

OHIO SECURITIES BULLETIN

A QUARTERLY PUBLICATION OF THE OHIO DIVISION OF SECURITIES

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Governor of Ohio

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Regulation FD: "The End of Steering Earnings?"

by Jeffrey D. Little

Introduction

On August 10, 2000, the Securities and Exchange Commission approved a proposal to restrict corporations from disclosing material, nonpublic information to analysts and large investors without making public disclosure of the same information. The proposal, known as Regulation FD, went into effect on October 23, 2000 and is founded on the premise that full and fair disclosure is the cornerstone of an efficient market system.

Despite significant controversy surrounding its proposal and adoption, Regulation FD is far from revolutionary. For at least

30 years, individuals have been subject to potential liability for making selective disclosures under the insider trading laws. Regulation FD builds on this concept, but goes two steps further: first, it creates affirmative disclosure requirements on public corporations so that material nonpublic information, once disclosed, must be widely rather than selectively disseminated; and second, it subjects public corporations themselves to potential liability for making selective disclosures.

Background

The SEC proposed Regulation FD in December 1999 against a backdrop of several
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Securities Law Seminar for Ohio Prosecutors

A Securities Law Seminar for Ohio Prosecutors was held on September 7, 2000, by the Ohio Division of Securities. The Seminar was planned to help enhance prosecutors' knowledge of the Ohio Securities Act and its criminal sanctions, and strengthen working relationships with Ohio county prosecutor's offices to fulfill part of the Division's mission of investor protection.

In addition to Ohio county prosecutors, the Division also invited representatives of other state and law enforcement agencies to attend the seminar. Representatives of the Columbus Police Department, the Ohio Attorney General's Office, other agencies within the Department of Commerce, and the Ohio Department of Insurance were also present.

The speakers included: Gary C. Suhadolnik, Director of Commerce; Thomas E. Geyer, Assistant Director of Commerce; Robert F. Smith, Assistant Attorney General, Ohio Organized Crime Investigations Commission; and Kenneth W. Oswalt, Assistant Prosecuting Attorney, Licking County. The following Division personnel also were speakers: Commissioner Debbie L. Dye Joyce, Matthew L. Fornshell, Michael P.

Miglets and Mark R. Heurman. A luncheon presentation was given by William A. Klatt, Chief Counsel to Governor Bob Taft.

The event was planned by employees participating in the Quality Service through Partnership (QStP) program which encourages employees to consider new ideas to meet customer needs and expectations. The Fraud Busters QStP Team members included the following people: Nancy Benton; Matt Fornshell; Dee O'Hair; Desiree Shannon; Karen Terhune (Team Leader) and Phyllis Humphrey (Facilitator). The Team Sponsors were Assistant Director Tom Geyer and Commissioner Debbie Dye Joyce. The team also worked through the Ohio Prosecuting Attorney's Association to disseminate a flyer on the seminar within the Association's summer mailing to prosecutors.

The attendees received materials which included an overview of securities law, copies of the antifraud provisions, and information pertaining to the nature of securities law violations. Ohio Securities Commissioner Debbie Dye Joyce commented, "We want to do everything we can to assist in the prosecution of criminals in the securities marketplace."

OHIO DEPARTMENT OF COMMERCE DIVISION OF SECURITIES

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celebrated instances where public corporations chose to disclose important information selectively to a small group of analysts or large investors, rather than to the investing public at large. In some cases, selective disclosures were made in conference calls or meetings that were open only to analysts and institutional investors. In other cases, corporate executives made selective disclosures directly to favored Wall Street analysts. Commonly, selective disclosures have taken the form of advanced notice of upcoming quarterly earnings or sales figures — information which, when announced, predictably and sometimes significantly impacts the market price of the disclosing corporation's securities.

The disclosure of corporate information to selected analysts has traditionally been encouraged, and indeed, was viewed as a necessary means of ultimately delivering information to the investing public. Today, because the technology exists to easily and rapidly disseminate information, the SEC will now place an affirmative disclosure obligation on public corporations with respect to their material nonpublic information. While public corporations will continue to maintain control over the timing of disclosure of their important corporate developments, Regulation FD will require that when material information is disclosed, it be "publicly disclosed." Regulation FD basically requires: (1) that when a public corporation intentionally discloses material information, it do so to the general investing public by means of adequate "public disclosure"; and (2) that when a public corporation learns that it unintentionally disclosed material nonpublic information, it promptly correct its mistake by making a public disclosure of the same information.

Regulation FD

Regulation FD effectively sets forth a rule against selective disclosures of material nonpublic information. Under the regulation, whenever:

- (1) an issuer, or person acting on its behalf,
- (2) discloses material nonpublic information,

(3) to certain enumerated persons (in general, securities market professionals or holders of the issuer's securities under circumstances where it is reasonably foreseeable that they will trade on the basis of the information),

(4) the issuer must make public disclosure of that same information:

- (a) simultaneously (for intentional disclosures), or
- (b) promptly (for non-intentional disclosures).

The SEC makes clear that in the absence of a specific duty to disclose, the federal securities laws do not generally require public corporations to disclose all material events as soon as they occur. However, consistent with the principles of insider trading law and common corporate practice, Regulation FD now requires that when public corporations choose to disclose material information, they do so broadly to the investing public, not exclusively to the chosen few.

Disclosure by an Issuer or Person Acting on its Behalf

Except for foreign private issuers and foreign governments, Regulation FD

applies to all public corporations that have securities registered under the Exchange Act of 1934, as amended, and public corporations required to file periodic reports, such as Forms 10-K and 10-Q. It applies not only to official disclosures made in the name of the corporation, but also to disclosures made by a "person acting on its behalf." This includes any senior official of the public corporation and any other officer, employee or agent of the corporation who regularly communicates with securities market professionals or holders of the corporation's securities.

