

OHIO SECURITIES BULLETIN

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Sub. H.B. 6 Authorizes Electronic Proxies and Makes Technical Changes to 1707

by Thomas E. Geyer

The 123rd General Assembly's Substitute House Bill 6 ("Sub. H.B. 6" or "the Bill"), which takes effect on September 13, 1999, amends the Ohio General Corporation Law (Ohio Revised Code ("R.C.") Chapter 1701) to expressly authorize the use of electronic proxies in shareholder voting under Ohio corporate law. The Bill also makes several important technical changes to the Ohio Securities Act (R.C. Chapter 1707).

Electronic Proxies

R.C. 1701.48 establishes the right to vote by proxy under Ohio law.¹ Sub. H.B. 6 authorizes the use of electronic proxies by amending R.C. 1701.48(A) to provide that a proxy may be appointed by "a verifiable communication authorized by the person" appointing the proxy. Correspondingly, the Bill amends R.C. 1701.48(B) to provide that "any transmission that creates a record capable of authentication," includ-

ing (but not limited to) an electronic mail or telephonic transmission, that appears to have been transmitted by the person entitled to vote is a "sufficient verifiable communication to appoint a proxy." The amendment puts Ohio on equal footing with the 20 other states that expressly permit electronic proxies.²

The use of electronic media in proxy voting is an issue that results from the intersection of technology and corporate law. Since 1995, when the Securities and Exchange Commission issued guidance regarding electronic communication between a company and its shareholders,³ "companies have moved rapidly to embrace the potential of electronic technologies in investor relations."⁴ Proponent testimony on Sub. H.B. 6 explained why companies have rapidly embraced electronic proxies: they are faster than ordinary mailed proxies; they are less expensive than ordinary mailed proxies; and they provide a convenient alternative for many shareholders.⁵

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Day Trading and Licensing Requirements under the Ohio Securities Act

by Michael P. Miglets

Securities firms have recently begun to solicit Ohio investors to become day traders. A day trader generally buys and sells securities directly from market makers or private trading networks with access from a securities firm's computers. Shares are held only for a few minutes or hours. The day trader liquidates all positions prior to the end of the trading day to avoid the risk of overnight news affecting the securities markets. The day trader's goal is to make small profits on a high number of transactions each day by getting the best price on each transaction.

Day traders generally deposit funds, usually \$25,000 to \$50,000, with the securities firm to offset losses and pay a monthly access fee to use the firm's computers. Commissions are usually \$.01 to \$.02 per share and are limited to a maximum of \$15.00 to \$25.00 per trade. Some firms require investors to pay for a training course on the operation of the firm's computers and day trading strategies. The securities firms offer computer access to market makers that compile best prices for securities. Trading profits are split between the investor and the firm.

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Ohio Securities Bulletin

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Sub. H.B. 6 and 1707

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Prior to Sub. H.B. 6, it was unclear whether electronic proxies were permitted under R.C. 1701.48. In May 1998, the Ohio Division of Securities (the "Division") requested the opinion of the Ohio Attorney General as to whether the shareholders of an Ohio corporation could vote by proxy via an electronic computer transmission.⁶ The Attorney General's office responded that electronic proxy voting was permitted; however the response letter stated that it "did not constitute a formal or informal opinion of the Attorney General, but is the legal advice of the Assistant Attorney General assigned to represent the Ohio Department of Commerce, Division of Securities."⁷ As a result, many practitioners were hesitant to rely upon the response.

Following the Attorney General's response to the Division, the Ohio State Bar Association Corporation Law Committee impaneled an Electronic Proxy Subcommittee to develop amendments to the Ohio General Corporation Law to expressly authorize the use of electronic proxies.⁸ During its deliberations, the Subcommittee reviewed the laws of other states, discussed the issue with secretaries of publicly held companies, and consulted with proxy solicitation firms. The Subcommittee developed the amendments to R.C. 1701.48 that are contained in Sub. H.B. 6. The Subcommittee also proposed the following "Committee Comment" to accompany the revised R.C. 1701.48:

The amendments to this section are intended to adapt Ohio law to developing technologies in the area of corporate elections. The amendments recognize as authorized under law all forms of manually and electronically transmitted proxy appointments to the extent such transmissions satisfy other provisions of applicable law. For purposes of this section, a verifiable communication shall include any document or transmission that is or may be converted into or viewed, stored and retrieved in paper or other verifiable format. Unless otherwise provided by law or by the articles or regulations, it is intended that di-

rectors shall have delegable authority to determine the validity of any proxy appointment or transmission pursuant to this section and to establish procedures for authenticating such appointments or transmissions in any matters properly submitted to shareholders for their vote. The amendments to this section are not intended to affect or invalidate proxy appointments or transmissions occurring prior to the effective date of the amendments. As provided in [R.C.] 1701.11(B)(10), 1701.04(B)(2) and 1701.69, the articles and regulations may contain provisions defining, limiting or regulating the form in which proxies may be transmitted.

Amendments to the Ohio Securities Act

At the suggestion of the Division, Sub. H.B. 6 also includes several technical, but important, changes to R.C. 1707.

First, the Bill amends the following sections which were added to the Ohio Securities Act by the 122nd General Assembly's Am. Sub. H.B. 695:⁹

- R.C. 1707.03(Y), to clarify that the exemption is available only to issuers and to clarify the circumstances under which the notice of the offering must be filed with the Division;

- R.C. 1707.161(A)(2), to clarify the circumstances under which a natural person may act as both an investment adviser and an investment adviser representative for another investment adviser;

- R.C. 1707.161(A)(4), to clarify the circumstances under which investment adviser representatives of certain investment advisers are excepted from being licensed by the Division; and

- R.C. 1707.161(B)(3), to make a grammatical correction by changing "is" to "in."

