

# OHIO SECURITIES BULLETIN

A QUARTERLY PUBLICATION OF THE OHIO DIVISION OF SECURITIES

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Governor of Ohio

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## Supreme Court Issues Opinion Regarding Attorneys Who Provide Financial Planning Services

ISSUED BY THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE: OPINION 2000-4, ISSUED DECEMBER 1, 2000

**SYLLABUS:** The Ohio Code of Professional Responsibility does not prohibit an attorney from providing financial planning services through the law firm to business and estate planning clients of the law firm when the law-related services are provided in connection with and are related to the provision of legal services. An attorney who provides law-related services in connection with and related to the provision of legal services is subject to the Ohio Code of Professional Responsibility. Attorneys who provide law-related services must heed applicable state and federal laws governing the law-related service.

The Board recommends that an attorney who provides financial services through

a law firm in connection with and related to the provision of legal services should not charge a fee based upon the total value of a fund averaged over a definite period, or, as of definite dates, or taken as of a definite date. Such compensation may possibly open the attorney and the attorney's records to state regulation and inspection under the Ohio Securities Act. The Board instead suggests the use of a fixed fee, flat or hourly, provided that the fee is not excessive under DR 2-106(A) and (B).

**OPINION:** This opinion addresses questions regarding an attorney providing both legal services and financial planning services to clients of a law firm.

1. Is it proper for an attorney to provide financial planning services through the attorney's law firm to

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## Division Makes "GLBA" Amendment to Permit Commission-Sharing with Banks and Announces Repeal of 1996 Guidelines

By Thomas E. Geyer

In general, the Ohio securities laws prohibit a securities dealer or salesperson from sharing commissions or other remuneration from securities transactions with persons that are not licensed under the securities laws. However, effective February 1, 2001, the Division amended Ohio Administrative Code (O.A.C.) 1301:6-3-19(D)(7) to permit securities dealers and salespersons to share certain remuneration with unlicensed financial institutions and their unlicensed employees.

This amendment follows the lead of the federal Gramm-Leach-Bliley Act (GLBA), which sought to encourage affiliations among financial service providers. Specifically, this amendment was moti-

vated by section 210 of the GLBA, which added new section 3(a)(4)(B)(i) to the Securities Exchange Act of 1934 allowing securities dealers to remunerate unlicensed bank employees under certain circumstances.

Amended O.A.C. 1301:6-3-19(D)(7), combined with the 1999 adoption of O.A.C. 1301:6-3-15(L) governing the sale of securities on bank premises (*see* Ohio Securities Bulletin 99:1), allows the Division to announce the repeal of its 1996 Guidelines for the Sale of Securities on Bank Premises (1996 Guidelines).

### Amendment of O.A.C. 1301:6-3-19(D)(7)

Prior to the February 1, 2001, amendment, O.A.C. 1301:6-3-19(D)(7) stated:

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## OHIO DEPARTMENT OF COMMERCE DIVISION OF SECURITIES

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business and estate planning clients of the attorney's law firm?

2. Is it proper for an attorney to charge a fee to a legal client for financial planning services, basing the fee on a percentage of the assets managed for the client?

### Question One

Is it proper for an attorney to provide financial planning services through the attorney's law firm to business and estate planning clients of the attorney's law firm?

An attorney proposes providing financial planning services to business and estate planning clients of the attorney's law firm. The financial planning services would include advising as to risk management; investment management, including asset allocation and selection; retirement planning; estate planning, and personal financial statements. The financial planning services would not include the sale of products or securities.

The Ohio Code of Professional Responsibility does not prohibit attorneys from providing law-related services. In fact, the Ohio Code of Professional Responsibility contains no direct reference to the provision of law-related services, other than to broadly acknowledge in an advertising rule, DR 2-102(E), that an attorney who engages in both the practice of law and another profession or business is subject to certain advertising restrictions. [DR 2-102(E) "A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on the lawyer's letterhead, office sign, or professional card, nor shall the lawyer identify himself or herself as a lawyer in any publication in connection with his or her other profession or business."]

Unlike the Ohio Code of Professional Responsibility, the ABA Model Rules of Professional Conduct address law-related services.

Rule 5.7 Responsibilities Regarding Law-Related Services

(a) A lawyer shall be subject to the Rules of Professional conduct with respect to the provision of law-related services, as defined in paragraph (b),

if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Although Model Rule 5.7 does not govern Ohio attorneys, the ABA rule provides guidance. *See e.g., Disciplinary Counsel v. Ball*, 67 Ohio St. 3d 401, 404 (1993) (discussing ABA Model Rules 5.1 and 5.3). ABA Model Rule 5.7(a) acknowledges that lawyers may provide law-related services either in circumstances that are not distinct

from the lawyer's provision of legal services to clients or through a separate entity. The rule identifies law-related services as services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services. The rule requires that lawyers who provide law-related services must comply with professional rules of conduct. This Board agrees.

In Opinion 94-7, this Board addressed the provision of law-related services through a separate entity. The Board advised that "[a]n attorney or several attorneys within a law firm may own an ancillary business that provides law-related services, for example, a Workers' Compensation Service Company that provides claims administration services for employers. Attorneys who operate such law-related businesses must do so in a manner consistent with the Ohio Code of Professional Responsibility. The ancillary business must not engage in activities that would be prohibited as unauthorized practice of law." Ohio Sup Ct, Bd of Comm'rs on Grievances & Discipline, Op. 94-7 (1994).

