

OHIO SECURITIES BULLETIN

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ANOTHER WORD ABOUT DRIPS



**Department
of Commerce**

Division of Securities

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Ohio Securities Bulletin

**Issue 2014: 1
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OHIO

DEPARTMENT OF
COMMERCE

DIVISION OF
SECURITIES

In the 2013:2 edition of the Ohio Securities Bulletin, the Division published an article entitled "Suitability Requirements in Direct Participation Programs." One section of that article under the heading "A Word About DRIPs" generated comments from Direct Participation Program ("DPP") sponsors and broker-dealers. The Division believes that providing additional clarification regarding the article and suitability obligations related to DPP Distribution Reinvestment Plans ("DRIPs") may be beneficial for DPP market participants.

The 2013:2 Bulletin article stated that "each distribution reinvestment triggers a broker-dealer's obligation to determine that the purchase of additional shares is suitable and appropriate for the participating shareholder." This statement is in reference to Ohio Administrative Code section 1301:6-3-19(A)(5) which states, "No dealer or salesperson shall . . . sell, purchase, or recommend the sale or purchase of any security without reasonable grounds to believe that the transaction or recommendation is suitable for the customer, . . ." The Division would like to offer the following clarification: OAC 1301:6-3-19(A)(5) applies only to dealers and salespersons. If a dealer or salesperson does not recommend participation in a DRIP, or recommend the sale or purchase of additional shares through a DRIP, then OAC 1301:6-3-19(A)(5) would not apply, and no suitability or concentration analysis would be required. However, where a dealer or salesperson makes an affirmative recommendation to a customer regarding his or her participation in a DRIP, or recommends the sale or purchase of additional shares through a DRIP, then the Division believes that OAC 1301:6-3-19(A)(5) and FINRA Rule 2111 would apply.

The 2013:2 Bulletin article also stated that "securities professionals should be careful to avoid inadvertent unsuitable sales to DRIP participants who are already at or near 10 percent concentration. Additionally, it would be unsuitable for a customer who has purchased up to his, her, or its Maximum Investible Amount in non-traded DPP securities to enroll in a DRIP." Upon further consideration, the Division will not apply the 10 percent concentration limit to purchases or sales made pursuant to a DRIP. As a result, the Division wishes to clarify that a customer's initial or continued participation in a DRIP beyond the point at which the customer's concentration in that security exceeds 10 percent of his, her, or its liquid net worth will not be deemed a per se suitability violation, provided, however, that any DRIP recommendation in excess of 10 percent concentration otherwise complies with OAC 1301:6-3-19(A)(5) and FINRA Rule 2111, if applicable. The Division reiterates that a customer's degree of concentration in any security is an important element of suitability that should be carefully considered any time that suitability must be determined.

**SAVE THE DATE!
2014 SECURITIES CONFERENCE
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Comments from Commissioner Andrea Seidt

A warm summer greeting from me and all of the staff at the Ohio Division of Securities (“Division”). This issue of the Ohio Securities Bulletin (“OSB”) is an effort to catch subscribers up on all of the important happenings that have impacted Ohio securities regulation in the past year. We have a lengthy update of Division enforcement actions that continue to show a strong trend of criminal misconduct by unlicensed promoters selling unregistered deals here in Ohio and a few articles highlighting issues related to those trends. Namely, state and federal laws governing the use of financial projections in offering materials or investor pitches and a growth in high-yield investment schemes. We also have an article that revises the Division’s position on application of concentration limits to dividend reinvestment programs (“DRIPs”) in direct participation programs (“DPPs”). I encourage readers to share their thoughts on these issues with the Division and to submit any timely articles of interest for possible publication in the next quarterly installment of OSB.



As many of you know, I have taken on the responsibility this year of serving as the President of the North American Securities Administrators Association (“NASAA”) in addition to the work I perform for all of you as Ohio’s Securities Commissioner. As NASAA President, I have had the opportunity to talk with my peer regulators and industry stakeholders at a number of events across the country, all with a common goal of improving state and provincial securities regulation here in Ohio and across the United States, Canada and Mexico. For subscribers who are also members of, or associated with, the Securities Industry and Financial Markets Association (SIFMA), Financial Services Institute (FSI), the Investment Programs Association (IPA), Consumer Federation of America (CFA), Public Investors Arbitration Bar Association (PIABA) or Fund Democracy, I have learned so much from speaking with the leaders of your organizations.

While I am quite proud of the hard work we do at the Ohio Division of Securities, I am excited about the prospect of upping our game to better serve the needs of the businesses and investors who operate in our markets. A recent example where we have stepped up is by joining, for the first time, a coordinated corporation finance review program that gives multi-state filers a finite, streamlined review. An issuer filing a Regulation A application without deficiencies can expect to move through the state registration process here in Ohio and 49 other U.S. jurisdictions in 21 business days, from start to finish. Per the SEC’s recent Regulation A+ rule proposal release, that registration process historically took many months (and sometimes a year or greater) to complete at the SEC and state level. I applaud the staff in my Registration Section and the folks in the larger state and NASAA network for making this huge achievement a reality.

This year, the NASAA Annual Fall Conference is being held September 14-16 in Indianapolis, Indiana. This is the first time during my tenure with the Division that the NASAA Conference has been within easy driving range of Ohio. There will be a nice reception and dinner held in my honor as I pass the presidential gavel over to my colleague from the state of Washington, Securities Director William Beatty. If you have never been to a NASAA Conference, it is a great opportunity to meet one-on-one with all of the state and federal securities regulators as well as hear from an impressive array of scholars and industry experts. Please go the NASAA website at www.nasaa.org for more details. I look forward to seeing many of you at our own Ohio Securities Conference on Friday, October 31. I am pleased to announce that we have brought the Conference back to downtown Columbus, Ohio, at the beautiful Renaissance Columbus hotel. Many thanks to our Conference co-sponsor, The University of Toledo College of Law, UT Professor of Law Eric C. Chaffee and our Division conference team of Seth Hertlein, Anne-Marie Christ, and Terri Beardsley for organizing the upcoming Conference.

