

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2001

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SENATE BILL 1455
Judiciary I Committee Substitute Adopted 7/11/02
Finance Committee Substitute Adopted 7/18/02

Short Title: Strengthen Securities Fraud Enforcement Laws.

(Public)

Sponsors:

Referred to:

June 18, 2002

A BILL TO BE ENTITLED

AN ACT TO STRENGTHEN THE LAWS TO PREVENT SECURITIES FRAUD.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 78A-12 reads as rewritten:

"§ 78A-12. Manipulation of market.

(a) In addition to the prohibitions of G.S. 78A-8, it is unlawful for any person ~~to~~to do any of the following:

- (1) Willfully quote a fictitious price with respect to a ~~security~~security.
- (2) Effect a transaction in a security which involves no change in the beneficial ownership of the security, for the purpose of creating a false or misleading appearance of active trading in a security, or a false or misleading appearance of activity with respect to the market for the ~~security~~security.
- (3) Enter an order for the purchase of a security with the knowledge that, at substantially the same time, an order of substantially the same size, and at substantially the same price, for the sale of the security has been, or will be, entered by or for the same person, or an affiliated person, for the purpose of creating a false or misleading appearance of active trading in a security, or a false or misleading appearance of activity with respect to the market for the ~~security~~security.
- (4) Enter an order for the sale of a security with knowledge that, at substantially the same time, an order of substantially the same size, and at substantially the same price, for the purchase of the security has been, or will be, entered by or for the same person, or an affiliated person, for the purpose of creating a false or misleading appearance of active trading in a security, or a false or misleading appearance of activity with respect to the market for the ~~security~~orsecurity.

1 (5) Employ any other deceptive or fraudulent device, scheme, or artifice to
2 manipulate the market in a ~~security~~-security, including the issuance of
3 analyses, reports, or financial statements that are false or misleading in
4 any material respect.

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

9 **SECTION 2.** G.S. 78A-25(a)(1)b. reads as rewritten:

10 "b. The issuer and any predecessors during the past three fiscal
11 years have had average net earnings, determined in accordance
12 with generally accepted accounting ~~practices~~,principles, (i)
13 which are applicable to all securities without a fixed maturity or
14 a fixed interest or dividend or distribution provision outstanding
15 at the date the registration statement is filed and equal at least
16 five percent (5%) of the amount of such outstanding securities
17 (as measured by the maximum offering price or the market
18 price on a day, selected by the registrant, within 30 days before
19 the date of filing the registration statement, whichever is higher,
20 or book value on a day, selected by the registrant, within 90
21 days of the date of filing the registration statement to the extent
22 that there is neither a readily determinable market price nor a
23 cash offering price), or (ii) which, if the issuer and any
24 predecessors have not had any security of the type specified in
25 clause (i) outstanding for three full fiscal years, equal at least
26 five percent (5%) of the amount (as measured in clause (i)) of
27 all securities which will be outstanding if all the securities being
28 offered or proposed to be offered (whether or not they are
29 proposed to be registered or offered in this State) are issued;"

30 **SECTION 3.** G.S. 78A-49(c) reads as rewritten:

31 "(c) The Administrator may by rule or order prescribe (i) the form and content of
32 financial statements required under this Chapter, (ii) the circumstances under which
33 consolidated financial statements shall be filed, and (iii) whether any required financial
34 statements shall be certified by independent or certified public accountants. All financial
35 statements shall be audited and shall be prepared in accordance with generally accepted
36 accounting ~~practices~~,principles, except where the Administrator shall by rule or order
37 provide otherwise."

38 **SECTION 4.** G.S. 78A-56(a) reads as rewritten:

39 "(a) Any person who:

40 (1) Offers or sells a security in violation of G.S. 78A-8(1), 78A-8(3),
41 78A-10(b), ~~78A-12~~, 78A-13, 78A-14, 78A-24, or 78A-36(a), or of any
42 rule or order under G.S. 78A-49(d) which requires the affirmative
43 approval of sales literature before it is used, or of any condition
44 imposed under G.S. 78A-27(d) or 78A-28(g), or

1 (2) Offers or sells a security by means of any untrue statement of a
2 material fact or any omission to state a material fact necessary in order
3 to make the statements made, in the light of the circumstances under
4 which they were made, not misleading (the purchaser not knowing of
5 the untruth or omission), and who does not sustain the burden of proof
6 that he did not know, and in the exercise of reasonable care could not
7 have known, of the untruth or omission,

