

Chapter 78D.

Commodities Act.

Article 1.

Scope.

§ 78D-1. Definitions.

- (1) "Administrator" means the Secretary of State.
- (2) "Board of Trade" means any person or group of persons engaged in buying or selling any commodity or receiving the same for sale on consignment, whether such person or group of persons is characterized as a board of trade, exchange or other form of marketplace.
- (3) "CFTC Rule" means any rule, regulation or order of the Commodity Futures Trading Commission in effect on October 1, 1989, and all subsequent amendments, additions or other revisions thereto, unless the Administrator, within 10 days following the effective date of any such amendment, addition or revision, disallows the application thereof to this Part or to any provision thereof by rule, regulation or order.
- (4) "Commodity" means, except as otherwise specified by the Administrator by rule, regulation or order, any agricultural, grain or livestock product or by-product, any metal or mineral (including a precious metal set forth in subdivision (13) of this section), any gem or gemstone (whether characterized as precious, semi-precious or otherwise), any fuel (whether liquid, gaseous or otherwise), any foreign currency, and all other goods, articles, products or items of any kind; provided that the term commodity shall not include (i) a numismatic coin whose fair market value is at least fifteen percent (15%) higher than the value of the metal it contains, (ii) real property or any timber, agricultural or livestock product grown or raised on real property and offered or sold by the owner or lessee of such real property or (iii) any work of art offered or sold by art dealers, at public auction or offered or sold through a private sale by the owner thereof.
- (5) "Commodity Contract" means any account, agreement or 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. Any commodity contract offered or sold shall, in the absence of evidence to the contrary, be presumed to be offered or sold for speculation or investment purposes. A commodity contract shall not include any contract or agreement which requires, and under which the purchaser receives, within 28 calendar days from the payment in good funds of any portion of the purchase price, physical delivery of the 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 to October 1, 1989, codified at 7 U.S.C. § 1, et seq. and all subsequent amendments, additions or other revisions thereto,

unless the Administrator, within 10 days following the effective date of any such amendment, addition or revision, disallows the application thereof to this Part or to any provision thereof by rule, regulation or order.

- (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 any of the foregoing;
 - g. Floor broker; and
 - h. Any other person (other than a futures association) required to register with the Commodity Futures Trading Commission.
- (9) "Commodity Option" means any account, agreement or contract giving a party thereto the right but not the obligation to purchase or sell one or more commodities and/or one or more commodity contracts, whether characterized as an option, privilege, indemnity, bid, offer, put, call, advance guaranty, decline guaranty or otherwise, but shall 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 of any state.
- (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, 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, but shall not include a contract market designated by the Commodity Futures Trading Commission or any clearinghouse thereof or a national securities exchange registered with the Securities and Exchange Commission (or any employee, officer or director of such 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; and
 - f. Such other items as the Administrator may specify by rule.
- (14) "Sale" or "sell" includes every sale, contract of sale, contract to sell, or disposition, for value. (1989, c. 634, s. 1.)

§ 78D-2. Unlawful commodity transactions.

Except as otherwise provided in G.S. 78D-3 or G.S. 78D-4, no person shall sell or purchase or offer to sell or purchase any commodity under any commodity contract or under any commodity option or offer to enter into or enter into as seller or purchaser any commodity contract or any commodity option. (1989, c. 634, s. 1.)

§ 78D-3. Exempt person transactions.

The prohibitions in G.S. 78D-2 shall not apply to any transaction offered by and in which any of the following persons (or any employee, officer or director thereof 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 such registration;
- (2) A person registered with the Securities and Exchange Commission as a broker-dealer whose activities require such registration;
- (3) A person affiliated with, and whose obligations and liabilities under the transaction are guaranteed by, a person referred to in subdivisions (1) or (2) of this section;
- (4) A person who is a member of a contract market designated by the Commodity Futures Trading Commission (or any clearinghouse thereof);
- (5) A financial institution; or
- (6) A person registered under the laws of this State as a securities broker-dealer whose activities require such registration.

