

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1989

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SENATE BILL 520*
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Short Title: Securities Enforcement.

(Public)

Sponsors: Senator Soles.

Referred to: Judiciary II.

March 20, 1989

1 A BILL TO BE ENTITLED
2 AN ACT TO AMEND THE NORTH CAROLINA SECURITIES ACT AND THE
3 INVESTMENT ADVISERS ACT BY ESTABLISHING AN INVESTOR
4 SECURITY FUND AND BY ENHANCING THE ENFORCEMENT
5 PROVISIONS OF THOSE ACTS.

6 The General Assembly of North Carolina enacts:

7 Section 1. Chapter 78A of the General Statutes is amended by adding a new
8 section to read:

9 "**§ 78A-11. Unlawful boiler rooms.**

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

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

18 "**§ 78A-12. Manipulation of market.**

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

21 (1) Quote a fictitious price with respect to a security;

22 (2) Effect a transaction in a security which involves no change in the
23 beneficial ownership of the security for the purpose of creating a false

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

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

11 (4) Enter an order for the sale of security with knowledge that an order of
12 substantially the same size and at substantially the same time and price
13 for the purchase of the security has been, or will be, entered by or for
14 the same person, or an affiliated person, for the purpose of creating a
15 false or misleading appearance of active trading in a security or a false
16 or misleading appearance of activity with respect to the market for the
17 security; or

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

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

24 Sec. 3. G.S. 78A-45(c) reads as rewritten:

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

29 Sec. 4. G.S. 78A-47 is amended by adding a new subsection to read:

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

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

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

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

41 Sec. 5. G.S. 78A-46(a) reads as rewritten:

42 "(a) The Administrator in his discretion

43 (1) May make such public or private investigations within or outside of
44 this State as he deems necessary to determine whether any person has

1 violated or is about to violate any provision of this Chapter or any rule
2 or order hereunder, or to aid in the enforcement of this Chapter or in
3 the prescribing of rules and forms hereunder,

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

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

9 (4) May appoint securities law enforcement agents and other enforcement
10 personnel.

11 a. Subject Matter Jurisdiction – The primary responsibility of an
12 agent shall be enforcement of this Chapter and Chapter 78C of
13 the General Statutes; however, after taking the oath prescribed
14 for a peace officer, a securities law enforcement agent shall
15 have authority to arrest and take other investigatory and
16 enforcement actions for any criminal offense.

17 b. Territorial Jurisdiction – A securities law enforcement agent is a
18 State officer with jurisdiction throughout the State.

19 c. Service of Orders of the Administrator – Securities law
20 enforcement agents may serve and execute notices, orders, or
21 demands issued by the Administrator for the surrender of
22 registrations or relating to any administrative proceeding.
23 While serving and executing such notices, orders, or demands,
24 securities law enforcement agents shall have all the power and
25 authority possessed by law enforcement officers when
26 executing an arrest warrant."

27 Sec. 6. G.S. 78A-47(a) reads as rewritten:

28 "(a) Whenever it appears to the Administrator that any person has engaged or is about
29 to engage in any act or practice constituting a violation of any provision of this Chapter
30 or any rule or order hereunder, he may in his discretion bring an action in any court of
31 competent jurisdiction to enjoin the acts or practices and to enforce compliance with
32 this Chapter or any rule or order hereunder. Upon a proper showing a permanent or
33 temporary injunction, restraining order, or writ of mandamus shall be granted and a
34 receiver or conservator may be appointed for the defendant or the defendant's assets. In
35 addition to any other remedies provided by this Chapter, the Administrator may apply to
36 the court hearing this matter for an order of restitution whereby the defendants in such
37 action shall be ordered to make restitution of these sums shown by the Administrator to
38 have been obtained by them in violation of any of the provisions of this Chapter. Such
39 restitution shall, at the option of the court, be payable to the Administrator or receiver
40 appointed pursuant to this section or directly to the persons whose assets were obtained
41 in violation of this Chapter. The court may not require the Administrator to post a
42 bond."

43 Sec. 7. Chapter 78A of the General Statutes is amended by adding a new
44 section to read:

1 **"§ 78A-51. Investor Security Fund.**

2 (a) Definitions. When used in this section, unless the context otherwise requires:

3 (1) 'Administrator' means the Secretary of State.

4 (2) 'Fund' means the Investor Security Fund of the North Carolina
5 Department of the Secretary of State.

