
THE BLUE SKY BUGLE

A Newsletter for Blue Sky Lawyers

Published by the ABA Committee on State Regulation of Securities

Volume 2007, Number 1, Winter, 2007

EVENTS CALENDAR

The State Regulation of Securities Committee will meet in conjunction with the 2007 Spring Meeting of ABA Business Law Section to be held
March 17, 2007 (10:30 AM to 12:00 PM)
Room 140B, Level 1
Washington Convention Center

The Committee and its Subcommittees will meet in conjunction with the 2007 Annual Meeting of ABA Business Law Section to be held
August 13-17, 2007
San Francisco, CA

The Committee and its Subcommittees will meet at the 2007 Annual NASAA Fall Conference
September 30 through October 3, 2007
Westin Hotel, Seattle Washington

PLAN FOR THE FUTURE

The Committee and its Subcommittees will meet in conjunction with the 2008 Spring Meeting of ABA Business Law Section
April 10 through April 13, 2008
at the Hilton Anatole Hotel, Dallas Texas

The Committee and its Subcommittees will meet in conjunction with the 2008 Annual Meeting of ABA Business Law Section
August 2008
New York, New York

The Committee and its Subcommittees will meet at the 2008 Annual NASAA Fall Conference
September 15 through September 18, 2008
Las Vegas, Nevada

* * *

IN THIS ISSUE

Events Calendar.....	1
Plan for the Future.....	1
Blue Sky Bits and Pieces	2
From the Chair – ABA Focusing on Preemption and Other Blue Sky Developments	3
NASAA Concerns for 2007	9
Proposed Hedge Fund Legislation in Connecticut	12
The Merrill Rule: Old Habits Die Hard	14
From the Other Side of the Desk.....	16
Editorial.....	17
State Liaisons	22
Directory of Editors and Contributors	29

CLE PROGRAMS SPONSORED BY THE STATE REGULATION OF SECURITIES COMMITTEE

Hot Securities Law Issues for Small Business
March 16, 2007, 10:30 a.m. to 12:30 p.m.
Room 141, Level 1
Washington Convention Center

Regulation of Variable Annuities
Date and Time TBA
and
California Dreamin’ – Watch Out for Speed Bumps!
Date and Time TBA

ABA Annual Meeting, August 13 to 17, 2007
San Francisco, California

BLUE SKY BITS AND PIECES

By Ellen Lieberman

Debevoise & Plimpton LLP (New York)

We are delighted to welcome **David C Wang**, a partner in Holland & Knight LLP located in its Portland, Oregon, office, as our Committee's new Liaison to the ABA Section of Business Law Committee on Diversity. David, a partner in Holland & Knight's Business Law department, practices general corporate and securities law, representing public and private companies in initial and secondary public offerings, private equity investments and venture capital financings, and advising companies on Securities Exchange Act compliance and reporting, corporate governance and intellectual property matters. We are pleased to have him represent us and participate with other Section leaders in furthering the goal of the ABA for a diverse profession of lawyers.

We are pleased that **Judy F. Zybach** has agreed to serve as our Committee's Liaison to the ABA Section of Business Law Pro Bono Committee. She will report back to let us know about the Section's pro bono activities, and if you have thoughts or suggestions relating to pro bono efforts, be sure to let her know. Judy was recently a partner at Runquist & Zybach LLP but since April 2006 has been "flying solo" and enjoying it immensely. She is admitted to practice and practices in Washington and in California, and is active in non-profit committees of the Washington State Bar Association and American Bar Association. Her practice generally focuses on nonprofit entities, limited liability companies and business transactions, and she has previously reported for our Subcommittee on Enforcement, and reported to this Committee on e-law issues. Judy is located in Granite Falls, Washington, and can be reached at Judy F. Zybach, PO Box 1469, Granite Falls, WA 98252-1469, Phone: (360) 691-4850. E-Mail: jzybach@zybach.com.

We are also pleased that **Benjamin L. Nager** has agreed to become our Committee's Liaison to the Meetings Committee of the ABA Section of Business Law. Ben is Counsel at Sidley Austin LLP in New York City where he advises on and is responsible for compliance with Blue Sky regulatory matters, including state broker-dealer, investment adviser and securities registration and exemption matters, as well as with the NASD's corporate financing rules. He received his J.D. degree from the University of Michigan Law School. Ben will act as a conduit representing our views and needs to the Meetings Committee, and keeping us apprised of what the Meetings Committee is planning.

In the fall of 2006, **Steven D. Irwin** was appointed as the third member of the Pennsylvania Securities Commission, succeeding **A. Richard Gerber**, who retired. Irwin has been a partner in the Pittsburgh law firm of Leech Tishman Fuscaldo & Lampl and a member of the firm's management committee. He was formerly a legislative assistant to U.S. Senator Arlen Specter and a law clerk to Judge Joseph F. Weis of the U.S. Third Circuit Court of Appeals which sits in Philadelphia. He graduated from Harvard and from the Georgetown University Law Center and serves as an adjunct professor at the University of Pittsburgh. The other two Commissioners are Robert M. Lam, and Thomas A. Michlovic.

Eric R. Dinallo was selected by Eliot Spitzer, New York's new governor, as New York's new Insurance Superintendent. He was General Counsel of Willis Group Holdings Limited, a global insurance broker, and a member of Willis' Partners Group, and before that Managing Director and Head of Regulatory Affairs at Morgan Stanley. Previously he served as Chief of the Investment Protection Bureau of the New York State Attorney General's Office under Mr. Spitzer. He was also an Assistant District Attorney in the New York County District Attorney's Office, a Litigation Associate at Paul Weiss and a clerk for The Honorable David M. Ebel, United States Court of Appeals, Tenth Circuit in Denver, Colorado. He received his J.D. from the New York University School of Law, an M.A. from Duke University's School of Public Policy and a bachelor's degree from Vassar College.

Andrew M. Cuomo was elected and took office on January 1, 2007 as New York's Attorney General, succeeding Eliot Spitzer. Cuomo previously served in the Clinton administration Cabinet as Secretary of Housing and Urban Development, Assistant District Attorney in Manhattan, as a partner in a New York City law firm and Of Counsel at Fried, Frank, Harris, Shriver & Jacobson. He has appointed his "dream team" to emphasize his priorities: **Eric Corngold**, Executive Deputy Attorney General for Economic Justice, former chief assistant U.S. attorney in Brooklyn and head of its Business and Securities Fraud Unit from 1999 – 2005 and General Crimes Unit from 1997 – 1999, and previously practiced at Hughes, Hubbard & Reed and Kramer Levin Naftalis & Frankel and clerked for Judge Charles Sifton in the Eastern District of New York; **Robin Baker**, Executive Deputy Attorney General for Criminal Justice, former deputy chief of appeal at the U.S. Attorney's Office in Manhattan, and previously practiced at Gibson, Dunn & Crutcher; **Mylan Denerstein**, Executive Deputy Attorney General for

Social Justice; and **Jenny Rivera**, Special Deputy Attorney General for Civil Rights: Cuomo has indicated he will address Medicaid fraud and ethics changes, and will continue to monitor Wall Street, but it is not certain that his approach will be a continuation of that of Eliot Spitzer since he has told reporters that it's a "different situation" on Wall Street than it was five years ago.

David D. Brown, IV, Bureau Chief of the Investment Protection Bureau in New York's Office of the Attorney General, has left that position. No replacement has been appointed at the time we go to press. Prior to working in the Office of the Attorney General, he was a vice president and associate general counsel of Goldman, Sachs & Co., a senior litigation attorney at Deutsche Bank, managing director and vice president at Bankers Trust Corporation and an associate at Davis Polk & Wardwell.

Gary Connor, First Deputy in the Investment Protection Bureau in New York's Office of the Attorney General, left that office effective March 1, 2007. He will be joining the New York State Division of Housing and Community Renewal as General Counsel.

Andrew Kandel, formerly Bureau Chief of the Investment Protection Bureau in New York's Office of the Attorney General and thereafter for eight and a half years First Vice President and Assistant General Counsel at Merrill Lynch, has left to join a private equity firm – Cerberus Capital Management – as Managing Director and Chief Compliance Officer. Andrew has been serving as our Committee's Liaison to NASAA's Enforcement Trends Project Group.

Florida's newest elected Chief Financial Officer, **Alex Sink**, took office in January 2007 and heads a reconfigured Department of Financial Services. Within the Department, **Don Saxon**, who had been Director of the Office of Financial Regulation, has now become Commissioner of Financial Regulation, and has responsibility for the following Divisions: Financial Institutions, Finance, and Securities.

Conrad G. Goodkind, Quarles & Brady LLP and a former Chair of this Committee, was just named as a member of the Section of Business Law Council effective August 2007. He joins on the Council another former Chair of this Committee, **Hugh H. Makens** of Warner Norcross & Judd LLP.

Effective August 2007, the new Chair of the ABA Section of Business Law will be **Charles E. McCallum** of Warner Norcross & Judd LLP, and the Chair-Elect will be **Nathaniel L. Doliner** of Carlton Fields PA. The

current Section Chair is **Linda Hayman** of Skadden Arps Slate Meagher & Flom LLP.

Donald A. Rett, Chair of our Liaison to States and NASD Subcommittee and our Florida liaison, proudly announced the arrival of his fourth grandchild born on February 5, 2007, in Charlotte, NC. Keegan Ann Rett, a brunette-for-now, joins three red-haired siblings (their father – and Don's son – has red hair). Mother/daughter are doing well. And we send our congratulations as well!

Daniel H Aronson, shared with us the exciting news that he has just joined the firm of Bilzin Sumberg Baena Price & Axelrod LLP, which he describes as a 100-lawyer, one-office, all-star boutique located in Miami. Dan was formerly with Greenberg Traurig LLP in Fort Lauderdale, Florida. We wish him all the best and we congratulate Bilzin Sumberg for having added another star!

With sadness we report the death on January 30 of **Gordon S. Macklin**, President of NASD from 1970 to 1987, and founder in 1971 and first President from 1975 to 1987 of NASDAQ. In later years he was a board member of WorldCom Inc and, in 2005, agreed with nine other former board members to pay an aggregate of \$54 million, including \$18 million in personal funds, to settle their portion of a class-action lawsuit brought by investors after an accounting scandal and the bankruptcy of the company.

FROM THE CHAIR – ABA FOCUSING ON PREEMPTION AND OTHER BLUE SKY DEVELOPMENTS

By Ellen Lieberman

Debevoise & Plimpton LLP (New York)

The ABA Addresses Preemption. *In Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005), the U.S. Supreme Court held that the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") did not preempt certain state law claims against a manufacturer. In that case in the context of state tort law and breach of warranty litigation against a manufacturer, the Court said that in areas of traditional state regulation it would assume that a federal statute has not supplanted state law unless Congress has made such intention clear and manifest. In response, in 2006 the ABA Tort Trial and Insurance Practice Section ("TIPS"), many of whose members are opposed to federal preemption at least within their area of practice, requested the ABA House of Delegates to revise existing ABA policy on federal

preemption. That request was subsequently withdrawn but the issue has not disappeared.

Torts and consumer protection laws are certainly areas that can be impacted significantly by preemption, but not the only such areas of law. Preemption is, or can be, a major factor in a number of areas of business law, including but not limited to securities law. Those of us who lived in the blue sky world pre- and post- the National Securities Markets Improvement Act of 1996 (“NSMIA”) know what a major change preemption can bring, and how the threat of preemption can also act to prompt and encourage states to at least act more uniformly on the laws they adopt and apply.

