

LEGISLATIVE BILL 575

Approved by the Governor April 17, 1987

Introduced by Haberman, 44

AN ACT relating to banking and finance; to adopt the
Commodity Code.

Be it enacted by the people of the State of Nebraska,

Section 1. This act shall be known and may be cited as the Commodity Code.

Sec. 2. For purposes of the Commodity Code, unless the context otherwise requires, the definitions found in sections 3 to 16 of this act shall be used.

Sec. 3. Board of trade shall mean 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.

Sec. 4. CFTC rule shall mean any rule, regulation, or order of the Commodity Futures Trading Commission in effect on the effective date of this act.

Sec. 5. Commodity shall mean, except as otherwise specified by the director by rule, regulation, or order, any agricultural, grain, or livestock product or byproduct; any metal or mineral, including a precious metal; 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. Commodity shall not include (1) a numismatic coin, the fair market value of which is at least fifteen per cent higher than the value of the metal it contains, (2) 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 (3) any work of art offered or sold by art dealers at public auction or offered or sold through a private sale by the owner of such work.

Sec. 6. Commodity contract shall mean 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 twenty-eight 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.

Sec. 7. Commodity Exchange Act shall mean the act of Congress known as the Commodity Exchange Act, 7 U.S.C. 1, as amended on the effective date of this act.

Sec. 8. Commodity Futures Trading Commission shall mean the independent regulatory agency established by Congress to administer the Commodity Exchange Act.

Sec. 9. Commodity merchant shall mean any of the following, as defined or described in the Commodity Exchange Act or by CFTC rule:

- (1) Futures commission merchant;
- (2) Commodity pool operator;
- (3) Commodity trading advisor;
- (4) Introducing broker;
- (5) Leverage transaction merchant;
- (6) An associated person of any of the

foregoing;

- (7) Floor broker; and

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

Sec. 10. Commodity option shall mean any account, agreement, or contract giving a party thereto the right but not the obligation to purchase or sell one or more commodities 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 Securities and Exchange Commission.

Sec. 11. Director shall mean the Director of Banking and Finance.

Sec. 12. Financial institution shall mean a bank, savings institution, or trust company organized under, or supervised pursuant to, the laws of the United States or of any state.

Sec. 13. Offer shall mean every offer to

sell, offer to purchase, or offer to enter into a commodity contract or commodity option.

Sec. 14. Person shall mean an individual, a corporation, a partnership, an association, a joint-stock company, a trust in which 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.

Sec. 15. Precious metal shall mean the following in either coin, bullion, or other form:

- (1) Silver;
- (2) Gold;
- (3) Platinum;
- (4) Palladium;
- (5) Copper; and
- (6) Such other items as the director may

specify by rule, regulation, or order.

Sec. 16. Sale or sell shall mean every sale, contract of sale, contract to sell, or disposition, for value.

Sec. 17. Except as otherwise provided in section 18 or 19 of this act, 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.

Sec. 18. (1) Section 17 of this act shall not apply to any transaction offered by and in which any of the following persons, or any employee, officer, or director of such person acting solely in that capacity, is the purchaser or seller:

(a) 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;

(b) A person registered with the Securities and Exchange Commission as a broker-dealer whose activities require such registration;

(c) A person affiliated with, and whose obligations and liabilities under the transaction are guaranteed by, a person referred to in subdivision

(1)(a) or (b) of this section;

(d) A person who is a member of a contract market designated by the Commodity Futures Trading Commission or any clearinghouse thereof;

(e) A financial institution; or

(f) A person registered under the laws of this state as a securities broker-dealer whose activities require such registration.

(2) This section shall not apply to any transaction or activity which is prohibited by the Commodity Exchange Act or CFTC rule.

