

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2003

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SENATE BILL 925  
Judiciary II Committee Substitute Adopted 4/23/03

Short Title: Strengthen Security Fraud Enforcement Laws.

(Public)

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Sponsors:

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Referred to:

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April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO STRENGTHEN THE LAWS TO PREVENT SECURITIES FRAUD  
AND TO CLARIFY THE PROHIBITION ON STATE CONTRACTS WITH  
VENDORS THAT ARE INCORPORATED IN A TAX HAVEN COUNTRY BUT  
THE UNITED STATES IS THE PRINCIPAL MARKET FOR THE PUBLIC  
TRADING OF THEIR CORPORATION'S STOCK.

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

1 active trading in a security, or a false or misleading appearance of  
2 activity with respect to the market for the ~~security~~; ~~or security~~.

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

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

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

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

32 **SECTION 3.** G.S. 78A-37(a) reads as rewritten:

33 "(a) A dealer or salesman may obtain an initial or renewal registration by filing  
34 with the Administrator an application together with a consent to service of process  
35 pursuant to G.S. 78A-63(f). The application shall contain whatever information the  
36 Administrator by rule requires concerning such matters as (i) the applicant's form and  
37 place of organization; (ii) the applicant's proposed method of doing business; (iii) the  
38 qualifications and business history of the applicant; in the case of a dealer, the  
39 qualifications and business history of any partner, officer, or director, any person  
40 occupying a similar status or performing similar functions, or any person directly or  
41 indirectly controlling the dealer, and a representation that the applicant dealer is duly  
42 registered as a dealer under the Securities Exchange Act of 1934; (iv) any injunction or  
43 administrative order or conviction of a misdemeanor involving a security or any aspect  
44 of the securities business and any conviction of a felony; and (v) the applicant's

1 financial condition and history. If no denial order is in effect and no proceeding is  
2 pending under G.S. 78A-39, registration becomes effective at noon of the thirtieth day  
3 after an application is filed. The Administrator may by rule or order specify an earlier  
4 effective ~~date,~~date and ~~he~~ may by order defer the effective date until noon of the  
5 thirtieth day after the filing of any amendment. Registration of a dealer automatically  
6 constitutes registration of any salesman who is a partner, executive officer, or director,  
7 or a person occupying a similar status or performing similar functions. After the  
8 Administrator institutes a proceeding under G.S. 78A-39 to postpone or deny an  
9 application for registration, withdrawal of the application shall be allowed only at such  
10 time and under such conditions as the Administrator may by order determine."

11 **SECTION 4.** G.S. 78A-49(c) reads as rewritten:

12 "(c) The Administrator may by rule or order prescribe (i) the form and content of  
13 financial statements required under this Chapter, (ii) the circumstances under which  
14 consolidated financial statements shall be filed, and (iii) whether any required financial  
15 statements shall be certified by independent or certified public accountants. All financial  
16 statements required to be filed with the Administrator shall be audited and shall be  
17 prepared in accordance with generally accepted accounting practices-principles, except  
18 where the Administrator may by rule or order provide otherwise. In determining  
19 whether to permit the filing of financial statements that have not been audited, the  
20 Administrator shall consider all of the following factors:

- 21 (1) Whether lesser standards for financial statements will impair investor  
22 protection.
- 23 (2) The cost of preparation of audited financial statements relative to the  
24 proposed offering amount.
- 25 (3) Whether recently audited financial statements of the issuer are  
26 available in addition to current interim statements.
- 27 (4) Whether the issuer has commenced significant business operations.
- 28 (5) Any other factors that are relevant to the protection of the investing  
29 public."

