

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1991

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SENATE BILL 245  
Judiciary I Committee Substitute Adopted 4/3/91  
House Committee Substitute Favorable 6/18/91

Short Title: Enhance Securities Enforcement.

(Public)

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Sponsors:

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Referred to:

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March 20, 1991

A BILL TO BE ENTITLED

AN ACT TO ENHANCE THE ENFORCEMENT PROVISIONS OF THE NORTH  
CAROLINA SECURITIES ACT AND THE INVESTMENT ADVISERS ACT.

The General Assembly of North Carolina enacts:

Section 1. Article 2 of Chapter 78A of the General Statutes is amended by  
adding two new sections to read:

**"§ 78A-11. Unlawful telephone rooms.**

It is unlawful for any person to willfully manage, supervise, control, or own, directly or indirectly, either alone or in association with others, any telephone room in this State. For purposes of this section, 'telephone room' means an enterprise in which two or more persons engage in telephone communications with members of the public using two or more telephones at one location, or more than one location in a common scheme or enterprise, in violation of G.S. 78A-8 or G.S. 78A-12. It is an affirmative defense to a prosecution under this section that the person acted in good faith and did not directly or indirectly induce an act or acts constituting a violation of G.S. 78A-8 or G.S. 78A-12.

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

(a) In addition to the prohibitions of G.S. 78A-8, it is unlawful for any person to:

- (1) Willfully quote a fictitious price with respect to a 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

- 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                    at substantially the same time, an order of substantially the same size,  
6                    and at substantially the same price, for the sale of the security has  
7                    been, or will be, entered by or for the same person, or an affiliated  
8                    person, for the purpose of creating a false or misleading appearance of  
9                    active trading in a security, or a false or misleading appearance of  
10                   activity with respect to the market for the security;
- 11                   (4)    Enter an order for the sale of a security with knowledge that, at  
12                   substantially the same time, an order of substantially the same size,  
13                   and at substantially the same price, for the purchase of the security has  
14                   been, or will be, entered by or for the same person, or an affiliated  
15                   person, for the purpose of creating a false or misleading appearance of  
16                   active trading in a security, or a false or misleading appearance of  
17                   activity with respect to the market for the 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 manipulation of the market under subsection  
23                   (a) of this section."
- 24                   Sec. 2. 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.~~ hereunder, and
- 36                   (4)    May appoint employees of the Securities Division as securities law  
37                   enforcement agents and as other enforcement personnel.
- 38                   a.      Subject matter jurisdiction – The responsibility of an agent shall  
39                   be enforcement of this Chapter and Chapters 78C and 78D of  
40                   the General Statutes.
- 41                   b.      Territorial jurisdiction – A securities law enforcement agent is a  
42                   State officer with jurisdiction throughout the State.
- 43                   c.      Service of orders of the Administrator – Securities law  
44                   enforcement agents may serve and execute notices, orders, or

1 demands issued by the Administrator for the surrender of  
2 registrations or relating to any administrative proceeding.  
3 While serving and executing such notices, orders, or demands,  
4 securities law enforcement agents shall have all the power and  
5 authority possessed by a law enforcement officer."

6 Sec. 3. G.S. 78A-47(a) reads as rewritten:

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

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

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

- 26 (1) Imposing a civil penalty of up to two thousand five hundred dollars  
27 (\$2,500) for a single violation or of up to twenty-five thousand dollars  
28 (\$25,000) for multiple violations in a single proceeding or a series of  
29 related proceedings; and  
30 (2) Requiring reimbursement of the costs of investigation.

31 Any civil penalty or reimbursement imposed under this subsection shall be paid into  
32 the General Fund. No order under this subsection may be entered without prior notice  
33 and an opportunity for a hearing conducted pursuant to Article 3 of Chapter 150B of the  
34 General Statutes."

35 Sec. 5. G.S. 78A-56 reads as rewritten:

36 "**§ 78A-56. Civil liabilities.**

37 (a) Any person who:

- 38 (1) Offers or sells a security in violation of G.S. 78A-8(1), 78A-8(3), 78A-  
39 10(b), 78A-12, 78A-24, or 78A-36(a), or of any rule or order under  
40 G.S. 78A-49(d) which requires the affirmative approval of sales  
41 literature before it is used, or of any condition imposed under G.S.  
42 78A-27(d) or 78A-28(g), or  
43 (2) Offers or sells a security by means of any untrue statement of a  
44 material fact or any omission to state a material fact necessary in order

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

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

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

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

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

40 (f) No person may sue under this section more than two years after the sale or  
41 contract of sale.

