Sept. 11, 2001
No one of us forgets where she or he was that day. Death, the companion of life, came suddenly -- all too soon, on our doorstep, and to our friends. . . . As the tragedies unfolded, there were no words of understanding that held us from the edge.
(excerpt from statement of Thomas L. Ambro, Chair, ABA Section of Business Law)

The day was doubly etched in the memories of the many members of the State Regulation of Securities Committee who were together that morning, in attendance at what had been planned to be the final day of the NASAA Annual Conference in San Francisco. Ellen Lieberman, in her “Blue Sky Bits and Pieces” column, reports on the effect of the day’s events on some of our members and friends.

The Business Law Section of the ABA will hold a memorial service for the victims of the September 11 tragedies at its Spring Meeting in Boston, which will convene April 4 through April 7, 2002.

PROVINCE OF ONTARIO INTRODUCES ACCREDITED INVESTOR EXEMPTION

By Michel Gélinas
Stikeman Elliott (Montreal)

The Ontario Securities Commission (the “OSC”) recently adopted two new rules that will fundamentally change the nature of private placements. Rule 45-501, “Exempt Distributions” (Rule 45-501 actually replaces an existing rule which bears the same title) and Multilateral Instrument 45-102, “Resale of Securities” are expected to become effective on November 30, 2001.

While Rule 45-501 applies only in Ontario, the securities commissions of British Columbia and Alberta have announced that they will change private placement requirements so that they largely mirror what is described below regarding “accredited investors”. There has been no public announcement in Quebec with respect to harmonizing private placement legislation in that province.

Rule 45-501, among other matters, replaces the various exemptions typically relied upon when dealing with sophisticated investors such as financial institutions and governments, as well as the C$150,000 purchase price exemption (with an exception in the case of pooled

(Ontario Exemption - continued Page 3)
EVENTS CALENDAR

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ABA SPRING MEETING

The State Regulation of Securities Committee is scheduled to meet on April 6, 2002, at 2:30 PM, in conjunction with the 2002 Spring Meeting of the Business Law Section of the ABA, to be held April 4 through April 7, 2002, in Boston at the Boston Marriott Copley Place and Westin Copley Place.

NASAA SPRING CONFERENCE

The annual NASAA Spring Conference will be held on Monday, April 15, 2002 at the Washington Court Hotel in Washington, D.C.

ABA ANNUAL MEETING

The State Regulation of Securities Committee will meet in conjunction with the 2002 Annual Meeting of the ABA, which will convene August 8 through 14, 2002, in Washington, D.C. at the Hyatt Regency on Capitol Hill.

NASAA ANNUAL FALL CONFERENCE

The State Regulation of Securities Committee will meet in conjunction with the 2002 Annual NASAA Conference, to be held September 29 through October 2 in Philadelphia, at Loews Philadelphia Hotel.

PLAN FOR THE FUTURE

2003 Annual NASAA Fall Conference
September 14 - 17, 2003
Chicago, Illinois
Chicago Marriott Downtown

WORD FROM THE CHAIR

By Alan P. Baden
Vinson & Elkins (New York)
Chair, State Regulation of Securities Committee

Update on the Proposed New Uniform Securities Act (the “USA”)

Other members of the State Regulation of Securities Committee and I continue to attend the meetings of the Drafting Committee of the National Conference of Commissioners on Uniform State Laws on the new Uniform Securities Act (the “USA”). The current draft of the proposed new USA can be found at the NCCUSL web site at (www.law.upenn.edu/bll/ulc/ulc.htm). Joel Seligman, Dean of the Washington University School of Law, is the reporter.

The premise for a new USA is that the provisions of the National Securities Markets Improvement Act of 1996, or NSMIA, warrant a fresh look at the USA. NSMIA preempted many aspects of blue sky regulation, but also left significant areas open to regulation. The new USA has had its first reading at the NCCUSL 2001 Annual Meeting and is slated for a second and final reading and adoption next Summer.

The State Regulation of Securities Committee intends to co-sponsor with the Federal Regulation of Securities Committee a program on the new USA at the Spring Meeting of the ABA Business Law Section in Boston next year. The program is tentatively scheduled for 2:30 p.m. – 4:30 p.m. on April 6, 2002.

This Fall, the NCCUSL Drafting Committee tackled several significant areas, notably broker/dealer, investment
adviser and agent registration and civil liability. Representatives of the Securities and Exchange Commission, the Securities Industry Association, the North American Securities Administrators Association and the Investment Company Institute, among others, have participated in these meetings.

The latest draft of the Act contemplates the regulation of investment advisors who are not Federally Covered Investment Advisors (persons required to be registered under Section 203 of the Investment Advisors Act – advisors with $25,000,000 or more under management). The regulation of investment advisors was preserved to the states with respect to smaller investment advisors. Of course, the Act preserves the current regulatory structure with respect to broker-dealers and agents. One of the matters currently being discussed is the breadth and scope of the provisions allowing the administrator to deny or suspend registration.

Of great importance are the civil liability provisions. These are in Section 509 of the new Act. Notably, the new Act proposes civil liability for an investment advisor for failure to register or fraudulent reports. The new Act also proposes joint and several liability for aiding and abetting. An item of much debate has been the statute of limitations. The latest version of the act proposes one year for registration violations, and for fraud, a standard of one year from actual discovery and four years from transaction date. The latter is different from the one and three year standard existing at the federal level.

The NCCUSL Drafting Committee will be meeting a few more times prior to the final reading next Summer. The NCCUSL Drafting Committee is scheduled to return to the registration of securities provisions, merit review and securities registration exemptions prior to completing its work. Anyone with comments should feel free to address them to me or Dean Seligman.

ONTARIO EXEMPTION (continued from Page 1)

funds), with a new exemption based on an “accredited investor” test similar to that found in the United States. Rule 45-501 also eliminates the “private company” exemption which is replaced by a “closely-held issuers” exemption.

The Accredited Investor Exemption

Under Rule 45-501, no minimum amount must be invested, provided that the investor is an accredited investor. Accredited investors include institutional investors such as Canadian banks, loan and trust companies, insurance companies, registered advisers and registered dealers (other than limited market dealers), governments and pension funds. The significant change, however, is that the accredited investor definition also encompasses individuals and smaller entities (who, subject to certain exceptions, could previously only rely on the C$150,000 purchase price exemption). The list of those characterized as accredited investors includes, among others:

- an individual who beneficially owns, alone or together with a spouse, financial assets (cash, securities, contracts of insurance, or deposits) having an aggregate realizable value before taxes, but net of any related liabilities, exceeding C$1,000,000;

- an individual whose net income before taxes exceeded C$200,000 in
each of the two most recent years, or whose net income before taxes combined with that of a spouse exceeded C$300,000 in each of those years and who, in either case, has a reasonable expectation of exceeding the same net income level in the current year; and

- a company or other business entity (other than a mutual fund or non-redeemable investment fund) that has net assets of at least C$5,000,000, as reflected in its most recently prepared financial statements.

