

# OHIO SECURITIES BULLETIN

A QUARTERLY PUBLICATION OF THE OHIO DIVISION OF SECURITIES

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Governor of Ohio

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## Administrative Hearings Pursuant to R.C. Chapter 119

by D. Michael Quinn, Esq.

*Editor's Note: Administrative actions taken by the Division of Securities proceed through the administrative hearing process established by Revised Code Chapter 119. The following article, which first appeared in Bulletin Issue 89:1, is a practitioner's introduction to the "119" process.*

One of the functions of the Division of Securities (the "Division") is to investigate alleged violations of the Ohio Securities Act through its Enforcement Section and, if a violation is suspected, to proceed against the

persons involved. That proceeding may be either through the criminal courts or through an administrative action. In the latter instance, an administrative hearing pursuant to Revised Code ("R.C.") Chapter 119 (a "119 Hearing") is offered to afford the Respondent in a Division action an opportunity to be heard and to challenge the Division's allegations. The procedures of a 119 Hearing, as those procedures are specifically applied by the Division, are the focus of this article.

Note that the Division is empowered to hold other types of hearings. R.C. section 1707.13 provides for an immediate suspension with a  
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## R.C. 1707.03(M): Not a "Free Exercise" Clause *Chiles v. M.C. Capital Corporation*

by Thomas E. Geyer, Esq.

Revised Code section 1707.03(M) provides a transactional exemption from the registration provisions of the Ohio Securities Act for:

A sale by a licensed dealer, acting either as principal or agent, of securities issued and outstanding before the sale ...<sup>1</sup>

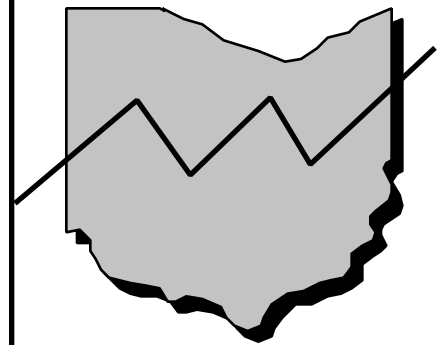
This section provides the basic transactional exemption for sales by licensed securities dealers.<sup>2</sup> However, in *Chiles v. M.C. Capital Corporation*,<sup>3</sup> the Franklin County Court of Appeals confirmed that the "03(M)" exemption does not apply to a transaction in which a securities dealer sells shares "short"<sup>4</sup> to a cus-

tomers and then exercises warrants to obtain the shares to "cover" its short position and deliver to the customer. Thus, 03(M) does not permit the "free exercise" of warrants. Rather, because 03(M) is available only for "securities issued and outstanding before the sale," the dealer must exercise the warrants and obtain the shares before selling the shares to its customers in order to claim the benefit of 03(M).

At issue in the *M.C. Capital* case were the sales by M.C. Capital Corporation, a Columbus-based penny stock dealer,<sup>5</sup> of shares of Premier Broadcasting Company. Premier was an Ohio corporation that operated a low power television station in Columbus. In December 1992, Premier filed with the

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## OHIO DEPARTMENT OF COMMERCE DIVISION OF SECURITIES



Ohio Securities Bulletin

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hearing to follow and R.C. section 1707.23 grants to the Division the authority to hold investigative hearings. The procedures discussed herein are not applicable to these other hearings.

The majority of administrative actions by the Division take the form of Cease and Desist orders and actions against dealer and salesman licenses. 119 Hearings are afforded to determine whether a proposed Cease and Desist order should be issued, or whether a proposed denial, suspension, or revocation of a dealer or salesman license should be imposed.

Even experienced trial counsel have indicated that they are unclear regarding what to expect in administrative hearings before the Division. Part of that uncertainty results from the Ohio Administrative Procedure Act, R.C. Chapter 119, dictating when an agency must provide a hearing, but only generally describing the hearing itself. The specific mechanics are left to the individual agencies. Agencies may conduct hearings under their jurisdictions with somewhat different procedures. Also, different Hearing Officers (the administrative judges) may vary procedures even within the same agency. This lack of uniformity is comparable to what may be encountered at different courts of common pleas, except the variation is exaggerated because the administrative hearings are typically more informal and evidentiary rules are relaxed.

The Division's hearing process begins with an administrative order, pursuant to R.C. section 119.07. This is analogous to a complaint by the Division and is captioned "Notice of Opportunity for Hearing" (the "Notice"). The Notice will contain the Division's allegations, and it will end with a statement indicating the Respondent (the subject of the Division's action) is entitled to a hearing, if, and only if, the hearing is requested by the Respondent within thirty days of

the date the Notice was mailed. The Notice is sent certified mail to the Respondent and filed with the Division. If service on the Respondent by certified mail is not effected, R.C. section 119.07 directs that publication, and a mailed copy of the newspaper containing the Notice, be the next method of service. In 1991, the statute was amended to allow for personal service as an alternative to publication.

