

SB 638

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SENATE OF WEST VIRGINIA

# WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1999



## ENROLLED

*COMMITTEE SUBSTITUTE FOR*  
SENATE BILL NO. 638

(By Senator WOOTEN, ET AL)



PASSED MARCH 13, 1999

In Effect NINETY DAYS FROM Passage

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WEST VIRGINIA LEGISLATURE  
SENATE CLERK'S OFFICE

## ENROLLED

COMMITTEE SUBSTITUTE

FOR

### Senate Bill No. 638

(SENATORS WOOTON, SNYDER AND LOVE, *original sponsors*)

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[Passed March 13, 1999; in effect ninety days from passage.]

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AN ACT to amend the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new chapter, designated chapter thirty-two-b, relating to the adoption of the model state commodity code; establishing state jurisdiction over commodity issues that are not pre-empted by federal law; providing for enforcement and prosecutorial power; and granting jurisdiction to courts of competent jurisdiction in the state to hear certain commodity matters; penalties.

*Be it enacted by the Legislature of West Virginia:*

That the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new chapter, designated chapter thirty-two-b, to read as follows:

**CHAPTER 32B.  
THE WEST VIRGINIA COMMODITIES ACT.**

**ARTICLE 1. GENERAL PROVISIONS.**

**§32B-1-1. Definitions.**

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

3 (b) "Board of trade" means any person or group of  
4 persons engaged in buying or selling any commodity or  
5 receiving the same for sale on consignment, whether such  
6 person or group of persons is characterized as a board of  
7 trade, exchange or other form of marketplace.

8 (c) "CFTC rule" means any rule, regulation or order of  
9 the commodity futures trading commission in effect on the  
10 effective date of this chapter, and all subsequent amend-  
11 ments, additions or other revisions thereto unless the  
12 commissioner, within ten days following the effective date  
13 of any such amendment, addition or revision, disallows the  
14 application thereof to this part or to any provision thereof  
15 by rule, regulation or order.

16 (d) "Commodity" means, except as otherwise specified  
17 by the commissioner by rule, regulation or order, any  
18 agricultural, grain or livestock product or byproduct, any  
19 metal or mineral, including a precious metal defined in  
20 subsection (m) of this section, any gem or gemstone,  
21 whether characterized as precious, semi-precious or  
22 otherwise, any fuel, whether liquid, gaseous or otherwise,  
23 any foreign currency, and all other goods, articles, prod-  
24 ucts or items of any kind. The term commodity does not  
25 include:

26 (1) A numismatic coin whose fair market value is at least  
27 fifteen percent higher than the value of the metal it  
28 contains;

29 (2) Real property or any timber, agricultural or livestock  
30 product grown or raised on real property and offered or  
31 sold by the owner or lessee of the real property; or

32 (3) Any work of art offered or sold by art dealers, at  
33 public auction or offered or sold through a private sale by  
34 the owner thereof.

35 (e) "Commodity contract" means any account, agree-  
36 ment or contract for the purchase or sale, primarily for  
37 speculation or investment purposes and not for use or  
38 consumption by the offeree or purchaser, of one or more  
39 commodities, whether for immediate or subsequent  
40 delivery or whether delivery is intended by the parties, and  
41 whether characterized as a cash contract, deferred ship-  
42 ment or deferred delivery contract, forward contract,  
43 futures contract, installment or margin contract, leverage  
44 contract or otherwise. Any commodity contract offered or  
45 sold, in the absence of evidence to the contrary, is pre-  
46 sumed to be offered or sold for speculation or investment  
47 purposes. A commodity contract does not include any  
48 contract or agreement which requires, and under which  
49 the purchaser receives, within twenty-eight calendar days  
50 from the payment in good funds of any portion of the  
51 purchase price, physical delivery of the total amount of  
52 each commodity to be purchased under the contract or  
53 agreement.

54 (f) "Commodity Exchange Act" means the act of Con-  
55 gress known as the Commodity Exchange Act, 7 U.S.C. 1  
56 (1974), as amended, and all subsequent amendments,  
57 additions or other revisions thereto, unless the commis-  
58 sioner, within ten days following the effective date of any  
59 such amendment, addition or revision, disallows the  
60 application thereof to this part or to any provision thereof  
61 by rule, regulation or order.

