WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1995

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ENROLLED

HOUSE BILL No. 2808

(By Delegates Harris and Gallagher)

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Passed March 19, 1995

In Effect Passage
AN ACT to amend and reenact section four hundred two, article four, chapter thirty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to securities transactions that are exempt from registration and sales and advertising literature filing.

Be it enacted by the Legislature of West Virginia:

That section four hundred two, article four, chapter thirty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

ARTICLE 4. GENERAL PROVISIONS.

§32-4-402. Exemptions.

(a) The following securities are exempt from sections 301 and 403:

(1) Any security (including a revenue obligation) issued or guaranteed by the United States, any state, any political subdivision of a state, or any agency or corporate or other instrumentality of one or more of the foregoing; or any certificate of deposit for any of the foregoing;
(2) Any security issued or guaranteed by Canada, any Canadian province, any political subdivision of any such province, any agency or corporate or other instrumentality of one or more of the foregoing, or any other foreign government with which the United States currently maintains diplomatic relations, if the security is recognized as a valid obligation by the issuer or guarantor;

(3) Any security issued by and representing an interest in or a debt of, or guaranteed by, any bank organized under the laws of the United States, or any bank, savings institution or trust company organized and supervised under the laws of any state;

(4) Any security issued by and representing an interest in or a debt of, or guaranteed by, any federal savings and loan association, or any building and loan or similar association organized under the laws of any state and authorized to do business in this state;

(5) Any security issued by and representing an interest in or a debt of, or guaranteed by, any insurance company organized under the laws of any state and authorized to do business in this state;

(6) Any security issued or guaranteed by any federal credit union or any credit union, industrial loan association or similar association organized and supervised under the laws of this state;

(7) Any security issued or guaranteed by any railroad, other common carrier, public utility or holding company which is: (A) Subject to the jurisdiction of the interstate commerce commission; (B) a registered holding company under the Public Utility Holding Company Act of 1935, or a subsidiary of such a company within the meaning of that act; (C) regulated in respect of its rates and charges by a governmental authority of the United States or any state; or (D) regulated in respect of the issuance or guarantee of the security by a governmental authority of the United States, any state, Canada, or any Canadian province;
(8) Any security listed or approved for listing upon notice of issuance on the New York Stock Exchange, the American Stock Exchange, or the Midwest Stock Exchange, any other stock exchange approved by the commissioner, the National Association of Securities Dealers Automated Quotation/National Market System (NASDAQ/NMS), or any other market system approved by the commissioner, any other security of the same issuer which is of senior or substantially equal rank, any security called for by subscription rights or warrants so listed or approved, or any warrant or right to purchase or subscribe to any of the foregoing, except that the commissioner may adopt and promulgate rules pursuant to chapter twenty-nine-a of this code which, after notice to such exchange or market system and an opportunity to be heard, remove any such exchange or market system from this exemption if the commissioner finds that the listing requirements or market surveillance of such exchange or market system are such that the continued availability of such exemption for such exchange or market system is not in the public interest and that removal is necessary for the protection of investors;

(9) Any security issued by any person organized and operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic or reformatory purposes, or as a chamber of commerce or trade or professional association, and no part of the net earnings of which inures to the benefit of any person, private stockholder or individual;

(10) Any commercial paper which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which evidences an obligation to pay cash within twelve months of the date of issuance, exclusive of days of grace, or any renewal of such paper which is likewise limited, or any guarantee of such paper or of any such renewal;

(11) Any investment contract issued in connection with an employees' stock purchase, savings, pension,
profit-sharing or similar benefit plan if the commissioner
is notified in writing thirty days before the inception of
the plan or, with respect to plans which are in effect on the
effective date of this chapter, within sixty days thereafter
(or within thirty days before they are reopened if they are
closed on the effective date of this chapter); and

(12) Any security issued by an agricultural
cooperative association operating in this state and
organized under article four, chapter nineteen of this code,
or by a foreign cooperative association organized under
the laws of another state and duly qualified to transact
business in this state.

(b) The following transactions are exempt from
sections 301 and 403:

(1) Any isolated nonissuer transaction, whether
effected through a broker-dealer or not;

(2) Any nonissuer distribution of an outstanding
security if: (A) A recognized securities manual contains
the names of the issuer's officers and directors, a balance
sheet of the issuer as of a date within eighteen months, and
a profit and loss statement for either the fiscal year
preceding that date or the most recent year of operations;
or (B) the security has a fixed maturity or a fixed interest
or dividend provision and there has been no default
during the current fiscal year or within the three preceding
fiscal years, or during the existence of the issuer and any
predecessors if less than three years, in the payment of
principal, interest or dividends on the security;

(3) Any nonissuer transaction effected by or through
a registered broker-dealer pursuant to an unsolicited order
or offer to buy; but the commissioner may by rule require
that the customer acknowledge upon a specified form that
the sale was unsolicited, and that a signed copy of each
such form be preserved by the broker-dealer for a
specified period;
(4) Any transaction between the issuer or other person on whose behalf the offering is made and an underwriter, or among underwriters;

