OHIO SECURITIES BULLETIN

A QUARTERLY PUBLICATION OF THE OHIO DIVISION OF SECURITIES

George V. Voinovich
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Commissioner of Securities

Ongoing Initiatives Address Securities Arbitration Management and Quality

By Robert N. Rapp, Esq.

Immediately following the 1987 U. S. Supreme Court decision allowing securities dealers to require their customers to take their disputes to arbitration, the courts were the primary source of new developments in the burgeoning arena of securities arbitration. That focus has shifted with a series of recent initiatives by the securities arbitration forums of the industry self-regulatory organizations ("SROs"), such as the National Association of Securities Dealers, Inc. ("NASD"), and the American Arbitration Association ("AAA").

Today, virtually all disputes arising out of the relationships between investors and securities dealers fall within the scope of arbitration provisions in the written agreements signed by customers in connection with establishing or maintaining brokerage firm accounts. U.S. Supreme Court decisions have mandated the enforcement of arbitration provisions as a matter of either the Federal Arbitration Act or state arbitration laws,[1] and have held that arbitration is required for the full range of federal, state and common law claims and remedies. The arena for resolving broker-customer disputes has shifted almost entirely from the courts to securities industry SRO sponsored arbitration forums, or the independent facilities of the AAA.[2]

The nearly complete shift from traditional litigation to arbitration

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Division Adopts Omnibus Guidelines For Review Of Certain Offerings

By Mark R. Heuerman, Esq.

As a part of the merit review of certain registered offerings, the Division will apply the North American Securities Administrator Association ("NASAA") Omnibus Guidelines (the "Omnibus Guidelines") as adopted by the NASAA membership on March 29, 1992. The Guidelines will be applied to Programs registering by qualification, pursuant to Ohio Revised Code section 1707.09, or coordination, pursuant to Ohio Revised Code section 1707.091, where previously adopted guidelines are inapplicable.[1] "Program" is defined at Omnibus Guideline I.B.20 as a limited or general partnership, joint venture, unincorporated association or similar organization other than a corporation formed and operated for the primary purpose of investment in, the operation of or gain from an interest in the assets to be acquired by such entity.

Consequently, the Division will no longer apply the Real Estate Guidelines to non-real estate Programs, as previously stated by policy in the Ohio Securities Bulletin (October 1986). The practice of applying the Real Estate Guidelines to non-real estate

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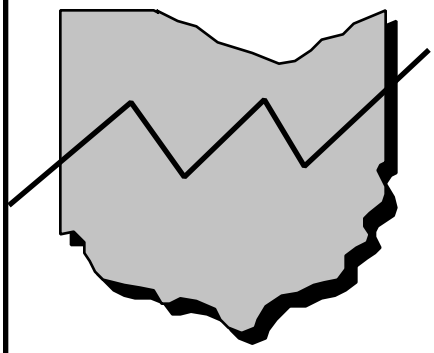

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forums for the resolution of investor claims[3] led Congress to commission a Government Accounting Office ("GAO") evaluation of the arbitration process. After a two year study of the rules and procedures, and the results of arbitration of the major SROs and the AAA, the GAO report, "Securities Arbitration: How Investors Fare," was issued in May 1992. The report confirmed the fairness of securities arbitration, but expressed concerns over the quality of arbitration panels and recommended improvements to the selection of arbitrators and their training in arbitration procedures.

Prominent among its conclusions concerning the securities arbitration process, the GAO observed:

Regardless of forum, the fairness of any arbitration proceeding depends largely on the independence and capability of the arbitrators. The primary ways that industry-sponsored forums can insure that their arbitration process is as fair as possible is to select arbitrators with appropriate background and experience and ensure that they are appropriately trained in the arbitration process.

Significant process changes were already underway in the SRO and AAA securities arbitration forums at the time of the GAO report. In May 1989, major changes in the SROs' Code of Arbitration Procedures[4] addressed a wide range of issues, including the criteria for classification of arbitrators ("public" and "industry"), expanded arbitrator profile information, the public reporting and availability of award information, and prehearing and discovery procedures.

A series of 1991 SRO rule changes allowed for broader permissive joinder of parties and more efficient resolution of discovery disputes in small cases. 1992 SRO rule changes dealt with claims submitted to arbitration either as class actions, or with class action claims already pending in the courts by restricting eligibility. On its own initiative, the AAA created a Securities Arbitration Task Force to consider changes in the AAA securities arbitration rules and procedures, which led to significant 1992 and 1993 AAA process and rule changes.[5]

Both on their own and in response to the GAO report, the SROs and AAA have addressed arbitration panel quality. As suggested by the GAO, arbitration panel quality has two elements: Arbitrator selection and arbitrator training. Attention must first be given to the selection of arbitrators with appropriate backgrounds and experience. Second, arbitrators must be trained in the conduct, or management, the arbitration process.

Newly-implemented SRO procedural changes relating to arbitrator background and experience are typified by the NASD approval process for new arbitrators. Under procedures now in operation, all arbitrator applicants must demonstrate a minimum of five to eight years business, professional or other practical securities experience. Applications must be supported by two letters of recommendation addressing the applicant's qualifications to serve as a securities arbitrator, and an attestation to their character and fitness. An enhanced arbitrator evaluation process has been implemented, and arbitrator biographical information and profiles are to be periodically updated and confirmed.

AAA has likewise responded to the GAO recommendations on panel quality. It has centralized administration of the securities arbitrator recruiting, application and screening processes, and enhanced the selection process by expanding the amount of information on which to assess qualifications. A pilot project is currently being conducted in one region and may be expanded whereby the qualifications of securities arbitrator applicants are reviewed by regional panel screening committees comprised of securities industry representatives and claimants' attorneys with particularly active caseloads.

Attention to the second dimension of arbitration panel quality led to the implementation of a national training requirement for securities arbitrators. The most significant change involving all securities arbitration forums is the implementation

OHIO SECURITIES BULLETIN

Thomas E. Geyer, 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.

Ohio Division of Securities

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of arbitrator training programs. Effective January 1, 1993, all securities arbitrators must complete a training requirement. The requirements of the AAA program are representative:

1. New arbitrators, and those who have never served as an arbitrator, must have completed a training course;

2. Those who have served as an arbitrator, but have never completed a training course, must complete a half-day refresher course within two years; and

3. Those who have been trained must complete a refresher course every five years.

Throughout 1993, the SROs and AAA combined to offer a series of full-day arbitrator training programs. Individual SROs, particularly the NASD, have also offered their own programs, and the principal forum sponsors are now collaborating in the production of an advanced-level arbitrator training video. Advanced arbitrator training will eventually be required, including specialized training for panel chairpersons.

In response to the GAO call for training in the "arbitration process," with an emphasis on procedures and the mechanics of the prehearing and hearing procedures, collaborative programs emphasize management of the arbitration process and undertaking the arbitrator function rather than substantive securities law issues. Training seminars address administrative rules and practices of the sponsoring organizations, prehearing and hearing procedures, arbitrator powers and responsibilities, and the sticky disclosure and ethical issues confronting arbitrators.

The principal objective of forum-sponsored arbitrator training has never been instruction on matters of applicable law, the nuances of duties and responsibilities in the broker-customer relationship, or the substance of particular claims and defenses. Nevertheless, the near total shift from courtrooms to arbitration hearing rooms, and the significant expansion of the pool of arbitrators has prompted concerns that arbitrators have a working understanding of essential terminology, basic operations, and the elements of common claims and defenses.

The majority of public arbitrators in all securities arbitration forums are lawyers, but levels of experience and understanding vary widely. Unnecessary confusion and inefficiency in processing cases can be avoided through programs which go beyond procedures to acquaint arbitrators with investment products, basic brokerage firm branch operations, the terminology of causes of action, and issues associated with topics such as time bars and punitive damages.

