

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1989

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HOUSE BILL 719*

Short Title: Securities Enforcement.

(Public)

Sponsors: Representative Blue.

Referred to: Commerce.

March 20, 1989

A BILL TO BE ENTITLED

AN ACT TO AMEND THE NORTH CAROLINA SECURITIES ACT AND THE INVESTMENT ADVISERS ACT BY ESTABLISHING AN INVESTOR SECURITY FUND AND BY ENHANCING THE ENFORCEMENT PROVISIONS OF THOSE ACTS.

The General Assembly of North Carolina enacts:

Section 1. G.S. 78A-8 reads as rewritten:

"§ 78A-8. Sales and purchases.

(a) It is unlawful for any person, in connection with the offer, sale or purchase of any investment or of any security, directly or indirectly:

(1) To employ any device, scheme, or artifice to defraud,

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading or,

(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

(b) For purposes of this section and G.S. 78A-11 'investment' means any commitment of money or property principally induced by a representation that an economic benefit may be derived from such commitment, except that the term 'investment' does not include a commitment of money or property for:

(1) The purchase of a business opportunity, a business enterprise, or real property through a person licensed under Chapters 58 and 93A of the General Statutes; or

- 1 (2) The purchase of tangible personal property through a person not
2 engaged in telephone solicitation, where said property is offered and
3 sold in accordance with the following conditions:
4 a. There are no specific representations or guarantees made by the
5 offeror or seller as to the economic benefit to be derived from
6 the purchase; and
7 b. The tangible property is delivered to the purchaser within 30
8 days after sale, except that such 30-day period may be extended
9 by the Administrator if market conditions so warrant."

10 Sec. 2. Chapter 78A of the General Statutes is amended by adding a new
11 section to read:

12 **"§ 78A-11. Unlawful boiler rooms.**

13 It is unlawful for any person to directly or indirectly manage, supervise, control or
14 own, either alone or in association with others, any boiler room in this State. 'Boiler
15 room' means an enterprise in which two or more persons engage in telephone
16 communications with members of the public using two or more telephones at one
17 location, or more than one location in a common scheme or enterprise, in violation of
18 G.S. 78A-8 or G.S. 78A-12."

19 Sec. 3. Chapter 78A of the General Statutes is amended by adding a new
20 section to read:

21 **"§ 78A-12. Manipulation of market.**

22 (a) Without limiting the general applicability of G.S. 78A-8, it is unlawful for
23 any person to:

- 24 (1) Quote a fictitious price with respect to a security;
25 (2) Effect a transaction in a security which involves no change in the
26 beneficial ownership of the security for the purpose of creating a false
27 or misleading appearance of active trading in a security or a false or
28 misleading appearance of activity with respect to the market for the
29 security;
30 (3) Enter an order for the purchase of a security with the knowledge that
31 an order of substantially the same size and at substantially the same
32 time and price for the sale of the security has been, or will be, entered
33 by or for the same person, or an affiliated person, for the purpose of
34 creating a false or misleading appearance of active trading in a security
35 or a false or misleading appearance of activity with respect to the
36 market for the security;
37 (4) Enter an order for the sale of security with knowledge that an order of
38 substantially the same size and at substantially the same time and price
39 for the purchase of the security has been, or will be, entered by or for
40 the same person, or an affiliated person, for the purpose of creating a
41 false or misleading appearance of active trading in a security or a false
42 or misleading appearance of activity with respect to the market for the
43 security; or

1 (5) Employ any other deceptive or fraudulent device, scheme, or artifice to
2 manipulate the market in a security.

3 (b) A transaction effected in compliance with the applicable provisions of the
4 Securities Exchange Act of 1934 and the rules and regulations of the Securities and
5 Exchange Commission thereunder is not a manipulation of the market under subsection
6 (a) of this section."

7 Sec. 4. G.S. 78A-45(c) reads as rewritten:

8 "(c) All fees provided for under this Chapter shall be collected by the Administrator
9 and shall be paid over to the State Treasurer to go into the general ~~fund.~~ fund, or shall be
10 paid as otherwise directed by provisions of Chapter 78A, Chapter 78C, or Chapter 78D
11 of the General Statutes."

