

OPINION NO. 65-122**Syllabus:**

1. Licenses issued by the Division of Securities pursuant to Section 1707.16, Revised Code, to salesmen of securities are valid only during the time such salesmen are employed by the licensed dealer shown on such salesmen's application for a license and must be renewed upon change of employment.

2. Where the employing corporation merges with another and pursuant to Section 1701.81, Revised Code, the latter corporation is the surviving one which continues to exist, the licenses formerly issued to the salesmen of the former corporation are void at the date of such merger, and the salesmen must renew their licenses in accordance with Section 1707.16, Revised Code, before being employed as salesmen of securities by the surviving corporation.

3. There is no statutory authority for the Division of Securities to issue a license to a salesman of securities or to renew such license without receiving payment of the fee prescribed by Section 1707.17, Revised Code.

To: Ralph A. Winter, Commissioner of Securities, Columbus, Ohio
By: William B. Saxbe, Attorney General, July 9, 1965

Your request for my opinion reads in part:

"The Division of Securities hereby requests your informal opinion as to the interpretation and application of the Ohio Securities Act with respect to the following:

"Corporation A, a Michigan corporation, which has been licensed as a dealer with this Division for eight years, proposes to merge with and into Corporation B, an Ohio corporation, which is not licensed as a dealer with this Division, but proposes to become so licensed before the merger becomes effective on July 1, 1965. Corporation B, the surviving corporation in the merger, will adopt the name of Cor-

poration A, and its plan of operation as a dealer in securities and its principal place of business, which has been located in Ohio for eight years, will be the same as Corporation A. Salesmen now under licenses for Corporation A will continue in the employ of Corporation B.

"The ownerships and managements of Corporation A and Corporation B are now identical, and upon the effective date of the merger the ownership and management of the surviving corporation will be substantially identical to such constituent corporations.

"Under the foregoing circumstances, we respectfully request your opinion as to whether the Division should require that each of the salesmen of Corporation A file an application for the renewal of his license pursuant to Section 1707.16, (E) of the Ohio Securities Act because of a change of employment.

"In the event your answer to the above question is in the affirmative, we then respectfully request your opinion as to whether the annual renewal fee of \$15 under Section 1707.17 of the Ohio Securities Act should again be imposed against such salesmen for the six months' period ending December 31, 1965.

"We should like to point out that the information which would be required of salesmen of Corporation B in an application for renewal of license under Section 1707.16 (E) would be identical to the information now on file for Corporation A; only the date of the Notarial Verification would be changed.

"A copy of Form 16, Application for Salesman's License, is enclosed for your convenience."

Section 1701.78, Revised Code, reads in part:

"(A) Any two or more corporations may merge into a single corporation which shall be one of the constituent corporations, or may consolidate into a single corporation which shall be a new corporation to be formed by the consolidation."

Section 1701.81, Revised Code, provides:

"(A) When such merger or consolidation becomes effective:

"(1) The separate existence of all the constituent corporations, except the surviving or new corporation, shall cease, except that, whenever a conveyance, assignment, transfer, deed, or other instrument, or act, is necessary to vest property or rights in the surviving or new corporation, the officers of the respective constituent corporations shall execute, acknowledge, and deliver such in-

struments, and do such acts, and for such purposes the existence of the constituent corporations and the authority of their respective officers and directors shall be deemed continued notwithstanding the merger or consolidation;

"(2) The constituent corporations shall become a single corporation which, in the case of a merger, shall be that one of the constituent corporations designated in the agreement of merger as the surviving corporation and, in the case of a consolidation, shall be the new corporation provided for in the agreement of consolidation;"

In the situation you have described, Corporation A will cease to exist as a legal entity at the time this merger becomes effective; only Corporation B will continue. The fact that this continuing corporation will adopt the name now used by Corporation A will not have the effect of continuing in existence a corporation which has in fact merged with another. Neither do I believe that the substantial identity of the ownership and management of the surviving corporation with that of present Corporation A is significant. I realize that this proposed merger is one involving a domestic and a foreign corporation. Statutory provision for such mergers and the effect thereof is made in Sections 1701.82 and 1701.83, Revised Code, and these sections do not change the legal effect of a merger of two or more corporations.

Upon completion of this merger, Corporation B will be the legal entity employing the salesmen who are now employed by and licensed to sell securities for Corporation A. Section 1707.16, Revised Code, requires that all salesmen of securities must be licensed by the Division of Securities. That section reads in part:

"Every salesman of securities must be licensed by the division of securities and shall be employed only by the licensed dealer specified in his license.

"The application for a salesman's license shall set forth:

"(A) The name and complete residence and business addresses of the applicant;

"(B) The name of the dealer who is employing the applicant or who intends to employ him;

"(C) The names and addresses of three persons in this state of whom the division may inquire as to the character and business reputation of the applicant;

"(D) The applicant's age and education, and his experience in the sale of securities; whether he has ever been licensed by the division, and if so, when, and what his license number was; whether he has ever been refused a license by the division; and whether he has ever been licensed or refused a license or any similar permit by any division or commissioner of securities, whatsoever name known or designated, anywhere;

"(E) The nature of the employment, and the names and addresses of the employers of the applicant for the period of ten years immediately preceding the date of the application.

