State of Ohio may require persons applying for admission to an examination to set forth in such application, in addition to the matters specifically designated by section 486-11, General Code, such other information as may be reasonably required touching the applicant's merit and fitness for the public service sought, but no person can be denied the right to take an examination by reason of his failure to set forth in his application his race or to attach thereto his potograph.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2427.

CORPORATION—EXCHANGE OF DEBENTURES FROM FOREIGN CORPORATION TO SUBSIDIARY CORPORATION FOR PURPOSES OF REORGANIZATION EXEMPT FROM PROVISIONS OF SECTIONS 8624-4, 8624-9, 8624-10, GENERAL CODE, WHEN.

SYLLABUS:

When a foreign corporation is the owner of certain debentures of a subsidiary corporation, and with a view to its reorganization, solicits offers from its debenture holders to exchange such debentures for the debentues of its subsidiary on certain terms and conditions, if as and when such reorganization may be accomplished, the corporation forbearing the acceptance of such propositions until it is determined whether such reorganization may be accomplished and thereupon, through the medium of an escrow or trustee, completes such exchange, such transaction, by reason of the provisions of Section 8624-4, *General Code, is exempt from the requirements of Sections* 8624-8, 8624-9, 8624-10, 8624-13 *and* 8624-14, *General Code, since it constitutes but a single transaction.*

COLUMBUS, OHIO, March 29, 1934.

HON. JOHN W. POWERS, *Chief, Division of Securities, Department of Commerce, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion, which reads as follows:

> "The 'A' Company, a foreign corporation, possesses a large outstanding fixed interest bearing debt. It is a corporation which, because of a downward trend in earnings due to the depression, increased taxes and threatened additional taxes, rate reductions both threatened and actual, etc., is in imminent danger of becoming seriously involved financially. * * * Because of these conditions, 'A' Company is desirous of reducing the principal sum of these debentures outstanding, or the interest on the same, thus rearranging the financial structure of 'A,' and it has offered to its debenture holders three options. Under Options one and two, the debentures of its wholly owned subsidiary, 'B' Company, are offered in exchange for its outstanding securities. Under Option three, a new

issue of its own debentures is offered to the debenture holders in exchange. The debentures of the subsidiary, 'B' Company have been acquired by the 'A' Company as a dividend and consequently as far as Options one and two are concerned, the company is actually in a position of distributing assets in payment of its debts. The new debentures will be at a lower rate of interest or smaller face value.

The question on which we desire to have an opinion and which is to be considered here is as to whether or not the exchange of securities by the 'B' Company for the securities of the 'A' Company and to its debenture holders, which the 'A' Company is attempting, is an exempted transaction, being a reorganization, within the meaning of the Sections of the General Code of the State of Ohio applicable to the same and is, therefore, not required under the Securities Act, to be registered with the State Securities Department either by description or by qualification."

Your inquiry raises the legal question as to whether the transactions therein contained come within the exemption provisions of Sections 8624-4, General Code. Such section, in so far as material to your inquiry, reads:

"The following transactions in securities may be carried on and completed without compliance with the provisions of sections 8, 9, 10, 13, or 14 of this act:

(1) A sale of securities by a bona fide owner, not the issuer thereof, such sale being made in good faith and not for the purpose of avoiding the provisions of this act and not being made in the course of repeated and successive transactions of a like or similar character;

* * * * * * *

(10) The distribution by a corporation of its securities to its shareholders or other security holders as a share dividend or other distribution out of earnings or surplus; or the issuance of securities by a corporation to its creditors or share holders in the process of a bona fide reorganization of such corporation, or the issuance of securities to a predecessor corporation or the security holders thereof by a corporation organized for the purpose of taking over substantially all of the assets and continuing the business of such predecessor corporation; or the transfer of its own securities by, or on account of one corporation to another corporation, or the security holders thereof, in connection with a consolidation or merger; or the issuance of securities of one class in exchange for securities of another class or other classes of securities; or the delivery of a greater or smaller number of securities of the same class in exchange for outstanding securities; or the sale of subscriptions for its shares by a newly formed corporation not exceeding the amount necessary to hold a first meeting of shareholders; all being done in good faith and not for the purpose of avoiding the provisions of this act."

