



# OHIO SECURITIES BULLETIN

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91:3

## The Exemptions R.C. 1707.03(K)(2) and 3(a)(9)<sup>1</sup>

by Robert B. Holodnak

Ohio Revised Code 1707.03(K)(2) provides a transactional exemption from the securities registration requirements of Chapter 1707 and reads as follows:

The exchange or distribution by the issuer of any of its securities or of the securities of any of the issuer's wholly owned subsidiaries exclusively with or to its existing security holders, where no commission or other remuneration is given directly or indirectly for soliciting the exchange, is exempt.

What types of transactions fall within this exemption? Two useful explanatory sources are J. William Hicks' *Exempted Transaction Under the Securities Act of 1933*<sup>2</sup> and Howard M. Friedman's *Ohio Securities Law & Practice*.<sup>3</sup> Some exploration of equity or debt security adjustments in corporations or their subsidiaries follows.

The language of R.C. 1707.03(K)(2), except for the terms "distribution" and "wholly owned subsidiaries," parallels the language contained in section 3(a)(9) of the Securities Act of 1933. Professor Friedman notes the differences between R.C. 1707.03(K)(2) and its federal counterpart are the result of an amendment to R.C. 1707.03(K)(2) in 1985.<sup>4</sup> Basically, the Ohio amendment was designed to expand the section's exemption to include exchanges with the issuer's *wholly owned subsidiaries* and the issuer's *distribution* of its securities or the securities of the issuer's wholly owned subsidiaries. "Distribution" was included in the transactional exemption because Ohio's definition of "sale" includes every disposition of a security without regard to whether anything of value was conveyed for the security, i.e., no transactional type of "gift" exemption exists in Ohio and every disposition of security is, by statute, a "sale" regardless of whether the disposition is for value.<sup>5</sup>

Because the transactional exemption set forth in R.C. 1707.03(K)(2) parallels the Securities Act of 1933 3(a)(9) exemption, the interpretations of the two sections are analogous. While a dearth of Ohio interpretations of R.C. 1707.03(K)(2) exists, its federal counterpart has been the sub-

ject of numerous Securities and Exchange Commission no-action letters. The factual scenarios which the S.E.C. has treated, discussed by Professor Hicks, are too numerous to mention herein. However, his discussion of the interpretation of the word "exclusively" in the context of this transactional exemption is noteworthy.

Professor Hicks points out the S.E.C. has interpreted "exclusively" to modify "existing security holders" so that any exchange of securities must be " 'exclusively,' ... with ... existing security holders." <sup>6</sup> Moreover, he explains, "exclusively" modifies "security" so that 3(a)(9), which is analogous to R.C. 1707.03(K)(2), must be read: "Any security *exclusively* exchanged by the issuer with its existing security holders exclusively." The effect of the second interpretation is that security holders in this type of an exempt transaction cannot be required to part with anything other than their old securities.<sup>7</sup>

The requirement that the exchange be "securities for securities only" is obviously well taken. For instance, suppose Corporation A sells its own common stock to 10 of A's own shareholders. Corporation A then distributes its own warrants, to those 10 shareholders. Each warrant is exercisable by the shareholder by giving one share of common stock ~~and two dollars to Corporation A~~. The distribution of those warrants to existing security holders is an exempt transaction pursuant to Ohio's R.C. 1707.03(K)(2) exemption.

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Suppose then, that a shareholder of Corporation A decides to exercise those warrants by relinquishing the warrants plus two dollars per share of A common. This transaction is not exempt, pursuant to R.C. 1707.03(K)(2), because the common stock is not exclusively exchanged for warrants. Rather, additional consideration is required in the form of the two dollar exercise price. It is clear that if the exchange exemption applied to this transaction, the purpose of the securities registration requirement, to provide adequate disclosure and to review the offering for merit, would be circumvented.

Basically, the aforementioned transaction (consisting of the exchange first and the exercise second) as a total transaction is not an "exclusive" exchange, but represents a "sale."<sup>8</sup> Moreover, employing Ohio's definition of "sale" set forth in R.C. 1707.01(C) the sale occurs when the securities are offered for sale through the issuance of the warrants. Essentially, Corporation A is soliciting its security holders for another capital investment, exactly the type of transaction from which the federal 1933 Act and the Ohio Securities Act intended to protect investors by requiring adequate disclosure.

Such an interpretation becomes even more compelling when the transaction involves the issuer's wholly owned subsidiary. For instance, Corporation A distributes to its own common stockholders, warrants, similarly exercisable at two dollars per share, in its wholly owned subsidiary, Corporation B. Corporation A security holders are now security holders in Corporation B and may exchange the Corporation B warrants along with two dollars for common shares of Corporation B. Corporation B has never had to register its common shares and nothing about Corporation A may have been disclosed to the now Corporation B shareholders. No Ohio exemption is permitted.