12 Sec. 5. G.S. 78A-47 is amended by adding a new subsection to read:

13 "(c) The Administrator may issue an order against an applicant, registered person,
14 or other person who willfully violates this Chapter or a rule or order of the
15 Administrator under this Chapter:

16 (1) Imposing a civil penalty up to a maximum of two thousand five
17 hundred dollars (\$2,500) for a single violation or of twenty-five
18 thousand dollars (\$25,000) for multiple violations in a single
19 proceeding or a series of related proceedings;

20 (2) Requiring reimbursement of the costs of investigation.

21 Any fine or reimbursement imposed under this subsection shall be paid to the Anti-
22 Fraud Trust Fund. No order under this subsection may be entered without prior notice
23 of an opportunity for hearing."

24 Sec. 6. G.S. 78A-46(a) reads as rewritten:

25 "(a) The Administrator in his discretion

26 (1) May make such public or private investigations within or outside of
27 this State as he deems necessary to determine whether any person has
28 violated or is about to violate any provision of this Chapter or any rule
29 or order hereunder, or to aid in the enforcement of this Chapter or in
30 the prescribing of rules and forms hereunder,

31 (2) May require or permit any person to file a statement in writing, under
32 oath or otherwise as the Administrator determines, as to all the facts
33 and circumstances concerning the matter to be investigated, and

34 (3) May publish information concerning any violation of this Chapter or
35 any rule or order hereunder.

36 (4) May appoint securities law enforcement agents and other enforcement
37 personnel.

38 a. Subject Matter Jurisdiction – The primary responsibility of an
39 agent shall be enforcement of this Chapter and Chapter 78C of
40 the General Statutes; however, after taking the oath prescribed
41 for a peace officer, a securities law enforcement agent shall
42 have authority to arrest and take other investigatory and
43 enforcement actions for any criminal offense.

- 1 b. Territorial Jurisdiction – A securities law enforcement agent is a
2 State officer with jurisdiction throughout the State.
- 3 c. Service of Orders of the Administrator – Securities law
4 enforcement agents may serve and execute notices, orders, or
5 demands issued by the Administrator for the surrender of
6 registrations or relating to any administrative proceeding.
7 While serving and executing such notices, orders, or demands,
8 securities law enforcement agents shall have all the power and
9 authority possessed by law enforcement officers when
10 executing an arrest warrant."

11 Sec. 7. G.S. 78A-47(a) reads as rewritten:

12 "(a) Whenever it appears to the Administrator that any person has engaged or is about
13 to engage in any act or practice constituting a violation of any provision of this Chapter
14 or any rule or order hereunder, he may in his discretion bring an action in any court of
15 competent jurisdiction to enjoin the acts or practices and to enforce compliance with
16 this Chapter or any rule or order hereunder. Upon a proper showing a permanent or
17 temporary injunction, restraining order, or writ of mandamus shall be granted and a
18 receiver or conservator may be appointed for the defendant or the defendant's assets. In
19 addition to any other remedies provided by this Chapter, the Administrator may apply to
20 the court hearing this matter for an order of restitution whereby the defendants in such
21 action shall be ordered to make restitution of these sums shown by the Administrator to
22 have been obtained by them in violation of any of the provisions of this Chapter. Such
23 restitution shall, at the option of the court, be payable to the Administrator or receiver
24 appointed pursuant to this section or directly to the persons whose assets were obtained
25 in violation of this Chapter. The court may not require the Administrator to post a
26 bond."

