# OHIO SECURITIES BULLETIN

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# Limits on the ESOP Defense to Hostile Takeovers

NCR Corporation v. American Telephone and Telegraph Company

*by Richard G. Schmalzel, Esq.*

The 1991 takeover battle between NCR and AT&T highlights the recent reemergence of the traditional proxy contest as a potent hostile takeover technique. Litigation resulting from that takeover also provides guidance on the way that the fiduciary duties of the incumbent directors impact their actions when confronted with a proxy contest.

In NCR Corporation v. American Telephone & Telegraph Company (NCR v. AT&T), the incumbent NCR board was blocked in its attempt to implement an employee stock ownership plan (ESOP) as a chief defense against the possibility of being unseated by the AT&T proxy contest. The ESOP defense, where a friendly ESOP is formed to increase the number of shareholder votes favorably disposed to the maintenance of the status quo, is one of the most powerful defensive weapons available to incumbent management seeking to stay in power. The advantages of an ESOP are readily discernible in that the interests in the ESOP and the shares held by the ESOP are controlled by the target corporation's employees. In most instances, incumbent management can be relatively confident that the target's employees' ESOP shares will be voted in accordance with management's wishes.

The availability of the ESOP defense as a legitimate anti-takeover technique was upheld in Shamrock Holdings Inc. v. Polaroid, 559 A. 2d 257 (Del.Ch. 1989), where the target corporation's establishment of an ESOP in the face of a hostile bid was affirmed by the court despite its significant anti-takeover effects. NCR v. AT&T illustrates that there are still some limits on what incumbent management may do when establishing an ESOP in the face of a hostile offer.

The events leading up to NCR's creation of the ESOP and the NCR v. AT&T decision were reminiscent of traditional takeover battles, before the leveraged buy out / junk bond era:

• In November, 1990, AT&T actively commenced making unsolicited proposals to NCR to purchase all of NCR's outstanding common stock in exchange for AT&T stock. NCR's board of directors rejected all of AT&T's proposals.

• In late December, 1990, AT&T launched a tender offer for all outstanding shares of NCR common stock. NCR's board recommended that NCR shareholders refuse the AT&T offer. Despite that recommendation, approximately 70% of NCR's outstanding common stock was tendered to AT&T by January 14, 1991.

• On January 21, 1991, AT&T demanded that a special NCR shareholders meeting be held; AT&T's intent being to oust the entire NCR board and replace them with AT&T's slate of directors. Because the AT&T request was valid and in full accord with NCR's by-laws, the NCR board set March 1, 1991 as the record date for the special meeting and established March 28, 1991 as the meeting date.

• On February 20, 1991, nine days before the March 1 record date, NCR created an ESOP and authorized the issuance of

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5,509,641.873 shares of preferred stock to the ESOP at a price of $90.75 per share, an aggregate of $500 million. Each new preferred share was to be convertible into eight tenths of a share of common stock, but was to be entitled to equal voting rights. The only consideration to be received by NCR for the issuance of the preferred shares was a $500 million promissory note due in 2016 from the ESOP trustee.

• As a consequence of special anti-takeover provisions in NCR's bylaws, a supermajority of 80% of the outstanding shares was needed to oust the entire NCR board at the special meeting.[1] As a result, NCR needed only 20% of the outstanding shares to either vote with management or to abstain. The shares issued to the ESOP amounted to 8% of the outstanding shares, or 40% of the votes that NCR needed. The NCR Board and management held another 2% of the outstanding shares. Assuming that AT&T would hold on to all of the tendered shares, AT&T would need the affirmative support of a full 50% of the uncommitted NCR shares upon implementation of the ESOP.

• Given the virtual certainty that some NCR shares would not be voted at all, AT&T believed the ESOP to be a substantial impediment to its ability to have a fair chance at ousting the NCR board at the special shareholders meeting. NCR sought a declaratory judgment that its ESOP was valid and enforceable and AT&T counterclaimed seeking an injunction to invalidate the ESOP.

NCR relied upon the business judgment rule both as a justification for adopting the ESOP and as a defense to AT&T's counterclaim. Under Maryland corporate law (NCR was a Maryland corporation), as in most jurisdictions, the business judgment rule creates a rebuttable presumption that a corporation's directors have acted in good faith. The NCR court reasoned that the NCR directors would be entitled to the presumption of the business judgement rule if it could be established (l) that the directors believed they were *acting in NCR's best interests*, and (2) that their belief was *reasonable*.

1. As to the question of whether the directors acted with the belief that their actions in adopting the ESOP were in the company's best interest, the NCR court "ha[d] difficulty in believing that NCR's outside directors adopted the ESOP with the subjective belief that they were acting in a manner harmful to the corporation or its common shareholders." 475 F. Supp. at 491. In reaching that conclusion, the court pointed to the following factors:

• the accomplishment and respect of NCR's ten outside directors in their various fields;

• the outside directors' independence from NCR's management;

• the lack of any personal gain that would have accrued to the outside directors individually by acting improperly; and

• the statement of one outside director who testified that the board was acting on the assumption that AT&T would be unsuccessful regardless of whether or not the ESOP was adopted.

2. However, even though the NCR court believed the board had acted in good faith, the court did not find the board's belief to be *reasonable*. Relying on Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1982), "there is no protection for directors who have made an unintelligent or unadvised judgment." Id. Such belief was not reasonable because of an abundance of information which was either not presented to, considered by or even requested by the board. Items that the NCR board should have requested and considered included:

• a fairness opinion of NCR's investment bankers or other financial experts as to the effect on existing common shareholders of issuing the preferred stock;

• the input of NCR's employee benefits and human resources departments to gauge employee support for an ESOP;[2]

• information as to the tax and accounting implications of adopting an ESOP, particularly in view of a number of relatively recent changes in the law on those issues;

• a "clean" legal opinion that the shares issued to the ESOP were validly issued, fully paid and nonassessable;[3]

• the true cost of the ESOP to NCR and the likelihood of being able to refinance the ESOP in the future; and

• an explanation of NCR's proxy solicitor as to why the ESOP shares would not affect AT&T's ability to obtain the necessary votes at the special meeting.

Accordingly, the presumption created by the business judgment rule was rebutted. The NCR directors' good intentions were not enough to offset their limited information.

Despite the failure of the business judgment rule, the court gave NCR one last chance to validate the ESOP under the "primary purpose test".

