WEST VIRGINIA CODE CHAPTER 32B ARTICLE 2

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§32B-2-1. Investigations.

(a) The commissioner may make investigations, within or without this state, as it finds necessary or appropriate to:

(1) Determine whether any person has violated, or is about to violate, any provision of this chapter or any rule or order of the commissioner; or

(2) Aid in enforcement of this chapter.

(b) The commissioner may publish information concerning any violation of this chapter or any rule or order of the commissioner.

(c) For purposes of any investigation or proceeding under this chapter, the commissioner or any officer or employee designated by rule or order may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of any books, papers, correspondence, memoranda, agreements or other documents or records which the commissioner finds to be relevant or material to the inquiry.

(d)(1) If a person does not give testimony or produce the documents required by the commissioner or a designated employee pursuant to an administrative subpoena, the commissioner or designated employee may apply for a court order compelling compliance with the subpoena or the giving of the required testimony.

(2) The request for order of compliance may be addressed to either:

(A) The circuit court of Kanawha County or the circuit court for the respective judicial circuit where service may be obtained on the person refusing to testify or produce, if the person is within this state; or

(B) The appropriate court of the state having jurisdiction over the person refusing to testify or produce, if the person is outside this state.

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§32B-2-2. Enforcement of chapter.

(a) If the commissioner believes, whether or not based upon an investigation conducted under the provisions of section one of this article, that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule or order under the provisions of this chapter, then the commissioner may:

(1) Issue a cease and desist order;

(2) Issue an order imposing a civil penalty in amount which may not exceed $10,000 for any single violation or $100,000 for multiple violations in a single proceeding or a series of related proceedings;

(3) Initiate any of the actions specified in subsection (b) of this section; or

(4) Take disciplinary action against a licensed person as specified in section eight, article three of this chapter.

(b) The commissioner may institute any of the following actions in an appropriate court of this state or of another state, in addition to any legal or equitable remedies otherwise available:

(1) A declaratory judgment;

(2) An action for a prohibitory or mandatory injunction to enjoin the violation and to ensure compliance with this chapter or any rule or order of the commissioner;

(3) An action for disgorgement;

(4) An action for appointment of a receiver or conservator for the defendant or the defendant's assets; or

(5) An action to enjoin permanently any person from acting as a commodity broker-dealer or a commodity sales representative, as defined in subsection (a) or (b), section one, article three of this chapter.

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§32B-2-3. Power of court to grant relief.

(a) (1) Upon a proper showing by the commissioner that a person has violated, or is about to violate, any provision of this chapter or any rule or order of the commissioner, the circuit court may grant appropriate legal or equitable remedies.

(2) Upon showing of violation of this chapter or a rule or order of the commissioner, the court, in addition to traditional legal and equitable remedies, including temporary restraining orders, permanent or temporary prohibitory or mandatory injunctions, and writs of prohibition or mandamus, may grant the following special remedies:

(A) Imposition of a civil penalty in amount which may not exceed $10,000 for any single violation or $100,000 for multiple violations in a single proceeding or a series of related proceedings;

(B) Disgorgement;

(C) Declaratory judgment;

(D) Restitution to investors wishing restitution;

(E) Appointment of a receiver or conservator for the defendant or the defendant's assets; and

(F) An injunction permanently enjoining the defendant or defendants from acting as a commodity broker-dealer or a commodity sales representative, as defined in section one-a or one-b, article three of this chapter.

(3) Upon a showing that the defendant is about to violate this chapter or a rule or order of the commissioner, the remedies shall be limited to:

(A) A temporary restraining order;

(B) A temporary or permanent injunction;

(C) A writ of prohibition or mandamus; or

(D) An order appointing a receiver or conservator for the defendant or the defendant's assets.

(b) The court may not require the commissioner to post a bond in any official action under this chapter.

(c)(1) Upon a proper showing by the commissioner of securities or commodity agency of another state that a person, other than a government or governmental agency or instrumentality, has violated, or is about to violate, any provision of the commodity code of

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that state or any rule or order of the commissioner or securities or commodity agency of that state, the circuit court may grant appropriate legal and equitable remedies.