As always, I am always looking for ideas to improve the Ohio business and investor experience with the Division, so please let me know if you have any suggestions. Ohio Department of Commerce (“Department”) Director Andre Porter wants to make sure all agency divisions are delivering exceptional customer service in each of our distinct industries. The Department will be issuing customer service surveys soon to hear your views. Please take the time to share your feedback.

Andrea Seidt
Securities Commissioner

High Yield Investments

Harkening back to the Prime Bank scams of the 1990's, the internet is awash with offers of various programs that promise truly unbelievable high rates of returns. These High Yield Investment Programs ("HYIP") come in various forms, but all will promise "too-good-to-be-true" interest rates, such as 2.7 percent return, compounded daily.

Prosecution of the persons soliciting investments in HYIPs is difficult. Due to the inherent anonymity of the internet, law enforcement may not even have information on the actual identity of the persons involved. It is all too common for the funds to be directed overseas, making investigations more difficult. Once transferred overseas, the initial account may be swept clean and the money dispersed to other accounts.

The Ohio Division of Securities ("Division") recently took action against a HYIP: Inter Reef, LTD, d/b/a Profitable Sunrise, with a primary business address in the United Kingdom. The Division led a group of 15 states and five Canadian provinces who were successful in shutting down the Profitable Sunrise website and who initiated administrative actions or issued investor alerts to warn investors about this investment scheme. On March 14, 2013, the Division issued Order No. 13-006, a Notice of Opportunity for a Hearing, naming Inter Reef, LTD, d/b/a Profitable Sunrise and Roman Novak and Radoslav Novak, who the website listed as the principals behind Profitable Sunrise. There is no confirmation that either of these two individuals actually exist. The website listed five different types of "investment plans," all of which were "risk free." For example, the "Starter Plan" had a minimum investment of \$10; and the Advanced Plan required at least a \$2500 investment. The stated return on the investment came

as interest rate payments, with the lowest interest rate listed as "1.6 percent daily, for 180 business days, compounding is available." That works out to about 288 percent, or \$174.13 earned in six months on the original \$10. At the highest end, Profitable Sunrise offered the "Long Haul Plan," which allegedly paid 2.7 percent for 240 days, "100 percent compounding is mandatory." This equates to 648 percent return or about \$6,000,000 earned in 240 business days for a \$10,000 investment. Neither Roman Novak nor Radoslav Novak requested a hearing based on the Notice Order, and the Division issued a final Cease and Desist Order on December 31, 2013.

Profitable Sunrise was able to grow their investor base quickly through the use of religious and charitable claims and multi-level marketing. Their website indicated that an individual could become a "Regional Representative" and participate in the "Referral Program" which included a commission for "all deposits made by downlines," i.e. for referring others to the program. Persons seeking to invest were instructed to wire their money to European banks, one being in the Czech Republic. Missing were verifiable details about how these remarkable interest payments would be achieved. Based on information the Division was able to obtain, it appears over 70,000 persons had invested in Profitable Sunrise.

On July 8, 2013, the Division filed a Complaint in the Court of Common Pleas located in Williams County, Ohio against Nancy Jo Frazer, Albert Rosebrock, Focus Up Ministries and others, who were alleged to have operated the largest multi-level marketing group within Profitable Sunrise. The Complaint, filed in Case Number 13CI000103, was filed jointly with the Ohio Attorney General Charitable Law Section and requested both injunctive relief and

restitution based on allegations of unlicensed activity, unregistered sale of securities, misrepresentations in the sale of securities and securities fraud. The court issued a preliminary injunction in this case, which is scheduled for trial on September 15, 2014. The U.S. Securities and Exchange Commission also filed a civil complaint naming Inter Reef Ltd d/b/a Profitable Sunrise and the Novak brothers in the U.S. District Court for the Northern District of Georgia in case number 1:13-CV-1104 seeking injunctive relief and an asset freeze on millions of dollars held in overseas bank accounts.

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.ohio.gov for editorial guidelines and publication deadlines. The Division reserves the right to edit articles submitted for publication.

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Statement Regarding the Use of Financial Projections in Offering Materials

Financial projections are forward-looking statements¹ and may be actionable as material misrepresentations of fact² under the anti-fraud provisions.³ The Ohio Division of Securities (Division) has recently observed an increase in the use of baseless or misleading financial projections, including at least five enforcement actions brought in 2013.⁴

Section 27A of the Securities Act of 1933 (“Securities Act”) and section 21E of the Securities Exchange Act of 1934 (“Exchange Act”) provide a safe harbor for forward-looking statements made by companies subject to the reporting requirements of sections 13(a) or 15(d) of the Exchange Act. Conversely, there is no safe harbor for forward-looking statements made by companies not subject to the reporting requirements of sections 13(a) or 15(d) of the Exchange Act. Companies that do not qualify for these safe harbor provisions, yet choose to make forward-looking statements, may look only to the judicially-created Bespeaks Caution Doctrine (the “Doctrine”) to insulate such statements from fraud liability.