• Under established Maryland precedent, the mere fact that a stock issuance has the effect of perpetuating management control is not *per se* invalid. Instead, the court applies a balancing test to see if any legitimate business purpose existed for the transaction other than the self-interest of the directors. If a legitimate business purpose exists, then the court must determine whether that independent purpose was a primary or principal one as opposed to whether the primary object was to manipulate control.

• The NCR court had no doubt that the ESOP had the effect of perpetuating management control, but it also determined that the ESOP served a legitimate corporate purpose in providing incentive to NCR employees. Nonetheless, the NCR court concluded that the facts overwhelmingly demonstrated that "the primary purpose of the ESOP was to entrench NCR management, in contravention of the principals [sic] of corporate democracy." Id. at 496.

With all of NCR 's defenses defeated, the NCR court had no choice but to find the ESOP invalid and unenforceable, and to enjoin the new NCR preferred shares from voting at the March 28, 1991 special shareholders meeting.

The lessons of NCR v. AT&T are many. Corporations cannot insulate their boards of directors from scrutiny merely by loading up with "big name, prestigious" directors (although it certainly helps). Outside directors of target corporations cannot blindly rely on information presented to them by the inside directors and other management personnel. And, best of all for lawyers, investment bankers and other professionals, NCR v. AT&T demonstrates the importance of creating a detailed "independent" record supporting the actions of the board.

FOOTNOTES

[1] NCR's directors otherwise served staggered terms and only one-third of the directors would normally be up for election at the annual meeting.

[2] To the contrary, the record showed that NCR's employee benefits personnel had previously considered the establishment of an ESOP and had concluded that an ESOP did not make sense under normal circumstances.

[3] The same opinion apparently could not have been given under Maryland law because Maryland does not recognize promissory notes as valid consideration for stock issuances.

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# Rules Amendments Effective January 17th

Amendments to the rules of the Division, representing the first comprehensive amendment to the Division's administrative standards in over a decade, were effective on January 17, 1992.

Amendments to the Division Rules appear throughout O.A.C. Chapter 1301:6-3 : 1301:6-3-01, Definitions; 1301:6-3-02, Exempt Securities; 1301:6-3-03, Exempt Transactions; 1301:6-3-06, Transactions Registered by Description; 1301:6-3-08, Registration by Description; 1301:6-3-09, Registration by Qualification; 1301:6-3-15, Dealer Responsibilities; 1301:6-3-16, Application for Salesman's License; 1301:6-3-19, Deceptive Practices and Good Business Repute; 1301:6-3-23, Enforcement Powers; and 1301:6-3-391, Retroactive Exemption, Qualification or Registration.

Generally, the amendments follow the form set out in Issue 91:3 of the *Ohio Securities Bulletin*. Terminology throughout the rules has been changed to conform more closely to standards established by the Legislative Services Commission; provisions of the rules have been relocated so that Ohio Administrative Code sections will be more closely coordinated with Ohio Securities Act section designation; and many changes recommended by the Division of Securities Advisory Committees have been incorporated in the rules.

One major change from the rules amendments published in issue 91:3 of the *Ohio Securities Bulletin* is the elimination of a proposed amendment to rule 19 to provide the Division with the authority to enforce the provisions of the federal "Cold Calling" when violations of that rule occur in Ohio. Despite the support of the Securities Regulation Subcommittee of the Corporations Section of the Ohio State Bar Association and the Division of Securities Enforcement Advisory Committee, the Division's proposal was rejected by the Joint Committee on Agency Rule Review.

In keeping with the opinion expressed by the OSBA Securities Regulation Subcommittee, the Division proposed the rule amendment on the understanding that the federal "Cold Calling" regulation, 17 CFR 240.15c2-6, already applies to all Ohio Broker-Dealers, both interstate and intrastate. The Division had sought the rule in response to the expectation that the Securities and Exchange Commission would not act in response to cold calling abuses which occurred in just one state, despite the SEC's authority to take action.

The text of the rules amendments will be published in the CCH *Blue Sky Law Reporter*, and updates to Howard Friedman's *Ohio Securities Law and Practice* and Bank-Baldwin's *Ohio's Securities Laws and Rules* are expected in 1992. For a copy of the rules amendments, please send your name and address and a check or money order payable to the Division in the amount of $5.00 to the attention of Donna Palsgrove at the Division offices.

• William E. Leber

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# 1991 Ohio Securities Conference and Advisory Committee Reports

The 1991 Ohio Securities Conference and Advisory Committee Meetings were held on September 30, and October 1 at the Columbus Marriott North. Approximately 140 members of the bar and representatives of the securities industry attended the Conference seminar on Monday, September 30, and approximately 60 committee members attended the Advisory Committee Meetings on Tuesday, October 1. The 1991 Ohio Securities Conference represented the fourth consecutive year that the Division and the Ohio Securities Conference, Inc. have sponsored a continuing legal education program featuring topics of interest to the securities community in Ohio.

The Conference topics on the morning program included "Ethical Considerations for Securities Law Practitioners" and "Due Diligence in Securities Offerings," and the afternoon session dealt with "Broker-Dealer Compliance in I.P.O.'s and Secondary Transactions" and a Division panel discussing "Recent Developments and Rule Enactments in the Ohio Division of Securities." An additional one-half hour topic on substance abuse was added this year to complement the program panel on securities ethical considerations.

On October 1, the five Advisory Committees met to discuss securities regulation issues and legislative and rule proposals relating to the interests of each committee.

**Enforcement Committee**

The Enforcement Advisory Committee was chaired by Joseph D. Carney, of Calfee, Halter and Griswold and Donald E. Meyer, Attorney Inspector.

The first topic discussed was the concept of excusable neglect for late exemption filings. Various options for providing more objective standards were discussed and many indicated a desire for the adoption of standards proposed by the Committee in 1989. Phillip Lehmkul, of Squire, Sanders and Dempsey, suggested that the Division publish a case analysis in an issue of the *Ohio Securities Bulletin*.

The second topic was the Division's interest in prosecutors giving higher priority to criminal violations of the Securities Act. Mr. Lehmkul suggested the Division should consider seeking the authority to prosecute cases directly. Mr. Carney suggested either training programs or conferences for prosecutors to increase awareness and knowledge of criminal securities issues. The general comment was made that practioners may contact prosecutors directly when a criminal securities case arises to express their interest in and desire that priority be given to a case referred by the Division.

The next topic discussed was the proposal for an amendment to the Ohio Securities Act to give the Division authority to impose fines for violations of the Act. The prevailing view was that fines are a reasonable response for certain violations that may not warrant the suspension or revocation of a license or criminal sanctions. A subcommittee was formed, chaired by Mr. Carney, to conduct a survey of the monetary penalty provisions of other state securities agencies, the NASD and the SEC. The results of the survey will be distributed to the committee upon its completion.

