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Bob Taft
Governor of Ohio

Gary C. Suhadolnik
Director of Commerce

Thomas E. Geyer
Commissioner of Securities

Division Proposes Exclusion for Certain Private Investment Advisers and Safe Harbor for Certain Solicitors

by Thomas E. Geyer

As a result of conversations with members of the bar and members of the investment adviser community, the Ohio Division of Securities is proposing to adopt an administrative rule that would exclude from the Ohio definition of "investment adviser" certain persons who privately advise a small number of sophisticated clients. In addition, the Division is proposing a separate administrative rule that would clarify the circumstances under which a "solicitor" is not deemed to be an "investment adviser." As detailed on p. 12 of this issue of the *Ohio Securities Bulletin*, the public hearing on these proposed rules will be held on April 13, 2000, at the offices of the Division. The text of the proposed rules is available from the Division, and also is posted on the Division's internet home page, www.securities.state.oh.us.

Exclusion for Certain Private Advisers

Section 203(b) of the federal Investment Advisers Act of 1940 (the "Advisers Act") provides certain exceptions from federal registration for certain investment advisers. In particular, Section 203(b)(3) of the Advisers Act provides an exception from federal registration for certain investment advisers who, in general, do not have more than fifteen clients and do not advertise.

However, the investment adviser licensing exceptions provided by Ohio Revised Code ("R.C.") 1707.141(A) are *different* than the investment adviser licensing exceptions provided by Section 203(b) of the Advisers Act. As a result,

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Amended Tender Offer Regulations Under the M&A Release

By Michael P. Miglets

In November of 1998, the U.S. Securities and Exchange Commission ("SEC") published for comment two releases that proposed significant changes in the federal securities regulation system. Release 33-7606, (the "Aircraft Carrier Release") contained proposed amendments relating to the offer and sale of securities and the registration of securities offerings, including a complete new set of forms for seasoned and unseasoned issuers. The companion release, Release No. 33-7607 (the "M&A Release"), addressed the various regulatory schemes applicable to security holder communications, going private transactions, mergers and tender offers. While the Aircraft Carrier Release remains pending, the SEC has announced that the M&A Release will become effective January 24, 2000. With the dual regulation of tender offers under federal law and the Ohio Control Bid Statute, set forth in R.C. 1707.041 to 1707.043, this article will provide an overview of the changes to tender offer regulations found in the M&A Release. *(There is a related article concerning the commencement of a tender offer on page 3 of this issue.)* Readers are encouraged to read the entire M&A Release for the SEC's discussion of communications under the Securities Act of 1933 and proxy regulations.

The M&A Release concentrates on four main areas relating to tender offers: communications and commencement, a more equal treatment of exchange offers and cash tender offers, disclosure requirements, and a general update of tender offer rules. The amendments in each of

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investment advisers that are excepted from registration with the Securities and Exchange Commission (the "Commission") pursuant to federal Section 203(b) ("203(b) Advisers") may be required to be licensed with the Division unless another state-level licensing exception is available. While most of Ohio's investment adviser provisions are based on the Advisers Act, Ohio's investment adviser licensing exception provision is based on Section 201(c) of the Uniform Securities Act. This approach was taken for two reasons.

The primary reason is Section 203A(b) of the Advisers Act, which was added by the National Securities Markets Improvement Act of 1996. Section 203A(b) sets out the two categories of advisers as to which state law is preempted: (i) advisers registered with the Commission under Section 203; and (ii) persons excluded from the definition of "investment adviser" pursuant to Section 202(a)(11). Congress did not include 203(b) Advisers in this preemptive provision, instead leaving their oversight to the states.

The secondary reason is that since Section 201(c) of the Uniform Securities Act does not match Section 203(b) of the Advisers Act, 203(b) Advisers are currently subject to state-level oversight (unless another state-level licensing exception is available). Prior to March 18, 1999, there was no state oversight of Ohio-based 203(b) Advisers because there was no Ohio investment adviser law. However, there was (and is) state oversight of 203(b) Advisers in their home state (unless another state-level licensing exception is available). The Ohio investment adviser laws, which took effect on March 18, 1999 (subject to certain "phase-in" provisions) established such home-state oversight for Ohio-based 203(b) Advisers.

As practitioners discovered this Ohio licensing obligation for 203(b) Advisers, they began to suggest to the Division that state-level investment adviser licensing did not add meaningful protections in favor of sophisticated clients who are privately advised by certain investment advisers. For example, "accredited investors" are deemed able to "fend for themselves" in most securities law contexts. Also, certain securities transactions that are carried out privately with sophisticated investors enjoy exceptions from certain other provisions of the securities laws. Further, advice in the trust context is subject to trust laws and fiduciary obligations. Finally, Congress has made the determination that federal registration is unnecessary when a person privately advises fifteen or fewer clients.

In light of these suggestions (and others), and notwithstanding the foregoing reasoning underlying R.C. 1707.141(A), the Division has preliminarily determined that it is appropriate in the public interest, and consistent with the purposes fairly intended by the policy of Chapter 1707, to promulgate a rule that would provide a limited definitional exclusion for persons who privately advise a small number of sophisticated clients. The Division believes that the best interests of the public demand that this rule-making be guided by several basic principles.

First, that the exclusion track federal Section 203(b)(3)'s requirements that the adviser have fifteen or fewer clients and not hold "himself out generally to the public as an investment adviser."

Second, that the exclusion be available only in the case of limited categories of clients, such as "accredited investors", trusts, and certain other entities.

Third, that the exclusion be narrowly drafted since it is a definitional exclusion.

The distinction between a definitional exclusion and a licensing exception is a subtle, but important, one. As previously mentioned, Section 203(b)(3) of the Advisers Act provides a statutory exception from federal investment adviser *registration.* The significance of this is that investment advisers who avail themselves of the "203(b)(3)" exception are still subject to other federal investment adviser provisions (including anti-fraud standards). In contrast, the Division's proposed rule 1301:6-3-01(K) would provide an exclusion from the Ohio *definition* of investment adviser. The significance of this is that persons who fall within the proposed rule would not be subject to any of the Ohio securities laws that apply to investment advisers. Note, however, that persons within the proposed rule still would be subject to the Ohio securities laws that apply to "persons," such as R.C. 1707.44(B)(5), which prohibits a person from making or causing to be made false representations of material facts in the giving of investment advice for compensation. Note also that private legal actions could be maintained against persons within the proposed rule under common law theories or fiduciary principles.

Ohio Securities Bulletin

Desiree T. Shannon, Esq., Editor

The *Ohio Securities Bulletin* is a quarterly publication of the Ohio Department of Commerce, Division of Securities. The primary purpose of the *Bulletin* is to (i) provide commentary on timely or timeless issues pertaining to securities law and regulation in Ohio, (ii) provide legislative updates, (iii) report the activities of the enforcement section, (iv) set forth registration and licensing statistics and (v) provide public notice of various proceedings.

The Division encourages members of the securities community to submit for publication articles on timely or timeless issues pertaining to securities law and regulation in Ohio. If you are interested in submitting an article, contact the Editor for editorial guidelines and publication deadlines. The Division reserves the right to edit articles submitted for publication.

Ohio Division of Securities

77 South High Street, 22nd Floor • Columbus, Ohio 43215

http://www.securities.state.oh.us

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The decision to pursue a definitional exclusion results from both statutory authority and expedience. R.C. 1707.01(X)(2)(i) grants the Division the authority to designate, by rule, persons excluded from the definition of investment adviser. However, the Division does not have the statutory authority to create licensing exceptions by rule. While a statutory licensing exception could be pursued, the legislative process is often slow and unpredictable. However, the rule-making process is relatively fast and predictable.

Safe Harbor for Certain Solicitors

O.A.C. 1301:6-3-44(C)(4)(c) defines "solicitor" as "any person who, directly or indirectly, solicits any client for, or refers any client to, an investment adviser or investment adviser representative." Unlike some states, Ohio does not require that solicitors *per se* be licensed. Rather, a solicitor need be licensed only if his or her activities meet the definition of "investment adviser," "investment adviser representative," "dealer" or "salesman" (and a licensing exception is not available).

Ohio's definitions of "investment adviser" and "investment adviser representative" are virtually identical to the federal definitions of those terms. Consequently, the Division believes that Commission pronouncements provide instructive guidance in this area. Based on language contained in a Commission release, members of the bar expressed a concern that a solicitor, while within the scope of his or her solicitation activities, could fall within the definition of "investment adviser."

Specifically, counsel pointed to the following statement contained in Commission Release IA-1092 (October 8, 1987): "A person providing advice to a client as to the selection or retention of an investment manager or managers also, under certain circumstances, would be deemed to be 'advising' others within the meaning of [the definition of 'investment adviser']." Counsel also pointed out, however, that the Commission has taken the position that a solicitor who is in compliance with the "Solicitor's Disclosure Rule" (Commission rule 206(4)-3) is not deemed to be an "investment adviser" solely as a result of solicitation activities. *See* Commission Release IA-688 (July 12, 1979).

