From: IVAN GRISWOLD [IGRISWOL@corp.ca.gov]

Sent: Wednesday, April 01, 2009 10:23 AM

To: Gerald Niesar

Subject: RE: Corporations Committee Letter re: Release 119-C

Gerry:

Thanks for your input; this is very helpful.

Can I circulate your email to the committee drafters? We are meeting later this week, and I'd like to discuss this issue.

Thanks,

Ivan

>>> "Gerald Niesar" <gniesar@ncblaw.com> 3/30/2009 3:56 PM >>>

Ivan: I have now studied the SEC Rule that would be relied upon If the Commissioner went with the State Bar committee recommendation.

I have one serious problem with that approach, which would rely on SEC Rule 3a4-1. To be included in the list of folks who would NOT be BDs, one would have to meet the conditions of one of the paragraphs (a)(4)(i), (ii) or (iii). The most likely subparagraph that would apply to early stage companies seeking to raise equity capital would be (ii) which basically contemplates (A) an officer, director or employee of the Issuer who is going to continue with the Issuer in some meaningful, non-securities offering capacity after the offering is completed, (B) has not been a Broker or affiliate in the past 12 months, and (C) doesn't participate in more than one offering every 12 months (other than non-relevant situations). (C) is the big problem for early stage companies. Many, if not most, of them are in a financial situation where, once an offering is completed, they will shortly need to begin raising a new round of financing. Often that is within less than 12 months after the previous round was completed. Especially in very early stages, the first offering may be a mere "bridge" offering to obtain capital to get launched, provide money for a thorough business plan and offering documents, and carry the company long enough to get the next financing completed. Often these are literally back-to-back offerings, with the second being at a significantly higher price, perhaps for a Series A Preferred vs. the Common issued in the bridge round; therefore, these two offerings, though close in time, would not be "integrated offerings". Likewise, for high-tech companies even when the Preferred Stock rounds are involved, the next offering often comes right after the conclusion of the former. In fact, it should be noted that the "rule of thumb" for offerings that are NOT integrated, is an offering that commences six months or more after the earlier offering. Thus, even the SEC rules contemplate that it will often be necessary for companies to begin two offerings in a period of less than twelve months.

For these reasons, I would suggest that, if reliance is to be had on Rule 3a4-1, the California version should delete the (C) condition from (a)(4)(ii).

Thank you for soliciting my comments. I would be happy to supplement this if you think that would be useful.

Best Regards,   Gerry Niesar

Gerald V. Niesar
Niesar & Whyte, LLP
90 New Montgomery Street, 9th Floor
San Francisco, CA 94105
P: 415-882-5300 x. 232
F: 415-882-5400

From: IVAN GRISWOLD [mailto:IGRISWOL@corp.ca.gov]
Sent: Wednesday, March 11, 2009 10:39 AM
To: Gerald Niesar
Cc: Oscar Escobar
Subject: Corporations Committee Letter re: Release 119-C

Hi Gerry,

Since you initially brought this issue to the Department's attention, I thought I'd forward the Corporations Committee's latest regulatory proposal regarding People v. Cole. As we discussed last year, the proposal would reference federal law (Rule 3a4-1), and create an "associated person" exclusion from the term "broker-dealer."

Alternatively, we could implement Rule 3a4-1, as a clarification of Corporations Code Section 25004, and more specifically what it means to be "engaged in the business of effecting transactions in securities." Accordingly, persons satisfying the Rule 3a4-1 safe harbor, would not be deemed to be "engaged in the business...."

I'd be very interested in any comments/suggestions you may have on the proposal.

Thanks,

Ivan