# Ohio Securities Bulletin

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STATE OF OHIO DEPARTMENT OF COMMERCE

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## INTRODUCTION

On April 20, 1978, Governor James A. Rhodes signed into law Amended Substitute Senate Bill 139. This act represents the first major alteration in the Ohio Securities Act since its passage 50 years ago. Amended Substitute Senate Bill 139 (hereinafter "S.B. 139") was originally prepared by representatives of the Ohio Bar Association. Concurrently, the Department of Commerce prepared what subsequently became House Bill 339 which was introduced in the House of Representatives. S.B. 139 is a compromise measure which includes provisions from both H.B. 339 and the original S.B. 139.

In its concern for facilitating the raising of venture capital, the original S.B. 139 focused on increasing the number of exemptions under the Ohio Securities Act. H.B. 339 characterized as Ohio's "Investors Protection Act" concentrated on safe-guarding the Ohio investor. The version of S.B. 139 which passed the Ohio General Assembly on April 4, 1978, represents an interesting combination of both goals. It creates three new exemptions from registration under the Ohio Securities Act, provides for registration by coordination, grants the Division cease and desist powers, and expands its rulemaking authority.

S.B. 139 will become effective on Thursday, July 20, 1978. In May, the Division began its analysis of this legislation in an effort to prepare itself for these substantive changes. Since that time, the Division has researched developments in related jurisdictions, both state and federal, with regard to similar provisions, has drafted rules and forms prescribed by the new sections, and has briefed all Division personnel on the practical workings of the new Act. The Division also met with representatives of the Ohio Bar Association to discuss its interpretation of the new sections. The purpose of this special edition of the Ohio Securities Bulletin is to share with the securities industry in Ohio the Division's policy with regard to S.B. 139.

This bulletin will focus primarily upon Sections 1707.03(O), 1707.03(Q), 1707.03(U), and 1707.091, of the Revised Code. Under each of these sections, there is included an explanation of how the statute is to be interpreted and the rules proposed thereunder. The proposed rules will take some time to move through the administrative process leading to adoption. Prior to adoption these proposed rules will function as guidelines.

### SECTION 1707.091

Registration by coordination allows an issuer to prepare one set of filings for both the Securities and Exchange Commission and the Ohio Division of Securities. Copies of documents filed with the SEC are merely filed with the Division of Securities without the issuer having to tailor them to suit, in most instances, Section 1707.09. Documents filed with the Division under Section 1707.091 will be reviewed and evaluated using the same criteria utilized in evaluating a Form 9. Unlike the exemption provisions of S.B. 139, the Division is not required to apply federal law to an Ohio filing. In this section its responsibility is to apply Ohio law to a federal filing.

Communication between the issuer and the Division of Securities is basic to the effective utilization of registration by coordination. The burden is on the issuer to communicate to the Division of Securities, both orally and in writing, the progress of his filing through the SEC. Without this communication/notification, the Division will be unable to coordinate its efforts with those of the SEC in processing a registration.

Unlike the Uniform Securities Act, Ohio's registration by coordination does not permit any security for which a registration statement has been filed under the Securities Act of '33 to be registered by coordination. Ohio's Act confines registration by coordination to:

1. A registration statement filed pursuant to Section 6 of the Securities Act of '33, or

2. A notification form and offering circular filed pursuant to Regulation A of the Rules and Regulations of the Securities and Exchange Commission.

A. Filings with the Division under Section 1707.091.

The statute provides that in addition to the consent to service of process required by Section 1707.11 of the Revised Code, the issuer shall file:

1. Three copies of the latest form of prospectus or offering circular,

2. The notification filed with the Securities and Exchange Commission, and

3. An undertaking that all amendments to the federal prospectus, offering circular, notification form, or other documents filed with the SEC will be filed promptly with the Division of Securities.

This provision also gives the Division authority to require that a variety of other documents be filed with the above, including all the information filed with the Securities and Exchange Commission. The Division found that other states having a similar registration by coordination provision have generally required, by rule, the filing of the documents enumerated in our statute. The Division has proposed the following.

Proposed Rule No. 1 under 1707.091

A registration statement under Section 1707.091 of the Revised Code, shall contain the following information and be accompanied by the following documents in addition to the information specified in Section 1707.091(B)(1) and Section 1707.091(B)(4), and the Consent to Service of Process required by Section 1707.11, unless the Commissioner in a specific instance permits otherwise:

1. A copy of the articles of incorporation and code of regulations or by-laws, or their substantial equivalent, as currently in effect.

2. A copy of any agreements with or among underwriters.

3. A copy of any indenture or other instrument governing the issuance of the security to be registered.

4. A specimen or copy of the security.

5. Any other information or copies of any other documents, filed with the Securities and Exchange Commission.

6. Any other information or copies of any documents required to be filed pursuant to Section 1707.09.

B. Effectiveness of the Registration

A registration statement filed pursuant to Section 1707.091 becomes effective in Ohio after clearance by the SEC if all of the conditions enumerated in the statute are satisfied.

1. Condition 1 [1707.091(C)(1)]

   a. No stop order is in effect.
   b. No proceeding is pending under Section 1707.13
   c. No cease and desist order has been issued pursuant to Section 1707.23

Section 1707.091 does not define stop order nor does it provide criteria for the issuance of a stop order. The only exception to the foregoing is for failure to file with the Division the required notice and copies of the price amendment. Failure to do so gives the Division the authority to enter a provisional stop order retroactively denying effectiveness until compliance with that provision.

After careful analysis, the Division has concluded that it was not the intention of the legislature to confine the issuance of a stop order to the failure to notify the Division of the contents of the price amendment and for failure to timely file the price amendment. The word "notice" is key to a discussion of the criteria for a stop order. A stop order can be issued for failure to comply with any one of a myriad of notice requirements under Section 1707.091 and for failure to file the required copies of the price amendment. The statute refers to filings with the SEC as a "notification" [1707.091(B)(1)], "notification form" [1707.091(B)(4)], "notify" and "notice" [1707.091(D)].

The statute provides the following stop order procedure:

1. The Division may enter a provisional stop order retroactively denying effectiveness to the registration statement or suspending the effectiveness of the registration statement until the issuer complies with the requirements of the Division.

2. This can be done providing the Division promptly notifies the issuer or the issuer's representative either by telephone or by telegram that an order has been entered against it. If by telephone, the notification must be confirmed either by letter or in a telegram.

3. If the issuer or the issuer's representative proves compliance with the requirements of the Division then the stop order is void as of the time it was entered.

4. In any event the registration statement cannot become effective in Ohio until all of the required conditions are satisfied.

Additionally, the Division felt that the issuance of a stop order in relation to a registration was more in keeping with registration procedures than the institution of proceedings by the Enforcement Section under either Section 1707.13 or 1707.23. Generally, in reviewing a registration, the Registration Section is interested in securing all necessary information in order to evaluate a particular offering. The stop order is a tool by which the registration process is held up until all the requirements of that process are met. Although proceedings under either Section 1707.13 or 1707.23 have not been precluded from use during the registration process, it is nevertheless contemplated that the stop order would be used in some of the same ways as the stop order provided for in Section 8(d) of the Securities Act of 1933. The Division has combined the criteria of Section 8(d) of the Securities Act of 1933, of Section 1707.09 of the Revised Code, and of the new 1707.091 of the Revised Code in drafting its proposed stop order rule, which follows.

Proposed Rule No. 2 under 1707.091

The Division may issue a stop order retroactively denying the effectiveness to the registration statement or suspending its effectiveness, provided the Division promptly notifies the issuer or its representative by telegram or telephone, and promptly confirms by letter or telegram, for the following:

a. if it appears to the Division at the time that the registration statement includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading;

b. if the Division is unable to find that the business of the issuer is not fraudulently conducted, that the proposed offer or disposal of securities is not on grossly unfair terms, that the plan of issuance and sale of securities would not defraud or deceive, or tend to defraud or deceive purchasers; or

c. for failure to provide the notice required by Section 1707.091. For purposes of this provision "notice" shall include:

1. all filings made pursuant to Section 1707.091, and

2. all oral or written communications prescribed thereunder.

The stop order shall set forth the reasons for such order. When the issuer has complied with the requirements of the Division, the stop order shall cease to be effective.

2. Condition 2 [1707.091(C)(2)]

Another condition which must be met in order for a federal registration statement to become effective in Ohio is that it be on file with the Division for a specified period of time. The statute sets out 15 days as the required period. However, the Division by rule may reduce the 15 days to a lesser number. The Division concluded that such a reduction would be inappropriate.

Although it does not take 15 days to review on registration, given the workload of the examiners in the Registration Section, it may take 15 days to get this registration and to give it the appropriate review. Another time factor considered was the time required by the SEC to review a registration statement. Technically, it should only take twenty days for a registration statement to clear the Securities and Exchange Commission. Additionally, the SEC has the authority to accelerate the effective date of a registration, however that option is rarely employed. After filing a registration statement with the SEC the issuer usually receives at least one deficiency letter to which he must respond with either appropriate documentation or amendments to his filings. Any amendment to a registration statement can start the running of a new twenty day period.

Also, a part of the second condition is the requirement that the issuer will have filed the registration statement with the Division of Securities within five days of his having filed the registration statement with the Securities and Exchange Commission. If an issuer does not file his registration statement with the Division of Securities within five days of having filed it with the SEC, the registration statement must be on file with the Division for 30 days, rather than the 15 days, before it can become effective in Ohio. Again, the Division, by rule, may reduce the 30 day period. It is not believed that such a reduction would be appropriate. However, a rule has been drafted which gives the Commissioner of Securities the authority to, in a specified instance, reduce the 15 days or the 30 days.

Proposed Rule No. 3 under 1707.091

The Commissioner of Securities may by order in a specific instance permit, pursuant to Section 1707.091(C)(2) and (3), a reduction in the time required for a registration statement and a statement of the maximum and minimum proposed offering prices and the maximum underwriting discount and commissions to be on file with the Division, prior to effectiveness, to such shorter period as he may deem appropriate.

3. Condition 3 [1707.091(C)(3)]

In order to comply with Condition 3, an issuer must file with the Division a statement containing the maximum and minimum prices at which shares could be sold and the maximum underwriting discounts and commissions to be paid. This information must be on file with the Division for at least two business days prior to the offering going effective in Ohio. Additionally, the offering must be made within the limitations set forth in the statement. The statute also provides that the Division, by rule, may reduce the two business days to a shorter period of time. Again, a reduction would not be in the best interest of either the Division or Ohio investors. However, the Commissioner has been provided with the authority to reduce the two business days if it would be appropriate. See Proposed Rule No. 3 under 1707.091.

4. Condition 4 [1707.091(C)(4)]

The fourth condition which must be met before a federal registration can go effective in Ohio relates to a registration fee. Section 1707.091(B)(5) provides: "a filing fee of $25.00." Section 1707.091(C)(4) provides: "The Division has received a registration fee of 1/20th of one percent of the aggregate price at which the securities are to be sold to the public in this state, which fee, however, shall in no case be less than twenty-five or more than five hundred dollars."

It is assumed that the issuer will pay a twenty-five dollar fee at the time the registration statement is filed with the Division of Securities. At that time the exact aggregate price would be unknown. Prior to going effective in Ohio and after the filing of the price amendment, the exact registration fee can be computed and paid. The issuer will be required to make two separate payments to the Division.

C. Notification of Federal Effectiveness

The issuer has the responsibility for notifying the Division, either by telephone or telegram of the date and time when the federal registration statement will become effective, and of the contents of the price amendment. Following this notification the price amendment is to be filed promptly with the Division. Because the Division felt that a telephone notification could be misunderstood or lost, two actions have been undertaken to minimize possible errors. All such calls are to be directed to the .091 clerk. Secondly, a rule has been drafted requiring the issuer to confirm in writing any telephone notification of federal effectiveness or contents of the price amendment.

Proposed Rule No. 4 under 1707.091

If the issuer or its representative, pursuant to Section 1707.091(D) of the Revised Code, notifies the Division of Securities by telephone, of the date and time when the offering may otherwise be commenced in accordance with the rules, regulations and orders of the Securities and Exchange Commission, and of the contents of the price amendments, if any, it shall promptly, and in any event not later than the first business day after the day on which the telephone notification was made, confirm the information conveyed in such telephone notification by letter or telegram.

At the time this notification is given to the Division, the offering should be reviewed to determine whether or not it will be possible for the registration statement to go effective in Ohio on the date specified for federal effectiveness. If it will be impossible for simultaneous effectiveness in Ohio, the issuer will be notified immediately. The notification to the issuer could take the form of a stop order specifying the reasons for the delay in Ohio.