The Bill also adds new R.C. 1707.161(B)(4), which clarifies that a natural person may be licensed by the Division as both a dealer of securities and an investment adviser.

Second, the Bill amends R.C. 1707 to clarify that fraud in the *purchase* of securities is prohibited. Prior to the Bill, R.C. 1707.44(G) provided in pertinent part that "no person *in selling securities* shall

OHIO SECURITIES BULLETIN

Desiree T. Shannon, Esq., Editor

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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knowingly engage in any act or practice which is . . . declared illegal, defined as fraudulent or prohibited.” The concept of “selling securities,” as defined in R.C. 1707.01(C), is very broad and includes “a solicitation of an offer to buy.” However, the Division’s Takeover Advisory Committee recommended that the prohibition on fraud in the purchase of securities be more expressly codified.¹⁰ Sub. H.B. 6 accomplishes this by adding the concept of purchase to the fraud prohibition in R.C. 1707.44(G), to the definition of fraud in R.C. 1707.01(G), and as a definition in new R.C. 1707.01(MM).¹¹

Third, the Bill adds new R.C. 1707.439 to clarify that rescission actions under R.C. 1707.43 are not subject to the standards for certain private securities litigation established by R.C. 1707.432 to 1707.438. This corrects an apparent oversight that occurred when the litigation standards were added to the Ohio Securities Act by the 121st Ohio General Assembly’s House Bill 350 (commonly known as the “Tort Reform Bill”). The litigation standards appear to have been designed to align the Ohio securities laws with the federal securities laws as amended by the federal Private Securities Litigation Reform Act of 1995.¹² However, the Ohio amendments were not as narrowly drafted as the federal amendments; while the federal amendments carefully preserved the federal right of rescission, the Ohio amendments could be read to impair the Ohio right of rescission. Since R.C. 1707.432 to 1707.438 were designed to align Ohio law with the federal securities litigation standards, and the federal standards fully preserve the federal right of rescission, the Division believes that new R.C. 1707.439 simply corrects an oversight and is consistent with the intent behind adding securities litigation standards to the Ohio Securities Act.¹³ Moreover, the Division is deeply committed to preserving the right of rescission because its *in terrorem* effect encourages compliance with the Ohio securities laws,¹⁴ because plaintiffs who bring rescission actions serve as “private attorneys general” in the enforcement of the Ohio securities laws, and because of the Ohio Supreme Court’s consistent and unequivocal recognition of the right of rescission.¹⁵

Copies of Sub. H.B. 6 are available at the Legislative Service Commission’s Bill Room in the Statehouse building in Columbus, and on the Internet at http://www.legislature.state.oh.us/bills.cfm?ID=123_HB_6.

Endnotes

¹ Under corporate law, “proxy” can mean one of three things. First, it can mean a person who represents another in an agency-type relationship. *See, e.g.,* *Cliffs Corporation v. United States*, 103 F.2d 77 (6th Cir. (Ohio) 1939); *Muth v. Maxton*, 53 Ohio Ops. 263 (C.P. 1954). Second, it can mean the grant of authority from one person to another so that the second person may act for the first. *See* R.C. 1707.48(A). Third, it can mean the instrument itself that grants authorization to one to act on behalf of another. *See* *Black’s Law Dictionary* 1226 (6th ed. 1990).

R.C. 1701.48 encompasses all three notions of proxy: first it speaks in terms of a proxy representing another person; second, it speaks in terms of granting authority to act by appointing a proxy; and third, it speaks in terms of an instrument, specifically “a writing signed by such person.” Sub H.B. 6’s amendments broaden the second and third statutory notions of proxy. Specifically, the amendments permit authority to be granted by one to another by a “verifiable communication,” rather than just a “writing,” and the amendments provide that electronic transmissions may serve as the method, or instrument, of authorization.

² Friedman, *Securities Regulation in Cyberspace* § 11.05 (2d ed. 1998). The states are: CA, CO, CT, DE, IN, LA, MI, MN, MS, MO, NV, NJ, ND, NY, OK, RI, TN, UT, VA and WY. *Id.* at n. 55.

³ Use of Electronic Media for Delivery Purposes, Release No. 33-

7233, 1 Fed. Sec. Law Rep. (CCH) ¶ 3200 (Oct. 6, 1995).

⁴ Testimony of Professor Howard M. Friedman regarding House Bill 6 before the House of Representatives Civil and Commercial Law Committee (Feb. 17, 1999).

⁵ Testimony of David P. Porter regarding House Bill 6 before the House of Representatives Civil and Commercial Law Committee (Feb. 10, 1999).

⁶ *See Division Receives Legal Advice Regarding E-Proxies*, Ohio Securities Bulletin 98:2 (1998). The Division also inquired as to whether electronic proxies were permitted in connection with a special meeting of the shareholders held pursuant to R.C. 1701.831, and whether R.C. 1707.041 required that the availability of electronic proxies be disclosed to the offerees of a control bid. *Id.*

⁷ *Id.*

⁸ Members of the Subcommittee were: David P. Porter, Chair (Jones, Day, Reavis & Pogue) Professor Howard M. Friedman (Toledo College of Law); David A. Zagore (Squire, Sanders and Dempsey); J. Michael Herr (Thompson, Hine & Flory); and the author.

⁹ *See* Ohio Securities Bulletin 98:4 (1998) for a discussion of Am. Sub. H.B. 695.

¹⁰ *See Takeover Advisory Committee Meeting Summary*, Ohio Securities Bulletin 99:1 (1999).