The definition of "person acting on behalf of an issuer" distinguishes between situations where an officer properly authorized to speak on a corporation's behalf, for example, makes a selective disclosure, and situations where an officer "tips" a friend or relative for his or her own benefit. This distinction means that public corporations will not automatically be liable under Regulation FD (or be responsible for making simultaneous or prompt public disclosure) whenever an unauthorized person improperly trades or tips. Instead, in these situations, the SEC believes it is appropriate to hold the unauthorized person liable for illegal insider trading, rather than to force corporations to make public disclosures.

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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Disclosure of Material Nonpublic Information

Public corporations are not permitted to selectively disclose “material” nonpublic information. While the SEC recognizes that “materiality judgments can be difficult,” it has refrained from defining the term “material” in Regulation FD. Instead, the regulation relies on the definition that is generally applicable under the federal securities laws: information is material if “there is a substantial likelihood that a reasonable shareholder would consider it important” in making an investment decision, or if it would significantly alter the “total mix” of information available to investors.

Unfortunately, materiality issues are rarely black and white and often force corporate officials to make snap judgments distinguishing among various shades of grey. To make matters worse, the ultimate determination of materiality is often made in hindsight based on the reactions of investors and the market. The SEC has stated, however, that information concerning the following events should be carefully reviewed to determine whether it is material: (1) earnings; (2) mergers, acquisitions, tender offers, joint ventures, or changes in assets; (3) new products or discoveries; (4) developments regarding key customers or suppliers; (5) changes in control or in management; (6) changes in auditors or auditor notification that the corporation can no longer rely on an auditor’s report; (7) changes in the corporation’s securities, such as defaults on senior securities, calls of securities for redemption, repurchase plans, stock splits or changes in dividends, changes to the rights of security holders, public or private sales of additional securities; and (8) bankruptcies or receiverships. With respect to earnings information, the SEC specifically cautions that when a corporate official

engages in a private discussion with an analyst who is seeking guidance about earnings estimates, he or she takes on a high degree of risk under Regulation FD. If the . . . official communicates selectively to the analyst nonpublic information that . . . anticipated earnings will be higher than, lower than, or even the same as what analysts have been forecasting, the issuer likely will have violated

Regulation FD. This is true whether the information about earnings is communicated expressly or through indirect “guidance.”

At the opposite end of the spectrum from earnings information, corporate officials generally need not worry about discussing general background information or “industry trends.” Many corporate officials are already sensitive to materiality issues, and Regulation FD should heighten that awareness. Nevertheless, when particularly difficult issues arise, responsible corporate officials should continue to decline comment and seek legal advice.

In addition to providing little guidance with respect to materiality, Regulation FD does not define the term “nonpublic.” It is well established, however, that information is nonpublic if it has not been disseminated in a manner making it available to investors generally. For information to be “public,” “it must be disseminated in a manner calculated to reach the securities market place in general through recognized channels of distribution, and public investors must be afforded a reasonable waiting period to react to the information.” Under Regulation FD, corporations generally have substantial flexibility in making information “public.” A corporation can disclose the information on a Form 8-K, issue a press release, or hold a press conference or analyst call that is open to the investing public. The SEC also encourages corporations to make public disclosures of information on their websites, although posting information on a website alone will not make information “public” for the purposes of Regulation FD.

Disclosure to Certain Enumerated Persons

Regulation FD is designed to solve the core problem of selective disclosure made to persons who are reasonably expected to trade on the information or provide others with advice about securities trading. Consequently, Regulation FD makes clear that the general rule against selective disclosure applies only to disclosures made to: (1) broker-dealers, investment advisors, institutional investment managers, investment companies, hedge funds, or their respective associated or affiliated persons (e.g., any partner, officer, director, branch manager, or employee of, or person controlling, controlled by, or under common control with, one of these securities

professionals); and (2) any holder of a public corporation’s securities under circumstances in which it is reasonably foreseeable that the holder will trade on the information.

In addition to the exclusive coverage of Regulation FD described above, the regulation contains an express exclusion for communications with persons who are bound by duties of trust or confidence not to disclose or use the information for trading. Thus, the regulation recognizes that public corporations may continue to share material nonpublic information with their attorneys, investment bankers and accountants. This exception also allows public corporations to make selective disclosures under special circumstances. For example, a public corporation can share material nonpublic information with other parties to a potential business combination without having to make the information public if the parties receiving the information agree to hold it in confidence and not to use it to gain a trading advantage.

Furthermore, Regulation FD contains an additional exclusion for communications with credit rating agencies. This exclusion, however, applies only where the information is disclosed for the purpose of developing a credit rating and the particular agency’s ratings are publicly available. The SEC has also stated that Regulation FD will not interfere with disclosures to the general media or to governmental agencies.

Timing of Disclosures Required by Regulation FD

The SEC recognizes that corporations cannot police all disclosures. Thus, Regulation FD distinguishes between “intentional disclosures,” which require simultaneous public disclosure, and “unintentional disclosures,” which merely require “prompt” correction.

- *Intentional Disclosures:* When a corporation makes an “intentional” disclosure of material nonpublic information, Regulation FD requires the corporation to *simultaneously* make public disclosure of the same information to the investing public. A selective disclosure is “intentional” when the person making the disclosure either knew, or was reckless in

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not knowing, that he or she would be disclosing information that was material and nonpublic. Thus, a communication would not be “intentional” if made through an honest mistake, for example, where a corporate official believed in good faith that the information had already been disclosed in a press release or an SEC filing.

- *Unintentional Disclosures:* When an unintentional disclosure of material nonpublic information occurs, the corporation is required to make “prompt” public disclosure of the same information. Under Regulation FD, “promptly” is defined to mean “as soon as reasonably practicable,” but no later than 24 hours after any executive officer, investor relations officer, public relations officer or similar employee performing equivalent duties, learns of the unintentional disclosure (unless the discovery occurs after trading hours on a Friday, in which case, public disclosure must be made before the market opens on the next Monday). By way of example, an executive officer of a public corporation may realize that he has unintentionally disclosed material nonpublic information if he sees a significant change in the market price or trading volume of his corporation’s stock, or an investor relations officer might learn that an employee has unintentionally disclosed material nonpublic information when an analyst calls requesting an official comment or confirmation.