The last topic discussed was the possibility of developing outside time limits in the Division rule regarding unreasonable delay in the delivery of stock certificates. William Jackson of the NASD indicated that the NASD had no time limits but that the question was controlled by two other mechanisms . One was that since selling securities short directly affected net worth, such practices were controlled by their requirements on net worth. The second mechanism was a requirement that member firms are required to borrow securities for short positions. The Division indicated that late delivery of stock certificates (sometimes extending to periods of over one year) is a serious problem and that the Division is endeavoring to adopt a more explicit rule. Suggestions on proposed approaches to a regulatory standard for dealing with late delivery abuses should be directed to the Commissioner's office.

• Donald E. Meyer

**Exemptions Committee**

Sixteen members of the Exemptions Advisory Committee met with Committee Co - Chairs Susan Brown of Vorys, Sater, Seymour & Pease and Paul Tague, Deputy Commissioner of the Division, to consider a variety of issues.

The committee initially discussed suggested changes to the proposed rule amendments to 1301:6-3-02(C) (promissory notes and sale to the public) and 1301:6-3-03(C)5 (employee plans). These two proposals were initiated by the committee for amendment to the exempt securities and exempt transactions sections. Certain non-substantive changes to the rule amendments were proposed.

A proposal was submitted to amend OAC rule 1301:6-3-391(B)(2) to permit the filing of a Form 391/3-O if all sales were made to officers or directors of the issuing company, and if application is made within three years of the earliest date of sale of the securities sought to be exempted. The committee favored the proposed amendment, also being considered by the Registration Advisory Committee. In particular, a suggested affidavit requirement was discussed.

The statutory requirements for the filing of the Form 3-O were also discussed. The protection afforded shareholder investors and the regulatory purpose for the filing were reviewed. Interest was expressed in studying possible changes in the statute, Section 1707.03(O), O.R.C., which might limit or restrict the need for the filing of Forms 3-O in certain de minimus situations. An ad hoc committee was named to prepare a preliminary study of these issues.

A question was raised about using Rule 144A as a basis for exemption and whether an Ohio 144A exemption, if recommended by the committee, could be adopted by rule or if an amendment to the statute would be required. A proposal for an Ohio 144A exemption will be prepared in writing and distributed to members of the committee for comment.

The matter of the resale of limited partnership interests in the secondary market was raised and a general discussion followed with respect to the issues involved in the resale of exempt securities. Further discussion concerned the statutory interpretation of a certain transaction within the definition of "sale" in the Ohio Securities Act.

• Paul Tague

**Licensing Committee**

The Licensing Advisory Committee meeting was opened by co-chairs James Francis of the Ohio Company and Dale Jewell of the Ohio Division of Securities. Joyce Cleary of the Division kept the minutes. Discussion of proposed amendments to the Division rules focused on changes to O.A.C. 1301:6-3-15 and O.A.C. 1301:6-3-16, and featured suggestions from the committee members to make the rules clearer and easier to understand. Dwight Hurd of Emens, Hurd, Kegler & Ritter objected to the Division's proposed standards for the sale of restricted securities as defined in the rules of the SEC.

• Dale Jewell

**Registration Committee**

Warren Udisky of Benesch, Friedlander, Coplan & Aronoff and Michael Miglets of the Division convened the meeting of the Registration Advisory Committee. Mark Heuerman of the Division kept the minutes of the meeting.

The main topic was a proposal submitted by the Investment Company Institute (ICI), a national association representing the investment company industry. The ICI proposed an amendment to Ohio Administrative Code rule 1301:6-3-09(G)(I)(1) which prohibits an investment company from investing more than 10% of its assets in securities of issuers which together with any predecessors have a record of less than three years of continuous operations or in securities which are restricted as to disposition. The ICI's position is that securities which may be traded under Rule 144A of the Securities and Exchange Commission should not be included in the 10% limitation under the Division's rule. Rule 144A allows certain qualified institutions to trade securities which have not been registered under the Securities Act of 1933.

The Registration Advisory Committee was still concerned with the issue of liquidity for securities which may be traded under Rule 144A. The Committee decided the Division should request more information from ICI on the trading volume and actual liquidity of securities which are traded under Rule 144A and on the NASD Portal System before amending the Division's current rule. The Committee also noted that investment companies which wish to invest in excess of 10% of assets in Rule 144A securities may still register in Ohio provided the prospectus contains additional cover page disclosure and the prospectus is delivered to the investor prior to consummation of the sale.

A suggestion was also made that the Division publish an issue of the Ohio Securities Bulletin containing all of the current Division guidelines for registrations.

• Michael P. Miglets

**Takeover Committee**

James Tobin of Squire, Sanders & Dempsey and Becky Robbins-Penniman of the Division served as co-chairs of the Takeover Advisory Committee.

The committee had two major topics on the agenda: the discussion of new administrative rules implementing the Control Bid Statute, R.C. §1707.041, and development of new a new form to be used in filing pursuant to that statute. The first part of the discussion concerned the general philosophy of the rulemaking process, with the committee members generally expressing the belief that the rules should be as narrow as possible and deal only with specific problems. The members were concerned that the evenhandedness of the current statutory scheme embodied in R.C. §1701.831, R.C. Chapter 1704, and R.C. §§1707.041 and 042, should not be impaired by overly restrictive or burdensome rules. In addition, it was suggested that some issues could be dealt with by an interpretive release by the Division, rather than a formal rule. A lengthy discussion ensued to identify specific rule topics and proposals where rulemaking is considered necessary.

There was an exchange of ideas regarding the Division's ability to consider information from sources other than the bidder. The committee members felt that the Division can and should request and obtain information from any source pursuant to the investigative powers contained in R.C. §1707.23, and suggestions were offered regarding factors the Division might consider in regulating takeovers.

Enforcement of R.C. §1707.042 by the Division was also discussed. Definitional problems, such as whether short term price movements constitute "manipulation", were identified. More aggressive enforcement of the section was also suggested.

The committee also briefly reviewed drafts of a new Form 041. It was suggested that a Certificate of Service to the Subject Company and offerees be added to the form, and the committee pointed out that the Division should be careful when requesting additional material pursuant to R.C. §1707.041(A)(2)(h), because these items must be sent to the offerees. The members suggested that the Division ask for information pursuant to R.C. §1707.23 if the materials, such as 10K filings, did not need to be sent to offerees. In addition, the members believed it advisable to require an officer of the Offeror to sign the form, although verification was not believed to be necessary.