Ohio has a Solicitor's Disclosure Rule, O.A.C. 1301:6-3-44(C), that is virtually identical to Commission rule 206(4)-3. In light of the requirements imposed by this rule, the intent of Ohio law is not to require licensure of a solicitor solely as a result of solicitation activities. Consequently, the Division has preliminarily determined that it is appropriate in the public interest, and consistent with the purposes fairly intended by the policy of R.C.1707, to promulgate a safe harbor rule which would provide that a person who acts solely as a solicitor, and is in compliance with O.A.C. 1301:6-3-44(C), is not deemed to be an "investment adviser."

Comments

The Division will accept public comments on these proposed rules until the time that the public hearing is concluded on April 13, 2000.

Mr. Geyer is the Commissioner of Securities.

Commencement of a Tender Offer and the Form 041 Filing

By Michael P. Miglets

The Ohio Control Bid Statute, set out in R.C. 1707.041 to 1707.043, ("OCBS") requires a filing on Form 041 with the Division when an offeror makes a "control bid" by a "tender offer or request or invitation for tenders"[1] for a "subject company." "Control bid" is defined in R.C. 1707.01(V) to include offers to purchase equity securities of a subject company if after the purchase the offeror would be directly, or indirectly, the beneficial owner of more than 10% of any class of the issued and outstanding shares of the subject company.[2] "Subject company" as defined in R.C. 1707.01(Y) includes companies with a principal place of business or principal executive office in Ohio, or companies that own, or control, assets located in Ohio with a fair market value of at least $1,000,000. The subject company also must have either 10% of its beneficial or record equity security holders resident in Ohio, more than 10% of the company's equity securities owned beneficially or of record by residents of Ohio, or more than one thousand beneficial or record equity security holders resident in Ohio.[3] "Tender offer" is not defined in the Ohio Securities Act.[4]

The Form 041 is required for both hostile and negotiated bids. If the tender offer is for the equity securities registered under the Securities and Exchange Act of 1934, the offeror also must file with the Securities and Exchange Commission ("SEC") under the Williams Act.[5] As both the OCBS and the Williams Act required filings before the commencement of the tender offer, the Form 041 and the federal Form 14d-1 were required to be filed simultaneously with the Division and the SEC. As R.C. 1707.041(A)(2) includes similar disclosure requirements to the Form 14d-1, the filing with the Division generally includes only the Form 041 and the Form 14d-1 and exhibits. In addition to the filing with the Division, the Form 041 and exhibits must be filed with the subject company on the same date.

At its recent meeting, the Division's Takeover Advisory Committee discussed the timing of the Form 041 filing in light of the SEC's adoption of the M&A Release, Release 33-7607; 34-40255; IC-24107, effective January 24, 2000. *(An in-depth article regarding the M&A Release begins on page 1).* Prior SEC regulations deemed a tender offer to have commenced once there was a public announcement of the following information: identity of the bidder, the identity of the target company, the amount and class of securities to be acquired, and the price or range of prices offered for the securities.[6] After the public announcement, the bidder then had five business days to file with the SEC or withdraw the offer. The Form 041 filing with the Division was then triggered by the third element of R.C. 1707.041, the commencement of the tender offer.

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The M&A Release eliminates the five business day rule and allows free communications by the bidder and the target. The bidder's communications may not include transmittal forms or instructions on how to tender. Written communications must include a legend advising security holders to read the full offer to purchase disclosure document.[7] The tender offer is deemed to commence once the bidder has published, sent or given the security holders the means to tender securities. This may include sending the transmittal form or publishing information on how to tender. It should be noted that the M&A Release defines "commencement," but does not define the term "tender offer" or change any of the SEC's positions on activities or transactions that may constitute a tender offer. Bidders and counsel still must look to the tests developed by federal courts to determine if a transaction may constitute a tender offer.[8]

The elimination of the five business day rule raises the question of when is the offeror, or bidder, required to file the Form 041 with the Division. As R.C. 1707.041(A) indicates that no control bid for any securities of a subject company pursuant to a tender offer may be made until there is a filing with the Division, it is apparent that the Form 041 filing must be made at the commencement of the tender offer. With the dual regulation under the Williams Act and the OCBS, it is the Division's position that the commencement of the tender offer under Rule 14d-2 triggers the filing of both the Form 041 and the Form 14d-1. The simultaneous filings with the SEC and the Division upon commencement of the tender offer should not impose any undue burdens on offerors and their counsel. Since the Division must complete its review within five days of the filing of Form 041, conduct any hearings and issue a final suspension order within nineteen days of the filing, a simultaneous filing with the Division and the SEC insures that any Division action will be completed within the twenty business days that a tender offer must remain open under the Williams Act.[9]

It should be noted that while the M&A Release eliminates the five business day rule, Rule 14e-8 prohibits bidders from announcing an offer: (1) without an intent to commence the offer within a reasonable time and complete the offer, (2) with the intent to manipulate the price of the bidder or the target's securities, or (3) without a reasonable belief that the person will have the means to purchase the securities sought. The Division has the authority to bring enforcement actions against persons making misleading or fraudulent statements regarding proposed control bids or tender offers under R.C. 1707.042 and 1707.44(G). Persons making false or misleading announcements also have potential civil liabilities under R.C. 1707.043.

Mr. Miglets is the Division's Control Bid Attorney.

Endnotes

[1]As used in this article, "tender offer" will refer to the entire statutory phrase "tender offer or request or invitation for tenders".

[2]R.C. 1707.01(V) states: (1) "Control bid" means the purchase of or offer to purchase any equity security of a subject company from a resident of this state if either of the following applies:

(a) After the purchase of that security, the offeror would be directly or indirectly the beneficial owner of more than ten per cent of any class of the issued and outstanding equity securities of the issuer.

(b) The offeror is the subject company, there is a pending control bid by a person other than the issuer, and the number of the issued and outstanding shares of the subject company would be reduced by more than ten per cent.

(2) For purposes of division (V)(1) of this section, "control bid" does not include any of the following:

(a) A bid made by a dealer for his own account in the ordinary course of his business of buying and selling securities;

(b) An offer to acquire any equity security solely in exchange for any other security, or the acquisition of any equity security pursuant to an offer, for the sole account of the offeror, in good faith and not for the purpose of avoiding the provisions of this chapter, and not involving any public offering of the other security within the meaning of Section 4 of Title I of the "Securities Act of 1933," 48 Stat. 77, 15 U.S.C.A. 77d(2), as amended;

(c) Any other offer to acquire any equity security, or the acquisition of any equity security pursuant to an offer, for the sole account of the offeror, from not more than fifty persons, in good faith and not for the purpose of avoiding the provisions of this chapter.

[3]R.C. 1707.01(Y) states: (1) "Subject company" means an issuer that satisfies both of the following:

(a) Its principal place of business of its principal executive office is located in this state, or it owns or controls assets located within this state that have a fair market value of at least one million dollars.

(b) More than ten per cent of its beneficial or record equity

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Takeover Advisory Committee Minutes

The Division's Takeover Advisory Committee ("Committee") held its annual meeting on December 9, 1999 after the Ohio Securities Issues Conference. The Committee's agenda included a summary of the six control bid filings in 1999 and a discussion of Sub. H.B. 6, Sub. H.B. 452 and the M&A Release (Release No. 33-760; 34-42055; IC-24107) of the Securities and Exchange Commission ("SEC").

Each of the six control bid filings with the Division in 1999 were negotiated transactions. Five of the control bids were made with the unanimous recommendation by the directors to tender the shares of the target company. There was no litigation involving R.C. 1701.831, 1704. or 1707.041 filed in connection with any of the control bids received in 1999.

At the 1998 Committee meeting, David Zagore suggested an amendment specifically prohibiting fraud during the purchase of a security. While R.C. 1707.44(G) clearly prohibited fraud during the sale of a security and the definition of sale under R.C. 1707.01(C) appeared to cover purchases and sales, the Committee agreed that an amendment would provide clarification. The need for legislation became apparent when groups began making "mini-tenders." Mini-tenders are offers to purchase less than 5% of a company's stock at a price below the market price. State and federal tender offer regulations do not require disclosure documents for these limited offers. David Porter, Professor Howard Friedman and Commissioner Thomas Geyer were able to include the prohibition against fraud in the purchase of securities in an amendment to R.C. 1707.44(G) in Sub. H.B. 6. The most significant aspect of that legislation was to amend Chapter 1701 of the Revised Code to permit electronic and other types of proxies. Sub. H.B. 6 was effective September 13, 1999. The amendment to R.C. 1707.44(G) gives the Division authority to take action against abusive mini-tenders or other frauds in the purchase of securities.

The Committee then reviewed Sub. H.B. 452 which became effective upon signing by Governor Taft on November 11, 1999. This legislation requires a filing with the Public Utilities Commission when an offeror makes a control bid for a natural gas company that is a public utility company, or for a holding company controlling such a company, in Ohio. The Public Utilities Commission then must hold a hearing and issue a public report on whether the acceptance of the control bid would promote public convenience and result in the provisions of adequate natural gas service at a reasonable rate, rental, toll or charge. The legislation does not appear to give the Public Utilities Commission any authority to suspend the control bid.