Public Disclosure

Regulation FD defines the type of “public disclosure” that will satisfy its general mandate, and generally provides public corporations with significant flexibility. Corporations can comply with the regulation by filing a Form 8-K with the SEC containing the relevant information. Notably, under Regulation FD, public corporations may choose between “filing” and merely “furnishing” information on an 8-K. If a corporation

chooses to “file” information, it subjects itself to potential liability under Section 18 of the Exchange Act if the information is false or misleading. “Furnishing” information, however, will not create a potential liability under Section 18, unless the corporation later specifically incorporates that information into a report, proxy statement or registration statement filed with the SEC. All disclosures on Form 8-K, whether “filed” or “furnished,” will continue to be subject to the antifraud provisions of the federal securities laws.

Instead of filing an 8-K, a corporation may make a public disclosure by issuing a press release through a widely circulated news or wire service, such as Dow Jones, Bloomberg, Business Wire, PR Newswire or Reuters. In addition, a corporation can make announcements through press conferences or conference calls that are open to members of the general public, so long as the public is given adequate notice of the conference or call and the means for gaining access. For example purposes only, the SEC provides the following model to help corporations in making planned public disclosures under Regulation FD:

First, issue a press release containing the information and distribute it to a news or wire service;

Second, provide adequate notice, through the press release or by some other means, of a scheduled conference call to discuss the material disclosure, giving investors the time and date of the call and instructions on how to access it;

Finally, hold the conference call in an open manner, allowing investors to listen in, either by telephone or Internet webcasting.

In addition to the SEC’s model for planned disclosures, Regulation FD provides corporations with the flexibility to make public disclosures by disseminating information through any other method of disclosure that is “reasonably designed to provide broad public access.”

Recognizing new and evolving technologies, the SEC also encourages corporations to make public disclosures on their websites. However, the SEC believes that Internet access has not evolved to the point of

providing broad public access, and therefore, website posting alone will not satisfy Regulation FD.

Penalties for Violating Regulation FD

Regulation FD is not an antifraud rule and it is not intended to create duties or liabilities under Section 10(b)(5) of the Exchange Act. As a result, the SEC has expressly stated that “no private liability will arise from an issuer’s failure to file or make public disclosure.” Nevertheless, if a public corporation fails to comply with Regulation FD, the SEC may institute an enforcement action, seeking a cease and desist order, an injunction, or civil monetary penalties. In appropriate cases, the SEC has also made it clear that it may bring an enforcement action against an individual responsible for a violation, either as “a cause of” the violation in a cease and desist proceeding, or as an aider and abetter of the violation in an action seeking an injunction or monetary penalties.

Although related, Regulation FD in no way alters any existing bases for liability under Rule 10b-5. Thus, for example, a corporate official may still be liable for “tipping” under Rule 10b-5, even if the corporation makes the proper public disclosures under the regulation. In addition, if a corporation fails to make the public disclosures required by Regulation FD, it may still be liable under a “duty to correct” or “duty to update” theory.

Practical Implication - The End of Steering?

For all practical purposes, Regulation FD should end the practice of “steering” earnings. No longer can corporate officers “guide” the street by selectively disclosing that earnings estimates may be “too aggressive.” Indeed, corporate executives cannot even selectively confirm earnings estimates without creating a public disclosure obligation for their corporation. Remember, the SEC specifically warns against selectively communicating that anticipated earnings “will be higher than, lower than, or even the same as what analysts have been forecasting.” Accordingly, public corporations should instruct their executive officers to give “no comment” responses concerning earnings issues. “No comment” responses should also

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MPI Financial, Michael Patterson, Inc., and Diversified Capital Markets

On July 24, 2000, the Division issued Division Order No. 00-212, a Cease and Desist Order, against MPI Financial, Michael Patterson, Inc., and Diversified Capital Markets. Respondent MPI Financial and its predecessor Michael Patterson, Inc. also did business under the name Diversified Capital Markets from their Ohio business address.

On June 15, 2000, the Division issued a Notice of Opportunity for Hearing, Division Order No. 00-147, to MPI Financial, Michael Patterson, Inc., and Diversified Capital Markets. The Division alleged that the Respondents had violated the provisions of Ohio Administrative Code ("O.A.C.") 1301:6-3-19(A)(2) by churning investors' accounts and O.A.C. 1301:6-3-19(A)(3) by executing transactions on behalf of investors without authority to do so. The Division also alleged that Respondents violated O.A.C. 1301:6-3-19(A)(5) by selling investors securities that were not suitable investments for them and O.A.C. 1301:6-3-19(A)(12) by executing unauthorized transactions in investors' margin accounts. The Division notified the Respondents of their rights to an administrative hearing pursuant to Chapter 119 of the Revised Code. Respondents later withdrew their initial request for an adjudicative hearing pursuant to Chapter 119 of the Ohio Revised Code. Therefore, the Division issued its Cease and Desist, Order No. 00-212.

Michael Patterson

On August 11, 2000, the Division issued Division Order No. 00-234, a Cease and Desist Order, against Michael Patterson. Respondent is an Ohio resident.

On June 15, 2000, the Division issued a Notice of Opportunity of Hearing, Division Order No. 00-147, to Michael Patterson. The Division alleged that the Respondent had violated the provisions of Ohio Administrative Code ("O.A.C.") 1301:6-3-19(A)(2) by churning investors' accounts and O.A.C. 1301:6-3-19(A)(3) by executing transactions on behalf of investors without authority to do so. The Division also alleged that the Respondent violated O.A.C. 1301:6-3-19(A)(5)

by selling investors securities that were not suitable investments for them and O.A.C. 1301:6-3-19(A)(12) by executing unauthorized transactions in investors' margin accounts. The Division notified the Respondent of his right to an administrative hearing pursuant to Chapter 119 of the Revised Code. The Respondent later withdrew his initial request for an adjudicative hearing pursuant to Chapter 119 of the Ohio Revised Code. Therefore, the Division issued its Cease and Desist, Order No. 00-234.

