Testimony of the Institute for Portfolio Alternatives
to the Joint Committee on Agency Rule Review
Concerning
Proposed Revisions to OAC 1301-6-3-09 (the "Proposal")
of the Ohio Department of Commerce, Division of Securities

August 14, 2023

Chair Callender, Vice-Chair Gavarone, Members of the Committee:

The Institute for Portfolio Alternatives appreciates the opportunity to testify on the Proposal. We represent, among other firms, the sponsors and distributors of state and federally regulated, nonlisted real estate investment trusts and business development companies who are subject to the Proposal.[1]

Nonlisted REITs are investment funds that hold real estate assets and "BDCs" are business development companies that hold interests and loans to small businesses. Nonlisted REITs and BDCs provide important investment opportunities to Ohio investors, providing them with portfolio diversification, a source of income, and other benefits. Nonlisted REITs and BDCs are managed by some of the largest asset management companies in the world and are distributed through large wirehouse broker-dealers, investment advisers, and independent broker-dealers – all of whom are regulated under federal and state law.

[1] For over 35 years, the Institute has advocated for increased investor access to alternative investment strategies with low correlation to equity markets, as part of a diversified portfolio. Such strategies include real estate, public and private credit and other real assets through investment vehicles such as REITs, BDCs, closed-end funds, interval funds and private placements, among others. With nearly $300 billion in capital investments, these portfolio diversifying investments are a critical component of an effectively balanced investment portfolio and serve an essential capital formation function for our national, state and local economies.

1. The Division's Mandates Exceed Federal Law.

Unfortunately, the Ohio Securities Division imposes some of the most restrictive conditions on nonlisted REITs and BDCs of any administrator in the country. Sponsors of these products must incur significant time and energy to get their offerings cleared in Ohio. The Proposal would exacerbate these expenses, which are eventually borne by Ohio and other shareholders.

The Division imposes these rules informally, without submitting them to the CSI or JCARR. The Division issues these rules through comment letters, staff bulletins, merit review standards, and the statements of policy of the North American Securities Administrators Association ("NASAA"), the trade association for state securities regulators.

The Division does not give Ohio businesses or investors any notice or warning that it is going to issue one of these informal rules. The Division provides no opportunity to comment. The Division does not explain how these informal rules are justified by any economic analysis or rationale.

The Division's informal rules have a national impact. All nonlisted REITs and BDCs that are filed with the Division are also being reviewed by the United States Securities and Exchange Commission ("SEC"). Once the SEC declares a registration statement effective, then *under federal law* the product may be sold anywhere in the United States. In Ohio, however, the fact that a nonlisted REIT or BDC offering has been registered with the SEC is irrelevant. The Division will impose conditions that the SEC has not imposed. The Division will even impose conditions that *conflict* with the SEC's position. Nonlisted REITs and BDCs have to comply with these conditions in order to register in Ohio.

In late 2021, the Division promised to Chair Callender that it would submit its informal rules to JCARR. The Division estimated that this project would take about six months. In April 2022, the Division proposed to submit 60 wide-ranging principles of law or policy to JCARR. The Division gave Ohio businesses and investors only 10 calendar days to review and comment on the proposal.

After April 2022 the Division took no further action. JCARR finally requested that the Division appear at a hearing in December 2022 to explain why it had not

submitted its principles of law or policy to JCARR. Following this hearing, JCARR took an unprecedented action: It ordered the Division to submit the Proposal to JCARR under R.C. 101.352.

The Division reissued the Proposal earlier this year. It asked for comment within 14 calendar days – a totally unreasonable deadline given the breadth of the Proposal. The Institute and other commenters requested an extension. The Division did not grant an extension and stood by its deadline of February 3rd. We commentators had to rush to review the Proposal, consult with our members and other interested parties, draft comments, and submit our comment letters to the Division. Three days later, *on February 6th*, the Division granted an "extension" until February 28th –reopening the Proposal for a second round of comments.