Consistent with Opinion 94-7, it is this Board's view that in the absence of a prohibitive rule, Ohio attorneys may, as they have by tradition and perhaps by unspoken rule, provide law-related services as part of the practice of law to legal clients of the law firm. The provision of law-related services through

## 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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### Ohio Division of Securities

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a law firm must comport with professional rules of conduct and to any applicable laws governing the law-related service.

Before providing financial planning services, Ohio attorneys should be fully aware of state and federal laws regulating investment advisory services. The Ohio Department of Commerce, Division of Securities administers the law regulating investment advisers in Ohio and is available as a resource on investment adviser issues. For a discussion of Ohio law (Chapter 1707 of the Ohio Revised Code) and for references to applicable federal law see Thomas E. Geyer, *An Overview of Amended Substitute House Bill 695's Amendments to the Ohio Securities Act and a Guide to Ohio's New Investment Adviser Provisions*, 28 Cap. U. L. Rev. 359 (2000).

This Board has no advisory authority as to state and federal law. Nevertheless, the Board notes that attorneys who provide investment advisory services for compensation are subject to the licensing and other regulations of Ohio law, *unless* the investment advisory services are provided by the attorney "solely incidental" to the practice of the attorney's profession. Under R.C. 1707.01(X)(2), when investment advisory services are provided by an attorney "solely incidental" to the practice of the attorney's profession, the attorney is not considered an "investment adviser" under R.C. 1707.01(X)(1).

R.C. 1707.01(X)(1) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of regular business, issues or promulgates analyses or reports concerning securities.

R.C. 1707.01(X)(2) "Investment adviser" does not mean any of the following:

- (a) Any attorney ... whose performance of investment advisory services described in division (X)(1) of this section is solely incidental to the practice of the attorney's ... profession.

Ohio Rev. Code Ann. § 1707.01(X)(1), (2) (West Supp. 2000).

Thus, if an attorney's financial advice to clients is beyond "solely incidental," the

attorney may meet the definition of investment adviser in R.C. 1707.01(X)(1) and be subject to regulation under the Ohio Securities Act set forth Chapter 1707 of the Ohio Revised Code.

What is considered "solely incidental" is not within this Board's authority to determine. The Securities and Exchange Commission has stated:

The performance by a lawyer of investment advisory services would be solely incidental to his [her] law practice where the following three conditions are met: (i) the lawyer does not hold himself [herself] out to the public as providing investment advisory services; (ii) the lawyer renders such services only in connection with the fulfillment of his (her) contract for legal services; (iii) the charge for such services is based on the same factors as determine the lawyer's usual charges. See Thrailkill & Goodman, P.C. (pub. avail. July 16, 1982), and LaManna & Hohman (pub. avail. March 18, 1983) (accountant exception).

Milton O. Brown, P.C. No-Action Letter, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶77,545 (Aug. 29, 1983).

For discussion of the Ohio Securities Act see Thomas E. Geyer, *An Overview of Amended Substitute House Bill 695's Amendments to the Ohio Securities Act and a Guide to Ohio's New Investment Adviser Provisions*, 28 Cap. U. L. Rev. 359, 367 (2000). The "solely incidental" exclusion is mentioned at page 376 of the Geyer article.

As to applicable disciplinary rules in the Ohio Code of Professional Responsibility, the Board offers the following guidelines. Preservation of client confidences and secrets must be maintained under DR 4-101. An attorney should consider whether provision of a law-related service subjects the attorney's records to inspection by regulatory agencies outside the legal profession. For example, if an attorney falls within the definition of investment adviser, but does not meet the "solely incidental" exclusion provided by law, the attorney will be subject to the law and to its regulatory powers that includes state inspection of records. It is the Board's view that an attorney should not jeopardize the confidences and secrets of clients of his law practice

in this manner. Thus, an attorney who wants to provide financial services through a law firm should do so only when the services are provided "solely incidental" to the practice of law.

An attorney should abide by DR 5-101 regarding conflicts of interest. In particular, DR 5-101(A)(1) requires that "[e]xcept with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's financial, business, property, or personal interests. Thus, to avoid a conflict of interest under DR 5-101(A)(1) a lawyer should inform a legal client who needs related financial services that the client may obtain financial services elsewhere. The lawyer should inform a client of the fee, if any, for providing the law-related services.

An attorney should abide by the publicity and other related rules under DR-2-101 to 2-105. As an example, to avoid a violation of DR 2-102(E), the lawyer should not advertise the financial planning services on the letterhead, office sign, or letterhead of the law practice.

An attorney should not charge an illegal or excessive fee under DR 2-106. The fee should be reasonable. A lawyer's fee for providing financial planning services in conjunction with legal services is addressed further in Question Two.

In conclusion, the Board advises that the Ohio Code of Professional Responsibility does not prohibit an attorney from providing financial planning services through the law firm to business and estate planning clients of the law firm when the law-related services are provided in connection with and are related to the provision of legal services. An attorney who provides law-related services in connection with and related to the provision of legal services is subject to the Ohio Code of Professional Responsibility. Attorneys who provide law-related services must heed applicable state and federal laws governing the law-related service.

### Question Two

Is it proper for an attorney to charge a legal client a fee for financial planning services, basing the fee on a percentage of the assets managed for the client?