The Bespeaks Caution Doctrine is a creature of federal case law that has been described as a “narrow defense.”⁵ The Doctrine is an affirmative defense available to defendants facing administrative, civil or criminal allegations of securities fraud premised on inaccurate, unreasonable or misleading forward-looking statements. The Doctrine is accepted in some form in all federal courts, but has been specifically applied to only a few state law causes of action of which the Division is aware.⁶ In contrast to the Doctrine, the Commonwealth of Pennsylvania prohibits the use of financial projections in securities offerings except in a handful of specified situations, and where the projections are prepared by an independent qualified preparer in accordance with the Statement of Standards for Accountants’ Services on Prospective Financial Information promulgated by the American Institute of Certified Public Accountants.⁷ The Supreme Court of Ohio has not officially recognized the Doctrine.

¹ “Forward-looking statements” are known by many names, including, but not limited to, forecasts, projections, estimates, and pro-forma financial statements, and include any more generalized statement that is predictive or anticipatory in nature.

² *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1093-1095 (1991); *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 203-4 (5th Cir. 1988) (“...courts have readily conceded that predictions may be regarded as ‘facts’ within the meaning of the antifraud provisions of the securities laws.”); *In re Apple Computer Securities Litigation*, 886 F.2d 1109, 1113 (9th Cir. 1989) (“A projection or statement of belief contains at least three implicit factual assertions: (1) that the statement is genuinely believed, (2) that there is a reasonable basis for that belief, and (3) that the speaker is not aware of any undisclosed facts tending to seriously undermine the accuracy of the statement. A projection or statement of belief may be actionable to the extent that one of these implied factual assertions is inaccurate”).

³ *See, e.g.*, section 1707.44(G) of the Ohio Revised Code; sections 11, 12(a)(2), and 17(a) of the Securities Act of 1933; and section 10(b) of the Securities Act of 1934 and Rule 10b-5 promulgated thereunder.

⁴ *See, e.g.*, *Pulsare Technology Investments, LLC*, Order No. 13-005 (Div. of Securities February 14, 2013) (Final Order of Suspension); *Inter Reef, Ltd. d/b/a Profitable Sunrise*, Order No. 13-006 (Div. of Securities March 14, 2013) (Notice of Intent to Issue Cease and Desist Order); *CIP Leveraged Fund Advisors, LLC*, Order No. 13-014 (Div. of Securities April 25, 2013) (Final Cease and Desist Order); *SoMoLend Holdings, LLC and Candace S. Klein*, Order No. 13-022 (Div. of Securities June 14, 2013) (Notice of Intent to Issue Cease and Desist Order); *Club Abundance, Inc. and Patricia Copeland*, Order No. 13-025 (Div. of Securities June 25, 2013) (Final Cease and Desist Order).

⁵ *Harden v. Raffensperger, Hughes & Co., Inc.*, 65 F.3d 1392, 1404-5 (7th Cir. 1995).

⁶ 5C Disclosure & Remedies Under the Sec. Laws § 12:93 n.102.

⁷ 10 Pa. Code § 609.010.

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Statement Regarding the Use of Financial Projections in Offering Materials

While the elements of the Doctrine vary somewhat among the federal circuits, the basic requirements of the Doctrine are more or less the same.⁸ If the following tenets are closely observed, a projection is less likely to be found to violate the anti-fraud provisions of the securities laws.

1. Forward looking statements must be made in good faith.⁹ A statement will generally be deemed to have been made in good faith if three sub-conditions are true as of the making of the statement:
 - a. The statement is genuinely believed by the maker.¹⁰
 - b. The maker does not have actual knowledge of the falsity of the statement.¹¹ Some courts have interpreted knowledge to include recklessness as to the truth or falsity of the statement.¹²
 - c. The maker is not aware of any undisclosed facts that would tend to seriously undermine the accuracy of the projection.¹³

⁸ The Private Securities Litigation Reform Act of 1995 (PSLRA) created the safe harbor for forward-looking statements which raised the scienter requirement of the speaker to “actual knowledge.” 15 U.S.C.A. 77z-2(c)(1)(B). The PSLRA also heightened the pleading standards, requiring private plaintiffs to “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” 15 U.S.C.A. 78u-4(b)(2)(A). However, the safe harbor is only available to Exchange Act reporting companies, and the heightened pleading standards only apply to securities fraud actions brought under the Exchange Act, typically Section 10(b) and Rule 10b-5 promulgated there under. Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 925 (2003). For all other situations, the more pro-plaintiff common law remains in effect. The following analysis is based on the common law of forward-looking statements and would differ for issuers or claims subject to the Exchange Act.

⁹ *Isquith*, 847 F.2d 186, 204. *See also*, 17 C.F.R. 230.175(a); Safe Harbor Rule for Projections, Securities Act Release No. 6084, [1979 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 82,117 at 81,942 (July 5, 1979); 5C Disclosure & Remedies Under the Sec. Laws § 12:93 n.120; and 5 Disclosure & Remedies Under the Sec. Laws § 3:30 nn.48-54.

¹⁰ *Mayer v. Mylod*, 988 F.2d 635, 639 (6th Cir. 1993); *City of Monroe Employees Retirement Sys. v. Bridgestone Corp.*, 399 F.3d 651, 675 (6th Cir. 2005) (citing *Helwig v. Vencor, Inc.*, 251 F.3d 540, 557 (6th Cir. 2001) (quoting *In re Apple Computer Securities Litigation*, 886 F.2d 1109, 1113 (9th Cir. 1989))). *See also*, 5C Disclosure & Remedies Under the Sec. Laws § 12:28 nn.5, 31.30.

¹¹ 5C Disclosure & Remedies Under the Sec. Laws § 12:93 nn.117-127.

¹² *In re Apple Computer*, 886 F.2d 1109, 1117. *See also*, 5C Disclosure & Remedies Under the Sec. Laws § 12:93 n.118.