The Division's disregard for the rulemaking requirements under Ohio law is thus apparent. It is made even more apparent by the fact that the Division has meanwhile continued to issue new principles of law or policy without submitting them to the CSI or JCARR! The Division has continued to impose new requirements by issuing comments to filers with which they must comply for their securities to be registered in Ohio. The Division has not put these new pronouncements in the Proposal, as JCARR ordered. The Division says in the Proposal that it never will codify the informal rules that it issues through its comment letters to the industry.

We respectfully remind the Committee that the legislature passed language in the 2024-2025 operating budget bill that would have made even clearer to the Division that it has no authority to conduct this "merit review" of non-listed REIT and BDC offerings. This language would have taken care of the problem that the Committee is addressing today. Unfortunately, the Governor vetoed this provision in the operating budget bill.

2. Seven Prongs in RC Section 106.021 Require the Proposal's Invalidation.

RC Section 106.021 suggests that if an agency rulemaking does not meet all eight prongs listed in that section, JCARR should recommend to the Senate and House of Representatives the adoption of a concurrent resolution to invalidate the proposed rule. The Proposal fails to meet *seven of the eight prongs*. JCARR

should recommend that the Senate and House of Representatives adopt a concurrent resolution to invalidate the Proposal.

First, the Proposal "exceeds the scope of [the Division's] statutory authority" under Section 106.021(A). See "First Prong" below.

Second, the Proposal "conflicts with the legislative intent of the statute under which it was proposed" under Section 106.021(B). See "Second Prong" at page 5.

Third, the Proposal "conflicts with another proposed or existing rule" under Section 106.021(C). See "Third Prong" at page 6.

Fourth, the Division "has failed to prepare a complete and accurate rule summary and fiscal analysis of the" Proposal under Section 106.021(E). See "Fifth Prong" at page 7.

Fifth, the Division "has failed to demonstrate through the business impact analysis, recommendations from the common sense initiative office, and the memorandum of response that the regulatory intent of the {Proposal] justifies its adverse impact on businesses in this state under Section 106.021(F). See "Sixth Prong" at page 8.

Sixth, the Division "has failed to justify the [Proposal]" under Section 106.021(G). See "Seventh Prong" at page 11.

Seventh, the Proposal "implements a federal law or rule in a manner that is more stringent or burdensome than the federal law or rule requires" under Section 106.021(H). See "Eighth Prong" at page 15.

FIRST PRONG: The Proposal exceeds the "scope of the Division's statutory authority."

The Proposal "exceeds the scope of [the Division's] statutory authority" under Section 106.021(A).

Nonlisted REITs and BDCs are regulated by the SEC and by the Ohio Department of Commerce Division of Securities. Under Ohio Revised Code Section 1707.091, nonlisted REITs and BDCs are "registered by coordination" which means that the securities offerings in Ohio are supposed to be registered and available to Ohio investors "at the moment" that the SEC registration is effective. The Division ignores the application of Section 1707.091 and invokes an entirely different section, Section 1707.09, to conduct "registration by qualification."

By insisting upon this form of registration – which does not apply to nonlisted REITs and BDCs – the Division gives itself license to delay the offering, decide its terms, and demand that issuers comply – even after the SEC has declared the offering effective. In other words, securities that under federal law may be offered anywhere in the United States, may not be offered to Ohio investors until the Division says they may.

The Proposal by its terms, is based upon the wrong section – Section 1707.09 – and not Section 1707.091. The Division conducts its "merit review" of these offerings under Section 1707.09, and the Proposal incorporates the rules of this merit review. Therefore, the Proposal "exceeds the scope of [the Division's] statutory authority" under Section 106.021(A).

SECOND PRONG: The Proposal "conflicts with the legislative intent of the statute under which it was proposed."

The Proposal "conflicts with the legislative intent of the statute under which it was proposed" under Section 106.021(B).

