CHAPTER 73

State Commodity Code

ARTICLE 1

Commodity Transactions

**SECTION 39‑73‑10.** Definitions.

As used in this chapter:

(1) "Administrator" means the South Carolina Secretary of State.

(2) "Board of Trade" means a person or group of persons engaged in buying or selling a commodity or receiving it for sale on consignment, whether the person or group of persons is characterized as a board of trade, exchange, or other form of marketplace.

(3) "CFTC Rule" means a rule, regulation, or order of the Commodity Futures Trading Commission in effect on the effective date of this chapter and their amendments unless the administrator, within ten days following the effective date of an amendment disallows its application to this chapter by regulation.

(4) "Commodity" means, except as otherwise specified by the administrator, an agricultural, a grain, or a livestock product or by‑product, a metal or mineral, including a precious metal, a gem, or gemstone whether characterized as precious, semi‑precious, or otherwise, a fuel whether liquid, gaseous, or otherwise, a foreign currency, and other goods, articles, products, or items. It does not include:

(a) a numismatic coin whose fair market value is at least fifteen percent higher than the value of the metal it contains;

(b) real property or a timber, an agricultural, or a livestock product grown or raised on real property and offered or sold by the owner or lessee of the property; or

(c) a work of art offered or sold by art dealers at public auction or offered or sold through a private sale by the owner.

(5) "Commodity Contract" means an account, an agreement, or a contract for the purchase or sale, primarily for speculation or investment purposes and not for use or consumption by the offeree or purchaser of one or more commodities, whether for immediate or subsequent delivery or whether delivery is intended by the parties, and whether characterized as a cash contract, deferred shipment or deferred delivery contract, forward contract, futures contract, installment or margin contract, leverage contract, or otherwise. A commodity contract offered or sold, in the absence of evidence to the contrary, is presumed to be offered or sold for speculation or investment purposes. A commodity contract does not include a contract or an agreement which requires and under which the purchaser receives, within twenty‑eight calendar days from the payment in good funds of a portion of the purchase price, physical delivery of the total amount of each commodity to be purchased under the contract or agreement.

(6) "Commodity Exchange Act" means the act of Congress known as the Commodity Exchange Act, as amended, unless the administrator within ten days following the effective date of an amendment, disallows the application to this chapter by regulation.

(7) "Commodity Futures Trading Commission" means the independent regulatory agency established by Congress to administer the Commodity Exchange Act.

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

(a) futures commission merchant;

(b) commodity pool operator;

(c) commodity trading advisor;

(d) introducing broker;

(e) leverage transaction merchant;

(f) an associated person of item (a), (b), (c), (d), or (e);

(g) floor broker;

(h) other person, other than a futures association, required to register with the Commodity Futures Trading Commission.

(9) "Commodity option" means an account, an agreement, or a contract giving a party the right but not the obligation to purchase or sell one or more commodities or one or more commodity contracts, or all of the foregoing, whether characterized as an option, privilege, indemnity, bid, offer, put, call, advance guaranty, decline guaranty, or otherwise. It does not include an option traded on a national securities exchange registered with the United States Securities and Exchange Commission.

(10) "Financial institution" means a bank, savings institution, or trust company organized under, or supervised pursuant to the laws of the United States or its states.

(11) "Offer" includes every offer to sell, offer to purchase, or offer to enter into a commodity contract or commodity option.

(12) "Person" means an individual, a corporation, a partnership, an association, a joint‑stock company, a trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government. It does not include a contract market designated by the Commodity Futures Trading Commission, a clearinghouse of it, a national securities exchange registered with the Securities and Exchange Commission, or an employee, an officer, or a director of the contract market, clearinghouse, or exchange acting solely in that capacity.

(13) "Precious metal" means the following in either coin, bullion, or other form:

(a) silver;

(b) gold;

(c) platinum;

(d) palladium;

(e) copper;

(f) other items the administrator may specify by regulation.

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

HISTORY: 1993 Act No. 68, Section 1, eff 200 days after approval (approved May 14, 1993).

**SECTION 39‑73‑20.** Commodity transactions under commodity contract or option restricted.

Except as otherwise provided in Section 39‑73‑30 or Section 39‑73‑40 no person may sell or purchase or offer to sell or purchase a commodity under commodity contract or under commodity option or offer to enter into or enter into as seller or purchaser a commodity contract or a commodity option.

