SECURITIES BULLETIN

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BINARY OPTIONS: BUYER BEWARE

By Ohio Division of Securities Attorney Inspector, Janice Hitzeman

Binary option trading is becoming increasingly popular through website platforms that tout the ability to earn astronomical returns through short term trading strategies. A Google search of the term "binary options" yields a return of over 28 million results for websites offering such services as "How to trade **binary options** like a pro!" and "Earn Up to 95% in Only 1 Hour!" These types of sales tactics lure investors into setting up online accounts to engage in binary options trading without proper disclosure of the risks involved, including the risk of fraudulent activity by unscrupulous internet platforms that are not registered or licensed to conduct these types of trades on behalf of investors.

Binary options differ from more conventional options in significant ways. A binary option is a type of options contract in which the return is based entirely on the outcome of a yes/no proposition. The yes/no proposition typically relates to whether the price of a particular asset that underlies the binary option will rise above or fall below a specified amount.[1] For example, an investor might purchase an option that the price of an underlying stock will be greater than a set amount on a specified future date and time. When the binary option expires, the option holder will receive either a pre-determined return or will lose their entire investment.[2]

The Securities and Exchange Commission ("SEC") filed a civil injunctive action on June 5, 2013 in the United States District Court for the District of Nevada, charging a Cyprus-based company and related individuals with selling binary options illegally to U.S. investors.[3] In granting the preliminary injunction, the court opined that binary options are wagering contracts that depend upon the value of securities, and, therefore, are securities as defined by The Securities Exchange Act of 1934.[4] The court described binary options as follows:

Both parties to a binary option are well aware that the transaction includes no present, future, vested, or contingent interest in the stock itself. Binary option givers and buyers do not purport to trade interests in securities any more than tellers and gamblers at a racetrack purport to trade interests in horses. In those transactions, the securities and the horses, respectively, are neither part of the consideration for nor the subject matter of the contract, but rather the securities' and horses' respective performance is simply a remote condition precedent triggering the obligations of the parties.[5]

Some binary options internet-based trading platforms may overstate the average return on investment by providing only the returns received on options that expire

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[1] Investor Alert: Binary Options and Fraud, SECURITIES AND EXCHANGE COMMISSION OFFICE OF INVESTOR EDUTION AND ADVOCACY, http://www.sec.gov/investor/alerts/ia_binary.pdf.
[2] *Id.*
[3] S.E.C. v. Banc de Binary, Ltd., 964 F. Supp. 2d 1229, 1231, (D. Nev. 2013); *See also* U.S. Commodity Futures Trading Comm'n v. Banc de Binary, Ltd., D. Nev. Case No. 2:13-cv-00992 (companion case filed the same day).
[4] Banc de Binary, Ltd., 964 F. Supp. 2d at 1231. (S.E.C. v. Banc de Binary, Ltd., D. Nev. Case No. 2:13-cv-00993 is still pending in the District Court for the District of Nevada. The SEC complaint requested additional relief including a permanent injunction, disgorgement and civil penalties. A trial date has not been scheduled as of the date of this article.)
[5] Banc de Binary, Ltd., 964 F. Supp. 2d at 1231.

Department Of Commerce
Division of Securities

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"in the money," a term used to describe an option that pays a return to the investor. In fact, binary options are high risk investments where the losses can include a total loss of the investment amount. Factoring in the losses would reduce the average return substantially, perhaps to a negative average return or net loss. These websites also promote their platforms by offering controlled risk, low cost, huge gains (if you guess right), and ease of use. Many platforms allow investors to set up their account with a credit card and trade from home whenever markets are open.

While some binary options are listed on registered exchanges or traded through designated contract markets, which are subject to oversight by the SEC or the U.S. Commodity Futures Trading Commission ("CFTC"), much of the binary options market operates through internet-based trading platforms that are not necessarily complying with applicable regulatory requirements. The number of Internet-based trading platforms that offer the opportunity to purchase and trade binary options has surged in recent years. The threat of fraudulent promotion schemes involving binary options trading platforms in Ohio is real and the Ohio Division of Securities (the "Division") has seen an increase in the number of complaints involving these trading platforms.

The Division recently initiated administrative actions against two internet platforms engaged in selling binary options through the internet. In Division Order No. 14-024 issued on October 23, 2014, the Division found that Vault Options was operating an internet-based binary options trading platform that was acting as an unlicensed securities dealer in Ohio.[6] The website, www.vaultoptions.com, is purportedly owned by a company located in England; but the website provides a principal business address for Vault Options as a vacant building in New York. A retired Ohio teacher was lured into investing $50,000 on the platform by advertisements promising up to 500% returns on investment. In addition to the unlicensed activity, the Division Order found that Vault Options engaged in securities fraud and manipulative, deceptive or fraudulent conduct and ordered them to cease and desist from further violative conduct.[7]

In Order Number 15-004 issued on February 25, 2015, the Division issued a Notice of Opportunity for Hearing and Notice of Intent to Issue a Cease and Desist Order to Chelestra Limited d/b/a LBinary ("LBinary"), a company located in Gibralter. LBinary operates the website www.lbinary.com, which the Division alleges solicited the sale of securities and acted as an investment adviser by offering investment advice to clients who invested a certain amount on the platform.[8] The Division further alleged that LBinary engaged in fraudulent, manipulative and deceptive conduct, in part, by advertising up to 720% profits.

In order to protect yourself or a client who is interested in engaging in binary options trading, the Division urges readers to conduct due diligence to insure that the platform is legitimate. Check to see if the binary options trading platform itself is registered as an exchange through the SEC website.[9] Also check to see if the binary options trading platform is a designated contract market through the CFTC website. Finally, if the platform or its representatives are offering suggestions or advice about trades, or if the platform is charging a fee to conduct transactions, check to see if they are properly licensed through the database of the Central Registration Depository and Investment Advisor Registration Depository.

[6]State of Ohio Department of Commerce, Division of Securities, Division Order 14-024 *In re Vault Options,* https://www.comapps.ohio.gov/secu/secu_apps/FinalOrders/Files/2014/14-024%20Vault%20Options%20C&D.pdf.
[7]*Id.*
[8]State of Ohio Department of Commerce, Division of Securities, Division Order 15-004 *In re Chelestra Limited d/b/a/ LBinary.*
[9]U.S. SECURITIES AND EXCHANGE COMMISSION, www.sec.gov/divisions/marketreg/mrexchanges.shtml.

