



OHIO SECURITIES BULLETIN

RICHARD F. CELESTE
GOVERNOR

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DIRECTOR OF COMMERCE

MARK V. HOLDERMAN
COMMISSIONER OF SECURITIES

89:3 Summer Quarter 1989

Ohio Securities Conference—1989

On Monday and Tuesday, October 30 and 31, 1989, the Ohio Division of Securities will again host a conference in Columbus at the Columbus Marriott North. This session continues the presentation of the annual securities conference renewed in November, 1988. The first day of the conference will consist of four panel discussions providing instruction and education in several securities law topics. The second day will be devoted solely to meetings of the five advisory committees. The panel discussions are concerned with some of the securities issues in the areas of broker-dealer licensing, investor remedies, business acquisitions and current blue sky law administration.

The first panel on Monday morning will discuss investor remedies in securities transactions from the plaintiff's perspective under the federal statutes and Ohio laws and how to bring such an action. The second morning panel will review securities arbitration in broker-dealer activities and deal with SRO procedures, discovery, AAA procedure and plaintiff and defendant practitioners' critiques.

In the early afternoon session of the program a panel will consider various aspects of negotiated business acquisitions including tax and accounting considerations. The final session in the afternoon will be the Division of Securities panel, which includes the Commissioner of Securities and the chiefs of the registration, licensing and enforcement sections.

The luncheon speaker at the Securities Conference will be Sarah B. Ackerson of the Division of Enforcement, United States Securities and Exchange Commission. Mrs. Ackerson is Chief of the Market Manipulation Program in the Enforcement Division and is also Chief of the Commission's Penny Stock Task Force.

The complete schedule for the Conference program on Monday, October 30, is as follows:

8:00 a.m. **Enrollment**
Continental Breakfast
8:45 a.m. **Introduction**
Mark V. Holderman, Commissioner
Ohio Division of Securities

9:00 a.m. **Topic—Investor Remedies from the Plaintiff's Perspective**

Overview of Investor Remedies
John P. Beavers, Esq.—Moderator
Bricker & Eckler
Columbus, Ohio

Remedies Under Federal Statutes
Gary P. Kreider, Esq.
Keating, Muething & Klekamp
Cincinnati, Ohio

Remedies Under Ohio Laws
Donald A. Antrim, Esq.
Carlisle, Patchen, Murphy & Allison
Columbus, Ohio

How to Bring an Investor's Action
Dennis E. Murray, Sr., Esq.
Murray & Murray
Sandusky, Ohio

10:30 a.m. **Break**

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Columbus, Ohio 43266-0548
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**Ohio Department of Commerce
Division of Securities**

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10:45 a.m. **Topic—Securities Arbitration**

Introduction and SRO Rule Changes

Richard M. Wachterman, Esq.—Moderator
Gradison & Company
Cincinnati, Ohio

Self Regulatory Organization Procedures

Deborah Masucci, Esq.
National Association of Securities Dealers
New York, New York

Discovery and Plaintiff Practitioner's Critique

Richard Wayne, Esq.
Strauss & Troy
Cincinnati, Ohio

AAA Procedure and Defense Practitioner's Critique

Robert N. Rapp, Esq.
Calfee, Halter & Griswold
Cleveland, Ohio

12:15 p.m. **Lunch—Speaker:**

Sarah B. Ackerson, Esq.
Division of Enforcement, S.E.C.
Washington, D.C.

Topic—Penny Stock Fraud and Investor Protection

1:45 p.m. **Topic—Business Acquisitions**

Overview of Negotiated Business Acquisitions

Charles F. Dugan, II, Esq.—Moderator
Vorys, Sater, Seymour & Pease
Columbus, Ohio

General Considerations

James E. Kline, Esq.
Trinova Corporation
Maumee, Ohio

Tax Aspects

Stephen M. Nechemias, Esq.
Taft, Stettinius & Hollister
Cincinnati, Ohio

Accounting Aspects

Gary D. Zeune, C.P.A.
Gary Zeune and Associates
Columbus, Ohio

3:15 p.m. **Break**

3:30 p.m. **Division of Securities Panel**

Overview of Current Blue Sky Issues

Mark V. Holderman, Esq.
Commissioner of Securities

Registration Matters

Michael P. Miglets, Esq.
Chief, Registration Section

Licensing Matters

Dale A. Jewell
Chief, Licensing Section

Enforcement Matters

Sylvia B. Robbins-Penniman, Esq.
Attorney Inspector

5:00 p.m. **RECEPTION**

This course has been approved by the Ohio Supreme Court Commission on Continuing Legal Education for 6.00 CLE credit hours, with no ethics instruction.

