EVENTS CALENDAR

ABA ANNUAL MEETING
The State Regulation of Securities Committee will meet in conjunction with the 2004 ABA Annual Meeting to be held August 6 - 10, 2004, at the Atlanta Hilton, Atlanta, Georgia.

NASAA ANNUAL FALL CONFERENCE
The State Regulation of Securities Committee will meet in conjunction with the 2004 NASAA Annual Fall Conference to be held September 30 through October 3, 2004, at the Fairmont Scottsdale Princess in Phoenix, Arizona

PLAN FOR THE FUTURE
ABA Business Law Section Spring Meeting
March 31-April 3, 2005
Nashville, Tennessee

ABA Annual Meeting
August 5 - 9, 2005
Chicago, Illinois

2005 Annual NASAA Fall Conference
September 11 through September 14, 2005
Hilton Minneapolis, Minneapolis, Minnesota

2006 Annual NASAA Fall Conference
San Diego, California

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

We report with sorrow that Meg Long, Joe Long's wife, passed away in January 2004 unexpectedly from a stroke following a routine medical treatment. Joe is the esteemed author of Blue Sky Law published in the Securities Law Series by West Group.

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It is reported (but hasn’t been confirmed!) that Guam has adopted, and the U.S. Virgin Islands is considering adopting, the new 2002 Uniform Securities Act.

Governor Arnold Schwarzenegger appointed William P. Wood as the California Corporations Commissioner. Previously, Commissioner Wood served as Chief Counsel to the California Secretary of State, and was directly responsible for legal and policy matters in two major areas, elections and the business programs division. In addition, he has served on the senior staff of the California District Attorneys Association and as a deputy district attorney in Sacramento County. Outside the office Commissioner Wood is a published author of novels.

Theodore V. Morrison, Jr. is serving a one year rotation as elected chair of the Virginia State Corporation Commission; serving with him on the Commission are fellow commissioner Clinton Miller and newly elected commissioner Mark C. Christie.

Martin A. Hewitt, the Assistant Editor of The Blue Sky Bugle, has moved his practice from Sidley Austin Brown & Wood LLP to Tannenbaum Helpern Syracuse & Hirschtritt LLP, at 900 Third Avenue, New York, NY, where he is working as a hedge fund attorney as well as continuing a blue sky practice.

Phil Rutledge, Chief Counsel of the Pennsylvania Securities Commission and long time active participant in NASAA, will retire June 30, 2004.

Beth Ann Blackwood, formerly a partner at Secore & Waller, L.L.P., was recently appointed by Governor Perry of Texas to a 6 year term on the Texas Securities Board. She is the first woman appointee in the 36 years of the agency.
And believe it or not, and I didn’t at first, the buzz is -- our very own Phil Feigin has embarked on a project to record a CD composed of 14 of the parodies of financial and regulatory issues that Phil and his NASAA singers performed at the banquets at the end of NASAA’s annual conferences over the last 20 years, and perhaps some new pieces as well. Phil will perform with his former singing partner and with help from some of those very same NASAA singers. Expect the CD in the fall (in time for the NASAA conference), according to the Executive Producer (Donald A. Rett, communicating from his Law Office in Tallahassee, Florida). Phil hopes to use the album as a promo to pick up gigs at financial conventions, banquets, etc. around the country, but assures us that he won’t be quitting his day job anytime soon. The working title of the album is "Better Late Than Never" and they may use the name "Blue Sky Singers." Phil, a former President of NASAA and former Commissioner of the Colorado Securities Commission, is now practicing at Rothgerber, Johnson & Lyons, LLP in Denver, Colorado. Wow! Way to go!

RULE 506 AND STATE REGULATION

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

In recent notice filings for offerings conducted in compliance with Rule 506 of Regulation D we (along with other Rule 506 notice filers) have been the recipient of requests from New Jersey and Utah for additional information about Rule 506 covered securities offerings.