HISTORY: 1993 Act No. 68, Section 1, eff 200 days after approval (approved May 14, 1993).

**SECTION 39‑73‑30.** Purchasers or sellers as to whom prohibition not applicable.

(A) The prohibitions in Section 39‑73‑20 do not apply to transactions offered by and in which any of the following persons, or an employee, an officer, or a director of them acting solely in that capacity, is the purchaser or seller:

(1) a person registered with the Commodity Futures Trading Commission as a futures commission merchant or as a leverage transaction merchant whose activities require registration;

(2) a person registered with the Securities and Exchange Commission as a broker‑dealer whose activities require registration;

(3) a person affiliated with, and whose obligations and liabilities under the transaction are guaranteed by, a person referred to in item (1) or (2);

(4) a person who is a member of a contract market designated by the Commodity Futures Trading Commission, or clearinghouse of it;

(5) a financial institution;

(6) a person registered under the laws of this State as a securities broker‑dealer whose activities require registration.

(B) The exemptions in this section do not apply to a transaction or an activity prohibited by the Commodity Exchange Act or a CFTC Rule.

HISTORY: 1993 Act No. 68, Section 1, eff 200 days after approval (approved May 14, 1993).

**SECTION 39‑73‑40.** Transactions as to which prohibition not applicable.

(A) The prohibitions in Section 39‑73‑20 do not apply to:

(1) an account, an agreement, or a 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 twenty‑eight calendar days from the payment in good funds of a portion of the purchase price, physical delivery of the quantity of the precious metals purchased by the payment. For purposes of this paragraph physical delivery is deemed to have occurred if, within the twenty‑eight‑day period, the quantity of precious metals purchased by the payment is delivered, whether in specifically segregated or fungible bulk forms into the possession of a depository other than the seller which is:

(a) a financial institution;

(b) a depository the warehouse receipts of which are recognized for delivery purposes for a commodity on a contract market designated by the Commodity Futures Trading Commission;

(c) a storage facility licensed or regulated by the United States or its agencies, or

(d) a depository designated by the administrator. The depository or other person which itself qualifies as a depository or a qualified seller shall issue and the purchaser shall receive a certificate, a 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 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 previously have 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 to the contract or a by‑product of it; or

(4) a commodity contract under which the offeree or the purchaser is a person referred to in Section 39‑73‑30, 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 purposes of item (2) of subsection (A) a qualified seller is a person who:

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

(2) has stored precious metals with one or more depositories on behalf of customers for at least the previous three years;

(3) before an offer and annually files with the administrator a sworn notice of intent to act as a qualified seller under item (2) of subsection (A) containing:

(a) the seller's name and address and 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 the 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 five million dollars;

(d) depository information, including:

(i) the name and address of the depository or depositories that the seller intends to sue;

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

(iii) independent verification from each depository named in sub‑subitem (ii) 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, 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 ten 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;

(iv) suspensions or expulsions from membership in or associations with self‑regulatory organizations registered under the Securities Exchange Act of 1934 or the Commodities Exchange Act;

(v) a statement that there were no proceedings.

(4) notifies the administrator within fifteen days of material changes in the information provided in the notice of intent;

(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.

(C) The administrator, upon request by the seller, may waive one or more of the exemption requirements in subsection (B), conditionally or unconditionally.

(D) The administrator, by order, may deny, suspend, revoke, or place limitations on the authority to engage in business as a qualified seller under item (2) of subsection (A) 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, a person occupying a similar status or performing similar functions, or a person who directly or indirectly controls or is controlled by the seller, or his affiliates or subsidiaries:

(1) has filed a notice of intention under subsection (C) with the administrator or the designee of the administrator which was incomplete in material respect or contained a statement which was, in light of the circumstances under which it was made, false or misleading with respect to a material fact;

(2) within the last ten years, has pled guilty or nolo contendere to, or been convicted of a crime indicating a lack of fitness to engage in the investment commodity business;

(3) has been enjoined permanently or temporarily by a court of competent jurisdiction from engaging in or continuing conduct or a 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 advisor;

(5) is the subject of one or more of the following orders which currently are effective and which were issued within the last five years:

(a) an order by a securities agency or an 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, commodity trading adviser, commodity pool operator, securities broker‑dealer, sales representative, or investment adviser, or the substantial equivalent of the foregoing;

(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 a securities agency or an administrator of another 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 a 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, by order, summarily may deny or suspend the exemption for a qualified seller. Upon the entry of the order the administrator promptly shall notify the person claiming the status that an order has been entered, the reasons for it, and that within thirty days after the receipt of a written request the matter will be set for hearing. Section 39‑73‑355 applies with respect to subsequent proceedings.