The NASD has taken the lead in producing more comprehensive programs. The danger, of course, is that they may be perceived as instructing on "the law," or in the manner of deciding cases, which is plainly not intended. Rather, these programs serve as a road map to efficient arbitrations, by exposing both new and experienced arbitrators to the language of today's common issues, and providing an open forum for discussions involving both claimants' and respondents' representatives.

Available composite data through 1992 indicates that there has been a five-fold increase in the number of cases commenced in SRO and AAA arbitration forums since 1980. As investors have become involved in a broader spectrum of markets, investment products and strategies, arbitrations have become increasingly complex. 1993 and 1994 will surely be seen as watershed years in the maturation of securities arbitration through process changes that will positively impact fairness and efficiency for many years ahead. More changes will be proposed, some undoubtedly controversial,[6] but today's focus on the quality of securities arbitration panels will pave the way to insuring that securities arbitration will continue to maintain the independence and a high level of competence that parties rightfully expect.

Footnotes

1. *See* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); *and* Rodriguez de Quijas v. Shearson/ American Express, Inc., 490 U.S. 477 (1989).

2. The forum for resolution of broker-customer disputes in arbitration is also a matter of contract. The applicable agreements specify available forums, which in many cases means a choice between the arbitration facilities of the New York or American Stock Exchanges, or the NASD, which administer securities arbitrations pursuant to a uniform code of procedures, where provided in the agreement, or otherwise allowed as a matter of law or some other requirement, i.e., the so-called "AMEX Window", the facilities of the AAA may also be elected. AAA administers securities arbitrations pursuant to its own "Securities Arbitration Rules."

3. Although all statutory and common law claims involved in broker-customer disputes are now within the scope of arbitration provisions in customer agreements, certain issues relating to the arbitration remain for consideration by courts. The validity of an arbitration provision and other "contract" questions may still be determined by courts under the applicable arbitration statutes. And certain "eligibility" or time limitation issues under SRO forum rules may still have to be determined by courts. *See, e.g.*, Roney and Co. v. Kassab, 981 F.2d 894 (6th Cir. 1992) *and* Dean Witter Reynolds, Inc. v. McCoy, 995 F.2d 649 (6th Cir. 1993).

4. The uniform code of arbitration procedure applicable to all cases involving public customers in each of the SRO forums is the product of SICA—the "Securities Industry Conference on Arbitration." SICA, which includes public representatives, engages in on-going review of the arbi-

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trations process and the rules which govern it.

5. AAA process and rule changes are now part of the Securities Arbitration Rules, effective May 1, 1993. By its rule changes, AAA has also focused on arbitrator classifications and affiliations; enhanced disclosure of arbitrator biographical data; pleading and prehearing processes; discovery; and multiple parties.

Part of the impetus for active attention at AAA to securities arbitration processes is the observation in the GAO report that: "To improve the public's perception of fairness, the SEC has urged broker-dealer firms to allow investors the option of using AAA as an arbitration forum." Currently, AAA is not widely included among available forums in broker-customer agreements, although as noted earlier, the AAA forum may nevertheless be available in some situations.

6. 1994 will likely see proposals, for example, to impose specific standards, or at least considerations, applicable to awards of punitive damages (where permitted by applicable state law) in arbitrations, and perhaps a mechanism for review of such awards. Other proposed process or procedural changes will address such things as "offers of awards", to encourage more efficiency in settlement evaluations. The role of mediation will likely be addressed again as well.

Robert N. Rapp, Esq., (B.A., J.D., Case Western Reserve University, M.B.A. Cleveland State University) is a partner in Calfee, Halter & Griswold, Cleveland. During 1993, he was Distinguished Lawyer in Residence at the Cornell Law School. Currently he is a member of the adjunct faculty of the Case Western Reserve University School of Law, where he teaches "Law, Theory and Practice in the Financial Markets." Mr. Rapp is a member of the Legal Advisory Board of the National Association of the Securities Dealers, Inc. and serves as a securities arbitrator in several forums

Omnibus Gidelines

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Programs had been based upon the lack of separate guidelines available for the review of non-real estate Programs, and is therefore obsolete in light of the adoption of the Omnibus Guidelines. Consistency is still afforded to issuers because many of the basic policies of the Omnibus Guidelines are similar to the basic policies of the Real Estate Guidelines.

Programs may be required to demonstrate that a completion bond or other satisfactory arrangements are in place for the Program to complete development, construction, major repairs or rehabilitation of Program assets.[2]

In general, the Division will not permit Sponsors to rely on Omnibus Guideline IV.A.3[3] to qualify new registrations with compensation fees and expenses in excess of permitted levels set out in Omnibus Guideline IV. However, the Division will allow reliance on Omnibus Guideline IV.A.3 if the issuer has an effective registration with both the Division and the Securities and Exchange Commission, and the issuer is seeking to extend the duration of the offering (i.e. renewal). Issuers should also note that organizational and offering expenses may not exceed 15% of gross offering proceeds. Under Omnibus Guideline IV.B.1, Front End Fees may not exceed 18% of gross offering proceeds. "Front End Fees" include organizational and offering expenses, acquisition fees and acquisition expenses.[4]

The Division may impose additional requirements on the sale of Program assets to the Sponsor. Omnibus Guideline V.B.1 states, "[a] Sponsor shall not acquire assets from the Program unless approved by Participants in accordance with [Omnibus Guideline] VI.B.1(d)."[5] In addition to Participant approval, the Division will require some assurance that the sale is on terms favorable to the Program. This "favorable terms" requirement is similar to that imposed by the Division on other public offerings,[6] and may require the asset to be sold to the Sponsor at the greater of cost or fair market value, as determined by an Independent Expert.[7]

The Division will look upon deviations from the Omnibus Guidelines with disfavor.[8] The Division may require an appropriate Cross Reference Sheet to be included in the application for registration.[9] Issuers shall provide footnotes or an appendix to the Cross Reference Sheet to explain or justify deviations from the Omnibus Guidelines.

The Omnibus Guidelines are contained in the NASAA Reports published by Commerce Clearing House ("CCH"). Because the Omnibus Guidlines have been amended, with other amendments proposed, since adoption, the Division suggests that issuers review the most current edition of the Omnibus Guidelines when preparing a filing.

Footnotes

1. NASAA Guidelines previously adopted by the Division include: Commodity Pool Programs, Equipment Programs, Real Estate Programs, Real Estate Investment Trusts, and Oil and Gas Programs. *See* Ohio Administrative Code Rule 1301:6-3-09(A)(3) *and Ohio Securities Bulletin* (July 1986; Winter 1990).

2. *See* NASAA Real Estate Guideline V.K.

3. Omnibus Guideline IV.A.3. states:

This Section of these Guidelines will ordinarily not be applied to Programs being registered by a Sponsor which has qualified repetitive Programs with a permitted structure of fees, compensation and expenses prior to the effective date of these Guidelines. This Section of these Guidelines should be applied in a flexible manner to all other Programs to take into consideration competition against Programs with ongoing variance from the provisions of this Sec-

tion and characteristics of the particular plan of business of each Programs including whether it requires intensive continuing management activities by the Sponsors.

4. *See* Omnibus Guideline I.B.11.

5. Omnibus Guideline VI.B.1 provides in pertinent part:

The Program agreement must provide that a majority of the then outstanding Program interests may, without the necessity for concurrence by the Sponsor, vote to:...

(d) approve or disprove the sale of all or substantially all of the assets of the Program, when such sale is to be made other than in the ordinary course of the Program's business.

