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SENATE BILL 925
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Fourth Edition Engrossed 6/11/03

Short Title: Strengthen Security Fraud Enforcement Laws.

(Public)

Sponsors:

Referred to:

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

1 been, or will be, entered by or for the same person, or an affiliated
2 person, for the purpose of creating a false or misleading appearance of
3 active trading in a security, or a false or misleading appearance of
4 activity with respect to the market for the ~~security~~; or security.

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

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

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

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

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

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

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

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

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

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

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

33 "(a) Any person who:

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

1 that he did not know, and in the exercise of reasonable care could not
2 have known, of the untruth or omission,
3 is liable to the person purchasing the security from him, who may sue either at law or in
4 equity to recover the consideration paid for the security, together with interest at the
5 legal rate from the date of payment, costs, and reasonable attorneys' fees, less the
6 amount of any income received on the security, upon the tender of the security, or for
7 damages if ~~he~~ the purchaser no longer owns the security. Damages are the amount that
8 would be recoverable upon a tender less the value of the security when the purchaser
9 disposed of it and interest at the legal rate as provided by G.S. 24-1 from the date of
10 disposition."

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

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

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

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

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

36 "(c)

37 (1) Every person who directly or indirectly controls a person liable under
38 subsection (a) or (b), (a), (b), or (b1) of this section, every partner,
39 officer, or director of such ~~at~~ the person, every person occupying a
40 similar status or performing similar functions, every employee of such
41 a person who materially aids in the act or transaction, and every dealer
42 or salesman ~~dealer or salesman~~ who materially aids in the sale are ~~is~~
43 also liable jointly and severally with and to the same extent as such ~~the~~
44 person, unless the person who is so liable sustains ~~able to sustain~~ the

1 burden of proof that ~~he~~ the person did not know, and in the exercise of
2 reasonable care ~~should~~ could not have known, of the existence of the
3 facts by reason of which the liability is alleged to 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 transaction giving rise to the liability and every
7 other person who materially aids in the transaction giving rise to the
8 liability is also liable jointly and severally with and to the same extent
9 as the person if the employee or other person actually knew of the
10 existence of the facts by reason of which the liability is alleged to
11 exist.

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

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

17 "(f) No person may sue under this section for a violation of G.S. 78A-24 or G.S.
18 78A-36 more than two years after the sale or contract of sale.

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

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

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

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

33 "**§ 78A-57. Criminal penalties.**

34 (a) Any person who willfully violates any provision of this Chapter except G.S.
35 78A-8, 78A-9, 78A-11, 78A-12, 78A-13, or 78A-14 is guilty of a Class I felony.

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

43 (a2) Any person who willfully violates G.S. 78A-8, 78A-11, ~~78A-12,~~ 78A-13, or
44 78A-14 ~~shall, upon conviction be punished as a Class H felon.~~ is guilty of a felony. If the

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

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

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

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

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

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

26 "**§ 78A-58. Obstruction of investigation.**

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

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

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

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

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

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

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

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

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

1 **SECTION 15.** G.S. 78A-63 is amended by adding a new subsection to read:
2 "(b1) G.S. 78A-12 applies when any act instrumental to effecting prohibited
3 conduct is done in this State."

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

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

- 17 a. An investment adviser representative or a person excluded from
18 the definition of investment adviser representative pursuant to
19 ~~G.S. 78C-2(3)e.~~; G.S. 78C-2(3)c.
- 20 b. A bank, savings institution, or trust ~~company;~~ company.
- 21 c. A lawyer, accountant, engineer, or teacher whose performance
22 of any such services is solely incidental to the practice of his
23 ~~profession;~~ profession.
- 24 d. A dealer or its salesman whose performance of these services is
25 solely incidental to the conduct of its business as a dealer and
26 who receives no special compensation for ~~them;~~ them.
- 27 e. A publisher of any newspaper, news column, newsletter, news
28 magazine, or business or financial publication or service,
29 whether communicated in hard copy form, or by electronic
30 means, or otherwise, that does not consist of the rendering of
31 advice on the basis of the specific investment situation of each
32 ~~client;~~ client.
- 33 f. A person solely by virtue of such person's services to or on
34 behalf of any "business development company" as defined in
35 Section 202(a)(22) of the Investment Advisers Act of 1940
36 provided the business development company is not an
37 "investment company" by reason of Section 3(c)(1) of the
38 Investment Company Act of 1940, as both acts were in effect
39 on ~~June 1, 1988;~~ June 1, 1988.
- 40 g. A personal representative of a decedent's estate, guardian,
41 conservator, receiver, attorney in fact, trustee in bankruptcy,
42 trustee of a testamentary trust, or a trustee of an inter vivos
43 trust, not otherwise engaged in providing investment advisory
44 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 subsection 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.~~
27 ~~78C-16(a)~~G.S. 78C-16(a), (a1), or (b) (an action pursuant to a
28 violation of G.S. 78C-16(b) may not be maintained except by those
29 persons who directly received advice from the unregistered investment
30 adviser representative), G.S. 78C-10(b), or of any rule or order under
31 G.S. 78C-30(d) which requires the affirmative approval of sales
32 literature 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 salesman~~dealer or salesman who materially aids in
13 ~~such the~~ conduct giving rise to the liability is liable jointly and
14 severally with and to the same extent as ~~such the~~ person, unless able to
15 sustain the burden of proof that ~~he the~~ person did not know, and in the
16 exercise of reasonable care ~~should could~~ not have ~~known known~~, of
17 the existence of the facts by reason of which the liability is alleged to
18 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 and every
22 other person who materially aids in the conduct giving rise to the
23 liability is liable jointly and severally with and to the same extent as
24 the person if the employee or associate or other person actually knew
25 of the existence of the facts by reason of which the liability is alleged
26 to exist.

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

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

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

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

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

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

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

8 "**§ 78C-39. Criminal penalties.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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~~ Association, Inc., for the purpose of promoting uniformity
22 of state securities ~~regulation~~ regulation, and to adopt rules governing the conduct of
23 hearings pursuant to this Chapter. After having the proposed temporary rule published
24 in the North Carolina Register and at least 30 days prior to adopting a temporary rule
25 pursuant to this 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.** G.S. 143-59.1 reads as rewritten:

39 "**§ 143-59.1. Contracts with certain foreign vendors.**

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

- 43 (1) A vendor if the vendor or an affiliate of the vendor meets one or more
44 of the conditions of G.S. 105-164.8(b) but refuses to collect the use tax

1 levied under Article 5 of Chapter 105 of the General Statutes on its
2 sales delivered to North Carolina. The Secretary of Revenue shall
3 provide the Secretary of Administration periodically with a list of
4 vendors to which this section applies.

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

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

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

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

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

21 **SECTION 29.** Sections 11, 12, 25, and 26 of this act become effective
22 December 1, 2003, and apply to acts committed on or after that date. Section 28 of this
23 act becomes effective October 1, 2003, and applies to contracts entered into on or after
24 that date. The remainder of this act is effective when it becomes law. If House Bill
25 1151, 2003 Regular Session, becomes law, then the amendment to G.S. 150B-21.1(a2)
26 made by Section 27 of this act is instead made to G.S. 150B-21.1(a)(8).