The Closely-Held Issuers Exemption

Rule 45-501 permits closely-held issuers to sell up to an aggregate of C$3,000,000 in securities on an exempt basis over the lifetime of the issuer, subject to certain conditions. This exemption is not expected to be adopted in British Columbia, Alberta or Quebec.

A closely-held issuer is defined as an issuer (other than a mutual fund or a non-redeemable investment fund):

- whose shares are subject to restrictions on transfer; and

- that has no more than 35 beneficial holders of its securities exclusive of (i) accredited investors; (ii) current or former directors, officers or employees; and (iii) certain current or former consultants (the two latter categories already benefit from certain exemptions under Rule 45-503 – Trades To Employees, Executives and Consultants).

A trade in a security of a closely-held issuer will be exempt from the prospectus and dealer registration requirement if the following conditions are met:

- following the trade, the issuer will be a closely-held issuer and the aggregate proceeds received by the issuer, and any other issuer engaged in a common enterprise with the issuer, in connection with trades made in reliance upon the closely-held issuers exemption will not exceed C$3,000,000 over their lifetime;

- no promoter of the issuer has acted as promoter of any other issuer that has issued a security in reliance upon the closely-held issuer exemption within the 12 months preceding the trade;

- no selling or promotional expenses are incurred except for services performed by a registered dealer; and

- the seller must provide to purchasers an information statement at least four days prior to the trade unless, following the trade, the issuer will not have more than five beneficial holders of its securities.

Rule 45-501 and the International Dealer Regime

Rule 45-501 also has an impact on Ontario’s Universal Registration System pursuant to which, with limited exception, a “market intermediary” (a definition which includes broker-dealers) must register as a dealer in order to trade in securities in Ontario. Most large U.S. broker-dealers are registered in Ontario in the International Dealer category which is a restricted dealer license permitting them to trade in non-Canadian securities, subject to certain exceptions, with “Designated Institutions” (essentially institutional investors, including the government). As a result, an International Dealer will generally not be permitted to trade with
an accredited investor unless such investor also constitutes a Designated Institution.

The Regulation adopted under the Securities Act (Ontario) has not yet been amended to reflect Rule 45-501. The OSC has indicated that it intends to modify the definition of Designated Institution to delete the reference to exempt purchasers (a status obtained upon application to the OSC) and add to the definition of Designated Institution any investor, other than an individual, that is an accredited investor under Rule 45-501. As a practical matter, this proposed amendment means that the categories of Designated Institutions will remain substantially the same. One notable new category of Designated Institutions will be entities that have net assets of at least C$5,000,000, as reflected in their most recently prepared financial statements.

Other Modifications

Under Rule 45-501, to the extent that an offering memorandum is delivered to prospective purchasers in reliance upon the accredited investor or closely-held issuers exemption, the statutory right of action referred to in the Securities Act (Ontario) will apply in respect of the offering and will have to be described in such offering memorandum.

As a result of the implementation of Rule 45-501, the situations under which the statutory right of action applies have been considerably broadened. Under the regime in force prior to November 30, 2001, the most common situation that required the provision of a right of action was when an offering was made relying on the C$150,000 exemption.

Rule 45-501 also requires the filing of a post-trade report and the payment of filing fees in connection with certain trades (such as the private placement of newly issued securities), but these requirements are not materially different from the current regime.

The resale rules pertaining to securities acquired pursuant to a private placement are also being modified. Multilateral Instrument 45-502 has been adopted by all the provinces other than Quebec and, as indicated above, is expected to become effective on November 30, 2001. This instrument provides, among other things, for a prospectus exemption, if certain conditions are met, in connection with the resale of the securities of a non-reporting issuer (essentially, an issuer which has not filed a prospectus in Canada) outside Canada if residents of Canada, at the time the securities were distributed in Canada, (i) did not own more than 10% of the outstanding securities of the class or series of securities being resold; and (ii) did not represent more than 10% of the total number of owners of securities of the class or series of securities being resold. The 10% threshold is inclusive of the securities distributed to the Canadian holders who wish to rely on the resale exemption.

Conclusion

While Rule 45-501 can be viewed as an attempt to harmonize Canadian securities legislation with the U.S. regime, significant differences remain. In fact, securities legislation in Canada varies from one province to another as each province has its own securities legislation and securities commission. The Canadian securities commissions are attempting to
harmonize the various provincial securities laws through the adoption of National Instruments, but until securities legislation is harmonized throughout Canada, it is difficult to imagine that Canadian and U.S. securities legislation could be harmonized in a comprehensive manner.

BLUE SKY BITS AND PIECES
By Ellen Lieberman
Debevoise & Plimpton (New York)

Blue Sky Bits and Pieces is the historical name of this column. But bits and pieces seems a shade too descriptive now of what our lives, and the World Trade Center, have become.

The September 2001 Annual Meeting of NASAA in San Francisco will not soon be forgotten. What began as a substantive discussion of issues and a social gathering of the securities industry and its regulators turned in a moment into a captive convention of distraught human sufferers-- unable to leave San Francisco and unable to tear themselves away from the riveting, constantly repeated visual refrain of airplanes flying into the twin towers of the World Trade Center and the unbelievable surrender of the towers to the forces of terrorism, the floors just melting down into a smoking pile of rubble.

And yet some at the meeting were thrilled to be there—it saved them from whatever tragedy could have befallen them if, instead of California, they were in their offices or at meetings in or near the WTC site. And all at the meeting did get home-- to cope with loss and fear and disruption and insecurity and sadness and anger, and a world very different than it was before.

Here are some of the stories and some information about where people are and what progress they are making in returning to normal routines, if not normal life.

The New York State Office of Court Administration is asking law firms and attorneys displaced as a result of the terrorist attack to update their addresses with its Attorney Registration Unit. Attorneys who have moved - even temporarily - should submit the information in writing at www.attyreg.courts.state.ny.us, or by fax at (212) 428-2804. The New York State Bar Association on its website (nysba.org) and by telephone is making contact information available to clients, attorneys and the public for attorneys whose offices were destroyed or are inaccessible.

Dianne Ridley Gatewood, Chief of the Registration Section of the New York State Department of Law, Investment Protection Bureau, reported on October 2, 2001 that the New York Department of Law was moving towards resumption of full operations, but telephone service was not widely available due to the WTC attack. Telephone service did resume the last week of October but, in the event of difficulties, you may still call the Albany office at (518) 473-7190 to convey a message.

Roger G. Fein of Wildman, Harrold, Allen & Dixon, notes sadly how timing is everything. Roger Fein’s good friend John O’Neill recently retired after 30 years with the FBI to become head of security at the WTC. His first day on the job was September 10th. He perished when he re-entered the building to help others evacuate and the building collapsed. John was head of
New York’s FBI counter-terrorism unit and, ironically, had investigated bin Laden extensively.

