

## **MODEL STATE COMMODITY CODE**

Adopted April 5, 1985, technical amendments October 2, 1985, amendments adopted April 29, 1989, November 18, 1997

**PREAMBLE.** *Purposes.* The Model Commodity Code seeks to protect the public from operators who purvey so-called commodity investments to the unwary at a loss of millions of dollars nationwide. Often, the innocent have been bilked out of their life savings by these commodity scam artists who entice their victims by promising huge profits in precious metals and other commodities. The Code is designed as a modern bucket shop law to prohibit the very type of transactions which have been fraught with customer abuses. At the same time, the Code is designed to complement the federal commodity laws by permitting the public to trade or invest in legitimate commodity instruments under the Commodity Exchange Act and under the specific terms of the Code. New Section 12(e) of the Commodity Exchange Act, enacted as part of the Futures Trading Act of 1982, makes clear that the states may apply their laws to those commodity-related activities that are conducted outside the regulatory structure of the Commodity Exchange Act. As a result of the enactment of Section 12(e), the states are now free to enact laws to prohibit specified commodity activities that are unlawful under the Act and to prohibit or regulate those activities not covered by the Act.

The Model Code does not purport either to prohibit or regulate those commodity transactions preempted by the federal Commodity Exchange Act. Instead, the Model Code seeks to complement the federal statutory scheme in three ways. First, the Code excludes from its provisions those commodity transactions and related activities exclusively regulated by the CFTC. **[Section 1.04(a)(1)].** Second, the Code prohibits certain transactions such as off-exchange futures contracts and activities such as unregistered commodity pool operations that are also prohibited by the Commodity Exchange Act and the CFTC rules. **[Sections 1.02 and 1.05.]** Third, the Code prohibits all other commodity transactions not covered by the Commodity Exchange Act except those offered or sold by certain persons licensed or supervised by the federal or state government or those specifically permitted under the terms of the Code. **[Sections 1.02, 1.03 and 1.04(a)(2)-(4).]**

### *Section-by-Section Overview.*

**Section 1.01** of the Code is the definitional provision. The definitions of commodity contract and commodity option are designed to cover any form of agreement to purchase or sell commodities primarily for investment or speculative purposes. Excluded from the commodity contract definition are agreements where the purchaser receives physical delivery of the commodity within 28 days of payment. Excluded from the commodity option definition are options traded on a national securities exchange, such as exchange-traded options on foreign currency.

Three alternatives to the definition of commodity are noted. The preferred alternative is a broad, generic and all-inclusive definition, without listing any specific commodities but with residual regulatory authority to exclude items. This definition would include items that are not presently the subject of lawful futures trading regulated by the CFTC, such as cobalt or diamonds. Excluded from the definition are certain numismatic coins, works of art, real estate and products grown or raised thereon. Nor does the definition purport to include a security. Other alternatives noted but not set forth are (1) a specific list of items that the state chooses to include for coverage under the Code and (2) the broad, generic definition followed by an inclusive, but not exhaustive, list of items.

A separate definition is provided for precious metals, to include silver, gold, platinum, palladium and copper, in anticipation that a state may choose to permit its citizens to purchase these metals under commodity contracts permitted by **Section 1.04(a)(2)** of the Code.

**Section 1.02** of the Code generally makes it unlawful for any person to sell or offer for sale any commodity contract or commodity option of any kind. Thus, for example, **Section 1.02** bans off-exchange commodity futures contracts. This ban applies to all leverage-type contracts other than those exclusively regulated by the CFTC under Section 19 of the Commodity Exchange Act, which under CFTC Rule are confined to those of a 10-year or longer duration. The CFTC has stated that other leverage-type contracts and particularly those of a shorter duration are off-exchange futures. Therefore, these are prohibited under **Section 1.02** of the Code.

