EVENTS CALENDAR

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

Friday Evening, April 11, 2008 Committee Dinner

Saturday, April 12, 2008, 10:30 a.m. – 12:00 p.m. Full Committee Meeting

Saturday, April 12, 2008, 9:30 a.m. – 10:30 a.m. Subcommittee on Broker-Dealers And Investment Advisers Meeting

Thursday April 10, 2008, 11:30 a.m. – 1:00 p.m. MCLE Program Co-Sponsor
Navigating Safe Harbors and Blue Skies The abcDs of a Private Offering of Securities

Friday, April 11, 2008, 10:30 a.m. – 12:30 p.m. MCLE Program Co-Sponsor
Hot Securities Law Issues for Small Business II

Friday, April 11, 2008, 2:30 p.m. – 4:30 p.m. MCLE Program Co-Sponsor
Ssh!! Privacy Laws – Basics, Bugaboos, and Beyond

The Committee will meet in conjunction with the 2008 Annual Meeting of the ABA August 7 through August 13, 2008 New York, New York

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

The Committee and its Subcommittees will meet in conjunction with the 2009 Spring Meeting of ABA Business Law Section April 16, 2009 – April 19, 2009 at the Pan Pacific Vancouver Hotel Vancouver, British Columbia

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BLUE SKY BITS AND PIECES

By Ellen Lieberman
Debevoise & Plimpton LLP

Thomas J. Kim has been named chief counsel and an associate director the Division of Corporation Finance of the Securities and Exchange Commission. He had served since 2006 as counsel to SEC Chairman Christopher Cox and, prior to that, as an in-house lawyer for General Electric Co., in the Washington, D.C. office of Latham & Watkins LLP, and as clerk for Judge Louis F. Oberdorfer, U.S. District Court for the District of Columbia. Kim received his bachelor’s degree from Yale and his J.D. from Harvard Law School.

Annette L. Nazareth, the SEC’s only remaining Democrat, left the SEC as of January 31. A Commissioner since August 2005, before that she served as counsel to SEC Chairman Christopher Cox and, prior to that, as an in-house lawyer for General Electric Co., in the Washington, D.C. office of Latham & Watkins LLP, and as clerk for Judge Louis F. Oberdorfer, U.S. District Court for the District of Columbia. Kim received his bachelor’s degree from Yale and his J.D. from Harvard Law School.

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The Securities Industry and Financial Markets Association appointed T. Timothy Ryan Jr. as its chief executive officer, replacing Marc Lackritz who retired at the end of 2007. Ryan was previously with J.P. Morgan as its vice chairman of Investment Banking for Financial Institutions and Governments and a member of the Investment Banking Coverage Management Committee. Prior to that, he served as director of the Office of Thrift Supervision, U.S. Department of the Treasury, where he was a principal manager of the savings and loan cleanup, and was a director of the Resolution Trust Corporation and of the Federal Deposit Insurance Corporation. Ryan also practiced law at Reed, Smith, Shaw & McClay, and was Solicitor of Labor at the U.S. Department of Labor.

Managed Funds Association, trade group for the hedge fund industry, named Republican Louisiana Congressman Richard H. Baker as its new president and chief executive officer. A member of the House of Representatives for 22 years, Baker served as a senior member of the House Financial Services Committee. He succeeds John G. Gaine, who served in that position for ten years and will became a special adviser to MFA with particular emphasis on expanding its outreach with regulators, policy makers, and market participants worldwide.

On January 17, 2008, NYSE Euronext Inc. announced that it will acquire the American Stock Exchange in an all-stock transaction anticipated to close in the third quarter of 2008 after approval is obtained from the SEC and the Department of Justice. NYSE Euronext Inc. is the holding company organized in 2007 in connection with the combination of NYSE Group, Inc. and Euronext N.V. On January 28, 2008, the CME Group and the New York Mercantile Exchange (both regulated by the CFTC) confirmed preliminary discussions concerning their possible merger. The CME Group itself resulted from the merger in July 2007 of the Chicago Mercantile Exchange with the Chicago Board of Trade after a lengthy review by the Justice Department.

Brian Misencik was named Ohio’s Acting Commissioner of Securities on August 7, 2007. He is the Deputy Director of Administration for the Department of Commerce and before that served for ten years in Ohio’s House and Senate including six years as Deputy Chief of Staff for the Senate.

Timothy L. Le Bas, Deputy California Corporations Commissioner and General Counsel, Office of Law and Legislation, left the California Department of Corporations as of February 29, 2008, to move to the California Department of Managed Health Care which regulates California HMOs.

Matthew Gaul, who was Chief, and Maria Filipakis, who was Deputy Chief, have left the New York Attorney General’s Investor Protection Bureau. Michael Berlin, New York’s Deputy Attorney General of Economic Justice, is now serving as Acting Bureau Chief.

We are delighted that Jacob A. Heth, a partner in the Portland, Oregon, office of Davis Wright Tremaine, LLP has agreed to serve as our Committee’s Oregon liaison. Jake’s practices emphasizes corporate and business transactions, particularly mergers, acquisitions and reorganizations in various areas (for example, real estate and health care facilities) and securities offerings and compliance, although he provides general counsel to a variety of businesses. He was formerly Director of Legal Affairs for Hollywood Entertainment Corp. Jake received his J.D. from Willamette University College of Law where he was executive editor of the Law Review, and an LLM in taxation from McGeorge School of Law. He has written on various business topics and was previously editor of the Oregon Business Lawyer. Jake is admitted to both the Oregon and California bars. We are pleased that he will be our liaison to Oregon, reporting on developments within the state and speaking for our Committee to Oregon regulators.

In their efforts to emphasize the global nature of business law, Section leaders have asked that the Committee reach out and include Mexico’s securities law within our jurisdictional area. The Committee already boasts a Canadian liaison in the person of Paul G. Findlay of Borden Ladner Gervais LLP, and a Subcommittee on International Securities headed by Ellen M. Creede of Cleary Gottlieb Steen & Hamilton LLP and Paul Findlay. In response, we did recently reach out to Guillermo Pérez Santiago, a partner at Ritch Mueller, S.C., in Mexico City and anticipate that some representative from his firm will join us at our meeting in Dallas in April and will continue to work with our Committee going forward. Sr. Perez and his partners participated in the drafting of a new Mexican securities market law enacted last year, and they have had an active practice in capital markets transactions in Mexico and in offerings by Mexican issuers in foreign markets. We welcome and appreciate their participation. Mexican regulators, as you know, are represented within NASAA.

Gary M. Emmanuel, Reitler Brown & Rosenblatt LLC, has agreed to serve as our Liaison for Regulation D Electronic Filing. He was born in England and received
an LL.B. with Honors from Queen Mary College, University of London, and an LLM in Intellectual Property from the Benjamin N. Cardozo School of Law. Gary is admitted to practice in New York and in Israel. He did a yeoman’s job in spearheading the joint comment letter of our Committee and the Committee on Federal Regulation of Securities on the electronic Form D proposal. His areas of practice include Securities, Mergers & Acquisitions, Venture Capital and Intellectual Property.

Jennie Getsin, whose practice focuses on areas of state securities law and regulatory law of FINRA in the New York office of Ropes & Gray LLP, has joined the editorial staff of the Blue Sky Bugle as an Assistant Editor. Jennie received her B.A. from New York University and her J.D. magna cum laude from New York Law School. We are delighted to welcome her and appreciate her continuing contributions to the Committee.

