
THE BLUE SKY BUGLE

A Newsletter for Blue Sky Lawyers

Published by the ABA Committee on State Regulation of Securities

Volume 2007, Number 2, Summer, 2007

EVENTS CALENDAR

The Committee will meet in conjunction with the
2007 Annual Meeting of the ABA
August 13, 10:30 a.m. to 12:30 p.m.
California Room, Mezzanine Level
Fairmont San Francisco
San Francisco, California

The Committee and its Subcommittees will meet at the
2007 Annual NASAA Fall Conference
September 29 through October 3, 2007
Westin Hotel, Seattle, Washington

Saturday, September 29, 2007, 5:00 p.m. – 6:00 p.m.
Enforcement Subcommittee, 6:00 p.m. – 7:00 p.m.
Subcommittee on NSMIA and Limited Offering
Exemptions

Sunday, September 30, 2007, 10:00 a.m. – 12:00 p.m.
Full Committee Meeting, 5:00 p.m. – 6:00 p.m.
Subcommittee on Employee Plans and Other Exempt
Securities

Monday, October 1, 2007, 8:30 a.m. – 9:00 a.m.
Subcommittee on Direct Participation/Commodities and
Other Hybrid Securities, 5:00 p.m. – 6:00 p.m. Liaisons
to States and NASD Subcommittee

The Committee 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

PLAN FOR THE FUTURE

The Committee will meet in conjunction with
the 2008 Annual Meeting of the ABA
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

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CLE PROGRAMS SPONSORED BY THE
COMMITTEE ON STATE REGULATION OF
SECURITIES

The Regulatory “Civil War” over Variable and Equity-
Indexed Annuity Sales and Supervision: Whose Side
Are You On Anyway?

August 12, 2007, 10:30 AM to 12:30 PM
Pavilion, Lobby Level
Fairmont San Francisco

Insider Trading Revisited VIII
August 12, 2007, 2:30 PM to 4:30 PM

Peacock Court, Lobby Level
Intercontinental Mark Hopkins
and

Watch Those Speed Bumps! – Quirky California Laws
Often Surprise Lawyers Involved in California-Based
Transactions

August 13, 2007, 2:30 PM to 4:30 PM
Crystal Room, Lobby Level
Fairmont San Francisco

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

BLUE SKY BITS AND PIECES

By Ellen Lieberman

Debevoise & Plimpton LLP (New York)

Enid and Alan Parness (our Committee's Vice Chair) joyfully announce the birth of their first grandchild, Jonah Robert Parness, born in New York City on July 30, 2007 at 2:47 p.m., weighing in at 7 lbs. 5 oz., and 20" tall. Speaking of blue sky, parents, Michael and Kelli Parness, and the new grandparents are right up there floating on Cloud Nine. Alan welcomed little Jonah into this world with a copy of "My First CCH Blue Sky Law Reporter," a new toy guaranteed to be this season's competitor to Tickle Me Elmo.

Robert D. Terry has been named Director of Georgia's Division of Securities & Business Regulation. Bob held that same position from February 1997 to August 2001. Thereafter he worked at B/D Solutions Consulting, Inc. (at which time he also served as our Committee's Georgia liaison), and then at Sun Trust Banks, where he was chief compliance officer and compliance counsel for SunTrust Investment Services, the bank's retail brokerage affiliate. Bob has an undergraduate degree in economics from Georgia Tech, an MBA from the University of Georgia, and a law degree from the University of Virginia.

We are delighted to welcome the following new state liaisons:

Georgia - **Steven Parker**. Steven practices law in the Atlanta, Georgia, firm of Page Perry LLC. Steve was previously the Assistant Commissioner of Securities, Director of the Georgia Securities Division, in the Office of the Secretary of State, from 2001 to 2003.

Vermont - **William A. (Chip) Mason, IV**. Chip practices law at Gravel and Shea in Burlington, Vermont, and is admitted to practice in Maine, Massachusetts, and Vermont. Chip is a member of each of those states' bar associations. He practices in the areas of corporate, commercial, commercial banking and securities law, and previously clerked for the Honorable Robert W. Clifford and Carolyn D. Glassman, Maine Supreme Judicial Court.

Massachusetts - **Michael M. Jurasic**. Michael practices in the Blue Sky/Broker-Dealer Group of the Corporate Department of Ropes & Gray in Boston. His practice focuses on all areas of state securities law and on related areas of federal securities laws applicable to registered and exempt securities offerings, with particular emphasis on regulatory matters concerning the activities of broker-

dealers, investment advisers, investment companies, and sponsors of pooled vehicles of all types. He is admitted to the New York and Massachusetts bars and received his Bachelor of Arts degree with honors from the University of Western Ontario, his J.D. degree from Syracuse University, and his LLM from Boston University.

Virginia- **Thomas G. Voekler**. Tom practices at Hirschler Fleischer in its Business Law section in Richmond, Virginia. His practice focuses principally on corporate finance, public and private securities offerings, merger and acquisitions and corporate governance issues, with a particular focus on real estate investment trusts, tenant-in-common syndications and private placements of real estate investments, and he has represented regional, national and international investment banking firms in initial and follow-on public offerings and private placements for REITs. Tom received his J.D. degree from Marshall-Wythe School of Law, College of William & Mary and his B.S. degree from George Mason University and was admitted to the Virginia bar in 2001.

Shane B. Hansen has joined **Don Rett** as Co-Chair of the Subcommittee on Liaisons to the States and the NASD. Shane is a partner at Warner Norcross & Judd LLP and practices in the area of financial services regulation of banks, broker-dealers, investment advisers, financial planners and money managers. He regularly advises clients about business, corporate, banking, securities and franchise laws and regulations and has substantial experience involving mergers, acquisitions and sales of financial institutions and their assets. You know what they say—what goes around comes around. On that note, I mention that this Subcommittee of liaisons was first conceived by Hugh Makens in the 1980's when Hugh himself was a partner at Warner Norcross and also Chair of the Committee on State Regulation of Securities. A great idea then.... And a real benefit to us through the years.

G. Philip Rutledge has been named to serve a one year term beginning August 2007 on the Editorial Board of *The Business Lawyer* where he will advise on articles submitted for publication in the area of state regulation of securities. Phil is a founding partner in the law firm of Bybel Rutledge LLP, Harrisburg, PA, and served for 23 years on the Pennsylvania Securities Commission as Chief Counsel, Deputy Chief Counsel and Director of Corporate Finance. His current private practice focuses on corporate and securities law, broker-dealer and investment adviser regulation and international law. He has testified before the United States Senate Permanent

Subcommittee on Investigations, in court and in arbitration proceedings as an expert witness. Phil has taught at The Dickinson School of Law of the Pennsylvania State University, lectured at the University of Cambridge, England, and been awarded the prestigious Inns of Court Fellowship at the University of London. He is the author of several books and numerous chapters and articles.

Jennie Getsin accepted a position as the sole blue sky lawyer for Reed Smith LLP effective June 2007. At her new firm, she is off and running—having hosted our Committee’s July 9 luncheon meeting. She previously practiced at Sullivan & Cromwell LLP with **Peter W. LaVigne**. Jennie is a 2000 graduate of New York University School of Law.

Daniel M. Baich, formerly an examiner with the NASD District 10 Membership Department, has joined Sullivan & Cromwell LLP. His practice will concentrate on blue sky and NASD matters. Dan received his J.D. in 2000 from the State University of New York at Buffalo and his B.S. degree in 1997 from the State University of New York at Albany.

Robert A. Hudson of the Detroit, Michigan office of Butzel Long, has co-authored Initial Public Offerings (The Bureau of National Affairs, Inc. Corporate Practice Series Portfolio No. 60-2nd) with **Donald L. Toker** of Crowell & Moring LLP in Washington, D.C. The Portfolio was recently mailed to subscribers.

David M. Katz, a partner at the New York office of Sidley Austin LLP and co-chair of our Subcommittee on Broker-Dealers and Investment Advisors, has been appointed Vice-Chair of the NASD Corporate Financing Rules Subcommittee of the ABA Committee on Federal Regulation of Securities. In his practice, David advises domestic and international corporations, investment banking firms, commercial banks, insurance companies, electronic trading systems and communication networks, market-making firms, other proprietary trading firms, securities borrowing and lending conduits, and private investment fund complexes in respect of federal and state broker-dealer regulatory matters, and applicable self-regulatory organization matters.

The Office of Mississippi Secretary of State **Eric Clark** is in transition awaiting a to-be-elected Secretary of State to take office in January 2008. Several of the staff in the Business Regulation and Enforcement Division departed in June 2007, including Assistant Secretary of State and three term NASAA Board Member **Jim Nelson**, Senior Attorney **Nathan Thomas** and Division

Director of Operations **Bill Wilkerson**. Stepping in to fill the void are Senior Attorney **Tanya Webber** handling enforcement matters and Senior Examiner **Mike Huggs** handling registrations.

Matt Gaul has been appointed as Bureau Chief for the newly renamed Investor Protection Bureau in New York’s Office of the Attorney General (“OAG”). He has been with the Bureau since March 2004 and Enforcement Section Chief since April 2005. Matt previously worked at Paul, Weiss, Rifkind, Wharton & Garrison, and clerked for Judges John S. Martin, Jr. of the Southern District of New York and Terence Evans of the 7th Circuit. He received his law degree from Loyola Law School in Los Angeles and his undergraduate degree from Yale University.

Maria Filipakis was named Deputy Bureau Chief of New York’s Investor Protection Bureau. She joined the Litigation Bureau in November 1999 and the Investment Protection Bureau in 2002 and became an Enforcement Section Chief in April 2005. Before joining the OAG, she was in private practice and externed at the United Nations Joint Appeals Board. She received her law degree from Brooklyn Law School and her undergraduate degree from NYU.