The exemption provided by this section shall not apply to any transaction or activity which is prohibited by the Commodity Exchange Act or CFTC Rule. (1989, c. 634, s. 1.)

§ 78D-4. Exempt transactions.

- (a) The prohibitions in G.S. 78D-2 shall not apply to the following:
 - (1) An account, agreement or transaction within the exclusive jurisdiction of the Commodity Futures Trading Commission as granted under the Commodity Exchange Act;
 - (2) A commodity contract for the purchase of one or more precious metals which requires, and under which the purchaser receives, within 28 calendar days from the payment in good funds of any portion of the purchase price, physical delivery of the quantity of the precious metals purchased by such payment, provided that, for purposes of this paragraph, physical delivery shall be deemed to have occurred if, within such twenty-eight-day period, such quantity of precious metals purchased by such payment is delivered (whether in specifically segregated or fungible bulk form) into the possession of a depository (other than the seller) which is either (i) a financial institution, (ii) a depository the warehouse receipts of which are recognized for delivery purposes for any commodity on a contract market designated by the Commodity Futures Trading Commission, (iii) a storage facility licensed or regulated by the United States or any agency thereof, or (iv) a depository designated by the Administrator, and such depository (or other person which itself qualifies as a depository as aforesaid) or a qualified seller issues and the

purchaser receives, a certificate, document of title, confirmation or other instrument evidencing that such quantity of precious metals has been delivered to the depository and is being and will continue to be held by the depository on the purchaser's behalf, free and clear of all liens and encumbrances, other than liens of the purchaser, tax liens, liens agreed to by the purchaser, or liens of the depository for fees and expenses, which have previously been disclosed to the purchaser;

- (3) A commodity contract solely between persons engaged in producing, processing, using commercially or handling as merchants, each commodity subject thereto, or any by-product thereof; or
 - (4) A commodity contract under which the offeree or the purchaser is a person referred to in G.S. 78D-3 of this Chapter, an insurance company, an investment company as defined in the Investment Company Act of 1940, or an employee pension and profit sharing or benefit plan (other than a self-employed individual retirement plan, or individual retirement account).
- (b) For the purposes of G.S. 78D-4(a)(2), a qualified seller is a person who:
- (1) Is a seller of precious metals and has a tangible net worth of at least \$5,000,000 (or has an affiliate who has unconditionally guaranteed the obligations and liabilities of the seller and the affiliate has a tangible net worth of at least \$5,000,000);
 - (2) Has stored precious metals with one or more depositories on behalf of customers for at least the previous three years;
 - (3) Prior to any offer, and annually thereafter, files with the Administrator a sworn notice of intent to act as a qualified seller under G.S. 78D-4(a)(2), containing:
 - a. The seller's name and address, names of its directors, officers, controlling shareholders, partners, principals, and other controlling persons;
 - b. The address of its principal place of business, state and date of incorporation or organization, and the name and address of seller's registered agent in this State;
 - c. A statement that the seller (or a person affiliated with the seller who has guaranteed the obligations and liabilities of the seller) has a tangible net worth of at least \$5,000,000;
 - d. Depository information including:
 1. The name and address of the depository or depositories that the seller intends to use;
 2. The name and address of each and every depository where the seller has stored precious metals on behalf of customers for the previous three years; and
 3. Independent verification from each and every depository named in (3)d2 of this section that the seller has in fact stored precious metals on behalf of the seller's customers for the previous three years and a statement of total deposits made during this period.
 - e. Financial statements for the seller (or the person affiliated with the seller who has guaranteed the obligations and liabilities of the seller) for the

past three years, audited by an independent certified public accountant, together with the accountant's report;

f. A statement describing the details of all civil, criminal, or administrative proceedings currently pending or adversely resolved against the seller or its directors, officers, controlling shareholders, partners, principals, or other controlling persons during the past 10 years including: (i) civil litigation and administrative proceedings involving securities or commodities violations, or fraud, (ii) criminal proceedings, (iii) denials, suspensions or revocations of securities or commodities licenses or registrations, and (iv) suspensions or expulsions from membership in, or associations with, self-regulatory organizations registered under the Securities Exchange Act of 1934, or the Commodity Exchange Act; or (v) a statement that there were no such proceedings.