NEW JERSEY

Specifically, we received a letter from the staff of the New Jersey Bureau of Securities referencing a recent Notice filing for a Rule 506 private offering, and noting that the Bureau acknowledged receipt thereof but stated that the filing cannot be accepted because the following deficiencies exist: “Please answer question 1 on page 6 of the Form D (Part D-Question 1).” Per my telephone conversation with staff, I explained that the “bad boy” provisions do not apply to a Rule 506 offering and therefore the correct response to the question is “Not Applicable.” In addition, I also noted that our responses to all of the questions in Part D as being “Not Applicable” were appropriate under NSMIA. I spoke with Frank Widmann, Chief, New Jersey Bureau of Securities, who confirmed that such requests for information are not appropriate and that persons making such filings and receiving these notices should contact him. The Bureau waived the alleged deficiencies.

UTAH

Utah commented that the Form D Notice filing was incomplete because (i) the staff claimed that Part E did not accompany the filing, (ii) Part D was incomplete in that the responses to Questions 1-4 were inappropriate and (iii) the date of “first sale” of securities in the state was not in the cover letter. Because of these errors to my filing, the following requests were made to complete the filing, pursuant to “the Division’s investigational authority found in Section 61-1-19 of the Act”:

“The Division will require the Issuer to submit an amended Form D which provides the information required by Form D, Part E. UAC §R164-15-2(B)(3) defines SEC Form D to include Part E and the Appendix.”

“The Division wants the date of the first sale of the Issuer’s securities in Utah. UAC §R164-15-2©(1) requires the filing of a notice filing no later than 15 days after the first sale of a federal covered security.”

“The Division wants a copy of each of the following – the Issuer’s subscription agreement/questionnaire, disclosure documents, and sales literature pursuant to this offering.”

While we sent our responses back to the Division of Securities, we explained that first, the notice filing was not being submitted pursuant to a limited offering exemption or ULOE and, therefore, the correct response to Part D-Question 1 is “Not Applicable” and the same answer applies to Column 5 of the Appendix to Form D. Second, their request for information about the issuer was outside the scope of Section 18(3)(c)(1) of the Securities Act of 1933, as amended by NSMIA. Third, their request for any information of the type requested was not within the state’s investigational authority unless “the Division considers necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter or any rule or order hereunder.”

Our Notice filing was “approved.” In a follow-up conversation with Anthony (Tony) Taggert, Director of the Utah Division of Securities, Tony mentioned that (a) these requests were inappropriate, and (b) he should be contacted if anyone receives such a request from the Division of Securities.

Securities purchased from an issuer in a nonpublic offering may be privately resold to qualified institutional buyers, or QIBs, under Securities and Exchange Commission Rule 144A, or privately resold to institutional accredited investors. Issuers of these securities often subsequently register with the SEC to exchange substantially identical registered securities for the original unregistered securities in an Exxon Capital “AB” exchange offer.

Pennsylvania previously exempted offers and sales to QIBs from “blue sky” securities law registration under Section 203(c) of the Pennsylvania Securities Act of 1972, as amended, and Sec. 102.111(a)(10) of the regulations thereunder. Pennsylvania also previously exempted offers and sales of equity to existing security holders of the same issuer from “blue sky” securities law registration under Section 203(n) if no compensation, other than a standby commission, was paid or given directly or indirectly for soliciting any equity security holder in Pennsylvania. There was no available exemption, however, for sales of debt to existing security holders that are institutional accredited investors but were not QIBs or other institutions that fit within Pennsylvania’s very specific institutional investor exemption. The Commission’s order creates an exemption allowing outstanding debt securities (and any related guarantees) that are “restricted securities” to be exchanged without additional consideration for substantially identical securities that have been registered with the Securities and Exchange Commission, without having to register the new securities in Pennsylvania.

**CALIFORNIA UPDATE**

**Uniform Securities Act of 2002**

The Department of Corporations is currently conducting an internal study of the Uniform Securities Act of 2002 (the “2002 USA”) and welcomes written comments from members of the American Bar Association. Especially welcome will be comments proposing changes to the current California Securities Law of 1968, perhaps through adoption of provisions of the 2002 USA, relating to exemption of compensatory benefit plans and venture capitalist activities. The Department is considering, among other approaches, whether to adopt the 2002 USA in its entirety, or to adopt changes to the current law designed to provide uniformity with the 2002 USA. Comments may be addressed to the attention of Timothy Le Bas, Deputy Commissioner and General Counsel, or to the attention of William Kenefick, Advisor to the Corporations Commissioner, at the Department of Corporations, 1515 K Street, Suite 200, Sacramento, CA 95814.