Ken DeMario is the new Bureau Chief of New York’s Real Estate Finance Bureau. Ken has been with the Bureau since May 1987 and Real Estate Review Section Chief since December 2000. Previously he clerked for Judge Lloyd F. MacMahon of the Southern District of New York, served in various positions in New York City government, including Counsel to the Loft Board and Chief of Hearings at the Department of Finance, and worked at the Legal Aid Criminal Appeals Division, the Vera Institute of Justice and the National Commission on Violence. He graduated from the University of Pennsylvania Law School and received his undergraduate degree from Yale University.

Eric R. Dinallo, who formerly served as Chief of the Investment Protection Bureau of the New York State OAG under then-Attorney General Eliot Spitzer, and now is New York’s Insurance Superintendent, was appointed by now-Governor Spitzer to chair the New York State Commission to Modernize the Regulation of Financial Services. The Commission includes representatives from industry, consumer groups, and government, and will propose changes to New York’s financial services laws, regulations and policies to ensure that Wall Street maintains its competitive position in international financial affairs.

David D. Brown, IV, formerly Bureau Chief of the Investment Protection Bureau in New York's Office of the Attorney General, has now become head of the New York State Dormitory Authority, which issues a large number of municipal bonds.

Effective in 2007, Governor Sarah Palin of Alaska named **Emil Notti** as Commissioner of Commerce, Community & Economic Development. He is an engineer with a public service background that includes, but is not limited to, service as the Commissioner of the Department of Community & Regional Affairs, membership for 30 years on the board of the National Bank of Alaska, and service in the United States Navy. In addition, the senior securities examiner within the Commission's Division of Banking and Securities retired earlier this year and was replaced by **Angela Otis**, and the senior bank and financial institutions examiner is scheduled to retire shortly.

Scott P. Borchert, formerly Director of the Minnesota Department of Commerce and Director of both its Enforcement and Registration Divisions, was named by the NASD as its State Liaison in January 2007. He will interact with state financial services regulators and with NASAA, the NAIC, and other umbrella groups of state regulators of financial products. Scott replaces **Chip Jones**, who was recently promoted to Vice President for Member Relations for the NASD.

Kimberly A. Zurz, previously an Ohio State Senator, was appointed in January by Ohio Governor Ted Strickland to serve as Director of the Ohio Department of Commerce, which oversees the Division of Securities. **G. Brent Bishop** was named in February as Ohio Commissioner of Securities, succeeding Acting Commissioner **James Turner**. Commissioner Bishop previously served as Assistant Director of the Ohio Department of Commerce and Superintendent of Real Estate, and worked in the insurance and securities industries.

Effective May 1, 2007, **LaNita Tyler**, Manager of Business Systems Support for NASD Corporate Financing Department, retired and was replaced by **Joani Ward**, Assistant Director.

Leigh Goldman, a law practitioner formerly with Tom Bolt & Associates, has opened his own law practice in St. Thomas, U.S. Virgin Islands. Leigh helped introduce us to the new Virgin Islands Uniform Securities Act when the U.S. Virgin Islands first entered the world of blue sky.

Sadly, we report the death in April of **Laura Jane Siegel**, graduate of Emory Law School, formerly an associate at Davis Polk & Wardwell, and more recently an attorney for Prudential Financial. Laura, the wife of Stephen Stern and the mother of Tara 17 and Samantha 13, died at the age of 50. I remember vividly dancing with Samantha who accompanied her mother to blue sky meetings when she was a toddler along with Laura's devoted mother Tess Siegel. We mourn Laura's untimely passing and remember her for her intelligence, her can-do approach to life, and, above all, her love for her family. She will be missed.

FROM THE CHAIR – BLUE SKY DEVELOPMENTS, AND FEDERAL DEVELOPMENTS THAT IMPACT OUR WORLD OF BLUE SKY

By Ellen Lieberman

Debevoise & Plimpton LLP (New York)

SEC Proposals Follow on the Heels of an ABA Comment Letter on Private Offering Reform, and the NASD Gets into the Act As Well.

On May 23, 2007, the Securities and Exchange Commission proposed a series of six measures largely geared to improving capital raising and reporting requirements for smaller companies: electronic Form D; integration of S-B into Regulation S-K with scaled regulation available to more companies; modified eligibility requirements so companies with a public float below \$75 million can utilize shelf registration; shortened holding periods under Rule 144; exemptions for compensatory employee stock options to avoid triggering Securities Exchange Act registration requirements; and the final release—proposing a new exemption from Securities Act registration for sales to “qualified purchasers,” a category of covered securities under Section 18 of the Securities Act, and making some changes to Regulation D including imposition of disqualification provisions for Rule 506 offerings. The Form D and Rule 144 proposals are highlighted below but, as we go to press, we are still awaiting the final release with details about the changes to Regulation D and the new qualified purchaser exemption proposal.

Electronic Form D Release. On June 29, 2007, the SEC published for comment proposals to restructure, in some respects simplify, and require electronic filing of Form D. Release Nos. 33-8814; 34-55980; 39-2446; IC-27878, <http://www.sec.gov/rules/proposed/2007/33-8814.pdf>.

The online Form D would be searchable by regulators and the public via the internet. The stated benefits of the

proposal are to ease filing burdens, make Form D information more readily publicly available, enhance federal and state uniformity and coordination, and provide information to aid in federal enforcement and rulemaking and, undoubtedly, it will provide information to also assist state and SRO enforcement as well.

Among the proposed revisions:

- permit the identification of multiple issuers in multiple issuer offerings but with a single address
- require an actual issuer address and not a c/o or P.O. Box
- via drop down menus identify the issuer's industry group (in lieu of description of business) and a revenue range (or choose the decline to disclose option, or the not applicable option where asset appreciation is intended)
- eliminate the 10% beneficial owner category, the name of the offering, whether the issuer has already been formed, the ULOE box, use of proceeds, expenses of the offering, state appendices and state undertakings, but require designation of states to which the filing is directed and also the date of first sale in that state or that no sale has yet occurred
- identify the particular exemptions, and if applicable the Investment Company Act Section 3(c) paragraphs, on which the issuer may be relying, whether the offering is intended to last more than a year, whether the offering is being made in connection with a business combination transaction, and the CRD number of each recipient getting sales compensation, and the SEC queried whether to require information as to whether a pooled investment vehicle is a federally registered investment adviser
- permit offering amounts to be stated as indefinite
- the federal and state signature requirements would be combined, and included with them would be representations that the contents are known to be true, that the issuer consents to service of process, that information provided to offerees will be provided upon written request to regulators (the SEC says in the text of the release, to the extent permitted by NSMIA), and

that the issuer is not disqualified under Rule 502(e)

- revise Rule 502(c) to include a safe harbor from the prohibition on "general solicitation" and "general advertising" for information provided in a Form D filed electronically with the SEC if the information is provided in good faith and the issuer made reasonable efforts to comply with the requirements of Form D and clarify when to file amendments.

The survey of our Subcommittee chaired by Mike Liles, Jr. and Kathleen Duggan, was cited at footnote 33 of this release: "According to a unit of the American Bar Association, 48 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands accept filings on Form D. New York prescribes its own Form 99. Florida does not require any filing for the types of transactions other jurisdictions require to be reported on Form D. See Report on Blue Sky Survey of the NSMIA Subcommittee, Committee on State Regulation of Securities, American Bar Association Business Law Section (Feb. 2006)."

The comment period ends September 7, 2007. Our Committee will be leading the effort to submit comments and members of our Committee will also be working with the Committee on Federal Regulation of Securities to provide comments on other releases. You may wish to submit your own comments, individually or via your local or state bar association groups. The release is full of references to proposals and needs of state regulators and I anticipate that NASAA and individual state regulators will have a great deal to say about the proposals.

Rule 144 Release. On June 22, 2007, the SEC proposed relaxations to Rules 144 and 145 to increase the liquidity of privately sold securities and decrease the cost of capital. Release No. 33-8813, <http://www.sec.gov/rules/proposed/2007/33-8813.pdf>. The proposal includes, but are not limited to, shortening from one year to six months the holding period for restricted securities of companies subject to the reporting requirements of the Securities Exchange Act of 1934 (but tolling the holding period for up to an additional six months to correspond to the amount of time the security holder engaged in hedging transactions); eliminating the manner of sale restrictions for resales by non-affiliates and for resale of debt securities by affiliates; increasing the thresholds triggering Form 144 filing requirements for affiliates and eliminating the filing requirements for non-affiliates.

Earlier SEC Proposals relating to Regulation D. Previously, on December 27, 2006, the SEC made other proposals with

respect to Regulation D and Section 4(6), which may be incorporated in the still-awaited new Regulation D release, perhaps with some modifications. Release Nos. 33-8766; IA-2576, <http://www.sec.gov/rules/proposed/2006/33-8766.pdf>. At that time, the SEC proposed to define in new Rule 509 a new category of accredited investor, accredited natural persons, who, in addition to meeting the accredited investor test of Rule 501(a)(5) or (6), would also own individually or jointly with spouse at least \$2.5 million (adjusted periodically for inflation) in investments (as defined; the definition, among other things, would exclude real estate used by the natural person or certain family members for personal purposes or in connection with a trade or business). This category of accredited natural person would apply in the context of determining if an investor were accredited at the time of purchase of securities issued by certain privately offered investment pools (private investment vehicles) relying on Section 3(c)(1) for exclusion from investment company registration. In the same release, the SEC proposed to prohibit investment advisers to Section 3(c)(1) and (7) pooled investment vehicles from making false or misleading statements or otherwise defrauding investors or prospective investors in those vehicles (the SEC adopted this latter rule on July 11, 2007, effective 30 days after publication in the Federal Register, applicable to advisers to all investment companies and to 3(c)(1) and (7) pooled investment vehicles).

ABA Comment Letter. The May 23 SEC proposals followed shortly after the Committee on Federal Regulation of Securities submitted a March 23, 2007 comment letter calling for comprehensive reform of private offerings based on the existing regulatory structure. That letter is available at <http://www.abanet.org/buslaw/committees/CL410000pub/comments/20070322000000.pdf>.

