Ohio Securities Bulletin

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The SEC's Rulemaking under Section 201(a) of the JOBS Act

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Division of Securities

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Ohio Securities Bulletin

Issue 2012:2

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In Regulation D, the Securities and Exchange Commission (the "SEC") established a non-exclusive safe harbor rule to help issuers ensure that their offerings qualified for the "private offering" exemption from registration under Section 4(2) of the Securities Act of 1933 (the "Securities Act"). That Regulation D safe harbor, Rule 506, allowed an issuer to raise an unlimited amount of capital from an unlimited number of accredited investors and no more than 35 sophisticated but non-accredited investors. An issuer remained within the Rule 506 safe harbor so long as it did not engage in general advertising and general solicitation, had a preexisting relationship with its potential investors, and ensured that investors had access to substantially the same information that investors would receive in a registered public offering

To illustrate how substantial Rule 506 has been to the capital markets, it is estimated that the total amount of capital raised in Rule 506 offerings in 2010 and 2011 was $903 billion and $895 billion, respectively, compared against $1.07 trillion and $984 billion raised in registered offerings in the same respective years.[i]

At an open meeting on August 29, 2012, the commissioners of the SEC voted four to one in favor of proposed rulemaking required by Section 201(a) of the JOBS Act ("Section 201(a)"). Section 201(a) mandated that the SEC amend Rule 506 of Regulation D to permit the use of widespread advertising and general solicitation in offerings made in reliance on Rule 506, provided that all of the purchasers in the offering are accredited investors.[ii] Additionally, Section 201(a) indicated that the SEC's rules must require the issuer to take reasonable steps to verify that purchasers of the securities are accredited investors using methods determined by the SEC. The JOBS Act directed the SEC to complete this rulemaking no later than July 4, 2012, 90 days after the signing of the JOBS Act.

As foreshadowed by the process leading up to the JOBS Act itself, the path to the SEC's proposed rule was interesting and contentious. Traditionally, the SEC's rulemaking has three steps – a rule proposal, a period for interested parties to provide comments to the proposed rule, and the adoption of final rules which may or may not incorporate the suggestions or criticisms raised

It's not too late to register for the 2012 Ohio Securities Conference
October 12, 2012

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Comments from Commissioner Andrea Seidt

I am looking forward to seeing many of you at the Ohio Securities Conference on Friday, October 12! This year's conference features nationally recognized speakers on emerging issues in securities regulation – as well as the Division's regulatory update. We are excited to bring the Conference to a new location this year – a state-of-the-art facility with larger space to more comfortably accommodate our guests. The Conference will be held at the Ohio Fire Academy in Reynoldsburg, which offers free parking – just 15 miles east of downtown Columbus. If you have not signed up for the Conference yet, there is still time – and feel free to invite your colleagues to join us.

I would like thank everyone who answered my call in the last Bulletin for stakeholder feedback regarding the Investment Adviser Oversight Act of 2012. The letters, e-mails, and calls all demonstrated a clear opposition to the bill by our state-registered investment adviser community. A chief concern about the bill was the additional regulatory costs it would impose on these small Ohio businesses. Another concern was the likelihood that an organization currently comprised of these advisers' competitors would take over after the bill passed and foist upon these advisers a new regulatory regime and philosophy that stands at odds with their core value system.

The House Financial Services Committee held a hearing on June 6th to hear all views on the bill and the voice of small state-registered investment advisers resonated throughout the chamber. The bill was tabled in July when Committee Chair Spencer Bachus concluded that consensus could not be reached on this controversial subject. A competing bill was introduced by Committee Member Maxine Waters who advances an alternative method of improving the frequency of SEC investment adviser examinations, namely, allowing the SEC to charge their advisers a user fee. State-registered investment advisers are expressly excluded from the Waters' bill and would not face a user fee here in Ohio. Chairman Bachus responded to the Waters' bill with an Op-Ed in the August 8th edition of the Wall Street Journal indicating he has not lost interest in his bill and will continue his pursuit of a self-regulatory organization (SRO) for investment advisers. The Division will be sure to update you in future Bulletins on any further developments on both of these bills if and when they occur.