David Katz reports that Sidley Austin Brown & Wood’s downtown office was located at One WTC and, miraculously, only a single staff person from the firm is unaccounted for. While that is a tragedy, it could have been so much worse. Lee Liebolt and Ben Nager were in San Francisco along with David, and Lee recounted his horrifying walk down 57 flights of stairs during the 1993 WTC bombing. Personnel from the firm have moved to the firm’s midtown office at 875 Third Avenue. David reports the firm has done an outstanding job in quickly getting the former downtown personnel “wired” into the computers, etc. and the firm is up and running.

Peter LaVigne of Sullivan & Cromwell says of the return from the NASAA meeting by car with Marty Miller, Willkie Farr & Gallagher, and Phil Feigen, Rothgerber, Johnson & Lyons, LLP, that the ride was calming and the beauty of the country therapeutic, though seen through the lens of sadness. People all along the way wished New York well. He walked by the WTC on September 18, as if at the wake of an old friend. He mourned the loss of the son of an acquaintance at a service on Sunday, but he needed to see the place where the WTC had stood. There are only a few places along the barriers where the wreckage could be seen, but the view from Nassau Street on either side of 140 Broadway was striking. The distinctive metal columns of the South Tower [since removed], where he once worked, rise several stories into the air, blackened by smoke and slightly bent like the bony fingers of a skeleton. His office is open, but the smell of smoke is a constant reminder that this is not business as usual.

Charles Harper and Lewis Freeman of Lewis B. Freeman & Partners, a consulting firm, also drove home from San Francisco, arriving in Miami in a white Cadillac after 70 hours on the road. Donald Saxon, Director of Florida’s Department of Banking and Finance, drove from San Francisco to Tallahassee, and gave a lift as far as St. Louis to Douglas Wilburn of First Union Securities and formerly a Missouri regulator. Their exploits were written up in the Miami Daily Business Review.

Like other large New York law firms, Ellen Lieberman reports that Debevoise & Plimpton made some conference room facilities available for those displaced by the WTC events, with about 50 Merrill Lynch employees in residence in the Debevoise offices for about three weeks, and with an entire Debevoise floor vacated for Cleary Gottlieb Steen & Hamilton for up to four months (Cleary Gottlieb is also using offices at 153 East 53rd Street in the Citicorp building). Debevoise had moved from 875 to 919 Third Avenue during the summer and had sufficient elbow room in its new facilities to share with those more immediately affected by the events; space vacated by Debevoise at 875 Third Avenue, already set up for use as a law office, thus became available for occupancy by Sidley Austin Brown & Wood. Also like many other companies, Debevoise is using their Employee Assistance Program to help people through this emotional crisis and the firm has also started a fund raising drive with matching contributions to help survivors and victims’ families.
Bruce Johnson reports that Morrison & Foerster LLP has available on its website the “Helping Handbook” created to provide relevant assistance and information for families of World Trade Center victims. The Handbook is available on the internet at http://www.mofo.com/about/pbhandbook/index.htm. The Handbook is also available at http://www.abcnyc.org and at http://www.probono.net. Hundreds of printed copies have been distributed to families of victims. The Handbook provides information about obtaining death certificates, probate procedures, applying for social security benefits, insurance, tax, immigration and other relevant topics. The Handbook was created by the New York office of Morrison & Foerster LLP, in conjunction with The Association of the Bar of the City of New York, Bothwell Marketing, Inc., Websight Design, Inc., RR Donnelley Financial, Duplicating USA and Coral Graphics.

The Securities and Exchange Commission’s Northeast Regional Office in New York City officially reopened October 15 in a new location in the heart of the city’s financial district in the historic Woolworth Building (233 Broadway) in lower Manhattan. Their previous office at 7 World Trade Center is gone but all employees were safely evacuated.

Lehman Brothers will purchase Morgan Stanley’s new office tower at 745 Seventh Avenue in New York City in the Times Square area. Lehman Brothers’ global headquarters was in the World Financial Center, which was evacuated on September 11. Many Lehman Brothers’ employees are currently working from New Jersey.

And there were important life events before and after September 11---

Harvey Pitt, formerly of Fried, Frank, Harris, Shriver & Jacobson, was confirmed by the Senate in August as the new Chairman of the Securities and Exchange Commission, stepping into the shoes of Arthur Levitt. The Commission has two other vacant seats and Commissioner Laura Unger, whose term has expired, has indicated she will not seek renomination. News sources rumor that those in consideration for vacant spots include Paul Atkins, a consultant at PricewaterhouseCoopers LLC’s Washington office, Thomas Geyer, Assistant Director for the Ohio Department of Commerce and former Ohio Securities Commissioner, Denise Voigt Crawford, Texas Securities Commissioner, and Elisse Walter, chief operating office at the National Association of Securities Dealers.

Alan Beller of Cleary, Gottlieb, Steen & Hamilton reportedly has agreed to become Director of the SEC Division of Corporation Finance, replacing David Martin, in January, 2002. Alan has resided in his law firm’s New York, Paris and Tokyo offices.

Suzanne E. Rothwell left her position as Chief Counsel, Corporate Financing, NASD Regulation, Inc., and joined the Washington, D.C. office of Skadden, Arps, Slater, Meagher & Flom.

Robert D. Terry left as Georgia Assistant Commissioner of Securities and Georgia Securities Division Director to become Counsel to Sutherland Asbill & Brennan, LLP in Atlanta, Georgia, in its Securities Enforcement, Regulation and Advisory Practice.
Don Rett of Collins & Truett, PA, was elected Chairman of the Board of Directors of Universal Beverages Holding Corporation, an OTC Bulletin Board company, and was recently re-elected to a second consecutive three-year term as a member of the Board of Directors of the Florida Securities Dealers Association. Don also became a first-time grandfather with the birth of Macklin Leo Rett in Charlotte, N.C., on February 19, 2001.

Philip Rutledge, Chief Counsel to the Pennsylvania Securities Commission, co-authored a new treatise: Butterworths Compliance Series: Electronic Markets, with Jason Haines, providing authoritative guidance on the use of the internet for the delivery of financial services and providing comparative treatment of internet-related guidance and regulations issued by authorities and organizations in the U.K., U.S., E.U. and Canada. Phil is also a 2000 Inns of Court Fellow and Adjunct Law Faculty, The Dickinson School of Law of the Pennsylvania State University; his co-author is a Research Fellow in Corporate and Financial Services Law, Institute for Advanced Legal Studies, University of London.

Peter C. Hildreth, New Hampshire’s Director of Securities Regulation, was named New Hampshire Bank Commissioner.

R. Michael Underwood, of the Tallahassee office of the Florida law firm Akerman Senterfitt, informs us that William Nortman joined the firm's Ft. Lauderdale office in October 2001; Mr. Nortman is former head of the Securities and Exchange Commission office in Miami and also worked for the Commission in New York and Atlanta.