8 is liable to the person purchasing the security from him, who may sue either at law or in
9 equity to recover the consideration paid for the security, together with interest at the
10 legal rate from the date of payment, costs, and reasonable attorneys' fees, less the
11 amount of any income received on the security, upon the tender of the security, or for
12 damages if he no longer owns the ~~security~~security, together with punitive damages
13 consistent with Chapter 1D of the General Statutes. Damages are the amount that would
14 be recoverable upon a tender less the value of the security when the purchaser disposed
15 of it and interest at the legal rate as provided by G.S. 24-1 from the date of disposition."

16 **SECTION 5.** G.S. 78A-56(b) reads as rewritten:

17 "(b) Any person who purchases a security by means of any untrue statement of a
18 material fact or any omission to state a material fact necessary in order to make the
19 statements made, in the light of the circumstances under which they are made, not
20 misleading (the seller not knowing of the untruth or omission), and who does not sustain
21 the burden of proof that he did not know, and in the exercise of reasonable care could
22 not have known, of the untruth or omission, shall be liable to the person selling the
23 security to him, who may sue either at law or in equity to recover the security, plus any
24 income received by the purchaser thereon, upon tender of the consideration received, or
25 for damages if the purchaser no longer owns the ~~security~~security, together with punitive
26 damages consistent with Chapter 1D of the General Statutes. Damages are the excess of
27 the value of the security when the purchaser disposed of it, plus interest at the legal rate
28 from the date of disposition, over the consideration paid for the security."

29 **SECTION 6.** G.S. 78A-56 is amended by adding a new subsection to read:

30 "(b1) A person who willfully participates in an act or transaction in violation of
31 G.S. 78A-12 is liable to a person who purchases or sells a security, other than a security
32 traded on a national securities exchange or quoted on a national automated quotation
33 system administered by a self-regulatory organization, at a price that was affected by the
34 act or transaction for the damages sustained as a result of the act or transaction, unless
35 the person sustains the burden of proof that the person did not know, and in the exercise
36 of reasonable care could not have known, of the existence of the facts by which the
37 liability is alleged to exist. Damages are the difference between the price at which the
38 securities were purchased or sold and the market value the securities would have had at
39 the time of the person's purchase or sale in the absence of the act or transaction, plus
40 interest at the legal rate of this State from the date of the act or transaction, costs, and
41 reasonable attorneys' fees determined by the court, together with punitive damages
42 consistent with Chapter 1D of the General Statutes."

43 **SECTION 7.** G.S. 78A-56(c) reads as rewritten:

1 "(c) Every person who directly or indirectly controls a person liable under
2 subsection ~~(a) or (b)~~, (a), (b), or (b1), every partner, officer, or director of such a person,
3 every person occupying a similar status or performing similar functions, every
4 employee or agent of such a person who materially aids in the act or transaction, and
5 every dealer or salesman who materially aids in the sale are also liable jointly and
6 severally with and to the same extent as such person, unless the person who is so liable
7 sustains the burden of proof that he did not know, and in the exercise of reasonable care
8 ~~should~~could not have known, of the existence of the facts by reason of which the
9 liability is alleged to exist. There is contribution as in cases of contract among the
10 several persons so liable."

11 **SECTION 8.** G.S. 78A-56(f) reads as rewritten:

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

14 **SECTION 9.** G.S. 78A-57 reads as rewritten:

15 "(a) Any person who willfully violates any provision of this Chapter except G.S.
16 78A-8, 78A-9, 78A-11, 78A-12, 78A-13, or 78A-14 or who willfully violates any rule
17 or order under this Chapter, ~~or who willfully violates G.S. 78A-9 knowing the statement~~
18 ~~made to be false or misleading in any material respect, shall upon conviction be~~
19 ~~punished as a Class I felon;~~Chapter shall be guilty of a Class I felony, but no person
20 may be imprisoned for the violation of any rule or order if he proves that he had no
21 knowledge of the rule or order.

22 (a1) Any person who willfully violates G.S. 78A-8, 78A-11, 78A-12, 78A-13, or
23 78A-14 shall, upon conviction be punished as a Class H felon, shall be guilty of a felony.
24 If the total value of the consideration involved in the violation or violations is one
25 hundred thousand dollars (\$100,000) or more, the person is guilty of a Class C felony. If
26 the total value of the consideration involved in the violation or violations is less than
27 one hundred thousand dollars (\$100,000), the person is guilty of a Class H felony.