A simple reading of the Ohio Revised Code reveals that nonlisted REITs and BDCs are supposed to be "registered by coordination" under Section 1707.091. Their securities registrations are supposed to occur in Ohio "at the moment" that the SEC orders it effective. The clear intention of the legislature in adopting Section 1707.091 was to ensure that the Ohio registration of these securities is coordinated with their registration by the SEC. The legislature intended that when the SEC declares these registrations to be effective and permits the securities to be publicly offered throughout the United States, that they also would be

permitted to Ohio investors. The legislature wanted to avoid the situation that exists today, in which the Division imposes requirements that exceed the federal rules, or even conflict with them.

The legislature most recently expressed its intention that "registration by coordination" means what it says when it passed the 2024-2025 operating budget bill. That bill included a provision to remove any possibility that the Division can act under the wrong section, Section 1707.09, to conduct "merit review" on nonlisted REIT and BDC registrations. Unfortunately, the Governor vetoed this provision. Nevertheless, its adoption by the House of Representatives and the Senate expresses the legislature's continued intention that under Section 1707.091 these registrations occur at the moment of SEC effectiveness – without any opportunity for the Division to delay the offering, decide its terms, and demand that issuers comply.

For these reasons, the Proposal "conflicts with the legislative intent of the statute under which it was proposed" under Section 106.021(B).

THIRD PRONG: The Proposal "Conflicts with Another Proposed or Existing Rule."

The Proposal "conflicts with another proposed or existing rule" under Section 106.021(C).

The federal securities laws comprehensively regulate nonlisted REITs and BDCs. All nonlisted REIT and BDC offerings are registered with the SEC and must receive a no-objections letter from the Financial Industry Regulatory Authority ("FINRA"). The broker-dealers who distribute nonlisted REITs and BDCs are regulated by the SEC and FINRA. Investment advisers who distribute them are regulated by the SEC and the states. Nonlisted BDCs are subject to many of the provisions of the Investment Company Act of 1940.

The Proposal conflicts with this federal regulation. Once the SEC declares a registration statement effective and the FINRA review is complete, then under federal law the offering may be sold anywhere in the United States. Nevertheless, the Division conducts a "merit review" in which it imposes additional conditions

on registration in Ohio. The Division will block an offering that federal law permits to Ohio investors, unless the REIT or BDC meets the Division's state-specific conditions. These conditions are the principles of law and policy that have "a general and uniform operation" and that the JCARR requested the Division include in the Proposal.

Even after the SEC has declared a registration effective, and despite the fact that nonlisted REITs and BDCs are sold through federally registered broker-dealers and investment advisers, the Division delays the registration of their securities in Ohio, until the issuer agrees to whatever terms are dictated by the Division. This delay means that securities that may be offered under federal law throughout the United States may not be offered in Ohio. Ohio investors are deprived of an investment opportunity that their federally registered broker-dealer or investment adviser believes would be in their best interest.

The requirements imposed by the Division, and those included in the Proposal, directly conflict with the federal rules governing the registration, operation, and distribution of nonlisted REITs and BDCs.

The Proposal thus "conflicts with another proposed or existing rule" under Section 106.021(C).

FIFTH PRONG: The Division "Has Failed to Prepare a Complete and Accurate Rule Summary and Fiscal Analysis."

The Division "has failed to prepare a complete and accurate rule summary and fiscal analysis of the" Proposal under Section 106.021(E).

The Division provides no fiscal analysis of the Proposal. The Business Impact Analysis asserts that the Proposal would not "impose fines or penalties for noncompliance." In fact, the Division claims to have enforcement authority with respect to securities offerings in Ohio. What are the Division's estimations of the amount of fines that it will collect should the Proposal be adopted? How might this enforcement authority discourage business activity in Ohio and negatively affect tax revenue in the state? What resources will the Division need to implement the Proposal? The Division has failed to provide any fiscal analysis of these questions.

