



180 East Broad Street
Columbus, Ohio 43215

ohio securities bulletin

JAMES A. RHODES
Governor

J. GORDON PELTIER
Director of Commerce

JAMES F. HURD
Commissioner of Securities

June 30, 1977

COMMENTS

Proposed Tender Offer By Esmark

On June 14, 1977, Esmark, Inc. filed a Form 041 with the Division of Securities and announced its intention to make an offer to purchase any and all of the outstanding shares of common stock of Inmont Corporation, an Ohio corporation, for cash at \$25 per share.

On January 14, 1977, Esmark purchased 5.7% of the total outstanding shares of Inmont in a private sale handled by Oppenheimer & Co. On March 10 and 11, 1977, also in a private sale handled by Oppenheimer, Esmark purchased an additional 297,000 shares bringing its total holdings to 9.5% of the outstanding Inmont shares. Given the foregoing, it was the opinion of the Division that it must decide whether or not R. C. Section 1707.041(B)(2) was applicable to Esmark's proposed offer before further examination could be made of the proposed offer.

R. C. Section 1707.041(B)(2) has been referred to by many as the "anti-creeping tender offer provision" of the Ohio Tender Offer Statute. R. C. Section 1707.041(B)(2) provides:

"(2) No offeror shall make a take-over bid if he owns five per cent or more of the issued and outstanding equity securities of any class of the target company, any of which were purchased within one year before the proposed take-over bid, and the offeror, before making any such purchase, or before the thirtieth day following the effective date of this section, whichever is later, failed to publicly announce his intention to gain control of the target company, or otherwise failed to make fair, full, and effective disclosure of such intention to the persons from whom he acquires such securities."

The purpose of this subsection is to prohibit the offeror from acquiring a significant portion of the offeree's stock without giving advance notice and disclosure to the sellers of the stock that it is seeking control of the offeree corporation.

The central legal issue before the Division of Securities was whether or not R. C. Section 1707.041(B)(2) strictly prohibits any tender offer being made within a year, when the offeror has purchased five percent or more of the outstanding equity securities of any class of the offeree company. If the strict prohibition interpretation of Section 1707.041(B)(2) were adopted, Esmark would clearly be precluded from making a tender offer for the period of one year from the date of its initial purchase on January 14, 1977. Alternatively, if the Division of Securities did not accept the strict prohibition argument then the statute would require an examination of the intentions of Esmark at the time of its initial purchase. The statute appeared to be susceptible to either the strict prohibition argument based upon its initial language or, in the subsequent language, an examination of the offeror's intent, "... the offeror before making any such purchase ... (will be precluded from making any offer if he has) failed to publicly announce his intention to gain control of the target company ..."

After reviewing the information and briefs filed by both Esmark and Inmont; after a review of legal authorities who have examined 1707.041(B)(2); after a review of relevant federal case law; and after careful consideration of the facts and the circumstances surrounding the purchases by Esmark, the Division concluded, in a thirteen page decision, that the proposed offer by Esmark would not be precluded by R. C. Section 1707.041(B)(2) from further examination by the Division pursuant to the other provisions of Section 1707.041.

On the same day, the Division granted Inmont's June 21, 1977, request for a hearing pursuant to Section 1707.041(B)(1)(b) of the Revised Code, for the purpose of determining whether Esmark has made fair, full and effective disclosure of all material information needed by the shareholders of Inmont in order for them to make a decision to accept or reject the proposed offer.

On July 8, 1977, the Commissioner designated Robert C. Perrin, a Columbus attorney, as hearing examiner for the

above mentioned hearing which was to convene on Monday, July 11, 1977. However, on July 8, 1977, Esmark and Inmont agreed by stipulation to delay the proceedings for eight days. Hearings were scheduled to commence on Tuesday, July 19, 1977, when a two day delay was agreed upon.

On July 21, 1977, the managements of Esmark and Inmont reached an agreement whereby Esmark granted an option to a person or persons designated by Inmont to purchase the Inmont shares held by Esmark. The option is to remain open until September 15, 1977. If the option is not exercised, Esmark will go forward with its proposed offer. In exchange, Inmont agreed to withdraw certain litigation pending against Esmark and withdraw its request for a hearing before the Division of Securities. On July 22, the Division refused Inmont's request.

Babcock & Wilcox – United Technologies

On June 6, 1977, Babcock & Wilcox Company filed a notice of its appeal to Franklin County Common Pleas Court from the June 3, 1977, Order of the Division which permitted United Technologies Corporation to go forward with its offer to purchase any and all of the outstanding equity securities of B&W.

On July 20, 1977, at 1:30 p.m., a hearing was held in that Court and a Motion to Dismiss filed by the Office of the Attorney General was granted. Babcock & Wilcox has appealed that decision to the Court of Appeals.

