

## Chapter 78C.

### Investment Advisers.

#### Article 1.

#### Title and Definitions.

##### § 78C-1. Title.

This Chapter shall be known and may be cited as the North Carolina Investment Advisers Act. (1987 (Reg. Sess., 1988), c. 1098, s. 1.)

##### § 78C-2. Definitions.

When used in this Chapter, the definitions of G.S. 78A-2 shall apply along with the following, unless the context otherwise requires:

- (1) "Investment adviser" means any person who, for compensation, engages in the business of advising others, 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 part of a regular business, issues or promulgates analyses or reports concerning securities. "Investment adviser" also includes financial planners and other persons who, as an integral component of other financially related services, provide the foregoing investment advisory services to others for compensation and as a part of a business or who hold themselves out as providing the foregoing investment advisory services to others for compensation. "Investment adviser" does not include:
  - a. An investment adviser representative or a person excluded from the definition of investment adviser representative pursuant to G.S. 78C-2(3)c.
  - b. A bank, savings institution, or trust company.
  - c. A lawyer, accountant, engineer, or teacher whose performance of any such services is solely incidental to the practice of his profession.
  - d. A dealer or its salesman whose performance of these services is solely incidental to the conduct of its business as a dealer and who receives no special compensation for them.
  - e. A publisher of any newspaper, news column, newsletter, news magazine, or business or financial publication or service, whether communicated in hard copy form, or by electronic means, or otherwise, that does not consist of the rendering of advice on the basis of the specific investment situation of each client.
  - f. A person solely by virtue of such person's services to or on behalf of any "business development company" as defined in Section 202(a)(22) of the Investment Advisers Act of 1940 provided the business development company is not an "investment company" by reason of Section 3(c)(1) of the Investment Company Act of 1940, as both acts were in effect on June 1, 1988.
  - g. A personal representative of a decedent's estate, guardian, conservator, receiver, attorney in fact, trustee in bankruptcy, trustee of a testamentary trust, or a trustee of an inter vivos trust, not otherwise engaged in

providing investment advisory services, and the performance of these services is not a part of a plan or scheme to evade registration or the substantive requirements of this Chapter.

- h. A licensed real estate agent or broker whose only compensation is a commission on real estate sold.
  - i. An individual or company primarily engaged in acting as a business broker whose only compensation is a commission on the sale of a business.
  - j. An individual who, as an employee, officer or director of, or general partner in, another person and in the course of performance of his duties as such, provides investment advice to such other person, or to entities that are affiliates of such other person, or to employee benefit plans of such other person or its affiliated entities, or, with respect to such employee benefit plans, to employees of such other person or its affiliated entities.
  - k. Any person excepted from the definition of investment adviser under the Investment Advisers Act of 1940 or any rule or regulation promulgated under that act.
  - l. An employee of a person described in subdivision b., e., f., g., h., or j. of G.S. 78C-2(1) acting on behalf of such person within the scope of his employment.
  - ll. An investment adviser who is covered under federal law as defined in subdivision (4) of this section.
  - m. Such other persons not within the intent of this subsection as the Administrator may by rule or order designate.
- (2) "Investment Advisers Act of 1940" means the federal statute of that name as amended before or after the effective date of this Chapter.
- (3) "Investment adviser representative" means, with respect to any investment adviser registered under this Chapter, any partner, officer, director (or a person occupying a similar status or performing similar functions) or other individual employed by or associated with an investment adviser, except clerical or ministerial personnel, who:
- a. Makes any recommendations or otherwise renders advice regarding securities directly to clients,
  - b. Manages accounts or portfolios of clients,
  - c. Determines which recommendations or advice regarding securities should be given; provided, however if there are more than five such persons employed by or associated with an investment adviser, who do not otherwise come within the meaning of G.S. 78C-2(3) a., b., d., or e., then only the direct supervisors of such persons are deemed to be investment adviser representatives under G.S. 78C-2(3) c.,
  - d. Solicits, offers or negotiates for the sale of or sells investment advisory services, unless such person is a dealer or salesman registered under Chapter 78A of the General Statutes and the person would not be an investment adviser representative except for the performance of the activities described in G.S. 78C-2(3) d., or

- e. Directly supervises investment adviser representatives as defined in G.S. 78C-2(3) a., b., c. (unless such investment adviser representatives are already required to register due to their role as supervisors by operation of G.S. 78C-2(3) c.), or d. in the performance of the foregoing activities.

Notwithstanding this subdivision, the term "investment adviser representative" as used in this Chapter and as applied to a person who is employed by, or associated with, an investment adviser covered under federal law only includes an individual who (i) has a "place of business" in the State, as that term is defined in rules or regulations adopted or promulgated under section 203A of the Investment Advisers Act of 1940 by the United States Securities and Exchange Commission and (ii) either:

- a. Is an "investment adviser representative" as that term is defined in rules or regulations adopted or promulgated under section 203A of the Investment Advisers Act of 1940 by the United States Securities and Exchange Commission; or
  - b. Is not a "supervised person" as that term is defined in rules or regulations adopted or promulgated under the Investment Advisers Act of 1940 by the United States Securities and Exchange Commission and who solicits, offers, or negotiates for the sale of, or who sells, investment advisory services on behalf of an adviser covered under federal law.
- (4) "Investment adviser covered under federal law" means any adviser who is registered with the Securities and Exchange Commission under section 203 of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-3).
- (5) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1989, c. 770, s. 12(a)-(c); 1997-419, s. 14; 1997-462, s. 6; 2001-273, s. 1; 2003-413, s. 16; 2013-91, s. 3(f).)

**§§ 78C-3 through 78C-7: Reserved for future codification purposes.**

Article 2.

Fraudulent and Prohibited Practices.

**§ 78C-8. Advisory activities.**

(a) It is unlawful for any person who receives, directly or indirectly, any consideration from another person for advising the other person as to the value of securities or their purchase or sale, whether through the issuance of analyses or reports or otherwise,

- (1) To employ any device, scheme, or artifice to defraud the other person,
- (2) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon the other person, or
- (3) Acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the

account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this subdivision shall not apply to any transaction with a customer of a dealer if such dealer is not acting as an investment adviser in relation to such transaction.

(b) In the solicitation of advisory clients, it is unlawful for any person to make any untrue statement of a material fact, or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading.

(c) Except as may be permitted by rule or order of the Administrator, it is unlawful for any investment adviser to enter into, extend, or renew any investment advisory contract unless it provides in writing:

- (1) That the investment adviser shall not be compensated on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client (unless otherwise provided by subsection (d) or (f) below);
- (2) That no assignment of the contract may be made by the investment adviser without the consent of the other party to the contract; and
- (3) That the investment adviser, if a partnership, shall notify the other party to the contract of any change in the membership of the partnership within a reasonable time after the change.