As discussed in greater detail in our discussion of the Sixth Prong, the Proposal provides virtually no information about complaints from Ohio investors, Division investigations or enforcement actions, other statistical information demonstrating the types of problems that the Proposal is intended to address, or data about the Proposal's costs and benefits. What little data the Division does provide is vague and indecipherable. The public cannot interpret the data because the Division leaves out so many facts.

For these reasons, the Division "has failed to prepare a complete and accurate rule summary and fiscal analysis of the" Proposal under Section 106.021(E).

SIXTH PRONG: The Division Has Failed to Provide an Adequate Business Impact Analysis.

The Division "has failed to demonstrate through the business impact analysis, recommendations from the common sense initiative office, and the memorandum of response that the regulatory intent of the [Proposal] justifies its adverse impact on businesses in this state under Section 106.021(F).

The Proposal does not meet the standard of RC Section 106.021(F) because the Business Impact Analysis is woefully inadequate. In fact, the Division denies that the Proposal will have *any adverse business impact at all!*[2]

The BIA is not presented on the standard Ohio template that commenters can use. Rather, it is buried in approximately 5,500 pages, which commenters must pick through for relevant data. It provides virtually no information about complaints from Ohio investors, Division investigations or enforcement actions, other statistical information demonstrating the types of problems that the Proposal is intended to address, or data about the Proposal's costs and benefits. What little data the Division does provide is vague and indecipherable. The Division never corrected the misstatements of fact in the faulty BIA that it previously submitted. For these reasons, the Proposal does not meet the standard of RC Section 106.021(F).

[2] Proposal at 62.

The Division asserts that its 96-page memorandum and its lengthy attachments constitute a "business impact analysis." Agencies are supposed to complete the BIA template, not supply 5,500 pages of wide-ranging narrative that commenters must pick through to decipher the Division's business impact analysis. The Division's attempt to bury its business impact analysis in 5,500 pages exemplifies the Division's lack of transparency throughout this rulemaking.

The Division admits that it "has not publicly charged anyone in the last few years with any violations involving [nonlisted REITs and BDCs]."[3] If the Proposal were justified, then one would expect to see some evidence of abuse in Ohio. In fact, the Division provides little data concerning complaints from Ohio investors, Division investigations or enforcement actions, other statistical information demonstrating the types of problems that the Proposal is intended to address, or data about the Proposal's costs and benefits.

In the entire 5,500 pages, the Division fails to provide any estimate of the costs of complying with the NASAA statements of policy, the Division's merit standards, the concentration limit, and the other provisions of the Proposal. Federal regulators are required to provide thorough economic analyses to support their proposed rules. Under Ohio law, the Division should do the same.

What little data the Division does provide is vague and indecipherable. The public cannot interpret the data because the Division leaves out so many facts. For example, the Division claims that it examined two nonlisted REITs, but asserts that it cannot provide any details because they are "confidential."[4] The Division claims that "most investor complaints involve elderly investors" – but *all* information about these complaints is "confidential."[5]

Because the Division provides no information, we commenters cannot analyze the data. For example, the Division asserts that about 80% of Ohio

[3] Proposal at 43. Despite this absence of any Division enforcement, the Division peppered the Proposal with wild claims of Ponzi schemes, fraud and misrepresentation connected to nonlisted REITs and BDCs. *See, e.g.,* Proposal at 40, 57, 68-69, 70, 71, 76, 77, 78,79, 85.

[4] Proposal at 30, n.69.

[5] Of course, the Institute does not suggest that the Division release private customer-identifying information.

investors holding two nonlisted REITs are "near or at retirement age" – without explaining what this means.[6] Did these investors *purchase* those shares when they were near retirement age? What was the financial condition, including the liquid net worth, and financial acumen of these investors when they purchased these shares?