G. Philip Rutledge, a founding partner of Bybel Rutledge LLP, in addition to his position on the Board of Editors of The Business Lawyer, has written a chapter on Sarbanes Oxley for an upcoming ABA publication (we will let you know when it’s published), and just accepted an invitation to serve as an advisor on the securities panel for ALI-ABA. He also presented a lecture, “The Subprime Mess: Old Wine in a New Bottle,” at the Cass Business School of the City University (London) on January 24, 2008 and addressed the Annual Banquet of the Worshipful Company of Pattenmakers at Mansion House, London, in the presence of the Lord Mayor.

We share the pride of our good friend Richard I. Ellenbogen in the accomplishments of his son Ari Ellenbogen. Rich is currently a consultant to Weil, Gotshal & Manges LLP. On January 30, 2008 Ari Ellenbogen, 16, the oldest son of Rich and Debra Weissman passed a board of review earning him the rank of an Eagle Scout. Ari had earned an Arrow of Light, the highest award in Cub Scouts, and then advanced through the ranks of Scouting while performing community service, demonstrating leadership and successfully completing 26 merit badges. For his Eagle Scout community services project, Ari produced and directed a 20-minute documentary film on fire safety for seniors. The film is current being used by firefighters in the community as a tool to educate and remind seniors in taking steps to prevent fires and minimize the potential for loss of life or damage in the case of a fire in the home or otherwise.

It is with sadness that we report the death on December 23, 2007 of Robert Douglas Noble, husband of 45 years to our respected colleague and friend Susan Noble, Paralegal Specialist Blue Sky Securities at Bingham McCutchen LLP in Boston and a frequent contributor to the Blue Sky Bugle and to our Committee deliberations. Bob died at the age of 78. He had attended Harvard College, Harvard Law School, and the John F. Kennedy School, received a B.A. cum laude and an M.P.A., and worked prior to his retirement as a tax consultant. He is survived by Sue, by his son Mark and daughter Helen, and by the children of his first marriage, Vivian and Christopher. Sue says that he loved to read and loved (and played) music, and his tastes in both were eclectic. His obituary in the Boston Globe recounts that, when he and Sue were dating, he quipped “If I had ordered the sole, too, would that make us sole-mates?” and that is when she fell in love with him. We who know Sue and have read her articles can see that the love of words was something they shared and in that and other respects they were indeed soul-mates.

Website. Do become a regular visitor to our Committee website. Access it via a Google search for ABA state regulation securities (it will be the first site that pops up), by going to http://www.ababusinesslaw.org/r/statereg/, or by marking the site as one of your favorites. What’s available once you get there? A current list of planned meetings and events, contact information for Committee leaders and members, back issues of meeting books, the Blue Sky Bugle, Subcommittee reports, Committee comment letters, and CLE Program materials, listserv archives; and links to a helpful list of other securities-related cites.

Free MCLE. Did you know that as a member of the ABA Section of Business Law, you can receive six hours of free CLE annually? The Section produces a series of six teleconferences annually (every other month) called BLT Live CLE Teleconferences, and they cover a wide range of topics, such as business ethics, non-profit endowments, client fraud and other complex issues. These sessions are free for the first 250 Section members to enroll in each session, and registration fees are deeply discounted for members after that. Your issue of Business Law Today should let you know what teleconferences are in the works and how to access them, or check the Section website.
NEW FORM D. The Securities and Exchange Commission released its final rules relating to filing of Form D (Electronic Filing And Revision Of Form D. Release Nos. 33-8891; 34-57280; 39-2453; IC-28145; File No. S7-12-07 (Feb. 08, 2008). The SEC is still considering changes proposed in two other releases, changes to Regulation D (including a new exemption and bad actor disqualification provisions) and changes in treatment of accredited investors in private pooled investment vehicles; the current changes do not reflect those additional proposed changes.

Beginning September 15, 2008 until March 16, 2009, filers need file only two copies of Form D in paper with the SEC (one of which must be manually signed), instead of the current five copies, and filers have the additional option of filing the new Form D electronically through an internet-accessed system. Commencing March 16, 2009, the new Form D and electronic filing will become mandatory for federal filings. It is not clear when the states will accept the new Form D but it is likely to be a gradual process, so that an offering may use dual forms—old and new, and dual filing mechanisms—paper and electronic, for a period of time. Electronic filers will need to obtain the same codes currently required for EDGAR filings—CCC and CIK codes and a password code (as well as a password modification authorization code). NASAA is trying to come up with a system that will interface with the SEC’s system and accept fees and filings on behalf of the states.

Commencing September 15, 2008, Form Ds must be filed within 15 days after the first sale (as is currently the case), although if the 15th day is a weekend or holiday the period will extend to the next business day. The SEC has clarified that “sale” for this purpose means the date on which the first investor is irrevocably contractually committed to invest, which, depending on the terms and conditions of the contract, could be the date on which the issuer receives the investor’s subscription agreement or check and not necessarily as late as the closing. New amendment requirements will apply from September 15, 2008 to March 16, 2009 to those filing a new Form D either electronically or in paper format, and to all Form Ds filed or where the offering is continuing on or after March 16, 2009. Under the new requirements, Form D amendments will be required annually (if the offering is continuing) on or before the anniversary of the last filed Form D; for a material mistake of fact or error (as soon as practicable after discovery); and to reflect a change in the information previously filed (whether or not material and as soon as practicable after the change but not if the change occurs after termination of the offering) with certain specified exceptions.

Among the changes in Form D (and this is by no means an exhaustive treatment of new Form D) are the following: multiple issuers may be identified on the same form; care of and postal box addresses will not be accepted for principal place of business; 10% beneficial owners no longer need be listed; industry group replaces description of business; revenue (or net asset value) range is required although the issuer may decline to disclose; investment company registration status is required where applicable; whether the offering is expected to last more than one year and the date of first sale are required; finders as well as placement agents need to be listed as well as their CRD #s, if any; an indefinite offering amount may be listed and the state appendix has been eliminated; and use of offering proceeds has been eliminated except for the amounts of sales commissions and finders fees, and gross proceeds to be paid to any executive officer, director or promoter. The signature block has been expanded and will include a consent to service of process.

The Committee, together with the Committee on Federal Regulation of Securities, submitted a detailed and comprehensive comment letter, which is cited many times in the adopting release. While we know that our concerns were considered by the staff and in some instances the new requirements reflect our comments, a number of our suggestions were not adopted. We will continue to monitor the changing landscape and hope to work with NASAA in the months ahead.

FEDERAL LEGISLATIVE OUTLOOK. BNA and other sources suggest that major federal legislation affecting the securities industry is unlikely this year except (i) as a reaction to the subprime mortgage crisis, (ii) possibly to rein in executive compensation by giving shareholders a larger albeit advisory role (“say on pay,” H.R. 1257, S. 1181, which previously passed the House), or (iii) possibly to remove second tier exchanges from the definition of “covered security” (H.R. 2868, which has also passed the House and was reported on in the last issue of the Blue Sky Bugle). Legislation which is viewed as not likely to move forward includes a bill to make arbitration in the securities and other industries optional rather than mandatory (Arbitration Fairness Act
of 2007, H.R. 3010, S. 1782, supported by NASAA but opposed by the brokerage industry), a bill to change disclosure requirements for mutual fund 12b-1 fees (Mutual Fund Fee Reform Act, H.R. 3225; the SEC is likely to adopt reforms without legislation), hedge fund regulation, soft dollars, Sarbanes-Oxley Act reform (although on January 31 the SEC announced a cost-benefit study of auditor attestation requirement for smaller companies under Section 404(b) and proposed a one-year delay to fiscal years ending on or after December 15, 2009 for applying those requirements to smaller public companies), changes in financial reporting standards, disclosure with respect to 401(k) plans, and the potential merger of the SEC and the Commodity Futures Trading Commission.