THE PROCESS OF A COMPLAINT

By Ohio Division of Securities Attorney Inspector, Janice Hitzeman

The Ohio Division of Securities (the "Division") receives complaints from a variety of sources, including direct complaints filed with the Division and internal and external referrals. The Division appreciates the opportunity to review all information received in order to determine whether such information justifies the initiation of an investigation. During the intake process, the Division may conduct a preliminary review of public information about the subject of the complaint that may be available on the internet. Examples of these sources would include any publicly-filed documents and records, in-state and federal securities licensing documents, and registration records. The Division reviews each complaint through a 4-person panel generally consisting of the Attorney Inspector, Deputy Attorney Inspector, Investigator and an Administrative Assistant. The panel reviews and discusses the information provided by the complainant, as well as any information gathered, in order to answer the following questions:

- Does the complaint involve a "security" as defined by R.C. 1707.01(B)?
- Is the subject of the complaint licensed in Ohio as a securities dealer, securities salesperson, investment adviser or investment adviser representative?
- Does the alleged activity involve a potential violation of the Ohio Securities Act?
- Did the alleged activity occur in Ohio? Are the alleged victims or the subject of the complaint located in Ohio?
- Did the alleged activity occur within the past 5 years?[1]
- Is there another state or federal agency that regulates the individuals and activities alleged in the complaint?
- Does the Division have any open or closed cases involving the subject of the complaint?
- Is there sufficient documentation provided with the complaint to substantiate the allegations?

After the panel reviews the complaint and documentation,[2] the panel recommends one or more of the following actions:

- Request additional documentation from the complainant to substantiate the complaint;
- Obtain further information from third-party sources to substantiate the complaint;
- Refer the matter to another agency which had primary regulatory authority or primary criminal investigative authority over the alleged acts; and/or
- Assign the investigation to an enforcement attorney to continue a formal investigation.

Members of the public can file a complaint with the Division online at https://www.comapps.ohio.gov/secu/secu_apps/complaints/, which can be accessed through the Ohio Department of Commerce website at www.com.state.oh.us. Individuals who would like to speak with an enforcement attorney to file a complaint via telephone should contact the Division at 1-877-683-7841 (877-NVEST411). The Division of Securities encourages potential investors to call the Division before investing to ask:

- Is the brokerage firm and salesperson licensed to sell securities in Ohio?
- Have any enforcement actions been taken against them?
- Has the security been properly registered with the Division of Securities?

[1] R.C. 1707.28 bars the Division from prosecuting or initiating action for a violation of the Ohio Securities Act if the action is not commenced within five years after the commission of the alleged violation.

[2] R.C. 1707.12(C) states, "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, state agencies, federal agencies, and other entities as set forth by rules adopted by the division."

ADMINISTRATIVE ACTIONS

Division Order No. 14-028
Timothy Karl Fife
CRD No. 2437888

On December 8, 2014, the Division issued Division Order Number 14-028, an Amended Notice of Opportunity for Hearing and Amended Notice of Intent to Suspend or Revoke Ohio Investment Adviser Representative No. 2437888 against Timothy Karl Fife, which amended original Division Order No. 14-018. The original Notice Order alleged that Fife's Ohio investment adviser representative license is subject to suspension or revocation based on false statements and other violative conduct related to the sale of leveraged exchange traded funds ("ETFs") in the account of an elderly client. The Amended Notice Order included allegations of similar conduct by Fife in the accounts of 5 additional clients. The administrative hearing in this case is scheduled to begin on March 18, 2015.

Division Order No. 15-001
Gregory Lunar Merrick
CRD No. 2933448
SICOR Securities, Inc.
CRD No. 16195

On January 2, 2015, the Division issued Division Order Number 15-001, an Order to Cease and Desist, Revocation of Investment Adviser and Investment Adviser Representative Licenses, and Consent Agreement to Gregory Lunar Merrick and SICOR Securities, Inc. The Consent Order revoked the Ohio licenses of Merrick and SICOR Securities, Inc. based, in part, on findings that they were not of good business repute and further based on findings that they conducted business in violation of rules and regulations prescribed for the benefit of investors. The Consent Order further found that Merrick marketed a program called "Controlled Asset Transfer System" ("CATS") to insurance agents looking to liquidate clients' securities and investment accounts in order to sell an insurance product. Merrick touted the program as a way to avoid acting as an unlicensed securities dealer when liquidating investment accounts. In certain cases, the clients paid a fee to but never received any advice from or had any personal contact with Merrick or SICOR. FINRA revoked the securities dealer registration of SICOR in 2013 and the securities salesperson registration of Merrick in 2014.

Division Order No. 15-002
Eric T. House
CRD No. 1984306

On January 27, 2015, the Division issued Order No. 15-002, a Notice of Opportunity for Hearing and a Notice of Intent to Issue a Cease and Desist Order against Eric T. House based, in part, on allegations that House engaged in the sale of unregistered securities and fraudulent, manipulative and deceptive acts in selling Real Estate Investment Trusts ("REITS") issued by French Manor Properties, LLC and Brenda Ashcraft. The Division further alleged that House sold the unregistered REITS to 3 Ohio investors in the amount of $850,000 in exchange for commissions totaling $30,251 received from French Manor Properties, LLC. In prior Division Order No. 13-035 issued on November 20, 2013, House consented to the revocation of his Ohio investment adviser license. Brenda Ashcraft was indicted in the United States District Court for the Southern District of Ohio in case number 1:13CR-093 based on allegations that she received funds of at least $15,000,000 from investors who believed they were investing in REITS issued by French Manor Properties, LLC, but whose funds were used to pay back previous investors or for her own personal use and benefit. The trial is scheduled to begin April 14, 2015.

Division Order No. 15-004
Chelestra Limited d/b/a LBinary

On February 25, 2015, the Division issued Division Order Number 15-003, a Notice of Opportunity for Hearing and Notice of Intent to Issue a Cease and Desist Order against Chelestra Limited d/b/a LBinary, located in Gibralter. The Notice Order alleges that Chelestra Limited, through its website www.lbinary.com, is acting as a unlicensed securities dealer and investment adviser by soliciting the sale of binary options in exchange for a fee and providing investment advice to investors who open an account online. The Notice Order further alleges that Chelestra Limited misrepresented material facts in the sale of securities, in part, by advertising returns up to 720% and further engaged in fraudulent, manipulative and deceptive conduct by failing to inform investors of the high risk involved in binary options and by failing to provide proper disclosures about the nature and terms of their investments.

Division Order No. 15-005
George Nicholas Krinos;
Krinos Holdings, Inc. et al.

On February 25, 2015, the Division issued Order No. 15-005, a Cease and Desist Order against George Nicholas Krinos, Krinos Holdings, Inc. and other affiliated entities owned by George Krinos. Krinos did not request a hearing in response to the Notice Order issued in Division Order No. 14-025. The Cease and Desist Order found that Krinos and his affiliated companies sold shares of common stock issued by Krinos Holdings, Inc. to at least 20 people located in Ohio and Pennsylvania in 2012 and 2013 and funneled investor proceeds to affiliated companies for Krinos' personal use. The Order further found that Krinos and his companies acted as unlicensed dealers or salespersons in the sale of unregistered securities, misrepresented material facts in the sale of securities and engaged in securities fraud.