If the Respondent submits a request for a hearing within the thirty-day period, the Division will immediately respond in writing and set a hearing date, time and place. R.C. section 119.07 requires the hearing to be set for a date between seven and fifteen days after the party requests the hearing. Since that time frame is usually inadequate for the Respondent to prepare for the hearing, every attempt will be made to coordinate with the Respondent, or his counsel, in rescheduling the hearing date. R.C. section 119.07 permits the parties to agree to any date, and R.C. section 119.09 gives the Division the authority to continue the hearing on the motion of the Respondent or on the Division's own motion. The Division

may use that authority to initially continue the hearing to a date beyond the fifteen days described above. The hearing will almost always be held at the Division's office in Columbus.

If a hearing request is not submitted within thirty days after the notice is served, the Division may issue a final Order against the Respondent, without a hearing, pursuant to R.C. section 119.07.

After the Division receives a Respondent's request for a hearing, and the hearing date is established, the Division will appoint a Hearing Officer who will immediately assume control of the administrative hearing process. Although the Administrative Procedure Act anticipates that an agency may conduct its own hearings (*see* R.C. 119.09), the Division will usually appoint a Hearing Officer. The Hearing Officer will be an attorney, usually within the Department of Commerce, and may be a member of the Division's Registration Section. Recognizing that conflicts could arise, the Division's staff, both Enforcement and Registration, take every possible precaution to avoid any information concerning a particular case reaching the Hearing

## 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.

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### Ohio Division of Securities

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Officer, other than the Notice. This precaution includes excluding Registration staff from discussions of potential cases and cases at the investigative stage.

Once the hearing date has been set, the Hearing Officer handling the case should be contacted if the Respondent desires to have subpoenas (or subpoenas *duces tecum*) issued pursuant to R.C. section 119.09. Names and addresses of those to be subpoenaed must be provided at least two weeks in advance of the hearing. Motions, including motions for continuance, must be made to the Hearing Officer.

The Attorney General's Office represents the Division in 119 Hearings and will become involved shortly after the request for the hearing is received. Procedural questions may be directed to the Hearing Officer or the Enforcement staff person handling the case. Any litigation issues should be addressed to the Assistant Attorney General representing the Division.

The Respondent may appear with or without counsel, or present his position in writing. R.C. section 119.13 provides that a party may be represented by an attorney or by such other representative as is lawfully permitted to practice before the agency. However, only an attorney may represent a party or an affected person at a hearing at which a record is taken which may be the basis of an appeal to court. Attorneys not licensed in Ohio should note that while R.C. Chapter 119 does not speak to the issue of whether an attorney not licensed in Ohio may practice before an agency, the Attorney General's office has taken the position, under section VII of the Supreme Court Rules of the Government of the Bar of Ohio, that Attorneys not licensed in Ohio should follow the *pro hac vice* requirements of the relevant court of common pleas before practicing before an agency. Thus, a Respondent should retain counsel licensed in Ohio

or make sure that non-Ohio licensed counsel has followed the appropriate *pro hac vice* procedure before the 119 Hearing.

The hearing is adjudicative and adversarial in nature and will be conducted in a manner similar to any trial-level adjudication. In opening and closing statements, and presenting the case-in-chief, the Division will precede the Respondent. Witnesses will testify under oath and the opportunity for cross-examination will be provided. If the Respondent does not testify on his own behalf, the Division may, nevertheless, require that party to testify as if upon cross-examination (*see* 1960 OAG 1573). At his or her discretion, an individual Hearing Officer may keep the record open long enough to allow closing arguments to be in writing, rather than, or in conjunction with, oral closing arguments. Any written closing arguments permitted may be coordinated with the availability of the transcript.

The most conspicuous difference between the Division's 119 Hearings and judicial proceedings is the more informal setting at the former; typically all the parties are seated around one table. That informal setting is not an indication of any informality tolerated during the conduct of the hearing. The most important substantive difference between the hearing and a judicial proceeding is the application of evidentiary rules: the rules of evidence are not as strictly construed in the hearings as in a judicial proceeding. For example, this may lead to the admission of hearsay testimony in the hearing. However, in general those rules are followed as a guideline to admissibility. Evidence, when admitted, will be accorded the weight the Hearing Officer deems appropriate.

Pursuant to R.C. section 119.07, a record of the hearing will be made. If the Respondent desires a copy of the transcript, he may request it of the reporter directly, at the reporter's usual fee. In addition, the Respondent

may examine the original transcript through arrangements made with the Division.

