

OHIO SECURITIES BULLETIN

A QUARTERLY PUBLICATION OF THE OHIO DIVISION OF SECURITIES

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Discovery of Division Information in Criminal Prosecutions under the Ohio Securities Act

by Thomas E. Geyer, Esq.

The Ohio Securities Act grants the Ohio Division of Securities (the "Division") authority to initiate criminal proceedings "by laying before the prosecuting attorney of the proper county any evidence of criminality which shall come to [the Division's] knowledge."¹ The criminal prosecution is one of the strongest weapons in the Division's enforcement arsenal and is often based on allegations of fraud,² unlicensed sales,³ sales of unregistered securities⁴ or a combination of the foregoing.

Normally, the Division makes a referral for criminal prosecution upon the conclusion of an extensive investigation.⁵ Thus, the "evidence of criminality" usually consists of a tremendous number of documents. These documents usually include such general categories as items filed with the Division, materials obtained by the Division during the investigation and Division work product.

Once an indictment is returned and a criminal prosecution is commenced, two issues arise: (1) what documents constituting the "evidence of criminality" are subject to discovery; and (2) what is the appropriate procedural method for obtaining discovery of such documents.

The former issue is governed by statute,⁶ and the latter issue is treated by case law. This article

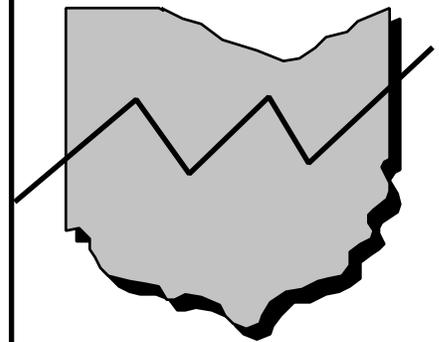
addresses both issues, discussing the procedural aspects first.

Because the Division is the state agency responsible for collecting and maintaining documentation and other information pertaining to securities regulation in Ohio, one might think that such materials constitute "public records" subject to disclosure under the general public records statute, Revised Code ("R.C.") section 149.43.⁷ However, the Ohio Securities Act contains a provision, R.C. section 1707.12, that specifically governs access to the documentation and materials maintained by the Division. In *State ex rel. Dublin Securities, Inc. v. Ohio Division of Securities*,⁸ the Ohio Supreme Court held that R.C. section 1707.12, not R.C. section 149.43, regulates disclosure of information in the Division's possession.⁹

Consequently, in general, a party seeking discovery of Division information in a criminal prosecution under the Ohio Securities Act would proceed under R.C. section 1707.12.¹⁰ However, in light of the Ohio Supreme Court's recent decision in *State ex rel. Steckman v. Jackson*,¹¹ if the party seeking discovery is a defendant in the criminal proceeding, Rule 16 of the Ohio Rules of Criminal Procedure ("Criminal Rule 16") is the exclusive procedural method for discovery.

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Criminal Prosecutions

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In *Steckman*, the Court addressed:

the continuing and ever-increasing problem of the use (and attempted use) of R.C. 149.43 (public records law) as a vehicle to obtain records from law enforcement officials and the contents of the files of prosecutors in pending criminal cases.¹²

While *Steckman* did not specifically construe R.C. section 1707.12, the holding of the case is not limited to the use of Criminal Rule 16 vis-a-vis another particular public records statute. Instead, the court simply held "that in the criminal proceeding itself, a defendant may use only Criminal Rule 16 to obtain discovery."¹³

Specifically, Criminal Rule 16(B) governs disclosure of evidence by a prosecuting attorney.¹⁴ Since, by statute,¹⁵ the Division must present "evidence of criminality" to the prosecuting attorney to initiate a criminal proceeding, the prosecuting attorney will be in possession of the pertinent evidentiary documents. Thus, the defendant's right of discovery exists against the prosecuting attorney, not the Division.¹⁶

Discovery in a criminal proceeding is narrower than in a civil proceeding because of the defendant's right against self-incrimination.¹⁷ As the *Steckman* court noted, "[s]uffice it to say that [Criminal Rule 16] does *not* provide for what is often called full, complete or open file discovery."¹⁸ The *Steckman* decision maintains the integrity of this limited discovery by preventing a criminal defendant from expanding the scope of discovery by using other statutory procedures for the discovery of "public records" in circumvention of Criminal Rule 16.

Steckman and Dublin Securities combine to establish the procedural avenues for discovery in a criminal prosecution under the Ohio Securities Act. If the party seeking discovery is a defendant, the party must proceed under Criminal Rule 16. Any other party must proceed under R.C. section 1707.12.¹⁹

Just as the status of the party making the discovery request determines the appropriate procedure, the status of the party making the discovery request also determines the substantive nature of the information disclosed. Under *Steckman*, a criminal defendant is limited to material required to be disclosed under Criminal Rule 16(B).²⁰ While an analysis of the type of information disclosable is beyond the scope of this article, the general categories of information disclosable under Criminal Rule 16(B) are: statements of the defendant or co-defendant;²¹ a copy of the defendant's prior record;²² documents and tangible objects material to the case to be used as evidence, or obtained from or belonging to the defendant;²³ results of physical or mental exami-

nations and scientific tests or experiments made in connection with the case;²⁴ witness names and addresses;²⁵ exculpatory evidence;²⁶ and prior inconsistent statements by witnesses, after an *in camera* inspection.²⁷

Specifically protected from disclosure under Criminal Rule 16(B) are "reports, memoranda or other internal documents made by the prosecuting attorney or his agents in connection with the investigation or prosecution of the case" and "statements made by witnesses or prospective witnesses to state agents."²⁸ Obviously, this provision protects material prepared and obtained by the Division in connection with the case.

Parties other than a defendant must proceed under R.C. section 1707.12 for access to documents pertaining to a criminal prosecution under the Ohio Securities Act. That statute establishes three categories for purposes of access to Division documents: the general public, those having a direct economic interest in the information or the

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The *Ohio Securities Bulletin* is a quarterly publication of the Ohio Department of Commerce, Division of Securities. The primary purpose of the *Bulletin* is to (i) provide commentary on timely or timeless issues pertaining to securities law and regulation in Ohio, (ii) provide legislative updates, (iii) report the activities of the enforcement section, (iv) set forth registration and licensing statistics and (v) provide public notice of various proceedings.

The Division encourages members of the securities community to submit for publication articles on timely or timeless issues pertaining to securities law and regulation in Ohio. If you are interested in submitting an article, contact the Editor for editorial guidelines and publication deadlines. The Division reserves the right to edit articles submitted for publication.

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Ohio Division of Securities

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transaction under investigation, and law enforcement agencies.

The first category, the general public, may inspect “[a]ll applications and other papers filed with the division.”²⁹ There are no distinguishing characteristics of this category of people, and this group of documents typically includes registration and exemption filings made with the Division.

The second category, those having a direct economic interest, may also inspect “information obtained by the division through any investigation.”³⁰ The *Dublin Securities* court held:

[p]ersons with a direct economic interest should generally be limited to consumers who, for example, may wish to file a civil suit against a dealer where the Division investigated the consumer’s complaint but chose not to proceed against the dealer...[t]he General Assembly specifically intended to provide a right of inspection to *consumers* with a direct economic interest in the information, not to the target of an investigation.³¹

The third category, law enforcement agencies, may inspect the applications and other papers filed, information obtained through an investigation and “confidential law enforcement investigatory records and trial preparation records of the division of securities or any other law enforcement or administrative agency which are in the possession of the division of securities.” Only law enforcement agencies may inspect investigatory and trial preparation records, since these documents are at the heart of the Division’s investigatory and enforcement powers.³² “Confidential law enforcement investigatory record”

includes any record pertaining to a law enforcement matter, the release of which would create a high probability of disclosure of a suspect not yet charged, a witness to whom confidentiality has been promised, or specific confidential investigatory techniques, procedures or work product.³³ “Trial preparation record” means any record specifically compiled in reasonable anticipation of a legal or administrative proceeding, including, but not limited to, the independent thought processes and personal trial preparation of division personnel.³⁴

A criminal prosecution for the violation of the Ohio Securities Act is a document intensive endeavor. Documents constituting the “evidence of criminality” include such voluminous items as filings made with the Division, materials given to investors, transaction, bank and accounting records, and materials specifically compiled by the Division during its investigation. Inspection of such documents has both procedural and substantive aspects. Procedurally, if the party seeking discovery is a defendant, the party must proceed under Criminal Rule 16; all other parties must proceed under R.C. section 1707.12. Substantively, Criminal Rule 16 governs what materials a criminal defendant may inspect and R.C. section 1707.12 governs what materials all other parties may inspect.

