

## CHAPTER 51-23 COMMODITIES TRANSACTIONS

### 51-23-01. Title.

This chapter must be known as the Commodities Act of 1989.

### 51-23-02. Definitions.

When used in this chapter, unless the context or subject matter otherwise requires:

1. "Board of trade" means any person or group of persons engaged in buying or selling any commodity or receiving any commodity for sale on consignment, whether the person or group of persons is characterized as a board of trade, exchange, or other form of marketplace.
2. "CFTC rule" means any rule, regulation, or order of the commodity futures trading commission in effect on April 7, 1989.
3. "Commissioner" means the securities commissioner of this state.
4. "Commodity" means, except as otherwise specified by the commissioner by rule 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, semiprecious, or otherwise; any fuel whether liquid, gaseous, or otherwise; any foreign currency; and all other goods, articles, products, or items of any kind. The term commodity does not include:
  - a. A numismatic coin with a fair market value at least fifteen percent higher than the value of the metal it contains;
  - b. 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 the real property; or
  - c. Any work of art offered or sold by art dealers, at public auction or offered or sold through a private sale by the owner.
5. "Commodity contract" means 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 must, in the absence of evidence to the contrary, be presumed to be offered or sold for speculation or investment purposes. A commodity contract may 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.
6. "Commodity Exchange Act" means the act of Congress known as the Commodity Exchange Act, as amended to April 7, 1989.
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.
  - 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 or one or more commodity contracts, whether characterized as an option, privilege, indemnity, bid, offer, put, call, advance guaranty, decline guaranty or otherwise, but does not include an option traded on a national securities exchange registered with the United States securities and exchange commission.
10. "Financial institution" means a bank, savings institution, or trust company organized under, or supervised under, 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 limited liability company, 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 does 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: silver, gold, platinum, palladium, copper, and such other items as the commissioner may specify by rule or order.
14. "Sale" or "sell" includes every sale, contract of sale, contract to sell, or disposition, for value.

#### **51-23-03. Unlawful commodity transactions.**

Except as otherwise provided in section 51-23-04 or 51-23-05, no person may 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.

#### **51-23-04. Exempt person transactions.**

The prohibitions in section 51-23-03 do 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 subsection 1 or 2.
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.
6. A person registered under the laws of this state as a securities dealer whose activities require such registration.
7. A public warehouseman as defined in section 60-02-01.

The exemption provided by this section does not apply to any transaction or activity which is prohibited by the Commodity Exchange Act or CFTC rule.

#### **51-23-05. Exempt transactions.**

1. The prohibitions in section 51-23-03 do 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 twenty-eight 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 subdivision, physical delivery must 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:
    - (1) A financial institution;
    - (2) 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;
    - (3) A storage facility licensed or regulated by the United States or any agency thereof; or
    - (4) A depository designated by the commissioner;and such depository, or other person which itself qualifies as a depository as aforesaid, 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 thereto, or any byproduct thereof.
  - d. A commodity contract under which the offeree or the purchaser is a person referred to in section 51-23-04, an insurance company, or an investment company as defined in the Investment Company Act of 1940.
2. The commissioner 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.

**51-23-06. Unlawful commodity activities.**

1. No person may 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, nor been suspended nor 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 may 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 has not been vacated, suspended, or revoked.

**51-23-07. Fraudulent conduct.**

No person may, 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 section 51-23-03 or 51-23-04, or subdivision b or d of subsection 1 of section 51-23-05. No action may be brought under this section by the commissioner after six years from the date of the alleged violation.

**51-23-08. Liability of principals, controlling persons, and others.**

1. The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, limited liability company, or trust within the scope of the person's employment or office must be deemed the act, omission, or failure of such individual, association, partnership, corporation, limited liability company, 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 this chapter, 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 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 the person did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

**51-23-09. Securities laws unaffected.**

Nothing in this chapter impairs, derogates, or otherwise affects the authority or powers of the commissioner under the Securities Act of 1951 or the application of any provision thereof to any person or transaction subject thereto.

**51-23-10. 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' law 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.