The Division raised the issue of whether the exclusions from filing control bids for public utilities, banks and savings and loans under R.C. 1707.041(G) should be reviewed in light of the recent trends of deregulation of public utilities and the amendments to the permitted activities for financial institutions under the Gramm-Leach-Bliley Act. The Committee concurred that there may be more tender offers for public utilities and financial institutions, and there are questions of the level of shareholder disclosures and protection under current public utility and financial institution regulations. David Zagore and Edward Schrag suggested that if R.C. 1707.041(G) was amended, the amendment should be drafted to give the Division the authority to exclude certain regulated industries by administrative rule from control bid filings based on shareholder protections. The ability to exclude certain target companies by rule would give the Division greater flexibility if public utility or financial institution regulations were amended. Commissioner Thomas Geyer indicated that the Division had contacted the Division of Financial Institutions to begin a review of the issue. The Committee concurred that a full review of existing regulations of public utilities and financial institutions is necessary to confirm that shareholder protections justify the exclusions under R.C. 1707.041(G).

The meeting concluded with a discussion of the M&A Release and its effect on control bids in Ohio and R.C. 1707.041. The M&A Release will be effective on January 24, 2000 and will substantially amend existing federal proxy and tender offer rules. The Division's initial concern is the SEC's new definition of "commencement" and the elimination of the five-day rule. Under the M&A Release, a bidder may issue a public announcement of a tender offer without filing with the SEC. These free communications may not include a transmittal form or instructions on how to tender. Cash tender offers and stock exchange offers are permitted to use free communications. The filing with the SEC and the delivery of the disclosure document must be made at the time the transmittal forms or instructions on how to tender are delivered. The Division's concern is to insure that bidders are aware that the filing requirement under R.C. 1707.041(A)(1) is consistent with the SEC filing date. The Division suggested an administrative rule defining commencement of a control bid that would confirm that a bidder would be required to file with the Division, the SEC and the target simultaneously. The Committee felt that the filing requirements with the SEC and the Division were consistent even with the M&A Release. The Committee suggested an article in the *Ohio Securities Bulletin* to advise bidders that a filing is required with the Division and the SEC simultaneously upon commencement of the tender offer. The Division agreed and an article on the timing of filings under R.C. 1707.041 is included in this issue of the *Ohio Securities Bulletin*. The Committee, and the Division, will also give additional thought to a rule proposal.

The M&A Release gives the SEC enforcement authority over fraudulent or misleading communications prior to a cash tender offer or an exchange offer under new Rule 14e-8. The Committee indicated that the Division has enforcement authority over free communications prior to a tender offer under R.C. 1707.42 and 1707.44(G). It was also suggested that R.C. 1707.43 could be amended to give the Division enforcement authority over fraudulent or manipulative communications.

The Committee also discussed the other tender offer provisions of the M&A Release, including the materiality of financial statements. The Committee concurred that R.C. 1707.041 needed to

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Summary of the Meeting of the Registration/Exemption Advisory Committee

The Division's Registration/ Exemption Advisory Committee met on December 9, 1999 following the Ohio Society of Certified Public Accountants/ Division of Securities sponsored Securities Conference. Topics of discussion at the meeting included the then-proposed administrative rules undergoing the rule making process (See *Securities Bulletin* volume 99:3). Also discussed were upcoming electronic filings with the Division using the Ohio Automated Securities Information Submission (OASIS) System, and future rule amendments resulting from federal legislation. Attendees also expressed an interest in receiving information from the Division via electronic mail as a more expedient method of communication.

Summary of the Meeting of the Licensing Advisory Committee

The Division's Licensing Advisory Committee met on December 9, 1999, in connection with the 1999 SEC and Ohio Securities Issues Conference. Dale A. Jewell, supervisor of the Division's Licensing Section, chaired the meeting.

The primary topic of discussion was the application of the "good business repute" standard. The Ohio Securities Act requires that the Division make an affirmative finding that an applicant is of "good business repute" before issuing a license. The factors that the Division considers under this analysis are set out in O.A.C. 1301:6-3-19(D), and include a consideration of whether the applicant has been the subject of criminal, civil, disciplinary or regulatory actions. The primary source of information for the Division in this regard is the applicant's profile on the NASD's Web CRD system.

Statistics compiled by the Division reveal that 85 to 90% of license applicants are "clean," meaning that they have no incidents reported on their Web CRD profile. The remaining 10 to 15% have a least one incident reported. Some states and the NASD grant licenses to applicants without regard to such incidents. It was suggested at the meeting that the Division heavily weigh the fact that an applicant has been licensed by a state or approved by the NASD subsequent to the occurrence of an incident reported on the Web CRD. Mr. Jewell indicated that the Division would take this suggestion under advisement. However, some states grant automatic approval to license applicants without regard to the extent or substance of incidents reported. Therefore, in many cases the licensing decision of those states is of little persuasive value in light of the Division's statutory obligation to make an affirmative finding of "good business repute."

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be consistent with the changes in the M&A Release, but the Division should focus on shareholder protection and disclosure when suggesting any amendments. The Committee suggested that Form 041 filings after January 24, 2000 be given a strict review, but that the Division weigh materiality before issuing any suspension orders. The Division indicated that an article summarizing the changes in the M&A Release would be published in the *Ohio Securities Bulletin*. The Division also may prepare suggested changes to R.C. 1707.041 as a starting point for Committee discussions. The Committee agreed that an additional meeting, or conference call, may be needed to finalize any proposed amendments to R.C. 1707.041, or related administrative rules.

Finally, James Tobin indicated that he would be unable to continue as Co-Chairperson for 2000 due to other commitments. David Zagore agreed to replace Mr. Tobin.

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security holders are resident in this state, more than ten per cent of its equity securities are owned beneficially or of record by residents in this state, or more than one thousand of its beneficial or record equity security holders are resident in this state.

(2) The division of securities may adopt rules to establish more specific applications of the provisions as set forth in division (Y)(1) of this section. Notwithstanding the provisions set forth in division (Y)(1) of this section and any rules adopted under this division, the division, by rule or in an adjudicatory proceeding, may make a determination that an issuer does not constitute a "subject company" under division (Y)(1) of this section if appropriate review of control bids involving the issuer is to be made by any regulatory authority of another jurisdiction.

[4]"Tender offer" is not defined in the Ohio Securities Act and there is not Ohio case law on point. As the language in the OCBS and the Williams Act is identical, a court hearing a case involving the OCBS statute would use the test established by federal courts to determine if a transaction was a tender offer.

[5]See §§14(d) and (e) of the Securities Exchange Act of 1934.

[6]See Rule 14d-2(b) and (c).

[7]See Revised Rule 14d-2(b)(2).

[8]See S-G Securities Inc. v. Fugua Investment Co., 466 Fsupp 1114 (D. Mass. 1978) and Securities and Exchange Commission v. Carter Hawley Hale Stores, Inc., 760 F.2d 945 (9th Cir. 1985).

[9]See Rule 14e-1(a)

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these areas include significant changes from current regulations, with an emphasis on the timely dissemination of information to shareholders and improvements in disclosure.

Communications and Commencement

The most significant change in the M&A Release addresses the commencement of a tender offer and communications prior to the tender offer. Current regulations define a cash tender offer to have commenced upon the public announcement of the following information: identity of the bidder, the identity of the target company, the amount and class of securities to be acquired, and the price or range of prices offered for the securities. After the public announcement, the bidder in a cash tender offer currently must file with the SEC within five business days of the public announcement or withdraw the tender offer.[1] Any communications by the target company on the merits of the cash tender offer, or a recommendation to its shareholders, are also currently restricted as these communications require the prompt filing of a disclosure document with the SEC.[2] The amendments in the M&A Release will permit free communications by both the bidder and the target company, provided that such communications do not include transmittal forms or instructions on how to tender securities. Written communications must include a legend advising security holders to read the full offer to purchase document or recommendation statement. The written communications also must be filed with the SEC on the date that the communication is made.[3] The information also must be filed with the target and any other bidders when it is filed with the SEC.[4] The five business day filing requirement will be eliminated.

Under the amendments, a tender offer will be deemed to have commenced once the bidder has published, sent or given security holders the means to tender securities. This could include sending a transmittal form or publishing information on how to tender.[5] Once the tender offer has commenced, the tender offer statement with all required disclosures must be delivered. The M&A Release also will not change the requirement that the tender offer remain open for at least 20 business days.[6] The SEC indicated that security holders need the formal disclosure documents at the point when they are asked or able to tender their securities. The SEC specifically indicated that while the M&A Release defined "commencement" of a tender offer, the amendments do not define the term "tender offer" or change any of the SEC's position on activities or transactions that may constitute a tender offer.

To avoid false or misleading communications, the M&A Release includes a prohibition against announcing an offer without an intent to commence the offer within a reasonable time, with the intent to manipulate the price of either the bidder's or target's securities, or without a reasonable belief that the bidder will have the means to purchase the securities.[7] This amendment is intended to prohibit fraudulent and misleading communications. The SEC indicated that the prohibitions provide sufficient protection to shareholders when balanced against the benefit of increased information permitted under the new free communications and commencement standards.

Equal Treatment of Cash and Exchange Offers

Cash tender offers and exchange offers will be placed on more equal terms under the M&A Release. Currently, stock offers are not permitted to commence and the minimum twenty-business-day offering period does not begin to run until the bidder's registration statement is declared effective by the SEC. The SEC noted that this gave cash tender offers a significant timing advantage as the cash tender offer may commence upon filing of the tender offer statement and dissemination to security holders.[8] The M&A Release will permit exchange offers by third party bidders to commence upon the filing of a registration statement with the SEC. As noted, bidders making exchange offers will also be permitted free communications prior to commencement.

