

GENERAL ASSEMBLY OF NORTH CAROLINA
1987 SESSION

CHAPTER 1098
HOUSE BILL 1237

AN ACT TO REGULATE INVESTMENT ADVISERS.

The General Assembly of North Carolina enacts:

Section 1. The General Statutes are amended by adding a new Chapter to read:

"Chapter 78C. Investment Advisers.

"Article 1.

"Title and Definitions.

"§ 78C-1. **Title.** – This Chapter shall be known and may be cited as the North Carolina Investment Advisers Act.

"§ 78C-2. **Definitions.** – When used in this Chapter, the definitions of G.S. 78A-2 shall apply along with the following, unless the context otherwise requires:

(1) 'Investment adviser' means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities. 'Investment adviser' also includes financial planners and other persons who, as an integral component of other financially related services, provide the foregoing investment advisory services to others for compensation and as a part of a business or who hold themselves out as providing the foregoing investment advisory services to others for compensation. 'Investment adviser' does not include:

- a. An investment adviser representative or a person excluded from the definition of investment adviser representative pursuant to G.S. 78C-2(4)c.;
- b. A bank, savings institution, or trust company;
- c. A lawyer, accountant, engineer, or teacher whose performance of any such services is solely incidental to the practice of his profession;
- d. A dealer or its salesman whose performance of these services is solely incidental to the conduct of its business as a dealer and who receives no special compensation for them;
- e. A publisher of any newspaper, news column, newsletter, news magazine, or business or financial publication or service, whether communicated in hard copy form, or by electronic means, or otherwise, that does not consist of the rendering of advice on the basis of the specific investment situation of each client;

- f. A person solely by virtue of such person's services to or on behalf of any 'business development company' as defined in Section 202(a)(22) of the Investment Advisers Act of 1940 provided the business development company is not an 'investment company' by reason of Section 3(c)(1) of the Investment Company Act of 1940, as both acts were in effect on June 1, 1988;
- g. A personal representative of a decedent's estate, guardian, conservator, receiver, attorney in fact, trustee in bankruptcy, trustee of a testamentary trust, or a trustee of an inter vivos trust, not otherwise engaged in providing investment advisory services, and the performance of these services is not a part of a plan or scheme to evade registration or the substantive requirements of this Chapter;
- h. A licensed real estate agent or broker whose only compensation is a commission on real estate sold;
- i. An individual or company primarily engaged in acting as a business broker whose only compensation is a commission on the sale of a business;
- j. An individual who, as an employee, officer or director of, or general partner in, another person and in the course of performance of his duties as such, provides investment advice to such other person, or to entities that are affiliates of such other person, or to employee benefit plans of such other person or its affiliated entities, or, with respect to such employee benefit plans, to employees of such other person or its affiliated entities;
- k. Any person who is exempt from registration under the Investment Advisers Act of 1940 by operation of Section 203(b)(3) of said act or by operation of any rule or regulation promulgated by the United States Securities and Exchange Commission under or related to said Section 203(b)(3) provided that any reference in this sub-subsection to any statute, rule or regulation shall be deemed to incorporate said statute, rule or regulation (and any statute, rule or regulation referenced therein) as in effect on June 1, 1988;
- l. An employee of a person described in subdivision b., e., f., g., h., or j. of G.S. 78C-2(4) acting on behalf of such person within the scope of his employment;
- m. Such other persons not within the intent of this subsection as the Administrator may by rule or order designate.

(2) 'Investment Advisers Act of 1940' means the federal statute of that name as amended before or after the effective date of this Chapter.

(3) 'Investment adviser representative' means any partner, officer, director (or a person occupying a similar status or performing similar functions) or other individual employed by or associated with an investment adviser, except clerical personnel, who:

- a. Makes any recommendations or otherwise renders advice regarding securities directly to clients,

- b. Manages accounts or portfolios of clients,
- c. Determines which recommendations or advice regarding securities should be given; provided, however if there are more than five such persons employed by or associated with an investment adviser, who do not otherwise come within the meaning of G.S. 78C-2(4)a., b., d., or e., then only the direct supervisors of such persons are deemed to be investment adviser representatives under G.S. 78C-2(4)c.,
- d. Solicits, offers or negotiates for the sale of or sells investment advisory services, unless such person is a dealer or salesman registered under Chapter 78A of the General Statutes and the person would not be an investment adviser representative except for the performance of the activities described in G.S. 78C-2(4)d., or
- e. Directly supervises investment adviser representatives as defined in G.S. 78C-2(4)a., b., c. (unless such investment adviser representatives are already required to register due to their role as supervisors by operation of G.S. 78C-2(4)c.), or d. in the performance of the foregoing activities.