Endnotes

¹ R.C. § 1707.23(E).

² *State v. Walsh*, 66 Ohio App. 2d 85 (Franklin Cty. Ct. App. 1979).

³ *State v. Hirsch*, 101 Ohio App. 425 (Franklin Cty. Ct. App. 1956).

⁴ *State v. George*, 50 Ohio App. 2d 297 (Franklin Cty. Ct. App. 1975).

⁵ R.C. § 1707.23 also grants investigatory powers to the Division.

⁶ R.C. § 1707.12.

⁷ R.C. § 149.93 defines “public records” as all records kept by a “public office,” with six narrowly defined exceptions. The statute grants to “any person” the right to request to inspect all “public records.”

⁸ 68 Ohio St. 3d 426 (1994).

⁹ See Zimmerman, *R.C. 1707.12: A Shield, not a Sword*, Ohio Sec. Bull. 94:2(1994), for a thorough discussion of the *Dublin Securities* case.

¹⁰ A party seeking inspection of information maintained by the Division must follow the procedure set out in O.A.C. 1301:6-1-04.

¹¹ 70 Ohio St. 3d 420 (1994).

¹² *Id.* at 421.

¹³ *Id.* at 429.

¹⁴ Although the rule provides that discovery is only available upon written request, many prosecuting attorneys produce discoverable material without a request as a matter of course.

¹⁵ R.C. § 1707.23(E).

¹⁶ In certain situations, for example where documents are too voluminous to transport practically, the Division may retain in its office certain documents underlying particular aspects of the “evidence of criminality” presented to the prosecuting attorney. In this case, this Division will make such documents available to a defendant if the prosecuting attorney advises the Division that such documents are within

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Amended Administrative Rules of the Ohio Division of Securities

Following is the text of the one new (1301:6-1-05) and five amended administrative rules of the Ohio Division of Securities, located in Chapter 1301 of the Ohio Administrative Code. These new rules were promulgated in connection with passage of House Bill 488, which amended several sections of the Ohio Securities Act. Five of the new rules became effective on October 18, 1994, seven days after the effective date of House Bill 488. Amended rule 1301:6-3-14 became effective on November 30, 1994.

These rules were authorized by Revised Code section 1707.20 and were promulgated and became effective pursuant to the provisions of Revised Code Chapter 119.

1301:6-1-05.

Computation of time.

(A) The division is closed to the public for the entire day on Saturdays, Sundays, and legal holidays established in section 1.14 of the Revised Code.

(B) When the time for making a filing or submission to the division is prescribed by chapter 1707. of the Revised Code, the time for making the filing or submission shall be computed by excluding the first and including the last day. If the last day falls on a Saturday, Sunday, or legal holiday, then the filing may be made on the next succeeding day that the division is open to the public.

(C) When the division is required by chapter 1707. of the Revised Code to perform an act within a prescribed amount of time, the time for performing the act shall be computed by excluding the first and including the last day. If the last day falls on a Saturday, Sunday, or legal holiday, then the act shall be performed on the next succeeding day that the division is open to the public.

1301: 6-3-01 Definitions.

(A) "Having no readily determinable value," as used in division (L)(l) of section 1707.01 of the Revised Code, means any securities not listed on an exchange specified in division (E)(1) of section 1707.02 of the Revised Code or approved by the division in accordance with division (E)(2) of section 1707.02 of the Revised Code or securities not actively traded in the over-the-counter market.

(B) "The distribution by a corporation of its securities," as used in division (K)(l) of section 1707.03 of the Revised Code, includes the distribution on a pro rata basis of shares of a subsidiary to shareholders of the parent corporation.

(C) For the purposes of Chapter 1301:6-3 of the Administrative Code, "division" shall, where the context indicates, mean the Ohio division of securities.

(D) "Institutional investor," as used in division (S) of section 1707.01 of the Revised Code, includes, but is not limited to, "qualified institutional buyer," as that term is defined in 17 C.F.R. 230.144(A).

(E) "Affiliated," as used in division (B) of section 1707.14 of the Revised Code, shall mean directly or indirectly through one or more intermediaries controlled by or under common control with another person or enterprise. For the purpose of this rule, "control" shall mean the authority to direct or cause the direction of the management and policies of the dealer through ownership, by contract, or otherwise. Without limiting the range of circumstances where persons or entities are determined to be affiliated, it shall be presumed that two or more persons or entities are affil-

ated when any person or entity is the owner of record or known beneficial owner of ten percent or more of the voting interests of the persons or entities, or when any person or entity is the owner of record or known beneficial owner of ten percent or more of the voting interests of the dealer.

1301:6-3-02 Exempt securities.

(A) Exemption of listed securities; securities listed upon notice of issuance

Any security listed or listed upon notice of issuance on the Chicago board options exchange, incorporated, Cincinnati stock exchange, Midwest stock exchange, New York stock exchange, or American stock exchange, or any security which is designated or approved for designation upon notice of issuance as a national market security on the national association of securities dealers automated quotation system is an exempt security under the provisions of division (E) of section 1707.02 of the Revised Code.

(B) Securities not deemed "payable out of the proceeds of a general tax."

A security is not deemed "payable out of the proceeds of a general tax" unless at the time of issuance, machinery has been set up for the servicing of the security out of the proceeds of a general tax in the event that revenues collected or administered by the issuer and allocated to the payment thereof prove to be insufficient. It is not sufficient for this purpose that the full faith and credit of a state is pledged to the payment of a security if it will be necessary, on the failure of specified revenues to meet security charges, to obtain legislative action which would make the security in

question payable out of the proceeds of a general tax.

(C) Commercial paper and promissory notes; sale to the public

(1) Pursuant to division (G) of section 1707.02 of the Revised Code, commercial paper and promissory notes are not offered for sale directly or indirectly to the public where their sale is restricted to:

(a) Sales to officers or directors of the issuer, of the parent corporation of the issuer, or of a corporate general partner of the issuer;

(b) Sales to general partners of the issuer;

(c) Sales to persons who directly or indirectly control the management and policies of the issuer by ownership of voting securities, by contract, or otherwise; or

(d) Sales by the issuer of the security to not more than ten persons in this state during any twelve month period, provided that:

(i) The issuer reasonably believes after reasonable investigation that the person is purchasing for investment;

(ii) No advertisement, article, notice, or other communication shall be published or broadcast or caused to be published or broadcast by the issuer in connection with the sale other than an offering circular or other communication delivered by the issuer to selected individuals;

(iii) The aggregate commission, discount, and other remuneration paid or given directly or indirectly for sale of the commercial paper and promissory notes of the issuer, excluding legal, accounting and printing costs, does not exceed ten percent of the initial offering price of the commercial paper and promissory notes; and

(iv) Any commission, discount, or other remuneration for sales of commercial paper and promissory notes in reliance on this exemption in this state is paid or given only to dealers or salesmen licensed pursuant to Chapter 1707. of the Revised Code; and

(e) For the purpose of determining compliance with paragraph (C)(1)(d) of this rule, a husband and wife, a child and its parent or guardian when the parent or guardian holds the security for the benefit of the child, a partnership, association or other unincorporated entity, or a trust not formed for the purpose of purchasing the security shall be deemed to be a single purchaser.

(f) For the purpose of determining compliance with paragraph (C)(1)(d) of this rule, sales of commercial paper and promissory notes registered or sold pursuant to an exemption under sections 1707.01 to 1707.45 of the Revised Code other than division (G) of section 1707.02 of the Revised Code or sold pursuant to paragraph (C)(1)(a), (C)(1)(b) or (C)(1)(c) of this rule shall not be integrated with sales made pursuant to paragraph (C)(1)(d) of this rule.