Under **Section 1.03**, purchases or sales by or to certain persons are excluded from the prohibition in **Section 1.02**. Specifically, transactions with CFTC registered futures commission merchants and leverage transaction merchants, SEC registered broker-dealers, affiliates whose commodity transactions are guaranteed by these

registrants, members of CFTC-designated contract markets (or clearinghouses) and banks and other specified financial institutions are excluded from the prohibition of **Section 1.02**. Also excluded are transactions with securities broker-dealers registered by the state and, should the state determine to enact the separate commodity broker-dealer registration legislation contemplated by Part III of the Code, persons registered under that legislation. These exclusions are deemed appropriate since the activities of these persons are otherwise regulated or supervised by federal and state authorities. Of course, the exemption for banks would not permit other persons to evade the prohibition in **Section 1.02** by resorting to banking arrangements to finance or otherwise assist unlawful conduct. Nor do the exemptions purport to permit any person to engage in activities, such as off-exchange futures contracts, that are unlawful under the Commodity Exchange Act or CFTC rules. A specific provision at the end of **Section 1.03** makes this clear.

**Section 1.04(a)(1)** exempts from **Section 1.02** all those accounts, agreements and transactions within the exclusive regulatory authority of the CFTC as granted by the Commodity Exchange Act. These include futures contracts and commodity options traded on boards of trade designated by the CFTC as contract markets, foreign futures except as otherwise specified by CFTC rule, authorized commodity options and 10-year or longer leverage contracts subject to regulation under Section 19 of the Commodity Exchange Act. So-called exchange of physical commodities for futures positions (EFP's) covered by the rules of CFTC-designated contract markets are included within this exemption.

**Sections 1.02(a)(2) through (a)(4)** of the Code specify those commodity transactions which the state elects to exempt from the ban imposed by **Section 1.02**. The exemption in **Section 1.04(a)(2)** permits contracts for the delivery of precious metals provided, among other things, that the purchaser receives either physical delivery of the precious metals within a specified period or appropriate documents of title and certificates of storage issued by banks, and other specified financial institutions, or certain qualified sellers who are required to file for this status and meet stringent requirements. Thus, the public will be able to invest in precious metals under the Code. **Section 1.04(a)(3)** permits commodity contracts between commercial users and **Section 1.04(a)(4)** permits contracts where the offeree or purchaser is a person exempted under **Section 1.03**, an insurance company, an investment company or an employee pension or profit-sharing or benefit plan. The state agency administering the Code is also granted general

rulemaking authority under **Section 1.04(b)** to grant exemptions in particular cases, and otherwise to implement the Code. It should be emphasized that **Section 1.04(a)** only exempts transactions from the prohibition in **Section 1.02** of the Code; it does not purport to make lawful any transaction that violates the Commodity Exchange Act or CFTC rules.

**Section 1.05** of the Code seeks to implement that portion of Section 12(e) of the Commodity Exchange Act which permits the states to apply their laws to those persons who have failed to obtain a required CFTC registration or designation. Under this provision, it is unlawful to engage in a trade or a business as a person required to be so registered or designated unless such person is in fact so registered or designated or otherwise permitted to engage in business through a CFTC temporary license.

**Section 1.06** broadly proscribes fraudulent conduct in connection with the contracts and options prohibited or regulated by the Code. The antifraud provisions of **Section 1.06** cover all contracts and options which the Code bans under **Section 1.02** as well as all contracts not subject to CFTC exclusive jurisdiction which are permitted under **Section 1.04(a)(2) through (4)**. It should be noted that **Section 1.06** does not apply to commodity contracts solely between commercial users permitted under **Section 1.04(a)(3)**. It should also be noted that persons exempt under Section 1.03 from the prohibition in **Section 1.02** are nevertheless subject to the antifraud provisions of **Section 1.06** and the provisions of **Section 1.07** relating to the liability of controlling persons, principals and aiders and abettors of those who violate the Code.

**Section 1.08** generally provides that the Code does not affect a state's securities laws. **Section 1.09** generally describes the purposes of the Code and provides also that the Code is not intended to create private rights of action against violations of the Code's provisions.

**Section 2.13** provides an affirmative defense to a proceeding if the transaction(s) in question would have qualified for the exclusion from the definition of commodity contract under paragraph 1.01(e) or for the exemption under paragraph 1.04(a)(2) but for the time of delivery of the commodity, and if the defendant proves that the delivery failure occurred due to factors beyond the seller's control such as unusual conditions in a primary or wholesale market, temporary supply failure or good faith mistake or error. The defense, however, is available only if delivery has in fact been made at the time the defense is asserted and only if delivery has in fact been made

within a reasonable time of full or partial payment. Although the term "reasonable time" is not defined, the reasonableness of any period of delay should be viewed in light of the requirement that delivery be made within a specified time period from full or partial payment. The seller remains subject to the duty of prompt delivery as soon as circumstances permit. The burden of proof rests upon the party asserting the defense.

