

Ohio Securities Bulletin



JAMES A. RHODES
Governor

J. GORDON PELTIER
Director of Commerce

KENNETH E. KROUSE
Commissioner of Securities

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ANNOUNCEMENTS

Notice of Public Hearing

The Division of Securities, Department of Commerce, State of Ohio, will hold a public hearing at 10:00 a.m. on January 8, 1980, in the State Office Tower, 30 East Broad Street, Columbus, Ohio, to consider the adoption of rules relating to the Ohio Securities Act, Chapter 1707., O.R.C.

The proposed rules, as filed with the legislative reference bureau, and the Clerk of the Senate, would amend rules 1301:6-3-05, 1301:6-3-09 and 1301:6-3-091, would rescind rules 1301:6-3-17 and 1301:6-3-23, and would adopt a new rule 1301:6-3-23 of the Administrative Code.

As a result of these amendments, form 23 reporting would be eliminated, indefinite amount registration by investment companies would be permitted, "specialty" companies would be re-defined, borrowing by investment companies would be permitted subject to certain restraints, substantive criteria would be applied to registrations by coordination, the renewal period for dealers and salesmen would be fixed as November 1 to December 15 of each year, and rules and procedures would be delineated for the conduct of investigative hearings by the Division of Securities.

Information on the hearings, and copies of the proposed rules may be obtained from the office of the Commissioner of Securities, 13th floor, Borden Building, 180 East Broad Street, Columbus, Ohio 43215, thirty days prior to the date of the hearing. Copies will be mailed upon request as provided in Section 119.03 of the Revised Code.

Purpose of Proposed Rule Changes

1301:6-3-05

Existing sections (A) and (D) of rule 1301:6-3-05 will be eliminated. Those sections presently require issuers of securities, registered by description under section 1707.05 O.R.C., to file form 23's on a periodic basis with the Division of Securities until the offering has been completely sold or terminated.

The Division has concluded that the information supplied by these forms is rarely useful from an enforcement standpoint. In addition, completion and timely filing of these forms imposes an undue hardship upon issuers. The same information, when needed, can be obtained by the Division through examination of the issuer pursuant to section 1707.23 of the Revised Code.

1301:6-3-09

Existing sections (A) and (C) of rule 1301:6-3-09 will be eliminated. Those sections presently require issuers of securities under section 1707.09 of the Revised Code to file form 23's with the Division of Securities on a periodic basis until the offering registered has been sold or terminated.

The Division has concluded that the information supplied by this filing is not routinely needed. The same information, when needed, may be obtained through examination of the issuer under section 1707.23 O.R.C. Moreover, the completion and timely filing of these forms has been a burden for legitimate issuers.

The Division proposed to replace sections (A) and (C) of rule 1301:6-3-09 with two new provisions relating to "indefinite amount registrations by investment companies." These new sections designated (B) and (C) are reprinted below for the convenience of the reader.

- (B) INDEFINITE AMOUNT REGISTRATION BY INVESTMENT COMPANIES.
AN INVESTMENT COMPANY, AS DEFINED BY THE INVESTMENT COMPANY ACT OF 1940, WHICH SUBMITS THE MAXIMUM STATUTORY FEES AS REQUIRED UNDER SECTIONS 1707.09 AND 1707.091 OF THE REVISED CODE, MAY REGISTER AN INDEFINITE AMOUNT OF SECURITIES FOR SALE IN OHIO.
- (C) PERIOD OF EFFECTIVENESS FOR INDEFINITE AMOUNT REGISTRATIONS.
THE MAXIMUM PERIOD OF EFFECTIVENESS FOR AN INDEFINITE AMOUNT REGISTRATION AS PROVIDED BY PARAGRAPH (B) OF RULE 1301:6-3-09 OF THE ADMINISTRATIVE CODE SHALL BE THIRTEEN MONTHS AS MEASURED FROM THE DATE OF THE DIVISION ORDER OF QUALIFICATION.

These new sections, if adopted, would permit the registration of an indefinite amount of securities by an investment company for sale in Ohio during a 13 month period.