28 (a2) Any person who willfully violates G.S. 78A-9 by knowingly making false or
29 misleading statements in any material respect shall be guilty of a Class H felony. Any
30 other willful violation of G.S. 78A-9 shall constitute a Class 2 misdemeanor.

31 (b) The Administrator may refer such evidence as is available concerning
32 violations of this Chapter or of any rule or order hereunder to the proper district
33 attorney, who may, with or without such a reference, institute the appropriate criminal
34 proceedings under this Chapter. Upon receipt of such reference, the district attorney
35 may request that a duly employed attorney of the Administrator prosecute or assist in
36 the prosecution of such violation or violations on behalf of the State. Upon approval of
37 the Administrator, such employee may be appointed a special prosecutor for the district
38 attorney to prosecute or assist in the prosecution of such violations without receiving
39 compensation from the district attorney. Such special prosecutor shall have all the
40 powers and duties prescribed by law for district attorneys and such other powers and
41 duties as are lawfully delegated to such special prosecutor by the district attorney for
42 violations of this Chapter.

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

1 (d) As used in this section, the phrase "total value of consideration" means in the
2 case of a sale of securities, the value of consideration paid to the seller, and in the case
3 of a purchase of securities, the value of the securities purchased."

4 **SECTION 10.** Article 7 of Chapter 78A of the General Statutes is amended
5 by adding a new section to read:

6 "**§ 78A-58. Obstruction of investigation.**

7 Any person who willfully makes or causes to be made to the Administrator or the
8 Administrator's designated representative any false, misleading, or unfounded oral or
9 written statement for the purpose of interfering with the performance of any audit,
10 examination, or investigation by the Administrator under this Chapter, or who shall
11 willfully (i) create, cause to be made, or produce any record, report, or document that is
12 false or misleading in any material respect; (ii) destroy or alter any record, report or
13 document; (iii) conceal or secrete any record, report, or document; or (iv) hinder or
14 obstruct the Administrator or the Administrator's designated representative in the
15 performance of the Administrator's duties under this Chapter, shall be guilty of a Class
16 H felony."

17 **SECTION 11.** G.S. 78A-63(a) reads as rewritten:

18 "(a) Sections 78A-8, 78A-10, 78A-12, 78A-13, 78A-14, 78A-24, 78A-31,
19 78A-36(a), and 78A-56 apply to persons who sell or offer to sell when (i) an offer to sell
20 is made in this State, or (ii) an offer to buy is made and accepted in this State."

21 **SECTION 12.** G.S. 78A-63(b) reads as rewritten:

22 "(b) Sections 78A-8, 78A-10, 78A-12, 78A-36(a) and 78A-56(b) apply to persons
23 who buy or offer to buy when (i) an offer to buy is made in this State, or (ii) an offer to
24 sell is made and accepted in this State."

25 **SECTION 13.** G.S. 78A-28(b) reads as rewritten:

26 "(b) Every person filing a registration statement shall pay a filing fee of two
27 thousand dollars (\$2,000). When a registration statement is withdrawn before the
28 effective date or a pre-effective stop order is entered under G.S. 78A-29, the
29 Administrator shall retain the filing fee. A registration statement relating to redeemable
30 securities to be offered for a period in excess of one year, other than securities covered
31 under federal law, must be renewed annually by payment of a renewal fee of ~~one~~
32 ~~hundred dollars (\$100.00)~~ two hundred dollars (\$200.00) and by filing any documents or
33 reports that the Administrator may by rule or order require."

34 **SECTION 14.** G.S. 78A-28(j) reads as rewritten:

35 "(j) A registration statement filed in accordance with subsection (b) of this section
36 may be amended after its effective date to increase the securities specified as proposed
37 to be offered. Such an amendment becomes effective when the Administrator so orders.
38 Every person filing such an amendment shall pay a filing fee of ~~fifty dollars~~
39 ~~(\$50.00)~~ one hundred dollars (\$100.00) with respect to the additional securities proposed
40 to be offered."

