WORD FROM THE CHAIR

JOINT MEETING ON PROPOSED NEW UNIFORM SECURITIES ACT
By Alan P. Baden
Vinson & Elkins (New York)

The State Regulation of Securities Committee will hold a joint meeting with the Committee on Federal Regulation of Securities, in conjunction with the 2002 Spring Meeting of the Business Law Section in Boston. Dean Joel Seligman of Washington University will lead a panel discussion including Richard Smith, chair of the NCCUSL Drafting Committee, and representatives of the ABA and NASAA. NCCUSL proposes to publish the proposed new Uniform Securities Act during 2002.

The program is scheduled for Saturday, April 6, 2002, at 2:30 PM, in the Vermont Suite on the 5th floor of the Boston Marriott Copley Place.

FINDERS IN NO-MAN'S LAND
Hugh H. Makens
Warner Norcross & Judd LLP
(Grand Rapids, Michigan)

Overview

Often in both acquisitions and business financings lawyers learn that finders are present. Finders can be both a blessing and a curse. As a source of funds otherwise unavailable to a client, or as the catalyst that leads to a successful acquisition, they are a boon to finance. As a purveyor of bad deals, bad relationships, securities law violations and the potential for rescission, they represent a major threat not only to the client but also to the professionals working with the client.

At their worst, finders are the poltergeist of business. Finders appear at the beginning of an offering and have engaged in general advertising or solicitation before the attorneys arrive. They can be the purveyors of that most worthless product in the securities industry - the "clean shell." They can bring to the transaction the market manipulators and profiteers whose only interest is the fast buck regardless of the consequences to the company. They can cause offers or sales to occur without regard to compliance with the very requirements of the securities offering exemptions they purport to rely on when advising an issuer.

("Finders" - continued on Page 2)
EVENTS CALENDAR
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ABA SPRING MEETING
The State Regulation of Securities Committee will hold a joint meeting with the Committee on Federal Regulation of Securities, as described in “Word From the Chair” on the front page.

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, 2002, in Philadelphia, at Loews Philadelphia Hotel.

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PLAN FOR THE FUTURE
2003 Annual NASAA Fall Conference
September 14 - 17, 2003
Chicago, Illinois
Chicago Marriott Downtown

(FINDERS - Continued from Page 1)

The definition of a "finder" is elusive and, indeed, it varies under the circumstances. In Use and Compensation of ‘Finders’ To Locate Purchasers in Private Placements,¹ the term is defined as "a person, be it a company, service or individual, who brings together buyers and sellers for a fee, but who has no active role in negotiations and may not bind either party to the transaction." The definition should be expanded to state "that the person should neither offer nor sell the security, nor solicit an offer to buy, but rather act strictly as an intermediary for the purpose of introducing the parties" to underscore this all too common problem.

The State of Michigan is the only state to register a finder, defining a finder as "a person who, for consideration, participates in the offer to sell, sale or purchase of securities by locating, introducing or referring potential purchasers or sells."² Michigan requires a finder to register as an investment adviser and imposes minimum requirements on the finder’s method of operations.³ Michigan generally expects the finder to perform the introduction, possibly deliver the offering materials, and then step away from the transaction.

The principal risk to the finder and the issuer is that the finder is in reality acting as an unlicensed broker-dealer. The Securities and Exchange Commission ("SEC") has issued several no-action letters outlining the parameters of a finder’s acceptable conduct, or declining to find conduct acceptable, in conjunction with the offer or sale of a security. Berkeley lists the factors which move one to the status of a broker-dealer as involvement in negotiations, discussing details regarding
the transaction or making a recommendations, receiving transaction-based compensation, and previous involvement in the sale of securities.

To complicate life for finders, there is a rumor rampant among the securities bar that the SEC is contemplating pulling one or more of the no-action letters which have provided some latitude to finders. On March 7, 2000, the staff of the Division of Market Regulation withdrew its letter in Dominion Resources, which had permitted Dominion to engage in a bundle of activities. The activities included analyzing the financial needs of an issuer, recommending or designing financing methods and securities to fit the issuer’s needs, recommending the lawyers to prepare documentation and broker-dealers to distribute the securities, participating in negotiations, and introducing the issuer to a commercial bank to act as the initial purchaser and as a stand-by purchaser if the securities could not be readily marketed. In return for these services, Dominion received a transaction based fee.