¹¹ Fraud in the purchase of securities is most often seen in the tender offer context. The Division’s concern in this regard has been height-

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Sub H.B. 6 and 1707

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ened with the recent increase in so-called “mini-tender” transactions. In a mini-tender, an offeror contacts shareholders seeking two to three percent of a corporation’s shares, usually at a price below the prevailing market price. By seeking less than five percent, the offeror avoids the disclosure requirement of the federal Williams Act, and by seeking less than ten percent the offeror avoids the disclosure requirements of the Ohio Control Bid Statute. As a result, little, if any, information is provided and shareholders are often intimidated into making unsound economic decisions. *See, e.g., Beware the Lure of Mini-Tenders*, Cleveland Plain Dealer, March 15, 1999; *R.G. Barry Shareholders Receive Unsolicited, Below-Market Tender Offer For Stock*, The Daily Reporter, Feb. 5, 1999; *Pacholder Offer Raises Questions*, Cincinnati Post, Jan. 29, 1999. *How The Master of Mini-Tenders Makes It Work*, The Wall Street Journal, Jan. 28, 1999; *Mini Tenders Draw Concerns of Regulators*, The Wall Street Journal, Jan. 27, 1999.

¹² Pub. L. No. 104-67, 109 Stat. 737 (Dec. 22, 1995).

¹³ The author believes that the oversight in failing to exclude re-

scission from the sweep of 1707.432 to 1707.438 is easily explained. First, while there are two primary federal securities statutes, the Securities Act of 1933 (the “1933 Act”) and the Securities Exchange Act of 1934 (the “1934 Act”), there is only one Ohio Securities Act. In simple terms, as to the range of issues addressed by the Ohio Securities Act, on the federal level some are addressed in the 1933 Act and some are addressed in the 1934 Act. Recognizing this distinction on the federal level, Private Securities Litigation Reform Act of 1995 (the “Federal Reform Act”) made one set of changes to the 1933 Act, and a similar, but different set of changes to the 1934 Act. This same care was not evidenced when the 1934 Act changes were dropped into the Ohio Securities Act as a “one size fits all” reform effort.

Second, the issue of rescission on the federal level is addressed in section 12 of the 1933 Act. And, the Federal Reform Act changes to the 1933 Act do not impair the federal right to rescission. This clearly evidences Congressional intent not to impact the rescission remedy. However, since 1707.432 to 1707.438 are based on the 1934 Act changes contained in the Federal Reform Act, 1707.432 to 1707.438 do impact the Ohio rescission remedy. Specifically, 1707.436, which addresses the required mental state and burden of

proof in certain civil securities litigation, is derived from section 21D(b) of the 1934 Act. 1707.436 appears to impair the rescission remedy under Ohio law. However, the language in section 21D(b) of the 1934 Act does not appear in the 1933 Act, demonstrating the Congressional intent not to impose the mental state and burden of proof requirements on federal rescission actions.

So, the author believes that new 1707.439 is appropriate because it has the effect of more accurately reflecting the Federal Reform Act. Further, damages in a rescission action are limited, by statute, to the purchase price of the security. Thus there is no concern that excepting rescission actions from 1707.432 to 1707.438 will lead to the types of large damage awards that the litigation standards seek to limit.

¹⁴ Friedman, Ohio Securities Law and Practice § 35.04 (1998 Supp.).

¹⁵ Callahan v. Class One, 58 Ohio St. 3d 76 (1991); Pencheff v. Adams, 5 Ohio St. 3d 153 (1983); and Bronaugh v. R. & E. Dredging Co., 16 Ohio St. 2d 35 (1968). In both *Callahan* and *Pencheff* the Division filed amicus briefs urging the full recognition of the rescission remedy.

Mr. Geyer is the Commissioner of Securities.

Day Trading

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The Division has received inquiries as to whether the securities firms offering day trading services and the individual investors must be licensed. Some firms have indicated that as all transactions are dealer to dealer and these trades do not involve retail clients, a license should not be required. While R.C. 1707.14(A)(1)(a) indicates a securities dealer license is not required for a person transacting business through or with a licensed securities dealer, the Division has concluded that a securities firm offering day trading programs to Ohio

investors must be licensed as a securities dealer in Ohio.

R.C. 1707.01(E) defines “dealer” to include persons who engage in the purchase or sale of securities for the account of others in the reasonable expectation of receiving a commission, fee or other remuneration from the purchase or sale of securities. Under this definition, both the securities firms and the day trader may be deemed dealers under the Ohio Securities Act. The securities firm clearly will be receiving commissions from each day

trader’s account, the monthly access fee and a share of profits on securities transactions. The securities firm may also receive compensation from the day trader’s deposit to offset losses.

The day trader may also be a dealer under the Ohio Securities Act, as the day trader is purchasing and selling securities for another person’s account in the reasonable expectation of compensation from profits on securities trades. As both the securities firm and the day trader are both dealers, one party must be licensed as a

Division Enforcement Section Reports

Administrative Orders

THE HERITAGE FOUNDATION, INC.

On March 10, 1999, the Division issued Order No. 99-092, a Cease and Desist Order, against the Heritage Foundation, Inc., located in Ohio.

On February 10, 1999, the Division issued Division Order No. 99-058, a Notice of Opportunity for Hearing, to The Heritage Foundation, Inc. The Division alleged that the Respondent violated the provisions of Ohio Revised Code section 1707.44(C)(1) which prohibits the unregistered sale of securities. Upon receiving the Order from the Division, the Respondent and Division entered into a Consent Agreement in which The Heritage Foundation, Inc. was ordered to Cease and Desist from acts and practices contributing to the above violation.

PHILIP IRWIN LEWIS

On March 12, 1999, the Division issued Order No. 99-095, a Final Order to Deny Application for Securities Salesman License, against Philip Irwin Lewis. The Applicant's residence is in Florida.

On January 28, 1999, the Division issued to Philip Irwin Lewis Division Order No. 99-033, a Notice of Intent to Deny Application for Securities Salesman License

and Notice of Opportunity for Hearing. The Division alleged that Applicant was not of "good business repute" as that term is used in Administrative Code Rule 1301:6-3-19(D)(9) and Revised Code section 1707.19(A). Applicant did not timely request an administrative hearing pursuant to Ohio Revised Code Chapter 119. Therefore, an Order was issued to Deny the application for securities salesman license of Philip Irwin Lewis.