In addition to the investment adviser SRO issue, the Division has also been following federal proposals emanating from the Jumpstart Our Business Startups (JOBS) Act since it passed into law earlier this Spring. The first two issues that have arisen involve SEC rulemaking on new general solicitation and advertising provisions for Regulation D filings set forth in Title II of the JOBS Act and the entirely new crowdfunding framework set forth in Title III. I would like to thank our Registration Compliance Counsel Frank Esposito and Seth Hertlein for their contributions to the article in this edition of the Bulletin explaining the Division's views on general solicitation rulemaking in the Regulation D context. I fully expect crowdfunding to be featured in the next edition of the Bulletin. Crowdfunding will also be a hot topic at the Ohio Securities Conference when Division staff and industry experts participate in an afternoon panel entitled, "JOBS Act Compliance: Crowdfunding and Rule 506 Reform."

I would like to close with some reflections on the 2012 North American Securities Administrators Association's Fall Conference that Director David Goodman and I attended last month entitled, "Through the Looking Glass: Providing Purposeful Regulation." It is clear to me as a state securities regulator who has spent a significant amount of time working with my peers across the country that it is critical for regulators to reach out to the regulated community and the public to make sure the laws and regulations we enforce are purposeful and fair. The Division currently plans on proposing some regulatory reforms in the coming year, some statutory and some through rulemaking, and I would very much like to include our Bulletin subscribers in the dialogue. If you are interested in learning more about potential reforms, please e-mail me your contact information along with a brief description of your top concerns or interests in Ohio securities regulation. My e-mail address is Andrea.Seidt@com.ohio.gov. I look forward to hearing your thoughts.

Andrea Seidt
Securities Commissioner

Message from Commerce Director David Goodman:

Dear Securities Professionals,

Technology. There's no escaping it. Used properly, it can make your work easier and the Division of Securities and the Department of Commerce better able to service you.

In the last year, we have implemented a system for e-filing mutual fund notices. Our goal by early next year is to provide electronic filing options for all types of registrations and exemptions. If we can gather the same information and reduce the time it takes to register, that's more time you have to concentrate on your core business.

Commissioner Seidt and I recently joined national securities regulators in discussions about Crowdfunding. Crowdfunding is a creative and innovative approach to bringing people together with simple online technology; pooling their resources to become investors in new ideas. That is exciting: creating capital to launch big ideas. Our excitement is tempered by the need to ensure unscrupulous people do not take advantage of unsophisticated investors and damage your profession. We encourage you to share your ideas for how we accomplish this by joining us at this year's Securities Conference. Please consider attending, particularly if you have not attended in the past. This is a service we make available so that you can obtain the latest information in Ohio Securities regulation and an opportunity for the regulators to hear from you.

As always, if I can be of any assistance to you, do not hesitate to let me know. David.goodman@com.ohio.gov.

David Goodman
Director, Ohio Department of Commerce

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If you are in need of a past Bulletin issue, you can find past issues on the Division's website at www.com.ohio.gov/secu/bulletins.aspx.

From this page, you can use the Abstract Search function to search by title, author, issue or abstract.

We currently have links on the website for issues dating 1994 to 2012. For issues prior to 1994, please contact Karen Bowman at 614-995-5791 or via e-mail karen.bowman@com.state.oh.us for a hard copy of that issue.

The Ohio Securities Bulletin is a quarterly publication of the Ohio Department of Commerce, Division of Securities.

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 Karen Bowman at karen.bowman@com.state.oh.us for editorial guidelines and publication deadlines. The Division reserves the right to edit articles submitted for publication.

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http://www.com.ohio.gov/secu

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2012 Ohio Securities Conference

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Hot Topics in Securities Litigation
(Discussion of Facebook IPO, Mergers & Acquisitions and the Morrison jurisdictional case)

JOBS Act: A Look into the Crystal Ball
(A lively debate into how Crowdfunding and Reg D rules should be written)

Division of Securities Regulatory Update
(Useful compliance tips for you and your clients)

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http://www.com.ohio.gov/secu/docs/secu_2012SecuritiesConference.pdf

JOBS Act continued...

during the comment process. In this case, prior to the adoption of proposed rules, the SEC solicited views from all interested parties regarding the SEC's JOBS Act rulemaking. This approach first appeared prior to the SEC's rulemaking under the Dodd-Frank Act of 2010 ("Dodd-Frank"), and may become a regular practice in connection with SEC rulemaking with heightened public awareness regarding potentially sensitive matters. During this period, the SEC received 68 comment letters from industry professionals, state securities regulators, issuers, and investors.

