Ohio Securities Bulletin

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EXEMPTIVE RULE FOR EMPLOYEE BENEFIT PLAN INTERESTS

by John R. Thomas and Richard P. McHugh
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A great deal of uncertainty exists regarding the proper application of the Ohio securities law to various types of employee benefit plans. Unlike the Uniform Securities Act or the federal securities laws, the Ohio securities law does not deal directly with such plans. Determining whether an exemption from the registration and broker-dealer provisions of the Ohio securities law is available for an employee benefit plan requires a convoluted analysis of various provisions of section 1707.03, which often fails to provide a satisfactory answer. Regulation 1301:6-3-03 (N) is intended to reflect current securities law rationale on employee benefit plans and to provide an exemption for the vast majority of such plans. The text of the regulation is as follows:

> "Any security in the form of a participation interest issued by a profit sharing plan, pension plan, money purchase pension plan, stock bonus plan or employer stock ownership plan, which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954, or any amendment or successor thereto, can be carried on without compliance with section 1707.08 to section 1707.11 of the Revised Code unless:
>
> 1. The plan is a voluntary defined contribution plan within the meaning of section 414(i) of the Internal Revenue Code of 1954;
> 2. Participants in the plan have the right to make contributions to the plan in excess of the amount contributed by the employer; and
> 3. The plan purchases employer securities in an amount which exceeds the amount of employer contributions to the plan.
>
> For purposes of this rule any security in the form of a participation interest issued by a plan which covers employees, some or all of whom are employees within the meaning of section 401(c)(1) of the Internal Revenue Code of 1954 can be carried on without compliance with section 1707.08 to section 1707.11 of the Revised Code."

The regulation is limited to employee benefit plans in which the participants' interests are most likely to be securities. Among such plans are pension plans, profit sharing plans, money purchase pension plans, stock bonus plans and employee stock ownership plans. Employee welfare plans, such as group term life insurance plans and medical care plans, are not included since participants' interests in such plans do not involve a security.

The application of the exemption to "qualified" employee benefit plans reflects existing federal and blue sky securities laws and also reflects a willingness to rely on the ERISA standards as a protection for participants.

There are two possible "securities" that can be considered in connection with employee benefit plans: (1) employees' participation interests in the plan; and (2) the plan's participation interests in other investment vehicles, including securities, in which plan assets are invested. The regulation does not attempt to cover investment of plan assets in securities.

The regulation reflects Ohio's acceptance of the Securities and Exchange Commission position, set forth in Release 33-6188, that employees' participation interests are securities only when the employees voluntarily participate in the plan and individually contribute thereto. However, the regulation goes further by exempting all such employee benefit plans except plans that meet the following tests. First, the plan must be a defined contribution plan in which employees voluntarily participate.[1] Second, the plan must provide that the participants have a right to make contributions in excess of the amounts contributed by the employer. Third, the plan must purchase employer securities in an amount which exceeds the amount of employer

[1] A defined contribution plan is a plan in which contributions to an employee's account by the employer are based on such factors as profits and compensation. As opposed to defined benefit plans, in which the amount of an employee's benefit is guaranteed by the employer, benefits in a defined contribution are equal to the employee's account balance at distribution.

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contributions to the plan. Thus, only plans where participants' funds are "used" to purchase employee securities are not exempted.

The regulation also recognizes the inappropriateness of registration where investment in employer securities is unlikely by exempting all employees' participation interests in Keogh plans, which are employee benefit plans adopted by the self-employed, including sole proprietorships and partnerships.

It should be noted that this regulation does not relate to securities transactions entered into by or with an employee benefit plan, other than employees' participation interests, or to the distribution of securities from such plan to its participants. The regulation does not relate to non-qualified employee benefit plans, such as stock option plans. Finally, the regulation does not exempt any employee's participation interest which is a security from the applicable anti-fraud provisions of the Ohio securities law.

NEW RULES (Effective 4-1-83)

On April 1, 1983, the Ohio Division of Securities adopted certain amendments to Administrative Rules 1301:6-3-03, 1301:6-3-06 and 1301:6-3-09. This article will not discuss all changes in detail, but will instead focus on specific changes.