The change of leadership at the Commission may affect the evaluation of the scope of the finder’s permissible role in the offering process. The aura of uncertainty is one of the factors motivating a decision to better address the regulation of finders. For the past two years the Small Business Committee of the Business Law Section has been working to develop a regulatory scheme for finders which could be proposed to the SEC, NASDR, and NASAA. This effort was expanded into a Task Force consisting of the Small Business, Federal Regulation of Securities, Negotiated Acquisitions and State Regulation of Securities Committee representatives.

The Task Force is chaired by Gerald Niesar of San Francisco, California, Nelson Castellano of Tampa, Florida, and myself. The status of the Task Force effort is summarized below.

A Need For Action:

A variety of factors drive the need for action. The broker-dealer universe is shrinking both in terms of the number of firms and the scope of services that they render. With bank acquisitions and consolidations of regional firms, the void of investment banking services, particularly for mid to small size issuers, has dramatically worsened. Smaller brokerage firms are focusing on mutual funds and variable products, especially after the bath that many took in promoting tech and .com stocks. The self-imposed thresholds for doing private deals is rising for economic reasons. The result is that very few brokerage firms are willing to do offerings, public or private, under $25 million. There are several rationale for this position. The risk of doing a small deal is comparable to a large one. The legal costs are often comparable to a larger transaction because of the lack of sophistication and systems of smaller issuers. The issuer’s financial information may not be as complete or accurate. Finally, the smaller the company, the less diversification it can provide to an investor in terms of product range and depth of personnel and markets.

Venture capital is not the answer for this void. Venture firms are trending to investment in profitable businesses and there has been a drop in available funds. Many venture capitalists got burned in tech stocks and their investors are more risk adverse. Recently, some venture capital funds have been
returning investor monies. Further, the high yield requirements for venture capitalists are frequently incompatible with the potential of the preponderance of smaller issuers. Finally, there are too few venture capital funds to have a significant impact on fulfilling the need for funds.

The traditional financing sources for smaller issuers remain limited. Most issuers engage in "cup of gas" financing, seeking enough funds to move their project down the road, but not getting the funds to really develop their business. These issuers run through the chain of friends and family, to customers, to suppliers, to extended contacts, and then often run out of alternatives for growth.

Laying in wait for these small issuers amidst the dark side of the securities business are the purveyors of shell corporations, the front-end fee con artists, the Regulation S specialists who send the stock off-shore and wait to dump it back into the US through unscrupulous brokerage firms or representatives who are receiving under-the-table payments for promoting stocks, the micro-cap manipulators, and the representatives who have been barred from the securities business. All of these options will likely cost the issuer dearly, even if some funds are received from them. Often these individuals and entities hold themselves out as finders and do this for a living by providing business plans, private placement memoranda (a form for every occasion), and who remain as paid consultants.

It is surprising to see the number of attorneys who will provide opinions giving comfort to finders, while ignoring SEC no-action letters and federal and state enforcement actions leading to a different conclusion. Generally these individuals are solo practitioners with very limited securities experience and no appreciation for the complexity of the analysis.

What Problems Does One Confront When Using a Finder?

Finders can cause major problems for an issuer. They can taint an offering by creating the basis for rescission rights, raise enforcement concerns, make fraudulent representations and engage in general solicitation. They can be individuals who have been suspended or barred from the securities business or fired by firms for misconduct. There are those who act in collusion with market manipulators and those who bribe registered representatives to act as touts. These individuals lead invariably to litigation when the deal goes bad, as it frequently does.

Who Are the Finders?

Finders come from a variety of sources. They include CPAs and to a lesser extent lawyers, M&A specialists, local "monied people" (the country club set), consultants (who take a variety of forms), insurance agents and real estate brokers, registered representatives illegally selling away from their firms, individuals who have substantial investor networks or the people that work for such individuals, individuals hired by entities seeking capital, angel networks, retired executives and community leaders. They also include unregistered individuals who hold themselves out as finders and do this for a living by providing business plans, private placement memoranda (a form for every occasion), and who remain as paid consultants.
Finders can provide encouragement to cut legal corners. They often underprice legitimate firms or deter issuers from going to legitimate firms. For an attorney, they are the bane of our profession, since their actions adversely affect opinions that we are asked to render.