Quite clearly, the transaction does not have to involve warrants in order for the "securities exclusively for securities" requirement to apply. For instance, Corporation A sells 10 debentures in its wholly owned subsidiary, Corporation B, to existing security holders. Corporation A then proposes a recapitalization where the debenture holders may exchange one debenture and \$1,000 for one share of Corporation B common. Clearly, this is not a pure "exchange," but is a "sale" because it requires the security holder to invest more capital and make another investment decision; the type of transaction for which the registration requirements are designed to apply.<sup>9</sup> Hence, the R.C. 1707.03(K)(2) exemption from the registration requirements would not be available.

The question of whether an Ohio exemption is available becomes more difficult to answer where the transaction does not involve the giving of additional consideration in return for the securities. For instance, if the transaction involving the debentures required that security holders of Corporation A give one debenture in exchange for one share of common stock in Corporation A, and the share of common is worth less than the debenture, has a clean exchange occurred? Or, if an issuer proposes an exchange of outstanding preferred stock in exchange for common stock, but in order to take advantage of the exchange the shareholder must forfeit the accrued outstanding dividends, has a "clean exchange" occurred?

On several occasions the S.E.C. has determined that this type of "exchange" of preferred for common, with the requirement that the preferred shareholder surrender accrued dividends, is an exempt transaction under 3(a)(9).<sup>10</sup> In Division Ruling 5,<sup>11</sup> several changes in outstanding preferred and common stock were proposed by the issuer. The changes

included the waiver of outstanding accrued dividends and changes in the voting rights of the shareholders. The proposed changes were to be accomplished by soliciting approval via proxies from the shareholders. The Division ruling concluded that, because of the change in the terms of the stock, an "exchange" of securities had occurred, notwithstanding that no new stock certificates had been issued. The exemption at R.C. 1707.03(K)(2) was not available to exempt this transaction, however, because the issuer had paid a fee for the solicitation of the proxies, thereby disqualifying the proposed transaction from the "exchange" exemption.<sup>12</sup>

Conversely, it has been held that the exercise of warrants, subject to common stock, by surrendering notes was not an exchange of securities for securities.<sup>13</sup> In *F&M Corporation* the S.E.C. concluded that the exercising of warrants, by surrendering notes, was the equivalent of paying cash for the stock and 3(a)(9) was not available to exempt that transaction because a pure "securities for securities exchange" had not occurred.

An opinion of the General Counsel of the S.E.C. proposed certain factors which are instructive in determining when a transaction qualifies as an "exchange," thereby exempting the securities involved from registration.<sup>14</sup> The primary consideration must be the purpose of the transaction. If the distribution is for raising capital, then the transaction may be viewed as a sale rather than an exchange. Other factors to consider are: "the length of time during which the securities received by the issuer were outstanding prior to their surrender in exchange, the number of holders of the securities originally outstanding, the marketability of such securities, and also the question whether the exchange is . . . [undertaken] . . . to enable . . . a few security holders to distribute their holdings to the public."

Although the opinion of the General Counsel did not describe a factual scenario in which the aforementioned factors exist, it is obvious that if the transaction is initiated for the purpose of distributing securities of the issuer to the public without registration the exchange exemption will not be available.

As an example, assume:

on March 15, 1991, Corporation A, by resolution, authorizes the distribution of a new class of warrants. The Corporation A warrants entitle holders to a Class B preferred stock in Corporation A at the exercise price of two dollars. Corporation A is the sole holder of the warrants. No holders of the Class B stock exist at the time these warrants are issued. No market exists for the warrants or for the Class B preferred.

Thereafter, on March 16, 1991, Corporation A distributes the warrants to shareholders of Corporation B, a wholly owned subsidiary of Corporation A. Neither the warrants nor the underlying preferred shares were registered. Because an offer for sale, which is by definition a "sale," of the securities underlying the warrants occurred with the issuance of the warrants, the preferred shares must be registered or exempt from registration. Corporation A relies on R.C. 1707.03(K)(2) to exempt this transaction from the registration requirements.

In the scenario set forth above, the preferred shares were held by a limited number of shareholders of Corporation A for

a short period of time. No market existed for either the warrant or the preferred. Clearly, then, the factors set forth in the noted General Counsel opinion are satisfied.

Essentially, the purpose of the transaction was to distribute the preferred shares without registration and to raise capital through the two dollar exercise price R.C. 1707.03(K)(2) would not be available to exempt the distribution of the preferred shares to shareholders of the wholly owned subsidiary.

In short, where additional cash consideration is required in a transaction, R.C. 1707.03(K)(2) would not be available to exempt that transaction from the registration requirements. In the transaction where the security holder is not required to surrender additional funds to the issuer, but something of value is required to be surrendered, the R.C. 1707.03(K)(2) exemption may be available if the transaction is not primarily to raise capital on behalf of the issuer and does not satisfy the other factors set forth in the S.E.C. General Counsel opinion.

In addition, the Division will consider whether the transaction requires the investor to make another investment decision thereby triggering the purpose of the registration requirements. If an investment decision is required, the Division most likely will conclude that the transactional exemption is not available, and that registration is required.

