

SENATE BILL NO. 378  
INTRODUCED BY S. KITZENBERG

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING AND CLARIFYING THE LAWS GOVERNING CERTIFIED CAPITAL COMPANIES; PROVIDING FOR CERTIFICATION OF NEW CAPITAL COMPANIES; PROVIDING REQUIREMENTS FOR CERTIFIED CAPITAL COMPANIES; PROVIDING FOR QUALIFIED INVESTMENTS IN QUALIFIED BUSINESSES; PROVIDING MONITORING AND REPORTING REQUIREMENTS; PROVIDING FOR TAX CREDITS FOR QUALIFIED INVESTMENTS; AMENDING SECTION 30-10-105, MCA; REPEALING SECTIONS 90-8-104, 90-8-106, 90-8-201, 90-8-202, 90-8-203, 90-8-204, 90-8-205, 90-8-301, 90-8-302, 90-8-303, 90-8-304, 90-8-305, 90-8-311, 90-8-312, 90-8-313, AND 90-8-321, MCA; AND PROVIDING AN EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Definitions.** As used in this chapter, the following definitions apply:

(1) "Affiliate" means, with respect to a certified capital company or a certified investor, any of the following:

(a) a person who, directly or indirectly, owns, controls, or holds power to vote for 10% or more of the outstanding voting securities or other voting ownership interests of the certified capital company or certified investor;

(b) a person, 10% of whose outstanding voting securities or other voting ownership interests are directly or indirectly owned, controlled, or held with power to vote by the certified capital company or certified investor;

(c) a person directly or indirectly controlling, controlled by, or under common control with the certified capital company or certified investor;

(d) a partnership in which the certified capital company or certified investor is a general partner; or

(e) a person who is an officer, director, or agent of the certified capital company or certified investor or who is an immediate family member of the officer, director, or agent.

(2) "Certified capital company" means a person that has been certified by the department under [section 2] and that has not been decertified under [section 9(3) or (4)].

(3) "Certified capital company tax credit" means the tax credit under [section 11].

(4) "Certified capital investment" means an investment in a qualified business that is certified under

[section 4(2)] and that fully funds either the investor's equity interest in a certified capital company, a qualified debt instrument that a certified capital company issues, or both.

(5) "Certified investor" means a person who makes a certified capital investment.

(6) "Department" means the department of commerce provided for in 2-15-1801.

(7) "Investment date" means, with respect to each investment pool, the date on which the last certified capital investment that is part of that investment pool was invested in the certified capital company.

(8) "Investment pool" means the aggregate of all certified capital investments in a certified capital company that are made as part of the same transaction, except that investments received more than 30 days apart may not be considered part of the same investment pool.

(9) "Qualified business" means a business that is a qualified business under [section 4].

(10) "Qualified debt instrument" means a debt instrument that a certified capital company issues at par value or at a premium and that has an original maturity date of at least 5 years from the date on which it was issued. The debt instrument must have a repayment schedule that is no faster than a level principal amortization, and until the certified capital company may make distributions other than qualified distributions, the interest, distribution, or payment features of the debt instrument may not be related to the certified capital company's profitability or the performance of its investment portfolio.

(11) "Qualified distribution" means a distribution or payment by a certified capital company to its equity holders for any of the following:

(a) the costs of forming, syndicating, managing, or operating the certified capital company;

(b) an annual management fee that does not exceed 2.5% of the certified capital company's total certified capital investments;

(c) reasonable and necessary fees paid for professional services related to the operation of the certified capital company;

(d) a projected increase in federal or state taxes of the equity owners of the certified capital company, including penalties and interest on those taxes, if those amounts are related to the certified capital company's ownership, management, or operation;

(12) "Qualified investment" means an investment in a qualified business by a certified capital company that meets the requirements under [section 4(1)].

