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# OHIO LEGISLATIVE SERVICE COMMISSION

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H.B. 312  
133<sup>rd</sup> General Assembly

## Bill Analysis

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**Version:** As Passed by the House

**Primary Sponsor:** Rep. Powell

Carla Napolitano, Attorney

### SUMMARY

- Permits *intrastate* equity crowdfunding, to be known as “OhioInvests offerings,” under certain circumstances.
- Specifies eligibility requirements for persons conducting an OhioInvests offering.
- Prohibits an unaccredited investor from purchasing more than \$10,000 in securities in a 12-month period in connection with OhioInvests offerings.
- Requires that the offerings be made exclusively through an intermediary consisting of a website operated by a “portal operator.”
- Requires portal operators to provide certain disclosures to investors.
- Requires portal operators to maintain and make available to the Division of Securities specified records.
- Subjects portal operators to regulation and enforcement, including the same regulation and enforcement by the Division that exists for licensees in Ohio that hold individual dealer, salesperson, investment advisor, or an investment advisor representative license.
- Authorizes the Division to order payment of an administrative penalty for violations of the Securities Law related to OhioInvests offerings and purchasers of the securities to bring an individual or class action to recover specified penalties for those violations.
- Expressly authorizes port authorities and community improvement corporations to act as portal operators for the offering of securities through such crowdfunding.

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## DETAILED ANALYSIS

### OhioInvests offerings - overview

The bill provides an exemption from registration under the Ohio Securities Law (R.C. Chapter 1707) for certain securities offered or sold through equity crowdfunding. “**Crowdfunding**” is an evolving method of using the internet to raise capital for startups and small businesses. An entity or individual raising funds through crowdfunding typically seeks small individual contributions from a large number of people.<sup>1</sup>

Equity crowdfunding implicates both state and federal securities laws, requiring registration under both sets of laws unless an exemption applies. Federal law contains an

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<sup>1</sup> U.S. Securities and Exchange Commission, Regulation Crowdfunding: A Small Entity Compliance Guide for Issuers, footnote 2, April 5, 2017, <https://www.sec.gov/info/smallbus/secg/rccomplianceguide-051316.htm> (accessed October 21, 2019).

exemption from registration for *intrastate* offerings.<sup>2</sup> As stated above, the bill provides an intrastate crowdfunding exemption from registration under the Ohio Securities Law. To qualify for the Ohio exemption, an offering and sale of securities must meet the bill's requirements for an "**OhioInvests offering**."<sup>3</sup> It must also qualify for the federal exemption for intrastate offerings.<sup>4</sup> As such, there are limitations as to the issuers that can participate, the offerings that can be made, the individuals that can invest, and the intermediaries that can act as portal operators for purposes of conducting the transactions.

## Issuer

The bill requires that the issuer be an **OhioInvests issuer** on the date its securities are first offered for sale in the offering and continuously through the closing of the offering.<sup>5</sup> An "**OhioInvests issuer**" is an entity organized under Ohio law, other than a general partnership, that satisfies the requirements under the federal exemption for intrastate offers and sales of securities and, in addition, meets **ALL** of the following requirements:

1. The entity meets at least **one** of the following conditions:
  - a. The principal office of the entity is located in Ohio;
  - b. As of the last day of the entity's most recent semiannual fiscal period, at least 80%, as described under federal law, of the entity's assets were located in Ohio; or
  - c. The entity derived at least 80%, or other threshold permitted under federal law, of its gross revenues from the operation of a business in Ohio during the previous fiscal year, if the OhioInvests offering begins during the first six months of the entity's fiscal year, or during the 12 months ending on the last day of the sixth month of the entity's current fiscal year, if the offering begins following the last day. This condition does not apply, however, if the entity's gross revenue during the most recent 12-month period did not exceed \$5,000.
2. As to itself or any other person, the entity does not attempt to limit any liability under, or avoid any prohibition in, the Ohio Securities Law;
3. The entity is not any of the following:
  - a. Engaged in the business of investing, reinvesting, owning, holding, or trading in securities, but it may hold securities of one class in an entity that is not itself engaged in the business of investing, reinvesting, owning, holding, or trading in securities;

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<sup>2</sup> 17 Code of Federal Regulations (C.F.R.) 230.147A.