Deborah Bortner, Director of Securities for Washington State, stepped down as President of the North American Securities Administrators Association and Joseph Borg, Director of the Alabama Securities Commission, assumed the Presidency. NASAA’s new Board of Directors includes, in addition to Joe and Deborah, Christine Bruenn, (President-Elect of NASAA) Securities Administrator of the Maine Securities Division, W. Mark Sendrow, Director of Securities for the Arizona Corporations Commission, Daphne Smith, Assistant Commissioner for Securities for the Tennessee Department of Commerce and Insurance, Scott Borchert, Director of the Enforcement Division for the Minnesota Department of Commerce, Craig Goettsch, Superintendent of the Iowa Securities Bureau, Guy Lemoine, Vice-Chair of the Quebec Securities Commission, and Melanie Lubin, Securities Commissioner for Maryland.

NASAA named as section chairs: Corporate Finance-- S. Anthony Taggart, Director of the Utah Securities Division; Enforcement-- Bradley Skolnik, Indiana Securities Commissioner; Investor Education-- Denise Voigt Crawford, Texas Securities Commissioner; Investment Adviser-- Patricia Struck, Administrator of the Wisconsin Department of Financial Institution’s Securities Division; and Broker-Dealer-- Franklin Widmann, Chief of the New Jersey Securities Bureau.

CONNECTICUT IMPLEMENTS ELECTRONIC REGISTRATION OF SECURITIES

Cynthia Antanaitis of the Connecticut Securities and Business Investments Division informs the Committee that Connecticut has
simplified its registration by coordination procedures for EDGAR filers. Registration by coordination may be accomplished by sending a simple one page “check the box” notice form to the Division, by e-mail or letter, providing appropriate information about the application for registration.

Instructions and the “Connecticut Form U-1 Supplement for EDGAR Filers - Notice of Intent to use EDGAR to Register Securities by Coordination” may be accessed on the internet at http://www.state.ct.us/dob/pages/regcedgr.htm

SECTION 3(a)(10) EXEMPTION AND OLD TIME BLUE SKY

By Martin Miller
Willkie, Farr & Gallagher (New York)

Old time blue sky law analysis is alive and well for certain exempt exchange offerings.

In October 1999, the Division of Corporation Finance of the Securities and Exchange Commission, (the “Division”) issued Staff Legal Bulletin No. 3 (CF), dated October 20, 1999, with regard to the Division’s position on the blue sky laws and Section 3(a)(10) of the Securities Act of 1933 (the “Securities Act”) and determined that securities issued pursuant to Section 3(a)(10) would loose any preemption under the National Securities Markets Improvement Act of 1996 (“NSMIA”). The previous year, in the Securities Litigation Uniform Standards Act of 1998, the U.S. Congress amended the Securities Act to take away the preemption of state securities registration requirements added by NSMIA for securities issued pursuant to the exemption in Section 3(a)(10) of the Securities Act.

Section 3(a)(10) provides an exemption from registration under the Securities Act for securities issued in an exchange pursuant to court or state regulatory agency approval, including approval by state securities commissions. The most well-known example of state securities regulator involvement are “fairness hearings” before the California Department of Corporations pursuant to Section 25142 of the California Corporations Code. Until Congress changed the law in 1998, Section 3(a)(10) securities were “covered” or preempted securities. Practitioners were concerned that if a security was preempted from state registration requirements under the state blue sky laws, how could interested parties ask a state securities commissioner to approve an offering of such securities pursuant to an administrative proceeding or “fairness hearing” under blue sky laws that were preempted. In reaction to this concern, Section 18 of the Securities Act was changed by Congress to remove the state law preemption for 3(a)(10) securities. Unfortunately for blue sky practitioners, the saga did not end there. The question still remained if a security was otherwise a “covered” security pursuant to one of the other state securities law preemption provisions in Section 18 of the Securities Act (for instance a municipal bond, a security listed on a stock exchange or issued pursuant to Regulation D), how could a state administrator review the offer and sale of the security pursuant to a fairness hearing?

In the Staff Legal Bulletin, the Division resolved this question by deciding that an offering pursuant to and in reliance on Section 3(a)(10) of the Securities Act would not have the benefit of any preemption of state securities law pursuant to any other
preemption section. The Staff Legal Bulletin cites the Division’s position taken in the Food Lion, Inc. (Jan. 13, 1999) and Maverick Networks (Jan. 25, 1999) no-action letters as prior examples of its view.

I do not know why the Division did not merely take the position that Section 3(a)(10) of the Securities Act would not be available to request a fairness hearing from a state securities regulator concerning otherwise preempted securities, instead of the more expansive reverse position that reliance on 3(a)(10) of the Securities Act would “cancel” the availability of any other preemption under Section 18 of the Securities Act. I also am not sure what basis the Division has for overturning a federally enacted statute providing a preemption of state securities law for securities meeting certain specified requirements. The Staff Legal Bulletin is not entirely clear on this point.

The important result for blue sky practitioners is that the Division has taken the position that securities that otherwise are in a category providing a preemption would in a transaction exempt under 3(a)(10) of the Securities Act no longer be considered preempted. Thus the practitioner would need to review the underlying Blue Sky law exemptions in connection with a Section 3(a)(10) offering. Some states do not provide an exemption comparable to 3(a)(10) and the securities may have no other applicable blue sky law exemption available. Since the offering is not registered with the Securities and Exchange Commission, state registration by coordination would also not be available. Arguably the “covered” securities most impacted by the Division’s position are securities listed on the New York or American Stock Exchanges or NASDAQ National Market, which in any other instance would enjoy a complete preemption of state securities law and would no longer have the benefit of that preemption if such securities are being issued pursuant to Section 3(a)(10). Therefore, a blue sky practitioner would need to do an analysis of the underlying state exemptions for the securities. This can be problematical for practitioners who have not had to consider the underlying state listing exemptions for securities since NSMIA. In the meantime, a number of states have changed their securities law provisions. A number of states have removed the listed securities exemption feeling it is not necessary in light of the federal preemption, and other states which had required filings in the past still require a filing.

Specifically, I note that Arkansas, Connecticut, Nebraska and Wisconsin have removed or restricted the exemption for certain listed securities. Among the states that were problematical in the past, Nevada no longer requires a filing for such securities. However, Florida still does not have an exemption for issuer sales of listed securities. Florida does provide an exemption in its regulations for court ordered transactions or issuances, but this may not also provide an exemption for offerings approved by a state securities regulator in a fairness hearing.

I find that federal securities law practitioners like to use Section 3(a)(10), because it obviates the need for registration with the Securities and Exchange Commission. However, blue sky practitioners may wish to caution their federal practitioner colleagues that the Division’s position makes blue sky compliance a much more complex task for 3(a)(10) offerings.
PRIVACY RULES APPLY TO STATE INVESTMENT ADVISERS

NASAA reminds state registered investment advisers that the Graham Leach Bliley Act created new privacy rules and regulations applicable to the securities industry. While the SEC has promulgated privacy rules applicable to federally registered investment advisers, state registered investment advisers are not technically subject to SEC rules. State registered advisers, however, must comply with privacy rules promulgated by the Federal Trade Commission. The FTC has taken the position that a state registered investment adviser that is in compliance with SEC privacy rules will be deemed to be in compliance with the FTC rules. NASAA has released an outline of the provisions. See CCH NASAA Reports ¶ 19,007.