CRIMINAL CASES

Bernard Minneyfield

On December 9, 2014, following a criminal referral by the Division of Securities, Bernard Minneyfield of Gahanna was indicted on two counts of grand theft, two counts of securities fraud, two counts of false representation in the sale of securities and two counts of the unlicensed sales of securities in case number 14CR006460 filed in the Franklin County Court of Common Pleas. He is accused of soliciting at least $50,000 in 2009 and 2010 from two investors in M&M Capital Partners in Gahanna. Minneyfield is not licensed as a securities representative or investment adviser by the State of Ohio. The trial is scheduled to begin May 5, 2015.

Janet Combs

On January 14, 2015, Janet Combs, pastor for The Ark by the River Fellowship Ministry in Cincinnati, was sentenced to five years of community control based on her plea of no contest in case number B1304 320 in the Hamilton County Court of Common Pleas to one count of receiving stolen property. The plea from Ms. Combs, who was indicted as a co-conspirator with former Rep. Peter Beck (R-Mason), John Fussner, *et. al.*, stems from allegations that the defendants funneled millions of dollars in funds from defrauded investors into other accounts, including some maintained by Ms. Combs and The Ark by the River Fellowship Ministry. Her plea and sentencing follows Mr. Fussner's guilty plea to two felony counts in this case on April 24, 2014.

CIVIL CASES

Nancy Jo Frazer
Albert Rosebrock
Focus Up Ministries (Profitable Sunrise)

On January 21, 2015, Judge Joseph Schmenk issued a permanent injunction based on an Agreed Entry against Nancy Jo Frazer, aka Nanci Jo Frazer, and Albert Rosebrock and their charity, Focus Up Ministries, Inc. in case number 13 CI 000103, filed in Williams County, Ohio. The Agreed Entry enjoins Frazer, Rosebrock and their charity from selling or offering to sell securities in or from Ohio and further enjoins them from acting as a securities dealer, securities salesperson, investment adviser or investment adviser representative without prior approval of the court and without proper licensure. The court further enjoined Frazer, Rosebrock and their charity from engaging in any deceptive, fraudulent or manipulative acts in connection with the sale of securities. In the Agreed Entry, Frazer and Rosebrock admitted they sold securities in a manner that violated the Ohio Securities Act. In the event that Frazer or Rosebrock violate the terms of the injunction, they will be subject to a judgment in the amount of $710,000.00. As part of the Agreed Entry, Frazer and Rosebrock agreed to dissolve their charity and repay an undisclosed sum to the Attorney General to be applied to charitable purposes for which donations were made to Focus Up Ministries.

The original complaint alleged that Frazer and Rosebrock solicited the sale of securities in an online high-yield investment program (HYIP) offered through the website www.profitablesunrise.com. The complaint alleged that Frazer and Rosebrock used their charitable organization as a front to lure investors into Profitable Sunrise. The websites for Profitable Sunrise, Focus Up Ministries, and their related groups included bible quotes and references to charitable and religious works in order to help Frazer and Rosebrock build the largest group of investors in Profitable Sunrise.

Profitable Sunrise was enjoined from the further sale of securities by a federal court in Georgia in April, 2013. Profitable Sunrise operated as a pyramid scheme by paying investors referral bonuses up to 5% for any new investors who invested funds through the website. The website offered rates of return between 1.6% and 2.7% compounded daily. Thousands of investors nationwide invested in Profitable Sunrise through local solicitors like Frazer and Rosebrock.

UPCOMING CRIMINAL TRIALS

March 4, 2015	State v. Peter Wilson	CR14-584-064	Cuyahoga County
March 23, 2015	State v. Peter Beck	B1304 320	Hamilton County
April 7, 2015	U.S. v. Geoffrey Nehrenz	1:15CR017	U.S. Dist. N. Ohio
April 14, 2015	U.S. v. Brenda Ashcraft	1:13CR093	U.S. Dist. S. Ohio
May 5, 2015	State v. Bernard Minneyfield	14CR006460	Franklin County
May 5, 2015	State v. Steven P. Moore	14CR110-0455	Delaware County

A to Z with L & E

Disclosure of Excessive Fees by Investment Advisers

The Division occasionally receives questions from investment advisers with respect to excessive fees. Advisers sometimes ask what are considered "excessive" fees, and what disclosures to potential and current clients are required if their fees are in fact deemed "excessive." Division policy often follows positions taken by the U.S. Securities and Exchange Commission ("SEC"), and the requirements regarding excessive fees are no exception. We offer the following guidance in this area.

Like the Ohio Securities Act, the Investment Advisers Act of 1940 ("Advisers Act") does not specifically address or explicitly regulate the types or amount of advisory fees an adviser may charge.[1] Rather, the Advisers Act's regulatory scheme relies on disclosure to address the appropriate level of fees, and the SEC requires that advisers – as fiduciaries – make full and fair disclosure about the fees they charge.[2]

The SEC staff has taken the position that charging an advisory fee that substantially exceeds those charged by other advisers may violate Section 206 (anti-fraud provisions) of the Advisers Act,[3] unless the adviser discloses to existing and prospective clients that such a fee is higher than that charged by other advisers providing the same or similar services.[4] The SEC staff generally applies a facts-and-circumstances analysis in applying this standard.[5] Through a series of No-Action letters dating back to 1970s, the SEC staff took the position that an advisory fee greater than two percent of the total assets under management would be considered "excessive" and in violation of Section 206, absent proper disclosure.[6] The Division has adopted this same analysis with respect to any advisory fee greater than 3 percent of assets under management.

Advisers who intend to charge an "excessive" fee must disclose to current and prospective clients the following:

- That investment advisers normally base fees on a percentage of assets under management;
- That any fee greater than 3 percent of assets under management is higher than that normally charged in the industry;
- That the fee charged may, under certain circumstances, be greater than percent of assets managed; and
- That, in such case, the same or similar services would be available from other advisers at lower rates.[7]

There are some "excessive" advisory fees; however, that even disclosure cannot cure. The SEC staff has taken the position that an extraordinarily high fee may in and of itself violate Section 206 of the Advisers Act. In this context, the SEC staff will examine the facts and circumstances surrounding the particular adviser-client relationship to determine whether the fee violates the anti-fraud provisions.

Generally speaking, the Division follows the Advisors Act and SEC guidance on this issue. Any state-licensed investment adviser with specific questions regarding "excessive" advisory fees should contact the Division.

[1] THOMAS P. LEMKE & GERALD T. LINS, REGULATION OF INVESTMENT ADVISERS § 2:9 (2012 ed.). The exception to this statement arises when the adviser charges performance fees, which is beyond the scope of this article.
[2] LEMKE & LINS, *supra.*
[3] U.S. Investment Advisers Act of 1940, 15 U.S.C.A. §§ 80b-1 through 80b-21, § 206 (2012) (Section 206 sets forth the anti-fraud provisions of the Advisers Act).
[4] *See Equitable Communications Co.*, SEC Staff No-Action Letter (Feb. 26, 1975); *Consultant Publications, Inc.*, SEC Staff No-Action Letter (Jan. 29, 1975); *Phillip Bulliard,* SEC Staff No-Action Letter (July 5, 1974); *Financial Counseling Corp.*, SEC Staff No-Action Letter (Dec. 7, 1974); *John G. Kinnard & Co., Inc.*, SEC Staff No-Action Letter (Nov. 30, 1973).
[5] LEMKE & LINS, *supra*; *see Phillip Bulliard*, *supra* ("… we wish to point out that if an investment adviser's fee is so high as to be unconscionable, or if it is much higher than the fees usually charged by investment advisers for similar services and the investment adviser fails to advise his client of this fact, this could involve fraud upon the client within the meaning of Sec. 206 of the Investment Advisers Act of 1940.")
[6] *See supra* note 5.
[7] *See Financial Counseling Corp.* and *Phillip Bulliard*, *supra*.