EDDIE HAROLD LANDERS

On March 12, 1999, the Division issued Order No. 99-096, a Final Order to Deny Application for Securities salesman License, against Eddie Harold Landers. The Applicant's business residence is in Texas.

On January 27, 1999, the Division issued to Eddie Harold Landers Division Order No. 99-032, a Notice of Intent to Deny Application for Securities Salesman License and Notice of Opportunity for Hearing. The Division alleged that Applicant was not of "good business repute" as that term is used in Administrative Code Rule 1301:6-3-19(D)(7) and (9) and Revised Code section 1707.19(A). Applicant did not timely request an administrative hearing pursuant to Ohio Revised Code Chapter 119. Therefore, an Order was issued to Deny the application of Eddie Harold Landers for an Ohio securities salesman license.

JAMES FREDERICK GLAZA

On March 12, 1999, the Division issued Order No. 99-097, a Final Order to Deny Application for Securities Salesman License, against James Frederick Glaza. The Applicant's residence is in Colorado.

On February 8, 1999, the Division issued to James Frederick Glaza Division Order No. 99-046, a Notice of Intent to Deny Application for Securities Salesman License and Notice of Opportunity for Hearing. The Division alleged that Respondent was not of "good business repute" as that term is used in Administrative code Rule 1301:6-3-19(D)(9) and Revised Code section 1707.19(A). The Applicant did not request an adjudicatory hearing as permitted under Chapter 119 of the Revised Code. Therefore, a Final Order to Deny Application for Securities Salesman License was issued against the Applicant, incorporating the allegations set forth on the Notice of Opportunity for Hearing.

PERRY DONAL SNAVELY, JR.

On March 12, 1999, the Division issued Order No. 99-015, Final Order to Deny Application for Securities Salesman License, against Perry Donal Snavely, Jr. The Applicant's residence is in Pennsylvania.

On January 12, 1999, the Division issued Division Order No. 99-015, Notice

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Day Trading

dealer in Ohio to take advantage of the exception from the dealer licensing requirement under R.C. 1707.14(A)(1)(a) for transactions through or with a licensed securities dealer. With day trading programs offered to unlicensed individuals in Ohio, it is clear that the securities firm must be licensed as a securities dealer under R.C. 1707.14 prior to adding Ohio day traders. If the securities firm is properly licensed by the Division, the individual day trader may not be required to be licensed pursuant to the licensing exception

under R.C. 1707.14(A)(1)(a) for transacting business through or with a licensed dealer.

It is important to note that as a licensed securities dealer, firms offering day trading programs have an obligation under Ohio Administrative Code 1301:6-3-19(A)(5) to determine that day trading is suitable for each client based on the client's investment objectives, financial situation and needs, and any other relevant information. Securities firms must also be aware of prohibitions on false and misleading advertising or disclosures.

A number of publications have noted numerous abuses by day trading firms including misrepresentations of potential profits, the risks of margin accounts and the failure to disclose the losses which day traders usually incur when starting trading. The National Association of Securities Dealers, Inc. has proposed specific suitability and disclosure requirements for members offering day trading in NASD Notice to Members 99-32. The Division will continue to review day trading for any potential abuses.

Mr. Miglets is the Division's Control Bid Attorney.

Administrative Orders

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of Intent to Deny Application for Securities Salesman License and Notice of Opportunity for Hearing, to Perry Donal Snavely, Jr. The Division alleged that Applicant was not of "good business repute" as that term is used in Administrative Code Rule 1301:6-3-19(D)(9) and Revised Code section 1707.19(A). Respondent did not timely request an administrative hearing as permitted pursuant to Ohio Revised Code Chapter 119. Therefore, the Division issued to the Applicant its Final Order to Deny Application for a securities salesman license.

MARY ROSE LIMOGES

On March 12, 1999, the Division issued Order No. 99-099, Final Order to Deny Application for Securities Salesman License, against Mary Rose Limoges. The Applicant's residence is in California.

On February 10, 1999, the Division issued to Mary Rose Limoges Division Order No. 99-052, a Notice of Intent to Deny Application for Securities Salesman License and Notice of Opportunity for Hearing. The Division alleged that the Applicant was not of "good business repute" as that term is used in Administrative Code Rule 1301:6-3-19(D)(7) and (9) and Revised Code section 1707.19(A). Applicant did not timely request an administrative hearing as permitted pursuant to Ohio Revised Code Chapter 119. Therefore, the Division issued an Order to deny the application of Mary Rose Limoges of a securities salesman license.

GEORGE BRADLEY TAYLOR

On March 15, 1999, the Division issued Order No. 99-102, a Final Order, to George Bradley Taylor. The Applicant's residence is in Illinois. The Order granted the Applicant an Ohio securities salesman license.

On July 16, 1998, the Division issued Division Order No. 98-269, a Notice of Intent to Deny Application for Securities Salesman License and Notice of Opportunity for Hearing, to George Bradley

Taylor. The Division alleged that Applicant was not of good "business repute" as that phrase is used in Ohio Revised Code sections 1707.16 and 1707.19, and Ohio Administrative Code Rule 1301:6-3-19(D)(7) and (9). The Applicant timely requested an adjudicative hearing pursuant to Ohio Revised Code section 119. The Hearing Examiner found in the Applicant's favor. The Division confirmed and approved the Report and Recommendation of the Hearing Examiner. Therefore, it was ordered the Respondent be granted a license as a salesman of securities.

ANDREW ANTONUCCI

On April 20, 1999, the Division issued Order No. 99-183, a Final Order to Deny Application for License, against Andrew Antonucci. The Applicant's residence is in New York.

