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***Bill Analysis***  
*Legislative Service Commission*

**Sub. S.B. 7**

125th General Assembly  
(As Reported by S. Judiciary on Civil Justice)

**Sens. Coughlin, Harris, Goodman, Amstutz, Mumper, Jacobson, DiDonato, Stivers, Hottinger, Wachtmann**

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**BILL SUMMARY**

- Modifies the application of the Securities Law to include certain oral, written, or electronic agreements, understandings, or opportunities.
- 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, (2) requiring the Division of Securities to refuse a registration under specified circumstances, and (3) permitting the Division to refuse registration under specified other circumstances.
- Makes a clarification concerning the designation of the Secretary of State to receive service of process under the Securities Law and generally establishes a fee of \$5 for filing a service of process with the Secretary of State.
- Provides that administrative enforcement actions are in addition to other remedies authorized by the Securities Law and modifies civil liability, including providing restitution authority.
- 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, for bringing actions involving the sale or contract for sale of securities in violation of the Securities Law, and for the Division of Securities or the Director of Commerce to bring an action for a violation of the Securities Law.

- Prohibits specified acts in connection with the preparation, compilation, review, or audit of financial statements.
- 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.
- Establishes a procedure for allowing the Director of Commerce to request restitution or rescission for persons damaged by violations of the Securities Law.
- Modifies language regarding exempt securities.
- Modifies the Corporation Law with respect to the timing of special meetings of shareholders held in connection with tender offer, control share acquisition bids, and allows the special meeting of shareholders to be rescheduled if the acquiring person changes the percentage of class shares being sought, the consideration offered, or the security dealer's soliciting fee, extends the expiration date of the tender offer for the shares being sought, or otherwise changes the terms of the proposed control share acquisition.
- Modifies the penalty for the offense of aggravated theft by providing that: if the value of the property or services stolen is \$100,000 or more and is less than \$500,000, aggravated theft is a felony of the third degree; and if the value of the property or services stolen is \$500,000 or more and is less than \$1 million, aggravated theft is a felony of the second degree.
- Modifies the penalty for the offense of theft from an elderly person or disabled adult by providing that if the value of the property or services stolen is \$25,000 or more and is less than \$100,000, theft from an elderly person or adult is a felony of the second degree; and if the value of the property or services stolen is \$100,000 or more, theft from an elderly person or disabled adult is a felony of the first degree.

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## CONTENT AND OPERATION

### SECURITIES LAW

#### *Application of the Securities Law--definition of securities*

Currently, for purposes of the 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." The bill expands that definition to include certain oral, written, or electronic agreements, understandings, or opportunities. Thus, under the bill, for purposes of the Securities Law, "security" means any certificate or instrument, *or any oral, written, or electronic agreement, understanding, or opportunity*, 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. The bill also provides that "security" includes an "uncertificated security" and substitutes "interests" for "certificates or written instruments" with respect to certain types of securities, including interests in or under profit-sharing participation agreements or interests in or under oil, gas, or mining leases. (R.C. 1707.01(B).)

### **Exempt securities**

Under current law, any security issued by and representing an interest in or an obligation of a state or nationally chartered bank, savings and loan association, savings bank, or credit union, or a governmental corporation or agency created by or under the laws of the United States or Canada is exempt from the laws regarding registration by description, registration by qualification, registration by coordination, notice filings, electronic filings, provisional registration by qualification, consent to service, and qualification of securities sold without compliance, if it is under the supervision of or subject to regulation by the government or state under whose laws it was organized. The bill modifies this language by removing *and representing an interest in or an obligation of* and replacing it with *guaranteed*. Therefore, any security issued (existing law) *or guaranteed* (added by the bill) by any of the above financial institutions or governmental entities is exempt from those specified laws. (R.C. 1707.02(C).)

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

#### **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 (R.C. 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 oath of the person filing it or any person having knowledge of the facts. Current law also specifies that registration by description is completed 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." (R.C. 1707.08.)

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, and documents required to be 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. (R.C. 1707.09.)

### **Operation of the bill**

The bill replaces the requirement that an application for registration by description be verified by oath by the *person* filing it or any person having knowledge of the facts in the application with a requirement that the *individual* filing it or any individual having knowledge of the facts verify by oath the information in the application. It also replaces the requirement that an application by qualification be sworn to by any person having knowledge of the facts in the application with a requirement that those facts be sworn to by any *individual* having knowledge of those facts. 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. Similarly, it requires that all exhibits, statements, and documents required to be provided with an application by qualification be verified by the applicant, issuer (existing law), or any individual (added by the bill) having knowledge of the facts. (R.C. 1707.08(B) and 1707.09(A)(2) and (D).)

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 (R.C. 1707.08(C) and 1707.09(A)(3)):

- (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. (R.C. 1707.08(D).)