(d) Subdivision (c)(1) does not apply to any person who is exempt from registration under G.S. 78C-16(a)(4) or to the performance, renewal, or extension of any advisory contract entered into by an investment advisor at a time when such investment advisor was exempt from registration under G.S. 78C-16(a)(4). Subdivision (c)(1) does not prohibit an investment advisory contract which provides for compensation based upon the total value of a fund averaged over a definite period, or as of definite dates or taken as of a definite date. "Assignment," as used in subdivision (c)(2), includes any direct or indirect transfer or hypothecation of an investment advisory contract by the assignor or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor; but, if the investment adviser is a partnership, no assignment of an investment advisory contract is considered to result from the death or withdrawal of a minority of the members of the investment adviser having only a minority interest in the business of the investment adviser, or from the admission to the investment adviser of one or more members who, after admission, will be only a minority of the members and will have only a minority interest in the business.

(e) It is unlawful for any investment adviser to take or have custody of any securities or funds of any client in contravention of any rule or order of the Administrator prohibiting, limiting or regulating such custody.

(f) The Administrator may by rule or order adopt exemptions from subdivision (a)(3) and subdivisions (c)(1), (c)(2) and (c)(3) where such exemptions are consistent with the public interest and within the purposes fairly intended by the policy and provisions of this Chapter. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 2013-91, s. 3(g).)

## **§ 78C-9. Misleading filings.**

It is unlawful for any person to make or cause to be made, in any document filed with the Administrator or in any proceeding under this Chapter, any statement which is, at the time and in the light of the circumstances under which it is made, false or misleading in any material respect. (1987 (Reg. Sess., 1988), c. 1098, s. 1.)

**§ 78C-10. Unlawful representations concerning registration or exemption.**

(a) Neither (i) the fact that an application for registration under Article 3 of this Chapter has been filed nor (ii) the fact that a person is effectively registered constitutes a finding by the Administrator that any document filed under this Chapter is true, complete, and not misleading. Neither any such fact nor the fact that an exemption or exception is available means that the Administrator has passed in any way upon the merits or qualifications of, or recommended, or given approval to any person.

(b) It is unlawful to make, or cause to be made, to any prospective customer, or client, any representation inconsistent with subsection (a) of this section. (1987 (Reg. Sess., 1988), c. 1098, s. 1.)

**§§ 78C-11 through 78C-15: Reserved for future codification purposes.**

Article 3.

Registration and Notice Filing Procedures of Investment Advisers and Investment Adviser Representatives.

**§ 78C-16. Registration and notice filing requirement.**

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

- (1) The person is registered under this Chapter;
- (2) The person's only clients in this State are investment companies as defined in the Investment Company Act of 1940, other investment advisers, investment advisers covered under federal law, dealers, banks, trust companies, savings institutions, savings and loan associations, insurance companies, employee benefit plans with assets of not less than one million dollars (\$1,000,000), and governmental agencies or instrumentalities, whether acting for themselves or as trustees with investment control, or other institutional investors as are designated by rule or order of the Administrator;
- (3) The person has no place of business in this State, and during the preceding 12-month period has had not more than five clients, other than those specified in subdivision (2) of this subsection, who are residents of the State; or
- (4) The person, during the course of the preceding 12 months, has had fewer than 15 clients, and neither holds himself or herself out generally to the public as an investment adviser nor acts as an investment adviser to any investment company registered under the Investment Company Act of 1940, or a company that has elected to be a business development company pursuant to section 54 of the Investment Company Act of 1940.

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

- (1) The person is registered under this Chapter; or
- (2) The person is an investment adviser representative employed by or associated with an investment adviser exempt from registration under subdivision (2), (3), or (4) of subsection (a) of this section; or
- (3) The person is an investment adviser representative employed by or associated with an investment adviser covered under federal law that is exempt from the notice filing requirements of G.S. 78C-17(a1).

(b) It is unlawful for any person required to be registered as an investment adviser under this Chapter to employ an investment adviser representative unless the investment adviser representative is registered under this Chapter. The registration of an investment adviser representative is not effective during any period when the investment adviser representative is not employed by (i) an investment adviser registered under this Chapter; or (ii) an investment adviser covered under federal law who has made a notice filing pursuant to the provisions of G.S. 78C-17(a1). When an investment adviser representative begins or terminates employment or association with an investment adviser who is registered under this Chapter, the investment adviser shall notify promptly the Administrator. When an investment adviser representative begins or terminates employment or association with an investment adviser covered under federal law, the investment adviser representative shall, and the investment adviser may, notify promptly the Administrator.

(b1) No investment adviser representative may be registered with more than one investment adviser registered under this Chapter or investment adviser covered under federal law unless each of the investment advisers which employs or associates the investment adviser representative is under common ownership or control.

(b2) Notwithstanding subsection (b1) of this section, an investment adviser representative may be registered with more than one investment adviser registered under this Chapter or investment adviser covered under federal law for the purposes of soliciting, offering, or negotiating for the sale of, or for selling investment advisory services for or on behalf of, those investment advisers. If an investment adviser representative is registered with more than one investment adviser pursuant to this subsection, the representative shall be registered separately with each investment adviser for whom the representative solicits business and shall provide in writing to each person solicited any information disclosing the terms of any compensation arrangement that is related to the representative's solicitation or referral activities and that is required by the Administrator pursuant to rule or order. The Administrator may, by rule or order, specify supervisory procedures consistent with regulations adopted by the United States Securities and Exchange Commission applicable to investment advisers who compensate persons for referrals of business.

(c) Every registration or notice filing expires December 31 of each year unless renewed.

(d) It is unlawful for any investment adviser covered under federal law to conduct advisory business in this State unless the investment adviser covered under federal law

complies with the provisions of G.S. 78C-17(a1). (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1997-419, ss. 15, 16; 1998-217, s. 9; 2001-273, s. 2; 2003-413, ss. 17, 18; 2013-91, s. 3(h).)

### **§ 78C-17. Registration and notice filing procedures.**

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

- (1) The applicant's form and place of organization;
- (2) The applicant's proposed method of doing business;
- (3) The qualifications and business history of the applicant; in the case of an investment adviser, the qualifications and business history of any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the investment adviser;
- (4) Any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities business and any conviction of a felony;
- (5) The applicant's financial condition and history; and
- (6) Any information to be furnished or disseminated to any client or prospective client.

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

(a1) The Administrator may require investment advisers covered under federal law to file with the Administrator any documentation filed with the Securities and Exchange Commission as a condition of doing business in this State. This subsection does not apply to (i) an investment adviser covered under federal law whose only clients are those described in G.S. 78C-16(a)(2), or (ii) an investment adviser covered under federal law who has no place of business in this State, and during the preceding 12-month period has had not more than five clients, other than those described in G.S. 78C-16(a)(2), who are residents of this State. A notice filing under this section may be renewed by (i) filing documents required by the Administrator and filed with the Securities and Exchange Commission, prior to the expiration of the notice filing, and (ii) paying the fee required under subsection (b1) of this

section. A notice filed under this section may be terminated by the investment adviser by providing the Administrator notice of the termination, which shall be effective upon receipt by the Administrator.

(b) Every applicant for initial or renewal registration shall pay a filing fee of three hundred dollars (\$300.00) in the case of an investment adviser, and seventy-five dollars (\$75.00) in the case of an investment adviser representative. When an application is denied or withdrawn, the Administrator shall retain the fee.