"If the division finds that the applicant is of good business repute, appears to be qualified to act as a salesman of securities, and has fully complied with sections 1707.01 to 1707.45, inclusive, of the Revised Code, and that the dealer named in the application is a licensed dealer, the division shall, upon payment of the fees prescribed by section 1707.17 of the Revised Code, issue a license to the applicant authorizing him to act as salesman for the dealer named in the application.

"If such salesman severs his connection with such dealer, the salesman's license is void.

"If the applicant is merely renewing his license for the previous year or renewing his license upon change of employment, only the information required under divisions (A) and (B) of this section need be given."

(Emphasis added)

Section 1707.15, Revised Code, which provides for the licensing of dealers contains these directions:

"An application to act as dealer shall be in writing and shall be filed with the division of securities. It shall be in such form as the division prescribes, and verified by oath of the applicant, his agent, or his attorney, and it shall set forth:

* * * * *

"(F) The names and addresses of all salesmen of the applicant at the date of the application;

* * * * *

"If the applicant is merely renewing his license for the previous year the application need contain only the information required by divisions (B), (C), and (F) of this section.

* * * * *

"Dealers shall employ as salesmen only those who are licensed under sections 1707.01 to 1707.45, inclusive, of the Revised Code. If at any time such salesmen resign or are discharged or new salesmen are added, the dealer shall forthwith notify the division and shall file with the division the names and addresses of new salesmen."

Section 1707.17, Revised Code, requires that the licenses for

both dealers and salesmen be renewed annually and provides for the fee to be charged both for the original and the annual renewal of a license. That section concludes with this language:

"The fee for each salesman's license, and for each annual renewal thereof, shall be fifteen dollars."

Examination of these sections leads me to the conclusion that manifestly the salesmen who are now employed by Corporation A are licensed only to sell securities for that company. When that corporation ceases to exist by reason of the merger with Corporation B, the employment of these salesmen by that dealer will necessarily be terminated, although involuntarily on their part, and the licenses will be void. Employment with Corporation B will be, both as to that corporation and the salesmen, new or different employment, subject to the requirements of Sections 1707.15 and 1707.16, Revised Code, so that the salesmen's licenses must be renewed for a change in employment.

I find no authority for either the issuance or renewal of a salesman's license without payment of the statutory fee. I am aware that Section 1707.17, Revised Code, provides for a fee for each license or annual renewal thereof and does not by its express terms direct that a fee be charged where a salesman is "renewing his license upon change of employment," in accordance with Section 1707.16, Revised Code, but I find nothing which empowers you to waive payment of a license fee, and it is my conclusion that a fee must be paid for every issuance of a new license or a renewal license to a salesman of securities.

It may be thought that employment of the licensed salesmen who are now employed by Corporation A is a right or privilege which vests in the surviving corporation because of Section 1701.81, Revised Code. In my opinion, the decision in Columbus and Southern Ohio Electric Co. vs. West, Registrar, 140 Ohio St., 200, is pertinent here. The syllabus reads:

"1. Where constituent corporations are consolidated under the provisions of the General Corporation Act into a consolidated corporation so that the motor vehicles formerly owned by the constituent corporations become the motor vehicles of the consolidated corporation, there is a 'transfer of ownership' within the meaning of Section 6294-1, General Code, and new registration of the motor vehicles in the name of the consolidated corporation and the payment of the motor vehicles license taxes in accordance with the provisions of Sections 6294 and 6294-2 are required.

"2. The general provisions of Section 8623-68, General Code, providing, inter alia, for the transfer of privileges from the constituent corporations to the consolidated corporation, do not prevail over the explicit provisions of Section 6294-1, General Code, and do not have the effect of relieving the consolidated corporation from registering in its own name motor vehicles previously registered in the name of the constituent companies and from paying motor vehicle license taxes thereon."

Your attention is also invited to Opinion No. 4220, Opinions of the Attorney General for 1935, page 522, in which reference is made to prior opinions. That opinion, which discussed merger rather than a consolidation such as was considered in the Columbus and Southern Ohio Electric Co. case, supra, held, as shown by the syllabus:

"Where existing Corporations A and C are merged into existing Corporation B rather than forming a new consolidated corporation, the Corporation B need not procure new licenses for the motor vehicles it itself has already registered, but Corporation B into which the constituent Corporations A and C merged must procure new registration and licenses for the motor vehicles acquired, pursuant to the merger agreement from the constituent Corporations A and C, even though such motor vehicles are already registered and licensed by the constituent Corporations A and C."

See also The Greyhound Corp. vs. Ayers, Registrar, Bureau of Motor Vehicles, 119 Ohio App., 53, the headnote of which reads:

"Where two foreign motor transportation companies merge under the laws of a foreign state, such merger, on the date thereof, operates as a 'transfer of ownership' of the motor vehicles of the merged company, within the meaning of that term as used in Section 4503.12, Revised Code, making the surviving corporation liable to pay a proportion of the annual motor vehicle license tax as provided by Section 4503.02, Revised Code, for the privilege of operating motor vehicles in Ohio after the merger, although, prior to the date of the merger, the merged corporation had paid the tax for a full year."