27 Sec. 8. Chapter 78A of the General Statutes is amended by adding a new
28 section to read:

29 "**§ 78A-51. Investor Security Fund.**

- 30 (a) Definitions. When used in this section, unless the context otherwise requires:
- 31 (1) 'Administrator' means the Secretary of State.
- 32 (2) 'Fund' means the Investor Security Fund of the North Carolina
33 Department of the Secretary of State.
- 34 (3) 'Violator' means one who, at the time of the act complained of, was
35 registered, or should have been registered, pursuant to the provisions
36 of G.S. 78A or G.S. 78C. The fact that the act complained of took
37 place outside the State of North Carolina does not necessarily mean
38 that the violator was not acting as a securities dealer or salesman or as
39 an investment advisor in North Carolina.
- 40 (4) 'Claimant' means a person who has suffered a reimbursable loss
41 because of the wrongful conduct of a violator and has filed an
42 application for reimbursement.
- 43 (5) 'Wrongful conduct' means wrongful acts committed by a violator
44 against a claimant in the manner of embezzlement, fraud, the wrongful

1 taking or conversion of monies or other property, or market
2 manipulation.

3 (6) a. 'Reimbursable losses' means only those losses of money or other
4 property which meet all of the following tests:

5 1. The wrongful conduct which occasioned the loss
6 occurred on or after January 1, 1987;

7 2. The loss was caused by the wrongful conduct of a
8 violator acting either as a securities dealer or salesman,
9 as an investment adviser or investment adviser
10 representative, or in a fiduciary capacity customary to
11 the securities or investment adviser industries in the
12 matter in which the loss arose as set out in subdivision
13 (3) of this subsection;

14 3. The Administrator is satisfied that the claimant has
15 exhausted all viable means to collect claimant's losses
16 and has complied with this section.

17 b. The following shall be excluded from the definition of
18 'reimbursable losses':

19 1. Losses of spouses, children, parents, grandparents,
20 siblings, partners, associates, and employees of the
21 violator causing the losses.

22 2. Losses covered by any bond, surety agreement, or
23 insurance contract to the extent covered thereby.

24 3. Losses which have been otherwise received from or paid
25 by or on behalf of the violator who committed the
26 wrongful conduct.

27 (b) Creation of Fund. The Administrator shall establish a trust fund to be known
28 as the Investor Security Fund.

29 (c) Applications for Reimbursement.

30 (1) The Administrator shall prepare and make available an 'Application
31 for Reimbursement' form which shall require the following minimum
32 information:

33 a. The name and address of the applicant;

34 b. The name and address of the violator who engaged in the
35 wrongful conduct;

36 c. The amount of the alleged loss for which application is made;

37 d. The date or period of time during which the alleged loss was
38 incurred;

39 e. A general statement of facts relative to the application;

40 f. Verification by the claimant;

41 g. All supporting documents, including:

42 1. Copies of all court proceedings against the violator;

43 2. Copies of all documents showing any reimbursement or
44 receipt of funds in payment of any portion of the loss.

- 1 (2) The application shall contain the following statement in boldface type:
2 'IN ESTABLISHING THE INVESTOR SECURITY FUND
3 PURSUANT TO AN ACT OF THE NORTH CAROLINA
4 GENERAL ASSEMBLY, THE NORTH CAROLINA
5 DEPARTMENT OF THE SECRETARY OF STATE DID NOT
6 CREATE NOR ACKNOWLEDGE ANY LEGAL RESPONSIBILITY
7 FOR THE ACTS OF INDIVIDUAL VIOLATORS IN THE
8 SECURITIES OR INVESTMENT ADVISOR INDUSTRIES. ALL
9 REIMBURSEMENTS OF LOSSES FROM THE INVESTOR
10 SECURITY FUND SHALL BE A MATTER OF GRACE IN THE
11 SOLE DISCRETION OF THE ADMINISTRATOR OF THE FUND
12 AND NOT A MATTER OF RIGHT. NO APPLICANT OR
13 MEMBER OF THE PUBLIC SHALL HAVE ANY RIGHT IN THE
14 INVESTOR SECURITY FUND AS A THIRD PARTY
15 BENEFICIARY OR OTHERWISE.'
- 16 (3) An application shall be filed in the office of the North Carolina
17 Department of the Secretary of State in Raleigh, North Carolina, to the
18 attention of the Investor Security Fund.
- 19 (d) Processing Applications.
- 20 (1) The Administrator may cause a reasonable investigation of any
21 application filed with the North Carolina Department of the Secretary
22 of State. The Administrator shall conduct such investigation or review
23 as he deems necessary or desirable in order to determine whether the
24 application is for a reimbursable loss and to guide the Administrator in
25 determining the extent, if any, to which the claimant should be
26 reimbursed. After considering a report on an application, the
27 Administrator may request that testimony be presented concerning the
28 application. In all cases, the alleged violator or his personal
29 representative shall be given an opportunity to be heard by the
30 Administrator if he so requests.
- 31 (2) The Administrator shall, in his discretion, determine the amount of
32 loss, if any, for which the claimant should be reimbursed. In making
33 such decisions, the Administrator shall consider the following:
- 34 a. The negligence, if any, of the claimant that contributed to the
35 loss;
- 36 b. The comparative hardship that the claimant suffered because of
37 the loss;
- 38 c. The total amount of reimbursable losses of claimant on account
39 of one violator or association of violators;
- 40 d. The total amount of reimbursable losses in previous years for
41 which total reimbursement has not been made and the total
42 assets of the Fund;
- 43 e. The total amount of insurance or other source of funds available
44 to compensate the claimant for the loss.