The Board first considers several methods of compensation. Under the Ohio Ad-

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ministrative Code, an investment adviser, who is licensed or who should be licensed, is prohibited from charging a fee based upon performance. The Ohio Administrative Code prohibits a person who is an investment adviser licensed or required to be licensed from entering a contract that “[p]rovides for compensation to the investment adviser on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client.” Ohio Admin. Code § 1301:6-3-151(I)(1)(a)(i) (2000)(sic)

The Securities and Exchange Commission has also stated that a contingent fee based on performance of assets for providing financial services to legal clients is deemed an illegal fee. *See* Milton O. Brown, P.C. No-Action Letter, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶77,545 (Aug. 29, 1983). *See also*, Thomas E. Geyer, *An Overview of Amended Substitute House Bill 695’s Amendments to the Ohio Securities Act and a Guide to Ohio’s New Investment Adviser Provisions*, 28 Cap. U. L. Rev. 359, 396-98 (2000).

An investment adviser is permitted to charge a fee based upon the total value of a fund averaged over a definite period, or as of definite dates, or taken as of a definite date. The Ohio Administrative Code states that “[p]aragraph (I)(1)(a)(i) of this rule shall not: Be construed to prohibit an investment advisory contract which provides compensation based upon the total value of a fund averaged

over a definite period, or as of definite dates, or taken as of a definite date.” Ohio Admin. Code § 1301:6-3-151(I)(1)(b)(i) (2000).

However, even though it is legally proper for investment advisers to be compensated in this manner, this Board’s view is that an attorney who provides financial services through a law firm should not charge a fee in which the compensation is based upon the total value of a fund averaged over a definite period, or as of definite dates, or taken as of a definite date. Such compensation may possibly open the attorney and the attorney’s records to state regulation and inspection under the Ohio Securities Act.

One of the factors used by regulatory agencies to determine whether an attorney meets the “solely incidental” exception under R.C. 1707.01(X)(2) and falls outside the regulatory requirements of the law is whether the fee charged for advisory services is based on the same factors as those used to determine the fee for professional services. *See e.g.*, Milton O. Brown, P.C. No-Action Letter, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶77,545 (Aug. 29, 1983). *See also*, Thomas E. Geyer, *An Overview of Amended Substitute House Bill 695’s Amendments to the Ohio Securities Act and a Guide to Ohio’s New Investment Adviser Provisions*, 28 Cap. U. L. Rev. 359, 367 (2000). Whether a fee based upon the total value of a fund averaged over a definite period, or as of definite dates, or taken as of a definite date, would be viewed as based on the same factors as those used to determine a fee for the

attorney’s professional services is not a question this Board has authority to answer.

Until there is legal authority that clarifies this issue, the Board does not recommend this method of compensation for attorneys who provide law-related services through the law firm. The Board instead suggests the use of a fixed fee, flat or hourly. Fixed fees are expressly referred to in DR 2-106(B)(8) of the Ohio Code of Professional Responsibility. A fixed fee, flat or hourly, is a typical type of fee for legal services. A fixed fee must not be excessive under DR 2-106(A) and (B).

In conclusion, the Board recommends that an attorney who provides financial services through a law firm in connection with and related to the provision of legal services should not charge a fee based upon the total value of a fund averaged over a definite period, or as of definite dates, or taken as of a definite date. Such compensation may possibly open the attorney and the attorney’s records to state regulation and inspection under the Ohio Securities Act. The Board instead suggests the use of a fixed fee, flat or hourly, provided that the fee is not excessive under DR 2-106(A) and (B).

*Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney’s Oath of Office.*

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## “GLBA” Amendment

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No dealer or salesperson shall ... Share any commission, discount, or other remuneration from the purchase or sale of a security with any person not licensed as a dealer or salesperson in Ohio or in the jurisdiction where the purchase or sale of the security took place;

This rule prohibited, among other things, the sharing of “any commission, discount, or other remuneration from the purchase or sale of a security” with a bank that was not licensed under the securities

laws, or a bank employee that was not licensed under the securities laws.

The amended version of O.A.C. 1301:6-3-19(D)(7) still contains the foregoing prohibition. However, the amended version now contains two exceptions for purposes of allowing the sharing of certain remuneration with unlicensed financial institutions and their unlicensed employees. The complete text of the amended rule is set out at the end of this article.

First, new subdivision (a)(i) permits a securities dealer or salesperson to share “a commission, discount, or other remuneration from the purchase or sale of a security” with a bank, bank holding company, or financial holding company, even if the entity is not licensed under the securities

laws. Note that the Ohio Securities Act defines “bank” broadly to include virtually all depository institutions, including savings and loans, savings banks, and credit unions (*see* R.C. 1707.01(O)). The definitions of “bank holding company” and “financial holding company” are the same as in federal law.

Second, new subdivision (a)(ii) allows a securities dealer or salesperson to “provide to an employee of a bank compensation for the referral of a customer if the compensation is a nominal one-time cash fee of a fixed dollar amount and the payment of the fee is not contingent on whether the referral results in the purchase

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or sale of a security.” This language tracks new section 3(a)(4)(B)(i)(VI) of the Securities Exchange Act of 1934, and allows certain defined payments to unlicensed bank employees. Of course, a securities dealer or salesperson may pay a commission or other remuneration to bank personnel who are properly licensed under the securities laws.

In summary, amended O.A.C. 1301:6-3-19(D)(7) permits the following general categories of transaction-based compensation arrangements between the securities and financial institutions disciplines:

- the sharing of commissions or other remuneration by a securities dealer or salesperson with a licensed bank, licensed bank holding company, licensed financial holding company, or licensed individual;
- the sharing of commissions or other remuneration by a securities dealer or salesperson with an unlicensed bank, unlicensed bank holding company, or unlicensed financial holding company; and
- in exchange for a customer referral, the payment by a securities dealer or salesperson of a nominal one-time cash fee of a fixed dollar amount to an unlicensed bank employee provided that the payment is not contingent on whether the referral results in the purchase or sale of a security.