A TO Z WITH L & E

This section of the Bulletin, the Licensing and Examination Section of the Division ("L & E"), discusses timely and important topics impacting our licensees. The goal is to cover a wide-range of issues –from "A to Z" – that are of greatest interest to you!

We welcome your suggestions for future topics.

Ohio Division of Securities

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CALCULATING REGULATORY ASSETS UNDER MANAGEMENT

The Division occasionally receives questions from investment advisers with respect to the proper method of calculating Regulatory Assets Under Management ("RAUM") for purposes of licensing, disclosure, or reporting. In calculating an adviser's RAUM, the adviser should include:

a) the *securities portfolios*;
b) for which it provides *continuous and regular supervisory or management services*;
c) assessed using the *current market value* of the assets within the past 90 days.

The preceding italicized terms are expressly discussed in the Instructions to the Form ADV, Part 1, Item 5 (pages 19-22), which are available at: http://www.nasaa.org/industry-resources/uniform-forms/form-adv/. Advisers are strongly encouraged to pay careful attention to these Instructions and definitions, as they will dictate inclusion or exclusion of assets from the adviser's RAUM calculation. The Instructions also provide useful examples to assist with interpreting the calculation requirements.

LICENSING SECTION SPOTLIGHT

Introducing
JOYCE CLEARY
Securities Specialist

Joyce Cleary is a Securities Specialist in the Licensing Section at the Division. Joyce's experience spans over 36 years. She currently serves as a Field Examiner focusing on the compliance of state-licensed investment advisers, a program she helped develop from inception. Because of her experience and expertise, Joyce is also called upon to regularly conduct issuer and for-cause examinations.

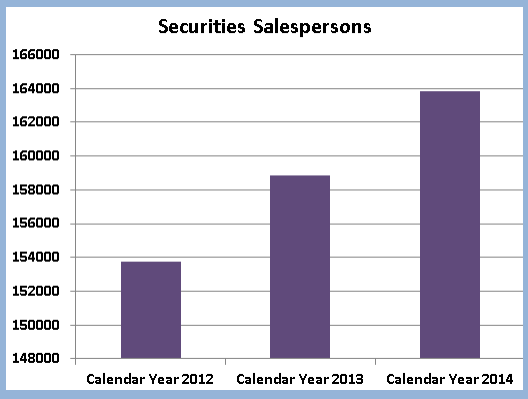
Prior to her current role, Joyce managed the examination staff and worked in the Enforcement Section, where she assisted attorneys and case managers by tracing and documenting cash-flows for securities fraud cases. Joyce has an accounting and business background, attending both Columbus State and Franklin University.

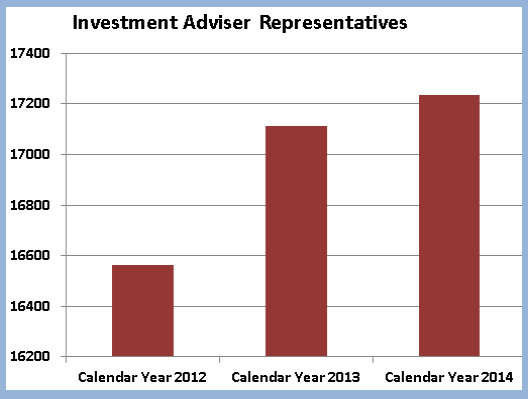
The Division is fortunate to have Joyce as an integral part of its Examination team.

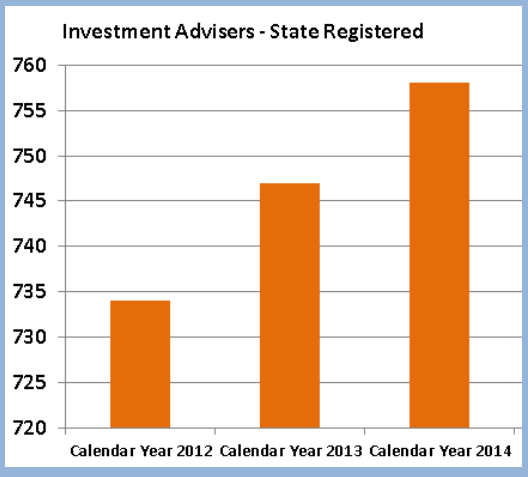
THE OHIO DIVISION OF SECURITIES IS COMMITTED TO ASSISTING OHIO'S VETERANS

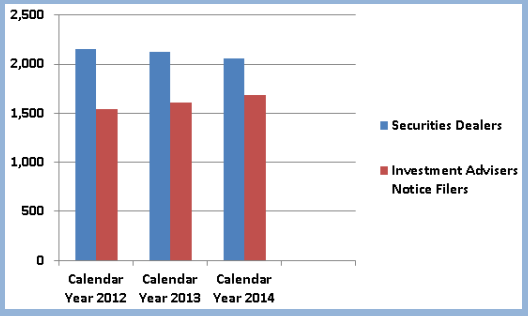
If you are a veteran and are applying for an Investment Adviser Representative License or a Security Salesperson License and need assistance, please contact Kelly Igoe at (614) 644-6296 or Email, Kelly.Igoe@com.state.oh.us.

LICENSES ISSUED 2012-2014









Q & A

Q. How are Investment Adviser Representatives ("IARs") defined under the Ohio Securities Act (the "Act")?

A. Before an individual can assess if they need to become licensed as an IAR in Ohio,[1] they must first determine if they fall within Ohio's definition of an IAR. The Act, in R.C. 1707.01(CC)(1), defines an IAR as:

- a *supervised person* of an investment adviser;
- who provides specific investment advice;
- has more than 5 natural person clients other than *excepted persons*, and more than 10% of the *supervised person's* clients are natural persons other than *excepted persons*;[2] and
- on a regular basis, solicits, meets with, or otherwise communicates with clients.

The italicized terms, *supervised person* and *excepted person*, are defined at R.C. 707.01(DD) and (EE) respectively, and should be referred to for the complete definitions. Generally speaking, however, a *supervised person* is a natural person who is any of the following:

1) a partner, officer or director of an investment adviser;
2) an employee of an investment adviser; or
3) a person who provides investment advisory services on behalf of the investment adviser and is subject to the supervision and control of the investment adviser.