The factual situation before the then Attorney General in Opinion No. 4249, Opinions of the Attorney General for 1935, page 554, was one in which two foreign corporations had each qualified under Ohio law and had filed the required reports. One corporation had paid the statutory fee for that year for the increase in the number of shares allocated to Ohio. The other corporation had not had an increase in the number of shares allocated to Ohio during that year, and had, therefore, paid no tax. The second corporation merged into the first during the year 1934. The exact question then presented was as follows:

"'A' Company, the corporation which retained its corporate identity as a result of the merger, has filed with this office its report as of Jan. 1, 1935 as provided by G. C. 8625-7. This report (as a result of the merger) shows 4000 issued shares, practically all of which are allocated to Ohio. The company has raised the question regarding the computation of the fee due on this report by claiming that it should be allowed as a deduction under the language of G. C. 8625-11 the sum of the prior proportion of each of the

constituent companies, i.e. 2000 shares plus 1939 shares, rather than simply the 1939 shares previously represented by 'A' Company.

"Our specific inquiry is whether in your opinion the language of G.C. 8625-11 would authorize us to allow as a deduction in computing the fee the previous proportion of shares of the one company or the sum of the previous proportion of shares of both companies."

The Attorney General concluded as follows:

"It is observed that the foregoing section requires the payment of a fee as therein set forth when the annual report shows an increase in the number of issued shares of a foreign corporation represented by property owned or used and business transacted in this state, without any exceptions as to whether or not some other corporation which might have merged with the reporting corporation had already paid a fee computed upon such increased shares. The language of the section is clear and unambiguous. The requirement in the first paragraph is 'the corporation shall pay to the Secretary of State an additional installment of the license fee based upon such number of additional shares.' The additional shares upon which the additional installment of the license fee is based in the event of an increase in the shares represented in this state, can only be the additional shares shown by the report of the reporting corporation. The reference again in the second paragraph of the foregoing section to 'such corporation' is clearly to the corporation making the report and not to some other corporation. It would undoubtedly be competent for the legislature to authorize a deduction under such circumstances as are set forth in your communication, but until this is done I find no authority therefor. In the case of a merger the individual corporate entities concerned may not be lost sight of. 'A' Company has, as a result of this merger, retained its corporate identity and in the absence of specific provision relating to such transaction, is in the same position as though it had increased the number of its shares represented by property owned or used and business transacted in this state either by increasing its outstanding shares or increasing the proportion of its property and business in Ohio. Compare my Opinion No. 4220, relating to a corporation merger as affecting registration of motor vehicles.

"Specifically answering your inquiry, it is my opinion that where the number of issued shares of a foreign corporation represented by property owned or used and business transacted in this state is increased as a result of another foreign corporation,

heretofore qualified to do business in Ohio, merging with such corporation, in computing the fee based upon such increase under Section 8625-11, General Code, no deduction is authorized on account of such merging corporation having theretofore paid a fee based upon its issued shares being represented by property owned or used and business transacted in this state."

Opinion No. 4249, supra, was approved and followed in Opinion No. 516, Opinions of the Attorney General for 1959, page 263.

Informal Opinion No. 319, Informal Opinions of the Attorney General for 1948, page 41, and Informal Opinion No. 306, Informal Opinions of the Attorney General for 1953, page 1031, both hold that where two or more corporations merge into one, the continuing corporation must secure new registrations on the motor vehicles formerly owned by the constituent ones which cease to exist as legal entities, as there is a change of ownership.

The rationale of the decisions and opinions mentioned herein applies equally to the situation you have described. I find neither any express provision in Chapter 1707, Revised Code, which exempts a plan such as you have described nor any legal basis for finding a legislative intent to exempt such a plan. Despite the proposed change of name of Corporation B to that now used by Corporation A, it is, as a matter of law, Corporation B which will survive, and this will not be varied by any change of name. Corporation B will be the licensed dealer employing salesmen of securities, just as the surviving corporation becomes the owner of motor vehicles formerly owned by the corporations merging into such survivor or the issuer of stock where the number of shares is increased because of a merger. This is true regardless of the fact that inequities may result, but as noted in the Columbus and Southern Ohio Electric Co. case, supra, such inequities are a matter of policy for legislative determination.

It is, therefore, my opinion and you are advised:

1. Licenses issued by the Division of Securities pursuant to Section 1707.16, Revised Code, to salesmen of securities are valid only during the time such salesmen are employed by the licensed dealer shown on such salesmen's application for a license and must be renewed upon change of employment.

2. Where the employing corporation merges with another and pursuant to Section 1701.81, Revised Code, the latter corporation is the surviving one which continues to exist, the licenses formerly issued to the salesmen of the former corporation are void at the date of such merger, and the salesmen must renew their licenses in accordance with Section 1707.16, Revised Code, before being employed as salesmen of securities by the surviving corporation.

3. There is no statutory authority for the Division of Securities to issue a license to a salesman of securities or to renew such license without receiving payment of the fee prescribed by Section 1707.17, Revised Code.