Section 1707.091(D) provides that despite the federal effectiveness, the registration statement cannot become effective in Ohio unless it meets all of the conditions specified in the statute (providing none are waived). Rule No. 3 was drafted to specifically grant the Commissioner of Securities the discretion to reduce the time requirements of Section 1707.091(C)(2) and (3) in order to limit the authority to waive these provisions to the Commissioner alone. A general provision for waiver on the part of the Division could subject this provision to considerable abuse.

The last paragraph of Section (D) places the responsibility on the Division of Securities to notify the issuer if the registration statement is not going to be able to go effective and why not. As indicated earlier this is the appropriate time for the Division to issue a stop order. If, however, all of the conditions have been met, and no proceeding is contemplated under either Section 1707.13 or 1707.23 of the Revised Code, the issuer will be notified. This notification in most cases will be in writing. The statute provides an opportunity to notify either the issuer or its representative by collect telephone call. In order to reduce the potential for error, telephone notification will be used only in exceptional circumstances. However, if in certain instances telephone notification is the method used, a written notification will follow immediately.

D. Proposed Process for Review of .091 Filing by the Division

Filings made under .091 will go first to the Division's file room for processing. From the file room, the filings will be sent to the Registration Section and the .091 clerk. The .091 clerk will prepare a registration by coordination checklist (an internal document*). The filing will then be delivered to the Registration Supervisor for assignment to the examiner. The filing is reviewed by the examiner using guidelines applicable to similar Form 9 filings.

All subsequent filings with the Division pursuant to a particular registration are to be routed first to the .091 clerk for notation on our checklist. From the .091 clerk amendments etc. will be forwarded to the reviewing examiner. The examiner will work closely with the .091 clerk in timing .091 syndications with the issuer. The .091 clerk has the responsibility for verifying, with appropriate Division personnel, that all of the requirements of 1707.091 have been met in order for the syndication to go effective in Ohio. All notifications from the issuer should be directed to the .091 clerk. The .091 clerk has the responsibility for notifying the issuer as to the effectiveness of the registration in Ohio. The .091 clerk for the Division of Securities is Kathy Veach, area code 614/466-3440.

**Sections 1707.14, 1707.20, 1707.23, 1707.41, 1707.43 and 1707.44**

In addition to the primary substantive changes effected in Sections 1707.03 and 1707.091, by S.B. 139, the new act has significantly amended a number of other sections of the Ohio Securities Act. Following is a summary of the more noteworthy of those provisions.

1707.14: This section, which establishes the requirement of dealer licensing in paragraph (A), has been amended only in the exceptions paragraph, (B). Section 1707.14(B)(1) presents an exception to an exception, bringing under the Division's licensing authority those sales of securities exempted from registration by 1707.03(O) or 1707.03(Q) where a commission, discount, or other remuneration is paid.

Section 1707.14(B)(4) provides an exception to the licensing requirement where an issuer is selling its own securities, and the sale is made under a merger, consolidation or combination, or the total number of Ohio purchasers does not exceed 35. Application of the paragraph will not preclude the need to register or qualify for exemption from registration, as applicable, but merely releases the selling issuer from the requirement of dealer licensing.

1707.20: In terms of the administrative functioning of the Division of Securities, this section may prove to have the most substantial impact of any of the elements of S.B. 139. Section .20 provides a substantially wider mandate for discretionary administrative action through a broadened grant of authority for the adoption, amendment, and rescission of rules, forms, and orders. In addition, the Division is authorized to direct, by rule or order, the format of financial statements, as well as the circumstances under which they are to be filed and certified, as necessary.

Division action to adopt, amend, or rescind a rule, form, or order may now by predicated upon the determination of what is necessary or appropriate in the public interest, for the protection of the investors, or in terms of consistency with the purposes and provisions of the Securities Act. In addition, the Ohio Division is provided explicit authority to cooperate with its counterparts in other states to achieve maximum uniformity in state securities procedures wherever appropriate.

1707.23: The enforcement powers of the Division have been substantially augmented by the explicit grant of authority to issue cease and desist orders and the establishment of procedures for enforcing them. Although many had presumed that the Division had had such authority all along, the addition of paragraph (H) to this section provides both substance and definition to the enforcement activity of the Division.

*The registration by coordination checklist is an internal document developed to facilitate the movement of a registration by coordination filing through the Division of Securities. It enumerates the various time limitations and other statutory requirements which must be met in order for the registration statement to go effective in Ohio. The .091 clerk has the responsibility for filing in all of the necessary data which verifies the issuers having complied with 1707.091. It is also used as an internal control device to make certain that the time responsibilities of the Division are met.

It should be noted also that the unamended paragraphs of 1707.23 will be employed more broadly than in past years as the basis for obtaining information with respect to the new exemption and registration formats in S.B. 139. Forms prepared under the authority of this section have been designated as a "Form 23" and will not be available, as public information, for general release or review. Information obtained through the "Form 23" series will remain confidential with respect to the public as the Division's investigative work product.

1707.41 & 1707.43: These sections relate directly to rights of individuals in securities litigation rather than to the authority of the Division. Section 1707.41, which relates to the action available to an individual who has suffered a loss through reliance on false material statements, has been broadened to include liability for the omission of material facts as well.

Both sections have been amended to increase the statute of limitations for such private actions from two years from the date of purchase to four years from date of purchase or two years from the date when the purchasers knew or had reason to know of the facts giving rise to the action.

1707.44: Here, sales of exempt securities under 1707.03(O), 1707.03(Q), and 1707.03(U) are exempted from the dealer licensing except where commissions or other compensation is paid in a sale under (O) or (Q). Language in section 1707.03 also requires licensing where compensation is paid in connection with the sales of securities under 1707.03(O) or 1707.03(Q).

**Section 1707.03(O)**

A. The Act

The new exemption created under Section 1707.03(O) is almost completely changed from the old provision. Unlike the old "3-O", this section does not exempt the initial sale of voting shares, but it does exempt from registration the sale of shares to a limited number of purchasers.

The essence of the .03(O) exemption is its limitation on sales to no more than twenty-five purchasers in a five year period. There is also a limitation on the sale to more than ten purchasers in the first year of the offering.

Additional provisions include a prohibition on advertising or other communication published in any newspaper, magazine, or similar medium, or broadcast over television or radio. This prohibition does not restrict the use of an offering circular delivered to selected individuals. To qualify for the exemption the issuer must also undertake a reasonable investigation to determine whether the purchaser is purchasing for investment.

Included in this section is the requirement that any commission, discount, or remuneration for sales be made only to an Ohio licensed dealer or salesman and that such commission be limited to ten percent of the initial offering price.

The issuer is required to file a notification with the Division of Securities not later than sixty days after the sale. This report is to contain the name and address of the issuer, the total amount of securities sold under this exemption, the number of persons to whom the securities were sold, the price at which the securities were sold, and the commissions or discounts paid or given. In addition, the issuer is to pay a filing fee of twenty-five dollars.

In adopting this section, the legislature saw fit to define what it considered some important terms. Because the exemption is limited to twenty-five purchasers, the definition of a single purchaser is necessary to completely understand the section. A single purchaser is defined in this section as a "husband and wife, a child and its parent or guardian when the parent or guardian holds the security for the benefit of the child, a corporation, a partnership, an association or other unincorporated entity, or joint stock company, or trust, but only if the corporation, partnership, association, entity, company, or trust was not found for the purposes of purchasing the security." This definition may pose a problem in determining when an entity is formed for the purpose of purchasing the security, however, the vagueness of this definition is clarified in the proposed rules.

Additionally, the legislature defined equity security as "any stock or similar security of a corporation," including any security convertible into that security or any warrant or right to subscribe or purchase that security." The definition of "stock or similar security" is also addressed in the new rules under this section.

From discussions with the drafters of this legislation and from a general reading of the new provisions, it appears that the purpose of Section 1707.03(O) is to aid "start up" corporations. The theory underlying such thinking is that by eliminating the expense and red tape normally experienced in the registration process, a relative cost saving would be experienced by the corporation. Such cost saving could be applied to stimulate the growth of the enterprise.

Although the cost saving theory seems plausible, the complexity of the section may preclude whatever saving the drafters had anticipated initially. As the staff of the Division of Securities dealt with this section, it recognized a need to balance the goal of helping "start-up" companies with its traditional responsibilities of regulating securities transactions and protecting the Ohio investor. The legislature aided the staff in its task by adopting Section 1707.20 which grants authority to the Division of Securities to "adopt, amend, and rescind" rules and forms which "are necessary to carry out section 1707.01 to 1707.45 of the Revised Code, including rules and forms governing registration statements, applications, and reports, and defining any terms whether or not used in Sections 1707.01 to 1707.45."

What resulted is a systematic procedure for claiming an exemption under section 1707.03(O) and a series of forms designed to satisfy both the notification requirements of the section and the fairness requirements of the entire act. In assessing the new exemption provision one should also be cognizant of the language of section 1707.13 which not only outlines the procedures for the suspension of registrations by description and qualification, but also includes the procedures for supervision of an exemption. The criteria for suspending an exemption is the same as for the suspension of a registration. If the Division of Securities determines that exempt transactions or securities are being carried out, "disposed of, or purchased on grossly unfair terms, in such manner as to deceive or defraud or as to tend to deceive or defraud purchasers or sellers, or in disregard of the lawful rules and regulations of the Division applicable to such securities or to transactions therein . . .", then a suspension will be issued. The .03(O) procedures outlined in the following rules discussion are based on the above consideration and criteria.

B Proposed rules

1301:6-3-01

The sale or attempt to sell, by any person or group of persons acting in concert who owns or controls 25% or more of any class of outstanding securities shall be considered as the issuance or proposal to issue any security.

This rule was drafted as a clarification of the issuer definition found in section 1707.01(G). Specifically, it classifies any owner of 25% or more of any class of outstanding securities, who seeks to sell these securities, as an issuer. The relevance of this rule to Section 1707.03(O) is that it prohibits the resale of shares bought under this exemption and held by one who owns 25% or more of the outstanding shares without registration.

It is difficult for a start-up company to achieve the necessary growth in its initial stages without a stable capital structure. A stable capital structure is not easily maintained when one purchaser controls a large amount of shares of the corporation and undertakes to sell those shares to a number of additional purchasers beyond the original twenty-five purchaser limitations. The effect of such a transaction would be the disbursement of the exempted securities to a larger number of purchasers than this section contemplated, all without the benefit of registration. By requiring such an individual or entity to register such shares before sale, the potential for this type of abuse will be minimized.

<u>1301:6-3-13 PROPOSED RULE No. 1</u>

For the purpose of Section 1707.03(O) of the Revised Code, the following definitions apply:

1. "Stock or similar security" means the common voting, share, certificate, or instrument which represents title to or interest in the capital, assets, profits, or property of an Ohio corporation and includes the right to participate in the election of directors of the corporation.

This definition limits what may be construed to include many types of securities, to simply common voting shares. The reason for such a limitation is the repeatedly demonstrated interest in aiding the start-up company. By requiring a capital structure which includes only common voting shares or convertibles, warrants, or rights which may be converted into or exercised against common voting shares, the capital structure is kept simple and easy to handle for the small enterpreneur. If it was hoped that the businessman himself would process this exemption, such a definitional limitation is not inconsistent.

2. "Issuer" means the Ohio corporation engaged in the sale of its equity security or the dealer licensed pursuant to Chapter 1707. of the Revised Code and engaged by the Ohio corporation to sell its equity security.

This issuer definition attempts to deal with the apparent contradiction in sub sections .03(O)(1) and .03(O)(5) and .03(O)(6). The first subsection requires sale by the issuer; the latter two subsections outline the payment of commissions and limit such payments to Ohio licensed dealers and salesmen. From the latter sections it appears that the legislature has contemplated the use of a dealer or salesman to sell the offering for the issuer.

To remedy this apparent inconsistency, the above rule was created. For the purposes of section .03(O) the dealer selling for the issuer is included within the definition of issuer.

3. "Ten per cent of the initial offering price" means one tenth of the number of securities sold multiplied by the offering price of such equity securities.

This term is found in the commission limitation provision of subsection .03(O)(5). The above rule limits the amount of commissions or other payments or discounts to one-tenth of the securities actually sold, rather than those which are proposed to be sold.

Proposed Rule No. 2

No dealer or salesman licensed under Chapter 1707. of the Revised Code shall sell any equity security under 1707.03(O), unless such dealer or salesman shall first notify the division, by form, of his intent to engage in the sale of such securities.