FLORIDA EXTENDS BENEFIT PLAN EXEMPTION

by R. Michael Underwood
Akerman Senterfitt & Eidson, P.A.
(Tallahassee)

In many ways Applied Digital Solutions, Inc. of Palm Beach, Florida is a typical high technology company, but by petitioning the Comptroller to exercise his rulemaking authority the company acted in the interest of all public companies. In order to attract talent in the wired world, it needs to offer equity as compensation. SEC Rule 701 generally exempts from federal registration offers and sales of stock and other securities in compensatory transactions with employees, directors and consultants. The State of Florida, however, like about half of the states, provides an exemption from the registration requirements of state securities law only for securities offered as compensation by an employer to its employees. The Florida securities administrator has orally confirmed that the Florida exemption is not available for compensatory securities offered to consultants or advisers who are not employees.

Section 517.061(19), Florida Statutes, authorizes the state Comptroller, as head of the Department of Banking and Finance, to adopt in the public interest transactional exemptions from the registration requirements of Chapter 517 and the requirement that securities be sold only by licensed entities. Under Florida’s Administrative Procedures Act, any person who can show an interest may petition an executive agency to adopt a rule. Applied Digital Solutions, Inc. filed a Petition to Initiate Rulemaking on July 6, 2000, invoking the Comptroller’s statutory authority. The petition pointed out this authority had been used four times. In three of those four instances the Comptroller had found it necessary in the public interest to adopt additional transactional exemptions in order to harmonize state and federal securities law. The petition also contended that the public interest had been determined in the Strategic Plan of the Florida Department of Banking and Finance to favor adoption of the proposed rule in two ways: First, Florida businesses should not, in the absence of investor protection issues, be more burdened by state regulation than by federal regulation. Second, state regulations should favor development of high technology business in Florida. These public interest concerns, moreover, also appear in the State Comprehensive Plan at Section 187.201, Florida Statutes.

Meanwhile, the Florida Governor’s office became involved through the public-private partnership
known as IT Florida. The issue of Florida’s treatment of securities in compensatory benefit plans was considered by the Florida Information Service Technology Development Task Force, particularly whether it might put Florida at competitive disadvantage with other states. On September 12, 2000, the Comptroller’s office conducted a public workshop in Tallahassee on the proposal to incorporate SEC Rule 701 as an exempt transaction in Florida. Discussion at the workshop, however, barely touched on the public policy issues concerning high technology business in Florida. Instead, the regulators focused on how the proposed exemption could be abused. At this point the assistance of the Blue Sky bar became crucial. Notice of the regulators’ concern was placed on the Blue Sky Listserv then operated by Villanova University School of Law. Practitioners from across the country responded with comments on the record as well as off-the-record suggestions that eventually satisfied the regulators and resulted in adoption of Florida Administrative Code Rule 3E-500.017, effective November 25, 2001. Experience will show if the new regulation works in practice. It is clearly intended to exempt from Florida regulation any security transaction exempt under SEC Rule 701.

**NSMIA AND THE FLORIDA SECURITIES ACT - PART TWO**

By Donald A. Rett
Collins & Truett (Tallahassee)

In an article for the Blue Sky Bugle earlier this year I addressed one of the practical problems arising from Florida's implementation in 1997 of the concept of "federal covered security". ("NSMIA and the Florida Securities Act - They Forgot Something" Blue Sky Bugle, Volume 2001, Number 1, March, 2001). Specifically, I pointed out that when adding the term, "federal covered security", as not needing to be registered as a securities offering here, the legislature did not add a companion exemption for the sellers of federal covered securities. Hence, even though a federal covered security was now completely exempted from securities registration, a separate question had to be addressed as to whether a Florida broker-dealer license was needed to distribute federal covered securities.

(Practitioners will recognize that an S.E.C. Rule 506 offering is embraced within the definitional section of a federal covered security, and will also understand that associated persons of an issuer are deemed not to be "brokers" - and can thus claim a "safe harbor" from 1934 Act registration, courtesy of Reg. 240.3a4-1.)

As a result, in order to perfect a complete exemption from both securities and broker-dealer exemption in Florida it was necessary in a Rule 506, issuer-distributed private placement to "dress" the offering document with language from Florida's private placement exemption (s.517.061(11) in order to be able to validly claim a private placement exemption for Florida, should a challenge arise. Such "dressing" would require language in the private placement memorandum, alerting Florida investors that they had a three-day right of rescission, language which I believe may be unique to Florida. I would guess that a number of Rule 506, issuer distributed, private placements may have "missed the mark".

During 2000, members of the Florida Bar's Business Law section attempted to obtain the approval of the
Florida Division of Securities for potential legislation which would have corrected this problem - but the endeavor was not successful. Earlier this year, discussions resumed, and it appears this inconsistency will be corrected shortly.

The Florida Division of Securities has noticed the adoption of a proposed new Rule, the full text of which follows:

"3E-500.016 Exemption for Issuers of Section 4(2) Offerings - Securities offered or sold in a transaction exempt under a rule or regulation issued by the Securities and Exchange Commission under section 4(2) of the Securities Act of 1933 as it existed on January 1, 2001, are hereby exempted from the filing requirements of Section 517.07, F.S. An issuer of such securities and each of its bona fide employees who satisfy the criteria set forth in section 517.021(6)(b)(6), and through whom the issuer elects to sell such securities, shall be exempted from the registration requirements of section 517.12(1), F.S."

Note that the proposed rule only creates a safe harbor for issuer-distribution under the Section 4(2) component of "federal covered security" which includes only offerings conducted under Rule 506 of Regulation D; if there are any issuer-distributions not in compliance with Rule 506 and Section 4(2) such issuers must continue to worry about Florida broker-dealer registration.

This.Rule proposal was noticed for adoption in the Florida Administrative Weekly on October 12, 2001. If a hearing is requested within twenty-one days of such date, one will be held in Tallahassee on December 3, 2001. Information can be obtained by calling Rick White, Financial Administrator, at 850.410.9-805.

NORTH CAROLINA REMOVES INSURANCE SECURITIES PROSPECTUS LEGEND REQUIREMENT

By Christine Will LeBoeuf, Lamb, Greene & MacRae, LLP

The so-called North Carolina insurance securities prospectus legend is no longer required for any type of securities offering, whether public or private, domestic or foreign. Relevant sections of Article 18 of the North Carolina insurance law were repealed by Senate Bill 459, effective June 15, 2001.

According to Part XV of the Summary of Insurance Legislation for the 2001 Regular Session of the legislature, prepared by the North Carolina Department of Insurance, “The Department’s involvement in the sale of securities as currently provided for in Article 18 is not needed because the N.C. Secretary of State’s Office currently regulates the sale of securities in this State, including such transactions involving insurance corporations or promoting or holding corporations.”