After the close of the hearing, the Hearing Officer will prepare a written report setting forth findings of fact, conclusions of law, and a recommendation (*see* R.C. section 119.09). Within five days of the submission of the report to the Division, the report shall be served upon the Respondent or his attorney. Within ten days of the Respondent's receipt of the Hearing Officer's report, the Respondent may file with the Division any written objections to the report and recommendation. The Commissioner of Securities will then rule to accept, reject, or modify the report and recommendation, taking into account any objections by the Respondent. The Commission's decision, as set forth in the final Division Order, will be prepared after the above ten-day period has expired and will be served on Respondent. Pursuant to R.C. section 119.12, the final Division Order may be appealed to common pleas court. The Respondent must appeal within fifteen days after the certified mailing of the Division's final Order. There are specific procedures which must be followed to perfect the appeal and it is recommended that those procedures be reviewed carefully.

This article serves as a basic description of the 119 Hearing process as it is applied by the Division. It is not intended to replace a thorough examination of R.C. Chapter 119 and relevant case law, nor does the Division represent that the procedures described are immutable. However, when read in conjunction with the applicable statutes, it should provide a sufficient description of the hearing process to allow counsel to focus on the substantive issues when preparing for a 119 Hearing.

*Mr. Quinn in a Staff Attorney in the Enforcement Section.*

## R.C. 1707.03(M)

*Continued from page 1*

Division of Securities a Form 6(A)(1) to register the sale of fifty "units" pursuant to Revised Code section 1707.06(A)(1). Each unit consisted of one Premier preferred share valued at \$1,000 per share; one Premier common share valued at \$3 per share; and three warrants, each warrant convertible into one common share at an exercise price of \$1,250.

The fifty units registered pursuant to the Form 6(A)(1) were sold to sixteen investors in December 1992 and January 1993. After the sale was completed in mid-January 1993, Premier declared a one thousand to one forward share split. As a result, each of the original units consisted of one thousand preferred shares, one thousand common shares and three thousand warrants, each warrant with an exercise price of \$1.25.

M.C. Capital learned about the Premier unit offering and between mid-January and January 29, 1993, M.C. Capital telephoned potential buyers to determine whether there was an interest in Premier securities, representing that Premier common shares would be available at \$3 to \$5 per share. After determining that sufficient demand existed, M.C. Capital contacted a number of Premier unit holders who agreed to sell warrants to M.C. Capital for \$.50 each. Beginning January 29, 1993, M.C. Capital then solicited orders for Premier common shares at \$5 per share. After securing the subscriptions to the common shares, M.C. Capital purchased warrants and then exercised the warrants to cover their short position.<sup>6</sup>

On March 1, 1993, the Division filed an action against M.C. Capital in the Franklin County Court of Common Pleas, seeking an injunction against the sale of unregistered securities. M.C. Capital counterclaimed and the case was removed to the Court of Claims. The Court of Claims held that M.C.

Capital's sales were not exempt from registration because the shares were not "issued and outstanding" prior to being sold, as required by 03(M). In addition, the court concluded that even if the Premier shares were deemed to be "issued and outstanding," section 1707.03(M)(2)<sup>7</sup> applied to defeat the 03(M) exemption because there were fewer than twenty-five beneficial owners of Premier common shares at the time of the sales by M.C. Capital.

M.C. Capital appealed to the Franklin County Court of Appeals, assigning six errors, the first three of which related to 03(M).<sup>8</sup> The Court of Appeals overruled all six assignments and affirmed the decision of the Court of Claims. A discretionary appeal to the Ohio Supreme Court was dismissed.<sup>9</sup>

In the first part of its first assignment, M.C. Capital contended that "issued and outstanding" pertained to the class of securities being sold, rather than the particular securities. As its starting point, the Court of Appeals noted that "issued" shares are generally that portion of a corporation's authorized shares that has been distributed to the public, while "outstanding" shares are those issued shares that remain in the hands of the public.<sup>10</sup> The court then turned to the language of 03(M) and held, as a matter of statutory construction, that the 03(M) exemption was available only where the particular securities sought to be exempted were "issued and outstanding" prior to the sale, not merely where the class of securities were issued and outstanding. The court concluded that the General Assembly would have included "class of securities" language in 03(M) had it intended such a construction, noting that the General Assembly had specifically referred to "class of securities" in several other sections of the Securities Act.<sup>11</sup>

In the second part of its first assignment, M.C. Capital argued that the trial court's holding placed a burden on securities dealers which the General Assembly did not in-

tend and which would have a chilling effect on the secondary market for penny stocks. The court summarily rejected this argument, stating, "We cannot agree that the burden is one not intended by the legislature in view of the statutory language the legislature employed."<sup>12</sup>

In its second assignment, M.C. Capital asserted that the requirement that particular securities be issued and outstanding contravened the Uniform Commercial Code's fungibility doctrine.<sup>13</sup> The court similarly dispatched this argument, noting that the fungibility rules are specifically "subject to any applicable law or regulation respecting short sales."<sup>14</sup>

In its final assignment regarding 03(M), M.C. Capital claimed that 03(M)(2) was not triggered so as to defeat the applicability of 03(M); that is, that there were more than twenty-five beneficial securities owners. In rejecting this argument, the Court of Appeals accepted the trial court's findings that Premier's share journal reflected less than twenty-five beneficial owners and that testimony that there were more than twenty-five beneficial owners was not credible.

