WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1997

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ENROLLED

HOUSE BILL No. 2842

Givens, Hunt, Coleman, Mahan,
Amores, Trump and L. White
(By Delegates)

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Passed ___________________________ April 12, 1997

In Effect __________________________ Ninety Days From Passage
AN ACT to amend and reenact sections two hundred one, two hundred two and two hundred three, article two, chapter thirty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact sections three hundred one and three hundred five, article three of said chapter; to further amend said article by adding thereto a new section, designated section three hundred four-a; to amend and reenact sections four hundred one, four hundred two, four hundred five, four hundred six, four hundred nine, four hundred thirteen and four hundred fourteen, article four of said chapter; and to further amend said article by adding thereto a new section, designated section four hundred seven-a, all relating to revisions to Uniform Securities Act; exempting federal covered advisers and certain other investment advisers from registration requirements; including references to notice filings for federal covered advisers; making it unlawful to employ unregistered investment adviser representatives; requiring investment adviser representatives to make certain notifications; requiring federal covered advisers to comply with notice filing and fee requirements; establishing certain registration fees and compliance assessments; changing
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minimum financial, surety bond, record keeping, financial reporting and correcting amendment requirements; establishing notice filing, fee and other requirements for federal covered securities, including provision for oversale assessments; adding and amending certain definitions; establishing registration exemption for federal covered securities; deleting "blue chip exemption" for certain securities; changing funding method for securities division; requiring that violators of chapter pay certain examination expenses; providing for administrative assessments for such violators; and expanding criminal penalties.

Be it enacted by the Legislature of West Virginia:

That sections two hundred one, two hundred two, two hundred three, article two, chapter thirty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that sections three hundred one and three hundred five, article three of said chapter, be amended and reenacted; that said article be further amended by adding thereto a new section, designated section three hundred four-a; that sections four hundred one, four hundred two, four hundred five, four hundred six, four hundred nine, four hundred thirteen and four hundred fourteen, article four of said chapter be amended and reenacted; and that said article be further amended by adding thereto a new section, designated section four hundred seven-a, all to read as follows:

ARTICLE 2. REGISTRATION OF BROKER-DEALERS AND AGENTS; REGISTRATION AND NOTICE FILING FOR INVESTMENT ADVISERS.

§32-2-201. Registration requirement.

1 (a) It is unlawful for any person to transact business in this state as a broker-dealer or agent unless he or she is registered under this chapter.

(b) It is unlawful for any broker-dealer or issuer to employ an agent unless the agent is registered. The registration of an agent is not effective during any period when he or she is not associated with a particular broker-dealer registered under this chapter or a particular issuer.

When an agent begins or terminates a connection with a
broker-dealer or issuer, or begins or terminates those
activities which make him or her an agent, the agent as
well as the broker-dealer or issuer shall promptly notify
the commissioner.

(c) It is unlawful for any person to transact business
in this state as an investment adviser unless: (1) He or she
is so registered under this chapter; (2) he or she is
registered as a broker-dealer without the imposition of a
condition under subdivision (5), subsection (b), section
two hundred four of this article; (3) he or she is a federal
covered advisor except that, until the tenth day of October,
one thousand nine hundred ninety-nine, a federal covered
adviser for which a nonpayment or underpayment of a fee
has not been promptly remedied following written
notification to the adviser of such nonpayment or
underpayment shall be required to register under this act;
or (4) he or she has no place of business in this state and:
(A) His or her only clients in this state are investment
companies as defined in the Investment Company Act of
1940, other investment advisers, federal covered advisers,
broker-dealers, banks, trust companies, savings and loan
associations, insurance companies, employee benefit plans
with assets of not less than one million dollars, and
governmental agencies or instrumentalities, whether acting
for themselves or as trustees with investment control, or
other institutional investors as are designated by rule or
order of the commissioner; or (B) during any period of
twelve consecutive months he or she does not have more
than five clients who are residents of this state, other than
those specified in this subsection, whether or not he or she
or any of the clients who are residents of this state is then
present in the state.