To note a few of the ABA proposals, the Committee called for elimination of the prohibition on general solicitation and elimination of offering restrictions for offers that do not result in sales, where the restrictions do not meaningfully enhance investor protection and do prevent full utilization of modern technology and communications; the easing of time constraints in determining whether offerings are integrated where the restrictions are not necessary for investor protection and may impede capital formation; with respect to Rule 506 of Regulation D, elimination of prohibitions on general solicitation and general advertising with greater focus instead on appropriate purchasers and less on the offering process itself, extension of the Rule 506 exemption to permit its use by control persons and in circumstances where a broker-dealer is involved as an intermediary in a principal capacity and resells to accredited investors, as well as for resales of restricted securities that otherwise satisfy the conditions of Regulation D. The Committee also suggested

elimination of the notice of sale on Form D for Rule 506 offerings, although it is now clear that that will not occur.

The Committee recommendations also covered Rules 144 and 144A. With respect to Rule 144, among the suggestions was reducing holding periods, eliminating manner of sale requirements and some volume thresholds and ending the notice filing requirement, with the aim of providing more liquidity for investors while continuing to ensure they are not acting as conduits for the issuer or its control persons. With respect to Rule 144A, the Committee suggests replacing the definition of “qualified institutional buyer” with “qualified purchaser” as defined under the Investment Company Act Section 2(a)(51)(A) and Investment Company Act Rule 2a51-2 for purposes of Section 3(c)(7), as a more comprehensive definition for determining who is a sophisticated investor that would also reduce the need for companion offerings to “institutional accredited investors”; removing restrictions on offers; and eliminating informational requirements because qualified purchasers would have sufficient clout and experience to be able to obtain information without the specific requirement that the information be furnished.

NASD Proposal to Regulate Member Private Placements. In Notice to Members 07-27, the NASD proposed Rule 2721 which would, for the first time, require certain filings with the NASD’s Corporate Finance Department for private placements of unregistered securities. The requirements would apply only with respect to securities issued by an NASD member or a member control entity, and would require both (i) providing a private placement memorandum to investors describing risk factors, use of proceeds (and at least 85% of proceeds must be used for described business purposes), offering expenses and other information needed to ensure the disclosure is not misleading and (ii) filing that memorandum with the NASD prior to or when provided to any investor (the offering could commence immediately after filing). Exemptions from the requirements are proposed, including but not limited to, certain institutional investor offerings. A control entity would be one with a greater than 50% beneficial ownership of voting securities (or profits interest for a partnership) in the NASD member. The proposal is in response to perceived abuses particularly in lack of information and use of proceeds spotted by the NASD. The comment period ends July 20, 2007.

SEC Exemption from Adviser Registration Overturned for Brokers whose Advice is Solely Incidental but who Receive Special Compensation. The U.S. Court of Appeals for the District of Columbia Circuit held on March 30, 2007, in *Financial Planning Association v. Securities and Exchange Commission* that the SEC exceeded its authority under the Investment Advisers Act of 1940 in

exempting from investment adviser registration requirements brokers and dealers that receive special compensation for fee-based programs for advice that is solely incidental to their brokerage services. The Court held that the SEC's exemption, in Rule 202(a)(11)-1, was in direct conflict with the unambiguous language of Section 202(a)(11)(C), which provides an exemption from investment adviser registration if the broker receives no special compensation for the "solely incidental" services. The Court also held that the SEC's exemption was in conflict with Section 202(a)(11)(F). Section 202(a)(11)(F) permits the SEC to designate additional exempt persons not within the intent of 202(a)(11), but the Court concluded from legislative history found in committee reports that the exemption drafted by the SEC was in direct conflict with Congressional intent and that Congress did not intend to permit broker-dealers to be exempted except in the limited circumstances provided in subsection (C). This decision not only does away with exemption from investment-adviser registration for broker-dealers receiving special compensation but it also makes these broker-dealer/ investment-advisers subject to the statutory fiduciary duties of investment advisers.

Absolute Privilege for U-5 Termination Forms. In *Rosenberg v. MetLife*, on March 29, 2007, the New York Court of Appeals held that disclosures made on a U-5 broker termination form are entitled to absolute, not qualified, privilege against lawsuits. The decision, delivered for the 4-2 majority by Judge Victoria A. Graffeo, was in response to a question certified to the New York Court of Appeals by the U.S. Court of Appeals for the Second Circuit. The Form U-5 is required to be filed with the NASD within 30 days of a broker's termination of employment and is available to federal and state regulators and prospective employers. If the termination is based upon the employee's having been subject to customer complaints or criminal charges or upon a violation of internal investment-related rules, the NASD member must disclose in the U-5 the nature of the actions that resulted in the employment termination.

The Court analogized the U-5 to complaints made against attorneys which can lead to disciplinary charges. The Form U-5, said the Court, is designed to alert the NASD to potential misconduct as a first step in a quasi-judicial process that can lead to formal disciplinary proceedings in which violations by registered reps of the Securities and Exchange Act, SEC regulations, and NASD rules can be punished, and that accurate and forthright statements on the U-5 by employers are crucial to the protection of the investing public from fraudulent practices. Absolute privilege means the employer will not be liable in a defamation suit, while a qualified privilege would have permitted liability as long as actual malice, including recklessness or negligence, could be shown. Employees may commence arbitration proceedings

to seek to have the employer statements expunged from their record.

The dissent noted, among other things, that creation of a uniform standard was preferable so that New York employees in the securities industry would have the same protections and rights as employees in other states, that is, they would be subject to a qualified, rather than an absolute privilege. The dissent referenced *Dawson v. New York State Life Insurance Co.*, 135 F.3d 1158 [7th Cir. 1997] [applying Illinois law]; *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132 [6th Cir. 1996] [applying Tennessee law]; *Eaton Vance Distribs, Inc. v. Ulrich*, 692 So.2d 915 [Fla. Dist. Ct. App]. Members of the Committee on State Regulation of Securities discussing the case on the listserv noted that all the wirehouses already have New York choice of law provisions in their broker-dealer representative agreements. Thus there should be a significant degree of uniformity notwithstanding the law in other states.

Naked Short Sales – State Legislation. In the last issue of this newsletter I incorrectly reported that legislation had been introduced in Maryland relating to naked short sales, along the lines of a previously enacted Utah statute. Thanks to Melanie Senter Lubin, Maryland Securities Commissioner, and Timothy F. Cox, Assistant Attorney General and Chief of Maryland Securities Registration, for confirming that no such legislation is on the docket or the drawing boards in Maryland. Other states, however, have considered adopting similar or even farther-reaching legislation, but these efforts have generally come to a halt in light of developments affecting the Utah statute

As was noted by Martin Miller of Willkie Farr & Gallagher LLP, and David Katz of Sidley Austin LLP, Co-Chairs of our Subcommittee on Broker-Dealers and Investment Advisers, reporting for our March 17, 2007 Meeting Book, the Utah legislature voted to repeal its "fail to deliver" law that would have required broker-dealers registered in Utah to report to the Utah Division of Securities failure to deliver certain securities issued by Utah companies. According to news sources, the sponsor of both the original legislation and of the February 2007 repeal legislation, Utah State Senator Curtis Bramble, claimed legislators were concerned that failure to repeal the law would result in Wall Street's overturning the law in federal court and lead to a further push by Wall Street to restrict state regulation of brokerages.

The legislation had been challenged by the Securities Industry and Financial Markets Association (SIFMA) as preempted by Section 15(h)(1) of the Securities Exchange Act, adopted by NSMIA, which prohibits states from imposing operational reporting requirements on brokers that differ from those imposed under the Securities Exchange

Act. The legislation was never enforced, since Utah Governor Jon Huntsman had agreed to delay enforcement after SIFMA filed its suit in a Utah federal court.

On June 13, 2007, the SEC voted to adopt additional changes to Regulation SHO to close loopholes and further reduce persistent failures to deliver stock by the end of the standard three-day settlement period for trades. The SEC will, among other things, (i) require all fail to deliver positions in threshold securities be closed out within 13 consecutive settlement days, whether or not they occurred before the security became a threshold security; (ii) permit securities that were threshold securities on the effective date of the new amendments be closed out within 35 settlement days of the effective date; (iii) extend the close out requirement from 13 to 35 consecutive settlement days for fails to deliver resulting from sales under Rule 144; (iv) eliminate the “tick test” and other price restrictions; and (v) propose for comments amendments to eliminate the options market maker exception to the close-out requirement (close out not required for a fail to deliver position in a threshold security resulting from short sales effected by a registered options market maker to establish or maintain a hedge on options positions created prior to the underlying security’s became a threshold security).

States Acting to Protect Seniors. Massachusetts has adopted regulatory amendments making it a dishonest or unethical practice in the securities business for a broker-dealer or investment adviser representative to use a professional designation implying special expertise in advising or servicing senior citizens, unless accredited by an organization recognized by Massachusetts by rule or order. Washington State is soliciting comments on how it can address the issue of misleading professional designations through regulation, although Washington has indicated it will certainly consider any model rule that NASAA may adopt.

SEC Designates Nasdaq Capital Market Securities as Covered Securities. On April 18, 2007 in Release No. 33-8791 (<http://www.sec.gov/rules/final/2007/33-8791.pdf>), the SEC amended Rule 146 under the Securities Act of 1933, which designates certain securities as “covered securities” within the meaning of Section 18(b)(1) and (2) of the Securities Act of 1933, as amended. The amended Rule designates securities listed on the Nasdaq Capital Market (formerly the Nasdaq SmallCap Market) as covered securities and also provides covered security status for any security authorized for listing on any of the exchanges designated in the Rule. Beginning on the effective date of the Rule, securities listed on the Nasdaq Capital Market, authorized for such listing or senior or of equal seniority to such securities, will be exempt from blue sky registration

and filing requirements. The amended Rule was effective 30 days after publication in the Federal Register, which occurred on April 24.