§ 78C-3 to 78C-7. – Reserved for future codification purposes.

"Article 2.

"Fraudulent and Prohibited Practices.

"§ 78C-8. **Advisory activities.** – (a) It is unlawful for any person who receives, directly or indirectly, any consideration from another person for advising the other person as to the value of securities or their purchase or sale, whether through the issuance of analyses or reports or otherwise,

- (1) To employ any device, scheme, or artifice to defraud the other person,
- (2) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon the other person, or
- (3) Acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this subdivision shall not apply to any transaction with a customer of a dealer if such dealer is not acting as an investment adviser in relation to such transaction.

(b) In the solicitation of advisory clients, it is unlawful for any person to make any untrue statement of a material fact, or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading.

(c) Except as may be permitted by rule or order of the Administrator, it is unlawful for any investment adviser to enter into, extend, or renew any investment advisory contract unless it provides in writing:

- (1) That the investment adviser shall not be compensated on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client (unless otherwise provided by subsection (d) or (f) below);
- (2) That no assignment of the contract may be made by the investment adviser without the consent of the other party to the contract; and
- (3) That the investment adviser, if a partnership, shall notify the other party to the contract of any change in the membership of the partnership within a reasonable time after the change.

(d) Subdivision (c)(1) does not apply to any person who is exempt from registration under the Investment Advisers Act of 1940 by operation of Section 203(b)(3) of said act or by operation of any rule or regulation promulgated by the United States Securities and Exchange Commission under or related to said Section 203(b)(3) provided that any reference in this subsection (d) to any statute, rule or regulation shall be deemed to incorporate said statute, rule or regulation (and any statute, rule or regulation referenced therein) as in effect on June 1, 1988. Subdivision (c)(1) does not prohibit an investment advisory contract which provides for compensation based upon the total value of a fund averaged over a definite period, or as of definite dates or taken as of a definite date. 'Assignment,' as used in subdivision (c)(2), includes any direct or indirect transfer or hypothecation of an investment advisory contract by the assignor or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor; but, if the investment adviser is a partnership, no assignment of an investment advisory contract is considered to result from the death or withdrawal of a minority of the members of the investment adviser having only a minority interest in the business of the investment adviser, or from the admission to the investment adviser of one or more members who, after admission, will be only a minority of the members and will have only a minority interest in the business.

(e) It is unlawful for any investment adviser to take or have custody of any securities or funds of any client in contravention of any rule or order of the Administrator prohibiting, limiting or regulating such custody.

(f) The Administrator may by rule or order adopt exemptions from subdivision (a)(3) and subdivisions (c)(1), (c)(2) and (c)(3) where such exemptions are consistent with the public interest and within the purposes fairly intended by the policy and provisions of this Chapter.

"§ 78C-9. Misleading filings. – It is unlawful for any person to make or cause to be made, in any document filed with the Administrator or in any proceeding under this Chapter, any statement which is, at the time and in the light of the circumstances under which it is made, false or misleading in any material respect.

"§ 78C-10. Unlawful representations concerning registration or exemption. – (a) Neither (i) the fact that an application for registration under Article 3 of this Chapter has been filed nor (ii) the fact that a person is effectively registered constitutes a finding by the Administrator that any document filed under this Chapter is true, complete, and not misleading. Neither any such fact nor the fact that an exemption or exception is

available means that the Administrator has passed in any way upon the merits or qualifications of, or recommended, or given approval to any person.

(b) It is unlawful to make, or cause to be made, to any prospective customer, or client, any representation inconsistent with subsection (a) of this section.

§ 78C-11 to 78C-15. – Reserved for future codification.

"Article 3.

"Registration of Investment Advisers and
Investment Adviser Representatives.

"§ 78C-16. Registration requirement. – (a) It is unlawful for any person to transact business in this State as an investment adviser or as an investment adviser representative unless:

- (1) He is so registered under this Chapter;
- (2) His only clients in this State are investment companies as defined in the Investment Company Act of 1940, other investment advisers, dealers, banks, trust companies, savings institutions, savings and loan associations, insurance companies, employee benefit plans with assets of not less than one million dollars (\$1,000,000), and governmental agencies or instrumentalities, whether acting for themselves or as trustees with investment control, or other institutional investors as are designated by rule or order of the Administrator;
- (3) He has no place of business in this State and during any period of 12 consecutive months does not direct business communications into this State in any manner to more than 10 clients, other than those specified in subdivision (2), whether or not he or any of the persons to whom the communications are directed is then present in this State; or
- (4) He is an investment adviser representative employed by or associated with an investment adviser exempt from registration under subdivisions (2) or (3), above.