We have repeatedly explained to the Division why its use of FINRA arbitration data is misplaced. In its latest draft, the Division continues to rely on this data without responding to our objections. The Division uses FINRA arbitration "claims" about nonlisted REITs, but not every claim results in an award. These claims often concern a problem that has nothing to do with the product, such as a general breach of contract. Investor claims in FINRA arbitration concern the conduct of a broker-dealer, not REIT sponsors against whom the Proposal is targeted.

The Division never corrected the misstatements of fact in the faulty BIA that it previously submitted. For example, the BIA asserts that the Proposal would "allow applicants for registration to make use of federal filings to satisfy state requirements as a cost-saving measure." The reality is precisely the opposite. All public nonlisted REIT and BDC offerings are registered with the SEC and must receive a FINRA no-objections letter, at which point the offering may be sold anywhere in the United States. Nevertheless, the Division conducts a "merit review" in which it imposes additional conditions on registration in Ohio. The problem with the Division's merit review is that issuers *may not* "make use of federal filings."

The BIA asserts that the Proposal would not "impose fines or penalties for noncompliance." In fact, the Division claims to have enforcement authority with respect to securities offerings in Ohio. The Proposal would expose a nonlisted REIT or BDC to a Division enforcement case – even when it complies with federal law – if the Division decides that the REIT or BDC has not met all aspects of the Division's mandates.

For these reasons, the Division "has failed to demonstrate through the business impact analysis, recommendations from the common sense initiative office, and the memorandum of response that the regulatory intent of the

[6] Proposal at 29.

[Proposal] justifies its adverse impact on businesses in this state under Section 106.021(F).

SEVENTH PRONG: The Division "Has Failed to Justify" the Proposal.

The Division "has failed to justify the [Proposal]" under Section 106.021(G).

The latest draft contains a waiver provision from the proposed "concentration limit." The concentration limit would limit investor choice in Ohio by prohibiting any Ohio investor from investing more than 10% of the Ohio investor's liquid net worth in any nonlisted REIT or BDC, its affiliates and other issuers of the same security.

The Proposal implies that Ohio investors hold, on average, only $4,100 in nonlisted REITs.[7] While some investors may hold more, this average implies that an across-the board concentration limit is unnecessary.

As we have previously said many times, the concentration limit is unworkable because it applies to REIT and BDC sponsors who have no control over what Ohio investors may do or what Ohio financial professionals might recommend to their customers. It would restrict choice *for all Ohio investors* -- even the Ohio investor who is wealthy, understands the risks, and is advised to buy the investment by a federally-regulated investment adviser or broker-dealer.

We requested a reasonable exemption for accredited investors, who have the wealth or income to bear investment risk. The Division rejected our suggestion, arguing that the federal Securities and Exchange Commission is not doing its job because it defines "accredited investor" too broadly.[8]

The Division *does understand* the problems with the concentration limit, however. So instead of the accredited investor carve-out, the Division proposed --

[7] The Division asserts that 5,000 Ohio investors held shares in the two largest nonlisted REITs and were unable to redeem $20.5 million of their investment in these REITs between November and December 2022. Proposal at 29. The Division says that Ohio investors were able to redeem .3% of their repurchase requests. Proposal at 30. The implied average is derived as follows: ($20,500,000 X .997) /5,000 = $4,088.

[8] Proposal at 63.

for the first time – that Ohio investors notify the Division that they want to purchase more than the concentration limit allows.

The Division "has failed to justify the proposed adoption [of this new waiver provision] containing a regulatory restriction" under Section 106.021(G). The new waiver provision dramatically changes the Proposal. It would present significant compliance changes for Ohio firms and would necessitate the education of Ohio investors on how to use the new waiver form. Yet the Division has not provided Ohio investors and other stakeholders with a reasonable opportunity to comment on the new provision.

The waiver provision raises a host of questions, which the Division did not anticipate because it did not ask for the views of Ohio investors or the industry:

- How will Ohio investors know that the waiver option exists?

- Will the form be on the Division's website?

- What are the permitted reasons for which an Ohio investor may request the waiver?

