

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1989

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SENATE BILL 520\*

Short Title: Securities Enforcement.

(Public)

Sponsors: Senator Soles.

Referred to: Judiciary II.

March 20, 1989

A BILL TO BE ENTITLED

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

The General Assembly of North Carolina enacts:

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

"§ 78A-8. Sales and purchases.

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

- (1) To employ any device, scheme, or artifice to defraud,
- (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading or,
- (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25           "(a) The Administrator in his discretion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

29 (c) Applications for Reimbursement.

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

33 a. The name and address of the applicant;

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

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

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

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

40 f. Verification by the claimant;

41 g. All supporting documents, including:

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

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

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

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

22       (e)    Assessments.

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

38       (f)    Subrogation for Reimbursement Made.

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

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

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

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

14 **"§ 78A-56. Civil liabilities.**

15 (a) Any person who:

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 "**§ 78A-57. Criminal penalties.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 **"§ 78C-38. Civil liabilities.**

7 (a) Any person who:

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

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

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

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

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

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

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

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

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

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

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

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

26 **"§ 78C-39. Criminal penalties.**

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

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

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

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

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

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

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