(2) Commercial paper and promissory notes otherwise offered to all other persons are deemed to be offered to the public for purposes of division (G) of section 1707.02 of the Revised Code.

1301:6-3-03

Exempt transactions.

(A) Definitions. For the purposes of this rule and section 1707.03 of the Revised Code:

(1) "Bank" shall have the meaning specified in division (O) of section 1707.01 of the Revised Code.

(2) "Escrow Agreement" shall mean a written instrument established by a dealer registered with the securities and exchange commission in accordance with the standards set forth in 17 CFR 15c2-4(b), or a written instrument signed by the issuer and the bank, the deposits of which are insured by the federal deposit insurance corporation and which is not an affiliate, subsidiary, or parent of the issuer, which

instrument provides for the establishment of an escrow account with the bank, establishes procedures for the prompt deposit into the escrow account of funds received from purchasers, specifies that no funds will be disbursed from the escrow account until a minimum stated amount of the securities have been sold and the proceeds have been deposited into the escrow account, and specifies a termination date when the proceeds held in the escrow account will be returned without deduction to the purchasers if the proceeds for a minimum stated amount of the securities have not been deposited in the escrow account.

(3) "Mortgage-backed security" shall mean indebtedness, a participation in indebtedness, or other interest in indebtedness secured by a mortgage lien upon real estate, or a participation in or other interest in a syndicate, pool, trust, or other entity consisting of indebtedness secured by a mortgage lien upon real estate.

(4) "Retail repurchase agreement" shall mean indebtedness arising from the sale of a security or pool of securities that is a direct obligation of or is fully guaranteed by the United States government or an agency thereof, or indebtedness collateralized by an interest in a security or pool of securities that is a direct obligation of or is fully guaranteed by the United States government or an agency thereof.

(5) "Ten per cent of the initial offering price" shall mean an amount equal to ten per cent of the offering price of the securities actually sold.

(6) "Internal Revenue Code" shall mean the Internal Revenue Code of 1986, as amended, 26 U.S.C. section 1, et seq.

(7) "Pooled income fund" shall mean a trust that meets the requirements of a pooled income fund

as defined in Internal Revenue Code section 642(c)(5), provided that the remainder beneficiary is a qualified charity.

(8) "Charitable remainder trust" shall mean a trust that meets the requirements of either a charitable remainder annuity trust or a charitable remainder unitrust as defined in Internal Revenue Code section 664, provided that the remainder beneficiary is a qualified charity.

(9) "Charitable lead trust" shall mean a trust that meets the requirements of a charitable lead trust as described in Internal Revenue Code section 170(f)(2), provided that the lead beneficiary is a qualified charity.

(10) "Charitable gift annuity" shall mean an agreement between a qualified charity and a donor in which the qualified charity agrees to pay to an annuitant to annuitants for life or for a term of years a fixed percentage of the amount deposited by the donor with the qualified charity.

(11) "Qualified charity" shall mean an entity that is described in Internal Revenue Code section 501(c)(3) and that is not a private foundation as described in Internal Revenue Code section 509.

(B) Claims of exemption in accordance with division (O) of section 1707.03 of the Revised Code and division (Q) of the Revised Code.

(1) The issuer or dealer shall file with the division a report of sales on a form 3-Q not later than sixty days after each sale of any security in reliance on division (Q) of section 1707.03 of the Revised Code. All sales within any sixty-day period which have not been reported on a prior form 3-Q may be included on a single form 3-Q.

(2) When the division receives a form 3-Q which appears to be defective, the division shall notify the claimant and shall allow not more than thirty days for the amendment of the form. If the defects are remedied by amendment in a timely manner, the form shall be deemed filed as of the date of the original filing. If the defects are not remedied by proper amendment, the division shall note on its records that the form is defective and that no effective claim of exemption has been made.

(3) Where the division determines by examination or otherwise that the information reported on a form 3-Q is inaccurate or incomplete, the division shall notify the claimant and shall afford the claimant an opportunity to present proof to establish that the exemption was properly claimed. In the absence of satisfactory proof to the division that claimant was entitled to claim the exemption, the division shall make a finding that the facts necessary for claiming the exemption did not exist at the time such exemption was claimed and that the claim of exemption was null and void and of no effect when made. The division shall thereupon order its records endorsed in accordance with that finding. If the division determines that an exemption has been improperly claimed, it may take action in accordance with Chapter 1707. of the Revised Code.

(4) The issuer shall maintain or cause to be maintained books and records which reflect all material transactions involving the sale of securities under division (O) of section 1707.03 of the Revised Code or under division (Q) of section 1707.03 of the Revised Code for a period of four years from the date of the last sale by the issuer under the claim of exemption.

(5) For the purpose of determining the date of sale for division

(O) or (Q) of section 1707.03 of the Revised Code, a sale shall be deemed to have occurred on the later of:

(a) The date that a subscription agreement or its equivalent, signed by the purchaser, is received by the issuer or the dealer, or the purchaser transfers or loses control of the purchase funds, whichever is earlier; or

(b) The first date of disbursement of any proceeds of the sale of the securities which have been deposited directly into an escrow account.

(6) No salesman shall sell securities in reliance on an exemption under division (O) or (Q) of section 1707.03 of the Revised Code other than through or with the salesman's employing dealer.

(C) Claims of exemption in accordance with division (O) of section 1707.03 of the Revised Code.

(1) An issuer shall be presumed to have established that a purchaser is purchasing for investment, in the absence of information to the contrary, when the issuer obtains a written declaration signed by the purchaser which includes:

(a) A statement that the purchaser is aware that no market may exist for the resale of the securities;

(b) A statement that the purchaser is purchasing for investment and not for the distribution of the securities; and

(c) A statement that the purchaser is aware of any and all restrictions imposed by the issuer on the further distribution of the securities, including, but not limited to, any restrictive legends appearing on the certificate, required holding periods, stop transfer orders, or buy-back rights of the corporation or the holders of its securities.

(2) For the purpose of computing the total number of purchasers under division (O) (2) of section 1707.03 of the Revised Code, suc-

cessive sales by an issuer to a single purchaser shall not be considered to be sales to additional purchasers.

(D) Additional exemptions in accordance with division (V) of section 1707.03 of the Revised Code.

(1) The sale by a bank, a subsidiary of a bank, or a service corporation owned by and organized to provide services to one or more banks of retail repurchase agreements is exempt pursuant to division (V) of section 1707.03 of the Revised Code.

(2) The sale by a bank, a subsidiary of a bank, or a service corporation owned by and organized to provide services to one or more banks of mortgage-backed securities is exempt pursuant to division (V) of section 1707.03 of the Revised Code.

(3) The sale of any security representing directly or indirectly a fractional interest in a pool of FHA-insured or VA-guaranteed first mortgage loans guaranteed by the full faith and credit of the United States government (commonly referred to as GNMA-backed securities or GNMA pass-through securities) pursuant to division (G) of section 306 of the National Housing Act of 1934, as amended, is exempt pursuant to division (V) of section 1707.03 of the Revised Code. The assets of a security sold in reliance on this paragraph may also include cash or other obligations backed by the full faith and credit of the United States government to a maximum of twenty per cent of the total assets of the security.

(4) The sale of any security representing directly or indirectly a fractional interest in a certificate of deposit or a pool of certificates of deposit is exempt pursuant to division (V) of section 1707.03 of the Revised Code, provided that:

(a) The certificates of deposit are issued by a bank with assets of two billion dollars or more;

(b) If a pool, no more than ten per cent of the pool's assets may be invested in the certificates of deposit of any one bank; and

(c) The total expenses of sale, issuance and distribution of the securities do not exceed three per cent of the gross proceeds of the sale of the securities.

(5) The sale of any security pursuant to a pension plan, stock plan, profit-sharing plan, compensatory benefit plan or similar plan is exempt pursuant to division (V) of section 1707.03 of the Revised Code if:

(a) The security is sold pursuant to a plan qualified under sections 401 to 425 of the Internal Revenue Code of 1986;

(b) The sale of the security is exempt from the provisions of section 5 of the Securities Act of 1933 because it meets the exemption set forth in rule 701 of the Securities Act of 1933 and any commission, discount or other remuneration paid or given for the sale of the security in this state is paid or given only to dealers or salesmen licensed by the division; or

(c) The security is effectively registered under sections 6 to 8 of the Securities Act of 1933 and is offered and sold in compliance with the provisions of section 5 of the Securities Act of 1933.