SECTIONS

CONSUMER FINANCE

Telephone Harassment

While the telephone has become almost indispensable as a debt collection tool, I wonder how many of the collection personnel are aware of the broader penal provisions and liabilities to which they are exposed under Section 2917.21 of the Ohio Revised Code.

The new provision (1974) provides in part:

(A) No person shall knowingly make repeated calls to another in any of the following ways:

- (1) Anonymously;
- (2) At extremely inconvenient hours;
- (3) In offensively coarse language;
- (4) After a reasonable request to desist.

(B) No person, with purpose to harass another, shall make a telephone call to such other person without purpose of legitimate communication.

While this statute bears some resemblance to the previous statute, there is still a significant departure. The previous

telephone harassment law (Section 4931.31, Ohio Revised Code) prohibited only certain types of telephone communication. These were:

- (1) threatening calls;
- (2) lewd, lascivious or indecent calls;
- (3) repeated calls for the sole purpose of harassment.

This previous statute would not be applicable to any of the normal collection communications, such as "repeated calls for the sole purpose of harassment". The newer law could involve ad hoc interpretation of "without purpose of legitimate communication" and could be much clearer if the debtor made a reasonable request that such calls be discontinued. Likewise, the newer law could involve ad hoc interpretation of "extremely inconvenient hours". It would seem that the basic purpose of the legislators was to eliminate the all-night calls but other situations could apply.

At any rate, the newer version broadened the telephone harassment statute generally, which is in keeping with society's increasing stress toward the privacy and personal well-being of its individuals.

1976 Basic Annual Report

The Section has just completed the accumulation and balancing of the statistics for the two 1976 Basic Annual Reports. While the responses from licensees were much more prompt than last year, we continue to find gross errors in the reports causing the Section many hours of needless work.

On the front page of the individual report, at the top, underlined and in capital letters, the instructions read: "REPORT DOLLAR-CENTS AMOUNT IN DOLLARS ONLY. ROUND OFF CENTS TO DOLLAR AMOUNTS ONLY." Fourteen small loan companies and sixteen mortgage loan companies failed to round off. Other errors included:

- (a) Assets and liabilities did not balance;
- (b) Lines 50 (second mortgage) and 51 (small loan) were not the same as lines 7(c) (second mortgage) and 7(e) (small loan);
- (c) Total of Schedules E and F did not agree with total loans made in year;
- (d) Errors in addition.

These problems were presented in previous articles in the Ohio Securities Bulletin (Vol. II, No. 2, 1974, and June 30, 1976)

Subsequently, the problems have increased and the Division is presently researching the promulgation of a rule providing for fines. In some cases, a revocation hearing should be held. From a time-cost standpoint, it is essential that these infractions be held to a minimum.

R. P. Fickell, Supervisor
Consumer Finance Section

CREDIT UNIONS

Early in 1976, the Union Bank, a California banking corporation, notified the Division that it wished to offer Ohio state chartered credit unions the opportunity to invest in the National Investment Fund for Credit Unions (NIFCU) and the Plan of Common Trust Funds of the Union Bank for Credit Unions.

The Division was asked to review this program, an investment fund established exclusively for credit unions, to determine if the NIFCU complies with the statutes and rules governing the operation of state chartered credit unions.

After careful consideration, the Division has authorized participation in this fund by Ohio state chartered credit unions with the following restrictions:

An Ohio chartered credit union may invest in the National Investment Fund to an extent not exceeding in the aggregate 5% of the capital and surplus of such credit union as of the previous 31st day of December.

The Division of Securities has not approved or recommended the Fund nor has the Division passed upon the accuracy or adequacy of same.

ENFORCEMENT

The Montgomery County Grand Jury returned indictments on July 7, 1977, against two securities salesmen, Leo F. Flotron and Joel A. Camery, for a securities fraud involving the sale of limited partnership interests in a restaurant chain in Cincinnati and Indianapolis. Flotron and Camery were indicted on a total of fifty-seven counts, which included forgery, theft by deception, larceny by trick, and the sale of unregistered securities. The Ohio Division of Securities and the Montgomery County Prosecutor's Office conducted a combined investigation that culminated in the indictments.

The indictments allege that Flotron and Camery failed to deposit in the escrow account funds obtained from investors. They instead diverted the money into the account of their own business, Tax Sheltered Investments, Inc. Over \$170,000 was fraudulently obtained from approximately twenty individuals in the Dayton, Ohio area.

Flotron and Camery were licensed securities salesmen with a St. Louis securities broker, Weinrich, Zitzmann and Whitehead. Their licenses were cancelled by the broker in April, 1977, after it instituted an investigation as a result of customer complaints.