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<sup>1</sup>15 U.S.C. §77(c)(a)(9)

<sup>2</sup>Vol. 7, *Securities Law Series*, Clark Boardman Company, Ltd., 1991 and updated, Chapter 2.

<sup>3</sup>1987 and updated, Banks-Baldwin Law Publishing Company, Text 9.08(B).

<sup>4</sup>1983 Senate Bill 310, effective 4-11-85.

<sup>5</sup>R.C. 1707.01(C)(1).

<sup>6</sup>Hicks at 2.05[1](a).

<sup>7</sup>Id.

<sup>8</sup>An exchange by definition is a sale and an exchange with existing security holders may be an exempt sale. Not every sale, of course, is an exchange.

<sup>9</sup>Hicks, *supra.*, §2.05[1](a).

<sup>10</sup>Hicks, *supra.*, §2.05[2](a).

<sup>11</sup>Friedman (above), Division Policies and Guidelines, page 4 prints Division Ruling 5.

<sup>12</sup>R.C. 1707.03(K)(2) provides that the exemption will not be available if a fee, such as a proxy solicitation fee, is given for soliciting the exchange. At the federal level exemption, see also Hicks, at § 2.07 see *Ohio Securities Bulletin*, December, 1987; Kahrl, "Mergers and Reorganizations Under the Ohio Securities Act"; also in Friedman (above) at OSB 11.20.

<sup>13</sup>*F&M Schaefer Corp.*, No-action letter (Aug. 23, 1977), [1977-78 Transfer Binder] paragraph 81342; *CCH Federal Securities Law Reporter*, Commerce Clearing House, Inc..

## Examination Section

by Richard A. Pautsch

In the course of executing the Division of Securities' responsibility to enforce the Ohio Securities Act (R.C. 1707.01 through 1707.99) and by the authority granted under R.C. 1707.23(B), the Division may examine, under oath, any seller, dealer, salesman, or issuer of any securities and any of their agents, employees, partners, officers, directors, members, or shareholders, wherever located, and examine records, books, documents, accounts, and papers as the Division deems material or relevant to the inquiry.

The examination process has been consolidated into the new Examination Section. Previously, the broker-dealer examiners reported to the Broker Dealer Section and the issuer examiners reported to the Enforcement Section. This consolidation will result in the more effective use of Division resources.

The following people have been assigned to the Section:

**Joyce Cleary** is based in Columbus and functions as the Administrative Assistant for the Section.

**Ed Folk** is based in Findlay and functions as a Field Examiner.

**Don Hershberger** is based in Columbus and specializes in the scheduling and analysis of financial data.

**David Melito** is based in Cleveland and functions as a Field Examiner.

**Joyce Perry** is based in Columbus and functions as the Secretary for the Section.

**Sandie Rosso-Roberts** is based in Delaware and functions as a Field Examiner.

**Everette Toland** is based in Columbus and functions as a Field Examiner.

**Ron Wheatley** is based in Columbus and functions as a Field Examiner.

**Richard Pautsch, CPA** is based in Columbus and is head of the Section.

The Examination Section is responsible for the scheduling and completion of all Division Field Examinations and the scheduling and analysis of financial data. Although not required by law, issuers generally are given 30 days notice of an examination. The notice includes a list of items that we will want to review during our examination. Please read this list and make sure that the requested items are available and that someone will be available to answer our examiner's questions.

A broker-dealer is required to maintain records that will enable the Division to determine at all times the financial condition of the broker-dealer and to disclose fully all transactions entered into by the broker-dealer. Issuers of securities are required to maintain records for at least three years from the date of their last use and to furnish those records to the Division upon request.

When one of our Field Examiners comes knocking at your door, your preparation and cooperation will help our examiner get the work completed faster which is to the benefit of all. We appreciate your cooperation.

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*The author is a CPA Administrator with the Division*

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## Developing Case Law on Rescission Rights Under R.C. 1707.43

by S.B. Robbins-Penniman

During the past year or so, there have been several decisions which have focussed on private causes of action pursuant to R.C. 1707.43. The seminal case in the area is *Pencheff v. Adams*,<sup>1</sup> which held that "as a matter of law . . . failure to comply with R.C. 1707.44(C)(1) materially affects the protection contemplated by the provision and entitles appellant to the relief provided under O.R.C. 1707.43." Three recent decisions have resulted in considerable speculation and debate among practitioners as to whether there is some erosion of the virtual strict liability which *Pencheff* had seemed to impose.

The first of these cases was *Callahan v. Class One, Inc.*,<sup>2</sup> where the appellate court reversed the lower court's order of rescission in favor of the plaintiff securities purchaser. The appellate court noted that the plaintiff-appellee had initiated and structured the transaction whereby the defendant-appellant had sold securities to the plaintiff. No claim of exemption was filed. The appellate court rejected strict application of *Pencheff* and held that the plaintiff's involvement removed him, as a matter of law, from the protections provided by R.C. 1707.44(C)(1). Therefore, the court reasoned, he was not entitled to rescission pursuant to R.C. 1707.43. The purchaser appealed this case to the Ohio Supreme Court; see discussion below.

