

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1989

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HOUSE BILL 696*
Second Edition Engrossed 5/5/89

Short Title: Commodity Act.

(Public)

Sponsors: Representative Redwine.

Referred to: Commerce.

March 20, 1989

1 A BILL TO BE ENTITLED
2 AN ACT TO PROVIDE A COMMODITIES ACT.

3 The General Assembly of North Carolina enacts:

4 Section 1. A new Chapter is added to the General Statutes to read:

5 **“CHAPTER 78D.**

6 **"COMMODITIES ACT.**

7 **"ARTICLE 1.**

8 **"SCOPE.**

9
10 **"§ 78D-1. Definitions.**

11 (1) ‘Administrator’ means the Secretary of State.

12 (2) ‘Board of Trade’ means any person or group of persons engaged in
13 buying or selling any commodity or receiving the same for sale on
14 consignment, whether such person or group of persons is characterized
15 as a board of trade, exchange or other form of marketplace.

16 (3) ‘CFTC Rule’ means any rule, regulation or order of the Commodity
17 Futures Trading Commission in effect on the effective date of this
18 Chapter and all subsequent amendments, additions or other revisions
19 thereto, unless the Administrator, within 10 days following the
20 effective date of any such amendment, addition or revision, disallows
21 the application thereof to this Part or to any provision thereof by rule,
22 regulation or order.

- 1 (4) 'Commodity' means, except as otherwise specified by the
2 Administrator by rule, regulation or order, any agricultural, grain or
3 livestock product or by-product, any metal or mineral (including a
4 precious metal set forth in subdivision (13) of this section), any gem or
5 gemstone (whether characterized as precious, semi-precious or
6 otherwise), any fuel (whether liquid, gaseous or otherwise), any
7 foreign currency, and all other goods, articles, products or items of any
8 kind; provided that the term commodity shall not include (i) a
9 numismatic coin whose fair market value is at least fifteen percent
10 (15%) higher than the value of the metal it contains, (ii) real property
11 or any timber, agricultural or livestock product grown or raised on real
12 property and offered or sold by the owner or lessee of such real
13 property or (iii) any work of art offered or sold by art dealers, at public
14 auction or offered or sold through a private sale by the owner thereof.
- 15 (5) 'Commodity Contract' means any account, agreement or contract for
16 the purchase or sale, primarily for speculation or investment purposes
17 and not for use or consumption by the offeree or purchaser, of one or
18 more commodities, whether for immediate or subsequent delivery or
19 whether delivery is intended by the parties, and whether characterized
20 as a cash contract, deferred shipment or deferred delivery contract,
21 forward contract, futures contract, installment or margin contract,
22 leverage contract or otherwise. Any commodity contract offered or
23 sold shall, in the absence of evidence to the contrary, be presumed to
24 be offered or sold for speculation or investment purposes. A
25 commodity contract shall not include any contract or agreement which
26 requires, and under which the purchaser receives, within 28 calendar
27 days from the payment in good funds of any portion of the purchase
28 price, physical delivery of the total amount of each commodity to be
29 purchased under the contract or agreement.
- 30 (6) 'Commodity Exchange Act' means the act of Congress known as the
31 Commodity Exchange Act, as amended to the effective date of this
32 Chapter, codified at 7 U.S.C. §1, et seq. and all subsequent
33 amendments, additions or other revisions thereto, unless the
34 Administrator, within 10 days following the effective date of any such
35 amendment, addition or revision, disallows the application thereof to
36 this Part or to any provision thereof by rule, regulation or order.
- 37 (7) 'Commodity Futures Trading Commission' means the independent
38 regulatory agency established by Congress to administer the
39 Commodity Exchange Act.
- 40 (8) 'Commodity Merchant' means any of the following as defined or
41 described in the Commodity Exchange Act or by CFTC Rule:
42 a. Futures commission merchant;
43 b. Commodity pool operator;
44 c. Commodity trading advisor;