Commissioner Andrea Seidt submitted the Ohio Division of Securities' (the "Division") views regarding Section 201(a) rulemaking to the SEC on July 3, 2012. The Division carefully considered the impact the JOBS Act and its required rulemaking would have on both investors and issuers, and made recommendations to the SEC intended to fairly balance the important interests of all parties.

First, the letter identified some of the far-reaching effects and unintended consequences that the seemingly minor changes to Rule 506 could have for issuers and investors. The Division then suggested that the SEC develop content standards for use in Rule 506 general solicitation and general advertising consistent with existing SEC regulations. It recommended that all issuers be required to provide offering circulars to potential investors, and recommended related revisions to the Form D. The Division further requested that the SEC establish clear rules and guidance to assist issuers in complying with Section 201(a)'s requirement that the issuer take affirmative steps to verify the accredited investor status of purchasers. The full text of the Division's letter to the SEC is available at: http://www.sec.gov/comments/jobs-title-ii/jobstitleii-38.pdf. The Division believes that these recommendations ease the regulatory

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burden on business while ensuring the protection of the investing public.

As the SEC's July 4th deadline approached and no proposed rules were forthcoming, it became clear the SEC would not meet its deadline. In testimony before Congress, SEC Commissioner Mary Schapiro argued that the 90-day rulemaking period was not "a realistic timeframe for the drafting of the new rule, the preparation of an accompanying economic analysis, the proper review by the [SEC], and an opportunity for public input." Substantial economic analysis has become particularly important to SEC rulemaking in the aftermath of *Business Roundtable and Chamber of Commerce of the United States of America v. Securities and Exchange Commission* (D.C. Cir. July 22, 2011), which overturned the SEC's proxy access rule under Dodd-Frank due to insufficient cost-benefit analysis by the SEC.

Talk within the industry suggested that the SEC would adopt an "interim final rule", a temporary but binding rule that would permit the use of general solicitation and general advertising under Rule 506 offerings. The public would be afforded a comment period prior to the adoption of a final rule, and the SEC would be given the opportunity to revise the rule based on both public comment and its observations of the interim final rule's effectiveness in practice. The SEC scheduled an open meeting for August 22, 2012, during which the SEC was widely expected to adopt the interim final rule. After several persuasive letters from the North American Securities Administrators' Association [iii] and various consumer groups[iv], the SEC changed course on its interim final rule, and instead clarified that it would be issuing a proposed rule in line with traditional SEC rulemaking procedure, and would table the portion of the August 22 open meeting related to Section 201(a) until August 29.

At the August 29 meeting, the SEC narrowly construed its rulemaking mandate under Section 201(a), taking only those steps it viewed as necessary to implement general advertising and general solicitation under Rule 506. As an initial matter, the SEC's proposal preserves the traditional Rule 506 exemption (sales to an unlimited number of accredited investors and no more than 35 sophisticated but non-accredited investors, provided there is no general solicitation or general advertising) under Rule 506(b)(2). The SEC's proposal permits issuers and their designees to advertise in connection with a Rule 506 offering, under Rule 506(c), so long as the issuer takes "reasonable steps to verify" that the purchasers of the securities are all accredited investors. The SEC elected not to identify specific measures that an issuer may take to verify a purchaser's accredited investor status or provide a bright line test for making this assessment. Instead, the SEC explained that the reasonableness of an issuer's verification efforts would be objectively determined on a case-by-case basis based on the particular facts and circumstances of each transaction. Facts and circumstances relevant to the analysis might include the nature of the purchaser, the information the issuer has about the purchaser, and the nature and terms of the offering (focusing significant attention on the minimum offering amount). The proposal would also amend Form D to require issuers to identify that they will use general advertising or general solicitation in connection with a Rule 506 offering. Otherwise, the SEC's proposal expresses the SEC's view that a "wait and see" approach is necessary to determine if further rulemaking is required to protect investors. The full text of the SEC's proposed rule can be found at: http://www.sec.gov/rules/proposed/2012/33-9354.pdf.