<sup>3</sup> R.C. 1707.03(Z) and 1707.05(B).

<sup>4</sup> R.C. 1707.051(B).

<sup>5</sup> R.C. 1707.051(A).

- b. Subject to the reporting requirement under federal securities laws;<sup>6</sup>
- c. Issuing fractional undivided interests in oil or gas rights, or a similar interest in other mineral rights, or engaging primarily in petroleum, gas, or hydraulic fracturing exploration, production, mining, or other extractive industries;
- d. Issuing life settlement interests;
- e. Engaged as a substantial part of its business in the purchase, sale, or development of commercial paper, notes, or other indebtedness, financial instruments, securities, or real property; purchasing, selling, or holding for investment commercial paper, notes, or other indebtedness, financial instruments, securities, or real property; or otherwise making investments; or
- f. A commodity pool, equipment leasing program, or a real estate investment trust.<sup>7</sup>

### **Ineligibility**

Certain issuers, however, are not eligible to use the exemption provided by the bill.<sup>8</sup> The following are some of the disqualifying factors:<sup>9</sup>

***Felony or misdemeanor conviction:*** An issuer is not eligible for the OhioInvests exemption if the issuer or any “affiliated party” (see “**Definition – affiliated party,**” below) has been convicted within ten years before the offering of any felony or misdemeanor (1) in connection with the purchase or sale of any security, (2) involving the making of any false filing with the Securities and Exchange Commission (SEC) or a state securities commissioner, or (3) arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser, or paid solicitor of purchasers of securities.

***Other court order, judgment, or decree:*** An issuer is not eligible for the OhioInvests exemption if the issuer or affiliated party was subject to a court order, judgment, or decree within five years before the sale, that, at the time of the sale, prohibits the person from engaging in any conduct or practice described in the preceding paragraph.

***Final order:*** An issuer is not eligible for the OhioInvests exemption if the issuer or affiliated party was subject to a final order of a state or federal agency (1) that at the time of the offering, prohibits the person from engaging in the business of securities, insurance, or banking or (2) that is based on a violation of a law or regulation that prohibits fraudulent, manipulative, or deceptive conduct entered within ten years before the offering.

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<sup>6</sup> 15 United States Code (U.S.C.) 78m and 78o(d).

<sup>7</sup> R.C. 1707.05(A).

<sup>8</sup> R.C. 1707.058.

<sup>9</sup> R.C. 1707.058(B).

***SEC or state securities commissioner order:*** An issuer is not eligible for the OhioInvests exemption if the issuer or affiliated party is subject to an SEC order or an order from a state securities commissioner that, at the time of the offering, does any of the following:

- Suspends or revokes the person’s license or registration as a broker, dealer, municipal securities dealer, or investment adviser;
- Places limitations on the activities, functions, or operations of the person;
- Bars the person from being associated with any entity or from participating in the offering of any penny stock.

In addition, an issuer is not eligible for the OhioInvests exemption if the issuer or affiliated party was subject to an SEC order or a state securities commissioner order entered within ten years before the sale that, at the time of the sale, orders the person to *cease and desist* from committing or causing a violation or future violation of any intent-based federal securities laws related to antifraud or interstate sales of securities, any state securities law involving fraudulent, manipulative, or deceptive conduct, or any state securities law requiring the registration of securities or state registration as a broker, dealer, agent, salesperson, investment adviser, or OhioInvests portal.

An issuer also is not eligible for the OhioInvests exemption if the issuer or affiliated party filed as a registrant or issuer, or was named as an underwriter in, any registration statement or Regulation A offering statement filed with the SEC or a state securities commissioner that, within five years before the sale, was the subject of a *refusal order, stop order, or order suspending* the Regulation A exemption or, if at the time of the sale, was the subject of an investigation or proceeding to determine whether a stop order or a suspension order should be issued.

***Trade group association suspension or debarment:*** An issuer is not eligible for the OhioInvests exemption if the issuer or affiliated party was subject to a suspension, expulsion, or debarment from membership or association with a registered national securities exchange or a registered national or affiliated securities association for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade.