- 1 d. Introducing broker;
 2 e. Leverage transaction merchant;
 3 f. An associated person of any of the foregoing;
 4 g. Floor broker; and
 5 h. Any other person (other than a futures association) required to
 6 register with the Commodity Futures Trading Commission.
- 7 (9) 'Commodity Option' means any account, agreement or contract giving
 8 a party thereto the right but not the obligation to purchase or sell one
 9 or more commodities and/or one or more commodity contracts,
 10 whether characterized as an option, privilege, indemnity, bid, offer,
 11 put, call, advance guaranty, decline guaranty or otherwise, but shall
 12 not include an option traded on a national securities exchange
 13 registered with the United States Securities and Exchange
 14 Commission.
- 15 (10) 'Financial Institution' means a bank, savings institution or trust
 16 company organized under, or supervised pursuant to, the laws of the
 17 United States or of any state.
- 18 (11) 'Offer' includes every offer to sell, offer to purchase, or offer to enter
 19 into a commodity contract or commodity option.
- 20 (12) 'Person' means an individual, a corporation, a partnership, association,
 21 a joint-stock company, a trust where the interests of the beneficiaries
 22 are evidenced by a security, an unincorporated organization, a
 23 government, or a political subdivision of a government, but shall not
 24 include a contract market designated by the Commodity Futures
 25 Trading Commission or any clearinghouse thereof or a national
 26 securities exchange registered with the Securities and Exchange
 27 Commission (or any employee, officer or director of such contract
 28 market, clearinghouse or exchange acting solely in that capacity).
- 29 (13) 'Precious Metal' means the following in either coin, bullion or other
 30 form:
- 31 a. Silver;
 32 b. Gold;
 33 c. Platinum;
 34 d. Palladium;
 35 e. Copper; and
 36 f. Such other items as the Administrator may specify by rule.
- 37 (14) 'Sale' or 'sell' includes every sale, contract of sale, contract to sell, or
 38 disposition, for value.

39 **"§ 78D-2. Unlawful commodity transactions.**

40 Except as otherwise provided in G.S. 78D-3 or G.S. 78D-4, no person shall sell or
 41 purchase or offer to sell or purchase any commodity under any commodity contract or
 42 under any commodity option or offer to enter into or enter into as seller or purchaser
 43 any commodity contract or any commodity option.

44 **"§ 78D-3. Exempt person transactions.**

1 The prohibitions in G.S. 78D-3 shall not apply to any transaction offered by and in
2 which any of the following persons (or any employee, officer or director thereof acting
3 solely in that capacity) is the purchaser or seller:

- 4 (1) A person registered with the Commodity Futures Trading Commission
5 as a futures commission merchant or as a leverage transaction
6 merchant whose activities require such registration;
- 7 (2) A person registered with the Securities and Exchange Commission as a
8 broker-dealer whose activities require such registration;
- 9 (3) A person affiliated with, and whose obligations and liabilities under
10 the transaction are guaranteed by, a person referred to in subdivisions
11 (1) or (2) of this section;
- 12 (4) A person who is a member of a contract market designated by the
13 Commodity Futures Trading Commission (or any clearinghouse
14 thereof);
- 15 (5) A financial institution; or
- 16 (6) A person registered under the laws of this State as a securities broker-
17 dealer whose activities require such registration.

18 The exemption provided by this section shall not apply to any transaction or activity
19 which is prohibited by the Commodity Exchange Act or CFTC Rule.