(d) Every registration or notice filing expires one
year from its effective date unless renewed. The
commissioner by rule or order may prepare an initial
schedule for renewals of registrations or notice filings so
that subsequent renewals of registrations or notice filings
effective on the effective date of this chapter may be
staggered by calendar months. For this purpose the
commissioner by rule may reduce the registration or
notice filing fee proportionately.
(e) It is unlawful for any:

(1) Person required to be registered as an investment adviser under this article to employ an investment adviser representative unless the investment adviser representative is registered under this article: Provided, That the registration of an investment adviser representative is not effective during any period when he or she is not employed by an investment adviser registered under this article; or

(2) Federal covered adviser to employ, supervise, or associate with an investment adviser representative having a place of business located in this state, unless such investment adviser representative is registered under this article, or is exempt from registration. When an investment adviser representative begins or terminates employment with an investment adviser, the investment adviser (in the case of 210 (f)(i), or the investment adviser representative (in the case of 201 (f)(ii), shall promptly notify the commissioner.

(f) Except with respect to advisers whose only clients are those described in subdivision (4), subsection (c) of this section, it is unlawful for any federal covered adviser to conduct advisory business in this state unless such person complies with the provisions of subsection (b), section two hundred two of this article.


(a) A broker-dealer, agent or investment adviser may obtain an initial or renewal registration by filing with the commissioner an application together with a consent to service of process pursuant to subsection (g), section four hundred fourteen, article four of this chapter. The application shall contain whatever information the commissioner by rule requires concerning matters such as:

(1) The applicant’s firm and place of organization; (2) the applicant’s proposed method of doing business; (3) the qualifications and business history of the applicant and in the case of a broker-dealer or investment adviser, the qualifications and business history of any partner, officer or director, any person occupying a similar status or
performing similar functions, or any person, directly or indirectly, controlling the broker-dealer or investment adviser and, in the case of an investment adviser, the qualifications and business history of any employee; (4) any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities business and any conviction of a felony; and (5) subject to the limitations of §15(h)(1) of the Securities Exchange Act of 1934, the applicant’s financial condition and history. The commissioner may by rule or order require an applicant for initial registration to publish an announcement of the application as a Class I legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area or areas for the publication shall be specified by the commissioner. If no denial order is in effect and no proceeding is pending under section two hundred four of this article, registration becomes effective at noon of the thirtieth day after an application is filed. The commissioner may by rule or order specify an earlier effective date, and he or she may by order defer the effective date until noon of the thirtieth day after the filing of any amendment to an application. Registration of a broker-dealer automatically constitutes registration of any agent who is a partner, officer or director, or a person occupying a similar status or performing similar functions, as designated by the broker-dealer in writing to the commissioner and approved in writing by the commissioner. Registration of an investment adviser automatically constitutes registration of any investment adviser representative who is a partner, officer, or director or a person occupying a similar status or performing similar functions as designated by the investment adviser in writing to the commissioner and approved in writing by the commissioner.

(b) Except with respect to federal covered advisers whose only clients are those described in paragraph (A), subdivision (4), subsection (c), section two hundred one of this article, a federal covered adviser shall file with the commissioner, prior to acting as a federal covered adviser in this state, such documents as have been filed with the
55 securities and exchange commissioner as the
56 commissioner, by rule or order, may require along with
57 notice filing fees under subsection (c), section two
58 hundred two, article two, chapter thirty-two of this code.

59 (c) Every applicant for initial or renewal registration
60 shall pay a filing fee of two hundred fifty dollars in the
61 case of a broker-dealer and the agent of an issuer,
62 fifty-five dollars in the case of an agent, one hundred
63 seventy dollars in the case of an investment adviser, and
64 fifty dollars for each investment advisor representative.
65 When an application is denied or withdrawn, the
66 commissioner shall retain all of the fee.

67 (d) A registered broker-dealer or investment adviser
68 may file an application for registration of a successor,
69 whether or not the successor is then in existence, for the
70 unexpired portion of the year. A filing fee of twenty
71 dollars shall be paid.

72 (e) The commissioner may, by rule or order, require
73 a minimum capital for registered broker-dealers, subject to
74 the limitations of section fifteen of the Securities
75 Exchange Act of 1934, and establish minimum financial
76 requirements for investment advisers, subject to the
77 limitations of section 222 of the Investment Advisers Act
78 of 1940, which may include different requirements for
79 those investment advisers who maintain custody of clients’
80 funds or securities or who have discretionary authority
81 over same and those investment advisers who do not.