**San Francisco Office Relocates**

The Department of Corporations has relocated its offices in San Francisco to 71 Stevenson Street, Suite 2100, San Francisco California, 94105-2980.

**New Legislation Enacted in the 2003-2004 Legislative Session**

**SB 1** enacted the California Financial Information Privacy Act (the “Act”), which requires a financial institution to provide a specified written form to a consumer in connection with the sharing of the consumer's nonpublic personal information. The Act would allow a consumer to direct the financial institution to not share the nonpublic personal information with affiliated companies or with nonaffiliated financial companies with which the financial institution has contracted to provide financial products and services. In addition, the consumer's permission would be required before the financial institution may share that consumer's nonpublic personal information with nonaffiliated companies. A court challenge has been filed to determine whether portions of the Act are preempted by federal law. The Act was signed by the governor on August 27, 2003.

**SB 220** amended the term “signature” as defined in the California Corporations Code to include a signature in a facsimile document presented to the Secretary of State. The Secretary of State is required to accept facsimile signatures on documents delivered by hand or mail. The Secretary of State is authorized to adopt procedures permitting the direct electronic or facsimile filing of documents. The bill also authorized the Commissioner of Corporations to prescribe circumstances under which the Commissioner would accept electronic records or electronic signatures. Signed by the Governor on September 3, 2003.

**Legislation Pending in the 2003-2004 Session**

Current information on the status of pending legislation is available on the California legislative website, under “Bill Information” at [http://www.leginfo.ca.gov/index.html](http://www.leginfo.ca.gov/index.html)

**AB 1000** would make clarifying amendments to the corporate disclosure law (AB 55) enacted in late 2002. The bill has passed the Assembly and is before the Senate. Specifically this bill would:
1. Change the due date of annual reports filed with SOS to be within 120 days of the end of the corporation's fiscal year.

2. Change the information publicly traded companies must report about the independent auditor used by the corporation. Every publicly traded company would disclose the name of the auditor that prepared the corporation's most recent annual financial statements and would describe other services performed by the auditor during the two most recent fiscal years and the period between the end of its most recent fiscal year and the date of the statement.

3. Change the requirements for reporting of the annual compensation paid to board members and executive officers of publicly traded companies. For each board member and executive officer, the corporation would disclose the annual compensation paid during the most recent fiscal year including the number of any shares of stock issued, or options for shares granted, or similar equity-based compensation granted, to each director or executive officer.

4. Clarify that corporations must report a detailed description of any loan made to a board member at an interest rate below the rate generally available from an unaffiliated commercial lender.

5. Clarify that corporations must indicate whether an order for relief has been entered in a bankruptcy case with respect to the corporation, its executive officers or board members during the preceding 10 years.

6. Delete the existing definition of "publicly traded company" and define it as "an issuer as defined in Section 3 of the Securities Exchange Act of 1934, as amended (15 U.S.C. Sec. 78c), the securities of which are registered under Section 12 of that Act (15 U.S.C. Sec. 78l) or that is required to file reports under Section 15(d) of that Act (15 U.S.C. Sec. 78o(d)."

7. Require nonprofit corporations to file a statement of information with SOS annually.

8. Make other technical, clarifying and conforming changes.

AB 2167 would provide a state remedy for persons involved in transactions with an unlicensed securities broker-dealer. Specifically, this bill would authorize a person who purchases a security from, or sells a security to, an uncertified broker-dealer to bring an action for rescission of the sale or purchase, or damages, if any, and specifies the measure of monetary recovery in such cases. The bill also would conform state law to recent changes in federal law regarding the limitations periods for private actions alleging violations of state securities law. It would extend by one year the period for filing a civil action against a person who willfully violates provisions of the California securities laws. The bill was passed by the Assembly on May 17, 2004.