- 1 (3) The Administrator may, in his discretion, allow further reimbursement,
2 in any year, of a reimbursable loss allowed by him in prior years with
3 respect to a loss which has not been fully reimbursed.
- 4 (4) A claimant may be advised of the status of the Administrator's
5 consideration of his application and shall be advised of the final
6 determination of the Administrator.
- 7 (5) All applications, proceedings, investigations, and reports involving
8 applications for reimbursement shall be kept confidential until and
9 unless the Administrator authorizes reimbursement to the claimant, or
10 until the violator requests that the matter be made public. All
11 participants in the application, investigation, or proceeding (including
12 the claimant) shall conduct themselves so as to maintain the
13 confidentiality of the application, investigation, or proceeding. This
14 provision shall not be construed to deny relevant information to law
15 enforcement or regulatory agencies, or to any other entity to whom the
16 Administrator authorizes release of information.
- 17 (6) The Administrator may, in his discretion, afford the claimant a
18 reconsideration of his or her application; otherwise, such rejection is
19 final, and the Administrator shall give no further consideration to that
20 application or another application by the same claimant based upon the
21 same alleged facts.

22 (e) Assessments.

- 23 (1) The Administrator shall cause a special assessment to be made upon
24 each registrant under the provisions of this Chapter and Chapter 78C
25 of the General Statutes. The first assessment shall be made on January
26 1, 1990, and shall be repeated as necessary on January 1 of any year
27 thereafter to create or to maintain a corpus of one million dollars
28 (\$1,000,000).
- 29 (2) Upon renewal of each registration, each registrant shall be assessed as
30 follows:
- 31 a. Securities dealer, fifty dollars (\$50.00);
32 b. Securities Salesman, ten dollars (\$10.00);
33 c. Investment Adviser, fifty dollars (\$50.00);
34 d. Investment Adviser Representative, ten dollars (\$10.00).
- 35 (3) The Fund shall be placed in an interest-bearing account. The
36 Administrator may use the interest to continue the Investor Awareness
37 Program or transfer it to the Anti-Fraud Trust Fund, or both.

38 (f) Subrogation for Reimbursement Made.

39 In the event reimbursement is made to a claimant, the North Carolina Department of
40 the Secretary of State shall be subrogated in the amount of reimbursement and may
41 bring such action as is deemed advisable against the violator, his assets, or his estate.
42 Such action may be brought in the name of the claimant, or in the name of the North
43 Carolina Department of the Secretary of State. The claimant shall be required to
44 execute a 'subrogation agreement' to authorize the action. Upon commencement of an

1 action by the Administrator pursuant to his subrogation rights, he shall advise the
2 reimbursed claimant at his last known address. A reimbursed claimant may then join in
3 such action to press an application for his or her loss in excess of the amount of the
4 above reimbursement. Any amounts recovered from the violator by the Administrator
5 in excess of the amount to which the Fund is subrogated, less the Administrator's actual
6 costs of such recovery, shall be paid to or retained by the claimant as the case may be.