No licensed salesman, employed by a licensed dealer, shall sell such securities except with the knowledge and prior written consent, and under the supervision of the employing dealer.

This rule contains two provisions regulating the actions of dealers or salesmen who may sell under this exemption. The first provision requires each licensed dealer or salesman to report his intent to sell such securities prior to the actual sale. Precedent for such a requirement is found in the division's normal supervisory power over Ohio brokers, dealers, and salesmen. Examples of such supervisory provisions are found in sections 1707.14, 1707.15, and 1707.16 and include the testing and business repute requirements a prospective licensee must meet. Also, a broker-dealer is required to undergo periodic examination of books and records, as well as a general scrutiny of his operations.

It is clear that the legislature allows Ohio licensed dealers and salesmen to sell .03(O) securities under sections .03(O)(5) and .03(O)(6). It is also clear that the Division of Securities has the power to supervise dealers and salesmen and also determine the fairness of sales under the section .03(O) exemption. As a result the reporting system described in the rule has been created to help determine the fairness of the transaction. Additionally, the report creates a tool by which the division can more efficiently supervise the activities of broker-dealers and salesmen.

The second part of this rule deals with a continuing problem facing the brokerage business and the Division of Securities. The potential for salesmen operating independently of their supervising dealers is apparent in the relatively unsupervised limited offering provision of section .03(O). Without the dealer's supervision and consent, the potential for abuse of investors by unsupervised salesmen is great.

Proposed Rule No. 3

The issuer shall maintain books and records of all transactions involving the sale of its equity under 1707.03(O) for a period of nine years beginning with the date of the first sale of such equity security.

This rule deals with the maintenance of books and records. The nine year provision encompasses the five year limitation on the sale to twenty-five purchasers and the new four year statute of limitations in private actions as set out in section 1707.43.

Proposed Rule No. 4

The issuer shall file a Form 3-O with the Division of Securities not later than sixty days after the first sale of an equity security under section 1707.03(O). The issuer shall simultaneously file a Form 23-O with the Division of Securities.

This rule creates forms and reporting requirements. Section .03(O)(7) creates a notification statement to be filed "not later than sixty days after the sale." The "after the sale" language may be interpreted in different ways. It may be read to mean after the first sale or after every sale of securities under this section. It was determined that to make an issuer file what could amount to twenty-five notification statements was too onerous a burden. The rule requires this filing to occur only once.

At the same time as the notification of claim of exemption is filed with the Division, a Form 23-O is also to be filed. This form is authorized under the Division's investigating power in section 1707.23. That section allows the Division, when it "believes to be in the best interest of the public and necessary for the protection of the investor", to "(A) require any person to file with it, or such forms as it prescribes, an original or additional statement or report in writing, under oath or otherwise, as to any facts or circumstances concerning the issuance, sale, or offer for sale of securities within this state by said person, and as to such other information it deems material or relevant thereto . . ."

The purpose of such an additional report is to satisfy the fairness requirements of the act. The information obtained in such a statement will allow the Division to regulate the exemption effectively.

Proposed Rule No. 5

All equity securities sold under 1707.03 shall be sold only in Ohio.

This provision simply limits sales, under the exemption, to those taking place in Ohio. Because of the limited number of purchasers and the goal of aiding small start-up companies, a broad sales program encompassing other states does not seem consistent.

Proposed Rule No. 6

No issuer shall sell any equity security under 1707.03(O) to more than ten purchasers in the twelve month period beginning with the date of the first sale of such equity security.

This provision limits sales in the first year to ten purchasers or less. It is unclear from the language in the statute whether the ten purchasers limitation in a twelve month period meant any particular period. It was determined that, because of the possible need to raise the maximum amount of capital available under the exemption, the ten purchasers per twelve month period rule should be applied only to the first year of existence. Such a provision would allow a corporation more flexibility in the remaining four years of its exemption.

Proposed Rule No. 7

No corporation, partnership, association, entity, company, or trust formed, organized, or created more than one year prior to the date of the filing of the articles of incorporation of the issuer Ohio corporation, shall be considered to have been formed for the purpose of purchasing the security of such Ohio corporation except that any licensed securities dealer or its subsidiaries or its affilites shall be considered to have been formed for the purpose of purchasing the security whenever it was formed, organized or created.

This rule defines what was felt to be a vague standard under the purchaser definition. Although the act states that entities formed for the purpose of purchasing securities, exempt under this section, would not be considered a single purchaser, it gives no guidelines as to how such companies would be recognized.

The rule states that any of the types of entities enumerated in the statute which were formed less than one year prior to the incorporation of the issuer, would be considered to have been formed for the purpose of purchasing the security. It also states that any licensed securities dealer, its subsidiaries, and its affiliates would be considered to have been formed for the purpose of purchasing the security regardless of when it was formed.

The purpose of such rules is to proscribe the buying up of the shares of start-up companies by entities with a view toward quick resale. Such practice would not promote a stable capital structure nor, consequently, would it promote the growth of the corporation. Additionally, the rule would prevent the circumvention of the twenty-five purchaser limitation by groups of individuals.

Proposed Rule No. 8

The issuer shall file a Form 23-O within 30 days after the first anniversary date of the first sale of an equity security under 1707.03(O). The issuer shall thereafter file a Form 23-O within 30 days after the anniversary date in each of the next four years unless:

1. The issuer has exhausted the twenty-five purchaser allotment of section 1707.03(O)(2), and such fact is reflected in previous reports to the Division, or,

2. The issuer has in writing advised the Division that it has terminated sales under 1707.03(O) and all sales occurring prior to such notification have been reported to the Division, or,

3. Future sales under 1707.03(O) are prohibited because five years have elapsed since the date of incorporation of the issuer and all sales under 1707.03(O) have been reported to the Division.

A continuing reporting process is created under this rule. It requires the issuer to file a Form 23-O within thirty days after the first anniversary date of the first sale of a security sold under this exemption and requires that form to be filed thirty days after subsequent anniversary dates in each of the next four years. These reports are required to be filed until the twenty-five purchaser limit has been exhausted, the offering has been voluntarily terminated, or five years have elapsed.

The reasons for such a five year reporting requirement are the need to determine how many purchasers have purchased in that period, whether the offering is still being sold fairly, and to provide a method of continually reporting sales under the exemption without reporting each sale.

Proposed Rule No. 9

An issuer may reasonably believe that the purchaser is purchasing for investment, in the absence of information to the contrary, when the issuer obtains a signed statement from the purchaser prior to sale wherein the purchaser states:

1. That he is aware that no market may exist for the resale of such security; and,

2. That he is purchasing for investment and not with the intention of selling such security within two years; and,

3. That he is aware of any and all restrictions on the resale of such securities, including but not limited to, restrictive legends appearing on the certificate, required holding periods, stop transfer orders, and buy-back privileges of the corporation or shareholders thereof.

A reasonable investigation to acquire a reasonable belief that a purchaser has investment intent is required of the purchaser in subsection .03(O)(4). Requiring the purchaser to have the requisite investment intent is consistent with the promotion of "start-up" capital.

At best, investment intent is an uncertain concept. Federal statutes requiring a person to have investment intent lean toward a holding period to satisfy that provision, for example, two years. It was determined, however, that this lengthy holding period would be a burden for the type of issuer and purchaser contemplated in .03(O).

The effect of the statement, which the purchaser must sign, is to guarantee that he is aware of the investment intent requirement and all of the restrictions which may exist. Such statement, at least, requires the issuer to inform the purchaser that investment intent is contemplated.

Proposed Rule No. 10

For the purpose of computing the total number of purchasers under section 1707.03(O)(2), successive sales by an issuer to a single purchaser shall not be considered to be sales to additional purchasers.

This rule clarifies what may be an ambiguity within the "computation of purchaser" language in section .03(O)(8). The rule states that an individual may participate in more than one transaction under the exemption and still be considered as only one purchaser. It contemplates a situation where, for example, an issuer has sold shares to a friend initially, decides he needs to raise more capital, and sells shares to his friend again within the five year period. The friend would still be regarded as one purchaser for purposes of the twenty-five purchaser limitation.

Proposed Rule No. 11

No issuer shall claim the exemption afforded by section 1707.03(O) for more than one class of equity securities or sell such equity security at a price which shall vary from purchaser to purchaser.

The limitation to one class of equity securities is again consistent with the start-up capital idea. A complicated capital structure is inconsistent with the simple needs of a beginning company. The rule precludes, for example, the sale of common voting shares and convertibles at the same time under the section .03(O) exemption; however, it does not preclude their simultaneous sale as long as one of those classes of equity securities is subject to a registration.

Limiting the sale of securities under this exemption to a nonavailable price per unit is an attempt to combine a fairness standard with the realities of a beginning company. It insures that all twenty-five purchasers pay the same amount for their investment. As none of the purchasers should be investing with a goal of quick appreciation, this requirement would not seem to be a stringent one.

Proposed Rule No. 12

Each Ohio corporation engaged in the sale of its own equity securities, under 1707.03(O), which does not engage the services of an Ohio licensed dealer or salesman, shall designate one representative who shall be responsible for compliance with the requirement of Chapter 1707. of the Revised Code and rules adopted thereunder. The corporation shall advise the Division of any change in the identity or address of this representative.

The compliance representative requirement is designed to facilitate communication between the Division of Securities and the issuer. When it is considered that to qualify for the exemption all of the conditions of section .03(O) must be satisfied, it is apparent that there is a potential for violation of the law. In such a case communication with the issuer is essential and it is imperative that the Division of Securities knows whom to contact.

Proposed Rule No. 13

One year after the date of the first sale of an equity security under section 1707.03(O), the issuer may sell to such number of purchasers as remains from the twenty-five purchaser allotment of 1707.03(O)(2).

This rule is the logical extension of proposed rule six. It further defines the ten and twenty-five purchaser limitation by allowing the issuer to sell to as many purchasers in subsequent years as remain from the maximum of twenty-five. For example, it allows an issuer to sell to only five purchasers in the first twelve month period but to twenty purchasers on the day after that twelve month period is over. This procedure allows for more flexibility in the offering. It allows the issuer to raise the maximum amount of capital at any time after the first twelve month period.

Proposed Rule No. 14

No Ohio corporation shall sell an equity security, other than a stock or similar security, under 1707.03(O) unless its stock or similar security has been registered by qualification or by description under 1707.06(a)(1) of the Revised Code.

This rule prohibits the sale of convertibles, rights, or warrants under the section .03(O) exemption unless there is an existing registration by qualification or registration by description under section .06(a)(1). This provision prevents the sale of such instruments without sufficient underlying shares into which they may be exercised. It was felt that there may be potential for fraudulent transactions without such a prohibition.

The language of section .03(O) and proposed rule (1)(a) defines equity securities as common voting shares or those securities which may be converted into or exercised against common voting shares. By creating the existing rule, the Division insures that a right would not be sold without an underlying common share. The reason for limiting the underlying shares to those registered by qualification or by description under .06(a)(1) is to insure that there are enough shares available for conversion or exercise. Both of these registrations allow unlimited sales, while other provisions limit the number of purchasers.

Proposed Rule No. 15

No Ohio corporation shall sell stock or similar security under 1707.03(O) if it is simultaneously engaged in the sale of equity securities under a registration by description or qualification under Chapter 1707. of the Revised Code.

This provision limits the issuer using the section .03(O) exemption to the sale of only those securities. It was felt that the sale of registered securities at the same time as section .03(O) shares would be inconsistent with the simple capital structure mandated by the legislature.

Although proposed rule 15 provides for the registration of underlying shares if other than stock or similar securities are sold, proposed rule 16 does not contradict it. The latter rule deals only with the definition of stock or similar securities which is defined in proposed rule 1. What is anticipated by proposed rule 16 is the situation where an issuer is an established corporation with existing registrations. This type of corporation could use the .03(O) exemption to sell warrants, rights, or convertibles, and not be in conflict with proposed rule 16. Even though they would be selling a registration at the same time as the .03(O) securities, proposed rule 16 does not prohibit this transaction.

## FORMS AND PROCESSING THE EXEMPTION

As explained above, information concerning the section .03(O) offering is obtained through a system of forms. Form 3-O asks only for the information required under section .03(O)(7). This information is public and is available upon normal request to the Division of Securities. Form 23-O asks for more detailed information about the offering than the Form 3-O. Exhibits, submissions, and answers to any questions on this form are confidential as is all investigatory information obtained by the Division of Securities.