Technosoft Consulting & Development, Inc.

On September 6, 2000, the Division issued Division Order No. 00-270, a Cease and Desist Order, against TechnoSoft Consulting & Development, Inc. Respondent's business address is in New York.

On July 26, 2000, the Division issued a Notice of Opportunity for Hearing, Division Order No. 00-213, to TechnoSoft Consulting & Development, Inc. The Division alleged that the Respondent had violated the provisions of Revised Code Sections 1707.44(C) and 1707.44(G), respectively, by selling unregistered securities and failing to disclose material facts in conjunction with the sales of securities. The Division also alleged that Respondent violated Revised Code Section 1707.44(B)(4) which provides that no person shall knowingly make or cause to be made any false representation concerning a material and relevant fact, in any oral statement or in any prospectus circular, description, application or written statement for the purpose of selling securities in Ohio. The Division's allegations stem from the Respondent's acts and practices of falsely representing that TechnoSoft Consulting & Development, Inc. would go public no later than September of 1998, that the investor's investment would greatly increase in value shortly after the company went public, and that the investor could expect a specific rate of return on his investment. The Division also notified the Respondent of its rights to an administrative hearing pursuant to Chapter 119 of the Revised Code. Respondent failed to timely request an adjudicative hearing pursuant to Chapter 119 of the Ohio Revised

Code. Therefore, the Division issued its Cease and Desist, Order No. 00-270.

Kid Kritter, Inc.

On September 5, 2000, the Division issued Division Order No. 00-265, a Cease and Desist Order, against Kid Kritter, Inc. The Respondent is located in California.

On May 26, 2000, the Division issued to the Respondent, a Notice of Opportunity for Hearing, Division Order No. 00-121, in accordance with Revised Code Chapter 119. The Order alleged that the Respondent had violated Revised Code sections 1707.44(B)(4) and 1707.44(C)(1). These sections prohibit making false representations of material and relevant facts in the sale of securities and selling securities without proper registration or claim of exemption from registration. These allegations stem from the sale of unregistered debentures, subsequently converted to shares of common stock, to Ohio residents. The Order also notified the Respondent of its right to an administrative hearing. The Respondent failed to timely request an administrative hearing. Therefore, the Division issued Cease and Desist Order No. 00-265.

Phillynn Productions, Jeffre Phillips

On August 18, 2000, the Division issued Division Order No. 00-243, a Cease and Desist Order, against Phillynn Productions and Jeffre Phillips. The Respondents are located in California.

On July 17, 2000, the Division issued to the Respondents, a Notice of Opportunity for Hearing, Division Order No. 00-188, in accordance with Revised Code Chapter 119. The Order alleged that the Respondents had violated Revised Code section 1707.44(C)(1). This section prohibits selling securities without proper registration or claim of exemption from registration. The allegations stem from the solicitation of an Ohio resident by Jeffre Phillips to invest in his company, Phillynn Productions, which constitutes an investment contract and an unregistered security. The Order also notified Respondents of their right to an administrative hearing. The Respondents failed to timely request an administrative hearing. Therefore, the Division issued Cease and Desist Order No. 00-243.

Konstantinos D. Sonitis

On September 27, 2000, the Division issued Division Order No. 00-322, to Konstantinos D. Sonitis, revoking his Ohio securities salesperson license. Previously, on July 6, 2000, the Division issued Division Order No. 00-182 to Sonitis suspending his Ohio securities salesperson license and notifying him of his right to an administrative hearing. Division Order No. 00-182 alleged that as a result of Sonitis' criminal indictment on charges of conspiracy and securities fraud, Sonitis was not of "good business repute" as that term is defined in O.A.C. 1301:6-3-19(D), and therefore, his Ohio securities salesperson license should be revoked pursuant to RC 1707.19(A)(1). Sonitis failed to timely request an administrative hearing, and thereafter, the Division issued Division Order No. 00-322 revoking Sonitis' Ohio securities salesperson license.

Mark M. Danieli

On September 27, 2000, the Division issued Division Order No. 00-324, to Mark M. Danieli, revoking his Ohio securities salesperson license. Previously, on July 6, 2000, the Division issued Division Order No. 00-176 to Danieli suspending his Ohio securities salesperson license and notifying him of his right to an administrative hearing. Division Order No. 00-176 alleged that as a result of Danieli's criminal indictment on charges of conspiracy and securities fraud and his status as a Defendant in an SEC administrative action alleging violations of Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934, Danieli was not of "good business repute" as that term is defined in O.A.C. 1301:6-3-19(D), and therefore, his Ohio securities salesperson license should be revoked pursuant to R.C. 1707.19(A)(1). Danieli failed to timely request an administrative hearing, and thereafter, the Division issued Division Order No. 00-324 revoking Danieli's Ohio securities salesperson license.

Stephen Labarbara

On September 27, 2000, the Division issued Division Order No. 00-323, to Stephen Labarbara, revoking his Ohio securities salesperson license. Previously, on July 6, 2000,

the Division issued Division Order No. 00-179 to Labarbara suspending his Ohio securities salesperson license and notifying him of his right to an administrative hearing. Division Order No. 00-179 alleged that as a result of Labarbara's criminal indictment on charges of securities fraud, Labarbara was not of "good business repute" as that term is defined in O.A.C. 1301:6-3-19(D), and therefore, his Ohio securities salesperson license should be revoked pursuant to R.C. 1707.19(A)(1). Labarbara failed to timely request an administrative hearing, and thereafter, the Division issued Division Order No. 00-323 revoking Labarbara's Ohio securities salesperson license.