## **MODEL STATE COMMODITY CODE**

### **Part I**

#### **Sec. 1.01. Definitions**

- (a) "Administrator" [or other descriptive term] means the [here identify the appropriate state agency or official administering the Code].
- (b) "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.
- (c) "CFTC Rule" means any rule, regulation or order of the Commodity Futures Trading Commission in effect on the effective date of this chapter [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].<sup>1</sup>
- (d) "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 paragraph (m) 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 (1) a numismatic coin whose fair market value is at least 15% higher than the value

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<sup>1</sup> The bracketed language is designed to incorporate future changes in the Commodity Exchange Act or CFTC Rules without the need for subsequent legislation. Such a provision may not be permissible under certain states' laws.

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 thereof.<sup>2</sup>

- (e) "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 [or other period determined by the state] 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.
- (f) "Commodity Exchange Act" means the act of Congress known as the Commodity Exchange Act, as amended to the effective date of this chapter, 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.]<sup>3</sup>
- (g) "Commodity Futures Trading Commission" means the independent regulatory agency established by Congress to administer the Commodity Exchange Act.

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<sup>2</sup> Other alternatives would be to define commodity by a listing of specifically included items or by using a generic definition as above, together with an illustrative listing of items.

<sup>3</sup> See note 1, supra.

- (h) "Commodity Merchant" means 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.<sup>4</sup>
- (i) "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.
- (j) "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.
- (k) "numismatic coin" means the following:
- (1) A coin shall be considered to be a "numismatic coin" within the meaning of Section 1.01(d)(1) if it possesses all of the following characteristics:

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<sup>4</sup> An alternative approach is to set forth in ¶(h) the definitions in their entirety.

- (i) the coin is of interest primarily to coin collectors, rather than to speculators or investors in precious metals (as defined in Section 1.01(m));
  - (ii) the fair market value of the coin is determined primarily by its design, subject matter, limited mintage, rarity, and relative condition of preservation from wear, rather than by its intrinsic precious metal or bullion content;
  - (iii) the fair market value of the coin is directly related to an individual inspection and grading of its relative condition according to an established system of numismatic standards promulgated independently of the offerer of the coin;
  - (iv) and with the exception of "proof", mint and commemorative coins, the coin is minted or manufactured under authority of the issuing government for the purpose of being used as legal tender.
- (2) A coin shall be presumed not to be a "numismatic coin" within the meaning of Section 1.01 (d)(1) if it possesses one or more of the following characteristics:
- (i) the coin is minted, manufactured or advertised for sale primarily to persons who seek to invest or speculate in precious metals (as defined in Section 1.01(m)), rather than to coin collectors or for use in commerce as legal tender;
  - (ii) the coin is advertised or sold with the expectation that it will be purchased or traded for its intrinsic precious metal or bullion content;
  - (iii) the price of the coin is directly related to the spot market price of its intrinsic precious metal or bullion content;
  - (iv) the coin is generally not used as legal tender;
  - (v) the quantity of mintage or manufacture of the coin is based on market demand; or



- (vi) or the coin is not sought for its design, subject matter, limited mintage, rarity, or relative condition of preservation from wear, but instead for the value of its intrinsic precious metal or bullion content.
- (l) "Offer" includes every offer to sell, offer to purchase, or offer to enter into a commodity contract or commodity option.
- (m) "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).
- (n) "Precious Metal" means 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 Administrator may specify by rule, regulation or order.<sup>5</sup>
- (o) "Sale" or "sell" includes every sale, contract of sale, contract to sell, or disposition, for value.

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<sup>5</sup> These are commonly recognized precious metals. A state may list other metals it specifically determines should be characterized as precious metals.