41 **SECTION 15.** G.S. 78A-31(a) reads as rewritten:

42 "(a) The Administrator, by rule or order, may require the filing of any of the
43 following documents with regard to a security covered under section 18(b)(2) of the
44 Securities Act of 1933 (15 U.S.C. § 77r(b)(2)):

- 1 (1) Prior to the initial offer of the security in this State, all documents that
2 are part of a federal registration statement filed with the Securities and
3 Exchange Commission under the Securities Act of 1933, or, in lieu
4 thereof, a form prescribed by the Administrator, together with a
5 consent to service of process signed by the issuer and with the
6 payment of a notice filing fee of two thousand dollars (\$2,000).
- 7 (2) After the initial offer of the security in this State, all documents that
8 are part of an amendment to a federal registration statement filed with
9 the Securities and Exchange Commission under the Securities Act of
10 1933, or, in lieu thereof, a form prescribed by the Administrator, which
11 shall be filed concurrently with the Administrator.
- 12 (3) A report of the value of securities covered under federal law that are
13 offered or sold in this State.
- 14 (4) A notice filing pursuant to this section shall expire on December 31 of
15 each year or some other date not more than one year from its effective
16 date as the Administrator may by rule or order provide. A notice filing
17 of the offer of securities covered under federal law that are to be
18 offered for a period in excess of one year shall be renewed annually by
19 payment of a renewal fee of ~~one hundred dollars (\$100.00)~~two
20 hundred dollars (\$200.00) and by filing any documents and reports that
21 the Administrator may by rule or order require consistent with this
22 section. The renewal shall be effective upon the expiration of the prior
23 notice period.
- 24 (5) A notice filed in accordance with this section may be amended after its
25 effective date to increase the securities specified as proposed to be
26 offered. An amendment becomes effective upon receipt by the
27 Administrator. Every person submitting an amended notice filing shall
28 pay a filing fee of ~~fifty dollars (\$50.00)~~one hundred dollars (\$100.00)
29 with respect to the additional securities proposed to be offered."

30 **SECTION 16.** G.S. 78A-37(a) reads as rewritten:

31 "(a) A dealer or salesman may obtain an initial or renewal registration by filing
32 with the Administrator an application together with a consent to service of process
33 pursuant to G.S. 78A-63(f). The application shall contain whatever information the
34 Administrator by rule requires concerning such matters as (i) the applicant's form and
35 place of organization; (ii) the applicant's proposed method of doing business; (iii) the
36 qualifications and business history of the applicant; in the case of a dealer, the
37 qualifications and business history of any partner, officer, or director, any person
38 occupying a similar status or performing similar functions, or any person directly or
39 indirectly controlling the dealer, and a representation that the applicant dealer is duly
40 registered as a dealer under the Securities Exchange Act of 1934; (iv) any injunction or
41 administrative order or conviction of a misdemeanor involving a security or any aspect
42 of the securities business and any conviction of a felony; and (v) the applicant's
43 financial condition and history. If no denial order is in effect and no proceeding is
44 pending under G.S. 78A-39, registration becomes effective at noon of the thirtieth day

1 after an application is filed. The Administrator may by rule or order specify an earlier
2 effective date, and he may by order defer the effective date until noon of the thirtieth
3 day after the filing of any amendment. Registration of a dealer automatically constitutes
4 registration of any salesman who is a partner, executive officer, or director, or a person
5 occupying a similar status or performing similar functions. If the Administrator
6 institutes a proceeding under G.S. 78A-39 to postpone or deny an application for
7 registration, withdrawal of the application shall be allowed only at such time and under
8 such conditions as the Administrator may by order determine."

9 **SECTION 17.** G.S. 78C-2(1) reads as rewritten:

10 "(1) "Investment adviser" means any person who, for compensation,
11 engages in the business of advising others, either directly or through
12 publications or writings, as to the value of securities or as to the
13 advisability of investing in, purchasing, or selling securities, or who,
14 for compensation and as part of a regular business, issues or
15 promulgates analyses or reports concerning securities. "Investment
16 adviser" also includes financial planners and other persons who, as an
17 integral component of other financially related services, provide the
18 foregoing investment advisory services to others for compensation and
19 as a part of a business or who hold themselves out as providing the
20 foregoing investment advisory services to others for compensation.