Until final rules are published by the SEC, issuers may not engage in general advertising or general solicitation in connection with a Rule 506 offering.

To avoid any confusion, the Division reminds issuers and counsel that the SEC's rule proposal does not reflect final, effective rule making. Until final rules are published by the SEC, issuers may not engage in general advertising or general solicitation in connection with a Rule 506 offering. While it is possible that the SEC's proposed rules will be adopted without significant revision, several dissenting voices arose during the SEC's open meeting on August 29, 2012, including a strongly worded dissent by SEC Commissioner Luis A. Aguilar (available at: http://www.cleveland.com/metro/index.ssf/2012/09/investors_lost_200_million_in_1.html). Commissioner Aguilar was the single "no" vote against the SEC's rule proposal, pointing out that the proposed rules did not include any of the enhanced protections suggested by commenters to address significantly increased investor vulnerability that could result from lifting the long-standing ban on general advertising and general solicitation. Several commentators to the proposed rule have expressed concern that hedge funds, in particular, should continue to be prevented from using general solicitation or general advertising.

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The comment period to the SEC's rule proposal opened on September 5, 2012 and continues for 30 days until October 5, 2012. The Division continues to monitor developments regarding Section 201(a) and is preparing its response to the SEC's rule proposal. The Division's comments will be available on the SEC website at http://www.sec.gov/comments/s7-07-12/s70712.shtml

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i Securities and Exchange Commission Proposed Rule, 17 CFR Parts 230 and 239.
ii Section 201(a) also mandates that the SEC amend Rule 144A of the Securities Act to permit general advertising and general solicitation in connection with sales made exclusively to qualified institutional buyers. The changes to Rule 144A are outside the scope of this article, but are substantially similar to the changes to Rule 506.
iii http://www.sec.gov/comments/jobs-title-ii/jobstitleii-58.pdf.
iv http://www.sec.gov/comments/jobs-title-ii/jobstitleii-59.pdf.

Navigating the Switch: Ohio's Mid-Sized Investment Adviser Firms After the Dodd-Frank Act

More than 110 mid-sized investment adviser firms made a smooth and timely transition from U.S. Securities and Exchange Commission (SEC) to state regulation this summer as switching advisers became fully registered with their home state and withdrew from SEC regulation.

The Division worked diligently to assist the investment adviser firms impacted by the Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"). The Dodd-Frank Act and the rules promulgated thereunder required firms with less than $100 million in assets under management to "switch" from SEC regulation to state regulation.

The Division sent regular mailings to remind advisers of the upcoming deadlines and responded to numerous telephone calls and e-mail inquiries to help switching firms navigate the steps to licensure as efficiently as possible. In 2011, the Division hosted free in-person seminars to discuss the licensing process and to provide detailed guidance on what the firms should expect in terms of on-site examination and compliance oversight in Ohio.

In addition, the Division continues to assist these switching firms by facilitating state registration fee refunds in accordance with R.C. 1707.17(D) so that these firms are not paying the Division a Notice Filing fee and then a state registration fee for the same year.

If you or your "switching" firm clients have any questions about state investment adviser licensure, please contact Anne Followell, Licensing Chief, at anne.followell@com.ohio.gov, 614-728-2840, or Richard Pautsch, Compliance Specialist, at richard.pautsch@com.ohio.gov, 614-752-9448.

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While we will still be reporting the quarterly updates in our Bulletin, this is an opportunity to receive the information in a more timely fashion.

In Curia: Recent Division Cases before the Ohio Supreme Court

This past year, the Division of Securities found itself before the Ohio Supreme Court on two separate matters, each involving important aspects of the Ohio Securities Act. The first case involved the Division's injunctive power to freeze the proceeds of securities fraud, and the second involved the licensure of commission-earning salespersons and the elements of fraud in the registration or sale of securities. Although the cases had very different outcomes – one resulting in a favorable opinion for the Division and the other resulting in the Court's refusal to accept jurisdiction – both cases undeniably impact the Division's ability to regulate the industry and protect Ohio investors.