To respond to these developments, the Business Law Section created a new Ad Hoc Committee on Federal Preemption of State Law. Lynne Barr and Myles Lynk have agreed to serve as co-chairs. Other members of the committee include Michael Flynn, Dixie Johnson, Donald Lampe, Jeffrey Langer, Martin Lybecker, James Scott, and me (carrying the banner for Blue Sky lawyers). The Ad Hoc Committee, whose work will become available on a specially designated listserv, will develop the Section’s positions on the complex issues surrounding the federal regulatory preemption of state laws, initially through preparation of white papers on the impact of preemption on the different segments of business practice. Thereafter, the Committee will act as a sounding board and advisory body, as a monitor for further developments, and as a forum to determine what ABA recommendations should be supported (or opposed) by Section officers. It is anticipated that, in the future, Committee members will be able to subscribe to this listserv.

TIPS and the ABA Section of Administrative Law and Regulatory Practice set in motion a new task force to see what, if any, changes in ABA policy on federal preemption are warranted. Other sections are now joining that group including a delegation from the Section of Business Law. That delegation, of which I am a member, is a subset of the Ad Hoc Committee. In addition to determining whether any changes in ABA policy are warranted, we are concerned that any recommendations reflect the views and practices of the various ABA Sections, including the Business Law Section. The task force will explore the different facets of this issue and determine if it is possible to agree on a single resolution expressing a new ABA policy acceptable to all of the Sections that it would recommend to the House of Delegates, updating or expanding on the existing 1988 policy adopted by the ABA on federal preemption. It is possible, of course,

that agreeing on a single common policy may not be feasible, in which case the Special Committee would advise Section officers who would act accordingly.

The black letter language of the ABA 1988 resolution recommended that:

1. Congress address foreseeable preemption issues clearly and explicitly when it enacts a statute affecting regulation or deregulation of an area of conduct;
2. Each Federal agency establish procedures to ensure timely consideration of the need to preempt state law or regulations that harm Federally protected interests in the areas of regulatory responsibility delegated to that agency by Congress, and each agency clearly and explicitly address preemption issues in the course of regulatory decision-making;
3. Particularly in the circumstances where a Federal regulatory program is being reduced or eliminated (deregulation), each Federal agency responsible for that program be alert to the form and magnitude of state regulation that may exist, or may be quickly adopted to fill a perceived void left by the diminished Federal regulation;
4. When a Federal agency foresees the possibility of a conflict between a state law or regulation and Federally protected interests within the Federal agency’s area of regulatory responsibility, that agency, when practicable, engage in informational dialogue with state authorities in an effort to avoid such conflict; and
5. When a Federal agency proposes to act through agency adjudication or rulemaking to preempt a state law or regulation, that agency attempt to provide all affected states, as well as other affected interests, notice and an opportunity for appropriate participation in the proceedings.

The Courts Address Preemption. *Consolidated Management Group, LLC v. DuFauchoard*, 2006 U.S. Dist. LEXIS 71111 (N.D. Cal. 2006). A Notice of Sale on Form D was filed by Consolidated Management Group, LLC (“Consolidated”), with the SEC, and the California Corporations Commission, together with a Consent to Service of Process and \$300 notice filing fee, for each of two joint ventures. This case was brought in federal court by Consolidated to challenge state

proceedings that stemmed from an order of the California Department of Corporations to Consolidated to desist and refrain from marketing unregistered securities. The Department had contended in its pleadings that, by offering the securities by mass mailings and holding seminars where the potential investors had no preexisting relationship with plaintiffs, the offerings did not satisfy the terms of the federal exemption under Rule 506 and therefore federal law did not preempt state regulatory authority. Pursuant to the Younger doctrine (*Younger v. Harris*, 401 US. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)), a federal court will generally not interfere with pending state judicial proceedings if (i) the state proceedings are ongoing; (ii) the proceedings implicate important state interests; and (iii) the state proceedings provide an adequate opportunity to raise federal questions. As to the second prong, the Court concluded that, based on the pleadings and the available authority, it could not find that preemption was “readily apparent” on the face of the pleadings, and therefore found that the ability of the state’s regulatory commission to investigate and possibly regulate issuers of securities who are in violation of federal and state regulation qualifies as an important state interest. Because all three prongs of the Younger doctrine were satisfied, the Court dismissed the federal complaint in favor of the state judicial proceedings.

Blue Flame Energy Corp. v. Ohio Department of Commerce, 2006 Ohio 6892; 2006 Ohio App. LEXIS 6809 (2006). Blue Flame Energy Corp. (“Blue Flame”), the managing general partner of two oil and gas exploration limited partnerships, filed Form D’s with the Ohio Division of Securities. The Court agreed that the trial court erred in holding that federal law preempted the enforcement of Ohio’s blue sky laws against Blue Flame. The Division had asserted the offerings were not valid “covered securities” because they failed to satisfy all the conditions necessary to qualify for the Rule 506 exemption, in particular by engaging in general solicitation and advertising in offering the securities via public postings on its website. Blue Flame had argued, *inter alia*, that their offerings did not need to actually comply with the Rule 506 conditions in order for their securities to constitute “covered securities” as long as they were offered and sold in reliance on Rule 506. The Court concluded, however, that under the Securities Act of 1933, state laws are preempted from regulating the issuance and sale of only those securities that actually are exempt under Rule 506, and that the trial court did not abuse its discretion in finding reliable, probative, and substantial evidence supporting the Commissioner’s finding that the ban on general advertising and general

solicitation was violated. The Court also held that Congress did not intend for a federal forum to have exclusive jurisdiction in the area, and so did not deprive state tribunals of jurisdiction to decide federal preemption.

Capital Research & Management Co. v. Brown, 2007 Cal. App. LEXIS 108 (2007). The California Court of Appeals reversed a lower court judgment and held that the NSMIA did not preempt a state from enforcing its antifraud provisions in an action against the investment adviser and wholesale broker-dealer for a registered investment company issuing federal covered securities for failure to disclose participation in “shelf-space” agreements with other broker-dealers. Although NSMIA preempted states from directly limiting or imposing any conditions upon the use of any offering document prepared by or on behalf of an issuer of covered securities, the Court held that the plain language and legislative history of NSMIA’s savings clause (which permits state regulators to bring enforcement actions with respect to fraud or deceit, or unlawful conduct by a broker or dealer, in connection with securities or securities transactions) permits states to bring an action against a broker-dealer for its conduct in offering and selling the securities even if such an action might indirectly cause the issuer to modify its disclosure documents. Thus, the Court noted that the California Attorney General cannot sue the registered investment company issuer to force it to change its disclosure documents, but that the Attorney General could sue the investment adviser and wholesale broker-dealer to force them to disclose their oral agreements with the shelf-space brokers.

NASAA Addresses Preemption in Its Legislative Agenda. NASAA recently released its 2007 11-point “pro-investor” legislative agenda, with heavy emphasis on preserving state regulatory and enforcement authority. Among other things, they will aggressively block efforts to neutralize state regulatory and enforcement functions and will pursue (including through support of legislative initiatives) close working relationships with the SEC, and industry SROs particularly with respect to disclosure of disciplinary history. They will ask Congress to act to prevent preemption by rulemaking or opinion issuance such as they believe recently occurred by the OTS and OCC, to preserve state authority to protect consumers from fraud and abuse in the securities and banking sectors and with respect to data security breach protection (confidentiality laws), and ask that federal data security breach laws not preempt state laws unless the federal laws set very high standards. They ask to have state regulatory oversight

over Rule 506 Regulation D transactions reinstated, and support increasing the standards for accredited investors in all contexts and requiring industry participants to independently verify that status. They ask Congress to look into securities arbitration, including disclosure of conflicts, fairness, cost and making the system optional rather than mandatory. They oppose weakening of Sarbanes Oxley provisions, although recognizing that some modifications might be needed for smaller businesses. They ask that equity-indexed securities be clearly recognized as securities and their offer and sale be regulated as such. NASAA is also on record as requesting additional consumer financial education, heavier penalties for fraud against seniors, more transparency for hedge funds, and greater protection for pension funds by counting public pension fund moneys in determining if 25% of hedge funds assets are pension assets, which would cause the fund and its manager to be trustees for such pension assets.

The Interim Report of the Committee on Capital Markets Regulation. This interim report, the first of several, was issued on November 30, 2006, by a committee of 22 members who are leaders from business, financial services, law and academia. The 32 recommendations include, in part, loosened regulation for foreign issues to ensure the U.S. remains competitive in the global capital markets; in depth cost-benefit analysis of proposed rules and continuing review of existing rules by the SEC and the SROs; prohibition of “pay to play” in connection with class actions; improved enforcement coordination between the states and the federal government with (i) states being able to pursue civil remedies only if the SEC is not also acting, (ii) the SEC having a veto on proposed structural remedies to be imposed in settlements of state actions that are viewed as having national importance and (iii) the Department of Justice receiving advance notice and having a national interest veto on proposed state indictments of financial or auditing firms that are national in scope.

State regulators did not receive the report with open arms, particularly those recommendations relating to enforcement “coordination” between the federal government and the states. New York’s then Governor-elect Eliot Spitzer commented, “This is the same old tired response from the defenders of the status quo who time and again jump to eviscerate the prosecutorial power of the only office who did anything in the past decade.” Also critiquing the report was former SEC Chairman Richard Breeden who was quoted as saying, “It is a bunch of warmed-over, impractical ideas, many of which have been kicking around for a long time. . . . It is very elegant whining.” On the other hand, Senator

Chris Dodd, who expected to be chair of the Senate Banking Committee, said, “This report makes a valuable contribution to our ongoing examination of international competitiveness, and I intend to review this report thoroughly in the coming days.”

The SEC Proposes to Act to Prohibit Investment Adviser Fraud and Revise Accredited Investor Criteria for Section 3(c)(1) Funds. In 2006, the D.C. Court of Appeals in *Goldstein v. SEC*, 371 U.S. App. D.C. 358; 451 F.3d 873; 2006 U.S. App. LEXIS 15760 (2006), vacated a proposed SEC rule which would have required hedge funds (“private funds”) to look through and count fund investors as individual clients for purposes of the fewer than 15 client exemption from federal investment adviser registration, with the result that hedge fund advisers would generally have had to register federally as investment advisers. Having had one door closed, the SEC (with some guidance from the *Goldstein* court) determined to open another. The court suggested that the SEC could adopt rules to protect fund investors under Section 206(4) of the Investment Advisers Act of 1940, which does not limit SEC action to fraudulent conduct affecting the adviser’s clients. Proposed Rule 206(4)-8(a)(1) would make it a fraudulent, deceptive or manipulative act, practice or course of conduct for any registered or unregistered adviser to a “pooled investment vehicle” to make an untrue statement of a material fact to any investor or prospective investor in the pooled vehicle, or to omit to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made not misleading. The rule as proposed would protect potential as well as actual investors, would not be limited to the offering process but reach all communications with investors and proposed investors, and would not require scienter, but would not create a private right of action. A “pooled investment vehicle” as proposed would generally include private funds and registered investment companies but not real estate investment trusts or business development companies.

The second major proposal would require natural person accredited investors in Section 3(c)(1) funds (other than venture capital funds) to meet, not only existing accredited investor standards, but a second standard as well. Funds that rely on Section 3(c)(7) would not be subject to the new rule because natural persons investing in such funds must be qualified purchasers who generally own \$5 million of investments. The second standard for Section 3(c)(1) investors, under proposed Rule 509 under the Securities Act of 1933, would require an accredited natural person to also own \$2.5 million (periodically adjusted for inflation) of

“investments.” Investments is proposed to be defined more narrowly than under Rule 2a51-1 of the Investment Company Act of 1940 (which defines “qualified purchaser” for purposes of Section 3(c)(7)) and, as proposed, would be based on fair market value of investments, excluding real estate not held for investment purposes, such as a residence or place of business of the investor or a related person and only 50% of any investments held jointly with spouse (unless the investment is being jointly made). The proposed Rule does not accommodate employees or knowledgeable employees who do not meet the new accredited natural person standard, unless they invest as unaccredited investors. The SEC comment period ends March 9, 2007, and other Committees of the ABA Section of Business Law will take the lead in compiling comments, although members of our Committee expect to have the opportunity to review the letter.