In June of 1990, the Cuyahoga County Court of Appeals held, in *Obenauf v. CIDCO Investment Services, Inc.*,<sup>3</sup> that plaintiff securities purchasers were not entitled to rescission under R.C. 1707.43 merely because the claims of exemption based on R.C. 1707.03(Q) were filed 14 to 16 days late. The court held that the late filing was a "trivial" violation and did not materially affect the protection contemplated by R.C. 1707.44(C)(1). Intriguingly, in arriving at its judgment, the court does not discuss, or even cite, the *Pencheff* decision.

A case involving similar facts was decided shortly later in *Sherman v. River Oaks Office Plaza, Ltd.*<sup>4</sup> The U.S. District Court for the Eastern Division opined that, under the rationale in *Pencheff*, R.C. 1707.44(C)(1) protected against the sale only of ". . . 'worthless or unnecessarily risky securities.'"<sup>5</sup> The *Sherman* court noted that the only flaw in the sales to the plaintiffs was that the claim of exemption was filed ". . . seven to nine days late."<sup>6</sup> Although the court acknowledged that there was a technical violation of R.C. 1707.03(Q),<sup>7</sup> it decided that the plaintiffs were not entitled to rescission because the securities they had purchased were not worthless or unnecessarily risky.<sup>8</sup>

These three cases appeared to signal a significant new hostility towards actions brought under R.C. 1707.43. A couple of developments since last summer have tempered claims that such causes of action were being substantially restricted. First, the *Sherman* decision was vacated because of federal jurisdiction problems.<sup>9</sup> Second, on March 13, 1991, the Ohio Supreme Court handed down its decision in *Callahan v. Class One, Inc.*<sup>10</sup> In a brief, six to one opinion, the court stated as follows:

The court has consistently held that any sale of securities which have not been registered as required by R.C. Chapter 1707—or which are not exempt from those requirements—will materially affect the protection afforded by the statute. *Pencheff v. Adams* (1983), 5 Ohio St. 3d 153, 5 OBR 318, 449 N.E. 2d 1277; *Bronaugh v. R. & E. Dredging Co.* (1968), 16 Ohio St. 2d 35; 45 O.O. 2d 321, 242 N.E. 2d 572. The Montgomery County Court of Appeals has fashioned an exception to this rule where the buyer initiates the sale. That exception would upset a well-settled scheme of regulation designed to protect the public and we therefore decline to adopt it.

The court below erroneously concluded that the buyer's initiation of the sale triggered th[e] exception in O.R.C. 1707.43. To permit such a decision to stand, however, would open the door to a balancing of factors not contemplated by the broad-based protection now afforded by the statute and the case law emanating from this court.

Appellees' failure to register their securities, or to seek an exemption, was a clear-cut violation of O.R.C. 1707.44(C)(1).

'Failure to comply with O.R.C. 1707.44(C)(1) materially affects the protection contemplated by that provision and entitles a purchaser of unregistered securities to the relief provided under O.R.C. 1707.43.' *Pencheff, supra*, at syllabus.

In addition, . . . [a]ny contrary determination would only serve to undermine the most fundamental purpose of the statute—protection of the public from the sale of unregistered securities.' *Id.* at 154, 5 OBR at 319, 449 N.E. 2d at 1278.

For that reason we endorse the position taken by the Ohio Department of Commerce, Division of Securities, in its *amicus* brief:

'The reason why the General Assembly, in enacting the Ohio Securities Act [R.C. Chapter 1707], required that registration provisions must apply to "every disposition" of a security without regard to who initiated the transaction, is a concern for the welfare of all purchasers of securities. . . .

To that end, we expand our holding in *Pencheff* and rule that failure to comply with O.R.C. 1707.44(C)(1) materially affects the protection contemplated by that provision and entitles a purchaser of unregistered securities to the relief provided under O.R.C. 1707.43, regardless of who initiates the transaction.<sup>11</sup>

As indicated by the Court, the Ohio Division of Securities filed a brief *amicus curiae* in support of the appellant in the *Callahan* case; one was also filed with the Sixth Circuit in support of the appellants in the *Sherman* case. The Division's position in that the General Assembly has provided, by statute,

the exemptions to the registration provisions. The exemptions should be strictly construed, and it is not the proper province of the courts to append judicial exemptions when the court believes the violation of the statute to be *de minimus*. A purchaser should be able to recover under R.C. 1707.43 if the seller violates R.C. 1707.44(C)(1). That is, the courts should focus on whether a violation of R.C. 1707.44(C)(1) has been proven. For example, there may be a distinction between the defendants in the *Obenauf* and *Sherman* cases because CIDCO, the seller of the *Obenauf* case, was merely an agent for the issuer, and there is a question whether CIDCO had the requisite *mens rea* under R.C. 1707.44(C).<sup>12</sup> There is no question, however, that the defendants in *Sherman* and *Callahan* had violated R.C. 1707.44(C)(1). The Division believes, therefore, that those purchasers are clearly entitled to rescission under R.C. 1707.43.