When one requests the forms to complete a section .03(O) sale of securities, he receives a packet containing one Form 3-O, six Form 23-O, and one set of instructions. It is the responsibility of the issuer to file each form when required.

The Division of Securities has adopted a multi-sectional approach for processing the section .03(O) offering. The Registration Section has the responsibility of reviewing the Form 3-O; the Enforcement Section reviews the Form 23-O; and the Broker-Dealer Section reviews Form 23/.03, the notification sent to the Division of Securities informing it of a dealer or salesman's participation in the section .03(O) offering.

**SECTION 1707.03(Q)**

A. The Act, generally

In new section 1707.03(Q) the legislature has enacted for Ohio, the federal private offering exemption created in the Securities Act of 1933. Similar to section 1707.03(O), section .03(Q) exempts the sale of any security if all of the conditions of the section are met. Subsection .03(Q)(1) exempts any sales which would not have to be registered under section 5 of the 1933 Act by reason of their exemption under either "Section 4(2) of that Act or any rule of the Securities and Exchange Commission made to carry out Section 4(2) . . ." What this language means is that federal law is now Ohio law for the purposes of a private offering. Specifically, section 4(2) provides that "transactions by an issuer not involving any public offering . . ." are exempt from registration.

It also specifically adopts Rule 146 under the Securities Act of 1933, the rule made to carry out section 4(2).

The meaning of this enactment is obvious to the Division of Securities. It is now responsible for interpreting federal law and rules. Since the enactment of Rule 146, the federal private offering exemption has been claimed in two ways. First, one could claim the exemption under the general language of section 4(2), requiring the issuer to comply with a growing body of case law. The second way to claim the exemption is to condition it on adherence to Rule 146.

Rule 146 creates a number of tests for the private offering exemption which are derived from SEC experience and the case law. Among the tests are a thirty-five purchaser limitation; the requirement that the issuer must have a reasonable belief that an offeree has sufficient knowledge in financial and business matters to evaluate the offering or that he may bear the risk; that each offering during the course of the transaction has access to the kind of information available on a registration statement; and other detailed requirements. In addition, all of the requirements of Rule 146 must be met or the exemption cannot be claimed on the basis of the rule.

Similar to the provisions in section .03(O), the legislature has added a ten percent commission or discount provision as well as the limitation that such payments be made or discounts given only to an Ohio licensed dealer or salesman. It has also required the issuer or dealer to file a report of sale detailing the number of persons to whom the securities were sold, the total amount, price, and any commissions paid or discounts given.

The drafters of Senate Bill 139 have stated that, unlike the exemptions under section .03(O), the section .03(U) exemption was designed for larger and more sophisticated venture capital offerings. Such a philosophy is a practical necessity if issuers attempt to follow the regiments of Rule 146, for, as a number of commentators point out, compliance with that rule is both time causing and expensive. Essentially, the federal requirements center around the need for every offeree to have access to the information contained in a registration statement and the opportunity for these offerees to question the principals of the issuer. Practically, to insure that such detailed compliance is achieved, the cost to the issuer may exceed the cost of a Regulation A filing.

To implement this rule any less stringently at the state level would be to disregard the express language of the legislation.

The Division of Securities again, as under section .03(O), is faced with the dilemma of facilitating capital formation and the creation of new jobs by reducing the issuer's securities offering costs and its traditional responsibilities of protecting the investor from abuses in the sale of securities. To solve both parts of this dilemma, the Division staff adopted a procedure involving rules, forms, and examinations to regulate sales under section .03(Q). Although any sale made under this section is exempt from registration, such exemption may be lost under the provisions of section 1707.13. This section allows the Division of Securities to suspend the right of "the issuer . . . to buy, sell, or deal in any particular security whether it is registered, qualified, or exempt, if the division finds that the issuer has violated sections 1707.01 to 1707.45, inclusive, of the Revised Code, or any lawful order or requirement of the Division, has fraudulently conducted its business, or has engaged in or is engaged in or about to engage in deceptive or fraudulent acts, practices, or transactions; that such security is being disposed of or purchased on grossly unfair terms, in such manner as to deceive or defraud or as to tend to deceive or defraud purchasers or sellers, or in disregard of the lawful rules and regulations of the Division applicable to such security or transactions therein, . . ."

What is realized from the above analysis is that, unlike federal law which is based on full disclosure, securities transactions in Ohio must be examined on the basis of fairness and potential for fraud. Although section .03(Q) creates federal law as the arbiter of what type of transactions may be exempt as a private offering it is still for the Division of Securities to determine whether that exemption is based on fairness.

Although the staff's initial reaction to section .03(Q) was to require all of the information that would be required under a registration statement information which, under the federal scheme, must be available for the offeree to examine, this stringent type of report was not adopted. This vigorous reporting philosphy was necessarily tempered by the goal of stimulating venture capital, and ultimately, new jobs. Even though the Division has the power to require such information under its section 1707.23 investigatory authority, an across-the-board disclosure requirement would stifle the venture capital goal.

What should be evident to the securities practitioner, in addition to the opportunity to raise venture capital, is the potential for many types of transactions and securities, which currently receive strict pre-sale review by the Division, to be sold under this section. An example of this type of transaction is the sale of the fractional interest in an oil and gas well. Currently such an offering is required, in almost all cases, to undergo a pre-sale registration which subjects those interests to long standing guidelines and the experience of the registration examiner who applies them. Under section .03(Q), these securities may certainly be sold without the opportunity for pre-sale review. It is the experience of the Division that there is considerable potential for abuse in the above-described transactions even when there is pre-sale review. Under section .03(Q) the only information the Division reviews is the notification of claim of exemption filed not later than sixty days after the sale. Little of the information normally obtained in a pre-sale review is obtained from the Form 3-Q notification.

Such considerations were faced by the Division staff in formulating a policy for processing the section .03(Q) exemption. Although Rule 146 is a substantive rule designed to implement the private offering exemption, it was felt that a system of rules, forms, and examinations was needed to adopt the federal disclosure policy to Ohio's "fairness" requirements. Such a system is explained in the following discussion.

B. The Rules

Proposed Rule No. 1

For the purposes of section 1707.03(Q) of the Revised Code, the following definitions apply:

1. The word "issuer" shall include any person or persons included within the definition of the word "underwriter" as set forth in Title I, section 2(11) of the Securities Act of 1933.

In this rule the general definition of issuer is clarified for the purposes of section .03(Q). Section 2(11) defines "underwriter" as any "person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security . . ." The definition goes on to exclude any "person whose interest is limited to a commission for an underwriter or deals not in excess of the usual and customary distributions or seller's commission." The definition also includes within the term "issuer" any person directly or indirectly controlling or controlled by the issuer, or any person under the direct or indirect common control with the issuer."

By including all of those meanings ascribed to "underwriter" in the above definition, the section .03(Q) reference to issuer would include, among others, the owner of securities who buys with a view toward repeated and successive sales. Such a purchaser is one who seeks to avoid the statute by buying under color of a section 4(2) or Rule 146 exemption and then reselling, all without benefit of registration. The section 2(11) definition effectively excludes the dealer contemplated in section .03(Q)(3) by exempting one who makes a normal commission, from the underwriter definition.

This definition also seeks to clarify a concept which may be unclear within the statute. Although there is an exemption, under section .03(B), for sales by a bona fide owner who is neither an issuer nor a dealer when those sales are not repeated and successive, the dimensions of the issuer definition under section 1707.01 are vague. This definition applies some parameters to the section 1707.01 definition when applied to section .03(Q) and deals with a common abuse which may be adopted to the .03(Q) situation.

2. "Ten per cent of the initial offering price" means one tenth of the number of securities sold multiplied by the offering price of the security.

This definition explains how the term used in section .03(Q)(2) is computed. It limits the commission to those securities actually sold rather than an initial estimate of the total offered.

Proposed Rule No. 2

No Ohio licensed dealer or salesman shall sell any security under 1707.03(Q), unless such dealer or salesman shall first notify the Division, by form, of his intent to engage in the sale of such security.

The Division of Securities has specific power under sections 1707.14, 1707.15, and 1707.16 to regulate and supervise the activities of brokers, dealers, and salesmen of securities in Ohio. Pursuant to that power this rule requires any dealer or salesman who wishes to sell securities under section .03(Q) to notify the Division before such sale can be undertaken. Such notification is achieved through the filing of Form 23/.03. This form contains the minimum information needed to notify the Division that a dealer or salesman is participating in a private offering.

Proposed Rule No. 3

No licensed salesman, employed by a licensed dealer, shall sell securities under 1707.03(Q) except with the knowledge and prior written consent, and under the supervision of the employing dealer.

By requiring a salesman who sells under this exemption to sell only with the knowledge and prior written consent of an employing dealer, an attempt is made to insure that the salesman is not acting independently and without the supervision of the dealer. It has come to the attention of the Division that salesmen sometimes create their own deals without informing their supervisory broker-dealers. Such a practice is prohibited under this provision.

Proposed Rule No. 4

The issuer shall maintain books and records of all transactions involving the sale of securities under section 1707.03(Q) for a period of four years after the date of the last sale of such a security.

This rule imposes a books and records maintenance requirement on the issuers of section .03(Q) securities. It corresponds to the new four year statute of limitations in private actions created in section 1707.43.

Proposed Rule No. 5

A dealer or salesman selling securities under section 1707.03(Q) shall maintain books and records of all transactions involving such securities for a period of four years after the date of the last sale of such securities.

This rule is almost exactly the same as proposed Rule No. 4 and imposes the four year books and records maintenance requirement on dealers and salesmen who participate in the sale of a section .03(Q) offering. Again the time period corresponds to the new statute of limitations in private actions created in section 1707.43.

Proposed Rule No. 6

1. The issuer shall file a Form 3-Q not later than sixty days after the first sale of a security under 1707.03(Q).

This rule creates a Form 3-Q on which the statutory notification authorized under .02(Q)(4) may be carried out. This rule articulates the requirement that a specific form must be filed.

2. The issuer shall simultaneously file a Form 23-Q, setting forth such information as is required by the Division to enable it to determine the applicability of section 1707.03(Q) to the transaction.

This rule requires the filing of a Form 23-Q at the same time the Form 3-Q is filed. Unlike the Form 23-Q which requires only the information contained in subsection .03(Q)(4), this form follows closely the provisions of Rule 146 and calls for the production of a number of exhibits which demonstrate that the offering achieves the fundamental fairness required of any securities transactions undertaken in Ohio.

A number of factors contributed to the determination that this type of information should be required for the section .03(Q) private offering. From an analysis of cases, commentators, and Securities and Exchange Commission releases it is without question that the minimum information required to be prepared is that information which registration of the offering would provide. Section (e)(1) of Rule 146 requires either the submission to the offeree of information required under Schedule A of the Act or access to the information required under Schedule A. The rule also contemplates the preparation of a registration statement or a Regulation A offering circular. All of this information must be available for the offeree to inspect.

It is also undisputed, and even suggested by the sponsors of the new legislation, that the Division of Securities has the power under section 1707.23 to create forms, require submissions, and perform examinations when it is considered to be in the best interest of the public. In light of such ability, it was felt that a post sale filing, requiring the submission of exhibits which must have been prepared, regardless, under the section 4(2) or Rule 146 requirements, would not create either an economic or a logistical hardship on the issuer or dealer.

The philosophy of such a form stays within the private offering emphasis of no pre-sale disclosure to the regulatory agency. By receiving such information through a reporting procedure, the Division is then not required to examine private offerings on a routine basis. It is anticipated that such an examination would only be done as the result of a complaint or when insufficient information is available from the Form 23-Q. Currently, the Division's examination staff is small. Without the Form 23-Q the Division's ability to develop sufficient information is limited.

Proposed Rule No. 7

The issuer and dealer shall each designate a representative who shall be responsible for the compliance of the issuer or dealer with the requirements of Chapter 1707. of the Revised Code. The representative designated by the dealer shall be an individual licensed by the Division as a broker or salesman of securities. The issuer or dealer shall in writing advise the Division of any change in the identity or address of their representative.

A compliance representative is required as an aid in effective regulation. From Division experience it was found that communication with an issuer or dealer is much more efficient when the examiner or other Division employee may communicate with the issuer or dealer.

Proposed Rule No. 8

No issuer or dealer shall sell a security under 1707.03(Q) at a price which varies from purchaser to purchaser.

The single price rule requires all securities sold under the private offering exemption to be sold at the same price per unit. The benefit of such a rule is in the guarantee to the purchaser that his interest in the issuer is the same as any other purchaser. In light of the investment intent provisions which are part of the federal exemption, such a single price rule is compatible. It follows the position that an offering which emphasizes investment intent would not offer quick appreciation or changing prices as an incentive to purchase.

