

MSBA BUSINESS LAW SECTION, SECURITIES LAW COMMITTEE

MINUTES FROM MEETING OF AUGUST 9, 2007

Ken Abel called the meeting to order at approximately 8:30 a.m.

The following people were in attendance: Securities Commissioner Melanie Lubin, Assistant AG Tim Cox, Assistant AG Joy Sakamoto-Wengel, Ken Abel, June Hooper, Penny Somer-Greif, Eric Orlinsky, Scott Freed, Rick Sachs, Tom Owsley

The following people participated via telephone: Chris Roberts, Jennifer Porter, Doug Fox, Charlemayne Walker, Greg Yawman, Jack Frenkel and Paula Miller.

K. Abel reviewed and briefly discussed each of the handouts. The handouts included the following: (1) Release Nos. 33-8814; 34-55980; 39-2446; IC-27878 – Electronic Filing and Simplification of Form D; (2) Release No. 33-8813 – Revisions to Rule 144 and Rule 145 to Shorten Holding Period for Affiliates and Non-Affiliates; (3) Release No. 33-8812 – Revisions to the Eligibility Requirements for Primary Securities Offerings on Forms S-3 and F-3; (4) Release No. 34-56010; International Series Release No. 1303 – Exemption of Compensatory Employee Stock Options from Registration Under Section 12(g) of the Securities Exchange Act of 1934; (5) Release Nos. 33-8819; 34-56013; 39-2447; - Smaller Reporting Company Regulatory Relief and Simplification; and (6) Release No. 33-8828; IC-27922 – Revisions of Limited Offering Exemptions in Regulation D.

NEW BUSINESS

DISCUSSION OF RECENT SEC PROPOSED RELEASES

Release Nos. 33-8814; 34-55980; 39-2446; IC-27878 – Electronic Filing and Simplification of Form D: This proposal would mandate electronic filing of information required by Regulation D of the Securities Act of 1993, including simplifying and restructuring the information requirements in the Form D.

Ken opened the discussion to solicit feedback from the Committee regarding whether it was interested in filing a comment letter to this release, and if so how would the Committee be interested in approaching the issues. Commissioner Lubin offered her experience about how electronic filing works with IARD/CRD: (1) the issuer opens an account with a third party; (2) designated persons are authorized to use the system on behalf of issuer; (3) a filing is made with the central filing system; (4) a single wire transfer for all state related fees is sent to a lock box affiliated with the central filing system; and (5) the third party disseminates the filing and the filing fee to each respective state. She offered to send the Committee some materials relied upon during the consideration process for IARD/CRD.

There was some discussion about whether attorneys might be granted a generic filing number to make filings on behalf of their clients. Commissioner Lubin said this issue was raised with IARD/CRD, but the regulators fought back. The filing number serves as important tracking and

indexing component for the system, so the SEC is not likely to permit an issuer to file an electronic Form D using a generic filing number issued to a third party.

Release No. 33-8828; IC-27922 – Revisions of Limited Offering Exemptions in Regulation D:

The SEC is proposing to (1) create a new exception from the registration provisions of the Securities Act of 1933 for offers and sales of securities to “large accredited investors;” (2) would permit limited advertising in an exempt offering where each purchaser meets the definition of “large accredited investor;” (3) define “large accredited investor;” (4) shorten the timing required by the integration safe harbor in Regulation D; and (5) apply uniform disqualification provisions to all offerings seeking to rely on Regulation D.

The Committee discussed how this proposal basically permits limited advertising, but only for super rich investors. According to the proposal, the announcement would be required to state prominently that sales will be made only to large accredited investors.

The conundrum arises as follows: If an issuer has a “bad” Rule 506 offering, it can fall back on Section 4(2). Rule 507 would not be a Section 4(2) exemption; it would be exempt under the SEC’s general exemptive power under Section 28 of the Securities Act. Therefore, if the issuer publishes a limited announcement of a Rule 507 offering, and subsequently sells to a person that is not a large accredited investor, that sale blows the issuer’s exemption, and the issuer cannot fall back on Section 4(2).

The Committee discussed the implications of the SEC’s movement towards an investment based qualification for an accredited investor. The Committee members agreed that the definition of “investments” should entitle a potential investor to include the value of his own business, adding that persons who invest in Reg. D offerings are often owners of small businesses themselves.

The Committee discussed the 90-day safe harbor rule under Rule 507, and how an issuer could start with a Rule 507 offering and publish a tombstone ad, and then wait 90 days pursuant to the safe harbor rule and proceed with a Rule 506 offering. Chris Roberts spoke about how impractical this possibility is since most small and medium companies trying to raise capital need the money as soon as possible, and how investors in these types of companies are generally not buying the security because they saw the offering in a flyer.

The Committee discussed how Rule 507 will effectively permit issuers with VC sponsors to advertise by making presentations, while smaller companies who do not have similar connections will simply be out of luck.

The Committee noted the following releases:

Release No. 33-8813 – Revisions to Rule 144 and Rule 145 to Shorten Holding Period for Affiliates and Non-Affiliates: The SEC is proposing six-month holding period requirement under Rule 144 for “restricted securities” of companies that are subject to the reporting requirements of the Exchange Act. The proposed six-month holding period for restricted securities of reporting companies would be extended, for up to an additional six months, by the amount of time during which the security holder has engaged in hedging transactions.

Restricted securities that are not subject to the reporting requirements would continue to be subject to a one-year holding period prior to any public resale.

Release No. 33-8812 – Revisions to the Eligibility Requirements for Primary Securities Offerings on Forms S-3 and F-3: The SEC is proposing to amend the eligibility requirements for Forms S-3 and F-3 to allow domestic and foreign private issuers to conduct primary securities offerings on these forms without regard to the size of their public float or the rating of the debt they are offering, so long as they satisfy the other eligibility conditions of the respective form and do not sell more than the equivalent of 20% of their public float in primary offerings pursuant to the new instructions on these forms over any period of 12 calendar months. The amendments are intended to allow more companies to benefit from the greater flexibility and efficient in accessing the public securities markets afforded by these forms without compromising investor protection.

Release No. 34-56010; International Series Release No. 1303 – Exemption of Compensatory Employee Stock Options from Registration Under Section 12(g) of the Securities Exchange Act of 1934:

Release Nos. 33-8819; 34-56013; 39-2447; - Smaller Reporting Company Regulatory Relief and Simplification: The SEC is proposing to allow companies with a public float of less than \$75 million to qualify for the smaller company requirements, up from \$25 million for most companies. The proposals would combine for most purposes the “small business issuer” and “non-accelerated filer” categories of smaller companies into a single category of “smaller reporting companies.”

The meeting was adjourned at approximately 10:00 a.m.

June Hooper, Esq., Secretary of Meeting