Goodman v. Mayhew, Admin'r of Estate of Dillabaugh, Case No. 2010-2159

The Goodman appeal stems from the Division's civil action against insurance salesman and former securities salesperson Roy Dillabaugh who sold promissory notes in a company called "The Dillabaugh Group." Dillabaugh told investors that the notes were insured and that their funds would be used for short-term, high interest business loans. Upon Dillabaugh's death in 2007, it was discovered that the entire venture was a Ponzi scheme.

As in other schemes, Dillabaugh used investor funds to pay his own personal expenses, including premiums on multi-million dollar life insurance policies that named his widow as the primary beneficiary. Unable to face his guilt in life, Dillabaugh left his widow a confession letter, to be read upon his death, instructing her to repay the investors with the insurance proceeds. Notwithstanding Dillabaugh's clear instruction and her knowledge that the policies were paid with stolen investor funds, the widow sought to retain the proceeds for her own use against the claims of the Dillabaugh Group investors.

The Division filed a complaint in the Montgomery County Court of Common Pleas against every recipient of Roy Dillabaugh's life insurance proceeds. In the complaint, the Division sought an injunction and an asset freeze pursuant to R.C. 1707.26, an order of restitution for the Dillabaugh Group investors pursuant to R.C. 1707.261, and the appointment of a receiver pursuant to R.C. 1707.27. *See Zurz v. Dillabaugh Group, et al,* 2008 CV 5911. In December 2009, the Court issued its Order granting restitution on behalf of the Dillabaugh Group investors and appointing a receiver.

Prior to the final order, the Common Pleas Court issued an opinion on a Motion for Summary Judgment holding that R.C. 1707.26 gives the Division the power to freeze the insurance proceeds, even when held by third parties not accused of violating the Securities Act. Due to an interplay with the insurance shield statute of R.C. 1311.10, however, the court held in its final order that the investors would only be permitted to recover the premiums from those proceeds. The Division appealed the part of the order applying the insurance shield statute, and the beneficiaries cross-appealed on the issue of the Division's injunctive powers against those who had not violated the Securities Act.

A panel for the Second District Court of Appeals agreed that the lower court erred in applying the insurance shield statute to bar the receiver from attaching the bulk of the insurance proceeds. *Zurz v. Mayhew, Admin'r of Estate of Dillabaugh* (2d Dist.), 2010-Ohio-5273. The panel also agreed with the beneficiaries' narrow construction of R.C. 1707.26, however, and held that the Division's injunctive authority may only be levied against those who violate the Ohio Securities Act. In so holding, the panel rejected the Division's reliance on the last clause in the statute, which allows the Division to seek "such other equitable relief as the facts warrant." In the panel's view, that final clause in R.C. 1707.26 only broadens the forms of relief that are available against violators, it did not expand the pool of potential defendants to beneficiaries of the unlawful conduct.

Due to the limitations the appellate decision placed on the Division's authority under R.C. 1707.26, the Division sought reversal of the decision in its appeal to the Ohio Supreme Court. In its jurisdictional briefing, the Division persuaded the Court that the case was a matter of great public interest as the Second District's limited interpretation of R.C. 1707.26 would permit securities fraudsters to hide their ill-gotten funds simply by transferring them to "innocent" third parties.

In its briefing and at oral argument, the Division advanced two arguments for reversing the appellate decision. The first argument was jurisdictional: the insurance beneficiaries had appealed only the final order in the case, which on its own terms did not impose any injunctive relief on them. No other basis for restraining the funds, whether earlier preliminary injunctions or the parties' informal agreement, was actually laid before the appellate court. The second argument was substantive: the appellate court's limited reading of R.C. 1707.26 would drastically undermine the Division's power to regulate the industry and would permit criminals to dispose of their assets simply by placing them in another's hands before a receiver could be appointed. In April 2012, the Supreme Court issued its decision in favor of the Division. The Court agreed with the Division's reasoning

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on the jurisdictional elements of the appeal, finding that the injunction was not a part of the final appealed order and, thus, was beyond the reach of the appellate court. The Court vacated the appellate decision, thereby leaving intact the trial court ruling that affirms the Division's broad injunctive powers under R.C. 1707.26 as to third parties who retain the proceeds or otherwise benefit from securities fraud.