AB 2752 would require publicly traded corporations to have corporate election procedures allowing a shareholder, or groups of shareholders, holding 2% or more of the voting stock to have director nominations included in the proxy sent to shareholders, and require that shareholder proposals, other than advisory proposals, be adopted by the company if approved by a majority at any annual meeting. The Commissioner of Corporations has indicated opposition to this bill, considering it premature in light of other pending proposals. The bill passed the Assembly on May 20, 2004.

SB 1306, sponsored by the Corporations Committee of the California State Bar, would update statutes relating to the conduct of business by corporations, partnerships, and limited liability companies (“LLCs”), to permit the use of electronic transmissions as a means of communication between the corporation and its directors, officers and shareholders, between LLCs and its members, and between partners. This bill passed the Senate on May 17, 2004.

SB 1496 follows on the heels of the corporate disclosure law enacted by AB 55 in late 2002 and would expand the types of corporations required to file disclosure statements with the Secretary of State to include insurance companies and financial institutions. The bill passed the Senate on May 25, 2004.

AB 1863 would increase the statute of limitations for violations of the California Securities Laws arising from fraudulent practices and other prohibited acts. Existing state law authorizes a civil action against a person who willfully violates these provisions, which must be brought within 4 years of the violation or within one year after the plaintiff's discovery of the violation, whichever occurs first. This bill would amend California Corporations Code §25506 by increasing the time that a plaintiff has to file a civil action to within 5 years after the violation or within 2 years of the plaintiff's discovery of the violation, whichever occurs first. This bill was referred to committee on February 26, 2004, and no further action has been taken.
SB 1528 would allow corporate directors to consider social concerns when making decisions and not violate the directors duty of care. Existing law provides that a corporate director shall perform his/her duties in good faith and in a manner that the director believes to be in the best interests of the corporation and its shareholders, and with the care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances. SB 1528 would provide that corporate directors may take into account a variety of factors in carrying out their duty to look after the best interests of the corporation. The factors would include:

(1) the interests of the corporation's employees, customers, suppliers, or creditors,
(2) the interests of the economy of the region, state and nation,
(3) the impact on the community,
(4) the environment, and
(5) the short and long-term interests of the corporation and its shareholders.

The Department of Corporations is opposing the bill. This bill has passed the Senate and is before the Assembly.

CALIFORNIA LIMITED OFFERING NOTICE - FILING FEE INCREASE

The filing fee for filing a Rule 506 Form D with the California Department of Corporations will increase to $300, and the maximum filing fee for a notice of transaction pursuant to Section 25102(f) will increase to $300, effective October 1, 2004. The increases and apply to notices filed on or after that date even though the transaction may have taken place prior to that date.

Currently the maximum filing fee for filing a Notice of Transaction Pursuant to Section 25102(f) is $150, pursuant to an order of the Commissioner at Release No. 115-C issued on December 6, 2001. That Release also set the filing fee for filing a Form D notice for an offering pursuant to Rule 506 at $150.

As currently, the fee notice filing fee for a Section 25102(f) notice will be determined on a sliding scale, based on the value of the securities proposed to be offered to persons in California by an out of state issuer, or to be sold to persons anywhere by an issuer located in California. On and after October 1, 2004, the fee for securities valued above $1,000,000 will be $300. The new fee schedule for a Section 25102(f) notice is as follows:

<table>
<thead>
<tr>
<th>Value of Securities Proposed to be Sold</th>
<th>Fee</th>
</tr>
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<tbody>
<tr>
<td>0.00 to $25,000</td>
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<tr>
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<td>$35</td>
</tr>
<tr>
<td>$100,001 to $500,000</td>
<td>$50</td>
</tr>
<tr>
<td>$500,001 to $1,000,000</td>
<td>$150</td>
</tr>
<tr>
<td>Over $1,000,000</td>
<td>$300</td>
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DID YOU KNOW?

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

Watch for it.

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

bl-stateregs@mail.abanet.org

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