Kudos to Alan M. Parness, Cadwalader Wickersham & Taft LLP and Vice Chair of the Committee, who did the heavy lifting in preparation of two Committee comment letters supporting Nasdaq’s initial rulemaking petition on April 3, 2006, and supporting the proposed rule on December 20, 2006, in each instance requesting that the Rule be extended to cover securities authorized for listing on the designated exchanges. Our comment letters were referenced and quoted a number of times in the release, and were obviously instrumental in achieving the final result. We applaud as well the cooperative efforts of NASAA, which also submitted supportive comment letters, and we appreciated the opportunity to work in tandem with them to bring about this happy result.

Committee Meetings. Despite treacherous driving conditions and cancelled transportation due to a March snowstorm, we had a lively Committee discussion at the ABA Section of Business Law Spring Meeting in Washington, D.C., attended by Melanie Senter Lubin, Maryland Securities Commissioner, and Theodore A. Miles, Director of the Washington, D.C. Securities Bureau. Among the issues discussed was the District’s intention to review its Act against the language on the Uniform Securities Act (2002), make appropriate changes, and then review its rules and regulations with some emphasis on promoting efficiency and transparency. The District is focusing on consumer protection, particularly in the areas of predatory lending and treatment of our military. Both the District and Maryland are concerned about Rule 506 Regulation D offerings that may not meet the requirements of Rule 506, and Gerald Laporte, Chief of the SEC’s Office of Small Business Policy, noted that NASAA would like to impose “bad boy” disqualification provisions on Rule 506 and said the SEC will take that under consideration. Maryland will be rewriting its regulations this summer, updating its website and developing and posting FrequentlyAskedQuestions. Primarily wearing her NASAA hat, Melanie Lubin noted that expungements continue to be an issue in the broker-dealer context, that the new BrokerCheck would be on line shortly, and that Part II of the IARD will soon be able to be filed on line although mandatory electronic filing will not be required at the outset.

Lee Liebolt also led an interesting and well-attended MCLE program on Hot Securities Law Issues for Small Business. The distinguished panel included, among others, Mark T. Uyeda, formerly Chief Advisor to California’s Corporations Commissioner and now Counsel to SEC Commissioner Paul S. Atkins, Gerald J. LaPorte, Chief of the SEC’s Office of

Small Business Policy, and Gregory C. Yadley of Shumaker, Loop & Kendrick LLP who is Co-Chair of the ABA Task Force on Private Placement Broker-Dealers. The discussion was wide-ranging and included SPACs, reverse mergers that take a company public without an IPO, proposals relating to private-placement broker-dealers, internal controls for small public companies, and issues relating to Rule 506 Regulation D offerings.

The Committee held another in our series of Blue Sky luncheon meetings, in New York but with conference call access, on July 9. Jennie Getsin of Reed Smith LLC was a gracious host to close to 30 people in person and approximately that number attending via conference call. Our speaker was Gerald Laporte, Chief of the SEC's Office of Small Business Policy, and the major focus was recent SEC releases, as well as the much-awaited release on new Rule 507 and revised Rule 502(e) to which Gerry could only allude in the absence of the actual release. The main topic—on which Gerry was free to speak— was electronic filing of Form D and proposed Form D revisions, and there was a fruitful exchange of thoughts on some of the issues raised by the new proposals.

We are expecting sunny skies and an interesting meeting in San Francisco in connection with the ABA Annual Meeting in August.

- The Committee will meet on Monday, August 13 from 10.30-12.30, Fairmont San Francisco, California Room, Mezzanine Level, and we've invited California Corporations Commissioner Preston DuFauchard and Timothy L. Le Bas, Deputy Commissioner, to join us in a general discussion of pending blue sky issues. We will also be joined by Keith Bishop, our California liaison, and a former California Corporations Commissioner.
- The Committee is also co-sponsoring three MCLE programs.
 - Peter Anderson of Sutherland Asbill & Brennan LLP is chairing a program "The Regulatory "Civil War" over Variable and Equity-Indexed Annuity Sales and Supervision: Whose Side Are You on Anyway?" Sunday morning, August 12 from 10.30-12.30, Fairmont San Francisco, Pavilion, Lobby Level (you will recall that variable annuities is one of those stumbling block issues that are holding up adoption of the USA 2002 in a number of states). The

program will cover, among other issues, turf battles between insurance and securities administrators, the regulatory positioning of the SEC, the NASD and NASAA, and issues relating to sales practices.

- "Insider Trading Revisited VIII" will be moderated by Kenneth Bialkin and Dixie Johnson, with panelists Judith Anderson, Meyer Eisenberg, Simon Lorne, John Olson, and Richard Phillips. This all-star program will be held on Sunday afternoon, August 12 from 2:30-4:30, Intercontinental Mark Hopkins, Peacock Court, Lobby Level.
- Gerry Niesar of Niesar Curls Bartling & Whyte, LLP is chairing a program on Monday afternoon, August 13 from 2.30-4.30, Fairmont San Francisco, Crystal Room, Lobby Level, "Watch Those Speed Bumps! – Quirky California Laws Often Surprise Lawyers Involved in California-Based Transactions" that will focus on unique issues when doing business in California, and Commissioner DuFauchard will be on the panel.

Looking ahead just a bit further, the Committee (on September 30) and a number of our subcommittees (on September 29, September 30 and October 1) will meet in Seattle in conjunction with NASAA's Annual Meeting. Visit the Committee's website for more information.

SECONDARY MARKET TRADING EXEMPTIONS

By Ujala Sehgal
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*"[T]he core interpretive task in federal securities law is preservation of both [state and federal] regimes to maximum effect, because the Congress has expressly declared that state authority should continue adjacent to federal regulation."*¹

The Uniform Securities Act of 2002 ("2002 Act") was designed to replace in full the two earlier versions of the

¹ Roger J. Dennis & Patrick J. Ryan, *State Corporate and Federal Securities Law: Dual Regulation in a Federal System*, 22 *Publius* 21 (1992) at 21.

Uniform Securities Act of 1956. The 2002 Act serves three predominant purposes. First, the 2002 Act emphasizes uniformity and coordination of state and local securities law. Second, new provisions are implemented to accommodate the National Securities Markets Improvement Act of 1996. Third, the 2002 Act modernized previous legislation to keep pace with rapidly advancing technological change in trading and globalization of the securities industry.² The 2002 Act has been endorsed by organizations such as the North American Securities Administrators Association (“NASAA”) and the Securities Industry and Financial Markets Association (“SIFMA”), which have been at the forefront of the campaign leading to the 2002 Act’s adoption in thirteen states to date.³

Recently, organizations including SIFMA have submitted proposals to state legislatures regarding adoption of certain secondary market trading exemptions delineated in the 2002 Act. SIFMA has proposed adoption of these exemptions to states including New Jersey, Connecticut, and Florida. Tennessee has already incorporated three such exemptions into their legislation.

The Secondary Market Trading Exemptions. Both federal and state legislatures have found that for companies issuing securities to the public, the benefits of registration and disclosure outweigh the costs; however, this is not always the case for nonissuing sellers of securities.⁴ Under Section 202 of the 2002 Act, certain transactions are exempt from registration, including the notice and sales literature filing requirements. Exemptions must be established before each transaction. Notably, Section 202 does not provide for exemption from antifraud provisions, nor broker-dealer, agent, or investment adviser registration requirements. Section 203 authorizes state administrators to adopt further exemptions without statutory amendment, and Section 204 grants authority to deny, suspend, condition, or limit specified exemptions.⁵

The secondary market exemptions most commonly proposed to states are those codified in Section 202(3), 202(5), and 202(8) of the 2002 Act.

² See CCH Blue Sky L. Rep. ¶ 6371 (“The Uniform Securities Act of 2002”).

³ See Joel Seligman, *The New Uniform Securities Act*, 81 Wash. U. L.Q. 243 (2003) at 244.

⁴ See generally Note, *Regulation of Nonissuer Transactions under Federal and State Securities Registration Laws*, 78 Harv. L. Rev. 1635 (1965).

⁵ See Seligman, *supra* note at 265-267.

1. Nonissuer transactions in specified foreign transactions.⁶ NASAA is credited with recommending this exemption for specified foreign nonissuer transactions subject to a manual exemption when there was disclosure of the issuer’s officers and directors in the issuer’s country of domicile. This subsection uses margin securities as an approach to identify sufficiently seasoned foreign securities. Margin securities are required to be in compliance with Regulation T, which was adopted by the Board of Governors of the Federal Reserve System.⁷
2. Nonissuer transactions in specified fixed income securities.⁸ The concept of a fixed income security rated by a nationally recognized statistical rating organization is established in federal securities law in Form S-3 adopted under the Securities Act of 1933 and the net capital Rule adopted under the Securities Exchange Act of 1934.⁹ These rating organizations have been identified by the Securities and Exchange commission (“SEC”) and include such organizations as Moody’s or Standard and Poor. Rating categories usually begin with AAA and include BBB as the fourth highest rating category.¹⁰
3. Nonissuer transactions with federal covered investment advisers.¹¹ This exemption was added on the understanding that federal covered investment advisers are sophisticated financial professionals who are capable of determining the merits of a security, therefore they do not require the protections provided by requiring registration.¹²

Substitute or Stop-Gap? Efforts towards wholesale adoption of the 2002 Act have by no means faltered; proponents such as SIFMA maintain that the ultimate goal remains adoption of the 2002 Act. Nonetheless, a few obstacles have been identified that may be delaying the recommended state adoption.

⁶ Section 202(3).

⁷ See *id.*

⁸ Section 202(5).

⁹ This provision was previously covered in the prior provision of the 1956 Act in Section 402(b)(2)(B); 2002 Act Section 402(4). See *id.*

¹⁰ See *id.*

¹¹ Section 202(8).