The issuer is too often led down a primrose path with false promises. They may add to the issuer’s existing problems significant litigation or enforcement action risk. The finders’ contracts can be incredibly over-bearing, significantly hampering future financing. Issuers may find themselves faced with very unhappy investors who are angry over misrepresentations by the finders, and who demand rescission or the buy-out of their shares. Those investors may also apply pressure to the issuer to make a corporation "go public" or qualify its shares for trading on the Nasdaq Bulletin Board or Small Cap market before the company is prepared to take that step from a financial or management sophistication perspective.

Regulators have a substantial concern over the "finders" who flaunt the securities laws. It is my conservative estimate that the various states bring over 100 enforcement cases against improper finders on an annual basis (and probably a great deal more because statistics are not available from NASAA or the states to identify the full extent of state action). The NASDR brings a large number of cases against individuals who are engaged in selling away from their brokerage firms for acting as "finders," often barring them from the business or imposing long suspensions. This is the second most frequently cited grounds for sanctioning registered representatives and has been for several years.

The illegitimate finders, who are really unlicensed broker-dealers, were the direct cause of the SEC action in restricting the scope of Regulation S and Rule 504 two years ago. Regulators are also unhappy to find that the people that they have expelled from the business have resurfaced in a new guise.

Today so-called finders are active in soliciting investors for a range of products which have been held to involve securities, including pay phone leases, viatical or life settlement contracts, promissory notes, foreign CDs, and "prime bank" scams.

**M&A Concerns:**

Finders play an important rule in the mergers and acquisitions ("M&A") practice, often bringing parties together when other conventional sources have been unable to do so. Even those who bring this benefit to the table can also bring problems, as they edge closer to the role of the broker-dealer in getting transaction-based compensation for bringing in venture capital, angels, institutional investors, or loans from non-commercial sources to assist in a management buy-out.

**The Search For Certainty:**

For the lawyer asked to render opinions in conjunction with financing transactions or acquisitions involving fees for obtaining financing, we simply want certainty. Tainted transactions are a tar pit for lawyers.

The problem with certainty is that the present system really does not work well for regulating finders. Often finders play a very limited role in transactions, but in order to engage in transactions presently, full broker-dealer
registration is required in a manner more appropriate to a full-service firm. Consequently, finders often state that they refuse to register under a system that has no real applicability to what they do.

The response of the Task Force is to work with the SEC, NASDR and the states, through NASAA, to develop a regulatory system that does work. This entails modifying existing procedures, forms, rules and systems to adapt them to what these individuals really do. At the same time, the Task Force will seek to provide systems to identify those individuals or entities who are "bad boys" or statutorily disqualified persons. It is likely that the SEC will be more aggressive in the future in policing unregistered broker-dealers. Under the most logical sequence, when the new form of broker-dealer is established, the SEC and NASAA would issue clarifying releases on the role of finders and the new broker-dealer registration procedures.

**The Task Force Agenda:**

The Task Force is faced with a number of interesting questions:

• Who should be able or required to register a "finder"?

• How do they register?

• What requirements should the NASDR impose under Membership Rules 1013 and 1014?

• What scope of activities should be permitted?
  
  Public Offerings?
  Private Offerings Only?
  Secondary Transactions in Restricted Securities?

• What accommodation should be made for those who facilitate M&A transactions?

• What examinations should be required?

• Should limitations be placed on the characteristics of eligible investors?

• What sponsorship arrangements should be imposed for those seeking to register and take examinations?

• What "bad boy" limitations should be imposed, and under what circumstances should they be waivable?

• What capital requirements will be necessary? The NASDR will require capital.

• What reporting requirements are appropriate?

• What procedural rules should be modified or waived?

There are many other questions that must be addressed. There are presently no clear answers. The Task Force will meet in Boston at the Spring Meeting of the Section, to discuss and assign research papers to its members on various issues. From that effort a compendium will emerge and to which draft forms will be added. The Task Force will then meet with the various designated representatives of the regulators and attempt to hammer out a consensus solution. A consensus solution will please no-one, but it will be a significant step toward establishing a workable system.

We invite comments or suggestions to the Task Force.
I. Background.

The Commodity Futures Modernization Act of 2000 (the "CFMA") was enacted in December 2000 and amended the Commodity Exchange Act (the "CEA") and various federal securities and banking statutes.