• Sylvia Robbins-Penniman

# Churning: Formulas and Theories For Establishing Excessive Trading

*by Erwin J. Dugasz, Jr.*

Churning is generally defined as an improper use of discretionary authority by a salesman that results in unreasonable commissions or compensation to the salesman. It is a concern for investors and an enforcement issue for regulatory agencies because of the nature of the typical compensation relationship between licensed dealers or salesmen and their clients. The licensee's compensation is generally based on activity in the investor's account. As a result, there is a natural pressure on the licensee to maintain a high level of activity in an investor's account: there is no economic benefit to the broker to maintain the *status quo* in a portfolio.

The problem arises when a salesman buys or sells securities for a customer to generate excessive commissions for himself or herself, while ignoring the investment objectives of the customer.[1] However, despite the common understanding of the meaning of the concept, churning has been difficult to prove in the courts.

Churning has three elements. First, the salesman must have had "control" over the account; second, the salesman must have acted with *scienter*; and third, the trading in the account, must have been "excessive," in light of the customer's investment objectives. However, despite the commonly accepted definition of the term (complicated as it is by the lack of specificity found in regulatory terminology), churning cases have not been widely prosecuted, in great part because of the difficulty of establishing what constitutes "excessive" trading in an investor's portfolio.

CONTROL: Churning cannot occur unless the salesman, in some way, controls the account of the customer. A salesman can acquire control over an investor's account through a contractual arrangement which grants the salesman discretionary authority to make investment decisions in the account. However, there are other factors which are considered in order to demonstrate that a salesman exercised control over an account. Courts and regulatory agencies have found control by a salesman over an investor's account by reviewing the age, education, and investment experience of the customer[2], the ability of the customer to read and understand monthly statements, the nature and extent of discussions between the customer and salesman regarding trading strategy and objectives, the relationship between the customer and salesman[3], the length of time the account was maintained, and the time and manner in which the client became aware, or suspicious, of potential problems.

Conversely, a review of the investor's actions also merits special attention when determining whether an account was controlled by the salesman. If the investor has made investment decisions independently of the salesman's recommendations and was competent to make those decisions, the investor should be considered to have controlled their own account[4] In addition, a customer who is intimately involved in the trading activity by the salesman[5] or consents to heavy trading in the account[6] will also be found to control their account.

SCIENTER: In the federal context, Ernst & Ernst v. Hochfelder,[7] established that scienter is required to be alleged and proven in a churning case. In an action under federal securities Rule 10b-5, scienter must be established by showing that the salesman intended to defraud or was acting in willful and reckless disregard for the customer's interests. Once excessive trading and the salesman's control have been established, the courts have inferred scienter unless the salesman could justify the actions taken in the account.[8] If the opposite is true, scienter will not be established.[9]

The Ohio Revised Code, however, does not require that the same high standard of scienter be met in a securities fraud case. The Ohio Securities Act calls for a negligence standard.[10] The difference between the federal and Ohio standards should be noted in any prosecution in an Ohio administrative or criminal action.

EXCESSIVE TRADING: There is no single factor that determines excessive trading; rather, several factors working together must be present to support the conclusion. The account history must be viewed as a whole, not as independent, isolated, or successive trades. Finally, high trading activity must have occurred throughout the life of the account, not just in an isolated instance.

**1. Investment Objectives of the Customer.** The intended investment strategy of the customer establishes the foundation for considering the question of whether or not here has been excessive trading. What type of investment strategy did the customer indicate for the account? If a customer was interested in short-term, speculative profits, more activity should be expected[11] However, if the customer requested that the salesman make conservative, long-term growth investments, less activity should occur in the account.[12]

**2. Turnover Rate** Various

formulas have been developed and used to determined how many times an account is "turned over"[13]. Although a turnover rate of six times per year (once every two months) may be considered excessive[14], both the courts and the Securities and Exchange Commission have found churning violations where the turnover rate was substantially lower.[15]

One theory determines turnover by the ratio of the total cost of the purchases made for an account during a given period of time to the amount invested by the customer. The Looper Formula, as it is commonly known, is as follows:

$$\text{TURNOVER RATE} = \frac{\text{\$ PURCHASES}}{\text{\$ AVG. NET EQUITY}}$$

Although a turnover rate of six times per year (once every two months) may be considered excessive[16], both the courts and the Securities and Exchange Commission have found churning violations where the turnover rate was substantially lower.[17]

One commentator has ranked turnover rates based on the Looper Formula as follows[18]: 2:1 demonstrates an inference of excessiveness; 4:1 demonstrates a presumption of excessiveness; and 6:1 demonstrates a conclusion of excessiveness. However, the turnover rate formula has been criticized because it measures volume rather than cost.[19]

**3. Amount of Compensation on Profits Generated from the Account:** This formula uses the ratio of the commissions generated by the account to the size of the customer's investment to consider "excessive" trading.

As with the other formulas, there is no exact percentage that will separate churned accounts from unchurned accounts. However, some cases have held that when the dealer's annual commissions reach 25% of the size of the customer's account, the ratio indicates churning[20] Note, however, that large commissions alone will not prove churning.[21]

In addition, an equation similar to the Looper formula has been developed which counteracts the emphasis on volume in the turnover rate. The Goldberg Cost/ Equity Maintenance Factor determines the percentage of return on the customer's average net equity needed in order to pay stock broker commissions and other expenses:

$$\text{COST/EQUITY MAINTENANCE FACTOR} = \frac{\text{COSTS}}{\text{AVERAGE NET EQUITY}}$$

The cost/equity maintenance factor for Goldberg's formula has also been quantified:[22] 4:1 demonstrates an inference of excessiveness; 8:1 demonstrates a presumption of excessiveness; and 12:1 demonstrates a conclusion of excessiveness. Although Goldberg's formula is a variation on the turnover rate formula, it has been used as a separate factor to establish churning.[23]

**4. Number of Trades, Frequency of Trades and "In and Out" Trading:** Formulas which compute the total number of trades effected in the account (number of trades) and the period of time within which the trades were effected (frequency of trades) have been applied with some frequency in churning cases. "In and out" trading consists of the sale of all or part of the customer's account, with the money immediately reinvested in other securities. Importance is placed on the period of time that the securities are held in the account before being sold. For this formula, there are no specific ratios that must be reached before an account is said to have been churned.