¹² See *id.*

The two subjects which have generated the most friction are treatment of banks as broker-dealers and variable annuities as securities.¹³ However, the nature of objections to uniform Blue Sky regulation remains ideological. State regulators simply question whether or not the 2002 Act will necessarily make Blue Sky filings and registration a more efficient and simplified process.

Uniformity in Blue Sky laws has long engendered a host of strong opinions. One commonly voiced point of view is that, with respect to state securities regulation, “[i]t would be difficult to think of any area of the law where there is as much pointless complexity.”¹⁴ The problems associated with this have been multifold;

“[a]lmost none of the 50 states have identical exemptive structures, and, accordingly, it is necessary to carefully review the law, rules, and lore of each jurisdiction prior to attempting to offer or sell securities in that state. Furthermore, the exemptions are often qualified by other sections of the Blue Sky laws, so that counsel cannot simply seek out the exemptive provisions, but rather must view the particular state act as a whole to determine whether additional restrictions or conditions may apply to the offering or to those persons who may be involved in the sale of securities. This regulatory maze presents serious risk of civil liability and regulatory action for non-compliance.”¹⁵

However, the ubiquity of this frustration has by no means quelled the various arguments opposing the adoption of a revised uniform legal framework. Certain sources have posited that it is unrealistic to believe that any central or national authority would be any more effective in overseeing the securities markets and preventing securities abuses in all fifty states. Additionally, even if there were one national standard, this standard might not be interpreted uniformly throughout the separate jurisdictions. For example, federal courts do not interpret the same federal laws in a uniform manner. As it stands, it is an easy possibility for each circuit to interpret a federal law in a different

manner, thus creating twelve differing interpretations of the same law.¹⁶

Another theory is that where public interest regarding an issue is low, such as the case with securities regulation, then the issue is particularly susceptible to the undue and disproportionate impact of special interest lobbies on the ultimate adoption of regulation.¹⁷ For example, prior to its adoption of the 2002 Act, it was feared that “[i]f Kansas considers the proposed 2002 Uniform Securities Act for adoption, the door could be opened for special interest to attack the Kansas Blue Sky Law.”¹⁸ According to some, the two controversial issues of variable annuities and banks as broker-dealers have stalled the 2002 Act’s progress due to the influence of the special interest insurance and banking lobbies, respectively, which might be evidence of this theory at work.¹⁹

Finally, other sources simply find that even if standardization is the goal, the fact that standardization has failed to develop in Blue Sky laws may have little to do with a need for more regulation, and more to do with fundamental principles of state securities law, namely merit-regulation,²⁰ which the 2002 Act continues to permit.²¹

¹⁶ Stefania A. Di Trolio, *Public Choice Theory, Federalism, and the Sunny Side to Blue-Sky Laws*, 30 Wm. Mitchell L. Rev. 1279, 1301 (2004).

¹⁷ See generally Amanda J. Kiefer, *Kansas Blue Sky is Not on the Market: The Deconstruction of Public Choice Theory Through the Lens of the Kansas Blue Sky Law*, 42 Washburn L.J. 281 (2003). This source notes that following the WorldCom and Enron scandals, however, interest in securities regulation has been increasing.

¹⁸ *Id.* at n.239.

¹⁹ See, e.g., Jay Fishman, Senior Writer Analyst, CCH, Inc., *Why More States Have Not Adopted the Model Uniform Securities Act of 2002*, available at <http://jimhamiltonblog.blogspot.com/2006/11/why-more-states-have-not-adopted-model.html>; Sara Hansard, *VA-specific regs irk insurers*, Investment News (May 3, 2004) (“‘The Uniform Securities Act is being held hostage by the insurance lobby,’ said Joseph Borg, director of the Alabama Securities Commission.”) available at <http://www.investmentnews.com>.

²⁰ Merit review requires a finding by the state that the offering is fair, just and equitable to the purchaser. This test is frequently met by the administrators declaring the offering is fair, just and equitable only if offered to persons of a certain level of wealth and/or sophistication. See generally National Conference of Commissioners on Uniform State Laws, *Uniform Securities Act*, available at <http://www.law.upenn.edu/bll/ulc/securities/2002final.htm>. Last Revised or Amended in 2005).

²¹ See Roberta Romano, *The Advantage of Competitive Federalism for Securities Regulation* 138 (2002); see generally Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 Yale L.J. 2359 (1998).

¹³ Philip A. Feigin, *Subcommittee Report on the Uniform Securities Act of 2002*, Blue Sky Bugle, Apr. 1, 2006, at 11-12.

¹⁴ Louis Loss and Edward M. Cowett, *Blue Sky Law* 230 (1958).

¹⁵ Hugh H. Makens & Willie R. Barnes, *Blue Sky Practice - Part I: Doing it Right: Avoiding Liability Arising from State Private Offerings Under ULOE and Limited Offering Exemptions*, ALI-ABA Course of Study: Regulation D Offerings and Private Placements, in Scottsdale, Az. (March 11-13, 2004), at 1.

“There is, however, no need for government regulation to obtain standardization...The unregulated financial derivatives sector developed its own standard-form contract for swaps. In addition, in numerous nonfinancial sectors, such as electronics, product standardization has occurred without regulatory intervention.”²²

The Interim Answer. Although uniformity in state regulation is often the “rally cry” of the federal government, state governments cannot blindly follow.²³ Though increased uniformity theoretically reduces some of the complexities imposed by the dual system of securities regulation and assuages the burdens placed on state businesses, state securities regulators—having operated under the shadow of preemption for years—remain wary.²⁴

While one purpose of the 2002 Act undoubtedly is to make Blue Sky filings and registration a more unified process, the secondary offering exemption provisions were specifically designed to enable states to accommodate a set of transactions that were not contemplated in the original Uniform Securities Act of 1956.²⁵ Currently, there are many securities that cannot be offered in various states, because it is impossible for many sellers of securities to provide, or force issuing companies to provide, significant information of guaranteed reliability. Disclosure is also an expensive and time-consuming process.²⁶ Therefore, in the case of incorporating these nonissuer exemptions, states do not need to address the ideological arguments for or against the 2002 Act; the sole issue for consideration is whether or not current state laws have the regulatory mechanisms necessary to accommodate certain secondary market transactions. The merits and flaws of the 2002 Act and preemption in general are unrelated, as many states which have not so far adopted the 2002 Act already have variations of these three exemptions, and some states even exempt all secondary trading.

Even those proponents of the 2002 Act whose emphasis remains on wholesale state adoption of the statute note that statutory adoption may take years, whereas incorporation of secondary market trading exemptions is a process that many states can accomplish by order or rule, providing much more immediate relief to a state’s securities industry. The 2002 Act exemptions can improve investor access in the context of a state’s own legal framework for investor protection, and thus are an example of utilizing the dual system of regulation to its maximum effect.

MINNESOTA COMMISSIONER OF COMMERCE ISSUES ORDER UNDER NEW UNIFORM SECURITIES ACT (2002)

By Alan M. Parness
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On July 27, 2007, the Minnesota Commissioner of Commerce (the “Commissioner”) issued an Order (the “Order”), adopting certain “guidelines” under the new Minnesota Uniform Securities Act (2002) (the “Act”), effective August 1, 2007. The Order provides for the following:

1. Exemptions from (a) broker-dealer registration for broker-dealers with no place of business in the state, (b) investment adviser registration for investment advisers, wherever located, and (c) federal covered investment adviser notice filings for investment advisers with no place of business in the state, if the broker-dealer is effecting transactions with, or the adviser’s clients are, “accredited investors” within the meaning of Rule 501(a) of SEC Regulation D (including natural persons) in Minnesota (the Act already exempts broker-dealers effecting transactions with, or advisers whose clients are, a variety of other types of institutional investors in the state).
2. Notice filings (without a fee) at least 10 days in advance of any sale in connection with the following four transactions exempt from securities registration:
 - (a) private offerings to not more than 35 purchasers in the state in reliance on Act § 80A.46(14), except in the case of sales to 10 or fewer Minnesota investors during any 12 consecutive months;
 - (b) sales to existing security holders in reliance on Act § 80A.46(15);

²² Romano, *Advantage*, *supra* note 21, at 20.

²³ NASAA Reports Letter No. 198, *Conference Highlights: Emerging Trends in Regulation, Protection* (October 21, 2004).

²⁴ See J. Parks Workman, *The South Carolina Uniform Securities Act of 2005: A Balancing Act Under a New Blue Sky*, 57 S.C. L. Rev. 409 (2006).

²⁵ Philip A. Feigin, *The Uniform Securities Act of 2002*, Blue Sky Bugle, July 2003.

²⁶ See Note, *supra* note 4.

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- (c) sales in connection with mergers, consolidations, etc., in reliance on Act § 80A.46(18); and
 - (d) sales in connection with various types of employee benefit plans in reliance on Act § 80A.46(21).
3. Notice filings and fees for offerings of “covered securities” under Section 18(b)(2) of the Securities Act of 1933 (the “1933 Act”) (investment companies registered under the Investment Company Act of 1940), pursuant to Act § 80A.50(a)(1) and (2).
 4. Notice filings and fees for offerings of “covered securities” under 1933 Act § 18(b)(4)(D) (offerings exempt under Rule 506 of SEC Regulation D), pursuant to Act § 80A.50(a)(3).

As has unfortunately been the case with several other states adopting the 2002 version of the Uniform Securities Act, Minnesota failed to promulgate new rules under the Act in a timely fashion (as of August 1, 2007, new rules hadn’t even been proposed), and this failure raises issues as to the enforceability of certain provisions of the Order. Thus, while Act §§ 80A.56(b)(1)(H), 80A.58(b)(3), and 80A.60(b)(1)(D) authorize the Commissioner to either issue an order, or adopt a rule, creating the additional exemptions described in item 1 above, and Act § 80A.50(a)(1) similarly permits the notice filings described in item 3 above to be imposed by either rule or order, the filings required by items 2 and 4 above don’t pass muster under the Act.