(6) The sale of a warrant, subscription right, or option to purchase a security exempted by division (E) of section 1707.02 of the Revised Code or the sale of a unit consisting of a warrant, subscription right, or option which is exempt under division (E) of section 1707.02 of the Revised Code and a security exempt under division (E) of section 1707.02 of the Revised Code is exempt pursuant to division (V) of section 1707.03 of the Revised Code if it is sold by a licensed dealer.

(7) The sale of a security of an issuer that is either a pooled income fund, a charitable remainder trust or a charitable lead trust and that

has a qualified charity as the only charitable beneficiary, or the sale by a qualified charity of a security that is a charitable gift annuity if:

(a) The sale is made by persons not licensed as dealers or salesmen whose compensation, however characterized, is not based directly on the amount of sales of the security;

(b) The security is evidenced by a written instrument that has been executed by the donor and the issuer and a copy of which has been provided to the qualified charity which is designated in the security as the beneficiary; and

(c) The designation of the qualified charity in the security is irrevocable so long as the qualified charity retains its status as a qualified charity.

1301:6-3-14

Dealer License and Securities and Exchange Commission Registration Requirements.

(A) A dealer's license shall be required of a person who acts as a dealer, as defined in division (E) of section 1707.01 of the Revised Code subject, to the provisions of division (A)(1) of section 1707.14 of the Revised Code, and to the following exceptions:

(1) Without a license, a person may sell the promissory notes or commercial paper of its subsidiary, provided such securities are not offered for sale, directly or indirectly, to the public, as that term is defined in paragraph (C) of rule 1301:6-3-02 of the Administrative Code.

(2) Without a license, a person which is organized not for profit and whose net earnings do not inure to the benefit of any person, may sell its subsidiaries' securities which do not constitute evidence of indebtedness or a promise to pay money, provided the total cost of sale does not exceed two per cent of their aggregate sale price, plus five hundred dollars.

(3) Without a license, a person may sell any securities of its subsidiary, which have been issued under an approved plan of reorganization, recapitalization or refinancing pursuant to section 1707.04 of the Revised Code.

(4) Without a license, a person may sell the securities of its subsidiary in the transactions specified in section 1707.06 of the Revised Code.

(B) In accordance with division (D) of section 1707.14 of the Revised Code, the division may, by division order, exempt a dealer from the requirement of being registered with the securities and exchange commission set out in division (B) of section 1707.14 of the Revised Code where the division determines that all of the following have been met:

(1) The dealer has been continuously licensed by the Ohio division of securities since October 11, 1994;

(2) The dealer, alone or with any other dealer with which it is affiliated, does not employ more than five securities salesmen at any time;

(3) No less than eighty per cent of the securities bought and sold by the dealer, as determined by the aggregate price of all securities bought and sold by the dealer, are securities of banks, as the term "bank" is defined in division (O) of section 1707.01 of the Revised Code, which have their principal place of business in Ohio;

(4) The dealer enters into an undertaking with the division whereby the dealer agrees that it will immediately surrender any exemption from the requirement of being registered with the securities and exchange commission in the event that it fails to disclose in writing to any person to whom it sells securities its compensation, however that com-

pensation is characterized, for the sale of the securities; and

(5) The dealer enters into an undertaking with the division whereby the dealer agrees that it will immediately surrender any exemption from the requirement of being registered with the Securities and Exchange Commission in the event that it no longer meets the standards set forth in paragraphs (C)(1), (C)(2) and (C)(3) of this rule.

1301:6-3-391
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.

(I) 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 pur-

chaser 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) For sales of securities prior to October 11, 1994, the failure to file a form 3-O with the division within one year of the earliest date of sale of securities for which exemption in reliance on division (O) of section 1707.03 of the Revised Code was sought ;

(2) For sales of securities prior to October 11, 1994, the failure to file a form 3-O with the division within three years of the earliest date of sale of securities for which exemption in reliance on division (O) of section 1707.03 of the Revised Code was sought prior to October 11, 1994 if sales were made only to spouses, parents, children, siblings, or grandparents of an officer, director or general partner of the issuer or of the spouse of an officer, director or general partner of the issuer;

(3) 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;

(4) 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;

(5) 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;

(6) The failure of an investment company to file an application for the registration of securities within six months of the earliest date of the sale of unregistered securities which had, within six months of the earliest date of sale of the unregistered securities, been previously registered with the division ; or

(7) The failure of an investment company to file an application for the registration of a sufficient number of securities within six months of the earliest date of the sale of the unregistered securities when an investment company has oversold the number or amount of securities registered with the division.

(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(O), 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.

Division Implements Automated Document "Fax Back" Service

The Division of Securities has implemented a new Automated Document "Fax Back" Service to provide Division forms and documents. This automated service allows a caller to request a specific form or document and have it sent directly to the fax machine of his or her choice.

The general number of the Fax Back Service, (614) 227-3345, provides an index to the general categories of documents. Within each category, a menu like the one printed on page 10 is provided. Upon choosing a particular document or form, the caller is given the correspond-

ing fax number and instructions on how to receive the fax.

If you have comments or questions about this service, you may telephone Deb Chafin, Manager of the Data and Records Section, at (614) 644-7449.

Directions to Receive Documents by Fax

From your fax machine

1. Call the direct dial number for the form you wish to receive.
2. When instructed to do so, press R (teh 7 key) to receive this fax.
3. Press the start button of you fax machine.

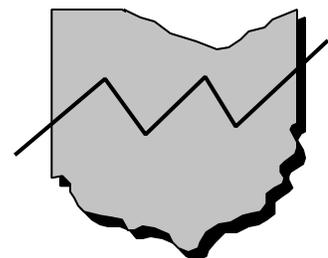
From a Touch-Tone phone

1. Call the direct dial number for the form you wish to receive.
2. When instructed to do so press I (the 4 key) to input a number.
3. Enter your fax number. Be sure to input 1 + your area code if your fax is located outside of the local Columbus, Ohio calling area.
4. Press A (the 2 key) to accept this fax.

Directions to Receive Documents by Mail

If you are unable to receive documents by facsimile, you may request documents by mail by calling (614) 227-3350 and leaving a message in the voice mailbox.

See Index on page 10



Index of Ohio Division of Securities Documents Available by Fax

ITEM #	TYPE OF FILING	FEES	DIRECT DIAL #
BROKER/DEALER			
2-1	Non-NASD Broker/Dealer Package		614-227-3351
2-2	NASD Broker/Dealer Package		614-227-3352
2-3	Guarantee of Subsidiary Ohio Dealer in Securities		614-227-3353
2-4	Surety Bond for Dealers		614-227-3354
2-5	\$10,000 Net Capital Requirement		614-227-3355
REGISTRATION			
3-1	Registration by Description - All Form 6s		614-227-3356
3-2	Reg. D/Private Placement Forms 3-G and 3-W (as in 3-3 and 3-4)		614-227-3357
3-3	Form 3-G-Reg. D Rule 506 Report of Sale of Securities	\$100 first filing \$50 for subsequent filings same year	614-227-3358
3-4	Form 3-W-Reg. D Rule 505	\$100.00	614-227-3359
3-5	Form 4 Corporate Reorganizations Deposit for Hearing Expense	\$100.00 \$1000 maximum	614-227-3360
3-6	Form .041 Takeovers	-0-	614-227-3361
3-7	Form 5(A) Filing minimum Filing maximum	\$100.00 \$1000.00	614-227-3362
3-8	Form 6(A)(1) Ohio Corporate Securities	\$50.00	614-227-3363
3-9	Form 6(A)(2) Ohio Corporate Securities to 35 persons maximum	\$50.00	614-227-3364
3-10	Form 6(A)(3) Limited Partnership 35 persons maximum	\$50.00	614-227-3365

ITEM #	TYPE OF FILING	FEES	DIRECT DIAL #
3-11	Form 6(A)(4) Sales of Corporate Securities to existing shareholders	\$50.00	614-227-3366
3-12	Form 9/Form U-1 Registration by Qualification	\$100.00; plus \$1/10 of 1% of amount to be registered (minimum \$100; maximum \$1000); plus qualification fee	614-227-3367
3-13	Form U-1 Registration by Coordination	\$100.00; plus \$1/10 of 1% of amount to be registered (minimum \$100; maximum \$1000)	614-227-3368
3-14	Corrective Filings Form 39 Qualification of Securities Sold without Compliance	\$100.00; plus 1/5 of 1% of amount (minimum \$100, maximum \$200)	614-227-3369
3-15	Form 391 (Penalty Filing) w/Explanatory Statement of Non-Prejudice	Twice fee that would have been required under 1707.03(O), 1707.03(G), 1707.03(W), 1707.09 (Credit for that already paid)	
3-15	Form 391 and Form 3-O		614-227-3373
3-16	Form 391 and Form 3-G		614-227-3374
3-17	Form 391 and Form 3-W		614-227-3370
3-18	Form 11 (Consent to Service)		614-227-3371
ENFORCEMENT			
4-1	Investor Complaint Form		614-227-3349
5-1	Investor Alert - IRA Approved Scams		614-227-3375

Division Enforcement Section Reports

Administrative Orders

NWO Motel Developers, Inc.