Congressional committees will continue to exercise their oversight function which could lead to legislation in the future. A Senate Committee is already looking into issues addressed by federal and state regulators on the enforcement level—the “free lunch” and “free dinner” seminars being used as a sales tool for seniors—and is also looking at designations used by registered reps to indicate particular expertise on advising seniors, again an issue already addressed at the state level by NASAA (which has issued a proposed model rule on use of senior-specific certifications and professional designations) and some individual states. Congress may also hold oversight hearings on issues the Securities and Exchange Commission is debating such as proxy access and broker-dealer and investment adviser regulation.

NASAA Legislative Agenda. NASAA recently announced its eleven point “pro-investor” legislative priorities for the year, with preemption once again its chief concern. The program points include

- defending state authority to regulate and bring enforcement actions seeking appropriate remedies; NASAA noted its increasing collaboration with the SEC and FINRA and other SROs and decried against the conclusions in recent reports on capital market competitiveness including The Interim Report of the Committee on Capital Markets Regulation, and reports from the Chamber of Commerce, McKinsey and the Financial Services Roundtable, which include recommendations to neutralize and/or bypass state regulation.
- securities arbitration fairness including passage of the Arbitration Fairness Act of 2007
- increasing sanctions for crimes against seniors
- defining equity-indexed annuities as securities
- ensuring state authority is not preempted with respect to data security breach, or at least imposing high federal standards
- opposing watering down the Sarbanes-Oxley Act, while recognizing some modification for small companies may be needed
- promoting financial literacy
- reinstating state regulatory oversight of all Regulation D offerings, and especially if the SEC does not impose “bad actor” disqualifications
- raising the standards for individual accredited investors
- supporting efforts toward greater hedge fund transparency and pension protection
- rolling back preemptive rules and opinion letter from the OTS and the OCC and preserving the authority of state regulators in banking and securities.

NASAA’s Corporate Finance Committee, which is chaired by Mark Connolly, New Hampshire Director of Securities, with Randall Schumann, Wisconsin Securities Division Legal Counsel, as Vice-Chairmen met in Albuquerque, New Mexico, on February 19, 2008, and Ellen Lieberman, Alan Parness, and Gary Emmanuel (on behalf of the ABA Committee on State Regulation of Securities) were invited to join a portion of that meeting by conference call to discuss issues of particular interest. Among the issues raised again by our Committee were the need for uniformity for state Rule 701 exemptions, the need for states to reexamine their exemptions for options, warrants and rights to acquire securities listed on the NASDAQ Global and Cap Markets and other exchanges, difficulties experienced in registering securities (including new shelf registrations virtually identical to previous shelf-registrations), and preparing for electronic filing of Form D.

Reports and Studies. The Financial Services Roundtable in November 2007 published its report, The Blueprint For U.S. Financial Competitiveness. The Blueprint suggests policy reforms and makes 68 individual recommendations, including implementing principles-based financial regulation to better serve both financial services firms and consumers, implementing prudential supervision and enforcement that would encourage constructive and ongoing engagement
between firms and their regulators, permitting optional national insurance charters, modernizing depository institution charters, and permitting optional national securities or national universal financial charters that would bypass state regulation. (http://www.fsround.org/cec/pdfs/FINALCompetitivenessReport.pdf)

The Rand Report commissioned by the SEC was published in a pre-publication version in January 2008. The SEC is seeking comments, there has been some talk it may be addressed in Congressional hearings, and Commissioner Cox has asked the SEC staff to develop advice based on the report. In broad terms, the report notes that investors are generally highly satisfied with their own financial service providers (based in large part on the personal attention they receive). With a diversity of business models, affiliations and services, functional differences between broker-dealers and investment advisers have blurred in recent years and led to investor confusion as to the different functions and different fiduciary responsibilities of advisors and brokers, thus perhaps suggesting a need for changes in the legal and regulatory environment. (http://www.sec.gov/news/press/2008/2008-1_randiabdr eport.pdf). While the SEC attempted via 2005 rulemaking to clarify some boundaries between broker-dealers and investment advisers by permitting non-adviser broker-dealers to charge fees to investors based on account size, that rule was overturned by the D.C. Court of Appeals in 2007 in Financial Planning Association v. Securities and Exchange Commission, 482 F.3d 481 (D.C. Cir. 2007)

In February 2008, An Empirical Study: Perception of Fairness of Securities Arbitration, which was prepared for the Securities Industry Conference on Arbitration, was released. The Survey reported that more than half of the securities customers who responded found arbitration to be unfair and biased and more so than court litigation. More than 50% did conclude that arbitration was economical. NASAA issued a news release in response to the Survey calling for immediate action to improve the fairness of the system of securities arbitration, beginning with the removal of the mandatory industry representative from arbitration panels.

As I previously reported in the Blue Sky Bugle, Eric R. Dinallo, who formerly served as Chief of the Investment Protection Bureau of the New York State OAG under then Attorney General Eliot Spitzer, and now is New York’s Insurance Superintendent, was appointed by Governor Spitzer to chair the New York State Commission to Modernize the Regulation of Financial Services. The group had its first formal meeting on January 18, 2008, and discussed converting all financial services industry sectors from rules-based to principles-guided regulation (that means that the principles would be a guide in interpreting and adopting regulations and statutes, but rules would continue to exist). As first proposed, there would be ten principles for licensees as well as ten for regulators (the latter including accountability, easily understood guidance and having an appropriate basis for any inquiry). Other issues the commission is exploring include eliminating burdensome out-of-date rules, having a single regulator for all financial services in the state, and having a risk-based approach to regulation.

Enforcement and Investigation. FINRA and various state regulations, including New York Attorney General Andrew Cuomo (under the state’s 1921 Martin Act which does not require proof of intent to defraud), are looking at the subprime mortgage brouhaha. The City of Cleveland, Ohio, filed a lawsuit in January against 21 lenders, investment banks, and other mortgage-related businesses with respect to damages of hundreds of millions of dollars relating to subprime lending and securitization (asking for a jury trial) in which Cleveland alleges that the sub-prime mortgages and corresponding foreclosures constitute a public nuisance (City of Cleveland v. Deutsche Bank Trust Co; http://www.city.cleveland.oh.us/pdf/whats_new/ForeclosureDocument1-11-08.pdf). In the wake of investigations launched by Massachusetts Secretary of State William Galvin and Attorney General Martha Coakely and the filing of an administrative complaint, Merrill Lynch agreed to reimburse the City of Springfield, Massachusetts, for losses associated with its investment into collateral debt obligations, which state officials called unsuitable for the city and which lost most of their value; the Attorney General’s office is continuing its review to determine whether additional action is necessary.

