

LEGISLATIVE BILL 283

Approved by the Governor March 22, 1993

Introduced by Haberman, 44

AN ACT relating to the Commodity Code; to amend sections 8-1701, 8-1704 to 8-1707, 8-1719, 8-1721, 8-1724, and 8-1726, Reissue Revised Statutes of Nebraska, 1943; to adopt federal rules as prescribed; to redefine terms; to change applicability of the code as prescribed; to provide for additional prohibited acts as prescribed; to provide for restitution; to provide for civil actions and limitations on civil actions as prescribed; to provide an affirmative defense; to harmonize provisions; and to repeal the original sections.

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

Section 1. That section 8-1701, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

8-1701. Sections 8-1701 to 8-1737 and sections 10 and 11 of this act shall be known and may be cited as the Commodity Code.

Sec. 2. That section 8-1704, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

8-1704. CFTC rule shall mean any rule, regulation, or order of the Commodity Futures Trading Commission in effect on ~~August 30, 1987~~ January 1, 1993.

Sec. 3. That section 8-1705, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

8-1705. (1) Commodity shall mean, except as otherwise specified by the director by rule, regulation, or order;

(a) Any ~~any~~ agricultural, grain, or livestock product or byproduct;

(b) Any ~~any~~ metal or mineral, including a precious metal;

(c) Any ~~any~~ gem or gemstone, whether characterized as precious, semi-precious, or otherwise;

(d) Any ~~any~~ fuel, whether liquid, gaseous, or otherwise;

(e) Any ~~any~~ foreign currency; and

(f) All ~~all~~ other goods, articles, products, or items of any kind.

(2) Commodity shall not include;

(a) A ~~(1)-a~~ numismatic coin, the fair market value of which is at least fifteen percent higher than the value of the metal it contains;

(b) Real ~~(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

(c) ~~Any or (3) any~~ work of art offered or sold by art dealers at public auction or offered or sold through a private sale by the owner of such work.

Sec. 4. That section 8-1706, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

8-1706. Commodity contract shall mean any account, agreement, or contract for the purchase or sale, primarily for speculation or investment purposes and not for use or consumption by the offeree or purchaser, of one or more commodities, whether for immediate or subsequent delivery or whether delivery is intended by the parties, and whether characterized as a cash contract, deferred shipment or deferred delivery contract, forward contract, futures contract, installment or margin contract, leverage contract, or otherwise. Any commodity contract offered or sold shall, in the absence of evidence to the contrary, be presumed to be offered or sold for speculation or investment purposes. ~~A commodity contract shall not include any contract or agreement which requires, and under which the purchaser receives, within twenty-eight calendar days from the payment in good funds of any portion of the purchase price, physical delivery of the total amount of each commodity to be purchased under the contract or agreement.~~

Sec. 5. That section 8-1707, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

8-1707. Commodity Exchange Act shall mean the act of Congress known as the Commodity Exchange Act, 7 U.S.C. 1, as amended on ~~August 30, 1987~~ January 1, 1993.

Sec. 6. That section 8-1719, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

8-1719. (1) Section 8-1717 shall not apply to the following:

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

(b) A commodity contract for the purchase of one or more precious metals which requires, and under which the purchaser receives, within ~~seven~~ twenty-eight calendar days from the payment ~~in good funds~~ of any portion of the purchase price, physical delivery of the total quantity of the precious metals purchased. For purposes of this subsection, physical ~~by such payment.~~ Physical delivery shall be deemed to have occurred if, within such ~~seven-day~~ twenty-eight-day period, ~~such~~ the total quantity of precious metals purchased ~~by such payment~~ is delivered, whether in specifically segregated or fungible bulk form, into the possession of a depository, other than the seller, which is either (i) a financial institution, (ii) a depository, the warehouse receipts of which are recognized for delivery purposes for any commodity on a contract market designated by the Commodity Futures Trading Commission, (iii) a storage facility licensed or regulated by the United States or any agency thereof, or (iv) a depository designated by the director, and such depository issues and the purchaser receives, a

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

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

(d) A commodity contract under which the offeree or the purchaser is a person referred to in section 8-1718, 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; ~~or~~

(e) A commodity contract which requires, and under which the purchaser receives, within twenty-eight calendar days from the payment of any portion of the purchase price, physical delivery of the total amount of each commodity to be purchased under the contract or agreement.