(b) It is unlawful for any investment adviser required to be registered to employ or associate an investment adviser representative unless the investment adviser representative is registered under this Chapter. The registration of an investment adviser representative is not effective during any period when he is not employed by or associated with an investment adviser registered under this Chapter. When an investment adviser representative begins or terminates employment or association with an investment adviser, the investment adviser shall promptly notify the Administrator. No investment adviser representative may be registered with more than one investment adviser unless each of the investment advisers which employs or associates the investment adviser representative is under common ownership or control.

(c) Every registration expires December 31st of each year unless renewed.

"§ 78C-17. Registration procedures. – (a) An investment adviser, or investment adviser representative may obtain an initial or renewal registration by filing with the Administrator or his designee an application together with a consent to service of process pursuant to G.S. 78C-46(b). The application shall contain whatever information the Administrator by rule requires concerning such matters as:

- (1) The applicant's form and place of organization;
- (2) The applicant's proposed method of doing business;
- (3) The qualifications and business history of the applicant; in the case of an investment adviser, the qualifications and business history of any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the investment adviser;
- (4) Any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities business and any conviction of a felony;
- (5) The applicant's financial condition and history; and
- (6) Any information to be furnished or disseminated to any client or prospective client.

If no denial order is in effect and no proceeding is pending under G.S. 78C-19, registration becomes effective at noon of the 30th day after an application is filed. The Administrator may by rule or order specify an earlier effective date, and he may by order defer the effective date until noon of the 30th day after the filing of any amendment. Registration of an investment adviser automatically constitutes registration of any investment adviser representative who is a partner, executive officer, or director, or a person occupying a similar status or performing similar functions.

(b) Every applicant for initial or renewal registration shall pay a filing fee of two hundred dollars (\$200.00) in the case of an investment adviser, and forty-five dollars (\$45.00) in the case of an investment adviser representative. When an application is denied or withdrawn, the Administrator shall retain the fee.

(c) A registered investment adviser may file an application for registration of a successor, whether or not the successor is then in existence, for the unexpired portion of the year. There shall be no filing fee.

(d) The Administrator may by rule establish minimum net capital requirements not to exceed one hundred thousand dollars (\$100,000) for registered investment advisers, which may include different requirements for those investment advisers who maintain custody of clients' funds or securities or who have discretionary authority over same and those investment advisers who do not.

(e) The Administrator may by rule require registered investment advisers who have custody of or discretionary authority over client funds or securities to post surety bonds in amounts up to one hundred thousand dollars (\$100,000), and may determine their conditions. Any appropriate deposit of cash or securities shall be accepted in lieu of any bond so required. No bond may be required of any investment adviser whose minimum net capital, which may be defined by rule, exceeds one hundred thousand dollars (\$100,000). Every bond shall provide for suit thereon by any person who has a cause of action under G.S. 78C-38 and, if the Administrator by rule or order requires, by any person who has a cause of action not arising under this Chapter. Every bond shall provide that no suit may be maintained to enforce any liability on the bond unless brought within the time limitations of G.S. 78C-38(d).

"§ 78C-18. Post-Registration provisions. – (a) Every registered investment adviser shall make and keep such accounts, correspondence, memoranda, papers, books and records as the Administrator by rule prescribes. All records so required shall be preserved for three years unless the Administrator by rule prescribes otherwise for particular types of records.

(b) With respect to investment advisers, the Administrator may require that certain information be furnished or disseminated as necessary or appropriate in the public interest or for the protection of investors and advisory clients. To the extent determined by the Administrator in his discretion, information furnished to clients or prospective clients of an investment adviser pursuant to the Investment Advisers Act of 1940 and the rules thereunder may be used in whole or partial satisfaction of this requirement.

(c) Every registered investment adviser shall file such financial reports as the Administrator by rule prescribes.

(d) If the information contained in any document filed with the Administrator is or becomes inaccurate or incomplete in any material respect, the registrant shall promptly file a correcting amendment unless notification of the correction has been given under G.S. 78C-16(b).