Frequently, investment company issuers have requested post registration amendments to increase the number of shares to be offered in Ohio or have been required to file a form 39 to cure an oversale. Given the "net asset value" price feature of such registrations, the Division believes that permitting "indefinite amount" registration by investment companies will not prejudice investors. The 13 month limitation will enable the Division to evaluate offerings on a nearly annual basis, hopefully co-incident with the filing of annually required updated documents.

Another proposed change in rule 1301:6-3-09 concerns the definition of "specialty companies." The definition is found in sub part (D)(2)(h)(ii) of the rule. That sub part, as filed, appears below with old language stricken and proposed language capitalized.

- (ii) This limitation shall not apply to ~~companies which restricted investments solely~~ "SPECIALTY COMPANIES" WHICH, AS TO EIGHTY PER CENT OF THEIR ASSETS, RESTRICT INVESTMENTS to the securities of companies operating in a particular industry. In the case of such ~~"specialty" companies~~ "SPECIALTY COMPANIES" a prohibition shall be established to require that the assets of the company shall be invested in the securities of not less than ten issuers, and to prohibit the purchase of THE securities of any issuer if such purchase, at the time thereof, would cause more than ten per cent of the total company assets to be invested in the securities of any one issuer.

The Division believes that the proposed definition would more nearly comport with the accepted industry understanding of the term. Simultaneously, the reduction of committed assets to 80% would enable the company to improve the liquidity of its portfolio.

In sub part (D)(2)(k) of rule 1301:6-3-09, the Division proposes to alter its prohibition on borrowing by investment companies. That sub part, as filed, appears below with old language stricken and proposed language capitalized.

- (k) Prohibit borrowing on behalf of the company unless there is at all times an asset coverage of at least three hundred per cent for all borrowings of the company. ~~Any such borrowing shall be undertaken only as a temporary measure for extraordinary or emergency purposes.~~ A COMPANY'S ABILITY TO BORROW FOR OTHER THAN EMERGENCY OR EXTRAORDINARY PURPOSES SHALL BE HIGHLIGHTED IN THE COMPANY'S PROSPECTUS OR OFFERING CIRCULAR AS A SPECIAL RISK CONSIDERATION.

If adopted, this rule would maintain the 300% asset coverage feature on borrowings, but would remove the requirement that such borrowing be temporary and only for emergency purposes. The ability of the issuer to borrow would need to be prominently disclosed to investors. Other states have long permitted the registration of leveraged funds. Ohio's prohibition of them is no longer justifiable.

Sub part (D)(3) of rule 1301:6-3-09 is also the subject of a proposed Division amendment. The language as filed appears below with old language stricken and proposed language capitalized.

- (D)(3) ~~Any company in compliance with rules governing investment companies prior to December 31, 1975, shall be deemed in compliance with paragraph (D) of rule 1301:6-3-09 of the Administrative Code.~~ PARAGRAPH (D) OF RULE 1301:6-3-09 OF THE ADMINISTRATIVE CODE SHALL APPLY TO ALL INVESTMENT COMPANIES OF THE MANAGEMENT TYPE, REGARDLESS OF THE SECTION OF CHAPTER 1707 OF THE REVISED CODE UNDER WHICH THE SECURITIES OF SUCH COMPANY ARE REGISTERED.

The language to be eliminated is a "grandfather clause" which is no longer needed due to the three year statute of limitations contained within section 1707.28 O.R.C. The proposed language alerts issuers which are investment companies of the management type that the Division will apply the provisions of paragraph (D) of rule 1301:6-3-09 to filings under other code provisions.

1301:6-3-091

The Division has proposed the following amendment to rule 1301:6-3-091.

- (E) THE PROVISIONS OF RULE 1301:6-3-09 OF THE ADMINISTRATIVE CODE SHALL APPLY TO REGISTRATIONS BY COORDINATION PURSUANT TO SECTION 1707.091 OF THE REVISED CODE.

This proposed amendment alerts issuers under 1707.091 that the Division will evaluate their offerings by using the criteria contained in rule 1301:6-3-09.