As regards the filings for the exemptions described in item 2 above, there is no authority in Act § 80A.46 to impose filing requirements (by order or rule) for any of the exempt transactions in item 2, which exemptions are literally self-executing. While Act § 80A.48(a) authorizes the issuance of orders denying, suspending application of, conditioning, limiting, or revoking any exemption created under § 80A.46, that authority is restricted to a specific security, transaction, or offer, and then requires compliance with the due process procedures in Act §§ 80A.54(d) and 80A.81.

As regards notice filings for Rule 506 covered securities, Act § 80A.50(a)(3) authorizes the imposition such filings only pursuant to a rule adoption, not issuance of an order. Compare, in this regard, the policy statement issued by the Commissioner of the Vermont Department of Banking, Insurance, Securities and Health Care Administration under the new Vermont Uniform Securities Act (2002), as reprinted at 3A Blue Sky L.

Rep. (CCH) ¶ 58,473, which continued effectiveness of various regulations, bulletins, policy statements, and orders promulgated under the prior Vermont Securities Act, pending adoption of rules under the new Vermont statute (which rules haven’t been adopted or proposed as of yet, either, despite the fact that the new Vermont statute was effective July 1, 2006). While notice filings were imposed for investment company covered securities (see Section 7.2 of the Vermont policy statement at CCH p. 51,656), they were not imposed for Rule 506 covered securities, in recognition of the fact that Section 5302(c) of the new Vermont statute requires adoption of a rule, not issuance of an order, to effectuate such a filing requirement [note, however, that Section 8.12 of the Vermont policy statement, at CCH p. 51,657, purports to continue the prior requirement of notice filings for covered securities under 1933 Act § 18(b)(4)(A), even though such filings are not required or permitted under Section 5302 of the new Vermont statute].

Accordingly, it remains to be seen whether the filings required by items 2 and 4 above will be legally enforceable, unless and until (a) the Act is amended to authorize filings with regard to the exemptions covered by item 2, and (b) a rule is adopted with regard to Rule 506 notice filings.

NO FREE LUNCH

By: Patricia Struck
Securities Division Administrator
Wisconsin Department of Financial Institutions,
Division of Securities

On March 29, 2006, the North American Securities Administrators Association alerted the public to the potential threat of the free lunch. As 2005-06 NASAA president, I testified before the Special Committee on Aging of the US Senate at its hearing: “Not Born Yesterday: How Seniors Can Stop Investment Fraud.” Noting that the first of an estimated 77 million baby boomers would celebrate their 60th birthdays during 2006, I highlighted the concern among state securities regulators that financial scams targeting seniors was on the rise. I noted that NASAA members had been receiving an increasing number of complaints from investors who had been enticed into attending seminars sponsored by “senior specialists,” commonly through the promise of a free meal.

In a joint press release dated May 8, 2006, NASAA and the SEC announced that regulators had initiated on-site examinations of firms sponsoring “free lunch”

investment seminars to ensure that they were following lawful sales practices.

Financial seminars are a marketing tool traditionally used by financial professionals. They frequently have offered enticements such as free meals, books, or trips for attendees. Increasingly, today these seminars are by invitation only, and they are aimed directly at retirees and other seniors. Sponsors invite participants to lunch or dinner at popular restaurants and may send “tickets” as evidence of the invitation. Before the free meal, sponsors collect information, including financial data, from guests. After the meal, they utilize the information collected to call participants and set up sales appointments, often at participants’ homes. At these meetings, sponsors often offer advice on how to attain a secure retirement or how to protect assets from market fluctuation, along with a sales pitch and sales materials that describe possible investment strategies. Regulators have received complaints and have seen indications of possible unsuitable sales of securities as a result of presentations at these seminars.

The on-site regulatory examinations target offices in states with large numbers of seniors who are likely targets of abusive sales pitches or fraudulent investment schemes. Exams have focused on whether the free meal sponsors are complying with regulatory requirements related to seminars. In particular, regulators have identified firms that have been the subject of customer complaints relating to sales seminars, sales of unsuitable investment recommendations and/or abusive or fraudulent sales tactics.

State regulators in Florida, California, Arizona, Texas, North Carolina, South Carolina, and Alabama have joined forces with the SEC as well as the NASD and NYSE in the exam sweep. SEC Chairman Cox announced at the May 18, 2007 Chicago Senior Symposium that in more than 100 exams, findings include:

- materials provided to seniors are sometimes misleading or exaggerated
- firms aren’t always complying with the suitability requirements under applicable securities laws
- in some cases, senior customers with conservative investment objectives and risk tolerances have been advised to invest a significant percentage of their assets in illiquid securities that involve a high degree of risk

The final sweep report is due to be released later this year.

Taking a cue from the proliferation of the free lunch marketing technique, the Wisconsin Department of Financial Institutions Division of Securities has joined a small group of consumer advocates to produce our own series of “free lunch” seminars during the 2007 summer months. We sent a single set of announcements to the largest employers in the largest cities in the state—Milwaukee, Madison, Appleton, Green Bay, Racine and Wausau—offering to buy box lunches for their employees in exchange for 60 minutes of their time.

As much as we knew about the free lunch phenomenon, we and our partners—the Wisconsin AARP and the Office of Privacy Protection at the Wisconsin Department of Agriculture, Trade and Consumer Protection—were nonetheless unprepared for the response to our announcements. We have scheduled more than 15 lunch hour seminars over the summer at workplaces around the state, including retirement communities, universities, medical clinics, factories, law firms, CPA firms, and insurance agencies. Entitled “Lunch and Learn” seminars, the presentations have been popular with both employers and their employees. The programs include presentations on 2 primary areas of financial abuse: securities fraud and identity theft.

Among the topics we cover in the securities fraud area is the prevalence of schemes aimed at baby boomers nearing retirement. Of particular relevance are the cases investigated by the Wisconsin Division of Securities involving employees of large companies offering early retirement packages. In these cases, brokers have targeted baby boomers who qualify for early retirement, and persuaded them to liquidate their retirement accounts containing their employers’ stock as the primary asset. The brokers have counseled, “trust me to invest your money—you can afford to retire and still live as well as you have lived while you were working”. Like most promises that sound too good to be true, this one certainly is. In several cases, the brokers invested the new retirees’ assets in unsuitable securities, and rather than producing a safe and stable retirement income, the securities have dropped drastically in value and forced the retirees back into jobs not nearly as good as the ones they’ve left.

By turning the free lunch model into investor education opportunities, we hope we are providing investors with information they can use to protect themselves against investment fraud.

ELECTRONIC FILING OF FORM D: A TRIP DOWN MEMORY LANE

By G. Philip Rutledge

Managing Partner

Bybel Rutledge, LLP, Lemoyne, Pennsylvania

On June 29, 2007, the U.S. Securities & Exchange Commission ("SEC") posted Release No. 33-8814 on its web site entitled "Electronic Filing and Simplification of Form D" wherein the SEC proposed revising the content of Form D and mandating electronic filing through SEC's EDGAR system (the "Release"). The Release contains the following passage:

"It is our hope that state securities regulators would permit 'one-stop' filing with the Commission and rely on Commission filings as satisfying state law filing requirements for offerings covered by a federal Form D filing. This would reduce significantly the costs and burdens of preparing and filing Form D information with the Commission and with state securities regulators. This could represent a substantial savings for small businesses and others filing Form D information."

This created a sense of déjà vu in your author since, long before Sarbanes-Oxley, Gramm-Leach-Bliley and even the National Markets Securities Improvement Act ("NSMIA"), there was a project known as the Securities Registration Depository ("SRD"). SRD was a 1990s initiative of the North American Securities Administrators Association ("NASAA") to bring the uniformity and economic efficiencies achieved in the securities brokerage industry with the Central Registration Depository ("CRD") to the issuer community by taking feeds from documents filed with EDGAR and electronically delivering them to designated state securities regulators along with associated filing fees.

The SRD concept originated prior to introduction of federal legislation that would come to be known as NSMIA so its beneficiaries would have included registered investment companies, corporate equity issuers whose shares were not listed on NYSE or Amex or quoted on Nasdaq NMS, and issuers of asset-backed securities, certain debt securities and public limited partnerships. Similar to CRD, SRD also would have eliminated state-by-state filing by issuers that filed documents electronically through EDGAR.

SRD development costs were funded in most part by NASAA. Appropriate software and security programs

were written, hardware specified and state securities staff trained. Operational presentations were made to the Task Force on the Future of Shared State and Federal Securities Regulation prior to passage of NSMIA. SRD was to be owned by NASAA which, as a non-profit entity consisting of members who were government agencies, did not pose problems for exclusive use by members from jurisdictions whose public procurement laws otherwise would have required a public bidding process for using this service. So, what happened? The answer may depend on who one asks.

Hence my wonderment if the above cited passage from the Release is calculated to stimulate discussion about reintroducing a SRD-type system? Courtesy of NSMIA and this year's adoption of amendments to Rule 146 according "covered security" status to securities listed or approved for listing upon notice of issuance on The Nasdaq Stock Market, Inc., such a system would be much less complicated since the volume of SEC filed documents which also are required to be filed at the state level has been narrowed.

Also, the Release may provide a touchstone for resolving issues surrounding the Uniform Limited Offering Exemption ("ULOE"). Prior to NSMIA, ULOE was envisioned as a state analog to offerings made in reliance on Rules 505 and 506 of SEC Regulation D. NSMIA effectively carved Rule 506 out of ULOE and replaced it with mandatory acceptance by the states of a notice filing consisting of the federal Form D filing.

Issuers, however, that want to rely on Rule 505 of SEC Regulation D remain confronted by varying requirements at the state level. By proposing to eliminate references to ULOE in Form D, including the ULOE signature, there appears to be a recognition by the SEC that there no longer exists a workable federal/state exemptive scheme for Rule 505 offerings.