**NEW SECTION. Section 2. Certification of capital companies.** (1) The department shall promulgate rules establishing procedures under which a person may apply to become a certified capital company. The

department shall grant or deny an application for certification under this section within 30 days of the date of application. If the department denies certification, the department shall include with the denial a detailed description of the grounds for the refusal, including suggestions for removal of those grounds.

(2) The department shall certify a person as a certified capital company if the department determines that all of the following conditions have been met:

(a) the person is a partnership, corporation, trust, or limited liability company, whether organized for profit or not for profit, that has as its primary business activity the investment of cash in qualified businesses;

(b) the person has a net worth, at the time of application, of at least \$500,000 and has at least \$500,000 in cash, cash equivalents, and marketable securities;

(c) the directors, officers, general partners, trustees, managers, or members or persons having a similar function are familiar with the requirements of this chapter;

(d) each of at least two officers, directors, general partners, trustees, managers, or members have at least 2 years of experience in the venture capital industry;

(e) the person has included the statements required under [section 3(1)] in any offering material involving the sale of securities; and

(f) the person has paid a nonrefundable application fee of \$7,500.

**NEW SECTION. Section 3. Investments in certified capital companies.** (1) Any offering material involving the sale of securities of a certified capital company must include all of the following statements:

(a) "By authorizing the formation of a certified capital company, the state does not necessarily endorse the quality of management or the potential for earnings of the company and is not liable for damages or losses to a certified investor in the company. Use of the word "certified" in an offering is not a recommendation or endorsement of the investment by the State of Montana Department of Commerce."

(b) "Investments in a prospective certified capital company prior to the time the company is certified are not eligible for a certified capital company tax credit under [section 11]. Investments in a certified capital company are not eligible for a certified capital company tax credit under [section 11] unless the proposed investment is certified under [section 3(2)(b)] before the investment is made. If certain statutory provisions are violated, the state may require forfeiture of unused certified capital company investment credits and repayment of used certified capital company investment credits."

(2) (a) A person may apply to make a certified capital investment in a certified capital company by providing notice under this subsection (2) to the department on a form specified by the department. The notice

must include the name of the person, the name of the certified capital company, the amount of the investment, and any other information specified by the department. The notice must also include an undertaking by the person to make the investment within 5 days after the department notifies the person that the investment has been certified.

(b) The department may certify an investment under this subsection (2) only if, after the certification, the department will not have certified a total of more than \$50 million in investments under this subsection (2).

(c) Prior to August 1, 2003, the department may not certify an investment under this subsection (2) if, after the certification, the investor, together with all affiliates of the investor, would have more than \$10 million in certified capital investments.

(d) If, as a result of the limitations under subsection (2)(b) or (2)(c), the department may not certify the full amount requested in applications for certified capital investments submitted under subsection (2)(a), the department shall allocate the amounts available for certification in order of priority based on the date on which the application was filed. If the amounts available for certification are insufficient to certify the full amount of all applications for certified capital investments that are submitted on the same day, the department shall prorate the available amount on the basis of the amount that the investor has committed to invest in the certified capital company under subsection (2)(a).

(3) A certified investor may not, individually or with or through one or more affiliates, own 10% or more of the equity securities in, be a general partner or manager of, or otherwise control the investments of the certified capital company. This subsection does not preclude a certified investor from exercising its legal rights and remedies, including interim management of a certified capital company, in the event that a certified capital company is in default of its statutory or contractual obligations to the certified investor.

**NEW SECTION. Section 4. Qualified businesses.** (1) A business is a qualified business if all of the following requirements are met as of the time that a certified capital company or any affiliate of the certified capital company makes its first investment in the business:

(a) the business is headquartered in this state and its principal business operations are located in this state;

(b) the business is in need of venture capital and is unable to obtain conventional financing, as defined by the department by rule;

(c) the business has no more than 100 employees, at least 75% of whom are employed in this state;

(d) during its 2 most recent fiscal years, the business had, together with all of its consolidated affiliates,

an average annual net income, after federal income taxes and excluding any carryover losses, of not more than \$2 million, as determined in accordance with generally accepted accounting principles;

(e) the business has, together with its consolidated affiliates, a net worth that is not in excess of \$5 million;

(f) the business is not predominantly engaged in professional services provided by accountants, lawyers, or physicians;

(g) the business is not engaged in the development of real estate for resale; and

(h) the business is not engaged in banking or lending and does not make any loans to or investments in certified capital companies.