6. *See, e.g.,* Real Estate Programs Guideline V.A.2; Equipment Programs Guideline V.A.2; *and* Oil and Gas Programs Guideline VI.A.3. *See also Ohio Securities Bulletin* (July 1986).

7. Omnibus Guideline I.B.12. defines "Independent Expert" as " a person with no material current or prior business or personal relationship with the Sponsor who is engaged to a substantial extent in the business of rendering opinions regarding the value of assets of the type held by the Program, and who is qualified to perform such work."

8. *See* Omnibus Guideline I.A.2.

9. *See* Ohio Administrative Code Rule 1301:6-3-09(A)(3) *and* Omnibus Guideline VIII. F.

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Common Tax Aspects of Worthless Securities

By Susan K. Nagel, Esq.

Investment in a new venture, or infusion of new capital into existing companies, invariably holds risk for the investor. Investors who have enjoyed a good return on a sound investment are familiar with capital gains tax treatment considerations based upon the return and the nature of the investment . However, when investment risk becomes a reality and holdings significantly diminish or disappear altogether, many investors are not aware of the tax ramifications and frequently contact the Division.

Investors who have worthless securities in their portfolio may have several options with respect to the tax treatment of such securities, including a potential deduction. Any investor holding worthless securities should contact qualified tax counsel in order to obtain accurate tax advice and establish a plan for personal financial damage control. While the following should not be construed as tax advice, it is a brief summary of some of the more common tax aspects of worthless securities.

Many losses incurred by an investor pertaining to securities in a particular venture are treated as capital losses, as opposed to ordinary losses. However, any losses pertaining to advances or guaranteed loans to a venture will constitute non-business bad debt and may be deducted as such.

In order to take a deduction, an investor who holds securities that become worthless in any calendar year must be able to point to a particular event during that year which evidences that the obligation became devoid of value. This evidence may range from a final accounting in a bankruptcy proceeding which proves that the securities are worthless to proof of no market for the securities. In other words, substantiated proof that the investment is devoid of value allows the investor to take a deduction for worthless securities in the year in which this event occurred. Tax counsel or a broker should be able to assist in gathering such evidence.

Often, when time consuming legal action is involved, an investor will not have substantiated proof of worthlessness until a year subsequent to the year in which the security, for practical purposes, became worthless. However, such time delays do no prevent an investor from taking the deduction. An investor may file an amended return for the year in which the security became worthless. Further, an investor has seven years to file an amended return, rather than the usual three year statutory limitation generally applicable to amended returns.

Susan K. Nagel, Esq., is a Staff Attorney in the Enforcement Section and holds an LL.M. in Business and Taxation from Capital University.

1994 Ohio Securities Conference

Make plans to attend the 1994 Ohio Securities Conference at the Columbus Marriott North. The Conference Seminar will be held on Monday, November 7, 1994, and the Advisory Committee Meetings will be held on Tuesday, November 8, 1994. Registration information will appear in the next issue of the *Ohio Securities Bulletin.*

1993 Ohio Securities Conference

The 1993 Ohio Securities Conference and Advisory Committee Meetings were held on November 15 and 16 at the Columbus Marriott North. Members of the bar and representatives of the securities industry attended the Conference seminar on Monday, November 15 and committee members attended their respective Advisory Committee Meetings on Tuesday, November 16. The 1993 Conference marked the sixth consecutive year that the Ohio Division of Securities and the Ohio Securities Conference, Inc., have sponsored a continuing legal education program featuring topics of interest to the securities community in Ohio.

The Conference seminar began with a panel discussion on "Attorney and Accountant Disclosure Liability." Panel members were Philip A. Brown, Esq., of Vorys, Sater, Seymour and Pease, Professor Joseph C. Long, Esq., of the University of Oklahoma College of Law and Harold I. Zeidman, C.P.A., of KPMG Peat Marwick. Mr. Brown discussed the recent trends in liability, pointing out that recently promulgated accounting literature places heightened emphasis on contingencies and future events. Mr. Brown also suggested that it is becoming more and more important to avoid litigation in the first place because law and accounting firms are often seen as the "deep pockets" in securities litigation. Professor Long described the expanding scope of primary liability against lawyers under the federal securities laws, particularly under Sections 11 and 12(2) of the Securities Act of 1933 and Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934. Professor Long also discussed the increasing reach of secondary liability under the federal securities laws for aiding and abetting the fraudulent conduct of others. Mr. Zeidman concluded the panel discussion by describing the impact of expanding liability on the accounting industry and the industry's reaction thereto.

The next topic was "Electronic Securities Filings," featuring panelists Jamie Johnson of RR Donnelley Financial, Duane T. Whitt of the North American Securities Administrators Association ("NASAA") and Anthony A. Vertuno, Esq., of the Securities and Exchange Commission ("SEC"). Mr. Johnson discussed the challenge of complying with the EDGAR filing rules and described the five steps for EDGAR filings. Mr. Whitt explained NASAA's Securities Registration Depository ("SRD") system and how the SRD is intended to operate in coordination with EDGAR to provide a uniform filing system for securities registrations. Mr. Vertuno presented a regulatory overview of EDGAR, including new SEC rules applicable to electronic filers.

The afternoon session of the Conference seminar began with a panel discussion of issues pertaining to penny stocks. Gary P. Kreider, Esq., of Keating, Meuthing & Klekamp served as moderator while panel members were Daniel M. Sibears, Esq., of the National Association of Securities Dealers, Inc. ("NASD"), Dennis E. Murray , Jr., Esq., of Murray & Murray and Mark R. Borrelli, Esq., of the SEC. Mr. Sibears began the discussion with a commentary on securities market manipulation, stating that manipulation is generally defined as a series of transactions designed to raise or lower the price of a security or to give the appearance of trading for the purpose of inducing others to buy or sell. Mr. Sibears went on to explain various methods of manipulation as well as NASD policies and procedures regarding penny stock, suitability and warrant offerings. Mr. Murray's presentation focused on investor remedies for penny stock fraud, such as claims under the federal securities laws, including the recent penny stock legislation, common law claims and violations of the Ohio Securities Act. In respect of the Ohio Securities Act, Mr. Murray explained the decision in *Chiles v. M.C. Capital*, No. 93-03781-PR (Ohio Ct. Cl. Sept. 21, 1993), where the Court of Claims held that a transaction in which a broker-dealer first sold shares to the public and then purchased such shares from the issuer by exercising warrants was not a transaction exempt under R.C. Section 1707.03(M)(1) because such shares were not "issued and outstanding" at the time they were sold "short" to the public. Consequently, such shares were sold in violation of R.C. Section 1707.44(C)(1). Mr. Borrelli completed the penny stock panel discussion by presenting federal regulatory perspectives on the penny stock industry.

The Conference seminar concluded with the topic "Securities Examinations and Recent Developments in the Division of Securities." Jack A. Bjerke, Esq., of Emens, Kegler, Brown, Hill & Ritter presented a lawyer's perspective on field examinations conducted by the Division and suggested ways to prepare for such an examination. Richard A. Pautsch, C.P.A., of the Division outlined the Division's examination procedures. Finally, a panel comprised of Mark V. Holderman, Esq., Michael P. Miglets, Esq., Caryn A. Francis, Esq., and Dale A. Jewell of the Division discussed questions frequently asked of the Division.

Securities Conference Manuals Available

If you missed the 1993 Ohio Securities Conference or would like an extra copy of the materials, the Division has available for sale a limited number of Conference Manuals. The cost is $25.00 per Manual. Send your request along with a check payable to "Ohio Securities Conference" to:

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Summaries of the Advisory Committee Meetings Held at the 1993 Ohio Securities Conference

Enforcement Advisory Committee

By Caryn Francis, Esq.