New York’s Martin Act. New York’s Martin Act, New York General Business Law Part 20, Article 23-A, Section 352, *et seq.*, was originally enacted in May 1921, and named after its state assembly sponsor Martin, and subsequently amended including 1955 amendments to permit criminal charges to be brought by the Attorney General. While some people have pushed for New York to consider adoption of the 2002 Uniform Securities Act, the Attorney General’s office has been reluctant to change the law in any way that might limit the expansive enforcement powers of the current Martin Act. With the New York Attorney General now having been sworn in as New York’s Governor, and a new occupant in place in his prior office, we will see what, if anything, develops. It’s interesting to note that the former Attorney General, Eliot Spitzer is reported to have admitted, circa 2004, the potential problems that could arise if 50 states attempt to regulate the international financial markets, and allowed that the state’s enforcement powers could be diminished as long as that didn’t occur within his term of Attorney General. John C. Coffee, Jr., the Adolf A. Berle Professor of Law at Columbia University Law School and director of its Center on Corporate Governance, was recently quoted as saying: “The Martin Act is a relic. Other states have updated their ‘blue sky’ statutes regularly, looking to the National Conference of Commissioners on Uniform State Laws’ Uniform Securities Act. Alone (except for Rhode Island), New York gives investors no right to sue under a state statute for securities fraud. All this should be re-examined. The Attorney General would be the appropriate state official to draft new legislation updating an old and dusty statute.” Stay tuned.

Committee Comment Letters. We have indeed been prolific as a Committee, with six comment letters filed in the past year. While our authority to directly comment to NASAA or other SROs is still being debated within the ABA leadership, we’ve nevertheless spoken up. Two comment letters were addressed to the SEC voicing our support for treating NASDAQ Capital Market Securities and securities authorized for listing on the NASDAQ Capital Market as “covered” securities under Section 18 of the Securities Act of 1933. One letter was directed to members of NASAA’s Direct Participation Program Policy Project Group with detailed comments on their proposed revision to the various Guidelines. Two comment letters were sent to California regulators relating to rulemaking to amend their Rule 701 and related employee benefit plan provisions, and in response to their request for comments on how California should treat finders. Finally, a comment letter was sent to Florida regulators on their proposed definition of branch office.

If you would like to participate in the Comment process, or if there are particular state or more general issues that you believe deserve or need a Committee response, please let me know so that we can continue to be as active and proactive as we have been this past year. And we appreciate the work of all those who worked on drafting committees, and particularly those who led the efforts including but by no means limited to Alan M. Parness, Cadwalader Wickersham & Taft LLP; Andrew D. Brooks, Seltzer Caplan McMahon Vitek; Michele A. Kulerman, Hogan & Hartson L.L.P.; Mike Liles Jr., Karr Tuttle Campbell; Shane B Hansen, Warner Norcross & Judd LLP; and R. Michael Underwood, Squire, Sanders & Dempsey L.L.P.

In addition, while not a comment letter, in October 2006 in my capacity as Committee Chair I wrote to Michael E. Stevenson, Washington Director of Securities and Chair of NASAA’s Corporate Finance Group. My letter requested that NASAA review existing exemptive provisions under state law and urge states to make appropriate changes, perhaps recommending language, to ensure continuing exemption from securities registration requirements for options, warrants and rights to acquire securities of the various Nasdaq tiers that qualify as “covered” securities under Section 18 of the Securities Act of 1933. I heard subsequently from the Corporate Finance Group and they are indeed looking into this issue.

Committee Luncheon Meeting. On February 23, 2007, the Committee held a luncheon meeting in person in New York and by telephone conference call. This was

the third in a series of ad hoc luncheon meetings arranged by the Committee. Invited guests at this event were Michael E. Stevenson, Washington Director of Securities and Chair of NASAA's Corporation Finance Section, and his colleagues in that group: Randall E. Schumann, Legal Counsel for the Wisconsin Securities Division, Timothy F. Cox, Maryland Chief of Securities Registration, Matt Kitzi, Missouri Securities Commissioner, and Peter Cassidy, Attorney in the Massachusetts Securities Division. The meeting was coordinated by Lee Liebolt, and hosted by Marty Miller and his firm, Willkie Farr & Gallagher LLP.

The discussion ranged over a number of NASAA projects and blue sky issues, including but not limited to, the NASAA Model Accredited Investor Exemption and the desire by NASAA for the SEC to adopt a corresponding exemption, such as the SEC did with Rule 1001 for offerings made pursuant to California Rule 25102(n), perhaps with an increased dollar limit equal to or greater than \$5 million; in progress revisions of the Direct Private Placement and other NASAA Guidelines (on which this Committee commented), and the Uniform Franchise Offering Circular Guidelines to correspond to recent changes adopted by the Federal Trade Commission; NASAA's exploring corporate accountability and disclosure for smaller companies; a NASAA project to promote coordinated interpretations of statutes and rules; changes to Form D and electronic filing of the Form (no specific information available at this time); an anticipated comment letter by NASAA which is likely to generally support the SEC's proposed rule changes to prohibit investment adviser fraud, and revise accredited investor criteria for Section 3(c)(1) funds; NASAA's efforts (in tandem with the Committee) to support NASDAQ Capital Market securities' recognition as "covered" securities under Section 18 of the Securities Act, together with securities so authorized for listing, and NASAA's efforts (at the request of the Committee) to have states make certain that their current exemptive language will continue to exempt options, warrants and rights to purchase securities of the various NASDAQ tiers. Also discussed were legislative and rule-making developments in several jurisdictions, included introduction in some state legislatures of the 2002 Uniform Securities Act; as well as legislation introduced in Maryland relating to naked short sales, along the lines of a Utah statute that is currently in litigation. The Committee raised, among other issues, the need for more uniformity in some state 701-exemptions to cover consultants as well as employees and securities issued pursuant to compensatory contracts as well as plans, and the need to

ask states to act upon and adopt an exemption to facilitate exchange offer or business combination transactions in which the U.S. component is minimal and exempt from federal securities registration under Rule 802 of the Securities Act.

Prior luncheon in person and conference call meetings featured Patricia D. Struck, then-President of NASAA and Wisconsin Securities Administrator, and subsequently Joseph P. Borg, President of NASAA and Director of the Alabama Securities Commission. These meetings followed a very gracious offer initiated by Denise Voigt Crawford, then Chair of NASAA's Corporation Finance Section and Texas Securities Commissioner, to open a portion of the Section meeting to conference call participation by ABA members and colleagues. The luncheons also reinstitute a popular lunch series that the blue sky lawyers in New York held over the years, and help fill the gaps between the Committee's three regularly scheduled meetings at the ABA Annual Meeting, the Section of Business Law Spring Meeting and the NASAA Annual Conference. We look forward to more such events and to continue to communicate with regulators and with each other. If there are particular guests you believe we should invite, or particular issues you think should be discussed, please let us know.

Events at Spring Meeting. Do join us!

Friday, March 16, 10:30-12:30. The Committee on State Regulation of Securities is sponsoring a CLE program Friday, March 15, 2007, at the ABA Section of Business Law Spring Meeting in Washington, D.C. on Hot Securities Law Issues for Small Business. Co-sponsors are the Committee on Federal Regulation of Securities and the Committee on Small Business. F. Lee Liebolt, Jr., former Chair of this Committee and our current Liaison to the NASAA Ombudsman, is the Program Chair and Moderator. The program will be held 10:30 a.m.-12:30 p.m., Friday morning, in Room 141 on Level 1 of the Washington Convention Center. A panel of experienced practitioners and top regulators will discuss current securities law issues impacting small- and mid-cap companies seeking to raise money in the public and private markets. Also included will be updates on the SEC advisory committee's recommendations, the private placement broker-dealer registration concept and certain state administrators' initiatives. Panelists will be M. Ridgway Barker, Chair of the Corporate Finance and Securities Practice Group at Kelley Drye located in their Stamford, Connecticut, office; David N. Feldman, founder and Managing Partner of Feldman Weinstein & Smith LLP,

New York City, and an authority on reverse mergers and PIPES, Gerald J. Laporte, Chief of the Office of Small Business Policy at the SEC since late 2002; David Lynn, Chief Counsel of the SEC's Division of Corporation Finance; Mark T. Uyeda, Counsel to SEC Commissioner Paul S. Atkins and formerly Chief Advisor to California's Corporations Commissioner; Ann Yvonne Walker, Partner in Wilson, Sonsini, Goodrich & Rosati's Palo Alto, California, office; and Gregory C. Yadley, Co-Chair of the Corporate Practice Group of Shumaker, Loop & Kendrick, LLP located in Tampa, Florida, and Co-Chair of the ABA Task Force on Private Placement Broker-Dealers.

Saturday, March 17, 10:30-12:00. The following morning, Saturday, March 17, 2007, the Committee will meet from 10:30 a.m.-12:00 noon in Room 140 B on Level 1 of the Washington Convention Center. In addition to a general discussion of current issues and updates from some of subcommittees and liaisons, we have invited neighboring regulators and liaisons to join our dialogue: Theodore A. Miles, the Director of Washington, D.C.'s Securities Bureau; Melanie Senter Lubin, Securities Commissioner, and Timothy F. Cox, Chief of Securities Registration, of Maryland; Ronald W. Thomas, Director of Virginia's Division of Securities, and our Committee's liaisons to Washington, D.C., Michele A. Kulerman of Hogan & Hartson L.L.P.; Maryland, William David Chalk of Piper Marbury Rudnick & Wolfe LLP; and Virginia and West Virginia, Ed McDevitt of Bowles Rice McDavid Graff & Love PLLC.

NASAA CONCERNS FOR 2007

By Joseph P. Borg
President, NASAA
Director, Alabama Securities Commission

By Rex Staples
General Counsel, NASAA

By Deborah House
Director Legislative Affairs, NASAA

For 87 years, NASAA, the association of state securities regulators has worked on initiatives impacting state and federal legislation, rulemaking, and coordinated enforcement actions all with the common goal of protecting investors and maintaining investor confidence in our markets. This year, NASAA has proposed an aggressive pro-investor legislative agenda that leads to that common goal.

NASAA's agenda falls into five broad categories:
1) Preserving the authority of state regulators to protect

investors, and evaluating the negative effects of preemption of certain state laws; 2) Strengthening the mechanisms currently in place that provide redress to investors for wrongdoing by industry participants; 3) Maintaining federal laws designed to insure corporate accountability and shareholder confidence; 4) Promoting sound and effective regulatory initiatives; and 5) Improving the scope and breadth of investor education efforts.

Let's discuss a few of these agenda items.

Preserving State Authority. State regulators will continue to vigorously defend our authority to regulate at the state level and bring enforcement actions seeking appropriate remedies against those firms and individuals that violate securities laws and thereby harm investors. Recently, those who would seek to eliminate or reduce state authority have abandoned direct efforts in Congress in favor of a new, more subtle methodology – the research study – e.g., the Committee on Capital Markets Regulation's Interim Report, and the more recent McKinsey Report. Both reports seek to use an “appeal to fear” that “the sky is falling” in an attempt to obstruct state regulators who are aggressively protecting investors, the bedrock of our market confidence.

Market globalization, for so long the mantra of Wall Street for loosening regulation has now changed – apparently now that globalization is here, with stronger, deeper foreign markets, technology equivalent to ours and a populace willing to invest in their own domestic markets. Predictably, Wall Street is attempting to blame “burdensome regulation” for increased competition. It should be noted, however, that numerous journalists, academics and other experts have questioned the premises, “conclusions” and “recommendations” of these reports – and rightfully so. Are we really losing ground in our markets? – or is it that the rest of the world has begun to draw alongside? Let's not forget that Wall Street has a large overseas stake in those foreign markets as well. The measurements utilized by the reports are suspect and deserve a much more detailed review. Many believe that the wrong conclusions have been reached and the arguments made do not hold water.