62 (g) "Commodity futures trading commission" means the  
63 independent regulatory agency established by Congress to  
64 administer the Commodity Exchange Act.

65 (h) "Commodity merchant" means any of the following  
66 as defined or described in the Commodity Exchange Act or  
67 by CFTC Rule:

68 (1) Futures commission merchant;

69 (2) Commodity pool operator;

70 (3) Commodity trading advisor;

71 (4) Introducing broker;

72 (5) Leverage transaction merchant;

73 (6) An associated person of any of the foregoing;

74 (7) Floor broker; and

75 (8) Any other person, other than a futures association,  
76 required to register with the commodity futures trading  
77 commission.

78 (i) "Commodity option" means any account, agreement  
79 or contract giving a party thereto the right but not the  
80 obligation to purchase or sell one or more commodities or  
81 one or more commodity contracts, or both commodities  
82 and commodity contracts, whether characterized as an  
83 option, privilege, indemnity, bid, offer, put, call, advance  
84 guaranty, decline guaranty or otherwise, but does not  
85 include an option traded on a national securities exchange  
86 registered with the United States securities and exchange  
87 commission.

88 (j) "Financial institution" means a bank, savings institu-  
89 tion or trust company organized under, or supervised  
90 pursuant to, the laws of the United States or of any state.

91 (k) "Offer" includes every offer to sell, offer to purchase,  
92 or offer to enter into a commodity contract or commodity  
93 option.

94 (l) "Person" means an individual, a corporation, a  
95 partnership, association, a joint-stock company, a trust  
96 where the interests of the beneficiaries are evidenced by a  
97 security, an unincorporated organization, a government or  
98 a political subdivision of a government. "Person" does not  
99 include a contract market designated by the commodity  
100 futures trading commission, any clearinghouse of that  
101 commission, a national securities exchange registered with  
102 the securities and exchange commission, or any employee,  
103 officer or director of such contract market, clearinghouse  
104 or exchange acting solely in that capacity.

105 (m) "Precious metal" means the following in coin,  
106 bullion or other form: silver, gold, platinum, palladium,  
107 copper, and any other metals as specified by the commis-  
108 sioner by rule, regulation or order.

109 (n) "Sale" or "sell" includes every sale, contract of sale,  
110 contract to sell or disposition for value.

**§32B-1-2. Unlawful commodity transactions.**

1 Except as otherwise provided in section three or four of  
2 this article, a person shall not sell or purchase or offer to  
3 sell or purchase any commodity under any commodity  
4 contract or commodity option, nor shall a person offer to  
5 enter into or enter into a contract as a seller or purchaser  
6 any commodity contract or any commodity option.

**§32B-1-3. Exempt person transactions.**

1 (a) The prohibitions in section two of this article do not  
2 apply to any transaction offered by and in which one of  
3 the following persons, or any employee, officer or director  
4 thereof acting solely in that capacity, is the purchaser or  
5 seller:

6 (1) A person registered with the commodity futures  
7 trading commission as a futures commission merchant or  
8 as a leverage transaction merchant whose activities  
9 require such registration;

10 (2) A person registered with the securities and exchange  
11 commission as a broker-dealer whose activities require  
12 such registration;

13 (3) A person affiliated with, and whose obligations and  
14 liabilities under the transaction are guaranteed by, a  
15 person referred to in subdivision (1) or (2) of this section;

16 (4) A person who is a member of a contract market  
17 designated by the commodity futures trading commission,  
18 or any clearinghouse thereof;

19 (5) A financial institution; or

20 (6) A person registered under the laws of this state as a  
21 securities broker-dealer whose activities require such  
22 registration.

23 (b) The exemption provided by this section does not  
24 apply to any transaction or activity which is prohibited by  
25 the Commodity Exchange Act or CFTC Rule.