The term *excepted person* is generally defined to be a natural person who is any of the following: (1) has at least $750,000 under the management of the adviser; (2) has a net worth, including assets held jointly with their spouse, of more than $1,500,000; (3) is a "qualified purchaser," as defined in RC 1707.01(LL); (4) is currently an executive officer, director, trustee, general partner, or person serving in a similar capacity of the investment adviser; or (5) a non-clerical employee of the investment adviser that has participated in the investment activities of the firm for at least 12 months.

In order to be an IAR under the Act, the natural person must on a regular basis solicit, meet with, or otherwise communicate with clients. Moreover, the natural person must also provide specific investment advice – i.e., more than written materials or oral statements that do not purport to meet the objectives or needs of specific individuals or accounts. See R.C. 1707.01(CC)(1)(a)- (b).

[1]As a matter of policy, the Division requires all state-licensed investment advisers using a legal entity (such as a corporation or LLC) to license at least one natural person as an IAR.
[2]The Act, in Section 1707.01(CC)(2), prescribes how to calculate the number of clients a natural person has for purposes of this analysis.

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SECURITIES EXCHANGE

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OHIO SECURITIES EXCHANGE

The Ohio Securities Exchange provides a platform where views and opinions relating to the securities industry can be shared from sources outside the Division.

The Division encourages members of the securities community to submit articles pertaining to securities law and regulation in the state of Ohio.

If you are interested in submitting an article, please contact the Editors-In-Chief:

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Courtney graduated Magna Cum Laude from Capital University Law School and is a member of the Order of the Curia, Order of the Barristers, Public Investors Arbitration Bar Association, Central Ohio Association for Justice, the Ohio Association for Justice, and the Ohio State Bar Association.

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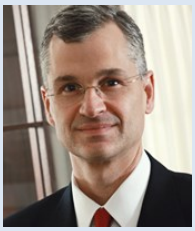
Brian has represented parties on both the buy-side and sell-side of M&A activity and capital formation. He provides outside general counsel advice for businesses throughout Ohio, including companies providing services in the information technology, life sciences and energy industries. Brian has considerable experience with start-up companies, serving as a strategic partner in the formation and growth of their enterprises and business activities.



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Investment Program Association

The Investment Program Association (IPA) supports individual investor access to a variety of asset classes not correlated to the traded markets and historically available only to institutional investors. These include public non-listed REITs (NL REITs), business development companies (BDCs), energy and equipment leasing programs, and private equity offerings.

For 30 years the IPA has championed the growth and improvement of such products, which have increased in popularity with financial professionals and investors alike. The mission of the IPA is advocating direct investments through education.

OHIO SECURITIES ACT—THE NEED FOR MODERNIZATION OF REMEDIES

By Courtney Yeager

The Ohio Securities Act ("OSA") was enacted in 1913 "for the obvious purpose of guarding investors against fraudulent enterprises, to prevent sales of securities based only on schemes purely speculative in character, and to protect the public from swindling peddlers of worthless stocks in mere paper corporations."[1] The OSA is designed both to encourage compliance and to provide recourse for those persons who are injured by violations. It is a remedial law, and Ohio courts are bound to construe it in favor of protecting injured buyers and sellers of securities.[2]

In capsule form, the civil liability provision of the OSA provides that any contract for the sale of securities which violates the Ohio Securities Act is voidable at the election of the purchaser, and under certain conditions the purchaser has an action against every person who has participated in or aided the seller in making the sale.[3]

OHIO INVESTORS ARE AT A CLEAR DISADVANTAGE

Despite the purpose behind the OSA being the need to guard investors and to protect the public, Ohio has the worst civil remedies for aggrieved investors in the country. A winning OSA claim allows the victim to recover the difference between the original purchase price of the security paid and what, if anything, was received in the resale of the security, and taxable court costs.[4] There is no provision in the OSA for a successful party to receive reasonable attorneys' fees or interest at the legal rate from the date of purchase.

In contrast, in any states that have adopted some version of the Uniform Securities Acts (forty states total), an investor who has a statutory claim against a seller for a violation is entitled to receive her damages, interest, and reasonable attorneys' fees that she incurred as a result of pursuing her claim. Of the ten states with securities statutes that cannot be attributed to some version of the Uniform Securities Acts, **Ohio is the only state with a civil liability provision that does not allow winning parties to recover either reasonable attorneys' fees or interest.**[5]

WHY THE UNIFORM SECURITIES ACT?

The 2002 Uniform Securities Act (USA) has been endorsed by the American Bar Association, the New York Stock Exchange, the North American Securities Administrators Association, and the Securities Industry Association. It is the latest national effort to modernize state securities statutes in response to the relatively new federal preemptive legislation (the National Securities Markets Improvements Act and the Securities Litigation Uniform Standards Act), changes in technology and electronic filing, and the increasingly interstate nature of securities transactions. Coordinating federal and state regulation was substantial objective of the drafters of the USA, and it comprehensively addresses federal preemptive legislation throughout.

Section 509 of USA is the civil liability provision for securities fraud. The measure of damages in Section 509(b)(3) is the same that is contemplated by Section 12 of the Securities Act of 1933. Actual damages in an action arising under this subsection are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it, plus interest at the legal rate from the date of purchase, costs, and reasonable attorneys' fees.

ATTORNEYS' FEES SHOULD BE AWARDED IN SECURITIES LITIGATION

It is important to keep in mind the purpose for departing from the American Rule that each side pays its own attorneys' fees. The fee shifting provision of the USA serves essential functions. It makes the investor whole by removing

the expense of legal representation as an obstacle to plaintiffs bringing suits to recover their damages. The purpose of remedies provisions are to provide the investor **full recovery of his investment** without deduction for attorney's fees or court costs. As a corollary to this point, the fee recovery provision will help insure that the investors with smaller claims will be able to secure counsel to represent them.

In addition, such an award penalizes the defendant for his violation – one of the purposes of the civil liability provision is to warn violators of the securities laws that based upon the penal character of this law, they will be responsible for damages, including reasonable attorneys' fees, incurred in returning the victim to his status quo. Finally, the civil recovery provisions serve an important public function in the enforcement of these acts. The state securities agencies and criminal prosecutors simply have neither the staff nor the funds to fully enforce every violation of the acts. Such civil actions are to be encouraged to vindicate public wrongs, and they create an incentive to initiate socially desirable litigation and enhance access to the judicial process.

The OSA is considerably outdated and inadequate when investors in other states enjoy fair remedies with the ability to be made whole on a meritorious claim. If investors are to defend themselves from misconduct and fraud, their remedies must be preserved under the securities laws. Ultimately, giving investors strong and effective remedies will not only help prevent misconduct and maintain the integrity of our financial market, but will ensure that victims of securities crimes walk away with their lives and well-being restored.