(2) A certified capital company may, prior to making an investment in a specific business, request a written opinion from the department that a business in which it proposes to invest is a qualified business. If the department determines that the business meets the requirements under subsection (1), the department shall issue a written opinion certifying that the business is a qualified business.

**NEW SECTION. Section 5. Operation of certified capital companies.** In order for a certified capital company to prevent disqualification of an investment pool under [section 9], the certified capital company shall ensure that the investment pool makes qualified investments in accordance with the schedule under [section 6]. An investment is a qualified investment if the investment meets all of the following requirements:

(1) the investment is a cash investment in a qualified business for the purchase of any of the following:

(a) an equity security of the qualified business;

(b) a debt security of the qualified business if the debt has a maturity of at least 5 years and if one of the following conditions is met:

(i) the debt is unsecured; or

(ii) the debt is convertible into equity securities or equity participation instruments such as options or warrants;

(2) as a condition of the investment, the qualified business agrees not to use the proceeds from the investment for the purpose of relocating its operations;

(3) as a condition of the investment, the qualified business agrees, as long as the certified capital company continues to hold the investment, not to relocate its headquarters out of this state;

(4) as a condition of the investment, the qualified business agrees, as long as the certified capital company continues to hold the investment, to maintain at least 75% of its employees in this state;

(5) as a condition of the investment, the qualified business agrees, as long as the certified capital company continues to hold the investment, to maintain at least 75% of its employees at worksites that were maintained by the qualified business at the time that the investment was made, unless the qualified business obtains an exemption from the department under this subsection. The department may grant an exemption unless it determines that the qualified business is locating the employees at new sites to take advantage of lower wage rates in the areas where the new sites are located.

**NEW SECTION. Section 6. Qualified investment schedule.** (1) A certified capital company shall ensure that each of its investment pools makes qualified investments according to the following schedule:

(a) within 3 years after the investment date for a particular investment pool, at least 30% of the investment pool must be placed in qualified investments; and

(b) within 5 years after the investment date for a particular investment pool, at least 50% of the investment pool must be placed in qualified investments.

(2) The proceeds of all capital of a qualified investment returned to a certified capital company by a qualified business may be placed in new qualified investments, which shall count toward the percentage requirements under [section 8(3)] and subsection (1) of this section. The department shall promulgate rules governing the extent to which a reinvestment of proceeds from the sale of a qualified investment in a qualified business may be counted toward the percentage requirements under [sections 8(3) and 9(4)(a)(ii)] and subsection (1) of this section. These rules may provide that reinvested proceeds from the sale of short-term investments may be only partially counted toward the percentage requirements under [sections 8(3) and 9(4)(a)(ii)] and subsection (1) of this section. The rules may also provide that proceeds from the sale of an investment in a qualified business that are reinvested in that qualified business or an affiliate of that qualified business may be only partially counted toward the percentage requirements under [sections 8(3) and 9(4)(a)(ii)] and subsection (1) of this section.

(3) All certified capital investments in a certified capital company that are not invested in qualified investments may be held or invested by the certified capital company as it considers appropriate, except that a certified capital company may not invest certified capital investments in an insurance company or in an affiliate of an insurance company.

(4) A certified capital company may not make a qualified investment in a person if, at the time of the investment, more than 15% of the total certified capital investments of the certified capital company would be invested in that person and affiliates of that person.

(5) A certified capital company may not be managed or controlled by or have a general partner that is an insurance company or an affiliate of an insurance company.