The Summary is available at the Department of Insurance website at http://www.ncdoi.com/Industry/Industry.asp?s=sidLBAR&c=cidLBLS. Persons with questions regarding the repeal of the prospectus legend requirement may contact Ray Martinez of the North Carolina Insurance Department by making inquiry at 800-546-5664.
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CLE & Publications
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Paul, Hastings, Janofsky & Walker LLP, 399 Park Avenue New York, NY 10022
Bruce Elwood Johnson
Morrison & Foerster LLP, 425 Market Street, San Francisco, CA 94105

Direct Participation, Commodities & Other Hybrid Securities
Alan M. Parness
Cadwalader, Wickersham & Taft, 100 Maiden Lane, New York, NY 10038

eCommerce
Judy Zybach
Runquist & Zybach LLP, 10618 Woodbridge Street, Toluca Lake, CA 91602

Enforcement
Dan R. Waller
Secore & Waller, L.L.P., 13355 Noel Road, L.B. 75 - Suite 2290, Dallas, TX 75240

Exempt Securities
Martin R. Miller
Willkie Farr & Gallagher, 153 East 53rd Street, New York, NY 10022
Mark T. Lab
Simpson Thacher & Bartlett, 425 Lexington Avenue, New York, NY 10017

International Securities
Charles Gittleman
Shearman & Sterling, 599 Lexington Avenue, 7th Floor, New York, NY 10022
John F.T. Warren
Borden & Elliot, Scotia Plaza, 40 King Street West, Toronto, Ontario M5H 3Y4

Investment Companies
Patricia (Patty) Louie
Equitable Life Assurance Society, 1290 Ave. of the Americas, 12th Floor, New York, NY 10104

Liaison with Securities Administrators and NASD
Roger G. Fein
Wildman, Harrold, Allen & Dixon, 225 West Wacker Drive, Chicago, IL 60606

Limited Offerings
Mike Liles, Jr.
Karr Tuttle & Campbell, 1201 Third Avenue, Suite 2900, Seattle, WA 98101
STATE LIAISONS
ABA STATE REGULATION OF SECURITIES COMMITTEE

SUBCOMMITTEE ON LIAISON WITH SECURITIES ADMINISTRATORS
AND THE NASD
As Of November 1, 2001

Roger G. Fein, Chair

AL
Ms. Carolyn L. Duncan
Ritchie Duncan & Goodwin, LLC
312 North 23rd Street
Birmingham, Alabama 35203-3878
E-Mail – cduncan@rdg-law.com

AK
Mr. Julius J. Brecht
Wohlforth, Argetsinger, Johnson & Brecht, a Professional Corporation
900 West 5th Avenue, Suite 600
Anchorage, Alaska 99501-2048
Firm E-Mail -- wajb@alaska.net
Direct E-Mail – jbrecht@gci.com

AZ
Mr. Dee Riddell Harris
Carmichael & Company LLC
2415 E. Camelback Rd. – Ste. 700
Phoenix, Arizona 85016
E-Mail – deeharris@carmichaelandco.com

AR
Mr. John S. Selig
Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.
425 West Capitol Avenue, Suite 1800
Little Rock, Arkansas 72201-3525
E-Mail – jselig@mws gw.com

CA
Mr. Bruce Elwood Johnson
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94101
E-Mail -- bjohnson@mofo.com

CO/M T/WY
Mr. Robert J. Ahrenholz
Kutak Rock LLP
717 Seventeenth Street - Suite 2900
Denver, Colorado 80202-3329
E-Mail -- robert.ahrenholz@kutakrock.com
<table>
<thead>
<tr>
<th>State</th>
<th>Name</th>
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<th>Address</th>
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<tr>
<td>CT</td>
<td>Ms. Susan E. Bryant</td>
<td>Bright &amp; Barnes</td>
<td>Six Forest Park Drive (06032)</td>
<td>(860)674-0111</td>
<td><a href="mailto:sebry@aol.com">sebry@aol.com</a></td>
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<td>P.O. Box 444</td>
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<td>Farmington, CT 06034-0444</td>
<td>(860)676-8080</td>
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<td>DE</td>
<td>Mr. Andrew M. Johnston</td>
<td>Morris, Nichols, Arsh &amp; Tunnell</td>
<td>1201 North Market Street</td>
<td>(302)658-9200</td>
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<td>P. O. Box 1347</td>
<td>(302)658-3989</td>
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<td>Wilmington, Delaware 19899-1347</td>
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<td>DC</td>
<td>Ms. Michele A. Kulerman</td>
<td>Hogan &amp; Hartson L.L.P.</td>
<td>Columbia Square</td>
<td>(202)637-5743</td>
<td><a href="mailto:makulerman@hhlaw.com">makulerman@hhlaw.com</a></td>
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<td></td>
<td>555 Thirteenth St., N.W.</td>
<td>(301)279-6772</td>
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<td>Washington, D.C. 20004-1109</td>
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<td>FL</td>
<td>Mr. Donald A. Rett</td>
<td>Collins &amp; Truett</td>
<td>2804 Remington Green Circle - Ste. 4</td>
<td>(850)386-6060</td>
<td><a href="mailto:drett@collinsfirm.com">drett@collinsfirm.com</a></td>
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<td>Tallahassee, Florida 32317</td>
<td>(904)894-0700</td>
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<td>(850)385-8220</td>
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<td>GA</td>
<td>Mr. Robert D. Terry</td>
<td>Sutherland Asbill &amp; Brennan LLP</td>
<td>999 Peachtree Street, NE</td>
<td>(404)853-8188</td>
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<td></td>
<td>Atlanta, GA 30309-3996</td>
<td>(404)853-8806</td>
<td><a href="mailto:rdterry@sablaw.com">rdterry@sablaw.com</a></td>
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<td>HA</td>
<td>Mr. David J. Reber</td>
<td>Goodwill Anderson Quinn &amp; Stifel</td>
<td>1099 Alakea Street – Ste. 1800</td>
<td>(808)547-5611</td>
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<td></td>
<td></td>
<td>Honolulu, Hawaii 96813</td>
<td>(808)395-7994</td>
<td><a href="mailto:dreber@goodsill.com">dreber@goodsill.com</a></td>
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<td>(808)547-5880</td>
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<td>ID</td>
<td>Mr. Jeffrey W. Pusch</td>
<td>Marshall Batt &amp; Fisher, LLP</td>
<td>101 South Capitol Boulevard - 5th Flr.</td>
<td>(208)331-1000</td>
<td><a href="mailto:jwpusch@marshallbatt.com">jwpusch@marshallbatt.com</a></td>
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<td>P.O. Box 1308</td>
<td>(208)331-2400</td>
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<td></td>
<td>Boise, Idaho 83701</td>
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<td>IL</td>
<td>Mr. Roger G. Fein</td>
<td>Wildman, Harrold, Allen &amp; Dixon</td>
<td>225 West Wacker Drive</td>
<td>(312)201-2536</td>
<td><a href="mailto:fein@wildmanharrold.com">fein@wildmanharrold.com</a></td>
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<tr>
<td></td>
<td>Subcom. Chair</td>
<td></td>
<td>Chicago, Illinois 60606-1229</td>
<td>(847)272-6933</td>
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<td>(312)201-2555</td>
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</table>
IN  Mr. Stephen W. Sutherlin
Stewart & Irwin
251 East Ohio Street
Suite 1100
Indianapolis, Indiana 46204
E-Mail – Ssutherlin@Stewart-Irwin.com