For example, in the case of Mihara v. Dean Witter & Co.,[24] during its first year, the account had 50% of its securities held for 15 days or less, 61% of its securities held for 30 days or less, and 76% of its securities held for 60 days or less. For the entire 30 months of its existence, the account had 81.6% of its securities held for 180 days or less. In addition to these figures, it was determined that the account had high commission ratios and suffered substantial losses. With these factors, the court held that the account was churned. There are other cases that have used the "In and Out" Trading formula to establish churning.[25]

There are instances, however, where an "In and Out" formulation may not give an accurate picture. In Horne v. Francis DuPont & Co.,[26] the court rejected a churning case presented by the customer based exclusively on in-and-out trading. The court found that the customer was sophisticated, controlled the account, initialed the transactions, and wanted to speculate. This case clearly shows how difficult it is for a customer who wanted short term profits to prosecute a churning action.

**5. Other factors.** There are some less commonly known formulas that have been used to indicate churning. Factors such as the ratio of losses in the account to the equity in the account[27], cross trading (where the salesman matches buy and sell orders between his clients accounts)[28] and the type and quality of security being purchased for the investor by the salesman[29] are used in conjunction with other factors and formulas to establish churning.

FEDERAL & OHIO LAW: Churning is not specifically defined in the Ohio Securities Act, the federal securities acts, or the rules adopted under those statutes. However, the administrative rules for the Ohio Securities Act state that a dealer may lack good business repute if it, or its salesman, have engaged in a continuing course of conduct that induced "trading in a customer's account that is excessive in size of frequency in view of the financial resources of the customer or the character of the account."[30]

A number of self-regulatory organizations have suitability standards set forth in their by-laws or regulations, commonly known as "know your customer" rules[31] and have used the theory as a foundation for build ing a churning case. Ohio also has its own suitability standard.[32]

In addition, Ohio Revised Code Section 1707.44(G) prohibits fraud in the sale of securities. To the extent that churning constitutes fraud under state or federal law,[33] the Division could institute an administrative or criminal action against a salesman or dealer. Courts have determined that churning constitutes actionable fraud[34] within the meaning of §10(b) of the Securities Exchange Act of 1934[35] and rule 10b-5.[36]

Alternatively, the Division may address churning violations by refusing, suspending or revoking the license of a dealer, salesman, or applicant who has engaged in churning. Pursuant to O.A.C. Rule 1301:6-3-15(O)(2), (6), and (7), the

**Division may take action against a licenses or applicant if the National Association of Securities Dealers, the Securities and Exchange Commission or similar agency has taken action against an applicant or licensee for churning.**

**Other State Securities Laws: Most states have defined churning in their statures and codes in language similar to O.A.C. Rule 1301:6-3-15(A)(2), 1301:6-3-19(A)(5) or 1301:6-3-19(D).[37]. Churning is considered by these states to be either a violation of a statute prohibiting dishonest or unethical business practices, or is considered to be a type of fraudulent business conduct. A few states have found the problem so pervasive that they issued policy statements on the matter.[38]**

**For all the statutes, rules and interpretations, however, there are few reported cases where state securities agencies prosecuted dealers and salesman who churn accounts.[39]**

**CONCLUSION: Despite the appearance of quantitative objectivity presented by the various formulas and theories for establishing "excessive" trading in a churning case, the issues involved in proving a churning case are not capable of being encapsulated in a single mathematic calculation. The various formulas may provide a guide to the issues, but it is still more difficult to prove churning than it is to identify it.**

FOOTNOTES

[1] Note, *Churning by Securities Dealers*, 80 Harv. L. Rev. 869 (1967).

[2] Hect v. Harris Upham & Co., 283 F. Supp 417 (N.D. Cal. 1968), modified in part and aff'd in part, 430 F.2d 1202 (9th Cir. 1970); In Re Bechel, Johnson & Co., 26 S.E.C. 180 (1952), aff'd, 198 F. 2d 690 (2d Cir. 1952), cert. denied, 344 U.S. 855 (1952).

[3] Kravitz v. Pressman, Frolich & Frost, Inc., 447 F. Supp. 203 (D. Mass. 1978).

[4] M & B Contracting Corp. v. Dale, 601 F. Supp. 1106 (E.D. Mich. 1984), aff'd, 795 F.2d 531 (6th Cir. 1986)(salesman always secured the customer's approval prior to a trade and maintained a business relationship throughout the life of the account); Carr v. Warner, 137 F. Supp 611 (D. Mass. 1955)(customer found to competently control own account due to employment and educational background).

[5] Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 461 F. Supp. 951 (E.D. Mich. 1978) aff'd mem., 647 F.2d 165 (6th Cir. 1981); Xaphes v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 632 F. Supp 471 (D. Me. 1986); Nunes v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 635 F. Supp 1391 (E.D. Mich. 1986); Cummings v. A.G. Edwards & Sons, Inc., 733 F. Supp 1029 (M.D. La. 1990).

[6] Follansbee v. Davis Skaggs & Co., Inc., 681 F.2d 673 (9th Cir. 1982).

[7] 425 U.S. 185 (1976).

[8] Rolf v. Blyth Eastman Dillon & Co., 424 F. Supp 1021 (S.D N.Y 1977), reversed on other grounds, 570 F.2d 38 (2d Cir. 1978), cert. denied 439 U.S. 1039 (1978).

[9] M & B Contracting Corp.v. Dale, 601 F. Supp 1106 (E.D. Mich. 1984). aff'd, 795 F.2d 531 (6th Cir. 1986).

[10] R.C. §1707.29; See also State v. Walsh, 66 Ohio App.2d 85 (1979).

[11] M & B Contracting Corp.v. Dale, 601 F. Supp 1106 (E.D. Mich. 1984). aff'd, 795 F.2d 531 (6th Cir. 1986).

[12] Hyman, *Churning in Securities: Full Compensation For The Investor*, 9 U. Dayton L. Rev. 1 (1984).

[13] For other formulas see A. Bromberg & L. Lowenfels, *Securities Fraud & Commodities Fraud*, §5.7 (322)(1)(1985).

[14] In Re Merrill Lynch, Pierce, Fenner & Smith, NASD Complaint No. LA-4012 (Aug. 26, 1985)(6.01 turnovers in six months and 11.16 turnovers in fifteen months); Hatrock v. Edward Jones & Co., 750 F.2d 767 (9th Cir. 1984)(6 to 7 turnover rate in three months); Rush v. Oppenheimer & Co., Inc., 592 F. Supp. 1108 (S.D. N.Y. 1984)(10 turnovers in eighteen months); Mihara v. Dean Witter, 619 F.2d 814 (9th Cir.1980)(6.0 turnovers in three years); Hecht v. Harris Upham & Co., 283 F. Supp. 417 (N.D. Cal. 1968), modified in part and aff'd, 430 F.2d 1202 (9th Cir.1970) (8 to 11.5 turnovers in six year, ten month period); Kaufman v. Magid, 539 F. Supp 1088 (D.C. 1982)(turnover rate of 6 sufficient to constitute excessive trading); In Re Shearson Hammill & Co., SEC Release No. 7743 (1965)(turnover rate of 70.77 during a 9 1/2 month period).