1301:6-3-17

The existing language of this rule will be eliminated. No replacement is being proposed. The rule did little more than fix the period for renewals of dealer and salesman licenses. The period for such renewals is fixed by section 1707.17 O.R.C. as November 2 to December 16 of each year.

1301:6-3-23

The existing language of this rule will be eliminated and new language proposed. The old language prescribed the form of complaints to be filed with the Division, and required all hearings before the Division to be conducted in a specified manner. A number of the features of the existing rule have been incorporated into the proposed rule. However, the proposed rule will address only investigative hearings and reflects the experience of the Division obtained in the past two years during which over 150 hearings have been conducted. The proposed rule is approximately one third as long as the existing rule and is reprinted below.

1301:6-3-23 Enforcement Powers

- (A) HEARINGS CONDUCTED BY THE DIVISION OF SECURITIES PURSUANT SOLELY TO SECTION 1707.23 OF THE REVISED CODE SHALL BE INVESTIGATIVE IN NATURE WITH ATTENDANCE RESTRICTED BY THE DIVISION TO THOSE PERSONS WHOSE PRESENCE IS NECESSARY FOR THE EFFICIENT CONDUCT OF THE HEARING. SUCH INVESTIGATIVE HEARINGS SHALL BE CONDUCTED BY AN ATTORNEY OF THE DIVISION OF SECURITIES ADMITTED TO THE PRACTICE OF LAW IN THIS STATE.
- (B) A TRANSCRIPT OF EVERY INVESTIGATIVE HEARING SHALL BE PREPARED BY THE DIVISION AT ITS EXPENSE. A COPY OF THE TRANSCRIPT SHALL BE FURNISHED TO THE WITNESS UPON REQUEST AT THE EXPENSE OF THE WITNESS. NO PHOTOGRAPHIC, RECORDING OR TRANSCREIVING DEVICES, EXCEPT THOSE USED BY THE REPORTER DESIGNATED BY THE DIVISION, SHALL BE PERMITTED AT INVESTIGATIVE HEARINGS.
- (C) EVERY WITNESS IN AN INVESTIGATIVE HEARING SHALL BE AFFORDED AN OPPORTUNITY TO MAKE A STATEMENT FOR THE OFFICIAL RECORD OF THE HEARING. THE WITNESS SHALL BE ADVISED OF THE RIGHT TO SECURE LEGAL COUNSEL AND TO HAVE COUNSEL PRESENT DURING QUESTIONING.
- (D) THE RULES OF EVIDENCE APPLICABLE IN JUDICIAL PROCEEDINGS SHALL APPLY TO INVESTIGATIVE HEARINGS BY THE DIVISION SO FAR AS PRACTICABLE, TAKING INTO CONSIDERATION THE ADMINISTRATIVE CHARACTER OF SUCH HEARINGS AND THE POWERS OF INVESTIGATION OF THE DIVISION.
- (E) NO RULE OR ADJUDICATION OF THE DIVISION SHALL RESULT FROM AN INVESTIGATIVE HEARING UNLESS AN OPPORTUNITY FOR A HEARING IS AFFORDED IN ACCORDANCE WITH SECTIONS 119.01 TO 119.13 OF THE REVISED CODE.
- (F) FOR THE PURPOSES OF DIVISION (C) OF SECTION 1707.23 OF THE REVISED CODE, "PARTY" OR "PARTIES" TO AN INVESTIGATIVE HEARING ARE THOSE PERSONS REQUIRED BY THE DIVISION TO TESTIFY AT THE HEARING.

Comment on these proposals is invited. Copies of the rules as filed may be obtained upon request.

Foreign Real Estate Policy Changes

As of January 1, 1980, the Division of Securities will no longer approve or disapprove foreign real estate advertising used subsequent to the initial approval of a foreign real estate registration. Ohio Administrative Rule 1301:6-3-09(F) requires the submission and approval of advertising as it relates to an initial registration. The rule does not address advertising used subsequent thereto.