82 (f) The commissioner may, by rule or order, require
83 registered broker-dealers, agents and investment advisers
84 who have custody of or discretionary authority over client
85 funds or securities, to post surety bonds in amounts as the
86 commissioner may prescribe, by rule or order, subject to
87 the limitations of section fifteen of the Securities
88 Exchange Act of 1934 (for broker-dealers) and section
89 222 of the Investment Advisers Act of 1940 (for
90 investment advisers), up to twenty-five thousand dollars
91 and may determine their conditions. Any appropriate
92 deposit of cash or securities shall be accepted in lieu of
93 any bond so required. No bond may be required of any
94 registrant whose net capital, or, in the case of an
investment adviser, whose minimum financial require-
ments, which may be defined by rule, exceeds the amounts
required by the commissioner. Every bond shall provide
for suit thereon by any person who has a cause of action
under section four hundred nine, article four of this
chapter and, if the commissioner by rule or order requires,
by any person who has a cause of action not arising under
this chapter. Every bond shall provide that no suit may be
maintained to enforce any liability on the bond unless
brought within the time limitations of subsection (f),
section four hundred nine, article four of this chapter.

(g) Every applicant, whether registered under this
chapter or not, shall pay a fifty-dollar fee for each name
or address change.

(h) Every broker-dealer and investment advisor
registered under this chapter shall pay an annual fifty-
dollar fee for each branch office located in West Virginia.

(i) Each agent, representative and associated person
of a broker-dealer or investment advisor when applying
for an initial license under section two hundred two of this
article or changing employers shall pay a compliance
assessment of twenty-five dollars. Each agent, repre-
sentative and associated person, when applying for a
renewal license under section two hundred two of this
article, shall pay a compliance assessment of ten dollars.

§32-2-203. Post-registration provisions.

(a) Every registered broker-dealer and investment
adviser shall make and keep such accounts,
correspondence, memoranda, papers, books and other
records as the commissioner prescribes by rule or order,
except as provided by section fifteen of the Securities
Exchange Act of 1934 (in the case of a broker-dealer)
and section 222 of the Investment Advisers Act of 1940
(in the case of an investment adviser). All records so
required, with respect to an investment adviser, shall be
preserved for three years unless the commissioner
prescribes by rule or order otherwise for particular types
of records.
(b) With respect to investment advisers, the commissioner may require that certain information be furnished or disseminated as necessary or appropriate in the public interest or for the protection of investors and advisory clients. To the extent determined by the commissioner, in his or her discretion, information furnished to clients or prospective clients of an investment adviser that would be in compliance with the Investment Advisers Act of 1940 and the rules thereunder may be used in whole or partial satisfaction of this requirement.

(c) Every registered broker-dealer and investment advisor shall file such financial reports as the commissioner may prescribe by rule or order, except as provided by section fifteen of the Securities Exchange Act of 1934 (in the case of a broker-dealer) and section 222 of the Investment Advisers Act of 1940 (in the case of an investment adviser).

(d) If the information contained in any document filed with the commissioner is or becomes inaccurate or incomplete in any material respect, the registrant or federal covered adviser shall promptly file a correcting amendment with the commissioner.

(e) All the records referred to in subsection (a) of this section are subject at any time or from time to time to such reasonable periodic, special or other examinations by representatives of the commissioner, within or without this state, as the commissioner deems necessary or appropriate in the public interest or for the protection of investors. For the purpose of avoiding unnecessary duplication of examinations, the commissioner, insofar as he or she deems it practicable in administering this subsection, may cooperate with the securities administrators of other states, the securities and exchange commission, and any national securities exchange or national securities association registered under the Securities Exchange Act of 1934.

ARTICLE 3. REGISTRATION OF SECURITIES.

§32-3-301. Registration requirement.
It is unlawful for any person to offer or sell any security in this state unless: (1) It is registered under this chapter; or (2) the security or transaction is exempted under section four hundred two of this article; or (3) the security is a federal covered security.

§32-3-304a. Federal covered securities.

(a) Securities for which a registration statement has been filed with the securities and exchange commission under the Securities Act of 1933 with respect to a federal covered security under section 18(b)(2) of the Securities Act of 1933 may be offered for sale or sold to residents of this state upon the commissioner’s receipt of: (1) A notice as prescribed by the commissioner by rule or otherwise or in lieu thereof a copy of the issuer’s federal registration statement as filed with the securities and exchange commissioner; (2) a consent to service of process signed by the issuer; and (3) payment of a fee as provided for in subsection (b), section three hundred five of this article:

Provided, That up through the tenth day of October, one thousand nine hundred ninety-nine, or such other date as may be legally permissible, a federal covered security for which a fee has not been paid or promptly remedied following written notification from the commissioner to the issuer of the nonpayment or underpayment of such fees, as required by this article, shall be required to register under this act.

