
WEST VIRGINIA CODE CHAPTER 32B

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§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

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.

(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.

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§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.

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§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.

§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.

§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.

§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.

§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.

§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.

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§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.

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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.

§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.

§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

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.

§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.

§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.

§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.

§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.

§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.

§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.

§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.

§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.

WV Legislature

§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.

§32B-3-1. Definitions.

(a) "Commodity broker-dealer" means any person engaged in the business of effecting transactions in commodity contracts or commodity options, as defined in article one of this chapter, for the account of others or for the person's own account.

(b) "Commodity sales representative" means any person authorized to act and that is acting for a commodity broker-dealer in effecting or attempting to effect a transaction in a commodity contract or a commodity option.

(c) All commodity broker-dealers and commodity sales representatives shall provide notice to the commissioner of securities on a form prescribed by the commissioner of securities that they are doing business in sales, offers or other nonexempt transactions involving sales of commodities. All notices shall contain such information as the commissioner of securities determines necessary or appropriate to facilitate the administration of this chapter.

(d) The notice does not constitute the granting of a license, registration or other authorization to do business under this chapter but is to be maintained as a record of those engaged in commodities transactions in the state.

§32B-4-1. Severability of provisions.

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, then the invalidity shall not affect other provisions or applications of the chapter that can be given effect without the invalid provision or application. To this end, the provisions of this chapter are severable.

WV Legislature

§32B-4-2. Saving provisions.

(a) Prior law exclusively governs all suits, actions, prosecutions or proceedings that are pending or may be initiated on the basis of facts or circumstances occurring before the effective date of this chapter, except that no civil suit or action may be maintained to enforce any liability under prior law unless brought within the period of limitation that applied when the cause of action accrued, and in any event, within three years after the effective date of this chapter.

(b) All administrative orders applicable to this chapter remain in effect so long as they would have remained in effect if this chapter had not been enacted. They are considered to have been filed, entered or imposed under this chapter, but are governed by prior law.

(c) Prior law applies in respect of any offer or sale made prior to the effective date of this chapter pursuant to an offering begun in good faith before its effective date on the basis of an exemption available under prior law. Fraudulent transactions or transactions in violation of the federal commodities trading laws are expressly subject to the provisions of this chapter regardless of whether they were undertaken prior to the effective date of this chapter.

(d) Judicial review of all administrative orders in which review proceedings have not been instituted by the effective date of this chapter are governed by section eleven of this article, except that no review proceeding may be instituted unless the petition is filed within the period of limitation that applied to a review proceeding when the order was entered and, in any event, within sixty days after the effective date of this chapter.