(e) All the records referred to in subsection (a) of this section are subject at any time or from time to time to such reasonable periodic, special, or other examinations by representatives of the Administrator, within or without this State, as the Administrator deems necessary or appropriate in the public interest or for the protection of investors. For the purpose of avoiding unnecessary duplication of examinations, the Administrator, insofar as he deems it practicable in administering this subsection, may cooperate with the securities administrators of other states, the Securities and Exchange Commission, and any national securities exchange or national securities association registered under the Securities Exchange Act of 1934.

"§ 78C-19. Denial, revocation, suspension, bar, censure, cancellation, and withdrawal of registration. – (a) The Administrator may by order deny, suspend or revoke any registration, or bar or censure any registrant or any officer, director, partner or person occupying a similar status or performing similar functions for a registrant, from employment with a registered investment adviser, or restrict or limit a registrant as to any function or activity of the business for which registration is required in this State if he finds:

- (1) That the order is in the public interest and;
- (2) That the applicant or registrant or, in the case of an investment adviser, any partner, officer or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the investment adviser;
 - a. Has filed an application for registration 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;
- b. Has willfully violated or willfully failed to comply with any provision of this Chapter or Chapter 78A or any rule or order under this Chapter or Chapter 78A;
 - c. Has been convicted, within the past 10 years, of any misdemeanor involving a security or the financial services business, or any aspect of the securities business, or the financial services business, or any felony;
 - d. Is permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practice involving any aspect of the securities or financial services business;
 - e. Is the subject of an order of the Administrator denying, suspending, barring, revoking, restricting or limiting registration as a dealer, salesman, investment adviser or investment adviser representative;
 - f. Is the subject of an adjudication or determination within the past five years by a securities, commodities or other financial services regulatory agency or an administrator of such laws of another state or a court of competent jurisdiction that the person has 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 commodities law of any other state or any other financial services regulatory laws as the Administrator may designate by rule;
 - g. Has engaged in dishonest or unethical practices in the securities or financial services business;
 - h. Is insolvent, either in the sense that his liabilities exceed his assets or in the sense that he cannot meet his obligations as they mature; but the Administrator may not enter an order against an investment adviser under this clause without a finding of insolvency as to the investment adviser;
 - i. Is not qualified on the basis of such factors as training, experience, and knowledge of the securities business, except as otherwise provided in subsection (b) of this section;
 - j. Has failed reasonably to supervise his salesmen or employees if he is a dealer or his investment adviser representatives or employees if he is an investment adviser to assure their compliance with this Chapter; or
 - k. Has failed to pay the proper filing fee; but the Administrator may enter only a denial order under this clause, and he shall vacate any such order when the deficiency has been corrected.

The Administrator may not institute a suspension or revocation proceeding on the basis of a fact or transaction known to him when registration became effective unless the proceeding is instituted within the next 120 days.

(b) The following provisions govern the application of G.S. 78C-19(a)(2)i.:

- (1) The Administrator may not enter an order against an investment adviser on the basis of the lack of qualification of any person other than (i) the investment adviser himself if he is an individual or (ii) an investment adviser representative.
- (2) The Administrator may not enter an order solely on the basis of lack of experience if the applicant or registrant is qualified by training or knowledge or both.
- (3) The Administrator shall consider that an investment adviser representative who will work under the supervision of a registered investment adviser need not have the same qualifications as an investment adviser.
- (4) The Administrator shall consider that an investment adviser or investment adviser representative is not necessarily qualified solely on the basis of experience as a dealer or salesman.
- (5) The Administrator may by rule provide for an examination, including an examination developed or approved by an organization of securities administrators, which examination may be written or oral or both, to be taken by any class of or all applicants. The Administrator may by rule or order waive the examination requirement as to a person or class of persons if the Administrator determines that the examination is not necessary for the protection of advisory clients.

(c) The Administrator may by order summarily postpone or suspend registration pending final determination of any proceeding under this section. Upon the entry of the order, the Administrator shall promptly notify the applicant or registrant, as well as the employer or prospective employer if the applicant or registrant is an investment adviser representative, that it has been entered and of the reasons therefor and that within 15 days after the receipt of a written request the matter will be set down for hearing. If no hearing is requested and none is ordered by the Administrator, the order will remain in effect until it is modified or vacated by the Administrator. If a hearing is requested or ordered, the Administrator, after notice of and opportunity for hearing, may modify or vacate the order or extend it until final determination.