**NEW SECTION. Section 7. Reporting requirements and fees.** (1) As soon as practicable after the receipt of a certified capital investment, a certified capital company shall report all of the following to the department:

(a) the name of the certified investor from which the certified capital investment was received, including the certified investor's tax identification number;

(b) the amount of the certified capital investment;

(c) the date on which the certified capital investment was received by the certified capital company; and

(d) the investment date for the investment pool of which the certified capital investment will be a part.

(2) As soon as practicable after the receipt of information by the certified capital company that a qualified business has violated an agreement made under [section 5], the certified capital company shall notify the department of the violation and the facts giving rise to the violation.

(3) On or before each January 31, a certified capital company shall report all of the following to the department:

(a) the amount of the certified capital company's certified capital investments at the end of the preceding year;

(b) whether the certified capital company has invested more than 15% of its total certified capital investments in any one person;

(c) all qualified investments that the certified capital company has made during the previous calendar year and the investment pool from which each qualified investment was made.

(4) Within 90 days of the end of the certified capital company's fiscal year, the certified capital company shall provide to the department a copy of its annual audited financial statements, including the opinion of an independent certified public accountant. The audit must address the methods of operation and conduct of the business of the certified capital company to determine whether the certified capital company is complying with this chapter and the rules adopted under this chapter, including whether certified capital investments have been invested in the manner required under [section 5]. The financial statements provided under this subsection must be segregated by investment pool and must be separately audited on that basis to allow the department to determine whether the certified capital company is in compliance with [section 6].

(5) On or before each January 31, a certified capital company shall pay a nonrefundable certification fee

of \$5,000 to the department, unless January 31 falls within 6 months of the date on which the certified capital company was certified under [section 2].

(6) If the department determines that a document submitted by a certified capital company under this section contains a trade secret, as defined in 30-14-402, or a business secret, that document is not subject to the right of inspection and copying under 2-6-102.

**NEW SECTION. Section 8. Distributions.** A certified capital company may make a distribution only if one of the following conditions is met:

- (1) the distribution is a qualified distribution;
- (2) the department made a written determination that the distribution may be made without adversely affecting the ability of the certified capital company to place, in qualified investments, an amount equal to 100% of the certified capital investments in the investment pool from which the distribution is to be made;
- (3) the certified capital company has placed in qualified investments an amount equal to 100% of the certified capital investments in the investment pool; and
- (4) the distribution is a payment of principal or interest owed to a debt holder of a certified capital company, even if the debt holder is also a holder of equity and even if the indebtedness is a certified capital investment.

**NEW SECTION. Section 9. Compliance reviews -- decertification -- disqualification.** (1) The department shall conduct an annual review of each certified capital company to determine if the certified capital company is complying with the requirements of this chapter, to advise the certified capital company regarding the status of its investments as qualified investments, and to ensure that no investment has been made in violation of this chapter. The cost of the annual review must be paid by each certified capital company according to a reasonable fee schedule adopted by the department.

(2) Any material violation of [section 6] is a ground for disqualification of the noncomplying investment pool. If the department determines that the certified capital company is not in compliance with [section 6] with respect to an investment pool, it shall send a written notice to the certified capital company and the commissioner of insurance stating that the investment pool has been disqualified.

(3) Any material violation of [section 6(3), (4), or (5) or 7(1), (2), (3), or (4)] is a ground for decertification of the noncomplying certified capital company. If the department determines that the certified capital company is not in compliance with [section 6(3), (4), or (5) or 7(1), (2), (3), or (4)], the department shall send a written



notice to the certified capital company that the certified capital company may be subject to decertification in 120 days from the date on which the notice was mailed unless the certified capital company brings itself into full compliance with [section 6(3), (4), or (5) or 7(1), (2), (3), or (4)]. If at the end of the 120-day period the certified capital company is not in compliance with [section 6(3), (4), or (5) or 7(1), (2), (3), or (4)], the department shall send a notice to the certified capital company and the commissioner of insurance stating that the certified capital company has been decertified.

