



H.B. 551
123rd General Assembly
(As Introduced)

Rep. Salerno

BILL SUMMARY

- Defines "security" to include any "viatical settlement interest."
- Makes viatical settlement interests subject to the Ohio Securities Law.

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CONTENT AND OPERATION

Viatical Settlement Interests

**Designation of "viatical settlement interest" as a "security" under the
Ohio Securities Law**

As used in the Ohio Securities Law, "security" means any certificate or instrument that 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, membership interests in limited liability companies, 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 Canada. (R.C. 1707.01(B).)

The bill includes "any viatical settlement interest" within the list of things that are examples of a "security" (R.C. 1707.01(B)). The inclusion of "viatical settlement interest" within that list of examples of a security makes that type of interest subject to most if not all of the provisions of the Ohio Securities Law (R.C. Chapter 1707.) (see "*Overview of Ohio Securities Law*," below).

Definition of "viatical settlement interest" and related definitions

The bill defines a "viatical settlement interest" as the entire interest of any fractional interest in an insurance policy or certificate of insurance, or in the benefit under such a policy or certificate, that is the subject of a "viatical settlement contract." The bill, for the purposes of the prior definition, defines "viatical settlement contract" as an arrangement between an insured person and another person pursuant to which any person will give compensation, consideration, or anything else of value to the insured person, or to the insured person's successor or successors in interest, in return for the assignment, transfer, sale, devise, or bequest by the insured person, or the insured person's successor or successors in interest, of the entire interest or any fractional interest in the benefit or ownership of the insurance policy or certificate of insurance. "Insured person" is defined as the owner or beneficiary of an individual insurance policy, or a certificate holder under, or beneficiary of, a group insurance policy. (R.C. 1707.01(NN).)

Overview of Ohio Securities Law

Licensing

Ohio law generally requires any person acting as a "dealer" to be licensed as a dealer by the Division of Securities. "Dealer," except as otherwise provided

in the Ohio Securities Law, means every person, other than a salesman, who engages or professes to engage, in this state, for either all or part of the person's time, directly or indirectly, either in the business of the sale of securities for the person's own account, or in the business of the purchase or sale of securities for the account of others in the reasonable expectation of receiving a commission, fee, or other remuneration as a result of engaging in the purchase and sale of securities (R.C. 1707.01(E)(1)). "Dealer" does not mean any of the following:

(1) Any issuer, including any officer, director, employee, or trustee of, or partner in, or any general partner of, any issuer, that sells, offers for sale, or does any act in furtherance of the sale of a security that represents an economic interest in that issuer, provided no commission, fee, or other similar remuneration is paid to or received by the issuer for the sale;

(2) Any licensed attorney, public accountant, or firm of such attorneys or accountants, whose activities are incidental to the practice of the attorney's, accountant's, or firm's profession;

(3) Any person that, for the account of others, engages in the purchase or sale of securities that are issued and outstanding before such purchase and sale, if a majority or more of the equity interest of an issuer is sold in that transaction, and if, in the case of a corporation, the securities sold in that transaction represent a majority or more of the voting power of the corporation in the election of directors;

(4) Any person that brings an issuer together with a potential investor and whose compensation is not directly or indirectly based on the sale of any securities by the issuer to the investor;

(5) Any bank, savings and loan association, savings bank, or credit union chartered under the laws of the United States or any state, provided that all transactions are consummated by or through a person licensed as a "dealer";

(6) Any person that the Division of Securities by rule exempts from the definition of "dealer."

A person does not have to be licensed as a dealer by the Division of Securities in the following cases (R.C. 1707.14(A)):

(1) When the person is transacting business through or with a licensed dealer;

(2) When the securities are the subject matter of one or more exempt transactions enumerated in R.C. 1707.03(B) to (L), (O) to (R), and (U) to (W), or

in R.C. 1707.06, except when a commission, discount, or other remuneration is paid or given in consideration with transactions enumerated in R.C. 1707.03(O), (Q), and (W), or in R.C. 1707.06;

(3) When the person is an issuer selling securities issued by it or by its subsidiary, if such securities are specified under R.C. 1707.02(G) or (I), or under R.C. 1707.04. "Issuer" means every person who has issued, proposes to issue, or issues any security (R.C. 1707.01(G)).

(4) When the person is participating in transactions exempt, under R.C. 1707.34, from R.C. Chapter 1707.

Every "salesman" of securities must be licensed by the Division of Securities, and every salesman must be employed only by the licensed dealer specified in the salesman's license. "Salesman" means every natural person, other than a dealer, employed, authorized, or appointed by a dealer to sell securities within this state.

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 the clerical or other employees of an issuer or dealer who are employed for work to which the sale of securities is secondary and incidental. 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 the licensing. (R.C. 1707.16 and 1707.01(F).)

