiving the same for sale on consignment, whether such person or group of persons is characterized as a board of trade, exchange or other form of marketplace.

(c) "CFTC Rule" means any rule, regulation or order of the commodity futures trading commission in effect on the effective date of this chapter, and all subsequent amendments, additions or other revisions thereto unless the commissioner, within ten days following the effective date of any such amendment, addition or revision, disallows the application thereof to this part or to any provision thereof by rule, regulation or order.

(d) "Commodity" means, except as otherwise specified by the commissioner by rule, regulation or order, any agricultural, grain or livestock product or byproduct, any metal or mineral, including a precious metal defined in subsection (m) of this section, any gem or gemstone, whether characterized as precious, multiprecious or otherwise, any fuel, whether liquid, gaseous or otherwise, any foreign currency, and all other goods, articles, products or items of any kind. The term commodity does not include:

(1) A numismatic coin whose fair market value is at least fifteen percent higher than the value of the metal it contains; (2) Real property or any timber, agricultural or livestock product grown or raised on real property and offered or sold by the owner or lessee of the real property; or

(3) Any work of art offered or sold by art dealers, at public auction or offered or sold through a private sale by the owner thereof.

(e) "Commodity contract" means any account, agreement or contract for the purchase or sale, primarily for speculation or investment purposes and not for use or consumption by the offeree or purchaser, of one or more commodities, whether for immediate or subsequent delivery or whether delivery is intended by the parties, and whether characterized as a cash contract, deferred shipment or deferred delivery contract, forward contract, futures contract, installment or margin contract, leverage contract or otherwise. Any commodity contract offered or sold, in the absence of evidence to the contrary, is presumed to be offered or sold for speculation or investment purposes. A commodity contract does not include any contract or agreement 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 total amount of each commodity to be purchased under the contract or agreement.

(f) "Commodity Exchange Act" means the act of Congress known as the Commodity Exchange Act, 7 U.S.C. 1 (1974), as amended, and all subsequent amendments, additions or other revisions thereto, unless the commissioner, within ten days following the effective date

WV Legislature

of any such amendment, addition or revision, disallows the application thereof to this part or to any provision thereof by rule, regulation or order.

(g) "Commodity futures trading commission" means the independent regulatory agency established by Congress to administer the Commodity Exchange Act.

(h) "Commodity merchant" means any of the following as defined or described in the Commodity Exchange Act or by CFTC Rule:

(1) Futures commission merchant;

(2) Commodity pool operator;

(3) Commodity trading advisor;

(4) Introducing broker;

(5) Leverage transaction merchant;

(6) An associated person of any of the foregoing;

(7) Floor broker; and

(8) Any other person, other than a futures association, required to register with the commodity futures trading commission.

(i) "Commodity option" means any account, agreement or contract giving a party thereto the right but not the obligation to purchase or sell one or more commodities or one or more commodity contracts, or both commodities and commodity contracts, whether characterized as an option, privilege, indemnity, bid, offer, put, call, advance guaranty, decline guaranty or otherwise, but does not include an option traded on a national securities exchange registered with the United States securities and exchange commission.

(j) "Financial institution" means a bank, savings institution or trust company organized under, or supervised pursuant to, the laws of the United States or of any state.

(k) "Offer" includes every offer to sell, offer to purchase, or offer to enter into a commodity contract or commodity option.

(l) "Person" means an individual, a corporation, a partnership, association, a joint-stock company, a trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government or a political subdivision of a government. "Person" does not include a contract market designated by the commodity futures trading commission, any clearinghouse of that commission, a national securities exchange registered with the securities and exchange commission, or any employee, officer or director of such contract market, clearinghouse or exchange acting solely in that capacity.

WV Legislature

(m) "Precious metal" means the following in coin, bullion or other form: Silver, gold, platinum, palladium, copper, and any other metals as specified by the commissioner by rule, regulation or order.

(n) "Sale" or "sell" includes every sale, contract of sale, contract to sell or disposition for value.

WV Legislature

§32B-1-2. Unlawful commodity transactions.