(b1) Every person acting as an investment adviser covered under federal law in this State shall pay an initial filing fee of three hundred dollars (\$300.00) and a renewal notice filing fee of three hundred dollars (\$300.00).

(b2) Any person required to pay a fee under this section may transmit through any designee any fee required by this section or by the rules adopted pursuant to this section.

(c) A registered investment adviser may file an application for registration of a successor, whether or not the successor is then in existence, for the unexpired portion of the year. There shall be no filing fee.

(d) The Administrator may by rule establish minimum net capital requirements not to exceed one hundred thousand dollars (\$100,000) for registered investment advisers, subject to the limitations of section 222 of the Investment Advisers Act of 1940 (15 U.S.C. § 80(b)-18a), which may include different requirements for those investment advisers who maintain custody of clients' funds or securities or who have discretionary authority over same and those investment advisers who do not.

(e) The Administrator may by rule require registered investment advisers who have custody of or discretionary authority over client funds or securities to post surety bonds in amounts up to one hundred thousand dollars (\$100,000), subject to the limitations of section 222 of the Investment Advisers Act of 1940 (15 U.S.C. § 80(b)-18a), and may determine their conditions. Any appropriate deposit of cash or securities shall be accepted in lieu of any bond so required. No bond may be required of any investment adviser whose minimum net capital, which may be defined by rule, exceeds one hundred thousand dollars (\$100,000). Every bond shall provide for suit thereon by any person who has a cause of action under G.S. 78C-38 and, if the Administrator by rule or order requires, by any person who has a cause of action not arising under this Chapter. Every bond shall provide that no suit may be maintained to enforce any liability on the bond unless brought within the time limitations of G.S. 78C-38(d). (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1997-419, s. 17; 2001-273, s. 3; 2002-126, s. 29A.35; 2002-189, ss. 2, 3; 2003-413, s. 19.)

#### **§ 78C-18. Post-registration provisions.**

(a) Every registered investment adviser shall make and keep such accounts, correspondence, memoranda, papers, books and records as the Administrator by rule prescribes, subject to the limitations of section 222 of the Investment Advisers Act of 1940 (15 U.S.C. § 80(b)-18a).

All records so required shall be preserved for three years unless the Administrator by rule prescribes otherwise for particular types of records.

(b) With respect to investment advisers, the Administrator may require that certain information be furnished or disseminated as necessary or appropriate in the public interest or for the protection of investors and advisory clients. To the extent determined by the Administrator in his discretion, information furnished to clients or prospective clients of an investment adviser pursuant to the Investment Advisers Act of 1940 and the rules thereunder may be used in whole or partial satisfaction of this requirement.

(c) Every registered investment adviser shall file such financial reports as the Administrator by rule prescribes, subject to the limitations of section 222 of the Investment Advisers Act of 1940 (15 U.S.C. § 80(b)-18a).

(d) If the information contained in any document filed with the Administrator is or becomes inaccurate or incomplete in any material respect, the registrant or an investment adviser covered under federal law shall promptly file a correcting amendment, if the document is filed with respect to a registrant or when the amendment is required to be filed with the Securities and Exchange Commission with respect to an investment adviser covered under federal law, unless notification of the correction has been given under G.S. 78C-16(b).

(e) All the records referred to in subsection (a) of this section are subject at any time or from time to time to such reasonable periodic, special, or other examinations by representatives of the Administrator, within or without this State, as the Administrator deems necessary or appropriate in the public interest or for the protection of investors. For the purpose of avoiding unnecessary duplication of examinations, the Administrator, insofar as he deems it practicable in administering this subsection, may cooperate with the securities administrators of other states, the Securities and Exchange Commission, and any national securities exchange or national securities association registered under the Securities Exchange Act of 1934. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1997-419, s. 18.)

**§ 78C-19. Denial, revocation, suspension, bar, censure, cancellation, and withdrawal of registration.**

(a) The Administrator may by order deny, suspend or revoke any registration, or bar or censure any registrant or any officer, director, partner or person occupying a similar status or performing similar functions for a registrant, from employment with a registered investment adviser, or restrict or limit a registrant as to any function or activity of the business for which registration is required in this State if he finds:

- (1) That the order is in the public interest and;
- (2) That the applicant or registrant or, in the case of an investment adviser, any partner, officer or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the investment adviser;
  - a. Has filed an application for registration which as of its effective date, or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained any statement which was, in light of the circumstances under which it was made, false or misleading with respect to any material fact;

- b. Has willfully violated or willfully failed to comply with any provision of this Chapter or Chapter 78A or any rule or order under this Chapter or Chapter 78A;
- c. Has been convicted, within the past 10 years, of any misdemeanor involving a security or the financial services business, or any aspect of the securities business, or the financial services business, or any felony;
- d. Is permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practice involving any aspect of the securities or financial services business;
- e. Is the subject of an order of the Administrator denying, suspending, barring, revoking, restricting or limiting registration as a dealer, salesman, investment adviser or investment adviser representative;
- f. Is the subject of an adjudication or determination within the past five years by a securities, commodities or other financial services regulatory agency or an administrator of such laws of another state or a court of competent jurisdiction that the person has violated the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940 or the Commodity Exchange Act, or the securities or commodities law of any other state or any other financial services regulatory laws as the Administrator may designate by rule;
- g. Has engaged in dishonest or unethical practices in the securities or financial services business;
- h. Is insolvent, either in the sense that his liabilities exceed his assets or in the sense that he cannot meet his obligations as they mature; but the Administrator may not enter an order against an investment adviser under this clause without a finding of insolvency as to the investment adviser;
- i. Is not qualified on the basis of such factors as training, experience, and knowledge of the securities business, except as otherwise provided in subsection (b) of this section;
- j. Has failed reasonably to supervise his salesmen or employees if he is a dealer or his investment adviser representatives or employees if he is an investment adviser to assure their compliance with this Chapter; or
- k. Has failed to pay the proper filing fee; but the Administrator may enter only a denial order under this clause, and he shall vacate any such order when the deficiency has been corrected.

The Administrator may not institute a suspension or revocation proceeding on the basis of a fact or transaction known to him when registration became effective unless the proceeding is instituted within the next 120 days.

(b) The following provisions govern the application of G.S. 78C-19(a)(2)i:

- (1) The Administrator may not enter an order against an investment adviser on the basis of the lack of qualification of any person other than (i) the investment adviser himself if he is an individual or (ii) an investment adviser representative.

- (2) The Administrator may not enter an order solely on the basis of lack of experience if the applicant or registrant is qualified by training or knowledge or both.
- (3) The Administrator shall consider that an investment adviser representative who will work under the supervision of a registered investment adviser need not have the same qualifications as an investment adviser.
- (4) The Administrator shall consider that an investment adviser or investment adviser representative is not necessarily qualified solely on the basis of experience as a dealer or salesman.
- (5) The Administrator may by rule provide for an examination, including an examination developed or approved by an organization of securities administrators, which examination may be written or oral or both, to be taken by any class of or all applicants. The Administrator may by rule or order waive the examination requirement as to a person or class of persons if the Administrator determines that the examination is not necessary for the protection of advisory clients.