State v. Willan, Case No. 2012-0216

David Willan was convicted by the Summit County Court of Common Pleas in December 2008 for his role in running a multi-million dollar mortgage and securities fraud. Willan's company, Evergreen Homes, LLC, was a real estate "flipping" company that also arranged for non-conventional financing for its purchasers. Such financing included securing first and second mortgages. Evergreen Homes' affiliate, Evergreen Investment Corporation, bought and held those second mortgages and raised funds for the real estate business through the sale of debt securities. Willan used an unlicensed salesperson, Daniel Mohler, to sell those securities to investors, paying him hundreds of thousands of dollars in commissions.

Willan was convicted of numerous violations of the Ohio Securities Act, including: making commission-based sales without a securities license, in violation of R.C. 1707.44(A)(1); making false statements (concerning the payment of commissions) for the purpose of registering securities, in violation of R.C. 1707.44(B)(1); and making false statements (concerning the payment of commissions) for the purpose of selling securities, in violation of R.C. 1707.44(G). Additionally, Willan was convicted of violating the Ohio Small Loan Act, R.C. 1321.02, for making usurious small loans without a proper license. He was sentenced to 16 years in prison.

Willan appealed his conviction, and in a divided opinion, the Ninth District Court of Appeals reversed the conviction on all but six counts. *State v. Willan* 2011-Ohio-6603. Regarding the numerous counts of unlicensed sales of securities, the Court of Appeals held that Willan was not a "dealer" under the Act, because Mohler received commissions for selling the securities, not Willan. The Court drew this conclusion notwithstanding the fact that it was Willan himself who appointed Mohler as the securities salesman and directed the payment of the commissions following every sale. For both categories of securities fraud claims — fraud for registration purposes under R.C. 1707.44(B)(1) and fraud in the sale under R.C. 1707.44(G) — the Ninth District held that the State must prove reliance and specific intent to defraud. According to the Appellate Court, the State had to prove that: (1) the Division of Securities relied in fact on the misrepresentations appearing in the materials submitted as part of the registration filing; (2) that investors relied on the false statements in buying the securities; and (3) that Willan specifically intended for the misstatements to induce sales or otherwise intended to defraud purchasers.

Because the Court of Appeals' decision so drastically altered long-standing principals of state securities laws, the Division worked with the Ohio Attorney General's Solicitor General, the Summit County Prosecutor's Office, and the North American Securities Administrators Association (NASAA) to appeal the Ninth District's decision to the Ohio Supreme Court. The Division, through the Solicitor General, and NASAA submitted *amicus curiae* briefs in support of Summit County Special Prosecutor Brad Tamarro's Memorandum in Support of Jurisdiction. The Division argued that the appellate decision abolished the licensing requirements for commission-based sales. The Division stated that it was irrelevant that the commissions went to Willan's employee, Mohler, rather than to Willan directly, as the definition of dealer covers both direct and indirect securities sales. The Division also argued that the Ohio Securities Act imposes criminal fraud liability on anyone who makes false statements for purposes of registering or selling securities, regardless of reliance or specific intent. To apply civil elements to criminal statutes "diminish[es] the distinct and vital protections afforded by these criminal statutes."

Despite the best efforts of the Division, NASAA, the Solicitor General and the Prosecutor's Office, the Supreme Court declined jurisdiction in the matter. Although the Supreme Court eventually reconsidered its denial and accepted jurisdiction of the Prosecutor's Motion, it did so on the sole issue of the sentencing mandate for pattern of corrupt activity charges. The Securities Act and Small Loan Act issues remain unheard. Notwithstanding the challenges it now faces in the Ninth District (which includes Lorain, Medina, Summit and Wayne counties), the Division continues in its efforts to monitor and shape the Ohio Securities Act, so that it can continue its mission of capital formation and investor protection.