***U.S. Postal Service action:*** An issuer is not eligible for the OhioInvests exemption if the issuer or affiliated party is subject to:

- A U.S. Postal Service false representation order entered within five years before the offering;
- A temporary restraining order or preliminary injunction with respect to conduct alleged by the U.S. Postal Service to constitute a scheme or device for obtaining money or property through the mail by means of false representations.

### **Limitation on ineligibility**

The disqualifying factors stated above do not apply:

1. With respect to any conviction, order, judgment, decree, suspension, expulsion, or bar that occurred or was issued before the bill's effective date;
2. If, upon a showing of good cause and without prejudice to any other action, the Division of Securities determines that it is not necessary under the circumstance that an exemption be denied;
3. If, before the relevant offering, the court that entered the relevant order, judgment, or decree advises in writing that the disqualification should not be a consequence of that court action; or
4. If the issuer establishes to the Division that it did not know and, in the exercise of reasonable care, could not have known that a disqualification existed.<sup>10</sup>

Events relating to any affiliated issuer that occurred before the affiliation arose is not to be considered disqualifying if the affiliated entity is not in control of the issuer or is not under common control with the issuer by a third party that was in control of the affiliated entity at the time of the events.<sup>11</sup>

### **Definition – affiliated party**

As used in this context, "affiliated party" means any (1) predecessor to the issuer, (2) affiliated issuer, (3) director, executive officer, other officer participating in the offering, general partner, or managing member of the issuer, (4) beneficial owner of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power, (5) promoter connected with the issuer in any capacity at the time of the sale, (6) investment manager of an issuer that is a pooled investment fund, (7) general partner or managing member of any investment manager participating in the offering, (8) director, executive officer, or other officer participating in the offering of any investment manager or general partner or managing member of the investment manager participating in the offering.<sup>12</sup>

### **The offering**

An "**OhioInvest offering**," defined as an offer, or an offer and sale, of securities by an OhioInvests issuer that is exempt from registration under the bill, must meet the requirements under the federal exemption for intrastate offerings and all of the following conditions:

- It expires within 12 months;
- In any 12-month period, the issuer does not raise more than \$5 million in connection with one or more OhioInvests offerings;
- The issuer uses at least 80% of the offering's net proceeds in connection with the operation of its business in Ohio;

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<sup>10</sup> R.C. 1707.058(C).

<sup>11</sup> R.C. 1707.058(D).

<sup>12</sup> R.C. 1707.058(A).

- All payments for the purchase of securities are held in escrow until the aggregate capital deposited into escrow from all purchasers is equal to or greater than the stated minimum offering amount. If the minimum offering amount is not raised by the stipulated expiration date, all purchasers receive a return of all their subscription funds;
- The offering meets other requirements that the Division prescribes for the protection of investors and the public interest.<sup>13</sup>

Not less than ten days before the beginning of an OhioInvests offering, the issuer must provide the Division with (1) a notice of a claim of exemption from registration, (2) a copy of the disclosure document that will be given to prospective purchasers (see below), (3) a \$50 filing fee, and (4) any other information the Division requires from the issuer or portal for the protection of investors and to enable the Division to determine that the sale of securities is entitled to an exemption.<sup>14</sup>

### **Advertisement**

An OhioInvests offering can be advertised only if the advertisement complies with all applicable Ohio and federal laws and contains disclaiming language clearly stating that the advertisement is not the actual offering, the offering is being made in reliance on the exemption provided under the bill, the offering is directed only to Ohio residents, and all offers and sales are made through an OhioInvests portal (see below). The only other information that can be included in the advertisement is (1) the issuer's name and contact information, (2) a brief description of the type of business conducted by the issuer, (3) the minimum offering amount the issuer is attempting to raise, (4) a description of how the funds raised will be used, (5) how long the offering will remain open, (6) the issuer's logo, and (7) the OhioInvests portal through which the offer is being made.<sup>15</sup>

### **The investors**

*Only Ohio residents* can purchase securities offered in an OhioInvests offering. In addition, no single purchaser can purchase more than \$10,000 in the aggregate in a 12-month period of securities in connection with OhioInvests offerings unless the purchaser is an accredited investor under the federal securities law. An accredited investor may purchase from all OhioInvests offerings in a 12-month period up to \$10,000 or a greater amount that does not exceed 10% of the accredited investor's annual income or net worth, whichever is less.<sup>16</sup> All investors are allowed to cancel the investment commitment for any reason for a period of time specified in the issuer's offering materials. That period of time must be at least five business

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<sup>13</sup> R.C. 1707.05(B) and 1707.051(A) to (E), (J), and (M).