(2) Upon showing of a violation of the securities or commodity act of the foreign state or a rule or order of the commissioner of securities or commodity agency of the foreign state, the court, in addition to traditional legal or equitable remedies, including temporary restraining orders, permanent or temporary prohibitory or mandatory injunctions and writs of prohibition or mandamus, may grant the following special remedies:

(A) Disgorgement; and

(B) Appointment of a receiver, conservator, or ancillary receiver or conservator for the defendant or the defendant's assets located in this state.

(3) Upon a showing that the defendant is about to violate the securities or commodity act of the foreign state or a rule or order of the commissioner of securities or commodity agency of the foreign state, the remedies shall be limited to:

(A) A temporary restraining order;

(B) A temporary or permanent injunction;

(C) A writ of prohibition or mandamus; or

(D) An order appointing a receiver, conservator or ancillary receiver or conservator for the defendant or the defendant's assets located in this state.

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§32B-2-4. Criminal penalties.

(a) Any person who willfully violates:

(1) Any provision of this chapter; or

(2) Any rule or order of the commissioner under this chapter shall, upon conviction of each violation, be fined not more than $20,000 or imprisoned at a state correctional facility not more than ten years, or both.

(b) Any person convicted of violating a rule or order under this chapter may be fined but not imprisoned if the person proves that he or she had no knowledge of the rule or order.

(c) The commissioner may refer any evidence concerning violations of this chapter or any rule or order of the commissioner to the United States attorney or the appropriate county prosecuting attorneys, who may, with or without a reference from the commissioner, institute the appropriate criminal proceedings under this chapter.

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§32B-2-5. Administration of chapter.

(a) This chapter shall be administered by the commissioner of this state.

(b) Neither the commissioner nor any employees of the commissioner may use any information that is filed with or obtained by the commissioner that is not public information for personal gain or benefit, nor may the commissioner nor any employees of the commissioner conduct any securities or commodity dealings whatsoever based upon any such information, even though public, if there has not been a sufficient period of time for the securities or commodity markets to assimilate the information.

(c)(1) Except as provided for in subdivision (2) of this subsection, all information collected, assembled or maintained by the commissioner is public information and is available for the examination of the public as provided by the Freedom of Information Act in chapter twenty-nine-b of this code.

(2) The following exceptions to subdivision (1) of this subsection are confidential:

(A) Information obtained in private investigations pursuant to section one of this article;

(B) Information made confidential by the provisions of the Freedom of Information Act in chapter twenty-nine-b of this code; and

(C) Information obtained from federal agencies that cannot be disclosed under federal law.

(3) The commissioner may disclose any information made confidential under paragraph (A), subdivision (2), subsection (c) of this section to persons identified in subsection (a), section six of this article.

(4) No provision of this chapter creates or negates any privilege that exists at common law, by statute or otherwise, when any documentary or other evidence is sought under subpoena directed to the commissioner or any employee of the commissioner.

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§32B-2-6. Cooperation with other agencies.

(a) To encourage uniform application and interpretation of this chapter and of securities regulation and enforcement in general, the commissioner and the employees of the commissioner may cooperate, and bear the expense of such cooperation, with the securities agencies or commissioner of another jurisdiction, Canadian province or territory, any other agencies administering this chapter, the commodity futures trading commission, the securities and exchange commission, any self-regulatory organization established under the Commodity Exchange Act or the Securities Exchange Act of 1934, any national or international organization of commodities or securities officials or agencies and any governmental law-enforcement agencies.

(b) The cooperation authorized by subsection (a) of this section includes, but is not limited to, the following:

(1) Making joint examinations or investigations;

(2) Holding joint administrative hearings;

(3) Filing and prosecuting joint litigation;

(4) Sharing and exchanging personnel;

(5) Sharing and exchanging information and documents;

(6) Formulating and adopting mutual regulations, statements of policy, guidelines, proposed statutory changes and releases; and

(7) Issuing and enforcing subpoenas at the request of the agency administering this chapter in another jurisdiction, the securities agency of another jurisdiction, the commodity futures trading commission or the securities and exchange commission if the information sought would also be subject to lawful subpoena for conduct occurring in this state.