(b) The commissioner, by rule or otherwise, may require the filing of any or all of the following documents with respect to a federal covered security under section 18(b)(2) of the Securities Act of 1933:

(1) Prior to the initial offer of such federal covered security in this state, all documents that are part of a current federal registration statement filed with the securities and exchange commission under the Securities Act of 1933; and

(2) After the initial offer of such federal covered security in this state, all documents that are part of an amendment to a current federal registration statement filed with the securities and exchange commission under the
Securities Act of 1933, which shall be filed concurrently with the commissioner.

(c) With respect to any security that is a federal covered security under section 18(b)(4)(D) of the Securities Act of 1933, the commissioner, by rule or order, may require the issuer to file a notice on SEC Form D and a consent to service of process signed by the issuer no later than fifteen days after the first sale of such federal covered security in this state, together with a fee as established by rule by the commissioner.

(d) The commissioner, by rule or otherwise, may require the filing of any document filed with the securities and exchange commission under the Securities Act of 1933, with respect to a federal covered security under section 18(b)(3) or (4) of the Securities Act of 1933, together with a filing fee for such document as appropriate under subsections (m) and (n), section three hundred five of this article.

(e) The commissioner may issue a stop order suspending the offer and sale of a federal covered security, except a federal covered security under section 18(b)(1) of the Securities Act of 1933, if it finds that: (1) The order is in the public interest; and (2) there is a failure to comply with any condition established under this section.

(f) The commissioner, by rule or order, may waive any or all of the provisions of this section.

§32-3-305. Provisions applicable to registration and notice filing generally.

(a) A registration or notice filing statement may be filed by the issuer, any other person on whose behalf the offering is to be made, or a registered broker-dealer. A registration or notice filing statement filed under this chapter registering or noticing investment company shares shall cover only one class, series or portfolio of investment company shares.

(b) Every person filing a registration or notice filing statement shall pay a filing fee of one twentieth of one
percent of the maximum aggregate offering price at which the registered or noticed securities are to be offered in this state, but the fee shall in no case be less than fifty dollars or more than fifteen hundred dollars. When a registration or notice filing statement is withdrawn before the effective date or a preeffective stop order is entered under section three hundred six of this article, the commissioner shall retain all of the fee.

(c) Every registration statement and notice filing shall specify: (1) The amount of securities to be offered in this state; (2) the states in which a registration statement or similar document in connection with the offering has been or is to be filed; and (3) any adverse order, judgment or decree entered in connection with the offering by the regulatory authorities in each state or by any court or the securities and exchange commission.

(d) In any case where securities sold in this state are in excess of the aggregate amount of securities specified under subsection (c) of this section, the commissioner may require payment of an oversale assessment which shall be three times an amount which equals the difference between the filing fee that would have been payable under subsection (b) of this section based upon the total amount of securities sold in this state and the total filing fees previously paid to the commissioner with respect to such registration or notice filing, but in no case shall the oversale assessment be less than three hundred fifty dollars or be more than fifteen hundred dollars.

(e) Any document filed under this chapter or a predecessor act within five years preceding the filing of a registration statement may be incorporated by reference in the registration statement to the extent that the document is currently accurate.

(f) The commissioner may by rule or otherwise permit the omission of any item of information or document from any registration or notice filing statement.

(g) In the case of a nonissuer distribution, information may not be required under section three hundred four of this article or subsection (k) of this
section unless it is known to the person filing the
registration statement or to the persons on whose behalf
the distribution is to be made, or can be furnished by them
without unreasonable effort or expense.

(h) The commissioner may by rule or order require
as a condition of registration by qualification or
coordination: (1) That any security issued within the past
three years or to be issued to a promoter for a
consideration substantially different from the public
offering price, or to any person for a consideration other
than cash, be deposited in escrow; and (2) that the
proceeds from the sale of the registered security in this
state be impounded until the issuer receives a specified
amount from the sale of the security either in this state or
elsewhere. The commissioner may by rule or order
determine the conditions of any escrow or impounding
required under this subsection, but he or she may not
reject a depository solely because of location in another
state.

(i) The commissioner may by rule or order require
as a condition of registration that any security registered
by qualification or coordination be sold only on a
specified form of subscription or sale contract, and that a
signed or conformed copy of each contract be filed with
the commissioner or preserved for any period up to three
years specified in the rule or order.