(d) If the Administrator finds that any registrant or applicant for registration is no longer in existence or has ceased to do business as an investment adviser or investment adviser 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 registration or application.

(e) Withdrawal from registration as an investment adviser or investment adviser representative becomes effective 90 days after receipt of an application to withdraw or within such shorter period of time as the Administrator may determine, unless a revocation or suspension proceeding is pending when the application is filed or a

proceeding to revoke or suspend or to impose conditions upon the withdrawal is instituted within 90 days after the application is filed. If a proceeding is pending or instituted, withdrawal becomes effective at such time and upon such conditions as the Administrator by order determines. If no proceeding is pending or instituted and withdrawal automatically becomes effective, the Administrator may nevertheless institute a revocation or suspension proceeding under G.S. 78C-19(a)(2)b. within one year after withdrawal became effective and enter a revocation or suspension order as of the last date on which registration was effective.

(f) No order may be entered under any part of this section except the first sentence of subsection (c) of this section without (i) appropriate prior notice to the applicant or registrant (as well as the employer or prospective employer if the applicant or registrant is an investment adviser representative) (ii) opportunity for hearing, and (iii) written findings of fact and conclusions of law.

"§ 78C-20. Alternative methods of registration. – (a) The Administrator may by rule or order provide an alternative method of registration by which any investment adviser or investment adviser representative may satisfy the requirements of this Article by furnishing the information otherwise required to be filed pursuant to this Article. The Administrator may provide for, among other things, alternative filing periods for investment advisers and investment adviser representatives, elimination of the issuance of a paper license and alternative methods for the payment and collection of initial or renewal filing fees, which shall be known as 'alternative filing fees'. The alternative filing fees shall be the same as provided in G.S. 78C-17(b).

(b) The Administrator may not adopt an alternative method of registration unless its purpose is to facilitate a central registration depository whereby investment advisers and investment adviser representatives can centrally or simultaneously register and pay fees for all states in which they plan to transact business that require registration. The Administrator may enter into an agreement with or otherwise facilitate an alternative method of registration with any national securities association registered with the Securities and Exchange Commission pursuant to Section 15A of the Securities Exchange Act of 1934, any national securities exchange registered under the Securities Exchange Act of 1934, or any national association of state securities administrators or similar association to effectuate the provisions of this section.

(c) Nothing in this section shall be construed to prevent the exercise of the authority of the Administrator as provided in G.S. 78C-19.

"§ 78C-21 to 78C-25. – Reserved for future codification.

"Article 4.

"Administration and Review.

"§ 78C-26. Administration of Chapter. – (a) This Chapter shall be administered by the Secretary of State. The Secretary of State as Administrator may delegate all or part of the authority under this Chapter to the Deputy Securities Administrator including, but not limited to, the authority to conduct hearings, and make, execute and issue final agency orders and decisions. The Secretary of State may appoint such clerks and other assistants as may from time to time be needed.

(b) It is unlawful for the Administrator or any of his officers or employees to use for personal benefit any information which is filed with or obtained by the Administrator and which is not made public. No provision of this Chapter authorizes the Administrator or any of his officers or employees to disclose any such information except among themselves or when necessary or appropriate in a proceeding or investigation under this Chapter. No provision of this Chapter either creates or derogates from any privilege which exists at common law or otherwise when documentary or other evidence is sought under a subpoena directed to the Administrator or any of his officers or employees.

(c) All fees provided for under this Chapter shall be collected by the Administrator and shall be paid over to the State Treasurer to go into the General Fund.

"§ 78C-27. Investigations and subpoenas. – (a) The Administrator in his discretion:

- (1) May make such public or private investigations within or outside of this State as he deems necessary to determine whether any person has violated or is about to violate any provision of this Chapter or any rule or order hereunder, or to aid in the enforcement of this Chapter or in the prescribing of rules and forms hereunder;
- (2) May require or permit any person to file a statement in writing, under oath or otherwise as the Administrator determines, as to all the facts and circumstances concerning the matter to be investigated; and
- (3) May publish information concerning any violation of this Chapter or any rule or order hereunder.

(b) For the purpose of any investigation or proceeding under this Chapter, the Administrator or any officer designated by him 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 deems relevant or material to the inquiry.

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

(d) The Administrator may act under subsection (b) of this section or apply under subsection (c) of this section to enforce subpoenas in this State at the request of a securities agency or administrator of any state if the alleged activities constituting a violation for which the information is sought would be a violation of this Chapter or any rule hereunder if the alleged activities had occurred in this State.