(F) If the administrator finds that an applicant or a qualified seller is no longer in existence, has ceased to do business, 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, he, by order, may deny or revoke the exemption for a qualified seller.

(G) The administrator may promulgate regulations prescribing the terms and conditions of transactions and contracts covered by this chapter which are not within the exclusive jurisdiction of the Commodity Futures Trading Commission as granted by the Commodity Exchange Act exempting and conditionally or unconditionally and otherwise implementing this chapter for the protection of purchasers and sellers of commodities.

HISTORY: 1993 Act No. 68, Section 1, eff 200 days after approval (approved May 14, 1993).

**SECTION 39‑73‑50.** Commodity merchant required to be registered, temporarily licensed, or exempt; board of trade must be designated.

(A) No person may engage in a trade or business or otherwise act as a commodity merchant unless he:

(1) is registered or temporarily licensed with the Commodity Futures Trading Commission for each activity constituting the person as a commodity merchant and the registration or temporary license has not expired or been suspended or revoked; or

(2) is exempt from registration by virtue of the Commodity Exchange Act or of a CFTC Rule.

(B) No board of trade may trade or provide a place for the trading of a commodity contract or commodity option required to be traded on or subject to the rules of a contract market designated by the Commodity Futures Trading Commission unless the board of trade has been so designated for the commodity contract or commodity option and the designation has not been vacated, suspended, or revoked.

HISTORY: 1993 Act No. 68, Section 1, eff 200 days after approval (approved May 14, 1993).

**SECTION 39‑73‑60.** Prohibited acts.

No person, directly or indirectly, in or in connection with the purchase or sale of, the offer to sell, the offer to purchase, the offer to enter into, or the entry into of, a commodity contract or commodity option subject to Sections 39‑73‑20, 39‑73‑310, or 39‑73‑40(A)(2) or (4), may:

(1) cheat or defraud or attempt to cheat or defraud a person or employ a device, a scheme, or an artifice to defraud a person;

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

(3) engage in a transaction, an act, a practice, or a course of business, including without limitation a form of advertising or solicitation which operates or would operate as a fraud or deceit upon a person; or

(4) misappropriate or convert the funds, security, or property of a person.

HISTORY: 1993 Act No. 68, Section 1, eff 200 days after approval (approved May 14, 1993).

**SECTION 39‑73‑70.** Agency, vicarious, and joint and several liability.

(A) The act, omission or failure of an official, an agent, or another person acting for an individual, an association, a partnership, a corporation, or a trust within the scope of his employment or office is deemed the act, omission or failure of the individual, association, partnership, corporation, or trust as well as of the official, agent, or other person.

(B) Every person who directly or indirectly controls another person liable under this chapter, every partner, officer, or director of the other person, every person occupying a similar status or performing similar functions, every employee of the other person who materially aids in the violation also is liable jointly and severally with and to the same extent as the other person, unless the person who also is liable by virtue of this section sustains the burden of proof that he did not know and in exercise or reasonable care could not have known of the existence of the facts by reason of which the liability is alleged to exist.

HISTORY: 1993 Act No. 68, Section 1, eff 200 days after approval (approved May 14, 1993).

**SECTION 39‑73‑80.** Chapter not to impair other state securities laws.

Nothing in this chapter impairs, derogates, or otherwise, affects the authority or powers of the administrator under state securities law or the application of this chapter to a person or transaction subject to state securities law.

HISTORY: 1993 Act No. 68, Section 1, eff 200 days after approval (approved May 14, 1993).

**SECTION 39‑73‑90.** Construction and implementation of chapter; no private right of action created.

This chapter may be construed and implemented to effectuate its general purpose to protect investors, to prevent and prosecute illegal and fraudulent schemes involving commodity contracts, and to maximize coordination with federal and other states' laws and the administration and enforcement of them. This chapter does not create rights or remedies upon which actions may be brought by private persons against persons who violate this chapter.