One of the key provisions of the CFMA lifted the ban on the trading of single stock and narrow-based stock index futures, and any put, call, straddle, option or privilege thereon ("Security Futures Products"), that was established under the Shad-Johnson Accord adopted jointly by the Securities and Exchange Commission (the "SEC") and the Commodity Futures Trading Commission (the "CFTC") in 1982, and enacted into law by Congress in 1983. The CFMA establishes a framework for the joint regulation of Security Futures Products by the SEC and the CFTC. In effecting this change, the CFMA amended the definition of "security" in both the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act") to specifically include Security Futures Products.

II. New Federal Broker-Dealer Registration Procedures.

Because a Security Futures Product is now a "security" under the Securities Act and the Exchange Act as well as a "futures contract" under the CEA, a person who is engaged in the business of effecting transactions in Security Futures Products must be registered (i) as an "introducing broker" or a "futures commission merchant" (a "CFTC Registrant") under the CEA and (ii) as a "broker" and/or "dealer" (a "broker-dealer") under the Exchange Act. The CFMA amended the CEA and the Exchange Act, however, to provide for streamlined "notice registration" procedures for persons that may be required to register under the CEA and the Exchange Act solely because such persons are effecting transactions in Security Futures Products. These statutory provisions are designed to permit persons who previously engaged solely in either the securities or the futures business to be able to trade Security Futures Products without being subjected to conflicting or duplicative regulation.
With respect to the registration of a CFTC Registrant as a broker-dealer under the Exchange Act (a "Security Futures Product Broker-Dealer"), the notice registration provisions are set forth in Section 15(b)(11) of the Exchange Act and Rule 15b11-1 thereunder ("Notice Registration"). Pursuant thereto, a Security Futures Product Broker-Dealer is not required to be a member of the National Association of Securities Dealers, Inc. (the "NASD") or a national securities exchange registered pursuant to Section 6(a) of the Exchange Act (a "Registered National Securities Exchange"), although Section 15(b)(11)(A) requires that a Security Futures Product Broker-Dealer be a member of a limited purpose national securities association registered under Section 15A(k) of the Exchange Act (presently, only the National Futures Association (the "NFA")).

In general, a CFTC Registrant which is a member of the NFA and whose only securities activities involve the trading of Security Futures Products is permitted to register as a Security Futures Product Broker-Dealer under the Exchange Act by Notice Registration, which registration is generally deemed to be effective upon the filing of new Form BD-N with the SEC.

Pursuant to Section 15(b)(11)(B) of the Exchange Act, a Security Futures Product Broker-Dealer is exempted from many of the requirements of the Exchange Act which are generally applicable to a registered broker-dealer (such as the SEC's net capital rule and customer protection rule).

Although Section 15(b)(11)(A) provides that a Security Futures Product Broker-Dealer may only trade Security Futures Products on a limited purpose national securities exchange registered pursuant to Section 6(g) of the Exchange Act (that is, designated contracts markets and derivatives transaction execution facilities that are registered with the CFTC under the CEA), Rule 15a-10 under the Exchange Act permits a Security Futures Product Broker-Dealer that is not a member of a Registered National Securities Exchange or the NASD to trade Security Futures Products in such markets without being registered as a "full" broker-dealer pursuant to Section 15(a)(1) of the Exchange Act. In addition, Rule 15a-10 permits a Security Futures Product Broker-Dealer to become a member of a Registered National Securities Exchange and/or the NASD without being registered as a full broker-dealer pursuant to Section 15(a)(1), provided that such exchange and/or the NASD adopts rules that provide specifically for the membership of Security Futures Product Broker-Dealers. The purpose underlying Rule 15a-10 is that permitting Security Futures Product Broker-Dealers to effect transactions in Security Futures Products traded on all markets should promote competition.

In sum, the CFMA's regulatory scheme provides that Security Futures Product Broker-Dealers are subject to primary regulation by the CFTC and the NFA, and regulation on core securities law issues by the SEC.