The M&A Release will impose a number of conditions on a third party bidder commencing an exchange offer prior to the effectiveness of the bidder's registration statement.[9] The registration statement must be filed prior to the commencement of the offer. All material information, including pricing information, must be included in the preliminary prospectus. The SEC specifically noted that no information may be excluded under Rule 430 or 430A under the Securities Act. The preliminary prospectus must be delivered to all security holders. New Rule 162 will permit the tender of securities before the registration statement is effective, but the bidder cannot purchase the securities until the registration statement is declared effective.

Current regulations do not set specific minimum time periods for the dissemination of amendments with material changes, other than price or the amount of securities to be purchased. Therefore, the SEC has adopted specific time periods for the dissemination of amendments to the preliminary prospectus for an exchange offer that has commenced prior to the effectiveness of the registration statement. Exchange offers that commence early must remain open for at least the following additional time periods:

1 five business days for a prospectus supplement containing a material amendment other than a price change or a change in the number of shares sought;

2. ten business days for changes in price, number of shares sought, the dealer's soliciting fee, or other significant change;

3. ten business days for a supplement included as part of a post-effective amendment; and

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4. twenty business days when the initial prospectus was materially deficient, such as a failure to comply with the going private rules or filing a shell document to "get in line" for staff review.

Disclosure Requirements

Current SEC regulations have different disclosure requirements for issuer tender offers, third-party tender offers, tender offer recommendations and going private transactions. Under the M&A Release, Schedules 13E-3, 13E-4, 14D-1 and 14D-9 are combined into Subpart 1000 of Regulation S-K ("Regulation M-A"). The SEC's goal was to streamline the schedules into an integrated disclosure system and eliminate inconsistent requirements. Schedules 13E-4 and 14D-1, used for issuer and third party tender offers, have been combined into the new Schedule TO. Schedule TO contains instructions listing the specific disclosure items of Regulation M-A for each different type of transaction.[11]

As a result of the amendments in the M&A Release, the information required by Schedule 14D-1, 13E-4 and 13E-3 may be disclosed in one combined filing.[12] A separate filing under Schedule 13E-3 will only be required when the going-private transaction is not a tender offer. While the M&A Release is intended to streamline the filing requirements, the SEC specifically indicated that disclosure documents sent to security holders must include a fair and adequate summary of the transaction.

As the SEC's Plain English rules for registration statements do not apply to disclosure documents for cash tender offers or cash mergers, the M&A Release adds a Plain English summary term sheet.[13] The summary term sheet should begin on the first or second page of the disclosure document. The SEC did not mandate specific items or questions that must be addressed.

The SEC noted that counsel should have the flexibility to determine relevant issues, but the SEC indicated in its examples that the following questions generally need to be addressed:

- Who is offering to buy my securities?
- What are the classes and amounts of securities sought in the offer?
- How much is the bidder offering to pay and what is the form of payment?
- Does the bidder have the financial resources to make payment?
- Is the bidder's financial condition relevant to my decision on whether to tender in the offer?
- How long do I have to decide whether to tender in the offer?
- Can the offer be extended, and under what circumstances?
- How will I be notified if the offer is extended?
- What are the most significant conditions to the offer?
- How do I tender my shares?
- Until what time can I withdraw previously tendered shares?
- How do I withdraw previously tendered shares?
- If the transaction is negotiated, what does my board of directors think of the offer?
- Is this the first step in a going-private transaction?
- Will the tender offer be followed by a merger if all the company's shares are not tendered in the offer?
- If I decide not to tender, how will the offer affect my shares?
- What is the market value (if traded) or the net asset or liquidation value (if not traded) of my shares as of a recent date?
- Who can I talk to if I have questions about the tender offer?

For merger transactions, the proxy statement must include a summary term sheet that includes a brief outline of the proposal and the material terms of the transaction. The SEC indicated that at a minimum the merger summary term sheet should include: the parties involved in the transaction, the consideration to be received by security holders, the board's recommendation, the effect of a vote for and against each proposal (including changing or revoking a vote), and a discussion of appraisal rights. The SEC agreed with commentators that other items, such as fairness opinions, accounting and federal income tax issues and the material interests of insiders, may be included in the summary term sheet.[13] Rather than adopt an extensive list of items to be disclosed, the SEC left the determination of materiality to the bidder and counsel.

The M&A Release amends Item 14 of Schedule 14A to harmonize the disclosure requirements for cash tender offers and cash mergers. The SEC felt that the Item 14 disclosures were unduly burdensome on cash mergers. Financial statements, and other information about the bidder, will only be required when it is material to the voting security holders' evaluation of the transaction.[14] If financial statements are required, the bidder must provide only financial statements for the two most recent fiscal years instead of three years.[15] If the bidder's shareholders are not voting to approve the transaction, then financial statements of the bidders would not be required.[16] The SEC felt that security holders already have financial information about the securities they hold. The SEC's goal is a shorter disclosure document that focuses on the material terms of the transaction.

Two proposals relating to financial statements and the delivery of disclosure documents in the initial M&A Release were not adopted. The SEC proposed that Item 14 would no longer permit incorporation by reference from the "glossy" annual report. The SEC also suggested eliminating the instructions in Schedule 14A and Form S-4 that required filers to send the disclosure document to security holders at least twenty business days prior to the meeting date or the expiration of an exchange offer if information is incorporated by reference. The SEC did not adopt these proposals as there were concerns that all security holders did not have access to information on the internet. It should also be noted that since the Aircraft Carrier Release has not been adopted, Securities Act registration Forms S-4 and

F-4 will not be replaced by Form C, or Form SB-3 for small business issuers.

The M&A Release significantly amends the financial statement requirements for mergers and stock tender offers when the target is not a reporting company under section 12(g) of the Securities Exchange Act of 1934. If the bidder's security holders are not voting on the transaction and the target is not significant to the bidder above the 20% level in Rule 3-05 of Regulation S-X, then financial statements of the non-reporting target are not required. If the non-reporting target is being acquired in a business combination transaction, then financial statements prepared in accordance with generally accepted accounting principles ("GAAP") for the most recent fiscal year must be provided. Also, if the non-reporting target's security holders received GAAP financial statements for either of the two fiscal years prior to the latest fiscal year, then GAAP financial statements must be provided for all three fiscal years.[17] If the non-reporting target's financial statements are not prepared under U.S. GAAP, a reconciliation to U.S. GAAP is required unless the reconciliation would involve unreasonable cost or expense. Financial statements for the latest fiscal year also must be audited to the extent practicable. Financial statements for prior years are not required to be audited, unless the financial statements had been previously audited.

General Update of Tender Offer Rules

New Rule 14d-11 gives third-party bidders the option of a subsequent offering period following the tender offer during which security holders may tender securities without withdrawal rights. The subsequent offering period may be used for either stock or cash tender offers. The bidder must disclose the subsequent offering period either in the initial offering materials or in an amendment. The disclosure must be made prior to the expiration of the tender offer. The subsequent offering period must be open for a minimum of three business days and a maximum of twenty business days, with any extensions made in accordance with Rule 14e-1(d). Other conditions for a subsequent offering period include:

1. The offer is for all outstanding securities of the class;
2. The initial offering period, with withdrawal rights, must be open for twenty days;
3. All conditions of the offer must be satisfied or waived by the bidder on or before the close of the initial offering period;
4. The bidder accepts and promptly pays for all securities tendered during the initial offering period at the closing of the initial offering period;
5. The bidder announces the approximate number and percentage of outstanding securities tendered by the close of the initial offering period no later than 9:00 a.m. Eastern time on the next business day following the scheduled expiration date of the initial offering period; and
6. The bidder immediately accepts and promptly pays for all shares as the shares are tendered during the subsequent offering period.

The subsequent offering period allows bidders to acquire additional shares to meet state law minimums necessary for a short-form, back-end merger. Security holders also will have one last chance to tender shares to avoid the delay and illiquid market after the tender offer and before the back-end merger.

For cash tender offers, the M&A Release clarifies when financial information for the bidder is required. The instructions in Schedule 14D-1 provide some guidance on when financial statements are material and must be included in the disclosure document.[18] However, Item 10 to new Schedule TO includes an instruction indicating that the bidder's financial statements are <u>not</u> material when:

1. Only cash consideration is offered;
2. The offer is not subject to any financing condition; and either
3. The bidder is a public reporting company that filed reports electronically on EDGAR; or
4. The offer is for all outstanding securities of the target.

The SEC noted that regardless of the amount of financial information available, the bidder's ability to pay for tendered securities is always a material disclosure item. Item 1007 of Regulation M-A requires disclosure of the specific sources of financing, any conditions to the financing, and the bidder's ability to finance the transaction through alternative means if the primary source of financing is not available. The M&A Release also codifies the SEC's practice of requiring net worth information if the bidder is a natural person. Additional disclosure is required if the individual's net worth consists of illiquid assets, or if there are guarantees or contingencies that may negatively affect the individual's net worth.[20]

If the financial statements of a bidder making a cash tender offer are material, only two years of financial statements are required.[21] If the tender offer is a "two-tier transaction," with a cash tender offer followed by a merger where the bidder's securities are offered as consideration, pro forma financial information on the combined entity must be included in the disclosure document.[22] As the bidder may not have access to the internal financial information of the target during a hostile tender offer; the pro forma financial information is required only in negotiated transactions where management of the target is cooperating with the bidder. However, the SEC in the M&A Release encouraged bidders to provide pro forma or similar information that they may consider useful and meaningful to security holders regardless if the transaction is hostile or negotiated. The SEC noted that bidders that intend to offer securities in a two-tier transaction most likely have prepared some level of pro forma financial information on the combined entity for their own planning and negotiating purposes.