HISTORY: 1993 Act No. 68, Section 1, eff 200 days after approval (approved May 14, 1993).

ARTICLE 3

Administration and Enforcement

**SECTION 39‑73‑310.** Authority of administrator to investigate; publication of information concerning violation; powers and procedures regarding investigations; court order to compel compliance.

(A) The administrator may make investigations, within or without this State, as it finds necessary or appropriate to:

(1) determine whether a person has violated or is about to violate this chapter or a regulation of the administrator; or

(2) aid in enforcement of this chapter.

(B) The administrator may publish information concerning a violation of this chapter or a regulation of the administrator.

(C) For purposes of an investigation or a proceeding under this chapter the administrator or an officer or employee designated by regulation may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of books, papers, correspondence, memoranda, agreements, or other documents or records which the administrator finds to be relevant or material to the inquiry.

(D)(1) If a person does not give testimony or produce the documents required by the administrator or a designated employee pursuant to an administrative subpoena, the administrator or designated employee may apply for a court order compelling compliance with the subpoena or the giving of the required testimony.

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

(a) the circuit court of Richland County or the circuit court of the county where service may be obtained on the person refusing to testify or produce if the person is within this State; or

(b) the appropriate court of the state having jurisdiction over the person refusing to testify or produce if the person is outside this State.

HISTORY: 1993 Act No. 68, Section 1, eff 200 days after approval (approved May 14, 1993).

**SECTION 39‑73‑315.** Action by administrator to prevent violation or imminent violation.

(A) If the administrator believes, whether or not based upon an investigation conducted under Section 39‑73‑310, that a person has engaged or is about to engage in an act or a practice constituting a violation of this chapter or a related regulation, the administrator may:

(1) issue a cease and desist order;

(2) issue an order imposing a civil penalty of not more than ten thousand dollars for a single violation or one hundred thousand dollars for multiple violations in a single proceeding or a series of related proceedings; or

(3) initiate the actions specified in subsection (B).

(B) The administrator may institute one or more of the following actions in the appropriate courts of this State or in the appropriate courts of another state in addition to legal or equitable remedies otherwise available:

(1) a declaratory judgment;

(2) an action for a prohibitory or mandatory injunction to enjoin the violation and to ensure compliance with this chapter or a regulation or order of the administrator;

(3) an action for disgorgement;

(4) an action for appointment of a receiver or conservator for the defendant or the defendant's assets.

HISTORY: 1993 Act No. 68, Section 1, eff 200 days after approval (approved May 14, 1993); 1994 Act No. 327, Section 1, eff April 20, 1994.

Effect of Amendment

The 1994 amendment deleted provisions containing references to incorrect sections.

**SECTION 39‑73‑320.** Legal, equitable, and special remedies available to court for enforcement.

(A)(1) Upon a proper showing by the administrator that a person has violated or is about to violate this chapter or a regulation or order of the administrator, the court may grant appropriate legal or equitable remedies.

(2) Upon a showing of a violation of this chapter or a regulation or order of the administrator, the court, in addition to traditional legal and equitable remedies, including temporary restraining orders, permanent or temporary prohibitory or mandatory injunctions, and writs of prohibition or mandamus, may grant the following special remedies:

(a) imposition of a civil penalty of not more than ten thousand dollars for a single violation or one hundred thousand dollars for multiple violations in a single proceeding or a series of related proceedings;

(b) disgorgement;

(c) declaratory judgment;

(d) restitution to investors wishing restitution;

(e) appointment of a receiver or conservator for the defendant or the defendant's assets.

(3) Appropriate remedies when the defendant is shown only about to violate this chapter or a regulation or order of the administrator is limited to:

(a) temporary restraining order;

(b) temporary or permanent injunction;

(c) writ of prohibition or mandamus; or

(d) order appointing a receiver or conservator for the defendant or the defendant's assets.

(B) The court may not require the administrator to post a bond in an official action under this chapter.

(C)(1) Upon a proper showing by the administrator or securities or commodity agency of another state that a person, other than a government or governmental agency or instrumentality, has violated, or is about to violate, the commodity code of that state or a regulation or order of the administrator or securities or commodity agency of that state, the court may grant appropriate legal and equitable remedies.