Beginning with January 1, 1980, foreign real estate issuers/developers should forward a copy of any advertising utilized in the sale of its registered lots to the Division of Securities. The Division will merely acknowledge receipt of this advertising copy. It will not approve or disapprove its format or content. The Division believes that the appropriateness and accuracy of the information contained in advertising is the responsibility of the issuer/developer.

Beginning January 1, 1980, the Division will no longer approve or disapprove price changes. It will not be necessary for an issuer/developer to file a price amendment with the Division of Securities, amending its original registration to include any price increases with respect to previously registered lots.

It will be necessary to notify the Division of Securities, by letter, of any price increase, the lots to which the increase applies and the effective date of such increase. The Division, in turn, will acknowledge receipt of this information but will not approve or disapprove the price alteration.

Advisory Groups

In an effort to avail the Division of Securities of the experience and expertise of members of the practicing bar and the industry, the Division has formed advisory groups; Registration, Real Estate, Oil & Gas, Broker-Dealer, Legislation, Policy and Rules and Advisory. Additional information regarding these groups will appear in the next issue of the Ohio Securities Bulletin.

Tender Offer

On October 19, 1979, AMCA International Corporation filed suit in the U.S. District Court for the Southern District of Ohio, Eastern Division against the Ohio Division of Securities and Warner & Swasey Company, seeking a declaratory judgment which would declare Section 1707.041 (the takeover statute) to be null and void, both on its face and as applied, because it violates the Constitution of the United States and is pre-empted by the Securities Exchange Act of 1934.

AMCA International Corporation also sought to enjoin the Ohio Division of Securities from enforcing the takeover statute against it in its offering to acquire any and all the common shares of the Warner & Swasey Company. A hearing to consider AMCA's request for interim injunctive relief was scheduled for October 23, 1979 before Judge Joseph Kinneary. Judge Kinneary declined to rule at that time on the request for injunctive relief and instead scheduled a trial on the merits to convene beginning November 19, 1979. A three day trial on the merits began on that day. As of December 1, 1979, no decision has yet been rendered.

On October 24, 1979, AMCA International Corporation, pursuant to section 1707.041 of the Revised Code, filed a Form 041 together with attached exhibits, with the Division of Securities and announced its intention to offer to purchase any and all of the outstanding shares of common stock, \$1 par value, of the Warner & Swasey Company, at \$57 per share. Hearings relative to AMCA's offer commenced on Monday, November 12, 1979 and continued until Wednesday, November 21, 1979. The hearing officer's report will be filed on or before December 11, 1979. A final decision by the Division will be rendered on or before December 24, 1979.

INQUIRIES

The Division of Securities receives a number of inquiries relating to Chapter 1707., O.R.C. In this section of the Bulletin, the Division will print its response to some of the most frequently asked questions.

Q. How much is XYZ stock selling for?

A. The Division usually can not answer this question. Generally, the Division has no information concerning secondary market prices. The Division is able to advise the caller of the primary sale offering price. The Division recommends that the caller first contact a broker regarding sales price. If the caller can not obtain a quote, then the primary offering price may be of some use.

Q. Does section 1707.06(a)(3) permit the sale of limited partnership units to ten Ohio residents?

A. No. The ten person limitation applies to "persons interested in such sale or in any part of the subject matter thereof". In the Division's view, the number of potential limited partners, regardless of residence, is determined by subtracting the number of general partners from the ten person limitation.

Q. Is XYZ corporation in good standing?

A. These questions are misdirected. They should be asked of the office of the Secretary of State. The Division can only tell the caller whether the corporation has made a filing with this office. In the normal course, it has no information regarding payment of franchise tax or current operations.

Q. Should executed statements of Non Prejudice be obtained prior to the filing of a form 39 to affect qualification of securities sold with that compliance?

A. No. Both the EXPLANATORY STATEMENT and STATEMENT OF NON PREJUDICE, referred to as Exhibit (J) on the form 39, must be contained in the same instrument. The EXPLANATORY STATEMENT must be reviewed prior to circulation. While most EXPLANATORY STATEMENTS are properly drafted to affect adequate disclosure, pre-circulation review insures that the EXPLANATORY STATEMENT and STATEMENT OF NON PREJUDICE will not need to be recirculated due to an omitted disclosure.