With a view to clarity it might be well to consider the provisions of sub-paragraph 10 prior to considering the provisions of sub-paragraph 1. Such

sub-paragraph exempts from the provisions of Sections 8624-8, 8624-9, 8624-10, 8624-13 and 8624-14, General Code, the following transactions:

(a) Distribution by a corporation of *its* securities to its shareholders or other security holders as a dividend or similar distribution of earnings;

(b) The issuance of securities by a corporation to its shareholders or creditors in the process of a bona fide reorganization of such corporation;

(c) The issuance of securities by a succeeding corporation to a predecessor corporation or its security holders;

(d) The exchange of securities in a consolidation or merger;

(e) The issuance of one class of securities in exchange for another class of securities;

(f) The delivery of a greater or smaller number of securities of the same class in exchange for outstanding securities;

(g) Sale of qualifying shares of a newly formed corporation,

providing such acts are not for the purpose of avoiding the provisions of the act.

The question arises as to whether the transaction amounts to a reorganization of the corporations. In 14A Corpus Juris, page 1041, section 3606, the author states:

"There are two general methods of reorganization, one being a reorganization within the corporation, and the other, a reorganization through, or by means of, a new corporation. The latter may be subdivided into two classes: The first is where the reorganization follows a forced sale of the corporate rights, franchises, and assets, and the second is where the sale is voluntary. Reorganizations are frequently effected through the medium of agreements whereby the rights of the various parties in interest are readjusted."

In Section 4834, of Fletcher's Cyclopedia of Corporations, page 8465, I find the following language:

"It is proper to classify reorganizations as (1) reorganizations in connection with the foreclosure of corporate mortgages, or in connection with other judicial or execution sales of the corporate property by the purchasers at the sale, and (2) other reorganizations or reincorporations. The latter class is divisible into (a) reincorporations where the purpose is merely to correct illegalities or defects in the original corporation, or to broaden the scope of the powers of the corporation, including, in one sense of the word, the amendment as well as the extension or revival of charters, (b) the scaling of securities by voluntary agreement, and (c) the organization, primarily by or on behalf of the stockholders as distinguished from the creditors of a new corporation, without any forced sale, to take over the property of the existing corporation."

See also, of similar import, 8 Thompson on Corporations, 3rd Ed., §5960; 5 Cook on Corporations, page 4103.

The language contained in Section 8623-15a, General Code, would indicate that the legislature attached much of the same significance to the term "consolidation" as applied to corporations, when it therein prescribed the requirements for perfecting a reorganization of Ohio corporations. I quote the first paragraph of such section:

> "A corporation may reorganize in the following manner:
> The board of directors may adopt a plan of reorganization which may include a determination or redetermination of the fair value to the corporation of its assets, tangible and intangible, any change in its articles, including changes of issued or unissued shares which could be effected by amendment, the entry on its books of the amount of the fair value to the corporation of its assets as determined or redetermined by the board of directors, the allotment of a part of the amount so determined or redetermined to stated capital and a part to surplus, the retention as earned surplus of the reorganized corporation of all or a part of the earned surplus then existing, the increase or reduction of stated capital, the distribution in cash, notes, bonds or other obligations of such corporation, or other property, of the excess assets, if any, resulting from the reduction of stated capital or otherwise, the manner, terms and basis of converting or exchanging shares, and such other details as the board may consider necessary or desirable. * * *"

The facts set forth in your inquiry were before the United States District Court, Eastern District of Pennsylvania, in the case of *Utility Investment Company* vs. *Stuart et al.*, Case No. 7809. The question therein presented was whether such transaction would be in violation of the Pennsylvania Securities Law. The court in that case held that the entire transaction amounted to an "issue of securities to the creditors in exchange for claims of such creditors" and was thus a reorganization of the corporation, and exempt from the provisions of the Pennsylvania Act.