Even given the broadest possible reading of the *Obenauf* decision, however, the Division recently has emphasized that there is no "materiality" exception for violations of R.C. 1707.44(C)(1), only for actions brought by private parties under R.C. 1707.43. In enforcement proceedings by the Division under R.C. 1707.13 and 1707.23, the Division will continue to take the position that all violations of R.C. 1707.44(C)(1) are actionable, and that there is no valid defense based on assertions that the violation was immaterial, trivial, or minimal. There may be a gray line clouding the skies for private plaintiffs, but the Division continues to see a bright line in its Blue Sky regulation.

<sup>15</sup> Ohio St. 3d 153 (1983).

<sup>2</sup>Montgomery App. No. 11550 (December 22, 1989), unreported for reconsideration or to certify the record denied (February 7, 1990), but see further history *infra* at fn. 10 and accompanying text.

<sup>3</sup>54 Ohio App.3d 131 (Cuyahoga 1990).

<sup>4</sup>N.D. Ohio No. C88-4674 (June 19, 1990), unreported. An appeal to the Sixth Circuit was perfected, and the Division filed a brief *amicus curiae* in support of the position of the plaintiff-appellants. Prior to decision by the Sixth Circuit, however, the case was remanded to the district court to determine whether there was federal court jurisdiction following the U.S. Supreme Court's decision in *C.T. Carden v. Arkoma Assoc.*, 110 S.Ct. 1015 (1990). The district court determined that it did not have jurisdiction, and granted relief from its judgment and remanded the case to the Cuyahoga Court of Common Pleas on December 18, 1990. The case is now pending as Case no. 160159 (J. Joseph F. McManamon).

<sup>5</sup>*Slip op.* at p. 7, citing *Bronaugh v. R.E. Dredging Co.*, 16 Ohio St. 2d 35, 41 (1968).

<sup>6</sup>*Id.* at p. 6.

<sup>7</sup>*Id.* Actually, as the Division pointed out in its brief *amicus curiae* before the Sixth Circuit, an issuer cannot violate R.C. 1707.03(Q), because this section simply details the prerequisites and requirements for claiming an exemption. If an exemption is not properly claimed, there then has been a sale of an unregistered security, which is a violation of R.C. 1707.44(C)(1).

<sup>8</sup>*Id.*

<sup>9</sup>See fn. 4 *supra*.

<sup>10</sup>58 Ohio St. 3d. 76 (1991).

<sup>11</sup>Id. at 76-77; footnote omitted.

<sup>12</sup>See, however, the discussion of *mens rea* in *Ohio Securities Bulletin*, 91:1, Spahia, "The Ohio Securities Act and Its Unique Presumption of Knowledge."

# Broker-Dealer

## LICENSES ISSUED:

## Outstanding Employee Award

The Outstanding Employee Award of the Division for the quarter ending December 31, 1990, was presented to Charlotte A. Davis of the Records Management Section. The Award recognizes her experience and service to the Division in assisting, in the performance of her job duties, with the processing and management of thousands of registration files and records. Charlotte has been an employee of the Division of Securities since 1974.

	Current Year 1-1-91 to 3-31-91	Past Year 1-1-90 to 3-31-90
Broker-Dealer	1,439	1,558
Salesman	<u>47,760</u>	<u>53,376</u>
Total	49,199	54,934

## Registration Filings

Form Type	Current Quarter 1/1/91 to 3/31/91	Quarter 1/1/90 to 3/31/90
2(B)	186	193
2(E)	0	0
3-O	3,005	3,395
3-Q	317	386
3-W	19	29
04	0	0
041	1	0
6(A)(1)	49	54
6(A)(2)	15	21
6(A)(3)	6	11
6(A)(4)	13	11
09	429	392
091	256	263
39	31	28
391/3-O	192	204
391/3-Q	50	40
391/3-W	3	2
391/6(A)(1)	1	0
391/6(A)(2)	0	0
391/6(A)(3)	0	0
391/6(A)(4)	1	0
391/09	4	6
391/091	<u>0</u>	<u>1</u>
TOTAL	4,578	5,036