- Will the Ohio investor receive confirmation that the Division has received the form and that it is in good order?

    - If so, for how long must the Ohio investor wait for this confirmation?
    - If not, how will the Ohio investor know if the form was in good order?

- The form permits a waiver not only from the concentration limit but from the NASAA statements of policy, merit standards, and advertising requirements.

    - What is the significance of a waiver from these provisions for an Ohio investor?
    - Will an investor's submission affect other similarly situated Ohio investors in the same fund or other funds?

- The form states that other federal and state conduct standards still apply to a recommendation made with a waiver. Will the Division prosecute an Ohio broker-dealer or investment adviser for unduly concentrating nonlisted REIT or BDC investments for a customer who has submitted a waiver?

- What is the implementation time for the waiver provision?

The Division must answer these questions before Ohio broker-dealers and investment advisers can decide whether to incorporate a waiver procedure into their operations. Adoption of a waiver mechanism will cost Ohio broker-dealers and investment advisers time and money. It may complicate their compliance procedures. They should have an opportunity to comment on the waiver proposal and obtain the Division's understanding of the language before they are asked to adopt the waiver into their systems.

B. The Division Did Not Request Comment on the New Concentration Limit.

The Division changed the language in the concentration limit without requesting public comment. The Division "has failed to justify the proposed adoption [of this new concentration limit] containing a regulatory restriction" under Section 106.021(G).

The new concentration limit would apply to an:

> issuer, its affiliates, and other issuers of the same security to the extent the securities held are subject to registration in accordance with sections 1707.09 and 1707.091 of the Revised Code and likewise restrict an Ohio purchaser's returns or ability to exist in whole or part for an indefinite or significant period of time.

We once again remind the Division that the new concentration limit, which it would impose on nonlisted REITs and BDCs, would fall on Ohio broker-dealers and investment advisers who are not subject to the proposal. REITs and BDCs cannot limit an Ohio investor's ability to exceed the 10% limit. They have no

influence or control over Ohio broker-dealers and investment advisers who recommend their shares to customers. Yet these Ohio broker-dealers and investment advisers will have to implement the concentration limit.

To apply the concentration limit, Ohio broker-dealers and investment advisers must understand its meaning, but the Division has given them no chance to inquire or comment, nor has the Division provided any explanation of the terms used in the new expanded concentration limit. For example:

- Does the final clause concerning "securities held" apply to securities of the issuer and its affiliates, or only other issuers of the same type of security?

- If it applies to securities of the issuer and its affiliates, do they include index funds, money market funds, and mutual funds managed by the issuer or its affiliate?

- What is the meaning of the clause "restrict an Ohio purchaser's returns or ability to exist in whole or part for an indefinite or significant period of time"?

- Why should an Ohio investor's ability to invest in securities of the issuer and its affiliates be restricted? For example, these securities may be covered securities like mutual funds, the registration of which is beyond the Division's jurisdiction.

Ohio broker-dealers and investment advisers who must implement the new concentration limit deserve a reasonable opportunity to comment and to receive the Division's answers to their questions. They cannot be expected to incur the expense of incorporating the new concentration limit into their systems without the benefit of a proper administrative rulemaking, with an opportunity to comment and to solicit the Division's interpretation of the basic terms used in the new concentration limit.

In short, the Division "has failed to justify the proposed adoption [of this new concentration limit] containing a regulatory restriction" under RC Section 106.021(G).

EIGHTH PRONG: The Proposal Implements a Rule "That is More Stringent or Burdensome than the Federal Law or Rule Requires."

The Proposal "implements a federal law or rule in a manner that is more stringent or burdensome than the federal law or rule requires" under Section 106.021(H).

As discussed above, the federal securities laws comprehensively regulate nonlisted REITs and BDCs. All nonlisted REIT and BDC offerings are registered with the SEC and must receive a no-objections letter from FINRA. The broker-dealers who distribute nonlisted REITs and BDCs are regulated by the SEC and FINRA. Investment advisers who distribute them are regulated by the SEC and the states. Nonlisted BDCs are subject to many of the provisions of the Investment Company Act of 1940.

