



# Common Sense Initiative

**Mike DeWine**, Governor  
**Jon Husted**, Lt. Governor

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## Business Impact Analysis

Agency, Board, or Commission Name: Securities

Rule Contact Name and Contact Information:

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Regulation/Package Title (a general description of the rules' substantive content):

Five-year Rule Review 2021

Rule Number(s): 1301:6-3-19; 1301:6-3-23; 1301:6-3-39.1; 1301:6-3-44; 1301:6-3-48

Date of Submission for CSI Review: March 4, 2021

Public Comment Period End Date: March 22, 2021

Rule Type/Number of Rules:

- New/\_\_\_ rules  No Change/\_2\_ rules (FYR? \_\_\_)  
 Amended/\_3\_ rules (FYR? \_\_\_)  Rescinded/\_\_\_ rules (FYR? \_\_\_)

The Common Sense Initiative is established in R.C. 107.61 to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. Under the Common Sense Initiative, agencies must balance the critical objectives of regulations that have an adverse impact on business with the costs of compliance by the regulated parties. Agencies should promote transparency, responsiveness, predictability, and flexibility while developing regulations that are fair and easy to follow. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

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## **Reason for Submission**

- 1. R.C. 106.03 and 106.031 require agencies, when reviewing a rule, to determine whether the rule has an adverse impact on businesses as defined by R.C. 107.52. If the agency determines that it does, it must complete a business impact analysis and submit the rule for CSI review.**

**Which adverse impact(s) to businesses has the agency determined the rule(s) create?**

**The rule(s):**

- a. Requires a license, permit, or any other prior authorization to engage in or operate a line of business.
- b. Imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action for failure to comply with its terms.
- c. Requires specific expenditures or the report of information as a condition of compliance.
- d. Is likely to directly reduce the revenue.

## **Regulatory Intent**

- 2. Please briefly describe the draft regulation in plain language.**

*Please include the key provisions of the regulation as well as any proposed amendments.*

These rules contain prohibited activity; limitations on the Division; procedure to qualify for a retroactive exemption, qualification or registration; and records retention.

- 1301:6-3-19 – This rule accomplishes two needs. It defines prohibited activity for dealers and salespersons. Also, to obtain and maintain a license pursuant to RC Chapter 1707 the person must be found to be of good business repute. This rule provides a definition of what constitutes good business repute. The proposed change is to reflect changes made in the federal conduct standard for broker-dealers (Regulation Best Interest).
- 1301:6-3-23 – RC 1707.23 gives the Division the authority to conduct investigative hearings. This rule creates certain parameters for the Division and rights for the respondent, in conducting such a hearing. No change is proposed.
- 1301:6-3-39.1 – RC 1707.391 states there are occasions where neglect to timely file is considered excusable and this rule sets out the mechanism for an applicant to apply,

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pursuant to RC 1707.391, for retroactive filing and, upon compliance, to have the file considered as though timely filed. The proposed amendments are to reflect elimination of federal rule analog; clarifying the term “promptly” for purposes of assessing the corrective period for a late RC 1707.03(X) issuer; to grant Regulation A and Regulation Crowdfunding notice filers corrective filing relief.

- 1301:6-3-44 – This rule provides for general prohibitions, comparable to those that exist for dealers and salespersons, and dealing with advertisements; how customer funds are held in custody; under what circumstances a solicitor may be used; information to be disclosed to clients; and compliance practices. The proposed changes will update custody rule and clarify the fiduciary duties owed by investment advisers and investment adviser representatives, to align with a majority of state model rules and federal and state common law.
- 1301:6-3-48 – This rule supplements the Division’s records retention statute, RC 1707.48. The rule provides for specific types of records that the Division receives or creates and sets a minimum time for the retention of those records. No change is proposed.

**3. Please list the Ohio statute(s) that authorize the agency, board or commission to adopt the rule(s) and the statute(s) that amplify that authority.**

Ohio Revised Code Sections 1707.20 and 1707.391. The rules amplify: RC 1707.19, 1707.23, 1707.391, 1707.44 and 1707.48, respectively.

**4. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program? If yes, please briefly explain the source and substance of the federal requirement.**

No

**5. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

Not applicable

**6. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?**

- 1301:6-3-19 – The term “good business repute” is used in RC 1707.19 without being defined. In addition, rules prescribing fraudulent, evasive, deceptive and grossly unfair practices or devices are to be defined by the Division. The rule provides notice

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to the licensees, and the public, what conduct is prohibited and what constitutes good business repute, or lack thereof.

- 1301:6-3-23 – To investigate violations of the Ohio Securities Act, the Division is given the authority to conduct investigative hearings. The rule sets out how a hearing will be conducted and what limitations are placed on the Division and the outcome of the hearing to comply with due process and provide transparency in the hearing process.
- 1301:6-3-39.1 - RC 1707.391 was created to excuse a late filing. There are statutory exemptions and registrations that require a filing be made within a certain time-frame (e.g.: within 60 days of the last sale – RC 1707.03(Q)) and failure to timely file, even by one day, causes a violation of the Securities Act by selling unregistered securities. It was recognized that such strict liability was, under some circumstances, overly harsh. This rule defines “excusable neglect” and provides a mechanism for an issuer who has filed late to have the late filing excused and the securities sold considered not in violation of the Act.
- 1301:6-3-44 – RC 1707.19(C) gives the Division the responsibility to prescribe rules relating to investment advisers and investment adviser representatives. RC 1707.44(M) contains prohibited conduct and states the Division may create rules reasonably designed to prevent acts, practices, or courses of business that are fraudulent, deceptive, or manipulative. 1301:6-3-44 is intended to work in conjunction with the other IA and IAR rules to create a system comparable with the federal regulation of IAs and IARs for the protection of the public and the marketplace. Federal law (Investment Advisers Act of 1940) and case law have long imposed a fiduciary obligation on investment advisers and their representatives. The purpose of the proposed specific Ohio prohibition is to explicitly state that such fiduciary duty is an Ohio requirement for the protection of the investing public.
- 1301:6-3-48 – This rule provides more detail relating to specific records created or received by the Division. It puts the public on notice how long those records will be maintained, promoting transparency.