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

31 "(a) Any person who:

- 32 (1) Offers or sells a security in violation of G.S. 78A-8(1), 78A-8(3),  
33 78A-10(b), ~~78A-12,~~ 78A-13, 78A-14, 78A-24, or 78A-36(a), or of any  
34 rule or order under G.S. 78A-49(d) which requires the affirmative  
35 approval of sales literature before it is used, or of any condition  
36 imposed under G.S. 78A-27(d) or 78A-28(g), or
- 37 (2) Offers or sells a security by means of any untrue statement of a  
38 material fact or any omission to state a material fact necessary in order  
39 to make the statements made, in the light of the circumstances under  
40 which they were made, not misleading (the purchaser not knowing of  
41 the untruth or omission), and who does not sustain the burden of proof  
42 that he did not know, and in the exercise of reasonable care could not  
43 have known, of the untruth or omission,

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

9 **SECTION 6.** G.S. 78A-56(b) reads as rewritten:

10 "(b) Any person who purchases a security by means of any untrue statement of a  
11 material fact or any omission to state a material fact necessary in order to make the  
12 statements made, in the light of the circumstances under which they are made, not  
13 misleading (the seller not knowing of the untruth or omission), and who does not sustain  
14 the burden of proof that he did not know, and in the exercise of reasonable care could  
15 not have known, of the untruth or omission, shall be liable to the person selling the  
16 security to him, who may sue either at law or in equity to recover the security, plus any  
17 income received by the purchaser thereon, upon tender of the consideration received, or  
18 for damages if the purchaser no longer owns the security. Damages are the excess of the  
19 value of the security when the purchaser disposed of it, plus interest at the legal rate as  
20 provided by G.S. 24-1 from the date of disposition, over the consideration paid for the  
21 security."

22 **SECTION 7.** G.S. 78A-56 is amended by adding a new subsection to read:

23 "(b1) A person who willfully violates G.S. 78A-12 is liable to a person who  
24 purchases or sells a security, other than a security traded on a national securities  
25 exchange or quoted on a national automated quotation system administered by a  
26 self-regulatory organization, at a price that was affected by the act or transaction for the  
27 damages sustained as a result of the act or transaction. Damages are the difference  
28 between the price at which the securities were purchased or sold and the value the  
29 securities would have had at the time of the person's purchase or sale in the absence of  
30 the act or transaction, plus interest at the legal rate as provided by G.S. 24-1 from the  
31 date of the purchase or sale, costs, and reasonable attorneys' fees determined by the  
32 court."

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

34 "(c)

35 (1) Every person who directly or indirectly controls a person liable under  
36 subsection ~~(a) or (b)~~, (a), (b), or (b1) of this section, every partner,  
37 officer, or director of ~~such~~ the person, every person occupying a  
38 similar status or performing similar functions, ~~every employee of such~~  
39 ~~a person who materially aids in the act or transaction~~, and every dealer  
40 or salesman dealer, salesman, or other person excluding an employee  
41 subject to subdivision (2) of this subsection, who materially aids in the  
42 sale ~~are~~ is also liable jointly and severally with and to the same extent  
43 as ~~such~~ the person, unless ~~the person who is so liable sustains~~ able to  
44 sustain the burden of proof that ~~he~~ the person did not know, and in the

1 exercise of reasonable care ~~should~~ could not have known, of the  
2 existence of the facts by reason of which the liability is alleged to  
3 exist.

4 (2) Unless liable under subdivision (1) of this subsection, every employee  
5 of a person liable under subsection (a), (b), or (b1) of this section who  
6 materially aids in the act or transaction is also liable jointly and  
7 severally with and to the same extent as the person if the employee  
8 actually knew of the existence of the facts by reason of which the  
9 liability is alleged to exist.

10 (3) There is contribution as in cases of contract among the several persons  
11 so liable liable under subdivisions (1) and (2) of this subsection as  
12 provided among tort-feasors pursuant to Chapter 1B of the General  
13 Statutes."

14 **SECTION 9.** G.S. 78A-56(f) reads as rewritten:

15 "(f) No person may sue under this section for a violation of G.S. 78A-24 or G.S.  
16 78A-36 more than two years after the sale or contract of sale.

17 No person may sue under this section for any other violation of this Chapter more  
18 than three years after the person discovers facts constituting the violation, but in any  
19 case no later than five years after the sale or contract of sale, except that if a person who  
20 may be liable under this section engages in any fraudulent or deceitful act that conceals  
21 the violation or induces the person to forego or postpone commencing an action based  
22 upon the violation, the suit may be commenced not later than three years after the  
23 person discovers or should have discovered that the act was fraudulent or deceitful."