Private Rights of Action. The U.S. Supreme Court in Stoneridge Investment Partners v. Scientific-Atlanta Inc., 552 U.S. ____, 128 S.Ct. 761 (2008), ruled against the plaintiffs’ right to sue customers and suppliers of an issuer under Section 10(b) and Rule 10b-5. The plaintiffs (petitioners) had alleged losses after purchasing the issuer’s stock. The respondent customers and suppliers had agreed to arrangements that allowed the issuer to mislead its auditor and issue a misleading financial statement affecting its stock price, but the respondents had had no role in actually preparing or disseminating the financial statement. The Court held that the customers and suppliers were not liable as
primary violators under the Securities Exchange Act of 1934 since they did not themselves make misstatements relied on by the public or violate a duty to disclose; they were at most aids and abetters. Since the Court had previously held, in Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A., 511 U. S. 164 (1994), that the private cause of action implied in Section 10(b) and Rule 10b-5 did not extend to aiders and abettors, the private right of action did not reach the respondents.

NASAA had filed an amicus brief and expressed disappointment over the ruling. The SEC staff and three of the five SEC commissioners had favored submitting an amicus brief in support of the petitioners, but the White House took a contrary view and instead instructed the Solicitor General to support “affirmance” of the Eighth Circuit decision which favored the respondents. Subsequent to the decision, some commentators have suggested that scheme liability under Section 10(b) is dead. Others suggest that an implied private right of action might still reach secondary actors in the financial sphere, including lawyers, accountants, and banks, who cause a public filing to be false, since Stoneridge dealt instead with ordinary business transactions that were deceptive and were not in the public sphere. Still others have suggested that a new Congress might address this issue next year.

The California Court of Appeals, 2nd Appellate District, in Apollo Capital Fund v. Roth Capital Partners, 158 Ca. App 4th 226 (2007), reached a similar conclusion with respect to a California statute. That Court held, among other things, that there is no private right of action under the California Corporate Securities Law Section 25403, which provides that any person that knowingly provides substantial assistance to another person in violation of any provision of any rule or order under the statute is deemed to be in violation to the same extent as the primary violator.

SEC Rulemaking. In Release No. 33-8878, the SEC adopted final rule amendments generally allowing smaller domestic and foreign private issuers to conduct primary securities offerings using Forms S-3 and F-3. In initially proposing the changes, the SEC asked whether the effect of state blue sky law would make it prohibitively difficult for companies without “covered securities” to register such securities in primary offerings on Form S-3 and F-3 pursuant to the proposal. Apparently the SEC concluded it would be prohibitively difficult because, in the final rule, issuers using Form S-3 and F-3 would be required to have at least one listed class of common equity securities, causing most securities offered pursuant to the new eligibility rules to be “covered securities” preempted from state blue sky regulation.

Meetings and Events. The Committee held a luncheon event, in person and by conference call, on February 27, 2008. A spirited discussion of new Form D was conducted by the leading lights of our drafting committee for the Committee’s Form D comment letter—Gary Emmanuel of Reitler Brown & Rosenblatt and Carmen Gaspero of Katten Muchin Rosenman LLP. The luncheon was graciously hosted by Marianne McKeon, Andrew Pagliughi and Chris Bergin of Dewey LeBoeuf LLP.

The Committee on State Regulation of Securities will next meet on Saturday, April 12, 2008, 10:30 a.m. – 12:00 p.m., at the Hilton Anatole Hotel in Dallas, Texas, at the ABA Section of Business Law Spring Meeting. We have confirmed that Texas Securities Commissioner Denise Voigt Crawford and Dan Waller, our liaison from Texas, will join us. Our Subcommittee on Broker-Dealers and Investment Advisers will meet immediately prior to the Committee meeting on April 12 from 9:30-10:30 a.m. We anticipate that the meetings will be in Steuben, Atrium I and II, Mezzanine Level. We will have a Committee dinner Friday night April 11 and ask that you contact Benjamin L. Nager, Sidley Austin LLP (212-839-8755, bnager@sidley.com), to let him know if you expect to attend and how many will be in your party. (Advance Meeting registration deadline: March 20, 2008; hotel reservation deadline: March 20, 2008; http://www.abanet.org/buslaw/meetings/2008/spring/.)

The Committee is sponsoring three MCLE programs as follows:

- Navigating Safe Harbors and Blue Skies - The abcds of A Private Offering of Securities (the D refers to Regulation D—a basic overview of private placements for the Young Lawyers Forum) Thursday April 10, 2008 11:30 a.m. – 1:00 p.m. Chair: Richard Leisner of Trenam Kemker; with Carmen A. Gaspero, Jr. of Katten Muchin Rosenman LLP
- Hot Securities Law Issues for Small Business II Friday April 11, 2008 10:30 a.m. – 12:30 p.m.; Chair: F. Lee Liebolt
- Ssh! Privacy Laws -- Basics, Bugaboos, and Beyond Friday April 11, 2008 2:30 p.m. – 4:30 p.m.; Chair: Shane Hansen of Norcross & Judd LLP.
The Committee submitted a comment letter on November 20, 2007 to the California Department of Corporations with respect to a proposed revision to California Rule 260.204.9. The proposal would eliminate an exemption from investment adviser licensing under the California Corporate Securities Law for advisers exempt from federal registration under Section 203(b)(3) of the Investment Advisers Act of 1940 and with fewer than 15 clients and more than $25 million of assets under management (except for those who only advise venture capital companies as defined).

THE BULLDOG GETS MUZZLED

By: Alan M. Parness
Cadwalader, Wickersham & Taft LLP

Phillip Goldstein has made a name for himself as the securities regulators’ arch-nemesis, by single-handedly knocking out the SEC’s so-called “hedge fund rules” under the Investment Advisers Act of 1940 in Goldstein v. SEC, 451 F.3d 873 (D.C. Cir. 2006). He has also been a major proponent of the concept that certain of the constraints under the federal and state securities laws are unconstitutional, as violations of the free speech rights guaranteed by the First Amendment of the U.S. Constitution and comparable provisions in state constitutions. In doing so, Mr. Goldstein has made himself an obvious target for greater scrutiny by securities regulators.

In one recent dust-up, the Securities Division (the “Division”) of the Massachusetts Secretary of the Commonwealth’s office commenced an administrative proceeding in January 2007 under the Massachusetts Uniform Securities Act (“MUSA”), against Bulldog Investors General Partnership, a general partnership, its four general partners, consisting of three hedge fund limited partnerships and a corporate managing partner (which managing partner also served as sole general partner of one of the hedge funds), two limited liability companies, each serving as general partner and investment adviser to one of the other two hedge funds, and the four individual principals of the entities, including Mr. Goldstein (collectively, “Bulldog”), charging that Bulldog offered unregistered securities in violation of MUSA by means of its website and certain related activities.

As described in the court decision cited below, Bulldog maintained an interactive website from about June 9, 2005 to January 5, 2007, providing information about its investment products to any visitor, including press articles and a printable brochure about its three hedge funds. The brochure included brief summaries of the funds’ respective investment approaches, and a link on the site led to a conclusory statement regarding the funds’ performance. Visitors to the website could request additional information by completing a registration screen asking for certain personal information and agreeing to a disclaimer which included statements to the effect that the additional information was for information purposes only, was not an invitation to subscribe for interests in any of the funds, and was not an offer or solicitation in any jurisdiction where unlawful or unauthorized. According to the decision, one Massachusetts resident who submitted the requested personal information received additional information about the funds by e-mail, together with an offer to discuss the funds with a Bulldog representative by telephone; among the materials provided was a letter discussing the Bulldog funds’ returns as compared to the Standard & Poor’s 500 Index. That letter also included a statement apparently designed to offend any regulator who might see it:

“We don’t need a nanny regulator to tell us right from wrong. And unlike most mutual fund managers, we put our money where our mouths are. Since day one a significant portion of our net worth has been invested in Full Value Partners [one of the hedge funds] so you can be sure that our interests are closely aligned with yours. In our opinion that is more important than all the cosmetic rules and regulations any regulator can dream up.”