(c) The Administrator may by order summarily postpone or suspend registration pending final determination of any proceeding under this section. Upon the entry of the order, the Administrator shall promptly notify the applicant or registrant, as well as the employer or prospective employer if the applicant or registrant is an investment adviser representative, that it has been entered and of the reasons therefor and that within 20 days after the receipt of a written request the matter will be scheduled for hearing in accordance with Chapter 150B of the General Statutes. If no request for a hearing, other responsive pleading, or submission is received by the Administrator within 30 business days of receipt of service of notice of the order upon the applicant or registrant and no hearing is ordered by the Administrator, the order shall become final and remain in effect unless it is modified or vacated by the Administrator. If a hearing is requested or ordered, the Administrator, after notice of and opportunity for hearing, may modify or vacate the order or extend it until final determination.

(d) If the Administrator finds that any registrant or applicant for registration is no longer in existence or has ceased to do business as an investment adviser or investment adviser representative, or is subject to an adjudication of mental incompetence or to the control of a committee, conservator, or guardian, or cannot be located after reasonable search, the Administrator may by order cancel the registration or application.

(e) Withdrawal from registration as an investment adviser or investment adviser representative becomes effective 90 days after receipt of an application to withdraw or within such shorter period of time as the Administrator may determine, unless a revocation or suspension proceeding is pending when the application is filed or a proceeding to revoke or suspend or to impose conditions upon the withdrawal is instituted within 90 days after the application is filed. If a proceeding is pending or instituted, withdrawal becomes effective at such time and upon such conditions as the Administrator by order determines. If no proceeding is pending or instituted and withdrawal automatically becomes effective, the Administrator may nevertheless institute a revocation or suspension proceeding under G.S.

78C-19(a)(2)b within one year after withdrawal became effective and enter a revocation or suspension order as of the last date on which registration was effective.

(f) No order may be entered under any part of this section except the first sentence of subsection (c) of this section without (i) appropriate prior notice to the applicant or registrant (as well as the employer or prospective employer if the applicant or registrant is an investment adviser representative), (ii) opportunity for hearing, and (iii) written findings of fact and conclusions of law. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1997-462, s. 7; 2001-126, s. 5.)

#### **§ 78C-20. Methods of registration.**

(a) All applications for initial and renewal registrations or notice filings required under G.S. 78C-17 shall be filed with the Investment Adviser Registration Depository (IARD) operated by the National Association of Securities Dealers.

(b) Repealed by Session Laws 2001-273, s. 4, effective October 1, 2001.

(c) Nothing in this section shall be construed to prevent the exercise of the authority of the Administrator as provided in G.S. 78C-19. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 2001-273, s. 4; 2002-159, s. 16.)

#### **§§ 78C-21 through 78C-25: Reserved for future codification purposes.**

### Article 4.

#### Administration and Review.

#### **§ 78C-26. Administration of Chapter.**

(a) This Chapter shall be administered by the Secretary of State. The Secretary of State as Administrator may delegate all or part of the authority under this Chapter to the Deputy Securities Administrator including, but not limited to, the authority to conduct hearings, and make, execute and issue final agency orders and decisions. The Secretary of State may appoint such clerks and other assistants as may from time to time be needed. The Secretary of State may designate one or more hearing officers for the purpose of conducting administrative hearings.

(b) It is unlawful for the Administrator or any of his officers or employees to use for personal benefit any information which is filed with or obtained by the Administrator and which is not made public. No provision of this Chapter authorizes the Administrator or any of his officers or employees to disclose any such information except among themselves or when necessary or appropriate in a proceeding or investigation under this Chapter. No provision of this Chapter either creates or derogates from any privilege which exists at common law or otherwise when documentary or other evidence is sought under a subpoena directed to the Administrator or any of his officers or employees.

(b1) It is the policy of this State that an investor's financial information should be treated as confidential and unavailable for inspection or examination by members of the public under G.S. 132-6.

(c) All fees provided for under this Chapter shall be collected by the Administrator and shall be paid over to the State Treasurer to go into the General Fund. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 2001-126, s. 10; 2020-74, s. 23(c).)

#### **§ 78C-27. Investigations and subpoenas.**

(a) The Administrator in his discretion:

- (1) May make any investigation within or outside of this State as the Administrator deems necessary to determine whether any person has violated or is about to violate any provision of this Chapter or any rule or order hereunder, or to aid in the enforcement of this Chapter or in the prescribing of rules and forms hereunder;
- (2) May require or permit any person to file a statement in writing, under oath or otherwise as the Administrator determines, as to all the facts and circumstances concerning the matter to be investigated; and
- (3) May publish information concerning any violation of this Chapter or any rule or order hereunder.

(b) For the purpose of any investigation or proceeding under this Chapter, the Administrator or any officer designated by him may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which the Administrator deems relevant or material to the inquiry.

(c) In case of contumacy by, or refusal to obey a subpoena issued to any person, any court of competent jurisdiction, upon application by the Administrator, may issue to the person an order requiring him to appear before the Administrator, or the officer designated by him, there to produce documentary evidence if so ordered or to give evidence touching the matter under investigation or in question. Failure to obey the order of the court may be punished by the court as a contempt of court.

(d) The Administrator may act under subsection (b) of this section or apply under subsection (c) of this section to enforce subpoenas in this State at the request of a securities agency or administrator of any state if the alleged activities constituting a violation for which the information is sought would be a violation of this Chapter or any rule hereunder if the alleged activities had occurred in this State. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1997-462, s. 8.)

#### **§ 78C-28. Injunctions; cease and desist orders; civil penalties.**

(a) Whenever it appears to the Administrator that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this Chapter or any rule or order hereunder, he may in his discretion bring an action in any court of competent jurisdiction to enjoin the acts or practices and to enforce compliance with this Chapter or any rule or order hereunder. Upon a proper showing a permanent or temporary injunction, restraining order, or writ of mandamus shall be granted and a receiver or conservator may be appointed for the defendant or the defendant's assets. In addition to any other remedies provided by this Chapter, the Administrator may apply to the court hearing this matter for an order of restitution whereby the defendant in such action shall be ordered

to make restitution of those sums shown by the Administrator to have been obtained by him in violation of any of the provisions of this Chapter. Such restitution shall be payable, in the discretion of the court, to the Administrator or receiver appointed pursuant to this section for the benefit of those persons whose assets were obtained in violation of this Chapter, or directly to those persons. The court may not require the Administrator to post a bond.