Caryn A. Francis, Chairman, called the meeting to order and moved to alternate Co-Chairman each year. The Committee unanimously approved the motion. Gregory J. Zelasko was nominated and unanimously chosen as the 1994 Co-Chairman of the Committee.

The Committee began with a discussion of new business. Phillip Lehmkuhl, Co-Chairman, circulated a proposed draft of revisions to the Ohio Securities Act which, if adopted, would enable the Division of Securities to impose fines administratively. Such revisions include a new section of the Ohio Revised Code, 1707.371, Division of Securities Enforcement Fund.

Mr. Lehmkuhl described the eight proposed uses of any monies deposited in the Enforcement Fund, transfer of excess funds, and the establishment of a rotary fund.

Commissioner Holderman indicated the need for a statutory change by stating that the Director of the Department of Commerce presently does not have control over enforcement funds and that any surplus may be "swept" out of the Department at the end of the year.

The Committee raised the following questions regarding the Enforcement Fund: would the funds be at the discretion of the Commissioner; which of the eight proposed uses would the Division want the most; and which of the eight proposed uses would the Division be willing to give up?

The Committee agreed that the proposed uses pertaining to purchase and lease of equipment, compensation of Division personnel and retention of private legal counsel are the most controversial. However, the Committee did not rule on deleting such proposed uses from any final version of the proposed rule.

The Committe then discussed whether the minimum and maximum penalties as set out in proposed section 1707.23(I) were too high, too low, or accurate. Mr. Lehmkuhl indicated that he conducted a survey to arrive at the figures and that $2,500 was recommended under the Uniform Securities Act.

Various issues were raised by the Committee, including concerns about the definition of "violations", whether a fine of $2,500 would be deemed an acceptable risk of doing business, and whether a report on the CRD would inflict a greater punishment than a monetary fine.

Six Committee members wanted the proposed minimum fine increased from $2,500 to $5,000. One Committee member wanted the figure kept at $2,500. No Committee members felt the figure of $2,500 should be decreased.

A motion was made and unanimously carried to change the proposed minimum fine from $2,500 to $5,000.

The Committee also discussed the administrative hearing proceedure under the proposed system.

Some Committee members raised concerns regarding the speed with which reports are currently issued following administrative hearings, although this issue was not resolved by the Committee.

An issue was raised whether the Division should be entitled to recover its attorneys fees and costs, including allocable time of its personnel, where an Order of the Commissioner is upheld on appeal. The Committee recommended a review of other states' rules concerning this issue.

Additional new business addressed by the Committee included the following: providing authority for the Division to enter into consent agreements wherein the respondents neither admit nor deny the alleged violations but agree to pay a civil penalty or undertake corrective action; failure to pay civil penalties resulting in a lien upon all the assets and property of the individual involved; and factors taken into consideration when determining the amount or extent of a civil penalty.

Several issues were raised concerning proposed revisions to Rule 1301:6-3-19(A) of the Ohio Administrative Code. The key issues which were discussed pertained to: the use of the settlement date rather than the trade date as the date which triggers the time frame for delivery of stock certificates or proceeds; the definition of "delivery" including the concept of "good" delivery; and deletion of any requirement that a broker have sufficient funds available to acquire a particular security prior to acceptance of a purchase order.

A motion was made and unanimously carried to set up a sub-committee to address issues pertaining to the proposed rule regarding timely delivery of securities. The following committee members agreed to participate: Howard Akin, Erwin Dugasz, Bill Jackson, Bob Rapp and Mary Spahia-Carducci.

Exemption Advisory Committee

By James Hunt, Esq.

Professor Howard Friedman of the University of Toledo College of Law, Co-Chair of the Committee, opened the meeting by noting a proposed amendment to the Ohio Administrative Code. Rule 1301:6-3-02(C)(1)(d) of the Ohio Administrative Code was supposed to be patterned after section 1707.03(O) of the Ohio Revised Code, which provides for a maximum of ten "purchasers". However, the rule speaks in terms of ten "sales". By definition, "sales" include "offers". In its current form the rule seems to limit the exemption to ten "offerees", whether or not they

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purchase. Therefore, it was suggested, and unanimously agreed to by the Committee, that the rule be amended to provide for ten "purchasers" of securities.

The next topic for discussion involved the proposed elimination of the filing requirements for sections 1707.02(B) and 1707.03(O) of the Ohio Revised Code. The proposal addressed issues raised at the 1992 Committee meeting, particularly the ideas of a sub-committee composed of Ann Gerwin, William Keck, and David Detec. The language of the proposal was unanimously approved. Members of the Committee noted that this would eliminate much of the inadvertent liability caused by a failure to timely file, especially for out-of-state attorneys. The Committee discussed whether the ten-purchaser limit should be raised to fifteen to bring Ohio more in line with surrounding states, but agreed that was an issue better left to another date.

The Committee then considered a proposal regarding the coordination of Form 3-W filings on the state level with Form D filings on the federal level. It was suggested that Form 3-Q filings also be included. The Committee discussed a number of issues raised by this proposal, such as what happens if an issuer relies solely on section 4(2) of the Securities Act of 1933, whether to blend 505 and 506 offerings together, whether there should be periodic filing requirements, and whether Form D could be substituted for Form 3-Q and Form 3-W. In view of the myriad problems and variables, a sub-committee was created to study the issues. Anyone wishing to comment or offer suggestions is free to contact the Division.

The next issue involved limited liability companies. William Leber , Counsel to the Commissioner, presented information to the Committee about pending legislation and the intent to make changes to sections 1707.03(O) and 1707.06 of the Ohio Revised Code to include limited liability companies along with corporations. Mr. Leber pointed out that approximately 38 states now have limited liability company statutes.

Finally, the Committee discussed the possibility of having the advisory committee meetings on the same day as the Ohio Securities Conference seminar. It was suggested that by shortening lunch and beginning a little earlier, the advisory committees could meet and still leave enough time for the conference to have five or six hours of CLE credit. A majority of the attendees thought the idea had merit.

Licensing Advisory Committee

By Dale A. Jewell

The primary focus of the Licensing Advisory Committee was House Bill 488 as it existed at that time. This bill would require that certain broker/dealers register with the SEC. Questions were raised concerning the threshold at which broker/dealers would be required to register with the SEC. A concern was also expressed that issuers selling their own securities might be included in the list of entities required to register with the SEC. Members questioned whether the requirement would inhibit capital formation in Ohio by increasing broker/dealers' cost of doing business.

The Committee also discussed the possibility of adding fining authority to the Division's enforcement powers. It was noted that fining power would allow the Division to more closely tailor the penalty to the violator's act(s). A Committee member from the NASD described the NASD's experience with fining and collection of fines from members.

Lastly, a member proposed that the Division consider excluding from underwriter's compensation the value of a warrant given to an account executive.

Registration Advisory Committee

By Michael P. Miglets, Esq.

Co-Chairs Warren Udisky and Michael Miglets convened the meeting of the Registration Advisory Committee. The Committee reviewed the agenda prepared by the Co-Chairs, discussed progress on topics from the last Committee meeting and considered several new topics raised by Committee members.

The Committee first discussed two changes which have been included in amended House Bill 488 which would allow issuers greater flexability in structuring offerings. The first change would exclude issuers from the definition of the term "dealer" and allow issuers to sell securities directly to the public without using a licensed securities dealer. The Committee felt that this amendment would bring the Ohio Securities Act more in line with the Uniform Securities Act and allow issuers to use the SEC's Small Business Initiatives, including Forms SB-1, SB-2 and 1-A, without the expense of using a licensed securities dealer. It was noted that the issuer would still be subject to the fraud prohibitions under the Ohio Securities Act and the Securities Act of 1933 and would be required to use a prospectus.