"§ 78C-28. Injunctions; cease and desist orders. – (a) Whenever it appears to the Administrator 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, he may in his discretion bring an action in any court of competent jurisdiction to enjoin the acts or practices and to enforce compliance with this Chapter or any rule or order hereunder. Upon a proper showing a permanent or temporary injunction, restraining

order, or writ of mandamus shall be granted and a receiver or conservator may be appointed for the defendant or the defendant's assets. The court may not require the Administrator to post a bond.

- (b) (1) If the Administrator determines after giving notice of an opportunity for a hearing, that any person has engaged in, 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, he may order such person to cease and desist from such unlawful act or practice and take such affirmative action as in the judgment of the Administrator will carry out the purposes of this Chapter.
- (2) If the Administrator makes written findings of fact that the public interest will be irreparably harmed by delay in issuing an order under G.S. 78C-28(b)(1), the Administrator may issue a temporary cease and desist order. Upon the entry of a temporary cease and desist order, the Administrator shall promptly notify in writing the person subject to the order that such order has been entered, the reasons therefor, and that within 20 days after the receipt of a written request from such person the matter shall be set down for hearing to determine whether or not the order shall become permanent and final. If no hearing is requested and none is ordered by the Administrator, the order shall remain in effect until it is modified or vacated by the Administrator. If a hearing is requested or ordered, the Administrator, after giving notice of an opportunity for a hearing to the person subject to the order, shall by written findings of fact and conclusion of law, vacate, modify, or make permanent the order.
- (3) No order under subsection (b) of this section, except an order issued pursuant to G.S. 78C-28(b)(2), may be entered without prior notice or an opportunity for hearing. The Administrator may vacate or modify an order under subsection (b) of this section upon his finding that the conditions which required such an order have changed and that it is in the public interest to so vacate or modify.
- (4) A final order issued pursuant to the provisions of subsection (b) of this section shall be subject to review as provided in G.S. 78C-29.

"§ 78C-29. Judicial review of orders. – (a) Any person aggrieved by a final order of the Administrator may obtain a review of the order in the Superior Court of Wake County by filing in court, within 30 days after a written copy of the decision is served upon the person by personal service or by registered or certified mail, a written petition praying that the order be modified or set aside in whole or in part. A copy of the petition shall be forthwith served upon the Administrator, and thereupon the Administrator shall certify and file in court a copy of the filing and evidence upon which the order was entered. When these have been filed, the court has exclusive jurisdiction to affirm, modify, enforce, or set aside the order, in whole or in part. The findings of the Administrator as to the facts, if supported by competent, material and substantial evidence, are conclusive. If either party applies to the court for leave to

adduce additional material evidence, and shows to the satisfaction of the court that there were reasonable grounds for failure to adduce the evidence in the hearings before the Administrator, the court may order the additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such conditions as the court considers proper. The Administrator may modify his findings and order by reason of the additional evidence and shall file in court the additional evidence together with any modified or new findings or order. The judgment of the court is final, subject to review by the Court of Appeals.

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

"§ 78C-30. Rules, forms, orders, and hearings. – (a) The Administrator may from time to time make, amend, and rescind such rules, forms, and orders as are necessary to carry out the provisions of this Chapter, including rules and forms governing registration, applications, and reports, and 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 and forms the Administrator may classify persons, and matters within his jurisdiction, and prescribe different requirements for different classes.

(b) No rule, form, or order may be made, amended, or rescinded unless the Administrator finds that the action is necessary or appropriate in the public interest or for the protection of investors and clients and consistent with the purposes fairly intended by the policy and provisions of this Chapter. In prescribing rules and forms the Administrator may cooperate with the securities administrators of the other states and the Securities and Exchange Commission with a view to effectuating the policy of this statute to achieve maximum uniformity in the form and content of registrations, applications, and reports wherever practicable.

(c) The Administrator may by rule or order prescribe (i) the form and content of financial statements required under this Chapter, (ii) the circumstances under which consolidated financial statements shall be filed, and (iii) whether any required financial statements shall be certified by independent or certified public accountants. All financial statements shall be prepared in accordance with generally accepted accounting practices.

(d) The Administrator may by rule or order require the filing of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature or advertising communication addressed or intended for distribution to prospective investors, including clients or prospective clients of an investment adviser.

(e) All rules and forms of the Administrator shall be published.