On September 20, 1994, the Division issued a final Cease and Desist Order, Division Order No. 94-176, against NWO Motel Developers, Inc., of Findlay, Ohio. The order resulted from NWO's unlicensed sale of securities that were neither registered nor exempt from the registration provisions of the Ohio Securities Act.

A field examination by the Division in February 1992 revealed that NWO sold 15 of its own common shares, at \$1,000 per share, to two Ohio investors between March 5, 1990, and April 5, 1990. The examination also revealed that four promissory notes, in the amount of \$20,000 each, and three promissory notes, in the amount of \$40,000 each, were also sold to seven Ohio investors between January 22, 1990, and April 5, 1990. The records of the Division revealed no registration or claim of exemption for the common shares or promissory notes.

On January 21, 1993, the Division had issued Division Order No. 93-004, a Notice of Opportunity for Hearing, to NWO setting forth the Division's allegations regarding the unlicensed sale of the unregistered, non-exempt securities. On January 29, 1993, NWO requested an administrative hearing. However, on September 16, 1994, NWO withdrew its request for an administrative hearing. The Division then issued its final order, ordering NWO to cease and desist from the unlicensed sale of unregistered, non-exempt securities in violation of R.C. sections 1707.44(A) and (C)(1).

Michael A. Zeidman

On September 27, 1994, the Division issued a final Cease and Desist Order, Division Order No. 94-180, against Michael A. Zeidman of Cincinnati, Ohio. The final order resulted after Zeidman failed to respond to Division Order No. 93-092, a Notice of Opportunity for Hearing, issued against him on October 12, 1993. The Notice of Opportunity for Hearing was returned to the Division undelivered and the Division then published notice in the *Cincinnati Court Index* pursuant to R.C. Chapter 119.

The final order was based on Zeidman's sale of a promissory note to an Ohio investor allegedly representing an investment interest in a scrap metal venture. At the time of the sale, Zeidman was not licensed by the Division. In addition, the promissory note was neither registered with the Division nor the subject of a perfected exemption from registration. As a result, the sale was in violation of R.C. sections 1707.44(A) and (C)(1). The final order issued against Zeidman ordered him to cease and desist from future violations of those provisions of the Ohio Securities Act.

Service Express, Inc. and Robert McCord

On September 28, 1994, the Division issued a final Cease and Desist Order, Division Order No. 94-181, against Service Express, Inc., and its president, Robert McCord of Columbus, Ohio. The final order resulted after neither Service Express nor McCord responded to Division Order No. 94-111, a Notice of Opportunity for Hearing, issued July 11, 1994, setting forth allegations of violations of the Ohio Securities Act. Service of the notice order was not obtained and notice was published in

Columbus Daily Reporter as required by R.C. Chapter 119.

The Division's action was based on a transaction in November 1991 when an Ohio investor paid McCord \$10,000 for 15% of the stock of Service Express. Subsequently, the investor never received a share certificate representing his investment. At the time of the sale, McCord was not licensed by the Division. Further, the Division's records revealed no registration or claim of exemption for the shares or the transaction. Thus, the transaction violated R.C. sections 1707.44(A) and (C)(1). The final order ordered McCord to cease and desist from future violations of those provisions of the Ohio Securities Act.

Aaron Magwood and Ledrew Farrow, Jr.

On October 3, 1994, the Division issued a final Cease and Desist Order, Division Order No. 94-183, against Aaron Magwood of Columbus, Ohio, and Ledrew Farrow, Jr., of Cincinnati, Ohio.

The Division's investigation into the matter revealed that in December 1991, an Ohio resident purchased, from Farrow, two hundred shares of preferred stock in AROSA Hotels. Farrow purported to be a vice president of AROSA Hotels and the chief financial officer of Geiger Enterprises. In January 1992, another Ohio resident purchased just over 1,000 shares of Balanced Environmental Services Tech, Inc., through Magwood, who purported to be the vice president of Balanced Environmental and the executive vice president of Geiger Enterprises.

The securities of both AROSA and Balanced Environmental were neither registered with the Division

nor subject to a perfected claim of exemption. In addition, at the time of the sales neither Magwood nor Farrow were licensed to sell securities in Ohio. As a result, Magwood's and Farrow's activities violated R.C. sections 1707.44(A) and (C)(1).

Only July 8, 1994, the Division had issued to Magwood and Farrow Division Order No. 94-110, a Notice of Opportunity for Hearing, setting forth the Division's allegations. Service by certified mail was not obtained and notice was published in the *Cincinnati Enquirer* pursuant to R.C. Chapter 119. After the statutory publication was satisfied and neither party requested an administrative hearing, the Division issued the final Cease and Desist Order.

Benjamin S. Bram

On October 17, 1994, the Division issued a final order, Division Order No. 94-191, denying the application for an Ohio Securities Salesman License of Benjamin S. Bram of New York, New York. Bram had applied for a license by submitting a Form U-4 to the National Association of Securities Dealers' Central Registration Depository. Ohio received the application on July 8, 1994. The application indicated that Goldman, Sachs & Co. intended to employ Bram.

In considering the application, the Division found that on or about August 7, 1992, the New York Stock Exchange entered into a Consent Order with Bram in which the NYSE censured Bram, suspended him for two weeks and fined him \$10,000 based on allegations that Bram effected transactions for his NYSE member firm employer's proprietary account for the sole purpose of causing a "plus" tick so that his employer could immediately thereafter effect the purchase transaction on a "zero-plus" tick on behalf of a customer. Consequently, the Divi-

sion determined that Bram was "not of good business repute" as that term is used in R.C. section 1707.19(A) and O.A.C. 1301:6-3-19(D).

On August 18, 1994, the Division issued to Bram Division Order No. 94-146, a Notice of Intent to Deny his application for license. The Notice Order contained the Division's basis for concluding that Bram was not of "good business repute" and stated that Bram had the opportunity to request an administrative hearing on the matter within 30 days of the date of mailing of the notice. The Division received notice from the U.S. Postal Service that Bram received the Notice of Intent to Deny on August 23, 1994. However, Bram failed to timely request an administrative hearing. Therefore, the Division issued the final order denying Bram's application and notifying him of his right to appeal.

Larry G. Glass

On October 25, 1994, the Division issued Division Order No. 94-193, a final Cease and Desist Order against Larry G. Glass of Cincinnati, Ohio. In connection with the Cease and Desist Order, the Division and Glass entered into a Consent Agreement in which Glass consented, stipulated and agreed to the findings, conclusions and orders set forth in the Cease and Desist Order.

The Division's action followed an investigation which revealed that in or around September 1993, Glass, an Ohio resident, solicited investors to invest in Banner Fund International through Swiss Trade & Commerce Trust, Ltd. Glass represented that Banner Fund International was a common law trust involved in arbitrage transactions and that Swiss Trade & Commerce was the trustee who managed the activities of Banner Fund International. The Division determined that these

investments in Banner Fund constituted securities as defined in R.C. section 1707.01(B). Such securities were neither registered with the Division nor the subject of a perfected exemption.