24 **SECTION 10.** G.S. 78A-56(j) reads as rewritten:

25 "(j) The rights and remedies provided by this Chapter are in addition to any other  
26 rights or remedies that may exist at law or in equity, but this Chapter does not create any  
27 cause of action not specified in this section or G.S. 78A-37(d). If the requirements of  
28 Chapter 1D of the General Statutes are met, punitive damages are available to the extent  
29 provided in that Chapter."

30 **SECTION 11.** G.S. 78A-57 reads as rewritten:

31 "§ 78A-57. **Criminal penalties.** (a) Any person who willfully violates any  
32 provision of this Chapter except G.S. 78A-8, 78A-9, 78A-11, 78A-12, 78A-13, or  
33 78A-14 is guilty of a Class I felony.

34 (a1) Any person or who willfully violates any rule or order under this Chapter, or  
35 who willfully violates G.S. 78A-9 knowing the statement made to be false or misleading  
36 in any material respect, shall upon conviction be punished as a Class I felon; but no  
37 Chapter is guilty of a Class I felony. No person may be imprisoned for the violation of  
38 any rule or order if he the person proves that he the person had no knowledge of the rule  
39 or order rule. It is an affirmative defense to a charge of violating an order under this  
40 Chapter that the person had no knowledge of the order.

41 (a2) Any person who willfully violates G.S. 78A-8, 78A-11, ~~78A-12,~~ 78A-13, or  
42 78A-14 shall, upon conviction be punished as a Class H felon is guilty of a felony. If the  
43 losses caused by a single act or a series of related acts in a common scheme or plan are  
44 one hundred thousand dollars (\$100,000) or more, the person is guilty of a Class C

1 felony. If the losses caused by a single act or a series of related acts in a common  
2 scheme or plan are less than one hundred thousand dollars (\$100,000), the person is  
3 guilty of a Class H felony.

4 (a3) Any person who willfully violates G.S. 78A-9 knowing the statement made to  
5 be false or misleading in any material respect is guilty of a Class H felony. Any other  
6 willful violation of G.S. 78A-9 constitutes a Class 2 misdemeanor.

7 (a4) Any person who willfully violates G.S. 78A-12 is guilty of a Class H felony.

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

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

22 **SECTION 12.** Article 7 of Chapter 78A of the General Statutes is amended  
23 by adding a new section to read:

24 "**§ 78A-58. Obstruction of investigation.**

25 A person is guilty of a Class H felony if the person willfully does any of the  
26 following for the purpose of interfering with the performance of any audit, examination,  
27 or investigation by the Administrator under this Chapter:

28 (1) Makes or causes to be made to the Administrator or the  
29 Administrator's designated representative any false or misleading oral  
30 or written statement.

31 (2) Creates, causes to be made, or delivers any record, report, or document  
32 knowing that it is false or misleading in any material respect.

33 (3) Destroys or alters any record, report, or document.

34 (4) Conceals or secretes any record, report, or document."

35 **SECTION 13.** G.S. 78A-63(a) reads as rewritten:

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

39 **SECTION 14.** G.S. 78A-63(b) reads as rewritten:

40 "(b) ~~Sections G.S. 78A-8, 78A-10, 78A-36(a) and 78A-56(b)~~ apply to persons  
41 who buy or offer to buy when (i) an offer to buy is made in this State, or (ii) an offer to  
42 sell is made and accepted in this State."

43 **SECTION 15.** G.S. 78A-63 is amended by adding a new subsection to read:

1       "(b1) G.S. 78A-12 applies when any act instrumental to effecting prohibited  
2 conduct is done in this State."

3       **SECTION 16.** G.S. 78C-2(1) reads as rewritten:

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

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

1 plan or scheme to evade registration or the substantive  
2 requirements of this ~~Chapter;~~Chapter.

3 h. A licensed real estate agent or broker whose only compensation  
4 is a commission on real estate ~~sold;~~sold.