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§32B-2-7. General authority to adopt rules, forms and orders.

(a) In addition to specific authority granted elsewhere in this chapter, the commissioner may make, amend and rescind rules, forms and orders as are necessary to effectuate the provisions of this chapter. The rules or forms include, but are not limited to, the following:

(1) Rules defining any terms, whether or not used in this chapter, insofar as the definitions are not inconsistent with the provisions of this chapter.

(2) For the purpose of rules or forms, the commissioner may classify commodities and commodity contracts, persons and matters within the commissioner's jurisdiction.

(b) Unless specifically provided for in this chapter, no rule, form or order may be adopted, amended or rescinded unless the commissioner finds that the action is:

(1) Necessary or appropriate in the public interest or for the protection of investors; and

(2) Consistent with the purposes fairly intended by the policy and provisions of this chapter.

(c) All rules and forms of the commissioner shall be published.

(d) A provision of this chapter imposing any liability does not apply to any act done or omitted in good faith in conformity with a rule, order or form adopted by the commissioner, notwithstanding that the rule, order or form may later be amended, rescinded or be determined by judicial or other authority to be invalid for any reason.

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§32B-2-8. Consent to service of process.

When a person, including a nonresident of this state, engages in conduct prohibited or made actionable by this chapter or any rule or order of the commissioner, such conduct shall cause the appointment of the commissioner as the person's attorney to receive service of any lawful process in a noncriminal proceeding against the person, a successor or personal representative for an action brought under this chapter or any rule or order of the commissioner with the same force and validity as if served personally.

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§32B-2-9. Scope of the chapter.

(a) Sections two, five and six, article one of this chapter shall apply to persons who sell or offer to sell when:

(1) An offer to sell is made in this state; or

(2) An offer to buy is made and accepted in this state.

(b) Sections two, five and six, article one of this chapter apply to persons who buy or offer to buy when:

(1) An offer to buy is made in this state; or

(2) An offer to sell is made and accepted in this state.

(c) For the purposes of this section, an offer to sell or to buy is made in this state, whether or not either party is then present in this state, when the offer:

(1) Originates from this state; or

(2) Is directed by the offeror to this state and received at the place to which it is directed, or at any post office in this state in the case of a mailed offer.

(d) For the purposes of this section, an offer to buy or to sell is accepted in this state when acceptance:

(1) Is communicated to the offeror in this state; and

(2) Has not previously been communicated to the offeror, orally or in writing, outside this state and acceptance is communicated to the offeror in this state, whether or not either party is then present in this state, when the offeree directs it to the offeror in this state, reasonably believing the offeror to be in this state, and the offer is received at the place to which it is directed, or at any post office in this state in the case of a mailed acceptance.

(e) An offer to sell or to buy is not made in this state when:

(1) The publisher circulates or there is circulated on his or her behalf any bona fide newspaper or other publication of general, regular or paid circulation that is not published in this state, or that is published in this state but has had more than two thirds of its circulation outside this state during the past twelve months; or

(2) A radio or television program originating outside this state that is received in this state.

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§32B-2-10. Procedure for entry of an order.

(a) The commissioner may commence an administrative proceeding under this chapter by entering a notice of intent to do a contemplated act or a summary order. The notice of intent or summary order may be entered without notice, without opportunity for hearing, and need not be supported by findings of fact or conclusions of law, but it shall be in writing.

(b) Upon entry of a notice of intent or summary order, the commissioner shall promptly notify all interested parties that the notice or summary order has been entered and the reasons therefor. If the proceeding is pursuant to a notice of intent, then the commissioner shall inform all interested parties of the date, time and place set for the hearing in the notice. If the proceeding is pursuant to a summary order, then the commissioner shall inform all interested parties that they have thirty business days from the entry of the order to file a written request for a hearing on the matter with the commissioner and that the hearing will be scheduled to commence within thirty business days after the receipt of the written request.