The *M.C. Capital* decision makes clear that the particular securities sold by a securities dealer must be issued and outstanding before they are sold in order to be exempt from registration under section 1707.03(M). Where the dealer holds warrants or options to purchase shares, such warrants or options must be exercised before the underlying securities are sold. However, the *M.C. Capital* decision does not establish a "safe harbour" for the sale of issued and outstanding shares. Rather, in addition, the dealer must ensure that one of the three exceptions<sup>15</sup> does not apply to defeat the 03(M) exemption.<sup>16</sup>

### *Endnotes*

1. Ohio Revised Code § 1707.03(M). The "03(M)" exemption also contains the following exceptions to its applicability:

(1) Securities constituting the whole or a part of an unsold allotment to or subscription by a dealer as an underwriter or other participant in the distribution of those securities by the issuer, whether that distribution is direct or through an underwriter, provided that, if the issuer is such by reason of owning one-fourth or more of those securities, such dealer has knowledge of such fact or reasonable cause to believe such fact; (2) Any class of shares issued by a corporation when the number of beneficial owners of that class is less than twenty-five, with the record owner of securities being deemed the beneficial owner for this purpose, in the absence of actual knowledge to the contrary; (3) Securities that within one year were purchased outside this state or within one year were transported into this state, if the dealer has knowledge or reasonable cause to believe, before the sale of those securities, that within one year they were purchased outside this state or within one year were transported into this state; but such a sale of those securities is exempt if any of the following occurs: (a) A recognized securities manual contains the names of the issuer's officers and directors, a balance sheet of the issuer as of a date within eighteen months, and a profit and loss statement for either the fiscal year preceding that date or the most recent year of operations; (b) Those securities, or securities of the same class, were registered within one year on the basis provided in section 1707.05 of the Revised Code, and that reg-

istration or qualification is in full force and effect; (c) Those securities at the time of sale could be registered on the basis provided in section 1707.05 of the Revised Code; (d) The sale is made by a licensed dealer on behalf of the bona fide owner of those securities in accordance with division (B) of this section; (e) Those securities were transported into Ohio in a transaction of the type described in division (L), (K), or (I) of this section, or in a transaction registered under division (A) of section 1707.06 of the Revised Code.

2. *See Sections 1707.03(M) and 1707.03(N)*, Ohio Sec. Bull. 73:4 (1973).

3. 95 Ohio App. 3d 485 (Franklin Cty. 1994), *appeal dismissed*, 71 Ohio St. 3d 1404 (1994).

4. A "short" sale is one in which the person selling shares does not own the shares that are sold. After a short sale, the seller must obtain the shares to "cover" the short position, that is, deliver the shares to the purchaser.

5. In December 1993, M.C. Capital failed to renew its Ohio Dealer of Securities License

6. M.C. Capital acquired each warrant for \$.50 and paid \$1.25 to convert each warrant into one common share, giving M.C. Capital a "basis" of \$1.75 in each common share. The \$5.00 selling price represented a "mark-up" of nearly 300%, and a profit of \$3.25 on each share. The Securities and Exchange Commission has held mark-ups as low as 10% to be excessive. *See* In the matter of Alstead, Dempsey & Company, Exchange Act Release No. 20825 (April 5, 1984).

7. *See supra* note 1.

8. The three pertaining to 03(M) were:

I. The court below erred to the prejudice of appellants by finding that the words "issued and outstanding" contained in R.C. 1707.03(M) relates *[sic]* to specific securities being sold rather than to the class of securities being sold.

II. The court below erred to the prejudice of appellants by finding that shares sold "short" by an Ohio licensed broker dealer must be "tracked" to insure that shares delivered or covering such short sale are issued and outstanding at the time of sale for the exemption contained in 1707.03(M) to be applicable to such sale.

III. The court below erred to the prejudice of appellants by finding Premier Broadcasting Company, Inc. did not have more than twenty-five beneficial owners prior to January 20, 1993.

The three other assignments were:

IV. The court below erred to the prejudice of appellants by finding that appellants sold stock in violation of R.C. 1707.44(C)(1) although appelles failed to meet their burden of proof.

V. The court below erred to the prejudice of appellants by granting injunctive relief to appelles against the manifest weight of the evidence.

VI. The court below erred in entering a judgment against Wayne Meadows individually.

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## R.C. 1707.03(M)

*Continued from page 5*

9. See *Enforcement Section Reports, Civil Cases, Chiles, et al. v. M.C. Capital Corporation*, Ohio Sec. Bull. 94:4 (1994).