Bulldog answered the administrative complaint in February 2007, denying the Division’s allegations and raising a defense based on the First Amendment and a comparable free speech provision in Article XVI of the Massachusetts Declaration of Rights. While the administrative proceeding was pending, Bulldog, together with an unaffiliated individual residing in Massachusetts claiming that he wanted to have access to and read the information contained in Bulldog’s website, but didn’t want to invest in any of Bulldog’s securities, filed a separate action in March 2007 with the Massachusetts Superior Court against William Galvin, the Secretary of the Commonwealth, and the Division’s Chief of Enforcement, alleging that the conduct forming the basis of the administrative complaint was protected by the First Amendment and the Declaration of Rights, asserted claims under the federal and state civil rights acts, and sought declaratory and injunctive relief, including a motion for a preliminary injunction to halt the administrative proceeding.
The Superior Court initially declined to rule on the plaintiffs’ motion, pending action in the administrative proceeding. A state hearing officer ultimately issued findings of fact and rulings of law in the administrative proceeding, concluding that Bulldog had offered unregistered securities via its website, and that there was no exemption available, principally because of the materials sent to the Massachusetts resident and because Bulldog had violated conditions in the exemptions prohibiting general advertising. Once the Acting Director of the Securities Division issued a final order in October 2007 adopting the hearing officer’s findings and rulings, and ordering Bulldog to cease and desist from further violations and pay an administrative fine of $25,000, the Court held a hearing on plaintiffs’ request for a preliminary injunction against enforcement of the final order and any further enforcement proceedings against them. That motion was denied in a December 26, 2007 decision. Bulldog Investors General Partnership v. Galvin, No. 07-1261-BLS2, 3A Blue Sky L. Rep. (CCH) ¶ 74,681 (Mass. Super. Ct. 2007) (hereinafter, “Galvin”).

The Galvin decision is an interesting analysis of the tension between the securities laws and federal and state constitutional protections of free speech. Initially, the Superior Court first found no precedent for Bulldog’s assertion that the application of MUSA to the website violated Article XVI of the Massachusetts Declaration of Rights, noting that Bulldog cited no authority relating to regulation of commercial speech or speech otherwise analogous to that involved in the case.

The Court then went on to analyze Bulldog’s First Amendment argument, noting that Bulldog didn’t identify any decision striking down any statute, regulation or application of either with respect to offering or advertising securities, and that the U.S. Supreme Court had on a number of occasions “cited the securities area as an example of speech regulation that does not violate the First Amendment.” In this regard, the Court considered whether the speech in question was commercial or non-commercial speech; the plaintiffs contended that the communications were non-commercial, since they didn’t propose any commercial transaction, and further, that the offending language in the letter quoted above was political speech. The State argued that the conduct in question wasn’t speech, but “merely incidental to a regulable transaction, that is, the sale of securities.” The Court disagreed with both parties, characterizing the website materials and e-mail attachments as

“... neither acts of offer and acceptance, in a direct contract sense, nor merely information about hedge funds in general or Bulldog funds in particular. Rather, they are in the nature of advertising, calculated to generate interest in investment in Bulldog’s funds...”

Accordingly, the Court concluded that the communications were clearly commercial, and that the inclusion of “political” commentary “in otherwise commercially oriented speech does not change its fundamental character.”

Noting that even commercial speech is protected by the First Amendment from unwarranted government regulation, the Court applied a four-prong test from the U.S. Supreme Court’s Central Hudson decision (447 U.S. 557 (1980)) to determine whether that was the case here, namely: (1) whether the speech in question provided truthful information about lawful activity; (2) whether the government has a substantial interest to be achieved by restricting the speech; (3) whether the regulatory technique was in proportion to the government’s interest; and (4) whether the government’s interest could be served as well by a more limited restriction on the speech.

As regards the first prong, the Court rejected the State’s contention that the information provided by Bulldog was misleading and related to unlawful activity, thereby failing the first prong of the test. However, it then went on to conclude that the second prong was satisfied because MUSA is designed “to protect the integrity of capital markets, and thereby to preserve the overall health of the economy, by ensuring that investors make decisions based on full and accurate material information.” The Court also concluded that MUSA satisfied the third prong, since it served the state’s interest by prohibiting any public offering without registration, subject to narrow exemptions. As regards the fourth prong, which the Court found “the most difficult to apply here,” the Court analyzed whether the state could regulate the speech without burdening “substantially more speech than is necessary to further the government’s legitimate interests,” and concluded that the Division’s order “fit directly within the longstanding arm of securities regulation that Courts have consistently accepted as permissible.” The Court rejected Bulldog’s claim that the website didn’t provide a mechanism to make an actual investment and that it hadn’t and wouldn’t sell interests in the hedge funds to non-accredited investors, the Court finding that “indiscriminate advertising to the general public tends to increase the likelihood of sales to ineligible persons,
who may be persuaded to invest without the full information that registration would provide.” The Court also rejected Bulldog’s suggestion that the state could achieve its objective with less burden on speech by monitoring actual investments, including requiring documentation of eligibility, subject to audit by regulators or even verification by regulators prior to investment transactions, concluding that such a system seemed to be more, rather than less, of a burden on speech.

Finally, the Court rejected Bulldog’s apparently belated argument that the Division’s regulations violated the so-called “dormant” aspect of the Commerce Clause of the U.S. Constitution, on the basis that regulating Bulldog’s website necessarily regulates commerce in other states. The Court found that the Division did not regulate the website in and of itself, but rather a combination of the website and the direct e-mail communication to a Massachusetts resident, and cited cases to the effect that regulation of e-mail sent into a state doesn’t implicate the dormant Commerce Clause where federal law authorizes state regulation in the area.

Bulldog might have avoided its confrontation with the Division by following the guidelines of the SEC’s no-action letters in IPOnet (July 26, 1996) and Lamp Technologies, Inc. (May 29, 1997), authorizing the use of password-protected websites in connection with private offerings relying on Rule 506 of SEC Regulation D under the Securities Act of 1933 (the “1933 Act”), without the issuer running afoul of the prohibition on general solicitation or general advertising in Rule 502(c) of Regulation D. Pursuant to these letters, an issuer could create a website with initial unrestricted access, but providing little or no specific information about its offering, and requiring prospective investors to provide background information by completing a questionnaire on the website to confirm their status as accredited investors, before they could access any specific offering materials. After vetting such prospects, the issuer could then provide passwords only to those it determines to be accredited investors, allowing them to access further information on the website about the offering (but with a 30-day waiting period before an actual investment would be allowed). Assuming that the issuer otherwise complies with Rule 506 of Regulation D, it could then assert preemption of state registration by reason of 1933 Act § 18(b)(4)(D). It’s unclear from Galvin whether Bulldog ever attempted to raise this argument, although footnote 3 in the opinion notes that Bulldog filed Form D’s with the SEC (but apparently not with the Division) for two of the three hedge funds in question, and it would also appear from the description of Bulldog’s activities in the opinion that it probably exceeded the website-related activities permitted by the SEC’s no-action letters anyway.

