

GENERAL ASSEMBLY OF NORTH CAROLINA
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SENATE BILL 1455
Judiciary I Committee Substitute Adopted 7/11/02
Finance Committee Substitute Adopted 7/18/02
Appropriations/Base Budget Committee Substitute Adopted 7/24/02

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, TO PROHIBIT THE STATE FROM CONTRACTING WITH BUSINESSES THAT HAVE ANY OFFICERS OR DIRECTORS WHO HAVE BEEN CONVICTED OF SECURITIES FRAUD, AND TO PROHIBIT THE STATE FROM CONTRACTING 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.

1 (4) Enter an order for the sale of a security with knowledge that, at
2 substantially the same time, an order of substantially the same size,
3 and at substantially the same price, for the purchase of the security has
4 been, or will be, entered by or for the same person, or an affiliated
5 person, for the purpose of creating a false or misleading appearance of
6 active trading in a security, or a false or misleading appearance of
7 activity with respect to the market for the ~~security~~; or security.

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

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

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

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

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

38 "(c) The Administrator may by rule or order prescribe (i) the form and content of
39 financial statements required under this Chapter, (ii) the circumstances under which
40 consolidated financial statements shall be filed, and (iii) whether any required financial
41 statements shall be certified by independent or certified public accountants. All financial
42 statements required to be filed with the Administrator shall be audited and shall be
43 prepared in accordance with generally accepted accounting ~~practices~~-principles, except
44 where the Administrator shall by rule or order provide otherwise."

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

2 "(a) Any person who:

- 3 (1) Offers or sells a security in violation of G.S. 78A-8(1), 78A-8(3),
4 78A-10(b), ~~78A-12~~, 78A-13, 78A-14, 78A-24, or 78A-36(a), or of any
5 rule or order under G.S. 78A-49(d) which requires the affirmative
6 approval of sales literature before it is used, or of any condition
7 imposed under G.S. 78A-27(d) or 78A-28(g), or
8 (2) Offers or sells a security by means of any untrue statement of a
9 material fact or any omission to state a material fact necessary in order
10 to make the statements made, in the light of the circumstances under
11 which they were made, not misleading (the purchaser not knowing of
12 the untruth or omission), and who does not sustain the burden of proof
13 that he did not know, and in the exercise of reasonable care could not
14 have known, of the untruth or omission,

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

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

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

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

37 "(b1) A person who willfully participates in an act or transaction in violation of
38 G.S. 78A-12 is liable to a person who purchases or sells a security, other than a security
39 traded on a national securities exchange or quoted on a national automated quotation
40 system administered by a self-regulatory organization, at a price that was affected by the
41 act or transaction for the damages sustained as a result of the act or transaction, unless
42 the person sustains the burden of proof that the person did not know, and in the exercise
43 of reasonable care could not have known, of the existence of the facts by which the
44 liability is alleged to exist. Damages are the difference between the price at which the

1 securities were purchased or sold and the market value the securities would have had at
2 the time of the person's purchase or sale in the absence of the act or transaction, plus
3 interest at the legal rate of this State from the date of the act or transaction, costs, and
4 reasonable attorneys' fees determined by the court, together with punitive damages
5 consistent with Chapter 1D of the General Statutes."

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

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

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

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

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

21 "(a) Any person who willfully violates any provision of this Chapter except G.S.
22 78A-8, 78A-9, 78A-11, 78A-12, 78A-13, or 78A-14 or who willfully violates any rule
23 or order under this Chapter, ~~or who willfully violates G.S. 78A-9 knowing the statement~~
24 ~~made to be false or misleading in any material respect, shall upon conviction be~~
25 ~~punished as a Class I felon;~~Chapter shall be guilty of a Class I felony, but no person
26 may be imprisoned for the violation of any rule or order if he proves that he had no
27 knowledge of the rule or order.

