



## **H.B. 664**

124th General Assembly  
(As Introduced)

**Rep. Manning**

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### **BILL SUMMARY**

- Modifies registration of securities requirements, including: (1) requiring that a registration application be verified or sworn to by a natural person and contain specified information about the person, and (2) requiring the Division of Securities to refuse a registration under specified circumstances.
- Modifies civil liability under the Securities Law, including providing restitution authority and providing for liability of "controlling persons."
- Increases statutes of limitations for bringing actions against directors of corporations for described unlawful activities, for bringing actions against an investment adviser or an investment adviser representative for a violation of the Securities Law, and for bringing actions involving the sale or contract for sale of securities in violation of the Securities Law.
- Prohibits specified acts in connection with the preparation, compilation, review, or audit of financial statements; and prohibits certain acts impeding enforcement action by the Division of Securities.
- Establishes a criminal violation for making false representations in certain notice filings with the Division of Securities and establishes the criminal violation of aggravated theft of \$1 million or more.
- Increases criminal penalties under the Criminal Theft Law for theft of \$100,000 or more from any person and theft of \$25,000 or more from an elderly or disabled person.

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## CONTENT AND OPERATION

### SECURITIES LAW

#### Registration of securities by description and by qualification

(secs. 1707.08 and 1707.09)

#### Current law

Generally, continuing law specifies that securities may be sold in Ohio if the securities are registered by description, by qualification, or by coordination (sec. 1707.07, not in the bill). Current law specifies the conditions and requirements for registration of securities by description and by qualification.

If securities are to be registered by *description*, existing law specifies that the registration (1) must be filed with the Division of Securities by one of the following: the issuer, a majority of the incorporators of the issuer, or an Ohio licensed securities dealer, (2) must be on forms prescribed by the Division, (3) must set forth specified information about the issuer, securities, and transactions involving the securities, and (4) must be verified by the person filing it or person having knowledge of the facts. Current law also specifies that registration by description is complete when it is filed with a filing fee of \$50 "in the form of cash, check, or United States postal money order," and is delivered or mailed "by certified mail with postage prepaid, to the [D]ivision."

Under existing law, an application for registration of securities by *qualification* (1) must be filed with the Division of Securities, (2) must be made in writing and signed by the issuer or an Ohio licensed securities dealer desiring to sell them in Ohio, (3) must be on forms prescribed by the Division of Securities, (4) must set forth specified information about the issuer, securities, and transactions involving the securities, and (5) must be sworn to by any person having knowledge of the facts stated in the application. Current law also requires that any exhibits, statements, or documents provided with the application for registration by qualification, except "certified public documents," be verified by oath of the applicant, issuer, or person having knowledge of the facts.

#### The bill

The bill replaces the requirement that an application for registration by description or by qualification be verified or sworn to by oath by the *person* filing it or having knowledge of the facts in the application, with a requirement that an *individual* filing it or having knowledge of the facts verify or swear to the information in the application. This appears to mean that a natural person having

knowledge of the facts in the application must swear to them on an application for registration by qualification, and a natural person either filing the application or having knowledge of the facts must verify the application for registration by description.

In addition, the bill specifies that the individual who executes an application for registration by description or by qualification on behalf of the applicant must state the individual's relationship to the applicant and certify all of the following:

- (1) The individual has executed the application on behalf of the applicant.
- (2) The individual is fully authorized to execute and file the application on behalf of the applicant.
- (3) The individual is familiar with the applicant's application.
- (4) To the best of the individual's knowledge, information, and belief, the statements made in the application are true, and the documents submitted with the application are true copies of the original documents.

The bill eliminates the specified methods of payment of the \$50 filing fee and specifications about when a registration by *description* is effective. Instead, the bill specifies that a registration by description is effective seven business days after the Division of Securities receives the description on applicable forms, together with a filing fee of \$50, if no proceeding is pending under continuing law authorizing the Division to suspend the registration of securities or no proceeding is pending under provisions of the bill discussed below under "**Refusal of registration of securities by the Division.**" However, the bill also allows the Division to permit an earlier effective date by rule or by issuing a certificate of acknowledgement for the registration by description.