By way of subsequent developments, according to a proxy statement filed by Bulldog with the SEC on February 15, 2008 in connection with Bulldog’s proxy contest seeking to elect its nominees as trustees of, and announcing a tender offer for, Franklin Universal Trust, Bulldog has filed an appeal of the decision in Galvin. In addition, according to a March 3, 2008 article by Paula Schaap, “Bulldog to Take Bite Out of SEC Ad Regs,” available on the ‘HedgeFund.net’ website, Mr. Goldstein has filed a request for a no-action letter from the SEC, in which “he has asked that he be allowed to maintain an open Web site as long as the firm doesn’t enter into transactions with unaccredited investors,” and threatening that if the SEC didn’t provide a favorable response soon, “he would seek a court ruling as to whether the SEC is violating commercial First Amendment rights.”

**NASAA URGES SEC TO CLASSIFY EQUITY INDEXED ANNUITIES AS NON-EXEMPT SECURITIES**

*By: Karen Tyler*

NASAA President, North Dakota Securities Commissioner

NASAA believes that Equity Indexed Annuities (“EIA’s”) are securities and that they do not fall within the exemption from regulation found in Section 3(a)(8) of the Securities Act of 1933, 15 U.S.C. § 77c(a)(8). We urge the SEC to adopt this position and to assert its jurisdiction over these products so that all investors who purchase EIA’s can benefit from the protections available under the securities acts. We understand that the SEC has been studying EIA’s ever since the agency first sought public comment on their status in its 1997 concept release. See Equity Index Insurance Products, Securities Act Release No. 33-7438, 1997 WL 473102 (Aug. 20, 1997). Although perhaps understandable given the complexity of the issues presented, this ongoing process has created an unfortunate regulatory vacuum. In the absence of definitive guidance from the SEC, EIA’s have generally been regarded as exempt from regulation by virtue of Section 3(a)(8), 15 U.S.C. § 77c(a)(8). As a result, many investors have been subject to fraud and other misconduct in the offer and sale of EIA’s without the protections that the securities laws normally afford.

This state of affairs is especially troubling because EIA’s lend themselves to abusive sales practices. Agents
portray EIA’s in very alluring terms, and because these products are so complex, most investors cannot look behind the sales pitch and assess the high costs and significant risks they actually entail. At the same time, EIA’s offer such generous commissions that agents cannot resist selling them, regardless of how unsuitable they may be for investors. As one recent analysis explains:

[E]quity-indexed annuities’ complexity makes it virtually impossible even for brokers and agents to properly evaluate the annuities. Salesmen can readily determine, though, that commissions paid for selling equity-indexed annuities—as high as 10% or 12%—are much higher than commissions paid on mutual funds and variable annuities. . . . The net result of equity-indexed annuities’ complex formulas and hidden costs is that they survive as the most confiscatory investments sold to retail investors.

Craig McCann and Dengpan Luao, An Overview of Equity Indexed Annuities, SECS. LITIG. AND CONS. GRP., at 13 (2006) (emphasis added).1

This regulatory gap has proven to be particularly harmful to our most vulnerable investors, our senior citizens. The elderly are all too often the victims of fraud through the sale of variable and equity indexed annuities. At the SEC’s first Senior Summit in July 2006, then-NASAA President Patty Struck shared state enforcement statistics indicating that “unregistered securities, variable annuities, and equity-indexed annuities are the most pervasive financial product involved in senior investment fraud.” See Patricia D. Struck, President, NASAA, Statement at SEC Seniors Summit, at 2 (July 17, 2006). Those statistics further show that in some states, well over half of all senior fraud cases involve variable or equity-indexed annuities. Id.

In NASAA’s view, shielding investors from the predatory sale of EIA’s is one of the most important steps that the SEC can take to advance the cause of investor protection. It is an essential complement to the other important initiatives that the SEC and fellow regulators have pursued over the last two years in an effort to reduce the financial exploitation of senior citizens. Those initiatives include strengthening investor education programs, conducting joint exams of “free lunch” seminars, and bringing dozens of enforcement actions against those who target seniors. See Christopher Cox, Chairman, SEC, Remarks to the “SEC Speaks in 2008” Program of the Practicing Law Institute, at 7 (Feb. 8, 2008).2 In addition, the SEC, NASAA, and the Financial Industry Regulatory Authority have recently launched a new effort to identify best practices “used by financial services firms in dealing with the special challenges faced by senior investors.” Id.

While all of these steps are important components of an overall investor protection strategy, none can have the impact of a declaration by the SEC that an entire class of investments widely used to exploit seniors shall henceforth be subject to the broad array of protections available under the federal securities acts. Those protections include rigorous disclosure and suitability standards; testing and licensing requirements for agents; and tough sanctions that can overcome the lure of high commissions. All of these measures are sorely needed with respect to EIA’s, and we therefore urge the SEC to resolve the longstanding uncertainty surrounding these products by declaring them to be securities subject to federal regulation.

The prerequisites for this regulatory initiative are in place. The legal foundation is more than adequate. EIA’s are securities in the form of investment contracts, and they do not qualify for the exemption from regulation set forth in Section 3(a)(8) of the Securities Act of 1933, 15 U.S.C. § 77c(a)(8). From the standpoint of public policy, consumers need protection from the abuses that occur so frequently in the marketing of EIA’s as investments. The threat has grown significantly in recent years. EIA’s are relatively new products, but their sales volume has increased sharply, from $14 billion in 2003 to an estimated $25 billion in 2005. Jonathan Coleman, Equity Indexed Annuities: “Securities” or Exempt Insurance Products Under the Federal Securities Laws?, 34 No. 2 SEC. REG. L. J. 1, 2 (2006). Also increasing are reports of seniors and other investors being exploited through the sale of variable as well as equity indexed products. Regulatory enforcement actions and private lawsuits abundantly document the sales practice abuses that are often used to sell EIA’s, from misrepresentations and omissions to utter disregard for suitability standards. Finally, there is no regulatory impediment or practical consideration that can justify further inaction. Although the status of EIA’s

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1 Available at http://www.slcg.com/research.php?c=1b&i=18.

2 Available at http://www.nasaa.org/Issues___Answers/Legislative_Activity/Testimony/4999.cfm.
has remained uncertain for over a decade, neither the passage of time nor the SEC’s earlier positions on the subject of EIA’s preclude the agency from now asserting its regulatory jurisdiction.

Regulating EIA’s as securities is not only a matter of sound legal analysis. It will also fulfill Congress’s underlying intent. The Supreme Court has again and again declared that the securities laws are remedial statutes, “which should be construed broadly to effectuate [their] purposes.” See Tcherepnin v. Knight, 389 U.S. 332, 336 (1967). The Court has specifically cautioned that “in searching for the meaning and scope of the word ‘security’ in the Act, form should be disregarded for substance and the emphasis should be on economic reality”—not economic theory. Id. at 336. The corollary to these principles is that exceptions and exemptions in remedial statutes are to be construed narrowly. See, e.g., Lowe v. SEC, 472 U.S. 181, 225 (1987) (White, J., concurring) (citing “longstanding policy of construing securities regulation enactments broadly and their exemptions narrowly”); Sorrell v. SEC, 679 F.2d 1323, 1327 (9th Cir. 1982) (exemptions are construed narrowly and the burden of proof falls on those who invoke the exemption).