Registration

Ohio law prohibits any person from offering or selling securities unless the securities or transactions in which they are offered and sold are registered or exempt. There are three methods by which a viatical settlement interest may be registered: registration by description, registration by qualification, or registration by coordination.

Registration by description

R.C. 1707.08 allows the securities specified in R.C. 1707.05 to be sold, and the transactions enumerated in R.C. 1707.06 to be consummated, on compliance with the following procedures. A description, verified either by the oath of the person filing it or of any person having knowledge of the facts, must be filed with the Division of Securities by the issuer, or by a majority of the incorporators of the issuer prior to election of officers if it is an incorporated issuer, or by a licensed dealer, which description must be on forms prescribed by the Division and must set forth the following information:

- (1) The name of the issuer;
- (2) A brief description of the securities;

(3) The amount of the securities to be offered after the filing of the description for sale in this state and, if all the securities are not to be offered by the person filing the description, then the respective amounts to be offered by others, so far as the amounts are known, and the names and addresses of other offerors;

(4) A brief statement of the facts that show that the securities fall within one of the classes specified in R.C. 1707.05 or that they are the subject matter of a transaction enumerated in R.C. 1707.06;

- (5) The price at which the securities are to be offered for sale.

Registration by description is completed when the description, together with the prescribed fee, in the form of cash, check, or United States postal money order, is delivered, or mailed by certified mail with postage prepaid, to the Division. At the time the description is filed, the person filing it must pay to the Division a fee of one-tenth of one per cent of the aggregate price at which the securities described are to be offered for sale to the public in this state, if they fall within one of the classes specified in R.C. 1707.05; but in no case can the fee be less than \$100 or more than \$1,000. If the securities are the subject matter of a transaction enumerated in R.C. 1707.06, the fee is a flat fee of \$50.

Registration by qualification

R.C. 1707.09 requires all securities, except those enumerated in R.C. 1707.02 or 1707.05 and those that are the subject matter of a transaction permitted by R.C. 1707.03, 1707.04, or 1707.06, be qualified under R.C. 1707.09 before being sold in this state. R.C. 1707.09 also requires that applications for that qualification, on forms prescribed by the Division of Securities, be made in writing either by the issuer of the securities or by any licensed dealer desiring to sell them within this state and be signed by the applicant, sworn to by any person having knowledge of the facts stated in the application, and filed in the office of the Division.

The Division must require the applicant to submit with the application for qualification information specified in R.C. 1707.09.

If the Division finds that it is not necessary in the public interest and for the protection of investors to require all the information specified in R.C. 1707.09, it may permit the filing of applications for qualification that contain the information that it considers necessary and appropriate in the public interest and for the

protection of investors; but this provision applies only in the case of applications for qualification of securities previously issued and outstanding that may not be made the subject matter of transactions exempt under R.C. 1707.03(M) by reason of the fact that those securities within one year were purchased outside this state or within one year were transported into this state.

All the statements, exhibits, and documents required by the Division under R.C. 1707.09, except properly certified public documents, must be verified by the oath of the applicant, of the issuer, or of any person having knowledge of the facts, and in the manner and form that may be required by the Division. Failure or refusal to comply with the requests of the Division is sufficient reason for a refusal by the Division to register securities. At the time of filing the information prescribed in R.C. 1707.09, the applicant must pay to the Division a filing fee of \$100.

Registration by coordination

R.C. 1707.091(A) allows 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 in connection with the same offering be registered by coordination. A registration statement filed by or on behalf of the issuer under this section with the Division of Securities must contain the following information and be accompanied by the following items in addition to the consent to service of process required by R.C. 1707.11 (R.C. 1707.091(B)):

(1) One copy of the latest form of prospectus or offering circular and notification filed with the securities 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 \$100.

Exempt transactions

Under R.C. 1707.03, there are certain circumstances under which a sale of a viatical settlement interest may be exempt from the registration requirements. "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 or under a cease and desist order, transactions in securities may be carried on and completed without compliance with R.C. 1707.08 to 1707.11 (R.C. 1707.03(A)). The list of exempt transactions is extensive. Some examples are as follows:

(1) A sale of securities made by or on behalf of a bona fide owner, neither the issuer nor a dealer, is exempt if the sale is made in good faith and not for the purpose of avoiding this chapter and is not made in the course of repeated and successive transactions of a similar character.

(2) The sale of securities by executors, administrators, receivers, trustees, or anyone acting in a fiduciary capacity is exempt, if the relationship was created by law, by a will, or by judicial authority, and the 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.

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

(4) A sale in good faith, and not for the purpose of avoiding the Ohio Securities Law, by a pledgee of a security pledged for a bona fide debt is exempt.

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

(6) 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.

(7) 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.

(8) A sale by a licensed dealer, acting either as principal or as agent, of securities issued and outstanding before the sale is exempt, unless the sale is of one or more of a list of transactions.