Proposed Rule No. 9

No foreign corporation, as defined under section 1703.01, shall engage in the sale of securities under 1707.03(Q) unless it has complied with Chapter 1703. of the Revised Code.

The requirement of compliance under Chapter 1703. of the Revised Code simply insures that the subject corporation has registered with the Secretary of State as a foreign corporation. Section .03(Q) certainly seems to contemplate foreign corporations selling section .03(Q) securities in Ohio. This rule guarantees that a foreign corporation understands it is not exempt from normal corporate registration procedures just because its shares are exempt from registration with the Division.

Proposed Rule No. 10

When the minimum price per unit of an offering under 1707.03(Q) exceeds $50,000, and no purchaser may acquire less than one unit of investment, and the offering does not involve the development of oil, gas, coal, or other mineral deposits, the issuer and dealer or salesman of such offering shall be excused from compliance with sections (2), (6)(2), and (8) of this rule.

This rule is the Division's reaction to the practical realities of the private offering exemption. Originally, the Division's staff had decided to require the Form 23-Q filing, the single price per unit rule, and the pre-sale notification by dealers and salesmen from any person or entity desiring to have the benefit of the private offering exemption. Upon consultation with the drafters of the legislation and other interested observers, it was felt that such a reporting requirement would not promote the raising of venture capital in Ohio. A valid argument was made that large private offerings would seek purchasers in other states with less strict requirements.

There was obvious concern for the extent of disclosure demanded on the Form 23-Q. An additional argument was made against the supposed harshness of the single price per unit rule. The drafters of the section felt that this rule did not address the realities of the private offering. A situation was described where, in large offerings, purchasers would be permitted to purchase greater amounts of the offering for large minimum investments. The single price per unit rule would not permit such premiums and it was successfully argued that this type of provision would limit the size of offerings entering Ohio.

What evolved from the above discussions was the $50,000 per unit exclusion. This rule excuses issuers and dealers from the disclosure and single price requirements if they are selling an offering with a unit price of more than $50,000.

In their discussion of the Division's proposals, the drafters were also aware of the Division's concern for abuses of the exemption process. The $50,000 minimum was designed to require disclosure from smaller issuers who were more likely to use the exemption as a way to avoid registration.

In addition, the rule reflects the Division's concern for the continuing difficulty in regulating oil and gas, coal, and other mineral developments. Even though the typical fractional well interest sells for less than \$50,000 it was anticipated that a promoter could construct an offering so as to appear to be selling for \$100,000 per unit. In realty the promoter would then drill five wells and the effective unit price would be \$20,000. This provision was not designed to discourage the drilling of well packages, simply to require compliance from the above described promoters.

C. Forms and Processing

As explained above, Form 3-Q asks only for that information required by the statute in .03(Q)(4). All information contained on that form is public information and is reviewed by the Registration Section.

Information on the Form 23-Q is confidential information obtained through the Division's investigatory power. Information on this form is reviewed by the Enforcement Section.

Both forms must be filed no later than sixty days after the first sale under this exemption and are one time filings. Examinations are also contemplated in the .03(Q) process as a supplement to the filings and as an aid to investigation. One should be aware that the results of a Division of Securities field examination are also confidential information.

**SECTION 1707.03(U)**

This is another new exemption under 1707.03 of the Revised Code. It exempts certain business combinations and exchanges of shares by a corporation or other business entity for its own shares or another corporation's shares. This section utilizes both federal law and Ohio corporation law, and the exemption is available only if one of two optional conditions are met.

A. First Condition

Condition 1 requires that if the securities to be issued are registered under section 6 to 8 of the Securities Act of 1933 and are sold in compliance with section 5 of the 1933 Act then the transaction is exempt from registration with the Ohio Division of Securities.

B. Second Condition

The second condition available to a company wishing to utilize the exemption provided under 1707.03(U) requires the submission to the shareholders of an information statement prepared by or on behalf of the management of the issuer which is subject to section 14(a) or 14(c) of the Securities Exchange Act of 1934. If the issuer is not a reporting company under the 1934 Act, it is required to prepare information substantially equivalent to the information required in section 14(a) or 14(c) of the 1934 Act.

Section 1707.03(U) does not provide for any filing of information with the Division of Securities relative to either the securities to be issued in a particular transaction or the transaction itself. It was concluded that the perfection of this exemption should require filing of information with the Division. Without such a filing, the Division would be unable to determine whether or not any of these conditions have been satisfied. Additionally, it was felt that "substantially equivalent" should be specifically defined.

Because of the foregoing the Division has drafted a proposed rule under this section.

<u>Proposed Rule Under 1707.03(U)</u>

Pursuant to the authority granted the Division of Securities under sections 1707.20 and 1707.23 of the Revised Code, a filing made pursuant to section 1707.03(U) shall be submitted on a form 23-U, together with any consent to service required by section 1707.11. It shall be accompanied by:

a. In the case of a filing made pursuant to condition (a) of section 1707.03(U), all materials filed in satisfaction of Rule 1301:6-3-09.1 of the Ohio Administrative Code, except if a registration statement, covering the securities to be issued in this transaction, is already in effect, the issuer shall file only the information necessary to update such registration statement.

b. In the case of a filing made pursuant to condition (b) of section 1707.03(U), wherein a proxy statement or information statement prepared by or on behalf of the management of an issuer, subject to section 14(a) or 14(c) of the Securities Act of 1934 is required and the information is filed with the Securities and Exchange Commission in satisfaction of either of those provisions; the issuer shall:

(1) forward to the Division, promptly, and in any event not later than the first business day after the day they are forwarded to or thereafter with the Securities and Exchange Commission, whichever occurs first, all amendments to the proxy statement or information statement.

(2) file one copy of the final proxy statement or information statement with the Division of Securities not later than the date such material is first sent or given to security holders.

c. In the case of a filing made pursuant to condition (b) of section 1707.03(U), wherein "information substantially equivalent" to the information required under (b) of this rule is to be made available to security holders, "information substantially equivalent" shall mean the information required in Schedule 14A of Regulation 14A promulgated under section 14 of the Securities Exchange Act of 1934.

(1) unless the Commissioner in a specific instance permits otherwise, one copy of the information required under section (c) of this rule shall be filed with the Division ten days prior to the date definitive copies of such material are to be submitted to the security holders.

(2) when the definitive copies of the materials are furnished to security holders, the person responsible for such submission shall file one copy of that information with the Division of Securities not later than the date such material is first sent or given to any security holder.

The rule refers to a Form 23-U. The form is required pursuant to sections 1707.03(U), 1707.20, and 1707.23 of the Revised Code. This form, which is not public information, requests information for Division use about the principals in the transaction and particulars about the transaction. One question asks for the number of Ohio shareholders to be notified of the transaction. This is designed to ferret out for cursory review only transactions involving large numbers of Ohio shareholders. No filing fee is required.

C. Effect of this section on existing law and Division policy

Section 1707.03(U) lays to rest some old questions about the treatment of mergers under 1707.03. Section 1707.03(K)(2) provides:

"The exchange of any security by the issuer exclusively with its existing security holders, where no commission or other remuneration is given directly or indirectly for soliciting such exchange, is exempt."

This section together with Administrative Rule 2, adopted some time prior to January 1, 1965, have generally exempted the kinds of transactions covered by 1707.03(U) from registration with the Division. Administrative Ruling 2, over the years, has been used or abandoned depending upon the Administration. New section 1707.03(U) would appear to moot out any concern for whether or not Administrative Ruling 2 is in effect.

The Division has not determined its position with respect to the potential conflict between new section 1707.03(U) and section 1707.04. Section 1707.04 of the Revised Code provides in pertinent part:

"(A) The division of securities may consider and conduct hearings upon any plan of reorganization, recapitalization, or refinancing of a corporation organized under the laws of this state, or having its principal place of business within this state, when such plan is proposed by such corporation or by any of its shareholders or creditors and contains a proposal to issue securities in exchange for one or more bona fide outstanding securities, claims, or property interests, or partly in such exchange or partly for cash. The division may also approve the terms of such issuance and exchange and the fairness of such terms, after a hearing upon which fairness at which all persons to whom it is proposed to issue securities in such exchange have the right to appear, if application for such a hearing is made by such corporation, by the holders of a majority in amounts of its debts, or by the holders of a majority in amount of any outstanding class of securities issued by it."

Section 1707.04(B)(5) defines "reorganization" to include a merger or consolidation.

Section 1707.04 has been used on numerous occasions to satisfy section 3(a)(10) of the 1933 Act and thereby avoid a costly registration under the 1933 Act. Section 3(a)(10) of the Securities Act of 1933 provides:

> "Any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, <u>after a hearing upon the fairness of such terms</u> and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or <u>by any state</u> or territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval:" (emphasis added)

need not be registered.

D. Processing Form 23-U

The completed Form 23-U and attached exhibits will go first to the Division's file room for processing. From the file room the Form 23-U will be sent to an examiner for review. Review of the filing will be made pursuant to guidelines developed for that purpose. Only substantial variances from the guidelines will result in any action by the Division. It is the Division's belief that only those combinations seeking exemption based on Condition 2 will be reviewed in this fashion.

Those combinations seeking the exemption by meeting condition 1 are likely to register their combination utilizing registration by coordination. In such cases, it is necessary for the issuer to file only the Form 23-U without a duplicate set of information filed with the Registration Section under 1707.091. However, as the rule states, any updating, such as with a shelf registration, must accompany the filing of a Form 23-U.

New forms under Senate Bill 139 are available from the Division of Securities, 180 East Broad Street, Columbus, Ohio 43215. Any telephone requests for forms may be directed to Doris Gibson, area code 614/466-3440.

# 1978 AMENDMENTS TO
# CHAPTER 1707.
Effective: July 20, 1978

THESE AMENDMENTS REFLECT THE CHANGES IN THE OHIO SECURITIES ACT EFFECTED BY THE PASSAGE OF AMENDED SUBSTITUTE SENATE BILL 139 WHICH WAS SIGNED BY GOVERNOR RHODES IN APRIL, 1978. THE NEW PROVISIONS BECAME EFFECTIVE ON JULY 20, 1978. SECTIONS 1707.01, 1707.03, 1707.14, 1707.20, 1707.23, 1707.41, 1707.43, 1707.44 AND 1707.091 AS PRINTED HERE SHOULD BE USED IN PLACE OF EARLIER LANGUAGE. THE OTHER SECTIONS OF THE OHIO SECURITIES ACT WERE UNCHANGED.

JAMES A. RHODES
Governor

J. GORDON PELTIER
Director

JAMES F. HURD
Commissioner

# CHAPTER 1707
# SECURITIES

## 1707.01

As used in sections 1707.01 to 1707.45, of the Revised Code:

(A) Whenever the context requires it, "division" or "division of securities" may be read as "director of commerce" or as "chief of the division of securities."

(B) "Security" means any certificate or instrument which represents title to or interest in, or is secured by any lien or charge upon, the capital, assets, profits, property, or credit of any person or of any public or governmental body, subdivision, or agency. It includes shares of stock, certificates for shares of stock, voting-trust certificates, warrants and options to purchase securities, subscription rights, interim receipts, interim certificates, promissory notes, all forms of commercial paper, evidences of indebtedness, bonds, debentures, land trust certificates, fee certificates, leasehold certificates, syndicate certificates, endowment certificates, certificates or written instruments in or under profit-sharing or participation agreements or in or under oil, gas, or mining leases, or certificates or written instruments of any interest in or under the same, receipts evidencing preorganization or reorganization subscriptions, preorganization certificates, reorganization certificates, certificates evidencing an interest in any trust or pretended trust, any investment contract, any instrument evidencing a promise or an agreement to pay money, warehouse receipts for intoxicating liquor, and the currency of any government other than those of the United States and the Dominion of Canada, but such sections shall not apply to bond investment companies or to the sale of real estate. "Security" shall, for the purpose of such sections, be deemed to include real estate not situated in this state and any interest in real estate not situated in this state.

(C)(1) "Sale" has the full meaning of "sale" as applied by or accepted in courts of law or equity, and includes every disposition, or attempt to dispose, of a security or of an interest in a security. "Sale" also includes a contract to sell, an exchange, an attempt to sell, an option of sale, a solicitation of a sale, a solicitation of an offer to buy, a subscription, or an offer to sell, directly or indirectly, by agent, circular, pamphlet, advertisement, or otherwise.