<sup>14</sup> R.C. 1707.051(K).

<sup>15</sup> R.C. 1707.051(L).

<sup>16</sup> R.C. 1707.051(F) and 1707.056(A)(3).

days after the date of commitment. However, an investment commitment cannot be cancelled during the 48 hours prior to the offering deadline identified in the issuer's offering materials.<sup>17</sup>

## **The intermediary; the OhioInvests portal**

The sale of the securities must be conducted exclusively through an OhioInvests portal. An "**OhioInvests portal**" is defined as a website that is operated by a portal operator for the offer or sale of securities of an OhioInvests issuer. The website cannot, however, use the word "OhioInvests" in its internet address.<sup>18</sup>

A "**portal operator**" is an entity, including an issuer, that (1) is authorized to do business in Ohio and (2) is licensed with the Division in accordance with the bill or is a licensed dealer under the Ohio Securities Law.<sup>19</sup> Portal operators under the bill are subject to the same regulation and enforcement by the Division of Securities that exists for licensees in Ohio that hold individual dealer, salesperson, investment advisor, or an investment advisor representative license, which include criminal penalties the degree of which depends on the value of the funds or securities involved.<sup>20</sup> In addition, the bill permits the Division to prescribe reasonable rules regarding the acts and practices of a portal operator for the protection of investors.<sup>21</sup>

A person, other than a licensed dealer, is prohibited from offering or selling securities pursuant to an OhioInvests offering or otherwise acting as a portal operator unless the person is licensed as a portal operator by the Division or is transacting business through a portal operator licensed by the Division. A license application for a portal operator license must be filed with the Division and include the information, materials, and forms specified in rules adopted by the Division, a \$100 filing fee, and a copy of the articles of incorporation or other documents that indicate the entity's form of organization. If the Division approves the application, it will issue a license, valid for one year. The entity may submit a renewal application annually with a \$100 renewal fee.<sup>22</sup>

When conducting an OhioInvests offering, the portal must implement steps to limit website access to only Ohio residents and must make reasonable efforts to verify that purchasers do not exceed the purchase limitations. Additionally, it cannot allow the offering to be viewed by a prospective purchaser until (1) the portal operator verifies, through its exercise of reasonable steps, that the prospective purchaser is an Ohio resident and (2) the prospective purchaser makes an affirmative acknowledgment, electronically through the portal, of the following:

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<sup>17</sup> R.C. 1707.051(H).

<sup>18</sup> R.C. 1707.05(C) and 1707.051(G).

<sup>19</sup> R.C. 1707.05(D).

<sup>20</sup> R.C. 1707.19, 1707.23, 1707.44, and 1707.99.

<sup>21</sup> R.C. 1707.19(D).

<sup>22</sup> R.C. 1707.054 and 1707.17(A)(5) and (B)(8).



I am an Ohio resident.

The securities and investment opportunities listed on this web site involve high-risk, speculative business ventures. If I choose to invest in any securities or investment opportunity listed on this web site, I may lose all of my investment, and I can afford such a loss.

The securities and investment opportunities listed on this web site have not been reviewed or approved by any state or federal securities commission or division or other regulatory authority, and no such person or authority has confirmed the accuracy or determined the adequacy of any disclosure made to prospective investors relating to any offering.

If I choose to invest in any securities or investment opportunity listed on this web site, I understand that the securities I will acquire may be difficult to transfer or sell, that there is no ready market for the sale of such securities, that it may be difficult or impossible for me to sell or otherwise dispose of this investment at any price, and that, accordingly, I may be required to hold this investment indefinitely.<sup>23</sup>

## Disclosures

The portal operator must make available to each prospective purchaser through the portal a copy of the issuer's balance sheet and income statement and a downloadable disclosure document that contains certain information, including the following:

--Specific information about the issuer, such as the type of entity it is, the address and telephone number of its principal office, formation history for the previous five years, the identity of all persons owning more than 10% of any class of equity interest in the issuer, the identity and experience of its members and executive management, the material facts of its business plan and capital structure, any material risks, and its intended use of the offering proceeds;

--Specific information regarding the securities being offered, such as the terms and conditions of the securities; the price per share, unit, or interest of the securities; a description of any outstanding securities of the issuer; the minimum and maximum amount being offered; any restrictions on the transfer of the securities; and the date on which the offering will expire;

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<sup>23</sup> R.C. 1707.05(C) and 1707.056(A)(3).

