



February 3, 2023

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Ohio Common Sense Initiative  
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**RE: Ohio Division of Securities Rule 1301:6-3-09 Registration by Qualification**

Dear Sir or Madam,

The undersigned associations (“Associations”) appreciate the opportunity to comment on the proposal of the Ohio Division of Securities Division (the “Division”) to amend Rule 1301:6-3-09 (the “Proposal”). Our organizations represent a broad spectrum of businesses and investment professionals across the financial services sector.

We appreciate the Division’s willingness to engage in administrative rulemaking, as requested by the Joint Committee on Agency Rule Review under R.C. 101.352. By submitting the Proposal through this process, the Division is ensuring that it hears from impacted constituents and market participants in Ohio such as our members.

The changes outlined in the Proposal are wide reaching and impactful on Ohio market participants. Many of the changes, however, represent a departure from the language of the principles of law and policy that have been previously enforced by the Division outside of the Ohio rulemaking process. We respectfully submit the following comments to the Proposal:

- The Division should extend the length of the comment period to provide a meaningful opportunity to comment.
- The Division should be required to submit an appropriate business impact analysis as required by the Ohio Common Sense Initiative (“CSI”).
- The Division should first conduct a thorough business impact analysis of a concentration limit in Ohio and amend any proposed concentration limit to provide an accredited investor exemption.

1. *The Division should Extend the Comment Period.*

The laws and regulations promulgated and enforced by the Division are vitally important to the protection of Ohio investors and the facilitation of capital formation in Ohio. The Associations, however, are concerned that meaningful public input into the rulemaking process, a critical element to ensuring that the Division’s rules are appropriately tailored and that the Division is meeting its statutory obligations, is at risk with a comment period of merely 14 calendar days. On February 1, 2023, multiple stakeholders requested an extension of at least an additional 14 days to respond; however, the Division did not respond to that request by the comment deadline. Sufficient time for meaningful public input into individual proposals, and equally the potential interconnectedness of these proposals, is important and could have a significant impact on investors, capital formation, economic growth and job creation.

It is also important to recognize that the Associations’ members are regulated by other U.S. regulatory agencies and governmental bodies. The Associations’ members must not only consider the Division’s rulemaking, but also proposals from numerous other federal, state and international regulators. The Division’s rule proposals affect many of the same market participants and the investing public in general. Several of the proposed changes could overlap and potentially impact each other. Market participants cannot, nor should the Division or CSI, consider the costs and benefits of each rule in isolation.

Exceptionally short comment periods such as this do not provide public commenters with the opportunity to fully consider a rule proposal and draft a focused and clear response to the Division. The exceedingly short comment period associated with a proposal that contains 20 NASAA Statements of Policy, 17 Merit Standards, and new rule language does not allow the public time to fully analyze, consider and comment on the Proposal, including the time that it takes to study and analyze the market and economic implications of the Proposal. By contrast, the SEC 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 changes, an extension of the comment period is necessary.

**The Associations respectfully requests that the Division extend the review and comment period to give the public a reasonable opportunity to comment.**

2. *The Division Should Submit a Full Business Impact Analysis*

A pivotal element of the rulemaking process is a thoughtful business impact analysis of a proposed rule. Section 107.53 of the Ohio Revised Code requires the Division to conduct a Business Impact Analysis of any new legislative rule, including this Proposal. When rules are not appropriately tailored to consider their business impact, regulatory obstacles may hamper business and potentially harm Ohio as an innovative and entrepreneurial state.

An appropriate business impact analysis that meets CSI's statutory and policy obligations necessarily requires meaningful input from the public, including subject-matter experts and investors. Without this public input, the Division runs the risk of drafting, implementing, and enforcing rules that may have a direct impact on Ohio's business growth, investment opportunities and job creation.

