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Recommended Citation
Thomas M. George, Curative Registration under the Proposed Ohio Securities Act, 25 Case W. Res. L. Rev. 324 (1975)
Available at: https://scholarlycommons.law.case.edu/caselrev/vol25/iss2/7
CURATIVE REGISTRATION UNDER THE PROPOSED OHIO SECURITIES ACT

Section 1707.14 of the proposed Ohio Securities Act provides for the registration of securities that the issuer has wrongfully failed to register prior to sale. The author compares this curative registration provision with the current Ohio law and with approaches taken by other states and by the Uniform Securities Act. He points out that in several respects the proposed section provides less protection for the purchaser than does prior registration and concludes that these weaknesses must be remedied if the section is to be enacted.

I. INTRODUCTION

THE PRIMARY purpose of most blue sky laws is to prevent the sale of securities on terms that are fraudulent or unfair. This protection is initially provided by registration requirements, which require issuers to register with a state securities agency prior to the offer or sale of most securities. The registration process affords the agency an opportunity to scrutinize the issuer's operations and finances and the circumstances surrounding the offering of the security in question. Before approving the registration, the administrator must be satisfied that the security is suitable for sale to the public. The administrator may require an approved disclosure document for use by investors. The net effect of this process, then, is to provide the individual purchaser some degree of assurance that the security

1. 1 L. Loss, Securities Regulation 30-63 (2d ed. 1961) [hereinafter cited as Loss].
2. See Uniform Securities Act § 301 [hereinafter cited as USA].
3. The registration requirement is statutorily waived for certain exempt securities and transactions. See, e.g., USA § 402. The rationale behind many of the exemptions is that they are not so susceptible to unfairness or fraud as are their non-exempt counterparts. See, e.g., USA §§ 402(a)(1)-(2) (securities issued by the United States and Canada). This rationale however is clearly not applicable to some exemptions. See, e.g., USA §§ 402(a)(9) (securities of issuers organized for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes). See generally 1 Loss 64-67; 1 Blue Sky L. Rep. ¶ 509 (1967).
4. See, e.g., USA §§ 301-06.
5. See, e.g., USA § 306(a)(2)(F). The grounds for disapproval under the USA are not as broad as they are under some state laws. See, e.g., Ohio Rev. Code Ann. § 1707.09 (Page 1964); Wis. Stat. Ann. § 551.23 (1974).
6. See, e.g., USA § 304(d). Though an administrator may not have express authority to require the use of an approved selling document, this power may be implicit in his power to disapprove an offering. In other words, he may deem it unfair not to use approved selling literature.
registered is not only free from fraud but also fair and accompanied by full disclosure.

Occasionally, however, issuers sell nonexempt securities without first registering them, thereby frustrating the protective scheme of the securities law. In so violating the law, an issuer immediately exposes himself to administrative action by the securities agency, civil liability (in the form of rescission and, if applicable, damages), and criminal liability. Recognizing the harshness of applying these measures to the nonwilful violator, legislatures and securities administrators have provided both formal and informal means by which such violator may extricate himself from illegality and avoid some of the public and private sanctions to which he otherwise would be exposed.

These procedures are referred to as either late or curative registration. Whatever the form of the procedure, it allows the issuer, after the illegal sale of unregistered securities, to double back and attempt to register those securities retroactively and thus avoid the necessity of rescinding individual sales and issuing different, properly registered securities. The advantage of this method is that it not only forecloses civil liability to the individual purchasers through the use of some form of rescission offer, but also results in proper registration, thereby removing the grounds upon which the state securities agency could institute administrative action. While most jurisdic-

7. Reasons for failure to register may include a desire to avoid the scrutiny of the Division, an unwillingness to fulfill the timing requirements, an innocent belief that registration of the security in question was unnecessary, or even a total ignorance of the law's existence.
11. That is, an issuer who sold securities in good faith, without actual knowledge of the registration requirements and without having committed any acts of fraud or other substantive violations.
13. "Late registration," as the name implies, is merely late compliance with the normal statutory registration provision. "Curative" registration is a statutorily authorized procedure separate from the normal registration provision.
14. OHIO SECURITIES BULL., July 1973, at 6. Compliance with the cura-
tions, including the federal, permit this late registration on a carefully administered basis, Ohio is the only state\textsuperscript{15} that maintains a statutory provision for curative registration.\textsuperscript{16} The purpose of this Note is to compare Ohio's present formal system of curative registration with the method of late registration in use throughout most of the nation and with that method set forth in the proposed Ohio Securities Act (OSA).\textsuperscript{17}

II. LATE REGISTRATION: THE INFORMAL METHOD

In most states, an issuer who wants to avoid civil liabilities and agency action arising from the sale of unregistered, nonexempt securities must approach those who purchased in the violative offering and either tender a statutory rescission offer\textsuperscript{18} or seek a nonstatu-

tive registration provision of the proposed Ohio Securities Act, § 1707.14, Ohio S.B. 338, 110th Gen. Assembly, Regular Sess. (1973-74), however, removes only civil liability for nonfraud violations. It does not operate to alleviate the vulnerability of the issuer to administrative action for his initial nonregistration violation. \textit{See generally} notes 46-85 \textit{infra} and accompanying text.

15. California had a curative registration provision in effect until recently. \textsc{cal. corp. code} §§ 25800-04 (West 1968). This section of the Code was enacted to protect purchasers and innocent violators and their managements from the effects of § 26100 of the Corporate Code, Law of May 2, 1947, ch. 129, § 16, [1947] Cal. Stat. 649 (repealed 1969), which made all unregistered securities void, a problem that Ohio has never had and does not have at this time. For a full discussion of these effects (manifested prior to the enactment of the late registration provisions), see Note, 18 \textsc{stan. l. rev.} 1184 (1966). For an analysis of benefits conferred upon wrongful issuers by the California late registration provisions, see Olson, \textit{The California Corporate Securities Law of 1968}, 9 \textsc{santa clara law}, 75, 97 (1968). The need for the express late registration provisions was extinguished by the enactment of the new California Securities Act, \textsc{cal. corp. code} §§ 25000 \textit{et seq.} (West Cum. Supp. 1974), in 1969, which repealed § 26100. As a result, the curative registration provisions, having been left in effect for a period to allow late registration of those securities sold in violation of the previous securities act, expired on January 2, 1972. After that time, the informal method of curative registration, described below in text, came into exclusive use.