20 **"§ 78D-4. Exempt transactions.**

21 (a) The prohibitions in G.S. 78D-2 shall not apply to the following:

- 22 (1) An account, agreement or transaction within the exclusive jurisdiction
23 of the Commodity Futures Trading Commission as granted under the
24 Commodity Exchange Act;
- 25 (2) A commodity contract for the purchase of one or more precious metals
26 which requires, and under which the purchaser receives, within seven
27 calendar days from the payment in good funds of any portion of the
28 purchase price, physical delivery of the quantity of the precious metals
29 purchased by such payment, provided that, for purposes of this
30 paragraph, physical delivery shall be deemed to have occurred if,
31 within such seven-day period, such quantity of precious metals
32 purchased by such payment is delivered (whether in specifically
33 segregated or fungible bulk form) into the possession of a depository
34 (other than the seller) which is either (i) a financial institution, (ii) a
35 depository the warehouse receipts of which are recognized for delivery
36 purposes for any commodity on a contract market designated by the
37 Commodity Futures Trading Commission, (iii) a storage facility
38 licensed or regulated by the United States or any agency thereof, or
39 (iv) a depository designated by the Administrator, and such depository
40 (or other person which itself qualifies as a depository as aforesaid)
41 issues and the purchaser receives, a certificate, document of title,
42 confirmation or other instrument evidencing that such quantity of
43 precious metals has been delivered to the depository and is being and
44 will continue to be held by the depository on the purchaser's behalf,

1 free and clear of all liens and encumbrances, other than liens of the
2 purchaser, tax liens, liens agreed to by the purchaser, or liens of the
3 depository for fees and expenses, which have previously been
4 disclosed to the purchaser;

5 (3) A commodity contract solely between persons engaged in producing,
6 processing, using commercially or handling as merchants, each
7 commodity subject thereto, or any by-product thereof; or

8 (4) A commodity contract under which the offeree or the purchaser is a
9 person referred to in G.S. 78D-3 of this Chapter, an insurance
10 company, an investment company as defined in the Investment
11 Company Act of 1940, or an employee pension and profit sharing or
12 benefit plan (other than a self-employed individual retirement plan, or
13 individual retirement account).

14 (b) The Administrator may issue rules or orders prescribing the terms and
15 conditions of all transactions and contracts covered by the provisions of this Chapter
16 which are not within the exclusive jurisdiction of the Commodity Futures Trading
17 Commission as granted by the Commodity Exchange Act, exempting any person or
18 transaction from any provision of this Chapter conditionally or unconditionally and
19 otherwise implementing the provisions of this Chapter for the protection of purchasers
20 and sellers of commodities.

21 **"§ 78D-5. Unlawful commodity activities.**

22 (a) No person shall engage in a trade or business or otherwise act as a commodity
23 merchant unless such person (i) is registered or temporarily licensed with the
24 Commodity Futures Trading Commission for each activity constituting such person as a
25 commodity merchant and such registration or temporary license shall not have expired,
26 nor been suspended nor revoked; or (ii) is exempt from such registration by virtue of the
27 Commodity Exchange Act or of a CFTC rule.

28 (b) No board of trade shall trade, or provide a place for the trading of, any
29 commodity contract or commodity option required to be traded on or subject to the rules
30 of a contract market designated by the Commodity Futures Trading Commission unless
31 such board of trade has been so designated for such commodity contract or commodity
32 option and such designation shall not have been vacated, nor suspended nor revoked.

33 **"§ 78D-6. Fraudulent conduct.**

34 No person, shall directly or indirectly:

35 (1) Cheat or defraud, or attempt to cheat or defraud, any other person or
36 employ any device, scheme or artifice to defraud any other person;

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

41 (3) Engage in any transaction, act, practice or course of business,
42 including, without limitation, any form of advertising or solicitation,
43 which operates or would operate as a fraud or deceit upon any person;
44 or

1 (4) Misappropriate or convert the funds, security or property of any other
2 person;
3 in or in connection with the purchase or sale of, the offer to sell, the offer to purchase,
4 the offer to enter into, or the entry into of, any commodity contract or commodity option
5 subject to the provisions of G.S. 78D-2, 78D-3, 78D-4(a)(2) or G.S. 78D-4(a)(4) of this
6 Chapter.