# 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>
<b>Harold J. Ramey</b> Bexley, Ohio	12/5/90	90-298	Revocation of Securities Salesman's License
<b>Leigh Garnsey;</b> <b>Nevada Consolidated</b> <b>Milling and Manufacturing, Inc.</b> Sandy Valley, Nevada	12/13/90	90-303	Cease and Desist
<b>Michael Minot</b> Warren, Ohio <b>Midwest Exchangers, Inc., dba</b> <b>Teachers Pet Software</b> Girard, Ohio	12/24/90	90-312	Cease and Desist
<b>Dane Price;</b> <b>Midwest Exchangers, Inc., dba</b> <b>Teachers Pet Software</b> Girard, Ohio	12/24/90	90-313	Cease and Desist
<b>FDC Cat Scanner No. 10, L.P.;</b> <b>Form 3(Q), File No. 316721;</b> <b>Form 3(Q), File No. 303139</b> Maple Heights, Ohio	12/24/90	90-315	Cease and Desist; Null and Void of Filings
<b>Thomas Sarago</b> Alexandria, Virginia; <b>Michael Sarago;</b> <b>M&amp;T Associates</b> Youngstown, Ohio	1/16/91	91-018	Case and Desist
<b>Terry Gillmore;</b> <b>A.C. Med-Co., Inc.</b> Troy, Ohio	1/17/91	91-019	Cease and Desist
<b>Bradley E. Moore</b> Ft. Wayne, Indiana	1/25/91	91-026	Final Order; Securities Salesman's License Not Denied
<b>John Douglass Ryan</b> Warren, Ohio	1/28/91	91-028	Cease and Desist
<b>Howard P. Eisenman</b> Tallahassee, Florida	1/28/91	91-029	Final Order; Securities Salesman's License Not Denied
<b>Weatherly Securities Corporation</b> New York, New York	2/26/91	91-036	Final Order; Denial of Application of Dealer's License

**FINAL ADMINISTRATIVE ORDERS—continued**

<u>Respondent</u>	<u>Date Issued</u>	<u>Order No.</u>	<u>Action Taken/ Type of Order</u>
<b>Arlington Securities, Inc.</b> St. Louis, Missouri	2/26/91	91-037	Final Order; Denial of Application of Dealer's License
<b>Derby Downs, L.P.</b> Granville, Ohio	2/28/91	91-040	Cease and Desist
<b>James R. Holloran</b> Shaker Heights, Ohio	3/5/91	91-045	Final Order; Securities Salesman's License Not Denied
<b>David B. Patchen</b> Parsippany, New Jersey	3/5/91	91-046	Final Order; Securities Salesman's License Not Denied
<b>Wayne Grayson Capital Corp.</b> Nyack, New York	3/11/91	91-047	Final Order; Securities Salesman's License Not Denied
<b>Americana Products</b> Columbus, Ohio; <b>Alan T. Durst</b> Westerville, Ohio; <b>Frederick J. Noethlich</b> Bexley, Ohio	3/12/91	91-052	Final Order; Cease and Desist
<b>The Investas Corporation;</b> <b>William E. Pohl and Associates</b> Cincinnati, Ohio	3/28/91	91-058	Cease and Desist
<b>Consolidated Partners Investment Company;</b> <b>Consolidated Partners Investment Company, Limited Partnership No. 3;</b> <b>Melvin W. Mitchell;</b> <b>Form 3(Q), File No. 370617</b> North Olmsted, Ohio	3/28/91	91-059	Cease and Desist; Partial Null and Void of Filing

**CRIMINAL CASES**—*The following is information reported through March 31, 1991.*

<u>Case Name</u>	<u>Jurisdiction/ Referring Staff Person</u>	<u>Action Taken</u>	<u>Comments</u>
Joseph Krantz, dba National Invest- ment Services	Crawford County/ Referred by Bob Holodnak	<b>Indicted</b> on 12/3/90 on 8 counts each, as follows: 1. 4 counts of the sale of an unregistered security; 2. 4 counts of making a misrepresentation in the sale of a security.	Joseph Krantz, dba National; Investment Services allegedly sold units of a registered mutual fund, Financial Programs, Inc., while unlicensed to do so. In addition, he allegedly charged commissions on the sales and failed to disclose that the investors could invest in the fund directly without paying commissions.
Donald L. Struck	Montgomery County/ Assisted by Karen Terhune	1. <b>Probation revoked</b> on 1/4/91. 2. <b>Sentenced</b> on 1/4/91 to the following: (a) 16 years imprisonment for 8 counts of grand theft; and (b) 12 years imprisonment for 8 counts of securities fraud, to be served concurrently with the sentence imposed on the grand theft charges.	Donald L. Struck, a former securities salesman for PaineWebber, sold securities of "Fidelity Partners, Inc." to investors while employed by PaineWebber. Some investors were led to believe that their funds would be invested into a mutual fund run by Fidelity Investments. However, the investors funds ended up as an investment in a now defunct Dayton bar. Struck did not adhere to the restitution schedule set by the court.
Darrell R. Muncy	Montgomery County/ Assisted by Karen Terhune	<b>Indicted</b> on 1/9/91 for the following: 1. 2 counts of grand theft; 2. 2 counts of securing writings by deception; 3. 1 count of the sale of an unregistered security; 4. 1 count of the unlicensed sale of a security; and 5. 1 count of securities fraud. <b>Indicted</b> on 3/7/91 for the following: 1. 1 count of passing a bad check; 2. 1 count of theft; and 3. 1 count of grand theft.	Darrell R. Muncy, president of an Ohio real estate broker, allegedly sold unregistered shares of stock in an unincorporated entity, Kettering Investments, Inc., Dayton Properties Subsidiary, in which investors were promised quarterly dividends.
Shearson Lehman Brothers, Inc.; Sheldon Strauss; Stephen Weinberg	Cuyahoga County/ Referred by Mary Spahia	<b>Charges dismissed</b> for each co-defendant on 1/11/91, as follows: 21 counts of securities fraud.	Sheldon Strauss, a former Cleveland account executive for Shearson Lehman Hutton, inc., was charged with violations including unauthorized trades, unauthorized use of margins and unauthorized use of discretion, which allegedly resulted in millions of dollars of losses for investors. Stephen Weinberg, former branch manager of the Cleveland office, and Shearson Lehman Hutton, Inc. were named in the indictments for their alleged complicity in Strauss' actions.