(j) Every registration statement is effective for one
year from its effective date, or any longer period during
which the security is being offered or distributed in a
nonexempted transaction by or for the account of the
issuer or other person on whose behalf the offering is
being made or by any underwriter or broker-dealer who is
still offering part of an unsold allotment or subscription
taken by him or her as a participant in the distribution,
except during the time a stop order is in effect under
section three hundred six of this article. All outstanding
securities of the same class as a registered security are
considered to be registered for the purpose of any
nonissuer transaction: (1) So long as the registration
statement is effective; and (2) between the thirtieth day
after the entry of any stop order suspending or revoking
the effectiveness of the registration statement under
section three hundred six of this article (if the registration
statement did not relate, in whole or in part, to a nonissuer
distribution) and one year from the effective date of the
registration statement. A registration statement may not
be withdrawn for one year from its effective date if any
securities of the same class are outstanding. A registration
statement may be withdrawn otherwise only in the
discretion of the commissioner.

(k) So long as a registration statement is effective,
the commissioner may by rule or order require the person
who filed the registration statement to file reports, not
more often than quarterly, to keep reasonably current the
information contained in the registration statement and to
disclose the progress of the offering.

(l) A registration statement relating to a security
issued by a face amount certificate company or a
redeemable security issued by an open-end management
company or unit investment trust, as those terms are
defined in the Investment Company Act of 1940, may be
amended after its effective date so as to increase the
securities specified as proposed to be offered. The
amendment becomes effective when the commissioner so
orders. Every person filing an amendment shall pay a
filing fee, calculated in the manner specified in subsection
(b) of this section, with respect to the additional securities
proposed to be offered.

(m) Every person changing the name or address of
a securities registration or notice filing shall pay a fifty-
dollar fee for change.

(n) Every person amending a registration statement
or notice filing or offering a document without increasing
the dollar amount registered shall pay a fifty-dollar fee for
each amended statement, notice filing or document.

ARTICLE 4. GENERAL PROVISIONS.

§32-4-401. Definitions.
When used in this chapter, unless the context otherwise requires:

(a) "Commissioner" means the auditor of the state of West Virginia.

(b) "Agent" means any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities. "Agent" does not include an individual who represents an issuer in: (1) Effecting transactions in a security exempted by subdivisions (1), (2), (3), (10) or (11) of subsection (a), section four hundred two of this article; (2) effecting transactions exempted by subsection (b), section four hundred two of this article; (3) effecting transactions in a covered security as described in section 18(b)(3) and section 18(b)(4)(d) of the Securities Act of 1933; (4) effecting transactions with existing employees, partners or directors of the issuer if no commission or other remuneration is paid or given, directly or indirectly, for soliciting any person in this state; or (5) effecting transactions in this state limited to those transactions described in section 15(h)(2) of the Securities Exchange Act of 1934. A partner, officer or director of a broker-dealer or issuer, or a person occupying a similar status or performing similar functions, is an agent only if he or she otherwise comes within this definition.

(c) "Broker-dealer" means any person engaged in the business of effecting transactions in securities for the account of others or for his or her own account. "Broker-dealer" does not include: (1) An agent; (2) an issuer; (3) a bank, savings institution or trust company; or (4) a person who has no place of business in this state if: (A) He or she effects transactions in this state exclusively with or through; (i) the issuers of the securities involved in the transactions; (ii) other broker-dealers; or (iii) banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees; or (B) during any period of twelve consecutive months he or she does not
direct more than fifteen offers to sell or buy into this state in any manner to persons other than those specified in clause (A), whether or not the offeror or any of the offerees is then present in this state.

(d) "Fraud," "deceit" and "defraud" are not limited to common-law deceit.

(e) "Guaranteed" means guaranteed as to payment of principal, interest or dividends.

(f) "Federal covered adviser" means a person who is: (1) Registered under section 203 of the Investment Advisers Act of 1940; or (2) is excluded from the definition of "investment advisor" under section two hundred two-a (11) of the Investment Advisers Act of 1940.

(g) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. "Investment adviser" also includes financial planners and other persons who, as an integral component of other financially related services, provide the foregoing investment advisory services to others for compensation and as part of a business or who hold themselves out as providing the foregoing investment advisory services to others for compensation. "Investment adviser" does not include: (1) A bank, savings institution or trust company; (2) a lawyer, accountant, engineer or teacher whose performance of those services is solely incidental to the practice of his or her profession; (3) a broker-dealer whose performance of these services is solely incidental to the conduct of his or her business as a broker-dealer and who receives no special compensation for them; (4) a publisher, employee or columnist of a newspaper, news magazine or business or financial publication, or an owner, operator, producer, or employee of a cable, radio, or television network, station, or production facility if, in either case, the financial or business news published or