## Repeal of the 1996 Guidelines

The Division promulgated the 1996 Guidelines in response to the proliferation of securities activities on bank premises (*see* Ohio Securities Bulletin 96:1). The 1996 Guidelines did not announce new law, but rather served as a reminder of the applicability of pertinent provisions of the Ohio Securities Act and related administrative rules.

The 1996 Guidelines contained two parts: “Compensation” and “Conduct.” The “Conduct” part of the 1996 Guidelines was superceded in 1999 when the Division adopted O.A.C. 1301:6-3-15(L), which represented the adoption of the NASAA Model Rules for Sales of Securities at Financial Institutions (*see* Ohio Securities Bulletin 99:1). The adoption of O.A.C. 1301:6-3-15(L) did not affect the “Compensation” part of the 1996 Guidelines.

However, amended O.A.C. 1301:6-3-19(D)(7) supercedes the “Compensation” part of the 1996 Guidelines. The 1996 Guidelines explained the commission sharing prohibition, and discussed how lease arrangements could be used to pass remuneration without violating the commission sharing prohibition (*see* Ohio Securities Bulletins 96:1 and 96:2). New O.A.C. 1301:6-3-19(A)(7)(a)(i) eliminates the need to include in lease agreements complicated remuneration formulas designed solely for the purpose of not violating the commission sharing prohibition.

Since both the “Compensation” and “Conduct” parts of the 1996 Guidelines have been superceded, the Division hereby repeals the 1996 Guidelines.

### Text of Amended O.A.C. 1301:6-3-19(A)(7)

*(new text appears in ALL CAPS)*

(A) No dealer or salesperson shall:

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(7) Share any commission, discount, or other remuneration from the purchase or sale of a security with any person not licensed as a dealer or salesperson in Ohio or in the jurisdiction where the purchase or sale of the security took place;

(a) NOTWITHSTANDING THE PROVISIONS OF PARAGRAPH (A)(7) OF THIS RULE, A DEALER OR SALESPERSON:

(i) MAY SHARE A COMMISSION, DISCOUNT, OR OTHER REMUNERATION FROM THE PURCHASE OR SALE OF A SECURITY WITH:

(a) A BANK, AS THAT TERM IS DEFINED IN SECTION 1707.01(O) OF THE REVISED CODE;

(b) A BANK HOLDING COMPANY APPROVED BY THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE BANK PURSUANT TO THE BANK HOLDING COMPANY ACT OF 1956, 70 STAT. 133, 12 U.S.C. 1841, AS AMENDED; OR

(c) A FINANCIAL HOLDING COMPANY APPROVED BY THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE BANK PURSUANT TO THE BANK HOLDING COMPANY ACT OF 1956, 70 STAT. 133, 12 U.S.C. 1841, AS AMENDED;

(ii) MAY PROVIDE TO AN EMPLOYEE OF A BANK COMPENSATION FOR THE REFERRAL OF A CUSTOMER IF THE COMPENSATION IS A NOMINAL ONE-TIME CASH FEE OF A FIXED DOLLAR AMOUNT AND THE PAYMENT OF THE FEE IS NOT CONTINGENT ON WHETHER THE REFERRAL RESULTS IN A PURCHASE OR SALE OF A SECURITY.

*Mr. Geyer is an Assistant Director of the Department of Commerce. He served as Commissioner of Securities from 1996 to 2000.*



## *Enforcement Section Reports*

### **Kevin Lee Miller**

On July 18, 2000, the Division issued a Notice of Opportunity for Hearing to Kevin Lee Miller ("Respondent"), Order number 00-199. The order alleged that the Respondent omitted material information during the sale of unregistered securities to Ohio investors. The order also alleged that the Respondent made those sales without being properly licensed as a dealer. The Respondent did request an administrative hearing. Thereafter, the Division and the Respondent entered into a consent agreement settling the matter. As part of the settlement, on February 21, 2001, the Division issued Cease and Desist Order No. 01-048 against the Respondent, finding that the Respondent violated Ohio Revised Code sections 1707.44(C)(1), 1707.44(A)(1) and 1707.44(G).

### **James Pendleton Carpenter Vision Capital Group, Ltd. The Vantage Capital Group, Inc.**

On March 20, 2001, the Division issued Division Order No. 01-093, a Cease and Desist Order against James Pendleton Carpenter, Vision Capital Group, Ltd. and The Vantage Capital Group, Inc. Respondents conduct business from Ohio.

On December 7, 2000, the Division issued a Notice of Opportunity for Hearing, Division Order No. 00-468, to James Pendleton Carpenter, Vision Capital Group, Ltd. and The Vantage Capital Group, Inc. The Division alleged that the Respondents had violated the provisions of Revised Code sections 1707.44(C)(1) and 1707.44(A)(1), respectively, by selling unregistered securities and by selling securities without being licensed as dealers. The Division's allegations stem from Respondents' sales of promissory notes or debentures of Lomas de la Barra Development, Inc., Serengeti Diamonds USA, Inc., Rawhide Select, Inc. and International Real Estate Investment Group, Ltd. The Division notified Respondents of their rights to an administrative hearing pursuant to Chapter 119 of the Revised Code. Respondents withdrew their request for a

hearing pursuant to Chapter 119 of the Ohio Revised Code. Therefore, the Division issued Cease and Desist Order No. 01-093.

### **Richard Joseph Gambale Empire Properties, Inc.**

On February 21, 2001, the Division issued Division Order No. 01-043, a Cease and Desist Order against Richard Joseph Gambale and Empire Properties, Inc. Respondents conduct business from Brooklyn, New York.