Although some states have moved, in a post-NSMIA environment, to adopt a simplified exemption predicated upon compliance with the Rule 505 exemption, it has not been a uniform movement. Even though the subject has been discussed within NASAA project groups for a number of years, no new state exemption analog to Rule 505 has been proposed by NASAA which would replace the last vestiges of ULOE.

Issuance of this Release affords state securities administrators, SEC staff, NASAA and the issuer community with an opportunity to bring the uniformity and economic efficiencies of the CRD (and latterly the

Investment Adviser Registration Depository) to the issuer community via a new SRD initiative. Given the predicate of the “old” SRD to distribute EDGAR filed documents to the states, the development costs should consist of updating the SRD plan to take advantage of interim advances in technology.

If there is a willingness among these interested parties to provide a new uniform and streamlined exemptive regime for Rule 505 offerings which would use federal Form D as the notice filing and acceptance of Form D for filing of a state notice under the state Accredited Investor Exemption, the “new” SRD could provide for one-stop filing of:

- Form D notice filings under Rule 504(b)(iii) for offerings made available only to Accredited Investors.
- Form D notice filings under Rule 505.
- Form D notice filings under Rule 506.
- Form U-1 and registration statements filed pursuant to Section 5 of the Securities Act of 1933 (“1933 Act”).

Adding notice filings made with the states by registered investment companies to the “new” SRD delivery system would pose additional questions. After NSMIA, state securities regulators and the investment company industry engaged in collaborative discussions which resulted in universal use by the states of “Form NF.” Form NF is not mandated by the SEC and is not filed on EDGAR. Although NSMIA permits states to receive documents filed with the SEC by registered investment companies, the data which the states want (reports on the value of securities sold or offered in a jurisdiction) generally is not readily discernable from SEC filed documents, particularly as the states are not uniform in their notice requirements and may ask for a notice filing to be made for each “fund,” “class” or “sub-class.”

To add this component as a meaningful feature to a “new” SRD” would require the states to take a uniform approach in agreeing on the level of the fund complex which would be required to file a notice (and pay a fee) and SEC rulemaking adopting a form similar to Form NF to be filed on EDGAR. The author suspects neither is likely in the short term.

Why should state regulators, SEC staff and the industry invest any time and effort on renewing the “SRD?” First, we are dealing with notice filings for statutory or regulatory exemptions where legislative and policy

decisions already have been made that, under the relevant circumstances, registration of the securities is not necessary for protection of investors. As indicated in the Release, the notice filings are a means to gather empirical evidence on types of issuers using the exemptions, how they are being used and whether their use raises any regulatory or enforcement issues which require amendatory action.

Second, current emphasis on competitiveness of the United States in matters financial will continue. It is hard to argue why, in this day and age of technology, the same notice filing needs to be filed with both the SEC and the several states without a one-stop filing option. If accepting and distributing state filing fees for Form D notices becomes an impediment, consideration should be given by the states not to levy filing fees on Form D notices and recapture that revenue by raising registration fees on agents. This has the benefit of spreading the lost revenue over the greatest number of registrants who also are authorized to sell the private placements for which the Form D notices were made. For instance, in a large state which generates \$500,000 in annual fee revenue from Form D notices for Rule 506 offerings and has 150,000 registered securities agents, shifting the lost Rule 506 revenue to agent registration fees would result in only a \$3.33 annual increase in the agent registration fee.

Third, states probably don’t want to deal with paper anymore than the SEC. Electronic delivery to states of documents filed with the SEC will permit states to store the documents electronically (and more economically) while still complying with state public access and recordkeeping laws and select which registration statements to review. For direct public participation programs, it might be useful for SEC to permit the filing of the relevant NASAA cross-reference sheet as an exhibit to the 1933 Act registration. Also, some states still require the filing of SEC registration statements for certain dividend reinvestment and stock purchase plans and state filings for these plans would be simplified by a “new” SRD.

Fourth, this provides an opportunity for state securities regulators, NASAA and the issuer community to discard ULOE once and for all and replace it with a workable state-level Rule 505 exemption and accept the “new” Form D as the notice filing standard for the states and the SEC for filings required by Rules 504(b)(iii), 505 and 506 which would supplant currently applicable individual state notice forms.

Lastly, but very importantly, a “new” SRD would give some transparency to the state filing systems where none or very little exists today. Practitioners rely heavily on use of the SEC web site to search for documents filed with the SEC. There is no similar facility available to the practitioner to determine in what states the same document is filed or when it was filed. Currently, phone calls must be made to individual states and responses and response times vary. Under a “new” SRD, this data would be available on the SEC web site via EDGAR. Practitioners would have access to real time data, issuers would not have to pay for practitioners and paralegals to make calls to individual states, and state securities staff would save time answering what they view as “routine” inquiries.

Someone said, if first you don’t succeed, try, try again. SRD might have not been successful at first but maybe it is time to try again. Anyone interested?

This article reflects the sole views of the author and not Bybel Rutledge LLP nor any clients represented by Bybel Rutledge LLP.

CALIFORNIA DEPARTMENT OF CORPORATIONS AMENDS REGULATIONS REGARDING COMPENSATORY BENEFIT PLANS

By: Andrew D. Brooks, Esq.
Seltzer | Caplan | McMahon | Vitek

(This material originally appeared as an eBulletin of the California State Bar Corporations Committee which granted permission for this use and was provided by Andrew D. Brooks.)

On July 9, 2007, the California Department of Corporation’s final amended regulations relating to compensatory benefit plans took effect under the California Corporate Securities Law of 1968, as amended (the “California Law”). The original notice of the proposed rule-making was published in November 2006, with several additional changes in the intervening months.

The final rules create new flexibility for corporations in administering compensatory equity plans, including stock option plans and stock purchase plans, by eliminating many of the restrictive vesting and pricing requirements in the prior rules. These rules primarily affect privately-held companies granting options to California employees, but also impact publicly-traded companies that are unlisted or are trading on certain smaller exchanges. The amendments were originally proposed as a way of removing the burdens imposed on

companies with operations in California that were inconsistent with federal laws and securities laws in other states. The California rules are now more closely aligned with Rule 701 of the Securities Act of 1933, as amended (“Rule 701”), making it easier for a company to draft a plan that meets California’s requirements, particularly when trying to implement consistent employee benefit plans in multiple jurisdictions.

A company that issues securities in California under a compensatory benefit plan must fit within the exemption provided in Section 25102(o) of the California Law or seek qualification of the plan by the California Commissioner of Corporations under the California Law. To qualify for the exemption under Section 25102(o), the subject plan must satisfy all of the requirements of Rule 701, as well as the requirements under specified sections of the California Law, and the issuer must file a notice with the California Department of Corporations regarding the plan.

The amended rules include the following notable changes, among others:

- Elimination of the requirement of a minimum exercise price for options and a minimum purchase price of securities under compensatory benefit plans (which used to be 85% of the fair value of the underlying securities when the security was granted).
- Elimination of the requirement that options granted to non-management employees must vest on a schedule no less than 20% per year from the date of option grant, allowing a company to use more targeted incentives and performance-based vesting for all employees.
- The list of the individuals eligible to participate under covered plans has been expanded to include the same eligible persons who are exempt under Rule 701.
- For plans that are exempt under Section 25102(o), elimination of certain restrictions on repurchase rights with respect to non-management employees (minimum repurchase price, minimum repurchase period, minimum rate of lapse of repurchase rights of at least 20% of the subject shares per year), although such restrictions, with certain modifications, will apply to plans that are qualified by the Commissioner under the California Law.

- Elimination of the requirement that shares of common stock issuable under a plan exempt under Section 25102(o) must carry equal voting rights on all matters where such vote is permitted by applicable law, although such restrictions will apply to plans that are qualified by the Commissioner under the California Law.
- For plans that meet the requirements of Rule 701, elimination of the provision requiring a company to provide plan participants with financial statements on an annual basis.
- For plans that meet the requirements of Rule 701, elimination of the restriction that the number of underlying securities subject to outstanding options not exceed 30% of a company's outstanding securities, unless a higher percentage is approved with the vote of two-thirds of a company's outstanding voting securities.
- The amended rules make it easier for out-of-state issuers to comply with the Section 25102(o) exemption, including by allowing security holder consent for a plan by the later of within 12 months of plan adoption or prior to granting any options in California (permitting grants under plans that were adopted more than a year prior to making grants in California). In addition, the final rules allow foreign private issuers to issue options or stock under plans to recipients in California without stockholder consent, as long as the number of recipients does not exceed 35 in California.

However, note that the following substantive requirements for compensatory benefit plans remain in place in the final amended rules:

- The subject plan must specify the total number of securities that may be issued and the class of eligible individuals that may be awarded grants under the plan.
- The exercise period of an option cannot extend more than 120 months from the date of grant.
- The subject plan must be approved by a majority of the outstanding securities entitled to vote by the later of within 12 months of plan adoption or prior to granting any options in California.
- Options and the right to acquire securities under a plan can only be transferable by will, by the

laws of descent and distribution, to a revocable trust or as permitted by Rule 701.

- Optionees must be permitted to exercise their options until the earlier of:
 - the option expiration date; and
 - at least 6 months from a termination due to death or disability, or at least 30 days from a termination due to reasons other than death or disability.

Equity awards must be granted within 10 years from the earlier of the date the plan is adopted and the date the plan is approved by the issuer's security holders.

The full text of the final rules can be found at <http://www.corp.ca.gov/pol/rm/2706order.pdf>.

For more information about the Corporations Committee, please see the committee's Web site: www.calbar.org/buslaw/corporations.

**“ONE INVESTOR AT A TIME”
PRESERVING STATE SECURITIES HISTORY AT
www.sechistorical.org**

By Carla Rosati
Executive Director
Securities and Exchange Commission Historical Society

“I think one of the great selling points for state securities regulation is that any citizen can pick up the phone and call and get me and we often have one investor walking in with a bag full of account statements saying I have a problem here, and we have the ability to try and sort out their problems, one investor at a time.”