In addition to investments in the restaurant chain, funds were also obtained from investors who thought they were

purchasing life insurance policies, interests in a motion picture production, and interests in the offspring of a prize-winning bull.

On June 15, 1977, Lewis D. Hall entered a plea of guilty in the Hamilton County Court of Common Pleas to a charge of selling securities without a license in violation of Section 1707.44(A) of the Ohio Revised Code.

PENDING LEGISLATION

H. B. 339

The proposed Ohio Investors Protection Act was introduced into the House of Representatives on March 1, 1977. On March 9 it was referred to the House Insurance, Utilities, and Financial Institutions Committee. Subsequently the bill was assigned to the Financial Institutions Subcommittee. To date there has been one hearing on the proposed act.

H. B. 356

This bill would create a Division of Credit Unions and a Division of Consumer Finance within the Ohio Department of Commerce. In addition, it would create a credit union rotary fund. Small credit unions, which now find the examination fees especially burdensome, would benefit by the adoption of H. B. 356, which abolishes all such fees. The bill would help state chartered credit unions achieve parity with federal credit unions. The Superintendent of Credit Unions would be granted authority to initiate rules and regulations to allow the state credit unions certain privileges already afforded federal credit unions.

H. B. 356 was introduced on March 2, and referred to the Governmental Affairs Committee on March 23. There was a March 30 hearing on the bill.

S. B. 139

Senate Bill 139 was introduced on March 8, and held in the Senate Judiciary Committee from April 6 to May 11. The Senate passed the measure on May 25. The bill was referred to the House Insurance, Utilities, and Financial Institutions Committee. Representatives of the Division of Securities recently testified before the House Insurance, Utilities, and Financial Institutions Committee in opposition to Senate Bill 139. This measure amends several sections of the Ohio Securities Act which, among other things, would increase the number and types of exemptions, and substantially alter existing liability provisions.

The first phrase of proposed 1707.20 states "No provision of Sections 1707.01 to 1707.45 of the Ohio Revised Code imposing any liability applies . . .". What this phrase means is that if the remaining part of the section is complied with, there would be no liability to anyone - investors, the Divi-

sion of Securities, etc. This phrase writes out of the Ohio Securities Act all liability provisions - criminal or civil, and whether available to investors, the Division of Securities, prosecutors or anyone else.

It then becomes important to review the succeeding language. The section continues: ". . . to any act done or omitted in good faith in conformity with any rule, form or order of the Division of Securities, 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."

The Division of Securities, in making the necessary findings under Section 1707.09 to permit registration of securities, does so by issuing an "Order." This order, when considered in the light of proposed 1707.20, would appear to mean that sales of securities in accordance with such order authorizing the sale could be conducted without investors having the right to use the liability provisions of the Ohio Securities Act, even though a Court or the Division later determines that the order is invalid. This means that the investor - the person putting his own money into the securities sold, has lost the benefit of the liability provisions of the Ohio Securities Act whenever the Division authorizes the registration of an issuer.

The fact of the matter is that the Division of Securities can make mistakes in authorizing the registration of securities. The loser from any such a mistake, under the provisions of proposed 1707.20, is the investor. The burden thus imposed upon the Division to not make a mistake for fear of injuring investors is not one which the Division desires, nor one that the legislature should desire the Division to have.

Of the exemptions contained in S. B. 139, the Division of Securities views the exemption provided for in proposed 1707.03(O) as the most destructive. That proposed section omits any "suitability requirements." Some or all of the investors permitted to purchase under proposed 1707.03(O) may have no investment experience, and might be investing their life savings in a very risky venture. Under proposed 1707.03(O), they could be charged a commission - with no limitation on the amount of commission. There is no requirement that there even be a prospectus, so that potential investors might not be able to read about the company in which they are investing. There is no requirement that they be sophisticated or know anything about the company. The proposed 1707.03(O) would permit a company to sell to 10 such unsophisticated persons per year, year after year. This is tantamount to permitting ten free bites at unsophisticated investors per year. For the smooth talking, hard sell salesman, this would be more than enough. Certainly any desire to help small business in avoiding red tape should not be at the expense of the unsophisticated investor. In balancing investor protection against administrative inconvenience, clearly proposed 1707.03(O) should not be adopted.

Any exemption from registration has the effect of eliminating or reducing investor protection. As to the securities

or transactions exempted, there is no review by the Division of Securities. In balancing the concepts of "investor protection" against "administrative inconvenience", the present Ohio Securities Act reaches the conclusion that the likelihood of damage to investors in some limited situations is so small that certain limited exemptions are permitted for administrative convenience. These are narrowly defined situations. S. B. 139, on the other hand, would open up broad exemptions from registration with no showing that the proposed exemptions would not harm the cause of investor protection.