On September 27, 2000, the Division issued a Notice of Opportunity for Hearing, Division Order No. 00-321, to Richard Joseph Gambale and Empire Properties, Inc. The Division alleged that the Respondents had violated the provisions of Revised Code section 1707.44(C)(1) by selling unregistered securities. The Division's allegations stem from the Respondents' sales of common stock of Empire Properties, Inc. The Division notified Respondents of their rights to a hearing pursuant to Chapter 119 of the Revised Code. Respondents failed to timely request an adjudicatory hearing pursuant to Chapter 119 of the Ohio Revised Code. Therefore, the Division issued Cease and Desist Order No. 01-043.

### **Jenni Elaine Buys**

On January 31, 2001, the Division issued a Cease and Desist Order, Division Order No. 01-028, to Jenni Elaine Buys, of Irvine, California.

On November 22, 2000, the Division issued a Notice of Opportunity for Hearing, Division Order No. 00-435, to Ms. Buys pursuant to Revised Code Chapter 119. The Division alleged that Ms. Buys violated Revised Code section 1707.44(A)(1) by effecting securities transactions on behalf of an Ohio resident without a license to do so. The Division also notified Ms. Buys of her right to an adjudicatory hearing pursuant to Chapter 119 of the Revised Code. A hearing was not requested and a final Cease and Desist Order was issued on January 31, 2001.

### **Scott T. Rothfuss**

On March 8, 2001, the Division issued a Cease and Desist Order, Division Order No. 01-065, to Scott T. Rothfuss, of Hamilton, Ohio.

On September 21, 2000, the Division issued a Notice of Opportunity for Hearing to Rothfuss pursuant to Revised Code Chapter 119. The Division alleged that Rothfuss violated Revised Code sections 1707.44(C)(1) and 1707.44(A)(1) by selling unregistered promissory notes of Ameritech Petroleum and selling promissory notes without a license to do so. The Division also notified Rothfuss of his right to an adjudicatory hearing pursuant to Chapter 119 of the Revised Code. Rothfuss did not request a hearing and a final Order to Cease and Desist was issued on March 8, 2001.

### **Karl Henry Foster**

On March 21, 2001, the Division issued a Cease and Desist Order, Division Order No. 01-094, to Karl Henry Foster of Toledo, Ohio.

On October 18, 2000, the Division issued a Notice of Opportunity for Hearing to Foster pursuant to Revised Code Chapter 119. The Division alleged that Foster violated Revised Code section 1707.44(C)(1) and Ohio Administrative Code rule 1301:6-3-19(A)(19) by selling unregistered promissory notes of Ameritech Petroleum and selling promissory notes without the knowledge or permission of his employing broker-dealer. The Division also notified Foster of his right to an adjudicatory hearing pursuant to Chapter 119 of the Revised Code. Foster did not request a hearing and a final Order to Cease and Desist was issued on March 21, 2001.

### **Paul C. Jared**

On March 21, 2001, the Division issued a Cease and Desist Order, Division Order No. 01-096, to Paul C. Jared of Mason, Ohio.

On November 8, 2000, the Division issued a Notice of Opportunity for Hearing to Jared pursuant to Revised Code Chapter 119. The Division alleged that

Jared violated Revised Code sections 1707.44(C)(1) and 1707.44(A)(1) and Ohio Administrative Code rule 1301:6-3-19(A)(19) by selling unregistered promissory notes of Ameritech Petroleum and Millennium 2100 Inc., selling promissory notes without being licensed as a dealer, and selling promissory notes without the knowledge or permission of his employing broker-dealer. The Division also notified Jared of his right to an adjudicative hearing pursuant to Chapter 119 of the Revised Code. Jared did not request a hearing and a final Order to Cease and Desist was issued on March 21, 2001.

### **Cable Fund XXVII Limited Partnership**

On March 28, 2001, Cable Fund XXVII Limited Partnership, located in Columbus, Ohio, through its principal Jack Wilson, entered into a Consent Agreement with the Division and accepted the issuance of a final Cease and Desist Order.

On January 19, 2001, the Division issued a Notice of Opportunity for Hearing, Division Order No. 01-016, to Cable Fund XXVII Limited Partnership pursuant to Revised Code Chapter 119. The Division alleged that Cable Fund XXVII Limited Partnership violated Revised Code section 1707.44(C)(1) for selling a limited partnership interest to an Ohio resident that was not registered by description, coordination or qualification, nor exempt from registration requirements. The Division also notified Cable Fund XXVII Limited Partnership of its right to an adjudicative hearing pursuant to Chapter 119 of the Revised Code. Cable Fund withdrew its hearing request after the parties agreed to enter into a consent agreement and a final Order to Cease and Desist was issued on March 28, 2001.

### **Donald Erwin Jones**

On January 16, 2001, the Division issued Division Order No. 01-012, a Cease and Desist Order, against Donald Erwin Jones. The Respondent is located in Ohio.

On December 14, 2000, the Division issued a Notice of Opportunity for Hearing, Division Order No. 00-337, to Donald Erwin Jones. The Division alleged

that the Respondent had violated the provisions of Ohio Revised Code Sections 1707.44(C)(1) and 1707.44(B)(4) by selling unregistered securities and making false representations of material and relevant facts in the sale of securities. These allegations stem from the sale of an unregistered investment contract with the J.R.T. Family Trust located in Sacramento, California, which the Respondent falsely represented as having access to a privileged, private investment program involving specialized trading in U.S. Treasury Notes. The Order notified the Respondent of his right to an administrative hearing. The Respondent failed to timely request an administrative hearing. Therefore, the Division issued Cease and Desist Order No. 01-012.