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

(a) The provisions of section 5 of the Securities Act of 1933 do not apply to the sale by reason of an exemption under section 4 (2) of that act.

(b) 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.

(c) Any such commission, discount, or other remuneration for sales in this state is paid or given only to dealers or salespersons registered under the Ohio Securities Law.

(d) 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.

(e) The issuer pays a filing fee of \$100 for the first filing and \$50 for every subsequent filing during each calendar year.

(10) The execution by a licensed dealer of orders for the purchase of any security is exempt, provided that the dealer acts only as agent for the purchaser, has made no solicitation of the order to purchase the security, has no interest in the distribution of the security, and delivers to the purchaser written confirmation of the transaction that clearly itemizes the dealer's commission.

(11) The sale of any security is exempt if the Division by rule finds that registration is not necessary or appropriate in the public interest or for the protection of investors.

Prohibitions

R.C. 1707.44 generally prohibits any person from failing to comply with the securities registration, the broker-dealer registration, and the anti-fraud provisions of the Ohio Securities Law. Under the bill, this section will apply to viatical settlement interests. The prohibitions are as follows:

(1) No person may engage in any act or practice that violates R.C. 1707.14(A), (B), or (C), and no salesperson may sell securities in this state without being licensed.

(2) No person may engage in any act or practice that violates Division (A) of R.C. 1707.141(A).

(3) No person may 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, to comply with the Ohio Securities Law, in regard to registering securities by description; to secure the qualification of any securities; to procure the licensing of any dealer, salesperson, investment adviser, or investment adviser representative; to sell any securities in this state; or to advise for compensation, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities.

(4) No person may knowingly and intentionally sell, cause to be sold, offer for sale, or cause to be offered for sale, any security that is not exempt, is not the subject matter of an exempt transaction, has not been registered by description, coordination, or qualification, and is not the subject matter of a transaction that has been registered by description; for which the prescribed fees for registering by description, by coordination, or by qualification have not been paid in respect to such security; when the person has been notified by the Division, or has knowledge of the 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; or when the offer or sale is accompanied by a statement that the security offered or sold has been or is to be in any manner endorsed by the Division.

(5) 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 the issuer exceed its assets, may sell any securities of or for any such issuer, without disclosing the fact of the insolvency to the purchaser.

(6) No person with intent to aid in the sale of any securities on behalf of the issuer may knowingly make any representation not authorized by such issuer

or at material variance with statements and documents filed with the Division by such issuer.

(7) No person, with intent to deceive, may 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 the issuer exceed its assets, taken at their fair market value.

(8) No person in purchasing or selling securities may knowingly engage in any act or practice that is declared illegal, defined as fraudulent, or prohibited under the Ohio Securities Law.

(9) No licensed dealer may refuse to buy from, sell to, or trade with any person because the 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.

(10) No dealer in securities, knowing that the dealer's liabilities exceed the reasonable value of the dealer's assets, may accept money or securities, except in payment of or as security for an existing debt, from a customer who is ignorant of the dealer's insolvency, and thereby cause the customer to lose any part of the customer's securities or the value of those securities, by pledging, selling, or otherwise disposing of such securities, when the dealer has no lien on or any special property in such securities; or by pledging such securities for more than the amount due, or otherwise disposing of such securities for the dealer's own benefit, when the dealer has a lien or indebtedness on such securities.

(11) No person, with purpose to deceive, may make, issue, publish, or cause to be made, issued, or published any statement or advertisement as to the value of securities, or as to alleged facts affecting the value of securities, or as to the financial condition of any issuer of securities, when the person knows that such statement or advertisement is false in any material respect.

(12) No person, with purpose to deceive, may make, record, or publish or cause to be made, recorded, or published, a report of any transaction in securities that is false in any material respect.

(13) No dealer may engage in any act that violates the provisions of section 15(c) or 15(g) of the "Securities Exchange Act of 1934" or any rule or regulation promulgated by the Securities and Exchange Commission.

(14) No investment adviser or investment adviser representative may employ any device, scheme, or artifice to defraud any person; engage in any act,

practice, or course of business that operates or would operate as a fraud or deceit upon any person; in acting as principal for the investment adviser's or investment adviser representative's own account, knowingly sell any security to or purchase any security from a client, or in acting as salesperson for a person other than such client, knowingly effect any sale or purchase of any security for the account of such client, without disclosing to the client in writing before the completion of the transaction the capacity in which the investment adviser or investment adviser representative is acting and obtaining the consent of the client to the transaction; or engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative.

(15) No investment adviser or investment adviser representative may take or have custody of any securities or funds of any person, except as provided in rules adopted by the Division.

(16) In the solicitation of clients or prospective clients, no person may make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made not misleading in light of the circumstances under which the statements were made.

HISTORY

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