(2) Upon showing of a violation of the securities or commodity act of the foreign state or a regulation or order of the administrator or securities or commodity agency of the foreign state, the court, in addition to traditional legal or equitable remedies, including temporary restraining orders, permanent or temporary prohibitory or mandatory injunctions, and writs of prohibition or mandamus, may grant the following special remedies:

(a) disgorgement;

(b) appointment of a receiver, conservator, or ancillary receiver or conservator for the defendant or the defendant's assets located in this State.

(3) Appropriate remedies when the defendant is shown only about to violate the securities or commodity act of the foreign state or a regulation or order of the administrator or securities or commodity agency of the foreign state is limited to:

(a) temporary restraining order;

(b) temporary or permanent injunction;

(c) writ or prohibition or mandamus; or

(d) order appointing a receiver, conservator, or ancillary receiver or conservator for the defendant or the defendant's assets located in this State.

HISTORY: 1993 Act No. 68, Section 1, eff 200 days after approval (approved May 14, 1993); 1994 Act No. 327, Section 2, eff April 20, 1994.

Effect of Amendment

The 1994 amendment deleted subsection (A)(2)(f), which contained a reference to an incorrect section.

**SECTION 39‑73‑325.** Penalties for willful violation; for unknowing violation; reference to Attorney General for criminal proceedings.

(A) A person who wilfully violates a regulation or order of the administrator under this chapter, upon conviction, must be fined not more than twenty thousand dollars, or imprisoned not more than ten years, or both, for each violation.

(B) A person convicted of violating a regulation or order under this chapter may be fined but must not be imprisoned if the person proves he had no knowledge of the rule or order.

(C) The administrator may refer evidence available concerning violations of this chapter or a regulation or order of the administrator to the Attorney General or the appropriate solicitor who, with or without a reference from the administrator, may institute the appropriate criminal proceedings under this chapter.

HISTORY: 1993 Act No. 68, Section 1, eff 200 days after approval (approved May 14, 1993).

**SECTION 39‑73‑330.** Secretary of State to administer chapter; confidential or public nature of information; use of information for personal gain.

(A) This chapter must be administered by the South Carolina Secretary of State.

(B) The administrator and his employees may not use information filed with or obtained by the administrator which is not public information for personal gain or benefit and may not conduct securities or commodity dealings based upon the information, even though public, if there has not been sufficient time for the securities or commodity markets to assimilate the information.

(C)(1) Except as provided in item (2), all information collected, assembled, or maintained by the administrator is public information and is available for examination by the public.

(2) The following information is confidential and an exception to item (1):

(a) information obtained in private investigations pursuant to Section 39‑73‑310;

(b) information made confidential by the Freedom of Information Act;

(c) information obtained from federal agencies which must not be disclosed under federal law.

(3) The administrator in his discretion may disclose information made confidential under subsection (C)(2)(a) to persons identified in Section 39‑73‑335(A).

(4) This chapter does not create or derogate a privilege which exists at common law, by statute, or otherwise when documentary or other evidence is sought under subpoena directed to the administrator or his employees.

HISTORY: 1993 Act No. 68, Section 1, eff 200 days after approval (approved May 14, 1993).

**SECTION 39‑73‑335.** Cooperation with other jurisdictions; joint action.

(A) To encourage uniform application and interpretation of this chapter and securities regulation and enforcement in general, the administrator and his employees may cooperate, including bearing the expense of the cooperation, with the securities agencies or administrator of another jurisdiction, the Canadian province or territory, or other agencies administering this chapter, the Commodity Futures Trading Commission, the Securities and Exchange Commission, a self‑regulatory organization established under the Commodity Exchange Act or the Securities Exchange Act of 1934, a national or an international organization of commodities or securities officials or agencies, and a governmental law enforcement agency.

(B) The cooperation authorized by subsection (A) includes, but is not limited to:

(1) making joint examinations or investigations;

(2) holding joint administrative hearings;

(3) filing and prosecuting joint litigation;

(4) sharing and exchanging personnel;

(5) sharing and exchanging information and documents;

(6) formulating and adopting mutual regulations, statements of policy, guidelines, proposed statutory changes, and releases;

(7) issuing and enforcing subpoenas at the request of the agency administering this chapter in another jurisdiction, the securities agency of another jurisdiction, the Commodity Futures Trading Commission, or the Securities and Exchange Commission if the information sought also is subject to lawful subpoena for conduct occurring in this State.