¹³ *In re Apple Computer*, 886 F.2d 1109, 1113; *Weiss v. Mentor Graphics Corp.*, D.Or. No. CV-97-1376-ST, 1999 WL 985141, at *16 (Oct. 6, 1999). *See also*, 5C Disclosure & Remedies Under the Sec. Laws § 12:93 n.126; 5C Disclosure & Remedies Under the Sec. Laws § 12:28 n.31.30.

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Statement Regarding the Use of Financial Projections in Offering Materials continued...

2. The forward looking statement must have a reasonable basis in fact.¹⁴ To form a reasonable basis in fact, the following requirements should be observed:

- a. The maker must conduct a reasonable investigation into the facts that will serve as the foundation for the projection. A reasonable investigation includes at least two responsibilities:¹⁵
 - i. The responsibility to reasonably gather relevant facts, and
 - ii. The responsibility to reasonably evaluate the facts gathered.

In assessing the reasonableness of an investigation, an issuer forecasting its own business is usually held to a higher duty than an outsider because the issuer is best able to accumulate and analyze relevant facts that are solely within its knowledge and possession.¹⁶

- b. All significant assumptions made in arriving at each projected figure should be disclosed, and must be disclosed if the assumption would be material to an investor's understanding of the projection, or if the assumption differs from what a reasonable listener would expect.¹⁷ A speaker would not have a reasonable basis for a forward looking statement if the assumptions underlying the statement, whether or not disclosed, were unreasonable.¹⁸ A projection's basis may be strengthened by disclosure of any data relied upon, as well as the source of any such data.
- c. If any of the maker's prior projections have proven inaccurate in the past, the details of each inaccurate projection should be disclosed.¹⁹ A history of poor prognosticating would be highly material to a potential investor's evaluation of the basis for a projection currently before them. Some courts may consider this disclosure to be mandatory.²⁰

¹⁴ Virginia Bankshares, 501 U.S. 1083, 1093; Mylod, 988 F.2d 635, 639; Isquith, 847 F.2d 186, 204; *In re Apple Computer*, 886 F.2d 1109, 1113; Weiss, 1999 WL 985141, at *16 ("In one scenario, the speaker may make a false forward-looking statement with absolutely no basis in fact as to its truth; in other words, he simply makes it up. In that event, the speaker is clearly liable."). *See also*, 5 Disclosure & Remedies Under the Sec. Laws § 3:30 n.48; 5C Disclosure & Remedies Under the Sec. Laws § 12:28 n.29 (a statement made without a reasonable basis is actionable even though it fortuitously comes to pass).

¹⁵ 5C Disclosure & Remedies Under the Sec. Laws § 12:28 n.12.

¹⁶ 5C Disclosure & Remedies Under the Sec. Laws § 12:28 nn.16-22.

¹⁷ Isquith, 847 F.2d 186, 205. *See also*, Securities Act Release No. 6084, 5C Disclosure & Remedies Under the Sec. Laws § 12:28 nn.25-26; 5 Disclosure & Remedies Under the Sec. Laws § 3:30 nn.89-94.

¹⁸ 5C Disclosure & Remedies Under the Sec. Laws § 12:28 nn.25-26; 5 Disclosure & Remedies Under the Sec. Laws § 3:30 n.94.

¹⁹ 5C Disclosure & Remedies Under the Sec. Laws § 12:93 nn.67-68; 5C Disclosure & Remedies Under the Sec. Laws § 12:28 n.24.

²⁰ *Supra* n.17.

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Statement Regarding the Use of Financial Projections in Offering Materials continued...

3. Cautionary language must be prominent, substantive and tailored precisely to the specific matter projected.²¹
 - a. Boilerplate disclaimers or general acknowledgments of risk are insufficient to insulate a faulty projection from liability.²²
 - b. The Doctrine requires disclosure of *the* factor that actually caused the forward looking statement not to become true.²³
 - c. Potential consequences to the issuer and investors if the projections prove inaccurate should be discussed.²⁴
 - d. Cautionary language should surround the projection, be presented in like manner, and be clearly and prominently identified. In other words, it must be too prominent to be ignored.²⁵
 - e. A forward looking statement that the maker knows is wrong or for which he has no basis in fact cannot be protected by even the best cautionary statement.²⁶
4. The maker has a continuing duty to correct or update forward looking statements that have become inaccurate by virtue of subsequent events, are later discovered to have been false or misleading from the outset or whenever the maker knows or has reason to know that its earlier statements no longer have a reasonable basis.²⁷

²¹ *In re Donald J. Trump Casino Securities Litigation-Taj Mahal Litigation*, 7 F.3d 357, 371-2 (3d Cir. 1993); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1097 (1991). *See also*, 5C Disclosure & Remedies Under the Sec. Laws § 12:93 nn.7, 151-173.

²² *Trump*, 7 F.3d 357, 371-2; 5C Disclosure & Remedies Under the Sec. Laws § 12:93 nn.151-162.

²³ *Trump*, 7 F.3d 357, 371-2; 5C Disclosure & Remedies Under the Sec. Laws § 12:93 nn.151, 154, 164.

²⁴ *Supra* n.21 (Discussion of consequences should a projection prove false helps to tailor cautionary language precisely to the specific projection).

²⁵ 5C Disclosure & Remedies Under the Sec. Laws § 12:93 n.169.

²⁶ 5C Disclosure & Remedies Under the Sec. Laws § 12:93 nn.117-127.