7 **"§ 78D-7. Liability of principals, controlling persons and others.**

8 (a) The act, omission, or failure of any official, agent, or other person acting for
9 any individual, association, partnership, corporation, or trust within the scope of his
10 employment or office shall be deemed the act, omission, or failure of such individual,
11 association, partnership, corporation, or trust, as well as of such official, agent, or other
12 person.

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

21 **"§ 78D-8. Securities and laws unaffected.**

22 Nothing in this Chapter shall impair, derogate or otherwise affect the authority or
23 powers of the Administrator under Chapters 78A or 78C of the General Statutes or the
24 application of any provision thereof to any person or transaction subject thereto.

25 **"§ 78D-9. Purpose.**

26 This Chapter may be construed and implemented to effectuate its general purpose to
27 protect investors, to prevent and prosecute illegal and fraudulent schemes involving
28 commodity contracts and to maximize coordination with federal and other states' laws
29 and the administration and enforcement thereof. This Chapter is not intended to create
30 any rights or remedies upon which actions may be brought by private persons against
31 persons who violate the provisions of this Chapter.

32 **"ARTICLE 2.**

33 **"ADMINISTRATION AND ENFORCEMENT.**

34 **"§ 78D-21. Investigations.**

35 (a) The Administrator may make investigations, within or without this State, as it
36 finds necessary or appropriate to:

37 (1) Determine whether any person has violated, or is about to violate, any
38 provision of this Chapter or any rule or order of the Administrator; or

39 (2) Aid in enforcement of this Chapter.

40 (b) The Administrator may publish information concerning any violation of this
41 Chapter or any rule or order of the Administrator.

42 (c) For purposes of any investigation or proceeding under this Chapter, the
43 Administrator or any officer or employee designated by rule or order, may administer
44 oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and

1 require the production of any books, papers, correspondence, memoranda, agreements,
2 or other documents or records which the Administrator finds to be relevant or material
3 to the inquiry.

4 (d) (1) If a person does not give testimony or produce the
5 documents required by the Administrator or a designated employee
6 pursuant to an administrative subpoena, the Administrator or
7 designated employee may apply for a court order compelling
8 compliance with the subpoena or the giving of the required
9 testimony.

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

11 a. The Superior Court of Wake County where service may be
12 obtained on the person refusing to testify or produce, if the
13 person is within this State; or

14 b. The appropriate court of the State having jurisdiction over the
15 person refusing to testify or produce, if the person is outside
16 this State.

17 (e) The Administrator in his discretion may appoint commodities law
18 enforcement agents and other enforcement personnel.

19 (1) Subject Matter Jurisdiction. – The responsibility of an agent shall be
20 enforcement of this Chapter.

21 (2) Territorial Jurisdiction. – A securities law enforcement agent is a State
22 officer with jurisdiction throughout the State.

23 (3) Service of Orders of the Administrator. – Commodities law
24 enforcement agents may serve and execute notices, orders, or demands
25 issued by the Administrator for the surrender of registrations or
26 relating to any administrative proceeding. While serving and
27 executing such notices, orders, or demands, commodities law
28 enforcement agents shall have all the power and authority possessed
29 by law enforcement officers when executing an arrest warrant.

30 **§ 78D-22. Enforcement of Chapter.**

31 (a) If the Administrator believes, whether or not based upon an investigation
32 conducted under G.S. 78D-21 that any person has engaged or is about to engage in any
33 act or practice constituting a violation of any provision of this Chapter or any rule or
34 order hereunder, the Administrator may:

35 (1) Issue a cease and desist order;

36 (2) Issue an order imposing a civil penalty in amount which may not
37 exceed twenty-five thousand dollars (\$25,000) for any single violation
38 or five hundred thousand dollars (\$500,000) for multiple violations in
39 a single proceeding or a series of related proceedings;

40 (3) Issue an order requiring reimbursement of the costs of investigation; or

41 (4) Initiate any of the actions specified in subsection (b) of this section.