Let's not lose sight of the fact that history has demonstrated that the complementary state-federal-industry regulatory relationship has a proven record of serving investors well. In light of the proposed consolidation of the NASD and the NYSE Regulation, the need for strong state securities regulatory authority is heightened. With more than 100 million investors relying on our securities markets to meet their financial

goals – and on regulators to keep those markets well-policed – we must ensure that this successful and cooperative regulatory relationship remains as strong as possible. NASAA would support legislative initiatives designed to facilitate and strengthen this cooperation.

The Securities Arbitration System. Every year thousands of investors file complaints against their stockbrokers. If these disputes aren't settled, investors are left with only one avenue to pursue their claims – arbitration. With the recent consolidation of the NASD and NYSE regulatory functions – for all practical purposes – only one arbitration forum remains. This system, which is administered by an affiliate of the NASD, should be examined to ensure it is fair and transparent to all. With no appeal rights, and no second review, the system has to be fair, equitable and just. It has to be right the FIRST time. Investors don't get a second chance (unlike the jury system). State securities regulators believe the system should be reviewed in its totality. We must examine the manner in which arbitrations are conducted to determine if there is sufficient disclosure of potential conflicts by panel members; we must scrutinize the manner and method of arbitrator selection to determine if selection, qualification, and composition of the panels is fair to the parties. We must investigate the adequacy of the training that arbitrators receive. We must evaluate the explanations of awards to determine that they are sufficient. We must also determine if the system is, as claimed, efficient and economical for investors; and if the system is not fair, the entire arbitration process should be optional, not mandatory, for investors.

Reinstate State Regulatory Authority of Regulation D 506 Offerings. For those of you who know me, I've been on this bandwagon for years. We see fraudulent Reg D offerings almost every week. The scope of covered securities in Section 18(b) of the 1933 Act has expanded since the National Securities Markets Improvement Act of 1996 (NSMIA) was enacted, even though the definition has technically remained the same. More issuers are using Rule 506 and the listing standards on some of the exchanges are deteriorating, so more securities that fall within the definition of covered security are being offered to the public with little or no scrutiny.

Rule 506 of Regulation D offerings are provided the special status of private placements and are exempt from federal and state securities registration laws. As a result of this special status, there is no regulatory review of the 506 offerings at either the federal or state level. Thus, for example, NSMIA has preempted the states from

prohibiting Regulation D offerings *even where the promoters or broker-dealers have a criminal or disciplinary history*. Some courts have even held that offerings made under the guise of Rule 506 are immune from scrutiny under state law, regardless of whether they actually comply with the requirements of the rule. And while that trend is changing – as demonstrated in a few cases (Blue Flame (OH)) (Buist (AL)) – all the while, state securities regulators continue to observe an increase in the number of questionable Reg D Rule 506 offerings in their respective jurisdictions. In light of the growing popularity of the offering and the expansive reading of the exemption given by certain courts, NASAA believes the time has come for Congress to reinstate state regulatory oversight of Regulation D offerings.

The Accredited Investor Definition. Recently, the Securities and Exchange Commission proposed two rules that would require natural persons investing in hedge funds and other private funds that claim an exemption under 1940 Investment Company Act Section 3(c)(1) to have a minimum of \$2.5 million in certain types of investments at the time of their investment in the fund. Such investments would not include, among other items, the value of the individual's residence. This test would be *in addition to the current requirement* that the investor must have either \$1 million in net worth or a certain level of income – \$200,000 individually or \$300,000 with a spouse. This standard was adopted in 1982, and NASAA has repeatedly encouraged the Commission to increase these levels to keep pace with inflation and a sustained growth in wealth and income. NASAA is commenting on the proposed rulemaking, and believes the accredited investor standard should be revised in all its applications, rather than limited to investments in certain private funds. Raising the individual investor standard to be an accredited investor would provide greater protection for investors and would aid state regulators in enforcement activities by ensuring that those individuals who are taking a greater risk are in fact accredited. In order to insure that those representing themselves as “accredited investors” do in fact meet the definition, NASAA suggests implementing, either by rule or by statute, a requirement that industry participants be required to independently verify a potential investor's representation that he or she meets the financial guidelines.

Define Equity Indexed Annuities as Securities. The sale of equity-indexed annuities (EIAs) has risen dramatically since 1995, when they first appeared on the market. Estimates are that \$25 billion of these products were sold in 2005. This increase in sales volume has

been driven largely by the high commissions that sales agents earn on EIAs. As financial media commentators have said repeatedly – these products are not bought but sold.

Problems have arisen, however, because EIAs are extremely complex and they have a number of onerous features, including long accumulation periods and high surrender charges. State securities regulators, as well as the SEC and the SROs, are receiving an increasing number of complaints about EIAs. Although EIAs may be legitimate investment vehicles for some people, NASAA is concerned that these products are unsuitable for many investors and that they are often associated with deceptive marketing tactics. Particularly troubling is the sale of EIAs to senior citizens, who are being aggressively targeted through investment seminars nationwide.

The status of EIAs as securities remains uncertain. The SEC first solicited public comment on the appropriate treatment of EIAs under federal securities law in 1997 but the agency has not yet issued guidance on the issue. The NASD has cautioned its members that EIAs may well constitute securities, depending upon the facts and circumstances in each case, and it requires member firms to follow special precautions when their associated persons sell EIAs, regardless of whether they are deemed to be securities. However, the NASD has expressly declined to address the legal status of EIAs. NASAA believes that it is time to remove the legal uncertainty surrounding EIAs and that it is appropriate to classify these investment products as securities. This is conceptually sound under current law, at least in instances where EIAs are promoted and sold primarily as investments rather than insurance products. This is especially appropriate from the standpoint of investor protection, given the level of sales abuse associated with these products and the unique ability of securities regulators at both the state and federal level to address those abuses at the point of sale. The strong suitability standards found in the state and federal securities laws will help ensure that EIAs are sold only to investors for whom they are appropriate. The application of the securities laws to the sale of these products also will help ensure that investors receive complete, understandable, and accurate information regarding all material aspects of these products prior to purchase and that investors are afforded remedies if they are defrauded or harmed by other abusive sales practices.

Let's be real – what are they, how are they sold, who are they marketed to and what are buyers told? The conclusion is inescapable – it's a security.

Increase Sanctions for Crimes Against Senior Citizens. OK – I admit it – I'm a Baby Boomer (and so are many of you reading this today) and while I'm not ready to be called a senior citizen and notwithstanding the multi-front offensive launched by state and federal securities regulators, senior citizens remain a target for unscrupulous scam artists. State securities regulators recently announced that 26 percent of all enforcement actions during 2004-2005 involved the financial exploitation of seniors. Investment fraud targeting seniors is an ongoing concern, and NASAA believes that Congress should explore proposals to assist law enforcement and prosecutors to ensure that those who take advantage of our nation's elderly will be held accountable. Fraudulent investment sales to seniors will remain a problem of epidemic proportions as long as the benefits to the perpetrators outweigh the costs.

Enhanced penalties for senior abuse – ranging from fines to jail terms – should help to raise those costs, deter law violations, and punish appropriately those who exploit senior investors.

Advance and Increase Financial Education Efforts. The securities regulators that form the NASAA membership are firmly committed to promoting and supporting financial literacy, and are firmly committed to delivering investor education. We believe we have an ongoing obligation to help our constituents develop the knowledge they need to make good personal financial decisions. We think that reaching our young citizens with financial education at a very early age can help them build a lifetime of good money management habits. And, the increased need to educate seniors about investment fraud cannot be overemphasized. It remains our fundamental belief that financial education is the first and best defense against financial fraud, abuse, and exploitation. State securities agencies are leaders in grass-roots investor outreach and education and look for opportunities to join forces with other members of the financial education community. NASAA urges Congress to fund programs to cultivate financial education partnerships amongst federal, state and nonprofit entities.

One final thought – in my state we need good financial advisors, representatives and agents – my citizens need all the help they can get to reach their goals – whether it's a new home, college education or retirement – the need is there and the need is real – state regulators encourage good businesses to come to our states. The business community, by joining with us to keep out the "bad apples," not only serve their clients but themselves. Every dollar lost to fraud is a dollar that is

lost to one of my citizens and it's a dollar that the financial community does not have in their asset base. Let's remember that those who don't learn from history (or ignore it for the short term interest) are doomed to repeat it. We can't afford another year like 2000 or another Enron or mutual fund scandal . . . we're all in this together.

PROPOSED HEDGE FUND LEGISLATION IN CONNECTICUT

By David M. Katz
Sidley Austin LLP

Legislation has been introduced in Connecticut (Bill No. 1171) that would purport to, among other things, restrict investments in hedge funds.

The new legislation, which would become effective on October 1, 2007, would require that hedge funds (defined in the legislation as private investment funds (i) which are excluded from the definition of "investment company" under the Investment Company Act of 1940 by reason of either Section 3(c)(1) or Section 3(c)(7) thereunder, (ii) which are "located in [Connecticut]" (defined to mean that the hedge fund has an office in Connecticut where employees "regularly conduct business" on behalf of the hedge fund), (iii) interests in which are offered to "investors" (any holder of record of a class of equity security in a hedge fund) in accordance with the exemption from registration under the Securities Act of 1933 (the "Securities Act") set forth in Rule 506 of Regulation D thereunder, and (iv) which meet "any other criteria as may be established by the [Connecticut] Banking Commissioner in regulations adopted [thereunder]") which offer interests therein must meet each of the following conditions:

(a) on and after January 1, 2009, no hedge fund shall consist of individual investors who, individually or jointly with a spouse, have less than \$2.5 in "investment assets" (which includes any security, real estate held for investment purposes, bank deposits, cash and cash equivalents, commodity interests held for investment purposes and such other forms of investment assets as may be established by the Connecticut Banking Commissioner) or "institutional investors" (an investor other than an individual investor including, but not limited to, a bank, savings and loan association, "registered" broker, dealer, investment company, licensed small business investment company, corporation or any other legal entity) which have less than \$5 million in "assets" (not defined) [there does not appear to be any "grandfathering" provision in the

proposed legislation with respect to hedge funds that would, as of January 1, 2009, have investors who do not meet the above minimum investment requirements suggesting that those investors would need to be involuntarily redeemed out of the hedge fund];

(b) the hedge fund's investment "manager" (defined to mean an individual located in the State of Connecticut who has direct and personal responsibility for the operation and management of a hedge fund) must disclose to each "investor or prospective investor", not later than 30 days before any investment in the hedge fund, any financial or other interests the manager may have "that conflict with or are likely to impair, the manager's duties and responsibilities to the hedge fund or its investors" [it is not clear what it means for the manager's duties and responsibilities to the hedge fund or its investors to be "impaired" in light of the fact that a hedge fund's manager would likely be deemed to be acting as an "investment adviser" to the hedge fund under the Investment Advisers Act of 1940 (the "Advisers Act"), whether or not the manager is registered as an investment adviser thereunder, and thus would be deemed, under the Advisers Act, to have a fiduciary duty to its advisory clients (and, thus, to act in the best interests of its advisory clients)];

(c) the hedge fund's investment manager must disclose to each investor (1) any "material" (defined to mean, with respect to future expenditures or adverse impact on the hedge fund's financial position, more than 1% of the assets of the hedge fund) change in the investment strategy and philosophy of the hedge fund, and the departure of any individual employed by such fund who exercises significant control over the investment strategy or operation of the hedge fund, (2) the existence of any "side letters" (not defined) provided to investors in the hedge fund, and (3) any "major litigation" (defined to mean any legal proceeding to which the hedge fund is a party and, if decided adversely against the hedge fund, would require such fund to make material future expenditures or have a material adverse impact on the hedge fund's financial position) and which involves the hedge fund or any governmental investigation of the hedge fund; and

(d) on January 1, 2008, and annually thereafter, the hedge fund's investment manager must disclose to each investor (1) the fee schedule to be paid by the hedge fund including, but not limited to, management fees, brokerage fees and trading fees, and (2) a financial statement indicating the investor's capital balance that has been audited by an independent auditing firm.