A copy of the rules may be obtained from the Division of Securities, free of charge, by writing to Natalie Bissett.

I. DATE OF SALE RULE 1301:6-3-03(K)

(K) For the purpose of determining the date of sale for Division (O) or (Q) of section 1707.03 of the Revised Code, a sale shall be deemed to have occurred on the earlier of the date that:

(1) A subscription agreement or its equivalent is signed by the purchaser; or

(2) The purchaser transfers or loses control of the purchase funds.

The Division of Securities adopted this rule in order to resolve the ambiguity that existed with respect to the "reporting date" of a sale made under claim of exemption of section 1707.03(O) or 1707.03(Q) O.R.C. The Division received substantial comment on this rule prior to its adoption. Most of the comments received favored a "closing date" approach to determining the date of sale. The Division declined to follow such an approach primarily because the "closing" could occur long after a misrepresentation in connection with the solicitation. From an enforcement perspective, the Division desires to be informed of sales under sections 1707.03(O) and 1707.03(Q) as soon as possible.

II. EXEMPTIONS FROM REGISTRATION UNDER 1707.03(V)

Upon passage of H.B. 822 on November 18, 1982, the Division of Securities was empowered to create new ex-

emptions from registration through the rule making process. The Division of Securities exercised this authority by adopting rules 1301:6-3-03(L), (M) and (N).

Rule 1301:6-3-03(N) exempts certain participation interests in employee stock ownership plans (E.S.O.P.) This rule is discussed at length elsewhere in this edition of the Ohio Securities Bulletin. Rule 1301:6-3-03(L) and (M) exempt from registration certain retail repurchase agreements and mortgage backed securities, if said securities are sold by a bank or closely related entity. Because these exemptions are only available if the securities are being sold by a bank, the exemptions are "transactional" in nature. Interested persons should consult the definition of "Bank" found in section 1707.01(O).

III. OFFERING CIRCULAR REQUIREMENTS FOR FORM 6 REGISTRATIONS: RULE 1301:6-3-06(G)

Upon passage of H.B. 822 on November 18, 1982, sections 1707.06(a)(1) and (a)(2) were amended substantially. (See Ohio Securities Bulletin, issue 3, 1982). Rule 1301:6-3-06(G) established an offering circular requirement for offerings in excess of $250,000.00 and sets forth minimum content requirements. Special offering circular requirements for Oil & Gas interest offerings are set forth in subsection (G)(12). The text of this rule is set forth below.

(G) An offering circular is required for any registration by description filed pursuant to section 1707.06 of the Revised Code where the aggregate amount of the offering exceeds two hundred fifty thousand dollars and for all oil and gas interests sold pursuant to a registration by description filed pursuant to section 1707.06 of the Revised Code. At a minimum the offering circular shall contain the following information.

(1) Name and address of the issuer, the type of business entity, the state or jurisdiction of incorporation or formation, and the date of incorporation or formation.

(2) The following information in tabular form on the outside front cover page of the offering circular:

Offering Price To Public	Underwriting Discounts Or Commissions	Proceeds To Issuer Or Other Persons

(3) Amount of securities to be offered, aggregate offering price to the public, aggregate underwriting discounts or commissions, amount of expenses of the issuer and amount of expenses to the underwriters to be borne by the issuer, and the aggregate proceeds. If the securities are not to be offered for cash, state the basis upon which the offering is to be made.

(4) Describe the method by which the offering is to be made and, if the offering is to be made through an underwriter, name and address of underwriter and amount of participation of each underwriter, indicating the nature of any material relationships between issuer and underwriter.

(5) Statement of purposes for which the proceeds of the sale of securities will be used and the amount to be used for each purpose, indicating the present intention with respect to the order of priority in which the proceeds will be used for the purposes.

(6) Description of the background and expertise of the issuer in the particular business which is the subject of the offering.

(7) Description of the significant risk factors inherent in the particular offering.