--Either the percentage of economic ownership of the issuer represented by the offered securities or the valuation of the issuer implied by the price of the offered securities;

--The identity of and consideration payable to any person who has been retained by the issuer to assist in conducting the offering and sale, including a portal operator;

--A description of any pending material litigation or regulatory action involving the issuer;

--A copy of the escrow agreement between the escrow agent, the issuer, and, if applicable, the portal operator;

--A statement that the securities have not been registered under federal or state securities law, that the securities are subject to limitation on resale, and that any future issuance of securities might dilute the value of the securities being offered;

--A statement, printed in boldface type of the minimum size of ten points, as follows (for reference, the statement below is in ten-point type, rather than the normal 12-point type used in analyses):

**IN MAKING AN INVESTMENT DECISION, PURCHASERS MUST RELY ON THEIR OWN EXAMINATION OF THE ISSUER AND THE TERMS OF THE OFFERING, INCLUDING THE MERITS AND RISKS INVOLVED. THESE SECURITIES HAVE NOT BEEN RECOMMENDED BY ANY FEDERAL OR STATE SECURITIES COMMISSION OR DIVISION OR OTHER REGULATORY AUTHORITY. FURTHERMORE, THE FOREGOING AUTHORITIES HAVE NOT CONFIRMED THE ACCURACY OR DETERMINED THE ADEQUACY OF THIS DOCUMENT. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE. THESE SECURITIES ARE SUBJECT TO RESTRICTIONS ON TRANSFERABILITY AND RESALE AND MAY NOT BE TRANSFERRED OR RESOLD EXCEPT AS PERMITTED BY 17 C.F.R. 230.147A(e) AND THE APPLICABLE STATE SECURITIES LAWS, PURSUANT TO REGISTRATION OR EXEMPTION THEREFROM. PURCHASERS SHOULD BE AWARE THAT THEY WILL BE REQUIRED TO BEAR THE FINANCIAL RISKS OF THIS INVESTMENT FOR AN INDEFINITE PERIOD OF TIME.**

--All material information necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading and such other information as the Division may require.<sup>24</sup>

### **Certification**

The portal operator must obtain from each prospective purchaser a certification that is either in written or electronic form and that, at a minimum, states the following:

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<sup>24</sup> R.C. 1707.05(F), 1707.051(I)(1) and (2), and 1707.052.

I UNDERSTAND AND ACKNOWLEDGE THAT:

If I make an investment in an offering through this OhioInvests portal, it is very likely that I am investing in a high-risk, speculative business venture that could result in the complete loss of my investment, and I need to be able to afford such a loss.

This offering has not been reviewed or approved by any state or federal securities commission or division or other regulatory authority and that no such person or authority has confirmed the accuracy or determined the adequacy of any disclosure made to me relating to this offering.

If I make an investment in an offering through this OhioInvests portal, it is very likely that the investment will be difficult to transfer or sell and, accordingly, I may be required to hold the investment indefinitely.

By entering into this transaction with the company, I am affirmatively representing myself as being an Ohio resident at the time that this contract is formed, and if this representation is subsequently shown to be false, the contract is void.<sup>25</sup>

### **Investment advice; compensation; fees**

The bill prohibits a portal operator that is not a licensed dealer under the Ohio Securities Law from doing any of the following:

--Offering investment advice or recommendations, or soliciting the purchase or sale of securities. This does not include selecting, or performing due diligence with respect to, issuers or offerings to be listed or providing general investor education materials;

--Providing transaction-based compensation to employees, agents, or other persons for securities sold unless those persons are licensed under the Ohio Securities Law and are permitted to receive such compensation;

--Charging a fee to the issuer for an offering of securities on the portal unless the fee is (1) a fixed amount for each offering, (2) a variable amount based on the length of time the securities are offered on the portal, or (3) a combination of such fixed or variable amounts;