In addition, Glass' solicitations constituted "sales" as defined in R.C. section 1707.01(C). At the time of the solicitations Glass was not licensed by the Division. Consequently, the Division found that Glass violated R.C. sections 1707.44(A) and (C)(1).

On October 7, 1994, the Division had issued to Glass Division Order No. 94-188, a Notice of Opportunity for Hearing, which set forth the Division's allegation and notified Glass of his opportunity to request an administrative hearing on the matter. Instead of requesting the administrative hearing, Glass entered into the Consent Agreement, which was incorporated into the Final Cease and Desist Order and ordered Glass to cease and desist from future violations of R.C. sections 1707.44(A) and (C)(1).

Joseph P. Medsker

On October 24, 1994, the Division issued Division Order No. 94-194, a final Cease and Desist Order against Joseph P. Medsker of Dayton, Ohio. In connection with the Cease and Desist Order, the Division and Medsker entered into a Consent Agreement in which Medsker consented, stipulated and agreed to the findings, conclusions and orders set forth in the Cease and Desist Order.

Throughout 1991 and 1992, Medsker sold to Ohio residents investment interests in Unified Financial Golf Associates ("UFGA"). The investment interests in UFGA were purportedly general partnership interests. However, the Division determined that such investment interests were in fact "invest-

ment contracts" by applying the four prong test established by the court in *State v. George*, 50 Ohio App. 2d 297 (Franklin Cty. Ct. App. 1975). Applying the test, the Division found that all four prongs of the *George* test were met because the investors furnished initial value, such initial value was subject to the risks of the enterprise, the investment was induced by representation of future financial gain and the investors did not receive the right to exercise practical and actual control over the managerial decisions.

Establishing the fourth prong of the test was crucial to the Division's case since the UFGA interests were purportedly general partnership interests. Normally, general partners in a general partnership have control over the managerial decisions of the partnership. However, the Division's investigation revealed that the partnership agreement left so little power in the hands of the investors as to the distribute power as it would be in a limited partnership, and that the investors were so inexperienced and unknowledgeable in the business affairs of the partnership that they were incapable of intelligently exercising any alleged management power.

On August 25, 1994, the Division had issued to Medsker a Notice of Opportunity for Hearing, Division Order No. 94-150, in which the Division set forth alleged violations of R.C. sections 1707.44(A), (B)(4), (C)(1) and (G) and notified Medsker of his right to request an administrative hearing on the matter. Medsker timely requested an administrative hearing but entered into the Consent Agreement before the administrative hearing was held. The Consent Agreement was incorporated into the final Cease and Desist Order which ordered Medsker to cease and desist from future violations of the Ohio Securities Act.

Virginia Capital Group, Inc.

On November 4, 1994, the Division issued Division Order No. 94-202, a final Cease and Desist Order against Virginia Capital Group, Inc., a Virginia corporation located in Williamsburg Virginia. The final order was issued after Virginia Capital failed to timely request an administrative hearing as permitted by Division Order No. 94-177, issued on September 20, 1994.

At least three former Ohio securities salespeople were employed at Virginia Capital: Kelly L. Ainsworth, Vern E. Davis, II, and John D. Runyon (collectively, "Respondents"). The Division's investigation revealed that in January and February 1993, Respondents sold to at least 13 Ohio residents shares of Virginia Capital Group, Inc. Such shares were not exempt from registration under the Ohio Securities Act, the subject matter of an exempt transaction nor registered with the Division. In addition, none of the Respondents were licensed by the Division at the time of the sales. Consequently, the Division determined that Respondents violated R.C. sections 1707.44(A), (C)(1) and (G) and issued the final order against Virginia Capital after no hearing was requested.

John F. Schulte

On November 22, 1994, the Division issued a final Cease and Desist Order, Division Order No. 94-204, against John F. Schulte of Oregon, Ohio. The final order resulted from Schulte's misrepresentations in connection with the sale of securities to at least five Ohio investors.

Between November 1991 and February 1992, Ohio resident Ethel Harkcom gave Schulte a total of \$50,000 to invest on her behalf: \$35,000 to be invested in a certificate of deposit known as Northern

Trust Investment; \$10,000 to go into a money market fund; and \$5,000 to purchase United States Treasury Notes. The Division found that Schulte diverted Harkcom's funds to his own personal and business use and created fictitious confirmation and interest payment slips and sent them to Harkcom.

In September 1992, Ohio resident Elsie Snyder gave Schulte \$15,000 for investment in the Franklin Ohio Insured Tax Free Income Fund. The Division found that Schulte created fictitious confirmation and monthly account statements, sent them to Snyder and diverted Snyder's funds to his own personal and business use.

In May 1992, Ohio resident Gladys Harder provided Schulte with a check for \$20,1000 for the purpose of purchasing a United States Treasury Note in the name of Harder Loving Trust. The Division found that Schulte diverted Harder's funds to his own personal and business use and created a fictitious confirmation slip to cover up the misuse. In February 1993, Harder gave Schulte additional funds for investment in the Templeton Global Income Fund. Schulte similarly misused these funds for his own personal and business use and created a fictitious confirmation slip to cover up the misuse.

In February 1993, H. C. Reinhart, an Ohio resident, gave Schulte \$10,000 to purchase United States Treasury Notes for Reinhart. Schulte prepared a fictitious confirmation slip and diverted Reinhart's funds to his own personal and business use. In September 1993, Reinhart gave Schulte \$12,750 for investment in the Government National Mortgage Association Mortgage Backed Securities Program. Schulte also diverted these funds to his own personal and business use instead of making the investment directed by Reinhart.

In May 1993, Ohio resident Billy Fosnaugh gave Schulte over \$18,000 for investment in a Money Market Fund. The Division found that Schulte diverted these funds to his own personal and business use and issued to Fosnaugh fictitious account statements to cover up the misuse.

On September 14, 1994, the Division issued to Schulte a Notice of Opportunity for Hearing, Division Order No. 94-175, setting forth the Division's allegations and advising Schulte of his right to request an administrative hearing on the matter. The notice was sent certified mail but was returned undelivered. Subsequently, the Division published notice in the *Toledo Blade* pursuant to R.C. Chapter 119. Schulte did not request an administrative hearing and the Division issued the final Cease and Desist Order after the statutory publication requirements had been satisfied.

**Texas Star Resources, Inc.;
University Lands Well
#15-1 Acquisition and
Stimulation Project; and
Bill Orr, Jr.**

On December 6, 1994, the Division issued a final Cease and Desist Order against Texas Star Resources, Inc., University Lands Well #15-1 Acquisition and Stimulation Project, and Bill Orr, Jr. (collectively, "Respondents"). Texas Star is a Utah corporation with a principal place of business in Dale, Texas, and Orr is the president and statutory agent for Texas Star with an address in Austin, Texas. University Lands was an oil and gas project established by Texas Star in Crockett County Texas.

In February 1994, a husband and wife residing in Ohio purchased one fractional interest in the University Lands project for \$9,975. The interest constituted a security as

defined in R.C. section 1707.01(B). At the time of the sale, neither Texas Star, University Lands nor Orr was licensed to sell securities in Ohio. Further, the University Lands interest was not registered with the Division, the subject matter of an exempt transaction or exempt from the registration provisions of the Ohio Securities Act. Consequently, the interest in University Lands was sold in violation of R.C. sections 1707.44(A) and (C)(1).

On October 27, 1994, the Division issued to Respondents a Notice of Opportunity for Hearing, followed by an Amended Notice of Opportunity for Hearing on November 4, 1994, setting forth the Division allegations and informing Respondents of their rights to request an administrative hearing on the matter. When none of the Respondents requested an administrative hearing the final order was issued ordering Respondents to cease and desist from violating R.C. sections 1707.44(A) and (C)(1).