(2) The director may adopt and promulgate or issue rules, regulations, or orders prescribing the terms and conditions of all transactions and contracts covered by the Commodity Code, which are not within the exclusive jurisdiction of the Commodity Futures Trading Commission as granted by the Commodity Exchange Act, exempting any person or transaction from any provision of the Commodity Code conditionally or unconditionally and otherwise implementing such code for the protection of purchasers and sellers of commodities.

Sec. 7. That section 8-1721, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

8-1721. (1) 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, ~~(2)~~ (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, ~~(c) necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading,~~ (3) engage in any transaction, act, practice, or course of business, including, but not limited to, any form of advertising or solicitation, which operates or would operate as a fraud or deceit upon any person, or ~~(4)~~ (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 section 8-1717 or 8-1718 or subdivision (1)(b) or (d) of section 8-1719.

(2) No person shall sell a commodity contract under the

terms of which the purchaser, other than a person referred to in section 8-1718 or subdivision (1)(d) of section 8-1719, finances the transaction (a) through a lender affiliated with or related to the seller, (b) through a lender who directly supplies the seller with the contract documents used by the purchaser to evidence the loan and the seller has knowledge of the credit terms and participates in the preparation of the document, (c) through a lender who knowingly participates with the seller in the sale, or (d) under an agreement which conditions the granting of the loan on the purchase of the commodity from a particular seller.

Sec. 8. That section 8-1724, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

8-1724. The Commodity Code may be construed and implemented to effectuate its general purpose to protect investors, to prevent and prosecute illegal and fraudulent schemes involving commodity contracts, and to maximize coordination with federal and other states' law and the administration and enforcement thereof. ~~The Commodity Code is not intended to create any rights or remedies upon which actions may be brought by private persons against persons who violate the provisions of the code.~~

Sec. 9. That section 8-1726, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

8-1726. (1) If the director believes, whether or not based upon an investigation conducted under section 8-1725, that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of the Commodity Code or any rule, regulation, or order under the code, the director may:

(a) Issue a cease and desist order;

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

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

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

(a) An action for a declaratory judgment;

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

(c) An action for disgorgement or restitution; or

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

(3)(a) Any fine and costs imposed under this section shall be in addition to all other penalties imposed by the laws of this state and shall be collected by the director and remitted to the State Treasurer. Costs shall be credited to the Securities Act Cash Fund, and fines shall be

credited to the permanent school fund.

(b) If a person fails to pay the administrative fine or investigation costs referred to in this section, a lien in the amount of such fine and costs may be imposed upon all assets and property of such person in this state and may be recovered by suit by the director. Failure of the person to pay such fine and costs shall constitute a separate violation of the code.

Sec. 10. (1) Any person who violates section 8-1721 shall be liable to the purchaser who may sue either at law or in equity to recover the consideration paid under the commodity contract, including interest paid under a financing agreement in connection with the purchase, costs, and reasonable attorney's fees, less (a) the amount received upon the disposition of the commodity or (b) the value of the commodity on the date of the entry of judgment.

(2) Every cause of action under this section shall survive the death of any person who might have been a plaintiff or defendant. No person may sue under this section more than three years after the contract of sale. If the cause of action is not discovered and could not be reasonably discovered within the three-year period, then the action may be commenced within two years from the date of the discovery or from the date of discovery of facts which would reasonably lead to the discovery, whichever is earlier. In no event may a person sue under this section more than five years after the contract of sale.

(3) No person who has made or engaged in the performance of any contract in violation of any provision of the Commodity Code or any rule or order under the code or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation of the code may base any suit on the contract. Any condition, stipulation, or provision purportedly binding any purchaser to waive compliance with any provision of the code or any rule or order under the code shall be void.

Sec. 11. It shall be a defense in any complaint, information, indictment, writ, or proceeding brought under the Commodity Code alleging a violation of section 8-1717 based solely on the failure in an individual case to make physical delivery within the applicable time period under subdivisions (1)(b) and (c) of section 8-1719 if (1) the 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, or the seller's affiliates, subsidiaries, or successors and (2) physical delivery was completed within a reasonable time under the applicable circumstances.

Sec. 12. That original sections 8-1701, 8-1704 to 8-1707, 8-1719, 8-1721, 8-1724, and 8-1726, Reissue Revised Statutes of Nebraska, 1943, are repealed.