**§32B-1-4. Exempt transactions.**

1 (a) The prohibitions in section two of this article do not  
2 apply to the following:

3 (1) An account, agreement or transaction within the  
4 exclusive jurisdiction of the commodity futures trading  
5 commission as granted under the Commodity Exchange  
6 Act;

7 (2) A commodity contract for the purchase of one or  
8 more precious metals which requires, and under which the  
9 purchaser receives, within twenty-eight calendar days  
10 from the payment in good funds of any portion of the  
11 purchase price, physical delivery of the quantity of the  
12 precious metals purchased by the payment: *Provided,*  
13 That for purposes of this subdivision, physical delivery  
14 occurs if, within the twenty-eight day period, the quantity  
15 of precious metals purchased by the payment is delivered,  
16 whether in specifically segregated or fungible bulk form,  
17 into the possession of a depository, other than the seller,  
18 that is:

19 (A) A financial institution;

20 (B) A depository in which the warehouse receipts are  
21 recognized for delivery purposes for any commodity on a  
22 contract market designated by the commodity futures  
23 trading commission;

24 (C) A storage facility licensed or regulated by the United  
25 States or any agency thereof; or

26 (D) A depository designated by the commissioner in  
27 which the depository, or other person which itself qualifies  
28 as a depository, or a qualified seller issues and the pur-  
29 chaser receives, a certificate, document of title, confirma-  
30 tion or other instrument evidencing that the quantity of

31 precious metals has been delivered to the depository and  
32 is being and will continue to be held by the depository on  
33 the purchaser's behalf, free and clear of all liens and  
34 encumbrances, other than liens of the purchaser, tax liens,  
35 liens agreed to by the purchaser or liens of the depository  
36 for fees and expenses, which have previously been dis-  
37 closed to the purchaser;

38 (3) A commodity contract solely between persons  
39 engaged in producing, processing, using commercially or  
40 handling as merchants, each commodity subject to the  
41 contract, or any by-product of the commodity; or

42 (4) A commodity contract under which the offeree or the  
43 purchaser is a person referred to in section three of this  
44 article, an insurance company, an investment company as  
45 defined in the Investment Company Act of 1940, or an  
46 employee pension and profit sharing or benefit plan other  
47 than a self-employed individual retirement plan or indi-  
48 vidual retirement account.

49 (b) For the purposes of subdivision (2), subsection (a) of  
50 this section, a qualified seller is a person who:

51 (1) Is a seller of precious metals and has a tangible net  
52 worth of at least five million dollars, or has an affiliate  
53 who has unconditionally guaranteed the obligations and  
54 liabilities of the seller and the affiliate has a tangible net  
55 worth of at least five million dollars;

56 (2) Has stored precious metals with one or more deposi-  
57 tories on behalf of customers for at least the previous three  
58 years;

59 (3) Prior to any offer, and annually thereafter, files with  
60 the commissioner a sworn notice of intent to act as a  
61 qualified seller under subdivision (2), subsection (a) of this  
62 section, containing:

63 (A) The seller's name and address, and the names of the  
64 seller's directors, officers, controlling shareholders,  
65 partners, principals and other controlling persons;



66 (B) The address of the seller's principal place of business  
67 and date of incorporation or organization, and the name  
68 and address of seller's registered agent in this state;

69 (C) A statement that the seller, or a person affiliated  
70 with the seller who has guaranteed the obligations and  
71 liabilities of the seller, has a tangible net worth of at least  
72 five million dollars;

73 (D) Depository information including:

74 (i) The name and address of each depository that the  
75 seller intends to use;

76 (ii) The name and address of each depository where the  
77 seller has stored precious metals on behalf of customers for  
78 the previous three years; and

79 (iii) Independent verification from each depository  
80 named by the seller stating that the depository has stored  
81 precious metals on behalf of the seller's customers for the  
82 previous three years and the total deposits made by the  
83 seller during this period;

84 (E) Financial statements from the seller, or the person  
85 affiliated with the seller who has guaranteed the obliga-  
86 tions and liabilities of the seller, for the past three years,  
87 audited by an independent certified public accountant,  
88 including the accountant's report;

89 (F) A statement describing the details of all civil, crimi-  
90 nal or administrative proceedings currently pending or  
91 adversely resolved against the seller or its directors,  
92 officers, controlling shareholders, partners, principals or  
93 other controlling persons during the past ten years includ-  
94 ing:

95 (i) Civil litigation and administrative proceedings  
96 involving securities or commodities violations or fraud;