The registration fee for attendance on Monday, October 30, is \$125 per person. Registration includes all activities on October 30 and 31, including instructional materials. An enrollment form is set forth on the last page of this issue of the Bulletin. Enrollment forms must be received by Monday, October 23, 1989.

Advisory committee meetings will be held in several meeting rooms at Columbus Marriott North on Tuesday, October 31, 1989 from 9:00 a.m. to 2:00 p.m. A buffet breakfast will be served from 8:00 to 9:00 a.m. Enrollment for Monday's panel presentations is not required in order to participate as a committee member. Persons interested in appointment to an advisory committee may write and advise the Division of their selection or preference. Each person can serve on only one committee at any time. The five advisory committees are as follows:

- Takeovers
- Exemptions
- Registration
- Enforcement
- Licensing

The Columbus Marriott North has a limited block of discounted rooms for attendees who make hotel reservations by October 9, 1989. Please call (614) 885-1885 and refer to the Ohio Securities Conference.

Access to Division Documents

By S. B. Robbins-Penniman

Recent court actions and requests from the bar regarding access to Division records indicate the need for a brief discussion of the Division's policy and procedures in this area.

The Division of Securities is a state agency, and is in possession of a variety of documents received and created during the course of performing its functions. Basically, three statutes govern these documents: Revised Code Sections 1707.12, 149.43, and 119.01. Section 1707.12 is part of the Ohio Securities Act, and specifically governs inspection of Division documents. The 1984 amendments made significant changes in this section. The second, Section 149.43, is the public records law generally applicable to all state agencies. This statute applies to the extent that Section 1707.12 is silent. Although the terms used in both statutes are similar, there are important differences between them, which are discussed below. The third is Section 119.01, which provides that documents which are part of an administrative hearing record are public.

In addition to these statutes, O.A.C. Rule 1301:6-1-04 governs access to Division records, and Department of Commerce policy memorandum 7.06 details costs for copying.¹

Section 1707.12 has a three-tiered approach to assessing requests for access to Division records.² Section 1707.12(A) provides that "[a]ll applications and other papers filed with the division of securities shall be open to inspection at all reasonable times, except for unreasonable or improper purposes." (Emphasis added.) The Division construes this to mean that all papers filed with the Registration Section and Broker-Dealer Section by the entities or persons seeking registration or licen-

sure are open for inspection. The meaning of "unreasonable or improper purpose" has not been explored in any actions. Most Division records fit within this first tier and the analysis for the bulk of the access requests usually should stop at this level.

Other materials generated or received by the Division in its regulatory capacity include documents which owe their existence to an investigation of some type, and the Division often receives requests for these investigative records.³ These requests are governed by the second tier of analysis, Section 1707.12(B), which states as follows:

Information obtained by the division through any investigation shall be retained by the division and shall not be available to inspection by persons other than those having a *direct economic interest* in the information or the transaction under investigation, or by a law enforcement officer pursuant to the duties of his office. (Emphasis added.)

The Division interprets this to mean that *only* those who have a "direct economic interest" in the investigative records are entitled to inspect them; all others are barred. The meaning of "direct economic interest" is not defined in the statute, nor has it been the subject of a court action. Nonetheless, the Division has attempted to implement the usual meaning of these words and the apparent legislative intent of the phrase when reviewing document requests. If a person or entity has some financial relationship to the matter investigated by the Division, or if the requester is a law enforcement agency, then the second tier of the test has been satisfied.

A direct economic interest does not end the analysis, however, when the Division is assessing requests for the inspection of records from an investigation. Section 1707.12 further provides in (C) that:

Confidential law enforcement investigatory records and trial preparation records of the division of securities or any other law enforcement or administrative agency which are in the possession of the division of securities shall in no event be available to inspection by other than law enforcement agencies.