CRIMINAL CASES—continued

Case Name	Jurisdiction/ Referring Staff Person	Action Taken	Comments
John H. Davis; Donnie E. Roberts	Summit County/ Referred by Karen Terhune	<p><b>Indicted</b> on 1/28/91 for the following:</p> <ol style="list-style-type: none"> <li>1. John H. Davis:               <ol style="list-style-type: none"> <li>(a) 1 count of aggravated theft;</li> <li>(b) 2 counts of grand theft;</li> <li>(c) 2 counts of theft;</li> <li>(d) 4 counts of securities fraud;</li> <li>(e) 4 counts of making a misrepresentation in the sale of a security;</li> <li>(f) 4 counts of the unlicensed sale of a security; and</li> <li>(g) 4 counts of the sale of an unregistered security.</li> </ol> </li> <li>2. Donnie E. Roberts:               <ol style="list-style-type: none"> <li>(a) 1 count of aggravated theft;</li> <li>(b) 2 counts of grand theft;</li> <li>(c) 2 counts of theft.</li> </ol> </li> </ol> <p><b>Arraigned</b> as follows:</p> <ol style="list-style-type: none"> <li>1. John H. Davis <b>pled not guilty</b> on 2/2/91 to all counts.</li> <li>2. Donnie E. Roberts <b>pled not guilty</b> on 2/14/91 to all counts.</li> </ol>	<p>John H. Davis was president of Sports Enterprises, Inc., a Munroe Falls-based company. Donnie E. Roberts was the national operations director, and the secretary-treasurer of the National Horseshoe Pitchers Association. Close to \$1 million was allegedly raised from more than 200 investors throughout Ohio for development of indoor horseshoe pitching complexes. Investors who bought unregistered stock and/or promissory notes were allegedly informed that their investments were risk-free. In addition, investors were not informed that a Cease and Desist Order was issued against Davis, Roberts, Sports Enterprises, Inc., and 11 salespeople by the Division on 10/23/87, for unregistered and unlicensed sales of securities.</p>
Dale Normand; Leon Eden	Guernsey County/ Referred by Mary Spahia	<ol style="list-style-type: none"> <li>1. Dale Normand:           <ol style="list-style-type: none"> <li>(a) Three-day trial commenced on 1/31/91, where Normand was <b>found guilty</b> of 8 counts each of unregistered sales of securities and unlicensed sales of securities.</li> <li>(b) <b>Sentenced</b> on 2/2/91 to 13.5 years imprisonment and fined \$5,000.</li> </ol> </li> <li>2. Leon Eden:           <ol style="list-style-type: none"> <li>(a) <b>Extradited</b> on 2/17/91 from San Diego to Ohio.</li> <li>(b) <b>Indicted</b> on 3/12/91 on 8 counts each of unregistered sales of securities and unlicensed sales of securities.</li> </ol> </li> </ol>	<p>Dale Normand, former president of California-based Heritage Securities, Inc., sold unregistered limited partnership units in Stellex Partners, Ltd., to Ohio investors. He was extradited from California last fall, where he had been convicted on unrelated charges. Leon Eden who ran Stellex, Inc., allegedly also sold unregistered limited partnership units. He was extradited from San Diego, after being found and arrested, on an outstanding warrant from charges previously filed on the securities violations.</p>
Henry M. Cool	Cuyahoga County/ Referred by Bob Holodnak	<ol style="list-style-type: none"> <li>1. <b>Pled guilty</b> on 2/21/91 to 2 counts of attempted theft after full restitution of \$15,000 was made to investors.</li> <li>2. <b>Sentenced</b> on 2/21/91 to 6 months imprisonment. (Sentence was suspended and 1 year inactive probation was imposed.)</li> </ol>	<p>Henry M. Cool sold unregistered shares of common stock in Agri-World Trade Development Corporation, an Ohio corporation, in which he was secretary-treasurer, to Ohio investors. He promised to pay 12% interest on the shares, which were to be transferred in the future. Cool never delivered the stock to investors, failed to transfer the shares, and failed to deliver promised interest checks. A Cease and Desist Order was issued against Henry M. Cool and Agri-World Trade Development Corporation for numerous securities law violations on July 12, 1990.</p>