28 (a1) Any person who willfully violates G.S. 78A-8, 78A-11, 78A-12, 78A-13, or
29 78A-14 shall, upon conviction be punished as a Class H felon, shall be guilty of a felony.
30 If the total value of the consideration involved in a single act or for a series of related
31 acts in a common scheme or plan is one hundred thousand dollars (\$100,000) or more,
32 the person is guilty of a Class C felony. If the total value of the consideration involved
33 in a single act or for a series of related acts in a common scheme or plan is less than one
34 hundred thousand dollars (\$100,000), the person is guilty of a Class H felony.

35 (a2) Any person who willfully violates G.S. 78A-9 knowing the statement made to
36 be false or misleading in any material respect shall be guilty of a Class H felony. Any
37 other willful violation of G.S. 78A-9 shall constitute a Class 2 misdemeanor.

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 reference, the district attorney
42 may request that a duly employed attorney of the Administrator prosecute or assist in
43 the prosecution of such violation or violations on behalf of the State. Upon approval of
44 the Administrator, such employee may be appointed a special prosecutor for the district

1 attorney to prosecute or assist in the prosecution of such violations without receiving
2 compensation from the district attorney. Such special prosecutor shall have all the
3 powers and duties prescribed by law for district attorneys and such other powers and
4 duties as are lawfully delegated to such special prosecutor by the district attorney for
5 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 (d) As used in this section, the phrase "total value of consideration" means in the
9 case of a sale of securities, the value of consideration received, directly or indirectly, by
10 the seller, and in the case of a purchase of securities, the value of the securities
11 purchased."

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

14 **§ 78A-58. Obstruction of investigation.**

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

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

26 "(a) Sections 78A-8, 78A-10, 78A-12, 78A-13, 78A-14, 78A-24, 78A-31,
27 78A-36(a), and 78A-56 apply to persons who sell or offer to sell when (i) an offer to sell
28 is made in this State, or (ii) an offer to buy is made and accepted in this State."

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

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

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

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

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

43 "(j) A registration statement filed in accordance with subsection (b) of this section
44 may be amended after its effective date to increase the securities specified as proposed

1 to be offered. Such an amendment becomes effective when the Administrator so orders.
2 Every person filing such an amendment shall pay a filing fee of ~~fifty dollars~~
3 ~~(\$50.00)~~one hundred dollars (\$100.00) with respect to the additional securities proposed
4 to be offered."

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

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

9 (1) Prior to the initial offer of the security in this State, all documents that
10 are part of a federal registration statement filed with the Securities and
11 Exchange Commission under the Securities Act of 1933, or, in lieu
12 thereof, a form prescribed by the Administrator, together with a
13 consent to service of process signed by the issuer and with the
14 payment of a notice filing fee of two thousand dollars (\$2,000).

15 (2) After the initial offer of the security in this State, all documents that
16 are part of an amendment to a federal registration statement filed with
17 the Securities and Exchange Commission under the Securities Act of
18 1933, or, in lieu thereof, a form prescribed by the Administrator, which
19 shall be filed concurrently with the Administrator.

20 (3) A report of the value of securities covered under federal law that are
21 offered or sold in this State.

22 (4) A notice filing pursuant to this section shall expire on December 31 of
23 each year or some other date not more than one year from its effective
24 date as the Administrator may by rule or order provide. A notice filing
25 of the offer of securities covered under federal law that are to be
26 offered for a period in excess of one year shall be renewed annually by
27 payment of a renewal fee of ~~one hundred dollars (\$100.00)~~two
28 hundred dollars (\$200.00) and by filing any documents and reports that
29 the Administrator may by rule or order require consistent with this
30 section. The renewal shall be effective upon the expiration of the prior
31 notice period.

32 (5) A notice filed in accordance with this section may be amended after its
33 effective date to increase the securities specified as proposed to be
34 offered. An amendment becomes effective upon receipt by the
35 Administrator. Every person submitting an amended notice filing shall
36 pay a filing fee of ~~fifty dollars (\$50.00)~~one hundred dollars (\$100.00)
37 with respect to the additional securities proposed to be offered."