**Continental Wireless
Television Company; New
Orleans Wireless Cable
Associates; Robin J.
McPherson; J. R. Bishop;
Gene R. Cardenaz and
David Burnell**

On December 7, 1994, the Division issued a Final Cease and Desist Order against Continental Wireless Television Company ("CWTC"); New Orleans Wireless Cable Associates ("NOWCA"); Robin J. McPherson; Jay R. Bishop; Gene R. Cardenaz and David Burnell (collectively, "Respondents"). CWTC is a Nevada corporation with the principal place of business in San Diego, California. NOWCA is a California partnership with a principal place of business in San Diego, California. Bishop, McPherson and Cardenaz are the sole directors and executive officers of CWTC. Burnell

was an agent of CWTC and/or NOWCA. CWTC is purportedly engaged in the business of organizing and marketing partnerships to fund and operate wireless cable television systems in various market areas. NOWCA was purportedly organized to fund and operate a wireless cable television system in New Orleans, Louisiana.

On or about January 29, 1994, Burnell contacted Mark V. Holderman, the Commissioner of the Division of Securities, about investing in an NOWCA general partnership interests and an NOWCA promissory note. The solicitation constituted a "sale" as that term is defined in R.C. section 1707.01(C). Upon reviewing the NOWCA general partnership agreement the Division found that after providing for an initial meeting of the partners, the partnership agreement did not provide any vehicle for individual or concerted action by the partners. Consequently, the Division determined that the NOWCA interests was an "investment contract" by applying the four prong investment contract analysis established by the court in *State v. George*, 50 Ohio App. 2d 297 (Franklin Cty. Ct. App. 1975). Specifically, the Division found that an investor furnishes initial value, the initial value is subject to the risks of the enterprise, the investment is induced by representations of future financial gain and, in light of the provisions of the partnership agreement, an investor is not granted any management control.

On September 20, 1994, the Division issued to Respondents a Notice of Opportunity for Hearing setting forth the Division's allegations that Respondents were not licensed as dealers or salesmen by the Division in violation of R.C. sections 1707.44(A) and that the interest in NOWCA was not registered with the Division, the subject matter of an exempt transaction, or ex-

empt from the registration requirements of the Ohio Securities Act and was therefore sold in violations of R.C. section 1707.44(C)(1). The Notice of Opportunity for Hearing also informed Respondents of their right to request an administrative hearing on the matter. When none of the Respondents requested an administrative hearing, the Division issued its final order ordering Respondents to cease and desist from future violations of the Ohio Securities Act.

Peter M. Gonsalves, Jr.

On December 12, 1994, the Division issued a final Cease and Desist Order, Division Order No. 94-209, to Peter M. Gonsalves, Jr. of Fullerton, California. The final order was issued after Gonsalves failed to request an administrative hearing as permitted by Division Order No. 94-187, which was issued to Gonsalves on October 7, 1994, and set forth the Division's allegations.

In June 1993, Gonsalves sold to an Ohio resident an investment interest in Banner Fund International, a purported common law trust managed by the Swiss Trade & Commerce Trust, Ltd. The investment interests in the Banner Fund constituted a security, as that term is defined in R.C. section 1707.01(B). The investment interest in Banner Fund was not registered with the Division, the subject matter of an exempt transaction or subject to a perfected exemption. Consequently, the security was sold in violation of R.C. section 1707.44(C)(1). In addition, at the time of the sale neither Swiss Trade & Commerce nor Gonsalves were licensed to sell securities in Ohio, therefore violating R.C. section 1707.44(A). The final order ordered Gonsalves to cease and desist from future violations of the Ohio Securities Act.

H.J. Meyers & Co.; Jason Stern

On December 13, 1994, the Division issued a final Cease and Desist Order, Division Order No. 94-210, against H.J. Meyers & Co. and Jason Stern. H.J. Meyers is a California company with its principal place of business in Beverly Hills, California and Stern is an agent of H.J. Meyers with a business address in Los Angeles, California.

On February 2, 1994, Stern sold to an Ohio resident 500 shares of Holstead Energy Corporation stock for \$4,505. The Holstead Energy securities were not registered with the Division, the subject matter of an exempt transaction nor exempt from the registration requirements of the Ohio Securities Act. Consequently, the securities were sold in violation of R.C. section 1707.44(C)(1). In addition, Stern sold securities in Ohio without being licensed to do so, in violation of R.C. section 707.44(A).

On November 4, 1994, the Division had issued Division Order No. 94-201, a Notice of Opportunity for Hearing, to H.J. Meyers, Stern and another H.J. Meyers agent, Jason Sallows, setting forth the Division's allegations and giving notice of the right to request an administrative hearing on the matter. Neither H.J. Meyers nor Stern requested an administrative hearing and the Division issued its final order ordering H.J. Meyers and Stern to cease and desist from future violations of the Ohio Securities Act.

National Amateur Bowlers, Inc.; Dwight Geary

On December 13, 1994, the Division issued a final Cease and Desist Order, Division Order No. 94-211, against National Amateur Bowlers, Inc. ("NABI"), and Dwight

Geary. NABI is a Kansas corporation with its mailing address in Kansas City, Kansas. Geary was the principal owner of NABI of Toledo and had a last known residential address in Toledo. In February 1992, Geary contacted a Perrysburg, Ohio, couple about investing in NABI of Toledo. In March 1992, Geary sold to the couple a purported "Equity Investors Agreement" indicating that the couple owned a 25% stock ownership in NABI of Toledo and were also entitled to additional moneys based on bowling tournaments to be held by NABI of Toledo. The investment in NABI of Toledo constituted a security, as that term is defined in R.C. section 1707.01(B).

The security was not registered with the Division, subject to an exemption from the registration provisions of the Ohio Securities Act or the subject matter of an exempt transaction. Further, Geary was not licensed by the Division to sell securities. Consequently, the transaction was in violation of R.C. sections 1707.44(A) and (C)(1).

On September 22, 1994, the Division had issued to Geary a Notice of Opportunity for Hearing, Division Order No. 94-179, setting forth the Division's allegations and notifying Geary of his right to request an administrative hearing on the matter. Geary did not request an administrative hearing and the Division issued its final order ordering Geary to cease and desist from future violations of the Ohio Securities Act.

John D. Runyon

On December 15, 1994, the Division issued a final Cease and Desist Order, Division Order No. 94-212, against John D. Runyon of Newport News, Virginia. The Division issued the final order after Runyon failed to request an administrative hearing as permitted by Division Order No. 94-177, a Notice of Opportunity for Hearing, issued

on September 20, 1994, setting forth the Division's allegations of violations of the Ohio Securities Act by Runyon in connection with his activities with Virginia Capital Group, Inc.

The Division found that in January and February of 1993, Runyon sold to at least three Ohio residents shares of stock of Virginia Capital and made misrepresentations in connection with those sales. Further, at the time of the sales Runyon was not licensed to sell securities in Ohio and the securities were not registered with the Division, the subject matter of an exempt transaction, or otherwise exempt from the registration provisions of the Ohio Securities Act. Consequently, Runyon violated R.C. sections 1707.44(A), (C)(1) and (G). The final order ordered Runyon to cease and desist from future violations of the Ohio Securities Act.

Vern E. Davis, II

On December 15, 1994, the Division issued a final Cease and Desist Order, Division Order No. 94-213, against Vern E. Davis, II. The Division issued its final order after Davis failed to request an administrative hearing as permitted by Division Order No. 94-177, a Notice of Opportunity of Hearing, issued on September 20, 1994, setting forth the Division's allegations of violations of the Ohio Securities Act by Davis in connection with his activities with Virginia Capital Group, Inc.

The Division found that in January and February of 1993, Davis sold to at least six Ohio residents shares of stock of Virginia Capital and made misrepresentations in connection with those sales. Further, at the time of the sales Davis was not licensed to sell securities in Ohio and the securities were not registered with the Division, the subject matter of an exempt

transaction, or otherwise exempt from the registration provisions of the Ohio Securities Act. Consequently, Davis violated R.C. sections 1707.44(A), (C)(1) and (G). The final order ordered Davis to cease and desist from future violations of the Ohio Securities Act.

Civil Cases

William Milton Donald DeArman v. Ohio State Department of Commerce, Division of Securities.

On November 23, 1994, Judge William Millard of the Franklin County Court of Common Pleas issued a written decision setting aside Division Order No. 94-025, a final order denying William Milton Donald DeArman's application for an Ohio Securities Salesman License. *William Milton Donald DeArman v. Ohio State Department of Commerce, Division of Securities*, No. 94CVF-03-1409 (Franklin Cty. C.P. Nov. 23, 1994). The decision remanded the case to the Division for further proceedings.