18. A statutory rescission offer is one expressly sanctioned by the statute in force. \textit{E.g.}, \textsc{usa} § 410(e); \textsc{ohio rev. code ann.} § 1707.43 (Page 1964). It is effective only when each of the statute's provisions is fully complied with.
tory release.\textsuperscript{19} Whichever method is used, the issuer is also required to file a late registration identical to that needed for timely compliance with the requirements for registration prior to sale.\textsuperscript{20} First the violator must file regular registration forms\textsuperscript{21} (including a prospectus or other sale literature).\textsuperscript{22} The agency then scrutinizes the application to at least the same degree it would with a timely application. Should the blue sky administrator find the securities acceptable, a conditional registration\textsuperscript{23} is issued, enabling the issuer to approach those to whom he illegally sold the securities with an unqualified offer of rescission.\textsuperscript{24} The purchaser examines his earlier purchase af-

\begin{itemize}
  \item 19. A nonstatutory release is a privately negotiated waiver of rights which does not meet the specific requirements of a statutory offer of rescission but the terms of which are deemed satisfactory by the parties involved. Public policy dictates that any nonstatutory release contain, at a minimum, an offer of rescission. See note 24 infra and accompanying text.
  \item 20. While the late registration method is not documented in an official manner for any state, it is the technique that Professor Loss views as the proper method under the Securities Act of 1933. 3 Loss 1825. For this reason, states can apply it to their laws by analogy. Properly administered, it provides full disclosure (the primary federal purpose), while at the same time permitting rigorous division scrutiny for fraud (a primary state purpose).
  \item 21. USA § 307.
  \item 22. Id. § 304(b)(12).
  \item 23. The registration is conditioned upon the violator's tender of an offer of rescission to the purchaser.
  \item 24. Blue sky laws generally give the purchaser of illegally sold securities a statutory right of rescission. \textit{E.g.}, USA § 410; \textit{Ohio Rev. Code Ann.} § 1707.43 (Page 1964). However, to exercise this right a purchaser may have to threaten or actually initiate litigation against the issuer. An offer of rescission, on the other hand, only requires the purchaser to accept what the violator has proposed, thereby eliminating the cost, pain, and time of litigation. Such an offer, in effect, returns the purchaser to approximately his presale position by making it much easier for him to extricate himself from the transaction should he decide that, in the light of any new facts made known in the registration process, the purchase is not to his advantage.

It must be noted that in spite of all attempts to return the purchaser to his exact pre-sale position, he can never regain his original neutrality toward the securities in question. Once he is approached by an issuer or his representative and is subjected to any sales presentation, the would-be purchaser becomes biased toward the securities and the issuer. His bias is strengthened by the initial decision to buy. Once the purchase is completed, the purchaser has passed well beyond neutrality and has become entrenched in the issuer's camp. Because of this bias, it is most difficult for the purchaser to view his holdings objectively and to reevaluate them at the time of the rescission offer. Professor Loss refers to this problem as "investor inertia." 1 Loss 201, 208, 215-21.
ter full disclosure of all material facts surrounding the security, such as the past and present economic condition of the issuer and the potential impact that the offers of rescission might have on the stability and the desirability of the offering.\textsuperscript{25} The condition of registration is fulfilled upon the offer of rescission,\textsuperscript{26} the offer itself constitutes an offer to sell the securities,\textsuperscript{27} and the purchaser's decision with respect to that offer is, in effect, his decision whether to purchase. If after careful consideration of all the facts involved, the purchaser decides that he does not want to retain the securities, he need only accept the rescission offer. Upon tender of the securities, he will be repaid his purchase price plus interest. If the purchaser rejects the rescission offer, he is agreeing to "buy." The purchase price is the consideration already paid for the previously unregistered securities and the buyer's relinquishment of his right to rescission. As a result, the purchaser becomes the holder of properly registered securities. Thus, the informal mechanism by which late registration of previously unregistered, nonexempt securities is handled in most states provides the same protections to the general public and the individual purchaser as if the securities had been registered \textit{ab initio}, while, at the same time, it eliminates the issuer's civil liability.

If the tender of rescission were perfected pursuant to the statutorily authorized process, there is no doubt that the violator would avoid liability to those who took the illegally offered securities. If the tender of rescission did not fit within the legislative pattern, the question remains whether the rejection of rescission and the release negotiated between the violator and the purchaser is effective, notwithstanding the so-called antiwaiver provisions of most securities laws.\textsuperscript{28}

\textsuperscript{25} For example, if a substantial number (in relative or absolute terms) of purchasers of the unregistered security might rescind, would rescind, or did rescind the sale, a substantial depletion of the issuer's assets could result. The securities, then, would be of little value to those who elected to reject the rescission offer. Thus, a potential reduction in value must be disclosed to the purchaser since it could have a dispositive impact upon his decision to accept or reject the rescission offer.

\textsuperscript{26} \textit{See} note 23 \textit{supra}.

\textsuperscript{27} \textit{See} Southeastern Properties, Inc., [1972-1973 Transfer Binder] CCH \textit{Fed. Sec. L. Rep.} \textsuperscript{\textdagger} 79,188 (1973). This position can also be substantiated by the blue sky laws themselves. Most define an "offer" of securities as being, in part, an "attempt . . . to dispose of . . . a security." \textit{E.g.}, USA § 401(j)(2). \textit{See also} ALI \textit{Fed. Sec. Code} § 1421(6), Comment (Tent. Draft No. 2, Mar. 1973).