- (b) (1) If the Administrator determines after giving notice of an opportunity for a hearing, that any person has engaged in, or is about to engage in, any act or practice constituting a violation of any provision of this Chapter or any rule or order hereunder, he may order such person to cease and desist from such unlawful act or practice and take such affirmative action as in the judgment of the Administrator will carry out the purposes of this Chapter.
- (2) If the Administrator makes written findings of fact that the public interest will be irreparably harmed by delay in issuing an order under G.S. 78C-28(b)(1), the Administrator may issue a temporary cease and desist order. Upon the entry of a temporary cease and desist order, the Administrator shall promptly notify in writing the person subject to the order that such order has been entered, the reasons therefor, and that within 20 days after the receipt of a written request from such person the matter shall be scheduled for hearing in accordance with Chapter 150B of the General Statutes to determine whether or not the order shall become permanent and final. If no request for a hearing, other responsive pleading, or submission is received by the Administrator within 30 business days of receipt of service of notice of the order upon the person subject to the order and no hearing is ordered by the Administrator, the order shall become final and remain in effect unless it is modified or vacated by the Administrator. If a hearing is requested or ordered, the Administrator, after giving notice of an opportunity for a hearing to the person subject to the order, shall by written findings of fact and conclusion of law, vacate, modify, or make permanent the order.
- (3) No order under subsection (b) of this section, except an order issued pursuant to G.S. 78C-28(b)(2), may be entered without prior notice or an opportunity for hearing. The Administrator may vacate or modify an order under subsection (b) of this section upon his finding that the conditions which required such an order have changed and that it is in the public interest to so vacate or modify.
- (4) A final order issued pursuant to the provisions of subsection (b) of this section shall be subject to review as provided in G.S. 78C-29.

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

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

The clear proceeds of civil penalties imposed under this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. Any reimbursement imposed under this subsection shall be paid into the General Fund. No order

authorized by this subsection may be entered without prior notice of an opportunity for a hearing conducted pursuant to Article 3 of Chapter 150B of the General Statutes. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1991, c. 456, s. 7; 1997-462, s. 9; 1998-215, s. 121; 2001-126, s. 6.)

#### **§ 78C-29. Judicial review of orders.**

(a) Any person aggrieved by a final order of the Administrator may obtain a review of the order in the Superior Court of Wake County by filing in court, within 30 days after a written copy of the decision is served upon the person by personal service or by registered or certified mail, a written petition praying that the order be modified or set aside in whole or in part. A copy of the petition shall be forthwith served upon the Administrator, and thereupon the Administrator shall certify and file in court a copy of the filing and evidence upon which the order was entered. When these have been filed, the court has exclusive jurisdiction to affirm, modify, enforce, or set aside the order, in whole or in part. The findings of the Administrator as to the facts, if supported by competent, material and substantial evidence, are conclusive. If either party applies to the court for leave to adduce additional material evidence, and shows to the satisfaction of the court that there were reasonable grounds for failure to adduce the evidence in the hearings before the Administrator, the court may order the additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such conditions as the court considers proper. The Administrator may modify his findings and order by reason of the additional evidence and shall file in court the additional evidence together with any modified or new findings or order. The judgment of the court is final, subject to review by the Court of Appeals.

(b) The commencement of proceedings under subsection (a) of this section does not, unless specifically ordered by the court, operate as a stay of the Administrator's order. (1987 (Reg. Sess., 1988), c. 1098, s. 1.)

#### **§ 78C-30. Rules, forms, orders, and hearings.**

(a) The Administrator may from time to time make, amend, and rescind such rules, forms, and orders as are necessary to carry out the provisions of this Chapter, including rules and forms governing registration, applications, and reports, and defining any terms, whether or not used in this Chapter, insofar as the definitions are not inconsistent with the provisions of this Chapter. For the purpose of rules and forms the Administrator may classify persons, and matters within his jurisdiction, and prescribe different requirements for different classes.

(b) No rule, form, or order may be made, amended, or rescinded unless the Administrator finds that the action is necessary or appropriate in the public interest or for the protection of investors and clients and consistent with the purposes fairly intended by the policy and provisions of this Chapter. In prescribing rules and forms the Administrator may cooperate with the securities administrators of the other states and the Securities and Exchange Commission with a view to effectuating the policy of this statute to achieve

maximum uniformity in the form and content of registrations, applications, and reports wherever practicable.

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

(d) The Administrator may by rule or order require the filing of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature or advertising communication addressed or intended for distribution to prospective investors, including clients or prospective clients of an investment adviser.

(e) All rules and forms of the Administrator shall be published.

(f) No provision of this Chapter imposing any liability applies to any act done or omitted in good faith in conformity with any rule, form, or order of the Administrator, notwithstanding that the rule, form, or order may later be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

(g) Every hearing in an administrative proceeding shall be public unless the Administrator in his discretion grants a request joined in by all the respondents that the hearing be conducted privately. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 2003-413, s. 20.)

### **§ 78C-31. Administrative files and opinions.**

(a) A document is filed when it is received by the Administrator.

(b) The Administrator shall keep a register of all applications for registration which are or have been effective under this Chapter and all denial, suspension, or revocation orders or similar orders which have been entered under this Chapter. The register shall be open for public inspection.

(c) The information contained in or filed with any registration, application, or report may be made available to the public under such rules as the Administrator prescribes.

(c1) The files and records of the Administrator relating to criminal investigations and enforcement proceedings undertaken pursuant to this Chapter are subject to the provisions of G.S. 132-1.4.

(c2) The files and records of the Administrator relating to noncriminal investigations and enforcement proceedings undertaken pursuant to this Chapter shall not be subject to inspection and examination pursuant to G.S. 132-6 until the investigations and proceedings are completed and cease to be active.

(c3) Any information obtained by the Administrator from any law enforcement agency, administrative agency, or regulatory organization on a confidential or otherwise restricted basis in the course of an investigation or proceeding undertaken pursuant to this Chapter shall be confidential and exempt from G.S. 132-6 to the same extent that it is confidential in the possession of the providing agency or organization.

(c4) Notwithstanding subsections (c1) and (c2) of this section, any records obtained by the Administrator in connection with an examination under G.S. 78C-18(e), an investigation under G.S. 78C-27, or an action under G.S. 78C-28 or G.S. 78C-19 shall not be a public record available for public examination.

(c5) A record that is not required to be provided to the Administrator or filed under this act and is provided to the Administrator only on the condition that the information will not be subject to public examination or disclosure is not a public record that is available for public examination.

(c6) The Administrator may disclose a record obtained in connection with an examination under G.S. 78C-18(e), an investigation under G.S. 78C-27, or an action under G.S. 78C-28 or G.S. 78C-19 if disclosure is for the purpose of a civil, administrative, or criminal investigation, action, or proceeding or to a securities regulator of one or more states, Canada or one or more of its provinces or territories, one or more foreign countries; the United States Securities and Exchange Commission, the United States Department of Justice, the Commodity Futures Trading Commission, the Federal Trade Commission, the Securities Investor Protection Corporation, a self-regulatory organization, a national or international organization of securities regulators, federal or state banking and insurance regulators, and any governmental law enforcement agency, in order to effectuate greater uniformity in securities matters among the federal government, self-regulatory organizations, and state and foreign governments.