(4) Notifies the Administrator within 15 days of any material changes in the information provided in the notice of intent; and

(5) Annually furnishes to each purchaser for whom the seller is then storing precious metals, and to the Administrator, a report by an independent certified public accountant of the accountant's examination of the seller's precious metals storage program that includes a reconciliation of the total amount of depository confirmations issued by all depositories where the seller has stored precious metals to the total amount of all confirmations issued to customers by the seller.

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

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

(1) Has filed a notice of intention under G.S. 78D-4(c) with the Administrator or the designee of the Administrator which was incomplete in any material respect or contained any statement which was, in light of the circumstances under which it was made, false or misleading with respect to any material fact;

(2) Has, within the last 10 years, pled guilty or nolo contendere to, or been convicted of any crime indicating a lack of fitness to engage in the investment commodity business;

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

(4) Is the subject of an order of the Administrator denying, suspending, or revoking the person's license as a securities broker-dealer, sales representative, or investment adviser;

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

- a. An order by the securities agency or Administrator of another state, Canadian province or territory, the Securities and Exchange Commission, or the Commodity Futures Trading Commission, entered after notice and opportunity for hearing, denying, suspending, or revoking the person's registration as a futures commission merchant, leverage transaction merchant, introducing broker, commodity trading adviser, commodity pool operator, securities broker-dealer, sales representative, or investment adviser, or the substantial equivalent of those terms;
- b. Suspension or expulsion from membership in, or association with, a self-regulatory organization registered under the Securities Exchange Act of 1934 or the Commodity Exchange Act;
- c. A United States Postal Service fraud order;
- d. A cease and desist order entered after notice and opportunity of hearing by the Administrator or the securities agency or Administrator of any other state, Canadian province or territory, the Securities and Exchange Commission, or the Commodity Futures Trading Commission;
- e. An order entered by the Commodity Futures Trading Commission denying, suspending or revoking registration under the Commodity Exchange Act.

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

(7) Has failed reasonably to supervise sales representatives or employees.

(e) If the public interest or the protection of investors so requires, the Administrator may, by order, summarily deny or suspend the exemption for a qualified seller. Upon the entry of the order, the Administrator shall promptly notify the person claiming said status that an order has been entered and the reasons therefor and that within 20 days after the receipt of a written request the matter will be scheduled for hearing. The provisions of G.S. 78D-30 shall apply with respect to all subsequent proceedings.

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

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

§ 78D-5. Unlawful commodity activities.

(a) No person shall engage in a trade or business or otherwise act as a commodity merchant unless such person (i) is registered or temporarily licensed with the Commodity Futures Trading Commission for each activity constituting such person as a commodity merchant and such

registration or temporary license shall not have expired, nor been suspended nor revoked; or (ii) is exempt from such registration by virtue of the Commodity Exchange Act or of a CFTC rule.

(b) No board of trade shall trade, or provide a place for the trading of, any 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 such board of trade has been so designated for such commodity contract or commodity option and such designation shall not have been vacated, nor suspended nor revoked. (1989, c. 634, s. 1.)

§ 78D-6. Fraudulent conduct.

No person, shall directly or indirectly:

- (1) Cheat or defraud, or attempt to cheat or defraud, any other person or employ any device, scheme or artifice to defraud any other person;
 - (2) Make any false report, enter any false record, or make any 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 any transaction, act, practice or course of business, including, without limitation, any form of advertising or solicitation, which operates or would operate as a fraud or deceit upon any person; or
 - (4) Misappropriate or convert the funds, security or property of any other person;
- 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, any commodity contract or commodity option subject to the provisions of G.S. 78D-2, 78D-3, 78D-4(a)(2) or G.S. 78D-4(a)(4) of this Chapter. (1989, c. 634, s. 1.)