Contrary view of high turnover rate indicates churning: Newburger, Loeb & Co., Inc. v. Gross, 365 F. Supp 1364 (S.D.N.Y. 1973), aff'd in part, rev. in part, 563 F.2d 1057 (2d Cir. 1977) cert. denied, 434 U.S. 1035 (1977) (7 turnovers per year for sophisticated investor not deemed excessive); Thompson v. McKinnon, 35 S.E.C. 451 (1953)(turnover rate of 25 not deemed churning since customer initiated the transactions).

[15] In Re Richard D. Cea, SEC Release No. 8662 (1969) (one turnover in fifteen and one-half months); Stevens v. Abbott, Proctor & Paine, 288 F. Supp. 836 (E.D. Va. 1968)(two turnovers in twelve months); In Re Shearson, Hamill & Co., 42 S.E.C. 811 (1965)(5.45 turnovers in twenty months); In Re J. Logan & Co., 41 S.E.C. 88 (1962)(3.03 turnovers in twenty-three months); In Re Behel, Johnson & Co., 26 S.E.C. 163 (1947)(4.50 turnovers in 3 years); In Re Samuel B. Franklin & Co., 42 S.E.C. 325 (1964)(4.4 turnovers in 18 months).

Contrary view of low turnover rate: Siegel v. Tucker, Anthony & R.L.Day, Inc., 658 F. Supp. 550 (S.D. N.Y. 1987)(annual turnover rate of 2.00 was too low to justify churning); Grove v. Shearson Loeb Rhodes, Inc., [1983-84 Transfer Binder] Fed. Sec. L. Rep (CCH) ¶199,229 (turnover rate only 1.87 per year); Rolf v. Blyth Eastman Dillon & Co., 424 F. Supp. 1021 (S.D. N.Y. 1977), rev. on other grounds, 570 F.2d 38 (2d Cir. 1978), cert. denied, 439 U.S. 1039 (1978) (turnover rate of stocks was never higher than 1.85); Carroll v. Bear Stearns & Co., 416 F. Supp. 998 (S.D. N.Y. 1976) (1 turnover in fifteen months); Marshak v. Blyth Eastman Dillon & Co., 413 F. Supp 377 (N.D. Okla. 1975)(turnover rate of 3.1 for 11 months not churning).

[16] In Re Merrill Lynch, Pierce, Fenner & Smith, NASD Complaint No. LA-4012 (Aug. 26, 1985) (6.01 turnovers in six months and 11.16 turnovers in fifteen months); Hatrock v. Edward Jones & Co., 750 F.2d 767 (9th Cir. 1984)(6 to 7 turnover rate in three months); Rush v. Oppenheimer & Co., Inc., 592 F. Supp. 1108 (S.D. N.Y. 1984) (10 turnovers in eighteen months); Mihara v. Dean Witter, 619 F.2d 814 (9th Cir.1980)(6.0 turnovers in three years); Hecht v. Harris Upham & Co., 283 F.Supp. 417 (N.D. Cal 1968), modified in part and aff'd 430 F.2d 1202 (9th Cir.1970) (8 to 11.5 turnovers in six year, ten month period); Kaufman v. Magid, 539 F. Supp 1088 (D.C. 1982)(turnover rate of 6 sufficient to constitute excessive trading); In Re Shearson Hammill & Co., SEC Release No. 7743 (1965)(turnover rate of 70.77 during a 9 1/2 month period).

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[18] This chart only applies to ordinary investment accounts. Different types of accounts, such as trading or speculative accounts, are not to be considered in the same fashion, because more active trading is expected. S. Goldberg, *Fraudulent Broker-Dealer Practices*, §2.9(b)(5) (1978).

[19] Id.

[20] A. Bromberg & L. Lowenfels, *Securities Fraud & Commodities Fraud*, §5.7 (322)(2)(1985).

[21] Peterson v. Lincolnwood, Inc., [1984-1985 Transfer Binder] Blue Sky L. Rep (CCH)¶172,216.

[22] S. Goldberg, *Fraudulent Broker-Dealer Practices*, §2.9(b)(6)(1978).

[23] In Re Merrill Lynch, Pierce Fenner & Smith, Inc., Okla. Sec. Comm. No. OSC-0109 [1982-84 Transfer Binder] Blue Sky L. Rep. (CCH) ¶ 71,792 (August 25, 1980).

[24] 619 F.2d 814 (9th Cir. 1980).

[25] Hecht v. Harris Upham & Co., 283 F. Supp. 417 (N.D. Cal. 1968), modified in part and aff'd
430 F.2d 1202 (9th Cir. 1970).

[26] Petrites v. JC Bradford, 428 F. Supp. 1271 (D. DC 1977) aff'd., 646 F.2d 1033 (5th Cir. 1981).

[27] Costello v. Oppenheimer & Co., Inc., 711 F.2d 1361 (7th Cir. 1983).

[28] Norris & Hirshberg v. S.E.C., 177 F.2d 228 (D.C. Cir. 1949).

[29] Stevens v. Abbott, Proctor & Paine, 288 F. Supp. 836 (E.D. Va. 1968); Twomey v. Mitchum Jones & Templeton, Inc., 262 Cal. App. 2d 690, 69 Cal. Rptr. 222 (1968).

[30] Ohio Administrative Code. Rule 1301:6-3-19(A)(2).

[31] see NASD Manual-Rules of Fair Practice, Art. III, Sec. 2 ¶ 2152; American Stock Exchange Guide, Rule 411 ¶9431; New York Stock Exchange Guide, Rules 405 and 2405.

[32] O.A.C. Rule 1301:6-3-19(A)(5).

[33] R.C. §1707.01(J) defines "fraud" as anything recognized on or after July 22, 1929, as such in courts of law or equity; any device, scheme, or artifice to defraud or to obtain money or property by means of any false pretense, representation or promise; any fictitious or pretended purchase or sale of securities; and any act, practice, transaction, or course of business relating to the sale of securities which is fraudulent or which has operated or would operate as a fraud upon the purchaser; see also O.A.C. 1301:6-3-15(O)(1).