(f) No provision of this Chapter imposing any liability applies to any act done or omitted in good faith in conformity with any rule, form, or order of the Administrator, notwithstanding that the rule, form, or order may later be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

(g) Every hearing in an administrative proceeding shall be public unless the Administrator in his discretion grants a request joined in by all the respondents that the hearing be conducted privately.

"§ 78C-31. Administrative files and opinions. – (a) A document is filed when it is received by the Administrator.

(b) The Administrator shall keep a register of all applications for registration which are or have been effective under this Chapter and all denial, suspension, or revocation orders or similar orders which have been entered under this Chapter. The register shall be open for public inspection.

(c) The information contained in or filed with any registration, application, or report may be made available to the public under such rules as the Administrator prescribes.

(d) Upon request and at such reasonable charges as he prescribes, the Administrator shall furnish to any person photostatic or other copies (certified under his seal of office if requested) of any entry in the register or any document which is a matter of public record. In any proceeding or prosecution under this Chapter, any copy so certified is prima facie evidence of the contents of the entry or document certified.

(e) The Administrator in his discretion may honor requests from interested persons for interpretative opinions upon the payment of a fee of one hundred fifty dollars (\$150.00).

§ 78C-32 to 78C-37. – Reserved for future codification purposes.

"Article 5.

"Civil Liabilities and Criminal Penalties.

"§ 78C-38. Civil liabilities. – (a) Any person who:

- (1) Engages in the business of advising others, for compensation, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities, in violation of G.S. 78C-8(b), G.S. 78C-16(a) or (b) (an action pursuant to a violation of G.S. 78C-16(b) may not be maintained except by those persons who directly received advice from the unregistered investment adviser representative), G.S. 78C-10(b), or of any rule or order under G.S. 78C-30(d) which requires the affirmative approval of sales literature before it is used, or
- (2) Receives, directly or indirectly, any consideration from another person for advice as to the value of securities or their purchase or sale, whether through the issuance of analyses, reports or otherwise and employs any device, scheme, or artifice to defraud such other person or engages in any act, practice or course of business which operates or would operate as a fraud or deceit on such other person, in violation of G.S. 78C-8(a)(1) or (2), is liable to any person who is given such advice in such violation, who may sue either at law or in equity to recover (i) the consideration paid for such advice together with interest

thereon at the legal rate as provided in G.S. 24-1 from the date of payment of the consideration, plus (ii) the actual damages to such person proximately caused by such violation, plus (iii) costs of the action and reasonable attorneys' fees. An action based on violation of G.S. 78C-8(b) may not prevail where the person accused of the violation sustains the burden of proof that he 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.

(b) Every person who directly or indirectly controls a person liable under subsection (a) of this section, including every partner, officer, or director of such a person, every person occupying a similar status or performing similar functions, every employee or associate of such a person who materially aids in the conduct giving rise to the liability, and every dealer or salesman who materially aids in such conduct is liable jointly and severally with and to the same extent as such person, unless able to sustain the burden of proof that he did not know, and did not act in reckless disregard of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable and as provided among tort-feasors pursuant to Chapter 1B of the General Statutes.

(c) Every cause of action under this statute survives the death of any person who might have been a plaintiff or defendant.

(d) No person may sue under this section more than three years after the rendering of investment advice in violation of this Chapter, except that in the case of a violation of G.S. 78C-8(a)(1) or (2) a person may sue under this section within two years after such person discovers or should have discovered, the facts constituting the violation.

(e) No person who has made or engaged in the performance of any contract in violation of any provision of this Chapter or any rule or order hereunder, 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, may base any suit on the contract.

(f) Any condition, stipulation, or provision binding any person receiving any investment advice to waive compliance with any provision of this Chapter or any rule or order hereunder is void.

(g) The rights and remedies provided by this Chapter are in addition to any other rights or remedies that may exist at law or in equity, but this Chapter does not create any cause of action not specified in this section or G.S. 78C-17(e).

"§ 78C-39. Criminal penalties. – (a) Any person who willfully violates any provision of this Chapter except G.S. 78C-9 or who willfully violates G.S. 78C-9 knowing the statement made to be false or misleading in any material respect, shall upon conviction be punished as a Class I felon.

(b) The Administrator may refer such evidence as is available concerning violations of this Chapter or of any rule or order hereunder to the Attorney General or the proper district attorney, who may, with or without such a reference, institute the appropriate criminal proceedings under this Chapter.

(c) Nothing in this Chapter limits the power of the State to punish any person for any conduct which constitutes a crime by statute or at common law.

