

REGULATION OF SECURITIES COMMITTEE

REPORT PREPARED FOR THE SEPTEMBER 23, 2010 COUNCIL MEETING

By Jerry Schwartz

1. Next Scheduled Meeting of the Committee

Our Committee recently met on August 19. The next meeting has not yet been scheduled.

2. Council Approval

No approvals are being requested.

3. Membership

We have created a current Committee membership of about 70 persons, including men and women with experience ranging from very little to extensive, members of law firms of all sizes, attorneys from private and public companies, attorneys from the Michigan Securities Division, and from a law school. Our Committee has some diversity, and we are looking for opportunities to expand our Committee's diversity. Several new members have been added in the past few months.

4. Accomplishments Toward Committee Objectives

A new Michigan Uniform Securities Act became effective October 1, 2009. Last year we received from the Michigan Office of Financial and Insurance Regulation ("OFIR") an initial draft of rules for the new Act and provided comments on the initial draft. Subsequently OFIR prepared a new draft of Articles 1, 2 and 3 of proposed rules for the new Act, which we also reviewed and commented on. We anticipate making comments on further drafts of rules when they become available to us. In addition, from time to time, members of our Committee have provided comments to OFIR on proposed and issued transition orders relating to the new Act.

5. Meetings and Programs

Members of our Committee who volunteered to review proposed rules for the new Michigan Uniform Securities Act met on June 28, 2010 to discuss their comments on Articles 1, 2, and 3 of the proposed rules; and subsequently provided comments on those proposed rules to OFIR.

Our Committee also had a meeting on August 19, 2010 to:

- Discuss topics for articles to be written for the *Michigan Business Law Journal*, and identify persons who would like to write the articles;
- Obtain an update from OFIR on the proposed rules and transition orders for the new Michigan Uniform Securities Act;
- Discuss performance fee and custody rules applicable to investment advisers in Michigan;
- Hear a presentation on the new Dodd-Frank Wall Street Reform and Consumer Protection Act; and
- Discuss an August 12, 2010 Delaware Chancery Court decision upholding a Board's implementation of a poison pill.

Minutes of the June 28, 2010 and August 19, 2010 meetings were prepared and are available for review.

6. Publications

At our August meeting, we identified several topics for articles to be submitted for publication in the *Business Law Journal* for the March 2011 issue. We have one firm commitment and several tentative commitments to write articles. We expect to firm up the tentative commitments over the next few weeks.

7. Methods of Monitoring Legislative/Judicial/Administrative Developments and Recommended Action

The new Michigan Uniform Securities Act, designated Act No. 551 of the Public Acts of 2008, became effective October 1, 2009. OFIR has issued four transition orders to address issues that are expected to arise under the new Act between when it became effective on October 1, and when rules are promulgated to implement the new Act. OFIR has also issued drafts of some of the rules for the new Act. Diane Bissell of OFIR has been doing an excellent job keeping us up to date on drafts of the transition orders and rules as they become available, and on the transition orders as they are issued. We understand that a fifth transition order is contemplated by OFIR.

8. Miscellaneous

Nothing to report.

If I can be of help to you, please let me know. My contact information is Jerry Schwartz, Dickinson Wright PLLC, 500 Woodward Avenue, Suite 4000, Detroit, Michigan 48226. Phone: 313-223-3628. Email: jschwartz@dickinsonwright.com.

Date: September 15, 2010

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**Minutes of the August 19, 2010 Meeting
of the Regulation of Securities Committee
of the Business Law Section of the State Bar of Michigan**

A meeting of the Regulation of Securities Committee of the Business Law Section of the State Bar of Michigan was held at 4:00 p.m., local time, at the offices of Dickinson Wright PLLC at 38525 Woodward Avenue, Bloomfield Hills, Michigan 48304.