--Handling purchaser funds or securities, unless the portal operator is the issuer;

--Allowing its officers, directors, partners, or any other person with similar status or function, to have a financial interest in an OhioInvests issuer using the services of the portal

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<sup>25</sup> R.C. 1707.051(l)(3) and 1707.053.

operator, or receive such a financial interest as compensation for services provided to or for the benefit of the OhioInvests issuer, in connection with the offer and sale of its securities.<sup>26</sup>

### **Fraudulent, deceptive, or manipulative acts**

The bill prohibits a portal operator from knowingly employing any device, scheme, or artifice to defraud or engaging in any act, practice, or course of business that operates as a fraud or deceit or that is fraudulent, deceptive, or manipulative. A person who violates this prohibition is guilty of a felony ranging from a fifth degree felony to a first degree felony, depending on the value of the funds or securities involved. The Division may adopt rules that are reasonably designed to prevent these acts, practices, or courses of business.<sup>27</sup>

### **Examination of records; recordkeeping**

A portal operator must provide the Division with read-only access to the administrative sections of its OhioInvests portal. It must also furnish, upon the Division's request, any of the records the bill requires the portal operator to maintain in relation to issuers, purchasers, and offerings.<sup>28</sup> However, failure of a portal operator that is not the issuer to comply with the recordkeeping requirements does not affect the OhioInvests issuers' exemption from registration under the bill.<sup>29</sup>

A portal operator must maintain and preserve records, for a period of at least five years, in a way that (1) allows for the immediate location of the document, (2) retains the documents exclusively in a nonrewriteable, nonerasable format, (3) verifies automatically the quality and accuracy of the storage recording process, (4) serializes the originals, and (5) allows indexes and records preserved to be downloaded to an acceptable medium. If the records retention system commingles records required to be retained with other records, the Division can review all of the commingled records.

The following records must be maintained in the manner described above:

- The name of each issuer whose securities have been listed on its OhioInvests portal and the full name, residential address, Social Security number, date of birth, and copy of a state-issued identification of all owners with greater than 10% voting equity in the issuer;
- Copies of all offering materials that have been displayed on its OhioInvests portal;
- The names and other personal information of each purchaser who has registered at its OhioInvests portal. (Except when disclosing to the Division, a portal operator is prohibited from disclosing personal (identifying) information without the written or

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<sup>26</sup> R.C. 1707.055.

<sup>27</sup> R.C. 1707.44(Q) and 1707.99.

<sup>28</sup> R.C. 1707.056(A)(1) and (2) and 1707.057.

<sup>29</sup> R.C. 1707.057(C).

electronic consent of the prospective purchaser or purchaser. This confidentiality requirement does not apply with respect to records required to be furnished to the Division under the bill or to the disclosure of personal information to an OhioInvests issuer relating to its OhioInvests offering or to the extent required under other law.)

- Any agreements and contracts between the portal operator and an issuer;
- Any information used to establish that a prospective purchaser or purchaser of securities through its OhioInvests portal is a resident of Ohio and that an issuer whose securities are listed on the portal has its principal office in Ohio; and
- Any other records the Division requires by rule to be maintained and preserved.<sup>30</sup>

## **Escrow agent and agreement**

The escrow agent used for holding payments for the purchase of securities must be a financial institution or trust company authorized to do business in Ohio. The escrow agent's duty is only to the party establishing the account unless set forth in the escrow agreement or other contract. Before contracting with an issuer, the escrow agent must search the issuer and its executive management against the Specifically Designated Nationals List (SDN) maintained by the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury. Under existing federal law, the OFAC publishes a list of SDNs, which are individuals and companies owned or controlled by terrorists and narcotics traffickers. SDN's assets are blocked and U.S. persons are generally prohibited from dealing with SDNs.<sup>31</sup>

## **Penalties; private right of action**

### **Division of Securities**

If the Division finds, after notice and an opportunity for a hearing, that a person has committed a violation of the Securities Law in connection with securities sold through an OhioInvests offering (hereinafter referred to as "violation"), the Division may order the payment of an administrative penalty *in addition to or in lieu of* any other remedy provided by law. The maximum penalty per violation is \$1,000. The total penalty, however, cannot exceed the total amount of the OhioInvests offering or offerings involved in the violation. The penalties are to be deposited into the existing Securities Investor Education and Enforcement Expense Fund.<sup>32</sup>

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<sup>30</sup> R.C. 1707.056(B) and 1707.057.