HISTORY: 1993 Act No. 68, Section 1, eff 200 days after approval (approved May 14, 1993).

**SECTION 39‑73‑340.** Authority to promulgate regulations, forms, and orders; publication; insulation from liability for acts or omissions done in good faith in conformity with regulation, order or form.

(A) In addition to specific authority granted elsewhere in this chapter, the administrator may make, amend, rescind regulations, forms, and orders as are necessary to carry out this chapter. The regulations or forms must include, but are not limited to, regulations defining terms, whether or not used in this chapter. The definitions must not be inconsistent with this chapter. For the purpose of regulations or forms the administrator may classify commodities and commodity contracts, persons, and matters within the administrator's jurisdiction.

(B) Unless specifically provided in this chapter, no regulation, form, or order may be adopted, amended, or rescinded unless the administrator finds that action is:

(1) necessary or appropriate in the public interest or for the protection of investors;

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

(C) Regulations and forms of the administrator must be published.

(D) A provision of this chapter imposing liability does not apply to an act done or omitted in good faith in conformity with a regulation, order, or form adopted by the administrator, notwithstanding that the regulation, order, or form may be amended, rescinded, or determined by judicial or other authority to be invalid.

HISTORY: 1993 Act No. 68, Section 1, eff 200 days after approval (approved May 14, 1993).

**SECTION 39‑73‑345.** Engaging in prohibited conduct constitutes appointment of administrator to accept service of process.

When a person, including a nonresident of this State, engages in conduct prohibited or made actionable by the chapter or a regulation or order of the administrator, the engaging in the conduct constitutes the appointment of the administrator as the person's attorney to receive service of lawful process in a noncriminal proceeding against the person, a successor, or personal representative, which grows out of that conduct and which is brought under the chapter or a regulation or order of the administrator with the same force as if served personally.

HISTORY: 1993 Act No. 68, Section 1, eff 200 days after approval (approved May 14, 1993).

**SECTION 39‑73‑350.** Applicability of sections 39‑73‑20, 39‑73‑50, and 39‑73‑60 to persons who sell, buy, or offer to sell or buy commodities in state; when offer to sell or buy is made or accepted in state.

(A) Sections 39‑73‑20, 39‑73‑50, and 39‑73‑60 apply to persons who:

(1) sell or offer to sell when an offer to:

(a) sell is made in this State; or

(b) buy is made and accepted in this State;

(2) buy or offer to buy when an offer to:

(a) buy is made in this State; or

(b) sell is made and accepted in this State.

(B) For the purpose of this section, an offer to sell or buy is made in this State, whether or not either party is then present in this State, when the offer:

(1) originates from this State; or

(2) is directed by the offeror to this State and received at the place to which it is directed, or at a post office in this State for a mailed offer.

(C) For the purpose of this section, an offer to buy or sell is accepted in this State when acceptance:

(1) is communicated to the offeror in this State;

(2) previously has not been communicated to the offeror, orally or in writing, outside this State, and acceptance is communicated to the offeror in this State, whether or not either party is then present in this State, when the offeree directs it to the offeror in this State, reasonably believing the offeror to be in this State and it is received at the place to which it is directed or at a post office in this State for a mailed acceptance.

(D) An offer to sell or to buy is not made in this State when one or both of the following exist:

(1) The publisher circulates or there is circulated on his behalf in this State a bona fide newspaper or other publication of general, regular, and paid circulation which is not published in this State or which is published in this State but has had more than two‑thirds of its circulation outside this State during the past twelve months.

(2) A radio or television program originating outside this State is received in this State.

HISTORY: 1993 Act No. 68, Section 1, eff 200 days after approval (approved May 14, 1993).

**SECTION 39‑73‑355.** Administrative proceedings; notice; hearing; order.

(A) The administrator shall commence an administrative proceeding under this chapter by entering a notice of intent to do a contemplated act or a summary order. The notice of intent or summary order may be entered without notice, and without opportunity for hearing and need not be supported by findings of fact or conclusions of law but must be in writing.