6 (3) 'Violator' means one who, at the time of the act complained of, was
7 registered, or should have been registered, pursuant to the provisions
8 of G.S. 78A or G.S. 78C. The fact that the act complained of took
9 place outside the State of North Carolina does not necessarily mean
10 that the violator was not acting as a securities dealer or salesman or as
11 an investment advisor in North Carolina.

12 (4) 'Claimant' means a person who has suffered a reimbursable loss
13 because of the wrongful conduct of a violator and has filed an
14 application for reimbursement.

15 (5) 'Wrongful conduct' means wrongful acts committed by a violator
16 against a claimant in the manner of embezzlement, fraud, the wrongful
17 taking or conversion of monies or other property, or market
18 manipulation.

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

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

23 2. The loss was caused by the wrongful conduct of a
24 violator acting either as a securities dealer or salesman,
25 as an investment adviser or investment adviser
26 representative, or in a fiduciary capacity customary to
27 the securities or investment adviser industries in the
28 matter in which the loss arose as set out in subdivision
29 (3) of this subsection;

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

33 b. The following shall be excluded from the definition of
34 'reimbursable losses':

35 1. Losses of spouses, children, parents, grandparents,
36 siblings, partners, associates, and employees of the
37 violator causing the losses.

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

40 3. Losses which have been otherwise received from or paid
41 by or on behalf of the violator who committed the
42 wrongful conduct.

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

1 (c) Applications for Reimbursement.

2 (1) The Administrator shall prepare and make available an 'Application
3 for Reimbursement' form which shall require the following minimum
4 information:

5 a. The name and address of the applicant;

6 b. The name and address of the violator who engaged in the
7 wrongful conduct;

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

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

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

12 f. Verification by the claimant;

13 g. All supporting documents, including:

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

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

17 (2) The application shall contain the following statement in boldface type:
18 'IN ESTABLISHING THE INVESTOR SECURITY FUND
19 PURSUANT TO AN ACT OF THE NORTH CAROLINA
20 GENERAL ASSEMBLY, THE NORTH CAROLINA
21 DEPARTMENT OF THE SECRETARY OF STATE DID NOT
22 CREATE NOR ACKNOWLEDGE ANY LEGAL RESPONSIBILITY
23 FOR THE ACTS OF INDIVIDUAL VIOLATORS IN THE
24 SECURITIES OR INVESTMENT ADVISOR INDUSTRIES. ALL
25 REIMBURSEMENTS OF LOSSES FROM THE INVESTOR
26 SECURITY FUND SHALL BE A MATTER OF GRACE IN THE
27 SOLE DISCRETION OF THE ADMINISTRATOR OF THE FUND
28 AND NOT A MATTER OF RIGHT. NO APPLICANT OR
29 MEMBER OF THE PUBLIC SHALL HAVE ANY RIGHT IN THE
30 INVESTOR SECURITY FUND AS A THIRD PARTY
31 BENEFICIARY OR OTHERWISE.'

32 (3) An application shall be filed in the office of the North Carolina
33 Department of the Secretary of State in Raleigh, North Carolina, to the
34 attention of the Investor Security Fund.

35 (d) Processing Applications.

36 (1) The Administrator may cause a reasonable investigation of any
37 application filed with the North Carolina Department of the Secretary
38 of State. The Administrator shall conduct such investigation or review
39 as he deems necessary or desirable in order to determine whether the
40 application is for a reimbursable loss and to guide the Administrator in
41 determining the extent, if any, to which the claimant should be
42 reimbursed. After considering a report on an application, the
43 Administrator may request that testimony be presented concerning the
44 application. In all cases, the alleged violator or his personal