81 disseminated is made available to the general public and
82 the content does not consist of rendering advice on the
83 basis of the specific investment situation of each client; (5)
84 a person whose advice, analyses or reports relate only to
85 securities exempted by subdivision (1), subsection (a),
86 section four hundred two of this article; (6) a person who
87 has no place of business in this state if (A) his or her only
88 clients in this state are other investment advisers, broker-
89 dealers, banks, savings institutions, trust companies,
90 insurance companies, investment companies as defined in
91 the Investment Company Act of 1940, pension or profit-
92 sharing trusts, or other financial institutions or institutional
93 buyers, whether acting for themselves or as trustees, or (B)
94 during any period of twelve consecutive months he or she
95 does not have more than five clients who are residents of
96 this state other than those specified in clause (A), whether
97 or not he or she or any of the persons to whom the
98 communications are directed is then present in this state;
99 (7) an investment adviser representative; (8) a “federal
100 covered adviser”; or (9) such other persons not within the
101 intent of this paragraph as the commissioner may by rule
102 or order designate.

103 (h) “Investment adviser representative” means any
104 partner, officer, director of, or a person occupying a
105 similar status or performing similar functions, or other
106 individual, except clerical or ministerial personnel, who is
107 employed by or associated with an investment adviser that
108 is registered or required to be registered under this
109 chapter, or who has a place of business located in this state
110 and is employed by or associated with a federal covered
111 adviser; and including clerical or ministerial personnel,
112 who does any of the following: (1) Makes any
113 recommendations or otherwise renders advice regarding
114 securities; (2) manages accounts or portfolios of clients;
115 (3) determines which recommendation or advice
116 regarding securities should be given; (4) solicits, offers or
117 negotiates for the sale of or sells investment advisory
118 services unless such person is registered as an agent
119 pursuant to this act; or (5) supervises employees who
120 perform any of the foregoing unless such person is
121 registered as an agent pursuant to this act.
(i) "Issuer" means any person who issues or proposes to issue any security, except that (1) with respect to certificates of deposit, voting-trust certificates or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors or persons performing similar functions or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which the security is issued; and (2) with respect to certificates of interest or participation in oil, gas or mining titles or leases or in payments out of production under such titles or leases, there is not considered to be any "issuer."

(j) "Nonissuer" means not, directly or indirectly, for the benefit of the issuer.

(k) "Person" means an individual, a corporation, a partnership, an 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.

(l) "Sale" or "sell" includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value.

(2) "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

(3) Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing is considered to constitute part of the subject of the purchase and to have been offered and sold for value.

(4) A purported gift of assessable stock is considered to involve an offer and sale.

(5) Every sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as every sale or offer of a security
which gives the holder a present or future right or privilege to convert into another security of the same or another issuer, is considered to include an offer of the other security.

(6) The terms defined in this subdivision do not include: (A) Any bona fide pledge or loan; (B) any stock dividend, whether the corporation distributing the dividend is the issuer of the stock or not, if nothing of value is given by stockholders for the dividend other than the surrender of a right to a cash or property dividend when each stockholder may elect to take the dividend in cash or property or in stock; (C) any act incident to a class vote by stockholders, pursuant to the certificate of incorporation or the applicable corporation statute, on a merger, consolidation, reclassification of securities or sale of corporate assets in consideration of the issuance of securities of another corporation; or (D) any act incident to a judicially approved reorganization in which a security is issued in exchange for one or more outstanding securities, claims or property interests, or partly in such exchange and partly for cash.


(n) "Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting-trust certificate; certificate of deposit for a security; certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease; or, in general, any
interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. "Security" does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or some other specified period.

(o) "Federal covered security" means any security that is a covered security under section 18(b) of the Securities Act of 1933, as amended by the National Securities Markets Improvement Act of 1996, or rules promulgated thereunder.

(p) "State" means any state, territory or possession of the United States, the District of Columbia and Puerto Rico.

§32-4-402. Exemptions.

(a) The following securities are exempt from section three hundred one, article three of this chapter and section of this article:

(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);

(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.

(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 or she 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 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.
§32-4-405. Unlawful representations concerning registration, exemption or notice filing.

(a) Neither (1) the fact that a notice filing or an application for registration under article two of this chapter or a registration statement under article three of this chapter has been filed nor (2) the fact that a person or security is effectively registered constitutes a finding by the commissioner that any document filed under this chapter is true, complete and not misleading. Neither any such fact nor the fact that an exemption or exception is available for a security or a transaction means that the commissioner has passed in any way upon the merits or qualifications of, or recommended or given approval to, any person, security or transaction.