As reported in *Bulletin* Issue 94:2, an administrative hearing on DeArman's licensure had been held on August 25, 1992. On December 9, 1993, the hearing officer issued his report recommending that DeArman be licensed. The Division rejected the hearing officer's report and issued Order No. 94-025 on February 15, 1994. Specifically, the Division found that DeArman was not of "good business repute" based on factors (2), (5), (7), (9) and (10) of O.A.C. 1301:6-3-19(D).

Judge Millard ordered a remand because the hearing officer refused to admit certain evidence purporting to relate to DeArman's "good business repute." The judge noted that the "balancing of positive and negative information" under O.A.C. 1301:6-3-19(D) would

result in a "rational conclusion" regarding "good business repute" rather than a conclusion that is "arbitrary or unreasonable."

Chiles, et al. v. M.C. Capital Corporation, et al.

A discretionary appeal to the Supreme Court of Ohio was not allowed in the case of *Chiles, et al. v. M.C. Capital Corporation, et al.*, 95 Ohio App. 3d 485 (Franklin Cty. Ct. App. 1994), *appeal dismissed* 71 Ohio St. 3d 1404 (1994). The dismissal let stand the Franklin County Court of Appeals' opinion on the interpretation of R.C. section 1707.03(M).

As described in *Bulletin* Issue 94:2, the appellate court had affirmed the opinion of the Court of Claims as to the non-availability of the transactional exemption provided by R.C. section 1707.03(M) in certain "short" sales. Specifically, the *M.C. Capital* decision confirmed the Division's position that the 03(M) exemption does not apply to the short sale of shares where the short position is covered by exercising warrants subsequent to the sale of the shares. The exemption does not apply in this situation because the shares sold are not "issued and outstanding" at the time of their sale, as required by the plain language of 03(M). Rather, the shares only become issued and outstanding upon the exercise of the warrants, which in this situation is done after the sale to cover the short position.

Beginning in January 1993, M.C. Capital had engaged in a scheme in which it first purchased, at \$.50 each, warrants to purchase shares of Premier Broadcasting. Next, M.C. Capital sold short to the public shares of Premier at \$5.00 each. Finally, M.C. would collect the investor funds and cover the short position by exercising the warrants to purchase the Premier shares at \$1.25 each.

Criminal Prosecutions

Continued from page 3

the scope of discovery under Criminal Rule 16. Although the documents are physically located at the Division's office, the discovery is still against the prosecuting attorney through Criminal Rule 16.

¹⁷ U.S. Const. Am. V; Ohio Const. Art. I § 10. *See generally* L. Katz, *Ohio Criminal Law and Practice* 197-207 (1992).

¹⁸ *Steckman*, 70 Ohio St. 3d at 428.

¹⁹ O.A.C. 1301:6-1-04 sets out the procedure for requesting documents under R.C. § 1707.12 and states in pertinent part:

Any person who desires to make an inspection of division applications, filings, or reports shall apply to the commissioner, or his designate, for permission to make such inspection. Any application for inspection of information in the files of the division must be made in writing, verified by oath of the applicant, setting forth the purpose for which inspection is desired and, in the

case of an application for inspection of information obtained through an investigation, a further statement as to the interest of the applicant.

²⁰ This result also flows from Article IV, Section 5(B) of the Ohio Constitution which subordinates R.C. § 1707.12 to Criminal Rule 16.

²¹ Crim. R. 16(B)(1)(a).

²² Crim. R. 16(B)(1)(b).

²³ Crim. R. 16(B)(1)(c).

²⁴ Crim. R. 16(B)(1)(d).

²⁵ Crim. R. 16(B)(1)(e). This section also provides that: "names and addresses of witnesses shall not be subject to disclosure if the prosecuting attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion."

²⁶ Crim. R. 16(B)(1)(f).

²⁷ Crim. R. 16(B)(1)(g).

²⁸ Crim. R. 16(B)(2). The rule also provides that this information is discoverable as provided for by Crim. R. 16(B)(1)(a),(b),(d),(f) or (g).

²⁹ R.C. § 1707.12(A). Inspection for "unreasonable of improper purposes" is expressly prohibited. *Id.*

³⁰ R.C. § 1707.12(B).

³¹ *Dublin Securities*, 68 Ohio St. 3d at 432 (internal quotation marks omitted; emphasis in original).

³² R.C. § 1707.12(C).

³³ The Division requires any agency seeking documents to submit a written "access request" promising to maintain the confidentiality of the documents.

³⁴ R.C. § 1707.12(E)(1).

³⁵ R.C. § 1707.12(E)(2).

Mr. Geyer is a Staff Attorney in the Enforcement Section and the Editor of the Ohio Securities Bulletin.

Criminal Actions

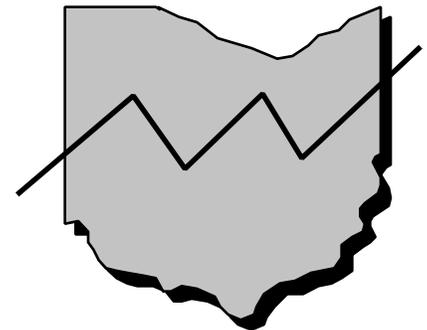
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Stephen T. Strabala

On December 6, 1994, Stephen T. Strabala of Salem, Ohio, pleaded guilty to all fifty-nine counts on which he had been indicted by a Columbiana County Grand Jury in April 1994. Specifically, the plea covered: sixteen counts each of securities fraud (1707.44(G)), false representations in the sale of securities (1707.44(B)(4)) and unlicensed sale of securities

(1707.44(A)); two counts of making false records in securities transactions (1707.44(K)); two counts of aggravated theft; and seven counts of theft.

As reported in *Bulletin* Issue 94:2, Stephen Strabala is the son of former Columbiana County Treasurer Ardel Strabala. While Treasurer, Ardel invested County funds through Stephen while Stephen was not licensed by the Division. Over \$6,700,000 was lost and another \$3,000,000 was located and frozen at brokerage firms.



Registration Statistics

The table to the right sets out the number of registration filings received by the Division during the fourth quarter of 1994, compared to the number received during the fourth quarter of 1993, as well as the number of registration filings received by the Division in 1994, compared to the number received in 1993.

* Effective October 11, 1994, the Form 2(B) and Form 3-O filing requirements were eliminated.

<i>1707</i>	<i>4Q'94</i>	<i>Total '94</i>	<i>4Q'93</i>	<i>Total '93</i>
.02(B) *	51	836	374	1,461
.03(O) *	1,125	10,433	2,587	11,580
.03(Q)	329	1,406	336	1,287
.03(W)	37	135	46	155
.04	0	2	0	0
.041	0	0	0	2
.06(A)(1)	30	132	30	143
.06(A)(2)	15	51	10	48
.06(A)(3)	7	24	8	22
.06(A)(4)	7	45	18	65
.09	145	583	154	550
.091	894	3,407	897	3,196
.39	14	93	15	88
.391	0	3	0	2
.391/.09	1	10	0	7
.391/.03(O)	218	959	208	808
.391/.03(Q)	40	180	31	125
.391/.03(W)	1	9	2	6
.391/.06(A)(1)	0	0	0	0
.391/.06(A)(2)	0	0	0	0
.391/.06(A)(3)	0	0	0	0
.391/.06(A)(4)	0	0	0	0
<i>Totals</i>	<i>2,914</i>	<i>18,308</i>	<i>4,716</i>	<i>19,546</i>

Licensing Statistics

The table below sets out the number of Salesmen and Dealers licensed by the Division at the end of the fourth quarter of 1994, compared to the same quarter of 1993, as well as the number of Salesmen and Dealers licensed by the Division at the end of the first, second and third quarters of 1994, compared to the same quarters of 1993.

	End of Q1 1994	End of Q1 1993	End of Q2 1994	End of Q2 1993	End of Q3 1994	End of Q3 1993	End of Q4 1994	End of Q4 1993
Number of Salesmen Licensed:	65,991	56,200	70,200	59,570	72,045	62,345	70,642	64,589
Number of Dealers Licensed:	1,778	1,678	1,842	1,750	1,894	1,812	1,759	1,800

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