97 (ii) Criminal proceedings;

98 (iii) Denials, suspensions or revocations of securities or  
99 commodities, licenses or registrations;

100 (iv) Suspensions or expulsions from membership in, or  
101 associations with, self-regulatory organizations registered  
102 under the Securities Exchange Act of 1934, or the Com-  
103 modities Exchange Act; or

104 (v) A statement that there were no such proceedings;

105 (4) Notifies the commissioner within fifteen days of any  
106 material changes in the information provided in the notice  
107 of intent; and

108 (5) Annually furnishes to each purchaser for whom the  
109 seller is then storing precious metals, and furnishes to the  
110 commissioner a report by an independent certified public  
111 accountant of the accountant's examination of the seller's  
112 precious metals storage program.

113 (c) The commissioner may, upon request by the seller,  
114 waive any of the exemption requirements in subsection (b)  
115 of this section, conditionally or unconditionally.

116 (d) The commissioner may, by order, deny, suspend,  
117 revoke or place limitations on the authority to engage in  
118 business as a qualified seller under the provisions of  
119 subdivision (2), subsection (a) of this section, if the com-  
120 missioner finds that the order is in the public interest and  
121 that the person, the person's officers, directors, partners,  
122 agents, servants or employees, any person occupying a  
123 similar status or performing similar functions, any person  
124 who directly or indirectly controls or is controlled by the  
125 seller or the seller's affiliates or subsidiaries:

126 (1) Has filed a notice of exemption under the provisions  
127 of subsection (c) of this section with the commissioner or  
128 the designee of the commissioner which was incomplete in  
129 any material respect or contained any statement which  
130 was, in light of the circumstances under which it was  
131 made, false or misleading with respect to any material  
132 fact;

133 (2) Has, within the last ten years, pled guilty or nolo  
134 contendere to, or has been convicted of any crime indicat-  
135 ing a lack of fitness to engage in the investment commod-  
136 ity business;

137 (3) Has been permanently or temporarily enjoined by any  
138 court of competent jurisdiction from engaging in or  
139 continuing any conduct or practice which injunction  
140 indicates a lack of fitness to engage in the investment  
141 commodities business;

142 (4) Is the subject of an order of the commissioner deny-  
143 ing, suspending or revoking the person's license as a  
144 securities broker-dealer, sales representative or investment  
145 advisor;

146 (5) Is the subject of any of the following orders which are  
147 currently effective and which were issued within the last  
148 five years:

149 (A) An order by the securities agency or commissioner of  
150 another state, Canadian province or territory, the securi-  
151 ties and exchange commission, or the commodity futures  
152 trading commission, entered after notice and opportunity  
153 for hearing, denying, suspending or revoking the person's  
154 registration as a futures commission merchant, commodity  
155 trading adviser, commodity pool operator, securities  
156 broker-dealer, sales representative or investment adviser  
157 or the substantial equivalent of those terms;

158 (B) Suspension or expulsion from membership in, or  
159 association with, a self-regulatory organization registered  
160 under the Securities Exchange Act of 1934 or the Com-  
161modity Exchange Act;

162 (C) A United States postal service fraud order;

163 (D) A cease and desist order entered after notice and  
164 opportunity of hearing by the commissioner or the securi-  
165 ties agency or commissioner of another state, Canadian  
166 province or territory, the securities and exchange commis-  
167 sion, or the commodity futures trading commission;

168 (E) An order entered by the commodity futures trading  
169 commission denying, suspending or revoking registration  
170 under the Commodity Exchange Act;

171 (6) Has engaged in an unethical or dishonest act or  
172 practice in the investment commodities or securities  
173 business; or

174 (7) Has failed reasonably to supervise sales representa-  
175 tives or employees.

176 (e) If the public interest or the protection of investors so  
177 requires, the commissioner may, by order, summarily deny  
178 or suspend the exemption for a qualified seller. Upon the  
179 entry of the order, the commissioner shall promptly notify  
180 the person claiming this status that an order has been  
181 entered, the reasons for the order and that within thirty  
182 days after the receipt of a written request the matter will  
183 be set for hearing. The provisions of section ten, article  
184 two of this chapter apply with respect to all subsequent  
185 proceedings.