[1] *Groby v. State*, 109 Ohio St. 543, 550, 143 N.E. 126, 128 (1924).
[2] *Baker v. Conlan*, 66 Ohio App. 3d 454, 461, 585 N.E.2d 543, 547 (1990).
[3] R.C. 1707.43(A).
[4] R.C. 1704.43(A); *Roger v. Lehman Bros. Kuhn Loeb*, 621 F. Supp. 114, 119, 25 O.B.R. 58 (S.D. Ohio 1985).
[5] New York alone provides no statutory private right of action for investors. Pennsylvania joins Ohio in not including a provision for reasonable attorneys' fees – however, Pennsylvania allows for interest to be collected at the legal rate from the date of purchase.

PRIVATE PLACEMENT OF SECURITIES UNDER RULE 506: NEW EFD SYSTEM TO STREAMLINE BLUE SKY NOTICE FILINGS - By Brian C. Begg

As most securities professionals are aware, Regulation D, promulgated by the Securities and Exchange Commission (SEC), contains certain safe harbors that provide exemptions from federal registration. These safe harbors include exemptions under Rule 504, Rule 505 and Rule 506 of Regulation D under the Securities Act of 1933. Rule 506 is clearly the most utilized exemption, as the SEC estimates that Rule 506 offerings account for more than 90% of all Regulation D safe harbor private offerings and substantially all of the capital raised under Regulation D.

Issuers seeking an exemption under the commonly utilized Rule 506 must meet certain statutory requirements in order to be exempt from registering their offerings with the SEC and the applicable state regulators. It is important to note, however, that even for issuers relying on the Rule 506 *exemption from registration*, there is still a requirement to file a "notice of exempt offering of securities" (Form D), with the SEC and state regulators for jurisdictions in which an offering or sale of private securities was made. This Form D filing is commonly referred to as a "notice filing."

OHIO NOTICE FILING REQUIREMENT

The notice filing requirement in Ohio is set forth in Section 1707.03(X) of the Ohio Revised Code. Pursuant to that section, any offer or sale of securities made in reliance on the exemption provided in Rule 506, and in accordance with Rules 501 to 503 of Regulation D under the Securities Act of 1933, is exempt from registration provided certain conditions are met.[1] Specifically, any offer or sale of securities in Ohio made in reliance on the exemption under Rule 506 will be exempt so long as (i) the issuer makes a ***notice filing*** with the Ohio Division of Securities on Form D of the securities and exchange commission ***within fifteen days of the first sale in Ohio,***[23] (ii) any commission, discount or other ***remuneration*** for sales of securities in Ohio is ***paid or given only to dealers or salespersons licensed*** under Chapter 1707 of the Ohio Revised Code,[45] and (iii) the issuer pays a ***filing fee*** of one hundred dollars to the Ohio Division of Securities.[6]

Historically, issuers had to submit their Form D notice filings to state regulators, including the Ohio Division of Securities, in paper form along with the applicable filing fee. In addition to this filing requirement, issuers conducting multi-state offers also needed to be aware of each state's own rules and regulations regarding where and how the notice filings are made. Some states, for example, require the Form D to have an original signature of an officer of the issuer, some require certain information regarding the aggregate amount of the offering, and certain states require information regarding whether any brokers were used. This process has long been in need of a more streamlined approach.

NASAA ELECTRONIC FILING DEPOSITORY (EFD)

In an effort to simplify state notice filing compliance, the North American Securities Administrators Association (NASAA) launched a new system, known as the Electronic Filing Depository (EFD), allowing issuers to electronically submit state notice filings (also referred to as Form D filings) for Rule 506 offerings with participating state securities divisions and regulators. This multi-state EFD system became effective on December 15, 2014. The purpose of this new EFD system, ac-

cording to NASAA president William Beatty, is to provide an efficient and streamlined process for regulatory filings and to allow for increased transparency for investors.[7] In line with such goals, the EFD allows the public to search and view, free of charge, Form D filings made with state securities divisions through the EFD.[8]

The EFD utilizes its web based platform to allow the efficient processing of multiple state notice filings. In addition to any filing fees required by the state regulators, an issuer must pay a one-time fee of $150 for each offering it makes through the EFD system. Issuers should note that this fee encompasses the initial Form D filing and all amendments and renewal filings made through the EFD for such offering. The EFD system will provide an electronic receipt of the submission as proof of the issuer's offering. As an added benefit, issuers will be able to monitor the progress of the states' review of the offering to respond to any deficiencies that may arise.[9]

As noted above, Ohio merely requires the filing of a Form D and the associated filing fee in order to comply with its notice filing requirements. Issuers should recognize that the EFD, at this time, does not allow any uploads of forms or other information outside of the requirements of Form D. If any information or document aside from those required for the Form D is required by a state regulator, it will be necessary to submit such information or document to

(Continued on page 12)

[1] R.C. § 1707.03(X).
[23] R.C. § 1707.03(X)(1); OHIO ADMIN. CODE 1301:6-3-39.1(A)(3) (2015) (The division has interpreted the term "date of sale" to be the earlier of the date that a subscription agreement or its equivalent is signed by the purchaser or the date that the purchaser transfers or loses control of the purchase funds, or the date of disbursement of funds subject to an escrow agreement specifically approved by the division or established in accordance with the administrative rules of the division.)
[45] R.C. § 1707.03(X)(2); ORC 1707.01(E)(1)(a).
(An issuer [including its officers, directors, managers, partners, trustees, or employees] selling its own securities may not be required to be licensed by the Ohio Division of Securities so long as sales compensation or commissions on the sale of securities are not made.)
[6] R.C. § 1707.03(X)(3); OHIO ADMIN. CODE 1301:6-3-09.3(C)(3) (2015).
[7] NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, http://www.nasaa.org/33829/nasaa-launches-streamlined-electronic-filing-depository/ (last visited March 7, 2015).
[8] NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION , https://www.efdnasaa.org/ (last visited March 7, 2015).
[9] *Id.*

(Continued from page 11)

the state regulators separately.

As of the date of this article 41 states and territories are participating in the new EFD system.[10] As Commissioner Seidt noted in the most recent Ohio Securities Bulletin, the Ohio Division of Securities has recently started accepting Form D notice filings through the EFD.[11] Issuers need to be aware, however, that while many participating regulators will still allow issuers to submit their filing in paper form, some states are intending to require issuers to file electronically through the EFD. As this electronic filing process continues to evolve, it will be important to review each state's filing requirements before submitting any Form D filings. Currently, in Ohio, filers are not required to use the EFD and may continue to submit the Form D and pay the filing fee by mail or through the EFD.[12]

ELECTRONIC FILING IN OHIO

The Ohio Division of Securities has already laid the procedural groundwork for the submission of electronic filings by issuers.[13] Pursuant to the division's rules, issuers relying on Rule 506 of Regulation D, as amended, shall file a Form D for its electronic filings.[14] Pursuant to these rules, electronic filings may be submitted from Monday to Friday (except for legal holidays), from the hours of 8:00 A.M. to 5:00 P.M. eastern standard time or eastern daylight time as applicable.[15] An electronic filing is deemed filed upon receipt of the required forms and fees.[16] Issuers should note that, although the EFD system may allow submission of filings outside of the time period set forth below, it will be necessary to comply with each state regulator's electronic filing requirements as set forth in the applicable regulations.