On August 27, 1998, the Division issued Order No. 98-360, a Notice of Intent to Deny Application for Securities Salesman License and a Notice of Opportunity for Hearing, to Andrew Antonucci. The Division alleged that Applicant was "not of good business repute" as that phrase is used in Ohio Revised Code sections 1707.16 and 1707.19, and Ohio Administrative Code Rule 1301:6-3-19(D)(2), (7) and (9). The Division also notified the Applicant of the right to request an adjudicative hearing regarding this matter pursuant to Revised Code Chapter 119. The Applicant timely requested an adjudicative hearing. A Hearing was held and the Hearing Officer found in the Division's favor. The Division confirmed and approved the Report and Recommendation of the Hearing Officer. With the issuance of Order No. 99-183, it was ordered that Applicant be denied a license as a salesman of securities.

RUSSELL DALE GOLDNER

On April 20, 1999, the Division issued Order No. 99-184, a Final Order, to Russell Dale Goldner, an Ohio resident. The order granted him a securities salesman license.

On November 23, 1998, the Division issued Division Order No. 98-501

against Russell Dale Goldner, alleging the Applicant was not of good "business repute" as that phrase is used in Ohio Revised Code sections 1707.16 and 1707.19, and Ohio Administrative Code Rule 1301:6-3-19(D)(7) and (9). The Order gave the Applicant notice of the Division's intent to deny Applicant's application for licensure as a salesman of securities. The Applicant timely requested an adjudicative hearing as permitted pursuant to Chapter 119 of the Revised Code. The Hearing Officer ruled against the Applicant. However, based on the evidence presented at the hearing and contained in the Respondent's objections to the hearing Officer's report, the Division disapproved the Hearing Officer's recommendation. Therefore, the Division issued its Final Order granting the Respondent a securities salesman license.

STEPHEN F. HICKEY

On May 5, 1999, the Division issued Order No. 99-199, a Cease and Desist Order, against Stephen F. Hickey, an Ohio resident.

On January 7, 1999, the Division issued Order No. 99-006, a Notice of Opportunity for Hearing to the Applicant. The Order alleges that Applicant had violated Revised Code sections 1707.44(B)(4) and 1707.44(G) by making false representation concerning material and relevant facts and failing to disclose material facts while selling promissory notes to investors. The Order notified the Applicant of his right to an adjudicatory hearing pursuant to Chapter 119 of the Revised Code. The Applicant failed to timely request a hearing. Therefore, the Division issued its Cease and Desist Order No. 99-199.

T-N-T LAND COMPANY, INC.; JOE TAGLIARINI

On May 5, 1999, the Division issued Division Order No. 99-198, a Cease and Desist Order, against T-N-T Land Company, Inc. and Joe Tagliarini, both of whom reside in Ohio.

On August 1, 1997, the Division issued to Respondent its Notice of Oppor-

tunity for Hearing, Division Order No. 97-288, pursuant to Ohio Revised Code Chapter 119. The Division alleged that Respondent violated the provisions of the Revised Code section 1707.44(C)(1) by selling unregistered securities. The Division also notified the Respondent of its right to adjudicatory hearing pursuant to Chapter 119 of the Revised Code. The Respondent failed to timely request a hearing. Therefore, the Division issued its Cease and Desist Order No. 99-198.

FIRST LENDER INDEMNITY CORPORATION

On May 10, 1999, the Division issued Division Order No. 99-211, a Cease and Desist Order, against First Lender Indemnity Corporation. The Respondent is located in Florida but was doing business in Ohio.

On April 6, 1999, the Division issued to Respondent its Notice of Opportunity for Hearing, Division Order No. 99-156, against First Lenders Indemnity Corporation in care of its Trustee. The Division alleged that Respondent violated provisions of the Ohio Revised Code sections 1707.44(C)(1) and 1707.44(G) by, respectively, selling unregistered securities and failing to disclose material facts in conjunction with the sales of securities. The Division also notified the Respondent of its right to an adjudicatory hearing pursuant to Chapter 119 of the Revised Code. The Respondent through its Trustee did not timely request a hearing. Therefore, the Division issued its Cease and Desist Order No. 99-211.

INTERACTIVE PRODUCTS AND SERVICES, INC.; MATTHEW BOWIN

On May 13, 1999, the Division issued Division Order No. 99-218, a Cease and Desist Order, against Interactive Products and Services, Inc. and Matthew Bowin. The Respondent is a California corporation conducting business in Ohio.

On January 5, 1999, the Division issued its Notice of Opportunity for Hearing, Division Order No. 99-004, pursuant to Ohio Revised Code Chapter 119. The

Division alleged that Respondent violated provisions of the Ohio Revised Code sections 1707.44(C)(1) and 1707.44(B)(4) by, respectively, selling unregistered securities and making false representations concerning material and relevant facts. The Division also notified the Respondent of its right to an adjudicatory hearing pursuant to Chapter 119 of the Revised Code. The Respondent did not timely request an adjudicatory hearing. Therefore, the Division issued its Cease and Desist Order No. 99-218.

WILLIAM WESLEY NEIGHBORS, SR.

On May 24, 1999, the Division issued Division Order No. 99-231, a Final Order to Deny Application for Securities Salesman License, against William Wesley Neighbors, Sr. The Applicant's residence is in Alabama.

On March 24, 1999, the Division issued its Notice of Opportunity for Hearing, Division Order No. 99-120, pursuant to Ohio Revised Code Chapter 119. The Division alleged that Applicant was not of "good business repute" as that term is used in Revised Code section 1707.19(A)(1) and the Administrative Code Rule 1301:6-3-19(D)(7) and (9). The Division also notified the Applicant of his right to an adjudicatory hearing pursuant to Chapter 119 of the Revised Code. The Applicant did not timely request a hearing. Therefore, the Division issued an Order No. 99-231, denying the Applicant a license as a salesman of securities.