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

39 "(a) A dealer or salesman may obtain an initial or renewal registration by filing
40 with the Administrator an application together with a consent to service of process
41 pursuant to G.S. 78A-63(f). The application shall contain whatever information the
42 Administrator by rule requires concerning such matters as (i) the applicant's form and
43 place of organization; (ii) the applicant's proposed method of doing business; (iii) the
44 qualifications and business history of the applicant; in the case of a dealer, the

1 qualifications and business history of any partner, officer, or director, any person
2 occupying a similar status or performing similar functions, or any person directly or
3 indirectly controlling the dealer, and a representation that the applicant dealer is duly
4 registered as a dealer under the Securities Exchange Act of 1934; (iv) any injunction or
5 administrative order or conviction of a misdemeanor involving a security or any aspect
6 of the securities business and any conviction of a felony; and (v) the applicant's
7 financial condition and history. If no denial order is in effect and no proceeding is
8 pending under G.S. 78A-39, registration becomes effective at noon of the thirtieth day
9 after an application is filed. The Administrator may by rule or order specify an earlier
10 effective date, and he may by order defer the effective date until noon of the thirtieth
11 day after the filing of any amendment. Registration of a dealer automatically constitutes
12 registration of any salesman who is a partner, executive officer, or director, or a person
13 occupying a similar status or performing similar functions. If the Administrator
14 institutes a proceeding under G.S. 78A-39 to postpone or deny an application for
15 registration, withdrawal of the application shall be allowed only at such time and under
16 such conditions as the Administrator may by order determine."

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

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

- 30 a. An investment adviser representative or a person excluded from
31 the definition of investment adviser representative pursuant to
32 ~~G.S. 78C-2(3)e.~~; G.S. 78C-2(3)c.
33 b. A bank, savings institution, or trust ~~company;~~ company.
34 c. A lawyer, accountant, engineer, or teacher whose performance
35 of any such services is solely incidental to the practice of his
36 ~~profession;~~ profession.
37 d. A dealer or its salesman whose performance of these services is
38 solely incidental to the conduct of its business as a dealer and
39 who receives no special compensation for ~~them;~~ them.
40 e. A publisher of any newspaper, news column, newsletter, news
41 magazine, or business or financial publication or service,
42 whether communicated in hard copy form, or by electronic
43 means, or otherwise, that does not consist of the rendering of

- 1 advice on the basis of the specific investment situation of each
2 ~~client;~~client.
- 3 f. A person solely by virtue of such person's services to or on
4 behalf of any "business development company" as defined in
5 Section 202(a)(22) of the Investment Advisers Act of 1940
6 provided the business development company is not an
7 "investment company" by reason of Section 3(c)(1) of the
8 Investment Company Act of 1940, as both acts were in effect
9 on ~~June 1, 1988;~~June 1, 1988.
- 10 g. A personal representative of a decedent's estate, guardian,
11 conservator, receiver, attorney in fact, trustee in bankruptcy,
12 trustee of a testamentary trust, or a trustee of an inter vivos
13 trust, not otherwise engaged in providing investment advisory
14 services, and the performance of these services is not a part of a
15 plan or scheme to evade registration or the substantive
16 requirements of this ~~Chapter;~~Chapter.
- 17 h. A licensed real estate agent or broker whose only compensation
18 is a commission on real estate ~~sold;~~sold.
- 19 i. An individual or company primarily engaged in acting as a
20 business broker whose only compensation is a commission on
21 the sale of a ~~business;~~business.
- 22 j. An individual who, as an employee, officer or director of, or
23 general partner in, another person and in the course of
24 performance of his duties as such, provides investment advice
25 to such other person, or to entities that are affiliates of such
26 other person, or to employee benefit plans of such other person
27 or its affiliated entities, or, with respect to such employee
28 benefit plans, to employees of such other person or its affiliated
29 ~~entities;~~entities.
- 30 k. ~~Any person who is exempt from registration under the~~
31 ~~Investment Advisers Act of 1940 by operation of Section~~
32 ~~203(b)(3) of said act or by operation of any rule or regulation~~
33 ~~promulgated by the United States Securities and Exchange~~
34 ~~Commission under or related to said Section 203(b)(3) provided~~
35 ~~that any reference in this sub-subsection to any statute, rule or~~
36 ~~regulation shall be deemed to incorporate said statute, rule or~~
37 ~~regulation (and any statute, rule or regulation referenced~~
38 ~~therein) as in effect on June 1, 1988;~~
- 39 l. An employee of a person described in subdivision b., e., f., g.,
40 h., or j. of G.S. 78C-2(1) acting on behalf of such person within
41 the scope of his ~~employment;~~employment.
- 42 l 1. An investment adviser who is covered under federal law as
43 defined in subdivision (4) of this section.