## Sec. 1.02. Unlawful Commodity Transactions

Except as otherwise provided in Section 1.03 or 1.04, 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. 1.03. Exempt Person Transactions

The prohibitions in Section 1.02 of this chapter 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:

- (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 paragraph (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;
- (f) a person registered under the laws of this state as a securities broker-dealer whose activities require such registration; or
- [(g) a person registered as a commodity broker-dealer or commodity sales representative in accordance with the provisions of Part III of this chapter.<sup>6</sup>]

The exemption provided by this Section 1.03 shall not apply to any transaction or activity which is prohibited by the Commodity Exchange Act or CFTC Rule.

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<sup>6</sup> Paragraph (g) permits a state to adopt a separate registration scheme to permit commodity transactions to be offered or sold by persons not otherwise exempted by the other listed exemptions in Section 1.03.

#### Sec. 1.04. Exempt Transactions

(a) The prohibitions in Section 1.02 of this chapter 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;<sup>7</sup>
- (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 28 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

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<sup>7</sup> Under Section 2(a) (1) (A) of the Commodity Exchange Act, the CFTC is granted exclusive jurisdiction over various commodity accounts, agreements or transactions, such as transactions involving commodity futures contracts. However, since enactment of Section 12(e) of the Commodity Exchange Act, the CFTC does not have exclusive jurisdiction over transactions effected outside the Act's regulatory structure. Thus, for example, any unlawful futures transaction conducted outside the facilities of a CFTC-designated contract market would not be covered by this exemption.

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 Section 1.03 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)].<sup>8</sup>

(b) For the purposes of Section 1.04(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 Section 1.04(a)(2), containing:
  - (i) the seller's name and address, names of its directors, officers, controlling shareholders, partners, principals, and other controlling persons;

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<sup>8</sup> The bracketed exemption is modeled on that contained in many states' securities laws. A state may decide this exemption is inappropriate for commodity contracts.

- (ii) 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;
- (iii) 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;
- (iv) depository information including: (i) the name and address of the depository or depositories that the seller intends to use; (ii) 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 (iii) independent verification from each and every depository named in 3(D)(ii) 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.
- (v) 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;
- (vi) a statement describing the details of all civil, criminal, or administrative proceedings currently pending or adversely resolved against the seller or its directors, officers, controlling shareholders, partners, principals, or other controlling persons during the past ten years including: (i) civil litigation and administrative proceedings involving securities or commodities violations, or fraud, (ii) criminal proceedings, (iii) denials, suspensions or revocations of securities or commodities, licenses or registrations, and (iv) suspensions or expulsions from membership in, or associations with, self-regulatory organizations registered under the Securities Exchange Act of 1934, or the Commodities Exchange Act; 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.
- (c) The Administrator may, upon request by the seller, waive any of the exemption requirements in Section 1.04(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 1.04(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 Section 1.04(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 ten 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 advisor;
  - (5) is the subject of any of the following orders which are currently effective and which were issued within the last five years:

- (i) 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, commodity trading adviser, commodity pool operator, securities broker-dealer, sales representative, or investment adviser, or the substantial equivalent of those terms;
  - (ii) 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;
  - (iii) a United States Postal Service fraud order;
  - (iv) 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;
  - (v) 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 30 days after the receipt of a written request the matter will be set for hearing. The provisions of Section 2.10 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, regulations 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 and conditionally or unconditionally and otherwise implementing the provisions of this chapter for the protection of purchasers and sellers of commodities.

#### Sec. 1.05. Unlawful Commodity Activities

- (a) No person shall engage in a trade or business or otherwise act as a commodity merchant unless such person (1) 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 (2) 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.

#### Sec. 1.06. Fraudulent Conduct

No person, shall directly or indirectly:

- (a) cheat or defraud, or attempt to cheat or defraud, any other person or employ any device, scheme or artifice to defraud any other person;
- (b) 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;

- (c) 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
- (d) 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 Sections 1.02, 1.03, 1.04(a)(2), or 1.04(a)(4) of this chapter.

#### Sec. 1.07. 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.

#### Sec. 1.08. Securities Laws Unaffected

Nothing in this chapter shall impair, derogate or otherwise affect the authority or powers of the Administrator under [here specify relevant state securities law] or the application of any provision thereof to any person or transaction subject thereto.