JONATHAN WALTER WAY

On May 24, 1999, the Division issued Division Order No. 99-230, a Final Order to Deny Application For Securities Salesman License, against Jonathan Walter Way. The Applicant's residence is in California.

On March 24, 1999, the Division issued its Notice of Opportunity for Hearing, Division Order No. 99-118, pursuant to Ohio Revised Code Chapter 119. The Division alleged that Applicant was not of "good business repute" as that phrase is used in Ohio Revised Code section 1707.19(A)(1) and Administrative Code

Rule 1301:6-3-19(D)(9). The Order also notified the Applicant of his right to an adjudicatory hearing pursuant to Chapter 119 of the Revised Code. The Applicant failed to timely request a hearing. Therefore, the Division issued Order No. 99-230, denying the Applicant a license as a salesman of securities.

GOOGINS & CO., INC.

On May 25, 1999, the Division issued Division Order No. 99-239, a Cease and Desist Order with Consent Agreement, against Googins & Co., Inc. The Respondent is a Wisconsin corporation conducting business in Ohio.

On May 12, 1999, the Division issued its Division Order No. 99-213, a Notice of Opportunity for Hearing, pursuant to Ohio Revised Code Chapter 119. The Division alleged that the Respondent violated Revised Code section 1707.44(A), which prohibits unlicensed sale of securities. The Order also notified the Respondent of the Division's intent to issue a final Cease and Desist Order against it. Upon issuance of the order, the Division and the Respondent entered into a Consent Agreement, which was accompanied by the issuance of a Cease and Desist Order, Order No. 99-239. The Respondent was required to offer rescission to purchasers in all sales from April 10, 1997 to April 14, 1998 and through and including the date of the issuance of the license. The agreement also requires the Respondent to waive appeal rights in this matter.

JOHN PATRICK DIPRE

On May 28, 1999, the Division issued Division Order No. 99-243, a Cease and Desist Order with Consent Agreement, against John Patrick Dipre, an Ohio resident.

On May 7, 1999, the Division issued its Division Order No. 99-200, a Notice of Opportunity for Hearing, pursuant to Ohio Revised Code Chapter 119. The Order alleged that the Respondent violated Revised Code Section 1707.19(A)(9), which prohibits the conducting of business in the violation of the Division's rules and regulations, and Administrative Code Rule 1301:6-3-

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Administrative Orders

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19(A)(19), which prohibits the selling of unauthorized securities. The Order also notified the Respondent of the Division's intent to issue a final Cease and Desist Order against him. Upon issuance of the order, the Division and the Respondent entered into a Consent Agreement, which was accompanied by the issuance of a Cease and Desist Order, Division Order 99-243, incorporating these allegations. The agreement requires the Respondent to waive appeal rights in this matter and to stipulate to the findings, conclusions and orders found in the Cease and Desist Order.

CASINO CRUISES; GARY JASON MCCRORY

On June 4, 1999, the Division issued Division Order No. 99-251, a Cease and Desist Order, against Casino Cruises and Gary Jason McCrory. The Respondents reside in California.

On April 7, 1999, the Division issued to the Respondents Division Order 99-158, a Notice of Opportunity for Hearing pursuant to Ohio Revised Code Chapter 119. The Order alleged the Respondents violated Ohio Revised Code 1707.01(C)(1) and 1707.44(B)(4) which, respectively, prohibits selling unregistered securities and knowingly making false representation concerning material and relevant facts in the sale of securities. The Order also notified the Respondents of the Division's intent to issue a final Cease and Desist Order against them. The Respondent failed to timely request an adjudicative hearing. Therefore, the Division issued its Cease and Desist Order, No. 99-251.

OCTAVE JOSEPH FRANCIS, III

On June 23, 1999, the Division issued Division Order No. 99-275, a Final Order to Deny Application for Securities Salesman License, against Octave Joseph

Francis, III. The Applicant resides in Louisiana.

On April 16, 1999, the Division issued to Octave Joseph Francis, III its Notice of Opportunity for Hearing, Division Order No. 99-174, pursuant to Ohio Revised Code Chapter 119. The Order alleged that Applicant is not of "good business repute" as the term is used in Administrative Code Rule 131:6-3-19(D)(7) and (9) and Revised Code section 1707.19(A)(1). The Order also notified the Applicant of the Division's intent to deny his application for a securities salesman license. The Respondent did not timely request an adjudicatory hearing as permitted by Chapter 119 of the Revised Code. Therefore, the Division issued Order No. 99-275, Final Order to Deny Application for securities salesman license.

Editor's Note: Those wishing further information regarding any of the above enforcement actions may contact the Division and review the orders summarized.



Administrative Rule Amendments

As indicated by the public notice contained in Bulletin Issue 99:1, the following four administrative rules have been amended, effective July 29, 1999. Only the relevant amended portions of the administrative rules are printed below. The five asterisk symbol (*****) indicates where unamended language has not been reprinted.

OAC 1301:6-3-01 Definitions.

(J) For purposes of division (E)(1) of section 1707.01 of the Revised Code:

(1) "Dealer" shall not mean any person that:

(a) Is chartered as a bank under the laws of the United States or any state of the United States and that is subject to regulation or supervision by the state or United States;

(b) Is a member of the New York stock exchange;

(c) Would be subject to rules, if any, promulgated by the securities and exchange commission pursuant to division (e) of section 15 of the Securities Exchange Act of 1934;

(d) Files with the commissioner a written notice evidencing the satisfaction of the conditions contained in paragraphs (J)(1)(a) to (J)(1)(c) of this rule; and

(e) Has received a written acknowledgment of the filing from the commissioner.

(2) Any dealer or salesperson associated or affiliated with a person receiving a written acknowledgment from the commissioner pursuant to paragraph (J)(1)(e) of this rule shall not be subject to the prohibitions of paragraph (A)(7) of rule 1301:6-3-19 of the Administrative Code with respect to sharing any commission, discount or other remuneration from the purchase or sale of a security with the person receiving the written acknowledgment.