IA/MN  Mr. James R. McDaniel
Sidley & Austin
One First National Plaza
Chicago, IL 60603
E-Mail – jmcdanie@sidley.com

KS/MO  Mr. William M. Schutte
Polsinelli/Shalton/Welte
700 West 47th Street, Suite 1000
Kansas City, Missouri 64112-1802
E-Mail – wschutte@pswlaw.com

KY  Mr. Manning G. Warren III
University of Louisville
Louis D. Brandeis School of Law
2301 South Third Street
Louisville, Kentucky 40292
E-Mail – mgw111@louisville.edu

LA  Mr. Carl C. Hanemann
Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.
Place St. Charles
201 St. Charles Avenue
New Orleans, Louisiana 70170-5100
E-Mail – chanemann@jwlaw.com

ME  Mr. Wayne E. Tumlin
Bernstein, Shur, Sawyer & Nelson PA
100 Middle Street - W. Tower
P.O. Box 9729
Portland, ME 04104-5029
E-Mail – wtumlin@mainelaw.com
wtumlin@bernsteinshur.com

MD  Mr. Wm. David Chalk
Piper Marbury Rudnick & Wolfe LLP
6225 Smith Avenue
Baltimore, MD 21209-3600
E-Mail – david.chalk@piperrudnick.com
<table>
<thead>
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<tr>
<td>MA</td>
<td>Ms. Anne (Polly) G. Plimpton</td>
<td>Testa, Hurwitz &amp; Thibeault, LLP, 125 High Street, Boston, Massachusetts 02110</td>
<td><a href="mailto:plimpton@tht.com">plimpton@tht.com</a></td>
<td>(617)248-7514 (Work), (617)731-6180 (Home), (617)248-7100 (Fax)</td>
</tr>
<tr>
<td>MI</td>
<td>Mr. Cyril Moscow</td>
<td>Honigman Miller Schwartz and Cohn, 2290 First National Building, 660 Woodward Avenue, Detroit, Michigan 48226-3583</td>
<td><a href="mailto:czm@honigman.com">czm@honigman.com</a></td>
<td>(313)465-7486 (Work), (313)642-0582 (Home), (313)465-7487 (Fax)</td>
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<td>MS</td>
<td>Mr. Daniel G. Hise</td>
<td>Butler, Snow, O’Mara, Stevens &amp; Cannada, P.O. Box 22567, Jackson, MS 39225-2567</td>
<td><a href="mailto:dan.hise@butlersnow.com">dan.hise@butlersnow.com</a></td>
<td>(601)948-5711 (Work), (601)355-1742 (Home), (601)949-4555 (Fax)</td>
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<td>NE</td>
<td>Mr. David R. Tarvin, Jr.</td>
<td>Kutak Rock LLP, 1650 Farnam Street, Omaha, Nebraska 68102-2186</td>
<td><a href="mailto:david.tarvin@kutakrock.com">david.tarvin@kutakrock.com</a></td>
<td>(402)346-6000 (Work), (402)346-1148 (Fax)</td>
</tr>
<tr>
<td>NV</td>
<td>Mr. Ken Creighton</td>
<td>9295 Prototype Drive, Reno, NV 89511</td>
<td><a href="mailto:ken.creighton@igt.com">ken.creighton@igt.com</a></td>
<td>(775)448-0119 (Work), (775)825-1844 (Home), (775)448-0120 (Fax)</td>
</tr>
<tr>
<td>NH</td>
<td>Richard A. Samuels</td>
<td>McLane, Graf, Raulerson &amp; Middleton P.A., P.O.Box 326, Manchester, NH 03105-0326</td>
<td><a href="mailto:rsamuels@mclane.com">rsamuels@mclane.com</a></td>
<td>(603)628-1470 (Work), (603)228-8636 (Home), (603)625-5650 (Fax)</td>
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<tr>
<td>NJ</td>
<td>Mr. Peter D. Hutcheon</td>
<td>Norris, McLaughlin &amp; Marcus, P.A., 721 Route 202-206, Somerville, New Jersey 08876-1018</td>
<td><a href="mailto:pdhutcheon@nmmlaw.com">pdhutcheon@nmmlaw.com</a></td>
<td>(908)722-0700 (Work), (908)356-4766 (Home), (908)722-0755 (Fax)</td>
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<td>NM</td>
<td>Mr. Robert G. Heyman</td>
<td>Sutin Thayer &amp; Browne</td>
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<td>(505)986-5493</td>
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<tr>
<td>NY</td>
<td>Mr. F. Lee Liebolt, Jr.</td>
<td>Sidley Austin Brown &amp; Wood</td>
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<td>(212)906-2780</td>
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<td>E-Mail – <a href="mailto:lliebolt@sidley.com">lliebolt@sidley.com</a></td>
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<tr>
<td>NC</td>
<td>Ms. Heather K. Mallard</td>
<td>Womble Carlyle Sandridge &amp; Rice, a PLLC</td>
<td></td>
<td>(919)755-2176</td>
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<td>E-Mail – <a href="mailto:hmallard@wcsr.com">hmallard@wcsr.com</a></td>
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<td>ND</td>
<td>Mr. Craig A. Boeckel</td>
<td>Tschider &amp; Boeckel</td>
<td></td>
<td>(701)258-2400</td>
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<td>Provident Life Building</td>
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<td>OH</td>
<td>Mr. Richard S. Slavin</td>
<td>Cohen and Wolf, P.C.</td>
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<td>(203)337-4103</td>
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<td>E-Mail – <a href="mailto:rslavin@cohenandwolf.com">rslavin@cohenandwolf.com</a></td>
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<td>OK</td>
<td>Mr. C. Raymond Patton, Jr.</td>
<td>Conner &amp; Winters A Professional Corporation</td>
<td></td>
<td>(918)586-8523</td>
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<td>3700 First Plaza Tower</td>
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<td>E-Mail – <a href="mailto:rpatton@cwlaw.com">rpatton@cwlaw.com</a></td>
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<tr>
<td>OR</td>
<td>Mr. Richard M. Layne</td>
<td>Layne &amp; Lewis</td>
<td></td>
<td>(503)295-1882</td>
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<td>1 SW Columbia Street - Ste. 1800</td>
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<td>E-Mail -- <a href="mailto:mlayne@layne-lewis.com">mlayne@layne-lewis.com</a></td>
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</tbody>
</table>
PA  Mr. Michael Pollack  (215)851-8182  (Work)
    Reed, Smith, Shaw & McClay LLP  (215)628-9904  (Home)
    One Liberty Place - Ste. 2500  (215)851-1420  (Fax)
    1650 Market Street
    Philadelphia, PA 19103-7301
    E-Mail—mpollack@reedsmith.com