(2) "Sell" means any act by which a sale is made.

(3) The use of advertisements, circulars, or pamphlets in connection with the sale of securities in this state exclusively to the purchasers specified in division (D) of section 1707.03 of the Revised Code is not a sale when the advertisements, circulars, and pamphlets describing and offering such securities bear a readily legible legend in substance as follows: "This offer is made on behalf of dealers licensed under sections 1707.01 to 1707.45 of the Revised Code, and is confined in this state exclusively to institutional investors and licensed dealers."

(4) The offering of securities by any person in conjunction with a licensed dealer, by use of advertisement, circular, or pamphlet is not a sale if such person does not otherwise attempt to sell securities in this state.

(5) Any security given with, or as a bonus on account of, any purchase of securities is conclusively presumed to constitute a part of the subject of such purchase, and has been "sold".

(6) "Sale" by an owner, pledgee, or mortgagee, or by a person acting in a representative capacity, includes sale on behalf of such party by an agent, including a licensed dealer or salesman.

(D) "Person" means a natural person, firm, partnership, limited partnership, partnership association, syndicate joint-stock company, unincorporated association, trust or trustee except where the trust was created or the trustee designated by law or judicial authority or by a will, and a corporation organized under the laws of any state or of any foreign government, or political subdivision thereof.

(E)(1) "Dealer," except as otherwise provided in sections 1707.01 to 1707.45, of the Revised Code, means every person, other than a salesman who engages or professes to engage, in this state, for either all or part of his time, directly or indirectly, in the business of the sale of securities.

(2) "Licensed dealer" means a dealer licensed under such sections.

(F)(1) "Salesman" means every person, other than a dealer, employed, authorized, or appointed by a dealer to sell securities within this state.

(2) The general partners of a partnership, and the executive officers of a corporation or unincorporated association, licensed as a dealer, are not salesmen within the meaning of this definition, nor are such clerical or other employees of an issuer or dealer as are employed for work to which the sale of securities is secondary and incidental; but the division of securities may require a license from any such partner, executive officer, or employee if it determines that protection of the public necessitates such licensing.

(3) "Licensed salesman" means a salesman licensed under sections 1707.01 to 1707.45 of the Revised Code.

(G) "Issuer" means every person who has issued, proposes to issue, or issues any security.

(H) "Director" means each director or trustee of a corporation, each trustee of a trust, each general partner of a partnership, except a partnership association, each manager of a partnership association, and any person vested with managerial or directory power over an issuer not having a board of directors or trustees.

(I) "Incorporator" means any incorporator of a corporation and any organizer of, or any person participating, other than in a representative or professional capacity, in the organization of an unincorporated issuer.

(J) "Fraud," "fraudulent acts," "fraudulent practices," or "fraudulent transactions" means anything recognized on or after July 22, 1929, as such in courts of law or equity; any device, scheme, or artifice to defraud or to obtain money or property by means of any false pretense, representation, or promise; any fictitious or pretended purchase or sale of securities; and any act, practice, transaction, or course of business relating to the sale of securities which is fraudulent or which has operated or would operate as a fraud upon the purchaser.

(K) Except as otherwise specifically provided, whenever any classification or computation is based upon "par value," as applied to securities without par value, the average of the aggregate consideration received or to be received by the issuer for each class of such securities shall be used as the basis for such classification or computation.

(L)(1) "Intangible property" means patents, copyrights, secret processes, formulas, services, good will, promotion and organization fees and expenses, trademarks, trade brands, trade names, licenses, franchises, any other assets treated as intangible according to sound accounting practice, and securities, accounts receivable, or contract rights having no readily determinable value.

(2) "Tangible property" means all property other than intangible property and includes securites, accounts receivable, and contract rights, when such securities, accounts receivable, or contract rights have a readily determinable value.

(M) "Public utilities" means those utilities defined in sections 4905.22, 4905.03, 4907.02, and 4907.02 of the Revised Code; in the case of a foreign corporation, it means those utilities defined as public utilities by the laws of its domicile; and in the case of any other foreign issuer, it means those utilities defined as public utilities by the laws of the situs of its principal place of business. The term always includes railroads whether or not they are so defined as public utilities.

(N) "State" means any state of the United States, any territory or possession thereof, the District of Columbia, and any province of the Dominion of Canada.

(O) "Bank" means any bank, trust company, building and loan association, or savings association incorporated or organized under the laws of the United States or of any state thereof, and subject to regulation or supervision by such county, state, or province.

(P) "Include," when used in a definition, does not exclude other things or persons otherwise within the meaning of the term defined.

(Q)(1) "Registration by description" means that the requirements of section 1707.08 of the Revised Code have been complied with.

(Q)(2) "Registration by qualification" means that the requirements of sections 1707.09 and 1707.11 of the Revised Code have been complied with.

(3) "Registration by coordination" means that there has been compliance with section 1707.091 of the Revised Code. Reference in Chapter 1707. of the Revised Code to registration by qualification shall also be deemed to include registration by coordination unless the context otherwise indicates.

(R) "Intoxicating liquor" includes all liquids and compounds which contain more than three and two-tents per cent of alcohol by weight and are fit for use for beverage purposes.

(S) "Institutional investor" means any corporation, bank, insurance company, pension fund or trust, employees' profit sharing fund or trust, any association engaged, as a substantial part of its business or operations, in purchasing or holding securities, or any trust in respect of which a bank is trustee or cotrustee.

(T) "Securities act of 1933," 84 Stat. 74, 15 U.S.C. 77a-77aa, "Securities exchange act of 1934," 48 Stat. 881, 15 U.S.C. 78a-78jj, and "Internal Revenue code of 1954," 68a Stat. 3, 26 U.S.C. 1 mean the federal statutes of those names as amended before or after the effective date of division (T) of this section.

(U) "Securities and exchange commission" means the securities and exchange commission established by the securities exchange act of 1934.

**1707.03**

(A) As used in this section, "exempt" means that, except in the case of securities the right to buy, sell, or deal in which has been suspended or revoked under an existing order of the division of securities under section 1707.13 of the Revised Code or under a cease and desist order under division (H) of section 1707.23 of the Revised Code, transactions in securities may be carried on and completed without compliance with sections 1707.08 to 1707.11 of the Revised Code.

(B) A sale of securities made by or on behalf of a bona fide owner, neither the issuer nor a dealer, is exempt, if such sale is made in good faith and not for the purpose of avoiding sections 1707.01 to 1707.45 of the Revised Code, and is not made in the course of repeated and successive transactions of a similar character. Any sale of securities over a stock exchange which is lawfully conducted in this state and regularly open for public patronage and which has been established and operated for a period of at least five years prior to such sale at a commission not exceeding the commission regularly charged in such transactions is also exempt.

(C) The sale of securities by executors, administrators, receivers, trustees, or anyone acting in a fiduciary capacity is exempt, where such relationship was created by law, by a will, or by judicial authority, and where such sales are subject to approval by, or are made in pursuance to authority granted by, any court of competent jurisdiction or are otherwise authorized and lawfully made by such fiduciary.

(D) A sale to the issuer, to a dealer, or to an institutional investor is exempt.

(E) A sale in good faith, and not for the purpose of avoiding sections 1707.01 to 1707.45 of the Revised Code, by a pledgee of a security pledged for a bona fide debt, is exempt.

(F) The sale at public auction by a corporation of shares of its stock because of delinquency in payment therefor is exempt.

(G)(1) The giving of any conversion right with, or on account of the purchase of, any security which is exempt, is the subject matter of an exempt transaction, has been registered by description, by coordination, or by qualification, or is the subject matter of a transaction which has been registered by description, is exempt.

(2) The giving of any subscription right, warrant, or option to purchase a security or right to receive a security upon exchange, which security is exempt at the time such right, warrant, or option to purchase or right to receive is given, is the subject matter of an exempt transaction, is registered by description, by coordination, or by qualification, or is the subject matter of a transaction which has been registered by description, is exempt.

(3) The giving of any subscription right or any warrant or option to purchase a security, which right, warrant, or option expressly provides that it shall not be exercisable except for a security which at the time of such exercise is exempt, is the subject matter of an exempt transaction, is registered by description, by coordination, or by qualification, or at such time is the subject matter of a transaction which has been registered by description, is exempt.

(H) The sale of notes, bonds, or other evidences of indebtedness, which are secured by a mortgage lien upon real estate, leasehold estate other than oil, gas, or mining leasehold, or tangible personal property, or which evidence of indebtedness is due under or based upon a conditional-sale contract, if all such notes, bonds, or other evidences of indebtedness are sold to a single purchaser at a single sale, is exempt.

(I) The delivery of securities by the issuer on the exercise of conversion rights, the sale of securities by the issuer on exercise of subscription rights or of warrants or options to purchase securities, the delivery of voting-trust certificates for securities deposited under a voting-trust agreement, the delivery of deposited securities on surrender of voting-trust certificates, and the delivery of final certificates on surrender of interim certificates, are exempt; but the sale of securities on exercise of subscription rights, warrants, or options, is not an exempt transaction unless such rights, warrants, or options when granted were the subject matter of an exempt transaction under division (G) of this section or were registered by description, by coordination, or by qualification.

(J) The sale of securities by a bank or credit union organized under the laws of the United States or of this state is exempt, if at a profit to such seller of not more than two per cent of the total sale price of such securities.

(K)(1) The distribution by a corporation of its securities to its shareholders or other security holders as a share dividend or other distribution out of earnings or surplus is exempt.

(2) The exchange of any security by the issuer exclusively with its existing security holders, where no commission or other remuneration is given directly or indirectly for soliciting such exchange, is exempt.

(3) The sale or preorganization subscriptions for shares of stock of a corporation prior to the incorporation thereof is exempt, when such sale is evidenced by a written agreement, no remuneration is given, or promised, directly or indirectly, for or in connection with the sale of such securities, and no consideration is received, directly or indirectly, by any person from the purchasers of such securities until registration by qualification, by coordination, or by description of such securities is made under sections 1707.01 to 1707.45, of the Revised Code.

(L) The issuance of securities in exchange for one or more bona fide outstanding securities, claims, or property interests, not including securities sold for a consideration payable in whole or in part in cash, under a plan of reorganization, recapitalization, or refinancing approved by a court pursuant to the Bankruptcy Act of the United States or to any other federal act giving any federal court jurisdiction over such plan of reorganization, or under a plan of reorganization approved by a court of competent jurisdiction of any state of the United States, is exempt. As used in this division, "reorganization," "recapitalization," and "refinancing" have the meanings assigned to them in section 1707.04 of the Revised Code.

(M) A sale by a licensed dealer, acting either as principal or as agent, of securities issued and outstanding before such sale, is exempt, unless such sale is of one or more of the following:

(1) Securities constituting the whole or a part of an unsold allotment to or subscription by a dealer as an underwriter or other participant in the distribution of such securities by the issuer, whether such distribution is direct or through an underwriter, provided that where the issuer is such by reason of owning one-fourth or more of such securities, such dealer has knowledge of such fact or reasonable cause to believe such fact:

(2) Any class of shares issued by a corporation when the number of beneficial owners of such class is less than twenty-five, with the record owner of securities being deemed the beneficial owner for this purpose, in the absence of actual knowledge to the contrary:

(3) Securities which within one year were purchased outside this state or within one year were transported into this state, where such dealer has knowledge or reasonable cause to believe, before the sale of such securities, that within one year they were purchased outside this state or within one year were transported into this state; but a sale of such securities is exempt if any of the following occur:

(a) A recognized securities manual contains the names of the issuer's officers and directors, a balance sheet of the issuer as of a date within eighteen months, and a profit and loss statement for either the fiscal year preceeding that date or the most recent year of operations;

(b) Such securities, or securities of the same class, were registered within one year on the basis provided in section 1707.05 of the Revised Code, or within one year were qualified under section 1707.09 or 1707.091 of the Revised Code, and such registration or qualification is in full force and effect;

(c) Such securities at the time of sale could be registered on the basis provided in section 1707.05 of the Revised Code;

(d) Such sale is made by a licensed dealer on behalf of the bona fide owner thereof in accordance with division (B) of this section;

(e) Such securities were transported into Ohio in a transaction of the type described in division (L), (K), or (I) of this section, or in a transaction registered under divison (A) of section 1707.06 of the Revised Code.