7 Before receiving a payment from the Fund, the person who is to receive such
8 payment or his legal representative shall execute and deliver to the Administrator a
9 written agreement stating that in the event the reimbursed claimant or his estate should
10 ever receive any restitution from the violator or his estate, the reimbursed claimant
11 agrees that the Fund shall be repaid up to the amount of the reimbursement from the
12 Fund plus expenses."

13 Sec. 9. G.S. 78A-56 reads as rewritten:

14 **"§ 78A-56. Civil liabilities.**

15 (a) Any person who:

16 (1) Offers or sells a security in violation of G.S. 78A-8(a)(1) and (3), 78A-
17 10(b), 78A-11, 78A-12, 78A-24, or 78A-36(a), or of any rule or order
18 under G.S. 78A-49(d) which requires the affirmative approval of sales
19 literature before it is used, or of any condition imposed under G.S.
20 78A-27(d) or 78A-28(g), or

21 (2) Offers or sells a security by means of any untrue statement of a
22 material fact or any omission to state a material fact necessary in order
23 to make the statements made, in the light of the circumstances under
24 which they were made, not misleading (the purchaser not knowing of
25 the untruth or omission), and who does not sustain the burden of proof
26 that he did not know, and ~~did not act in reckless disregard,~~ in the exercise
27 of reasonable care could not have known, of the untruth or omission, is
28 liable to the person purchasing the security from him, who may sue
29 either at law or in equity to recover the consideration paid for the
30 security, together with interest at the legal rate from the date of
31 payment, costs, and reasonable attorneys' fees, less the amount of any
32 income received on the security, upon the tender of the security, or for
33 damages if he no longer owns the security. Damages are the amount
34 that would be recoverable upon a tender less the value of the security
35 when the purchaser disposed of it and interest at the legal rate as
36 provided by G.S. 24-1 from the date of disposition.

37 (b) Any person who purchases a security by means of any untrue statement of a
38 material fact or any omission to state a material fact necessary in order to make the
39 statements made, in the light of the circumstances under which they are made, not
40 misleading (the seller not knowing of the untruth or omission), and who does not sustain
41 the burden of proof that he did not know, and in the exercise of reasonable care could
42 not have known, of the untruth or omission, shall be liable to the person selling the
43 security to him, who may sue either at law or in equity to recover the security, plus any
44 income received by the purchaser thereon, upon tender of the consideration received, or

1 for damages if the purchaser no longer owns the security. Damages are the excess of the
2 value of the security when the purchaser disposed of it, plus interest at the legal rate
3 from the date of disposition, over the consideration paid for the security.

4 (c) Every person who directly or indirectly controls a person liable under
5 subsection (a) or (b), every partner, officer, or director of such a person, every person
6 occupying a similar status or performing similar functions, every employee of such a
7 person who materially aids in the act or transaction, and every dealer or salesman who
8 materially aids in the sale are also liable jointly and severally with and to the same
9 extent as such person, unless the person who is so liable sustains the burden of proof
10 that he did not know, and ~~did not act in reckless disregard,~~ in the exercise of reasonable
11 care could not have known, of the existence of the facts by reason of which the liability
12 is alleged to exist. There is contribution as in cases of contract among the several
13 persons so liable.

14 (d) Any tender specified in this section may be made at any time before entry of
15 judgment. Tender shall require only notice of willingness to exchange the security for
16 the amount specified. Any notice may be given by service as in civil actions or by
17 certified mail addressed to the last known address of the person liable.

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

20 (f) No person may sue under this section more than ~~two~~ five years after the sale
21 or contract of sale.

22 (g) (1) No purchaser may sue under this section if, before suit is
23 commenced, the purchaser has received a written offer stating the respect in which liability
24 under this section may have arisen and fairly advising the purchaser of his rights; offering to repurchase the
25 security for cash payable on delivery of the security equal to the
26 consideration paid, together with interest at the legal rate as provided
27 by G.S. 24-1 from the date of payment, less the amount of any
28 income received on the security or, if the purchaser no longer owns
29 the security, offering to pay the purchaser upon acceptance of the
30 offer an amount in cash equal to the damages computed in
31 accordance with subsection (a); and stating that the offer may be
32 accepted by the purchaser at any time within 30 days of its receipt;
33 and the purchaser has failed to accept such offer in writing within
34 the specified period.