Q. Are notes or bonds of non-profit corporations, offered only to members, exempt from registration?

A. Chapter 1707 contains no exemption from registration precisely applicable to such a sale.

Non-profit corporate issuers are urged to consider a filing under 1707.06(A)(1) or 1707.09 O.R.C. The only exemption expressly applicable to non-profit issuers is 1707.02(I). By its terms, this exemption is not available if the securities to be sold are "notes, bonds, debentures, or other evidences of indebtedness or of promises or agreements to pay money."

Moreover, section 1707.03(O) is generally not available to such issuers by virtue of the "equity security" restriction or the restriction that all sales occur within five years of incorporation.

Notes may be offered to the officers and directors of the non-profit corporate issuer under 1707.02(G), however, this exemption does not apply to sales to an entire "membership".

ENFORCEMENT ACTIVITY

May to November

Division Orders

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| May 8 | Vacation of earlier suspension of Gersten Investments, Inc. upon proof of compliance with net worth requirement. |
| May 9 | Suspension of Efficiency Systems, Inc. as a licensed dealer for net worth violation and failure to file required financial statements. |
| May 25 | Revocation of salesman license of Chester Gerig for failure to comply with lawful order or requirement of the Division. |
| May 25 | Revocation of dealers license of Monatterra Investment Corporation for failure to comply with lawful order or requirement of the Division. |
| June 6 | Vacation of earlier suspension of Lord Abbott Income Fund, Inc. upon proof of compliance with rule 1301:6-3-09 O.R.C. |
| June 8 | Termination of earlier refusal to issue a salesman license to Nicholas R. Wilson. |

- June 20 Affirmative order requiring Belmont Investment, Inc. to deliver securities to those purchasers with whom no written safe-keeping agreement existed as of 6/13/79.
- June 21 Vacation of earlier suspension of Efficiency Systems, Inc. upon surrender of dealers license.
- June 25 Termination of earlier suspension of Alex Adelman, DBA Tri-State Properties upon proof of compliance with net worth and records requirements of licensed dealers.
- June 29 Refusal to issue a salesman license to Bruce C. Birger.
- June 29 Suspension of Foreign Real Estate dealers license of N. E. Issacson of Michigan, Inc. for net worth violation.
- July 18 Suspension of dealers license of the Kissel Blake Organization, Inc. for violation of the net worth and financial statement requirements of licensed dealers.
- October 10 Suspension of Foreign Real Estate dealers license of Colony Mobile Home Communities for failure to file financial statements.
- October 10 Suspension of dealers license of Roya, Inc. for violation of net worth requirement, failure to file financial statements and failure to maintain required records.
- October 16 Notice of Opportunity for hearing on prospective suspension of license as a Foreign Real Estate dealer of Gaede Realty.

Cease and Desist Orders

- June 8 Issued to 4-All Corporation for sale of unregistered securities.
- June 14 Issued to O. G. Energy Investments for sale of securities without benefit of licensure as a dealer.

Civil Actions Filed

- May FASHION OPTICS, INC. Complaint alleged sale of unregistered securities and misrepresentation. Relief sought included injunction and plan of rescission.
- July MIDWEST COAL. Complaint alleged sale of unregistered securities, misrepresentation, misappropriation of funds and contempt of previous consent judgment. Relief sought included injunction, and appointment of a receiver.
- July SPAGHETTI TREE et. al. Complaint alleged sale of unregistered securities, misrepresentation, and sale through unlicensed salesmen. Relief sought included injunction and the appointment of a receiver.
- October A.K.G.-K.A.G.S. Complaint alleged sale of unregistered securities and misrepresentation. Relief sought included injunction and the appointment of a receiver.

Criminal Actions

- September A.K.G.-K.A.G.S. Convictions obtained against certain principals for sale of unregistered securities, misrepresentation or sale by unlicensed salesmen.