42 (g) (1) No purchaser may sue under this section if, before suit is  
43 commenced, the purchaser has received a written offer stating the  
44 respect in which liability under this section may have arisen and

1 fairly advising the purchaser of his rights; offering to repurchase the  
2 security for cash payable on delivery of the security equal to the  
3 consideration paid, together with interest at the legal rate as provided  
4 by G.S. 24-1 from the date of payment, less the amount of any  
5 income received on the security or, if the purchaser no longer owns  
6 the security, offering to pay the purchaser upon acceptance of the  
7 offer an amount in cash equal to the damages computed in  
8 accordance with subsection (a); and stating that the offer may be  
9 accepted by the purchaser at any time within 30 days of its receipt;  
10 and the purchaser has failed to accept such offer in writing within  
11 the specified period.

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

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

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

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

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

40 Sec. 6. G.S. 78A-57 reads as rewritten:

41 **"§ 78A-57. Criminal penalties.**

42 (a) Any person who willfully violates any provision of this Chapter except G.S.  
43 78A-8, 78A-9, 78A-11, or 78A-12, or who willfully violates any rule or order under this  
44 Chapter, or who willfully violates G.S. 78A-9 knowing the statement made to be false

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

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

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

19 Sec. 7. G.S. 78C-28 reads as rewritten:

20 "**§ 78C-28. Injunctions; cease and desist orders. ~~orders~~; civil penalties.**

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

36 (b) (1) If the Administrator determines after giving notice of an  
37 opportunity for a hearing, that any person has engaged in, or is about  
38 to engage in, any act or practice constituting a violation of any  
39 provision of this Chapter or any rule or order hereunder, he may  
40 order such person to cease and desist from such unlawful act or  
41 practice and take such affirmative action as in the judgment of the  
42 Administrator will carry out the purposes of this Chapter.

43 (2) If the Administrator makes written findings of fact that the public  
44 interest will be irreparably harmed by delay in issuing an order under

1 G.S. 78C-28(b)(1), the Administrator may issue a temporary cease and  
2 desist order. Upon the entry of a temporary cease and desist order, the  
3 Administrator shall promptly notify in writing the person subject to the  
4 order that such order has been entered, the reasons therefor, and that  
5 within 20 days after the receipt of a written request from such person  
6 the matter shall be set down for hearing to determine whether or not  
7 the order shall become permanent and final. If no hearing is requested  
8 and none is ordered by the Administrator, the order shall remain in  
9 effect until it is modified or vacated by the Administrator. If a hearing  
10 is requested or ordered, the Administrator, after giving notice of an  
11 opportunity for a hearing to the person subject to the order, shall by  
12 written findings of fact and conclusion of law, vacate, modify, or make  
13 permanent the order.

14 (3) No order under subsection (b) of this section, except an order issued  
15 pursuant to G.S. 78C-28(b)(2), may be entered without prior notice or  
16 an opportunity for hearing. The Administrator may vacate or modify  
17 an order under subsection (b) of this section upon his finding that the  
18 conditions which required such an order have changed and that it is in  
19 the public interest to so vacate or modify.

20 (4) A final order issued pursuant to the provisions of subsection (b) of this  
21 section shall be subject to review as provided in G.S. 78C-29.

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 of up to two thousand five hundred dollars  
26 (\$2,500) for a single violation or of up to twenty-five thousand dollars  
27 (\$25,000) for multiple violations in a single proceeding or a series of  
28 related proceedings; and

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

30 Any civil penalty or reimbursement imposed under this subsection shall be paid into  
31 the General Fund. No order authorized by this subsection may be entered without prior  
32 notice of an opportunity for a hearing conducted pursuant to Article 3 of Chapter 150B  
33 of the General Statutes."

34 Sec. 8. G.S. 78C-38(b) reads as rewritten:

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 should not have known of the existence of the facts by  
43 reason of which the liability is alleged to exist. There is contribution as in cases of

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

3 Sec. 9. G.S. 78C-39 reads as rewritten:

4 "**§ 78C-39. Criminal penalties.**

5 (a) Any person who willfully violates any provision of this Chapter except G.S.  
6 78C-8(a)(1), 78C-8(a)(2), 78C-8(b), or 78C-9 or who willfully violates G.S. 78C-9  
7 knowing the statement made to be false or misleading in any material respect, shall  
8 upon conviction be punished as a Class I felon. Any person who willfully violates G.S.  
9 78C-8(a)(1), 78C-8(a)(2), or 78C-8(b) shall, upon conviction, be punished as a Class H  
10 felon.

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

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

25 Sec. 10. This act becomes effective October 1, 1991.