35
36 (2) No seller may sue under this section if, before suit is commenced, the
37 seller has received a written offer stating the respect in which liability
38 under this section may have arisen and fairly advising the seller of his
39 rights; offering to return the security plus the amount of any income
40 received thereon upon payment of the consideration received, or, if the
41 purchaser no longer owns the security, offering to pay the seller upon
42 acceptance of the offer an amount in cash equal to the damages
43 computed in accordance with subsection (b); and providing that the
44 offer may be accepted by the seller at any time within 30 days of its

1 receipt; and the seller has failed to accept such offer in writing within
2 the specified period.

3 (3) Offers shall be in the form and contain the information the
4 Administrator by rule prescribes. Every offer under subsection (g)
5 shall be delivered to the offeree or sent by certified mail addressed to
6 him at his last known address. If an offer is not performed in
7 accordance with its terms, suit by the offeree under this section shall
8 be permitted without regard to this subsection.

9 (h) No person who has made or engaged in the performance of any contract in
10 violation of any provision of this Chapter or any rule or order hereunder, or who has
11 acquired any purported right under any such contract with knowledge of the facts by
12 reason of which its making or performance was in violation, may base any suit on the
13 contract.

14 (i) Any condition, stipulation, or provision binding any person acquiring any
15 security to waive compliance with any provision of this Chapter or any rule or order
16 hereunder is void.

17 (i1) The court, in a suit under G.S. 78A-8(a)(1) and (3), 78A-11, 78A-12, and
18 subsections (a)(2), (b), and (c) of this section, may award an amount equal to three times
19 the consideration paid for the security, together with interest, costs, and attorney's fees,
20 less any amounts, all specified in subsection (a)(2) and (b) of this section upon a
21 showing that the violation was reckless or intentional.

22 (j) The rights and remedies provided by this Chapter are in addition to any other
23 rights or remedies that may exist at law or in equity, but this Chapter does not create any
24 cause of action not specified in this section or G.S. 78A-37(d)."

25 Sec. 10. G.S. 78A-57 reads as rewritten:

26 "**§ 78A-57. Criminal penalties.**

27 (a) Any person who willfully violates any provision of this Chapter except G.S.
28 78A-8, G.S. 78A-9, G.S. 78A-11 or G.S. 78A-12, or who willfully violates any rule or
29 order under this Chapter, or who willfully violates G.S. 78A-9 knowing the statement
30 made to be false or misleading in any material respect, shall upon conviction be
31 punished as a Class I felon; but no person may be imprisoned for the violation of any
32 rule or order if he proves that he had no knowledge of the rule or order. Any person who
33 willfully violates G.S. 78A-8, G.S. 78A-11 or G.S. 78A-12 shall upon conviction be
34 punished as a Class H felon.

35 (a1) In lieu of a fine otherwise authorized by law, a person who has been
36 convicted of or who has pleaded guilty or no contest to having engaged in conduct in
37 violation of the provisions of this Chapter may be sentenced to pay a fine that does not
38 exceed the greater of three times the gross value gained or three times the gross loss
39 caused by such conduct, plus court costs and the costs of investigation and prosecution,
40 reasonably incurred.

41 (a2) The Administrator shall establish a trust fund to be known as the Anti-Fraud
42 Trust Fund. Any amounts assessed as costs of investigation and prosecution under this
43 subsection shall be deposited in the trust fund. Funds deposited in such trust fund shall

1 be used for investigation and prosecution of civil and criminal actions arising under the
2 provisions of Chapters 78A, 78C, and 78D.

