



May 9, 2022

Kelly Kauffman
Ohio Division of Securities
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Roger Lee Patrick, Jr., CFE
Ohio Division of Securities
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Re: *Division Request for Comment on Revised Rule 1301:6-3-09*

Dear Ms. Kauffman and Mr. Patrick:

The Institute for Portfolio Alternatives¹ appreciates the opportunity to comment on the Ohio Division of Securities (“Division’s”) proposal to incorporate, without any change or alteration, every North American Securities Administrators Association (“NASAA”) standard and statement of policy and all the Division’s Merit Standards for Securities Offerings, into Rule 1301:6-3-09 concerning registration by qualification (collectively, the “Proposal”). IPA recognizes the importance of ensuring that Division rulemaking complies with JCARR. In fact, JCARR applies to many Division interpretations other than the standards and statements of policy that are the subject of the Proposal. For example, JCARR also applies to all of the forms of rulemaking in which the Division engages through staff bulletins, comment letters and other interpretive publications. We look forward to a similar effort by the Division to conform these interpretations to JCARR.

While we offer our comments on the Proposal today as requested by the May 9th request, we urge the Division to withdraw this Proposal in favor of a newly revised proposal that conforms to JCARR. The May 9th deadline provided only 10 calendar days to review and comment. This amount of time is insufficient to provide complete and meaningful comments on each of the 43 NASAA statements of policy and the 17 Merit Standards covered by the Proposal. By contrast, the Securities and Exchange Commission typically allows 60 to 90 days for public comment on its rule proposals. Given the importance of these issues to the citizens of Ohio and the magnitude of these new changes, issuing a new proposal including each standard and statement is appropriate and necessary.

In the event the Division does proceed, we offer the following comments on the Proposal.

¹ For over 35 years the IPA has raised awareness of portfolio diversifying investment products among stakeholders and market participants, including investment professionals, policymakers and the investing public. We support increased access to investment strategies with low correlation to the equity markets, such as net asset value REITs and business development companies. Through advocacy and industry-leading education, the IPA is committed to ensuring that all investors have access to real assets and the opportunity to effectively diversify their investment portfolios.

The Proposal Would Undermine the JCARR Process

The Division's Proposal to incorporate by reference all of these standards and statements of policy, without any change and in one single stroke of rulemaking, would undermine JCARR in at least five ways.

1. The Division Proposes to Deny JCARR a Rule-by-Rule Substantive Review

As the Division is aware, the North American Securities Administrators Association is a trade association for state securities commissioners. Its pronouncements and statements of policy, by themselves, carry no legal weight in any state. NASAA issues these statements without conducting the same vigorous administrative inquiry and deliberation that JCARR demands. As a trade association representing the interests of state securities commissioners, NASAA does not impartially evaluate public comments about a proposed statement of policy nor does it take into account the relevant intent of the various state legislatures, the authority of the state commissioners to adopt the statement, or the statement's fiscal effects. NASAA does not consider whether a statement of policy "has an adverse impact on business" nor does it demonstrate through a "business impact analysis" that the statement's "regulatory intent justifies its adverse impact on business."² All of these considerations are, of course, fundamental to JCARR.

Despite these defects in NASAA procedure, the Division proposes to automatically incorporate -- without any change -- NASAA's 43 statements of policy covering a wide variety of topics including:

- cattle-feeding programs (from a 1980 statement);
- NASAA's monitoring of the World Wide Web (from a 1996 statement); and
- church bonds (from a 2002 statement).

Other topics include asset-backed offerings, church extension funds, commodity pool programs, equipment leasing programs, mortgage programs, oil and gas programs, omnibus programs, real estate investment trusts, and real estate programs. NASAA has issued these policy statements over four decades, a period in which these industries have dramatically changed.

The Division's 17 Merit Standards similarly cover widely-disparate topics that the Division issued over a period of almost 50 years.

²See Joint Committee on Agency Rule Review, <https://www.jcarr.state.oh.us/about>.

These standards and statements cover topics that are so disparate, regulate so many types of firms, concern so many unrelated categories of investors, that they can only be evaluated one by one, each on its own merits. By bundling them together and dropping them on the public in bulk without prior individual review, the Division undermines JCARR, which requires the Division to conduct a careful, objective, deliberative evaluation of each standard and statement. The Division may not simply amalgamate them into an enormous mass for wholesale incorporation into the Administrative Code.

We respectfully request that the Division break out, request comment, and separately evaluate each NASAA standard and statement of policy, and each Division Merit Standard, in compliance with JCARR.³

2. The Division Proposes to Incorporate Future Standards and Statements

Not only does the Division propose the wholesale incorporation of standards and statements of policy that NASAA and the Division have adopted so far, it also proposes to incorporate those that NASAA and the Division *will adopt in the future*. The rule text thus states that incorporation would apply to all standards and statements of policy “as adopted” by NASAA and the Merit Standards “as listed on the Division’s website” -- without any cut-off date for either.

Section 121.72 of the Ohio Revised Code states:

An agency that incorporates a text or other material by reference into a rule is presumed to have incorporated by reference a version of the text or other material that is in existence at the time of its incorporation by reference. An agency may not incorporate by reference a future version of the text or other material that is not in existence at the time of its incorporation by reference.

The Division’s Proposal to automatically incorporate future standards and statements of policy would violate this provision.

This violation of the Ohio Revised Code would be most pernicious for issuers who do not monitor the public statements of NASAA officials. These issuers will be especially vulnerable to surprise as NASAA’s pronouncements find their way into Ohio law through this evasion of JCARR.