- 1 representative shall be given an opportunity to be heard by the
2 Administrator if he so requests.
- 3 (2) The Administrator shall, in his discretion, determine the amount of
4 loss, if any, for which the claimant should be reimbursed. In making
5 such decisions, the Administrator shall consider the following:
- 6 a. The negligence, if any, of the claimant that contributed to the
7 loss;
- 8 b. The comparative hardship that the claimant suffered because of
9 the loss;
- 10 c. The total amount of reimbursable losses of claimant on account
11 of one violator or association of violators;
- 12 d. The total amount of reimbursable losses in previous years for
13 which total reimbursement has not been made and the total
14 assets of the Fund;
- 15 e. The total amount of insurance or other source of funds available
16 to compensate the claimant for the loss.
- 17 (3) The Administrator may, in his discretion, allow further reimbursement,
18 in any year, of a reimbursable loss allowed by him in prior years with
19 respect to a loss which has not been fully reimbursed.
- 20 (4) A claimant may be advised of the status of the Administrator's
21 consideration of his application and shall be advised of the final
22 determination of the Administrator.
- 23 (5) All applications, proceedings, investigations, and reports involving
24 applications for reimbursement shall be kept confidential until and
25 unless the Administrator authorizes reimbursement to the claimant, or
26 until the violator requests that the matter be made public. All
27 participants in the application, investigation, or proceeding (including
28 the claimant) shall conduct themselves so as to maintain the
29 confidentiality of the application, investigation, or proceeding. This
30 provision shall not be construed to deny relevant information to law
31 enforcement or regulatory agencies, or to any other entity to whom the
32 Administrator authorizes release of information.
- 33 (6) The Administrator may, in his discretion, afford the claimant a
34 reconsideration of his or her application; otherwise, such rejection is
35 final, and the Administrator shall give no further consideration to that
36 application or another application by the same claimant based upon the
37 same alleged facts.
- 38 (e) Assessments.
- 39 (1) The Administrator shall cause a special assessment to be made upon
40 each registrant under the provisions of this Chapter and Chapter 78C
41 of the General Statutes. The first assessment shall be made on January
42 1, 1990, and shall be repeated as necessary on January 1 of any year
43 thereafter to create or to maintain a corpus of one million dollars
44 (\$1,000,000).

- 1 (2) Upon renewal of each registration, each registrant shall be assessed as
 2 follows:
 3 a. Securities dealer, fifty dollars (\$50.00);
 4 b. Securities Salesman, ten dollars (\$10.00);
 5 c. Investment Adviser, fifty dollars (\$50.00);
 6 d. Investment Adviser Representative, ten dollars (\$10.00).
 7 (3) The Fund shall be placed in an interest-bearing account. The
 8 Administrator may use the interest to continue the Investor Awareness
 9 Program or transfer it to the Anti-Fraud Trust Fund, or both.

10 (f) Subrogation for Reimbursement Made.

11 In the event reimbursement is made to a claimant, the North Carolina Department of
 12 the Secretary of State shall be subrogated in the amount of reimbursement and may
 13 bring such action as is deemed advisable against the violator, his assets, or his estate.
 14 Such action may be brought in the name of the claimant, or in the name of the North
 15 Carolina Department of the Secretary of State. The claimant shall be required to
 16 execute a 'subrogation agreement' to authorize the action. Upon commencement of an
 17 action by the Administrator pursuant to his subrogation rights, he shall advise the
 18 reimbursed claimant at his last known address. A reimbursed claimant may then join in
 19 such action to press an application for his or her loss in excess of the amount of the
 20 above reimbursement. Any amounts recovered from the violator by the Administrator
 21 in excess of the amount to which the Fund is subrogated, less the Administrator's actual
 22 costs of such recovery, shall be paid to or retained by the claimant as the case may be.

23 Before receiving a payment from the Fund, the person who is to receive such
 24 payment or his legal representative shall execute and deliver to the Administrator a
 25 written agreement stating that in the event the reimbursed claimant or his estate should
 26 ever receive any restitution from the violator or his estate, the reimbursed claimant
 27 agrees that the Fund shall be repaid up to the amount of the reimbursement from the
 28 Fund plus expenses."

29 Sec. 8. G.S. 78A-56 reads as rewritten:

30 "**§ 78A-56. Civil liabilities.**

31 (a) Any person who:

- 32 (1) Offers or sells a security in violation of G.S. 78A-8(a)(1) and (3), 78A-
 33 10(b), 78A-11, 78A-12, 78A-24, or 78A-36(a), or of any rule or order
 34 under G.S. 78A-49(d) which requires the affirmative approval of sales
 35 literature before it is used, or of any condition imposed under G.S.
 36 78A-27(d) or 78A-28(g), or
 37 (2) Offers or sells a security by means of any untrue statement of a
 38 material fact or any omission to state a material fact necessary in order
 39 to make the statements made, in the light of the circumstances under
 40 which they were made, not misleading (the purchaser not knowing of
 41 the untruth or omission), and who does not sustain the burden of proof
 42 that he did not know, and ~~did not act in reckless disregard,~~ in the exercise
 43 of reasonable care could not have known, of the untruth or omission, is
 44 liable to the person purchasing the security from him, who may sue