(N) For the purpose of this division and division (M) of this section, "underwriter" means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or who participates directly or indirectly in any such undertaking or in the underwriting thereof, but such term does not include a person whose interest is limited to a discount, commission, or profit from the underwriter or from a dealer which is not in excess of the customary distributors' or sellers' discount, commission or profit; and "issuer" includes any person or any group of persons acting in concert in the sale of such securities, owning beneficially one-fourth or more of the outstanding securities of the class involved in the transactions in question, with the record owner of securities being deemed the beneficial owner for this purpose, in the absence of actual knowledge to the contrary.

(O) The sale of any equity security is exempt if all the following conditions are satisfied:

(1) The sale is by the issuer of the security;

(2) The total number of purchasers in this state of all securities issued or sold by the issuer in reliance upon this exemption during the period of one year ending with the date of the sale does not exceed ten, provided that this exemption is limited to a total of twenty-five purchasers and that all such sales shall be made within five years after the date of incorporation. A sale of securities registered under sections 1707.01 to 1707.45 of the Revised Code or sold pursuant to an exemption under sections 1707.01 to 1707.45 of the Revised Code other than this exemption shall not be integrated with a sale pursuant to this exemption in computing the number of purchasers hereunder.

(3) No advertisement, article, notice, or other communication published in any newspaper, magazine, or similar medium, or broadcast over television or radio is used in connection with the sale, but the use of an offering circular or other communication delivered by the issuer to selected individuals does not destroy this exemption.

(4) The issuer reasonably believes after reasonable investigation that the purchaser is purchasing for investment.

(5) The aggregate commission, discount, and other remuneration, excluding legal, accounting, and printing fees, paid or given directly or indirectly does not exceed ten per cent of the initial offering price.

(6) Any such commission, discount, and other remuneration for sales in this state is paid or given only to dealers or salesmen registered pursuant to Chapter 1707. of the Revised Code.

(7) The issuer files with the division of securities not later than sixty days after the sale, a report of sale setting forth the name and address of the issuer, the total amount of the securities sold under this exemption, the number of persons to whom the securities were sold, the price at which the securities were sold, and the commissions or discounts paid or given.

(8) The issuer pays a filing fee of twenty-five dollars.

For the purposes of this division, each of the following is deemed to be a single purchaser of a security: husband and wife, a child and its parent or guardian when the parent or guardian holds the security for the benefit of the child, a corporation, a partnership, an association or other unincorporated entity, a joint-stock company, or a trust, but only if the corporation, partnership, association, entity, company, or trust was not formed for the purpose of purchasing the security.

As used in this division "equity security" means any stock or similar security of a corporation; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security that the division considers necessary or appropriate, by such rules as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.

(P) The sale of securities representing interests in or under profit-sharing or participation agreements relating to oil or gas wells located in this state, or representing interests in or under oil or gas leases of real estate situated in this state, is exempt, when such securities are issued by an individual, partnership, limited partnership, partnership association, syndicate, pool, trust or trust fund, or other unincorporated association, if each of the following conditions is complied with:

(1) The beneficial owners of the securities do not and will not after such sale, exceed five natural persons;

(2) Such securities constitute or represent interests in not more than one oil or gas well;

(3) A certificate or other instrument in writing is furnished to each purchaser of the securities at or before the consummation of such sale, disclosing the maximum commission, compensation for services, cost of lease, and expenses with respect to the sale of such interests and with respect to the promotion, development, and management of the oil or gas well, and the total of such commission, compensation, costs, and expenses does not exceed twenty-five per cent of the aggregate interests in said oil or gas well, exclusive of any landowner's rental or royalty;

(4) The sale is made in good faith and not for the purpose of avoiding sections 1707.01 to 1707.45 of the Revised Code.

(Q) The sale of any security is exempt if all of the following conditions are satisfied:

(1) The provisions of section 5 of the securities act of 1933 do not apply to the sale by reason of an exemption under either section 4(2) of that act or any

rule of the securities and exchange commission made to carry out section 4(2) of that act in effect at the time of such sale.

(2) The aggregate commission, discount, and other remuneration, excluding legal, accounting, and printing fees, paid or given directly or indirectly does not exceed ten per cent of the initial offering price.

(3) Any such commission, discount, or other remuneration for sales in this state is paid or given only to dealers or salesmen registered under chapter 1707. of the Revised Code.

(4) The issuer or dealer files with the Division of Securities not later than sixty days after the sale, a report setting forth the name and address of the issuer, the total amount of the securities sold under this division, the number of persons to whom the securities were sold, the price at which the securities were sold, and the commissions or discounts paid or given.

(5) The issuer pays a filing fee of twenty-five dollars.

(R) A sale of a money order, travelers' check, or other instrument for the transmission of money by a person qualified to engage in such business under section 1107.03 or 1310.01 of the Revised Code is exempt.

(S) A sale by a licensed dealer of securities which are in the process of registration under the act of congress known as the "Securities Act of 1933," 48 Stat., 74, 15 U.S.C. 77a., as amended, unless exempt thereunder, and which are in the process of registration, if registration is required under the provisions of sections 1707.01 to 1707.45 of the Revised Code, is exempt, provided that no such sale shall be consummated prior to the registration by description or qualification of such securities.

(T) The execution by a licensed dealer of orders for the purchase of any security is exempt, provided such dealer acts only as agent for the purchaser, has made no solicitation of the order to purchase such security, has no interest in the distribution of such security, and delivers to the purchaser written confirmation of the transaction which clearly itemizes his commission. "Solicitation" as used in this division, means solicitation of the order for the specific security purchased and does not include general solicitations or advertisements of any kind.

(U) The sale so far as the security holders of a person are concerned, where, pursuant to statutory provisions of the jurisdiction under which such person is organized, or pursuant to provisions contained in its articles of incorporation, certificate of incorporation, partnership agreement, declaration of trust, trust indenture, or similar controlling instrument, there is submitted to such security holders, for their vote or consent, (1) a plan or agreement for a reclassification of securities of such person which involves the substitution of a security of such person for another security of the same person, (2) a plan or agreement of merger, or consolidation, or a similar plan or agreement of acquisition in which the securities of such person held by such security holders will become or be exchanged for securities of any other person, or (3) a plan or agreement for a combination as defined in division (Q) of section 1701.01 of the Revised Code or a similar plan or agreement for the transfer of assets of such person to another person in consideration of the issuance of securities of any person, is exempt if, with respect to any of the foregoing transactions, either of the following conditions is satisfied:

(a) The securities to be issued to such security holders are effectively registered under sections 6 to 8 of the securities act of 1933 and offered and sold in compliance with section 5 of that act;

(b) At least twenty days prior to the date on which a meeting of such security holders is held or the earliest date on which corporate action may be taken when no meeting is held, there is submitted to such security holders, by such person, or by the person whose securities are to be issued in the transaction, information substantially equivalent to the information that would be required to be included in a proxy statement or information statement prepared by or on behalf of the management of an issuer subject to section 14 (a) or 14 (c) of the Securities Exchange Act of 1934.

**1707.07**

The securities specified in section 1707.05 of the Revised Code may be sold if such securities have been registered by description in conformity with section 1707.08 of the Revised Code, or if they have been registered by qualification in conformity with section 1707.09 or 1707.10 and section 1707.11 of the Revised Code or if they have been registered by coordination in conformity with section 1707.091 of the Revised Code; and the transactions specified in section 1707.06 of the Revised Code may be carried on and completed if section 1707.08 of the Revised Code has been complied with.

**1707.091**

(A) Any security for which a registration statement has been filed pursuant to section 6 of the Securities Act of 1933 or for which a notification form and offering circular has been filed pursuant to Regulation A of the general rules and regulations of the Securities and Exchange Commission, 17 C.F.R. sections 230.251 to 230.256 and 230.258 to 230.263, as amended before or after the effective date of this section, in connection with the same offering may be registered by coordination.

(B) A registration statement filed by or on behalf of the issuer under this section with the division of securities shall contain the following information and be accompanied by the following items in addition to the consent to service of process required by section 1707.11 of the Revised Code:

(1) Three copies of the latest form of prospectus or offering circular and notification filed with the Securi-

ties and Exchange Commission;

(2) If the division of securities by rule or otherwise requires, a copy of the Articles of Incorporation and Code of Regulations or Bylaws, or their substantial equivalents, as currently in effect, a copy of any agreements with or among underwriters, a copy of any indenture or other instrument governing the issuance of the security to be registered, and a specimen or copy of the security;

(3) If the division of securities requests, any other information, or copies of any other documents, filed with the Securities and Exchange Commission;

(4) An undertaking by the issuer to forward to the division, promptly and in any event not later than the first business day after the day they are forwarded to or thereafter are filed with the Securities and Exchange Commission, whichever occurs first, all amendments to the federal prospectus, offering circular, notification form, or other documents filed with the Securities and Exchange Commission, other than an amendment that merely delays the effective date;

(5) A filing fee of twenty-five dollars.

(C) A registration statement filed under this section becomes effective either at the moment the federal registration statement becomes effective or at the time the offering may otherwise be commenced in accordance with the rules, regulations, or orders of the Securities and Exchange Commission, if all of the following conditions are satisfied:

(1) No stop order is in effect, no proceeding is pending under section 1707.13 of the Revised Code, and no cease and desist order has been issued pursuant to section 1707.23 of the Revised Code;

(2) The registration statement has been on file with the division for at least fifteen days or for such shorter period as the division by rule or otherwise permits; provided, that if the registration statement is not filed with the division within five days of the initial filing with the Securities and Exchange Commission, the registration statement must be on file with the division for thirty days or for such shorter period as the division by rule or otherwise permits.

(3) A statement of the maximum and minimum proposed offering prices and the maximum underwriting discounts and commissions has been on file with the division for two full business days or for such shorter period as the division by rule or otherwise permits and the offering is made within those limitations;

(4) The division has received a registration fee of one-twentieth of one per cent of the aggregate price at which the securities are to be sold to the public in this State, which fee, however, shall in no case be less than twenty-five or more than five hundred dollars.

(D) The issuer shall promptly notify the division by telephone or telegram of the date and time when the federal registration statement became effective, or when the offering may otherwise be commenced in accordance with the rules, regulations, or orders of the Securities and Exchange Commission, and of the contents of the price amendment, if any, and shall promptly file the price amendment.

"Price amendment" for the purpose of this division, means the final federal registration statement amendment that includes a statement of the offering price, underwriting and selling discounts or commissions, amount of proceeds, conversion rates, call prices, and other matters dependent upon the offering price.

If the division fails to receive the required notice and required copies of the price amendment, the division may enter a provisional stop order retroactively denying effectiveness to the registration statement or suspending its effectiveness until there is compliance with this division, provided the division promptly notifies the issuer or its representative by telephone or telegram, and promptly confirms by letter or telegram when it notifies by telephone, of the entry of the order. If the issuer or its representative proves compliance with the requirements of this division as to notice and price amendment filing, the stop order is void as of the time of its entry. The division may by rule or otherwise waive either or both of the conditions specified in divisions (C) (2) and (3) of this section. If the federal registration statement becomes effective, or if the offering may otherwise be commenced in accordance with the rules, regulations, or orders of the Securities and Exchange Commission, before all of the conditions specified in divisions (C) and (D) of this section are satisfied and they are not waived by the division the registration statement becomes effective as soon as all of the conditions are satisfied.

If the issuer advises the division of the date when the federal registration statement is expected to become effective, or when the offering may otherwise be commenced in accordance with the rules, regulations, or orders of the Securities and Exchange Commission, the division shall promptly advise the issuer or its representative by telephone or telegram, at the issuer's expense, whether all of the conditions have been satisfied or whether the division then contemplates the institution of a proceeding under section 1707.13 or 1707.23 of the Revised Code, but such advice does not preclude the institution of such a proceeding at any time.

**1707.14**

(A) No person shall engage in this state in the business of acting as broker for others in the purchase or sale of securities unless such person is licensed as a dealer by the division of securities.

(B) No person shall sell securities within this state or engage in the business of buying, selling, or dealing in securities otherwise than in transactions through or with a licensed dealer, unless such person is licensed as a dealer by the division, except in the following cases:

(1) When the securities are the subject matter of one or more transactions enumerated in division (B) to (L),

and (O) to (R) and (U) of section 1707.03 of the Revised Code except when a commission, discount, or other remuneration is paid or given in consideration with transactions enumerated in divisions (O) and (Q) of section 1707.03 of the Revised Code;

(2) When the person is an issuer selling securities issued by it or by its subsidiary, if such securities are specified under division (G) or (I) of section 1707.02, or under section 1707.04, of the Revised Code, or if such issuer is not a dealer under section 1707.06 of the Revised Code;

(3) When the person is participating in transactions exempt, under section 1707.34 of the Revised Code, from sections 1707.01 to 1707.45 of the Revised Code;

(4) When the person is selling securities issued by it or its subsidiary that have been registered in compliance with sections 1707.01 to 1707.11 of the Revised Code and either of the following conditions are satisified:

(a) The securities are sold pursuant to a plan or agreement of merger, consolidation, or combination as defined in division (Q) of section 1701.01 of the Revised Code to security holders of a corporation that is participating in the merger, consolidation, or combination;

(b) The total number of purchasers in this state of the securities registered and sold does not exceed thirty-five.