\textsuperscript{28} \textit{See}, \textit{e.g.}, USA § 410(g). Ohio does not presently have a similar antiwaiver provision. \textit{See} notes 93-105 \textit{infra} and accompanying text.
III. CURATIVE REGISTRATION: THE PRESENT OHIO METHOD, OHIO REVISED CODE SECTION 1707.39

At the present time, the Ohio Securities Law\(^2\) has an express provision dealing with the curative registration process. Ohio Revised Code section 1707.39 provides:

When any securities have been sold without compliance with sections 1707.01 to 1707.45, inclusive, of the Revised Code, or any former law in force at the time of such sale, any interested person may apply in writing to the division of securities for the qualification of such securities under such sections. If it appears to the division that no person has been defrauded, prejudiced, or damaged by such noncompliance or sale and that no person will be defrauded, prejudiced, or damaged by such qualification, the division may permit such securities to be so qualified upon the payment of a fee of twenty-five dollars plus the fees prescribed in section 1707.09 of the Revised Code.

Such qualification shall not affect or relieve anyone who has violated sections 1707.01 to 1707.45, inclusive, of the Revised Code, or any previous law in force at the time of such sales from prosecution thereunder.

The section is worded in broad, general language, setting forth few specific procedures or protections and requiring for curative registration the single prerequisite that the Ohio Division of Securities (Division) find "that no person has been defrauded, prejudiced, or damaged by . . . [the] noncompliance or sale and that no person will be defrauded, prejudiced, or damaged by such qualification . . . ."\(^3\)

Given this broad standard, it is not absolutely clear which, if any, of the protections sought to be given the public and the individual purchaser through the registration requirements are preserved.\(^4\)

The general wording of section 1707.39, however, has allowed the Division to remedy the immediate inadequacies of the provision through informal policy and practice. This section does not by itself represent the entire curative registration process, but only the framework upon which the process has been structured. Pursuant to its power to establish its own forms and procedures in the administration of the Ohio blue sky law,\(^5\) the Division has adopted and promul-

\(^2\) OHIO REV. CODE ANN. § 1707 (Page 1964).
\(^4\) See notes 20-27 supra and accompanying text.
gated several requirements, which, when taken together, provide essentially the same protections to the public and the purchaser as do timely registration and the late registration method used in other states.

Under this new policy for administering section 1707.39, the Division requires that every application "satisfy all of the requirements, including regulatory standards and disclosure requirements, to which it would have been subject had the offering been properly registered in the first instance." This requirement also demands the submission of an offering circular (prospectus) for Division approval, followed by the distribution of the circular to all purchasers of the offering whenever the illegal sale has certain characteristics. Clearly, this element of the new policy acts to ensure that the standards of scrutiny and disclosure applied to a curative registration application be at least equal to those applied to a timely application, so that the violating issuer is prevented from gaining a favored position.

The new policy also requires that "[a]n offer of rescission acceptable to the Division, properly funded, accompanied by an offering circular where applicable, and expiring not less than thirty days from the date of its distribution must be extended by the issuer to all purchasers of the securities which have been sold in violation." Included in this offer must be full disclosure of both the legal consequences of the violation and any change in the value of the securities

34. Indeed, in several instances, the protection afforded by the policy statement is stronger than would be afforded under normal registration. For example, in a timely registration by qualification, the issuer must file with the Division any offering circular that it plans to use in marketing the securities. Ohio Rev. Code Ann. § 1707.09(D) (Page 1964). Note, however, that the provision does not require that such a circular be used, although in practice use of the circular is required on the theory that failure to use them makes the offering "grossly unfair." See Ohio Rev. Code Ann. § 1707.09 (Page 1964). Under the curative registration process, however, the applicant must provide an offering circular, approved by the Division, to all purchasers whenever the offering to be registered is in excess of $50,000 and if it is or has been sold to more than 25 persons. Ohio Securities Bull., July 1973, at 6. Note also that the offering circular must contain "current information," a term that may be manipulated by the Division to meet whatever exigencies each case presents. Id.
35. See notes 20-27 supra and accompanying text.
37. See note 34 supra.
since the illegal sale. Furthermore, those purchasers who accept the rescission offer must be repaid their consideration in full.

While the Division adopted two other requirements to attain curative registration under Ohio Revised Code section 1707.39, neither has significant impact upon the preservation of normal registration protections. The administrative requirements for meeting at least normal registration standards of scrutiny and disclosure and for making an offer of rescission do, however, act to protect the public and the individual purchaser from the evils that the statute seeks to eliminate. In a manner nearly identical to the late registration method used in other states, the present statutory and regulatory system now provides for Division inspection, full disclosure, and an attempt to return the innocent purchaser to his presale position, affording him the opportunity to "buy" or "sell" as his good judgment dictates. At the same time, once curative registration is completed, the issuer receives the same benefits sought under late registration because "qualification pursuant to section 1707.39 cuts off grounds for administrative action and civil liability but not grounds for criminal prosecution," to the extent that liability is premised on the failure to preregister.

In summary, the present formal method of curative registration in Ohio, as supplemented by the informal policy statements of July 1973, is as satisfactory from a functional standpoint as its informal

40. Id.
41. The Division now requires both an explanatory statement from the issuer and a statement of nonprejudice from each purchaser. Ohio Securities Bull., July 1973, at 6. The former is designed to aid the Division in its inquiry into the good faith of the issuer's failure to register. The value of the statement of nonprejudice is, at best, questionable. See note 75 infra and accompanying text.
42. "Investor inertia," of course, may prevent him from exercising his best judgment.
44. The Division guidelines provide, however:
   B. Qualification pursuant to Section 1707.39 does not cut off grounds for administrative action, but the statute contains no specific provision for civil liability (see Section 1707.40) or criminal prosecution (see Section 1707.44) on the basis of non-compliance with regulatory standards except where a Division Order has been violated.
   C. Qualification pursuant to Section 1707.39 does not cut off grounds for administrative action, civil liability (a rescission offer under Section 1707.43 cuts off only a right to rescission and not to damages), or criminal prosecution on the basis of fraud.
45. The procedure presently implemented under § 1707.39 has one serious
counterpart used in other states. However, the statute alone does not provide adequate protections and until the policy statements are codified, they remain subject to change with the discretion of the administrator.