## Sec. 1.09. 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.

## **Part II—Administration and Enforcement**

### Sec. 2.01. 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:

- (i) the [insert the name of the court having general trial jurisdiction] Court located in [insert the name of the city, county, or judicial unit in which the Administrator's office is located] or the [name of the court having general trial jurisdiction] Court where service may be obtained on the person refusing to testify or produce, if the person is within this State; or
- (ii) the appropriate court of the state having jurisdiction over the person refusing to testify or produce, if the person is outside this state.

#### Sec. 2.02. Enforcement of Chapter

- (a) If the Administrator believes, whether or not based upon an investigation conducted under Section 2.01, 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 amount which may not exceed [\$10,000] for any single violation or [\$100,000] for multiple violations in a single proceeding or a series or related proceedings;
  - (3) initiate any of the actions specified in subsection (b); [or
  - (4) take disciplinary action against a licensed person as specified in Section 3.08;]
- (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; or
- [(5) an action to enjoin permanently any person from acting as a commodity broker-dealer or a commodity sales representative, as defined in Section 3.01(a) or 3.01(b).]<sup>9</sup>

Sec. 2.03. 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, the [insert name of the appropriate court] 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:
  - (i) imposition of a civil penalty in amount which may not exceed [\$10,000] for any single violation or [\$100,000] for multiple violations in a single proceeding or a series of related proceedings;
  - (ii) disgorgement;
  - (iii) declaratory judgment;
  - (iv) restitution to investors wishing restitution; and
  - (v) appointment of a receiver or conservator for the defendant or the defendant's assets; and
- [(iv) an injunction permanently enjoining the defendant or defendants from acting as a commodity broker-dealer or a

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<sup>9</sup> For those states that elect to adopt a separate registration scheme, see Part III.

commodity sales representative, as defined in Section 3.01(a) or 3.01(b).]<sup>10</sup>

- (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:
  - (i) a temporary restraining order;
  - (ii) a temporary or permanent injunction;
  - (iii) a writ of prohibition or mandamus; or
  - (iv) an order appointing a receiver or conservator for the defendant or the defendant's assets.
- (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 [insert the name of the appropriate court] may grant appropriate legal and equitable remedies.
  - (2) Upon showing of a violation of the securities or commodity act of the foreign state or a 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:

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<sup>10</sup> See Footnote 9.

- (i) disgorgement; and
  - (ii) appointment of a receiver, conservator, or ancillary [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:
- (i) a temporary restraining order;
  - (ii) a temporary or permanent injunction;
  - (iii) a writ of prohibition or mandamus; or
  - (iv) an order appointing a receiver, conservator, or ancillary [ancillary] receiver or conservator for the defendant or the defendant's assets located in this State.

#### Sec. 2.04. Criminal Penalties

- (a) Any person who willfully violates:
  - (1) any provision of this chapter; or
  - (2) any rule or order of the Administrator under this chapter shall, upon conviction, be fined not more than [\$20,000] or imprisoned more than [10] years, or both, for each violation.
- (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) 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.

Sec. 2.05. Administration of Chapter

- (a) This chapter shall be administered by the [insert name of local administrative agency and any related provisions on method of selection, salary, term of office, budget, selection and remuneration of personnel, annual reports to the Legislature or Governor, etc., which are appropriate to the particular state].
- (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 subsection (2) of this Section, all information collected, assembled or maintained by the Administrator is public information and is available for the examination of the public as provided by [the jurisdiction's freedom of information or open records act].
  - (2) The following are exceptions to subsection (1) which are deemed to be confidential:
    - (i) information obtained in private investigations pursuant to Section 2.01 of this chapter;
    - (ii) information made confidential by the provisions of [the freedom of information or open records act].
    - (iii) information obtained from federal agencies which may not be disclosed under federal law.
  - (3) The Administrator in its discretion may disclose any information made confidential under subsection (2)(A) to persons identified in Section 2.06(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.

#### Sec. 2.06. 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.

#### Sec. 2.07. 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.
- (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.

#### Sec. 2.08. Consent to Service of Process

When a person, including a non-resident 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

non-criminal 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.