Robert A. Balsamo

On August 9, 2000, the Division issued Division Order No. 00-228, to Robert A. Balsamo, revoking his Ohio securities salesperson license. Previously, on July 6, 2000, the Division issued Division Order No. 00-172 to Balsamo suspending his Ohio securities salesperson license and notifying him of his right to an administrative hearing. Division Order No. 00-172 alleged that as a result of Balsamo's criminal indictment on charges of conspiracy and securities fraud, Balsamo was not of "good business repute" as that term is defined in O.A.C. 1301:6-3-19(D), and therefore, his Ohio securities salesperson license should be revoked pursuant to R.C. 1707.19(A)(1). Balsamo failed to timely request an administrative hearing, and thereafter, the Division issued Division Order No. 00-228 revoking Balsamo's Ohio securities salesperson license.

Chester L. Chicosky

On August 9, 2000, the Division issued Division Order No. 00-230, to Chester L. Chicosky, revoking his Ohio securities salesperson license. Previously, on July 6, 2000, the Division issued Division Order No. 00-175 to Chicosky suspending his Ohio securities salesperson license and notifying him of his right to an administrative hearing. Division Order No. 00-175 alleged that as a result of Chicosky's criminal indictment on charges of conspiracy and securities fraud and his status as a Defendant in an SEC administrative action alleging violations of Section 17(a) of the Securities Act of 1933 and Sec-

tion 10(b) of the Securities Exchange Act of 1934, Chicosky was not of "good business repute" as that term is defined in O.A.C. 1301:6-3-19(D), and therefore, his Ohio securities salesperson license should be revoked pursuant to R.C. 1707.19(A)(1). Chicosky failed to timely request an administrative hearing, and thereafter, the Division issued Division Order No. 00-230 revoking Chicosky's Ohio securities salesperson license.

John M. Black, Jr.

On August 9, 2000, the Division issued Division Order No. 00-229, to John M. Black, Jr., revoking his Ohio securities salesperson license. Previously, on July 6, 2000, the Division issued Division Order No. 00-174 to Black suspending his Ohio securities salesperson license and notifying him of his right to an administrative hearing. Division Order No. 00-174 alleged that as a result of Black's criminal indictment on charges of RICO, RICO conspiracy, wire fraud and illegal kickbacks, Black was not of "good business repute" as that term is defined in O.A.C. 1301:6-3-19(D), and therefore, his Ohio securities salesperson license should be revoked pursuant to R.C. 1707.19(A)(1). Black failed to timely request an administrative hearing, and thereafter, the Division issued Division Order No. 00-229 revoking Black's Ohio securities salesperson license.

Craig P. McGuinn, II

On August 9, 2000, the Division issued Division Order No. 00-232, to Craig P. McGuinn, II, revoking his Ohio securities salesperson license. Previously, on July 6, 2000, the Division issued Division Order No. 00-180 to McGuinn suspending his Ohio securities salesperson license and notifying him of his right to an administrative hearing. Division Order No. 00-180 alleged that as a result of McGuinn's criminal indictment on charges of conspiracy and securities fraud and his status as a Defendant in an SEC administrative action alleging violations of Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934, McGuinn was not of "good business repute" as that term is defined in O.A.C. 1301:6-3-19(D), and therefore, his Ohio securities salesperson license should be revoked pursuant to R.C. 1707.19(A)(1).

McGuinn failed to timely request an administrative hearing, and thereafter, the Division issued Division Order No. 00-232 revoking McGuinn's Ohio securities salesperson license.

Facundo R. Ponce

On August 9, 2000, the Division issued Division Order No. 00-231, to Facundo R. Ponce, revoking his Ohio securities salesperson license. Previously, on July 6, 2000, the Division issued Division Order No. 00-181 to Ponce suspending his Ohio securities salesperson license and notifying him of his right to an administrative hearing. Division Order No. 00-181 alleged that as a result of Ponce's criminal indictment on charges of conspiracy and securities fraud and his status as a Defendant in an SEC administrative action alleging violations of Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934, Ponce was not of "good business repute" as that term is defined in O.A.C. 1301:6-3-19(D), and therefore, his Ohio securities salesperson license should be revoked pursuant to R.C. 1707.19(A)(1). Ponce failed to timely request an administrative hearing, and thereafter, the Division issued Division Order No. 00-231 revoking Ponce's Ohio securities salesperson license.

James Chmielowicz

On June 1, 2000, the Division issued Order Number 00-127, Notice of Opportunity for a Hearing, to James Chmielowicz of Toledo, Ohio. Chmielowicz was alleged to have sold unregistered securities, in the form of promissory notes of World Vision Entertainment, Inc., to an Ohio resident. Chmielowicz was also accused of using misrepresentations and fraudulent omissions of material facts to sell the promissory notes.

Chmielowicz did not request a hearing and the Division issued Order Number 00-331, Order to Cease and Desist, against Chmielowicz, finding that he sold unregistered securities using misrepresentations and fraudulent omissions of material facts in the sale of the securities.

George J. Fiorini II

On July 7, 2000, the Division issued Order No. 00-183, a Cease and Desist Order

by Consent against George J. Fiorini II. The Order found Fiorini sold 31 promissory notes to 19 investors for a total of \$1,284,476. The Order found the unregistered notes to have been sold in violation of R.C. 1707.44(C)(1), and furthermore, found a violation of R.C. 1707.44(G), since the trust issuing the notes did not exist, and this fact was not disclosed to investors. The Order by Consent followed a Division Order, Notice of Opportunity for Hearing, Order No. 00-119, issued on May 24, 2000.