IV. CURATIVE REGISTRATION: THE PROPOSED OHIO APPROACH, OHIO SECURITIES ACT SECTION 1707.14

The proposed Ohio Securities Act currently under consideration includes a provision that addresses the problem of late registration. Ohio Securities Act section 1707.14 provides:

(A) When any security has been sold in violation of section 1707.02 [the registration requirement] of the Revised Code or any comparable provision of prior law, any interested person may apply to register such security under this section.

(B) An application to register a security under this section shall contain all of the information and be accompanied by all of the documents required by division (B) of section 1707.10 of the Revised Code for registering a security by qualification, and in addition shall contain or be accompanied by the following:

(1) A statement explaining the circumstances of the sale, including the names of all security holders who acquired the security as a result of such sale, the kind and

logical flaw. A careful reading of the policy statements promulgated in the Ohio Securities Bull., July 1973, at 6, leads to the conclusion that all four requirements (full filing and disclosure, offer of rescission, explanatory statement, and statement of nonprejudice) must be fulfilled as conditions precedent to curative registration. If this is the case, an issuer's attempt to comply with these conditions, as a technical matter, results in a second violation of the law.

Since an offer of rescission and an attempt to procure a statement of nonprejudice constitute attempts to dispose of a security, see note 29 supra, the curative registration process itself falls within the statutory definition of "sale" as provided by Ohio Revised Code § 1707.01(C)(1). If, then, this "sale" is made before any final registration action by the Division, it constitutes a sale of an unregistered nonexempt security, in violation of the Code. Ohio Rev. Code Ann. § 1707.44 (C)(1) (Page 1964). See also ALI Fed. Sec. Code § 1421(6), Comment (Tent. Draft No. 2, Mar. 1973).

The process of late registration used by other states is also susceptible to this problem of circularity. Proper administration of the informal method avoids this trouble by the issuance of a conditional registration before the issuer approaches the purchaser with his offer of rescission. See note 23 supra and accompanying text. This is a technique that the Ohio Division of Securities could adopt through a modification of its informal policy, by the use of registration subject to the conditions set out above.


47. Id. § 1707.14.
amount of securities sold to and acquired by each such person, the price or prices at which such securities were sold, and such additional information as the Commissioner of Securities may by rule require;

(2) A statement from each security holder to whom a security was sold in violation of section 1707.02 of the Revised Code that he has been advised of the violation and his rights under Chapter 1707. of the Revised Code, including his right to rescind under this division (A) of section 1707.37 of the Revised Code, and that he is satisfied that, to the best of his knowledge and belief, he has not been defrauded, prejudiced, or damaged by such sale; but the Commissioner may by rule or order waive or modify this requirement if he determines that the applicant cannot obtain or cannot reasonably be expected to obtain such statement from one or more of such security holders without unreasonable effort or expense;

(3) Such additional information or documents as the Commissioners [sic] may be [sic] rule or otherwise require.

(C) Every person filing an application to register a security under this section shall pay a filing fee of fifty dollars plus three-tenths of one percent of the amount of securities to be registered under this section, no portion of which shall be refundable.

(D) If, on the basis of the information contained in and accompanying the application, it appears to the Commissioner that no person has been defrauded, prejudiced, or damaged by the sale of the security sought to be registered and that no person will be defrauded, prejudiced, or damaged by the registration of such security, the Commissioner may, in his discretion, enter an order permitting such security to be registered under this section.

(E) Any security registered under this section shall, for purposes of division (A) of section 1707.37 of the Revised Code, be deemed to have been registered, offered, and sold in compliance with section 1707.02 of the Revised Code or any comparable provision of prior law at the time such sale was made; but the registration of such security under this section shall not:

(1) Relieve any person who, but for this section, would be deemed to have violated section 1707.02 of the Revised Code or any comparable provision of prior law from any other duty, liability or penalty imposed upon him under Chapter 1707. of the Revised Code or under prior law;

(2) Estop or bar any security holder who signed a
statement of the type described in division (B)(2) of this section from asserting a claim under division (B), (D), or (G), of section 1707.37 of the Revised Code;

(3) Preclude the Commissioner from instituting any prosecuting or proceeding under Chapter 1707. of the Revised Code.

Unlike Ohio Revised Code section 1707.39, this new provision sets forth highly specific requirements, which an issuer must meet to gain the benefits of late registration. These requirements include the filing of the documents required for registration by qualification, a statement detailing the particulars of the illegal sale, a notice to the purchasers of their statutory right to rescind, and a statement of nonprejudice from each purchaser. In addition, the Commissioner of Securities must find that no person has been defrauded, prejudiced, or damaged by the sale and that no one will be defrauded, prejudiced, or damaged by the subsequent registration. It is the use of such specific requirements that causes serious problems with the proposed curative registration provision. Certain mechanical and linguistic problems inherent in the specificity of the section’s language threaten, if they do not defeat, investor protections that fairness demands should be preserved. The net result of the provision is to restrict the scope of the Division’s evaluation of curative registration applications. As discussed below, the possible relaxation of scrutiny, coupled with the potential elimination of administrative protective measures, will only result in a benefit to the violator and others in the distribution chain who are required to comply with the general registration requirement; the public and the individual purchaser, meanwhile, lose many of the protections that would have been provided by presale registration.

48. These benefits are apparently identical to those gained under an Ohio Rev. Code Ann. § 1707.39 (Page 1964) registration or through the method of late registration described in the text above (i.e., the cutting off of grounds for agency action against the violator and of civil liability to the purchaser to the extent that liability is premised on nonregistration). OSA § 1707.14(E).
49. OSA § 1707.14(B).
50. Id. § 1707.14(B)(1).
51. Id. § 1707.14(B)(2).
52. Id. The statement of nonprejudice must also verify that the violator has notified the purchaser of all his rights under ch. 1707. The statement of nonprejudice can be waived by the Commissioner upon determination that the applicant cannot reasonably be expected to obtain such statements from one or more security holders without unreasonable effort or expense. Id.
53. Id. § 1707.14(D).
54. See id. §§ 1707.02-.04.
The critical weakness of OSA section 1707.14 lies not in the vagueness of its language, but in its specificity. While the broad language of the present curative registration provision gives the Division substantial leeway in setting policies to implement the general purposes of state blue sky law, the precise language of its proposed replacement suggests that the drafters recognized and dealt with each specific problem in a specific manner. It is therefore beyond the power of the courts or an administrator to demand anything more than what the statute calls for or to permit anything less to suffice.\textsuperscript{55} This is not to say that specificity is in itself a weakness. Were the standards enunciated in the provision ample to protect the interests of the public and the purchaser, there would be no problem with their precision. Unfortunately, this does not appear to be the case.