RI  Mr. John F. Corrigan  (401)274-7200  (Work)
    Adler Pollock & Sheehan PC  (401)885-1025  (Home)
    2300 Financial Plaza  (401)751-0604  (Fax)
    Providence, Rhode Island 02903-2443
    or 351-4607
    E-Mail—jcorrigan@APSLAW.com

SC  Mr. F. Daniel Bell III  (919)781-4000  (Work)
    Wyrick Robbins Yates & Ponton LLP  (919)781-4865  (Fax)
    4101 Lake Boone Trail – Ste. 300
    P.O.Drawer 17803
    Raleigh, NC 27619
    E-Mail—dbell@wyrick.com

SD  Mr. Charles D. Gullickson  (605)357-1270  (Work)
    Davenport, Evans, Hurwitz & Smith, L.L.P.  (605)331-3880  (Home)
    513 South Main Avenue  (605)335-3639  (Fax)
    P. O. Box 1030
    Sioux Falls, South Dakota 57101-1030
    E-Mail—cgullickson@dehs.com

TN  Ms. E. Marlee Mitchell  (615)244-6380  (Work)
    Waller Lansden Dortch & Davis, PLLC  (615)298-2514  (Home)
    Nashville City Center  (615)244-6804  (Fax)
    Suite 2100, 511 Union Street
    Nashville, Tennessee 37219-1760
    E-Mail—mmitchell@wallerlaw.com

TX  Mr. Daniel R. Waller  (972)776-0200  (Work)
    Secore & Waller LLP  (972)392-2452  (Home)
    13355 Noel Rd., LB 75, Ste. 2290  (972)776-0240  (Fax)
    Dallas, TX 75240-6657
    E-Mail—dan@secorewaller.com

UT  Mr. Arthur B. Ralph  (801)532-3333  (Work)
    Van Cott, Bagley, Cornwall & McCarthy, P.C.  (801)272-5027  (Home)
    50 South Main Street, Suite 1600  (801)534-0058  (Fax)
    Salt Lake City, Utah 84144-0450
    E-Mail—aralph@vancott.com
<table>
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<tr>
<th>State</th>
<th>Individual</th>
<th>Address</th>
<th>Phone Numbers</th>
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<tbody>
<tr>
<td>VT</td>
<td>Mr. Charles H. B. Braisted</td>
<td>167 Orchard Run, Cornwall, VT 05753</td>
<td>(802)462-3923 (Work), (802)462-3922 (Fax)</td>
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<td>WA</td>
<td>Mr. John L. Mericle</td>
<td>Harris, Mericle, Wakayama &amp; Mason, 999 Third Avenue, Suite 3210, Seattle, WA 98104</td>
<td>(425)742-3985 (Work), (425)742-4676 (Fax)</td>
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<td>WV</td>
<td>Mr. Edward D. McDevitt</td>
<td>Bowles Rice McDavid Graff &amp; Love, PLLC, 600 Quarrier Street, Charleston, WV 25314</td>
<td>(304)347-1711 (Work), (304)343-3058 (Fax)</td>
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<td>WI</td>
<td>Mr. Joseph P. Hildebrandt</td>
<td>Foley &amp; Lardner, 150 East Gilman, Madison, WI 53701</td>
<td>(608) 258-4232 (Work), (608) 258-4258 (Fax)</td>
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<td>(608) 366-8855 (Home)</td>
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<td>SEE COLORADO</td>
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<td>CAN</td>
<td>Mr. Paul G. Findlay</td>
<td>Borden Ladner Gervais LLP, Scotia Plaza, Suite 4400, Toronto, Canada</td>
<td>(416)367-6191 (Work), (416)361-7083 (Fax)</td>
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<td>(416)484-9862 (Home)</td>
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<td>NASD</td>
<td>Mr. Mark T. Lab</td>
<td>Simpson, Thacher &amp; Bartlett, 425 Lexington Avenue, New York, NY 10017-3954</td>
<td>(212)455-3429 (Work), (212)455-2502 (Fax)</td>
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DIRECTORY OF OFFICERS AND CONTRIBUTORS

Baden, Alan P.  Vinson & Elkins L.L.P., 1325 Avenue of the Americas, 17th Floor, New York, NY 10019, (917) 206-8001, fax (917) 849-5337,  abaden@velaw.com

Boresta, Robert A.  Paul, Hastings, Janofsky & Walker LLP, 399 Park Avenue New York, NY 10022 (212) 318-6000, fax (212) 319-4090,  robertboresta@paulhastings.com

Fein, Roger G.  Wildman, Harrold, Allen & Dixon, 225 West Wacker Drive, Chicago, IL 60601, (312) 201-2536, fax (312) 201-2555  fein@wildmanharrold.com

Gélinas, Michel  Stikeman Elliott, 1155 René Lévesque Boulevard West, 40th Floor, Montreal, Quebec H3B SV2 Canada  (514) 397-3050, fax (514) 397-3433  mgelinas@mtl.stikeman.com

Johnson, Bruce Elwood  Morrison & Foerster LLP, 425 Market Street, San Francisco, CA 94105, (415) 268-6628, fax (415) 268-7522,  bjohnson@mofo.com

Lieberman, Ellen  Debevoise & Plimpton, 875 Third Avenue, New York, NY 10022, (212) 909-6096, fax (212) 909-6836  elieberm@debevoise.com

Miller, Martin R.  Willkie, Farr & Gallagher, 787 Seventh Avenue, New York NY 10019-6099, (212) 728-8690, fax (212) 728-8111  mmiller@willkie.com

Parness, Alan M.  Cadwalader, Wickersham & Taft, 100 Maiden Lane, New York, NY 10038, (212) 504-6342, fax (212) 504-6666,  aparness@cwt.com

Rett, Don  Collins & Truett, 2804 Remington Green Circle - Ste. 4, Tallahassee, Florida 32317, (850) 386-6060, fax (850) 385-8220  drett@collinsfirm.com

Underwood, R. Michael  Akerman Senterfitt & Eidson, P.A., 301 South Bronough Street, Suite 200, Tallahassee, Florida 32302, (850)-222-3471, fax (850)-222-8628,  munderwood@akerman.com

Will, Christine A.  LeBoeuf, Lamb, Greene & MacRae, LLP, 125 West 55th St., New York, NY 10019 (212) 424-8000, fax (212)-424-8500  cwill@llgm.com

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To submit materials for future editions contact:
Bruce Elwood Johnson, Morrison & Foerster LLP, 425 Market Street, San Francisco, CA 94105, (415) 268-6628, fax (415) 268-7522,  bjohnson@mofo.com
or
Robert A. Boresta, Paul, Hastings, Janofsky & Walker LLP, 399 Park Avenue New York, NY 10022 (212) 318-6000, fax (212) 319-4090,  robertboresta@paulhastings.com

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