(4) (a) A certified capital company may voluntarily decertify itself as a certified capital company if any of the following conditions are met:

(i) it has been at least 10 years since the last certified capital investment was made in the certified capital company;

(ii) the certified capital company has placed in qualified investments an amount equal to 100% of the certified capital investment in the certified capital company.

(b) A certified capital company wishing to decertify itself under this subsection (4) shall send a notice to the department certifying that it is eligible for decertification under subsection (4)(a). The decertification is effective on the date that the notice under this subsection (4)(b) is received by the department.

(5) Decertification of a certified capital company or an investment pool has the effects specified in [section 11].

(6) The department shall notify a certified investor when the certified capital company tax credit arising from a certified investment is no longer subject to recapture and forfeiture under [section 11].

**NEW SECTION. Section 10. Department evaluation of program.** Beginning on March 31, 2004, and on March 31 of each succeeding even-numbered year, the department shall submit a report to the legislature under 5-11-210 regarding the program under this chapter. The report must include all of the following:

(1) the total amount of certified capital investments made during the previous 2 calendar years, as well as the total amount of certified capital investments made since July 1, 2003;

(2) statistical information on the qualified investments made by certified capital companies during the previous 2 calendar years; and

(3) the department's assessment of the number of jobs created in this state during the previous 2 calendar years as a result of the certified capital company program under this chapter.

**NEW SECTION. Section 11. Tax credit.** (1) A certified investor that makes a certified capital

investment may claim a credit against the taxes due under Title 15, chapter 30 or 31, for 10 years beginning with the year of the investment. The certified investor may claim either 10% of the certified investment or the amount by which the sum of the certified investor's certified capital investments and the qualified investments exceeds the certified investor's qualified investments in the tax year before the certified investor first claimed the credit under this section, whichever is less.

(2) If the credit under subsection (1) is not entirely offset against the taxes otherwise due under Title 15, chapter 30 or 31, the unused balance may be carried forward and credited against those taxes in the following years to the extent that it is not offset by those taxes otherwise due in all the years between the year in which the investment was made and the year in which the carryforward credit is claimed.

(3) If a certified capital company is decertified or an investment pool is disqualified under [section 9] before the certified capital company fulfills the investment requirement under [section 6(1)(a)] with respect to the investment pool, any certified investor that has received a credit under this section with respect to that investment pool shall repay that credit to the department of revenue for deposit in the general fund and may not claim more credit in respect to that investment pool.

(4) If a certified capital company fulfills the investment requirement under [section 6(1)(b)] with respect to an investment pool but the certified capital company is decertified or an investment pool is disqualified under [section 9] before the certified capital company fulfills the investment requirement under [section 6(1)(b)] for that investment pool, any insurer that has received a credit under this section with respect to that investment pool shall repay all credits that were claimed for tax years after the tax year that includes the third anniversary of the investment date of the investment pool and may claim no more credits for tax years after the tax year that includes the third anniversary of the investment date of the investment pool.

(5) A certified investor may sell a credit under this section to another certified investor that is subject to taxation under Title 15, chapter 30 or 31, if the certified investor notifies the department of revenue of the sale and includes with that notification a copy of the transfer documents.

(6) This state may not impose a new tax or change an existing tax in order to nullify the credit created under this section.

**Section 12.** Section 30-10-105, MCA, is amended to read:

**"30-10-105. Exempt transactions -- rulemaking.** Except as expressly provided in this section, 30-10-201 through 30-10-207 and 30-10-211 do not apply to the following transactions:

(1) a nonissuer isolated transaction, whether effected through a broker-dealer or not. A transaction is

presumed to be isolated if it is one of not more than three transactions during the prior 12-month period.