(8) Description of securities.

(9) Description of business:

(a) Nature of issuer's present or proposed products or services, the principal market, and the length of time the issuer has been in commercial production.

(b) Location and character of plants or other physical property now held or to be acquired and the nature of title.

(c) For new invention or process, state how it is to be used and whether covered by patent. Identify with appropriate serial numbers.

(10) Specify the following:

(a) Names and residence addresses of all officers and directors and ten per cent shareholders of the issuer. If the issuer was incorporated or organized within the last year, give similar information as to all promoters.

(b) Aggregate annual remuneration of all directors and officers as a group for the last year and annual remuneration of each of the three highest paid officers of the issuer for the last year.

(11) Financial statements must be provided. These statements need not be certified by a certified public accountant but they must be verified (as true in all material aspects) within the actual knowledge and belief of the verifier, the chief financial officer of the issuer.

(a) Balance sheet as of a date within ninety days prior to the filing of the application for registration by description;

(b) Statements of income and statements of other shareholders equity shall be furnished for the two years prior to the date of the balance sheet provided in the paragraph above, or for the period of the issuer's existence, if less than the period specified above.

(12) For offerings of oil and gas interests only:

(a) Information on the sponsors' production history, including well locations, initial production, investor cost versus investor payout, and dry holes drilled;

(b) The amount of administrative costs including salary and overhead expenses to be borne from the proceeds of the offering;

(c) The source and amount of any additional funds to be secured for drilling the well;

(d) Complete information on any dry hole money to be paid;

(e) All appropriate and material tax considerations relevant to a decision to invest in the offering;

(f) Information on oil and gas regulation including but not limited to availability of markets and pricing;

(g) A summary of all material contracts;

(h) A summary of the geologist's opinion;

(i) An opinion of counsel as to the validity of the lease;

(j) Information on all forms of compensation paid or to be paid to the sponsor or affiliates including but not limited to profits on drilling, revenue interests, overriding royalties, and operating fees; and

(k) Such other information, not enumerated herein, included within the oil and gas guidelines as set forth in the October 1973 issue of the Ohio Securities Bulletin, or as the division may require.

IV. DEALER/SALESMEN RULES OF CONDUCT

The North American Securities Administrators Association (NASAA) recently adopted Uniform Rules for Broker-Dealer Conduct. (See Ohio Securities Bulletin Issue II 1982). Rule 1301:6-3-19(B) (represented below) reflects Ohio's adoption of those standards. Subsections (B)(10) and (B)(11) reflect modifications made by the Ohio Division of Securities to the proposed NASAA rules of conduct following input from the Division's Broker Dealer Advisory Committee and those in attendance at the public hearing held in January 1983.

(B) No licensed dealer or salesman shall:

(1) Engage in any pattern of unreasonable or unjustified delay in the delivery of securities purchased by a customer.

(2) Induce trading in a customer's account which is excessive in size or frequency in view of the financing resources or character of the account.

(3) Execute a transaction on behalf of a customer without authority to do so.

(4) Exercise any discretionary power in effecting a transaction for a customer's account without first obtaining written discretionary authority from the customer, unless the discretionary power relates solely to the time or price for execution of orders.

(5) Effect a transaction in, or recommend to a customer the purchase, sale or exchange of any security without reasonable grounds to believe that such transaction or recommendation is suitable for the customer, based upon reasonable inquiry concerning the customer's investment objectives, financial situation and needs, and any other relevant information known to dealer or salesman.

(6) Effect any transaction in or induce the purchase or sale of any security by means of any manipulative, deceptive, or fraudulent device, practice, plan, program, design or contrivance.

(7) Share a commission from the purchase or sale of a security with any unlicensed individual.

(8) Enter into any transaction with or for a customer at a price not reasonably related to the current market price of the security involved in the transaction.

(9) Fail to disclose to a customer that the licensed dealer or salesman is controlled by, controlling or otherwise affiliated with or under common control with the issuer of any security before entering into any contract with or for a customer for the purchase or sale of a security.