(b) It is unlawful to make, or cause to be made, to any prospective purchaser, customer or client any representation inconsistent with subsection (a).

§32-4-406. Administration of chapter; operating fund for securities department.

(a) This chapter shall be administered by the auditor of this state, and he or she is hereby designated, and shall be, the commissioner of securities of this state. He or she has the power and authority to appoint or employ such assistants as are necessary for the administration of this chapter.

(b) The auditor shall set up a special operating fund for the securities division in his or her office. The auditor shall pay into the fund twenty percent of all fees collected as provided for in this chapter. If, at the end of any fiscal year, the balance in the operating fund exceeds one hundred fifty thousand dollars, the excess shall be withdrawn from the special fund and deposited in the general revenue fund.

The special operating fund shall be used by the auditor to fund the operation of the securities division located in his or her office. The special operating fund shall be appropriated by line item by the Legislature.
(c) Moneys payable for assessments established by section four hundred seven-a of this article shall be collected by the commissioner and deposited into the general revenue fund.

(d) It is unlawful for the commissioner or any of his or her officers or employees to use for personal benefit any information which is filed with or obtained by the commissioner and which is not made public. No provision of this chapter authorizes the commissioner or any of his or her officers or employees to disclose any information except among themselves or when necessary or appropriate in a proceeding or investigation under this chapter. No provision of the chapter either creates or derogates from any privilege which exists at common law or otherwise when documentary or other evidence is sought under a subpoena directed to the commissioner or any of his or her officers or employees.

ARTICLE 4. GENERAL PROVISIONS.

§32-4-407a. Administrative assessments.

(a) A registrant, applicant for registration, issuer or other person upon whom the commissioner has conducted an examination, audit, investigation or prosecution and who has been determined by the commissioner to have violated this article or rule or order of the commissioner under this article shall pay for all the costs incurred in the conduct of such examination, audit, investigation or prosecution. These costs shall include, but not be limited to, the salaries and other compensation paid to clerical, accounting, administrative, investigative, examiner and legal personnel, the actual amount of expenses reasonably incurred by such personnel and the commissioner in the conduct of such examination, audit, investigation or prosecution, including a pro rata portion of the commissioner's administrative expense.

(b) After giving notice and opportunity for a hearing, the commissioner may issue an order accompanied by written findings of fact and conclusions of law which imposes an administrative assessment in an amount provided in paragraph (1) against a broker-dealer, agent, investment adviser or investment adviser representative registered under section two hundred one,
article two of this chapter, or an affiliate of the broker-dealer or investment adviser where the commissioner finds that the person either willfully has violated this act or a rule or order of the commissioner under this act or has engaged in dishonest or unethical practices in the securities business or has taken unfair advantage of a customer.

(1) The commissioner, in issuing an order under this subsection may impose an administrative assessment of up to ten thousand dollars for a single violation or of up to fifty thousand dollars for multiple violations in a single proceeding or a series of related proceedings. Each act or omission that provides a basis for issuing an order under this subsection shall constitute a separate violation.

(2) For purposes of determining the amount of administrative assessment to be imposed in an order issued under this subsection, the commissioner shall consider:

(i) The circumstances, nature, frequency, seriousness, magnitude, persistence and willfulness of the conduct constituting the violation;

(ii) The scope of the violation, including the number of persons in and out of this state affected by the conduct constituting the violation;

(iii) The amount of restitution or compensation that the violator has made and the number of persons in this state to whom the restitution or compensation has been made;

(iv) Past and concurrent conduct of the violator that has given rise to any sanctions or judgment imposed by, or plea of guilty or nolo contendere or settlement with, the commissioner or any securities administrator of any other state or other country, any court of competent jurisdiction, the securities and exchange commissioner, the commodity futures trading commission, any other federal or state agency or any national securities association or national securities exchange as defined in the Securities Exchange Act of 1934 (48 Stat. 88a, 15 U.S.C. 78A et seq.);

(v) Any other factor that the commissioner finds appropriate in the public interest or for the protection of
investors and consistent with the purposes fairly intended
by the policy and provisions of this act.

(3) An administrative assessment imposed by an
order issued under this subsection is not mutually
exclusive of any other remedy available under this act.

(4) The commissioner shall not impose an
administrative assessment with respect to any public
proceeding which was instituted prior to the date of
enactment of this section.

§32-4-409. Criminal penalties.