3 (b) The Administrator may refer such evidence as is available concerning
4 violations of this Chapter or of any rule or order hereunder to the Attorney General or
5 the proper district attorney, who may, with or without such a reference, institute the
6 appropriate criminal proceedings under this Chapter. Upon receipt of such reference, the
7 Attorney General or the district attorney may request that a duly employed attorney of
8 the Administrator prosecute or assist in the prosecution of such violation or violations
9 on behalf of the State. Upon approval of the Administrator, such employee shall be
10 appointed a special prosecutor for the Attorney General or the district attorney to serve
11 without compensation from the Attorney General or district attorney. Such special
12 prosecutor shall have all the powers and duties prescribed by law for Assistant
13 Attorneys General or district attorneys and such other powers and duties as are lawfully
14 delegated to such special prosecutor by the Attorney General or the district attorney.

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

17 Sec. 11. G.S. 78C-26(c) reads as rewritten:

18 "(c) All fees provided for under this Chapter shall be collected by the
19 Administrator and shall be paid over to the State Treasurer to go into the General Fund.
20 Fund, or shall be paid as otherwise directed by the provisions of this Chapter."* ♦

21 Sec. 12. G.S. 78C-28 is amended by adding a new subsection to read:

22 "(c) The Administrator may issue an order against an applicant, registered person,
23 or other person who willfully violates this Chapter or a rule or order of the
24 Administrator under this Chapter:

25 (1) Imposing a civil penalty up to a maximum of two thousand five
26 hundred dollars (\$2,500) for a single violation or of two thousand five
27 hundred dollars (\$2,500) for multiple violations in a single proceeding
28 or a series of related proceedings.

29 (2) Requiring reimbursement of the costs of investigation.

30 Any fine or reimbursement imposed under this subsection shall be paid to the Anti-
31 Fraud Trust Fund. No order under this subsection may be entered without prior notice of
32 an opportunity for hearing."

33 Sec. 13. G.S. 78C-28(a) reads as rewritten:

34 "(a) Whenever it appears to the Administrator that any person has engaged or is about
35 to engage in any act or practice constituting a violation of any provision of this Chapter
36 or any rule or order hereunder, he may in his discretion bring an action in any court of
37 competent jurisdiction to enjoin the acts or practices and to enforce compliance with
38 this Chapter or any rule or order hereunder. Upon a proper showing a permanent or
39 temporary injunction, restraining order, or writ of mandamus shall be granted and a
40 receiver or conservator may be appointed for the defendant or the defendant's assets. In
41 addition to any other remedies provided by this Chapter, the department may apply to
42 the court hearing this matter for an order of restitution whereby the defendants in such
43 action shall be ordered to make restitution of those sums shown by the department to
44 have been obtained by them in violation of any of the provisions of this Chapter. Such

1 restitution shall, at the option of the court, be payable to the Administrator or receiver
2 appointed pursuant to this section or directly to the persons whose assets were obtained
3 in violation of this Chapter. The court may not require the Administrator to post a
4 bond."

5 ♦ Sec 14. G.S. 78C-38 reads as rewritten:

6 **"§ 78C-38. Civil liabilities.**

7 (a) Any person who:

8 (1) Engages in the business of advising others, for compensation, either
9 directly or through publications or writings, as to the value of
10 securities or as to the advisability of investing in, purchasing, or selling
11 securities, or who, for compensation and as a part of a regular
12 business, issues or promulgates analyses or reports concerning
13 securities, in violation of G.S. 78C-8(b), G.S. 78C-16(a) or (b) (an
14 action pursuant to a violation of G.S. 78C-16(b) may not be
15 maintained except by those persons who directly received advice from
16 the unregistered investment adviser representative), G.S. 78C-10(b), or
17 of any rule or order under G.S. 78C-30(d) which requires the
18 affirmative approval of sales literature before it is used, or

19 (2) Receives, directly or indirectly, any consideration from another person
20 for advice as to the value of securities or their purchase or sale,
21 whether through the issuance of analyses, reports or otherwise and
22 employs any device, scheme, or artifice to defraud such other person
23 or engages in any act, practice or course of business which operates or
24 would operate as a fraud or deceit on such other person, in violation of
25 G.S. 78C-8(a)(1) or (2),

26 is liable to any person who is given such advice in such violation, who may sue either at
27 law or in equity to recover (i) the consideration paid for such advice together with
28 interest thereon at the legal rate as provided in G.S. 24-1 from the date of payment of
29 the consideration, plus (ii) the actual damages to such person proximately caused by
30 such violation, plus (iii) costs of the action and reasonable attorneys' fees. An action
31 based on violation of G.S. 78C-8(b) may not prevail where the person accused of the
32 violation sustains the burden of proof that he did not know, and in the exercise of
33 reasonable care could not have known of the existence of the facts by reason of which
34 the liability is alleged to exist.