10. The court noted that treasury stock is included in "issued" stock but not in "outstanding" stock.

11. See, e.g., 1707.03(M)(2), 1707.03(M)(3)(b), and 1707.03(N)

12. *M.C. Capital*, 95 Ohio App. 2d at 492.

13. R.C. §1308.06(A) (Uniform Commercial Code (Section 8-107)), which governs the fungibility doctrine as it relates to "short" sales, provides:

Unless otherwise agreed and subject to any applicable law or regulation respecting short sales, a person obligated to transfer securities may transfer any certificated security of the specified issue in bearer form or registered in the name of the transferee or indorsed to him or in blank, or he may transfer an equivalent uncertificated security to the transferee or a person designated by the transferee.

14. *M.C. Capital*, 95 Ohio App. 2d at 494 (*quoting* R.C. 1308.06(A)).

15. See *supra* note 1.

16. See Friedman, Ohio Securities Law § 9.15 (1993) for a discussion of these three exceptions to the 03(M) exemption.

*Mr. Geyer is a Staff Attorney in the Enforcement Section and Editor of the Ohio Securities Bulletin.*

## Division Enforcement Section Reports

### *Administrative Orders* —

#### **Larry P. Stevens; Ohio Mobile Communications, Inc. and Cardiff, Jenkins and Stevens, Inc.**

On June 20, 1995, the Division issued a final Cease and Desist Order, Division Order No. 95-031, against Larry P. Stevens, Ohio Mobile Communications, Inc. and Cardiff, Jenkins and Stevens, Inc., all of Columbus, Ohio, (the "Respondents"). Stevens served as the president of both Ohio Mobile Communications, Inc. and Cardiff, Jenkins and Stevens, Inc.

An examination by the Division revealed that Respondents sold up to 8,000 shares of Ohio Mobile stock at .25¢ per share on or about February 14, 1992. The records of the Division revealed no registration or claim of exemption regarding these sales. Further, none of the Respondents were licensed to sell securities in Ohio at the time of the sales. Therefore, the transactions violated R.C. sections 1707.44(A) and (C)(1).

On February 9, 1995, the Division had issued to Respondents Division Order No. 95-010, a Notice of Opportunity for Hearing, outlining the Division's allegations regarding the unlicensed, unregistered sales. When service could not be made through certified mail, the Division published notice as required by R.C. Chapter 119. After the statutory publication requirements were satisfied, and the Respondents failed to request an administrative hearing, the Division issued the final order.

#### **Bradford Capital Group; Clem Chad**

On June 27, 1995, the Division issued Division Order No. 95-033, a final Cease and Desist Order against Bradford Capital Group and Clem Chad. Bradford has a business address in Los Angeles, California, and Chad is the managing partner of Bradford.

A Division investigation revealed that on or about August 31, 1993, Chad sold to an Ohio resident a purported interest in an oil and gas venture titled "Joint Venture Partnership with Working Interest Ownership in the Premier #3 Project." The Division determined that the interest, which was sold for \$5,000, was a "security" as defined in R.C. section 1707.01(B).

The Division records revealed no registration or claim of exemption for the interest. Consequently, the interest was sold in violation of R.C. section 1707.44(C)(1). In addition, neither Bradford nor Chad was licensed by the Division at the time of the sale, resulting in a violation of 1707.44(A).

On May 17, 1995, the Division had issued to Bradford and Chad Division Order No. 95-023, a Notice of Opportunity for Hearing, which set forth the Division's allegations and gave notice of the right to request an administrative hearing on the matter. Service was perfected through certified mail. When neither Bradford nor Chad timely requested an administrative hearing, the Division issued the final order.

#### **Dewey's Candy Company**

On July 17, 1995, the Division issued a final Cease and Desist Order, Division Order No. 95-036, against Dewey's Candy Company of

Lordstown, Ohio. The Division issued the final order after Dewey's failed to request an administrative hearing as permitted by Division Order No. 95-030 which was issued on June 13, 1995, and set forth the Division's allegations.

In the final order, the Division found that from on or about April 6, 1993, to on or about July 30, 1993, Dewey's knowingly and intentionally engaged in the sale of its own shares of stock to approximately 134 Ohio residents. The shares were neither registered under the Ohio Securities Act nor properly exempted from registration. In addition, Dewey's was not licensed by the Division at the time of the sales. Consequently, the sales violated R. C. sections 1707.44(A), 1707.44(C)(1) and 1707.44(G). The final order ordered Dewey's to cease and desist from those violations of the Ohio Securities Act.

### **A.J. Sexton, V**

On September 6, 1995, the Division issued a final Cease and Desist Order, Division Order No. 95-053, against A.J. Sexton, V, of Columbus, Ohio. The final order is related to Division Order No. 95-036 issued by the Division on July 17, 1995, against Dewey's Candy Company.