The terms "confidential law enforcement investigatory record" and "trial preparation record" are defined in both Sections 1707.12(E) and 149.43. There are no meaningful differences between these statutes in their respective definitions of "confidential law enforcement investigatory record." The disparity in language between them regarding "trial preparation record" is notable, however. Section 149.43(A)(4) reads:

"Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.

In contrast, Section 1707.12(E)(2) states that "trial preparation record" means:

any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a criminal, quasi-criminal, civil, or *administrative action or proceeding*, including, but not limited to, the independent thought processes and personal trial preparation of an attorney *and division personnel, their notes, diaries, and memoranda.* (Emphasis added.)

Read in light of Paragraph (C), it is clear that the third tier of the statute *prohibits* the Division from releasing confidential

law enforcement investigatory and trial preparation records to anyone besides law enforcement agencies. This prohibition is not found in the Public Records Act.

The interplay of R.C. § 1707.12 and § 149.43 was addressed recently in *Republic Oil Co. v. Columbus Accounting & Tax Service, Inc.*, Case No. 85CV-11-6851 (Franklin Cty. C.P., June 8, 1989, McGrath, J.). The Division was subpoenaed as a third party to produce all documents relevant to a criminal investigation which the Division had undertaken several years before concerning Republic Oil Co. Although the Division did not contest that the requesting party had a direct economic interest in the documents, the Division moved to quash the subpoena insofar as it required production of confidential law enforcement and trial preparation records. The court conducted an *in camera* inspection of the documents prior to ruling on the motion.⁴ In granting the Division's motion, the court stated as follows:

R.C. 1707.12 is a statute, although with some similar wording, that gives broader protection from disclosure than R.C. 149.43 which is simply a statute defining what is and what is not, a public record. (slip op. at p 5.)

The court then described the documents the Division sought to protect and determined that they were not discloseable:

The [Division of Securities] has specifically requested protection of documents generated by DOS investigators such as memoranda to the Franklin County Prosecutor for use at trial; documents which would reveal a specific investigatory technique (i.e., a method or mode of tracing funds) and statements taken from certain individuals which the DOS has considered confidential, work product, and as trial preparation documents.

The Court has reviewed the documents for which protection is sought and is satisfied that in terms of R.C. 1707.12, those documents fall within the categories of records protected. *Moreover, the Court believes the DOS is similar to a police agency whose documents and investigatory records enjoy a certain common law privilege against a civil action subpoena pursuant to the balancing test set forth in Henneman. . . .*

As noted in *Henneman*, the public has an important interest in the confidentiality of information compiled in the course of law enforcement internal investigations. Disclosure of such information may, in many instances, work to undermine investigatory processes by encouraging [sic] persons with knowledge from coming forward or by revealing the identities of confidential sources. Although the DOS is not specifically a police agency, its functions are similar. *The DOS specific investigatory techniques and information require protection.* (Emphasis added; citing *Henneman v. Toledo* (1988), 35 Ohio St. 3d. 241, slip op. at pp 5-6).

The distinction drawn by the Division in arguing the *Republic Oil* motion was, on the one hand, the difference between materials which could have been obtained only from the Division, such as analyses and witness interviews, and, on the other hand, those documents which the litigants had the independent right to obtain, through discovery, from either the litigants themselves or other third parties.⁵ The latter included, for example, bank account information and materials from companies which participated in the transactions in question. Thus, the Division had no objection to the court's order that this "raw" data underlying the Division's analyses be produced.

As a creature of statute, the Division is bound by the duties and prohibitions imposed by the General Assembly. The Division attempts to deal with requests for production under Section 1707.12 in a straightforward and reasonable manner.

The author is Attorney Inspector with the Division.

¹Photocopying costs are fifty cents per page for the first twenty-five pages, and twenty-five cents per page for the remaining pages. *Policy and Procedures Manual for Department of Commerce*, June, 1986 ed.