The clearest example of the damage that the specific language of the provision may cause is found in the requirement that all purchasers be notified of their statutory right of rescission as a condition to curative registration.\textsuperscript{56} As previously noted,\textsuperscript{57} it is imperative that the innocent purchaser of unregistered, nonexempt securities receive from the violating issuer an unqualified offer of rescission, so that the purchaser may be returned (as nearly as possible) to his presale position with respect to the securities in question. An offer of rescission permits the purchaser to exercise his statutory right without recourse to litigation. Mere notice of the right to rescind, however, may force the purchaser to sue the issuer in order to exercise his right. The desire to avoid the expenditure of time and resources in litigation could influence a purchaser to forgo his rescissional right. If that were to occur, the violating issuer would not only receive the benefit of curative registration, but would also benefit from the purchaser's failure to rescind since he would be relieved of the burden of having to find a new purchaser for the securities. The purchaser,

\textsuperscript{55} This is an application of the "literal interpretation" doctrine of statutory construction, a canon by which a court restricts its inquiry to the text of the statute if unambiguous, and holds that text to be the entire scope of the law. Like all other rules of statutory interpretation, this canon is not absolute and can be met by other equally convincing approaches that result in broader interpretations. For a full discussion of the literal interpretation doctrine, see 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 46 (4th ed. 1972) [hereinafter cited as SUTHERLAND]. For a general discussion of the problems of reliance on any maxim of statutory interpretation, see Llewellyn, Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to be Construed, 3 VAND. L. REV. 395 (1950).

\textsuperscript{56} OSA § 1707.14(B)(2).

\textsuperscript{57} See note 24 supra.
meanwhile, would own securities that he does not want and might not have purchased initially, but for the issuer’s failure to register. The solution to this difficulty is to require an offer of rescission and not mere notice of that right.

The policy supporting this solution is two-fold. First, an offer of rescission goes far to return the purchaser to his presale status. Admittedly, such a requirement places an extra burden upon the good faith violator, but as a wrongdoer he is not entitled to any relaxation of his duties, especially where the interests of the already psychologically prejudiced purchaser are involved. Secondly, the requirement is consistent with the prophylactic nature of registration requirements, since the tender of rescission would obviate the need of the innocent investors to resort to litigation in order to enforce their rights.

The specificity of OSA section 1707.14 is not the only reason why registration under it may offer less protection to the general public and the individual purchaser than late registration or registration pursuant to Ohio Revised Code section 1707.39. A breakdown in protection may also occur if the language used in other provisions of OSA chapter 1707. is read in conjunction with the curative registration provision.

Unlike the present Ohio curative registration provision, which permits late registration through compliance with those sections of the Code that would have applied had timely registration been sought, the proposed provision operates independently, and ostensibly no reliance whatever is placed on the requirements of the other registration provisions. Compliance is effected by what may be termed a “section 14” registration, instead of registration by qualification, notification, or coordination. The result of creating this

58. Id.
59. Id.
60. OHIO REV. CODE ANN. § 1707.39 (Page 1964) provides:
   When any securities have been sold without compliance with sections 1707.01 to 1707.45 inclusive, of the Revised Code, or any former law in force at the time of such sale, any interested person may apply in writing to the division of securities for the qualification of such securities under such sections. [Emphasis added.]
61. OSA § 1707.14(A) provides:
   When any security has been sold in violation of section 1707.02 of the Revised Code or any comparable provision of prior law, any interested person may apply to register such security under this section [emphasis added].
62. Registration by qualification requires submission of a variety of material, which provides the securities administrator with sufficient information
special type of registration is that many of the administrative protections and safeguards expressly provided for in other methods of registration may be deemed inapplicable to a "section 14" registration, by the application of the statutory interpretation doctrine: 

Expressio unius est exclusio alterius.\textsuperscript{65}

Examples are numerous. The Commissioner has the express power, under certain conditions here immaterial, to require as a condition to registration by qualification, coordination, or notification that a security so sought to be registered be placed in escrow.\textsuperscript{66} Since OSA section 1707.11(H)(1) expressly refers to the aforementioned methods of registration and no mention is made of the "section 14" registration process, it is at least arguable reference to that method was consciously omitted. If this interpretation were accepted, the conclusion appears almost inescapable that the Commissioner has no power to impose such a requirement on curative registration, even though conditions may exist that make the imposition of such a requirement desirable. Similarly, the Commissioner may lack the power to impound a portion of the proceeds from a sale of unregistered securities as a condition to curative registration, despite his express power to do so in the case of a timely registration by qualification, coordination, or notification.\textsuperscript{67} The same problem will curtail the Commissioner's authority to require that a prospectus be sent or given to each purchaser. As a result, full disclosure of relevant facts, which otherwise might not be made known under the general notification requirement of OSA section 1707.14(B)(2) will be impaired.\textsuperscript{68} The statutory provision that allows the Commissioner to require a prospectus (in certain situations) expressly limits that to make decisions concerning the "merits" of the proposed offering. See Ohio Rev. Code Ann. §§ 1709.09-.11 (Page 1964).

63. Registration by notification, also referred to as registration by description, permits submission of abbreviated factual data and is restricted to securities that can be expected to subject the purchaser to a lower risk than the average security, for example the securities of a corporation with a favorable earnings record. See Ohio Rev. Code Ann. § 1707.05 (Page 1964) for the classifications of securities permitted to use this simpler method, and id. § 1707.08, prescribing how such registration can be achieved.

64. A third method of registration authorized by the Ohio statute, registration by coordination, allows the issuer, if he filed a registration statement with the SEC, to file a copy of the statement with the Division together with an affidavit of an interested party that the statement is in effect. See id. § 1707.25.