(10) Borrow any money or securities from a customer, except for obligations of dealers arising out of customary option transactions, activity in margin accounts, the maintenance of customer free credit balances, delivery failures in the ordinary course of business, loans from banks and other financial institutions, and deposits made pursuant to written subordination agreements or pursuant to securities loan agreements made to cover short positions.

(11) Upon discovery of any apparent violation of this rule which is also an apparent violation of any rule of a national securities exchange or national association of which a dealer or a salesman is a member, or of the United States securities and exchange commission, the division may refer any such evidence of violation to the appropriate regulatory body in lieu of proceeding under this rule.

INITIAL PUBLIC OFFERINGS – PERSPECTIVE OF COMPANY COUNSEL

By Marc H. Morgenstern, Esq.*

Companies are again going public in record numbers. In 1972, almost $2.7 Billion Dollars was raised through initial public offerings. During the next eight years, however, only an aggregate of $3.3 Billion Dollars was raised as the initial public market shrank severely. In 1981 ($3.2 billion dollars)[1], 1982 ($1.47 billion dollars)[2], and the first four months of 1983 ($2.9 billion dollars)[3], the initial public offering market has again become a robust financial vehicle for raising equity.

This resurgence has resulted in numerous lawyers acting for the first time as company counsel for a public offering. As counsel for the issuer, they have significant responsibilities dictated by the registration requirements of the Securities Act of 1933, as amended (the "Securities Act")[4] and the anti-fraud provisions of the Securities Exchange Act of 1934, as amended (the "Exchange Act")[5]. In addition to the specific statutory disclosure and due diligence requirements, counsel has the broader challenge of assisting a private company to conform its behavior to the more rigorous requirements of public companies[6].

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This article addresses only two aspects of a public offering that may be useful to uninitiated company counsel: (1) the relationship between the company and the underwriters; and (2) the pre-offering period.

Underwriters

The company should select and evaluate prospective underwriters primarily based upon their ability to sell the initial offering, and secondarily from their record of remaining an active and stabilizing market maker in the secondary market and their talent at providing ongoing capital and financial services for the company. Where the company is exciting, and the proceeds required substantial, one or more national underwriters may be interested. If investor interest will be limited to the company's home community, a regional firm may make sense as the sole lead underwriter or at least as a co-dealer manager. The company's analysis of the investment appeal of its offering, and therefore the most appropriate underwriter, should reflect the views of its counsel, accountants, and several prospective underwriters.

During the selection process, the company should concentrate on three broad negotiating areas: (1) underwriter's compensation; (2) mechanics of the underwriting; and (3) initial public offering price.

Underwriter selection involves practical business questions. Who will pay the expenses of underwriter's counsel? What percentage of the gross proceeds of the offering will the underwriting syndicate receive as their "spread"? Will the company be required to obtain expensive underwriters' indemnification insurance? Contrary to what the underwriters may indicate, all of these are negotiable, and financially important, items. Even minimal differences in the "spread" or allocation of offering expenses can involve substantial sums. Counsel should confirm in writing the underwriters' proposals relative to fees, expenses, and minimum estimated price/earnings multiples. While underwriters will often resist reducing their proposals to a letter of intent, and though the actual underwriting agreement will not be executed until the night before the offering, written communications should firmly indicate to the underwriters what the company's expectations are.

Underwriting mechanics, the second principal area of concern to the issuer, involve a variety of issues. Where there are co-dealer managers, the company should select one underwriter who will control the books of the syndicate, and whom the company will regard as the lead underwriter. The company must decide how many shares will be available to the underwriters as an over-allotment option (referred to as the "Green Shoe"), the length of time such option may be exercised, and whether the over-allotment shares will be sold by the company, the selling shareholders, or both. In connection with a firm commitment public offering, the underwriting group may create a short position in the security by selling more shares than the maximum being offered. This is frequently done in anticipation of subsequent cancellation of orders by customers. The underwriter obtains the over-allotment option to be used to cover the syndicate short position.