—Christine Bruenn, Fireside Chat on State Securities Regulation, www.sechistorical.org, June 22, 2004

The history of state securities regulation, beginning with the first “Blue Sky Law” in Kansas in 1911, pre-dates the creation of the U.S. Securities and Exchange Commission by more than two decades. This vital history, both in terms of its longevity and its grass-roots impact, is now being preserved in www.sechistorical.org, the virtual museum and archive of SEC and securities history.

www.sechistorical.org is run by the Securities and Exchange Commission (SEC) Historical Society, which is independent of and separate from the U.S. Securities and Exchange Commission, and receives no government

support. The virtual museum and archive currently offers over 2,000 primary materials—papers, photos, oral histories, online educational programs and a timeline—on the development of securities regulation since the start of the 20th century. The virtual museum is free and accessible worldwide at all times; up to 5,000 persons each month visit and use the museum.

A group of current and former state securities administrators has volunteered to assist the SEC Historical Society in preserving state securities history in the virtual museum and archive. Chaired by Hugh Makens (Michigan), the group includes Lewis Brothers (Virginia), Christine Bruenn (Maine), Phil Feigin (Colorado), Craig Goettsch (Iowa), John Lynch (North American Securities Administrators Association), and Orestes Mihaly (New York).

The group's goal is to build a permanent gallery in the virtual museum and archive, opening in 2011, to mark the centennial of the first "Blue Sky Law." The virtual museum's galleries provide easy access for visitors to all museum materials — papers, photos, oral histories, online programs and news audio/film clips — on a specific subject. The state securities regulation gallery will be the eighth gallery planned for the virtual museum, joining current galleries on Joseph P. Kennedy and the Creation of the SEC, William O. Douglas and the Growing Power of the SEC, and Fair To All People: The SEC and the Regulation of Insider Trading; and future galleries on the SEC's work from 1961 through 1981, and the internationalization of securities regulation.

The building of the gallery will begin this fall with the accession of such materials as:

- a 1953 memorandum from SEC Chairman Ralph Demmler to all his regional administrators, stressing cooperation with state securities administrators, courtesy of Mr. Feigin.
- releases from the New York Attorney General from the 1950s through the 1980s, courtesy of Mr. Mihaly, which demonstrate that state securities administrators deal with "one crook at a time" as well.

The group is also identifying persons significant to state securities regulation as candidates for oral histories interviews, and preparing a timeline of important state securities events over the last century to serve as a framework for building the gallery. The group welcomes contributions of papers, photos or other

materials relating to state securities history; all materials will be returned to the donor.

For further information on the state securities regulation gallery, or if you have primary materials or information that you wish to share, please contact Carla Rosati, Executive Director, SEC Historical Society, 202-756-5015; c.rosati@sechistorical.org.

FLORIDA "INSURANCE AGENCY" LICENSING REQUIREMENTS REVISED

By: R. Michael Underwood
Squire, Sanders & Dempsey L.L.P.

In 2006, the world financial services industry had to deal with a Florida state statute that required a license from the Florida insurance regulator for any location, in or out of the State of Florida, used by an individual to perform any function that requires a license as a Florida insurance agent.²⁷ Failure to apply for a Florida "insurance agency" license can result in fines up to US \$10,000 for each location.²⁸

On June 19, 2007, Florida Governor Charlie Crist signed into law, Chapter 2007-199, Laws of Florida, which relaxes somewhat the requirements of the Florida Insurance Agency Act effective on July 1, 2007. First, for locations that are licensed with the NASD as securities branch offices, a streamlined, one-time only "registration" is available in lieu of licensing.²⁹ Fingerprints and a fingerprint processing fee must still be filed with the Florida Department of Financial Services for each location, but renewal filings every three years are not required for registered locations.

The second change concerns the practice of insurance agents who schedule meetings with customers in a circuit of locations. This arrangement, common in insurance subsidiaries of banks, was impossible for agents licensed in Florida before enactment of the new law. A new provision in the Florida Insurance Code will now permit the practice, provided no insurance activities occur at a location when the agent is not there.³⁰

²⁷ Section 626.112(7)(a), Florida Statutes (2006).

²⁸ Section 626.112(7)(a)1., Florida Statutes (2006).

²⁹ Section 1, Ch. 2007-199, Laws of Florida (2007), amending Section 626.112(7)(a), Florida Statutes.

³⁰ Section 4, Ch. 2007-199, Laws of Florida (2007), amending Section 626.747(1), Florida Statutes.

FROM THE OTHER SIDE OF THE DESK

By Sue Noble

Paralegal Specialist – Blue Sky/Securities
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We hold these truths to be self-evident . . .
—The Declaration of Independence

The Fourth of July is a holiday that celebrates the very heart of American culture. One hears a great deal about life, liberty and the pursuit of happiness, all of which mean different things to different people. The Declaration of Independence is the quintessential political document, but it contains statements that may be applied not just to the political situation then prevailing but also to the practice of blue sky law (or indeed the practice of any profession) today. Consider:

- “All experience hath shewn, that mankind are more disposed to suffer . . . than to right themselves by abolishing the forms to which they are accustomed.” All of us have encountered, at some point in our professional lives, someone whose practice is based on “that’s the way we’ve always done it.”
- “In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.” Litigators and practitioners of administrative law have certainly experienced this feeling.

But what we celebrate is not the litany of hardships included in the Declaration, it is the creative solution which the Declaration began, and so it is with professional life, as well.

Fireworks are one of the mandatory ways of celebrating at this time of year. Although not invented in America, fireworks are nevertheless the traditional means of publicly displaying our pleasure in the anniversary of the Declaration, as well as celebrating many other occasions. They come in an astonishing variety of forms, with new ones being invented all the time, ranging from the simplest ones that many of us give our children to play with, such as sparklers, to firecrackers in a variety of sizes, to more spectacular displays such as Catherine Wheels (rotating wheels that throw off colored sparks or flames).

Those are some of the terrestrial forms of fireworks, but there are many varieties that light up the sky as well: Among them, Roman candles shoot projectiles that

detonate in the sky, creating multiple showers of stars before disappearing with a loud bang, while chrysanthemums fill the sky with an umbrella-like shower of sparks with visible trails which quietly disappear. Then there are the orchestrated displays, often accompanied by music (for example, the grand spectacle of the Boston Pops Orchestra playing the 1812 Overture with elaborate fireworks displays timed to the music).

Sparklers burn very brightly and are surprisingly hot, although by the time the spark hits your hand, it will have cooled off considerably. In the end, one is left holding a charred wire.

Firecrackers do not make much of a show and are chiefly valuable for the wonderful loud noise they make, especially satisfactory to teenage boys. They can maim an incautious user.

Catherine Wheels are very beautiful, but spin round and round very fast more or less at eye level, and then fizzle out.

Roman candles light up the sky with showers of color for a brief time and then disappear with a loud bang. If not sufficiently charged, they wobble on the way up and may even fall back to earth.

Chrysanthemums, especially when different colors are set off in rapid succession, fill the sky with a quiet, enveloping display that slowly fades from view and is followed by a boom that can startle the unwary.

Orchestrated displays entail light, sound and noise, and invariably generate oohs and aahs and applause, as well as muttered asides (such as “how do they DO that?”). They can leave the viewer overwhelmed, deaf and unable to smell anything except gunpowder.

It’s a lot of fun to assign the characteristics of the various fireworks to deals we’ve worked on or people we’ve worked with. But let’s not forget, in the process, that apparently negative characteristics are sometimes the most valuable features. The charred stick of a sparkler serves as an important reminder that some matters throw a lot of light but not much else, while a Catherine Wheel of a deal may spin for months before fizzling out. Identifying the transaction as a Catherine Wheel may make the protracted nature of the negotiations more tolerable.

To me, chrysanthemums typify the ideal transaction, where everything proceeds according to plan, each player does her part with quiet competence, and after the

closing those who weren't involved experience the boom. "Oh, you were on THAT deal? Lucky you."

Orchestrated displays are the truly awesome projects, often brought in by rainmakers (yes, even on July 4, it may rain). Almost all of us have at least one of these in our past, and even if they don't quite achieve the light, sound and noise of, say, the Google IPO, they are likely to have left us exhausted and unable to see or smell much of anything for some time after the closing.

What's that you say? I left out firecrackers and Roman candles? So I did. You all have your own images for those and don't need any examples from me. There's just one more thing to be said about fireworks, and it's a commonplace caution: don't try this at home.

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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

This issue of the Blue Sky Bugle has more contributors than ever before. These contributors run the spectrum from grizzled veterans to summer associates (not to mention the occasional brilliant paralegal!). I would like to thank one and all for their hard work in providing so much worthwhile content. In fact, we have a few new contributors including Andrew D. Brooks and Carla Rosati.

In particular I would like to thank our newest and youngest contributor, Ujala Sehgal. Ujala is a graduate of Carnegie Mellon University and is entering her final year at the University of Michigan Law School. It was indeed gratifying that I did not have to ask twice for her to contribute to the Blue Sky Bugle as one of her summer assignments here at Cadwalader, Wickersham & Taft LLP. Her thoroughness is evident as well as her

desire to learn about an area of law that, let's face it, isn't exactly popular with most of her classmates.

I would also like to take this opportunity to add a new feature to the editorial page of the Blue Sky Bugle. As we travel to conventions and on vacations there are those moments which, when captured on camera, somehow gravitate to the practice of blue sky law. It seems appropriate that these pictures become part of this publication. To that end and going forward a photo will appear at the bottom of each editorial which captures a quintessential blue sky moment. Contributions are encouraged from any and all readers whether they contribute articles or not. The first contributor is, not surprisingly, our intrepid traveler from near and far Alan M. Parness. Below is a shot taken from a favorite taverna of Alan's on the island of Santorini, Greece, where he recently vacationed.



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