The proposed legislation appears to conflict, directly, with the federal preemption of State securities registration, or qualification, requirements set forth in Section 18(a) of the Securities Act, as adopted by the National Securities Markets Improvement Act of 1996 (“NSMIA”). Pursuant to Section 18(b)(4)(D) of the Securities Act, private offerings which are exempt from registration by reason of Rule 506 of Regulation D thereunder (whether or not hedge funds) constitute “covered securities” offerings. Section 18(a)(1) provides that “no law, rule, regulation, or order, or other administrative action of any State or any political subdivision thereof . . . requiring, or with respect to, registration or qualification of securities, or registration or qualification of securities transactions, shall directly or indirectly apply to” any covered security.

Section 18(a)(2)(A) prohibits any State, directly or indirectly, from prohibiting, limiting or imposing any condition upon the use of any offering document that is prepared by or on behalf of the issuer and that relates to a covered security. Section 18(a)(3) prohibits any State, directly or indirectly, from prohibiting, limiting or imposing any condition, based on the “merits of such offering or issuer”, upon the offer or sale of any covered security.

Because the proposed legislation is directly tied to offerings of securities conducted in accordance with Rule 506 of Regulation D under the Securities Act, it would appear that the mandated disclosure, suitability, and other conditions, or requirements, that the legislation proposes to impose on any such offering, as described above, would conflict with the prohibitions against State action on disclosure and merit review imposed under Sections 18(a)(2)(A) and 18(a)(3) of the Securities Act, and would appear to be tantamount to a State registration or qualification requirement imposed in contravention of Section 18(a)(1) of the Securities Act.

In this regard, prior to the enactment of NSMIA, it was common for State “Blue Sky” or securities laws – either by statute or by rule, or regulation, adopted thereunder – to impose disclosure requirements on Rule 506 offerings as well as “suitability” requirements on prospective investors (generally limiting the amount of assets that any investor could commit to any particular offering). Thus, the type of regulation contemplated by Connecticut under the proposed legislation appears to have been specifically contemplated, and targeted, by Congress when it enacted NSMIA.

Note that the Securities and Exchange Commission (the “SEC”) recently proposed to amend the definition of

“accredited investor” in Rule 501(a) of Regulation D under the Securities Act to require that individual investors who qualify as accredited investors under the SEC’s net worth or income test must, in addition, have at least \$2.5 million in “investments” (excluding from investments any real estate that is used by the investor for personal or business purposes). If so adopted by the SEC, such rule change would be consistent with the “suitability” provision of Connecticut’s proposed legislation for individual investors. Notwithstanding the foregoing, however, Connecticut would be free to define the term “investments” in a manner which may not be consistent with the SEC’s interpretation thereof. Moreover, if the SEC proposal does not get adopted, or is modified, there could be further deviation between the ultimate Connecticut and SEC standards (and, in any event, the SEC’s proposal does not impose any suitability requirement on “institutional” investors). Finally, the Connecticut legislation would preclude Connecticut-based hedge funds, which are conducting their offerings in accordance with Rule 506 of Regulation D under the Securities Act, from offering/selling interests therein to non-accredited investors, even though Rule 506 specifically permits an issuer (including hedge funds) to sell to up to 35 such investors. Suffice it to say, through NSMIA, and specifically Section 18 of the Securities Act, Congress intended for all substantive regulation of, among other things, Rule 506 offerings to be left to the SEC, and not the States.

Although Congress did reserve to the States the ability to investigate “fraud or deceit”, and bring enforcement actions, in connection with covered securities offerings (*see* Section 18(c)(1) of the Securities Act), the affirmative, or mandated, prospective regulation of disclosure in connection with a Rule 506 offering, as contemplated by the proposed Connecticut legislation, would seemingly vitiate the explicit federal preemption of State disclosure requirements with respect to any offering document prepared by or on behalf of a hedge fund/issuer under Section 18(a)(2)(A) of the Securities Act.

THE MERRILL RULE: OLD HABITS DIE HARD

By: *Jeffrey Spill*

Deputy Director

New Hampshire Bureau of Securities Regulation *

Introduction. When regulators and industry professionals met in 2006 to discuss hot topics in the securities industry for the coming year 2007, the general consensus was that the Merrill Lynch Rule, SEC Rule 202(a)(11)-1, adopted on April 6th, 2005, and the confusion generated by the lack of a clear standard of fiduciary duty were areas of significant concern. At the annual convention of the Financial Planning Association (FPA), there was a call for a comprehensive and continuous fiduciary standard. The FPA called for a task force to provide members with information on the topic of fiduciary responsibility. On November 13th, 2006, the Securities Industry and Financial Markets Association Compliance & Legal Division hosted a Fall Compliance Seminar in New York. Panelists touched upon the confusion among consumers when brokers use designations which suggest that they are investment advisors, and when brokers sell products such as full-service brokerage accounts which include investment advice incidental to the brokerage relationship. In a recent article, Edwards, Pay Me, But Don't Blame Me: The Merrill Rule, Vol. 13 No. 2 Public Investors Arbitration Bar Association 29 (Summer 2006), Edwards states that, "in today's environment, the line between brokers and financial advisors has been blurred." This comment is reflective of a common opinion among industry professionals.

Defining the Problem. There are some legal principles of the fiduciary relationship that we all clearly understand. For instance, we all know that a fiduciary relationship can come into being by contract when it is expressly understood between the parties that the fiduciary relationship exists. Brokers who gain discretionary control over an account are deemed fiduciaries and will be held to the higher standards typically associated with an investment advisor. These include the duty to manage the account over time in a manner comporting with the needs and objectives of the customer; keeping informed regarding the changes in the market which affect the customer's interests; keeping the customer informed as to each completed transaction; and explaining the practical impact and potential risks of a course of dealing. Further, brokers must act as fiduciaries if they are required to by statute.

The problems arise, however, when there is no contractual or statutory requirement that is applicable, and establishment of a fiduciary duty turns on whether the conduct of the parties established the fiduciary obligation. Herein lays the fundamental problem. Although the law carves out an exemption for the conduct of brokers such that they can avoid the application of the Investment Advisors Act of 1940 if their advice is "incidental" to the brokerage relationship, the conduct of the parties is subject to interpretation and fluctuation, and on countless occasions the courts have stepped in and found that the fiduciary obligations normally associated with an investment advisor will apply to a broker who maintains an indicia of general control over the customer's account. Brokers are typically deemed to be in a special relationship with their customer such that their duty begins and ends with each individual transaction, but this relationship can be transformed when trust and confidence is reposed by the customer to the broker.

Three Schools of Thought. When assessing court precedent in this area three schools of thought emerge. The minority view is that a broker is not a fiduciary unless the customer entrusts him with "discretion" to select the investments. This view sees the broker relationship as an arm's-length contractual relationship wherein no fiduciary obligation exists. The majority of courts, however, fall into one of two groups. The first group follows the "shingle theory" of brokerage which states that when a broker hangs his shingle he impliedly represents that he will deal with the public fairly, and that even in a non-discretionary account, he is always under a fiduciary obligation as to each individual brokerage transaction. These duties include: recommending a stock only after becoming familiar with its nature, price and fundamental prognosis; carrying out the customer's order in a manner that is best execution for the customer; informing the customer of the risks of an investment; transaction of business only after receiving authorization; refraining from self-dealing or disclosure of personal interest; and not to misrepresent material facts. The second group takes the position that the scope of a stock broker's fiduciary obligation in a particular case is an issue of fact that turns on the manner in which investment decisions have been reached and transactions executed for the account.

There is a definitive line of cases that fall into one of these two main groups. An understanding of these cases gives us a better sense of when fiduciary obligations and higher standards of care will be attached to the brokerage relationship. Recently, a rash of cases has made it clear that when there is no actual discretion or the indicia of

* The foregoing article contains the opinions of the author, and not those of the Bureau.

discretion or control, customers are at a disadvantage when bringing suit against brokers alleging a failure to disclose information. In *Benzon v. Morgan Stanley Distributors Inc.*, 420 F.3d 598 (2005), plaintiff investors in Morgan Stanley mutual funds brought suit claiming fraud in the failure to disclose in the prospectus a scheme which plaintiffs alleged worked a conflict of interest. The allegation was that compensation was greater to agents for the sale of Morgan Stanley funds than unaffiliated funds and greater for the sale of B shares than any other class. The case was dismissed when the court ruled that there was no statutory or regulatory duty of Morgan Stanley to reveal that their brokers earn more for the sale of their own funds. In *Re Morgan Stanley and Van Kampen Fund Securities Litigation*, 2006 U.S. Dist. Lexis 20758, held that a duty to disclose arises either through explicit regulatory or statutory requirement, or when omitted information is otherwise material. SEC regulation imposes no duty to disclose the allocation of broker compensation. In *Press v. Quick & Reilly, Inc.*, 218 F.3d 121 (2000), clients of defendant broker-dealer who established accounts that swept uninvested funds into money market accounts made allegations that the defendant committed fraud when it chose the money market funds based on the revenue paid by the fund to the broker-dealer as opposed to the performance of the fund. The court held that the defendant was obligated under SEC Rule 10b-10 to disclose any remuneration received from third parties in connection with a customer transaction, and that the broker-dealer was operating under a conflict of interest, however, the court ruled that the mutual fund prospectus provided adequate disclosure of this arrangement. The court ruled that the mutual fund prospectus could satisfy and take the place of the broker's obligation to disclose.

On the other hand, customers have been more successful in litigation against brokers when the allegations involved cases wherein the broker has usurped control over the account or when trust and confidence was reposed by the customer to the broker. Between the non-discretionary and discretionary account is a hybrid type account over which the broker has usurped control. When a broker usurps actual control over a non-discretionary account, he has the same fiduciary obligations that he would have had if the account had been discretionary. In determining whether a broker assumed control, the courts have weighed several factors including the customer's age, education, and investing experience. However, if the court finds that the broker and customer spoke frequently over the prudence of the transactions, the court will usually find that the customer maintained control over the account. Generally speaking,

as the broker's control increases so does the broker's fiduciary duty.

In *Patsos v. First Albany Corporation*, 742 N.E.2d 841 (2001), the Supreme Court for the State of Massachusetts reversed and remanded a lower court's dismissal of an investor action against his broker for breach of fiduciary duty saying that the determination of a fiduciary relationship was a question of fact for the jury to consider. The court stated that in analyzing whether there existed a fiduciary relationship in an otherwise nondiscretionary account, courts must look at the documentation of the customer's account as well as the account transactions. Other factors the court considered were the investor's lack of investment acumen, the broker's knowledge that the investor relied on the broker's advice, and social or personal ties with the broker. In *MidAmerica Federal Savings and Loan Ass'n v. Shearson/American Express Inc.*, 886 F.2d 1249 (10th Cir. 1989), the court found a fiduciary relationship under Oklahoma law between a broker and his client in circumstances where the broker held himself out as having superior knowledge and expertise and the client reasonably placed his confidence in the broker. The court in its ruling looked at the strength on one side and the weakness on the other which resulted in trust and dependence reposed in the stronger. See also a similar ruling by the Supreme Court of Colorado in *Paine Webber v. Caryl Adams*, 718 P.2d 508 (1986). In *Haddock v. Nationwide Financial Services Inc.*, 419 F. Supp. 2d 156 (2006), defendants were deemed plan fiduciaries under ERISA to the extent they exercised control over the selection and offering of particular mutual funds as investment options and, since payments were made to them in their fiduciary capacities by fund companies as revenue sharing payments, the court ruled that Nationwide exercised authority and control relating to disposition of plan assets, and therefore, had a duty to disclose the payments made even though Nationwide did not actually invest the pension contributions in particular mutual funds.

