

§ 78D-4. Exempt transactions.

- (a) The prohibitions in G.S. 78D-2 shall not apply to the following:
- (1) An account, agreement or transaction within the exclusive jurisdiction of the Commodity Futures Trading Commission as granted under the Commodity Exchange Act;
 - (2) A commodity contract for the purchase of one or more precious metals which requires, and under which the purchaser receives, within 28 calendar days from the payment in good funds of any portion of the purchase price, physical delivery of the quantity of the precious metals purchased by such payment, provided that, for purposes of this paragraph, physical delivery shall be deemed to have occurred if, within such twenty-eight-day period, such quantity of precious metals purchased by such payment is delivered (whether in specifically segregated or fungible bulk form) into the possession of a depository (other than the seller) which is either (i) a financial institution, (ii) a depository the warehouse receipts of which are recognized for delivery purposes for any commodity on a contract market designated by the Commodity Futures Trading Commission, (iii) a storage facility licensed or regulated by the United States or any agency thereof, or (iv) a depository designated by the Administrator, and such depository (or other person which itself qualifies as a depository as aforesaid) or a qualified seller issues and the purchaser receives, a certificate, document of title, confirmation or other instrument evidencing that such quantity of precious metals has been delivered to the depository and is being and will continue to be held by the depository on the purchaser's behalf, free and clear of all liens and encumbrances, other than liens of the purchaser, tax liens, liens agreed to by the purchaser, or liens of the depository for fees and expenses, which have previously been disclosed to the purchaser;
 - (3) A commodity contract solely between persons engaged in producing, processing, using commercially or handling as merchants, each commodity subject thereto, or any by-product thereof; or
 - (4) A commodity contract under which the offeree or the purchaser is a person referred to in G.S. 78D-3 of this Chapter, an insurance company, an investment company as defined in the Investment Company Act of 1940, or an employee pension and profit sharing or benefit plan (other than a self-employed individual retirement plan, or individual retirement account).
- (b) For the purposes of G.S. 78D-4(a)(2), a qualified seller is a person who:
- (1) Is a seller of precious metals and has a tangible net worth of at least \$5,000,000 (or has an affiliate who has unconditionally guaranteed the obligations and liabilities of the seller and the affiliate has a tangible net worth of at least \$5,000,000);
 - (2) Has stored precious metals with one or more depositories on behalf of customers for at least the previous three years;
 - (3) Prior to any offer, and annually thereafter, files with the Administrator a sworn notice of intent to act as a qualified seller under G.S. 78D-4(a)(2), containing:
 - a. The seller's name and address, names of its directors, officers, controlling shareholders, partners, principals, and other controlling persons;

- b. The address of its principal place of business, state and date of incorporation or organization, and the name and address of seller's registered agent in this State;
 - c. A statement that the seller (or a person affiliated with the seller who has guaranteed the obligations and liabilities of the seller) has a tangible net worth of at least \$5,000,000;
 - d. Depository information including:
 - 1. The name and address of the depository or depositories that the seller intends to use;
 - 2. The name and address of each and every depository where the seller has stored precious metals on behalf of customers for the previous three years; and
 - 3. Independent verification from each and every depository named in (3)d2 of this section that the seller has in fact stored precious metals on behalf of the seller's customers for the previous three years and a statement of total deposits made during this period.
 - e. Financial statements for the seller (or the person affiliated with the seller who has guaranteed the obligations and liabilities of the seller) for the past three years, audited by an independent certified public accountant, together with the accountant's report;
 - f. A statement describing the details of all civil, criminal, or administrative proceedings currently pending or adversely resolved against the seller or its directors, officers, controlling shareholders, partners, principals, or other controlling persons during the past 10 years including: (i) civil litigation and administrative proceedings involving securities or commodities violations, or fraud, (ii) criminal proceedings, (iii) denials, suspensions or revocations of securities or commodities licenses or registrations, and (iv) suspensions or expulsions from membership in, or associations with, self-regulatory organizations registered under the Securities Exchange Act of 1934, or the Commodity Exchange Act; or (v) a statement that there were no such proceedings.
- (4) Notifies the Administrator within 15 days of any material changes in the information provided in the notice of intent; and
 - (5) Annually furnishes to each purchaser for whom the seller is then storing precious metals, and to the Administrator, a report by an independent certified public accountant of the accountant's examination of the seller's precious metals storage program that includes a reconciliation of the total amount of depository confirmations issued by all depositories where the seller has stored precious metals to the total amount of all confirmations issued to customers by the seller.