186 (f) If the commissioner finds that any applicant or  
187 qualified seller is no longer in existence, has ceased to do  
188 business, is subject to an adjudication of mental incompe-  
189 tence or to the control of a committee, conservator or  
190 guardian or cannot be located after reasonable search,  
191 then the commissioner may, by order, deny or revoke the  
192 exemption for a qualified seller.

193 (g) The commissioner may issue rules or orders prescrib-  
194 ing the terms and conditions of all transactions and  
195 contracts covered by the provisions of this chapter that are  
196 not within the exclusive jurisdiction of the commodity  
197 futures trading commission as granted by the Commodity  
198 Exchange Act, exempting, conditionally or uncondition-  
199 ally, and implementing the provisions of this chapter for  
200 the protection of purchasers and sellers of commodities.

**§32B-1-5. Unlawful commodity activities.**

1 (a) A person may not engage in a trade or business or  
2 otherwise act as a commodity merchant unless the person:  
3 (1) Is registered or temporarily licensed with the commod-  
4 ity futures trading commission for each activity in which  
5 the person is acting as a commodity merchant and the  
6 registration or temporary license has not expired, been  
7 suspended or revoked; or (2) is exempt from registration by  
8 virtue of the Commodity Exchange Act or of a CFTC rule.

9 (b) A board of trade shall not trade or provide a place for  
10 the trading of any commodity contract or commodity

11 option required to be traded on or subject to the rules of a  
12 contract market designated by the commodity futures  
13 trading commission unless the board of trade has been so  
14 designated for the commodity contract or commodity  
15 option and the designation has not been vacated, sus-  
16 pended or revoked.

**§32B-1-6. Fraudulent conduct.**

1 (a) A person may not directly or indirectly:

2 (1) Cheat or defraud, or attempt to cheat or defraud any  
3 other person or employ any device, scheme or artifice to  
4 defraud any other person;

5 (2) Make any false report, enter any false record, or make  
6 any untrue statement of a material fact or omit to state a  
7 material fact necessary in order to make the statements  
8 made, in the light of the circumstances under which they  
9 were made, not misleading;

10 (3) Engage in any transaction, act, practice or course of  
11 business, including, without limitation, any form of  
12 advertising or solicitation, which operates or would  
13 operate as a fraud or deceit upon any person; or

14 (4) Misappropriate or convert the funds, security or  
15 property of any other person in or in connection with the  
16 purchase or sale of, the offer to sell, the offer to purchase,  
17 the offer to enter into, or the entry into of, any commodity  
18 contract or commodity option subject to the provisions of  
19 subdivision (2), (3) or (4), subsection (a), section four of this  
20 article.

**§32B-1-7. Liability of principals, controlling persons and others.**

1 (a) The act, omission or failure of any official, agent or  
2 other person acting for any individual, association,  
3 partnership, corporation or trust within the scope of his or  
4 her employment or office is considered the act, omission or  
5 failure of the individual, association, partnership, corpora-  
6 tion or trust, as well as of such official, agent or other  
7 person.

8 (b) Every person who directly or indirectly controls a  
9 person liable under any provision of this chapter, every

10 partner, officer or director of a person, every person  
11 occupying a similar status or performing similar functions  
12 and every employee of a person who materially aids in the  
13 violation is also liable jointly and severally with and to the  
14 same extent as the other person, unless the person who is  
15 also liable by virtue of this provision sustains the burden  
16 of proof that he or she did not know and, in the exercise of  
17 reasonable care, could not have known of the existence of  
18 the alleged facts that the liability is based upon.

**§32B-1-8. Securities laws unaffected.**

1 Nothing in this chapter impairs, derogates or otherwise  
2 affects the authority or powers of the commissioner under  
3 the West Virginia Uniform Securities Act, or the applica-  
4 tion of any provision of chapter thirty-two of this code to  
5 any person or transaction subject to its provisions.