### **Michael Brugnolotti**

On June 20, 2000, the Division issued Division Order No. 00-149, a Cease and Desist Order, against Michael Brugnolotti. The Respondent is located in Staten Island, New York.

On May 18, 2000, the Division issued a Notice of Opportunity for Hearing, Division Order No. 00-118, to Michael Brugnolotti. The Division alleged that the Respondent had violated Ohio Revised Code Section 1707.44(A)(1) by selling without a securities dealer license. The allegations stem from Respondent's sales to Ohio investors of common stock in the Plymouth Organization, a Delaware corporation that conducts business in Staten Island, New York. The Order notified the Respondent of his right to an administrative hearing. The Respondent failed to timely request an administrative hearing. Therefore, the Division issued Cease and Desist Order No. 00-149.

### **Raymond Beals**

On June 20, 2000, the Division issued Division Order No. 00-148, a Cease and Desist Order, against Raymond Beals. The Respondent is located in Staten Island, New York.

On May 18, 2000, the Division issued a Notice of Opportunity for Hearing, Division Order No. 00-117, to Raymond Beals. The Division alleged that the Re-

spondent had violated Ohio Revised Code Section 1707.44(A)(1) by selling without a securities dealer license. The allegations stem from Respondent's sales to Ohio investors of common stock in the Plymouth Organization, a Delaware corporation that conducts business in Staten Island, New York. The Order notified the Respondent of his right to an administrative hearing. The Respondent failed to timely request an administrative hearing. Therefore, the Division issued Cease and Desist Order No. 00-148.

### **Allan Talib**

On November 1, 2000, the Division issued Division Order No. 00-392, a Cease and Desist Order, against Allan Talib. The Respondent is an Ohio resident.

On September 26, 2000, the Division issued a Notice of Opportunity for Hearing, Division Order No. 00-316, to Allan Talib. The Division alleged that the Respondent had violated provisions of Ohio Revised Code Section 1707.44(C)(1) by selling unregistered securities. The Division's allegations stem from Respondent's sale of a promissory note in Sun Broadcasting Systems, Inc. of Palm Springs, California. The promissory note was not registered or claimed from exemption with the Division. The Order notified the Respondent of his right to an administrative hearing. The Respondent failed to timely request an administrative hearing. Therefore, the Division issued Cease and Desist Order No. 00-392.

### **First Associated Securities Group, Inc.**

On January 24, 2001, the Ohio Division of Securities issued Division Order No. 01-022, a Cease and Desist Order against First Associated Securities Group, Inc., ("First Associated") whose last known principal business address was Chico, California. First Associated is a brokerage firm that was licensed with the Division, but is no longer in business.

On October 21, 2000, the Division issued a Notice of Opportunity for Hearing to First Associated. The Division's investigation found that First Associated sold unregistered mutual fund shares to

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## Enforcement Section Reports

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Ohio residents in The Cyprus Funds, Inc. mutual fund, a foreign mutual fund company whose address was in Belmopan, Belize, and was purportedly incorporated in Belize. The Cyprus Funds processing center was located in Canton, Ohio. The Division also found that First Associated failed to properly disclose to Ohio customers that the Cyprus Funds shares and fixed interest rate investments were not registered with the Division or exempt from such registration.

The Securities and Exchange Commission obtained a Temporary Restraining Order in U.S. District Court for the Southern District of Florida from U.S. District Judge Edward B. Davis, against Bartoli and the officers and directors of the fund on September 3, 1999, for federal securities law violations that included massive fraud involving the sale of securities to Ohio and other investors. U.S. District Judge Davis appointed a receiver, and also issued a freeze of the Bartoli's assets and those of the other defendants. On September 3, 1999, a Preliminary Injunction was issued by U.S. District Judge Davis, which also indefinitely continued the freeze of assets.

The Order finds that the securities were not registered with the Division, or exempt from such registration, in violation of Revised Code section 1707.44(C)(1). There were also omissions of material fact by First Associated, in violation of Revised Code section 1707.44(G) and Ohio Administrative Code 1301:6-3-19(A)(6).

### Eric V. Bartoli

On January 25, 2001, the Ohio Division of Securities issued Division Order No. 01-024, a Cease and Desist Order against Eric V. Bartoli, whose last known address in Ohio was in Littleton, New Hampshire. Bartoli was the founder and an officer and director of The Cyprus Funds, Inc.

On October 11, 2000, the Division issued a Notice of Opportunity for Hearing to Bartoli, formerly of Marshallville, Ohio. The Division's investigation found that unregistered mutual fund shares and

fixed interest rate investments were sold to Ohio residents in The Cyprus Funds, Inc. mutual fund, a foreign mutual fund company whose address was in Belmopan, Belize, and was purportedly incorporated in Belize. The Cyprus Funds processing center was located in Canton, Ohio. The Division also found that Bartoli failed to properly disclose to investors in the Cyprus Funds offering documents that the shares and fixed interest rate investments were not registered with the Division or exempt from such registration.

The Securities and Exchange Commission obtained a Temporary Restraining Order in U.S. District Court for the Southern District of Florida from U.S. District Judge Edward B. Davis, against Bartoli and the officers and directors of the fund on September 3, 1999, for federal securities law violations that included massive fraud involving the sale of securities to Ohio and other investors. U.S. District Judge Davis appointed a receiver, and also issued a freeze of the Bartoli's assets and those of the other defendants. On September 3, 1999, a Preliminary Injunction was issued by U.S. District Judge Davis, which also indefinitely continued the freeze of assets.