The second significant change for registrations under amended House Bill 488 would change the expense limitation under section 1707.06(A)(1) of the Ohio Revised Code to exclude the legal, accounting and printing expenses of the corporation from the 3% expense limitation. The Committee felt that this change was necessary to allow the corporation to pay expenses when an offering circular was required under Ohio Administrative Code rule 1301:6-3-06(D). The amendment would also provide consistency in determining the exclusions from the limitation on offering expenses for the different types of registration by description and exempt transactions. The final

change to the registration provisions would require issuers or dealers to file one copy of the prospectus and registration statement instead of the current requirement for three copies.

The Committee then reviewed the Division's guidelines on underwriting warrants. The Division's 1973 Guidelines for Public Offerings included a 10% limitation on warrants issued to underwriters. In 1986 the Division updated a number of guidelines for public offerings and indicated that the Division would use the formula used by the NASD to value underwriting warrants. The Division's policy statement did not include a 10% limitation on the number of warrants to be issued to underwriters. It was noted that the NASAA and the NASD included a 10% limitation on underwriting warrants. The Committee discussed whether to specifically amend the Division's policy statement to include a 10% limitation on underwriting warrants to be consistent with NASAA and the NASD, but decided to defer a final decision until House Bill 488 was enacted. As amended, House Bill 488 would require all retail securities dealers to be NASD members and therefore the Committee felt a consistent guideline could be drafted at that time.

An update on other pending legislation was provided, including a summary of the two bills providing for limited liability companies. During the general discussion period, Jason Blackford suggested an amendment to section 1707.43 of the Ohio Revised Code to allow investors to arbitrate claims under the Ohio Securities Act. Currently an investor is required to tender securities in open court to void a securities transaction made in violation of the Ohio Securities Act. Mr. Blackford felt that arbitration offered investors an alternative to a civil action which could be less expensive and provide an expedited decision. The Committee felt that an arbitration alternative could offer advantages to both issuers and investors noting the recent studies of required arbitrations involving securities dealers. Mr. Blackford indicated that he would discuss the issue with the Corporation Law Committee of the Ohio State Bar Association. The Committee decided that any formal proposals would need to be circulated with the Division's Exemption, Enforcement and Broker-Dealer Advisory Committees.

Takeover Advisory Committee

By S.B.Robbins-Penniman, Esq.

The meeting of theTakeover Advisory Committee was called to order by Co-Chair Sylvia Robbins-Penniman. Also presiding at the meeting was Co-Chair James Tobin.

At the conclusion of last year's meeting, Robert Schwartz agreed to research whether trading or acquisitions of debt claims relating to companies in bankruptcy proceedings should be defined by rule as "equity securities" which are covered by Ohio Revised Code ("R.C.") section 1707.041. Mr. Schwartz reported the results of his research, and concluded that any rule the Division drafted would probably be over broad and would unnecessarily interfere with routine liquidations. He also advised the Committee that bankruptcy courts are well aware of the activities of traders, and the courts had been able to control the traders effectively. Mr. Tobin queried whether creditor protection issues might cause a conflict with any rule drafted. Mr. Schwartz noted that R.C. section 1707.44(D) requires disclosure of insolvency, whether or not a bankruptcy is involved. The Committee agreed that a new rule would not be prudent at this time

Another issue remaining from last year was the problem of the three calendar day deadline found in R.C. section 1707.041(A)(3), and the impact of this requirement when the third day falls on a weekend or holiday. Last year, the Committee agreed that the situation would be governed by R.C. section 1.14, which generally governs the manner in which days are counted, and provides that if the deadline falls on a day when a state agency is closed, the act could be deferred to the next day the offices were open. However, R.C. section 1.14 does not assume that an agency is closed on Saturday, although the Division of Securities is closed. A proposed Administrative Rule 1301:6-1-05 was distributed, which builds on R.C. section 1.14. The proposed rule states that the offices of the Ohio Division of Securities are closed on Saturdays and holidays. The rule would govern filings under all provisions of the Ohio Securities Act, not only those made pursuant to R.C. section 1707.041. The Takeover Advisory Committee approved the draft of the proposed rule and recommended that the Division take steps to adopt it.

A new issue considered concerned the wording of R.C. section 1707.01(V)(2)(b). It had been postulated that this section exempts all private offerings, not just private offerings involving exchanges of securities. After much discussion, the consensus was that the statutory language was clear, and that the exemption is limited only to exchanges. Nonetheless, if the Division believed that clarification was advisable, the Committee recommended that the issue be handled by rule rather than statutory amendment. A proposed rule was reviewed, to which the Committee had no particular objection.

The Committee also discussed the interplay of R.C. sections 1707.041(B)(1), which requires a "tender offer" to be made to all holders, and 1707.07 (V)(2)(c), which provides an exemption if the target has fewer than fifty offerees. The Committee concluded that the exemption should apply when there are fewer than fifty offerees, regardless of the number of shareholders,

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and that the doctrine of integration of successive offers would control abuses.

Finally, the Committee discussed the Division's interpretation in *In the Matter of Dover Securities Co. Tender Offer for Miners & Mechanics Savings and Trust Co. of Steubenville* (1984) that bank holding companies are not exempt from R.C. section 1707.041 because no federal agency reviews the control bid to determine whether there was full, fair and effective disclosure to shareholders. The consensus of the public members of the Committee was that this decision was not consistent with the plain meaning of the statute. The members recognized that the Division might consider itself bound by the *Dover Securities* Order unless a different official position were publicly taken and published. Ms. Robbins-Penniman agreed to relay the consensus to the Division, but could not assure the members that the Division would alter its current interpretation.

Editor's Note:

This Issue of the *Ohio Securities Bulletin,* 94:1, follows *Bulletin* Issue 93:2. *Bulletin* Issues 93:3 and 93:4 were not published. Statistical information for the second, third and fourth quarters of 1993 are included in this Issue.

If you did not receive *Bulletin* Issue 93:1 or 93:2 and would like a copy of either or both, please contact the Division.

Division Enforcement Section Reports

Administrative Orders

Michael E. Latham; Sage Petroleum Corporation

On April 5, 1993, the Division issued a Cease and Desist Order, Division Order No. 93-014, ordering Michael E. Latham of Dallas, Texas, to Cease and Desist from selling securities in Ohio without being licensed by the Division. On December 18, 1992, the Division had issued Division Order No. 92-095 giving Latham notice of the Division's intent to issue a Cease and Desist Order and allowing him to request a hearing on the matter. The Division issued the Cease and Desist Order after Latham failed to request a hearing.

The Division found that in December 1989, Latham sold working interests in oil and gas wells to two Ohio residents without being licensed to sell securities in Ohio. The Division also found that the oil and gas interests were neither registered nor exempt from registration under the Ohio Securities Act.

Steven W. Kochensparger; One Plus Communications, Inc.

Steven W. Kochensparger, of Columbus, Ohio, was the subject of two Cease and Desist Orders issued by the Division, and One Plus Communications, Inc., an Ohio corporation of which Kochensparger was the President, incorporator, a director and a shareholder, was named in a third.

In Division Order No. 93-013, dated April 5, 1993, the Division ordered One Plus to Cease and Desist from the unlicensed sale of securities and from the sale of unregistered securities. One Plus did not contest the Division's findings that, from June through November of 1991, it had sold its own securities to various Ohio residents without licensure or registration.

Kochensparger was personally ordered to Cease and Desist from fraudulent acts in the sale of securities in Division Order No. 93-018, dated April 8, 1993. The Division found that Kochensparger had taken funds from a client's account without the authorization, knowledge or consent of the client, and then invested the money. The unauthorized transactions which led to the Division's action took place in 1989 and 1990 when Kochensparger was employed as a salesman and sales manager at Parsons Securities, Inc., a now-defunct interstate securities dealer. Kochensparger did not request a hearing when notified of the Division's charges.