**51-23-11. Investigations.**

1. The commissioner may make investigations, within or without this state, as the commissioner finds necessary or appropriate to:
  - a. Determine whether any person has violated, or is about to violate, any provision of this chapter or any rule or order of the commissioner.
  - b. Aid in enforcement of this chapter.
2. The commissioner may publish information concerning any violation of this chapter or any rule or order of the commissioner.
3. For purposes of any investigation or proceeding under this chapter, the commissioner 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 commissioner finds to be relevant or material to the inquiry.

4. a. If a person does not give testimony or produce the documents required by the commissioner or a designated employee pursuant to an administrative subpoena, the commissioner or designated employee may apply for a court order compelling compliance with the subpoena or the giving of the required testimony.
- b. The request for order of compliance may be addressed to either:
  - (1) The district court of Burleigh County, North Dakota, or the district court of any county in this state, where service may be obtained on the person refusing to testify or produce, if the person is within this state; or
  - (2) The appropriate court of the state having jurisdiction over the person refusing to testify or produce, if the person is outside this state.

**51-23-12. Enforcement of chapter.**

1. If the commissioner believes, whether or not based upon an investigation conducted under section 51-23-11, 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 commissioner may:
  - a. Issue a cease and desist order;
  - b. Issue an order imposing a civil penalty in an amount which may not exceed ten thousand dollars for any single violation or one hundred thousand dollars for multiple violations in a single proceeding or a series of related proceedings; and
  - c. Initiate any of the actions specified in subsection 2.
2. The commissioner 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:
  - a. A declaratory judgment;
  - b. 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 commissioner;
  - c. An action for disgorgement; and
  - d. An action for appointment of a receiver or conservator for the defendant or the defendant's assets.

**51-23-13. Power of court to grant relief.**

1. a. Upon a proper showing by the commissioner that a person has violated, or is about to violate, any provision of this chapter or any rule or order of the commissioner, the district court of Burleigh County, North Dakota, may grant appropriate legal or equitable remedies.
- b. Upon showing of violation of this chapter or a rule or order of the commissioner, 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:
  - (1) Imposition of a civil penalty in an amount that may not exceed ten thousand dollars for any single violation or one hundred thousand dollars for multiple violations in a single proceeding or a series of related proceedings;
  - (2) Disgorgement;
  - (3) Declaratory judgment;
  - (4) Restitution to investors wishing restitution; and
  - (5) Appointment of a receiver or conservator for the defendant or the defendant's assets.
- c. Appropriate remedies when the defendant is shown only about to violate this chapter or a rule or order of the commissioner must be limited to:
  - (1) A temporary restraining order;
  - (2) A temporary or permanent injunction;
  - (3) A writ of prohibition or mandamus; and

- (4) An order appointing a receiver or conservator for the defendant or the defendant's assets.
2. The court may not require the commissioner to post a bond in any official action under this chapter.
3.
  - a. Upon a proper showing by the commissioner 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 district court of Burleigh County, North Dakota, may grant appropriate legal and equitable remedies.
  - b. 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:
    - (1) Disgorgement; and
    - (2) Appointment of a receiver, conservator, or ancillary receiver or conservator for the defendant or the defendant's assets located in this state.
  - c. 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 must be limited to:
    - (1) A temporary restraining order;
    - (2) A temporary or permanent injunction;
    - (3) A writ of prohibition or mandamus; and
    - (4) An order appointing a receiver, conservator, or ancillary receiver or conservator for the defendant or the defendant's assets located in this state.

#### **51-23-14. Criminal penalties.**

1. Any person who willfully violates any provision of this chapter, or any rule or order of the commissioner under this chapter, is guilty of a class B felony.
2. Any person convicted of violating a rule or order under this chapter may be fined, but may not be imprisoned, if the person proves the person had no knowledge of the rule or order.

#### **51-23-15. Administration of chapter.**

1. This chapter must be administered by the securities commissioner.
2. Neither the commissioner nor any employees of the commissioner may use any information which is filed with or obtained by the commissioner which is not public information for personal gain or benefit, nor may the commissioner nor any employees of the commissioner 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.
3.
  - a. Except as provided in subdivision b, all information collected, assembled, or maintained by the commissioner is public information and is available for the examination of the public.
  - b. The commissioner may keep confidential information obtained in private investigations pursuant to this chapter and information obtained from federal agencies which may not be disclosed under federal law.
  - c. 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 commissioner or any employee of the commissioner.