21 "Investment adviser" does not include:

- 22 a. An investment adviser representative or a person excluded from
23 the definition of investment adviser representative pursuant to
24 ~~G.S. 78C-2(3)e.~~; G.S. 78C-2(3)c.
- 25 b. A bank, savings institution, or trust ~~company;~~ company.
- 26 c. A lawyer, accountant, engineer, or teacher whose performance
27 of any such services is solely incidental to the practice of his
28 ~~profession;~~ profession.
- 29 d. A dealer or its salesman whose performance of these services is
30 solely incidental to the conduct of its business as a dealer and
31 who receives no special compensation for ~~them;~~ them.
- 32 e. A publisher of any newspaper, news column, newsletter, news
33 magazine, or business or financial publication or service,
34 whether communicated in hard copy form, or by electronic
35 means, or otherwise, that does not consist of the rendering of
36 advice on the basis of the specific investment situation of each
37 ~~client;~~ client.
- 38 f. A person solely by virtue of such person's services to or on
39 behalf of any "business development company" as defined in
40 Section 202(a)(22) of the Investment Advisers Act of 1940
41 provided the business development company is not an
42 "investment company" by reason of Section 3(c)(1) of the
43 Investment Company Act of 1940, as both acts were in effect
44 on ~~June 1, 1988;~~ June 1, 1988.

- 1 g. A personal representative of a decedent's estate, guardian,
2 conservator, receiver, attorney in fact, trustee in bankruptcy,
3 trustee of a testamentary trust, or a trustee of an inter vivos
4 trust, not otherwise engaged in providing investment advisory
5 services, and the performance of these services is not a part of a
6 plan or scheme to evade registration or the substantive
7 requirements of this ~~Chapter;~~Chapter.
- 8 h. A licensed real estate agent or broker whose only compensation
9 is a commission on real estate ~~sold;~~sold.
- 10 i. An individual or company primarily engaged in acting as a
11 business broker whose only compensation is a commission on
12 the sale of a ~~business;~~business.
- 13 j. An individual who, as an employee, officer or director of, or
14 general partner in, another person and in the course of
15 performance of his duties as such, provides investment advice
16 to such other person, or to entities that are affiliates of such
17 other person, or to employee benefit plans of such other person
18 or its affiliated entities, or, with respect to such employee
19 benefit plans, to employees of such other person or its affiliated
20 ~~entities;~~entities.
- 21 ~~k. Any person who is exempt from registration under the~~
22 ~~Investment Advisers Act of 1940 by operation of Section~~
23 ~~203(b)(3) of said act or by operation of any rule or regulation~~
24 ~~promulgated by the United States Securities and Exchange~~
25 ~~Commission under or related to said Section 203(b)(3) provided~~
26 ~~that any reference in this sub-subsection to any statute, rule or~~
27 ~~regulation shall be deemed to incorporate said statute, rule or~~
28 ~~regulation (and any statute, rule or regulation referenced~~
29 ~~therein) as in effect on June 1, 1988;~~
- 30 l. An employee of a person described in subdivision b., e., f., g.,
31 h., or j. of G.S. 78C-2(1) acting on behalf of such person within
32 the scope of his ~~employment;~~employment.
- 33 l 1. An investment adviser who is covered under federal law as
34 defined in subdivision (4) of this section.
- 35 m. Such other persons not within the intent of this subsection as the
36 Administrator may by rule or order designate."

37 **SECTION 18.** G.S. 78C-16(a) reads as rewritten:

- 38 "(a) It is unlawful for any person to transact business in this State as an investment
39 adviser unless:
- 40 (1) The person is registered under this Chapter;
- 41 (2) The person's only clients in this State are investment companies as
42 defined in the Investment Company Act of 1940, other investment
43 advisers, investment advisers covered under federal law, dealers,
44 banks, trust companies, savings institutions, savings and loan

1 associations, insurance companies, employee benefit plans with assets
2 of not less than one million dollars (\$1,000,000), and governmental
3 agencies or instrumentalities, whether acting for themselves or as
4 trustees with investment control, or other institutional investors as are
5 designated by rule or order of the Administrator; or

6 (3) The person has no place of business in this State, and during the
7 preceding 12-month period has had not more than five clients, other
8 than those specified in subdivision (2) of this subsection, who are
9 residents of the ~~State~~.State; or

10 (4) The person is described in Section 203(b)(3) of the Investment
11 Advisers Act of 1940."