<sup>31</sup> R.C. 1707.05(F) and 1707.051(J)(2) to (4) and U.S. Department of the Treasury, Resource Center, <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> (accessed October 22, 2019).

<sup>32</sup> R.C. 1707.50(A) and (B).

The Division also may intervene as of right on behalf of the state in any private action or appeal brought by a purchaser of the securities (see below).<sup>33</sup>

## Purchasers

In addition, a purchaser of securities may commence an individual or class action to recover specific civil penalties for an alleged violation if the purchaser or the purchaser's representative:

- Brings the action within two years after the violation was committed or within two years after the purchaser discovered or should have discovered the ground for the violation, whichever is later;
- Mails to the Division, not later than ten days after the action is commenced, a file-stamped copy of the complaint; **and**
- Mails to the Division, not later than ten days from a judgment and any subsequent appeals becoming final, a file-stamped copy of the final judgment and appellate decisions.<sup>34</sup>

The civil penalty authorized by the bill is based on the total amount raised in the OhioInvests offering *as of the time of the violation*. If that amount is less than \$25,000, the penalty per violation is \$100. If that amount is \$25,000 or more, the penalty per violation is \$250. In either case, the total penalty cannot exceed the total amount of the OhioInvests offering or offerings involved in the violation. A court may, however, award a lesser amount if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is "unjust, arbitrary and oppressive, or confiscatory."<sup>35</sup>

Purchasers that prevail in an action receive 75% of the total amount awarded. The other 25% is to be deposited into the GRF for payment of debt service on direct obligations of the state. The purchasers are also entitled to reasonable attorney's fees and costs as determined by the court. The bill does not preclude purchasers from also proceeding with any other cause of action available to them.<sup>36</sup>

The bill prohibits any person from knowingly engaging in any act, practice, or course of business that would interfere with a purchaser's ability to bring such an individual or class action.<sup>37</sup>

The bill states that, in enacting the private cause of action described above, the General Assembly finds all of the following:

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<sup>33</sup> R.C. 1707.50(E).

<sup>34</sup> R.C. 1707.50(C)(1).

<sup>35</sup> R.C. 1707.50(C)(2) and (3).

<sup>36</sup> R.C. 1707.50(C)(4) to (6).

<sup>37</sup> R.C. 1707.50(D).

1. While adequate financing of essential investor protection enforcement is necessary to achieve maximum compliance with state law, to ensure an effective disincentive for businesses that raise money via crowdfunding to engage in unlawful, fraudulent, and anticompetitive business practices, and to provide appropriate regulation of an emerging and quickly evolving industry;
2. Although self-policing efforts by industry watchdog groups may have some success in educating some fundraisers about their obligations under state consumer and investor laws, in other cases the only meaningful deterrent to unlawful conduct is the vigorous assessment and collection of civil penalties;
3. It is in the public interest to provide that civil penalties for violations of law may also be assessed and collected by aggrieved crowdfunding investors acting as private attorneys general enforcement.<sup>38</sup>

### Conforming changes

The bill makes a number of conforming changes.<sup>39</sup>

### Local government entities as portal operators

The bill expressly permits port authorities and community improvement corporations to act as portal operators for purposes of an OhioInvests offering.<sup>40</sup>

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## HISTORY

Action	Date
Introduced	07-17-19
Reported, H. Financial Institutions	11-14-19
Passed House (92-0)	11-19-19

H0312-PH-133/ts

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<sup>38</sup> Section 3.

<sup>39</sup> R.C. 145.114, 742.114, 1707.01, 1707.04, 1707.042, 1707.10, 1707.13, 1707.161, 1707.19, 1707.20, 1707.21, 1707.24, 1707.25, 1707.26, 1707.261, 1707.27, 1707.28, 1707.29, 1707.30, 1707.31, 1707.32, 1707.34, 1707.35, 1707.38, 1707.39, 1707.391, 1707.40, 1707.431, 1707.99, 3307.152, 3309.157, and 5505.068.

<sup>40</sup> R.C. 1724.02, 4582.06, and 4582.31.