From such authorities and the cases cited by the text-writers in support thereof, it is apparent that a "reorganization of a corporation" is any substantial readjustment of its capital structure or financial set-up. The proposed transaction as set forth and referred to as options one and two would have the effect of eliminating certain items of debentures payable from its capital structure and the eliminating from its assets certain items of securities owned. As indicated in your inquiry, under options "one" and "two," the company is using a portion of its invested capital or capital assets for the purpose of exchanging them for a release of a portion of its obligations, or, in other words, a partial liquidation, with the intent of using the remaining assets with a view to furthering its corporate purposes. In the use of option "three," the corporation is changing its financial structure by refinancing outstanding obligations of different tenor, that is, less in amount and less as to interest rate. The necessary effect of such operations, if completed, will be to change the financial structure and its evidence, the balance sheet of the corporation, by changing the ratio of the assets to the liabilities. In my opinion, if such exchange of obligations is substantial and is carried out for

the purpose of changing the financial structure of the corporation it would amount to reorganization of the corporation.

I have assumed herein, that the securities of the "B" Company were owned by the "A" Company as capital investments and not for the purpose of resale with a view to profit or as a business, such fact being implied in your request. If my conclusion be correct, it would necessarily follow that, in my opinion, the consummation of plan "three" in your inquiry, would be an exempt transaction by reason of the provisions of Paragraph 10 of Section 8624-4, General Code.

In plans "one" and "two" a more perplexing question arises since the securities which are contemplated to be exchanged are not issued by the "A" Company but by the "B" Company. Debentures ordinarily, are one of the many varieties of negotiable instruments. Section 8295, General Code, defines the term "issue," as follows:

> "'Issue' means the first delivery of the instrument, complete in form, to a person who takes it as holder."
> See also *Bank* vs. *Day,* 145 Mo. App., 410.

The debentures in question were *issued* when they were so delivered to the "A" Company by the "B" Company.

It is to be presumed that the legislature uses words in their usual and ordinary significance unless the context shows that a different meaning was intended. *Kiefer* vs. *State,* 106 O. S., 285, 289; *Woolford Realty Co. Inc.* vs. *Rose,* 286 U. S. 319.

I am unable to find anything in the language of Section 8624-4, General Code, which would indicate that the legislature intended any other meaning for the word "issue" than that given in Section 8295, General Code, which definition is a part of the Negotiable Instrument Law and is of general commercial usage.

The first clause of sub-paragraph 16 of Section 8624-4, General Code, reads in part:

> "The distribution by a corporation of *its securities* to its * * security holders as a share dividend or other distribution out of earnings or surplus;"

It might be urged that the language "its securities" refers to any securities owned by the corporation. However, the language "share dividend" has a definite meaning which would tend to rebut such contention. By a share dividend is usually meant the application of a certain amount of the surplus assets of the corporation in payment for unissued shares of a corporation and the distribution of such shares ratably among the shareholders of the corporation. See Section 8623-38, General Code; *Bank* vs. *Patton Co.,* 12 O. C. C. (N. S.) 287.

In sub-paragraph 1, of Section 8624-4, General Code, as above quoted, is certain language which might cause the contemplated transaction to be an exempted transaction if the course of dealing is a sale within the meaning of such section and also if such course of dealing is in fact a single transaction.

While the term "sale," when used in its narrower sense, does not include a barter or exchange, it does not appear that the term is used in such narrow sense in the Ohio Securities Act. Paragraph 3 of Section 8624-2, General

Code, specifically states, in defining such terms for the purposes of the act, that "sale * * * shall include every disposition, assignment * * * solicitation or agreement to sell or exchange any security * * *." I am, in interpreting the act, bound by the definitions of terms as given by the legislature in the Act. (See Black on Interpretation of Laws, §84.)