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

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

(b) Every person who directly or indirectly controls another person liable under any provision of this Chapter, every partner, officer, or director of such other person, every person occupying a similar status or performing similar functions, every employee of such other person who materially aids in the violation is also liable jointly and severally with and to the same extent as such other person, unless the person who is also liable by virtue of this provision sustains the burden of proof that he did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. (1989, c. 634, s. 1.)

§ 78D-8. Securities and laws unaffected.

Nothing in this Chapter shall impair, derogate or otherwise affect the authority or powers of the Administrator under Chapters 78A or 78C of the General Statutes or the application of any provision thereof to any person or transaction subject thereto. (1989, c. 634, s. 1.)

§ 78D-9. Purpose.

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 thereof. This Chapter is not intended to create any rights or remedies upon which actions may be brought by private persons against persons who violate the provisions of this Chapter. (1989, c. 634, s. 1.)

§§ 78D-10 through 78D-20. Reserved for future codification purposes.

Article 2.

Administration and Enforcement.

§ 78D-21. Investigations.

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

- (1) Determine whether any person has violated, or is about to violate, any provision of this Chapter or any rule or order of the Administrator; or
- (2) Aid in enforcement of this Chapter.

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

(c) For purposes of any investigation or proceeding under this Chapter, the Administrator or any officer or employee designated by rule or order, may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any 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 either:
 - a. The Superior Court of Wake 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.

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

- (1) Subject Matter Jurisdiction. – The responsibility of an agent shall be enforcement of this Chapter.
- (2) Territorial Jurisdiction. – A commodities law enforcement agent is a State officer with jurisdiction throughout the State.
- (3) Service of Orders of the Administrator. – Commodities law enforcement agents may serve and execute notices, orders, or demands issued by the Administrator for the surrender of registrations or relating to any administrative proceeding. While serving and executing such notices, orders, or demands, commodities law enforcement agents shall have all the power and authority possessed by law enforcement officers when executing an arrest warrant. (1989, c. 634, s. 1.)

§ 78D-22. Enforcement of Chapter.

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

- (1) Issue a cease and desist order;
- (2) Issue an order imposing a civil penalty in an amount which may not exceed twenty-five thousand dollars (\$25,000) for any single violation or five hundred thousand dollars (\$500,000) for multiple violations in a single proceeding or a series of related proceedings;
- (3) Issue an order requiring reimbursement of the costs of investigation; or
- (4) Initiate any of the actions specified in subsection (b) of this section.

The clear proceeds of civil penalties imposed pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. Any reimbursement of costs imposed by this subsection shall be paid to the General Fund.

(b) The Administrator may institute any of the following actions in the appropriate courts of this State, or in the appropriate courts of another state, in addition to any 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 any rule or order of the Administrator;
- (3) An action for disgorgement; or
- (4) An action for appointment of a receiver or conservator for the defendant or the defendant's assets. (1989, c. 634, s. 1; 1998-215, s. 123.)

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

- (a)
 - (1) Upon a proper showing by the Administrator that a person has violated, or is about to violate, any provision of this Chapter or any rule or order of the Administrator, any court of competent jurisdiction may grant appropriate legal or equitable remedies.
 - (2) Upon showing of violation of this Chapter or a rule 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 in an amount which may not exceed twenty-five thousand dollars (\$25,000) for any single violation or five hundred thousand dollars (\$500,000) for multiple violations in a single proceeding or a series of related proceedings;
 - b. Disgorgement;
 - c. Declaratory judgment;
 - d. Restitution to investors wishing restitution; and
 - 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 rule or order of the Administrator shall be limited to:
 - a. A temporary restraining order;
 - b. A temporary or permanent injunction;
 - c. A writ of prohibition or mandamus; or
 - d. An order appointing a receiver or conservator for the defendant or the defendant's assets.