Sec. 19. (1) Section 17 of this act shall not apply to the following:

(a) An account, agreement, or transaction within the exclusive jurisdiction of the Commodity Futures Trading Commission as granted under the Commodity Exchange Act;

(b) A commodity contract for the purchase of one or more precious metals which requires, and under which the purchaser receives, within seven 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. Physical delivery shall be deemed to have occurred if, within such seven-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 director, and such depository 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;

(c) A commodity contract solely between persons engaged in producing, processing, using commercially, or handling as merchants, each commodity subject to such contract or any byproduct of such

commodity; or

(d) A commodity contract under which the offeree or the purchaser is a person referred to in section 18 of this act, 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.

(2) The director may adopt and promulgate or issue rules, regulations, or orders prescribing the terms and conditions of all transactions and contracts covered by the Commodity Code, 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 the Commodity Code conditionally or unconditionally and otherwise implementing such code for the protection of purchasers and sellers of commodities.

Sec. 20. (1) No person shall engage in a trade or business or otherwise act as a commodity merchant unless such person (a) 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 or been suspended or revoked or (b) is exempt from such registration by virtue of the Commodity Exchange Act or of a CFTC rule.

(2) 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, suspended, or revoked.

Sec. 21. 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, but not limited to, 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 section 17 or 18 of this act or subdivision (1)(b) or (d) of section 19 of this act.

Sec. 22. (1) 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 or her 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.

(2) Every person who directly or indirectly controls another person liable under any provision of the Commodity Code, every partner, officer, or director of such other person, every person occupying a similar status or performing similar functions, and every employee of such other person who materially aids in the violation shall also be 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 section sustains the burden of proof that he or she 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.

Sec. 23. Nothing in the Commodity Code shall impair, derogate, or otherwise affect the authority or powers of the director under the Securities Act of Nebraska or the application of any provision of the act to any person or transaction subject to such act.

Sec. 24. The Commodity Code 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' law and the administration and enforcement thereof. The Commodity Code 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 the code.

Sec. 25. (1) The director may make investigations, within or without this state, as he or she finds necessary or appropriate to:

(a) Determine whether any person has violated or is about to violate any provision of the Commodity Code or any rule, regulation, or order of the director; or

(b) Aid in enforcement of the Commodity Code.

(2) The director may publish information concerning any violation of the code or any rule, regulation, or order of the director.

(3) For purposes of any investigation or proceeding under the Commodity Code, the director or any officer or employee designated by rule, regulation, or order may administer oaths and affirmations, subpoena witnesses, compel the attendance of witnesses, take evidence, and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which the director finds to be relevant or material to the inquiry.

(4)(a) In case of contumacy by or refusal to obey a subpoena issued to any person, any court of competent jurisdiction, upon application by the director, may issue to that person an order requiring him or her to appear before the director or the officer designated by the director to produce documentary evidence if so ordered or to give evidence touching the matter under investigation or in question. Any failure to obey the order of the court may be punished by the court as a contempt of court.

(b) The request for order of compliance may be addressed to either (i) the district court of Lancaster County or the district court in the county where service may be obtained on the person refusing to testify or produce, if the person is within this state, or (ii) the appropriate district court of this state having jurisdiction over the person refusing to testify or produce, if the person is outside this state.

Sec. 26. (1) If the director believes, whether or not based upon an investigation conducted under section 25 of this act, that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of the Commodity Code or any rule, regulation, or order under the code, the director may:

(a) Issue a cease and desist order;

(b) Issue an order imposing a civil penalty in an amount which may not exceed twenty-five thousand dollars for any single violation or one hundred thousand dollars for multiple violations in a single proceeding or a series of related proceedings; or

(c) Initiate any of the actions specified in subsection (2) of this section.

(2) The director may institute any of the following actions in the appropriate district court of this state or in the appropriate courts of another state in addition to any legal or equitable remedies otherwise

available:

(a) An action for a declaratory judgment;
 (b) An action for a prohibitory or mandatory injunction to enjoin the violation and to ensure compliance with the Commodity Code or any rule, regulation, or order of the director;

(c) An action for disgorgement; or
 (d) An action for appointment of a receiver or conservator for the defendant or the defendant's assets.