12 **SECTION 19.** G.S. 78C-16(a1) reads as rewritten:

13 "(a1) It is unlawful for any person to transact business in this State as an investment
14 adviser representative unless:

15 (1) The person is registered under this Chapter; or

16 (2) The person is an investment adviser representative employed by or
17 associated with an investment adviser exempt from registration under
18 ~~subdivision (2) or (3)~~ subdivision (2), (3), or (4) of subsection (a) of
19 this section; or

20 (3) The person is an investment adviser representative employed by or
21 associated with an investment adviser covered under federal law that is
22 exempt from the notice filing requirements of G.S. 78C-17(a1)."

23 **SECTION 20.** G.S. 78C-17(a) reads as rewritten:

24 "(a) An investment adviser, or investment adviser representative may obtain an
25 initial or renewal registration by filing with the Administrator or the Administrator's
26 designee an application together with a consent to service of process pursuant to G.S.
27 78C-46(b) and paying any reasonable costs charged by the designee for processing the
28 filings. The application shall contain whatever information the Administrator by rule
29 requires concerning such matters as:

30 (1) The applicant's form and place of organization;

31 (2) The applicant's proposed method of doing business;

32 (3) The qualifications and business history of the applicant; in the case of
33 an investment adviser, the qualifications and business history of any
34 partner, officer, or director, any person occupying a similar status or
35 performing similar functions, or any person directly or indirectly
36 controlling the investment adviser;

37 (4) Any injunction or administrative order or conviction of a misdemeanor
38 involving a security or any aspect of the securities business and any
39 conviction of a felony;

40 (5) The applicant's financial condition and history; and

41 (6) Any information to be furnished or disseminated to any client or
42 prospective client.

43 If no denial order is in effect and no proceeding is pending under G.S. 78C-19,
44 registration becomes effective at noon of the 30th day after an application is filed. The

1 Administrator may by rule or order specify an earlier effective date, and he may by
2 order defer the effective date until noon of the 30th day after the filing of any
3 amendment. Registration of an investment adviser automatically constitutes registration
4 of any investment adviser representative who is a partner, executive officer, or director,
5 or a person occupying a similar status or performing similar functions. If the
6 Administrator institutes a proceeding under G.S. 78C-19 to postpone or deny an
7 application for registration, withdrawal of the application shall be allowed only at such
8 time and under such conditions as the Administrator may by order determine."

9 **SECTION 21.** G.S. 78C-30(c) reads as rewritten:

10 "(c) The Administrator may by rule or order prescribe (i) the form and content of
11 financial statements required under this Chapter, (ii) the circumstances under which
12 consolidated financial statements shall be filed, and (iii) whether any required financial
13 statements shall be certified by independent or certified public accountants. All financial
14 statements shall be audited and shall be prepared in accordance with generally accepted
15 accounting practices-principles, except where the Administrator shall by rule or order
16 provide otherwise."

17 **SECTION 22.** G.S. 78C-38(a) reads as rewritten:

18 "(a) Any person who:

- 19 (1) Engages in the business of advising others, for compensation, either
20 directly or through publications or writings, as to the value of
21 securities or as to the advisability of investing in, purchasing, or selling
22 securities, or who, for compensation and as a part of a regular
23 business, issues or promulgates analyses or reports concerning
24 securities, in violation of G.S. 78C-8(b), ~~G.S. 78C-16(a)~~G.S.
25 78C-16(a), (a1), or (b) (an action pursuant to a violation of G.S.
26 78C-16(b) may not be maintained except by those persons who
27 directly received advice from the unregistered investment adviser
28 representative), G.S. 78C-10(b), or of any rule or order under G.S.
29 78C-30(d) which requires the affirmative approval of sales literature
30 before it is used, or
31 (2) Receives, directly or indirectly, any consideration from another person
32 for advice as to the value of securities or their purchase or sale,
33 whether through the issuance of analyses, reports or otherwise and
34 employs any device, scheme, or artifice to defraud such other person
35 or engages in any act, practice or course of business which operates or
36 would operate as a fraud or deceit on such other person, in violation of
37 G.S. 78C-8(a)(1) or (2),

38 is liable to any person who is given such advice in such violation, who may sue either at
39 law or in equity to recover (i) the consideration paid for such advice together with
40 interest thereon at the legal rate as provided in G.S. 24-1 from the date of payment of
41 the consideration, plus (ii) the actual damages to such person proximately caused by
42 such violation, plus (iii) costs of the action and reasonable attorneys' ~~fees-fees,~~ together
43 with punitive damages consistent with Chapter 1D of the General Statutes. An action
44 based on violation of G.S. 78C-8(b) may not prevail where the person accused of the

1 violation sustains the burden of proof that he did not know, and in the exercise of
2 reasonable care could not have known of the existence of the facts by reason of which
3 the liability is alleged to exist."