The Order finds that the securities were not registered with the Division, or exempt from such registration, in violation of Revised Code section 1707.44(C)(1). There were also omissions of material fact in the offering documents of the Cyprus Funds, in violation of Revised Code section 1707.44(G).

### Mark E. Szczepinski

On February 21, 2001, the Ohio Division of Securities issued Division Order No. 01-046, a Cease and Desist Order with a Consent Agreement, against Mark E. Szczepinski of Cleveland, Ohio.

On August 9, 2000, the Division issued a Notice of Opportunity for Hearing to Szczepinski. The Division's investigation found that Szczepinski sold unregistered mutual fund shares and fixed interest rate investments to Ohio residents in The Cyprus Funds, Inc. mutual fund, a foreign mutual fund company whose address was in Belmopan, Belize, and was

purportedly incorporated in Belize. The Cyprus Funds processing center was located in Canton, Ohio. The Division also found that Szczepinski failed to properly disclose to investors that the shares and fixed interest rate investments were not registered with the Division or exempt from such registration.

The Securities and Exchange Commission obtained a Temporary Restraining Order in U.S. District Court for the Southern District of Florida from U.S. District Judge Edward B. Davis, against the Cyprus Funds and the officers and directors of the fund on September 3, 1999, for federal securities law violations that included massive fraud involving the sale of securities to Ohio and other investors. U.S. District Judge Davis appointed a receiver, and also issued a freeze of the Cyprus Funds' assets and those of the other defendants. On September 3, 1999, a Preliminary Injunction was issued by U.S. District Judge Davis, which also indefinitely continued the freeze of assets.

Szczepinski agreed to enter into a Consent Agreement after his administrative hearing had commenced. The Cease and Desist Order finds that the securities were not registered with the Division, or exempt from such registration, in violation of Revised Code section 1707.44(C)(1). There were also omissions of material fact by Szczepinski, in violation of Revised Code section 1707.44(G).

### Carl Dominic Martellaro

On January 24, 2001, the Ohio Division of Securities issued Division Order No. 01-064, a Cease and Desist Order against Carl Dominic Martellaro whose last known address was Chico, California. Martellaro was a director, principal and shareholder of First Associated Securities Group, Inc. ("First Associated"), a brokerage firm that was licensed with the Division, but is no longer in business. He also was the Ohio-licensed principal/officer of First Associated.

On December 22, 2000, the Division issued a Notice of Opportunity for Hearing to Martellaro. The Division's investigation found that Martellaro failed to do proper due diligence on behalf of

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# OHIO SECURITIES CONFERENCE 2001

presented by  
**Ohio Department of Commerce, Division of Securities and The Cybersecurities  
Law Institute at the University of Toledo College of Law**

**November 2, 2001**

Executive Conference and Training Center  
Vern Riffe Center  
77 South High Street, 31<sup>st</sup> Floor  
Columbus, Ohio

*Ohio Securities Act Liabilities and Remedies*

Thomas E. Geyer, Assistant Director  
Ohio Department of Commerce

Michael P. Miglets, Control Bid Attorney  
Ohio Division of Securities

Jane S. Arata, Enforcement Attorney  
Ohio Division of Securities

*Arbitration*

Dennis J. Concilla  
Carlisle, Patchen & Murphy

Robert N. Rapp  
Calfee, Halter & Griswold

*Regulation FD*

David P. Porter  
Jones, Day, Reavis & Pogue

*Ohio Division of Securities Update*

Deborah L. Dye Joyce, Commissioner  
Matthew Fornshell, Attorney Inspector  
Caryn A. Francis, Division Licensing Counsel  
Michael P. Miglets, Control Bid Attorney

The meetings of the Ohio Division of Securities Advisory Committees will be held in conjunction with this Conference. In September, a Conference Brochure with detailed information and registration instructions will be sent to all Ohio subscribers to the *Ohio Securities Bulletin*.

## **Division Seeks Your Cooperation in Ohio Securities Bulletin Survey**

Over the years, the Ohio Division of Securities has relied on the Ohio Securities Bulletin to relay pertinent information to the securities community concerning its operations and interpretations of securities law. The Division strives to make the Bulletin a quality, professional-caliber publication that serves the needs of its readers. To this end, a brief survey has been included in this issue. Please take a few moments to complete it. You can fax your completed survey to the Division, care of Desiree Shannon, Editor, at (614) 466-3316. You can also mail it to : Desiree Shannon, Ohio Division of Securities, Department of Commerce, 22<sup>nd</sup> Floor, 77 S. High St., Columbus, Ohio 43215. The Division thanks you in advance for your time and participation in this project, as it will aid in providing an important service to you, our customers.

# OHIO SECURITIES BULLETIN SURVEY

1. What part of the Bulletin do you read?

- Division Enforcement Section Reports
- Capital Formation Statistics
- Registration Filings and Licensing Statistics
- News Articles
- Articles concerning special topics and/or statutory changes
- Administrative Rule Change Notices

2. Is there subject matter you would like to see included in the Bulletin that is not currently covered?

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3. Is there any content in the Bulletin that you feel could be omitted?

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4. What format changes, if any, would you suggest?

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5. What is your occupation or profession?

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6. Do you have any additional comments?

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NAME (OPTIONAL): \_\_\_\_\_  
ADDRESS: \_\_\_\_\_  
\_\_\_\_\_  
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## Enforcement Section Reports

*continued from page 8*

First Associated and he caused to be offered for sale and/or caused to be sold unregistered mutual fund shares to Ohio residents in The Cyprus Funds, Inc. mutual fund, a foreign mutual fund company whose address was in Belmopan, Belize, and was purportedly incorporated in Belize. The Division also found that First Associated failed to properly disclose to Ohio customers that the Cyprus Funds shares and fixed interest rate investments were not registered with the Division or exempt from such registration.