III. Blue Sky Preemption.

A. Impact of Blue Sky Laws on Security Futures Products in General

Because Security Futures Products are now "securities" for the purposes of the Securities Act and the Exchange Act, such products might also be deemed to constitute "securities"
under the Blue Sky laws. On the other hand, the definitions of "security" set forth in Section 2(a)(1) of the Securities Act and Section 3(a)(10) of the Exchange Act were amended by the CFMA to specifically include a "security future" (as defined, in each case, in Section 3(a)(55) of the Exchange Act). Arguably, because the definitions of "security" under the various jurisdictions' Blue Sky laws have probably not been amended to specifically include Security Futures Products, such products should not be construed to constitute "securities" under the Blue Sky laws. On the other hand, the definition of "security" in many jurisdictions includes any "instrument commonly known as a security." Because Security Futures Products are now considered to be "securities" for the purposes of the Securities Act and the Exchange Act, such products could be deemed to be "commonly known" as securities for these purposes. Moreover, many jurisdictions' Blue Sky laws contain a provision which requires such laws to be interpreted to promote uniformity with the "related Federal regulation", which a Blue Sky commissioner might seize upon to interpret the applicable definition of "security" to encompass Security Futures Products. Finally, a jurisdiction's Blue Sky law could always be amended to specifically include Security Futures Products in the definition of "security."

With respect to broker-dealer registration, most, but not all, of the Blue Sky laws contain exemptions (or exclusions from the applicable definition of broker-dealer) in respect of a person who effects transactions in any such jurisdiction exclusively with certain enumerated classes of institutional investors (other requirements may also apply, such as the person in question cannot have a place of business in such jurisdiction). Such institutional investor exemptions/exclusions, however, would not permit a Security Futures Product Broker-Dealer to effect transactions in Security Futures Products with retail investors.

B. CFMA Preemption with Respect to Security Futures Products

The CFMA also amended Section 28(a) of the Exchange Act to provide the following: "No provision of State law regarding the offer, sale, or distribution of securities shall apply to any transaction in a securities futures product, except that this sentence shall not be construed as limiting any State antifraud law of general applicability."

It is not clear, by any means, that this language covers or preempts the broker-dealer registration requirements under the Blue Sky laws. Arguably, the terms "offer" and "sale" relate to the securities registration requirements of the Blue Sky laws, which laws generally prohibit the "offer or sale" of securities, unless such securities are registered or are the subject of an exemption from such registration. Generally, the Blue Sky laws contain separate registration requirements relating to broker-dealers (and their "agents" or "salesmen"). If such "offer" and "sale" language of Section 28(a) is limited to the preemption of the securities registration requirements of the Blue Sky laws, then the broker-dealer registration requirements of the Blue Sky laws are preempted only if it could be concluded that such registration requirements are encompassed within the phrase "distribution of securities." This conclusion has justification in that if the phrase "distribution of securities" refers only to the offer and sale of securities,
such term would create a redundancy in that Section 28(a) already refers to the "offer and sale" of securities.

On the other hand, Congress presumably understood that the Blue Sky laws regulate, among other things, both the offer and sale of securities as well as the activities of broker-dealers. For example, Section 18(a)(1) creates the preemption of State securities registration or qualification requirements with respect to certain types of "covered securities" while Section 18(c)(1) preserves the authority of the various States to investigate and bring enforcement actions with respect to "unlawful conduct by a broker or dealer" in connection with securities or securities transactions. Moreover, Section 15(h) of the Exchange Act (which was added to the Exchange Act, along with the revisions to Section 18 of the Securities Act, as part of the National Securities Markets Improvement Act of 1996) makes it clear that Congress was aware of, and did not intend to preempt, broker-dealer registration under the Blue Sky laws. Thus, it might be argued that if Congress intended to preempt, through Section 28(a), the broker-dealer registration requirements of the Blue Sky laws with respect to Securities Futures Product Broker-Dealers, it would have done so more explicitly.

However, in view of Congress' clear intent through the enactment of the CFMA (i) to provide for the primary regulation of Security Futures Product Broker-Dealers by the CFTC and the NFA, (ii) to provide for "fast track" Notice Registration, and (iii) to exempt Security Futures Product Broker-Dealers from many of the requirements of the Exchange Act applicable to full broker-dealers (registered pursuant to Section 15(a)(1)) as well as exempting Security Futures Product Broker-Dealers from having to become members of the NASD or a Registered National Securities Exchange, Congress' intent would be severely frustrated if Security Futures Product Broker-Dealers are nonetheless subject to the less than "fast track" registration process that is characteristic of the Blue Sky laws as well as the many requirements imposed by the Blue Sky laws on broker-dealers registered thereunder which are similar, in many instances, to those requirements imposed on full broker-dealers under the Exchange Act from which Congress specifically exempted Security Futures Product Broker-Dealers through the CFMA. Finally, if Congress was intending to merely limit the preemption of Section 28(a) to the securities registration requirements of the Blue Sky laws, presumably Congress would have placed such preemption in the Securities Act, which deals with securities registration, and not the Exchange Act which does not provide for analogous registration.