"§ 78C-40. Burden of proof. – In a civil or administrative proceeding brought under this Chapter, the burden of proving an exemption or an exception from a definition is upon the person claiming it. In a criminal proceeding brought under this Chapter, the State has no initial burden of producing evidence to show that the defendant's actions do not fall within the exemption or exceptions; however, once the defendant introduces evidence to show that his conduct is within the exemption or exception, the burden of persuading the trier of fact that the exemption or exception does not apply falls upon the State.

§ 78C-41 to 78C-45. – Reserved for future codification purposes.

"Article 6.

"Miscellaneous Provisions.

"§ 78C-46. Scope of the Chapter; service of process. – (a) G.S. 78C-8, 78C-16(a) and (b), 78C-10, and 78C-38 apply when any act instrumental in effecting prohibited conduct is done in this State, whether or not either party is then present in this State.

(b) Every applicant for registration under this Chapter shall file with the Administrator, in such form as he by rule prescribes, an irrevocable consent appointing the Administrator or his successor in office to be his attorney to receive service of any lawful process in any noncriminal suit, action or proceeding against him or his successor, executor or administrator which arises under this Chapter or any rule or order hereunder after the consent has been filed, with the same force and validity as if served personally on the person filing the consent. A person who has filed such a consent in connection with a previous registration need not file another. Service may be made by leaving a copy of the process in the office of the Administrator, but it is not effective unless (i) the plaintiff, who may be the Administrator in a suit, action, or proceeding instituted by him, forthwith sends notice of the service and a copy of the process by registered or certified mail to the defendant or respondent at his last address on file with the Administrator, and (ii) the plaintiff's affidavit of compliance with the subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(c) When any person, including any nonresident of this State, engages in conduct prohibited or made actionable by this Chapter or any rule or order hereunder, and he has not filed a consent to service of process under subsection (b) of this section and personal jurisdiction over him cannot otherwise be obtained in this State, that conduct shall be considered equivalent to his appointment of the Administrator or his successor in office to be his attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against him or his successor, executor or administrator which grows out of that conduct and which is brought under this Chapter or any rule or order hereunder with the same force and validity as if served on him personally. Service may be made by leaving a copy of the process in the office of the Administrator, and it is not effective unless (i) the plaintiff, who may be the Administrator in a suit, action, or proceeding instituted by him, forthwith sends notice of the service and a copy of the process by registered or certified mail to the defendant or respondent at his last known

address or takes other steps which are reasonably calculated to give actual notice, and (ii) the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(d) When process is served under this section, the court, or the Administrator in a proceeding before him, shall order such continuance as may be necessary to afford the defendant or respondent reasonable opportunity to defend.

"§ 78C-47. Statutory policy. – This Chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this Chapter with the related federal regulation. Nothing in this Chapter shall be construed to limit or preclude the applicability of any provision of Chapters 78A or 150B of the General Statutes.

"§ 78C-48. Severability of provisions. – If any provision of this Chapter or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are severable.

"Article 7.

"Sports Agents.

"§ 78C-60. Sports Agents defined. – For purposes of this Article a 'Sports Agent' shall be an agent or other person who advises athletes with respect to professional sports services contracts, endorsements and other financial matters, for compensation. 'Sports Agent' shall not include those agents or persons excluded from the definition of Investment Advisor in G.S. 78C-(2)a.- j., or m. Furthermore, G.S. 78C-(2)k. and G.S. 78C-16(a)(3) shall not apply to sports agents.

"§ 78C-61. Sports agents subject to act. – Sports agents as defined in this Article shall be subject to all provisions of this Chapter.

"§ 78C-62. Article shall expire. – This Article shall expire on July 1, 1989."

Sec. 2. Notwithstanding the provisions of G.S. 78C-26(c), the Secretary of State shall retain from the funds generated by the fees provided for in this act the sum of one hundred thirty-two thousand eight hundred thirty-two dollars (\$132,832) for the 1988-89 fiscal year to be used to implement the provisions of this act.

Sec. 3. This act shall become effective January 1, 1989, except that with regard to investment advisers and investment adviser representatives engaged in business in this State prior to January 1, 1989, the provisions of G.S. 78C-16 shall be complied with prior to July 1, 1989. The Secretary of State may adopt rules authorized by this act after its ratification; provided that these rules cannot become effective prior to January 1, 1989.

In the General Assembly read three times and ratified this the 11th day of July, 1988.