Ohio provides some respite in the event of technical difficulties regarding any online submission. According to the division, if an issuer, in good faith, attempts to submit an electronic filing to the division in a timely manner, but the transmission is delayed due to technical difficulties, the electronic filer may request an adjustment to the filing date of the transmission.[17] The division may grant the request if it appears that such an adjustment is appropriate and consistent with the public interest and the protection of investors.[18]

As for any general issues that may arise with electronic filings, issuers should be aware that the division has set forth rules which provide that an issuer will not be subject to the liability and antifraud provisions of Chapter 1707 of the Revised Code with respect to an error or omission in an electronic filing resulting solely from electronic transmission errors beyond the control of the electronic filer where the error or omission is corrected by submitting to the division a filing that contains an amendment as soon as reasonably practicable after the electronic filer becomes aware of the error or omission.[19]

LATE FILING RELIEF AND PENALTIES

Undoubtedly, there will be scenarios where a notice filing may be late or improperly filed, other than as a result of a technical difficulty as discussed above. The division has contemplated these issues as well and has provided guidance, specifically stating that when any securities have been sold in reliance upon R.C. § 1707.03(X) (among others), but such reliance was improper because the required filing was not timely or properly made *due to excusable neglect*, upon the effective date of an application made to the division and payment of any applicable fee, and upon payment of a penalty fee equal to the greater of the fee or one hundred dollars, the sale of the securities shall be deemed exempt, as though timely and properly filed.[20]

The division has provided further interpretation regarding the late application relief provided above for notice filings under Rule 506. According to the division, an issuer that has not timely[21] or properly[22] made a notice filing with the division under of R.C. § 1707.03 (X), shall promptly file with the division a Form D and the fee required under R.C. § 1707.03 (X) and the fee under R.C. § 1707.391.[23] As seen herein, in the event an issuer finds its filing untimely or improperly filed, other than by reason of a technical difficulty as set forth above, the division has carved out the necessary procedure in order to cure such defect.

Notwithstanding the above, it is important to recognize that the effectiveness of an application under R.C. § 1707.391 does not relieve anyone who has, other than for excusable neglect, violated R.C. §§ 1707.01 to 1707.45, or any previous law in force at the time of sale, from prosecution thereunder.[24]

[10] NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, https://www.efdnasaa.org/about (last visited March 7, 2015). (As of the date of this article, offerings or sales made in Arizona, California, Connecticut, Delaware, Florida, Louisiana, Massachusetts, Michigan, Minnesota, New York, North Carolina, and Oregon cannot use the EFD system to submit the required notice filing.)
[11] Ohio Securities Bulletin, OHIO DEPARTMENT OF COMMERCE DIVISION OF SECURITIES, 2015:1 (2015).
[12] OHIO ADMIN. CODE, 1301:6-3-09.3(A) (2015).
[13] *Id.*
[14] OHIO ADMIN. CODE, 1301:6-3-09.3(A)(3) (2015).
[15] OHIO ADMIN. CODE, 1301:6-3-09.3(D)(1)-(2) (2015).
[16] OHIO ADMIN. CODE, 1301:6-3-09.3(D)(3) (2015).
[17] OHIO ADMIN. CODE, 1301:6-3-09.3(D)(4) (2015).
[18] *Id.*
[19] OHIO ADMIN. CODE, 1301:6-3-09.3(F) (2015).
[20] R.C. § 1707.391.
[21] OHIO ADMIN. CODE, 1301.6-3-39.1(A)(1) (2015) (According to the division "failure to timely file" means the failure to file an application to exempt securities within the time required by the applicable section of the Ohio Securities Act or the rules adopted thereunder [15 days for notice filings under Rule 506]).
[22] OHIO ADMIN. CODE, 1301.6-3-39.1(A)(2) (2015) (The division has provided that the "failure to properly file" means the filing of an application to exempt securities which was not proper because the application was incomplete, because there was a clerical error made in completing the application, because an error was made regarding the facts underlying the application, or because the application was made on the wrong form.)
[23] OHIO ADMIN. CODE, 1301:6-3-39.1(F) (2015).
[24] R.C. § 1707.391.

CROWD CONTROL: CROWDFUNDING FACT AND FICTION

By Thomas E. Geyer

FACT: Crowdfunding is a new and evolving method to raise money using the internet.

Characterized by efforts to raise small individual contributions from a large number of people, a Crowdfunding campaign identifies the use of – and target amount for – the funds to be raised. Typically the campaign is publicized on the internet or other social media. The people behind the campaign provide some details, and individuals interested in participating in the campaign share information with each other, and may use such information, to decide whether or not to fund the campaign based on the "collective wisdom of the crowd." [1] One commentator has stated: "Anyone who can convince the public he has a good business idea can become an entrepreneur, and anyone with a few dollars to spend can become an investor."[2] In addition to supporting entrepreneurial efforts, Crowdfunding has been used to support artistic and charitable endeavors.

FICTION: There is a Constitutional right to sell securities through Crowdfunding without government regulation.

Crowdfunding does not appear in the Bill of Rights (or elsewhere in the Constitution). Crowdfunding is an attractive way to raise funds because it is a low-cost way to reach potential investors. However, to the dismay of many entrepreneurs and small business owners, they cannot offer or sell securities – through Crowdfunding or other efforts – without compliance with the federal and state securities laws. Because securities are intangible – one cannot "kick the tires" of a security – securities offerings have proven to be susceptible to fraud. Through registration and disclosure requirements the securities laws not only protect investors, but also assist entrepreneurs by establishing a regulated marketplace in which individuals can invest with confidence. Ultimately the securities laws work to the benefit of entrepreneurs by establishing a fair, orderly, and efficient marketplace that promotes capital formation.

FACT: Certain Crowdfunding efforts do not implicate the securities laws.

Crowdfunding efforts can be categorized into five types: (1) the donation model; (2) the reward model; (3) the pre-purchase model; (4) the lending model; and (5) the equity model.[3] Under type (1), the donation model, contributors receive nothing in return; the funds provided are purely a donation to a cause or other venture.[4] Types (2) and (3) are similar: under the reward model, the "investor" receives a reward such as movie tickets or a listing in movie credits; under the pre-purchase model, the "investor" receives the product – or the right to purchase the product – that the entrepreneur is creating, such as a music album.[5] Under type (4), lending, contributors provide funds on a temporary basis expecting repayment with, or sometimes without, interest. Under type (5), equity Crowdfunding, entrepreneurs seek funds in exchange for a promised return on investment.

Crowdfunding under types (1), (2) and (3) normally would not trigger the securities laws. Type (4) lending may trigger the securities laws depending on its structure. Type (5) equity Crowdfunding does trigger the securities laws.