42 Any fine or reimbursement of costs imposed by this subsection shall be paid to the Anti-
43 Fraud Trust Fund established under Chapters 78A and 78C and may be used as provided
44 by those Chapters.

1 (b) The Administrator may institute any of the following actions in the
2 appropriate courts of this State, or in the appropriate courts of another state, in addition
3 to any legal or equitable remedies otherwise available:

4 (1) A declaratory judgment;

5 (2) An action for a prohibitory or mandatory injunction to enjoin the
6 violation and to ensure compliance with this Chapter or any rule or
7 order of the Administrator;

8 (3) An action for disgorgement; or

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

11 **"§ 78D-23. Power of court to grant relief.**

12 (a) (1) Upon a proper showing by the Administrator that a person
13 has violated, or is about to violate, any provision of this Chapter or
14 any rule or order of the Administrator, any court of competent
15 jurisdiction may grant appropriate legal or equitable remedies.

16 (2) Upon showing of violation of this Chapter or a rule or order of the
17 Administrator, the court, in addition to traditional legal and equitable
18 remedies, including temporary restraining orders, permanent or
19 temporary prohibitory or mandatory injunctions, and writs of
20 prohibition or mandamus, may grant the following special remedies:

21 a. Imposition of a civil penalty in amount which may not exceed
22 twenty-five thousand dollars (\$25,000) for any single violation
23 or five hundred thousand dollars (\$500,000) for multiple
24 violations in a single proceeding or a series of related
25 proceedings;

26 b. Disgorgement;

27 c. Declaratory judgment;

28 d. Restitution to investors wishing restitution; and

29 e. Appointment of a receiver or conservator for the defendant or
30 the defendant's assets.

31 (3) Appropriate remedies when the defendant is shown only about to
32 violate this Chapter or a rule or order of the Administrator shall be
33 limited to:

34 a. A temporary restraining order;

35 b. A temporary or permanent injunction;

36 c. A writ of prohibition or mandamus; or

37 d. An order appointing a receiver or conservator for the defendant
38 or the defendant's assets.

39 (b) The court shall not require the Administrator to post a bond in any official
40 action under this Chapter.

41 (c) (1) Upon a proper showing by the administrator or securities or
42 commodity agency of another state that a person (other than a
43 government or governmental agency or instrumentality) has
44 violated, or is about to violate, any provision of the commodity code

- 1 of that state or any rule or order of the administrator or securities or
2 commodity agency of that state, the Superior Court of Wake County
3 may grant appropriate legal and equitable remedies.
4 (2) Upon showing of a violation of the securities or commodity act of the
5 foreign state or a rule or order of the administrator or securities or
6 commodity agency of the foreign state, the court, in addition to
7 traditional legal or equitable remedies including temporary restraining
8 orders, permanent or temporary prohibitory or mandatory injunctions
9 and writs of prohibition or mandamus, may grant the following special
10 remedies:
11 a. Disgorgement; and
12 b. Appointment of a receiver, conservator, or ancillary receiver or
13 conservator for the defendant or the defendant's assets located
14 in this State.
15 (3) Appropriate remedies when the defendant is shown only about to
16 violate the securities or commodity act of the foreign state or a rule or
17 order of the administrator or securities or commodity agency of the
18 foreign state shall be limited to:
19 a. A temporary restraining order;
20 b. A temporary or permanent injunction;
21 c. A writ of prohibition or mandamus; or
22 d. An order appointing a receiver, conservator, or ancillary
23 receiver or conservator for the defendant or the defendant's
24 assets located in this State.