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

The bill requires the Division of Securities to refuse any registration by description, by qualification, or by coordination if 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 (R.C. 1707.131(B)). However, under the bill, the Division *may* refuse any registration by description, by qualification, or by coordination if either of the following applies (R.C. 1707.131(C)):

(1) 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;

(2) 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 is required to 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, 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 (R.C. 1707.131(A)).

### **Service of process**

Generally, continuing law requires every entity not organized under the laws of Ohio, not licensed as a foreign corporation under Ohio law, or not having its principal place of business in Ohio to execute and submit to the Division of Securities an irrevocable consent to service of process when making filings for exemption from securities registration, making applications for securities registration, or making investment company notice filings. Among other requirements, continuing law requires that the irrevocable consent to service of process designate the Secretary of State as agent to receive service of process or pleadings. (R.C. 1707.11(A) and (B)(1).)

The bill clarifies that even if an application, form, or other material filed with or submitted to the Division of Securities purports to appoint a person other than the Secretary of State as agent for service of process, the application, form, or other material nonetheless is considered to appoint the Secretary of State as agent for service of process (R.C. 1707.11(C)).

The bill also establishes a fee of \$5 for filing a service of process with the Secretary of State, except as otherwise provided in the Revised Code (R.C. 111.16(V)).

### **Application for and issuance of salesperson's license**

Under current law, every salesperson of securities must be licensed by the Division of Securities and must be employed only by the licensed dealer specified in the salesperson's license. If the salesperson severs the connection with that licensed dealer, the salesperson's license is void. The bill modifies this provision by requiring that every salesperson of securities be employed, *authorized, or appointed* by the licensed dealer specified in the salesperson's license and specifying that, if the *relationship between the salesperson and the dealer is severed*, the salesperson's license *shall be void*. (R.C. 1707.16(A).)

### **Administrative and civil liability**

#### **Administrative enforcement actions**

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. (R.C. 1707.23.)

The bill adds that the remedies discussed in the preceding paragraph are cumulative and concurrent with any other remedy provided under the Securities Law, and the exercise of one remedy does not preclude or require the exercise of any other remedy (R.C. 1707.23(J)).

### **Restitution authority**

The bill provides that if a court of common pleas grants an injunction against any person alleged to have engaged in or to be about to engage in any deceptive, fraudulent, or manipulative act, practice, or transaction in violation of the Securities Law, the Director of Commerce, after consultation with the Attorney General, may request that court to order the defendant or defendants that are subject to the injunction to make restitution or rescission to any purchaser or holder of securities damaged by the defendant's or defendants' violation of the Securities Law.

If the court of common pleas is satisfied with the sufficiency of the Director's request for restitution or rescission and of the sufficiency of the proof of a substantial violation of the Securities Law, or of the use of any act, practice, or transaction declared to be illegal or prohibited or defined as fraudulent by the Securities Law or rules adopted under the Securities Law by the Division of Securities, to the material prejudice of a purchaser or holder of securities, the court may order the defendant or defendants subject to the injunction to make restitution or rescission to any purchaser or holder of securities damaged by the defendant's or defendants' violation of the Securities Law. (R.C. 1707.261(A) and (B).)

A court order granting restitution or rescission based upon a request made by the Director as provided above must meet the requirements described above and may not be based solely upon a final order issued by the Division pursuant to R.C. Chapter 119. or upon an action to enforce a final order issued by the Division pursuant to that chapter. Notwithstanding the foregoing provision, the request for restitution or rescission may concern the same acts, practices, or transactions that were, or may later be, the subject of a Division of Securities action for a violation of the Securities Law. If a request for restitution or rescission concerns the same acts, practices, or transactions that were the subject of a final order issued by the Division pursuant to R.C. Chapter 119., the court must review the request in accordance with the prior paragraph and the standard of review in R.C. 119.12 (that the order is supported by reliable, probative, and substantial evidence and is in accordance with law) does not apply to the request. (R.C. 1707.261(C).)

A purchaser or holder of securities who is entitled to restitution or rescission is prohibited from recovering, pursuant to the above provisions or any other proceeding, a total amount in excess of the person's purchase price for the securities sold in violation of the Securities Law (R.C. 1707.261(D)).

In addition, 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 Director of Commerce to request the court of common pleas to grant restitution or rescission to persons that have suffered damages as a result of a violation of the Securities Law. (R.C. 1707.40.)

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

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. (R.C. 1707.41(D).)

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

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. (R.C. 1707.42(B).)

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

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. (R.C. 1707.43(B).)

### **Criminal violations of the Securities Law**

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 (R.C. 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) (R.C. 1707.44(B)(6)).

The bill also adds a prohibition against any person knowingly influencing, coercing, manipulating, or misleading 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. (R.C. 1707.44(N).)

The bill increases the statute of limitations for prosecutions (existing law) *and actions by the Division of Securities or the Director of Commerce* (added by the bill) for a violation of the Securities Law from three years to five years (R.C. 1707.28).

### **Technical changes**

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.