(c) If the proceeding is pursuant to a summary order, then the commissioner, whether or not a written request for a hearing is received from any interested party, may set a hearing on the matter on the commissioner's own motion.

(d) If no hearing is requested and none is ordered by the commissioner, then the summary order will automatically become a final order after thirty business days.

(e) If a hearing is requested or ordered, then the commissioner, after notice of and an opportunity for a hearing is made to all interested persons, may modify or vacate the order or extend it until final determination.

(f) No final order or order after a hearing may be returned without:

(1) Appropriate notice to all interested persons;

(2) Opportunity for hearing by all interested persons; and

(3) Entry of written findings of fact and conclusions of law.

(g) Every hearing in an administrative proceeding under this chapter is public unless the commissioner grants a request joined in by all the respondents that the hearing be conducted privately.

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§32B-2-11. Judicial review of orders.

(a) Any person aggrieved by a final order of the commissioner may obtain a review of the order in the circuit court of Kanawha County by filing, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside, in whole or in part. A copy of the petition for review shall be served upon the commissioner.

(b) Upon the filing of a petition for review, except where the taking of additional evidence is ordered by the court pursuant to the provisions of subsection (e) or (f) of this section, the court has exclusive jurisdiction of the matter and the commissioner may not modify or set aside the order, in whole or in part.

(c) The filing of a petition for review under the provisions of subsection (a) of this section, does not, unless specifically ordered by the court, operate as a stay on the commissioner's order, and the commissioner may enforce or ask the court to enforce the order pending the outcome of the review proceedings.

(d) Upon receipt of the petition for review, the commissioner shall certify and file in the court a copy of the order and the transcript or record of the evidence upon which it was based. If the order became final by operation of law under the provisions of subsection (d), section ten of this article, then the commissioner shall certify and file in court the summary order and evidence of its service upon the parties and an affidavit certifying that no hearing has been held and that the order became final pursuant to the provisions of subsection (d), section ten of this article.

(e) If either the aggrieved party or the commissioner applies to the court for leave to present additional evidence, and shows to the satisfaction of the court that there were reasonable grounds for failure to adduce the evidence in the hearing before the commissioner or other good cause, then the court may order the additional evidence to be taken by the commissioner under such conditions as the court considers proper.

(f) If new evidence is ordered to be taken by the court, then the commissioner may modify the findings and order by reason of the additional evidence and shall file in the court the additional evidence together with any modified or new findings or order.

(g) The court shall review the petition based upon the original record before the commissioner as amended under the provisions of subsections (e) and (f) of this section. The findings of the commissioner as to the facts, if supported by competent, material and substantive evidence, are conclusive. Based upon this review, the court may affirm, modify, enforce or set aside the order, in whole or in part.

(h) The judgment of the circuit court is subject to review by the Supreme Court of Appeals of this state.

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§32B-2-12. Pleading exemptions.

It is not necessary to negate any of the exemptions of this chapter in any complaint, information or indictment, or in any writ or proceeding brought under this chapter, and the burden of proof of any such exemption is upon the party claiming the exemption.

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§32B-2-13. Affirmative defense.

(a) It is a defense in any complaint, information, indictment, writ or proceeding brought under this chapter alleging a violation of the provisions of section two, article one of this chapter, based solely on the failure in an individual case to make physical delivery within the applicable time period under the provisions of subsection (e), section one or subdivision (2), subsection (a), section four, article one of this chapter if:

(b) Failure to make physical delivery was due solely to factors beyond the control of the seller, the seller's officers, directors, partners, agents, servants or employees, every person occupying a similar status or performing similar functions, every person who directly or indirectly controls or is controlled by the seller, or the seller's affiliates, subsidiaries or successors; and

(c) Physical delivery was completed within a reasonable time under the applicable circumstances.

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