Sec. 27. (1) Upon a proper showing by the director that a person has violated or is about to violate any provision of the Commodity Code or any rule, regulation, or order of the director, the court may grant appropriate legal or equitable remedies.

(2) Upon a showing of a violation of the Commodity Code or a rule, regulation, or order of the director, 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 for any 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; 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 the Commodity Code or a rule, regulation, or order of the director 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.

(4) The court shall not require the director to post a bond in any official action under the Commodity Code.

Sec. 28. (1) Upon a proper showing by the director or securities or commodity agency of a foreign 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 such state or any rule, regulation, or order of the director or securities or commodity agency of the foreign state, the court may grant appropriate legal and equitable remedies.

(2) Upon a showing of a violation of the securities or commodity act of the foreign state or a rule, regulation, or order of the director 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, regulation, or order of the director 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.

Sec. 29. (1) Any person who willfully violates any provision of the Commodity Code or any rule, regulation, or order of the director under the code shall, upon conviction, be guilty of a Class IV felony.

(2) Any person convicted of violating a rule, regulation, or order under the code may be fined but may not be imprisoned if the person proves he or she had no knowledge of the rule, regulation, or order.

(3) The director may refer such evidence as is available concerning violations of the code or any rule, regulation, or order of the director to the Attorney General or county attorney who may, with or without reference from the director, initiate criminal proceedings pursuant to the code.

Sec. 30. (1) The Commodity Code shall be administered by the Department of Banking and Finance. Neither the director nor any employees of the director shall use any information which is filed with or obtained by the director which is not public information

for personal gain or benefit, nor shall the director or any employees of the director 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.

(2) Except as provided in subsection (3) of this section, all information collected, assembled, or maintained by the director shall be public information and shall be available for the examination of the public as provided by sections 84-712 to 84-712.09.

(3) The following information shall be deemed to be confidential:

(a) Information obtained in investigations pursuant to section 25 of this act;

(b) Information made confidential by sections 84-712 to 84-712.09; or

(c) Information obtained from federal agencies which may not be disclosed under federal law.

(4) The director may disclose any information made confidential under subdivision (3)(a) of this section to persons identified in section 31 of this act.

(5) No provision of the Commodity Code shall either create or derogate any privilege which exists at common law, by statute, or otherwise, when any documentary or other evidence is sought under subpoena directed to the director or any employee of the director.

Sec. 31. (1) To encourage uniform application and interpretation of the Commodity Code and securities regulation and enforcement in general, the director and the employees of the director may cooperate, including bearing the expense of the cooperation, with the securities agencies or director of another jurisdiction, Canadian province, or territory or such other agencies administering its commodity code, 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.

(2) The cooperation authorized by subsection (1) of this section shall include, but need not be limited to, the following:

(a) Making joint examinations or investigations;

(b) Holding joint administrative hearings;

(c) Filing and prosecuting joint litigation;

- (d) Sharing and exchanging personnel;
- (e) Sharing and exchanging information and documents;
- (f) Formulating and adopting mutual regulations, statements of policy, guidelines, proposed statutory changes, and releases; and
- (g) Issuing and enforcing subpoenas at the request of the agency administering such code 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.

Sec. 32. (1) In addition to specific authority granted elsewhere in the Commodity Code, the director may adopt and promulgate rules, regulations, and orders as are necessary to carry out the code. Such rules and regulations shall include, but not be limited to, rules and regulations defining any terms, whether or not used in the code, insofar as the definitions are not inconsistent with the code. For the purpose of rules and regulations, the director may classify commodities and commodity contracts, persons, and matters within the director's jurisdiction.

(2) Unless specifically provided in the Commodity Code, no rule, regulation, or order may be adopted and promulgated unless the director finds that the action is:

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

(b) Consistent with the purposes fairly intended by the policy and provisions of the code.

(3) All rules and regulations of the director shall be published.