But Professionals Are Also Confused. When courts step in to resolve the boundaries of broker conduct toward the customer, they resolve only part of the equation. Recently, professionals have weighed in and have expressed strong opposition to the Merrill Rule stating that a rule which blurs the lines between brokers and advisors encroaches on the conduct of financial professionals that are licensed advisors in that brokers who operate under the rule's exclusions provide the same services to customers as advisors without the necessary fiduciary standards and safeguards which protect the customer. In fact, the FPA filed a lawsuit

against the SEC challenging the Merrill Rule in the U.S. Court of Appeals for the District of Columbia Circuit on April 28th, 2005. The suit alleges that the rule is illegal since it allows brokers to provide financial planning without the fiduciary and disclosure protections afforded to investors under the Investment Advisers Act of 1940. Several agencies have weighed in as amicus curiae including the North American Securities Administrators Association.

In a nutshell, the FPA accuses the SEC of enacting a rule which is fatally flawed in that the rule fails to adopt boundaries which describe the difference between financial planning by brokers and that done by certified financial planners. The FPA claims that the rule causes further confusion by allowing brokers to call themselves financial planners. The FPA accuses the SEC of creating a double standard for planners. The SEC response has been to call attention to a distinction between a financial plan which seeks to address a wide spectrum of the client's long term goals, and a financial tool which is used to provide guidance to a customer with respect to a particular transaction based upon the long-term needs of the customer. According to the SEC, the former is comprehensive planning and outside of the broker exemption, and the latter is not. Here again, the courts will now have to step in and set the boundaries.

Conclusion. The recently enacted Merrill Rule embodies inherent conflicts which create confusion among investors and professionals. When the Advisors Act was put into law in 1940, the exemption for brokers in providing advice incidental to the brokerage relationship was put in place back then as a way to avoid overlapping and redundant regulation. The SEC would argue that today's Merrill Rule merely carries forward this exemption by updating and reflecting the market place which now dictates the need for full-service brokerage designed to better service the customers who seek lower cost trading and advice. However, if the rule is causing confusion and harm in the industry, perhaps a more clear and comprehensive fiduciary standard is warranted.

FROM THE OTHER SIDE OF THE DESK

*By Sue Noble, Paralegal Specialist – Blue Sky/Securities
Bingham McCutchen LLP*

*Take an Indian to lunch today,
Make him feel he's one of the bunch today . . .
—Stan Freberg Presents The United
States of America*

The late and greatly missed Chick Braisted shared a fondness for the satire of Tom Lehrer with our editor, Martin Hewitt and, though he never knew it, with me. I originally thought that an overdue Valentine for Chick – and all the residents of the Blue Sky Reservation – might be built around a Tom Lehrer lyric. But I just couldn't find one that seemed to do the job, so I turned to another great satirist, Stan Freberg. With apologies to all Native Americans and First People, I am going to use the term "Indian," just as Freberg did, along with some other politically incorrect terms.

I am a natural-born Indian. When I was a kid, I was a geek. Certainly not in today's sense of a computer geek, but also not in the much older sense of being a sideshow freak. At least, that's a capacity I stoutly deny. Rather, I was a studious, somewhat introverted kid who adored music and loved to read, and who from an early age enjoyed the uses of words, their subtle distinctions, and the ways they could be both taken apart and put together. And I loved puzzles of many kinds, especially those that involved words or required the fitting together of many pieces from many different sources.

These traits did not endear me to my classmates, who had a number of unflattering (nick)names for me and considered, with some justification, that I lived on a reservation of my own making. The usual pressures to conform did no more to change my basic character than they do in most cases, and those interests have proven incredibly useful, at least to me, along the way. They have allowed me to be a sort of utility squaw, at various times a dancer, teacher, musician, student of Latin and Greek, litigation assistant and, pretty nearly best of all, a blue sky practitioner. Of course, I didn't discover until I was well into adulthood that this history uniquely equipped me for my current profession. Most of the other blue sky professionals I know, whether they are braves, squaws, chiefs or tribesmen, have a comparable range of interests and skills.

And yet, during nearly 25 years of blue sky work, it has often struck me that blue sky practitioners, like many Indians, live in a special, reserved area. Although we are often chiefs honored among our own people, all of us have counted coup in the fray at one time or another, and most are extraordinarily knowledgeable, we tend to spend a lot of time on the Reservation (sometimes called "Odd Specialties" by non-Indians). Being a blue sky shaman can be lonely work, and Valentines are not often given. But I think we don't *give* many Valentines, either.

So I'd like to offer some of the more familiar types of Valentines to deserving parties, both on and off the Reservation. Here are my Valentine nominees:

Every spouse, significant other or family member who has uncomplainingly put up with the long absences or cancelled plans caused by blue sky crises, whether at year end or otherwise, should receive a *rare and special antique Victorian card*, carefully chosen and suitably inscribed. It's really impossible to thank these recipients adequately, yet their stoic behavior has been for the good of the tribe.

For every person who has pitched in to make a crisis as painless as possible and helped to interpret smoke signals, a *red, satin-finished, heart-shaped box filled with fine candy*. Help comes from many quarters, and should always be acknowledged. This Valentine may be accompanied by a peace pipe in appropriate circumstances.

To each client who responds promptly to inquiries and sends back signed documents well in advance of any filing deadline, a *generous selection of "sweethearts" or "conversation hearts," with all the usual Valentine's Day sentiments*, including such mottos as "You're the Best," "Be Mine," "Thank You," "So Fine," and of course one that says "Blue Skies." We need to maintain good relationships with those who don't live on the Reservation.

For regulators, who spend vast amounts of time on the Reservation and off, trying to educate non-Indians and to protect the residents of their states from scalpers of all kinds, a *lace doily, painstakingly cut out in a heart shape and pasted on red construction paper*. Despite the strong sentiment accompanying such gifts, these remembrances have no intrinsic value and so cannot be thought of as wampum.

Medicine men – be they paraprofessionals, partners, counsel, of counsel or associates – improve life on the Reservation with thoughtful and creative solutions to esoteric questions, apply sharp tomahawks to cut through complex issues, and generously share their knowledge with all comers. To each of these, a *carefully chosen "be my Valentine" card, not too sweet but not at all funny*, and a coup stick.

And last, but by no means least, to all those colleagues – specifically including Chick – who have taught and are still teaching me my profession, *one heart, crookedly drawn with red crayon on construction paper or newsprint and labeled "I love you" in misshapen letters*, as if by a papoose or very young child (I'm a blue sky

specialist, not an artist), and signed "I love you." I'm extremely proud to be one of your bunch, on the Reservation or off.

©2006 Bingham McCutchen LLP.

The views expressed in this article are those of the author and do not necessarily reflect those of Bingham McCutchen LLP.

EDITORIAL

By Martin A. Hewitt
Cadwalader, Wickersham & Taft LLP

Caveat emptor. Let the buyer beware. This advice seems simple enough and yet the emphasis these days seems to be on the culpability of the issuer or the broker/dealer, while at the same time removing any responsibility from the investor to perform even a minimal amount of due diligence.

In reading Joe Borg's article above, investor education is at the bottom of the list of priorities for NASAA, not the top. We live in a time in which personal responsibility is not required at any level and failure is always someone else's fault. This starts in the non-competitive atmosphere of our schools in which children are not allowed to fail. The teachers are blamed when a student does not perform up to par. The same holds true for investors. Investors now have the expectation that all investments will go up in value and, if they do not, it must be because someone has engaged in nefarious conduct.

While it can't be argued that there are rogue brokers who must be held accountable for their willful misconduct, one has to wonder about the individuals who trust such brokers. It should be noted that the majority of brokers are honest and hardworking. It should also be noted that what seems to drive the rogue brokers is the same thing that drives many investors to trust such brokers in the first place. The common denominator on both sides is greed. Many investors are not looking to make prudent investments. They are looking to make a killing. When they don't, they don't look in the mirror at their own shortcomings. They look to blame someone else and in so doing they often accuse their broker for misleading them. This is where the indisputable benefit of education comes into play.

How many investors actually read through the offering material they receive? How many have ever learned the basics of securities analysis the gold standard of which is "Securities Analysis – Principles and Technique" by Benjamin Graham and David L. Dodd"? Approximately

25 years ago I was working on a trading floor and someone had taped to his desk a note which read “more people know the theme to the Woody Woodpecker Show than know a thing about stock options.” I would argue that this is still the case. (For those of you who may not know the above referenced musical theme please see the following link:

<http://www.elite.net/~gurpal/tv/woodpck.mid.>)

In the end I believe we can all appreciate the goals of the various regulators, though we often strongly disagree with how these goals are to be accomplished; however, in the end all the enforcement in the world, without investor education, will accomplish little. There will still be investor complaints when investors sell at a loss. The answer is in educating the public from an early age in the world of investing.

OFFICERS

ABA COMMITTEE ON STATE REGULATION OF SECURITIES

Chair: Ellen Lieberman

Debevoise & Plimpton LLP, 919 Third Ave., New York, NY 10022

Phone: (212) 909-6096, Fax: (212) 909-6836, Email: elieberman@debevoise.com

Vice Chair: Alan M. Parness

Cadwalader, Wickersham & Taft LLP, One World Financial Center, New York, NY 10281

Phone: (212) 504-6342, Fax: (212) 504-6666, Email: alan.parness@cw.com

Secretary: R. Michael Underwood

Squire, Sanders & Dempsey L.L.P., Ste. 601, 215 South Monroe St., Tallahassee, FL 32301-1846

Phone: (850) 222-2300, Fax: (850) 222-8410, Email: munderwood@ssd.com

Subcommittee Chairs:

Broker-Dealers and Investment Advisors

Co-Chairs:

Martin R. Miller

Willkie Farr & Gallagher LLP, 787 7th Ave., New York, NY 10019-6018

Phone: (212) 728-8690, Fax: (212) 728-9690, Email: mmiller@willkie.com

David M. Katz

Sidley Austin LLP, 787 Seventh Ave., New York, NY 10019

Phone: (212) 839-7386, Fax (212) 830-5599, Email: dkatz@sidley.com

CLE & Publications

Chair:

Martin A. Hewitt

Cadwalader, Wickersham & Taft LLP, One World Financial Center, New York, NY 10281

Phone: (212) 504-6228, Fax: (212) 504-6666, Email: martin.hewitt@cw.com

Direct Participation, Commodities & Other Hybrid Securities

Chair:

Alan M. Parness

Cadwalader, Wickersham & Taft LLP, One World Financial Center, New York, NY 10281

Phone: (212) 504-6342, Fax: (212) 504-6666, Email: alan.parness@cw.com

Employee Plans and Other Exempt Securities

Co-Chairs:

Michele Audrey Kulerman

Hogan & Hartson L.L.P., 555 Thirteenth St. NW, Washington, DC 20004-1109

Phone: (202) 637-5743, Fax: (202) 637-5910, Email: makulerman@hhlaw.com

Peter Danias

Kaye Scholer LLP, 425 Park Avenue, New York, NY 10022-3598

Phone: (212) 836-8078, Fax: (212) 836-6678, Email: pdanias@kayescholer.com

Enforcement

Chair:

R. Michael Underwood

Squire, Sanders & Dempsey L.L.P., Ste. 601, 215 South Monroe Street, Tallahassee, FL 32301-1846

Phone: (850) 222-2300, Fax: (850) 222-8410, Email: munderwood@ssd.com

Vice-Chair:

Richard Slavin

Cohen and Wolf, P.C., 1115 Broad Street, Bridgeport, CT 06604-4247

Phone: (203) 337-4103, Fax: (203) 394-9901, Email: Rslavin@cohenandwolf.com

International Securities

Co-Chairs:

Ellen M. Creede

Cleary Gottlieb Steen & Hamilton, 1 Liberty Plaza, New York, NY 10006-1404

Phone: (212) 225-2026, Fax: (212) 225-3999, Email: ecreede@cgs.com

Paul G. Findlay

Borden Ladner Gervais LLP, 40 King St W. Toronto, ON M5H 3Y4 Canada

Phone: (416) 367-6191, Fax: (416) 361-7083, Email: pfindlay@blgcanada.com

NSMIA and Limited Offerings Exemptions

Co-Chairs:

Mike Liles, Jr.