The third Order, Division Order No. 93-031, was issued on April 30, 1993 and arose out of Kochensparger's sales of unregistered One Plus securities. The Division found that Kochensparger had sold One Plus interests to a variety of Ohio residents from June to November of 1991, and that he used a promotional document in making those sales that misstated and omitted material facts about an investment in One Plus. Neither One Plus nor Kochensparger contested the Division's charges in any of the Cease and Desist Orders.

Roger A. Carter dba Kris Oil Company

On April 9, 1993, the Division issued Division Order No. 93-019 which ordered Roger A. Carter, of Clyde, Ohio, doing business as Kris Oil Company, to Cease and Desist from violating Revised Code sections 1707.44(A) and 1707.44(C)(1), the Ohio Securities Act prohibitions against the unlicensed sale of securi-

ties and the sale of unregistered securities not qualified for exemption.

The Division established at a hearing that Carter, who was not licensed to sell securities, sold $30,000 worth of securities that were neither registered nor qualified for exemption. The securities in question included a promissory note that was ostensibly collateralized by a lease for a Texas oil field.

Bradley Roger Kastan

The Division suspended the Ohio Securities Salesman License of Bradley Roger Kastan, of Columbus, Ohio, for a period of two months commencing on March 8, 1993 and ending on May 8, 1993. The Division imposed the suspension upon learning that Kastan, a salesman affiliated with PaineWebber Incorporated, had earlier been suspended for two months under the terms of a "Stipulation of Facts and Consent to Penalty" with the New York Stock Exchange, Inc. Under the terms of that consent and stipulation, Kastan agreed to be censured, serve a two month suspension from affiliation with any member of the exchange, and be subject to a six month period of "enhanced supervision" following the suspension. The Exchange's suspension of Kastan ran from February 11 through April 12, 1993, the date that Ohio Division Order No. 93-020 was issued.

The Division determined that neither Kastan nor his dealer had advised the Division of the various actions taken against him by the Exchange until PaineWebber notified the Division on March 8, 1993.

Dublin Securities, Inc.

On June 15, 1993, the Division issued Division Order No. 93-053 which revoked the Ohio Dealer of Securities License of Dublin Securities, Inc., of Worthington, Ohio. DSI failed to comply with Ohio Administrative Code rule 1301:6-3-15(H) which requires all licensed dealers to file an audited financial statement with the Division within ninety days of the end of the dealer's fiscal year. The Division established that the fiscal year for DSI ended on December 31, 1992, and that DSI was therefore required to file its 1992 financial statement by March 31, 1993.

When the Division determined that DSI had not complied with the rule, it issued Division Order No. 93-035 on May 5, 1993, which gave DSI notice of the Division's charges and intention to revoke DSI's license, and granted DSI an opportunity for a hearing. DSI did not request a hearing or contest the finding that it failed to provide timely financial information to the Division.

David Alan Nahmias

On May 6, 1993, the Division ordered the Denial of the Application for Licensing as a Securities Salesman of David Alan Nahmias, of Memphis, Tennessee, because Nahmias was not of "good business repute", as that phrase is used in the Ohio Securities Act and Rules. Nahmias had applied for licensing as a salesman with PaineWebber Incorporated in Memphis, Tennessee in June 1992.

In Division Order No. 93-033, the Division reported three instances where Nahmias had been the subject of regulatory action. Nahmias was the subject of a 1988 Tennessee Cease and Desist Order, had been fined and suspended by the NASD in 1990, and had been censured, fined, and ordered to re-comply with registration standards by the NASD in 1991. Nahmias did not contest the charges presented by the Division in the Notice sent to him prior to the Final Order which found him to lack "good business repute."

JAB Production Company, Inc.

JAB Production Company, Inc., and the Division entered into a Consent Agreement whereby JAB stipulated and consented to the findings and conclusions set out in Division Order No. 93-054, issued June 21, 1993. James B. Williams, President of JAB, signed the agreement on behalf of the Amelia, Ohio corporation on June 10, 1993, consenting to the Cease and Desist Order directing JAB to cease violations of the exemption provisions set out in Revised Code sections 1707.03(O) and 1707.03(Q).

A field examination by the Division established that JAB had exceeded the number of sales allowed under the claimed exemption and had failed to perfect claims of exemption in connection with sales of JAB common shares from 1988 through 1990.

Herbert Garrett Frey

On June 24, 1993, the Division issued Division Order No. 93-055, a Final Order in the application for licensing of Herbert Garrett Frey of Cincinnati, Ohio. The Division accepted the recommendation of Hearing Examiner Robert M. Wasylik that an Ohio Securities Salesman License be issued to Frey.

As noted in Division Order No. 93-055, the Division found Frey to be "of good business repute" as that phrase is used in the Ohio Securities Act and the Rules.

A. Frank Ayyash

On July 9, 1993, the Division issued Division Order No. 93-064 against A. Frank Ayyash, of Brecksville, Ohio, ordering him to Cease and Desist from violating the provisions of Revised Code section 1707.44(C)(1), which prohibits the sale of unregistered, non-exempt securities, and Revised Code section 1707.44(G), which prohibits acts or practices that are defined as fraudulent. On May 24, 1993, the Division had issued to Ayyash a Notice of Opportunity for a Hearing through Division Order No. 93-046. Ayyash did not request a hearing.

Order No. 93-064 stated that Ayyash, while employed with Worthington Investments, Inc., engaged in the sale of securities of Worthington Investment Trust,

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World Wide Licensing Corp., Duncan Hill Company, Ltd., and Cortland Energy Co., Inc. to Ohio residents. These securities were neither registered nor exempt from registration under the Ohio Securities Act. The Division also found that Ayyash sold the aforementioned securities at unreasonable mark-ups, sometimes in excess of 200%, and failed to disclose to his customers the mark-up on those securities.

Dale A. Craig

On July 14, 1993, the Division issued a Cease and Desist Order, Division Order No. 93-066, which ordered Dale A. Craig of Columbus, Ohio, to Cease and Desist from selling unregistered, nonexempt securities. On June 10, 1993, the Division had issued Division Order No. 93-050 giving Craig notice of the Division's intent to issue a Cease and Desist Order and affording him the opportunity to request an administrative hearing on the matter. When Craig failed to request an administrative hearing, the Division issued the Cease and Desist Order.

In January 1993, Craig was the Vice President of Marketing of Aries Aluminum Corporation, an Ohio corporation. On January 26, 1993, Craig signed and sent to Aries shareholders a letter soliciting the shareholders to purchase "at below market value" shares of Aries and/or warrants to purchase shares of Aries. However, such shares and warrants were neither registered nor exempt from registration under the Ohio Securities Act.

At least three Ohio residents received Craig's solicitation letter. Because Craig's solicitation letter constituted a "sale" as defined in the Ohio Securities Act, such solicitation was made in violation of the Ohio Securities Act since the Aries shares and warrants were neither registered nor exempt from registration.

Main Street U.S.A., Inc.; Merrill L. Katz

On August 23, 1993, the Division issued Division Order No. 93-073 which ordered Main Street U.S.A., Inc. and Merrill L. Katz ("Respondents"), both of Solon, Ohio, to Cease and Desist from violating Revised Code sections 1707.44(A), 1707.44(C)(1) and 1707.44(G). On March 26, 1993, the Division had issued Division Order No. 93-012 which provided Respondents a Notice of Opportunity for a Hearing and stated the Division's intent to issue a Cease and Desist Order.

On September 23, 1993, the Division entered into a Consent Order with Respondents in which the Division and Respondents consented, stipulated and agreed to the findings and conclusions set forth in Order No. 93-073 and Respondents waived their right to a hearing. The Order found that Respondents had failed to timely file a Form 3-O, had sold promissory notes without registration or proper claim of exemption, and sold securities without being licensed by the Division.