65. See 2A Sutherland § 47.23.
66. OSA § 1707.11(H)(1)(a).
67. Id. § 1707.11(H)(1)(b).
68. See also note 34 supra and accompanying text.
power to registration by qualification and by notification.69 Such a limitation on the Commissioner's power could seriously hamper a purchaser's access to information necessary for an informed choice regarding rescission and the statement of nonprejudice.70

A further erosion of blue sky protection may be traced to the difference between standards for denial of applications seeking timely registration and those seeking curative registration under the proposed statute. Although normal registration applications may be denied upon a finding that the offering would be grossly unfair to purchasers,71 the express standard to be applied in the curative registration process is that no one has or will be "defrauded, prejudiced, or damaged,"72 a criterion that could conceivably be met by a "grossly unfair" offering. For example, an offering of unregistered, non-exempt securities is made, and subsequently the issuer seeks curative registration. Upon close examination, the Commissioner finds that the offering is inherently unfair but that its unfairness has not matured to the degree that it has defrauded, prejudiced, or damaged anyone. Does the Commissioner have the power to apply the "grossly unfair" standard in deciding whether registration should be granted? The proposed Ohio Securities Act is unclear on the matter. On one hand, OSA section 1707.12 expressly applies to any registration, which indicates that the "grossly unfair" standard would operate to prohibit registration. On the other hand, invocation of the statutory interpretation rule that a specific provision governs over a general one when inconsistencies are present73 would appear to require the use of the "defrauded, prejudiced, or damaged" criterion of OSA section 1707.14 when curative registration is sought. The result may be that the Commissioner would be deprived of the power to deny registration of a "grossly unfair" offering if it meets the lesser standard expressed in the proposed curative registration provision. This problem, which results from an internal inconsistency in the proposed bill, may be more theoretical than real. Even if the courts were to apply the "specific controls over general" canon of construction, the likely result would be a holding that the Commissioner has the power

69. OSA § 1707.11(L).
70. This information could conceivably be required, albeit not in prospectus form, under OSA § 1707.14(B)(1), which allows the Commissioner to demand whatever additional information he wants that is relevant to the illegal issuance. However, there is no evident authority permitting him to require that the information be disseminated to purchasers.
71. Id. § 1707.12(A)(6).
72. Id. § 1707.14(D).
73. See, e.g., 2A SUTHERLAND § 51.05.
to deny "section 14" registration of a "grossly unfair" offering, even though he may not apply the "grossly unfair" standard directly. By the terms of OSA section 1707.14, the Commissioner is not required to permit late registration of all securities meeting the statutory requirements, but may do so at his discretion.\textsuperscript{74}

Two other provisions of OSA section 1707.14 may also seriously constrict the scope of general rights and protections under the securities act. The first and more troublesome requirement is the statement of nonprejudice, which the purchaser signs and returns to the issuer as a precondition to curative registration.\textsuperscript{75} There is no evident benefit from this requirement. Whatever causes of action accrue against an issuer for failure to register are barred to the purchaser after curative registration by operation of the statute.\textsuperscript{76} Thus the issuer gains nothing with respect to the release of civil liabilities which he could not otherwise attain were these documents not required for late registration. The Division may gain some insight into the circumstances surrounding the offering from the statements, but even this benefit is minimized by their nondefinitive wording.\textsuperscript{77} Certainly the language of the statements provides the Division with little more than a superficial impression of the actual harm that the illegal security sale has caused or will cause the purchaser. In addition, one must question the actual validity of these statements. That is, the purchaser may actually believe that he has not been harmed by the illegal sale, when, in fact, he has suffered a prejudice. That the wrongdoer is the party soliciting the signatures leads one to question the objectivity of any arguments he might make for and against the purchaser's compliance with his request. This problem is further complicated by the pro-issuer bias in the mind of the purchaser himself, a bias which is the product of the "investor inertia" phenomenon.\textsuperscript{78}

\textsuperscript{74} OSA § 1707.14(D). It is doubtful whether the Commissioner could be found liable for an abuse of discretion. \textit{See} MacKethan v. Commonwealth, CCH \textsc{Fed. Sec. L. Rep.} ¶ 94,454, at 95,589 (E.D. Va. 1974). \textit{But cf.} Tcherepnin v. Franz, No. 64C 1285 (N.D. Ill. 1973).

\textsuperscript{75} OSA § 1707.14(B)(2). Such a statement is presently required under the Division's policy for enforcing Ohio Revised Code § 1707.39. \textit{See} note 41 \textit{supra} and accompanying text. As a result, this criticism is also applicable with minor modifications to current Ohio practice (although probably to a lesser degree because of the substantial protective measures retained).

\textsuperscript{76} OSA § 1707.14(E).

\textsuperscript{77} \textit{Id.} § 1707.14(B)(2) requires only that the purchaser be satisfied that "to the best of his knowledge and belief he has not been defrauded, prejudiced, or damaged."

\textsuperscript{78} \textit{See} note 24 \textit{supra}. 
While the statement of nonprejudice provides little, if any, benefit to the parties, it does have a serious impact on subsequent actions for fraud that the purchaser might bring against the issuer. OSA section 1707.14 expressly reserves to the purchaser the option of bringing an action for fraud. Further, the statute provides that a statement of nonprejudice does not act to estop or bar any such action. Nevertheless, such statements are admissible at the trial of such an action under a well-known exception to the hearsay rule, the admission of a party-opponent. The requirement, then, induces the purchaser to unwittingly create evidence that may later be used in court against him as a defense to a suit expressly reserved by statute. Once again, the statute acts to aid the violator at the expense of the innocent victim.

A final problem with OSA section 1707.14 lies in the express power of the Commissioner to waive as to the individual purchasers the requirements for notice of the right of rescission and the statement of nonprejudice upon a finding of unreasonable hardship or cost for the applicant. This provision creates more of a puzzle than a problem. That it allows the waiver of a most important, albeit diluted, precondition (the notice of the rescission right) is disturbing. That it impliedly permits curative registration without requiring even so much as notice of such registration to purchasers who are deemed too difficult or too expensive to locate is appalling, especially in the light of the other dilutions of protections that are currently provided for by the securities law.