(a) Any person who willfully violates any provision
of this chapter, except section 404, or who willfully
violates any rule or order under this chapter, or who
willfully violates section 404 knowing the statement made
to be false or misleading in any material respect, shall be
guilty of a felony, and, upon conviction thereof, shall be
fined not more than fifty thousand dollars, or imprisoned
in the penitentiary not less than one nor more than three
years, or both fined and imprisoned; but no person may
be imprisoned for the violation of any rule or order if he
or she proves that he or she had no knowledge of the rule
or order. No indictment may be returned under this
chapter more than five years after the alleged violation.

(b) The commissioner may refer such evidence as is
available concerning violations of this chapter or of any
rule or order hereunder to the proper prosecuting
attorney, who may, with or without such a reference,
institute the appropriate criminal proceedings under this
chapter.

(c) Nothing in this chapter limits the power of the
state to punish any person for any conduct which
constitutes a crime by statute or at common law.

§32-4-413. Administrative files and opinions.

(a) A document is filed when it is received by the
commissioner.

(b) The commissioner shall keep a register of all
notice filings and all applications for registration and
registration statements which are or have ever been
effective under this chapter and all denial, suspension or
revocation orders which have been entered under this
chapter. The register shall be open for public inspection.

(c) The information contained in or filed with any
registration statement, application or report may be made
available to the public under rules prescribed by the
commissioner.

(d) Upon request and at such reasonable charges as
he or she prescribes, the commissioner shall furnish to any
person photostatic or other copies (certified under his or
her seal of office if requested) of any entry in the register
or any document which is a matter of public record. In
any proceeding or prosecution under this chapter, any
copy so certified is prima facie evidence of the contents of
the entry or document certified.

(e) The commissioner in his or her discretion may
honor requests from interested persons for interpretative
opinions. Copies of the opinions shall be filed in a special
file maintained for that purpose and shall be public
records available for public inspection. The commissioner
shall charge a one hundred-dollar fee for each
interpretative opinion.

§32-4-414. Scope of the chapter and service of process.

(a) Sections 101, 201(a), 301, 405 and 410 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 101, 201(a) and 405 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 purpose 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 purpose of this section, an offer to buy or
to sell is accepted in this state when acceptance: (I) 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 it 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 in this state any bona fide newspaper or
other publication of general, regular and paid circulation
which is not published in this state, or which 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 is received in this state.

(f) Sections 102 and 201(c), as well as section 405 so
far as investment advisers are concerned, apply when any
act instrumental in effecting prohibited conduct is done in
this state, whether or not either party is then present in this
state.

(g) Every person making a notice filing and every
applicant for registration under this chapter and every
issuer which proposes to offer a security in this state
through any person acting on an agency basis in the
common-law sense shall file with the commissioner, in
such form as he or she by rule prescribes, an irrevocable
consent appointing the commissioner or his or her
successor in office to be his or her attorney to receive
service of any lawful process in any noncriminal suit,
action or proceeding against him or her or his or her
successor, executor or administrator which arises under
this chapter or any rule or order hereunder after the
consent has been filed, with the same force and validity as
if served personally on the person filing the consent. A
person who has filed such a consent in connection with a
previous registration need not file another. Service may
be made by leaving a copy of the process in the office of
the commissioner, but it is not effective unless: (1) The
plaintiff, who may be the commissioner in a suit, action or
proceeding instituted by him, forthwith sends notice of the service and a copy of the process by registered or certified mail to the defendant or respondent at his or her last address on file with the commissioner; and (2) the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(h) When any person, including any nonresident of this state, engages in conduct prohibited or made actionable by this chapter or any rule or order hereunder, and he or she has not filed a consent to service of process under subsection (g) of this section and personal jurisdiction over him or her cannot otherwise be obtained in this state, that conduct shall be considered equivalent to his or her appointment of the commissioner or his or her successor in office to be his or her attorney to receive service of any lawful process in any noncriminal suit, action or proceeding against him or her or his or her successor, executor or administrator which grows out of that conduct and which is brought under this chapter or any rule or order hereunder, with the same force and validity as if served on him or her personally. Service may be made by leaving a copy of the process in the office of the commissioner, and it is not effective unless (1) the plaintiff, who may be the commissioner in a suit, action or proceeding instituted by him, forthwith sends notice of the service and a copy of the process by registered or certified mail to the defendant or respondent at his or her last-known address or takes other steps which are reasonably calculated to give actual notice, and (2) the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(i) When process is served under this section, the court, or the commissioner in a proceeding before him, shall order such continuance as may be necessary to afford the defendant or respondent reasonable opportunity to defend.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman, Senate Committee

Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within approved this the ___ day of May, 1997.

Governor