Stephen Ventre

On July 7, 2000, the Division issued Order No. 00-184, a Cease and Desist Order by Consent against Stephen Ventre and The Standard Trust. The Order found Ventre and Standard to have sold 51 promissory notes to 49 investors for a total of \$3,484,000.38. The Order found the unregistered notes to have been sold in violation of R.C. 1707.44(C)(1). The Order by Consent followed a Division Order, Notice of Opportunity for Hearing, Order No. 00-184, issued on May 24, 2000.

John Coatney

On August 31, 2000, the Division issued Division Order 00-253, a Cease and Desist Order, against John Coatney. Respondent is an Ohio resident.

On June 9, 2000, The Division issued a Notice of Opportunity for Hearing to Respondent pursuant to Ohio Revised Code Chapter 119. The Division alleged that Respondent had violated Revised Code Sections 1707.44(A)(1), 1707.44(B)(4), 1707.44(C)(1) and 1707.44(G), respectively, by selling without a securities license unregistered securities, making false representations in the sale of securities, and failing to disclose material facts in conjunction with the sales of securities, thereby engaging in acts which are declared illegal, defined as fraudulent or prohibited.

The Division's allegations stem from Respondent's sales of promissory notes in Tee to Green Golf Parks, Inc. of Buffalo, New York. The notes were purportedly guaranteed by bonds issued by Tangent Insurance Company of Antigua, BWI. Respondent did not have a license to sell securi-

ties at the time he sold the promissory notes. The notes were not registered or claimed from exemption with the Division of Securities. Moreover, Respondent failed to disclose risk of loss, commissions, the financial condition of the company, or its relationship to Legend Sports against which the state of Florida had issued a Cease and Desist Order and had filed a Complaint alleging multiple violations of Florida securities laws in the U.S. District Court, Middle District of Florida.

The Division notified the Respondent of his right to an administrative hearing pursuant to Chapter 119 of the Revised Code. Respondent failed to timely request an administrative hearing. Therefore, the Division issued its Cease and Desist Order, Order No. 00-253.

Frank P. Dibella

On August 31, 2000, the Division issued Division Order 00-256, a Cease and Desist Order, against Frank P. DiBella. Respondent is an Ohio resident.

On June 8, 2000, the Division issued a Notice of Opportunity for Hearing to Respondent pursuant to Ohio Revised Code Chapter 119. The Division alleged that Respondent had violated Revised Code Section 1707.44(C)(1) and Administrative Code Section 1301:6-3-19(A), respectively, by selling unregistered securities and by effecting a securities transaction not recorded on the regular books and records of the dealer that the salesman represented at the time of sale.

The Division's allegations stem from Respondent's sales of promissory notes in Tee to Green Golf Parks, Inc. of Buffalo, New York to Ohio investors. The notes were not registered or claimed from exemption with the Division of Securities.

The Division notified the Respondent of his right to an administrative hearing pursuant to Chapter 119 of the Revised Code. Respondent failed to timely request an administrative hearing. Therefore, the Division issued its Cease and Desist Order, Order No. 00-256.

Peggy Hilty-Kauffman

On August 31, 2000, the Division issued Division Order 00-255, a Cease and Desist Order, against Peggy Hilty-Kauffman. Respondent is an Ohio resident.

On June 30, 2000, The Division issued a Notice of Opportunity for Hearing to Respondent pursuant to Ohio Revised Code Chapter 119. The Division alleged that Respondent had violated Revised Code Section 1707.44(C)(1) by selling unregistered securities. The Division's allegations stem from Respondent's sales of promissory notes in Tee to Green Golf Parks, Inc. of Buffalo, New York to Ohio investors. The notes were not registered or claimed from exemption with the Division of Securities.

The Division notified the Respondent of her right to an administrative hearing pursuant to Chapter 119 of the Revised Code. Respondent failed to timely request an administrative hearing. Therefore, the Division issued its Cease and Desist Order, Order No. 00-255.

Everett Hocker

On August 31, 2000, the Division issued Division Order 00-261, a Cease and Desist Order, against Everett Hocker. Respondent is an Ohio resident.

On June 30, 2000, the Division issued a Notice of Opportunity for Hearing to Respondent pursuant to Ohio Revised Code Chapter 119. The Division alleged that Respondent had violated Revised Code Sections 1707.44(A)(1) and 1707.44(C)(1), respectively, by selling without a securities license unregistered securities.

The Division's allegations stem from Respondent's sales of promissory notes in Tee to Green Golf Parks, Inc. of Buffalo, New York. Respondent did not have a license to sell securities, and the notes were not registered or claimed from exemption with the Division of Securities.

The Division notified the Respondent of his right to an administrative hearing pursuant to Chapter 119 of the Revised Code. Respondent failed to timely request an administrative hearing. Therefore, the Division issued its Cease and Desist Order, Order No. 00-261.

Glen McClure

On August 31, 2000, the Division issued Division Order 00-259, a Cease and Desist Order, against Glen McClure. Respondent is an Ohio resident.

On June 9, 2000, the Division issued a Notice of Opportunity for Hearing to Respondent pursuant to Ohio Revised Code Chapter 119. The Division alleged that Respondent had violated Revised Code Section 1707.44(C)(1) by selling unregistered

securities. The Division's allegations stem from Respondent's sales of promissory notes in Tee to Green Golf Parks, Inc. of Buffalo, New York to Ohio investors. The notes were not registered or claimed from exemption with the Division of Securities.

The Division notified the Respondent of his right to an administrative hearing pursuant to Chapter 119 of the Revised Code. Respondent failed to timely request an administrative hearing. Therefore, the Division issued its Cease and Desist Order, Order No. 00-259.

Paul Morrison

On August 31, 2000, the Division issued Division Order 00-257, a Cease and Desist Order, against Paul Morrison. Respondent is an Ohio resident.

On July 19, 2000, the Division issued a Notice of Opportunity for Hearing to Respondent pursuant to Ohio Revised Code Chapter 119. The Division alleged that Respondent had violated Revised Code Sections 1707.44(A)(1) and 1707.44(C)(1), respectively, by selling without a securities license unregistered securities.