Federal Reserve Association of Fite & Co. Holdings

On April 12, 2012, the Division issued Order No. 12-011, which immediately suspended the Form D Registration filing of **Federal Reserve Association of Fite & Co. Holdings** ("Fite"), File No. 497308, and suspended the right of any issuer or dealer to buy, sell, or deal in any securities of that offering or file number. The suspension was made pursuant to R.C. 1707.13, based on numerous deficiencies in Fite's filing.

In accordance with R.C. 1707.13, the Division scheduled a hearing on the confirmation or revocation of the suspension for April 20, 2012. The suspension hearing was held as scheduled with Commissioner Andrea Seidt presiding. Fite did not appear, but submitted written documentation in its defense.

On May 17, 2012, the Division issued a Final Order No. 12-016, Confirming the Suspension of the Offering of Fite and Confirming the Suspension of the Right of any Issuer or Dealer to Buy, Sell or Deal in Securities Pursuant to Offering and File No. 497308. The Division found that Fite had made numerous material misrepresentations in its Form D, including a gross misrepresentation that the Division would guarantee or otherwise participate in the financing of Fite's alleged $10 billion offering. Fite included with its filing a photocopy of a $10 million check drawn on a false account with false addresses. Further investigation showed that the Franklin County Court of Common Pleas declared Fite to be a vexatious litigator for filing false financial records and amendments with the Ohio Secretary of State.

Based on these false and deceptive acts, the Division found that Fite was engaging in or was about to engage in fraudulent acts, and that Fite was attempting to dispose of securities that would be sold on grossly unfair terms or would be likely to operate as a fraud upon the public. Accordingly, the Division confirmed the suspension of the offering.

Terrence J. Monahan

On May 23, 2012, the Division issued a Cease and Desist Order against **Terrence J. Monahan**, Division Order 12-017, based on his unlicensed sale of securities to Ohio residents. After receiving Notice of the Opportunity for Hearing, Monahan requested a hearing and submitted written evidence in his defense. The Administrative Hearing was held on April 20, 2012, and in his Report and Recommendation Hearing Officer Frank Cellura found that Monahan received significant transactional-based compensation for the sale of ABN and HBSC reversible convertible notes to Ohio investors, despite the fact he did not hold an Ohio securities license. The Division affirmed the Report and Recommendation, and found that Monahan violated R.C. 1707.44(A). Monahan was ordered to Cease and Desist from any future violations of the Ohio Securities Act.

Apex Realty Enterprises, LLC, Rajesh R. Lahoti, Raymond M. Brown, Michael G. Council, and Wilbur N. Ischie

On May 31, 2012, the Division issued a Consent Cease and Desist Order, Division Order 12-018, against **Apex Realty Enterprises, LLC** ("Apex") and its principals, **Rajesh R. Lahoti, Raymond M. Brown, Michael G. Council,** and **Wilbur N. Ischie**. Apex sold investment units in a condominium development to several Ohio investors. The investment units were never registered, and the Apex principals used investor funds to repay their own loans to the business, without disclosing such to the investors. Furthermore, the Private Placement Memorandum contained misrepresentations about the number of units that were pre-sold. As a result, the Division found that Apex and its principals violated R.C. 1707.44(B)(4), R.C. 1707.44(C), and R.C. 1707.44(G) and ordered the Respondents to Cease and Desist from any future violations.

Thomas Colby Cantrell

On June 4, 2012, the Division entered into a Suspension Order and Consent Agreement against **Thomas Colby Cantrell,** Division Order No. 12-019, who was employed as an investment adviser representative with Advanced Planning Capital Corporation in Granville, Ohio. Mr. Cantrell had a history of disciplinary issues with FINRA, including several arbitration complaints for unsuitability which resulted in awards against him, as well as a 12-month FINRA suspension in 2011 for selling unauthorized securities.

Mr. Cantrell consented to a finding by the Division that he was not of good business repute. The Order suspended Mr. Cantrell from the securities investment business for 30 days.