²The three-tiered approach was noted with approval in *Republic Oil Co. v. Columbus Accounting & Tax Service, Inc.*, Case No. 85CV-11-6851 (Franklin Cty. C.P., June 8, 1989). This case is discussed in more detail *infra*.

³Although the Enforcement Section is most generally mentioned in this context, the Broker-Dealer Section performs examinations which are of an investigatory nature.

⁴This was done in order to comply with *State, ex rel. National Broadcasting Co., Inc. v. Cleveland* (1988), 38 Ohio St. 3d. 79.

⁵The Division was in possession of original documents of other companies which had been produced pursuant to Division subpoena. Even though the litigants could not then obtain direct discovery from these companies, the Division permitted access to the records.

Reg-Flex Rule Review

PUBLIC NOTICE

Pursuant to section 121.24(D) of the Ohio Revised Code, the Divisions of Administration, Banks, Securities and Unclaimed Funds within the Ohio Department of Commerce are conducting a review of their currently effective rules which are found, respectively, in Chapter 1301-1, and Divisions 1301:1, 1301:6 and 1301:10 of the Ohio Administrative Code.

The divisions must determine whether the rules should be continued without change or amended or rescinded (consistent with the purpose, scope and intent of the applicable statutes authorizing the rules' adoption) so as to minimize the economic impact of the rules upon individuals, small businesses or small organizations.

Interested parties are invited to submit written comments by December 15, 1989 about the continued need for the rules; the degree to which technology, economic conditions or any other relevant factors have changed in the areas affected by the rules; or the extent of any problems as they relate to other currently effective rules.

Comments should be mailed to the Department of Commerce, Division of Administration, Room 2347, 77 South High Street, Columbus, OH 43266-0544.

Outstanding Employee Award

Tracie T. Cope was the recipient of the Division's Outstanding Employee Award for the quarter ending June 30,

1989. Tracie is a secretary in the Broker-Dealer Section and has been with the Division since 1988.

Personnel

Carol L. Barnum joined the Division in July 1989, as an attorney examiner in the registration section. She is a graduate of The Ohio State University College of Law and has had experience in corporate legal departments.

Interesting Reading

Mark v. FSC Securities Corporation, 870 F.2d 331 (U.S.C.A. Sixth, 3-16-89).

In this case, the plaintiff/investor class argued that the issuer/defendant sold unregistered securities without a licensed dealer, and (among other things) asked for rescission under the Ohio Securities Act. The jury agreed with the defendant's arguments that it had properly claimed the federal "private offering" exemptions and Ohio's private offering exemption found in Ohio Revised Code Section 1707.03(Q).

The Sixth Circuit, however, rendered a judgment n.o.v. stating that the defendant had the burden of proof to establish the exemption and that a reasonable juror could only have concluded that the defendant had failed to comply with both the federal statutory private offering exemption, section 4(2), as well as federal Rule 506. The defendant, therefore, lost both the federal and Ohio exemptions and the circuit court ordered the district court to award rescissory damages.

Registration

REGISTRATION FILINGS AS OF SEPTEMBER 30,

Form Type	Summer Quarter	Year to September 30,	Summer Quarter	Year to September 30,
	1989	1989	1988	1988
2(B)	292	818	274	756
3-O	2,693	9,100	2,833	9,063
3-Q	346	1,110	375	1,148
3-W	39	112	51	144
04	0	2	0	2
041	0	1	0	3
041(B)(4)	0	0	0	1
5(A)	0	0	0	1
6(A)(1)	61	193	87	248
6(A)(2)	23	67	26	100
6(A)(3)	13	32	26	57
6(A)(3)OG	0	1	2	2
6(A)(4)	17	55	25	76
09	431	1,008	363	1,037
09OG	0	0	0	3
091	270	1,148	494	1,405
10	0	0	0	0
39	32	141	46	129

Advisory Committees

Exemptions Advisory Committee

The Exemptions Advisory Committee will meet in conjunction with the Ohio Securities Conference on Tuesday, October 31, 1989 at the Columbus Marriott North.