**§32B-1-9. Purpose.**

1 This chapter may be construed and implemented to  
2 effectuate its general purpose to protect investors, to  
3 prevent and prosecute illegal and fraudulent schemes  
4 involving commodity contracts and to maximize coordina-  
5 tion with federal and other states' laws and the adminis-  
6 tration and enforcement thereof. This chapter is not  
7 intended to create any rights or remedies upon which  
8 actions may be brought by private persons against persons  
9 who violate the provisions of this chapter.

**ARTICLE 2. ADMINISTRATION AND ENFORCEMENT.**

**§32B-2-1. Investigations.**

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

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

6 (2) Aid in enforcement of this chapter.

7 (b) The commissioner may publish information concern-  
8 ing any violation of this chapter or any rule or order of the  
9 commissioner.

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

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

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

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

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

**§32B-2-2. Enforcement of chapter.**

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

8 (1) Issue a cease and desist order;

9 (2) Issue an order imposing a civil penalty in amount  
10 which may not exceed ten thousand dollars for any single  
11 violation or one hundred thousand dollars for multiple  
12 violations in a single proceeding or a series or related  
13 proceedings;

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

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

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

22 (1) A declaratory judgment;

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

26 (3) An action for disgorgement;

27 (4) An action for appointment of a receiver or conserva-  
28 tor for the defendant or the defendant's assets; or

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

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

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

6 (2) Upon showing of violation of this chapter or a rule or  
7 order of the commissioner, the court, in addition to  
8 traditional legal and equitable remedies, including tempo-  
9 rary restraining orders, permanent or temporary prohibi-  
10 tory or mandatory injunctions, and writs of prohibition or  
11 mandamus, may grant the following special remedies:

12 (A) Imposition of a civil penalty in amount which may  
13 not exceed ten thousand dollars for any single violation or  
14 one hundred thousand dollars for multiple violations in a  
15 single proceeding or a series of related proceedings;



16 (B) Disgorgement;

17 (C) Declaratory judgment;

18 (D) Restitution to investors wishing restitution;

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

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

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

28 (A) A temporary restraining order;

29 (B) A temporary or permanent injunction;

30 (C) A writ of prohibition or mandamus; or

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

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

35 (c)(1) Upon a proper showing by the commissioner of  
36 securities or commodity agency of another state that a  
37 person, other than a government or governmental agency  
38 or instrumentality, has violated, or is about to violate, any  
39 provision of the commodity code of that state or any rule  
40 or order of the commissioner or securities or commodity  
41 agency of that state, the circuit court may grant appropri-  
42 ate legal and equitable remedies.

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

51 (A) Disgorgement; and

52 (B) Appointment of a receiver, conservator, or ancillary  
53 receiver or conservator for the defendant or the defen-  
54 dant's assets located in this state.

55 (3) Upon a showing that the defendant is about to violate  
56 the securities or commodity act of the foreign state or a  
57 rule or order of the commissioner of securities or commod-  
58 ity agency of the foreign state, the remedies shall be  
59 limited to:

60 (A) A temporary restraining order;

61 (B) A temporary or permanent injunction;

62 (C) A writ of prohibition or mandamus; or

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

**§32B-2-4. Criminal penalties.**

1 (a) Any person who willfully violates:

2 (1) Any provision of this chapter; or

3 (2) Any rule or order of the commissioner under this  
4 chapter shall, upon conviction of each violation, be fined  
5 not more than twenty thousand dollars or imprisoned at a  
6 state correctional facility not more than ten years, or both.

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

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

**§32B-2-5. Administration of chapter.**

1 (a) This chapter shall be administered by the commis-  
2 sioner of this state.

3 (b) Neither the commissioner nor any employees of the  
4 commissioner may use any information that is filed with  
5 or obtained by the commissioner that is not public infor-  
6 mation for personal gain or benefit, nor may the commis-  
7 sioner nor any employees of the commissioner conduct any  
8 securities or commodity dealings whatsoever based upon  
9 any such information, even though public, if there has not  
10 been a sufficient period of time for the securities or  
11 commodity markets to assimilate the information.