## **CRIMINAL LAW**

### **Criminal Theft Law**

The Criminal Theft Statute prohibits a person, with purpose to deprive the owner of property or services, from obtaining or exerting control over either the property or services of the owner without the owner's or authorized person's consent or beyond the scope of that consent or by deception, threat, or intimidation. The criminal sanction for a violation of these provisions and the name of the offense depends upon the value or type of property or services stolen.

Under current law, it is a third degree felony, and the offense is "aggravated theft" if the value of the property or services involved in the offense is \$100,000 or more. If the victim of the offense is an elderly person or disabled adult, the offense is "theft from an elderly person or disabled adult," and the penalty depends upon the value of the property or services involved in the offense. If that value is \$25,000 or more, it is a second degree felony. (R.C. 2913.02.)

Under the bill, the offense is "aggravated theft" and is a felony of the third degree if the value of the property or services stolen is \$100,000 or more and is less than \$500,000. The bill also provides that if the value of the property or services is \$500,000 or more and is less than \$1 million, the offense is aggravated theft and is a felony of the second degree. If the value of the property or services is \$1 million or more, the offense is "aggravated theft of one million dollars or more" and is a felony of the first degree.

With regards to "theft from an elderly person or disabled adult," the bill provides that if the value of the property or services stolen is \$25,000 or more and is less than \$100,000, "theft from an elderly person or disabled adult" is a felony of the second degree. If the value of the property or services stolen is \$100,000 or more, "theft from an elderly person or disabled adult" is a felony of the first degree. (R.C. 2913.02(B)(2) and (B)(3).)

## **CORPORATION LAW**

### **Control share acquisitions--special meetings of shareholders**

Continuing law specifies certain requirements that apply when a person proposes to make a control share acquisition of a public corporation. Generally,



continuing law defines a "control share acquisition" to mean an acquisition in which there is gained, indirectly, alone or with others, the ability to exercise voting power within a particular voting category ranging from one-fifth to a majority of the voting power (R.C. 1701.01(Z).)

The bill modifies the part of the definition of "control share acquisition" that specifies what does not constitute a "control share acquisition" by providing that the acquisition by any person of any shares of an issuing public corporation does not constitute a control share acquisition under the statutory procedure for control share acquisitions if the acquisition was or is consummated in, results from, or is the consequence of a merger or consolidation adopted, or a combination or majority share acquisition authorized, by vote *of the shareholders of the issuing public corporation* in compliance with certain merger or consolidation provisions of the General Corporation Law. It also removes the condition that this exemption applies only when the issuing public corporation is the surviving or new corporation in the merger or consolidation or is the acquiring corporation in the consolidation or majority share acquisition. (R.C. 1701.01(Z)(2)(e).)

The bill also modifies the definition of "interested shares" by providing that "interested shares" means the shares of an issuing public corporation in which any of the specified persons may exercise or direct the exercise of the voting power of the corporation in the election of directors, to include any person that acquires such shares for valuable consideration during the period beginning with the date of the first public disclosure of a *proposal for, or expression of interest in, a control share acquisition of the issuing public corporation; a transaction pursuant to certain provisions of the General Corporation Law pertaining to the sale or disposition of entire assets, merger or consolidation, or voluntary dissolution that involves the issuing public corporation or its assets; or any action that would directly or indirectly result in a change in control of the issuing public corporation or its assets* and ending on the record date established by the directors if either of two existing statutory conditions exist. (R.C. 1701.01(CC)(1)(d).)

Under current law, within ten days after receipt of an acquiring person statement, the directors of the issuing public corporation must call a special meeting of shareholders of the issuing public corporation for the purpose of voting on the proposed control share acquisition. Unless the acquiring person agrees in writing to another date, the special meeting of shareholders must be held within 50 days after receipt by the issuing public corporation of the acquiring person statement (or no sooner than 30 days after such receipt depending upon the circumstances). The special meeting of shareholders must be held no later than any other special meeting of shareholders that is called, after receipt by the issuing public corporation of the acquiring person statement, in compliance with certain

provisions of the General Corporation Law. The bill modifies this provision by stating that both the acquiring person *and the issuing public corporation* must agree in writing to another date of the special meeting of shareholders. (R.C. 1701.831(C)(1).)

The bill also provides that if, in connection with a proposed control share acquisition, the acquiring person (1) changes the percentage of the class of shares being sought, the consideration offered, or the security dealer's soliciting fee, (2) extends the expiration date of a tender offer for the shares being sought, or (3) otherwise changes the terms of the proposed control share acquisition, then the directors of the issuing public corporation may reschedule the required special meeting of the shareholders required under existing law as described in the previous paragraph. If the proposed control share acquisition is to be made pursuant to a tender offer, then the meeting may be rescheduled to a date that is not later than the expiration date of the offer. If the proposed control share acquisition is to be made other than pursuant to a tender offer, the meeting may be rescheduled to a date that is not later than ten business days after notice of the change is first given to the shareholders. (R.C. 1701.831(C)(2).)

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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	01-23-03	p. 65
Reported, S. Judiciary on Civil Justice	03-20-03	pp. 199-200

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