When all shares are sold by the company, the proceeds strengthen the balance sheet and financial position of the issuer. Founding shareholders, however, frequently sell a percentage of their shares to realize cash - a disposition which does not benefit the company. Where the shareholders sell only a fraction of their interests and retain the balance, the underwriters are normally comfortable. Although some cash is realized, the majority of the selling shareholders' profits will depend upon the performance of the stock after the offering. What does offer the underwriters some discomfort is the converse situation where the shareholders sell virtually all of their shares. Because this can appear to be a "bail-out" of the sellers at the expense of the public investors, underwriters are understandably resistant to wholesale disposition of founders' shares. In the final analysis, however, it is the company and its founders who are going public, and if they are insistent on this issue, they should prevail.

The allocation of offering expense between the company and selling shareholders is extremely important. Selling shareholders may pay a proportionate share of the aggregate expenses, with or without a maximum amount, or simply pay a fixed sum. State securities commissions are extremely sensitive on this point and may refuse to register new issues where selling shareholders pay less than their proportionate share of expenses, thereby apparently profiting at the expense of the company. This possibility militates strongly against making an allocation of expenses on other than a proportionate basis.

Initial public offerings are traded in the over-the-counter market. The major stock exchanges all require listing companies to have a minimum number of round-lot shareholders and to satisfy a broad geographical shareholder distribution requirement. If management believes that exchange listing is a corporate goal, then the underwriting agreement should specify that after the offering, all such exchange requirements will have been satisfied.

Companies are concerned not only about the geographical distribution of their shareholders, but also about their characteristics as investors. Some companies prefer institutional investors who tend to trade infrequently but in block quantities. When a high percentage of shares is held institutionally, the active float in the secondary market diminishes. Issuers desiring an active secondary market will encourage the underwriter to emphasize sales to individuals and limit sales to institutional investors. Today's securities markets are dominated by institutions so that there are serious limitations to the underwriter's ability to restrict institutional sales. If the company persists, however, the underwriter can considerably increase the percentage of individual share ownership.

The final aspect of the underwriting/issuer relationship is probably the most critical - initial public offering price. The underwriter and company will explore the price-to-earnings ratios of comparable companies in similar industries, to try to establish a value that reflects the company's worth yet which will also be saleable to the public. Issuer and underwriter share a general concern - that the company realize value for its shares sold, and that the price of the shares perform well in the secondary market. An overpriced stock may create value initially for the company, but create a weak aftermarket with falling prices, negatively impacting the company, the underwriter, and the non-selling founding shareholders.

Because pricing depends upon exact stock market and economic conditions on the offering date, the actual offering price is not determined until the night before the offering. The underwriter frequently attempts to reduce the offering price to minimize risk that the underwriter can sell all of the securities. Lowering the price also increases the likelihood that the stock price will rise after the offering. Nothing is better for the underwriter than for the price of the stock to increase 5-15% in the aftermarket, thereby immediately benefiting the new investors. On the other hand, nothing is more painful for the company than to watch its stock rise 50% in the week following the offering and realize how much money was made by others and not the company. The company and its counsel should press for a fair price, but remember that the underwriter's business is selling securities, and their pricing decisions generally reflect a seasoned business judgment.

Preparation Period

Negotiating with the underwriter represents the external aspect of the offering process. Equally important are the internal changes prompted by the frequently traumatic transition from a private to a public company. Major corporate decisions for a public company may require shareholder approval from a diverse and independent group. Such approval involves compliance with the proxy requirements of the Exchange Act, including review by the Securities and Exchange Commission (SEC), rather than the casual shareholder and director approval common in a closely-held corporation. To minimize the inconvenience and attendant expense of obtaining shareholder approval after the public offering, the company and its counsel frequently use the pre-offering period to analyze existing policies and adopt all anticipated programs, agreements, or plans which require shareholder approval.