4 **SECTION 23.** G.S. 78C-38(b) reads as rewritten:

5 "(b) Every person who directly or indirectly controls a person liable under
6 subsection (a) of this section, including every partner, officer, or director of such a
7 person, every person occupying a similar status or performing similar functions, every
8 employee or associate of such a person who materially aids in the conduct giving rise to
9 the liability, and every ~~dealer or salesman~~ agent of such person who materially aids in
10 such conduct is liable jointly and severally with and to the same extent as such person,
11 unless able to sustain the burden of proof that he did not know, and in the exercise of
12 reasonable care ~~should~~ could not have known of the existence of the facts by reason of
13 which the liability is alleged to exist. There is contribution as in cases of contract among
14 the several persons so liable and as provided among tort-feasors pursuant to Chapter 1B
15 of the General Statutes."

16 **SECTION 24.** G.S. 78C-39 reads as rewritten:

17 **"§ 78C-39. Criminal penalties.**

18 (a) Any person who willfully violates any provision of this Chapter except G.S.
19 78C-8(a)(1), 78C-8(a)(2), 78C-8(b), or 78C-9 ~~or who willfully violates G.S. 78C-9~~
20 ~~knowing the statement made to be false or misleading in any material respect, shall~~
21 ~~upon conviction be punished as a Class I felon.~~ shall be guilty of a Class I felony.

22 (a1) Any person who willfully violates G.S. 78C-8(a)(1), 78C-8(a)(2), or 78C-8(b)
23 shall, upon conviction, be punished as a Class H felon. shall be guilty of a felony. If the
24 actual losses caused by the violation or violations are one hundred thousand dollars
25 (\$100,000) or more, the person is guilty of a Class C felony. If the actual losses caused
26 by the violation or violations are less than one hundred thousand dollars (\$100,000), the
27 person is guilty of a Class H felony.

28 (a2) Any person who willfully violates G.S. 78C-9 by knowingly making false or
29 misleading statements in any material respect shall be guilty of a Class H felony. Any
30 other willful violation of G.S. 78C-9 shall constitute a Class 2 misdemeanor.

31 (a3) Any person who willfully makes or causes to be made to the Administrator or
32 the Administrator's designated representative any false, misleading, or unfounded oral
33 or written statement for the purpose of interfering with the performance of any audit,
34 examination, or investigation by the Administrator under this Chapter, or who shall
35 willfully (i) create, cause to be made, or produce any record, report, or document that is
36 false or misleading in any material respect; (ii) destroy or alter any record, report, or
37 document; (iii) conceal or secrete any record, report, or document; or (iv) hinder or
38 obstruct the Administrator or the Administrator's designated representative in the
39 performance of the Administrator's duties under this Chapter, shall be guilty of a Class
40 H felony.

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

1 may request that a duly employed attorney of the Administrator prosecute or assist in
2 the prosecution of such violation or violations on behalf of the State. Upon approval of
3 the Administrator, such employee may be appointed a special prosecutor for the district
4 attorney to prosecute or assist in the prosecution of such violations without receiving
5 compensation from the district attorney. Such special prosecutor shall have all the
6 powers and duties prescribed by law for district attorneys and such other powers and
7 duties as are lawfully delegated to such special prosecutor by the district attorney for
8 violations of this Chapter.

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

11 **SECTION 25.** G.S. 78D-24(a) reads as rewritten:

12 "(a) Any person who willfully violates any provision of this Chapter ~~shall, upon~~
13 ~~conviction, be punished as a Class I felon,~~ shall be guilty of a felony. If the actual losses
14 caused by the violation or violations are one hundred thousand dollars (\$100,000) or
15 more, the person is guilty of a Class C felony. If the actual losses caused by the
16 violation or violations are less than one hundred thousand dollars (\$100,000), the person
17 is guilty of a Class H felony."