OAC 1301:6-3-14 Exceptions to 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:

Administrative Rule Amendments

(6) Without a license, a person who has received a written acknowledgment from the commissioner pursuant to paragraph (J) of rule 1301:6-3-01 of the Administrative Code may sell securities to an institutional investor.

OAC 1301:6-3-15 Dealer responsibilities.

(M) Sale of securities on bank premises.

(1) Applicability. Paragraph (M)(1) to (M)(4) of this rule shall apply exclusively to broker-dealer services conducted by dealers on the premises of a bank where retail deposits are taken. Paragraph (M) of this rule does not alter or abrogate a dealer's obligations to comply with other applicable laws, rules, or regulations that may govern the operations of dealers and their salespersons, including but not limited to, supervisory obligations. These rules do not apply to broker-dealer services provided to non-retail customers.

(2) Definitions. For purposes of paragraphs (M)(1) to (M)(4) of this rule, the following terms have the meanings indicated:

(a) "Bank" means any bank, trust company, savings and loan association, savings bank, or credit union that is incorporated or organized under the laws of the United States, any state of the United States, Canada, or any province of Canada and that is subject to regulation or supervision by that country, state, or province, that is located in this state, and the service corporations located in this state of such bank, trust company, savings and loan association, savings bank, or credit union.

(b) "Networking arrangement" and "brokerage affiliate arrangement" mean a contractual or other arrangement between a dealer and a bank pursuant to which the dealer conducts broker-dealer services on the premises of the bank where retail deposits are taken.

(c) "Affiliate" has the same meaning as defined by conduct rule 2720 of the "National Association of Securities Dealers, Inc."

(d) "Broker-dealer services" means the investment banking or securities business as defined in paragraph (p) of article I of the by-laws of the "National Association of Securities Dealers, Inc."

(3) Standards for dealer conduct. No dealer shall conduct broker-dealer services on the premises of a bank where retail deposits are taken unless the dealer complies initially and continuously with the following requirements:

(a) **Setting.** Wherever practical, broker-dealer services shall be conducted in a physical location distinct from the area in which the bank's retail deposits are taken. In all situations, the dealer shall identify its services in a manner that clearly distinguishes those services from the bank's retail deposit-taking activities. The dealer's name shall be clearly displayed in the area in which the dealer conducts its broker-dealer services.

(b) **Networking arrangement and brokerage affiliate arrangements and program management.** Networking arrangements and brokerage affiliate arrangements shall be governed by a written agreement that sets forth the responsibilities of the parties and the compensation arrangements. Networking arrangements and brokerage affiliate arrangements must provide that supervisory personnel of the dealer and representatives of state securities authorities, where authorized by state law, will be permitted access to the bank's premises where the dealer conducts broker-dealer services in order to inspect the books and records and other relevant information maintained by the dealer with respect to its broker-dealer services. The dealer shall be responsible for ensuring that the networking arrangement and brokerage affiliate arrangement clearly outlines the duties and responsibilities of all parties.

(c) **Customer disclosure and written acknowledgment.**

(i) Subject to paragraph (M)(4) of this rule, at or prior to the time that a customer's securities brokerage account is opened by a dealer on the premises of a bank where retail deposits are taken, the dealer shall:

(a) Disclose, orally and in writing, that the securities products purchased or sold in a transaction with the dealer:

(i) Are not insured by the federal deposit insurance corporation;

(ii) Are not deposits or other obligations of the bank and are not guaranteed by the bank; and

(iii) Are subject to investment risks, including possible loss of the principal invested.

(b) Make reasonable efforts to obtain from each customer during the account opening process a written acknowledgment of the disclosures required by paragraph (M)(3)(c)(i)(a) of this rule.

(ii) If broker-dealer services include any written or oral representations concerning insurance coverage, other than federal deposit insurance corporation insurance coverage, then clear and accurate written or oral explanations of the coverage must also be provided to the customers when such representations are first made.

(d) **Communications with the public.**

(i) **Confirmations, advertisements and recommendations:**

(a) All of the dealer's confirmations and account statements must indicate clearly that the broker-dealer services are provided by the dealer.

Administrative Rule Amendments

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(b) Subject to paragraph (M)(4) of this rule, advertisements and sales literature that announce the location of a bank where broker-dealer services are provided by the dealer, or that are distributed by the dealer on the premises of a bank, must disclose that securities products:

(i) Are not insured by the federal deposit insurance corporation;

(ii) Are not deposits or other obligations of the bank and are not guaranteed by the bank; and

(iii) Are subject to investment risks, including possible loss of the principal invested. The shorter, logo format described in paragraph (M)(3)(d)(ii)(a) of this rule may be used to provide these disclosures.

(c) Recommendations by a dealer concerning non-deposit investment products with a name similar to that of the bank must only occur pursuant to a sales program designed to minimize the risk of customer confusion.

(ii) Logo format disclosures:

(a) Subject to paragraph (M)(4) of this rule, the following shorter, logo format disclosures may be used by a dealer in advertisements and sales literature, including material published, or designed for use, in radio or television broad casts, automated teller machine screens, billboards, signs, posters and brochures, to comply with the requirements of paragraph (M)(3)(d)(i)(b) of this rule, provided that such disclosures are displayed in a conspicuous manner:

(i) Not FDIC insured;

(ii) No bank guarantee; and

(iii) May lose value.

(b) As long as the omission of the disclosures required by paragraph (M)(3)(d)(i)(b) of this rule would not cause the advertisement or sales literature to be misleading in light of the context in which the material is presented, such disclosures are not required with respect to messages contained in:

(i) Radio broadcasts of thirty seconds or less;

(ii) Electronic signs, including billboard-type signs that are electronic, time, and temperature signs and ticker tape signs, but excluding messages contained in such media as television, on-line computer services, or automated teller machines; and

(iii) Signs, such as banners and posters, when used only as location indicators.