The best scenario (short of a statutory fix) would be to have the SEC publish an interpretation that Section 28(a) preempts the broker-dealer registration requirements of the Blue Sky laws with respect to Security Futures Product Broker-Dealers. In conversations that I have held with a senior representative of the SEC, such SEC interpretation appears doubtful, although such representative expressed the view that Section 28(a) "clearly" preempted the broker-dealer registration requirements of the Blue Sky laws in this regard.

So far the Blue Sky jurisdictions seem to be quiet in this area, but it remains to be seen if the States attempt, through broker-dealer registration, to
assert jurisdiction over Security Futures Products in the case of retail-oriented products.

FINAL CALIFORNIA EMPLOYEE BENEFIT PLAN RULES ADOPTED

Proposed amendments to the current emergency California securities Rules governing option and employee purchase plans have been adopted and are to become effective as permanent Rules on March 9, 2002. The amendments further conform the Rules to statutory amendments that became effective on January 1, 2001. One other important change conforms the definition of permissible transferees in the Rules to the definition of that term in Rule 701 under the 1933 Act. Of course, availability of the statutory exemption at Section 25102(o) of the Corporations Code remains dependent on compliance with the Rules requiring certain substantive provisions in the option or purchase plan.

ISSUES UNDER THE FINAL RULES - THE D.C. SECURITIES ACT OF 2000

By Michele Kulerman
Hogan & Hartson LLP (Washington, D.C.)

The Department of Insurance and Securities Regulation of the District of Columbia recently adopted certain rules to be included in Title 17, Chapter 19 of the District of Columbia Municipal Regulations (DCMR). The rules govern the contents of registration statements, qualifications and licensure for issuers, agents, small corporate offerings, exemptions from registration, and filing fees for securities offerings in the District, pursuant to Section 806 of the D.C. Securities Act of 2000 (the “D.C. Act”), effective September 29, 2000.

Mr. Theodore Miles, Director of the Securities Bureau of the Department of Insurance and Securities Regulation, accepted my invitation to attend a luncheon hosted by Ellen Creed at the New York offices of Cleary, Gottlieb, Steen & Hamilton. The luncheon took place on February 11, 2002, and was attended by many of the New York blue sky practitioners. The purpose of the luncheon was to have Mr. Miles discuss the process by which rules are adopted - and hopefully changed - in the District, and to offer to the group an explanation of many requirements now imposed by these current "final" rules which, to many of us, are overly burdensome.

Since most members of the Committee are aware of the new rules and the various limitations now imposed on our compliance with the DC Act, I thought it would be helpful for those who did not attend this luncheon to provide a summary of the issues discussed.

Advertising

The Rules on sales and advertising literature relating to an offering of securities for which a registration statement has been filed, as well as those rules relating to legend requirements and prospectus disclosures and exchange offers, will be moved to another area in the rules relating to registration of securities.

Form U-2 Consent to Service of Process

The Rule will be changed to clarify that, in issuer transactions, the issuer is to sign the Form U-2, but in nonissuer transactions, the Form U-2 may be signed and submitted by the applicant or selling stockholder.
Securities and Transactional Exemptions

Section 401(7) of the Rules requires a 20-day notice filing to claim an exemption for an option issued by a clearing agency registered under the 1934 Act, other than an off-exchange futures contract, or substantially similar arrangement, subject to certain conditions in the DC Act. There was some discussion of removing the notice requirement.

Certain exemptions provided in the DC Act are not uniform with the 1933 Act exemptions, such as the bank securities exemption at Section 401(3). Mr. Miles stated that, if the exemption falls under a 1933 Act exemption, then it will be preempted and not subject to the DC registration requirements although a notice filing for a covered security might be required. However, while a legislative fix may be possible to change this, the proposal for this change would need to go before the Corporation Counsel for further consideration and final adoption.