The clear proceeds of civil penalties imposed pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) The court shall not require the Administrator to post a bond in any 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, any provision of the commodity code of that state or any rule or order of the administrator or securities or commodity agency of that state, the Superior Court of Wake County 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 rule 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; and
 - 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 rule or order of the administrator or securities or commodity agency of the foreign state shall be limited to:
 - a. A temporary restraining order;
 - b. A temporary or permanent injunction;
 - c. A writ of prohibition or mandamus; or
 - d. An order appointing a receiver, conservator, or ancillary receiver or conservator for the defendant or the defendant's assets located in this State. (1989, c. 634, s. 1; 1998-215, s. 124.)

§ 78D-24. Criminal penalties.

(a) Any person who willfully violates any provision of this Chapter is guilty of a felony. If the losses caused by the violation or violations are one hundred thousand dollars (\$100,000) or more, the person is guilty of a Class C felony. If the losses caused by the violation or violations are less than one hundred thousand dollars (\$100,000), the person is guilty of a Class H felony.

(b) Any person convicted of violating a rule or order under this Chapter may be fined, but may not be imprisoned, if the person proves he had no knowledge of the rule or order.

(c) In lieu of a fine otherwise authorized by law, a person who has been convicted of or who has pleaded guilty or no contest to having engaged in conduct in violation of the provisions of this Chapter may be sentenced to pay a fine that does not exceed the greater of three times the gross value gained or three times the gross loss caused by such conduct, plus court costs and the costs of investigation and prosecution, reasonably incurred.

(d) The Administrator may refer such evidence as is available concerning violations of this Chapter or any rule or order of the Administrator to the Attorney General or the proper district attorney, who may, with or without such a reference from the Administrator, institute the appropriate criminal proceedings under this Chapter. Upon receipt of such reference, the Attorney General or the district attorney may request that a duly employed attorney of the Administrator prosecute or assist in the prosecution of such violation or violations on behalf of the State. Upon approval of the Administrator, such employee shall be appointed a special prosecutor for the Attorney General or the district attorney to serve without compensation from the Attorney General or district attorney. Such special prosecutor shall have all the powers and duties prescribed by law for Assistant Attorneys General or district attorneys and such other powers and duties as are lawfully delegated to such special prosecutor by the Attorney General or the district attorney.

(e) Nothing in this Chapter limits the power of the State to punish any person for any conduct which constitutes a crime by statute or at common law. (1989, c. 634, s. 1; 2003-413, s. 26.)

§ 78D-25. Administration of Chapter.

(a) This Chapter shall be administered by the Secretary of State. The Secretary of State as Administrator may delegate all or part of the authority under this Chapter to the Deputy Securities Administrator including, but not limited to, the authority to conduct hearings, make, execute and issue final agency orders and decisions. The Secretary of State may appoint such clerks and other assistants as may from time to time be needed. The Secretary of State may designate one or more hearing officers for the purpose of conducting administrative hearings.

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

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

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

- a. Information obtained in private investigations pursuant to G.S. 78D-21 of this Chapter;
- b. Information made confidential by the provisions of Chapter 132 of the General Statutes;
- c. Information obtained from federal agencies which may not be disclosed under federal law.

- (3) The Administrator in his discretion may disclose any information made confidential under subsection (2)a. to persons identified in G.S. 78D-26(a).
- (4) No provision of this Chapter either creates or derogates any privilege which exists at common law, by statute or otherwise when any documentary or other evidence is sought under subpoena directed to the Administrator or any employee of the Administrator. (1989, c. 634, s. 1; 2001-126, s. 11.)

§ 78D-26. Cooperation with other agencies.

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

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

- (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; and
- (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 would also be subject to lawful subpoena for conduct occurring in this State. (1989, c. 634, s. 1.)