(5) Any transaction in a bond or other evidence of indebtedness secured by a real or chattel mortgage or deed of trust, or by an agreement for the sale of real estate or chattels, if the entire mortgage, deed of trust, or agreement, together with all the bonds or other evidences of indebtedness secured thereby, is offered and sold as a unit;

(6) Any transaction by an executor, administrator, sheriff, marshal, constable, receiver, trustee in bankruptcy, guardian or conservator, and any transaction constituting a judicial sale;

(7) Any transaction executed by a bona fide pledgee without any purpose of evading this chapter;

(8) Any offer or sale to a bank, savings institution, trust company, insurance company, investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or other financial institution or institutional buyer, or to a broker-dealer, whether the purchaser is acting for itself or in some fiduciary capacity;

(9) Any transaction pursuant to an offer directed by the offeror to not more than ten persons (other than those designated in subdivision (8) above) in this state during any period of twelve consecutive months, whether or not the offeror or any of the offerees is then present in this state, if: (A) The seller reasonably believes that all the buyers in this state (other than those designated in subdivision (8) above) are purchasing for investment; and (B) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective buyer in this state (other than those designated in subdivision (8) above); but the commissioner may by rule or order, as to any security or transaction or any type of security or transaction, withdraw or further condition this exemption,
or increase or decrease the number of offerees permitted, or waive the conditions in clauses (A) and (B) with or without the substitution of a limitation on remuneration;

(10) Any offer or sale of a preorganization certificate or subscription if: (A) No commission or other remuneration is paid or given directly or indirectly for soliciting any prospective subscriber; (B) the number of subscribers does not exceed ten; and (C) no payment is made by any subscriber;

(11) Any transaction pursuant to an offer to existing security holders of the issuer, including persons who at the time of the transaction are holders of convertible securities, nontransferable warrants or transferable warrants exercisable within not more than ninety days of their issuance, if: (A) No commission or other remuneration (other than a standby commission) is paid or given directly or indirectly for soliciting any security holder in this state; or (B) the issuer first files a notice specifying the terms of the offer and the commissioner does not by order disallow the exemption within the next five full business days;

(12) Any offer (but not a sale) of a security for which registration statements have been filed under both this chapter and the Securities Act of 1933 if no stop order or refusal order is in effect and no public proceeding or examination looking toward such an order is pending under either chapter.

(13) A security issued by an issuer registered as an open-end management investment company or unit investment trust under section (8) of the Investment Company Act of 1940 if:

(A)(i) The issuer is advised by an investment adviser that it is a depository institution exempt from registration under the Investment Company Act of 1940, or that is currently registered as an investment adviser, and has been registered, or is affiliated with an adviser that has been registered, as an investment adviser under the Investment
Advisers Act of 1940, for at least three years next preceding an offer or sale of a security claimed to be exempt under this paragraph; and the adviser has acted, or is affiliated with an investment adviser that has acted, as investment adviser to one or more registered investment companies for at least three years next preceding an offer or sale of a security claimed to be exempt under this paragraph; or

(ii) The issuer has a sponsor that has at all times throughout the three years before an offer or sale of a security claimed to be exempt under this paragraph sponsored one or more registered investment companies or unit investment trusts the aggregate total assets of which have exceeded one hundred million dollars.

(B) The division has received prior to any sale exempted herein:

(i) A notice of intention to sell which has been executed by the issuer which sets forth the name and address of the issuer and the title of the securities to be offered in this state;

(ii) A filing fee equal to one twentieth of one percent of the maximum aggregate offering price, but such fee shall not be less than fifty nor greater than fifteen hundred dollars, for open-end management companies; or

(iii) A filing fee equal to one twentieth of one percent of the maximum aggregate offering price, but such fee shall not be less than fifty nor greater than fifteen hundred dollars, for unit investment trusts.

(C) A separate notice and fee shall be required for each portfolio, series or class of an open-end management company.

(D) For the purpose of this subsection, an investment adviser is affiliated with another investment adviser if it controls, is controlled by or is under common control with the other investment adviser.
(c) The commissioner may by order deny or revoke any exemption specified in subdivision (9) or (11) of subsection (a) or in subsection (b) of this section with respect to a specific security or transaction. No such order may be entered without appropriate prior notice to all interested parties, opportunity for hearing, and written findings of fact and conclusions of law, except that the commissioner may by order summarily deny or revoke any of the specified exemptions pending final determination of any proceeding under this subsection.

Upon the entry of a summary order, the commissioner shall promptly notify all interested parties that it has been entered and of the reasons therefor and that within fifteen days of the receipt of a written request the matter will be set down for hearing. If no hearing is requested and none is ordered by the commissioner, the order will remain in effect until it is modified or vacated by the commissioner. If a hearing is requested or ordered, the commissioner, after notice of and opportunity for hearing to all interested persons, may modify or vacate the order or extend it until final determination. No order under this subsection may operate retroactively. No person may be considered to have violated section 301 or 403 by reasons of any offer or sale effected after the entry of an order under this subsection if he sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the order.

(d) In any proceeding under this chapter, the burden of proving an exemption or an exception from a definition is upon the person claiming it.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Ernest C. Moore
Chairman House Committee

Originating in the House.

Takes effect from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within _______________ this the __________

day of _____________________, 1995.

Governor