Failure to provide a meaningful economic impact of this Proposal may result in a direct, negative impact on the Division's obligations to protect investors and facilitate capital formation. Companies and investors deserve regulatory rulemaking that is appropriately tailored, well-crafted and fully thought-out.

The Division should be required to resubmit a Business Impact Analysis that takes this impact on businesses in Ohio into account and fully addresses the questions, as required by the Common Sense Initiative and the JCARR order.

**The Associations respectfully request that the CSI require the Division to submit a detailed and thorough Business Impact Analysis.**

3. *The Associations Recommend that a Specific Business Impact Analysis be Performed on the Proposed Concentration Limit, and that any Emerging Concentration Limit Include an Accredited Investor Exemption.*

Although the Associations need more time to review and comment on all aspects of the Proposal, we do have specific comments on the concentration limit. We hope that our comments will help the Division develop this part of the Proposal.

The federal government does not impose a concentration limit on investors and Ohio is in the minority of states that impose a concentration limit. As a preliminary matter, we believe it is critical that the Division conduct a specific business impact analysis on the benefit versus cost to Ohio of a concentration limit that restricts investment opportunities. Market volatility and economic factors are important considerations for investors seeking portfolio diversification. These factors, along with the impact on economic and business activity in Ohio, should be considered in the context of a limitation on investment.

If, after conducting a business impact analysis, the Division moves forward with adoption of a concentration limit, we recommend that the Division adopt an accredited

investor exemption, as defined in Rule 501 of Regulation D under the Securities Act of 1933.<sup>1</sup> By doing so, the Proposal would ensure that wealthy and sophisticated investors maintain investment choice when they are advised by their federally regulated broker or investment adviser. These investors may need to follow portfolio diversification strategies like those employed by large institutions.

The Associations strongly recommend that the Division include an exemption from the concentration limit for accredited investors. The “accredited investor” definition in SEC Rule 501 is intended to encompass those individuals and entities “whose financial sophistication and ability to sustain the risk of loss of investment or ability to fend for themselves render the protections of the Securities Act’s registration process unnecessary.”<sup>2</sup> By not including this exemption, the Proposal would preclude the recommendation of a licensed financial professional without regard to the financial sophistication of the investor. No one is in a better position to evaluate what is best for investors than investors themselves and their financial professionals.

The Associations recommend that the Division amend the concentration limit to read as follows:

(5) Absent good cause shown, registration by qualification will be conditioned upon the restriction of sales to the purchaser in concentrations not to exceed 10% of a purchaser’s liquid net worth. This standard shall not be applied to purchasers who qualify as an “accredited investor” as defined in Rule 501 of Regulation D under the Securities Act of 1933, as amended.<sup>3</sup>

**The Associations respectfully recommend that the Division conduct a detailed Business Impact Analysis of the concentration limit before any adoption and amend any concentration limit to include an exemption for an accredited investors.**

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The undersigned appreciate the opportunity to comment on the Proposal. We are ready and willing to work with the CSI and the Division on this important rulemaking.

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<sup>1</sup> In 2016, the North American Securities Administrators Association proposed to include in guidance a concentration limit with an accredited investor exemption. See <https://www.nasaa.org/wp-content/uploads/2016/07/Notice-for-Public-Comment-REIT-Concentration-Limit-07272016.pdf>.

<sup>2</sup> See, e.g., Rel. No. 33-6683 (Jan. 16, 1987) [52 FR 3015] (Regulation D Revisions; Exemption for Certain Employee Benefit Plans).

<sup>3</sup> 17 C.F.R. § 230.501(a)(1) to (8).

Sincerely,

American Investment Council  
Coalition for Business Development  
Defined Contribution Alternatives Association  
Defined Contribution Real Estate Council  
Financial Services Institute  
Institute for Portfolio Alternatives  
Insured Retirement Institute  
National Association of Insurance and Financial Advisors  
Nareit  
Real Estate Roundtable  
Small Business Investor Alliance  
Securities Industry and Financial Markets Association (SIFMA)