The Order finds that the securities were not registered with the Division, or exempt from such registration, in violation of Revised Code section 1707.44(C)(1). There were also omissions of material fact by Martellaro, in violation of Revised Code section 1707.44(G) and Ohio Administrative Code 1301:6-3-19(A)(6).

### **Blackstone Financial Services Corporation; Joseph Devlin**

On January 23, 2001, the Division issued Division Order No. 01-017, a Cease and Desist Order, against Blackstone Financial Services Corporation and Joseph Devlin.

On December 22, 2000, the Division issued a Notice of Opportunity for Hearing, Division Order No. 00-482, to Blackstone Financial Services Corporation and Joseph Devlin. The Division alleged that the Respondents had violated the provisions of Revised Code Sections 1707.44(C)(1) 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 Respondents 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 Respondents' sale of viatical settlements while falsely representing that the investor's principal

investment could not be lost and that the investor could expect a specific rate of return on her investment. The Respondents also failed to disclose the risks associated with viatical settlements. The Division notified the Respondents of their rights to an administrative hearing pursuant to Chapter 119 of the Revised Code. The Respondents 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. 01-017.

### **Paul O'Connor**

On January 12, 2001, the Division issued Division Order No. 01-009, a Cease and Desist Order, against Paul O'Connor. Respondent is an Ohio resident.

On October 11, 2000, the Division issued a Notice of Opportunity for Hearing, Division Order No. 00-354, to Paul O'Connor. The Division alleged that the Respondent had violated the provisions of Revised Code Section 1707.44(C)(1) by selling unregistered 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 notified the Respondent of his right to an administrative hearing pursuant to Chapter 119 of the Revised Code. The 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. 01-009.

### **Ascot Bloodstock, Inc.**

An Ohio resident received a solicitation from Ascot Bloodstock, Inc., which is located in Las Vegas, Nevada. The solicitation describes an investment opportunity called P.R.O. (Professional Racing Organizer) which is a computer program for betting on dog and horse races. Accord-

ing to the brochure, the program has the potential to add \$200,000 to one's annual income (tax-free). Individuals must pay a licensing fee and royalties on profits and set aside an "investment bank" of \$5,000.

Based upon an investment contract analysis, Notice of Opportunity for Hearing Order Number 00-485 was issued against Ascot Bloodstock, Inc. and its president / creator Roger Bronstein, both of Las Vegas. Service was obtained December 29, 2000. No hearing was requested. Cease and Desist Order Number 01-037 was issued February 6, 2001 and service obtained February 9, 2001.



## Final Order Summaries

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

<b>PARTY</b>	<b>DECISION</b>	<b>ORDER SENT/NO.</b>	<b>ALLEGATIONS H.O. RECOMM.</b>
Dwight O'Connor Campbell	Denied	12/29/00 00-495	O.A.C. 1301:6-3-19(D)(9); 1707.16; 1707.19 Findings Approved
Bryan Richard Clancy	Denied	2/12/01 01-039	O.A.C. 1301:6-3-19(D)(9); 1707.16; 1707.19 Findings Approved
Gene Paul Ramos	Denied	2/21/01 01-050	O.A.C. 1301:6-3-19(D)(9) 1707.19(A)(1) No Hearing Requested
Mark Steven Goodman	Denied	2/21/01 01-051	O.A.C. 1301:6-3-19(D)(9) 1707.19(A)(1) No Hearing Requested
Michael John Mussay	Denied	2/21/01 01-052	O.A.C. 1301:6-3-19(D)(9) 1707.19(A)(1) No Hearing Requested

## Licensing Statistics

<b>License Type</b>	<b>YTD 2000</b>
Dealer	2,260
Salesmen	125,560
Investment Adviser	1,378
Investment Adviser Representative	7,854

## Registration Statistics

The following table sets forth the number of registration, exemption, and notice filings received by the Division during the first quarter of 2001, compared to the number of filings received during the first quarter of 2000. Likewise, the table compares the year-to-date filings for 2001 and 2000.

Filing Type	1st Qtr '01	YTD '01	1st Qtr '00	YTD '00
1707.03(Q)	39	39	73	73
1707.03(W)	8	8	9	9
1707.03(X)	301	301	428	428
1707.03(Y)	1	1	1	1
1707.04	0	0	0	0
1707.041	1	1	0	0
1707.06	23	23	24	24
1707.09	11	11	12	12
1707.091	39	39	29	29
1707.092(A)*	1409	1409	1323	1323
1707.092(C)**	0	0	0	0
1707.39	2	2	3	3
1707.391	21	21	34	34
Total	1855	1855	1936	1936

\* 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	First Qtr 2001	YTD 2001
<b>Exemptions</b>		
Form 3(Q)	\$65,362,399	\$65,362,399
Form 3(W)	17,504,000	17,504,000
Form 3(X)	23,715,447,180	23,715,447,180
Form 3(Y)	950,000	950,000
<b>Registrations</b>		
Form .06	505,823,381	505,823,381
Form .09	85,100,000	85,100,000
Form .091	7,397,959,350	7,397,959,350
Form .092(C)	0	0
<b>Investment Companies</b>		
Definite	224,084,500	224,084,500
Indefinite**	848,000,000	848,000,000
<b>TOTAL</b>	<b>\$32,860,230,810</b>	<b>\$32,860,230,810</b>

# OHIO SECURITIES BULLETIN

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

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