35 (b) Every person who directly or indirectly controls a person liable under
36 subsection (a) of this section, including every partner, officer, or director of such a
37 person, every person occupying a similar status or performing similar functions, every
38 employee or associate of such a person who materially aids in the conduct giving rise to
39 the liability, and every dealer or salesman who materially aids in such conduct is liable
40 jointly and severally with and to the same extent as such person, unless able to sustain
41 the burden of proof that he did not know, and ~~did not act in reckless disregard in the~~
42 exercise of reasonable care could not have known of the existence of the facts by reason
43 of which the liability is alleged to exist. There is contribution as in cases of contract

1 among the several persons so liable and as provided among tort-feasors pursuant to
2 Chapter 1B of the General Statutes.

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

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

10 (e) No person who has made or engaged in the performance of any contract in
11 violation of any provision of this Chapter or any rule or order hereunder, or who has
12 acquired any purported right under any such contract with knowledge of the facts by
13 reason of which its making or performance was in violation, may base any suit on the
14 contract.

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

18 (f1) The court in a suit under G.S. 78C-8(a) and (b) of this section may award an
19 amount equal to three times the consideration paid for the security, together with
20 interest, costs, and attorney's fees, less any amounts, all specified in subsection (a)(2) of
21 this section upon a showing that the violation was reckless or intentional.

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

25 Sec. 15. G.S. 78C-39 reads as rewritten:

26 **"§ 78C-39. Criminal penalties.**

27 (a) Any person who willfully violates any provision of this Chapter except G.S.
28 78C-9 or who willfully violates G.S. 78C-8(a)(1), (2) and (b) and G.S. 78C-9 knowing
29 the statement made to be false or misleading in any material respect, shall upon
30 conviction be punished as a Class I felon. Any person who willfully violates G.S. 78C-
31 8(a)(1), (2) and (b) shall upon conviction be punished as a Class H felon.

32 (a1) In lieu of a fine otherwise authorized by law, a person who has been
33 convicted of or who has pleaded guilty or no contest to having engaged in conduct in
34 violation of the provisions of this Chapter may be sentenced to pay a fine that does not
35 exceed the greater of three times the gross value gained or three times the gross loss
36 caused by such conduct, plus court costs and the costs of investigation and prosecution,
37 reasonably incurred.

38 (a2) The Administrator shall establish a trust fund to be known as the Anti-Fraud
39 Trust Fund. Any amounts assessed as costs of investigation and prosecution under this
40 subsection shall be deposited in the trust fund. Funds deposited in such trust fund shall
41 be used for investigation and prosecution of civil and criminal actions arising under the
42 provisions of Chapters 78A, 78C, and 78D.

43 (b) The Administrator may refer such evidence as is available concerning
44 violations of this Chapter or of any rule or order hereunder to the Attorney General or

1 the proper district attorney, who may, with or without such a reference, institute the
2 appropriate criminal proceedings under this Chapter. Upon receipt of such reference,
3 the Attorney General or the district attorney may request that a duly employed attorney
4 of the Administrator prosecute or assist in the prosecution of such violation or violations
5 on behalf of the State. Upon approval of the Administrator, such employee shall be
6 appointed a special prosecutor for the Attorney General or the district attorney to serve
7 without compensation from the Attorney General or district attorney. Such special
8 prosecutor shall have all the powers and duties prescribed by law for Assistant
9 Attorneys General or district attorneys and such other powers and duties as are lawfully
10 delegated to such special prosecutor by the Attorney General or the district attorney.

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

13 Sec. 16. This act is effective upon ratification.