Rule 13e-1 prohibited an issuer from repurchasing its securities during a third-party tender until information about the repurchase was filed with the SEC and sent to security holders. The M&A Release clarifies that the filing is required after the third-party tender offer is made. The requirement that the information be sent to security holders was eliminated. The SEC felt the information about a repurchase serves the useful purpose of providing information to the marketplace, while the elimination of the mailing to security holders reduces the cost.

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Revisions to Rule 14d-5 bring tender offer dissemination requirements in line with proxy dissemination requirements in Rule 14d-7. A target company that elects to provide a bidder with a security holder list in lieu of mailing the bidder's tender offer materials, must provide the most recent list of names, addresses, security positions of non-objecting beneficial owners and record holders. The target company must provide the information in the format requested by the bidder unless it is an undue burden or expense. The SEC indicated that the purpose of the amendment was to give the bidder the same access as the target to non-objecting beneficial owners of securities.

Rule 10b-13 has been amended and redesignated as Rule 14e-5. The amendments prohibit a "covered person" from purchasing or arranging to purchase a security that is subject to a tender offer other than through the tender offer. "Covered person" is defined to include: the offeror and its affiliates; the offeror's dealer-manager and its affiliates; any advisor to the offeror, dealer-manager or their affiliates if such advisor's compensation is dependent on the completion of the offering and any person acting, directly or indirectly, in concert with any of the other covered persons.[23] The SEC indicated that advisors such as attorneys and accountants would not be affected by the rule as their compensation is not usually determined by the successful completion of the tender offer. The prohibition applies from the time of any pre-commencement communications until any subsequent offering period has expired.

The exception for purchases by plans under Rule 10b-13 has been amended to delete references to the Internal Revenue Code. The exception now permits the purchase of subject securities by any "plan" if the purchases are made by an "independent agent" as those terms are defined in Regulation M. Other exceptions under Rule 14e-5 include:

1. Exercises of securities. Transactions by covered persons to convert, exchange, or exercise related securities into subject securities, if the covered person owned the related securities before public announcement;

2. Purchases during odd-lot offers. Purchases or arrangements to purchase if the tender offer is excepted under §240.13e-4(h)(5);

3. Purchases as intermediary. Purchases by or through a dealer-manager of its affiliates that are made in the ordinary course of business and made either:

i. On an agency basis not for a covered person; or

ii. As principal for its own account if the dealer-manager or its affiliate is not a market maker, and the purchase is made to offset a contemporaneous sale after having received an unsolicited order to buy from a customer who is not a covered person;

4. Basket transactions. Purchases or arrangements to purchase a basket of securities containing a subject security or a related security if the following conditions are satisfied:

i. The purchase or arrangement to purchase is made in the ordinary course of business and not to facilitate the tender offer;

ii. The basket contains 20 or more securities; and

iii. Covered securities and related securities do not comprise more than 5% of the value of the basket;

5. Covering transactions. Purchases or arrangements to purchase that are made to satisfy an obligation to deliver a subject security or a related security arising from a short sale or from the exercise of an option by a non-covered person if:

i. the short sale or option transaction was made in the ordinary course of business and not to facilitate the offer;

ii. In the case of a short sale, the short sale was entered into before public announcement of the tender offer; and

iii. In the case of an exercise of an option, the covered person wrote the option before public announcement of the tender offer;

6. Purchases pursuant to contractual obligations. Purchases or arrangements to purchase pursuant to a contract if the following conditions are satisfied:

i. The contract was entered into before public announcement of the tender offer;

ii. The contract is unconditional and binding on both parties; and

iii. The existence of the contract and all material terms including quality, price and parties are disclosed in the offering materials;

7. Purchases or arrangements to purchase by an affiliate of the dealer-manager. Purchases or arrangements to purchase by an affiliate of a dealer-manager if the following conditions are satisfied:

i. The dealer-manager maintains and enforces written policies and procedures reasonably designed to prevent the flow of information to or from the affiliate that might result in a violation of the federal securities laws and regulations;

ii. The dealer-manager is registered as a broker or dealer under Section 15(a) of the Act;

iii. The affiliate has no officers (or persons performing similar functions) or employees (other than clerical, ministerial, or support personnel) in common with the dealer-manager that direct, effect, or recommend transactions in securities; and

iv. The purchases or arrangements to purchase are not made to facilitate the tender offer;

8. Purchases by connected exempt market makers or connected exempt principal traders. Purchases or arrangements to purchase if the following conditions are satisfied:

i. The issuer of the subject security is a foreign private issuer, as defined in §240.3b-4(c);

ii. The tender offer is subject to the United Kingdom's City Code on Takeovers and Mergers;

iii. The purchase or arrangement to purchase is effected by a connected exempt market maker or a connected exempt principal trader, as those terms are used in the United Kingdom's City Code on Takeovers and Mergers;

iv. The connected exempt market maker or the connected exempt principal trader complies with the applicable provisions of the United Kingdom's City Code on Takeovers and Mergers; and

v. The tender offer documents disclose the identity of the connected exempt market maker or the connected exempt principal trader and disclose, or describe how U.S. security holders can obtain information regarding market making or principal purchases by such market maker or principal trader to the extent that this information is required to be made public in the United Kingdom; and

9. Purchases during cross-border tender offers. Purchases or arrangements to purchase if the following conditions are satisfied:

i. The tender offer is excepted under §240.13e-4(h)(8) or §240.14d-1(c);

ii. The offering documents furnished to U.S. holders prominently disclose the possibility of any purchases, or arrangements to purchase, or the intent to make such purchases;

iii. The offering documents disclose the manner in which any information about any such purchases or arrangements to purchase will be disclosed;

iv. The offeror discloses information in the United States about any such purchases or arrangements to purchase in a manner comparable to the disclosure made in the home jurisdiction, as defined in §240.13e-4(i)(3); and

v. The purchases comply with the applicable tender offer laws and regulations of the home jurisdiction.

When the M&A Release was published for comment, the SEC solicited comments on whether the provisions of the Private Securities Reform Act of 1995[24] safe harbor for forward-looking statements should be expanded to cover statements made in connection with a tender offer. The SEC did not include a safe harbor for forward-looking statements made in connection with a tender offer in the rules and amendments effective January 24, 2000. The SEC did not comment on proposals that were not adopted, but indicated that additional changes may be proposed in the future based on the effects of the changes in the final M&A Release.

The Division is currently comparing the changes in the M&A Release with the filing requirements under the Ohio Control Bid Statute, set forth in R.C. 1707.041 to 1707.043. Amendments to the Ohio Securities Act may be required to insure that bidder's filings under the Williams Act will satisfy the Form 041 filing requirements in Ohio. For control bid filings made after January 24, 2000, the Division may exercise its discretion not to suspend an offer if non-material items, such as a third year of financial statements in a cash tender, are not included in the Form 041 filing. Each Form 041 filing will be reviewed on a case by case basis to insure all material disclosures are made to Ohio shareholders.

Mr. Miglets is the Division's Control Bid Attorney.

Endnotes

[1] See Rule 14d-2(b) and (c).

[2] See Rule 14d-9(a).

[3] See Revised Rule 14d-2(b)(2).

[4] See Rule 14d-3(a)(2).

[5] See Revised Rule 14d-2(a).

[6] See Rule 14e-1(a).

[7] See Revised Rule 14e-8.

[8] See Rule 14d-2(a)(4).

[9] See New Rule 162 and Revised Rules 13e-4(e)(2) and 14d-4(b).

[10] See Revised Rule 14d-4.

[11] General Instruction J to Schedule TO.

[12] Item 1001 of Regulation M-A.

[13] Page 14 of the M&A Release, Release No. 33-7760; 34-42055; IC-24107; File No. 57-28-98.

[14] Revised Instruction 2(a) to Item 14 of Schedule A.

[15] Revised Item 14(c)(1) to Schedule 14A.

[16] Revised Instruction 2(b) to Item 14 of Schedule 14A.

[17] Revised Items 17(b)(7) of Form S-4 and 17(b)(5) of Form F-4.

[18] Instruction 1 to Item 9 of Schedule 14D-1.

[19] Item 1007 of Regulation M-A.

[20] Instruction 4 to Item 10 of New Schedule TO.

[21] Item 1010(a) and (b) of Regulation M-A.

[22] Instruction 5 to Item 10 of new Schedule TO.

[23] See Rule 14e-5(5)(3)(i) to (iv).

[24] Pub. L. No. 104-67, 109 Stat. 737 (1995.)

PUBLIC NOTICE

At 10:00 a.m. on April 13, 2000, the Ohio Division of Securities will hold a public hearing regarding the Division's intent to amend Ohio Administrative Rules 1301:6-3-01, 1301:6-3-02, 1301:6-3-15, 1301:6-3-151, and 1301:6-3-161. The hearing will be held in the offices of the Division located at 77 South High Street, 22nd Floor, Columbus, Ohio 43215.