The "due diligence" obligations of the Securities Act[7] necessitate a thorough review by all underwriting participants to ascertain that the company has complied with all statutory and regulatory requirements affecting its business. Counsel frequently begins the review process by examining the company's corporate record book to ascertain whether all required meetings have been held and all transactions approved. Bank loans, leases, employment agreements, acquisitions, and relationships with insiders must be carefully scrutinized. This review frequently uncovers incomplete documents, undocumented transactions, or other "housekeeping" details which must be attended to. Depending on the transaction, counsel may sometimes feel like Hercules before the Augean stables.

Prior to going public, the company's Articles of Incorporation will usually be amended to increase the authorized number of shares. The company may diversify its capital stock by creating a class of preferred shares with indeterminate financial terms. This provision permits the Board of Directors to subsequently establish specific terms for such preferred shares without additional shareholder approval[8], thereby facilitating the use of such shares in future acquisitions.

As a public company, unwanted take-over bids[9] may be forthcoming. Common defensive measures to thwart such hostile attempts include amending the company's articles of incorporation to eliminate cumulative voting,[10] providing for staggering terms for election to the Board of Directors, or requiring supra-majority approval to remove directors or to amend articles of incorporation. It is easier to adopt such provisions before a public offering rather than in the midst of an unfriendly tender offer.

Ohio corporations can also take advantage of recent changes in the Ohio General Corporation Law and Ohio Securities law.[11] These changes regulate bids for large blocks of stock of a public company. Section 1701.831 requires a favorable shareholder vote (excluding certain "interested shares") before a "control share acquisition" may be implemented, unless a corporation's articles of incorporation or code of regulations specifically provide that this section does not apply. These statutory provisions elongate the acquisition period for an unwanted raider, and give the target the maximum time to thwart the attempt. Where the principal shareholders and the company contemplate selling substantial amounts of stock, they may want to amend the charter documents to explicitly reject the provisions of the statute. If the shareholders contemplate that control share acquisitions would only occur under unfriendly circumstances, then counsel should accept the benefit of the statutory protection.

Prior to becoming a public company, shareholders and management (usually the same individuals) are often informal with respect to compensation. As the sole owners of the business, distinctions between salaries, bonuses, dividends, and loans may have been blurred. The correct time to eliminate ambiguities is prior to the public offering. The company should consider written employment agreements for its key executives, with or without the now infamous "golden parachute" provisions. All loan relationships should be evidenced by appropriate instruments and security agreements if any.

Stock option plans may be adopted during this period which should be approved by shareholders. Such plans should provide that no option shares may be issued until registered with the SEC. Registration of option shares is usually accomplished by filing a Registration Statement on Form S-8 with the SEC approximately six months after the initial public offering. Counsel should consider the relative tax consequences and merits of incentive stock option or non-qualified plans, and such sensitive issues as the availability of options to major shareholders, directors, or non-employee advisors to the company.

Finally, management should examine purchase, lease, or service transactions between the company and its shareholders, officers, and directors to determine if such relationships should be maintained following the public offering. If management concludes that such transactions are beneficial to the company, then written agreements should be entered into, sensitively reflecting the inherent conflict in such situations.

It is important to note the philosophical difference between federal and state securities regulations. The federal system is predicated upon the prophylactic effect of public disclosure. A registration statement fully disclosing conflicts, no matter how severe, will be acceptable to the SEC and the shares may be registered for sale thereunder. Most state

securities divisions, by contrast, review offerings on their merits and consider fundamental fairness of transactions.[12] The "blue sky" review of insider relationships may result in a denial of the issuer's right to sell its securities in one or more states, which can seriously undermine marketing efforts. Where possible, the relationships should be terminated, or management should prepare itself to defend the propriety of the transactions. Appraisals or independent valuations of worth may assist this procedure.

There is no magic answer as to how to resolve any of the foregoing issues. After the company is public, changes must be examined with a critical eye to potential reactions from financial analysts, impact on share prices, and relationships with, and approval from, public shareholders. The value of a diligent pre-offering review process, however, is that while the company is private, changes may be effected after consultation with only a few people, all deeply involved with the company.