25 **§ 78D-24. Criminal penalties.**

- 26 (a) Any person who willfully violates:
27 (1) Any provision of this Chapter; or
28 (2) Any rule or order of the Administrator under this Chapter shall, upon
29 conviction, be punished as a Class H felon.
30 (b) Any person convicted of violating a rule or order under this Chapter may be
31 fined, but may not be imprisoned, if the person proves he had no knowledge of the rule
32 or order.
33 (c) In lieu of a fine otherwise authorized by law, a person who has been
34 convicted of or who has pleaded guilty or no contest to having engaged in conduct in
35 violation of the provisions of this Chapter may be sentenced to pay a fine that does not
36 exceed the greater of three times the gross value gained or three times the gross loss
37 caused by such conduct, plus court costs and the costs of investigation and prosecution,
38 reasonably incurred.
39 (d) Any amounts assessed as costs of investigation and prosecution under this
40 subsection shall be deposited in the Anti-Fraud Trust Fund established under the
41 provisions of Chapters 78A and 78C, and may be used as provided by those Chapters.
42 (e) The Administrator may refer such evidence as is available concerning
43 violations of this Chapter or any rule or order of the Administrator to the Attorney
44 General or the proper district attorney, who may, with or without such a reference from

1 the Administrator, institute the appropriate criminal proceedings under this Chapter.
2 Upon receipt of such reference, the Attorney General or the district attorney may
3 request that a duly employed attorney of the Administrator prosecute or assist in the
4 prosecution of such violation or violations on behalf of the State. Upon approval of the
5 Administrator, such employee shall be appointed a special prosecutor for the Attorney
6 General or the district attorney to serve without compensation from the Attorney
7 General or district attorney. Such special prosecutor shall have all the powers and
8 duties prescribed by law for Assistant Attorneys General or district attorneys and such
9 other powers and duties as are lawfully delegated to such special prosecutor by the
10 Attorney General or the district attorney.

11 (f) Nothing in this Chapter limits the power of the State to punish any person for
12 any conduct which constitutes a crime by statute or at common law.

13 **"§ 78D-25. Administration of Chapter.**

14 (a) This Chapter shall be administered by the Secretary of State. The Secretary
15 of State as Administrator may delegate all or part of the authority under this Chapter to
16 the Deputy Securities Administrator including, but not limited to, the authority to
17 conduct hearings, make, execute and issue final agency orders and decisions. The
18 Secretary of State may appoint such clerks and other assistants as may from time to time
19 be needed.

20 (b) Neither the Administrator nor any employees of the Administrator shall use
21 any information which is filed with or obtained by the Administrator which is not public
22 information for personal gain or benefit, nor shall the Administrator nor any employees
23 of the Administrator conduct any securities or commodity dealings whatsoever based
24 upon any such information, even though public, if there has not been a sufficient period
25 of time for the securities or commodity markets to assimilate such information.

26 (c) (1) Except as provided in subdivision (2) of this subsection, all
27 information collected, assembled or maintained by the Administrator
28 is public information and is available for the examination of the
29 public as provided by Chapter 132 of the General Statutes.

30 (2) The following are exceptions to subdivision (1) which are deemed to
31 be confidential:

32 a. Information obtained in private investigations pursuant to G.S.
33 78D-21 of this Chapter;

34 b. Information made confidential by the provisions of Chapter 132
35 of the General Statutes;

36 c. Information obtained from federal agencies which may not be
37 disclosed under federal law.

38 (3) The Administrator in his discretion may disclose any information
39 made confidential under subsection (2)a. to persons identified in G.S.
40 78D-26(a).

41 (4) No provision of this Chapter either creates or derogates any privilege
42 which exists at common law, by statute or otherwise when any
43 documentary or other evidence is sought under subpoena directed to
44 the Administrator or any employee of the Administrator.

1 **"§ 78D-26. Cooperation with other agencies.**

2 (a) To encourage uniform application and interpretation of this Chapter and
3 securities regulation and enforcement in general, the Administrator and the employees
4 of the Administrator may cooperate, including bearing the expense of the cooperation,
5 with the securities agencies or administrator of another jurisdiction, Canadian province
6 or territory or such other agencies administering this Chapter, the Commodity Futures
7 Trading Commission, the Securities and Exchange Commission, any self-regulatory
8 organization established under the Commodity Exchange Act or the Securities
9 Exchange Act of 1934, any national or international organization of commodities or
10 securities officials or agencies, and any governmental law enforcement agency.