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

OAC 1301:6-3-01. The proposed amendment creates a new paragraph (K) for an exclusion from the definition of "investment adviser." Generally, the exclusion will be available to those persons who, during the preceding twelve months, have fewer than fifteen clients, do not hold themselves out as investment advisers, and whose clients are those listed in the proposed rule.

The purpose of the proposed rule is to provide an exclusion from the definition of "investment adviser" for those persons who privately advise a small number of sophisticated clients and solicitors.

OAC 1301:6-3-02. Paragraph (A) of the rule would be replaced in its entirety, a new paragraph (B) would be added, and the remaining paragraphs within the rule would be renamed so that it is clear what securities listed on national exchanges have an exemption available in Ohio.

The purpose of the proposed rule is to align the "exchange exemption" in Ohio with the exemption available under the federal provisions.

OAC 1301:6-3-15. Paragraph (J)(2) will be amended to clarify that it is an administrative enforcement proceeding against the salesperson rather than against the dealer that is applicable, and that a request to terminate a salesperson's license during the pendency of such a proceeding will not permit a request for termination of the salesperson's license to automatically become effective.

The purpose of the proposed rule is to clarify that a request to terminate a salesperson's license does not automatically become effective if an administrative enforcement proceeding is pending against the salesperson.

OAC 1301:6-3-151. Paragraph (K)(1) would be amended to reflect that the responsibility to notify the Division of the dissassociation of an investment adviser representative with an investment adviser is only imposed on investment advisers licensed by the Division.

The purpose of the proposed amendment is to clarify that a federally registered investment adviser cannot be required to submit a Form U-5 to notify the Division of the dissassociation of an investment adviser representative with the investment adviser and that only those investment advisers licensed by the Division are subject to the requirement to file the Form U-5.

OAC 1301:6-3-161. The proposed rule would require an investment adviser representative employed by or associated with a federally registered investment adviser to file a Form U-5 with the Division to notify the Division of his or her disassociation with the investment adviser. The rule would also allow a federally registered investment adviser to file the Form U-5 on the investment adviser representative's behalf.

The purpose of the proposed rule would be to impose a requirement on an investment adviser representative employed by or associated with a federally registered investment adviser to notify the Division of his or her disassociation with the federally registered investment adviser.

Administrative Orders

ROBERT L. CAWMAN

On August 12, 1999, the Division issued Order No. 99-317, a Suspension of Ohio Salesperson License and Cease and Desist Order with Consent Agreement against Robert L. Cawman. Respondent is a Kentucky resident.

On May 24, 1999, the Division issued Division Order No. 99-236, a Notice of Opportunity for Hearing and Notice of Intent to Revoke Securities Salesperson License to Robert L. Ca wman. The Division alleged that the Respondent violated the provisions of Ohio Administrative Code Rule 1301:6-3-19(A)19 by effecting a securities transaction not recorded on the regular books and records of the dealer that the salesman represents. Additionally, the Division alleged the Respondent also violated Revised Code section (R.C.) 1707.44(C)(1) and R.C. 1707.44(G) by, respectively, selling unregistered securities and failing to disclose material facts in conjunction with the sales of securities. Because these sections were violated, the Respondent salesperson's license could be suspended or revoked pursuant to Revised Code section 1707.19(A)(4), which allows suspension or revocation when a salesperson has intentionally violated any provision of Revised Code sections 1707.01 through 1707.45. Suspension or revocation of the Respondent's salesperson's license was also allowed because the Respondent violated R.C. 1707.19(A)(9), by conducting business in violation of the Division's rules and regulations.

The Division's allegations stem from the Respondent's sales of promissory notes in First Lender's Indemnity Corporation (FLIC) that were purportedly partially secured by collateral that included automobile loan portfolios. The notes were not registered or claimed from exemption with the Division of Securities. The Respondent also failed to disclose to investors that several state securities regulators had issued Cease and Desist Orders against companies affiliated with the issuance of the notes. The Division also notified the Respondent of his rights to an adjudicative hearing pursuant to Chapter 119 of the Revised Code. Upon issuance of the Order, the Division and the Respondent entered into a Consent Agreement, which was accompanied by the issuance of a Suspension of Ohio Salesperson License and Cease and Desist Order, Order No. 99-317, incorporating these allegations as findings. The agreement principally requires the Respondent to agree to a three-month suspension of his Ohio securities license and a further six-month period of supervision pursuant to an agreement between the Respondent and his dealer. Respondent was required to waive appeal rights in this matter and to stipulate and agree to the findings, conclusion and orders found in the Cease Desist Order.

ERIC MARTIN SOKOL

On August 20, 1999, the Division issued Order No. 99-331, a Cease and Desist Order, against Eric Martin Sokol. The Respondent's business address is in Ohio.

On July 19, 1999, the Division issued Division Order No. 99-312, a Notice of Opportunity for Hearing, to Eric Martin Sokol. The Division alleged that the Respondent violated Revised Code Section 1707.44(C)(1) by selling unregistered securities. The Respondent had sold viatical settlements to several Ohio investors. The Order notified the Respondent of the Division's intent to issue a final Cease and Desist Order against him. The Respondent did not timely request a hearing. Therefore the Division issued its Cease and Desist Order, No. 99-331.

SCOTT THOMAS ROTHFUSS

On September 2, 1999, the Division issued Order No. 99-343, a Cease and Desist Order, against Scott Thomas Rothfuss. Respondent is an Ohio resident.

On April 2, 1999, the Division issued Division Order No. 99-153, a Notice of Opportunity for Hearing, to Scott Thomas Rothfuss. The Division alleged that the Respondent violated the provisions of Ohio Administrative Code Rule 1301:6-3-19(A)(19) by effecting a securities transaction not recorded on the regular books and records of the dealer that the salesman represents. The Order also alleged that the Respondent violated R.C. 1707.19(I) by conducting business in violation of the Division's rules and regulations, as well as R.C. 1707.44(C)(1) and R.C.1707.44(G) by, respectively, selling unregistered securities and failing to disclose material facts in conjunction with the sales of securities. The Division's allegations stem from the Respondent's sales of promissory notes in FLIC that were purportedly partially secured by collateral that included automobile loan portfolios. The notes were not registered or claimed from exemption with the Division of Securities. The Respondent also failed to disclose to investors that several state securities regulators had issued Cease and Desist Orders against companies affiliated with the issuance of the notes. The Division also notified the Respondent of his rights to an adjudicative hearing pursuant to Chapter 119 of the Revised Code. Respondent failed to timely request an administrative hearing pursuant to Ohio Revised Code Chapter 119. Therefore, the Division issued it's Cease and Desist Order, Order No. 99-343.

ANDRE D. ANDERSON

On September 2, 1999, the Division issued Division Order No. 99-349, a Cease and Desist Order, against Andre D. Anderson. The Respondent is a resident of Washington.

On April 22, 1999, the Division issued a Notice of Opportunity for Hearing, Division Order 99-192, to Respondent pursuant to Ohio Revised Code Chapter 119. The Division alleged the Respondent had violated the provisions of Revised Code section 1707.44(C)(1) by selling securities that were not registered by description, coordination or qualification. The Division also notified the Respondent of his rights to an adjudicatory hearing pursuant to Chapter 119 of the Revised Code. The Respondent failed to make a timely request for a hearing. Therefore the Division issued its Cease and Desist Order No. 99-349, incorporating the allegation noted above as findings.

JACK FRANK BRUSCIANELLI

On September 7, 1999, the Division issued Division Order No. 99-354, a Final Order, to Jack Frank Bruscianelli. The Respondent is a resident of Illinois.

On March 18, 1999, the Division issued a Notice of Opportunity for Hearing, Division Order 99-111, to Respondent giving Respondent notice of intent to deny Respondent's application for licensure as a salesman of securities in the state of Ohio. The Division alleged that Respondent was not of good "business repute" as that phrase is used in Revised Code sections 1707.16 and 1707.19 and Ohio Administrative Code Rule 1301:6-3-19(D)(9). The Respondent timely requested an adjudicative hearing. Upon issuance of the Order, the Respondent requested an administrative hearing pursuant to Ohio Revised Code Chapter 119. The Hearing Examiner found in the Applicant's favor. The Division confirmed and approved the Report and Recommendation of the Hearing Examiner. Therefore, it was ordered the Respondent be granted a license as a salesman of securities, Division Order No. 99-354.

BRET LEE SANDER

On September 7, 1999, the Division issued Division Order No. 99-356, a Cease and Desist Order with Consent Agreement against Bret Lee Sander. The Respondent is a resident of Ohio.

On May 27, 1999, the Division issued a Notice of Opportunity for Hearing, Division Order No. 99-242, to Respondent. The Division alleged that the Respondent violated the provisions of Ohio Administrative Code Rule 1301:6-3-19(A)(19) by effecting a securities transaction not recorded on the regular books and records of the dealer that the salesman represents. The Order also alleged that the Respondent violated Revised Code sections 1707.44(C)(1) and 1707.44(G) by, respectively, selling unregistered securities and failing to disclose material facts in conjunction with the sales of securities, thereby violating Revised Code section 1707.19(I), conducting business in violation of the Division's rules and regulations and violated.

