

***** DRAFT - NOT YET FILED *****

1301:6-3-39.1

Retroactive exemption, qualification or registration.

(A) An application may be made pursuant to section 1707.391 of the Revised Code to exempt, qualify or register securities when the only deficiency is a failure to timely file or a failure to properly file with the division the appropriate form due to excusable neglect and the issuer is not otherwise in violation of section 1707.13 of the Revised Code.

(1) For the purposes of this rule, "failure to timely file" means the failure to file an application to exempt, qualify or register securities within the time required by the applicable section of the Ohio Securities Act or the rules adopted thereunder.

(2) For the purposes of this rule, "failure to properly file" means the filing of an application to exempt, qualify or register securities which was not proper because the application was incomplete, because there was a clerical error made in completing the application, because an error was made regarding the facts underlying the application, or because the application was made on the wrong form.

(3) For the purposes of this rule, "date of sale," shall be the earlier of the date that a subscription agreement or its equivalent is signed by the purchaser or the date that the purchaser transfers or loses control of the purchase funds, or the date of disbursement of funds subject to an escrow agreement specifically approved by the division or established in accordance with the administrative rules of the division.

(B) For the purposes of section 1707.391 of the Revised Code, "excusable neglect" shall include, but not be limited to:

(1) The failure to file a form 3-Q with the division within six months of the earliest date of sale of securities for which exemption in reliance on division (Q) of section 1707.03 of the Revised Code is sought;

(2) The failure to file a form 3-W with the division within six months of the earliest date of sale of securities for which exemption in reliance on division (W) of section 1707.03 of the Revised Code is sought;

(3) The failure to file a form 3-Y with the division within six months of the earliest date of sale of securities for which exemption in reliance on division (Y) of section 1707.03 of the Revised Code is sought;

- (4) The failure to file a form 6 with the division within one month of the earliest date of sale of securities for which registration by description in reliance on section 1707.08 of the Revised Code is sought;
- (C) For the purposes of section 1707.391 of the Revised Code, "excusable neglect" shall not include: any failure to timely or properly file an application to exempt, qualify, or register securities by an issuer who has itself, or together with its affiliates, filed more than two applications for retroactive exemption, qualification, or registration within twelve months of the date of the filing of the form 391 under consideration unless the issuer establishes in writing to the division that there is good cause to include the failure to timely or properly file within excusable neglect.
- (D) An application to exempt, qualify or register securities pursuant to section 1707.391 of the Revised Code shall include:
- (1) A form 391 cover page attached to the properly completed appropriate form (e.g., form 3(ΘQ), form U-1, etc.) which should have been timely or properly filed;
 - (2) All exhibits required by the form 391 and the appropriate form which should have been filed;
 - (3) A sworn statement from the issuer or its legal counsel in a form acceptable to the division stating that no purchaser or offeree of the securities was prejudiced by the failure to timely or properly file; and
 - (4) A sworn statement from the issuer or its legal counsel stating:
 - (a) The reason for the failure to timely or properly file;
 - (b) The number of times the issuer or an affiliate has filed a form 391 during the preceding twelve months.
- (E) The notice to an applicant of the denial of an application based on a finding of lack of excusable neglect required by section 1707.391 of the Revised Code may be delivered by the division by any reasonable means, including but not limited to telephone, telegram, transmission by any form of public or private mail, oral communication, in person, or other electronic means. Any telephone or other oral communication of the denial of an application shall be promptly confirmed by the division in writing. The notice shall include a brief statement of the reason or reasons for the division's determination of a lack of excusable neglect.

(F) An issuer that has not timely or properly made a notice filing with the division under division (X) of section 1707.03 of the Revised Code shall promptly file with the division:

(1) A form D; and

~~(2) A consent to service, if required under section 1707.11 of the Revised Code, on either form 11 or form U-2; and~~

~~(3)~~(2) The fee required under division (X) of section 1707.03 of the Revised Code, unless previously submitted and the fee under section 1707.391 of the Revised Code.

(G) An investment company which has not timely or properly submitted a notice filing under section 1707.092 of the Revised Code or that has sold securities in excess of the amount designated on an effective notice filing shall promptly submit to the division:

(1) A notice filing consisting of either:

(a) A copy of the issuer's federal registration statement as filed with the securities and exchange commission; or

(b) A form U-1 or form NF, and a copy of the issuer's prospectus and statement of additional information.

(2) A consent to service of process, if required under section 1707.11 of the Revised Code, on either form 11 or form U-2, unless previously submitted; and

(3) The fees required under either division ~~(A)(1)(b)~~ (A)(2)(a) or (A)(2)(b) of section 1707.092 of the Revised Code, unless previously submitted, and the required fees under section 1707.391 of the Revised Code.

Effective:

Five Year Review (FYR) Dates:

Certification

Date

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