Anytime you create an exemption for sales to a number of people, without defining any qualities of suitability, sophistication or financial responsibility of those people, you are creating the possibility (and probable reality) that non-registered sales will be made to unsophisticated people who may invest a substantial portion of their net worth in those securities exempted. As to those persons, investor protection has been reduced through the elimination of registration with, and review by, the Division of Securities.

The Division of Securities believes that amendments to the Ohio Securities Act might be in order so long as those proposed amendments and/or exemptions do not cause damage to Ohio investors.

ADMINISTRATIVE ACTIONS

Statistics summarizing the Division's activities for April, May, and June 1977:

ENFORCEMENT SECTION	April	May	June
Inquiries Received	129	48	48
Complaints Received	20	13	12
Complaints Closed	22	0	8
Broker/Dealer Suspensions	0	0	0
Salesman Suspensions	0	0	0
Salesman License Revocations	0	0	0
Salesman License Refusals	1	2	1
Registration Suspensions	1	0	0
Hearings Held	4	0	0
Court Actions	0	0	1
Prosecutions Recommended	1	2	3
In-Depth Investigative Interviews	80	22	9
Subpoenas Issued	11	7	1
Matters Referred to			
Attorney General	2	1	0
Matters Referred to SEC	1	4	2
CONSUMER FINANCE SECTION	April	May	June
<u>Licenses Issued</u>			
Small Loan	7	4	9
2nd Mortgage	7	2	6
Premium Finance	1	0	0
Pawnbroker	0	2	0

Licenses Cancelled

Small Loan	1	1	4
2nd Mortgage	6	1	0
Premium Finance	0	0	0
Pawnbroker	0	0	0

Licenses Suspended

Small Loan	0	0	0
2nd Mortgage	0	0	0
Premium Finance	0	0	0
Pawnbroker	0	0	0

CREDIT UNION SECTION

	April	May	June
Suspensions	0	0	0
Hearings	0	0	0
Mergers	1	0	4
New Charters	0	0	0
Examination Fees	\$5,985.84	5,967.40	5,869.23
Xerox Fees	\$ 201.25	310.25	380.50
Supervisory Fees	\$ 240.14	0	0
CU-2 Fees	\$ 10.00	0	0
Penalty Fees	\$ 165.00	0	0

BROKER/DEALER SECTION

	April	May	June
--	-------	-----	------

Applications Received

Securities Broker/Dealer (Form 15)	12	10	10
Foreign Real Estate Broker/Dealer (Form 331A)	0	2	3
Securities Salesman (Form 16)	190	200	198
Foreign Real Estate Salesman (Form 331B)	14	7	6

Licenses Cancelled

Securities Broker/Dealer Foreign Real Estate Broker/Dealer	1	0	0
Securities Salesman Foreign Real Estate Salesman	416	119	93
	4	4	9

EXAMINATION SECTION

	April	May	June
Broker/Dealer Examinations	2	25	13
Form 6	5	7	7
Form 9	22	15	5
Other	6	6	2
Credit Union Examinations	73	56	43
Small Loan Examinations	165	148	123
Second Mortgage Examinations	130	109	89
Premium Finance Examinations	0	0	0
Pawnbroker Examinations	2	3	11
Compliance Examinations	297	260	223

*Small loan, second mortgage, premium finance, and pawnbroker examinations.

STATISTICS

REGISTRATION SECTION

Applications Received

	April	May	June
2(B)	71	70	46
3-0	732	582	542
5(A)	2	2	3
6(A)(1) & 6(A)(2)	262	201	194
6(A)(3)	35	29	38
6(A)(4)	11	10	6
Interstate Corporate Stock Option & Purchase Plan	36	28	25
Intrastate Corporate Investment Companies	1	3	13
R.E.I.T.	3	5	3
Real Estate Ltd. Partnerships	43	42	41
Cattle Funds	1	1	0
Oil & Gas Offerings Form 39	14	15	8
	1	0	1
	25	33	37
	25	13	19

Certificates and Orders Issued

	April	May	June
2(B)	72	57	64
3-0	782	490	597
5(A)	0	1	2
6(A)(1) & 6(A)(2)	281	154	177
6(A)(3)	46	18	37
6(A)(4)	11	9	5
Interstate Corporate Stock Option & Purchase Plan	23	24	34
Intrastate Corporate Investment Companies	4	5	7
R.E.I.T.	1	1	2
Real Estate Ltd. Partnerships	41	54	45
Cattle Funds	0	0	0
Oil & Gas Offerings Form 39	11	18	11
	0	0	0
	18	30	36
	10	18	14

**STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF SECURITIES
180 East Broad Street
Columbus, Ohio 43215**