Karr Tuttle & Campbell, Suite 2900, 1201 Third Avenue, Seattle, WA 98101-3028

Phone: (206) 224-8068, Fax: (206) 682-7100, Email: mliles@karrtuttle.com

Kathleen G. Duggan,

Cahill Gordon & Reindel LLP, 80 Pine St., New York, NY 10005

Phone: (212) 701-3974, Fax: (212) 269-5420, Email: kduggan@cahill.com

Uniform Securities Act of 2002

Co-Chairs:

Philip Alan Feigin

Rothgerber Johnson & Lyons LLP, 1200 17th St., Suite 3000, Denver, CO 80202-5835

Phone: (303) 628-9509, Fax: (303) 623-9222, Email: pfeigin@rothgerber.com

Lynn D. Naefach

Wachovia Securities, WS 1012, 10750 Wheat First Drive, Glen Allen, VA 23060

Phone: (804) 398-5201, Fax: (804) 398-4760, Email: lynn.naefach@wachoviasec.com

Liaison to the Committee on Diversity of the

ABA Section of Business Law

David C. Wang

Holland & Knight LLP, Suite 2300, 111 SW 5th Avenue, Portland, OR 97204-3626

Phone: (503) 517-2914, Fax: (503) 241-8014, Email: david.wang@hklaw.com

Liaison to the Meetings Committee of the

ABA Section of Business Law

Benjamin L. Nager, Sidley Austin LLP, 787 Seventh Avenue, New York, New York 10019

Phone: (212) 839-8755, Fax: (212) 839-5599, Email: banger@sidley.com

Liaison to NASAA Broker-Dealer Section

Melanie A. Jenkins, Senior Vice President and Senior Regulatory Counsel, Regulatory Compliance Unit

Citigroup Global Markets, Inc., 485 Lexington Avenue, 15th Floor, New York, New York 10017

Phone: (212) 783-3996, Fax: (212) 783-4010, Email: melanie.jenkins@citigroup.com

Liaison to NASAA Corporate Finance Section

E. Marlee Mitchell

Waller Lansden Dortch & Davis, LLP, Ste. 2700, 511 Union St., Nashville, TN 37219-1791

Phone: (615) 850-8943, Fax: (615) 244-6804, Email: mmitchell@wallerlaw.com

Liaison to NASAA's Enforcement Trends Project Group

Andrew Kandel, Managing Director and Chief Compliance Officer

Cerberus Capital Management, L.P., 299 Park Avenue, New York, New York 10171

Phone: (646) 885-3450, Email: akandel@cerberuscapital.com

**Liaison to NASAA Investment Adviser Section, Subcommittee on
Investment Companies and Investment Advisers of the
ABA Section of Business Law Committee on Federal Regulation of Securities**

Tamara K. Salmon
Investment Company Institute, 1401 H Street NW, Washington, DC 20005-2110
Phone (202) 326-5825, Fax: (202) 326-5839, Email: tamara@ici.org

Liaison to NASAA Ombudsman

F. Lee Liebolt, Jr.
Ste. 2620, 420 Lexington Avenue, New York, NY 10170
Phone: (212) 286-1384, Fax: (212) 286-1389, Email: lliebolt@aol.com

**Liaison to the Pro Bono Committee of the
ABA Section of Business Law**

Judy F. Zybach, PO Box 1469, Granite Falls, WA 98252-1469
Phone: (360) 691-4850, Email: jzybach@zybach.com

Liaison to Securities Administrators and NASD

Chair:

Donald A. Rett
1660 Metropolitan Circle, Tallahassee, FL 32308
(850) 298-4454, Fax: (850) 298-4494, Email: drett52687@aol.com

Liaison to the Securities Industry Conference on Arbitration

David N. Jonson
Kennedy Covington Lobdell & Hickman, L.L.P., 4350 Lassiter at North Hills Avenue, Suite 300 (27609),
Post Office Box 17047, Raleigh, NC 27619-7047
Phone: (919) 743-7308, Fax: (919) 516-2008, Email: djonson@kennedycovington.com

Liaison on TICs and Other Real Estate Related Securities Issues

Deborah Schwager Froling
Arent Fox PLLC, 1050 Connecticut Avenue, NW, Washington, DC 20036
Phone: (202) 857-6075, Fax: (202) 857-6395, Email: froling.deborah@arentfox.com

Liaison on Variable Annuity Issues

Peter S. Anderson
Sutherland Asbill & Brennan LLP, 999 Peachtree Street, NE, Suite 2300, Atlanta, GA 30309-3996
Phone: (404) 853-8414, Fax: (404) 853-8806, Email: peter.anderson@sablaw.com

STATE LIAISONS

ABA BUSINESS LAW SECTION COMMITTEE ON STATE REGULATION OF SECURITIES

AL	Ms. Carolyn L. Duncan Cabaniss Johnston, et al. Ste. 700, 2100 Park Pl N Birmingham, Alabama 35203-2744 E-Mail – cld@cabaniss.com	(205) 716-5200 () - (205) 716-5389	(Work) (Home) (Fax)
AK	Mr. Julius J. Brecht Wohlforth, Johnson, Brecht, Cartledge & Brooking Suite 600, 900 West 5th Avenue, Anchorage, Alaska 99501-2044 Direct E-Mail – jbrecht@akatty.com	(907) 276-6401 () - (907) 276-5093	(Work) (Home) (Fax)
AZ	Mr. Dee Riddell Harris Arizona Angels Venture Group, Inc. 2415 E. Camelback Rd., Suite 700 Phoenix, Arizona 85016 E-Mail – dharris@Arizona-Angels.org	(602) 508-6055 (602) 840-4078 (602) 508-6099 (602) 840-6824 Fax)	(Work) (Home) (Fax) (Home)
AR	Mr. John S. Selig Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C. 425 West Capitol Avenue, Suite 1800 Little Rock, Arkansas 72201-3525 E-Mail – jselig@mwsgw.com	(501) 688-8804 (501) 821-1540 (501) 688-8807	(Work) (Home) (Fax)
CA	Mr. Keith Paul Bishop Buchalter Nemer Fields & Younger 184 Von Karman Avenue, #800 Irvine, California 92612 E-Mail – kbishop@buchalter.com	(949) 224-6293 () - (949) 224-6228	(Work) (Home) (Fax)
CO/MT/WY	Mr. Robert J. Ahrenholz Kutak Rock LLP 1801 California Street, Suite 3100 Denver, Colorado 80202 E-Mail – robert.ahrenholz@kutakrock.com	(303) 297-2400 () - (303) 292-7799	(Work) (Home) (Fax)
CT	Mr. Richard Slavin Cohen and Wolf, P.C. 1115 Broad Street Bridgeport, CT 06604-4247 E-Mail – Rslavin@cohenandwolf.com	(203) 337-4103 () - (203) 394-9901	(Work) (Home) (Fax)
DE	Mr. Andrew M. Johnston Morris Nichols, et al. Wilmington, Delaware 19899-1347 E-Mail – ajohnston@mnat.com	(302) 351-9202 () - (302) 658-3989	(Work) (Home) (Fax)

DC	<p>Ms. Michele A. Kulerman Hogan & Hartson L.L.P. Columbia Square 555 Thirteenth St., N.W. Washington, D.C. 20004-1109 E-Mail – makulerman@hhlaw.com</p>	<p>(202) 637-5743 (301) 279-6772 (202) 637-5910</p>	<p>(Work) (Home) (Fax)</p>
FL	<p>Mr. Donald A. Rett Law Office of Donald Rett 1660 Metropolitan Circle Tallahassee, Florida 32308 E-Mail – drett52687@aol.com</p>	<p>(850) 298-4454 (904) 894-0700 (850) 298-4494</p>	<p>(Work) (Home) (Fax)</p>
GA	<p>Mr. Robert D. Terry B/D Solutions Eleven Piedmont Center, Suite 125 Atlanta, Georgia 30305 E-Mail – Rterry@bdsolutions.com</p>	<p>(404) 303-8840 x.204 (877) 423-4636 (404) 250-9972</p>	<p>(Work) (Home) (Fax)</p>
HA	<p>Mr. David J. Reber Goodsill Anderson Quinn & Stifel 1099 Alakea Street, Suite 1800 Honolulu, Hawaii 96813 E-Mail – dreber@goodsill.com</p>	<p>(808) 547-5611 (808) 395-7994 (808) 547-5880</p>	<p>(Work) (Home) (Fax)</p>
ID	<p>Mr. Jeffrey W. Pusch Marshall Batt & Fisher, LLP 101 South Capitol Boulevard, 5th Fl. P.O. Box 1308 Boise, Idaho 83701 E-Mail – jwpusch@marshallbatt.com</p>	<p>(208) 331-1000 () - (208) 331-2400</p>	<p>(Work) (Home) (Fax)</p>
IL	<p>Ms. Misty S. Gruber Dykema Gossett PLLC Ste. 2300 10 South Wacker Drive Chicago, Illinois 60606-7453 E-Mail – mgruber@dykema.com</p>	<p>(312) 627-2122 () - (312) 876-1115</p>	<p>(Work) (Home) (Fax)</p>
IN	<p>Mr. Stephen W. Sutherlin Stewart & Irwin 251 East Ohio Street Suite 1100 Indianapolis, Indiana 46204 E-Mail – SSutherlin@Stewart-Irwin.com</p>	<p>(317) 639-5454 (317) 733-8084 (317) 632-1319</p>	<p>(Work) (Home) (Fax)</p>
IA	<p>Ms. Katherine G. Manghillis Schottenstein Zox & Dunn Co., LPA Arena District 250 West Street Columbus, OH 43215-2538 E-Mail – kmanghillis@szd.com</p>	<p>(614) 462-1087 () - (614) 462-5135</p>	<p>(Work) (Home) (Fax)</p>

KS/MO	Mr. William M. Schutte Polsinelli/Shalton/Welte 6201 College Blvd., Suite 500 Overland, KS 66211 E-Mail – wschutte@pswlaw.com	(913) 234-7414 (913) 451-6205 (913) 345-0054	(Work) (Fax) (Home)
KY	Mr. Manning G. Warren III University of Louisville Louis D. Brandeis School of Law 2301 South Third Street Louisville, Kentucky 40292 E-Mail – mgw111@louisville.edu	(502) 852-7265 () ____ - ____ (502) 852-0862	(Work) (Home) (Fax)
LA	Mr. Carl C. Hanemann Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P. Place St. Charles 201 St. Charles Avenue, 51st Floor New Orleans, Louisiana 70170-5100 E-Mail – chanemann@joneswalker.com	(504) 582-8156 (504) 861-3992 (504) 582-8012	(Work) (Home) (Fax)
ME	Mr. Wayne E. Tumlin Bernstein, Shur, Sawyer & Nelson, P.A. 100 Middle Street – W. Tower P.O. Box 9729 Portland, ME 04104-5029 E-Mail – wtumlin@mainelaw.com wtumlin@bernsteinshur.com	(207) 774-1200 () ____ - ____ (207) 774-1127	(Work) (Home) (Fax)
MD	Mr. Wm. David Chalk Piper Marbury Rudnick & Wolfe LLP 6225 Smith Avenue Baltimore, MD 21209-3600 E-Mail – david.chalk@piperrudnick.com	(410) 580-4120 () ____ - ____ (410) 580-3001	(Work) (Home) (Fax)
MA	[VACANT]	() ____ - ____ () ____ - ____ () ____ - ____	(Work) (Home) (Fax)
MI	Mr. Shane B. Hansen Warner Norcross & Judd LLP 111 Lyon Street, N.W. Grand Rapids, Michigan 49503 E-mail – shansen@wnj.com	(616) 752-2145 (616) 942-7063 (616) 752-2500	(Work) (Home) (Fax)
MN	(See IOWA)		
MS	Mr. Daniel G. Hise Butler, Snow, O’Mara, Stevens & Cannada, PLLC P.O. Box 22567 Jackson, MS 39225-2567 E-Mail – dan.hise@butlersnow.com	(601) 985-5711 (601) 355-1742 (601) 985-4500	(Work) (Home) (Fax)