The Proposal would impose conditions that are more stringent or burdensome than the federal law or rule requires. Under the Proposal, a nonlisted REIT or BDC would have to comply *not only* with the federal requirements, but with *all* of the Divisions "merit review standards," NASAA's Statements of Policy, the proposed concentration limits, and other requirements.

Technically speaking, the Proposal would implement excessive state requirements, not a federal law or rule. Nevertheless, the state rules would have national implications. Nonlisted REITs and BDCs typically offer their securities on the same terms in all states. If the Division imposes a concentration limit then a nonlisted REIT or BDC must comply with that limit even when it offers its securities in the other 49 states. To do otherwise would create inefficiency and increase costs to the issuer.

The Proposal thus implements a rule with *federal* implications. By the Proposal the Division essentially would amend the terms by which the SEC has registered nonlisted REIT and BDC offerings, and those terms will be carried out throughout the country.

For these reasons, the Proposal can be interpreted to implement "a federal . . . rule in a manner that is more stringent or burdensome than the federal law or rule requires" under Section 106.021(H).

* * *

The Institute appreciates the opportunity to comment on the Proposal. We are ready and willing to work with JCARR and the Division on this important rulemaking.

Honor Banvard

From: Tony Long <tlong@ohiochamber.com>
Sent: Monday, August 14, 2023 11:20 AM
To: JCARR1
Subject: Letter in Opposition of Proposed Revisions to 1301:6-3-09
Attachments: 082023 Letter to JCARR.pdf

Enclosed is the Ohio Chamber of Commerce letter in opposition to the adoption of the changes to Rule 1301:6-3-09.

Respectfully Submitted,

Tony Long

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August 14, 2023

The Honorable Jamie Callendar
Chair, Joint Committee on Agency Rule Review
77 S. High Street
Columbus, OH 43215

RE: Ohio Administrative Rule Number 1301:6-3-09

Dear Representative Callendar:

On behalf of the Ohio Chamber of Commerce I am writing to share our opposition to the adoption of Ohio Administrative Rule Number 1301: 6-3-09 regarding a proposal of the Ohio Department of Commerce, Division of Securities.

The Division of Securities is attempting to overregulate investment products already subject to federal review by the Securities Exchange Commission (SEC) and the Financial Industry Regulatory Authority (FINRA). Once the non-listed REIT and Business Development Companies (BDCs) receive clearance from SEC and BDC the offerings can be sold everywhere in the United States. However, the Ohio Department of Commerce, Division of Securities imposes an additional burden on the offerings requiring the non-listed REIT or BDC to register with the Ohio Agency before the products can be offered to Ohio investors. Not only is this additional restrictive state requirement bad for Ohio economic development and the attraction of investors willing to invest in Ohio, but the proposal also violates several prongs outlined by JCARR. This letter will focus on just two.

Although the governor vetoed the language added by the legislature in the Fiscal years 2024-2025 Ohio operating budget, the legislature made its intent clear that any additional rules be imposed under ORC 1707.091 and not 1707.09. Notwithstanding this veto, the recent decision in Twism Enterprises LLC v. State Bd. Of Registration for Professional Engineers & Surveyors 2022-Ohio 4677 suggests that the courts will have a role in deciding the correctness of the rule instead of an old standard of deference to an administrative agency.

The proposal also conflicts with another existing rule and exceeds the agency's authority. The federal securities laws regulate non-listed REITS and BDCs. The proposal conflicts with this federal regulation and has the potential to be challenged in court as a violation of the federal Supremacy Clause.

Under the JCARR announced test for rule review, commonly known as the Eight Prong test, the proposal should be invalidated.