(d) Upon request and at such reasonable charges as the Administrator prescribes, the Administrator shall furnish to any person photostatic or other copies (certified under the seal of office if requested) of any entry in the register or any document which is a matter of public record. In any proceeding or prosecution under this Chapter, any copy so certified is prima facie evidence of the contents of the entry or document certified.

(e) The Administrator may honor requests from interested persons for interpretative opinions upon the payment of a fee of one hundred fifty dollars (\$150.00). (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1997-462, s. 10; 2020-74, s. 23(d).)

**§§ 78C-32 through 78C-37: Reserved for future codification purposes.**

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.**

### Article 6.

#### Miscellaneous Provisions.

#### **§ 78C-46. Scope of the Chapter; service of process.**

(a) G.S. 78C-8, 78C-16(a) and (b), 78C-10, and 78C-38 apply when any act instrumental in effecting prohibited conduct is done in this State, whether or not either party is then present in this State.

(b) Every applicant for registration under this Chapter shall file with the Administrator, in such form as he by rule prescribes, an irrevocable consent appointing the Administrator or his successor in office to be his attorney to receive service of any lawful process in any noncriminal suit, action or proceeding against him or his successor, executor or administrator which arises under this Chapter or any rule or order hereunder after the consent has been filed, with the same force and validity as if served personally on the person filing the consent. A person who has filed such a consent in connection with a previous registration or notice filing need not file another. Service may be made by leaving a copy of the process in the office of the Administrator, but it is not effective unless (i) the plaintiff, who may be the Administrator in a suit, action, or proceeding instituted by him, forthwith sends notice of the service and a copy of the process by registered or certified mail to the defendant or respondent at his last address on file with the Administrator, and (ii) the plaintiff's affidavit of compliance with the subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(c) When any person, including any nonresident of this State, engages in conduct prohibited or made actionable by this Chapter or any rule or order hereunder, and he has not filed a consent to service of process under subsection (b) of this section and personal jurisdiction over him cannot otherwise be obtained in this State, that conduct shall be considered equivalent to his appointment of the Administrator or his successor in office to be his attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against him or his successor, executor or administrator which grows out of that conduct and which is brought under this Chapter or any rule or order hereunder with the same force and validity as if served on him personally. Service may be made by leaving a copy of the process in the office of the Administrator, and it is not effective unless (i) the plaintiff, who may be the Administrator in a suit, action, or proceeding

instituted by him, forthwith sends notice of the service and a copy of the process by registered or certified mail to the defendant or respondent at his last known address or takes other steps which are reasonably calculated to give actual notice, and (ii) the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(d) When process is served under this section, the court, or the Administrator in a proceeding before him, shall order such continuance as may be necessary to afford the defendant or respondent reasonable opportunity to defend. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1997-419, s. 19.)

**§ 78C-47. Statutory policy.**

This Chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this Chapter with the related federal regulation. Nothing in this Chapter shall be construed to limit or preclude the applicability of any provision of Chapters 78A or 150B of the General Statutes. (1987 (Reg. Sess., 1988), c. 1098, s. 1.)

**§ 78C-48. Severability of provisions.**

If any provision of this Chapter or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are severable. (1987 (Reg. Sess., 1988), c. 1098, s. 1.)

**§§ 78C-49 through 78C-59. Reserved for future codification purposes.**

Article 7.

Sports Agents.

**§§ 78C-60 through 78C-62: Expired.**

**§§ 78C-63 through 78C-70. Reserved for future codification purposes.**

Article 8.

Regulation of Athlete Agents.

**§§ 78C-71 through 78C-81: Repealed by Session Laws 2003-375, s. 1, effective August 1, 2003.**

**§§ 78C-82 through 78C-84. Reserved for future codification purposes.**

Article 9.

Uniform Athlete Agents Act.

**§ 78C-85. Title.**

This Article may be cited as the "Uniform Athlete Agents Act". (2003-375, s. 2.)

**§ 78C-86. Definitions.**

The following definitions apply in this Article:

- (1) Agency contract. – An agreement in which a student-athlete authorizes a person to negotiate or solicit on behalf of the student-athlete a professional-sports-services contract or an endorsement contract.
- (2) Athlete agent. – An individual who enters into an agency contract with a student-athlete or, directly or indirectly, recruits or solicits a student-athlete to enter into an agency contract. The term includes an individual who represents to the public that the individual is an athlete agent. The term does not include a spouse, parent, sibling, or guardian of the student-athlete or an individual acting solely on behalf of a professional sports team or professional sports organization.
- (3) Athletic director. – An individual responsible for administering the overall athletic program of an educational institution or, if an educational institution has separately administered athletic programs for male students and female students, the athletic program for males or the athletic program for females, as appropriate.
- (4) Contact. – A communication, direct or indirect, between an athlete agent and a student-athlete to recruit or solicit the student-athlete to enter into an agency contract.
- (5) Endorsement contract. – An agreement under which a student-athlete is employed or receives consideration to use on behalf of the other party any value that the student-athlete may have because of publicity, reputation, following, or fame obtained because of athletic ability or performance.
- (6) Intercollegiate sport. – A sport played at the collegiate level for which eligibility requirements for participation by a student-athlete are established by a national association for the promotion or regulation of collegiate athletics.
- (7) Person. – An individual, company, corporation, partnership, association, or any other legal or commercial entity.
- (8) Professional-sports-services contract. – An agreement under which an individual is employed or agrees to render services as a player on a professional sports team, with a professional sports organization, or as a professional athlete.
- (9) Record. – Information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- (10) Registration. – A certificate issued by the Secretary of State evidencing that a person has satisfied the requirements of an athlete agent pursuant to this Article.
- (11) Student-athlete. – An individual who engages in, is eligible to engage in, or may be eligible in the future to engage in any intercollegiate sport. If an individual is permanently ineligible to participate in a particular intercollegiate sport, the individual is not a student-athlete for purposes of that sport. (2003-375, s. 2.)

**§ 78C-87. Service of process; subpoenas.**

(a) By acting as an athlete agent in this State, a nonresident individual appoints the Secretary of State as the individual's agent for service of process in any civil action in this State related to the individual's acting as an athlete agent in this State.

(b) The Secretary of State may issue subpoenas for any material that is relevant to the administration of this Article. (2003-375, s. 2.)

**§ 78C-88. Athlete agents; registration required; exceptions; void contracts.**

(a) Except as otherwise provided in this section, an individual may not act as an athlete agent in this State without holding a certificate of registration under G.S. 78C-90 or G.S. 78C-92.

(b) Before being issued a certificate of registration, an individual may act as an athlete agent in this State for all purposes except signing an agency contract if: (i) a student-athlete or another person acting on behalf of the student-athlete initiates communication with the individual; and (ii) within seven days after an initial act as an athlete agent, the individual submits an application for registration as an athlete agent in this State.

(c) A North Carolina licensed and resident attorney may act as an athlete agent in this State for all purposes without registering pursuant to this section if the attorney neither advertises directly for, nor solicits, any student-athlete by representing to any person that the attorney has special experience or qualifications with regard to representing student-athletes and represents no more than two student-athletes.