5 i. An individual or company primarily engaged in acting as a  
6 business broker whose only compensation is a commission on  
7 the sale of a ~~business;~~business.

8 j. An individual who, as an employee, officer or director of, or  
9 general partner in, another person and in the course of  
10 performance of his duties as such, provides investment advice  
11 to such other person, or to entities that are affiliates of such  
12 other person, or to employee benefit plans of such other person  
13 or its affiliated entities, or, with respect to such employee  
14 benefit plans, to employees of such other person or its affiliated  
15 ~~entities;~~entities.

16 k. ~~Any person who is exempt from registration under the  
17 Investment Advisers Act of 1940 by operation of Section  
18 203(b)(3) of said act or by operation of any rule or regulation  
19 promulgated by the United States Securities and Exchange  
20 Commission under or related to said Section 203(b)(3) provided  
21 that any reference in this sub-subsection to any statute, rule or  
22 regulation shall be deemed to incorporate said statute, rule or  
23 regulation (and any statute, rule or regulation referenced  
24 therein) as in effect on June 1, 1988;~~

25 l. An employee of a person described in subdivision b., e., f., g.,  
26 h., or j. of G.S. 78C-2(1) acting on behalf of such person within  
27 the scope of his ~~employment;~~employment.

28 l 1. An investment adviser who is covered under federal law as  
29 defined in subdivision (4) of this section.

30 m. Such other persons not within the intent of this subsection as the  
31 Administrator may by rule or order designate."

32 **SECTION 17.** G.S. 78C-16(a) reads as rewritten:

33 "(a) It is unlawful for any person to transact business in this State as an investment  
34 adviser unless:

35 (1) The person is registered under this Chapter;

36 (2) The person's only clients in this State are investment companies as  
37 defined in the Investment Company Act of 1940, other investment  
38 advisers, investment advisers covered under federal law, dealers,  
39 banks, trust companies, savings institutions, savings and loan  
40 associations, insurance companies, employee benefit plans with assets  
41 of not less than one million dollars (\$1,000,000), and governmental  
42 agencies or instrumentalities, whether acting for themselves or as  
43 trustees with investment control, or other institutional investors as are  
44 designated by rule or order of the Administrator; ~~or~~



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

5 (4) The person is exempt from registration under the Investment Advisers  
6 Act of 1940 by operation of section 203(b)(3) of that act or by  
7 operation of any rule or regulation promulgated by the United States  
8 Securities and Exchange Commission under or related to section  
9 203(b)(3) provided that any reference in this subdivision to any statute,  
10 rule, or regulation shall be deemed to incorporate the statute, rule, or  
11 regulation (and any statute, rule, or regulation referenced therein) as in  
12 effect June 1, 1988."

13 **SECTION 18.** G.S. 78C-16(a1) reads as rewritten:

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

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

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

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

24 **SECTION 19.** G.S. 78C-17(a) reads as rewritten:

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

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

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

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

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

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

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

1 If no denial order is in effect and no proceeding is pending under G.S. 78C-19,  
2 registration becomes effective at noon of the 30th day after an application is filed. The  
3 Administrator may by rule or order specify an earlier effective ~~date,~~date and ~~he~~ may by  
4 order defer the effective date until noon of the 30th day after the filing of any  
5 amendment. Registration of an investment adviser automatically constitutes registration  
6 of any investment adviser representative who is a partner, executive officer, or director,  
7 or a person occupying a similar status or performing similar functions. After the  
8 Administrator institutes a proceeding under G.S. 78C-19 to postpone or deny an  
9 application for registration, withdrawal of the application shall be allowed only at such  
10 time and under such conditions as the Administrator may by order determine."

11 **SECTION 20.** G.S. 78C-30(c) reads as rewritten:

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

19 **SECTION 21.** G.S. 78C-38(a) reads as rewritten:

20 "(a) Any person who:

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

40 is liable to any person who is given such advice in such violation, who may sue either at  
41 law or in equity to recover (i) the consideration paid for such advice together with  
42 interest thereon at the legal rate as provided in G.S. 24-1 from the date of payment of  
43 the consideration, plus (ii) the actual damages to such person proximately caused by  
44 such violation, plus (iii) costs of the action and reasonable attorneys' fees. An action

1 based on violation of G.S. 78C-8(b) may not prevail where the person accused of the  
2 violation sustains the burden of proof that he did not know, and in the exercise of  
3 reasonable care could not have known of the existence of the facts by reason of which  
4 the liability is alleged to exist."