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

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

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

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

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

- (2) Consistent with the purposes fairly intended by the policy and provisions of this Chapter.
- (c) All rules and forms of the Administrator shall be published.
- (d) No provision of this Chapter imposing any liability applies to any act done or omitted in good faith in conformity with a rule, order, or form adopted by the Administrator, notwithstanding that the rule, order, or form may later be amended, or rescinded, or be determined by judicial or other authority to be invalid for any reason. (1989, c. 634, s. 1.)

§ 78D-28. Consent to service of process.

When a person, including a nonresident of this State, engages in conduct prohibited or made actionable by the Chapter or any rule or order of the Administrator, the engaging in the conduct shall constitute the appointment of the Administrator as the person's attorney to receive service of any 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 any rule or order of the Administrator with the same force and validity as if served personally. (1989, c. 634, s. 1.)

§ 78D-29. Scope of the Chapter.

- (a) G.S. 78D-2, 78D-5 and 78D-6 apply to persons who sell or offer to sell when:
 - (1) An offer to sell is made in this State, or
 - (2) An offer to buy is made and accepted in this State.
- (b) G.S. 78D-2, 78D-5 and 78D-6 apply to persons who buy or offer to buy when:
 - (1) An offer to buy is made in this State, or
 - (2) An offer to sell is made and accepted in this State.
- (c) For the purpose of this section, an offer to sell or to 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 any post office in this State in the case of a mailed offer).
- (d) For the purpose of this section, an offer to buy or to sell is accepted in this State when acceptance:
 - (1) Is communicated to the offeror in this State, and
 - (2) Has not previously 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 any post office in this State in the case of a mailed acceptance).
- (e) An offer to sell or to buy is not made in this State when:
 - (1) The publisher circulates or there is circulated on his behalf in this State any 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 12 months, or
 - (2) A radio or television program originating outside this State is received in this State. (1989, c. 634, s. 1.)

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

(a) The Administrator shall commence an administrative proceeding under this Chapter, by entering either 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, 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 shall promptly notify all interested parties that the notice or summary order has been entered and the reasons therefor. If the proceeding is pursuant to a notice of intent, the Administrator shall inform all interested parties of the dates, 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 30 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 within 20 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 any interested party, may schedule the matter for hearing on the Administrator's own motion.

(d) If no request for a hearing, other responsive pleading, or submission is received by the Administrator within 30 business days of receipt of service of notice of summary order under subsection (b) of this section and no hearing is ordered by the Administrator, the summary order will automatically become a final order after 30 business days from the date service of the notice of summary order was received.

(e) If a hearing is requested or ordered, the Administrator, after notice of, and opportunity for, hearing to 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; and
- (3) Entry of written findings of fact and conclusions of law.

Every hearing in an administrative proceeding under this Chapter shall be public unless the Administrator grants a request joined in by all the respondents that the hearing be conducted privately. (1989, c. 634, s. 1; 1998-196, s. 1; 2001-126, s. 8.)

§ 78D-31. Judicial review of orders.

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

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

(b) The commencement of proceedings under subsection (a) does not, unless specifically ordered by the court, operate as a stay of the Administrator's order. (1989, c. 634, s. 1.)

§ 78D-32. Pleading exemptions.

It shall not be necessary to negative any of the exemptions of this Chapter in any complaint, information or indictment, or any writ or proceeding brought under this chapter; and the burden of proof of any such exemption shall be upon the party claiming the same. (1989, c. 634, s. 1.)

§ 78D-33. Affirmative defense.

It shall be a defense in any complaint, information, indictment, any writ or proceeding brought under this Chapter alleging a violation of G.S. 78D-2 based solely on the failure in an individual case to make physical delivery within the applicable time period under G.S. 78D-1(5) or G.S. 78D-4(a)(2) if the party asserting the defense sustains the burden of proof that:

- (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, every person occupying a similar status or performing similar functions, every person who directly or indirectly controls or is controlled by the seller, or any of them, the seller's affiliates, subsidiaries or successors; and
- (2) Physical delivery was completed within a reasonable time under the applicable circumstances. (1989, c. 634, s. 1.)