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

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

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

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

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

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

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

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

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

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

26 (2) The person is an investment adviser representative employed by or
27 associated with an investment adviser exempt from registration under
28 ~~subdivision (2) or (3)~~subdivision (2), (3), or (4) of subsection (a) of
29 this section; or

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

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

34 "(a) An investment adviser, or investment adviser representative may obtain an
35 initial or renewal registration by filing with the Administrator or the Administrator's
36 designee an application together with a consent to service of process pursuant to G.S.
37 78C-46(b) and paying any reasonable costs charged by the designee for processing the
38 filings. The application shall contain whatever information the Administrator by rule
39 requires concerning such matters as:

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

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

42 (3) The qualifications and business history of the applicant; in the case of
43 an investment adviser, the qualifications and business history of any
44 partner, officer, or director, any person occupying a similar status or

1 performing similar functions, or any person directly or indirectly
2 controlling the investment adviser;

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

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

7 (6) Any information to be furnished or disseminated to any client or
8 prospective client.

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

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

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

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

28 "(a) Any person who:

29 (1) Engages in the business of advising others, for compensation, either
30 directly or through publications or writings, as to the value of
31 securities or as to the advisability of investing in, purchasing, or selling
32 securities, or who, for compensation and as a part of a regular
33 business, issues or promulgates analyses or reports concerning
34 securities, in violation of G.S. 78C-8(b), ~~G.S. 78C-16(a)~~G.S.
35 78C-16(a), (a1), or (b) (an action pursuant to a violation of G.S.
36 78C-16(b) may not be maintained except by those persons who
37 directly received advice from the unregistered investment adviser
38 representative), G.S. 78C-10(b), or of any rule or order under G.S.
39 78C-30(d) which requires the affirmative approval of sales literature
40 before it is used, or

41 (2) Receives, directly or indirectly, any consideration from another person
42 for advice as to the value of securities or their purchase or sale,
43 whether through the issuance of analyses, reports or otherwise and
44 employs any device, scheme, or artifice to defraud such other person

1 or engages in any act, practice or course of business which operates or
2 would operate as a fraud or deceit on such other person, in violation of
3 G.S. 78C-8(a)(1) or (2),
4 is liable to any person who is given such advice in such violation, who may sue either at
5 law or in equity to recover (i) the consideration paid for such advice together with
6 interest thereon at the legal rate as provided in G.S. 24-1 from the date of payment of
7 the consideration, plus (ii) the actual damages to such person proximately caused by
8 such violation, plus (iii) costs of the action and reasonable attorneys' ~~fees.~~fees, together
9 with punitive damages consistent with Chapter 1D of the General Statutes. An action
10 based on violation of G.S. 78C-8(b) may not prevail where the person accused of the
11 violation sustains the burden of proof that he did not know, and in the exercise of
12 reasonable care could not have known of the existence of the facts by reason of which
13 the liability is alleged to exist."