18 **SECTION 26.** G.S. 53B-4 reads as rewritten:

19 "**§ 53B-4. Access to financial records.**

20 Notwithstanding any other provision of law, no government authority may have
21 access to a customer's financial record held by a financial institution unless the financial
22 record is described with reasonable specificity and access is sought pursuant to:

- 23 (1) Customer authorization that meets the requirements of the Right to
24 Financial Privacy Act § 1104, 12 U.S.C. § 3404, provided, however, a
25 customer authorization received by a State agency or a county
26 department of social services for the purpose of determining eligibility
27 for the programs of public assistance under Chapter 108A of the
28 General Statutes, or for purposes of a government inquiry concerning
29 these same programs of public assistance, cannot be revoked and shall
30 remain valid for 12 months unless a shorter period is specified in the
31 authorization, or a customer authorization that is given by a licensed
32 attorney with respect to an account in which the attorney holds funds
33 as a fiduciary;
- 34 (2) Authorization under G.S. 105-251, 105-251.1, or 105-258;
- 35 (3) Search warrant as provided in Article 11 of Chapter 15A of the
36 General Statutes;
- 37 (4) Statutory authority of a supervisory agency to examine or have access
38 to financial records in the exercise of its supervisory, regulatory, or
39 monetary functions with respect to a financial institution;
- 40 (5) The authority granted under G.S. 116B-72 and G.S. 116B-75;
- 41 (6) Examination and review by the State Auditor or his authorized
42 representative under G.S. 147-64.6(c)(9) or G.S. 147-64.7(a);

- 1 (7) Request by a government authority authorized to buy and sell student
2 loan notes under Article 23 of Chapter 116 of the General Statutes for
3 financial records relating to insured student loans;
4 (7a) Investigations conducted by the Securities Administrator pursuant to
5 G.S. 78A-46(a), 78C-27(a), and 78D-21(a);
6 (8) Pending litigation to which the government authority and the customer
7 are parties;
8 (9) Subpoena or court order in connection with a grand jury proceeding;
9 (10) A writ of execution under Article 28 of Chapter 1 of the General
10 Statutes; or
11 (11) Other court order or administrative or judicial subpoena authorized by
12 law if the requirements of G.S. 53B-5 are met.

13 As used in this section, the term "reasonable specificity" means that degree of
14 specificity reasonable under all the circumstances, and, with respect to requests under
15 G.S. 116B-72 and G.S. 116B-75, may include designation by general type or class."

16 **SECTION 27.** G.S. 150B-21.1(a2) reads as rewritten:

17 "(a2) Notwithstanding the provisions of subsection (a) of this section, the Secretary
18 of State may adopt temporary rules to implement the certification technology provisions
19 of Article 11A of Chapter 66 of the General ~~Statutes and Statutes,~~ to adopt uniform
20 Statements of Policy that have been officially adopted by the North American Securities
21 Administrators Association for the purpose of promoting uniformity of state securities
22 ~~regulation.~~ regulation, and to adopt rules governing the conduct of hearings pursuant to
23 this Chapter. After having the proposed temporary rule published in the North Carolina
24 Register and at least 30 days prior to adopting a temporary rule pursuant to this
25 subsection, the Secretary shall:

- 26 (1) Notify persons on its mailing list maintained pursuant to G.S.
27 150B-21.2(d) and any other interested parties of its intent to adopt a
28 temporary rule;
29 (2) Accept oral and written comments on the proposed temporary rule;
30 and
31 (3) Hold at least one public hearing on the proposed temporary rule.

32 When the Secretary adopts a temporary rule pursuant to this subsection, the Secretary
33 must submit a reference to this subsection as the Secretary's statement of need to the
34 Codifier of Rules.

35 Notwithstanding any other provision of this Chapter, the Codifier of Rules shall
36 publish in the North Carolina Register a proposed temporary rule received from the
37 Secretary in accordance with this subsection."

38 **SECTION 28.** There is hereby appropriated to the Office of the Secretary of
39 State for the 2002-2003 fiscal year the sum of two hundred twenty-six thousand six
40 hundred ninety-two dollars (\$226,692) for recurring expenses and fifteen thousand nine
41 hundred ninety dollars (\$15,990) for nonrecurring expenses for three additional
42 unsworn securities investigators in the Securities Division.

43 **SECTION 29.** Sections 9, 10, 24, and 25 of this act become effective
44 December 1, 2002, and apply to acts committed on or after that date. Sections 13, 14,

1 and 15 become effective October 1, 2002, and apply to fees assessed on or after that
2 date. Section 28 of this act became effective July 1, 2002. The remainder of this act is
3 effective when it becomes law.