79. OSA § 1707.14(B)(2).
80. Id.
82. Of course, the impact of this evidence may be mitigated by the "to the best of my knowledge" language required. See note 77 supra.
83. This situation is further aggravated by the absence of any requirement that an approved offering circular be presented with the statement-of-nonprejudice form. See notes 68-70 supra and accompanying text.
84. OSA § 1707.14(B)(2).
85. It is unclear whether the rights of these unnotified purchasers are retained after curative registration. From the purchaser's standpoint, it appears that these rights should be preserved, at least for the duration of the civil statute of limitations. See id. § 1707.37(j). There is no reason whatsoever to let the rights of those who are unnotified perish at the instant of curative (or late) registration. To do so would enable the issuer to benefit from his wrongdoing at the expense of the totally innocent purchaser, a result repugnant to traditional concepts of fairness. However, such a retention of rights could defeat the purpose of late registration, relief for the issuer from agency action and civil liability. This is especially likely where the purchasers of a relatively large proportion of the securities cannot be located "without unreasonable effort or expense." To some extent this difficulty may be alleviated
V. INTENTIONAL VIOLATIONS OF THE REGISTRATION REQUIREMENT

Curative registration is designed to allow an issuer who mistakenly believed his securities to be exempt from registration requirements to avoid agency action and private civil liabilities attendant upon his violation of the securities laws. It is interesting to note, however, that while the Division has taken the position that it will not grant curative registration to intentional violators, there is no language in either section 1707.39 of the Ohio Revised Code or OSA section 1707.14 that prevents such issuers from using the remedy. The primary concern of these provisions is full disclosure; they are silent as to the impact of intent on the availability of the remedy. Accordingly, common statutory interpretation would seem to dictate that an issuer who intentionally fails to register, for whatever reason, need only convince the Division that no one was or will be "deceived, prejudiced, or damaged" and file the proper papers to receive the benefits of the curative provisions. He can escape administrative action and civil liability (except for fraud) without the expense of rescinding earlier sales and issuing new, properly registered securities. Such treatment of willful violators should not be the result of any law. Leniency of this nature would only invite further violations of the law whenever the issuer found it in his best interests to risk the imposition of criminal sanctions for the benefits gained from a quick unregistered sale of nonexempt securities. This is especially clear in the light of the inherent problems that a blue sky administrator faces in discerning illegal motives and overcoming "investor inertia" which could have a significant effect even if bad faith

by the Commissioner's exercise of his discretion with respect to the waiver or with respect to the granting of curative registration itself. See note 74 supra and accompanying text.

86. See note 11 supra and accompanying text.

87. The policy statements set forth in the Ohio Securities Bull., July 1973, at 5-7, were prompted by an increasing number of issuers who interpreted Ohio Rev. Code Ann. § 1707.39 (Page 1964) as an alternate, perhaps less rigid, registration method, and intentionally disregarded the normal, "timely" registration processes. Under the new policy an "Explanatory Statement" detailing the nature and the reason of the registration violation is required before curative registration will be granted.

OSA § 1707.14(B)(1) requires the applicant to file a statement "explaining the circumstances of the sale . . . and such additional information as the Commissioner of Securities may by rule require." This standard could be interpreted to demand disclosure of facts regarding the reasons why normal registration was not sought.

were proved.

To eliminate the use of the curative registration process as a mere alternative to the normal registration mechanism, language should be included in the curative provision expressly denying its use where the Division finds an intentional avoidance of timely registration. This approach would force intentional violators to rescind the sales (not merely offer rescission) and issue new, properly registered securities in order to avoid civil liability arising out of the initial illegal sale. Still harsher action could also be taken, even to the extent of forbidding the wilful violator from selling any security for a fixed period of time. Though such a severe sanction would have to be applied with caution, its mere existence would be a strong deterrent to abuse of the late registration provision by intentional violators of the registration requirement provisions.

VI. TERMINATION OF THE CIVIL REMEDY OF RESCission

The critical benefit that the late registration process offers to issuers is the termination of the purchaser's right of rescission prior to the running of the civil statute of limitations. This termination can be accomplished in several ways. One route is through the statutorily mandated method of a formal, negotiated rejection of rescis-

89. OHIO SECURITIES BULL., July 1973, at 29.
90. This approach has been implicitly approved by the Court of Appeals for the Second Circuit in Corenco Corp. v. Schiavone & Sons, 488 F.2d 207 (2d Cir. 1973), with respect to a tender offer. In that case, the plaintiff asserted that the defendant's tender offer failed to disclose essential financial information, that this nondisclosure was an intentional omission on the part of the defendant, and that to permit the defendant to modify the offer retroactively to contain the necessary information was in violation of the Supreme Court's ruling in J.I. Case Co. v. Borak, 377 U.S. 426 (1963), where the Court held that remedies should encourage compliance with the law, and that the defendant should be required to rescind its offer and start the entire tender offer process again. The court, while admitting that there might be merit to the plaintiff's proposal, refused to invoke such penalty, but only because there was no proof of an intentional withholding of information by the defendant. A tender of rescission was absolutely required, however, even though late compliance was allowed. 488 F.2d at 214.
92. The nonstatutory nature of the late registration process used in other states requires that these anti-abuse sanctions be implemented through informal policy declarations, rather than statutory enactment.
93. See, e.g., USA § 410(a); OHIO REV. CODE ANN. § 1707.43 (Page 1964); OSA § 1707.37(A)(1). See also note 9 supra and accompanying text.
Another method of avoiding civil liability is through private arrangements outside the scope of the statute, providing for formal waiver. The problems raised by private arrangements of this sort are often cited as the justification for enacting specific curative registration provisions like Ohio Revised Code section 1707.39 and OSA section 1707.14.