The Division's allegations stem from Respondent's sales of promissory notes in Tee to Green Golf Parks, Inc. of Buffalo, New York. Respondent did not have a license to sell securities, and the notes were not registered or claimed from exemption with the Division of Securities.

The Division notified the Respondent of his right to an administrative hearing pursuant to Chapter 119 of the Revised Code. Respondent failed to timely request an administrative hearing. Therefore, the Division issued its Cease and Desist Order, Order No. 00-257.

Dennis Ray Owens

On August 31, 2000, the Division issued Division Order 00-254, a Cease and Desist Order, against Dennis Ray Owens. Respondent is an Ohio resident.

On July 17, 2000, the Division issued a Notice of Opportunity for Hearing to Respondent pursuant to Ohio Revised Code Chapter 119. The Division alleged that Respondent had violated Revised Code Sections 1707.44(A)(1), 1707.44(B)(4), 1707.44(C)(1) and 1707.44(G), respectively, by selling without a securities license unregistered securities, making false representations in the sale of securities, and failing to disclose material facts in conjunction with the

sales of securities, thereby engaging in acts which are declared illegal, defined as fraudulent or prohibited.

The Division's allegations stem from Respondent's sales of promissory notes in Tee to Green Golf Parks, Inc. of Buffalo, New York. The notes were purportedly guaranteed by bonds issued by Tangent Insurance Company of Antigua, BWI. Respondent did not have a license to sell securities at the time he sold the promissory notes. The notes were not registered or claimed from exemption with the Division of Securities. Moreover, Respondent failed to disclose risk of loss, commissions, the financial condition of the company, or its relationship to Legend Sports against which the state of Florida had issued a Cease and Desist Order and had filed a Complaint alleging multiple violations of Florida securities laws in the U.S. District Court, Middle District of Florida.

The Division notified the Respondent of his right to an administrative hearing pursuant to Chapter 119 of the Revised Code. Respondent failed to timely request an administrative hearing. Therefore, the Division issued its Cease and Desist Order, Order No. 00-254.

Floyd Schierholt

On August 31, 2000, the Division issued Division Order 00-258, a Cease and Desist Order, against Floyd Schierholt. Respondent is an Ohio resident.

On June 30, 2000, the Division issued a Notice of Opportunity for Hearing to Respondent pursuant to Ohio Revised Code Chapter 119. The Division alleged that Respondent had violated Revised Code Sections 1707.44(A)(1), 1707.44(B)(4), 1707.44(C)(1) and 1707.44(G), respectively, by selling without a securities license unregistered securities, making false representations in the sale of securities, and failing to disclose material facts in conjunction with the sales of securities, thereby engaging in acts which are declared illegal, defined as fraudulent or prohibited.

The Division's allegations stem from Respondent's sales of promissory notes in Tee to Green Golf Parks, Inc. of Buffalo, New York. The notes were purportedly guaranteed by bonds issued by Tangent Insurance Company of Antigua, BWI. Respondent did not have a license to sell securities at the time he sold the promissory notes. The notes were not registered or claimed from exemption with the Division of

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Final Order Summaries

The following is a summary of recent final orders issued by the Division in response to salesman and investment adviser representative license applications.

<u>PARTY</u>	<u>DECISION</u>	<u>SENT</u>	<u>ALLEGATIONS H.O. REPORT</u>
FLORENCE SARAH POLLARD	DENIED	8/1/00	O.A.C. RULE 1301:6-3-19(D)(7) AND (9) R.C. 1707.19(A)(1) NO HEARING REQUESTED
TROY JOSEPH FLOWERS	DENIED	8/1/00	O.A.C. RULE 1301:6-3-19(D)(9) R.C. 1707.19(A)(1) NO HEARING REQUESTED
KARL FRANCIS JESAITIS, JR.	DENIED	9/25/00	O.A.C. RULE 1301:6-3-19(D)(9) R.C. 1707.19(A)(1) NO HEARING REQUESTED
BRENT WILLIAM BROWN	DENIED	9/25/00	O.A.C. RULE 1301:6-3-19(D)(7) AND (9) R.C. 1707.19(A)(1) NO HEARING REQUESTED
DAVID ALAN BENDER	DENIED	9/25/00	O.A.C. RULE 1301:6-3-19(D)(9) R.C. 1707.19(A)(1) NO HEARING REQUESTED

Licensing Statistics

License Type	YTD 2000
Dealer	2,544
Salesmen	115,813
Investment Adviser	1,244
Investment Adviser Representative	6,728

PUBLIC NOTICE

At 10:00 a.m. on December 18, 2000, the Ohio Division of Securities will hold a public hearing regarding the Division's intent to amend Ohio Administrative Rules 1301:6-3-01, 1301:6-3-03, 1301:6-3-093, 1301:6-3-161 and 1301:6-3-19. The hearing will be held in the offices of the Division located at 77 South High Street, 22nd Floor, Columbus, Ohio 43215.

Copies of the proposed amendments may be obtained by contacting the Ohio Division of Securities at the above address or by calling the Division at (614) 644-7381. Copies of the proposed amendments may also be obtained from the Division's Internet homepage located at www.securities.state.oh.us. Each of the proposed amendments and new rules is summarized in the following:

OAC 1301:6-3-01(L) The proposed amendment adds new paragraph (L) containing the definition for the phrases, "filed with the division" and "filing with the division". The proposed amendment also adds an exception to the definition of the term "dealer."

The purpose of proposed paragraph (L) is to clarify that information filed electronically with the Division via the central registration depository or the investment adviser registration database is an acceptable method of filing with the Division of Securities.

The purpose of the proposed amendment to paragraph (J)(3) is to provide an exception from the dealer licensing requirements for those Canadian dealers who do not have a physical presence in Ohio, but who effect securities transactions in Canadian self-directed retirement accounts for Canadians residing in Ohio.