(2) (a) a nonissuer distribution of an outstanding security by a broker-dealer registered pursuant to 30-10-201 if:

(i) quotations for the securities to be offered or sold (or the securities issuable upon exercise of any warrant or right to purchase or subscribe to the securities) are reported by the automated quotations system operated by the national association of securities dealers, inc., or by any other quotation system approved by the commissioner by rule; or

(ii) 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 3 preceding fiscal years or if the issuer and any predecessors have been in existence for less than 3 years and there has been no default in the payment of principal, interest, or dividends on the security.

(b) The commissioner may by order deny or revoke the exemption specified in subsection (2)(a) with respect to a specific security. Upon the entry of an order, the commissioner shall promptly notify all registered broker-dealers that it has been entered and give the reasons for the order and shall notify them that within 15 days of the receipt of a written request, the matter will be set for hearing. If a hearing is not requested and is not ordered by the commissioner, the order remains 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. An order under this subsection may not operate retroactively. A person may not be considered to have violated parts 1 through 3 of this chapter by reason of any offer or sale effected after the entry of an order under this subsection if the person sustains the burden of proof that the person did not know and in the exercise of reasonable care could not have known of the order.

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

(4) a transaction between the issuer or other person on whose behalf the offering is made and an underwriter or between underwriters;

(5) a transaction by an executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator in the performance of official duties;

(6) a transaction executed by a bona fide pledgee without any purpose of evading parts 1 through 3 of

this chapter;

(7) an 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 a fiduciary capacity;

(8) (a) a transaction pursuant to an offer made in this state directed by the offeror to not more than 10 persons, ~~other than those designated in subsection (7)~~, during any period of 12 consecutive months, if:

(i) the seller reasonably believes that all the buyers are purchasing for investment; and

(ii) a commission or other remuneration is not paid or given directly or indirectly for soliciting a prospective buyer. However, a commission may be paid to a registered broker-dealer if the securities involved are registered with the United States securities and exchange commission under the federal Securities Act of 1933, as amended.

(b) any transaction pursuant to an offer made in this state directed by the offeror to not more than 25 persons, other than those designated in subsection (7), during any period of 12 consecutive months if:

(i) the seller reasonably believes that all the buyers are purchasing for investment;

(ii) a commission or other remuneration is not paid or given directly or indirectly for soliciting a prospective buyer; however, a commission may be paid to a registered broker-dealer if the securities involved are registered with the United States securities and exchange commission under the federal Securities Act of 1933, as amended; and

(iii) the offeror applies for and obtains the written approval of the commissioner prior to making any offers in this state and pays a filing fee that must accompany the application for approval. The commissioner may deny an application.

(c) For the purpose of the exemptions provided for in this subsection (8), an offer to sell is made in this state, whether or not the offeror or any of the offerees are then present in this state, if the offer either originates from this state or 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).

(9) an offer or sale of a preorganization certificate or subscription if:

(a) a commission or other remuneration is not paid or given directly or indirectly for soliciting a prospective subscriber;

(b) the number of subscribers does not exceed 25; and

(c) a payment is not made by a subscriber;

(10) a 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 90 days of their issuance, if:

(a) a commission or other remuneration, ~~{other than a standby commission}~~, is not 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 either subsection (10)(a) or the notice specifying the terms of the offer;

(11) an offer, but not a sale, of a security for which registration statements have been filed under both parts 1 through 3 of this chapter and the Securities Act of 1933 if a stop, refusal, denial, suspension, or revocation order is not in effect and a public proceeding or examination looking toward an order is not pending under either law;

(12) an offer, but not a sale, of a security for which a registration statement has been filed under parts 1 through 3 of this chapter and the commissioner does not disallow the offer in writing within 10 days of the filing;

(13) the issuance of a security dividend, whether the corporation distributing the dividend is the issuer of the security or not, if nothing of value is given by security holders for the distribution other than the surrender of a right to a cash dividend when the security holder can elect to take a dividend in cash or in securities;

(14) a transaction incident to a right of conversion, a statutory or judicially approved reclassification, or a recapitalization, reorganization, quasi-reorganization, stock split, reverse stock split, merger, consolidation, or sale of assets;

(15) a transaction in compliance with rules that the commissioner may adopt to serve the purposes of 30-10-102. The commissioner may require that 30-10-201 through 30-10-207 and 30-10-211 apply to any transactional exemptions adopted by rule.