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

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

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

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

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

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

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

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

1 (a) To encourage uniform application and interpretation  
2 of this chapter and of securities regulation and enforce-  
3 ment in general, the commissioner and the employees of  
4 the commissioner may cooperate, and bear the expense of  
5 such cooperation, with the securities agencies or commis-  
6 sioner of another jurisdiction, Canadian province or  
7 territory, any other agencies administering this chapter,  
8 the commodity futures trading commission, the securities  
9 and exchange commission, any self-regulatory organiza-  
10 tion established under the Commodity Exchange Act or  
11 the Securities Exchange Act of 1934, any national or  
12 international organization of commodities or securities  
13 officials or agencies and any governmental law-enforce-  
14 ment agencies.

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

17 (1) Making joint examinations or investigations;

18 (2) Holding joint administrative hearings;

19 (3) Filing and prosecuting joint litigation;

20 (4) Sharing and exchanging personnel;

21 (5) Sharing and exchanging information and documents;

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

25 (7) Issuing and enforcing subpoenas at the request of the  
26 agency administering this chapter in another jurisdiction,  
27 the securities agency of another jurisdiction, the commod-  
28 ity futures trading commission or the securities and  
29 exchange commission if the information sought would also  
30 be subject to lawful subpoena for conduct occurring in this  
31 state.

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

1 (a) In addition to specific authority granted elsewhere in  
2 this chapter, the commissioner may make, amend and  
3 rescind rules, forms and orders as are necessary to effectu-

4 ate the provisions of this chapter. The rules or forms  
5 include, but are not limited to, the following:

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

9 (2) For the purpose of rules or forms, the commissioner  
10 may classify commodities and commodity contracts,  
11 persons and matters within the commissioner's jurisdic-  
12 tion.

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

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

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

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

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

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

1 When a person, including a nonresident of this state,  
2 engages in conduct prohibited or made actionable by this  
3 chapter or any rule or order of the commissioner, such  
4 conduct shall cause the appointment of the commissioner  
5 as the person's attorney to receive service of any lawful  
6 process in a noncriminal proceeding against the person, a  
7 successor or personal representative for an action brought  
8 under this chapter or any rule or order of the commis-  
9 sioner with the same force and validity as if served person-  
10 ally.

**§32B-2-9. Scope of the chapter.**

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

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

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

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

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

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

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

12 (1) Originates from this state; or

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

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

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

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

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

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

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

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

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

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

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

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

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

32 (f) No final order or order after a hearing may be re-  
33 turned without:

34 (1) Appropriate notice to all interested persons;

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

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

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

**§32B-2-11. Judicial review of orders.**

1 (a) Any person aggrieved by a final order of the commis-  
2 sioner may obtain a review of the order in the circuit court  
3 of Kanawha county by filing, within sixty days after the  
4 entry of the order, a written petition requesting that the  
5 order be modified or set aside in whole or in part. A copy  
6 of the petition for review shall be served upon the commis-  
7 sioner.

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

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

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



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

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

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

50 (h) The judgment of the circuit court is subject to review  
51 by the supreme court of appeals of this state.

**§32B-2-12. Pleading exemptions.**

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

**§32B-2-13. Affirmative defense.**

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

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

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

**ARTICLE 3. NOTICE FILING.**

**§32B-3-1. Definitions.**

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

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

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

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

**ARTICLE 4. SEVERABILITY AND SAVING PROVISIONS.**

**§32B-4-1. Severability of provisions.**

1 If any provision of this chapter or the application thereof  
2 to any person or circumstance is held invalid, then the  
3 invalidity shall not affect other provisions or applications

4 of the chapter that can be given effect without the invalid  
5 provision or application. To this end, the provisions of this  
6 chapter are severable.

**§32B-4-2. Saving provisions.**

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

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

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

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

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

*Bob Schuman*  
.....  
Chairman Senate Committee

*Joe F. Smith*  
.....  
Chairman House Committee

Originating in the Senate.

In effect ninety days from passage.

*Carroll E. Ebbens*  
.....  
Clerk of the Senate

*Gregg H. Boy*  
.....  
Clerk of the House of Delegates

*Earl Ray Tomblin*  
.....  
President of the Senate

*John W. Rowley*  
.....  
Speaker House of Delegates

The within *affirmed* this the *2nd*  
Day of *April*, 1999

*Jeff Gueren*  
.....  
Governor

PRESENTED TO THE

GOVERNOR

Date

4/1/99

Time

10:30 am