Sec. 2.09. Scope of the Chapter

- (a) Sections 1.02, 1.05 and 1.06 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) Sections 1.02, 1.05 and 1.06 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 twelve months, or
- (2) a radio or television program originating outside this State is received in this State.

#### Sec. 2.10. 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 date, time, and place set for the hearing on the notice. If the proceeding is pursuant to a summary order, the Administrator shall inform all interested parties that they have 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 to commence within 30 business days after the receipt of the written request.
- (c) If the proceeding is pursuant to a summary order, the Administrator, whether or not a written request for a hearing is received from any interested party, may set the matter down for hearing on the Administrator's own motion.
- (d) If no hearing is requested and none is ordered by the Administrator, the summary order will automatically become a final order after 30 business days.
- (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.

#### Sec. 2.11. Judicial Review of Orders

- (a) Any person aggrieved by a final order of the Administrator may obtain a review of the order in the [insert name of appropriate court] by filing in court, 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 Administrator.
- (b) Upon the filing of a petition for review, except where the taking of additional evidence is ordered by the court pursuant to subsection (e) or (f), the court shall have exclusive jurisdiction of the matter, and the Administrator may not modify or set aside the order, in whole or part.
- (c) The filing of a petition for review under subsection (a), does not, unless specifically ordered by the court, operate as a stay of the Administrator's order, and the Administrator may enforce or ask the court to enforce the order pending the outcome of the review proceedings.
- (d) Upon receipt of the petition for review, the Administrator shall certify and file in the court a copy of the order and the transcript or record of the evidence upon which it was based. If the order became final by operation of law under subsection 2.10(d), the Administrator shall certify and file in court the summary order [and] evidence of its source [service] upon the parties to it and an affidavit certifying that no hearing has been held and the order became final pursuant to subsection 2.10(d).
- (e) If either the aggrieved party or the Administrator 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 Administrator or other good cause, the court may order the additional evidence to be taken by the Administrator under such conditions as the court considers proper.

- (f) If new evidence is ordered taken by the court, the Administrator may modify the findings and order by reason of the additional evidence and shall file in the court the additional evidence together with any modified or new findings or order.
- (g) The court shall review the petition based upon the original record before the Administrator as amended under subsections (e) and (f). The findings of the Administrator as to the facts, if supported by competent, material, and substantive evidence, are conclusive. Based upon this review, the court may affirm, modify, enforce, or set aside the order, in whole or in part.
- (h) The judgment of the court is subject to review by the [insert name of appropriate court].

#### Sec. 2.12. 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.

#### Sec. 2.13. Affirmative Defense

It shall be a defense in any complaint, information, indictment, any writ or proceeding brought under this Chapter alleging a violation of Section 1.02 based solely on the failure in an individual case to make physical delivery within the applicable time period under Section 1.01(e) or section 1.04(a)(2) if:

- (a) 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 sellers affiliate's, subsidiaries or successors; and

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

### **Part III**

#### Sec. 3.01. Definitions and Application

- (a) Commodity broker-dealer means any person engaged in the business of effecting transactions in commodity contracts or commodity options, as defined in Part I of this Chapter, for the account of others or for the person's own account.
- (b) Commodity sales representative means any person authorized to act and acting for a commodity broker-dealer in effecting or attempting to effect a transaction in a commodity contract or a commodity option.
- (c) The application for licensing must contain the information as the Administrator determines, by rule, is necessary or appropriate to facilitate the administration of this chapter.

#### Sec. 3.02. Fees

- (a) An applicant for licensing shall pay a registration fee as follows:
  - (1) commodity broker-dealer [\$100.00] and for each branch office [\$50.00]; and
  - (2) commodity sales representative [\$25.00].
- (b) Except in any year in which a licensing fee is paid, an applicant shall pay an annual fee as follows:
  - (1) a commodity broker-dealer [\$75.00] and for each branch office in this State [\$30.00]; and
  - (2) commodity sales representative [\$15.00].
- (c) For purposes of this Section, a branch office shall mean each office of a commodity broker-dealer in this State, other than the principal office in this State of the commodity broker-dealer, from which three or more commodity sales representatives transact business.

- (d) If an application is denied or withdrawn or the license is terminated by revocation, cancellation, or withdrawal, the Administrator shall retain the fee paid.