The Division found that Sexton, while employed by Dewey's Candy Company, sold Dewey's stock to approximately 134 Ohio residents between April 6, 1993, and July 30, 1993. Sexton was not licensed by the Division at the time of the sales. In addition, the shares of Dewey's stock were neither registered under the Ohio Securities Act nor properly exempted from registration. Consequently, the sales by Sexton violated R. C. sections 1707.44(A), 1707.44(C)(1) and 1707.44(G).

On June 13, 1995, the Division had issued Division Order No. 95-030, a Notice of Opportunity for Hearing, to Sexton setting forth the Division's allegations and giving

notice of his right to request an administrative hearing on the matter. After a copy of the notice order which had been mailed to Sexton via certified mail was returned to the Division undelivered, the Division published notice of the notice order as required by R.C. Chapter 119. After the statutory publication requirements were satisfied, and Sexton failed to request an administrative hearing, the Division issued the final order, which ordered Sexton to cease and desist from violations of the Ohio Securities Act.

### **Brandon M. Adams**

On September 6, 1995, the Division issued a final Cease and Desist Order, Division Order No. 95-054, against Brandon M. Adams of Columbus, Ohio. The final order is related to Division Order No. 95-036 issued by the Division on July 17, 1995, against Dewey's Candy Company.

The Division found that Adams, while employed by Dewey's Candy Company, sold Dewey's stock to approximately 134 Ohio residents between April 6, 1993 and July 30, 1993. Adams was not licensed by the Division at the time of the sales. In addition, the shares of Dewey's stock were neither registered under the Ohio Securities Act nor properly exempted from registration. Consequently, the sales by Adams violated R. C. sections 1707.44(A), 1707.44(C)(1) and 1707.44(G).

On June 13, 1995, the Division had issued Division Order No. 95-030, a Notice of Opportunity for Hearing to Adams setting forth the Division's allegations and giving notice of his right to request an administrative hearing on the matter. After a copy of the notice order which had been mailed to Adams via certified mail was returned to the Division undelivered, the Division published notice of the notice order as required by R.C. Chapter 119. After the statutory publication requirements were satisfied, and

Adams failed to request an administrative hearing, the Division issued the final order, which ordered Adams to cease and desist from violations of the Ohio Securities Act.

### **Lorilee Enterprises, Inc.; Richard J. Lannon**

On September 21, 1995, the Division issued Division Order No. 95-058, a final Cease and Desist Order against Lorilee Enterprises, Inc., an Ohio corporation, and Richard J. Lannon, of Westerville, Ohio, Lorilee's sole officer.

An examination by the Division revealed that on or about October 12, 1993, Lannon sold a 10% interest in Lorilee, in the form of 10 shares of stock, to two Ohio residents for \$15,000. The records of the Division contained neither a registration nor claim of exemption for the transaction. Consequently, the shares were sold in violation of R.C. 1707.44(C)(1).

On August 11, 1995, the Division had issued to Lannon and Lorilee Division Order No. 95-051, a Notice of Opportunity of Hearing, setting forth the Division's allegations and describing the right to request an administrative hearing on the matter. The notice order was properly served, but neither Lannon nor Lorilee requested an administrative hearing. The Division subsequently issued the final order, ordering Lannon and Lorilee to Cease and Desist from selling unregistered/non-exempt securities.

### **Holovision Systems, Inc.; Ronald Kirk**

On September 22, 1995, the Division issued Division Order No. 95-059, against Holovision Systems, Inc., and its President, Ronald Kirk (collectively, the "Respondents"). Holovision is an Ohio corporation with a principal business address in Findlay, Ohio. Division Order No.

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95-059 ordered Respondents to cease and desist from the sale of unregistered/non-exempt securities and also declared certain exemptive filings made by Respondents with the Division pursuant to R.C. 1707.03(Q) to be null and void.

Between December 1992 and April 1994, Respondents filed with the Division nine Form 3-Qs to claim exemptions for certain sales of stock. On each filing, Respondents stated that the basis for the exemption was Rule 506 (17 C.F.R. 230.506) promulgated under the federal Securities Act of 1933.

An examination by the Division revealed that at least 91 investors purchased under the Form 3-Qs filed between December 1992 and December 1993. The examination failed to reveal any documentation by Respondents regarding the "accredited" status of such purchasers, as required by Rule 506. Further, HoloVision's business manager, Mark Dysinger, testified under oath that Respondents made no inquiry regarding the financial status of investors.

In addition, the Division's examination revealed that Respondents did not include any audited financial information in the offering circulars provided to the investors and there was no evidence that Respondents otherwise provided such information. Rule 506 requires that such information be provided to all non-"accredited" investors.