Kelco Industries Inc.; John Kelly

On September 14, 1993, the Division issued Division Order No. 93-079, a Cease and Desist Order against Kelco Industries Inc. and John Kelly, both of Columbus, Ohio.

The Order was issued based on findings by the Division that Kelly, the President of Kelco, had sold certain "investment agreements" to Ohio residents in violation of Revised Code section 1707.44(C)(1) because such securities were neither registered nor exempt from registration under the Ohio Securities Act. The Division issued the Cease and Desist Order after Kelly failed to request a hearing as permitted by Division Order No. 93-062, which was issued on July 1, 1993, and gave Kelly notice of the Division's findings.

James V. Matoszkia

On October 21, 1993, the Division issued Division Order No. 93-099 which denied James V. Matoszkia, of Columbus, Ohio, an Ohio Securities salesman License. On September 30, 1992, the Division had issued Division Order No. 92-060, notifying Matoszkia of the Division's intent to deny his application for a license based on his lack of "good business repute", as that phrase is used in the Ohio Securities Act and Rules, and giving Matoszkia notice of his opportunity for a hearing on the matter.

Matoszkia requested a hearing, which was held December 2, 1992. The Hearing Officer recommended that Matoszkia not be licensed based on his guilty plea to a third degree felony drug charge. The Division adopted the Hearing Officer's report and recommendation and ordered that Matoszkia not be licensed.

Peter Grant Fager

On December 6, 1993, the Division issued Division Order No. 93-119, denying Peter Grant Fager, of Sarasota, Florida, an Ohio Securities Salesman License. On October 29, 1993, the Division had issued a Notice of Intent to Deny Fager's application for a License which gave Fager notice of his opportunity to request a hearing.

The Division found that Fager was not of "good business repute" as that phrase is used in the Ohio Securities Act and Rules. The finding was based on a New York Stock Exchange censure, fine of $1,000 and suspension of six weeks, a settlement with a customer based on allegations that Fager failed to follow the customer's instructions, and an arbitration award based on allegations of unsuitable and unauthorized trading by Fager. The Division issued Order No. 93-119 after Fager failed to request a hearing.

Lawrence Wayne Durbin

On December 28, 1993, the Division issued Division Order No. 93-125, a Cease and Desist Order, against Lawrence Wayne Durbin of Wadsworth, Ohio.

The Order was issued based on findings by the Division that Durbin violated Revised Code section 1707.44(C)(1) by selling securities of University Businesses, Inc., which were neither registered nor exempt from registration. The Division and Durbin entered into a Consent Agreement agreeing to the findings and conclusion set forth in the Cease and Desist Order.

Criminal Actions

Paul Dieter

On March 4, 1993, Paul Dieter, of Shaker Heights, Ohio, was sentenced in Cuyahoga County Common Pleas Court to eighteen months incarceration on each of six theft counts to run concurrently. Dieter had pled guilty to the counts on February 8, 1993. The execution of sentence was suspended. Dieter was placed on five years supervised probation, was ordered to pay court costs of $3,000 and restitution of $100 per month, to be divided among the five aggrieved investors. Dieter had been indicted on an additional nineteen counts, which were dropped as part of the plea bargain.

The charges against Dieter arose out of the sale of interests in a Mexico peso exchange program to Cleveland-area investors during 1989. Dieter introduced investors to a scheme whereby they would tender $5,000 to an organization identified as FLH Group, which was to place the funds in a pool of money that was accumulated from investors nationwide. The pooled money was then to be exchanged for U.S. dollars, at which time the investors were to receive a 12% return on their investment. Investors lost all funds that were invested in the program and the FLH principals were imprisoned.

Mary Spahia-Carducci, Enforcement Section Staff Attorney, referred this case to the Office of Cuyahoga County Prosecutor Stephanie Tubbs-Jones.

Michael E. Wilson; Paul G. Dotson; Conward E. Johnson

On April 22, 1993, Michael E. Wilson, of Galloway, Ohio, Paul G. Dotson of Brookville, Ohio, and Conward E. Johnson, of Dublin, Ohio, were indicted by a Franklin County Grand Jury. The charges allege that inaccurate and false information was provided to the Division in connection with the pending intrastate broker/dealer application for SCC Group, Inc.

Donald Meyer, former Attorney-Inspector of the Enforcement Section, referred this case to the Office of the Franklin County Prosecuting Attorney Michael Miller.

Thomas P. Gilmartin, Jr.

On July 7, 1993, Thomas P. Gilmartin, Jr., of Youngstown, Ohio, was arraigned before U.S. District Judge Manos in Cleveland, where he entered a plea of not guilty to a fifty-eight count indictment. The charges included twenty-one counts of securities fraud.

A Cleveland federal grand jury had handed down the multiple count indictment on June 24, 1993. Along with the twenty-one counts of securities fraud, the charges included three counts of conspiracy, sixteen counts of mail fraud, five counts of wire fraud, three counts of money laundering, two counts of interstate transportation of securities taken by fraud, one count of bank fraud and four counts of failure to file tax returns.

Gilmartin was the CEO of First Ohio Securities Company, an Ohio-based broker/dealer whose failure caused SIPC to seize it and force it in to bankruptcy to liquidate what assets remained. First Ohio Securities also maintained offices in Chicago, New Jersey and Texas. There were over $6 million in losses through the sale of bogus securities and other schemes designed to fool regulators as to First Ohio Securities' true net capital.

Karen Terhune, Enforcement Section Assistant Manager, and E.J. Dugasz, Jr., Enforcement Section Staff Attorney, worked closely with the Office of United States Attorney Emily M. Sweeney, United States Attorney for the Northern District of Ohio on this case.

Wilson M. Graham

On August 4, 1993, Wilson M. Graham, of Mason, Ohio, was sentenced to six concurrent terms of one year imprisonment and fined $12,000 by Judge Fedders in Warren County Common Pleas Court. On June 17, 1993, Graham had pled guilty to six counts of selling unregistered securities. At the sentencing, Judge Fedders suspended the prison term, but not the fine, ordered Graham to make restitution to aggrieved investors and placed Graham on probation. As a condition of the probation, Graham is not permitted to continue employment in the field of public accounting.

Graham, a former certified public accountant, was the principal of Graham & Associates, CPA's. Graham sold promissory notes in which he promised investors double their funds in six to eight months. Graham told investors that the funds were going to finance the opening of several branch offices of Graham & Associates, CPA's. At least $83,000 was misappropriated.

Mary Spahia-Carducci, Enforcement Staff Attorney, who was appointed a special assistant prosecutor on this case, and Donald Meyer, former Attorney Inspector, referred this case to Warren County Prosecutor Timothy Oliver.

Terence W. Zawacki

On September 21, 1993, Terence W. Zawacki, of Lake Forest, Illinois, was sentenced by U. S. District Judge Aldrich in Cleveland to thirty-three

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months imprisonment to be followed by three years supervised probation and 3,000 hours of community service. Judge Aldrich also ordered restitution of $3.4 million.

On July 21, 1993, Zawacki had been arraigned before Judge Aldrich and entered a guilty plea to an eighteen count bill of information, including two counts of securities fraud, two counts of conspiracy to commit securities fraud, six counts of wire fraud, seven counts of mail fraud, and one count of interstate transportation of securities taken by fraud. Zawacki had entered intoa plea agreement with authorities on June 24, 1993.

Like Thomas P. Gilmartin, Jr., Zawacki had been a principal of First Ohio Securities Company, serving as the company's President and Chief Financial Officer.