³ The Division further undermines JCARR by establishing its own regulatory standards and policies apart from NASAA without appropriate review as required by JCARR. The Division engages in unauthorized rule making through publication in the Ohio Securities Bulletin, issuer comment letters and other pronouncements. We recommend that all of these standards and policies similarly be subject to JCARR.

It appears as if the Ohio Securities Commissioner seeks to evade JCARR through NASAA's adoption of future statements. As the Division's website proclaims, the Ohio Securities Commissioner "is a national leader in state securities regulation through her role with the North American Securities Administrators Association."⁴ She presently serves as the Chair of its Corporation Finance Section Committee, which oversees the adoption of these NASAA standards. Under the amalgamated Proposal, the Commissioner could encourage NASAA to adopt statements of policy to automatically incorporate them into the Ohio Administrative Code, without following JCARR.

We respectfully request that the Division clarify that it would incorporate by reference (and would not otherwise apply) only those NASAA standards and statements of policy and Division Merit Standards in existence, and precisely as written, upon approval of the final approval of the proposed revised rule, in compliance with the Ohio Revised Code. We further request clarification that the Division would incorporate by reference (and would not apply) any new standard or statement, and any revision to any previously incorporated standard or statement, only upon completion of the JCARR and other administrative rulemaking processes under the Ohio Revised Code.⁵

3. The Division Proposes to Adopt Undefined "Standards"

Section 121.72 also requires an agency to "accompany the incorporation by reference with a citation that provides information sufficient to enable a reasonable person to whom the rule applies readily and without charge to find and inspect the text or other material that has been incorporated by reference." The Division's integrated Proposal fails to comply with this requirement.

For example, the Division proposes to automatically incorporate NASAA "standards", but a search of NASAA's website produces no compendium of "standards." It is unknown and unclear what specific standards the revised rule would incorporate and therefore we cannot comment about any such general present (and future) standards under JCARR.

We respectfully request that the Division provide citations or the text of the NASAA "standards" that it proposes to incorporate by reference, in compliance with the Ohio Revised Code.

4. The Division Enforces Unadopted Standards and Statements of Policy

⁴ <https://com.ohio.gov/divisions-and-programs/securities/about-securities/leadership>.

⁵ For example, NASAA is amending at least one statement of policy related to real estate trusts. In order to be applied by the Division, this amendment also must complete JCARR and other the processes under the Administrative Code.

Under Ohio law, an amended rule cannot be effective before it enters JCARR. Indeed, it is not even effective immediately *after it leaves* JCARR.⁶ Rather, “[f]or a rule to be effective an agency must final file the rule in the ERF System and set an effective date.”⁷

The Division violates this requirement by continuing to enforce NASAA standards and statements of policy now, before it has even begun the JCARR process. As the Division says in its request for comment:

The Division seeks to amend the rule to *formally* adopt *existing* industry standards . . .

(Emphasis added.)

If the Division can enforce rules that have not been through JCARR and reached final approval, then JCARR and the Administrative Code mean nothing. To comply with JCARR, the Division must suspend any application or enforcement of the NASAA standards and statements of policy and the Division’s Merit Standards, until they have been formally adopted as Division rules.

We respectfully request that the Division clarify that the Division will not implement or enforce any NASAA standard or statement of policy nor any Division Merit Standard until it becomes a legally binding rule under Ohio law, in compliance with JCARR and the Administrative Code.

5. The Division Misapplies the Statements of Policy and Merit Standards

On its face, the combined Proposal applies only to registrations by qualification under Section 1707.09 of the Ohio Revised Code, a type of registration upon which the Division may conduct a merit review. Unstated in the Proposal is the fact that the Division applies the NASAA standards and statements of policy and its own Merit Standards to registrations *by coordination*, in violation of the Ohio Revised Code.

Registrations by coordination, governed by Section 1707.091, become effective “at the moment the federal registration statement becomes effective.” The legislature intended that they constitute notice filings that are simultaneously effective when the Securities and Exchange Commission deems them effective at the federal level. One must distinguish them from registrations by qualification, which Section 1707.09 permits the Division to review.

⁶ Joint Committee on Agency Rule Review Procedure Manual (July 27, 2021), <https://www.jcarr.state.oh.us/assets/files/procedures-manual-7-27-2021-625.pdf> at 6.

⁷ *Id.*

The Division simply ignores this established statutory scheme, which delineates the two types of registration, and instead applies the NASAA standards and statements of policy and its own Merit Standards to registrations by coordination. In contravention of the Ohio Revised Code, the Division insists that registrations by coordination *are not* effective “at the moment of the federal registration becomes effective” but become effective at a time and manner of the Division’s choosing, after it applies whatever merit standard it wishes. The revised rule would represent a continuation of this illegitimate practice by the Division.

We respectfully request that the Division clarify that the proposed incorporation by reference of NASAA standards and statements of policy and the Division’s Merit Standards would not apply to any registration by coordination under Section 1707.091, in compliance with the Ohio Revised Code.

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The IPA appreciates the opportunity to comment on the bundled Proposal. Should the Division have any questions about our comments, please feel free to me or contact Anya Coverman, General Counsel, at (202) 548-7190.

Sincerely,



Anthony Chereso
President & CEO, Institute for Portfolio Alternatives

cc: Senator Theresa Gavarone, JCARR Chair
Representative Jamie Callendar, JCARR Chair
Representative Jean Schmidt

Larry Wolpert,
Executive Director, JCARR

Commissioner Andrea Seidt