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

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

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

27 "**§ 78C-39. Criminal penalties.**

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

32 (a1) Any person who willfully violates G.S. 78C-8(a)(1), 78C-8(a)(2), or 78C-8(b)
33 ~~shall, upon conviction, be punished as a Class H felon.~~shall be guilty of a felony. If the
34 total consideration received, directly or indirectly, by the violator for a single act or for
35 a series of related acts in a common scheme or plan is one hundred thousand dollars
36 (\$100,000) or more, the person is guilty of a Class C felony. If the total consideration
37 received, directly or indirectly, by the violator for a single act or for a series of related
38 acts in a common scheme or plan is less than one hundred thousand dollars (\$100,000),
39 the person is guilty of a Class H felony.

40 (a2) Any person who willfully violates G.S. 78C-9 knowing the statement made to
41 be false or misleading in any material respect shall be guilty of a Class H felony. Any
42 other willful violation of G.S. 78C-9 shall constitute a Class 2 misdemeanor.

43 (a3) Any person who, for the purpose of interfering with the performance of any
44 audit, examination, or investigation by the Administrator under this Chapter, willfully

1 makes or causes to be made to the Administrator or the Administrator's designated
2 representative any false, misleading, or unfounded oral or written statement, or who
3 shall willfully (i) create, cause to be made, or produce any record, report, or document
4 that is false or misleading in any material respect; (ii) destroy or alter any record, report,
5 or document; (iii) conceal or secrete any record, report, or document; or who shall
6 hinder or obstruct the Administrator or the Administrator's designated representative in
7 the performance of the Administrator's duties under this Chapter, shall be guilty of a
8 Class H felony.

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

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

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

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

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

31 "**§ 53B-4. Access to financial records.**

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

- 35 (1) Customer authorization that meets the requirements of the Right to
36 Financial Privacy Act § 1104, 12 U.S.C. § 3404, provided, however, a
37 customer authorization received by a State agency or a county
38 department of social services for the purpose of determining eligibility
39 for the programs of public assistance under Chapter 108A of the
40 General Statutes, or for purposes of a government inquiry concerning
41 these same programs of public assistance, cannot be revoked and shall
42 remain valid for 12 months unless a shorter period is specified in the
43 authorization, or a customer authorization that is given by a licensed

- 1 attorney with respect to an account in which the attorney holds funds
2 as a fiduciary;
- 3 (2) Authorization under G.S. 105-251, 105-251.1, or 105-258;
- 4 (3) Search warrant as provided in Article 11 of Chapter 15A of the
5 General Statutes;
- 6 (4) Statutory authority of a supervisory agency to examine or have access
7 to financial records in the exercise of its supervisory, regulatory, or
8 monetary functions with respect to a financial institution;
- 9 (5) The authority granted under G.S. 116B-72 and G.S. 116B-75;
- 10 (6) Examination and review by the State Auditor or his authorized
11 representative under G.S. 147-64.6(c)(9) or G.S. 147-64.7(a);
- 12 (7) Request by a government authority authorized to buy and sell student
13 loan notes under Article 23 of Chapter 116 of the General Statutes for
14 financial records relating to insured student loans;
- 15 (7a) Investigations conducted by the Securities Administrator pursuant to
16 G.S. 78A-46(a), 78C-27(a), and 78D-21(a);
- 17 (8) Pending litigation to which the government authority and the customer
18 are parties;
- 19 (9) Subpoena or court order in connection with a grand jury proceeding;
- 20 (10) A writ of execution under Article 28 of Chapter 1 of the General
21 Statutes; or
- 22 (11) Other court order or administrative or judicial subpoena authorized by
23 law if the requirements of G.S. 53B-5 are met.