²⁷ *Isquith*, 847 F.2d 186, 205; *Kirby v. Cullinet Software, Inc.*, 721 F.Supp. 1444, 1450 (D.Mass. 1989). *See also*, Securities Act Release No. 6084, 5C Disclosure & Remedies Under the Sec. Laws § 12:28 n.89; 5 Disclosure & Remedies Under the Sec. Laws § 3:30 n.86.

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Statement Regarding the Use of Financial Projections in Offering Materials continued...

Practical application of the Bespeaks Caution case law highlights several observations:

- The more specific the forward-looking statement, the more factual basis is necessary to justify the statement.
- In most situations, it is more difficult to justify a long-term projection than a near-term projection.
- Projections of expenses generally enjoy a greater level of confidence than projections of revenues because an issuer has a greater degree of control over its spending than it does over its income.
- An issuer's history of operations is usually the most indicative source of information about its future prospects. An issuer with no history of operations may be unable to establish a reasonable basis for projections.
- Similarly, a participant in an established industry generally has better access to relevant facts on which to base a projection than does a participant in a new industry.

Generally, issuers and their counsel should be cautious publishing projections of future financial performance in offering documents. As part of its statutory duty to safeguard Ohio investors and preserving the integrity of Ohio's securities markets by preventing fraud,²⁸ the Division carefully reviews projections that are included in filings made pursuant to the Ohio Securities Act. Issuers submitting financial projections as part of a securities filing may receive a letter from the Division requesting that the issuer set forth its basis for projected figures in order to evaluate whether there was a reasonable basis in fact for the statement to investors. Questionable financial projections may be referred to Enforcement or, in the case of a post-sale filing, such as offerings claiming the exemption under R.C. 1707.03(Q), may require a rescission offer. Issuers or counsel with questions regarding the propriety of financial projections are encouraged to call the Division prior to filing or use.

²⁸ See, *Bronaugh v. R. & E. Dredging Co.*, 16 Ohio St. 2d 35, 40-41 (1968); *Pencheff v. Adams*, 5 Ohio St. 3d 153, 154 (1983); and *In re Columbus Skyline Securities, Inc.*, 74 Ohio St. 3d 495, 498 (1996).

ENFORCEMENT SECTION REPORTS

Brenda Ashcraft

On August 21, 2013, a federal grand jury charged Brenda Ashcraft with defrauding investors of at least \$15 million between 2009 and 2013 in a scheme to purchase and sell real estate through real estate investment trusts, known as REITs. The indictment alleged that Ashcraft owned and operated French Manor Properties, which she told investors was acting as the REIT Trustee that would “secure residential and commercial real estate at wholesale pricing.” Investors believed that their investments were secured by real estate, and Ashcraft promised them 40 percent annual returns on their investments. Instead, the indictment alleged, Ashcraft diverted investor funds to her own personal use and benefit, including a \$50,000 investor payment that she used to pay for Cincinnati Reds season tickets. Ashcraft would at times send investors checks for returns on their investments, but the checks often bounced. The indictment charged Ashcraft with one count of wire fraud and one count of securities fraud, one count of engaging in a monetary transaction in criminally derived property and aiding and abetting. The trial is scheduled to begin November 3, 2014. The indictment is filed in Case No. 1:13-cr-0093-SSB in the U.S. District Court for the Southern District of Ohio.

Frederick C. Bryant

On March 21, 2013, Frederick C. Bryant of Bay Village, Ohio, pled guilty to a bill of information filed in case number 1:13-cr-00141-DAP in the U.S. District Court for the Northern District of Ohio. The bill of information set forth two criminal counts, wire fraud and tax evasion. The Ohio Division of Securities (Division) provided information to federal law enforcement officials in an investigation that led to his conviction in the United States Northern District Court of Ohio, Eastern Division. The charges and plea were based on activities whereby

Bryant solicited a \$534,000 investment from an Ohio investor in return for a five percent rate of return over seven years. Bryant told the investor that her money would be used for the Global Venture Fund, a fund established to save tigers from extinction. Instead of investing her money, Bryant converted it to his own use. Bryant also failed to pay the federal tax on the converted funds and concealed them in a nominee bank account. On June 25, 2013, Bryant was sentenced to 46 months incarceration and ordered to pay restitution in the amount of \$505,832.15.

CIP Leveraged Fund Advisors, LLC

On April 25, 2013, the Division issued a Cease and Desist Order with Consent against CIP Leveraged Fund Advisors, LLC based on a finding that the Respondent violated the Ohio Securities Act by knowingly making future earnings projections in its Private Placement Memorandum that had no reasonable basis in fact.

Eric M. Douglas

On April 29, 2013, after an administrative hearing, the Division issued a Final Order suspending the investment adviser license and securities salesperson license of Eric M. Douglas for 90 days based on a finding that he had engaged in manipulative and deceptive conduct in the sale of securities issued by Maumee Authority Stamping, which offered recently displaced employees a permanent job and a money-back guarantee in exchange for investments in the company. The Division found that, although some of the investors did obtain temporary employment with the issuer, none received their money back when the company closed.

Nanci Jo Frazer aka Nancy Jo Frazer

Focus Up Ministries, Inc. et al.

On July 8, 2013, the Director of Commerce and the Ohio Attorney

General filed a civil complaint against Nanci Jo Frazer aka Nancy Jo Frazer d/b/a NJF Global Group, David Frazer, Albert Rosebrock, Defining Vision Ministries, Inc. and Focus Up Ministries, Inc., alleging violations of the Ohio Securities Act and Ohio Charitable Organizations Act for activities related to the high yield investment program offered by Profitable Sunrise and Roman Novak. The case was filed in Case No. 13CI000103 in the Court of Common Pleas in Williams County, Ohio. See the article on High Yield Investment Programs in this bulletin for further information.