A waiver of any nature is traditionally held in disfavor by the law and the courts. It is viewed as an instrument by which the dominant party in a bargaining situation can relieve himself of liability for any wrongs committed in the course of bargaining, while the subservient party is left without remedy. The danger of an unknowing waiver of rights is intensified by the numerous ways in which a waiver provision can be disguised in a bargaining agreement. Legislatures and courts have taken a number of steps to insulate the inexperienced security purchaser from the unintentional relinquishment of rights. A typical measure is the enactment of the so-called antiwaiver provision, which operates to hold "[a]ny condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision of . . . [the Securities Act] . . . void." Even where there is no express antiwaiver provision, courts have acted either to imply such a provision or to subject a waiver to sufficiently intense scrutiny as virtually to eliminate its value in all but highly selective fact situations.

It is within this unfavorable atmosphere that the informal private waiver must function for late registration to relieve the issuer of the
threat of purchaser rescission, and it is this judicial animosity that provides the impetus for enacting a curative registration provision. Whereas the formal offer of rescission has a statutory basis which requires that it be read in pari materia with the antiwaiver provision, the informal waiver agreement lacks this advantage and, thus, is highly vulnerable to challenge in the courts. Thus, so the argument goes, the only way to give absolute effect to these informal waivers is through a curative registration provision, which operates to cut off purchaser rescission rights. The question is, however, given the potential for abuse that attends curative registration, does the advantage gained by codification justify its inclusion in the securities law, especially in view of the viability of alternative means to reach the same goal? The answer must be a resounding “no.”

The most obvious alternative to curative registration is a blanket prohibition of any waiver other than that permitted by the statutes as a formal rejection of the offer of rescission. This alternative has two advantages. First, it forces the wrongdoer to offer rescission, an offer that on its face somewhat eases the predicament of the innocent party. Secondly, it requires the violator to present the innocent purchaser with a clear choice, to accept or reject, which by its nature precludes deception on the part of the issuer.

Assumption of such a hard line position may, however, place undue hardship upon the issuer who violated the registration requirement in good faith. Thus, a second alternative, that of express statutory acceptance of an informal waiver pursuant to late registration might be considered more equitable. The enactment of such legislation would remove any question as to the validity of the waiver, assuming that the relinquishment of rights meets basic, statu-

100. This potential is greatest with respect to OSA § 1707.14. See notes 46-85 supra and accompanying text. OHIO REV. CODE ANN. § 1707.39 (Page 1964) is also susceptible to abuse, because of its vague language. This potential, however, is greatly reduced under present policy. See notes 29-45 supra and accompanying text.
101. See note 24 supra.
102. But quaere whether any attempt whatsoever should be made to ease the burden of a wrongdoer when such an attempt would act to lessen the rights of an innocent injured party.
103. In states having an antiwaiver provision, this acceptance could take the form of an exception to the antiwaiver rule, an exception which due to its specific nature would control over the more general provision. Express exceptions to the antiwaiver provisions are not uncommon and are liberally construed by the courts. See Ayers v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 93,742 (E.D. Pa. 1973); Financial House, Inc. v. Otten, [1973-1974 Transfer Binder] CCH Fed. Sec.
itorily defined standards of fairness. This would allow the issuer more leeway in fashioning his escape from purchaser rescission. He would still be required to register the security before seeking a waiver from the purchaser but he would not be forced to comply fully with the terms of the statutory offer of rescission provision. Such a concession may appear trivial at first glance, but it would substantially ease the burden on the good faith violator.

Thus, the argument that a curative registration provision is needed to assure the validity of informal waivers of the purchaser’s right to rescind is not substantial. The late registration method employed in most states operates satisfactorily to protect the purchaser while it enables the innocent wrongdoer to avoid rescission by means of the formal rejection of the offer to rescind. If it is decided that this format is unduly restrictive in that it unfairly limits the issuer to the use of an offer of rescission, the statute can easily be amended to include an express acceptance of an informal waiver subject to certain minimum standards. In either case, any potential conflict with an antiwaiver provision, either express or implied, is avoided without resort to the curative registration process.

VII. Conclusion

As long as securities laws remain complex and confusing to the layman, there will be a need for some sort of late registration process by which a good faith violator can be relieved of some of the burdens that the offer or sale of unregistered, nonexempt securities brings down upon him. In any attempt to save the good faith violator from his own ignorance of the law, however, care must be taken to avoid dilution of the protection provided to the public and the individual investor by the securities laws.

It is within this context that three methods of postsale registration have been evaluated. It is suggested that the informal, nonstatutory late registration method employed by the federal system and by most states offers the most protection to the public and the investor. The present Ohio mechanism of curative registration, section 1707.39 of L. Rep. ¶ 84,395 (E.D. Mich. 1973). In states having no express antiwaiver provision, the express acceptance will operate to prevent the application of common law antiwaiver rules.

104. Such an acceptance of waiver should, at a minimum, require a statement of full disclosure regarding various remedies available to the purchaser, the effect of the proposed waiver on these remedies, and, perhaps, even a disclosure of the effect that the various remedies would have on the issuer himself.

105. See note 27 supra.
the Ohio Revised Code, as modified by informal policy declarations, is also satisfactory, being, in effect, a statutory version of the late registration process. This scheme does have mechanical imperfections, which in theory are disconcerting, but which in practice have little impact. The third method, that of the proposed Ohio Securities Act, OSA section 1707.14, is wholly unsatisfactory when compared to the others because the specificity of certain provisions and a variety of drafting problems will lead to a serious dilution of the protections created by the other sections of the securities law.

It is submitted that there is no need whatsoever for special curative registration provisions such as those now in effect or under consideration in Ohio. A perceived problem with the more common late registration process, that of possible conflict with express or implied antiwaiver provisions, has been used as a justification for the enactment of a curative registration measure. Whatever the dimensions of this problem may be, it can be readily solved without resort to an extensive curative provision.

Nevertheless, in the past, Ohio’s legislators have concluded that a curative registration provision is necessary. If this opinion prevails, then the legislators should reject the proposed provision as it now stands and, instead, retain the present statutory provision with its policy statement modifications and add a formal ban, coupled with strict sanctions, on the use of the curative registration process by wilful violators. Only then will the rights of all interested parties be satisfactorily protected from abuse in the curative registration process.

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