**7. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?**

These rules cover a range of areas within the securities field, but success will be measured generally by how well the regulations balance the goal of investor protection and the goal of a fair and strong market. The Division encourages feedback, during Advisory group meetings at its Annual Conference and throughout the year.

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- 8. Are any of the proposed rules contained in this rule package being submitted pursuant to R.C. 101.352, 101.353, 106.032, 121.93, or 121.931?**

*If yes, please specify the rule number(s), the specific R.C. section requiring this submission, and a detailed explanation.*

No

### **Development of the Regulation**

- 9. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.**

*If applicable, please include the date and medium by which the stakeholders were initially contacted.*

See attached list. Stakeholders were emailed a package of the rules with a cover letter indicating which rules were No Change and which were amendments. The email was sent February 8, 2021, and comments were requested by February 19, 2021.

- 10. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?**

No input was provided by stakeholders during the early outreach period.

- 11. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?**

The rules follows statutory requirements relating to the Revised Code and the applicable federal law. Since the general structure of the rules has been in place for several years, the Division has taken advantage of opportunities to revise the rules.

- 12. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?**

The rules herein are based on long-standing state and federal regulation. No other alternatives were required, either because it would cause conflict with the federal requirements or case law, or alter the expectations of the industry and the public.

- 13. Did the Agency specifically consider a performance-based regulation? Please explain. *Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.***

These rules generally limit actions, or require disclosure, that will act in the best interest of the market and for the protection of the public. Specific actions are only required in the preparation or dissemination of information.

**14. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?**

The Division is the only Ohio agency regulating in this area. All statutes and rules governing, or enforced by, the Division were reviewed to ensure there were no duplications or conflicts. As applicable, federal law is reviewed to avoid duplication or conflict.

**15. Please describe the Agency’s plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.**

These rules have been in place for a significant number of years, providing industry and the investing public notice. The general application of the rules will not change. Those changes that are proposed will be widely disseminated and discussed before application. Because the rules are widely distributed, and the Division staff is accessible, transparency of implementation provides predictable application.

**Adverse Impact to Business**

**16. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:**

**a. Identify the scope of the impacted business community; and**

The rules will impact all licensees and other regulated persons, including persons acting in violation of the Securities Act.

**b. Identify the nature of all adverse impact (e.g., fees, fines, employer time for compliance,); and**

There could be time spent planning to prevent a prohibited activity. IAs will spend time and costs associated with providing clients with the necessary communications. To apply for a retroactive exemption, qualification, or registration an issuer will have to prepare a sworn statement to comply with the requirements of RC 1707.391.

**c. Quantify the expected adverse impact from the regulation.**

*The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a “representative business.” Please include the source for your information/estimated impact.*

- 1301:6-3-19 – There will be time and cost associated with establishing procedures to avoid prohibited activity. The cost will depend on the size of the business and the level of outsourcing.
- 1301:6-3-23 – The only costs will be to the Division

- 1301:6-3-39.1 – The time to prepare the form 391 and the sworn statement should be less than one hour.
- 1301:6-3-44 – In setting up an IA business, various bookkeeping and systems will have to be established. The size of the business, and the type and volume of clients will make the costs associated with the business vary as will the amount, if any, of compliance work that is outsourced. As a general guide, we have been given the estimate by an outside vendor of a one-time cost of \$3-to 5,000 to file the license applications and set up all the internal procedures and compliance manuals to begin the business. Once operational, the ongoing bookkeeping time will be an hour or more each day, as in any business, plus the mandatory client communications.
- 1301:6-3-48 – This is an internal rule to the Division and the only costs will be incurred by the Division.

**17. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?**

The compliance requirements mirror the federal requirements which were in place prior to the states taking over regulation of the smaller IAs. These rules promote safety and equality in the market by imposing the same recordkeeping and disclosure expectations on all firms. The rules protect the investing public and promote efficiency and confidence in the market.

**Regulatory Flexibility**

**18. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.**

1301:6-3-39.1 is primarily for smaller issuers. Smaller issuers, including those who act without counsel, are more likely to fail to timely file. The provision allowing solicitors in 1301:6-3-44(C) was created to permit smaller IAs to utilize unlicensed assistance under limited circumstances. This particularly assists solo practitioners

**19. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?**

When the Division examines a licensee and determines there are deficiencies, communications begin to bring the licensee into compliance. For violations such as recordkeeping, there are frequently multiple communications between the Division and the licensee.

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**20. What resources are available to assist small businesses with compliance of the regulation?**

The Division receives, and responds to, phone calls on a regular basis from issuers and practitioners that wish to discuss an issue or the interpretation of a rule or statute. We accept federal forms for purposes of the filing in Ohio. The Division's annual Securities Conference provides for meetings with the industry and the Bar to begin or continue conversations regarding the Division's rules. The rules are widely disseminated, and changes are typically noted in the Ohio Securities Bulletin.

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