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

6 "(b)

7 (1) Every person who directly or indirectly controls a person liable under  
8 subsection (a) of this section, including every partner, officer, or  
9 director of ~~such a~~the person, every person occupying a similar status or  
10 performing similar functions, ~~every employee or associate of such a~~  
11 ~~person who materially aids in the conduct giving rise to the liability,~~  
12 ~~and every dealer or salesmandealer, salesman, or other person~~  
13 ~~excluding an employee subject to subdivision (2) of this subsection,~~  
14 who materially aids in such conduct is liable jointly and severally with  
15 and to the same extent as ~~such the~~ person, unless able to sustain the  
16 burden of proof that ~~he the~~ person did not know, and in the exercise of  
17 reasonable care ~~should could~~ not have ~~known known,~~ of the existence  
18 of the facts by reason of which the liability is alleged to exist.

19 (2) Unless liable under subdivision (1) of this subsection, every employee  
20 or associate of a person liable under subsection (a) of this section who  
21 materially aids in the conduct giving rise to the liability is liable jointly  
22 and severally with and to the same extent as the person if the employee  
23 or associate actually knew of the existence of the facts by reason of  
24 which the liability is alleged to exist.

25 (3) There is contribution as ~~in cases of contract~~ among the several persons  
26 ~~se~~ liable under subdivision (1) and (2) of this subsection and as  
27 provided among tort-feasors pursuant to Chapter 1B of the General  
28 Statutes."

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

30 "(d) No person may sue under this section more than three years after the  
31 rendering of investment advice in violation of ~~this Chapter, except that in the case of a~~  
32 ~~violation of G.S. 78C 8(a)(1) or (2) a person may sue under this section within two~~  
33 ~~years after such person discovers or should have discovered, the facts constituting the~~  
34 ~~violation. G.S. 78C-16.~~

35 No person may sue under this section for any other violation of this Chapter more  
36 than three years after the person discovers facts constituting the violation, but in any  
37 case no later than five years after the rendering of investment advice, except that if a  
38 person who may be liable under this section engages in any fraudulent or deceitful act  
39 that conceals the violation or induces the person to forego or postpone commencing an  
40 action based upon the violation, the suit may be commenced not later than three years  
41 after the person discovers or should have discovered that the act was fraudulent or  
42 deceitful."

43 **SECTION 24.** G.S. 78C-38(g) reads as rewritten:

1       "(g) The rights and remedies provided by this Chapter are in addition to any other  
2 rights or remedies that may exist at law or in equity, but this Chapter does not create any  
3 cause of action not specified in this section or G.S. 78C-17(e). If the requirements of  
4 Chapter 1D of the General Statutes are met, punitive damages are available to the extent  
5 provided in that Chapter."

6               **SECTION 25.** G.S. 78C-39 reads as rewritten:

7       "**§ 78C-39. Criminal penalties.**

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

12       (a1) Any person who willfully violates any rule or order under this Chapter is  
13 guilty of a Class I felony. No person may be imprisoned for the violation of any rule if  
14 the person proves that the person had no knowledge of the rule. It is an affirmative  
15 defense to a charge of violating an order under this Chapter that the person had no  
16 knowledge of the order.

17       (a2) Any person who willfully violates G.S. 78C-8(a)(1), 78C-8(a)(2), or 78C-8(b)  
18 ~~shall, upon conviction, be punished as a Class H felon.~~ is guilty of a felony. If the losses  
19 caused, directly or indirectly, by the violator for a single act or for a series of related  
20 acts in a common scheme or plan is one hundred thousand dollars (\$100,000) or more,  
21 the person is guilty of a Class C felony. If the losses caused, directly or indirectly, by  
22 the violator for a single act or for a series of related acts in a common scheme or plan is  
23 less than one hundred thousand dollars (\$100,000), the person is guilty of a Class H  
24 felony.