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

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

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

- 37 (1) Notify persons on its mailing list maintained pursuant to G.S.
38 150B-21.2(d) and any other interested parties of its intent to adopt a
39 temporary rule;
- 40 (2) Accept oral and written comments on the proposed temporary rule;
41 and
- 42 (3) Hold at least one public hearing on the proposed temporary rule.

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

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

7 **SECTION 28.** Article 3 of Chapter 143 is amended by adding a new section
8 to read:

9 **"§ 143-59.2. Certain vendors prohibited from contracting with State.**

10 (a) Unauthorized Vendors. – A vendor is not entitled to enter into a contract for
11 goods or services with any department, institution, or agency of the State government
12 subject to the provisions of this Article if the vendor has an officer, director, or owner of
13 an unincorporated business entity, who within 10 years immediately prior to the date of
14 the bid solicitation, has been convicted of any violation of Chapter 78A of the General
15 Statutes or the Securities Act of 1933 or the Securities Exchange Act of 1934.

16 (b) Bid Certification. – The Director of Administration shall require each vendor
17 submitting a bid to certify that none of its officers, directors, or owners of an
18 unincorporated business entity has been convicted of any violation referenced in
19 subsection (a) of this section within 10 years immediately prior to the date of the bid
20 solicitation. False certification is a Class I felony.

21 (c) Void Contracts. – A contract entered into in violation of this section is void.
22 A contract that is void under this section may continue in effect until an alternative can
23 be arranged when: (i) immediate termination would result in harm to the public health
24 or welfare, and (ii) the continuation is approved by the Director of Administration.
25 Approval of continuation of contracts under this subsection shall be given for the
26 minimum period necessary to protect the public health or welfare.

27 (d) No Duty to Investigate. – Nothing in this section imposes a duty on any
28 department, institution, or agency of the State government to investigate or verify the
29 information contained in a vendor's certification."

30 **SECTION 29.** G.S. 143-59.1 reads as rewritten:

31 **"§ 143-59.1. Contracts with certain foreign vendors.**

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

35 (1) A vendor if the vendor or an affiliate of the vendor meets one or more
36 of the conditions of G.S. 105-164.8(b) but refuses to collect the use tax
37 levied under Article 5 of Chapter 105 of the General Statutes on its
38 sales delivered to North Carolina. The Secretary of Revenue shall
39 provide the Secretary of Administration periodically with a list of
40 vendors to which this section applies.

41 (2) A vendor or an affiliate of the vendor that is incorporated in a tax
42 haven country, but the United States is the principal market for the
43 public trading of the corporation's stock.

44 (b) Definitions. – The following definitions apply in this section:

1 (1) ~~For the purpose of this section, the term "affiliate" has the meaning~~
2 ~~provided~~ Affiliate. – As defined in G.S. 105-163.010.

3 (2) Tax haven country. – Means each of the following: Barbados,
4 Bermuda, British Virgin Islands, Cayman Islands, Commonwealth of
5 the Bahamas, Cyprus, Gibraltar, Isle of Man, the Principality of
6 Liechtenstein, the Principality of Monaco, and the Republic of the
7 Seychelles."

8 **SECTION 30.** There is hereby appropriated to the Office of the Secretary of
9 State for the 2002-2003 fiscal year the sum of two hundred twenty-six thousand six
10 hundred ninety-two dollars (\$226,692) for recurring expenses and fifteen thousand nine
11 hundred ninety dollars (\$15,990) for nonrecurring expenses for three additional
12 unsworn securities investigators in the Securities Division.

13 **SECTION 31.** Sections 9, 10, 24, and 25 of this act become effective
14 December 1, 2002, and apply to acts committed on or after that date. Sections 13, 14,
15 and 15 of this act become effective October 1, 2002, and apply to fees assessed on or
16 after that date. Sections 28 and 29 of this act become effective October 1, 2002, and
17 apply to contracts entered into on or after that date. Section 30 of this act became
18 effective July 1, 2002. The remainder of this act is effective when it becomes law.