Following the meeting at the Ohio Securities Conference in November 1988, two separate proposals for changes to administrative rules were circulated among committee members. The first proposal would amend O.A.C. Rule 1301:6-3-03(N) by exempting sales of securities under compensatory benefit plans. The second would replace paragraph (C) of the present O.A.C. Rule 1301:6-3-02 with definitions of commercial paper and promissory notes, as applied to Section 1707.02(G) of the Revised Code. These two proposals were set forth in the *Ohio Securities Bulletin*—Spring Quarter 1989.

The agenda for this year's meeting will include the above two items. Other issues raised at the last meeting relating to private offerings and securities sales to institutional investors may also be included. Committee members are being contacted for substantive exemption issues that can be included in this year's agenda. The Committee remains open to suggestions from industry and the bar for consideration of issues within the general area of securities exemptions.

Broker-Dealer

DEALER AND SALESMAN LICENSES AS OF SEPTEMBER 30,

	1989	1988
Broker-Dealer	1,716	1,742
Salesman	57,048	55,709

REGISTRATION FILINGS AS OF SEPTEMBER 30, —continued

Form Type	Summer Quarter 1989	Year to September 30, 1989	Summer Quarter 1988	Year to September 30, 1988
391/09	1	10	6	11
391/3-O	191	598	189	568
391/3-Q	27	117	35	144
391/3-W	0	6	3	6
391/6(A)(1)	2	5	0	2
391/6(A)(2)	0	0	1	1
391/6(A)(3)	0	3	1	2
391/6(A)(4)	0	0	0	1
TOTAL	4,438	14,527	4,837	14,910

Enforcement

FINAL ADMINISTRATIVE ORDERS

The following are recent enforcement administrative orders. The orders have been issued by the Division after notice of the parties' opportunity for an administrative hearing in accordance with Ohio Revised Code Chapter 119. Orders which have been appealed to Common Pleas Court are so noted.

<u>Respondent</u>	<u>Date Issued</u>	<u>Order No.</u>	<u>Action Taken/Type of Order</u>
Mutual Securities, Inc.; Bernard Claude D'Ornellas Westlake Village, California	6/12/89	89-077	Cease & Desist
Dennis Quinn Fairley Westlake Village, California	6/12/89	89-078	Cease & Desist
Stocks and Bonds Investment Company, Inc. Columbus, Ohio	7/10/89	89-082	Suspension of Dealer's License
Jeffrey Wayne Hayes Lima, Ohio	7/24/89	89-083	Revocation of Securities Salesman's License
Mobile Care Corp., A.K.A. Ohio Mobile Dental; Michael Walcutt, President Worthington, Ohio	7/27/89	89-085	Cease & Desist
All States Oil & Producing Co., Inc. Canton, Ohio	8/11/89	89-086	Revocation of Dealer's License
Monastery Equities, Inc. Cincinnati, Ohio	8/15/89	89-088	Suspension of Dealer's License
Investment Center, Inc. Newark, Ohio	8/22/89	89-090	Suspension of Dealer's License

CRIMINAL CASES

<u>Case Name</u>	<u>Jurisdiction/Referring Staff Person</u>	<u>Action Taken</u>	<u>Comments</u>
Roy L. Currens	Franklin/ Referred by Karen Terhune	Pled guilty on 6/9/89 to the following: 1. 1 count of securities fraud; and 2. 1 count of sales of unregistered securities.	Roy L. Currens was indicted on 6/13/89 for selling units in a nonexistent fund, the Aggressive Cash Management Fund, while he was employed by American Heritage Research, Inc., and Heritage Market Research, Inc.