### **Refusal of registration of securities by the Division**

(sec. 1707.131)

The bill requires the Division of Securities to refuse any registration by description, by qualification, or by coordination if:

- (1) The issuer is in the development stage and either has no specific business plan or purpose or has indicated that its business is to engage in a merger or acquisition with an unidentified company or companies, or other entities or persons;

(2) The issuer does not disclose in the final offering circular, prospectus, or form U-7 of the North American Securities Administrators Association that any future transaction with an officer, director, 5% shareholder, manager, trustee, or general partner will be on terms no less favorable to the issuer than could be obtained from an independent third party; or

(3) The issuer does not disclose in the final offering circular, prospectus, or form U-7 of the North American Securities Administrators Association that (a) any outstanding loan from the issuer to an officer, director, 5% shareholder, manager, trustee, or general partner will be repaid within six months of the offering, except for a loan or extension of credit made by a bank, or (b) any future loan from the issuer to an officer, director, 5% shareholder, manager, trustee, or general partner will be for a bona fide business purpose and approved by a majority of the disinterested directors, 5% shareholders, managers, trustees, or general partners, or will be a type of transaction involving a director or executive officer of the issuer that is permitted by section 13(k) of the "Securities Exchange Act of 1934" (see **COMMENT**, below). For purposes of this provision, the bill defines "5% shareholder" as a beneficial owner of 5% or more of the issuer's outstanding securities.

### **Civil liability**

#### **Restitution authority**

(secs. 1707.231 and 1707.40(A))

Continuing law authorizes the Division of Securities to take certain enforcement actions against persons that have engaged in or may engage in specified actions, including fraudulent or deceptive practices. These enforcement actions include information filing requirements with the Division; examining records, books, and accounts of securities-related persons; requiring attendance of witnesses at hearings and production of documents; suspending or revoking an Ohio license of described securities-related persons; and initiating contempt or criminal proceedings (sec. 1707.23, not in the bill).

The bill adds that, after consultation with the Attorney General, the Director of Commerce may apply to a court of common pleas of any county for an order granting restitution to any purchaser or holder of securities or any recipient of advice regarding securities, that has suffered damages as a result of a violation of the Securities Law. Upon a showing by the Director that a person has violated the Securities Law, the court, in addition to other legal or equitable remedies allowed by law, may order that restitution be made.

However, the bill provides that in determining appropriate restitution relief (1) the court must consider any other sanctions or remedies imposed by any other authority in connection with transactions constituting violations of the Securities Law, and (2) no purchaser or holder of securities or any recipient of advice, that is entitled to restitution under the bill, may recover, under the bill or in any other proceeding, a total amount in excess of the person's actual damages resulting from the violation of the Securities Law.

Also under existing law, no new civil liability, other than certain common law liabilities for fraud or deception, is created under the Securities Law, including civil liability for noncompliance with orders, rules, regulations, or requirements of the Division of Securities. As a conforming provision, the bill provides that this limitation is subject to the bill's provisions authorizing the Division to seek restitution on behalf of purchasers or holders of securities or recipients of advice regarding securities that have suffered damages as a result of a violation of the Securities Law.

#### **Liability of controlling persons**

(sec. 1707.40(B))

The bill also specifies liability considerations for "controlling persons." Accordingly, the bill provides:

[e]very person, who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under [the Securities Law], also [is] liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

#### **Statute of limitations for actions against directors**

(sec. 1707.41(D))

Continuing law establishes the conditions upon which a person, including a director of a corporation, profiting from a sale of securities is liable to a person purchasing securities who relied, to the person's detriment, upon a written

prospectus, circular, or advertisement containing a false material statement or omitting a material fact. Under current law, an action must be brought against a director pursuant to this authority within two years after the purchaser knew or had reason to know of the unlawful action of the director or person profiting from the sale of the securities or within four years after the purchase of the securities, whichever period is shorter. The bill extends the four-year period to five years.

**Statute of limitations for actions against investment advisers or investment adviser representatives**

(sec. 1707.42(B))

Securities Law not affected by the bill specifies that an investment adviser or investment adviser representative is liable in a court of competent jurisdiction for damages resulting from a violation of the Securities Law. Existing law provides, however, that an action for damages cannot be brought more than four years after the rendering of investment advice or two years after discovery of facts constituting the violation, whichever is the shorter period. The bill lengthens the four-year period to five years.