The Division's allegations stem from the Respondent's sales of promissory notes in FLIC that were purportedly partially secured by collateral that included automobile loan portfolios. The notes were not registered or claimed from exemption with the Division of Securities. The Respondent also failed to disclose to investors that several state securities regulators had issued Cease and Desist Orders against companies affiliated with the issuance of the notes. The Division also notified the Respondent of his rights to an adjudicative hearing pursuant to Chapter 119 of the Revised Code. The Respondent timely requested an adjudicative hearing pursuant to Ohio Revised Code Chapter 119. Respondent withdrew request for an adjudicative hearing and entered into a Consent Agreement. The agreement principally requires the Respondent to waive appeal rights in the matter and to stipulate and agree to the findings, conclusions and orders found in Cease and Desist Order No. 99-356.

JAMES A. CUNNINGHAM

On September 15, 1999, the Division issued Division Order No. 99-376, a Cease and Desist Order, against James A. Cunningham, the former president, secretary, treasurer, chief financial officer and director of FLIC. Respondent is a resident of California.

On April 7,1999, the Division issued a Notice of Opportunity for Hearing, Division Order No. 99-156, to Respondent pursuant to Ohio Revised Code Chapter 119. The Division alleged that Respondent violated the provisions of Revised Code sections 1707.44 (C)(1) and 1707.44(G) by selling unregistered securities and failing to disclose material facts in conjunction with the sales of securities. The Division's allegations stem from the Respondent's sales of promissory notes of FLIC that were purportedly partially secured by collateral that included automobile loan portfolios. The notes were not registered or claimed from exemption with the Division of Securities. The Respondent also failed to disclose to investors that several state securities regulators had issued Cease and Desist Orders against companies affiliated with the issuance of the notes. The Division also notified the Respondent of his rights to an adjudicative hearing pursuant to Chapter 119 of the Revised Code. Respondent failed to timely request an administrative hearing pursuant to Ohio Revised Code Chapter 119. Therefore, the Division issued a Cease and Desist Order, Order No. 99-376.

MICHAEL A. GEORGE; JAMES ALTER

On September 17, 1999, the Division issued Division Order No. 99-383, an Order to Cease and Desist, against Michael A. George and James Alter. Michael A. George is an Ohio resident. James Alter is a resident of Michigan.

On April 22, 1999, the Division issued a Notice of Opportunity for Hearing, Division Order No. 99-193, to the Respondents pursuant to Ohio Revised Code Chapter 119. The Division alleged that Respondents had violated Revised Code section 1707.44(C)(1) by selling unregistered securities. The Division also notified the Respondents of their right to an administrative hearing pursuant to Chapter 119 of the Ohio Revised Code. Respondents timely requested an administrative hearing and withdrew the request. Therefore the Division issued its Cease and Desist Order No. 99-383, incorporating the allegations noted as findings.

ROBO ENTERPRISES, INC.; ROBO-OHIO BEREA DEVELOPMENNT, LLP; CRAIG HAYDEN

On September 23, 1999, the Division issued Division Order No. 99-386, a Final Order to Cease and Desist and Declaration that Claims of Exemption are Null and Void, against Robo Enterprises, Inc., Robo-Ohio Berea Development, LLP and Craig Hayden. Respondents are residents of Kentucky.

On June 1,1999, the Division issued a Notice of Opportunity for Hearing, Division Order No. 99-244, to the Respondents. The Division alleged that the Respondents violated Revised Code section 1707.44(C)(1) by selling securities without a valid claim of exemption. These allegations stem from the Respondents' making offerings of securities by solicitation through its internet Web Site. This Web Site was available to residents within the state of Ohio. The Division notified the Respondents of its intention to issue a Cease and Desist Order and to declare the Respondents' claims of exemption regarding the offerings Null and Void. Upon issuance of the Order, Robo Enterprises, Inc. and Robo-Ohio Berea Development, LLP timely requested an administrative hearing as permitted pursuant to Ohio Revised Code Chapter 119. Craig Hayden did not timely request an administrative hearing. A hearing was granted and the Hearing Officer found in the Division's favor. The Hearing Officer's Report and Recommendation was confirmed and approved. Therefore, the Division issued its Cease and Desist Order No. 99-386, incorporating the above-referenced allegations as findings.

NANCY KLATTER

On September 21, 1999, the Division issued Division Order No. 99-391, a Cease and Desist Order, against Nancy Klatter. Respondent is a resident of California.

On August 6, 1999, the Division issued Division Order No. 99-315, a Notice of Opportunity for Hearing, to the Respondent. The Division alleged that the Respondent violated the provisions of Revised Codes Sections 1707.44(C)(1) and 1707.44(G) which prohibit, respectively, selling unregistered securities and omission of material facts in the sale of securities. The Division also alleged that Respondent violated Revised Code section 1707.44(B)(4) by making false representations concerning material and relevant facts. The Order further notified the Respondent of her right to request an adjudicative hearing pursuant to Ohio Revised Code Chapter 119. Klatter failed to timely request an administrative hearing. Therefore, the Division issued its Cease and Desist Order, Order No. 99-391.

WILLLIAM HENRY WATSON, III

On September 24, 1999, the Division issued Division Order No. 99-393, a Final Order to Deny Application for License, against William Henry Watson, III. Defendant is a resident of California.

On March 12, 1999 the Division issued Division Order No. 99-103, a Notice of Intent to Deny Application for Securities salesman License and Notice of Opportunity for Hearing against Respondent. The Division alleged that the Respondent was "not of good business repute as that phrase is used in Revised Code sections 1707.16 and 1707.19 and Ohio Administrative Code Rule 1301:6-3-19(D)(9). Upon issuance of the Order, the Respondent timely requested an administrative hearing pursuant to Ohio Revised Code Chapter 119. The Hearing Officer ruled against the Applicant. The Division confirmed and approved the Report and Recommendation of the Hearing Officer. Therefore, the Division issued its Final Order denying a license as a salesman of securities, Order No. 99-393.

ALLIANCE TRUST

On September 24, 1999, the Division issued Division Order No. 99-394, a Cease and Desist Order, against Alliance Trust. The Respondent is a Florida corporation conducting business in Ohio.

On August 24, 1999, the Division issued to Respondent Division Order No. 99-332, a Notice of Opportunity for Hearing. The Division alleged that Respondent violated provisions of Revised Code sections 1707.44(C)(1) and 1707.44(B)(4) by selling unregistered securities and making false representations concerning material and relevant facts. The Order also notified the Respondent of its right to an adjudicative hearing pursuant to Chapter 119 of the Revised Code. The Respondent failed to timely request an adjudicative hearing. Therefore, the Division issued it Cease and Desist order, No. 99-394.

CHARLES L. ELLINGTON AND CLE DIAMOND MINING LIMITED PARTNERS

On September 28, 1999, the Division issued Division Order No. 99-395, a Cease and Desist Order, against Charles L. Ellington and CLE Diamond Mining Limited Partners. Respondents are Ohio residents.

On August 18, 1999, the Division issued to Respondents Division Order No. 99-318, a Notice of Opportunity for Hearing. The Division alleged that the Respondents had violated the provisions of Revised Code sections 1707.44(C)(1) and 1707.44(G) which prohibit, respectively, selling unregistered securities and omission of material facts in the sale of securities. The Division also alleged that Respondents violated Revised Code section 1707.44(B)(4) by making false representations concerning material and relevant facts. The Order further advised the Respondents of their right to request an adjudicative hearing pursuant to Ohio Revised Code Chapter 119. The Respondents failed to make a timely request for an administrative hearing as permitted under Revised Code Chapter 119. Therefore, the Division issued its Cease and Desist Order, Order No. 99-395.

Criminal Case Updates for 1999

JAMES S. POWELL

Hamilton County Common Pleas Judge Robert Ruehlman accepted a plea agreement on January 25, 2000 from James S. Powell. Powell pled guilty to three counts of selling unregistered securities and was sentenced to 1 1/2 years on one count (a fourth degree felony), and 1 year each on the

other two counts (each fifth degree felonies) to be followed by three years of post-release control. Three other counts were dropped as part of the plea bargain. Powell was ordered to repay the three elderly investors named in the indictment over a five-year period of time. His payment schedule includes a minimum payment of $25,000.00 per year up to a maximum of 70% of his gross income. Powell's sentence was suspended and he was placed on probation for five years. If Powell does not adhere to the restitution schedule, which will be implemented by the probation department, he will be imprisoned. Judge Ruehlman stated that $315,000.00 is owed these investors. The judge also included a provision that Powell must fully repay the investors if he wins the lottery or comes into any inheritance within the next five years.

Powell was indicted on July 27, 1999, by a Hamilton County grand jury on six counts of securities law violations, including securities fraud and the sale of unregistered securities. The sales were made to Powell's elderly insurance clients and involved limited partnership interests in his entity, Powell Financial Group Limited Partnership (PFGLP), totaling over $630,000. Powell formed PFGLP, to raise and invest Ohio investor funds in Lennox Investment Group, Ltd., in which $11.1 million was lost nationwide by investors, through the fraudulent offer and sale of unregistered securities in an alleged short-term high-yield international trading program. A Receiver, appointed by U.S. District Court for the Northern District of Texas, has been able to recover very little, since Lennox insiders spent most of the money. The Division also issued two Cease and Desist Orders against a total of eight Respondents in this matter: James S. Powell; Powell Financial Group; Powell Financial Group Limited Partnership; James F. Wardell; Randall W. Law; Lennox Investment Group, Ltd.; Monica M. Illes; and Standard Capital Group.