**CRIMINAL CASES—continued**

<u>Case Name</u>	<u>Jurisdiction/ Referring Staff Person</u>	<u>Action Taken</u>	<u>Comments</u>
Danny L. Davis	Franklin County/ Referred by Sid Silvan	<b>Sentenced</b> on 3/8/91 to 1 year imprisonment on each of 2 securities violations, to be served concurrently. A fine of \$1,000 for each count was imposed.	Danny L. Davis sold stock of an unincorporated insurance entity. The Division issued a Cease and Desist Order in January 1990 against Davis.
Bernard Albright; Southern Star Energy, Inc.	Cuyahoga County/ Referred by Mary Spahia	<b>Indicted</b> on 3/26/91 for the following: 1. 2 counts of the unlicensed sale of a security; 2. 2 counts of making a misrepresentation in the sale of a security; 3. 2 counts of the sale of unregistered securities; 4. 2 counts of theft; 5. 3 counts of grand theft; and 6. 4 counts of securities fraud.	Bernard Albright was charged with selling interests in an oil well which allegedly never existed. Also, he was charged with the unlicensed sale of unregistered securities.

# 1991 Ohio Securities Conference

The Division of Securities has released the schedule for the 1991 Ohio Securities Conference to be held on September 30 and October 1, 1991 at the Columbus Marriott North. The 1991 Conference has been approved by the Ohio Supreme Court Commission on Continuing Legal Education for 6.50 CLE credit hours, including 1.50 hours in Ethics and .50 hours in Substance Abuse Instruction.

## Monday, September 30, 1991

- 8:00 a.m. **Enrollment**  
Continental Breakfast
- 8:50 a.m. **Introduction**  
Mark V. Holderman, Esq., Commissioner  
*Ohio Division of Securities*
- 9:00 a.m. **Topic—Ethical Considerations for Securities Law Practitioners**  
**Recent Developments under SEC Rule 2E**  
Professor Howard M. Friedman, Esq.  
*College of Law, University of Toledo*  
Toledo, Ohio  
**Implications of the Silverado Conference Report**  
Professor Stephen C. Veltri, Esq.  
*College of Law, Ohio Northern University*  
Ada, Ohio  
**Conflicts of Interest in the Representation of Multiple Clients**  
Robert M. Gippin, Esq.  
*Buckingham, Doolittle & Burroughs*  
Akron, Ohio
- 10:30 a.m. **Break**

10:45 a.m. **Topic—Due Diligence in Securities Offerings**

**Moderator and Overview**

Stanley E. Everett, Esq.  
*Brouse and McDowell*  
Akron, Ohio

**Private Offerings and Qualifying Purchasers**

Andrew J. Federico, Esq.  
*Carlile, Patchen & Murphy*  
Columbus, Ohio

**Issuer's Disclosure Responsibilities in Public Offerings**

Bruce P. Chapnick, Esq.  
Cincinnati, Ohio

**Underwriter's Role in Preparing Public Offering Documents**

Patsy Abelle, Esq.  
*Cravath, Swaine & Moore*  
New York, New York

12:15 p.m. **Lunch**

1:45 p.m. **Topic—Broker-Dealer Compliance in IPOs and Secondary Transactions**

**Moderator**

Ann W. Gerwin, Esq.  
*Strauss & Troy, L.P.A.*  
Cincinnati, Ohio

**Counseling the Broker-Dealer in an Initial Public Offering**

James A. Francis, Esq.  
*The Ohio Company*  
Columbus, Ohio

**Limitations on Secondary Market Transaction Exemptions**

Karl E. May, Esq.  
*Kohrman, Jackson & Krantz*  
Cleveland, Ohio

**1991 OHIO SECURITIES CONFERENCE—continued**

**NASD Perspective on Broker-Dealer Compliance in IPOs and Secondary Transactions**

William H. Jackson, Jr., Esq., Director  
*National Association of Securities Dealers, Inc.*  
Cleveland, Ohio

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

3:30 p.m. **Topic—Recent Developments and Rule Enactments in the Ohio Division of Securities**

Mark V. Holderman, Esq.  
*Commissioner of Securities*

Michael P. Miglets, Esq.  
*Chief, Registration Section*

Donald E. Meyer, Esq.  
*Attorney Inspector*

William E. Leber, Esq.  
*Counsel to the Commissioner*

5:00 p.m. **Topic—Legal Ethics—Substance Abuse—A Perspective on Intervention**

Professor Michael Distelhorst, Esq.  
*Capital University Law School*  
Columbus, Ohio

5:30 p.m. **RECEPTION**

**Tuesday, October 1, 1991**

Advisory Committee meetings will be held in the Columbus Marriott North from 9:00 a.m. to 2:00 p.m. A buffet breakfast will be served from 8 to 9:00 a.m. Contact the Division for further information on Committee Assignments.

**ENROLLMENT FORM**

Please enroll the following people in the 1991 OHIO SECURITIES CONFERENCE:

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Firm: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_

State: \_\_\_\_\_ Zip: \_\_\_\_\_

Telephone: (      ) \_\_\_\_\_

Total number enrolling: \_\_\_\_\_

Amount enclosed: \_\_\_\_\_

**FEE:** \$125 per person (includes all activities on September 30 and October 1).

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, September 23, 1991.

Please indicate how many plan to attend the buffet breakfast on Tuesday morning, October 1st: \_\_\_\_\_