[1]See, Farrell Going Public, VENTURE, April-May, 1982, p. 30.
[2]Going Public - The Initial Public Reporter, January 2, 1983.
[3]Going Public - The Initial Public Reporter, April 28, 1983.
[4]15 U.S.C. Section 77a et seq.
[5]15 U.S.C. Section 78a et seq.
[6]For an excellent discussion of the broad range of securities issues faced by company management after the initial public offering, See, Schneider and Shargel, "Now that you are publicly owned . . ." 36 Bus. Law. 1631 (1981).
[7]The investigation mechanics required to satisfy the "reasonable examination" standards of Section 11 of the Securities Act are explored in, Soderquist, "Due Diligence Examinations" 24 Prac. Law. 33 (1978). Also, see Comment, The Expanding Liability of Securities Underwriters; From BarChris to Globus, 1969 Duke L.J. 1191.
[8]Ohio Rev. Code Section 1701.06(A)(12).
[9]A thorough analysis of the numerous methods of deterring unwanted takeovers is contained in Hochman and Folger, Deflecting Takeovers: Charter and By-Law Techniques, 34 Bus. Law. 537 (1979). See, also, Steinbrink, Management's Response to the Takeover Attempt, 28 Case W. Res. L. Rev. 882 (1978).
[10]Ohio corporations cannot eliminate the rights of shareholders to cumulative voting. Section 1701.55 of the Ohio Rev. Code provides that cumulative voting must be permitted if requested by any shareholder not less than 48 hours prior to the date of any meeting of shareholders.
[11]Effective as of November 18, 1982, Sections 1701 and 1701.48 Ohio Rev. Code were amended, and new sections 1701.831 and 1701.48 were added.
[12]See generally Long, State Securities Regulation - An Overview, 32 Okla. L. Rev. 541 (1979).

Enforcement

The previous issue of the Ohio Securities Bulletin contained a reference to a Cease and Desist Order which had been issued against Fred Johnson and Elayne Mitchell. It should be noted that such order was limited solely to commissions received in connection with the sales of securities in Century Fund VII, Ltd. and Century Fund, VIII, Ltd. We regret any confusion this may have caused.

PHILLIP S. FRY

On March 7, 1983, Phillip S. Fry consented to a permanent injunction in which he agreed not to engage in any future acts violative of the Ohio Securities Act. The terms of the injunction also bind his wife, Kathy S. Fry, and three entities controlled by Mr. Fry, Worthington Arms Mobile Home Park Cooperative, Inc., M.L.J. Trust, and Central Ohio Trust No. 1.

The permanent injunction arose out of an action filed by the Division in the Delaware County, Ohio, Court of Common Pleas. The Division's complaint alleged that Mr. Fry and the others were selling unregistered shares of stock in Worthington Arms Mobile Home Park Cooperative, Inc., in violation of Ohio Revised Code Section 1707.44(C)(1), were selling said shares otherwise than through a licensed securities dealer, in violation of Ohio Revised Code Section 1707.44(A), and had engaged in fraudulent sales practices in violation of Ohio Revised Code Section 1707.44(B) in that certain material facts were not disclosed to prospective purchasers.

In the consent order, Mr. Fry and the others agreed to disclose in all future offerings that (1) Phillip S. and Kathy S. Fry had filed a Voluntary Petition for Reorganization pursuant to Chapter 11 of the United States Bankruptcy Code, (2) Mr. Fry had consented to a permanent injunction in the matter of Securities and Exchange Commission v. Phillip S. Fry, et al., in which the SEC alleged unregistered and fraudulent sales of securities, and (3) the fact that Mr. Fry and the others had entered into the consent entry in the Delaware County action.

The Division action resulted from work conducted by Staff Attorney James Lummanick and Investigator Cy Sedlacko.

FREDERICK L. ROSS

On April 20, 1983, Frederick L. Ross was ordered to begin serving a six-to-thirty year sentence for violations of Section 1707.44(B)(4) of the Ohio Securities Act. Mr. Ross began serving his sentence on April 22, 1983.

Mr. Ross was indicted in April, 1981, following a lengthy investigation by the Ohio Division of Securities and other agencies. The indictments charged that he had caused false representations to be made for the purpose of selling securities in Eagle Energy Development, Ltd. No. 3, an oil and gas issuer. Although money was raised from investors, the promised wells were never drilled.