Karen Terhune, Enforcement Section Assistant Manager, and E.J. Dugasz, Jr., Enforcement Section Staff Attorney, worked closely with the Office of United States Attorney Emily M. Sweeney, United States Attorney for the Northern District of Ohio on this case.

William Marks

On October 20, 1993, William Marks of Brecksville, Ohio, pled guilty to a lesser offense of one count of attempt to commit securities fraud. He was ordered by Cuyahoga County Judge Wells to pay $7,500 in restitution, $2,500 due the day the plea was entered, with the balance due within six months. He was put on probation for six months, which could be reduced to four months if restitution is made. Marks agreed to never engage in the sale of securities. Failure to comply with all of the terms of the plea agreement will result in six months imprisonment.

Marks was indicted on September 5, 1990, on eight felony counts of securities violations relating to the sale of interests in an oil and gas venture. A warrant was issued for his arrest, and he was located June 4, 1993.

Mark Heuerman, Attorney/Examiner, referred this case to the Office of Cuyahoga County Prosecutor Stephanie Tubbs-Jones.

L. William Sahley

On November 1, 1993, L. William Sahley, of Richmond Heights, Ohio, was indicted by a Cuyahoga County Grand Jury for ten counts each of selling unregistered securities, selling securities without a license, making misrepresentations in the sale of securities, securities fraud and theft.

Sahley, the founder and operator of five corporations including Supermaterials Manufacturing, Inc., Ceramics Corporation of America and Ceramics Tech, allegedly falsified financial data and credentials in the offering documents distributed to Ohio investors in order to sell stock in the companies. In December 1992, the SEC suspended trading of Ceramics Tech stock because of questions surrounding the accuracy of information sent by Sahley to NASD, market makers, broker dealers and investors. The SEC is seeking a permanent injunction against Sahley.

Mary Spahia-Carducci, Enforcement Staff Attorney, referred this case to the Office of Cuyahoga County Prosecutor Stephanie Tubbs-Jones.

Robert L. Hill, Jr.

On November 17, 1993, Robert L. Hill, Jr., of Worthington, Ohio, was indicted on six counts of Ohio securities law violations and one count of theft by a Franklin County Grand Jury. Hill was alleged to have represented, during 1992, that he would make investments on behalf of Ohio residents in a mutual fund at a time when Hill was not licensed to sell securities in Ohio, and when the mutual fund was no longer accepting new investors. It was alleged that Hill never sent the money he received from the investors to the mutual fund, and that he used false and misleading statements and documents to induce the investors to invest their money through him. His trial is scheduled for April 7, 1994.

D. Michael Quinn, Enforcement Staff Attorney, referred this case to the Office of Franklin County Prosecutor Michael Miller.

Jack P. Boyle

On November 29, 1993, Jack P. Boyle, of Akron, Ohio, was sentenced to eight to fifteen years imprisonment, and ordered to make restitution of over $600,000 by Summit County Common Pleas Judge Bond. After a seven day trial, a Summit County jury returned guilty verdicts on November 23, 1993 on thirty felony counts, including eleven counts of securities violations.

On August 19, 1993, a twenty-eight count indictment was filed against Boyle after it had been returned by a Summit County Grand Jury. The indictment included seven counts each of the unlicensed sales of securities, securities fraud and unregistered sales of securities, six counts of misrepresentations in the sale of securities, and one count of issuing false statements concerning the value of securities. The indictment was a supplement to previous counts of aggravated theft, grand theft and theft returned by a Summit County Grand Jury in connection with his activities with his company, Boyle Financial Services, Inc., formerly located in the top suite of 1 Cascade Plaza, Akron, Ohio.

Although victims invested in bogus securities which Boyle called "reserve accounts" at the time of the sale, his attorneys argued unsuccessfully that investors "loaned" him the money. Investor lost more than $650,000 through Boyle. Some investors were misled after hearing Boyle speak on a weekly infomercial on WNIR (100.1-FM) radio station.

Karen Terhune, Enforcement Section Assistant Manager, referred this case to the Office of Summit County Prosecutor Lynn C. Slaby.

Registration Statistics

The table to the right sets out the number of registration filings received by the Division during the first quarter of 1994, compared to the number received during the first quarter of 1993, as well as the number of registration filings received by the Division in 1994 year to date, compared to the number received in 1993 year to date.

The table below sets out the number of registration filings received by the Division during the second, third and fourth quarters of 1993, compared to the number received during the same quarters of 1992, as well as the 1993 year end totals, compared to the 1992 year end totals.

Form Type	Q1 94	Q1 93	YTD 94	YTD 93
.02(B)	279	311	279	311
.03(O)	3,504	3,266	3,504	3,266
.03(Q)	441	336	441	336
.03(W)	28	29	28	29
.04	1	0	1	0
.041	0	2	0	2
.06(A)(1)	36	45	36	45
.06(A)(2)	11	14	11	14
.06(A)(3)	4	7	4	7
.06(A)(4)	13	12	13	12
.09	159	139	159	139
.091	844	799	844	799
.39	35	22	35	22
.391/.09	2	0	2	0
.391/.091	4	1	4	1
.391/.03(O)	255	187	255	187
.391/.03(Q)	59	33	59	33
.391/.03(W)	2	1	2	1
.391/.06(A)(1)	0	0	0	0
.391/.06(A)(2)	0	0	0	0
.391/.06(A)(3)	0	0	0	0
.391/.06(A)(4)	0	0	0	0

Form Type	Q2 93	Q2 92	Q3 93	Q3 92	Q4 93	Q4 92	Total 93	Total 92
.02(B)	421	457	355	364	374	419	1461	1519
.03(O)	3,020	2,793	2,707	2,667	2,587	2,589	11,580	11,190
.03(Q)	294	308	321	293	336	270	1,287	1,224
.03(W)	44	29	36	38	46	41	155	128
.04	0	0	0	1	0	0	0	2
.041	0	1	0	0	0	0	2	1
.06(A)(1)	43	64	25	29	30	48	143	182
.06(A)(2)	14	17	10	17	10	14	48	61
.06(A)(3)	5	9	2	10	8	7	22	31
.06(A)(4)	18	23	17	10	18	10	65	61
.09	127	146	130	145	154	116	550	559
.091	694	592	806	679	897	767	3,196	2,676
.39	28	22	23	26	15	41	88	122
.391/.09	2	2	0	2	0	0	2	6
.391/.091	1	3	5	3	0	1	7	10
.391/.03(O)	210	204	203	183	208	193	808	796
.391/.03(Q)	33	36	28	24	31	33	125	136
.391/.03(W)	2	2	1	1	2	2	6	5
.391/.06(A)(1)	0	1	0	1	0	0	0	2
.391/.06(A)(2)	0	0	0	0	0	0	0	1
.391/.06(A)(3)	0	0	0	0	0	0	0	1
.391/.06(A)(4)	0	0	0	0	0	0	0	0
Totals	4,956	4,709	4,669	4,493	4,716	4,551	19,546	18,713

Licensing Statistics

The table below sets out the number of Salesmen and Broker/Dealers licensed by the Division at the end of the second, third and fourth quarters of 1993, compared to the same quarters of 1992, as well as the number of Salesmen and Broker/Dealers licensed by the Division at the end of the first quarter of 1994, compared to the first quarter of 1993.

	End of Q2 1993	End of Q2 1992	End of Q3 1993	End of Q3 1992	End of Q4 1993	End of Q4 1992	End of Q1 1994	End of Q1 1993
Number of Salesmen Licensed:	59,570	57,002	62,345	59,449	64,589	56,212	65,991	56,200
Number of Broker/Dealers Licensed:	1,750	1,590	1,812	1,640	1,800	1,573	1,778	1,678

OHIO SECURITIES BULLETIN

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