CRIMINAL CASES—continued

<u>Case Name</u>	<u>Jurisdiction/ Referring Staff Person</u>	<u>Action Taken</u>	<u>Comments</u>
Michael J. Burke	Franklin/ Referred by Karen Terhune	1. Arrested on 6/22/89, when pulled over for a traffic violation. 2. Arraignment held on 6/30/89, where a not guilty plea was entered.	Michael J. Burke was indicted on 2/8/89 on 29 counts relating to promissory notes allegedly sold to investors for his company, AMM Investments.
Donald H. Coots	Wayne/ Referred by Karen Terhune	1. Indicted on 7/10/89 for: a. 1 count of misrepresentations in the sale of securities; and b. 3 counts of unlicensed sales of securities. 2. Indicted on 8/14/89 for: a. 18 counts of sales of unregistered securities, unlicensed sales of securities, and misrepresentations in the sale of securities; b. 1 count of theft; c. 1 count of perjury; d. 1 count of passing a bad check; and e. 1 count of aggravated theft.	Donald H. Coots, an insurance agent, allegedly sold "certificates of investment" through his company, Don H. Coots and Associates, in which high rates of return were promised.
Charles Williams	Montgomery/ Referred by Karen Terhune	1. Pled guilty on 7/20/89 to 1 count of misrepresentations in the sale of securities. 2. Sentenced on 8/17/89 to 1 year imprisonment. Confinement was suspended, and he was placed on probation for 2 years, ordered to make restitution of \$15,000 by 8/21/89, and pay court costs.	Charles Williams sold unregistered stock in his company, Classic Heating and Air Conditioning, Inc., in which monthly dividend checks were promised to an investor. The stock was never issued, and no dividends were paid.
Ron Robbins	Franklin/ Referred by Mike Quinn and Dan Malkoff	Indicted on 8/9/89 for: 1. 2 counts of securities fraud; 2. 2 counts of forgery; and 3. 2 counts of theft.	Ron Robbins, while a licensed securities salesman, allegedly kept investors' checks and converted the funds for his own use, rather than purchasing the securities for which he received the funds.
Robert L. Wildman	Hamilton/ Referred by Mary Spahia	Indicted on 8/16/89 for: 1. 7 counts of sales of unregistered securities; and 2. 7 counts of unlicensed sales of securities.	Robert L. Wildman, dba Roselawn Coin Centre, and Ohio International Coin Co., a partnership, a.k.a. Gold 'N Treasures, allegedly sold securities, consisting primarily of promissory notes, in which high annual rates of return of up to 30% were promised.
Arthur P. Miller	Franklin/ Referred by Norman Essey	1. Pled no contest on 8/26/89 to a Bill of Information of: a. 10 counts of sales of unregistered securities; and b. 10 counts of misrepresentations in the sale of securities. 2. Pronounced guilty on 8/26/89.	Arthur P. Miller, an investment adviser and licensed securities salesman, allegedly sold interests totaling approximately \$5 million for an investment fund, Financial Service Group Investment Account. Investors were allegedly told they would earn 12 to 14 percent.

CRIMINAL CASES—continued

<u>Case Name</u>	<u>Jurisdiction/ Referring Staff Person</u>	<u>Action Taken</u>	<u>Comments</u>
Robert L. Jones; Bernard L. Henry; Donald G. Jones	Stark/ Referred by Melanie Braithwaite	Indicted on 8/29/89 for the following: 1. Robert L. Jones— a. 4 counts of securities fraud and misrepresentations in the sale of securities; and b. 12 counts of sales of unregistered securities and unlicensed sales of securities. 2. Bernard L. Henry— a. 4 counts of securities fraud and misrepresentations in the sale of securities; and b. 11 counts of sales of unregistered securities and unlicensed sales of securities. 3. Donald G. Jones— a. 5 counts of securities fraud and misrepresentations in the sale of securities; and b. 3 counts of sales of unregistered securities.	Robert L. Jones and Bernard L. Henry of J.H. and Associates, and Donald L. Jones of D. Jones and Associates, allegedly sold oil and gas working interests illegally in a joint venture, J.H. and Associates 1986-I; N. Camden Well I.

ENROLLMENT FORM

Please enroll the following people in the
OHIO SECURITIES CONFERENCE—1989

Name: _____

Name: _____

Name: _____

Firm: _____

Address: _____

City: _____

State: _____ Zip: _____

Telephone: () _____

Total number enrolling: _____

Amount enclosed: _____

FEE: \$125 per person (includes all activities on
October 30 and 31).
Please make checks payable to:
Ohio Securities Conference Committee, Inc.

MAIL: Send enrollment forms and payment to:
Paul Tague, Deputy Commissioner
Ohio Division of Securities
77 S. High St., 22d Flr.
Columbus, OH 43266-0548

DEADLINE: Forms and requests for refunds must be
received by Monday, October 23, 1989.