(d) An agency contract resulting from conduct in violation of this section is void, and the athlete agent shall return any consideration received under the contract. (2003-375, s. 2.)

**§ 78C-89. Registration as athlete agent; form; requirements.**

(a) An individual seeking registration as an athlete agent shall submit an application for registration to the Secretary of State in a form prescribed by the Secretary of State. The application must be in the name of an individual and, except as otherwise provided in subsection (b) of this section, signed or otherwise authenticated by the applicant under penalty of perjury and must state or contain the following:

- (1) The name of the applicant and the address of the applicant's principal place of business.
- (2) The name of the applicant's business or employer, if applicable.
- (3) Any business or occupation engaged in by the applicant for the five years immediately preceding the date of submission of the application.
- (4) A description of the applicant's:
  - a. Formal training as an athlete agent.
  - b. Practical experience as an athlete agent.
  - c. Educational background relating to the applicant's activities as an athlete agent.
- (5) The names and addresses of three individuals not related to the applicant who are willing to serve as references.
- (6) The name, sport, and last known team for each individual for whom the applicant acted as an athlete agent during the five years immediately preceding the date of submission of the application.
- (7) The names and addresses of all persons who are:
  - a. With respect to the athlete agent's business if it is not a corporation, the partners, members, officers, managers, associates, or profit-sharers of the business.
  - b. With respect to a corporation employing the athlete agent, the officers, directors, and any shareholder of the corporation having an interest of five percent (5%) or greater.

- (8) Whether the applicant or any person named under subdivision (7) of this subsection has been convicted of a crime that, if committed in this State, would be a crime involving moral turpitude or a felony and identify the crime.
- (9) Whether there has been any administrative or judicial determination that the applicant or any person named under subdivision (7) of this subsection has made a false, misleading, deceptive, or fraudulent representation.
- (10) Any instance in which the conduct of the applicant or any person named under subdivision (7) of this subsection resulted in the imposition of a sanction, suspension, or declaration of ineligibility to participate in an interscholastic or intercollegiate athletic event on a student-athlete or educational institution.
- (11) Any sanction, suspension, or disciplinary action taken against the applicant or any person named under subdivision (7) of this subsection arising out of occupational or professional conduct.
- (12) Whether there has been any denial of an application for, suspension or revocation of, or refusal to renew the registration or licensure of the applicant or any person named under subdivision (7) of this subsection as an athlete agent in any state.

(b) An individual who has submitted an application for registration or licensure as an athlete agent in another state or who holds a certificate of registration or licensure as an athlete agent in another state may submit a copy of the application and certificate in lieu of submitting an application in the form prescribed pursuant to subsection (a) of this section. The Secretary of State shall accept the application and the certificate from the other state as an application for registration in this State if the application to the other state satisfied all of the following criteria:

- (1) Was submitted in the other state within six months immediately preceding the submission of the application in this State and the applicant certifies that the information contained in the application is current.
- (2) Contains information substantially similar to or more comprehensive than that required in an application submitted in this State.
- (3) Was signed by the applicant under penalty of perjury.

(c) An application filed under this section is a "public record" within the meaning of Chapter 132 of the General Statutes. (2003-375, s. 2.)

#### **§ 78C-90. Certificate of registration; issuance or denial; renewal.**

(a) Except as otherwise provided in subsection (b) of this section, the Secretary of State shall issue a certificate of registration to an individual who complies with G.S. 78C-89(a) or whose application has been accepted under G.S. 78C-89(b).

(b) The Secretary of State may refuse to issue a certificate of registration if the Secretary of State determines that the applicant has engaged in conduct that has a significant adverse effect on the applicant's fitness to act as an athlete agent. In making the determination, the Secretary of State may consider whether the applicant has:

- (1) Been convicted of a crime that, if committed in this State, would be a crime involving moral turpitude or a felony.
- (2) Made a materially false, misleading, deceptive, or fraudulent representation in the application or as an athlete agent.
- (3) Engaged in conduct that would disqualify the applicant from serving in a fiduciary capacity.

- (4) Engaged in conduct prohibited by G.S. 78C-98.
- (5) Had a registration or licensure as an athlete agent suspended, revoked, or denied or been refused renewal of registration or licensure as an athlete agent in any state.
- (6) Engaged in conduct the consequence of which was that a sanction, suspension, or declaration of ineligibility to participate in an interscholastic or intercollegiate athletic event was imposed on a student-athlete or educational institution.
- (7) Engaged in conduct that significantly adversely reflects on the applicant's credibility, honesty, or integrity.

(c) In making a determination under subsection (b) of this section, the Secretary of State shall consider: (i) how recently the conduct occurred; (ii) the nature of the conduct and the context in which it occurred; and (iii) any other relevant conduct of the applicant.

(d) An athlete agent may apply to renew a registration by submitting an application for renewal in a form prescribed by the Secretary of State. The application for renewal must be signed by the applicant under penalty of perjury and must contain current information on all matters required in an original registration.

(e) An individual who has submitted an application for renewal of registration or licensure in another state, in lieu of submitting an application for renewal in the form prescribed pursuant to subsection (d) of this section, may file a copy of the application for renewal and a valid certificate of registration or licensure from the other state. The Secretary of State shall accept the application for renewal from the other state as an application for renewal in this State if the application to the other state satisfied the following:

- (1) Was submitted in the other state within six months immediately preceding the filing in this State and the applicant certifies the information contained in the application for renewal is current.
- (2) Contains information substantially similar to or more comprehensive than that required in an application for renewal submitted in this State.
- (3) Was signed by the applicant under penalty of perjury.

(f) A certificate of registration or a renewal of a registration is valid for one year.

(g) An application filed under this section is a "public record" within the meaning of Chapter 132 of the General Statutes. (2003-375, s. 2.)

**§ 78C-91. Suspension; revocation; refusal to renew registration.**

(a) The Secretary of State may suspend, revoke, or refuse to renew a registration for conduct that would have justified denial of registration under G.S. 78C-90(b).

(b) The Secretary of State may deny, suspend, revoke, or refuse to renew a certificate of registration or licensure only after proper notice and an opportunity for a hearing in accordance with the Administrative Procedures Act pursuant to Article 3 of Chapter 150B of the General Statutes. (2003-375, s. 2.)

**§ 78C-92. Temporary registration.**

The Secretary of State may issue a temporary certificate of registration while an application for registration or renewal of registration is pending. (2003-375, s. 2.)

**§ 78C-93. Registration; renewal of fees.**

An application for registration or renewal of registration must be accompanied by a fee in the following amount:

- (1) Application for registration..... \$200.00
- (2) Application for registration based upon a certificate of registration or licensure issued by another state.....200.00
- (3) Application for renewal of registration..... 200.00
- (4) Application for renewal of registration based upon an application for renewal of registration or licensure submitted in another state.....200.00.

(2003-375, s. 2.)

**§ 78C-94. Required form of contract.**

(a) An agency contract must be in a record, signed or otherwise authenticated by the parties.