#### Sec. 3.03. Examinations

- (a) The Administrator may, by rule or order, impose an examination requirement upon:
  - (1) an applicant applying for licensing under this Part; and
  - (2) any class of applicants.
- (b) Any examination required may be administered by the Administrator or designee of the Administrator. Examinations may be oral, written or both, and may differ for each class of applicants.
- (c) The Administrator may, by order, waive any examination requirement imposed pursuant to subsection (a) as to any applicant, if the Administrator determines that such examination is not necessary for the protection of investors.

#### Sec. 3.04. Licensing

- (a) Unless a proceeding under Section 3.08 has been instituted, the license of any commodity broker-dealer or commodity sales representative becomes effective thirty (30) days after an application for licensing and the last of any additional information requested by the Administrator or the Administrator's designee has been filed and provided that all examination requirements imposed pursuant to Section 3.03 have been satisfied. The Administrator may, by order, authorize an earlier effective date of licensing.
- (b) The license of a commodity broker-dealer or commodity sales representative shall expire on December 31 of the year for which issued or at such other time as the Administrator may by rule prescribe.
- (c) The license of a commodity sales representative is only effective with respect to transactions effected as an employee or otherwise on behalf of the commodity broker-dealer for whom the commodity sales representative is licensed.

- (d) No person shall at any one time act as a commodity sales representative for more than one commodity broker-dealer, except (i) where the commodity broker-dealers for whom the commodity sales representative will act are affiliated by direct or indirect common control, a commodity sales representative may represent each of those organizations or (ii) where the Administrator, by rule or order, authorizes multiple licenses as consistent with the public interest and protection of investors.
- (e) When a commodity sales representative begins or terminates association with a commodity broker-dealer, or begins or terminates activities which make that person a commodity sales representative, the commodity sales representative and the former commodity broker-dealer on whose behalf the commodity sales representative was acting shall notify promptly the Administrator or his designee.
- (f) If the Administrator shall determine, by rule, that one or more classifications of licenses as a commodity broker-dealer or commodity sales representative which are subject to limitations and conditions on the nature of the activities which may be conducted by those persons are consistent with the public interest and the protection of investors, the Administrator may authorize the licensing of persons subject to specific limitations and conditions.

#### Sec. 3.05. Annual Report and Fee

For so long as a commodity broker-dealer or commodity sales representative is licensed under this chapter, it shall file an annual report, together with the fee specified in Section 3.02(b), with the Administrator or the designee of the Administrator, at a time and including that information as the Administrator determines, by rule or order, is necessary or appropriate.

#### Sec. 3.06. Post-Licensing Requirements

- (a)
  - (1) The Administrator may, by rule, require a licensed commodity broker-dealer to maintain:
    - (i) minimum net capital; and



- (ii) a prescribed ratio between net capital and aggregate indebtedness.

The minimum net capital and net capital-to-aggregate-indebtedness ratio may vary with type or class of commodity broker-dealer.

- (2) If a licensed commodity broker-dealer believes, or has reasonable cause to believe, that any requirement imposed on it under this subsection (a) is not being met, it shall promptly notify the Administrator of its current financial condition.
- (b) The Administrator may, by rule, require the furnishing of fidelity bonds from commodity broker-dealers.
- (c) A licensed commodity broker-dealer shall file financial and other reports and [as] the Administrator determines, by rule, are necessary or appropriate.
- (d)
  - (1) A licensed commodity broker-dealer or commodity sales representative shall make and maintain records as the Administrator determines, by rule, are necessary or appropriate.
  - (2) Required records may be maintained in computer or microform format or any other form of data storage provided that the records are readily accessible to the Administrator.
  - (3) Required records must be preserved for [five] years unless the Administrator, by rule, specifies either a longer or shorter period for a particular type or class of records.
- (e) If the information contained in any document filed with the Administrator or the Administrator's designee pursuant to Section 3.01 or this Section 3.06, except for those documents which the Administrator, by rule or order, may exclude from this requirement, is or becomes inaccurate or incomplete in any material respect, the licensed person shall promptly file a correcting amendment, unless notification of the correction has been given under section 3.04(e).