(c) The Administrator may, upon request by the seller, waive any of the exemption requirements in G.S. 78D-4(b), conditionally or unconditionally.

(d) The Administrator may, by order, deny, suspend, revoke or place limitations on the authority to engage in business as a qualified seller under G.S. 78D-4(a)(2) if the Administrator finds that the order is in the public interest and that the person, the person's officers, directors, partners, agents, servants or employees, any person occupying a similar status or performing

similar functions, any person who directly or indirectly controls or is controlled by the seller, or any of them, the seller's affiliates or subsidiaries:

- (1) Has filed a notice of intention under G.S. 78D-4(c) with the Administrator or the designee of the Administrator which was incomplete in any material respect or contained any statement which was, in light of the circumstances under which it was made, false or misleading with respect to any material fact;
 - (2) Has, within the last 10 years, pled guilty or nolo contendere to, or been convicted of any crime indicating a lack of fitness to engage in the investment commodity business;
 - (3) Has been permanently or temporarily enjoined by any court of competent jurisdiction from engaging in, or continuing, any conduct or practice which injunction indicates a lack of fitness to engage in the investment commodities business;
 - (4) Is the subject of an order of the Administrator denying, suspending, or revoking the person's license as a securities broker-dealer, sales representative, or investment adviser;
 - (5) Is the subject of any of the following orders which are currently effective and which were issued within the last five years:
 - a. An order by the securities agency or Administrator of another state, Canadian province or territory, the Securities and Exchange Commission, or the Commodity Futures Trading Commission, entered after notice and opportunity for hearing, denying, suspending, or revoking the person's registration as a futures commission merchant, leverage transaction merchant, introducing broker, commodity trading adviser, commodity pool operator, securities broker-dealer, sales representative, or investment adviser, or the substantial equivalent of those terms;
 - b. Suspension or expulsion from membership in, or association with, a self-regulatory organization registered under the Securities Exchange Act of 1934 or the Commodity Exchange Act;
 - c. A United States Postal Service fraud order;
 - d. A cease and desist order entered after notice and opportunity of hearing by the Administrator or the securities agency or Administrator of any other state, Canadian province or territory, the Securities and Exchange Commission, or the Commodity Futures Trading Commission;
 - e. An order entered by the Commodity Futures Trading Commission denying, suspending or revoking registration under the Commodity Exchange Act.
 - (6) Has engaged in an unethical or dishonest act or practice in the investment commodities or securities business; or
 - (7) Has failed reasonably to supervise sales representatives or employees.
- (e) If the public interest or the protection of investors so requires, the Administrator may, by order, summarily deny or suspend the exemption for a qualified seller. Upon the entry of the order, the Administrator shall promptly notify the person claiming said status that an order has been entered and the reasons therefor and that within 20 days after the receipt of a written request the matter will be scheduled for hearing. The provisions of G.S. 78D-30 shall apply with respect to all subsequent proceedings.

(f) If the Administrator finds that any applicant or qualified seller is no longer in existence or has ceased to do business or is subject to an adjudication of mental incompetence or to the control of a committee, conservator, or guardian, or cannot be located after reasonable search, the Administrator may, by order, deny or revoke the exemption for a qualified seller.

(g) The Administrator may issue rules or orders prescribing the terms and conditions of all transactions and contracts covered by the provisions of this Chapter which are not within the exclusive jurisdiction of the Commodity Futures Trading Commission as granted by the Commodity Exchange Act, exempting any person or transaction from any provision of this Chapter conditionally or unconditionally and otherwise implementing the provisions of this Chapter for the protection of purchasers and sellers of commodities. (1989, c. 634, s. 1; 2001-126, s. 7.)