(B) Upon entry of a notice of intent or summary order, the administrator promptly shall notify all interested parties that the notice or summary order has been entered and its reasons. If the proceeding is pursuant to a notice of intent, the administrator shall inform all interested parties of the date, time, and place set for the hearing on the notice. If the proceeding is pursuant to a summary order, the administrator shall inform all interested parties that they have thirty business days from the entry of the order to file a written request for a hearing on the matter with the administrator and that the hearing will be scheduled to commence within thirty business days after the receipt of the written request.

(C) If the proceeding is pursuant to a summary order, the administrator, whether or not a written request for a hearing is received from an interested party, may set the matter down for hearing on the administrator's own motion.

(D) If no hearing is requested and none is ordered by the administrator, the summary order automatically becomes a final order after thirty business days.

(E) If a hearing is requested or ordered, the administrator, after notice of a hearing to and an opportunity for a hearing for all interested persons, may modify or vacate the order or extend it until final determination.

(F) No final order or order after hearing may be returned without:

(1) appropriate notice to all interested persons;

(2) opportunity for hearing by all interested persons;

(3) entry of written findings of fact and conclusions of law.

(G) Every hearing in an administrative proceeding under this chapter is public unless the administrator grants a request joined in by all the respondents that the hearing be conducted privately.

HISTORY: 1993 Act No. 68, Section 1, eff 200 days after approval (approved May 14, 1993).

**SECTION 39‑73‑360.** Judicial review.

(A) A person aggrieved by a final order of the administrator may obtain a review of the order in court by filing, within sixty days after the entry of the order, a written petition requesting the order be modified or set aside in whole or in part. A copy of the petition for review must be served upon the administrator.

(B) Upon the filing of a petition for review, except where the taking of additional evidence is ordered by the court pursuant to subsection (E) or (F), the court shall have exclusive jurisdiction of the matter, and the administrator may not modify or set aside the order, in whole or in part.

(C) The filing of a petition for review under subsection (A), unless specifically ordered by the court, does not operate as a stay of the administrator's order, and the administrator may enforce or ask the court to enforce the order pending the outcome of the review proceedings.

(D) Upon receipt of the petition for review, the administrator shall certify and file in the court a copy of the order and the transcript or record of the evidence upon which it was based. If the order became final by operation of law under Section 39‑73‑355(D), the administrator shall certify and file in court the summary order and evidence of its source upon the parties to it and an affidavit certifying that no hearing has been held and the order became final pursuant to Section 39‑73‑355(D).

(E) If the aggrieved party or the administrator applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court there were reasonable grounds for failure to adduce the evidence in the hearing before the administrator or other good cause, the court may order the additional evidence to be taken by the administrator under conditions the court considers proper.

(F) If new evidence is ordered taken by the court, the administrator may modify the findings and order by reason of the additional evidence and shall file in the court the additional evidence with modified or new findings or order.

(G) The court shall review the petition based upon the original record before the administrator as amended under subsections (E) and (F). The findings of the administrator as to the facts, if supported by competent, material, and substantive evidence, are conclusive. Based upon this review, the court may affirm, modify, enforce, or set aside the order, in whole or in part.

(H) The judgment of the court is subject to review by the court.

HISTORY: 1993 Act No. 68, Section 1, eff 200 days after approval (approved May 14, 1993).

**SECTION 39‑73‑365.** Burden of proof as to exemptions.

It is not necessary to negate the exemptions of this chapter in a complaint, information, indictment, a writ, or a proceeding brought under this chapter. The burden of proof of the exemption is upon the party claiming it.

HISTORY: 1993 Act No. 68, Section 1, eff 200 days after approval (approved May 14, 1993).

**SECTION 39‑73‑370.** Defense, in case based on failure to make physical delivery, of factors beyond seller's control, where delivery completed within reasonable time.

It is a defense in a complaint, information, indictment, a writ, or a proceeding brought under this chapter alleging a violation of Section 39‑73‑20 based solely on the failure in an individual case to make physical delivery within the applicable time under Section 39‑73‑10(5) or Section 39‑73‑40(A)(2) if:

(1) failure to make physical delivery was due solely to factors beyond the control of the seller, the seller's officers, directors, partners, agents, servants, or employees, persons occupying a similar status or performing similar functions, persons who directly or indirectly control or are controlled by the seller, or the seller's affiliates, subsidiaries, or successors;

(2) physical delivery was completed within a reasonable time under the applicable circumstances.

HISTORY: 1993 Act No. 68, Section 1, eff 200 days after approval (approved May 14, 1993).