MO	(SEE KANSAS)		
MT	(SEE COLORADO)		
NE	Mr. David R. Tarvin, Jr. Kutak Rock LLP 1650 Farnam Street Omaha, Nebraska 68102-2186 E-Mail – david.tarvin@kutakrock.com	(402) 346-6000 () - (402) 346-1148	(Work) (Home) (Fax)
NV	Mr. Ken Creighton 9295 Prototype Drive Reno, NV 89511 E-Mail – ken.creighton@igt.com	(775) 448-0119 (775) 825-1844 (775) 448-0120	(Work) (Home) (Fax)
NH	Mr. Richard A. Samuels McLane, Graf, Raulerson & Middleton P.A. 900 Elm Street P.O. Box 326 Manchester, NH 03105-0326 E-Mail – rsamuels@mclane.com	(603) 628-1470 (603) 228-8636 (603) 625-5650	(Work) (Home) (Fax)
NJ	Mr. Peter D. Hutcheon Norris, McLaughlin & Marcus, P.A. 721 Route 202-206 P. O. Box 1018 Somerville, New Jersey 08876-1018 E-Mail – pdhutcheon@nmmlaw.com	(908) 722-0700 (908) 356-4766 (908) 722-0755	(Work) (Home) (Fax)
NM	Mr. Robert G. Heyman Sutin Thayer & Browne 100 North Guadalupe, Suite 202 Santa Fe, NM 87501 Mailing Address: P.O. Box 2187 Santa Fe, NM 87504 E-Mail – rg@sutinfirm.com	(505) 986-5493 () - (505) 982-5297	(Work) (Home) (Fax)
NY	Mr. F. Lee Liebolt, Jr. Suite 2620 420 Lexington Avenue New York, New York 10170 E-Mail – lliebolt@aol.com	(212) 286-1384 (212) 369-8067 (212) 286-1389	(Work) (Home) (Fax)
NC	Mr. David N. Jonson Kennedy Covington Lobdell & Hickman, L.L.P. 4350 Lassiter at North Hills Avenue Suite 300 (27609) Post Office Box 17047 Raleigh, North Carolina 27619-7047 E-Mail – djonson@kennedycovington.com	(919) 743-7308 (919) 639-0598 (919) 516-2008	(Work) (Home) (Fax)

ND	Mr. Craig A. Boeckel Tschider & Boeckel Provident Life Building 316 N. 5th Street P. O. Box 668 Bismarck, North Dakota 58502-0668 E-Mail – cboeckel@btinet.net	(701) 258-2400 () ____ - ____ (701) 258-9269	(Work) (Home) (Fax)
OH	Mr. Richard S. Slavin Cohen and Wolf, P.C. 1115 Broad Street Bridgeport, CT 06604 E-Mail – rslavin@cohenandwolf.com	(203) 337-4103 () ____ - ____ (203) 576-8504	(Work) (Home) (Fax)
OK	Mr. C. Raymond Patton, Jr. Conner & Winters A Professional Corporation 3700 First Plaza Tower 15 East Fifth Street Tulsa, OK 74103 E-Mail – rpattton@cwlaw.com	(918) 586-8523 (918) 299-5838 (918) 586-8548	(Work) (Home) (Fax)
OR	Mr. Richard M. Layne Layne & Lewis <i>(Until January 31, 2004)</i> 1 SW Columbia Street, Suite 1800 Portland, OR 97258-2040 <i>(As of February 1, 2004)</i> 111 SW Columbia Street, Suite 1000 Portland, OR 97201 E-Mail – mlayne@layne-lewis.com	(503) 295-1882 (503) 246-1441 (503) 295-2057	(Work) (Home) (Fax)
PA	Mr. Michael Pollack Reed, Smith, Shaw & McClay LLP One Liberty Place, Suite 2500 1650 Market Street Philadelphia, PA 19103-7301 E-Mail – mpollack@reedsmith.com	(215) 851-8182 (215) 628-9904 (215) 851-1420	(Work) (Home) (Fax)
PR	[VACANT]	() ____ - ____ () ____ - ____ () ____ - ____	(Work) (Home) (Fax)
RI	Mr. John F. Corrigan Adler Pollock & Sheehan PC 1 Citizens Plz. Ste. 800 Providence, Rhode Island 02903-1345 E-Mail – jcorrigan@APSLAW.com	(401) 274-7200 (401) 885-1025 (401) 751-0604 or 351-4607	(Work) (Home) (Fax)

SC	Mr. F. Daniel Bell III Kennedy Covington Lobdell & Hickman L.L.A. 434 Fayetteville Street Mall, 19th Fl. Raleigh, NC 27602-1070 E-Mail – dbell@kennedycovington.com	(919) 743-7335 (919) 872-7886 (919) 516-2035	(Work) (Home) (Fax)
SD	Mr. Charles D. Gullickson Davenport, Evans, Hurwitz & Smith, L.L.P. 206 West 14th Street P. O. Box 1030 Sioux Falls, South Dakota 57101-1030 E-Mail – cgullickson@dehs.com	(605) 357-1270 (605) 331-3880 (605) 335-3639	(Work) (Home) (Fax)
TN	Ms. E. Marlee Mitchell Waller Lansden Dortch & Davis, PLLC Nashville City Center Suite 2100, 511 Union Street Nashville, Tennessee 37219-1760 E-Mail – mmitchell@wallerlaw.com	(615) 244-6380 (615) 298-2514 (615) 244-6804	(Work) (Home) (Fax)
TX	Mr. Daniel R. Waller Secore & Waller LLP Suite 1100 12221 Merit Dr. Dallas, TX 75251-2227 E-Mail – dan@scorewaller.com	(972) 776-0200 (972) 392-2452 (972) 776-0240	(Work) (Home) (Fax)
USVI	Ms. Tom Bolt Tom Bolt & Associates PC Corporate Place 5600 Royal Dane Mall St. Thomas, VI 00802-6410 E-Mail – tbolt@vilaw.com	(340) 774-2944 () - (340) 776-1639	(Work) (Home) (Fax)
UT	Mr. Arthur B. Ralph Van Cott, Bagley, Cornwall & McCarthy, P.C. 50 South Main Street, Suite 1600 Salt Lake City, Utah 84144-0450 E-Mail – aralph@vancott.com	(801) 532-3333 (801) 272-5027 (801) 534-0058	(Work) (Home) (Fax)
VT	[VACANT]	() - () - () -	(Work) (Home) (Fax)
VA	(SEE WEST VIRGINIA)		
WA	Mr. John L. Mericle Harris, Mericle & Wakayama 999 Third Avenue, Suite 3210 Seattle, Washington 98104 E-Mail – jmericle@comcast.net	(425) 742-3985 () - (425) 742-4676	(Work) (Home) (Fax)

WV/VA	Mr. Edward D. McDevitt Bowles Rice McDavid Graff & Love, PLLC 600 Quarrier Street Charleston, West Virginia 25314 E-Mail – emcdevitt@bowlesrice.com	(304) 347-1711 (304) 345-4188 (304) 343-3058	(Work) (Home) (Fax)
WI	Mr. Terry Nelson Foley & Lardner 150 East Gilman P.O. Box 1497 Madison, WI 53701 E-Mail – tnelson@foleylaw.com	(608) 258-4232 (608) 836-8855 (608) 258-4258	(Work) (Home) (Fax)
WY	SEE COLORADO		
CAN	Mr. Paul G. Findlay Borden Ladner Gervais LLP Scotia Plaza, Suite 4400 40 King Street West Toronto, Ontario M5H 3Y4 Canada E-Mail – pfindlay@blgcanada.com	(416) 367-6191 (416) 484-9862 (416) 361-7083	(Work) (Home) (Fax)
NASD	Peter W. LaVigne Sullivan & Cromwell LLP 125 Broad St. New York, NY 10004 E-Mail – Lavignep@sullcrom.com	(212) 558-7402 () - (212) 558-3588	(Work) (Home) (Fax)

DIRECTORY OF EDITORS AND CONTRIBUTORS

Borg, Joseph P. Alabama Securities Commission, 770 Washington Ave., Suite 570, Montgomery, Alabama 36130-4700,
(334) 242-2984, fax (334) 242-0240, joseph.borg@asc.alabama.gov

Hewitt, Martin A. Cadwalader, Wickersham & Taft LLP, One World Financial Center, New York, NY 10281,
(212) 504-6228, fax (212) 504-6666, martin.hewitt@cwt.com

House, Deborah North America Securities Administration Association, Inc., 750 First Street, N.E.,
Suite 1140, Washington, D.C., 20002
(202) 737-0900, fax (202) 783-3571

Lieberman, Ellen Debevoise & Plimpton, 919 Third Avenue, New York, NY 10022,
(212) 909-6096, fax (212) 909-6836, elieberman@debevoise.com

Katz, David M. Sidley Austin LLP, 787 Seventh Avenue, New York, New York, 10019,
(212) 839-7386, fax (212) 839-5599, email: dkatz@sidley.com

Noble, Susan Bingham McCutchen LLP, 150 Federal Street, Boston, MA 02110,
(617) 951-8154, fax (617) 951-8736, susan.noble@bingham.com

Spill, Jeffrey D. New Hampshire Department of State, Bureau of Securities Regulation, 107 N. Main Street,
State House, Room 204, Concord, NH 03301-4989
(603) 271-1463, fax (603) 271-7933

Staples, Rex North America Securities Administration Association, Inc., 750 First Street, N.E.,
Suite 1140, Washington, D.C., 20002
(202) 737-0900, fax (202) 783-3571

DID YOU KNOW?

THE BLUE SKY BUGLE can be accessed online at
<http://www.buslaw.org/cgi-bin/controlpanel.cgi?committee=CL680000&info=Newsletter>

Watch for it.

The Committee's listserv is available to committee members for posting comments, arguments, updates, news relating to Blue Sky Law, the people who practice Blue Sky Law, and the people who administer Blue Sky Law

bl-stateregs@mail.abanet.org

Published by the American Bar Association Section of Business Law
Committee on State Regulation of Securities
Chair: Ellen Lieberman

THE BLUE SKY BUGLE
© 2007 by the American Bar Association

Editor: Martin A. Hewitt

To submit materials for future editions contact:
Cadwalader, Wickersham & Taft LLP, One World Financial Center, New York, NY 10281,
(212) 504-6228, fax (212) 504-6666 martin.hewitt@cwt.com

The views expressed in this Newsletter are not necessarily those of the American Bar Association, the Section of Business Law, or the Committee on State Regulation of Securities

THE BLUE SKY BUGLE

**ABA State Regulation of Securities Committee meets
in conjunction with**

**ABA BUSINESS LAW SPRING MEETING
MARCH 17, 2007
WASHINGTON, DC**

**ABA ANNUAL MEETING
AUGUST 13-17, 2007
SAN FRANCISCO, CA**

**NASAA 2007 FALL CONFERENCE
SEPTEMBER 30 - OCTOBER 3, 2007
SEATTLE, WASHINGTON**

**ABA BUSINESS LAW SPRING MEETING
APRIL 10 - APRIL 13, 2008
DALLAS TEXAS**

**ABA ANNUAL MEETING
AUGUST 2008
NEW YORK, NEW YORK**

**NASAA 2008 FALL CONFERENCE
SEPTEMBER 15-18, 2008
LAS VEGAS, NEVADA**



**750 North Lake Shore Drive
Chicago, IL 60616**