(4) No provision of the Commodity Code imposing any liability shall apply to any act done or omitted in good faith in conformity with a rule, regulation, or order adopted and promulgated by the director, notwithstanding that the rule, regulation, or order may later be amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

Sec. 33. When a person, including a nonresident of this state, engages in conduct prohibited or made actionable by the Commodity Code or any rule, regulation, or order of the director, the engaging in the conduct shall constitute sufficient contact with this state for the exercise of personal jurisdiction over such a person in any action which arises under the

Commodity Code. Service may be made by leaving a copy of the process in the office of the director, but it shall not be effective unless (1) the plaintiff, who may be the director in a suit, action, or proceeding instituted by him or her, forthwith sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his or her last address on file with the director and (2) the plaintiff's affidavit of compliance with this section is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

Sec. 34. (1) Sections 17, 20, and 21 of this act shall apply to persons who sell or offer to sell when (a) an offer to sell is made in this state or (b) an offer to buy is made and accepted in this state.

(2) Sections 17, 20, and 21 of this act shall apply to persons who buy or offer to buy when (a) an offer to buy is made in this state or (b) an offer to sell is made and accepted in this state.

(3) For the purpose of this section, an offer to sell or to buy shall be made in this state, whether or not either party is then present in this state, when the offer (a) originates from this state or (b) 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.

(4) For the purpose of this section, an offer to buy or to sell shall be accepted in this state when acceptance (a) is communicated to the offeror in this state and (b) has not previously been communicated to the offeror, orally or in writing, outside this state; and acceptance shall be 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.

(5) An offer to sell or to buy shall not be made in this state when (a) the publisher circulates, or there is circulated on his or her 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 twelve months or (b) a radio or television program originating outside this state is received in this state.

Sec. 35. (1) The director shall commence an

administrative proceeding under the Commodity Code 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 shall be in writing.

(2) Upon entry of a notice of intent or summary order, the director 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 director 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 director 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 director and that the hearing will be scheduled to commence within thirty business days after the receipt of the written request.

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

(4) If no hearing is requested and none is ordered by the director, the summary order shall automatically become a final order after thirty business days.

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

(6) No final order or order after hearing may be returned without (a) appropriate notice to all interested persons, (b) opportunity for hearing by all interested persons, and (c) entry of written findings of fact and conclusions of law.

(7) Every hearing in an administrative proceeding under the Commodity Code shall be public unless the director grants a request joined in by all the respondents that the hearing be conducted privately.

Sec. 36. (1) Any person aggrieved by a final order of the director may obtain a review of the order in the district court of Lancaster County by filing, within sixty days after the entry of the order, a written petition praying that the order be modified or set aside in whole or in part. A copy of the petition for review shall be served upon the director.

(2) Upon the filing of a petition for review, except when the taking of additional evidence is ordered by the court pursuant to subsection (5) or (6) of this section, the court shall have exclusive jurisdiction of the matter, and the director may not modify or set aside the order in whole or in part.

(3) The filing of a petition for review under subsection (1) of this section shall not, unless specifically ordered by the court, operate as a stay of the director's order, and the director may enforce or ask the court to enforce the order pending the outcome of the review proceedings.

(4) Upon receipt of the petition for review, the director 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 subsection (4) of section 35 of this act, the director shall certify and file in court the summary order 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 such section.

(5) If either the aggrieved party or the director applies to the court for leave to adduce additional 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 director or other good cause, the court may order the additional evidence to be taken by the director under such conditions as the court considers proper.

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

(7) The court shall review de novo the petition based upon the original record before the director as amended under subsections (5) and (6) of this section. The findings of the director as to the facts, if supported by competent, material, and substantive evidence, shall be conclusive. Based upon such review, the court may affirm, modify, enforce, or set aside the order, in whole or in part.

(8) The judgment of the court shall be subject to review by the Supreme Court.

Sec. 37. It shall not be necessary to refute the existence of any of the exemptions of the Commodity Code in any complaint, information, or indictment or any writ or proceeding brought under the code, and the

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burden of proof of any such exemption shall be upon the party claiming the same.