11 (b) The cooperation authorized by subsection (a) shall include, but need not be
12 limited to, the following:

13 (1) Making joint examinations or investigations;

14 (2) Holding joint administrative hearings;

15 (3) Filing and prosecuting joint litigation;

16 (4) Sharing and exchanging personnel;

17 (5) Sharing and exchanging information and documents;

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

20 (7) Issuing and enforcing subpoenas at the request of the agency
21 administering this Chapter in another jurisdiction, the securities agency
22 of another jurisdiction, the Commodity Futures Trading Commission
23 or the Securities and Exchange Commission if the information sought
24 would also be subject to lawful subpoena for conduct occurring in this
25 State.

26 **"§ 78D-27. General authority to adopt rules, forms, and orders.**

27 (a) In addition to specific authority granted elsewhere in this Chapter, the
28 Administrator may make, amend, and rescind rules, forms, and orders as are necessary
29 to carry out the provisions of this Chapter. Such rules or forms shall include, but need
30 not be limited to, the following:

31 (1) Rules defining any terms, whether or not used in this Chapter, insofar
32 as the definitions are not inconsistent with the provisions of this
33 Chapter. For the purpose of rules or forms, the Administrator may
34 classify commodities and commodity contracts, persons, and matters
35 within the Administrator's jurisdiction.

36 (b) Unless specifically provided in this Chapter, no rule, form, or order may be
37 adopted, amended or rescinded unless the Administrator finds that the action is:

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

40 (2) Consistent with the purposes fairly intended by the policy and
41 provisions of this Chapter.

42 (c) All rules and forms of the Administrator shall be published.

43 (d) No provision of this Chapter imposing any liability applies to any act done or
44 omitted in good faith in conformity with a rule, order, or form adopted by the

1 Administrator, notwithstanding that the rule, order, or form may later be amended, or
2 rescinded, or be determined by judicial or other authority to be invalid for any reason.

3 **"§ 78D-28. Consent to service of process.**

4 When a person, including a nonresident of this State, engages in conduct prohibited
5 or made actionable by the Chapter or any rule or order of the Administrator, the
6 engaging in the conduct shall constitute the appointment of the Administrator as the
7 person's attorney to receive service of any lawful process in a noncriminal proceeding
8 against the person, a successor, or personal representative, which grows out of that
9 conduct and which is brought under the Chapter or any rule or order of the
10 Administrator with the same force and validity as if served personally.

11 **"§ 78D-29. Scope of the Chapter.**

- 12 (a) G.S. 78D-2, 78D-5 and 78D-6 apply to persons who sell or offer to sell when:
13 (1) An offer to sell is made in this State, or
14 (2) An offer to buy is made and accepted in this State.
- 15 (b) G.S. 78D-2, 78D-5 and 78D-6 apply to persons who buy or offer to buy
16 when:
17 (1) An offer to buy is made in this State, or
18 (2) An offer to sell is made and accepted in this State.
- 19 (c) For the purpose of this section, an offer to sell or to buy is made in this State,
20 whether or not either party is then present in this State, when the offer:
21 (1) Originates from this State, or
22 (2) Is directed by the offeror to this State and received at the place to
23 which it is directed (or at any post office in this State in the case of a
24 mailed offer).
- 25 (d) For the purpose of this section, an offer to buy or to sell is accepted in this
26 State when acceptance:
27 (1) Is communicated to the offeror in this State, and
28 (2) Has not previously been communicated to the offeror, orally or in
29 writing, outside this State; and acceptance is communicated to the
30 offeror in this State, whether or not either party is then present in this
31 State, when the offeree directs it to the offeror in this State, reasonably
32 believing the offeror to be in this State and it is received at the place to
33 which it is directed (or at any post office in this State in the case of a
34 mailed acceptance).
- 35 (e) An offer to sell or to buy is not made in this State when:
36 (1) The publisher circulates or there is circulated on his behalf in this State
37 any bona fide newspaper or other publication of general, regular, and
38 paid circulation which is not published in this State, or which is
39 published in this State but has had more than two-thirds of its
40 circulation outside this State during the past 12 months, or
41 (2) A radio or television program originating outside this State is received
42 in this State.