David B. Zuppan

On June 14, 2012, **David B. Zuppan**, of Warren, Ohio, was indicted in Trumbull County Common Pleas Court on three counts relating to securities fraud. He pled not guilty to the charges at his arraignment. A pretrial hearing is set for October 24, 2012, in Trumbull County Common Pleas Court. According to the indictment, the alleged crimes were tied to a $50,000 investment.

The Division of Securities issued a Cease and Desist Order, No. 11-

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039, to Zuppan on September 29, 2011, finding that Zuppan received funds from investors in exchange for investments in Zuppan's companies, Columbia Polymers, Inc. and Hydrolock Basements, Inc., which market a system to prevent water intrusion into basements.

The Division found that Zuppan sold unregistered securities and committed securities fraud by not disclosing to investors that he was selling unregistered securities and that he would convert their money for his own personal living expenses. The Division found that he used investor funds to pay his personal income tax to the Internal Revenue Service, his daughter's college tuition, and gifts for his wife and niece.

Fair Finance Company

On June 20, 2012, an Indiana federal jury found **Timothy Durham** guilty of all 12 counts of securities fraud, wire fraud, and conspiracy stemming from a massive Ponzi scheme involving his Ohio-based company, Fair Finance. Durham's co-conspirators, **James Cochran** and **Rick Snow**, were found guilty of eight charges of securities fraud, wire fraud, and conspiracy. The convictions followed a one-week trial in the Southern District of Indiana, where jurors found that the defendants caused the demise of the long-standing company by diverting millions of dollars in related-party loans to Durham, Cochran, and their failing businesses. The Division denied the latest registration filing offered by Fair Finance. Durham, Cochran, and Snow remain jailed until their scheduled sentencing date of November 30, 2012.

Kevin M. Brown and Invision Investments of Columbus, LLC, et al.

On June 22, 2012, the Division entered into a Consent Cease and Desist Order with Respondents **Kevin M. Brown** and his companies, **Invision Investments of Columbus, LLC, Invision Investments of St. Louis, LLC**, and **Invision Holdings LLC**. The Consent Order followed the Division's June 6, 2012 Notice of Opportunity for Hearing and a Notice of Intent to Issue a Cease and Desist Order.

In the Consent Order, Respondents admitted that they had sold shares of Ubiquity Broadcasting Company ("UBC") to several Ohio investors, despite the fact they were not authorized to sell such stock. The shares of UBC were not registered in Ohio and were not subject to any registration exemption. Respondents consented to a finding that Mr. Brown and his companies engaged in the unlicensed sale of unregistered securities, in violation of R.C. 1707.44(A) and 1707.44(C). The Consent Order required Respondents to cease and desist from any further violations of the Ohio Securities Act.

Joanne Schneider

On August 20, 2012, the first day of her criminal trial in the Cuyahoga County Court of Common Pleas, **Joanne Schneider** pleaded guilty to 11 felony counts: five counts of securities fraud, two counts of selling unregistered securities, one count making material misrepresentations in the sale of securities, one count of engaging in a pattern of corrupt activity, one count of theft from the elderly, and one count of money laundering. Schneider was sentenced by Judge Shirley Saffold to nine years in prison, with credit for time served. The charges were initiated from a referral by the Division.

Schneider conducted a massive real estate Ponzi scheme over the course of decades. Schneider sold $60 million worth of promissory notes to investors, which were used to fund her real estate development projects, including the largest undertaking, the multi-million dollar Cornerstone Project. The project was to be a Main Street-style entertainment complex on W. 130th Street in Parma Heights, which she never developed.

Schneider's scheme unraveled when the Ohio Division of Securities received a complaint from a family member of an investor. The complainant was suspicious that his mother was promised 16-20% interest on her investment. He requested that the Division investigate his mother's investment. In May 2004, the Division issued a cease and desist order against Joanne Schneider for selling unregistered promissory notes. After continuing to sell promissory notes in violation of the cease and desist order, the State was successful in obtaining a preliminary injunction against Schneider. A few months later, she was found to have violated the preliminary injunction by continuing to sell securities without the permission of the court and a court-appointed Special Master. A receiver was then appointed to take possession of the joint assets of Joanne and her husband Alan Schneider, and the individual assets of Joanne Schneider. The receiver has since recovered $10.5 million for the investors.