25       (a3) Any person who willfully violates G.S. 78C-9 knowing the statement made to  
26 be false or misleading in any material respect is guilty of a Class H felony. Any other  
27 willful violation of G.S. 78C-9 constitutes a Class 2 misdemeanor.

28       (a4) A person is guilty of a Class H felony if the person willfully does any of the  
29 following for the purpose of interfering with the performance of any audit, examination,  
30 or investigation by the Administrator under this Chapter:

31               (1) Makes or causes to be made to the Administrator or the  
32 Administrator's designated representative any false or misleading oral  
33 or written statement.

34               (2) Creates, causes to be made, or delivers any record, report, or document  
35 knowing that it is false or misleading in any material respect.

36               (3) Destroys or alters any record, report, or document.

37               (4) Conceals or secretes any record, report, or document.

38       (b) The Administrator may refer such evidence as is available concerning  
39 violations of this Chapter or of any rule or order hereunder to the proper district  
40 attorney, who may, with or without such a reference, institute the appropriate criminal  
41 proceedings under this Chapter. Upon receipt of ~~such a~~ reference, the district attorney  
42 may request that a duly employed attorney of the Administrator prosecute or assist in  
43 the prosecution of ~~such the~~ violation or violations on behalf of the State. Upon approval  
44 of the Administrator, ~~such the~~ employee may be appointed a special prosecutor for the

1 district attorney to prosecute or assist in the prosecution of ~~such the~~ violations without  
2 receiving compensation from the district attorney. Such a special prosecutor shall have  
3 all the powers and duties prescribed by law for district attorneys and such other powers  
4 and duties as are lawfully delegated to ~~such the~~ special prosecutor by the district  
5 attorney for violations of this Chapter.

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

8 **SECTION 26.** G.S. 78D-24(a) reads as rewritten:

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

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

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

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

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

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

37 **SECTION 28.** G.S. 143-59.1 reads as rewritten:

38 "**§ 143-59.1. Contracts with certain foreign vendors.**

39 (a) Ineligible Vendors. – The Secretary of Administration and other entities to  
40 which this Article applies shall not contract for goods or services with either of the  
41 following:

- 42 (1) A vendor if the vendor or an affiliate of the vendor meets one or more  
43 of the conditions of G.S. 105-164.8(b) but refuses to collect the use tax  
44 levied under Article 5 of Chapter 105 of the General Statutes on its

1 sales delivered to North Carolina. The Secretary of Revenue shall  
2 provide the Secretary of Administration periodically with a list of  
3 vendors to which this section applies.

- 4 (2) A vendor if the vendor or an affiliate of the vendor ~~that is incorporated~~  
5 incorporates or reincorporates in a tax haven country after December  
6 31, 2001, but the United States is the principal market for the public  
7 trading of the ~~corporation's stock~~ stock of the corporation incorporated  
8 in the tax haven country.

9 (b) Vendor Certification. – The Secretary of Administration shall require each  
10 vendor submitting a bid or contract to certify that the vendor is not an ineligible vendor  
11 as set forth in subsection (a) of this section. Any person who submits a certification  
12 required by this subsection known to be false shall be guilty of a Class I felony.

13 (c) Definitions. – The following definitions apply in this section:

14 (1) Affiliate. – As defined in G.S. 105-163.010.

15 (2) Tax haven country. – Means each of the following: Barbados,  
16 Bermuda, British Virgin Islands, Cayman Islands, Commonwealth of  
17 the Bahamas, ~~Cyprus~~, Gibraltar, Isle of Man, the Principality of  
18 Liechtenstein, the Principality of Monaco, and the Republic of the  
19 Seychelles."

20 **SECTION 29.** Sections 11, 12, 25, and 26 of this act become effective  
21 December 1, 2003, and apply to acts committed on or after that date. Section 28 of this  
22 act becomes effective October 1, 2003, and applies to contracts entered into on or after  
23 that date. The remainder of this act is effective when it becomes law.