Respectfully Submitted,

Tony Long
General Counsel
Ohio Chamber of Commerce

Honor Banvard

From: Roger.Patrick@com.ohio.gov
Sent: Monday, August 14, 2023 12:10 AM
To: JCARR1
Cc: Ian Dollenmayer
Subject: Testimony of Ohio Securities Commissioner
Attachments: Testimony of Commissioner Seidt - August 14 2023 JCARR - Policy into Rule.pdf

The Ohio Securities Commissioner wishes to submit this testimony for the August 14, 2023 JCARR Meeting in regarding to the proposed amendment of OAC 1301:6-3-09 which is on the agenda.

CODIFICATION OF POLICY INTO RULE
PROPOSED AMENDMENTS TO O.A.C. 1301:6-3-09

Ohio Department of Commerce's Testimony of Securities Commissioner Andrea Seidt
August 14, 2023

The Ohio Division of Securities is pleased to appear before JCARR today to present its proposal to codify registration policies into rule. I will keep my comments brief because JCARR already conducted a lengthy pre-hearing back in December. All the data and details supporting this rulemaking effort are set forth in the Division's rulemaking memo and supplemental business impact analysis. While I was originally skeptical of the need to codify these policies into rule, it has been an informative and healthy exercise. Thank you to Chair Callender for his guidance and patience throughout this process.

The proposed revisions that I am presenting today are codifications of registration policies that the Division has followed for many years to provide filers with guidance regarding Ohio's registration requirements. The registration policies include NASAA Statements of Policy and merit guidelines that the Division is simply incorporating by reference. Those policies have been enforced and published on the Division's website for decades and are listed in new subsection (A)(4) of the rule. The Division consulted with JCARR's staff early on to ensure that it met all the requirements for properly incorporating those standards in accordance with R.C. 121.72 through R.C. 121.75.

The proposed revisions also include guidelines that the Division has offered filers for many years to help them comply with the merit standard set forth in R.C. 1707.09, which by definition applies to registration under R.C. 1707.091. More specifically, these guidelines help filers flesh out whether an offering term or practice is "grossly unfair" or would "tend to deceive or defraud investors" in violation of the statutory standard. The Division included these policies to comply with JCARR's directive following the initial hearing in December. Those policies, including the 10% concentration limit policy that we discussed at the last hearing, can be found in new subsection (A)(5) of the rule.

Following that hearing, the Division clarified and relaxed its concentration limit policy based on comments received in the rulemaking process. The proposed revisions and accompanying guidance in the rulemaking release clarify that the concentration limit does not apply to insurance products, federally covered securities, or other securities that do not restrict returns or exit for significant or indefinite periods of time. The Division relaxed the concentration limit policy by providing Ohio purchasers with an explicit self-executing waiver of the 10% limit.

The last thing that the proposed revisions include is a new waiver form (copy attached) that interested parties can use to obtain a waiver of any of the guidelines or policies that are being codified into rule. As I just mentioned, the form is self-executing on the 10% limit. Once an Ohio purchaser submits the form, the registration condition is automatically waived. The form will be available on the Division's website and can be submitted for free

online or by mail. The Division created this form in response to Committee comments suggesting the need for a formal, public mechanism. The Division made it self-executing for investors at all income levels, in response to comments regarding investor choice.

The Division has provided JCARR with a rule summary, fiscal analysis, business impact analysis, hearing summary report, and CSI's recommendation that the rule proceed as filed. The Division detailed the steps that the agency followed in this rulemaking process; explained the Division's rationale in formulating these policies for the benefit of Ohio businesses and investors alike; and responded to all stakeholder comments received by the Division throughout the rulemaking process. The materials and supporting data include more than 5,500 pages (excluding other cited and linked material) of registration filing data; examination findings; customer arbitrations and regulatory actions; rules and guidance from other federal and state regulators; academic research; industry research; financial trade press coverage; and other comments submitted in analogous policy proposals. At this juncture, the Division respectfully requests JCARR's approval to proceed with final rule adoption. If there are any questions, I would be happy to take them as this time.