(b) An agency contract must state or contain the following:

- (1) The amount and method of calculating the consideration to be paid by the student-athlete for services to be provided by the athlete agent under the contract and any other consideration the athlete agent has received or will receive from any other source for entering into the contract or for providing the services.
- (2) The name of any person not listed in the application for registration or renewal of registration who will be compensated because the student-athlete signed the agency contract.
- (3) A description of any expenses that the student-athlete agrees to reimburse.
- (4) A description of the services to be provided to the student-athlete.
- (5) The duration of the contract.
- (6) The date of execution.

(c) An agency contract must contain, in close proximity to the signature of the student-athlete, a conspicuous notice in boldface type in capital letters stating:

**WARNING TO STUDENT-ATHLETE**

**IF YOU SIGN THIS CONTRACT:**

- (1) YOU SHALL LOSE YOUR ELIGIBILITY TO COMPETE AS A STUDENT-ATHLETE IN YOUR SPORT;**
- (2) IF YOU HAVE AN ATHLETIC DIRECTOR, WITHIN 72 HOURS AFTER ENTERING INTO THIS CONTRACT, BOTH YOU AND YOUR ATHLETE AGENT MUST NOTIFY YOUR ATHLETIC DIRECTOR;**
- (3) YOU WAIVE YOUR ATTORNEY-CLIENT PRIVILEGE WITH RESPECT TO THIS CONTRACT AND CERTAIN INFORMATION RELATED TO IT; AND**
- (4) YOU MAY CANCEL THIS CONTRACT WITHIN 14 DAYS AFTER SIGNING IT. CANCELLATION OF THIS CONTRACT SHALL NOT REINSTATE YOUR ELIGIBILITY.**

(d) An agency contract that does not conform to this section is voidable by the student-athlete. If a student-athlete voids an agency contract, the student-athlete is not required to pay any consideration under the contract or to return any consideration received from the athlete agent to induce the student-athlete to enter into the contract.

(e) The athlete agent shall give a record of the signed or otherwise authenticated agency contract to the student-athlete at the time of execution.

(f) The waiver of attorney-client privilege does not affect those privileges between client and attorney when the attorney is not an athlete agent. (2003-375, s. 2.)

**§ 78C-95. Notice to educational institution.**

(a) Within 72 hours after entering into an agency contract or before the next scheduled athletic event in which the student-athlete may participate, whichever occurs first, the athlete agent shall give notice in a record of the existence of the contract to the athletic director of the educational institution at which the student-athlete is enrolled or the athlete agent has reasonable grounds to believe the student-athlete intends to enroll.

(b) Within 72 hours after entering into an agency contract or before the next athletic event in which the student-athlete may participate, whichever occurs first, the student-athlete shall inform the athletic director of the educational institution at which the student-athlete is enrolled that he or she has entered into an agency contract. (2003-375, s. 2.)

**§ 78C-96. Student-athlete's right to cancel.**

(a) A student-athlete may cancel an agency contract by giving notice of the cancellation to the athlete agent in a record within 14 days after the contract is signed.

(b) A student-athlete may not waive the right to cancel an agency contract.

(c) If a student-athlete cancels an agency contract, the student-athlete is not required to pay any consideration under the contract or to return any consideration received from the athlete agent to induce the student-athlete to enter into the contract. (2003-375, s. 2.)

**§ 78C-97. Required records; waiver of attorney-client privilege.**

(a) An athlete agent shall retain the following records for a period of five years:

(1) The name and address of each individual represented by the athlete agent.

(2) Any agency contract entered into by the athlete agent.

(3) Any direct costs incurred by the athlete agent in the recruitment or solicitation of a student-athlete to enter into an agency contract.

(b) Records required to be retained by subsection (a) of this section are open to inspection by the Secretary of State during normal business hours.

(c) Where a student-athlete enters into an agency contract regulated under this Article, the student-athlete will be deemed to waive the attorney-client privilege with respect to records required to be retained by subsection (a) of this section, subject to G.S. 78C-94(f). (2003-375, s. 2.)

**§ 78C-98. Prohibited conduct.**

(a) An athlete agent, with the intent to induce a student-athlete to enter into an agency contract, shall not:

(1) Give any materially false or misleading information or make a materially false promise or representation.

(2) Furnish anything of value to a student-athlete before the student-athlete enters into the agency contract.

(3) Furnish anything of value to any individual other than the student-athlete or another registered athlete agent.

(b) An athlete agent shall not intentionally:

(1) Initiate contact with a student-athlete unless the athlete agent is registered under this Article.

- (2) Refuse or fail to retain or permit inspection of the records required to be retained by G.S. 78C-97.
- (3) Fail to register as required by G.S. 78C-88.
- (4) Provide materially false or misleading information in an application for registration or renewal of registration.
- (5) Predate or postdate an agency contract.
- (6) Fail to notify a student-athlete before the student-athlete signs or otherwise authenticates an agency contract for a particular sport that the signing or authentication shall make the student-athlete ineligible to participate as a student-athlete in that sport. (2003-375, s. 2.)

**§ 78C-99. Criminal penalties.**

An athlete agent who violates any provision under G.S. 78C-98(a) is guilty of a Class I felony. (2003-375, s. 2.)

**§ 78C-100. Civil remedies.**

(a) An educational institution has a right of action against an athlete agent or a former student-athlete for damages caused by a violation of this Article. In an action under this section, the court may award costs and reasonable attorneys' fees to the prevailing party.

(b) Damages suffered by an educational institution under subsection (a) of this section include losses and expenses incurred because, as a result of the conduct of an athlete agent or former student-athlete, the educational institution was injured by a violation of this Article or was penalized, disqualified, or suspended from participation in athletics by: (i) a national association for the promotion and regulation of athletics; (ii) an athletic conference; or (iii) reasonable self-imposed disciplinary action taken to mitigate sanctions likely to be imposed by an athletic organization.

(c) A right of action under this section does not accrue until the educational institution discovers, or by the exercise of reasonable diligence would have discovered, the violation by the athlete agent or former student-athlete.

(d) Any liability of the athlete agent or the former student-athlete under this section is several and not joint.

(e) This Article does not restrict rights, remedies, or defenses of any person under law or equity. (2003-375, s. 2.)

**§ 78C-101. Administrative penalty.**

The Secretary of State may assess a civil penalty against an athlete agent not to exceed twenty-five thousand dollars (\$25,000) for a violation of this Article. (2003-375, s. 2.)

**§ 78C-102. Uniformity of application and construction.**

In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it. (2003-375, s. 2.)

**§ 78C-103. Electronic Signatures in Global and National Commerce Act.**

The provisions of this Article governing the legal effect, validity, or enforceability of electronic records or signatures, and of contracts formed or performed with the use of those records or

signatures, conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act, Pub. L. 106-229, 114 Stat. 464 (2000), and supersede, modify, and limit the Electronic Signatures in Global and National Commerce Act. (2003-375, s. 2.)

**§ 78C-104. Severability.**

If any provision of this Article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are severable. (2003-375, s. 2.)

**§ 78C-105. Rules.**

The Secretary of State may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out the provisions of this Article. (2003-375, s. 2.)