(16) a transaction in the securities of a certified ~~Montana~~ capital company or a certified ~~Montana~~ small business investment capital company, as defined in ~~90-8-104~~ [section 1], if the company first files all disclosure documents, along with a consent to service of process, with the commissioner. The commissioner may not charge a fee for the filing.

(17) the sale of a commodity investment contract traded on a commodities exchange recognized by the commissioner at the time of sale;

(18) a transaction within the exclusive jurisdiction of the commodity futures trading commission as granted under the Commodity Exchange Act;

(19) a transaction that:

(a) involves the purchase of one or more precious metals;

(b) requires, and under which the purchaser receives within 7 calendar days after payment in good funds of any portion of the purchase price, physical delivery of the quantity of the precious metals purchased. For the purposes of this subsection, physical delivery is considered to have occurred if, within the 7-day period, the quantity of precious metals, whether in specifically segregated or fungible bulk, purchased by the payment is delivered into the possession of a depository, other than the seller, that:

(i) (A) is a financial institution, meaning a bank, savings institution, or trust company organized under or supervised pursuant to the laws of the United States or of this state;

(B) is 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; or

(C) is a storage facility licensed by the United States or any agency of the United States; and

(ii) issues, and the purchaser receives, a certificate, document of title, confirmation, or other instrument evidencing that the quantity of precious metals has been delivered to the depository and is being and will continue to be held on the purchaser's behalf, free and clear of all liens and encumbrances other than:

(A) liens of the purchaser;

(B) tax liens;

(C) liens agreed to by the purchaser; or

(D) liens of the depository for fees and expenses that previously have been disclosed to the purchaser.

(c) requires the quantity of precious metals purchased and delivered into the possession of a depository, as provided in subsection (19)(b), to be physically located within Montana at all times after the 7-day delivery period provided in subsection (19)(b), and the precious metals are in fact physically located within Montana at all times after that delivery period;

(20) a transaction involving a commodity investment contract solely between persons engaged in producing, processing, using commercially, or handling as merchants each commodity subject to the contract or any byproduct of the commodity;

(21) an offer or sale of a security to an employee of the issuer, pursuant to an employee stock ownership plan qualified under section 401 of the Internal Revenue Code; or

(22) (a) an offer or sale of securities by a cooperative association organized under the provisions of Title 35, chapter 15 or 17, or under the laws of another state that are substantially the same as the provisions of Title 35, chapter 15 or 17, if the offer and sale are only to members of the cooperative association or the purchase of the securities is necessary or incidental to establishing membership in the cooperative association;

(b) a cooperative organized under the laws of another state may not take advantage of the exemption created by this subsection (22) unless, not less than 10 days before the issuance or delivery of the securities, the cooperative has furnished the commissioner with a general written description of the transaction and any other information the commissioner may require by rule or otherwise. The commissioner shall promulgate rules establishing a list of states whose laws are considered substantially the same as Title 35, chapter 15 or 17, for the purposes of this subsection (22)."

NEW SECTION. **Section 13. Repealer.** Sections 90-8-104, 90-8-106, 90-8-201, 90-8-202, 90-8-203, 90-8-204, 90-8-205, 90-8-301, 90-8-302, 90-8-303, 90-8-304, 90-8-305, 90-8-311, 90-8-312, 90-8-313, and 90-8-321, MCA, are repealed.

NEW SECTION. **Section 14. Codification instruction.** [Sections 1 through 11] are intended to be codified as an integral part of Title 90, chapter 8, and the provisions of Title 90, chapter 8, apply to [sections 1 through 11].

NEW SECTION. **Section 15. Saving clause.** [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

NEW SECTION. **Section 16. Effective date.** [This act] is effective July 1, 2003.

- END -