Nicholas L. Fry Fry Hensley & Co.

On December 23, 2013, the Division issued a Consent Order Revoking the Ohio Investment Adviser License of Fry Hensley & Co. and the Ohio Investment Adviser Representative License of Nicholas L. Fry, finding that the Respondents were not of good business repute based on admissions that they received undisclosed compensation, failed to seek best execution, made false and misleading disclosures to clients, charged inflated fees and failed to disclose Fry Hensley & Co's financial condition.

Jon Patrick Horvath

On January 15, 2014, Jon Patrick Horvath was indicted by a Hamilton County grand jury on nine counts including securities fraud, misrepresentation in the sale of securities, theft, forgery and selling unregistered securities. Horvath is accused of selling \$95,000 in unregistered securities to two investors and converting the funds for his personal use. Horvath has not maintained an Ohio securities salesperson or investment adviser representative license since 2011. The case is filed in Hamilton County, case number B1307440.

ENFORCEMENT SECTION REPORTS continued...

Eric T. House Valhalla Investment Advisory, Inc.

On November 20, 2013, the Division issued a Consent Order Revoking the Ohio Investment Adviser License of Valhalla Investment Advisory, Inc. and the Ohio Investment Adviser Representative License of Eric T. House based on findings that Respondents failed to comply with Division Order No. 12-001, failed to maintain required books and records, made incorrect disclosures and failed to make required disclosures on his Form ADV and published an improper testimonial on his LinkedIn webpage.

Victor Jada Hanan Khoury Tri-Monex

On July 9, 2013, Victor Jada was sentenced in the U.S. District Court for the Northern District of Ohio, in case number 1:12-cr-00109-DCN, to 48 months in prison based on his guilty plea to one count of wire fraud. On June 27, 2013, Hanan Khoury was sentenced in the same case to 37 months in custody based on her guilty plea to one count of wire fraud. Both defendants were ordered to pay \$1,757,520.00 in restitution. The conviction was based on the Defendants' actions in 1998 through 2011 that defrauded approximately 40 individuals and caused total losses in the amount of \$1,757,520. The victims invested money with Tri-Monex, Inc., a corporation located in Medina, Ohio, that was created and controlled by Jada and Khoury. The investors were told that Tri-Monex was a legitimate and licensed investment company that traded commodities and precious metals on foreign and domestic markets. When questioned by their investors, Jada and Khoury made false representations that banking and securities regulations prohibited them from returning the investors' funds. The Defendants created false documents, promissory notes, balance sheets, and rollover statements to further induce

the investors to believe their money was safe, or to encourage them to re-invest rather than withdraw their funds at the end of the investment period. The documents promised exaggerated rates of returns to discourage investors from withdrawing their principal.

William Jewell Jewell Jackson Oil and Gas, LLC et al.

On May 23, 2014, the Division issued Cease and Desist Order No. 14-016 against Jewell Jackson Oil and Gas, LLC, William Jewell, Jr., Charley Anthony Jackson III and William Jewell IV finding that the Respondents engaged in the sale of unregistered securities and committed securities fraud in issuing and selling fractional shares in the revenue generated from the production of oil and gas wells located in Kentucky. The order found that investor proceeds were converted for personal use, including purchases at Gamestop, Apple I-Tunes, and various fast food restaurants. The order further found that the Respondents did not inform investors that their proceeds would be used to pay commissions to individuals soliciting their investment.

Candace S. Klein SoMoLend Holdings, LLC

On February 10, 2014, the Division issued a Consent Cease and Desist Order against SoMoLend Holdings, LLC under Division Order No. 14-004 finding that SoMoLend had acted as an unlicensed securities dealer and had sold unregistered securities through their crowdfunding internet website. The Order further found that SoMoLend had sold their own securities that were not properly registered for sale in Ohio. The Notice of Hearing in this case was issued on June 14, 2013 under Division Order No. 13-022 and named SoMoLend Holdings, LLC and Candace S. Klein as Respondents. The administrative hearing for Ms. Klein is scheduled to resume on November 11, 2014.

Curtis L. Luckett III Owen Ratliff Holland Turner

On April 10, 2014, the Division issued Cease and Desist Orders against Holland Turner and Owen Ratliff under Division Order Nos. 14-011 and 14-012, respectively. On May 16, 2014, the Division issued Cease and Desist Order No. 14-013 against Curtis L. Luckett, III. All three orders found that the Respondents engaged in unlicensed activity and sold unregistered securities issued by Jewell Jackson Oil and Gas, LLC, which were sold as fractional shares in the revenue generated from the production of oil and gas wells located in Kentucky. The orders further found that the Respondents engaged in securities fraud by failing to inform investors that 10 percent of their principle investment would be paid to Respondents as a commission for the sale instead of being invested for the benefit of the investors.

William E. Meyer Norwich Financial Services et al.

On June 18, 2013, the Division issued a Cease and Desist Order against William E. Meyer et al. under Division Order Number 13-023 based on findings that the Respondents solicited and received investment funds from three investors for a pooled investment account to be used for futures trading without disclosing material risks and account losses. The Division further found that Meyer hid the losses by publishing false investment statements to investors.

Morgan Asset Management, Inc. Morgan Keegan & Company, Inc.

On August 7, 2013, as part of a multi-state settlement administered through the North American Securities Administrators Association (NASAA), the Division issued an Administrative Order and Consent against Morgan Asset Management, Inc. and Morgan Keegan & Company, Inc. finding, in part, that the Respondents failed to adequately disclose risks associated

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with investments in various funds administered and sold to their clients, did not correctly characterize fund holdings, failed to make suitable recommendations to clients invested in the funds and failed to implement sufficient supervisory protocols related to the sale of investments in the funds to their clients.