For the purposes of division (B) (4) (b) of this section, each of the following is deemed to be a single purchaser of a security:

Husband and wife, a child and its parent or guardian when the parent or guardian holds the security for the benefit of the child, a corporation, a partnership, an association or other unincorporated entity, a joint-stock company, or a trust, but only if the corporation, partnership, association, entity, company, or trust was not formed for the purpose of purchasing such security.

Notwithstanding said exceptions, however, no person other than an issuer selling its own securities shall engage in the business of selling securities to an institutional investor unless such person is licensed as a dealer.

**1707.20**

(A) The division of securities may adopt, amend, and rescind such rules, forms, and orders as are necessary to carry out sections 1707.01 to 1707.45 of the Revised Code, including rules and forms governing registration statements, applications, and reports, and defining any terms, whether or not used in sections 1707.01 to 1707.45 of the Revised Code, insofar as the definitions are not inconsistent with said sections. For the purpose of rules and forms, the division of securities may classify securities, persons, and matters within its jurisdiction, and prescribe different requirements for different classes.

(B) No rule, form, or order may be made, amended, or rescinded unless the division of securities finds that the action is necessary or appropriate in the public interest or for the protection of investors and consistent with the purposes fairly intended by the policy and provisions of sections 1707.01 to 1707.45 of the Revised Code. In prescribing rules and forms and in otherwise administering sections 1707.01 to 1707.45 of the Revised Code, the division of securities may cooperate with the securities administrators of the other states and the Securities and Exchange Commission with a view of effectuating the policy of this section to achieve maximum uniformity in the form and content of registration statements, applications, reports, and overall securities regulations wherever practicable.

(C) The division of securities may by rule or order prescribe:

(1) the form and content of financial statements required under sections 1707.01 to 1707.45 of the Revised Code;

(2) The circumstances under which consolidated financial statements shall be filed;

(3) Whether any required financial statements shall be certified by independent or certified public accountants. All financial statements shall be prepared in accordance with generally accepted accounting practices.

(D) All rules and forms of the division of securities shall be published; and in addition to fulfilling the requirements of sections 119.01 to 119.13 of the Revised Code, the division shall prescribe, and shall publish and distribute to all licensed dealers at least annually, its rules regarding the sale of securities, the administration of sections 1707.01 to 1707.45 of the Revised Code, and the procedure and practice before the division.

The division may also publish and distribute annually a list of licensed dealers and salesmen.

(E) No provision of sections 1707.01 to 1707.45 of the Revised Code imposing any liability applies to any act done or omitted in good faith in conformity with any rule, form, or order of the divisiion of securities, notwithstanding that the rule, form, or order may later be amended or rescinded or be determined by judicial or other authority to be invalid for any reason, except that the issuance of an order granting effectiveness to a registration under section 1707.09 or 1707.091 of the Revised Code for the purposes of this division shall not be deemed an order other than as the establishment of the fact of registration.

**1707.23**

Whenever it appears to the division of securities, from its files, upon complaint, or otherwise, that any person has engaged in, is engaged in, or is about to engage in any practice declared to be illegal or prohibited by Chapter 1707. of the Revised Code, or defined as fraudulent in such chapter, or any other deceptive scheme or practice in connection with the sale of securities, or when the division believes it to be in the best interest of the public and necessary for the protection of investors, the division may:

(A) Require any person to file with it, on such forms as it prescribes, an original or additional statement or report in writing, under oath or otherwise, as to any facts or circumstances concerning the issuance, sale, or offer for sale of securities within this state by said person, and as to such other information as it deems material or relevant thereto;

(B) Examine any seller, dealer, salesman, or issuer of any such securities, and any of their agents, employees, partners, officers, directors, members, or shareholders, under oath; and examine such records, books, documents, accounts, and papers as the division deems material or relevant to the inquiry;

(C) Require the attendance of such witnesses, and the production of such books, records, and papers, as are required either by the division or by any party to a hearing before the division, and for that purpose issue a subpoena for any witness, or a subpoena duces tecum to compel the production of any books, records, or papers, directed to the sheriff of the county where the witness resides or is found, and served and returned in the same manner as a subpoena in criminal cases is served and returned; and the fees and mileage of such sheriff and witnesses shall be the same as those allowed in the courts of common pleas in criminal cases, and shall be paid from the funds of the division, though no witness subpoenaed at the instance of parties other than the division shall be entitled to compensation from the State for attendance or travel unless the division certifies that his testimony was material to the subject matter of the hearing;

(D) Proceed under section 1707.19 of the Revised Code to suspend the license of any licensed dealer or salesman and ultimately, if the division determines, revoke such license under such sections;

(E) Initiate criminal proceedings under section 1707.44 of the Revised Code by laying before the prosecuting attorney of the proper county any evidence of criminality which shall come to its knowledge; and in the event of the neglect or refusal of the prosecuting attorney to prosecute such violations, the division shall submit such evidence to the attorney general, who may proceed in the prosecution with all the rights, privileges, and powers conferred by law on prosecuting attorneys, including the power to appear before grand juries and to interrogate witnesses before such grand juries;

(F) Require any dealers forthwith to furnish to the division copies of prospectuses, circulars, or advertisements respecting securities, which they publish or generally distribute;

(G) Require any dealers to mail to the division, prior to sale, notices of intention to sell, in respect to all securities which are not exempt under section 1707.02 of the Revised Code, or which are sold in transactions not exempt under section 1707.03 or 1707.04 of the Revised Code.

(H) Issue and cause to be served by certified mail upon all persons affected an order requiring the person or persons to cease and desist from the acts or practices appearing to the division of securities to constitute violations of Chapter 1707. of the Revised Code. The order shall state specifically the section or sections of Chapter 1707. of the Revised Code that appear to the division of securities to have been violated and the facts constituting the violation. If after the issuance of the order it appears to the division of securities that any person or persons affected by the order have engaged in any act or practice from which the person or persons shall have been required, by the order, to cease and desist, the director of commerce may apply to the court of common pleas of any county for, and upon proof of the validity of the order of the division of securities, the delivery of the order to the person or persons affected, and of the illegality and the continuation of the acts or practices that are the subject of the order, the court may grant an injunction implementing the order of the division of securities.

**1707.41**

In addition to the other liabilities imposed by law any person who, by a written or printed circular, prospectus, or advertisement, offers any security for sale, or receives the profits accruing from such sale, is liable, to any person who purchased such security relying on such circular, prospectus, or advertisement, for the loss or damage sustained by such relying person by reason of the falsity of any material statement contained therein or for the omission therefrom of material facts, unless such offerer or person who receives the profits establishes that he had no knowledge of the publication thereof prior to the transaction complained of, or had just and reasonable grounds to believe such statement to be true or the omitted facts to be not material. Whenever a corporation is so liable, each director of the corporation is likewise liable unless he shows that he had no knowledge of the publication complained of, or had just and reasonable grounds to believe the statement therein to be true or the omission of facts to be not material. Any such director, upon the payment by him of a judgment so obtained against him, shall be subrogated to the rights of the plaintiff against such corporation, and shall have the right of contribution for the payment of such judgment against such of his fellow directors as would be individually liable under this section. Lack of reasonable diligence in ascertaining the fact of such publication or the falsity of any statement contained in it or of the omission of such material fact shall be deemed knowledge of such publication and of the falsity of any untrue statement in it or of the omission of material facts.

No action brought against any director, based upon the liability imposed by this section, shall be brought unless it is brought within two years after the plaintiff knew, or had reason to know, of the facts by reason of which the actions of the person or the director were unlawful, or within four years after the purchase of the securities, whichever is the shorter period, or, in the case of an action to enforce a right of contribution under this section, it is brought within two years after the payment of the judgment for which contribution is sought.

**1707.43**

Every sale or contract for sale made in violation of Chapter 1707. of the Revised Code, is voidable at the election of the purchaser. The person making such sale or contract for sale, and every person who has participated in or aided the seller in any way in making such sale or contract for sale, are jointly and severally liable to such purchaser, in an action at law in any court of competent jurisdiction, upon tender to the seller in person or in open court of the securities sold or of the contract made, for the full amount paid by such purchaser and for all taxable court costs, unless the court determines that the violation did not materially affect the protection contemplated by the violated provision.

No action for the recovery of the purchase price as provided for in this section, and no other action for any recovery based upon or arising out of a sale or contract for sale made in violation of Chapter 1707. of the Revised Code, shall be brought more than two years after the plaintiff knew, or had reason to know, of the facts by reason of which the actions of the person or director were unlawful, or more than four years from the date of such sale or contract for sale, whichever is the shorter period.

No purchaser is entitled to the benefit of this section who has failed to accept, within thirty days from the date of such offer, an offer in writing made after two weeks from the date of such sale or contract of sale, by the seller or by any person who has participated in or aided the seller in any way in making such sale or contract of sale, to take back the security in question and to refund the full amount paid by such purchaser.

**1707.44**

(A) No person shall engage in the business of acting as broker for others in the purchase or sale of securities, sell securities, cause them to be sold, offer them for sale, cause them to be offered for sale, or engage in the business of buying, selling, or dealing in securities otherwise than in transactions through or with a licensed dealer, unless the securities are of a kind specified in division (G) or (I) of section 1707.02 of the Revised Code, the transactions are of a kind specified in divisions (B) to (L) and (O) to (R) and (U) of section 1707.03 of the Revised Code, except when a commission, discount, or other remuneration is paid or given in consideration with transactions enumerated in divisions (O) and (Q) of section 1707.03 of the Revised Code, or in section 1707.04 or 1707.06 of the Revised Code; or the transactions are exempt under section 1707.34 of the Revised Code, without being licensed by the division of securities.

(B) No person shall knowingly make or cause to be made any false representation concerning a material and relevant fact, in any oral statement or in any prospectus, circular, description, application, or written statement, for any of the following purposes:

(1) Complying with sections 1707.01 to 1707.45 of the Revised Code, in regard to registering securities by description;

(2) Securing the qualification of any securities under such sections;

(3) Procuring the licensing of any dealer or salesman under such sections;

(4) Selling any securities in this state.

(C) No person shall knowingly and intentionally sell, cause to be sold, offer for sale, or cause to be offered for sale, any security which comes under any of the following descriptions:

(1) Is not exempt under section 1707.02 of the Revised Code, nor the subject matter of one of the transactions exempted in sections 1707.03, 1707.04, and 1707.34 of the Revised Code, has not been registered by description, coordination, or qualification, and is not the subject matter of a transaction that has been registered by description;

(2) The prescribed fees for registering by description, by coordination, or by qualification have not been paid in respect to such security;

(3) Such person has been notified by the division, or has knowledge of such notice, that the right to buy, sell, or deal in such security has been suspended or revoked, or that the registration by description, by coordination, or by qualification under which it may be sold has been suspended or revoked;

(4) The offer or sale is accompanied by a statement that the security offered or sold has been or is to be in any manner indorsed by the division.

(D) No person who is an officer, director, or trustee of, or a dealer for, any issuer, and who knows such issuer to be insolvent in that the liabilities of such issuer exceed its assets, shall sell any securities of or for any such issuer, without disclosing the fact of such insolvency to the purchaser.

(E) No person with intent to aid in the sale of any securities on behalf of the issuer, shall knowingly make any representation not authorized by such issuer or at material variance with statements and documents filed with the division of such issuer.

(F) No person, with intent to deceive, shall sell, cause to be sold, offer for sale, or cause to be offered for sale, any securities of an insolvent issuer, with knowledge that such issuer is insolvent in that the liabilities of such issuer exceed its assets, taken at their fair market value.

(G) No person in selling securities shall knowingly engage in any act or practice which is, in sections 1707.01 to 1707.45 of the Revised Code, declared illegal, defined as fraudulent, or prohibited.

(H) No licensed dealer shall refuse to buy from, sell to, or trade with any person because such person appears on a blacklist issued by, or is being boycotted by, any foreign corporate or governmental entity, nor sell any securities of or for any issuer who is known in relation to the issuance or sale of such securities to have engaged in such practices.