[34] Faturik v. Woodmere Securities, Inc., 431 F. Supp 894 (D.C.N.Y. 1977); Dzentis v. Merrill Lynch, Pierce Fenner & Smith, Inc., 494 F.2d 168 (10th Cir. 1974).

[35] 15 U.S.C. §78(b).

[36] 17 C.F.R. §240.10.

[37] Ala. Admin. Code r. 830-X-3-18(2)(1983)
Alaska. Admin. Code tit. 3 §08.060(4)(Feb.1972)
Ar. Admin. Code tit. 23 r. 308.01(E)(1989)
Cal. Admin. Code tit. 9 §260.216.5(1982)
Conn. Agencies Regs. §36-500-15(ddd)(1983)
Fla. Admin. Code Ann. r. 3E-600.013(1)(b)(1991)
Ga. Comp. R. & Regs. r. 590-4-2-.14(1)(A)(2)(1987)
Haw. Admin. Code tit. §16-38-7(5)(1987)
Idaho Admin. Code tit. 30, r.11,4(7)(c)(1991)
Ind. Admin. Code tit. 710, r.1-17-1(i)(1988)
Iowa. Admin. Code r. No. 191-50.9(502)(b)
Kan. Admin. r. 808 KAR 10:040(4)(1989)
Mich. Comp. Laws §451.604(a)(1)(L)(1979)
Minn. R. 2875.0910(7)(1983)
Miss. Admin. Code r. 523(A)(2)(1990)
Mont. Admin. Code r. 6.10 126(1)(b)
N.H. Admin. Code r. Ins-Sec 602.01(A)(2)(1982)
N.M. Admin. R. SDR. 86-3.09(A)(2)(1986)
N.C. Admin. Code tit. 18, r. .1414(b)(2)(Oct. 1988)
N.D. Admin. Code §73-02-09-02(2)(1990)
Okla. Admin. Code r-204(g)(C)(13)(A)
64 Pa. Code §305.019(c)(1)(ii)(1990)
S.D. Admin. R. 20:08:03:22(2)
Tenn. Admin. R. 0708-4-3-.02(6)(A)(2)(1985)
Utah. Admin. R. 177-6-1g(B)(2)(1983)
Va. Reg. §305(A)(2)
Wash. Admin. Code §460-20A-425(b)(1989)
Wis. Admin. Code §SEC 4.06(1)(b)(Jan. 1989)

Investment advisor churning prohibitions: Ga. Comp. R. & Regs. r. 590-4-8-.17(1)(E)(1987); Md. Regs. Code tit. 2 §.03(5)(1989); N.W. Admin. R. SD 86-4.07(A)(3)(1986); N.C. Admin. Code tit. 18, r. 1801(A)(5)(Feb.1989); Okla. Admin. Code R-204(g)(D)(3); 64 Pa. Code §305.019(c)(3)(iii)(1990); S.D. Admin. R. 20:08:03.23)(1); Wash. Admin. Code §460-24A-220(3)(1985).

[38] Massachusetts Statement on Ethical Guidelines for the Securities Industry, Blue Sky L. Rep. CCH)§31,610 (May 9, 1985); Pennsylvania Unethical Business Practices of Investment Advisors and Broker-Dealers, Blue Sky L. Rep. (CCH)§48,679 (May, 1986); South Carolina's Standards of Conduct for Broker-Dealer and Agents, Blue Sky L. Rep. CCH)§51,563 (1981).

[39] In Re Gerald P. Ireland, Mich. Sec. Bureau Admin. No.85-98-S [1985-87 Transfer Binder] Blue Sky Rep. (CCH) ¶172,361(January 23, 1986); In Re Merrill Lynch, Pierce, Fenner & Smith, Inc., Okla. Sec. Common. No.OSC-79-0109 [1982-84 Transfer Binder] Blue Sky L. Rep. (CCH)¶71,791(Aug.25, 1980).

*Erwin John Dugasz, Jr. is a graduate of Kean College of Union, New Jersey and received his Juris Doctor degree from the Capital University Law School in Columbus, Ohio. He is admitted to the practice of law in Ohio and New Jersey. Mr. Dugasz is an Enforcement Staff Attorney with the Ohio Division of Securities*

## Examination Section Report:

### Books and Records of Broker-Dealers

Ohio Administrative Rule 1301:6-3-15(F)(1) requires that "Every dealer shall keep and maintain books and records which shall be adequate to enable the division to determine at all times the financial condition of such dealer."

Following is a listing of some of the items that we will expect to see to determine the financial condition of the broker-dealer. This listing is not intended to be all-inclusive as the particular business activities of individual dealers will determine the full scope of records maintenance responsibilities, but this article is intended to give dealers and their compliance staff an idea of the basic books and records that the Division's examination staff expects to be readily available on every dealer field examination.

It is important to keep in mind that good records and record-keeping by a dealer benefits both parties to a Division examination. When necessary information is readily available and clearly presented, the examiner can complete an exam without disrupting the dealer's office routine, and the potential for misunderstandings about the accounting procedures or financial condition of the dealer is minimized.

On a field exam, the examiner generally looks at the balance sheet first. As a result, it is important that supporting documentation for all significant balance sheet items be on hand and current. For example:

Cash: For any field exam, a dealer should expect that the Division's examination staff will review bank statements and reconciliations of the bank statement balance to the general ledger balance. It is helpful to have a separate general ledger account for each bank account. The division considers accurate and timely reconciliation of cash balances to be extremely important.

Accounts Receivable: We generally look to see details of who owes money to the broker-dealer, how long the money has been owed, and the nature of the transaction creating the receivable. We also evaluate the collectibility of the receivables. One of the tests we apply to receivables is to determine how long the money has been owed. Although not always required, it is helpful to set up separate general ledger accounts for receivables from customers, other dealers, and employees.

Notes Receivable: Copies of any notes are important verification of the balance sheet entries. If the notes are secured, we will need to see information showing the fair market value of the collateral pledged.

Inventory: The Division's examiner will generally ask to see the detail of the securities in inventory. We may perform a physical count of securities on hand and reconcile securities on hand with the amounts shown on the general ledger. We will need to be able to verify the unit prices the securities are carried at in inventory. A security position record, showing the location of all securities on any given day is helpful. We are also interested in similar verification of the short position.

Fixed Assets: Invoices to verify the cost of fixed assets should be available and up-to-date. Because of differing treatments for net worth purposes, it is helpful to maintain separate cost accounts and accumulated depreciation accounts for furniture and fixtures, machinery and equipment, leasehold improvements, and vehicles.