#### **51-23-16. Cooperation with other agencies.**

1. To encourage uniform application and interpretation of this chapter and securities regulation and enforcement in general, the commissioner and the employees of the commissioner 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.
2. The cooperation authorized by subsection 1 includes, 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 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.

#### **51-23-17. General authority to adopt rules, forms, and orders.**

1. In addition to specific authority granted elsewhere in this chapter, the commissioner may make, amend, and rescind rules and orders as are necessary to carry out the provisions of this chapter.
2. 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 commissioner, 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.

#### **51-23-18. Consent to service of process.**

When a person, including a nonresident of this state, engages in conduct prohibited or made actionable by this chapter or any rule or order of the commissioner, the engaging in the conduct constitutes the appointment of the commissioner 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 this chapter or any rule or order of the commissioner with the same force and validity as if served personally.

#### **51-23-19. Scope of this chapter.**

1. Sections 51-23-03, 51-23-06, and 51-23-07 apply to persons who sell or offer to sell when an offer to sell is made in this state or an offer to buy is made and accepted in this state.
2. Sections 51-23-03, 51-23-06, and 51-23-07 apply to persons who buy or offer to buy when an offer to buy is made in this state or 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 is made in this state, whether or not either party is then present in this state, when the offer originates from this state, or is directed by the offeror to this state and received at the place to which it is directed or at any post office in this state in the case of a mailed offer.

4. For the purpose of this section, an offer to buy or to sell is accepted in this state when acceptance is communicated to the offeror in this state, and 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.
5. An offer to sell or to buy is not made in this state when:
  - a. The publisher circulates or there is circulated on the publisher's 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.

**51-23-20. Procedure for entry of an order.**

1. The commissioner 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.
2. Upon entry of a notice of intent or summary order, the commissioner 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 commissioner 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 commissioner 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 commissioner 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 commissioner, whether or not a written request for a hearing is received from any interested party, may set the matter down for hearing on the commissioner's own motion.
4. If no hearing is requested and none is ordered by the commissioner, the summary order will automatically become a final order after thirty business days.
5. If a hearing is requested or ordered, the commissioner, after extending notice of an 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. If a hearing is requested or ordered under this section, it must be conducted in accordance with chapter 28-32.
8. No action may be brought under this chapter after five years from the date that the commissioner knew or reasonably should have known about the facts that are the basis for the alleged violation. This subsection does not apply to any action under section 51-23-07.

Every hearing in an administrative proceeding under this chapter must be public unless the commissioner grants a request joined in by all the respondents that the hearing be conducted privately.

**51-23-21. Pleading exemptions.**

It is not 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 is upon the party claiming the same.

### **51-23-22. Affirmative defense.**

It is a defense in any complaint, information, indictment, or any writ or proceeding brought under this chapter alleging a violation of section 51-23-03 based solely on the failure in an individual case to make physical delivery within the applicable time period under subsection 5 of section 51-23-02 or subdivision b of subsection 1 of section 51-23-05 if:

1. Failure to make physical delivery was due solely to factors beyond the control of the seller, the seller's officers, directors, partners, agents, servants, or employees, 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.

### **51-23-23. Remedies.**

Every sale or contract for sale made in violation of this chapter, or of any rule or order issued by the commissioner under this chapter, is voidable at the election of the purchaser. The person making a sale or contract for sale, and every director, officer, salesperson, or agent of or for the person who participated or aided in any way in making the sale is jointly and severally liable to the purchaser. The purchaser may sue either to recover the full amount paid by the purchaser and any court costs, interest at a rate consistent with section 47-14-05, and reasonable attorney's fees, less the amount of any income received on the commodities upon tender to the seller of the commodities sold or of the contracts made. If the person no longer owns the commodities, the person may sue for damages that would be recoverable upon a tender, less the value of the commodities when the purchaser disposed of the commodities and interest from the date of disposition. However:

1. No action may be brought under this section for the recovery of the purchase price after five years from the date of the sale or contract for sale.
2. No purchaser may claim or have the benefit of this section if the purchaser refused or failed to accept, within thirty days from the date of the offer, an offer in writing of the seller to take back the commodity contract in question and to refund the full amount paid by the purchaser, together with interest on the amount for the period from the date of payment by the purchaser to the date of repayment.
3. This chapter does not limit any statutory or common-law right of any person in any court for any act involved in the sale of commodities.