Gary Hess; Paul D. Morrison

Gary Hess was sentenced on November 23, 1999 by Guernsey County Common Pleas Court Judge David A. Ellwood. Hess was sentenced to 4.5 years in prison for selling unregistered securities and making false representations in the sale of securities. The sentencing followed the Court's acceptance of Hess' guilty plea. The criminal action was the result of Hess' sale of "Media Units" in the Sterling Group/Affordable Media to Guernsey County residents. The Division of Securities had issued a Cease and Desist Order on August 18, 1999 against Hess for violations of the Ohio Securities Act associated with these sales. The case was referred to the Guernsey County Prosecutor, and Hess was indicted on May 26, 1999 on three counts each of selling unregistered securities, selling securities without a license, making false representations, and one count of engaging in a pattern of corrupt activity.

Paul D. Morrison, who also was involved in selling Media Units in the Sterling Group, entered a no-contest plea as part of a plea agreement with prosecutors on January 11, 2000. Judge Ellwood found Morrison guilty of one count of selling securities without a license. Morrison had been indicted on May 26, 1999 on one count each of selling unregistered securities, selling securities without a license, making false representations and engaging in a pattern of corrupt activity. It is estimated that investors nationwide lost up to $60 million dollars relating to sales in the Sterling Group/Affordable Media.

Summary of Gramm-Leach-Bliley Act Now Available

On November 12, 1999, President Clinton signed the Gramm-Leach-Bliley Act into law. Popularly known as "financial services modernization", this legislation repeals certain provisions of the Glass-Steagall Act and otherwise facilitates affiliations between banks, securities firms and insurance companies.

A document entitles "The Gramm-Leach-Bliley Financial Services Modernization Act of 1999: Summary and Analysis for State Securities Regulators" is now available in PDF format on the Division's website, www.securities.state.oh.us.

Ohio Securities Bulletin Available in Cyberspace

Recent past issues of the Ohio Securities Bulletin, dating back to Issue 94:1, are available in PDF formaton the Ohio Division of Securities internet homepage, www.securities.state.oh.us.

In addition, Bulletin subscribers can now request a "virtual" edition of the Bulletin. If you wish to review electronic versions of the Bulletin, rather than traditional paper versions, send an e-mail message indicating that you wish to subscribe to the "Virtual Bulletin" to the Division's network manager, Cary Dachtyl, at cary.dachtyl@com.state.oh.us. The Division will send virtual subscribers an e-mail message when the "Virtual Bulletin" is posted (in PDF format) on the Division's homepage. The e-mail message will contain a "hot link" to the "Virtual Bulletin." "Virtual Bulletins" are identical to the paper Bulletins, and are posted on the Division's homepage on the day the paper version is returned from the printer.

Subscribers to the "Virtual Bulletin" will still remain on the "Bulletin Mailing List," but will no longer receive paper copies of the Bulletin.

Selected Registration, Exemption and Notice Filing Statistics, 1992 to 1999

The following table sets forth the number of registration and exemption filings received by the Division during the period January 1, 1992 to November 19, 1999:

Filing Type	No. of Filings
1707.02[1]	3,816
1707.03[2]	45,520
1707.05	0
1707.06[3]	1,610
1707.09[4]	2,604
1707.091[5]	19,772
Form NF[6]	9,799
1707.092[7]	1

[1] The registration exemption pursuant to 1707.02(B) became self-executing on October 11, 1994. Currently, all registration exemptions pursuant to 1707.02 are self-executing.

[2] The registration exemption pursuant to 1707.03(O) became self-executing on October 11, 1994. Currently, filings with the Division are required to perfect the registration exemptions pursuant to 1707.03(Q), (W), (X) and (Y).

[3] Includes filings pursuant to 1707.06(A)(1), (2), (3) and (4).

[4] Includes corrective filings pursuant to 1707.391.

[5] Includes corrective filings pursuant to 1707.391.

[6] Available beginning October 11, 1996.

[7] Available beginning March 18, 1999.

Capital Formation Statistics*

Filing Type	Fourth Quarter 1999	YTD 1999
Exemptions		
Form 3(Q)	71,908,753	720,022,093
Form 3(W)	60,976,106	140,746,110
Form 3(X)	43,274,589,981	89,505,814,323
Form 3(Y)	1,000,000	27,732,029
Registrations		
Form .06	4,494,900	861,437,969
Form .09	532,375,100	614,071,080
Form .091	4,046,239,559	9,351,477,090
Form .092(C)	Not Quantifiable	Not Quantifiable
Investment Companies		
Definite	98,466,000	383,746,500
Indefinite**	679,000,000	2,628,000,000
TOTAL	$48,769,050,399	$104,233,047,194

*Categories reflect amount of securities registered, offered or eligible to be sold in Ohio by issuers.
**Investment companies may seek to sell an indefinite amount of securities by submitting maximum fees. Based on the maximum filing fee of $1100, an indefinite filing represents the sale of a minimum of $1,000,000 worth of securities, with no maximum. For purposes of calculating an aggregate capital formation amount, each indefinite filing has been assigned a value of $1,000,000.

Because the Division's mission includes enhancing capital formation, the Division tabulates the aggregate dollar amount of securities to be sold in Ohio pursuant to filings made with the Division. As indicated in the notes to the table, the aggregate dollar amount includes a value of $1,000,000 for each "indefinite" investment company filing. However, the table does not reflect the value of securities sold pursuant to "self-executing exemptions" like the "exchange listed" exemption in R.C. 1707.02(E) and the "limited offering" exemption in R.C. 1707.03(O). Nonetheless, the Division believes that the statistics set out in the table are representative of the amount of capital formation taking place in Ohio.

Registration Statistics

The following table sets forth the number of registration and exemption filings received by the Division during the fourth quarter of 1999, compared to the number of filings received during the fourth quarter of 1998. Likewise, the table compares the year-to-date filings for 1998 and 1999.

Filings pursuant to RC 1707.03(X) and 1707.03(Y) became available March 18, 1999 with the effectiveness of Am. Sub. H.B. 695. The 3(X) filing is for Rule 506 offerings (the 3(Q) exemption is now exclusively for Section 4(2) claims of exemption.) The 3(Y) filing is an accredited investor exemption.

Filing Type	**4th Qtr '99**	**YTD '99**	**4th Qtr '98**	**YTD '98**
1707.03(Q)*	60	525	351	1502
1707.03(W)	13	41	14	55
1707.03(X)	362	1037	NA	NA
1707.03(Y)	01	12	NA	NA
1707.04	00	00	00	00
1707.041	01	07	01	01
1707.06	15	115	36	126
1707.09	25	64	26	72
1707.091	36	157	80	346
1707.092(A)**	1166	4446	1036	4202
1707.092(C)***	01	02	NA	NA
1707.39	01	06	06	11
1707.391	26	127	25	114
Total	**1707**	**6539****	**1575**	**6429**

*Statistics for the number of 3(Q) filings submitted prior to March 18, 1999 contain those pursuant to both Rule 506 and Section 4(2) of the Securities Act of 1933, whereas filings after March 18, 1999 will be represented by two different sections:

RC 1707.03(Q) for Section 4(2) filings, and RC 1707.03(X) for Rule 506 offerings.

**Investment company notice filings.

***Offerings of covered securities not otherwise covered by another statutory provision in the Ohio Securities Act.

****Total filings will have decreased after March 18, 1999 as a result of Rule 506 offerors not having to file amendments to the Form D filing in Ohio.

Licensing Statistics

The table below sets out the number of Salespersons and Dealers licensed by the Division at the end of the first, second and third quarters of 1999 compared to the corresponding quarters of 1998, as well as the fourth quarter of 1999 compared to the corresponding quarter of 1998.

	End of Q4 1999	End of Q4 1998	End of Q3 1999	End of Q3 1998	End of Q2 1999	End of Q2 1998	End of Q1 1999	End of Q1 1998
Number of Salespersons Licensed:	92,788	89,152	97,483	88,796	92,226	85,526	88,727	81,210
Number of Dealers Licensed:	2,347	2,137	2,332	2,151	2,287	2,106	2,223	2,082

OASIS System Now On-line

The Ohio Automated Securities Information Submission system (OASIS) is now available on the Division's web site located at http://www.securities.state.oh.us/ for filers of investment company notice filings. OASIS offers a secure, completely paperless method of submitting a notice filing to the Division.

- Use of OASIS is voluntary and is provided at no cost to the filer.
- OASIS is available for initial filings, renewal filings, UIT filings, name changes, and increases in the aggregate amount of securities eligible to be sold in Ohio.
- Filers must pay applicable filing fees via ACH Credit Transfers.
- The filer's "signature" on the electronic Form NF also represents an irrevocable consent to service of process on the Ohio Secretary of State.

The Division is pleased to be able to provide OASIS for your filing convenience. Please contact Debbie Dye Joyce, Securities Registration Supervisor, at 614-644-7435 or e-mail at debbie.dyejoyce@com.state.oh.us with questions or for further information.

OHIO SECURITIES BULLETIN

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

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