

HB 2808

RECEIVED  
1995 APR -5 PM 4:40  
OFFICE OF THE CLERK  
SECRETARY OF STATE

# WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1995



# ENROLLED

HOUSE BILL No. 2808.....

(By Delegates *Farris and Gallagher*)



Passed ..... *March 10,* ..... 1995

In Effect ..... *From* ..... Passage



ENROLLED

# H. B. 2808

(BY DELEGATES FARRIS AND GALLAGHER)

---

[Passed March 10, 1995; in effect from 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.**

1 (a) The following securities are exempt from sections  
2 301 and 403:

3 (1) Any security (including a revenue obligation)  
4 issued or guaranteed by the United States, any state, any  
5 political subdivision of a state, or any agency or corporate  
6 or other instrumentality of one or more of the foregoing;  
7 or any certificate of deposit for any of the foregoing;

8           (2) Any security issued or guaranteed by Canada, any  
9 Canadian province, any political subdivision of any such  
10 province, any agency or corporate or other instrumentality  
11 of one or more of the foregoing, or any other foreign  
12 government with which the United States currently  
13 maintains diplomatic relations, if the security is recognized  
14 as a valid obligation by the issuer or guarantor;

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

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

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

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

33           (7) Any security issued or guaranteed by any railroad,  
34 other common carrier, public utility or holding company  
35 which is: (A) Subject to the jurisdiction of the interstate  
36 commerce commission; (B) a registered holding company  
37 under the Public Utility Holding Company Act of 1935,  
38 or a subsidiary of such a company within the meaning of  
39 that act; (C) regulated in respect of its rates and charges by  
40 a governmental authority of the United States or any state;  
41 or (D) regulated in respect of the issuance or guarantee of  
42 the security by a governmental authority of the United  
43 States, any state, Canada, or any Canadian province;

44 (8) Any security listed or approved for listing upon  
45 notice of issuance on the New York Stock Exchange, the  
46 American Stock Exchange, or the Midwest Stock  
47 Exchange, any other stock exchange approved by the  
48 commissioner, the National Association of Securities  
49 Dealers Automated Quotation/National Market System  
50 (NASDAQ/NMS), or any other market system approved  
51 by the commissioner, any other security of the same issuer  
52 which is of senior or substantially equal rank, any security  
53 called for by subscription rights or warrants so listed or  
54 approved, or any warrant or right to purchase or subscribe  
55 to any of the foregoing, except that the commissioner may  
56 adopt and promulgate rules pursuant to chapter twenty-  
57 nine-a of this code which, after notice to such exchange  
58 or market system and an opportunity to be heard, remove  
59 any such exchange or market system from this exemption  
60 if the commissioner finds that the listing requirements or  
61 market surveillance of such exchange or market system  
62 are such that the continued availability of such exemption  
63 for such exchange or market system is not in the public  
64 interest and that removal is necessary for the protection of  
65 investors;

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

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

80 (11) Any investment contract issued in connection  
81 with an employees' stock purchase, savings, pension,

82 profit-sharing or similar benefit plan if the commissioner  
83 is notified in writing thirty days before the inception of  
84 the plan or, with respect to plans which are in effect on the  
85 effective date of this chapter, within sixty days thereafter  
86 (or within thirty days before they are reopened if they are  
87 closed on the effective date of this chapter); and

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

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

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

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

110 (3) Any nonissuer transaction effected by or through  
111 a registered broker-dealer pursuant to an unsolicited order  
112 or offer to buy; but the commissioner may by rule require  
113 that the customer acknowledge upon a specified form that  
114 the sale was unsolicited, and that a signed copy of each  
115 such form be preserved by the broker-dealer for a  
116 specified period;

117 (4) Any transaction between the issuer or other person  
118 on whose behalf the offering is made and an underwriter,  
119 or among underwriters;