Section 402(11) exempts sales to institutional investors. If the offering is limited to institutional investors (which by definition includes accredited investors), then notice will not be required even though the issuer relies on Rule 506 and a Form D is filed with the SEC. That is, when conducting an offering in compliance with Rule 506, the Form D notice filing is not required in DC if another exemption is available with no filing requirement.

In addition, Mr. Miles would consider adoption of a de minimus or "no notice required" exemption where the transaction involves a small corporate offering or an offering to family and friends. As currently adopted, the limited offering exemption requires a pre-offer notice filing.

The rules require that compliance with certain transactional exemptions (e.g., to claim an exemption for mergers/reorganizations; employee benefit plans; limited offerings) are available only if the issuer submits (and, in some instances, receives written approval by the Commissioner) a 10-day or 20-day pre-offer notice filing. Mr. Miles suggested that, until further clarification is provided by the Department, the transmittal letters for such notice filings should include request for a waiver of the 10-day or 20-day notice requirement and a brief explanation as to why the issuer cannot comply with the notice requirement. This is especially critical in the requirement for a notice filing for the employee plan exemption and the merger exemption, where, in both instances, it is oftentimes virtually impossible to comply. Another suggestion by Mr. Miles is to call him and give him notice that documents are being mailed and that such mailing cannot be held up until receipt of approval of the exemption by the Department.

Issuer-Agent Registration

If the offering involves an exempt security or transaction in DC, then issuer-agent registration will not be required. Further, officers or directors of an issuer will be exempt from registration when representing an issuer in effecting an offer and sale of an exempt security, or in effecting an exempt transaction, if no commission or other remuneration is paid in connection with solicitation of potential investors.
Definitions

Clarification of the definition of "broker-dealer" to change the "and" to an "or" will be addressed in an administrative Release. Without that change, there is no exclusion from the definition of broker-dealer for a person who has no place of business in the District and effects transactions in the District exclusively with institutional buyers, unless the buyer is an existing customer whose residence is not in the District and the person is licensed in a state in which it maintains a place of business.

At the end of this luncheon, Mr. Miles invited interested persons to continue to submit comments and concerns about the Rules and the DC Act, in general, and expressed an interest in working with all of us in the blue sky practice to make the statute and Rules more "user-friendly".

In summary, the Rules are overreaching in a number of areas. The only immediate solution seems to be the quick issuance by the Department of administrative Releases that will clarify the issues discussed above and also address the comments submitted to the Department prior to final adoption of the Rules but which apparently were not taken into serious consideration prior to final adoption.

Mr. Miles' email address is: theodore.miles@dc.gov. The fax number is (202) 442-8661, and his direct line is (202) 442-7800.

CALIFORNIA REDUCES NOTICE FILING FEE MAXIMUM

Effective January 1, 2002, the filing fee for filing a Form D notice for a Rule 506 offering in California is reduced to $150 from the previous $300.

The maximum fee for filing a 25102(f) exemption notice was also reduced, and the fee is as follows:

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<th>Value of Securities Proposed to be Sold</th>
<th>Fee</th>
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<td>$25</td>
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<tr>
<td>$25,000.01 to $100,000</td>
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<td>$500,000.01 and above</td>
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The fee reductions are effective at least through June 30, 2003.

CALIFORNIA TO ADOPT IARD FILING PROCEDURES

The California Corporations Commissioner ("Commissioner") has published a proposal to amend regulations under the Corporations Code relating to investment adviser and investment adviser representative applications, amendments, reports, notices, and fees required to be filed with the Commissioner to provide that all such documents and fees may be filed with the Investment Adviser Registration Depository ("IARD"). With few comments expected, the written comment period was set to expire at 5:00 p.m., March 4, 2002. Prior to that date comments may be sent to Kathy Womack at the Department of Corporations via electronic mail at regulations@corp.ca.gov or (2) via fax (916) 322-5875. New Section 260.230 will authorize investment advisers to make filings with IARD and designates IARD to accept filings on behalf of the Commissioner. It provides for the acceptance of electronic signatures, and provides that the electronic signature will constitute irrefutable evidence of a legal signature.
OFFICERS
ABA COMMITTEE ON STATE REGULATION OF SECURITIES

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