William F. Morgan

On March 18, 2013, William F. Morgan pled guilty to an indictment filed in Stark County Case No. 2012 CR 1900 and was convicted of 44 counts, including securities fraud, grand theft, theft from the elderly, and the sale of unregistered securities. Morgan was sentenced to five years in prison. The indictment stemmed from a criminal referral from the Ohio Division of Securities to the Stark County Prosecutor's Office. The plea and conviction were based on activities whereby Morgan sold approximately \$162,000 in unregistered securities to approximately 15 investors, primarily located in Stark County. At least nine of the investors were elderly. The investors believed they were investing in MA & P Partnership, which Morgan organized and managed. The investors were told that the partnership invested in various platforms, including oil futures and companies listed on the stock exchange. Morgan failed to properly account for investor money and made fraudulent statements to investors. Investors were told by Morgan that their investments were safe, secure and that there was no way they could lose their money. Instead of directly investing their funds, Morgan placed their money in his bank account and used it for personal expenditures. Morgan was licensed as a securities salesperson until January, 2004, when he was terminated by his firm for failing to fully cooperate in an investigation by the National Association of Securities Dealers.

On May 4, 2012, the Division issued a Cease and Desist Order No. 12-013 against William F. Morgan based on unregistered sales, misrepresentations in the sale of securities and fraud.

Azim Nakhooda Howard Slater Michael C. Perlmutter

On April 8, 2013, the Division issued Suspension Orders with Consent Agreements against Howard Slater and Azim Nakhooda under Division Order Nos. 13-009 and 13-010, respectively. On July 10, 2013, the Division issued a Cease and Desist Order with Consent against Michael C. Perlmutter under Division Order No. 13-027. All three individuals were employed by Cedar Brook Financial Partners, LLC at the time the violations occurred. The orders found that the respondents had misrepresented material terms related to investments in the IMH Secured Loan Fund, LLC and the Medical Capital Funding Corporation V.

Geoffrey Nehrenz Keystone Capital Management, LLC et al.

On June 14, 2013, based on a complaint filed by the Director of Commerce in the Stark County Court of Common Pleas in case number 2013-CV-001405, a Stark County judge issued a preliminary and permanent injunction against Geoffrey Nehrenz of Uniontown and his companies, Keystone Capital Management, LLC and Keystone Active Trader, LLC, both of Uniontown. The Court appointed James Kandel of Canton to act as a receiver for the assets in this case and issued an Order of Restitution requiring Nehrenz and his related businesses to make full restitution to any and all purchasers or investors of securities through his related businesses as provided in the complaint. The State's complaint alleged that Nehrenz, through

Keystone Capital Management, LLC, fraudulently solicited individuals to invest in Keystone Active Trader, LLC. Nineteen investors from northeast Ohio and Pennsylvania invested nearly \$7.9 million between May 2009 and September 2012. The Division alleged that Nehrenz withdrew investor funds far in excess of the amount he was permitted to withdraw and used investor funds for his personal or business use.

Roman Novak Inter Reef, Ltd. d/b/a Profitable Sunrise et al.

On December 31, 2013, the Division issued a Cease and Desist Order against Inter Reef, Ltd. d/b/a Profitable Sunrise, Roman Novak and Radoslav Novak under Division Order No. 13-039. See the article on High Yield Investment Programs in this bulletin for further information.

Donald W. Owens

On November 5, 2013, the Division issued a Cease and Desist Order with Consent Agreement against Donald W. Owens under Division Order No. 13-033 based on a finding that he caused to be filed false representations concerning material facts on his application to the Division for licensure as an investment advisor. The Division issued two previous orders against Mr. Owens. Division Order Number 99-533 found that Mr. Owens had engaged in fraud in the sale of securities and Division Order No. 02-100 found that he had acted as an unlicensed securities dealer and had provided false information to investors to whom he sold securities.

Omar Plummer Lion Global Strategies, LLC

On March 3, 2014, the Division issued a Cease and Desist Order against Lion Global Strategies, LLC and Omar Plummer finding that the Respondents sold securities in which

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they had a personal interest to clients by misrepresenting that the securities were being sold directly from the issuer and further finding that the Respondents committed securities fraud by failing to properly disclose how the investment funds would be used.

RBC Capital Markets, LLC

On December 31, 2013, as part of a multi-state settlement administered through NASAA, the Division issued a Consent Order under Division Order No. 13-040 finding that RBC failed to ensure that its securities sales assistants were properly licensed in the states where they were engaged in the sale of securities and further failed to implement reasonable supervisory procedures to avoid violations of the Ohio Securities Act and the rules promulgated thereunder.

Lee Solomon

On April 1, 2013, Lee Solomon pled guilty to an indictment, setting forth 16 felony counts, including theft, forgery, identity fraud, theft from the elderly and perjury filed in case number 12CR001990 in the Franklin County Court of Common Pleas. The perjury charge stemmed from the false statements that Solomon made in an investigatory hearing conducted by the Division which related to his businesses, Solomon Network and SOLO-NFO. On June 3, 2013, Solomon was sentenced to 12 months incarceration and ordered to pay restitution in the amount of \$162,242.36.

Steadfast Income REIT, Inc.

On June 28, 2013, the Division issued a Cease and Desist Order with Consent against Steadfast Income REIT, Inc. under Division Order No. 13-026 based on Steadfast's decision to publicly announce an offering price increase 59 days prior to implementation of the actual price increase, which created a sale period that may have artificially increased investor demand for its

securities. As part of the Consent Agreement, Steadfast agreed to cease from similar conduct during any future effective offering period.