43 **"§ 78D-30. Procedure for entry of an order.**

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

6 (b) Upon entry of a notice of intent or summary order, the Administrator shall
7 promptly notify all interested parties that the notice or summary order has been entered
8 and the reasons therefor. If the proceeding is pursuant to a notice of intent, the
9 Administrator shall inform all interested parties of the dates, time, and place set for the
10 hearing on the notice. If the proceeding is pursuant to a summary order, the
11 Administrator shall inform all interested parties that they have 30 business days from
12 the entry of the order to file a written request for a hearing on the matter with the
13 Administrator and that the hearing will be scheduled to commence with 30 business
14 days after the receipt of the written request.

15 (c) If the proceeding is pursuant to a summary order, the Administrator, whether
16 or not a written request for a hearing is received from any interested party, may set the
17 matter down for hearing on the Administrator's own motion.

18 (d) If no hearing is requested and none is ordered by the Administrator, the
19 summary order will automatically become a final order after 30 business days.

20 (e) If a hearing is requested or ordered, the Administrator, after notice of, and
21 opportunity for, hearing to all interested persons, may modify or vacate the order or
22 extend it until final determination.

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

24 (1) Appropriate notice to all interested persons;

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

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

27 Every hearing in an administrative proceeding under this Chapter shall be public unless
28 the Administrator grants a request joined in by all the respondents that the hearing be
29 conducted privately.

30 **"§ 78D-31. Judicial review of orders.**

31 (a) Any person aggrieved by a final order of the Administrator may obtain a
32 review of the order in the Superior Court of Wake County by filing in court, within 30
33 days after a written copy of the decision is served upon the person by personal service
34 or by registered or certified mail, a written petition praying that the order be modified or
35 set aside in whole or in part. A copy of the petition shall be forthwith served upon the
36 Administrator, and thereupon the Administrator shall certify and file in court a copy of
37 the filing and evidence upon which the order was entered. When these have been filed,
38 the court has exclusive jurisdiction to affirm, modify, enforce, or set aside the order, in
39 whole or in part. The findings of the Administrator as to the facts, if supported by
40 competent, material and substantial evidence, are conclusive. If either party applies to
41 the court for leave to adduce additional material evidence, and shows to the satisfaction
42 of the court that there were reasonable grounds for failure to adduce the evidence in the
43 hearing before the Administrator, the court may order the additional evidence to be
44 taken before the Administrator and to be adduced upon the hearing in such manner and

1 upon such conditions as the court considers proper. The Administrator may modify his
2 findings and order by reason of the additional evidence and shall file in court the
3 additional evidence together with any modified or new findings or order. The judgment
4 of the court is final, subject to review by the Court of Appeals.

5 (b) The commencement of proceedings under subsection (a) does not, unless
6 specifically ordered by the court, operate as a stay of the Administrator's order.

7 **"§ 78D-32. Pleading exemptions.**

8 It shall not be necessary to negative any of the exemptions of this Chapter in any
9 complaint, information or indictment, or any writ or proceeding brought under this
10 chapter; and the burden of proof of any such exemption shall be upon the party claiming
11 the same."

12 Sec. 2. This act shall become effective October 1, 1989, but rules under it
13 may be adopted at any time after ratification but may not become effective before
14 October 1, 1989.