Liabilities: Dealers should expect the Division's examiners to review information supporting the liabilities shown on the balance sheet to determine that they are properly stated and to determine if the broker-dealer is having trouble paying bills as they become due. The examiner will also need to have copies of any subordination agreements in effect.

As noted above, this list is not all-inclusive. We will need to see detail support for any other significant items on the balance sheet to determine proper treatment for net worth purposes and to assure that the books and records are adequate for us to have confidence in the information contained in those books and records.

• Richard Pautsch

## Enforcement Section Report:

### Criminal Cases

**Kenneth Jackson**
On December 9, 1991, Kenneth A. Jackson was indicted by the Wayne County Grand Jury on 79 felony counts. The indictments included 1 count each of aggravated theft, theft, perjury, and 76 counts of passing bad checks. The charges relate to his activities with his Wooster-based companies, Blazo Corporation, of which he was President, Chairman and Chief Executive Officer, and Vision Television Network, Inc., of which he was President.

On December 10, 1991, Jackson was arrested and was released the next day on a $50,000 bond. He was arraigned on December 18, 1991, at which time he pleaded not guilty to all the charges. Assistant Wayne County Prosecutor John Williams was assisted in the preparation of this case for presentation to the grand jury by Karen Terhune, Assistant Manager of the Enforcement Section.

### Enforcement Section Division Orders

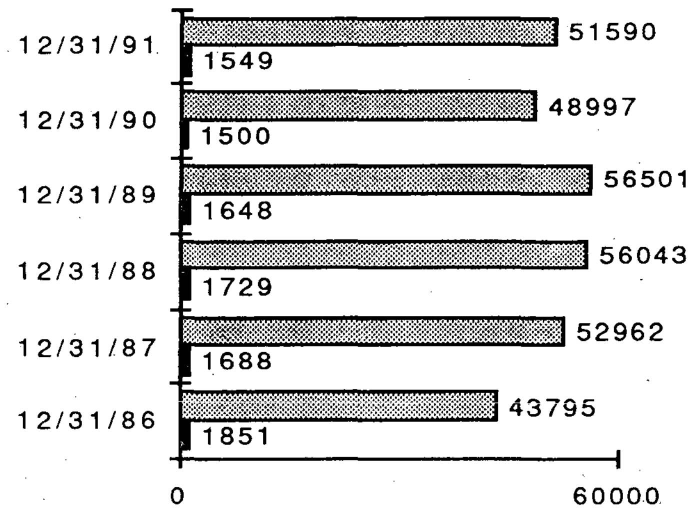
**Fortune Exploration Corporation and Caldwell Joint Venture 18-A**
On November 20, 1991, the Division issued Division Order 91-152, ordering Fortune Exploration and Caldwell Joint Venture, both of

Irving Texas, to cease and desist from future violations of the Ohio Securities Act. In the Notice of Opportunity for Hearing, Order No. 91-139, provided Fortune and Caldwell with an opportunity for a hearing to contest the allegation by the Division that Fortune and Caldwell violated the Securities Act by offering an unregistered interest in an offset oil and gas well located in Texas by means of an unlicensed telelphone solicitation to a Division employee . Fortune and Caldwell consented to the Final Order. The case was prepared by William D. Henry, Enforcement Section Staff Attorney.

**Sheldon Strauss**
On December 10, 1991, the Division issued Division Order 91-077, ordering Sheldon Strauss of South Euclid to cease and desist from future violations of the Ohio Securities Act. In the Division Order, to which Strauss consented, the Division ordered Strauss to comply with the provisions of the Ohio Securities Act. The Division's order arose out of activity reported earlier in the *Ohio Securities Bulletin*, where the Division alleged that Strauss, while employed by Shearson Lehman Hutton, Inc., made misrepresentations in the sale of securities and knowingly engaged in illegal, fraudulent and prohibited practices in such sales. Additionally, the order found that Strauss executed trades on behalf of customers without authority to do so, exercised discretionary power in affecting transactions without obtaining consent from his clients, and recommended trades that were not suitable for some of his clients. The case was prepared by Mary Spahia, Enforcement Section Staff Attorney.

**Marvin Beckwith and United American, Inc.**
On December 12, 1991, the Division issued Division Order 91-157, ordering Marvin Beckwith and United American, Inc.to cease and desist from future violations of the Ohio Securities Act. In the Division Order, the Division alleged that Beckwith and United American violated the Securities Act by selling unregistered stock to Ohio residents without a license to do so. Beckwith, of Birchway, Washington, and United American, of Custer, Washington consented to the Division's findings embodied in the order. The Case was prepared by Mary Spahia, Enforcement Section Staff Attorney.

**DEALER & SALESMAN LICENSES - YEAR-END TOTALS**




# Registration Statistics

| | 12/31/91 | 12/31/90 | 9/30/91 | 9/30/90 |
|---|---|---|---|---|
| 02B | 400 | 234 | 331 | 309 |
| 02E | 0 | 0 | 0 | 0 |
| 03O | 2,531 | 2,572 | 2,579 | 2,633 |
| 03Q | 301 | 271 | 293 | 308 |
| 03W | 41 | 36 | 35 | 30 |
| O4 | 1 | 0 | 0 | 1 |
| O41 | 1 | 1 | 1 | 0 |
| 05A | 0 | 0 | 1 | 0 |
| 06A1 | 45 | 58 | 50 | 54 |
| 06A2 | 21 | 15 | 15 | 18 |
| 06A3 | 12 | 9 | 9 | 5 |
| 06A3OG | 0 | 1 | 0 | 0 |
| 06A4 | 13 | 12 | 23 | 11 |
| O9 | 128 | 480 | 415 | 416 |
| O9OG | 1 | 0 | 0 | 0 |
| O91 | 666 | 266 | 289 | 286 |
| 39 | 31 | 30 | 25 | 22 |
| 391/3O | 189 | 212 | 195 | 189 |
| 391/3Q | 46 | 42 | 34 | 30 |
| 391/3W | 0 | 0 | 2 | 3 |
| 391/06A1 | 0 | 0 | 1 | 1 |
| 391/06A2 | 0 | 0 | 1 | 0 |
| 391/06A3 | 0 | 1 | 0 | 2 |
| 391/06A4 | 0 | 1 | 0 | 0 |
| 391/06OG | 0 | 0 | 0 | 0 |
| 391/09 | 1 | 1 | 0 | 0 |
| 391/091 | 1 | 1 | 0 | 0 |
| | | | | |
| totals | 4429 | 4243 | 4299 | 4322 |

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