Except as otherwise provided in section three or four of this article, a person shall not sell or purchase or offer to sell or purchase any commodity under any commodity contract or commodity option, nor shall a person offer to enter into or enter into a contract as a seller or purchaser any commodity contract or any commodity option.

WV Legislature

§32B-1-3. Exempt person transactions.

(a) The prohibitions in section two of this article do not apply to any transaction offered by and in which one of the following persons, or any employee, officer or director thereof acting solely in that capacity, is the purchaser or seller:

(1) A person registered with the commodity futures trading commission as a futures commission merchant or as a leverage transaction merchant whose activities require such registration;

(2) A person registered with the securities and exchange commission as a broker-dealer whose activities require such registration;

(3) A person affiliated with, and whose obligations and liabilities under the transaction are guaranteed by, a person referred to in subdivision (1) or (2) of this section;

(4) A person who is a member of a contract market designated by the commodity futures trading commission, or any clearinghouse thereof;

(5) A financial institution; or

(6) A person registered under the laws of this state as a securities broker-dealer whose activities require such registration.

(b) The exemption provided by this section does not apply to any transaction or activity which is prohibited by the Commodity Exchange Act or CFTC Rule.

WV Legislature

§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

WV Legislature

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;

WV Legislature

(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

WV Legislature

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.

WV Legislature

§32B-1-5. Unlawful commodity activities.

(a) A person may not engage in a trade or business or otherwise act as a commodity merchant unless the person: (1) Is registered or temporarily licensed with the commodity futures trading commission for each activity in which the person is acting as a commodity merchant and the registration or temporary license has not expired, been suspended or revoked; or (2) is exempt from registration by virtue of the Commodity Exchange Act or of a CFTC Rule.

(b) A board of trade shall not trade or provide a place for the trading of any commodity contract or commodity option required to be traded on or subject to the rules of a contract market designated by the commodity futures trading commission unless the board of trade has been so designated for the commodity contract or commodity option and the designation has not been vacated, suspended or revoked.

WV Legislature

§32B-1-6. Fraudulent conduct.

(a) A person may not directly or indirectly:

(1) Cheat or defraud, or attempt to cheat or defraud any other person or employ any device, scheme or artifice to defraud any other person;

(2) Make any false report, enter any false record, or 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 were made, not misleading;

(3) Engage in any transaction, act, practice or course of business, including, without limitation, any form of advertising or solicitation, which operates or would operate as a fraud or deceit upon any person; or

(4) Misappropriate or convert the funds, security or property of any other person in or in connection with the purchase or sale of, the offer to sell, the offer to purchase, the offer to enter into, or the entry into of, any commodity contract or commodity option subject to the provisions of subdivision (2), (3) or (4), subsection (a), section four of this article.

WV Legislature

§32B-1-7. Liability of principals, controlling persons and others.

(a) The act, omission or failure of any official, agent or other person acting for any individual, association, partnership, corporation or trust within the scope of his or her employment or office is considered the act, omission or failure of the individual, association, partnership, corporation or trust, as well as of such official, agent or other person.

(b) Every person who directly or indirectly controls a person liable under any provision of this chapter, every partner, officer or director of a person, every person occupying a similar status or performing similar functions and every employee of a person who materially aids in the violation is also liable jointly and severally with and to the same extent as the other person, unless the person who is also liable by virtue of this provision sustains the burden of proof that he or she did not know and, in the exercise of reasonable care, could not have known of the existence of the alleged facts that the liability is based upon.

WV Legislature

§32B-1-8. Securities laws unaffected.

Nothing in this chapter impairs, derogates or otherwise affects the authority or powers of the commissioner under the West Virginia Uniform Securities Act, or the application of any provision of chapter thirty-two of this code to any person or transaction subject to its provisions.

WV Legislature

§32B-1-9. Purpose.

This chapter may be construed and implemented to effectuate its general purpose to protect investors, to prevent and prosecute illegal and fraudulent schemes involving commodity contracts and to maximize coordination with federal and other states' laws and the administration and enforcement thereof. This chapter is not intended to create any rights or remedies upon which actions may be brought by private persons against persons who violate the provisions of this chapter.

WV Legislature