### Sec. 3.07. Inspection Power

- (a) The Administrator, without prior notice, may examine the records and require copies of the records which a licensed commodity broker-dealer or commodity sales representative is required to make and maintain under Section 3.06(d), within or without this State, in a manner reasonable under the circumstances. Commodity broker-dealers and commodity sales representatives must make their records available to the Administrator in a readable form.
- (b) The Administrator may copy records or require a licensed person to copy records and provide the copies to the Administrator in a manner reasonable under the circumstances.
- (c) The Administrator may impose reasonable fees for conducting an examination pursuant to this Section.

### Sec. 3.08. Grounds for Denial, Revocation, Suspension, Cancellation and Withdrawal

- (a) The Administrator may, by order, deny, suspend, or revoke any license, limit the activities which an applicant or licensed person may perform in this State, censure any applicant or licensed person, or bar any applicant or licensed person from association with a licensed commodity broker-dealer, if the Administrator finds that (1) the order is in the public interest and (2) that the applicant or licensed person or, in the case of a commodity broker-dealer, any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the commodity broker-dealer:
  - (1) has filed an application for licensing with the Administrator or the designee of the Administrator which, as of its effective date, or as of any date after filing in the case of an order denying effectiveness, 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) (i) has violated or failed to comply with a provision of this chapter, a predecessor act, or a rule or order under this chapter or a predecessor act, (ii) is the subject of an adjudication or determination within the

last five years by a securities agency or Administrator or court of competent jurisdiction that the person has willfully violated the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, or the Commodity Exchange Act, or the securities or commodity law of any other state (but only if the acts constituting the violation of that state's law would constitute a violation of this chapter had the acts taken place in this State);

- (3) has, within the last ten 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;
- (4) is 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;
- (5) is subject of an order of the Administrator denying, suspending, or revoking the person's license as a commodity or securities broker-dealer, sales representative, or investment adviser;
- (6) is the subject of any of the following orders which are currently effective and which were issued within the last five years;
  - (i) an order by the securities agency or administrator of another state, Canadian province or territory, or the Securities and Exchange Commission, entered after notice and opportunity for hearing, denying, suspending, or revoking the person's license as a commodities or securities broker-dealer, sales representative, or investment adviser, or the substantial equivalent of those terms;
  - (ii) a suspension or expulsion from membership in or association with a self-regulatory organization registered under the Securities and Exchange Act of 1934 or the Commodity Exchange Act;
  - (iii) a United States Postal Service fraud order;

- (iv) a cease and desist order entered after notice and opportunity for 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;
  - (v) an order entered by the Commodity Futures Trading Commission denying, suspending, or revoking registration under the Commodity Exchange Act;
  - (vi) has engaged in an unethical or dishonest conduct or practice in the investment commodities or securities business;
  - (vii) is insolvent, either in the sense that liabilities exceed assets, or in the sense that obligations cannot be met as they mature;
  - (viii) is not qualified on the basis of such factors as training, experience, and knowledge of the securities business (which determination shall be governed and limited by the provisions of subsection (b));
  - (ix) has failed reasonably to supervise sales representatives or employees; or
  - (x) has failed to pay the proper filing fee within thirty days after being notified by the Administrator of the deficiency (but the Administrator shall vacate any order under this subsection (K) when the deficiency has been corrected).
- (b) If the public interest or the protection of investors so requires, the Administrator may, by order, summarily suspend a license or postpone the effective date of a license. Upon the entry of the order the Administrator shall promptly notify the applicant or licensed person, as well as the commodity broker-dealer with whom the person is or will be associated if the applicant or licensed person is a commodity sales representative, that an order has been entered and of the reasons therefor and that within 30 days after the receipt of a written request the matter will be set down for hearing. The provisions of Section 2.10 shall apply with respect to all subsequent proceedings.

- (c) If the Administrator finds that any applicant or licensed person is no longer in existence or has ceased to do business as a commodity broker-dealer or commodity sales representative, 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, cancel the application or license.
- (d) The Administrator may not institute a suspension or revocation proceeding on the basis of a fact or transaction disclosed in the license application unless the proceeding is instituted within the next ninety days following issuance of the license.