These principles of statutory interpretation are particularly important with respect to the analysis of complex investments like EIA’s. The temptation is to view these products through a highly technical economic lens. But this approach violates the basic obligation that every regulator has to interpret the securities laws generously in order to protect the investing public. Analyzed in keeping with these rules of statutory construction, EIA’s should be subject to regulation by the SEC.

In short, when a financial product poses a significant threat to the investing public, and when sufficient legal grounds exist to regulate that product as a security, regulators have a duty to act. We encourage the SEC to do so without further delay.

THE SEC’S RECENT AMENDMENTS TO SMALLER REPORTING COMPANY DISCLOSURES

By: Jennie Getsin, Ropes and Gray LLP

In December 2007, the Securities and Exchange Commission (“SEC”) released its final rules relating to the reporting requirements for “smaller reporting companies.” The new rules became effective as of February 4, 2008. The new rules are scaled to reflect the characteristics and needs of smaller companies and their investors. They replace the disclosure requirements formerly found in SEC’s Regulation S-B, which applied to “small business issuers.” The new rules eliminate Regulation S-B, and move scaled disclosure requirements to Regulation S-K or the newly-created Article 8 of Regulation S-X.

The “smaller reporting company” category includes companies that qualified as “small business issuers” before the new rules, as well as most companies that qualify as “non-accelerated filers” (“non-accelerated filers” are companies with a public common equity float of less than $75 million). Under the new rules, companies that have less than $75 million in public common equity float (i.e. market value of shares held by non-affiliates) will qualify as smaller reporting companies and be eligible to use scaled disclosures. Companies unable to calculate their public common equity float will qualify if they have less than $50 million in annual revenues upon entering the system. These standards are more generous than under the former requirements where to qualify as a “smaller reporting company” companies had to have less than $25 million in public common equity float and less than $25 million in annual revenue. As a result of this change, many more companies will qualify for scaled disclosure.

The new rules permit foreign companies to qualify as smaller reporting companies if they use domestic forms (instead of the “F” forms for foreign private issuers) and if they prepare their financial statements in accordance with U.S. Generally Accepted Accounting Principles. Previously, the only foreign companies permitted to use SEC scaled disclosure requirements were Canadian companies. The new rules continue to exclude investment companies, including business development companies, and asset-backed issuers from eligibility for scaled disclosure treatment.

In the past, small business issuers filed their registration statements and periodic reports using SEC forms designated with the letters “SB.” Under the new disclosure rules, small business issuers will have the option to file their next annual report for a fiscal year ending after December 15, 2007 on Form 10-KSB or the standard Form 10-K. Any quarterly reports due before this annual report may be filed on Form 10-QSB or Form 10-Q. After the next annual report, all future annual and quarterly reports must be filed on the standard Securities Act and Securities Exchange Act forms. Using the standard forms is not expected to increase burdens for small business issuers, though the information required to be disclosed on the standard
forms may differ. Smaller reporting companies may choose to comply with scaled or non-scaled financial and non-financial item requirements on an item-by-item basis in any one filing. However, where the smaller reporting company requirement is more rigorous, the company must comply with the more rigorous standard. This is a departure from the former practice, which provided that companies either reported under Regulation S-K or reported as a small business company under Regulation S-B.

The SEC’s final rule regarding scaled disclosure for smaller reporting companies can be found at http://www.sec.gov/rules/final/2007/33-8876.pdf.

**FROM THE OTHER SIDE OF THE DESK**

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

*I don’t know the key to success, but the key to failure is trying to please everybody.*

Bill Cosby

The recent SEC revisions to Form D will require it to be filed electronically (proposed in SEC Release 33-8814; adopted in Release 33-8891) using the EDGAR system. Electronic filing will commence on a voluntary basis on September 15, 2008 and be mandatory for all filers commencing March 16, 2009.

As described in the Releases and on the SEC web site, EDGAR filers must go through a process of obtaining an identification number known as a Central Index Key, or CIK. The CIK is a unique identifier, somewhat akin to a taxpayer ID or Social Security Number, which will always lead to a specific issuer of securities. Although the Commission had previously indicated the possibility of a different or somewhat simplified procedure, Part III.A (page 60 et seq. of Release-33-8891) indicates that the procedure will be substantially identical to that required of all EDGAR filers, with the possible exception of a minor simplification (see below).

At present, CIKs are most commonly issued to reporting companies. All such issuers go through the procedure summarized below. Both Releases indicate that each nonreporting issuer filing an initial Form D would be required to go through these steps.

The Commission expressed the view in Release 33-8814 that electronic filing would “reduce significantly the costs and burdens of preparing and filing Form D information … [and] could represent a substantial savings for small businesses and others filing Form D information.” The Commission also stated that the electronic filing could perhaps allow more issuers to file their own Forms D without the assistance (and attendant fees) of a law firm. Apart from any other difficulties that may emerge during the transition to electronic filing, assignment of CIKs can present specific difficulties that small, entrepreneurial issuers may be unable to resolve without legal assistance.

**Obtaining a CIK**

As summarized in the Releases, in order to obtain a CIK several steps must be taken on behalf of an issuer:

A “Form ID” must be electronically filed by or on behalf of the issuer, providing the issuer’s legal name, address, taxpayer ID and other ministerial information. Within two business days after the electronic filing, a paper authentication document must be faxed to the SEC, reflecting a manual signature and notarization and including the accession number assigned to the electronic filing (the Commission indicates in Release 33-8891 that this requirement may be modified).

Following acceptance of the Form ID (generally two days following receipt of the authentication documentation), the SEC will issue the following access codes:

- The CIK, which is a public number and may not be changed by the issuer.
- A CIK Confirmation Code (CCC), used in the header of electronic filings to indicate that the filing is authorized by the issuer.
- A Password, which allows the issuer to log onto the EDGAR system, submit filings, and change the CCC.
- A Password Modification Authorization Code (PMAC), which must be used if a filer wishes to change a password.
- A Passphrase, used to create or change a CCC, Password, or PMAC.

The Password, PMAC and Passphrase are subject to specific rules. Each must be exactly eight characters, and include at least one number and one special character, such as @, #, * or $. All of them are case-sensitive, and Passwords expire every 12 months.

Once a CIK has been obtained, it is permanent, but it should be apparent that a good deal of maintenance is required with respect to Password, CCC, PMAC and
Passphrase so that the CIK can be properly attached to a new filing even if the issuer should change its name. Moreover, security considerations dictate changes in all parts of the identification other than the CIK at least whenever employees with knowledge of the identification leave a filer’s employment.

Given that the Commission’s own estimate is that 95% of Form D filers are entrepreneurial, and that each of those filing a Form D for the first time will have to go through the steps outlined above, and will have to establish a mechanism for the maintenance and security of its Password, CCC, PMAC and Passphrase, it seems fairly likely that this procedure will be excessively burdensome for small issuers who are just conducting their first real capital-raising round, particularly if they are widget manufacturers rather than software developers. The probable result will be either an increased reliance on law firms, greater use of financial printers, or a whole new industry segment dedicated to Form D filings.

A Single Nonreporting Issuer May Already Have One or More CIKs

Notwithstanding the Commission’s goal of one issuer/one CIK, on occasion more than one CIK has been assigned to the same issuer. This has come about because, for some time, the Commission has been assigning CIKs to each nonreporting company filing a Form D without requiring such issuers to go through the application process outlined above. Exactly when it began doing so is unclear, but CIKs were apparently assigned to nonreporting filers for Forms D filed commencing in January of 2002. Multiple CIK assignments seem unlikely to have occurred before that time.