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

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

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

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

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

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

38 (g) (1) No purchaser may sue under this section if, before suit is
39 commenced, the purchaser has received a written offer stating the
40 respect in which liability under this section may have arisen and
41 fairly advising the purchaser of his rights; offering to repurchase the
42 security for cash payable on delivery of the security equal to the
43 consideration paid, together with interest at the legal rate as provided
44 by G.S. 24-1 from the date of payment, less the amount of any

1 income received on the security or, if the purchaser no longer owns
2 the security, offering to pay the purchaser upon acceptance of the
3 offer an amount in cash equal to the damages computed in
4 accordance with subsection (a); and stating that the offer may be
5 accepted by the purchaser at any time within 30 days of its receipt;
6 and the purchaser has failed to accept such offer in writing within
7 the specified period.

8 (2) No seller may sue under this section if, before suit is commenced, the
9 seller has received a written offer stating the respect in which liability
10 under this section may have arisen and fairly advising the seller of his
11 rights; offering to return the security plus the amount of any income
12 received thereon upon payment of the consideration received, or, if the
13 purchaser no longer owns the security, offering to pay the seller upon
14 acceptance of the offer an amount in cash equal to the damages
15 computed in accordance with subsection (b); and providing that the
16 offer may be accepted by the seller at any time within 30 days of its
17 receipt; and the seller has failed to accept such offer in writing within
18 the specified period.

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

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

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

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

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

41 Sec. 9. G.S. 78A-57 reads as rewritten:

42 **"§ 78A-57. Criminal penalties.**

43 (a) Any person who willfully violates any provision of this Chapter except G.S.
44 78A-8, G.S. 78A-9, G.S. 78A-11 or G.S. 78A-12, or who willfully violates any rule or

1 order under this Chapter, or who willfully violates G.S. 78A-9 knowing the statement
2 made to be false or misleading in any material respect, shall upon conviction be
3 punished as a Class I felon; but no person may be imprisoned for the violation of any
4 rule or order if he proves that he had no knowledge of the rule or order. Any person who
5 willfully violates G.S. 78A-8, G.S. 78A-11 or G.S. 78A-12 shall upon conviction be
6 punished as a Class H felon.

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

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

18 (b) The Administrator may refer such evidence as is available concerning
19 violations of this Chapter or of any rule or order hereunder to the Attorney General or
20 the proper district attorney, who may, with or without such a reference, institute the
21 appropriate criminal proceedings under this Chapter. Upon receipt of such reference, the
22 Attorney General or the district attorney may request that a duly employed attorney of
23 the Administrator prosecute or assist in the prosecution of such violation or violations
24 on behalf of the State. Upon approval of the Administrator, such employee shall be
25 appointed a special prosecutor for the Attorney General or the district attorney to serve
26 without compensation from the Attorney General or district attorney. Such special
27 prosecutor shall have all the powers and duties prescribed by law for Assistant
28 Attorneys General or district attorneys and such other powers and duties as are lawfully
29 delegated to such special prosecutor by the Attorney General or the district attorney.

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

32 Sec. 10. G.S. 78C-26(c) reads as rewritten:

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

36 Sec. 11. G.S. 78C-28 is amended by adding a new subsection to read:

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

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

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

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

4 Sec. 12. G.S. 78C-28(a) reads as rewritten:

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

20 ♦ Sec. 13. G.S. 78C-38 reads as rewritten:

21 "§ 78C-38. **Civil liabilities.**

22 (a) Any person who:

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

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

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

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

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

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

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

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

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

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

39 Sec. 14. G.S. 78C-39 reads as rewritten:

40 "**§ 78C-39. Criminal penalties.**

41 (a) Any person who willfully violates any provision of this Chapter except G.S.
42 78C-9 or who willfully violates G.S. 78C-8(a)(1), (2) and (b) and G.S. 78C-9 knowing
43 the statement made to be false or misleading in any material respect, shall upon

1 conviction be punished as a Class I felon. Any person who willfully violates G.S. 78C-
2 8(a)(1), (2) and (b) shall upon conviction be punished as a Class H felon.

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

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

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

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

28 Sec. 15. This act is effective upon ratification.