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

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

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

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

140 (9) Any transaction pursuant to an offer directed by  
141 the offeror to not more than ten persons (other than those  
142 designated in subdivision (8) above) in this state during  
143 any period of twelve consecutive months, whether or not  
144 the offeror or any of the offerees is then present in this  
145 state, if: (A) The seller reasonably believes that all the  
146 buyers in this state (other than those designated in  
147 subdivision (8) above) are purchasing for investment; and  
148 (B) no commission or other remuneration is paid or given  
149 directly or indirectly for soliciting any prospective buyer  
150 in this state (other than those designated in subdivision (8)  
151 above); but the commissioner may by rule or order, as to  
152 any security or transaction or any type of security or  
153 transaction, withdraw or further condition this exemption,

154 or increase or decrease the number of offerees permitted,  
155 or waive the conditions in clauses (A) and (B) with or  
156 without the substitution of a limitation on remuneration;

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

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

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

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

185 (A)(i) The issuer is advised by an investment adviser  
186 that it is a depository institution exempt from registration  
187 under the Investment Company Act of 1940, or that is  
188 currently registered as an investment adviser, and has been  
189 registered, or is affiliated with an adviser that has been  
190 registered, as an investment adviser under the Investment

191 Advisers Act of 1940, for at least three years next  
192 preceding an offer or sale of a security claimed to be  
193 exempt under this paragraph; and the adviser has acted, or  
194 is affiliated with an investment adviser that has acted, as  
195 investment adviser to one or more registered investment  
196 companies for at least three years next preceding an offer  
197 or sale of a security claimed to be exempt under this  
198 paragraph; or

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

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

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

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

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

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

222 (D) For the purpose of this subsection, an investment  
223 adviser is affiliated with another investment adviser if it  
224 controls, is controlled by or is under common control with  
225 the other investment adviser.



226 (c) The commissioner may by order deny or revoke  
227 any exemption specified in subdivision (9) or (11) of  
228 subsection (a) or in subsection (b) of this section with  
229 respect to a specific security or transaction. No such order  
230 may be entered without appropriate prior notice to all  
231 interested parties, opportunity for hearing, and written  
232 findings of fact and conclusions of law, except that the  
233 commissioner may by order summarily deny or revoke  
234 any of the specified exemptions pending final  
235 determination of any proceeding under this subsection.  
236 Upon the entry of a summary order, the commissioner  
237 shall promptly notify all interested parties that it has been  
238 entered and of the reasons therefor and that within fifteen  
239 days of the receipt of a written request the matter will be  
240 set down for hearing. If no hearing is requested and none  
241 is ordered by the commissioner, the order will remain in  
242 effect until it is modified or vacated by the commissioner.  
243 If a hearing is requested or ordered, the commissioner,  
244 after notice of and opportunity for hearing to all  
245 interested persons, may modify or vacate the order or  
246 extend it until final determination. No order under this  
247 subsection may operate retroactively. No person may be  
248 considered to have violated section 301 or 403 by reasons  
249 of any offer or sale effected after the entry of an order  
250 under this subsection if he sustains the burden of proof  
251 that he did not know, and in the exercise of reasonable  
252 care could not have known, of the order.

253 (d) In any proceeding under this chapter, the burden  
254 of proving an exemption or an exception from a  
255 definition is upon the person claiming it.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

*Henry J. Hoover*  
\_\_\_\_\_  
Chairman Senate Committee

*Ernest C. Moore*  
\_\_\_\_\_  
Chairman House Committee

Originating in the House.

Takes effect from passage.

*Carroll A. Adams*  
\_\_\_\_\_  
Clerk of the Senate

*Donald L. Heff*  
\_\_\_\_\_  
Clerk of the House of Delegates

*Earl Ray Tomblin*  
\_\_\_\_\_  
President of the Senate

*Paul E. Clemen*  
\_\_\_\_\_  
Speaker of the House of Delegates

The within \_\_\_\_\_ this the \_\_\_\_\_  
day of \_\_\_\_\_, 1995.

\_\_\_\_\_  
Governor



PRESENTED TO THE

GOVERNOR

Date 3/24/95

Time 3:45 PM