(e) Notification of termination. The dealer must promptly notify the bank if any salesperson of the dealer who is employed by the bank is terminated for cause by the dealer.

(4) If paragraph (M) of this rule requires a dealer to disclose that securities products are not insured by the federal deposit insurance corporation, and the dealer is providing broker-dealer services on the premises of a bank with deposits insured by a program other than the federal deposit insurance corporation, the dealer shall instead disclose that the securities products purchased or sold in a transaction with the dealer are not insured by the other deposit insurance program.

OAC 1301:6-3-151 Application for investment adviser's license; responsibilities of licensed investment adviser.

(A) License application. The license application specified in division (A) of section 1707.151 of the Revised Code shall consist of:

(7) A copy of the form ADV-E if the investment adviser has possession or custody of client funds or securities.

(F) Renewal of investment adviser license. The application for renewal of an investment adviser license shall consist of:

(6) A copy of the form ADV-E if the investment adviser has possession or custody of client funds or securities.

Capital Formation Statistics*

Filing Type	Second Quarter 1999	YTD 1999
Exemptions		
Form 3(Q)	\$ 135,252,006	\$ 502,917,293
Form 3(W)	10,000,000	43,820,000
Form 3(X)	17,621,549,168	20,860,217,780
Form 3(Y)	16,000,000	17,000,000
Registrations		
Form .06	319,457,205	472,353,096
Form .09	16,870,000	75,620,980
Form .091	580,241,660	1,041,182,906
Form .092(C)	00	00
Investment Companies		
Definite	105,148,500	203,110,000
Indefinite**	687,000,000	1,365,000,000
TOTAL	\$19,491,518,539	\$24,581,222,055

*Categories reflect amount of securities registered, offered or eligible to be sold in Ohio by issuers.

**Investment companies may seek to sell an indefinite amount of securities by submitting maximum fees. Based on the maximum filing fee of \$1100, an indefinite filing represents the sale of a minimum of \$1,000,000 worth of securities, with no maximum. For purposes of calculating an aggregate capital formation amount, each indefinite filing has been assigned a value of \$1,000,000.

Because the Division's mission includes enhancing capital formation, the Division tabulates the aggregate dollar amount of securities to be sold in Ohio pursuant to filings made with the Division. As indicated in the notes to the table, the aggregate dollar amount includes a value of \$1,000,000 for each "indefinite" investment company filing. However, the table does not reflect the value of securities sold pursuant to "self-executing exemptions" like the "exchange listed" exemption in R.C. 1707.02(E) and the "limited offering" exemption in R.C. 1707.03(O). Nonetheless, the Division believes that the statistics set out in the table are representative of the amount of capital formation taking place in Ohio.

Registration Statistics

The following table sets forth the number of registration and exemption filings received by the Division during the second quarter of 1999, compared to the number of filings received during the second quarter of 1998. Likewise, the table compares the year-to-date filings for 1998 and 1999.

Filings pursuant to RC 1707.03(X) and 1707.03(Y) became available March 18, 1999 with the effectiveness of Am. Sub. H.B. 695. The 3(X) filing is for Rule 506 offerings (the 3(Q) exemption is now exclusively for Section 4(2) claims of exemption.) The 3(Y) filing is an accredited investor exemption.

Filing Type	2nd Qtr '99	YTD 1999	2nd Qtr '98	YTD 1998
1707.03(Q)*	75	433	413	785
1707.03(W)	4	19	12	30
1707.03(X)	293	350	NA	NA
1707.03(Y)	4	5	NA	NA
1707.04	0	0	0	0
1707.041	2	2	0	1
1707.06	25	73	30	69
1707.09	17	31	25	36
1707.091	33	84	93	193
1707.092(A)**	1165	2258	1069	2125
1707.092(C)***	0	0	NA	NA
1707.39	3	4	3	4
1707.391	30	60	40	67
Total	1651	3276****	1685	3310

* Statistics for the number of 3(Q) filings submitted prior to March 18, 1999 contain those pursuant to both Rule 506 and Section 4(2) of the Securities Act of 1933, whereas filings after March 18, 1999 will be represented by two different sections: RC 1707.03(Q) for Section 4(2) filings, and RC 1707.03(X) for Rule 506 offerings.

** Investment company notice filings.

*** Offerings of covered securities not otherwise covered by another statutory provision in the Ohio Securities Act.

**** Total filings will have decreased after March 18, 1999 as a result of Rule 506 offerors not having to file amendments to the Form D filing in Ohio.

Licensing Statistics

The table below sets out the number of Salespersons and Dealers licensed by the Division at the end of the first and second quarters of 1999 compared to the corresponding quarters of 1998 as well as the third and fourth quarter of 1998 compared to the corresponding quarter of 1997.

	End of Q2 1999	End of Q2 1998	End of Q1 1999	End of Q1 1998	End of Q4 1998	End of Q4 1997	End of Q3 1998	End of Q3 1997
Number of Salespersons Licensed:	92,226	85,526	88,727	81,210	89,152	83,238	88,796	83,545
Number of Dealers Licensed:	2,287	2,106	2,223	2,082	2,137	2,170	2,151	2,154

1999 S.E.C. AND OHIO SECURITIES ISSUES CONFERENCE

December 9, 1999, Columbus, Ohio

Sponsored by:
Kent State University
The Ohio Society of Certified Public Accountants
The Ohio Division of Securities

All subscribers to the Ohio Securities Bulletin will be mailed a Conference brochure that will include program details and registration information.

The Division's Advisory Committees are tentatively scheduled to meet at the conclusion of the seminar portion of the Conference. Detailed information will be mailed to Advisory Committee members.

OHIO SECURITIES BULLETIN

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