Six theft counts were dismissed against Mr. Ross as part of a plea bargain, in which he entered a no contest plea to the securities violations in September, 1981. Mr. Ross challenged the validity of the Grand Jury process and his indictments upon appeal. Among other issues raised, Mr. Ross contested the procedure by which former Division of Securities Counsel David LeGrand served as a special assistant prosecutor in the matter. Mr. Ross' appeal was denied by the Ohio Court of Appeals for the Tenth Appellate District in November, 1982. The Ohio Supreme Court refused to hear his appeal earlier this year.

ROBERT C. WILLS, WILLIAM E. BRAME AND MARK WING

On February 16, 1982, the Licking County, Ohio, Grand Jury, returned a twenty-four count indictment against Robert C. Wills, William E. Brame and Mark Wing, alleging theft and violations of the Ohio Securities Act. On April 13, 1983, two additional counts were added to the indictment, alleging the same violations.

Mr. Wills operates a tax and insurance consulting business, Wills and Associates, in Newark, Ohio. Messrs. Brame and Wing were associated with Mr. Wills in that business. The aggregate dollar loss alleged in the indictment exceeds $600,000.00. Messrs. Wills, Brame and Wing remain free on cash bond pending trial.

The indictment came at the end of a six-month investigation by Division Staff Attorney James Lummanick and Investigator Cy Sedlacko, along with Det. Ben Wells of the Newark, Ohio, Police Department and the Licking County Prosecutor's Office.

PUBLIC HEARING NOTICE

The Ohio Division of Securities, Department of Commerce, proposes an amendment of rule 1301:6-3-15 of the Administrative Code. The public hearing on the proposed rule amendment will be held at 10:00 a.m. on August 3, 1983, in the Fifth Floor Conference Room, Two Nationwide Plaza, Chestnut and High Streets, Columbus, Ohio 43215.

The rule amendment specifies the use of Generally Accepted Accounting Principles in construing terms in the rule and modifies adjustments to net worth computations for certain assets acquired in the ordinary course of business.

Information concerning the hearing and copies of the proposed rules may be obtained from the Division of Securities, Third Floor, Two Nationwide Plaza, Chestnut and High Streets, Columbus, Ohio 43215. Copies will be mailed upon request as provided in Section 119.03 of the Revised Code.

WARREN W. TYLER
DIRECTOR, DEPARTMENT OF COMMERCE

Warren Tyler is the former Vice President of the State Savings Company of Columbus. He previously served as Assistant to the Chairman of State Savings from 1976 to 1980. Mr. Tyler is the former Senior Project Manager of K.S. Sweet Associates, King of Prussia, Pennsylvania; and former managing partner of Joty Enterprises, Wilmington, Delaware. He is a trustee of the Rickenbacker Port Authority, a member of the Ohio Housing Finance Agency, and is a former trustee of the Columbus Urban League. He holds a B.S. in Secondary Education from Cheyney State College in Cheyney, Pennsylvania.

RODGER A. MARTING, COMMISSIONER
DIVISION OF SECURITIES

A native of Ironton, Ohio, Mr. Marting brings a diversity of educational and business experience to the office of Commissioner of the Ohio Division of Securities. Mr. Marting holds a Bachelor's Degree in Electrical Engineering from Ohio University, a Masters' Degree in Business Administration from Harvard, and a Law Degree from Ohio State University. Immediately preceding the acceptance of the position of Commissioner, Mr. Marting had been engaged in the private practice of law in Columbus for nine years. His other business endeavors include administrative assistant to the President of Ashland Oil, treasurer of a Columbus area real estate and insurance holding company, marketing at Corning Glass Works, and principal of an Ohio Securities Dealer. Mr. Marting has taught at Capital University in the M.B.A. program and is a professor at Franklin University. Mr. Marting and his wife Sue reside in Circleville, Ohio.

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DEPARTMENT OF COMMERCE
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