There is a further question as to whether the proposed actions constitute a single transaction or are "a course of repeated and successive transactions of a like or similar character." An examination of the sales plan or offer, indicates that the "A" Company plans to solicit offers from debenture holders to exchange their securities in accordance with one of the proposed plans, that the securities of the debenture holders who consent to turn in their debentures and accept any one of the plans, deposit their debenture certificates with a common trustee or escrow agent. If such number of "offers" and debentures are deposited with such common trustee as is satisfactory to the "A" Company or will enable it to perfect its reorganization, such company will deliver sufficient in number and amount of debentures of the "B" Company and/or the debentures of the "A" Company and will then authorize the trustee to make the exchange. In other words, it appears that the "A" Company intends to solicit offers from debenture holders to exchange their securities for other securities that the "A" Company's acceptance of the offer is conditioned upon and delayed until such number of offers are received to enable it to refinance or reorganize its structure. At that time the contract is accepted and entered into between the company and the debenture holders as a group and the entire transaction is then consummated as though a single proposition, through a single escrow agent and one escrow.

It would thus appear that the transactions are concurrent and not repeated or successive. Bearing in mind that the evident purpose of the Ohio Securities Law, as shown by its language, is to protect the investing public from fraud in the sale of securities rather than to provide supervision over the reorganization of corporations, I am unable to see any reason for a strained construction of the language with a view to making a reorganization plan appear within its provisions, when by a literal construction it would be exempted therefrom.

There is one further question presented by your inquiry, that is, when the only act being done within this state is the solicitation by agents of the "A" Company of offers from debenture owners for the exchange of such securities, the acceptance of the offer by the "A" Company and the consummation or performance of the contract being performed in another state, does the State of Ohio have any jurisdiction over the transaction? However, in view of my opinion that the transaction is exempted from the requirements of the Ohio Securities Act, I do not herein discuss such proposition nor do I express any opinion thereon.

Specifically answering your inquiry it is my opinion that when a foreign corporation is the owner of certain debentures of a subsidiary corporation and with a view to its reorganization solicits offers from its debenture holders to exchange such debentures for the debentures of its subsidiary on certain terms and conditions if, as and when such reorganization may be accomplished, the corporation forbearing the acceptance of such propositions until it is determined whether such reorganization may be accomplished and thereupon, through the medium of an escrow or trustee, completes such exchange, such transaction by reason of the provisions of Section 8624-4, General Code,

is exempt from the requirements of Sections 8624-8, 8624-9, 8624-10, 8624-13 and 8624-14, General Code, since it constitutes but a single transaction.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2428.

APPROVAL—BONDS OF VILLAGE OF UNIVERSITY HEIGHTS, CUYAHOGA COUNTY, OHIO—$14,000.00.

COLUMBUS, OHIO, March 29, 1934.

Industrial Commission of Ohio, Columbus, Ohio.

2429.

APPROVAL—NOTES OF BRADFORD VILLAGE SCHOOL DISTRICT, MIAMI COUNTY, OHIO—$5,833.00.

COLUMBUS, OHIO, March 29, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2430.

NURSERY STOCK—PLANTED AND KEPT BY OWNER OF LAND IN WHICH GROWING SHOULD BE VALUED AND ASSESSED AS PART OF LAND.

SYLLABUS:

Nursery trees and shrubs, commonly spoken of as nursery stock, which are planted and kept by the owner of the land in which they are growing, should be valued and assessed as a part of such land.

COLUMBUS, OHIO, March 30, 1934.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge the receipt of your recent communication which is as follows:

> "The matter of the proper classification of nursery stock, including fruit, shade and ornamental trees, shrubs and bushes, small fruit, bushes and plants, and property of a substantially similar character and nature,