There is apparently no procedure in place for notifying a nonreporting issuer that it has been assigned a CIK, with the result that many – perhaps even most – nonreporting companies that have filed an initial Form D since early 2002 don’t know that, as a result of such filing, they have already been assigned a CIK. There is apparently no procedure in place at the Commission for insuring that nonreporting issuers are assigned only one CIK. Moreover, because nonreporting issuers are so frequently unaware that they have already been given a CIK, multiple CIKs can be and have been assigned to the same company. Consider the following cases:

- A nonreporting company filed a Form D and was assigned a CIK. Thereafter, the company conducted an IPO. As part of the IPO preparations, it applied for and received a CIK. It then had two CIKs.

- A nonreporting company organized as an LLC filed a Form D and was assigned a CIK. It subsequently filed another Form D, and either as a result of a typographical error in the company name as submitted or a typographical error at the Commission in entering data, it was assigned a second CIK with its name incorrectly spelled. The same company then reorganized as a corporation, conducted another offering, and filed another Form D. A third CIK was assigned.

In a nutshell, it looks as though more than one CIK may be assigned for essentially simple reasons. Restructuring seems to be a particular problem. Getting to a single CIK for a specific issuer is likely to involve multiple efforts over a period ranging from a few days to months or more. The Releases do not address the fact that many issuers will already have CIKs or provide any guidance as to how they should proceed if that is the case.

Determining and Resolving CIK Issues

To learn whether a CIK has been assigned and to correct an assignment of more than one CIK:

- Log on to the SEC web page (www.sec.gov).
- Under the “Filings & Forms (Edgar)” heading, select “Search for Company Filings.”
- On the next page, choose “General-Purpose Searches -- Companies and Other Filers.” (You could also choose “Special-Purpose Searches -- CIK Lookup,” but then you will have to do a further search on the CIK(s) found.)
- Next, search the issuer name. Use the broadest sensible name. If your issuer is “American Manufactured Automobile Parts,” you should probably use at least “American Manufacture” or even “American Manuf”.
- If an issuer has changed its name in a dramatic way, e.g. ABC Widgets has become XYZ Manufacturing, former name(s) should be searched as well as the current name.
- You will either be given an indication that there are no matches or a list of CIKs and company names.
• Click on a CIK to verify the filer. You will not be able to see the actual Form D filing, but the date of filing and the address of the filer will be shown, and that is often enough to tell you whether more than one number has been assigned. Paper copies can be obtained in the event of uncertainty.

• If more than one CIK has been assigned, call the Office of Filings and Information Services at (202) 551-8090. They will work with you to resolve questions.

Resolving CIK Issues is Important

Resolving any CIK issues that you discover is important for several reasons. First, while a substantial majority of nonreporting issuers filing Form D will never go public, if and when an issuer does conduct its first public offering, any multiple CIK assignments will have to be resolved then. It’s simply one more thing in the IPO checklist, and one that is often avoidable.

Second, now that we have a final rule governing electronic filing that requires the use of the EDGAR system, multiple CIK assignments should be resolved at the earliest possible time, preferably before filing the first electronic Form D. Resolution may or may not be accomplished within the 15-calendar-day time frame for Form D filings, and so it is prudent to work ahead when possible.

Finally, even if some other method of filing or tracking Form D filings by issuers is ultimately adopted, presumably the existing database will be migrated to a new system and the nonreporting issuers who received multiple CIKs will still appear to be separate issuers. Thus, assignment of more than one CIK may significantly muddy the historical waters of a particular issuer’s filings.

The Key to Success

Assignment of multiple CIKs doesn’t create an insoluble problem, but it does create confusion. As practitioners, we know that it’s best to avoid confusion whenever possible, and to find ways of resolving it at the earliest feasible time. A few simple steps can expedite resolution:

- First, make it a routine practice to check the EDGAR database prior to filing a Form D for any issuer other than those you are certain have never filed a Form D (issuers you have organized, for example). If necessary, obtain paper copies of filings to verify assignment of more than one CIK to a single issuer.
- Second, if you find that more than one CIK has been assigned, begin proceedings immediately to insure that all filings are recorded under the single CIK that is most appropriate for the issuer’s current status. If, as in the example above, an issuer has reorganized, filings should be consolidated under the current form of organization and not an old form or an incorrect name.
- Third, track the status of the correction. The Commission, although entirely cooperative in correction efforts, does not always notify an issuer representative that the necessary changes have been effected.
- Finally, if you know your issuer’s CIK, be sure to include it in your cover letter to the Commission.

An undiscovered and unresolved CIK issue could lead to delay in making required filings, whether of Form D or some other filing that requires a CIK number for the filer. Taking these steps will not be a key to success for every CIK issue that arises, but it may be the closest you can come to pleasing everybody and not failing. The SEC will be pleased, your clients will be pleased, and you will have the satisfaction of knowing you have averted a potential problem.

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EDITORIAL

By Martin A. Hewitt
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“It was the best of times, it was the worst of times; it was the age of wisdom, it was the age of foolishness; it was the epoch of belief, it was the epoch of incredulity; it was the season of Light, it was the season of Darkness; it was the spring of hope, it was the winter of despair; we had everything before us, we had nothing before us; we were all going directly to Heaven, we were all going the other way.” – Charles Dickens.

We have all read this quote, whether in high school or college, but never before has it had such relevance for the Blue Sky community. As our practice undergoes its biggest transformation in more than a dozen years one might wonder what will be the end result of all the
machinations at the SEC. In reading the releases referred to throughout this edition of the Blue Sky Bugle one can’t help but notice the myriad implications that cannot as yet be fathomed; however, there are certain aspects of the releases that makes one wonder about how the Blue Sky landscape will change in both the near and distant future.

There are several areas of concern, both legal and technical, that must be resolved before a working/coordinated system is once again in place. At present the SEC’s schedule provides for voluntary electronic filing in September of 2008 with mandatory filing slated for March of 2009. The first question is how can so much be accomplished in so little time? Second, while it is worth noting that the state of Washington has already announced proposed rules to reflect the SEC releases, it is not clear from any published materials that the state of Washington can go live electronically in a timely manner. Third, while Washington may be the first jurisdiction to attempt to tackle various legal and technical problems with the new rules, even assuming that the other 53 jurisdictions follow in relatively short order, it appears that both practitioners and issuers will have to work with a bifurcated filing system – manual for the states and territories, electronic on the federal level – for many years to come.

It is worth noting that there were some jurisdictions which failed to adopt the use of Form D for Rule 506 offerings until the passage of the National Securities Market Improvement Act of 1996. This means that it took nearly 14 years to create some level of uniformity to the extent it exists at all. Assuming all goes well with the adoption of and adaptation to the new rules, is it even reasonable to assume that this time frame can be reduced by half? We can only hope.

Finally, it should be noted that the number of authors is once again slipping a tad. We need contributors. There are many practitioners, regulators, and brilliant paralegals who have knowledge and experience from which we could all benefit. Please feel free to contribute. It really doesn’t take too much time to write a brief article and the information shared could prove invaluable. We all work within our own neighborhood so to speak, and a fresh perspective is always welcome.

Though not as important, the Blue Sky Bugle is always looking for photos representing Blue Sky or the current outlook for all of us in the Blue Sky community. This month we have an anonymous entry of Puget Sound viewed from the Space Needle taken while attending our meetings in Seattle, Washington. It is perhaps a good pictorial representation of the current climate which we all must weather.
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