Thus, the Division's examination disclosed that Respondents failed to comply with the requirements of Rule 506. Consequently, Respondents did not qualify for the exemption provided by R.C. 1707.03(Q) and the Division declared the Form 3-Qs purporting to claim an exemption to be null and void. Since the sales of HoloVision stock were neither properly exempted nor registered, they were made in violation of R.C. 1707.44(C)(1).

On August 14, 1995, the Division issued to Respondents Division

Order No. 95-050, a Notice of Opportunity for Hearing, which set forth the Division's allegations and described Respondent's right to request an administrative hearing on the matter. The notice order was properly served but neither HoloVision nor Kirk requested an administrative hearing. The Division subsequently issued the final order declaring certain Form 3-Q filings to be null and void and ordering Respondents to cease and desist from the sale of unregistered/non-exempt securities.

### *Civil Cases*

#### **Columbus Skyline, Inc. v. Mark V. Holderman, Commissioner of Securities**

On October 10, 1995, the Ohio Supreme Court heard oral arguments in the Columbus Skyline case.

As described in Bulletin Issue 94:2, in September 1992, the Division revoked Columbus Skyline's Ohio Securities Dealer's license for repeated sales of securities at a price not reasonably related to the market price. The Franklin County Court of Common Pleas affirmed the revocation. In affirming, the court considered analogous federal case law and the NASD's 5% mark-up guideline and noted that, although Columbus Skyline was not a member of the NASD, "a comparison of the 5% guideline to [Columbus Skyline]'s mark-up of 300% or more should suggest to [Columbus Skyline] that its mark-up was subject to challenge."

However, the Tenth District Court of Appeals reversed the Court of Common Pleas, holding that the Division's reliance on federal mark-up standards failed to give Columbus Skyline adequate notice of what mark-up standards applied and, therefore, violated Columbus

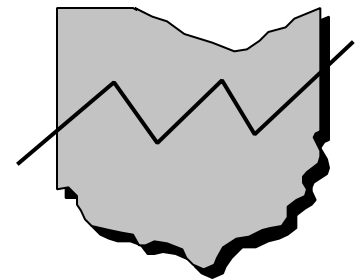
Skyline's substantive due process rights.

The propriety of applying federal mark-up standards is the central issue in the appeal to the Supreme Court.

### *Criminal Actions*

#### **Kenneth D. Moore**

On May 10, 1995, Kenneth D. Moore of Columbus, Ohio, was arrested and then released after being charged in the Franklin County Court of Common Pleas on a five count indictment that had been returned in 1992. As reported in Bulletin Issue 93:1, on November 25, 1992, a Franklin County Grand Jury indicted Moore on four counts of forgery and one count of theft by deception. Moore allegedly forged the signatures of customers on checks and deposited those checks into his own personal bank account without the knowledge or consent of the customers during the time he was a licensed securities salesman at two now-defunct Columbus-based securities dealers.





# PUBLIC NOTICE

## Proposed Changes to the Administrative Rules of the Ohio Division of Securities

**At 10:00 a.m. on December 12, 1995 the Ohio Division of Securities will hold a hearing regarding proposed changes to rules of the Division. The hearing will be held in the offices of the Ohio Division of Securities, 77 South High Street, 22nd Floor, Columbus, Ohio 43215.**

The Division of Securities has proposed the following amendments to the indicated rules:

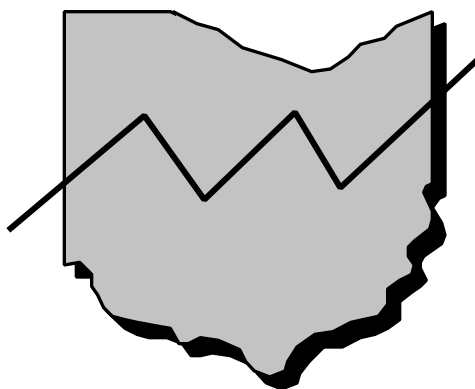
O.A.C. Rule **1301:6-3-03** will be amended to establish an exemption under R.C. section 1707.03(V) for the sale of a warrant, subscription right, or option to purchase a security exempted by R.C. 1707.03(E), for the sale of a unit consisting of warrant, subscription right or option to purchase a security exempted by R.C. 1707.03(E), and for a security which is exempt under division R.C. 1707.03(E). The rule will be also amended to establish an ex-

emption under R.C. 1707.03(V) for any guarantee, letter of credit, standby purchase agreement, or other credit enhancement that is offered and sold in conjunction with a security that is exempt under R.C. 1707.02(B) and which is not traded separately.

O.A.C. Rule **1301:6-3-09** will be amended to revise the definition of liquidity for the purpose of determining permissible investments for Investment Companies.

O.A.C. Rule **1301:6-3-14** will be amended to correct an incorrect reference in paragraph B of the rule..