**Statute of limitations for actions involving the sale of securities**

(sec. 1707.43)

Continuing law specifies the conditions under which a person making a sale or contract for sale of securities and any person aiding or participating in the sale for the seller, which sale is in violation of the Securities Law, is liable to a purchaser for all costs associated with the sale. One condition specified by current law is that the action for recovery of the purchase price be brought within two years after the purchaser knew or had reason to know of the unlawful actions or no more than four years after the date of the sale or contract for sale, whichever is shorter. Again, the bill extends the four-year period to five years.

**Criminal violations of the Securities Law**

(sec. 1707.44(B)(6), (N), and (O))

There are numerous prohibitions under the Securities Law that are subject to penalties, which penalties include a fine and criminal penalty dependent upon the value of funds or securities involved in the offense or the loss to the victim (sec. 1707.99, not in the bill). For example, under continuing law, a person is prohibited from knowingly making, or causing to be made, a false representation concerning a material or relevant fact in any oral statement or in a prospectus, circular, description, application, or written statement for purposes of submitting to the Division of Securities a notice filing indicating registration with the

Securities and Exchange Commission (SEC) as an investment company under the federal "Investment Company Act of 1940." This notice filing is one of the requirements of a person registered with the SEC selling nonexempt securities or acting as an investment adviser in Ohio.

The bill adds that a person is prohibited from knowingly making or causing to be made, a false representation concerning a material or relevant fact in any oral statement or in a prospectus, circular, description, application, or written statement for purposes of submitting to the Division of Securities a notice filing showing that securities are exempt from registration with the Division because the offer or sale is made in reliance on the exemption provided in Rule 506 of Regulation D of the "Securities Act of 1933" (which generally deals with exemptions from registration requirements for limited offers or sales of securities to no more than 35 purchasers) and is in accordance with Rules 501 to 503 of that regulation (which generally address exemptions from registrations).

The bill also adds that no person knowingly may influence, coerce, manipulate, or mislead any person engaged in the preparation, compilation, review, or audit of financial statements to be used in the purchase or sale of securities for the purpose of rendering the financial statements materially misleading. And the bill prohibits a person, upon receiving notice of the Division's exercise of enforcement authority pursuant to continuing law described above under "**Restitution authority**," knowingly altering, destroying, mutilating, concealing, covering up, falsifying, or making a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the Division's exercise of enforcement authority pursuant to continuing law.

## CRIMINAL LAW

### **Criminal Theft Law**

(sec. 2913.02)

The Criminal Theft Law prohibits a person, with purpose to deprive, obtaining or exerting control over either the property or services of the owner without the owner's consent or beyond the scope of that consent or by deception, threat, or intimidation. It also specifically prohibits theft committed against an elderly or disabled person. The criminal sanction for a violation of these provisions depends upon the value of the property or services stolen.

Under current law, the strictest criminal sanction makes it a third degree felony for an aggravated theft of property or services of \$100,000 or more. Existing law also provides that the strictest criminal sanction for theft of \$25,000 or more from an elderly or disabled person is a second degree felony.



The bill increases these penalties, making aggravated theft of \$100,000 or more a *second* degree felony. In addition, the bill establishes that if the value of the property or services stolen is \$1 million or more, it is an aggravated theft of \$1 million or more, which is a first degree felony. And theft from an elderly or disabled person of \$25,000 or more is increased to a *first* degree felony.

**Technical changes**

In addition, the bill proposes re-lettering of divisions in several sections to facilitate understandability of the bill's proposed changes and makes a number of other nonsubstantive adjustments to existing law.

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**COMMENT**

This federal law generally prohibits an issuer of securities making extensions of credit to directors or executive officers of the issuer, subject to express exceptions. These exceptions include described consumer credit, open end credit, charge cards, home improvement or manufactured home loans, and extensions of credit by securities brokers or dealers to employees of the broker or dealer to make securities transactions that (1) are permitted by other federal law, (2) are not used to purchase stock of "that issuer," and (3) meet other requirements including that the extension of credit is made in the ordinary course of "consumer credit business" of the issuer, is of a type generally made available to the public by the issuer, and made on terms not more favorable to the employee than other loans made by that issuer to the public.

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**HISTORY**

ACTION	DATE	JOURNAL ENTRY
Introduced	11-14-02	pp. 2060-2061

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