

Article 5.

Civil Liabilities and Criminal Penalties.

§ 78C-38. Civil liabilities.

(a) Any person who:

- (1) Engages in the business of advising others, for compensation, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities, in violation of G.S. 78C-8(b), G.S. 78C-16(a), (a1), or (b) (an action pursuant to a violation of G.S. 78C-16(b) may not be maintained except by those persons who directly received advice from the unregistered investment adviser representative), G.S. 78C-10(b), or of any rule or order under G.S. 78C-30(d) which requires the affirmative approval of sales literature before it is used, or
- (2) Receives, directly or indirectly, any consideration from another person for advice as to the value of securities or their purchase or sale, whether through the issuance of analyses, reports or otherwise and employs any device, scheme, or artifice to defraud such other person or engages in any act, practice or course of business which operates or would operate as a fraud or deceit on such other person, in violation of G.S. 78C-8(a)(1) or (2),

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

- (b) (1) Every person who directly or indirectly controls a person liable under subsection (a) of this section, including every partner, officer, or director of the person, every person occupying a similar status or performing similar functions, and every dealer or salesman who materially aids in the conduct giving rise to the liability is liable jointly and severally with and to the same extent as the person, unless able to sustain the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.
- (2) Unless liable under subdivision (1) of this subsection, every employee or associate of a person liable under subsection (a) of this section who materially aids in the conduct giving rise to the liability and every other person who materially aids in the conduct giving rise to the liability is liable jointly and severally with and to the same extent as the person if the employee or associate or other person actually knew of the existence of the facts by reason of which the liability is alleged to exist.
- (3) There is contribution among the several persons liable under subdivisions (1) and (2) of this subsection as provided among tort-feasors pursuant to Chapter 1B of the General Statutes.

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

(d) No person may sue under this section more than three years after the rendering of investment advice in violation of G.S. 78C-16.

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

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

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

(g) The rights and remedies provided by this Chapter are in addition to any other rights or remedies that may exist at law or in equity, but this Chapter does not create any cause of action not specified in this section or G.S. 78C-17(e). If the requirements of Chapter 1D of the General Statutes are met, punitive damages are available to the extent provided in that Chapter. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1991, c. 456, s. 8; 2003-413, ss. 21-24.)

§ 78C-39. Criminal penalties.

(a) Any person who willfully violates any provision of this Chapter except G.S. 78C-8(a)(1), 78C-8(a)(2), 78C-8(b), or 78C-9 is guilty of a Class I felony.

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

(a2) Any person who willfully violates G.S. 78C-8(a)(1), 78C-8(a)(2), or 78C-8(b) is guilty of a felony. If the losses caused, directly or indirectly, by the violator for a single act or for a series of related acts in a common scheme or plan is one hundred thousand dollars (\$100,000) or more, the person is guilty of a Class C felony. If the losses caused, directly or indirectly, by the violator for a single act or for a series of related acts in a common scheme or plan is less than one hundred thousand dollars (\$100,000), the person is guilty of a Class H felony.

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

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

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

- (2) Creates, causes to be made, or delivers any record, report, or document knowing that it is false or misleading in any material respect.
- (3) Destroys or alters any record, report, or document.
- (4) Conceals or secretes any record, report, or document.

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

(c) Nothing in this Chapter limits the power of the State to punish any person for any conduct which constitutes a crime by statute or at common law. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1991, c. 456, s. 9; 2003-413, s. 25.)

§ 78C-40. Burden of proof.

In a civil or administrative proceeding brought under this Chapter, the burden of proving an exemption or an exception from a definition is upon the person claiming it. In a criminal proceeding brought under this Chapter, the State has no initial burden of producing evidence to show that the defendant's actions do not fall within the exemption or exceptions; however, once the defendant introduces evidence to show that his conduct is within the exemption or exception, the burden of persuading the trier of fact that the exemption or exception does not apply falls upon the State. (1987 (Reg. Sess., 1988), c. 1098, s. 1.)

§§ 78C-41 through 78C-45: Reserved for future codification purposes.