FICTION: Equity Crowdfunding is currently permitted under the federal securities laws.

While it is true that the Jumpstart Our Business Startup Act of 2012 ("JOBS Act") includes a recognition of equity Crowdfunding, Congress directed the federal Securities and Exchange Commission ("SEC") to set the rules for equity Crowdfunding. The SEC proposed such rules in October 2013,[6] but the rules have not yet been finalized. The proposed rules would implement an exemption from the federal securities registration requirements for an offering of up to $1 million during a 12 month period, subject to: a maximum annual investment by individuals; issuer disclosure and reporting requirements; and use of a broker-dealer or internet funding portal to conduct the offering. The SEC is in the process of evaluating public comments on the proposed rules, and has not indicated when – or in what form – the rules may be finalized. Until the rules are finalized, interstate equity Crowdfunding is not permitted. Some states have adopted equity Crowdfunding regulations, but only for equity Crowdfunding offerings within their borders. Ohio has not adopted equity Crowdfunding regulations, but several types of small and limited equity offerings are exempt from securities registration under exiting Ohio law, *see, e.g.,* R.C. 1707.03(O), (Q), (W), (X), (Y).

FACT: The SEC has loosened restrictions on certain private securities offerings.

Consistent with the movement towards permitting equity Crowdfunding, the SEC has loosened restrictions on certain sales of equity securities through private offerings. Exemptions from the securities registration requirements typically are dependent on the amount of money being raised, the nature of the investors, and the nature of the offering and sales efforts. A common exemption from registration is provided for "private placements" or "private offerings" in which securities are sold to a

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[1] *Crowdfunding*, SEC Release No. 33-9470 (Oct. 23, 2013) § I.A.
[2] Bradford, *Crowdfunding and the Federal Securities Laws*, 2012 Columbia Business Law Review 1, 10 (2012).
[3] Bradford, *supra,* p. 14-15
[4] For example, www.globalgiving.org provides a central website for donations to various causes and ventures.
[5] Bradford reports that Kickstarter, www.kickstarter.com, and Indie GoGo, www.indiegogo.com, are the leading reward/purchase Crowdfunding sites.
[6] SEC Release No. 33-9470, *supra.*

CROWD CONTROL: CROWDFUNDING FACT AND FICTION

(Continued from page 13)

limited group of investors without advertising or other solution efforts. In July 2013, the SEC adopted a new rule that – pursuant to a directive in the JOBS Act – lifted the ban on general solicitation and advertising for certain private securities offerings.[7] Specifically, the rule change permits an issuer to engage in general solicitation or general advertising in the offer and sale of securities pursuant to a registration exemption under SEC Rule 506, provided that all purchasers of the securities are "accredited investors"[8] and the issuer takes reasonable steps to verify that such purchasers are accredited investors.

"The mob rushes in where individuals fear to tread."[9] While Crowdfunding has the potential to harness the power of "the mob" for positive investment and entrepreneurial opportunities, the application of the securities laws ensures that no investor (alone or in the crowd) will fear to tread into the opportunity. Crowdfunding can lower the barriers to capital formation and promote investment in small businesses, and the securities laws operate to the benefit of capital formation by establishing a fair, orderly, and efficient marketplace. Accordingly, anyone considering involvement in a Crowdfunding campaign must understand "Crowd Control," that is, the legal requirements applicable to Crowdfunding efforts.

[7] *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*, SEC Release No. 33-9415 (July 10, 2013).

[8] "Accredited investor" is a defined term in SEC Rule 501(a), and in the case of a natural person means a natural person who: has a net worth (individually or with spouse) in excess of $1,000,000; or had an individual income in excess of $200,000 in each of the two most recent years (or joint income with spouse in excess of $300,000), and has a reasonable expectation of reaching the same income level in the current year.

[9] Attributed to B.F. Skinner, American psychologist and author.

INDUSTRY COLLABORATION WITH NASAA DELIVERS THE BEST OUTCOMES FOR INVESTORS - By Kevin Hogan

The Investment Program Association (the "IPA") was formed in 1985 to provide effective national leadership for the direct investment industry. The IPA supports individual investor access to a variety of asset classes unrelated to the traded markets that were previously available only to institutional investors. Examples of direct investments include public non-listed REITs ("NL REITs"), business development companies ("BDCs"), energy and equipment leasing programs, and private equity offerings. For 30 years, the IPA has successfully championed the growth and improvement of such products, which have increased in popularity as an integral part of a well-balanced portfolio for investors. Direct investments are held in the accounts of more than two million individual investors, and the IPA's member companies operate or have properties in all 50 states. Today, these investment products function as a critical component of effectively diversified investment portfolios and serve an essential capital formation function for the United States economy.

As part of the IPA's mission, we constantly strive to improve communication and collaboration between regulators and industry. One recent example of collaboration resulted in SEC Release No. 34-72626; File No. SR-FINRA-2014-006 (the "SEC Release"), which revised NASD Rule 2340 (Customer Account Statements) to modify requirements relating to the inclusion of per share estimated values for direct participation programs ("DPPs") and unlisted real estate investment trusts ("REITs"). Further, FINRA Rule 2310 (Direct Participation Programs) was also modified as a result of the SEC Release to make corresponding changes to the requirements applicable to members' participation in public offerings of DPP or REIT securities.[1] FINRA and the IPA worked together to deliver meaningful transparency to investors' account statements to provide investors a clear picture of the value of their investments. While the process of cooperating with state and federal regulators is sometimes arduous, the collaborative result is more meaningful and effective regulation that both protects investors and encourages capital formation.

As to transparency generally, it is worth noting that transparency is applicable to the entire life of an alternative investment. For instance, while there is an obvious need to discuss the various risks in any investment, it is also important for investors to know where their money is ultimately invested. In the case of BDCs and REITs, the funds raised may ultimately result in increased investment and employment in an investor's own backyard. It should also be noted that in Ohio, there are 123 commercial properties totaling 10.5 million square feet and representing $1.5 billion of investment,[2] as a direct result of various IPA member companies and their investors.

It is often said that there are myriad risks to direct investments. While this is true, alternative investments are often part of a well-balanced investment portfolio. The decision to invest must be made by an educated investor possessing the ability and understanding to analyze an investment of any type. This is the best way to determine if the risks are worth the reward of one investment compared to another. At the end of the day, it is crucial to have sufficient transparency so that an investor understands a particular product whether it is a REIT, BDC, or a convertible note of a Fortune 500 company trading on an exchange or NASDAQ. Further, the investor, in consultation with his or her adviser or broker, can best determine the level of risk.

Finally, with all the changes in the regulatory landscape, it is crucial that regulators and issuers work together to ensure that investors are able to create a well-balanced portfolio and issuers are able to raise capital, which often results in improving local economies through job creation.

[1] See FINRA Regulatory Notice 15-02 http://www.finra.org/Industry/Regulation/Notices/2015/P602234.

[2] Based on a review of SEC filed 10K reports submitted by IPA member firms from 2003 – 2013.