Timothy Paul Stohs Michael P. Bean

On May 31, 2013, the Division entered Cease and Desist Orders with Consent Agreements against Timothy Paul Stohs and Michael P. Bean under Division Order Nos. 13-018 and 13-019, respectively, based on findings that both Respondents had engaged in the sale of unregistered securities and had made material misrepresentations in selling income diamond investments to an elderly Ohio resident in an aggregate amount exceeding \$92,000. Division Order No. 13-018 further found that Stohs acted as an unlicensed securities dealer by receiving a commission on the sales.

UBS Financial Services, Inc.

On November 20, 2013, as part of a multi-state settlement administered through NASAA, the Division issued a Consent Order under Division Order No. 13-036 finding that UBS failed to establish an adequate system to monitor the licensure status of persons accepting client orders and further failed to implement reasonable supervisory procedures to avoid violations of the Ohio Securities Act and the rules promulgated thereunder.

Richard A. Zakarian

On May 7, 2013, Richard A. Zakarian pled guilty to a bill of information filed in the U.S. District Court for the Northern District of Ohio in case number 1:13-cr-00218-DAP and was found guilty of two counts each of wire fraud and mail fraud and one count of making and subscribing false income tax returns. On August 7, 2013, Zakarian was sentenced to 210 months incarceration and ordered to pay restitution in the amount of

\$4,490,307.49 to nearly 100 victims. Zakarian was a certified financial planner and a self-employed tax preparer who owned and operated several business ventures. The five-count information details two schemes by Zakarian — one to defraud investment clients (many of whom were also clients of his tax-preparation business), another to defraud clients whose payroll taxes he handled through a company known as Ben Franklin Payroll Service. The indictment alleges that from September 2002 through August 2012, Zakarian devised a scheme to defraud investment clients by inducing them to invest their retirement funds and other savings accounts. He primarily targeted clients from his tax-preparation business when they received their tax refunds or sought his financial advice. Zakarian misled clients to believe their funds would be placed in safe, guaranteed-return investments when, in fact, he diverted the funds to pay personal and business expenses and invested in risky investments for which he had a consistent history of incurring large losses. While some received a return on part or all of their investment, 23 clients incurred combined out-of-pocket losses of more than \$1 million. In addition, the clients did not receive the hundreds of thousands of dollars of gains on their investments that Zakarian falsely reported to them during the scheme. A number of clients were retired, out of work or nearing retirement. Most invested through Zakarian by moving their money from traditional, relatively safe and dependable stocks, bonds, and mutual funds.

Peter A. Beck John W. Fussner TML Consulting et al.

On July 19, 2013, State Representative Peter Beck and John Fussner, President of Christopher Technologies, LLC

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were indicted by a Hamilton County grand jury in case number B1304320-A for a total of 23 felony charges for their roles in a securities case involving several entities located in Ohio and Tennessee. On April 24, 2014, John W. Fussner pled guilty to one count of selling unregistered securities and one count of selling securities in an insolvent company. A sentencing date has not been set. The Hamilton County Grand Jury returned a second indictment in this case on February 13, 2014 against Beck, Janet S. Combs, Christopher Technologies, LLC, Ark by the River Fellowship Ministry, Inc. and TML Consulting, LLC for a total of 79 counts, which were filed in case number B1400589-A. The second indictment alleges that the named Defendants engaged in a criminal enterprise which bilked 11 investors out of nearly \$2 million under the guise that the funds would be used to develop and market software, fund certified medical paraprofessionals on a turn-key basis to hospitals and surgical centers and develop music media for these related entities. However, investor money was allegedly diverted for other purposes such as contributions to Peter Beck's election campaign, commissions for successfully soliciting investors, paying credit card bills, funding to Ark by the River church and payments to other investors. As part of his plea agreement, Fussner agreed to testify at trial against his co-defendant and the other defendants named in the second indictment. The trial is scheduled to begin November 17, 2014.

Jennifer L. Willis

On March 11, 2014, following a criminal referral by the Division, Jennifer L. Willis, of Columbus, pled guilty to two counts of unregistered sales of securities, felonies of the fourth degree. She was sentenced to five years of community control and was ordered to pay restitution in the amount of \$27,350 to the two victims. Jennifer Willis, also known as Jennifer Hildebrand, was

accused of defrauding two central Ohio investors – one of whom she met through an online social networking site. Instead of investing the money as the investors directed, Willis used the money to fund her personal spending sprees. Willis allegedly told investors that she was licensed by the U.S. Securities and Exchange Commission (SEC). She has never been licensed by the SEC or the Division. Willis also told investors that she worked with GSA Energy LLC, out of Texas. She was not a company employee and was not authorized to sell shares on the company's behalf. Willis said she was working to fund oil platform investments.

Peter Wilson

On June 25, 2014, following a criminal referral by the Division, Peter Wilson of Rocky River, Ohio was indicted by a Cuyahoga County grand jury on four counts of fraud in the sale of securities and five counts of theft. If convicted on all of the counts, Wilson faces up to 43 years in prison. The indictment

alleges that Wilson received \$110,000 from four Ohio investors by informing them that their money would be used to invest in a spirituous liquor company. Wilson is accused of transferring the investors' money to fund tuition at a private university and for his own personal spending. A trial date has not been scheduled. In 2005, prior to the acts alleged in the indictment, Wilson was permanently enjoined from trading in securities, with limited exception, by Judge Patricia Gaughan of the U. S. District Court, Northern District of Ohio after a complaint was filed by the United States Securities and Exchange Commission alleging securities fraud and other violations.

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