**Copies of the proposed rules may be obtained by contacting the Ohio Division of Securities, 77 South High Street, 22nd Floor, Columbus, Ohio 43215**



# 1995 OHIO SECURITIES CONFERENCE

November 6, 1995

Columbus Marriott North

6500 Doubletree Ave

Columbus, Ohio 43229

## NEW ONE DAY FORMAT

8:00 to 8:30 a.m. .... Conference Registration  
8:30 to 10:00 a.m. .... Private Placements Panel  
10:00 to 11:45 a.m. .... Benefit Plans Panel  
11:45 a.m. to 1:15 p.m. .... Lunch (with Speaker)  
1:15 to 2:45 p.m. .... Division Panel  
3:00 p.m. to 5:00 p.m. .... Advisory Committee Meetings  
5:00 p.m. to 7:00 p.m. .... Reception  
Luncheon Speaker: Nancy Smith, Director, Office of Consumer Affairs,  
Securities and Exchange Commission

### Panel Presentations

#### **Private Placement**

##### Planning Considerations

Thomas C. Daniels, Esq.

*Jones, Day, Reavis & Pogue*

Elizabeth A. Horwitz, Esq.

*Cors & Bassett*

Edward W. Moore, Esq.

*Calfee, Halter & Griswold*

#### **Employee Benefit Plans**

##### and Executive Compensation

Amy Haynes, Esq.

*Cardinal Health, Inc.*

Ben F. Wells, Esq.

*Dinsmore & Shohl*

Peter A. Rome, Esq.

*Ulmer & Berne*

David A. Zagore, Esq.

*Squire, Sanders & Dempsey*

#### **Division Panel**

##### **Recent**

##### Developments

Mark V. Holderman, Esq.

William E. Leber, Esq.

Caryn A. Francis, Esq.

##### **Public Offering**

##### Guidelines

Michael P. Miglets, Esq.

Mark R. Heuerman, Esq.

Enrollment Fee is \$175 per person in advance, \$200 at the door.

The Conference has been approved for five hours of CLE credit and eight hours of CPE credit.

### 1995 OHIO SECURITIES CONFERENCE ENROLLMENT FORM

Name: \_\_\_\_\_

Firm/Organization: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Telephone: \_\_\_\_\_ Amount Enclosed: \_\_\_\_\_

Choice of Luncheon Entree: Beef  Chicken

Do you plan to attend an Advisory Committee Meeting? Yes  No

If "yes", which Advisory Committee? \_\_\_\_\_

For special accommodations, please contact Rich Pautsch at (614) 752-9448 before October 20, 1995.

Make checks payable to: "Ohio Securities Conference Committee, Inc." Send Enrollment Form and Payment to: Rich Pautsch, Ohio Division of Securities, 77 South High Street, 22nd Floor, Columbus, Ohio 43266-0548. Enrollment Deadline is October 30, 1995.

## Registration Statistics

The table to the right sets out the number of registration filings received by the Division during the third quarter of 1995 and the number of registration filings received by the Division in 1995 year to date, compared to the number received during the third quarter of 1994 and in 1994 year to date.

\*Effective October 11, 1994, the Form 2(B) and Form 3-O filing requirements were eliminated.

1707	Q3 95	YTD 95	Q3 94	YTD 94
.02(B)*	0	0	243	785
.03(O)*	0	0	2743	9,299
.03(Q)	258	887	331	1,079
.03(W)	30	91	32	99
.04	0	0	0	2
.041	0	1	0	0
.06(A)(1)	25	88	22	102
.06(A)(2)	11	29	11	36
.06(A)(3)	4	19	8	17
.06(A)(4)	10	22	8	38
.09	98	353	142	438
.091	827	2,539	823	2,514
.39	11	38	19	79
.391/.09	0	0	1	3
.391/.091	5	18	2	9
.391/.03(O)	20	186	259	743
.391/.03(Q)	24	103	43	141
.391/.03(W)	1	1	2	8
.391/.06(A)(1)	0	0	0	0
.391/.06(A)(2)	0	0	0	0
.391/.06(A)(3)	1	1	0	0
.391/.06(A)(4)	0	0	0	0
<i>Totals</i>	1,325	4,376	4,689	15,392

## Licensing Statistics

The table below sets out the number of Salesmen and Dealers licensed by the Division at the end of the first, second and third quarters of 1995, compared to the same quarters of 1994, as well as the number of Salesmen and Dealers licensed by the Division at the end of the fourth quarter of 1994, compared to the same quarter of 1993.

	End of Q4 1994	End of Q4 1993	End of Q1 1995	End of Q1 1994	End of Q2 1995	End of Q2 1994	End of Q3 1995	End of Q3 1994
Number of Salesmen Licensed:	70,642	64,589	69,143	65,991	70,580	70,200	72,062	72,045
Number of Dealers Licensed:	1,759	1,800	1,837	1,778	1,873	1,842	1,891	1,894

# OHIO SECURITIES BULLETIN

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

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