OAC 1301:6-3-03 The proposed amendment adds new subparagraphs (E)(10) and (E)(11), each containing a new self-executing exemption from the registration provisions of the Securities Act.

The purpose of the proposed rule is to reflect two new exemptions from the registration provisions of the Securities Act. Subparagraph (E)(10) provides a similar exemption to federal rule 801 and 802 of the Securities Act of 1933 that seeks to enhance investor participation in rights offerings in situations where there is a de minimus number of United States security holders in a foreign private issuer. Likewise, subparagraph (E)(11) provides an exemption from registration for the securities in self directed retirement accounts of Canadians living in Ohio.

OAC 1301:6-3-093 The proposed amendment would allow a fedwire transfer in addition to an ACH credit transfer as payment of fees on electronic filings.

The purpose of the proposed amendment is to expand the types of acceptable electronic funds transfers permitted as payment of filing fees in conjunction with investment company notice filings submitted electronically on the Division's electronic database.

OAC 1301:6-3-161 The proposed amendment deletes subparagraph (A)(5). The requirement to notify the Division of an investment adviser representative's dual affiliation is instead moved to new paragraph (E), and changed to a requirement that the investment adviser representative maintain records regarding his or her dual affiliation.

The purpose of the proposed amendment is to eliminate the filing requirement with the Division, but to maintain the requirement of the dual affiliation standard.

OAC 1301:6-3-19 The proposed amendment creates language similar to that contained in the Gramm-Leach-Bliley financial modernization act by allowing dealers or salespersons the ability to share commissions with banks.

The purpose of the proposed amendment is to provide an exception from the commission sharing prohibition contained in the rule.

Registration Statistics

The following table sets forth the number of registration, exemption, and notice filings received by the Division during the third quarter of 2000, compared to the number of filings received during the third quarter of 1999. Likewise, the table compares the year-to-date filings for 2000 and 1999.

Filing Type	3rd Qtr '00	YTD 2000	3rd Qtr '99	YTD 1999
1707.03(Q)*	39	153	81	466
1707.03(W)	6	19	9	28
1707.03(X)	339	1189	321	674
1707.03(Y)	5	9	6	11
1707.04	1	1	0	0
1707.041	0	0	3	6
1707.06	24	80	25	100
1707.09	13	46	7	38
1707.091	26	86	3	122
1707.092(A)**	1139	3660	1022	3280
1707.092(C)***	1	1	1	1
1707.39	8	14	1	5
1707.391	11	76	38	100
Total	1612	5334	1552	4831

*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 on or after March 18, 1999 will be represented by two different sections: R.C. 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.

Capital Formation Statistics*

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.

*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.

Filing Type	Second Qtr 2000	YTD 2000
Exemptions		
Form 3(Q)	145,578,012	364,586,580
Form 3(W)	13,685,000	43,224,000
Form 3(X)	129,602,093,465	210,005,658,881
Form 3(Y)	7,813,000	14,901,000
Registrations		
Form .06	345,434,082	1,064,551,670
Form .09	129,507,250	218,457,274
Form .091	6,722,549,726	11,564,833,974
Form .092(C)	415,000,000	415,000,000
Investment Companies		
Definite	103,838,660	316,236,160
Indefinite**	649,000,000	2,150,000,000
TOTAL	\$138,134,499,195	\$226,157,449,539

Enforcement Reports

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Securities. Moreover, Respondent failed to disclose risk of loss, commissions, the financial condition of the company, or its relationship to Legend Sports against which the state of Florida had issued a Cease and Desist Order and had filed a Complaint alleging multiple violations of Florida securities laws in the U.S. District Court, Middle District of Florida.

The Division notified the Respondent of his right to an administrative hearing pursuant to Chapter 119 of the Revised Code. Respondent failed to timely request an administrative hearing. Therefore, the Division issued its Cease and Desist Order, Order No. 00-258.

William E. Thurman, II

On August 31, 2000, the Division issued Division Order 00-263, a Cease and Desist Order, against William E. Thurman, II. Respondent is an Ohio resident.

On July 19, 2000, the Division issued a Notice of Opportunity for Hearing to

Respondent pursuant to Ohio Revised Code Chapter 119. The Division alleged that Respondent had violated Revised Code Sections 1707.44(A)(1), 1707.44(B)(4), 1707.44(C)(1) and 1707.44(G), respectively, by selling without a securities license unregistered securities, making false representations in the sale of securities, and failing to disclose material facts in conjunction with the sales of securities, thereby engaging in acts which are declared illegal, defined as fraudulent or prohibited.

The Division's allegations stem from Respondent's sales of promissory notes in Tee to Green Golf Parks, Inc. of Buffalo, New York. The notes were purportedly guaranteed by bonds issued by Tangent Insurance Company of Antigua, BWI. Respondent did not have a license to sell securities at the time he sold the promissory notes. The notes were not registered or claimed from exemption with the Division of Securities. Moreover, Respondent failed to disclose risk of loss, commissions, the financial condition of the company, or its relationship to Legend Sports against which the state of

Florida had issued a Cease and Desist Order and had filed a Complaint alleging multiple violations of Florida securities laws in the U.S. District Court, Middle District of Florida.

The Division notified the Respondent of his right to an administrative hearing pursuant to Chapter 119 of the Revised Code. Respondent failed to timely request an administrative hearing. Therefore, the Division issued its Cease and Desist Order, Order No. 00-263.

Regulation FD

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be easier to render for many corporate executives who can now use Regulation FD as an all important crutch to keep overzealous analysts at bay.

Editor's Note: Mr. Little is an associate attorney with the law firm of Jones Day Reavis and Pogue. The opinions expressed in this article are solely those of the author.

OHIO SECURITIES BULLETIN

*Ohio Division of Securities
77 South High Street
22nd Floor
Columbus, Ohio 43215*