The following members of the Committee were present:

Loren Andrulis (by phone)	Mark Metz
Maxwell Barnes (by phone)	Dave Millar (by phone)
Jonathan Berg	Cyril Moscow (by phone)
Dianne Bissell (by phone)	Jerry Schwartz
Marguerite Donahue (by phone)	Stuart Sinai
Shane Hansen (by phone)	Chad Vance (by phone)
Tim Horner (by phone)	Brad Wyatt

Call Meeting to Order

Mr. Schwartz called the meeting to order and acted as Chairman and Secretary of the meeting. He welcomed everyone to the meeting and expressed appreciation to Diane Bissell of the Office of General Counsel of the Michigan Office of Financial and Insurance Regulation ("OFIR") for joining the meeting.

Articles for March 2011 issue of Michigan Business Law Journal

Mr. Schwartz advised the meeting that the March 2011 issue of the *Michigan Business Law Journal* is scheduled to include a number of articles relating to securities law matters. According to Dan Kopka of ICLE, the articles are typically 10 to 15 double spaced pages in Word or WordPerfect, with some shorter, and others up to 20 pages. A copy of the Michigan Business Law Journal Style Guidelines provided by Mr. Kopka was handed out at the meeting. The Committee has been advised that the deadline for submitting articles for the March 2011 issue is November 30, 2010. The Committee discussed potential topics for articles, including:

- Regulation of private investment funds under the new Michigan Uniform Securities Act (2002) and Federal securities law;
- The Dodd-Frank Wall Street Reform and Consumer Protection Act, including topics like Say on Pay and changes to Regulation D;
- Anticipated restructuring of the Michigan Securities Office as a separate division;
- Small Business Investment and securities exemptions; and

- Limited offering exemptions from registration under the new Michigan Uniform Securities Act (2002).

Members of the Committee expressed interest in writing on the topics listed above and others. Mr. Schwartz asked that each member wishing to write an article send him an email this month with a brief summary of the topic they have chosen.

Rules and Transition Orders under the new Michigan Uniform Securities Act

Ms. Bissell advised the Committee of the progress being made by OFIR on the proposed rules for the new Michigan Uniform Securities Act. She indicated that some have been circulated within OFIR for comment, others within OFIR and outside. Regarding Articles 1, 2 and 3 of the proposed rules, that she provided to the Committee for review, Ms. Bissell confirmed that she received the comments prepared on behalf of the Committee's Rules Subcommittee. Ms. Bissell did not estimate when the rules would be finalized.

Ms. Bissell indicated that to date four transition orders have been issued in connection with the new Michigan Uniform Securities Act, and that a fifth transition order is expected to be issued in the near future.

Investment Adviser Performance Fees and Custody of Customer Funds

Mr. Hansen presented a summary of Michigan law as it relates to investment advisers charging performance fees and having custody of customer funds. He pointed out that under the existing transition orders, investment advisers in Michigan can not charge performance fees, without a specific order authorizing them to do so. Mr. Hansen indicated that in light of OFIR's other commitments, responding to requests for orders can take a long time.

The Committee discussed the impact of Michigan precluding performance fees for investment advisers, especially as it relates to sponsors of private equity and similar funds. Members of the Committee commented on the adverse impact that prohibiting performance fees is having. Also discussed was the model rule issued by the National Association of State Securities Administrators permitting performance fees.

Dodd-Frank Wall Street Reform and Consumer Protection Act

Mr. Berg presented a summary of the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act. Among the topics that Mr. Berg covered were the Act's provisions relating to the private adviser exemption, SEC whistleblower programs, removing the requirement that smaller reporting companies have their internal controls audited, SEC subpoena power, SEC authority to adopt rules precluding mandatory arbitration, say on pay proxy statement proposals, compensation clawbacks, and changes to Regulation D.

Poison Pills — Yucaipa v. Leonard Case

Mr. Sinai gave a presentation on the case of Yucaipa American Alliance Fund II, L.P. v. Leonard Riggio, Court of Chancery of the State of Delaware, C.A. No. 5465-VCS (Decided August 12, 2010). It discussed the adoption of a poison pill plan by Barnes & Nobles' Board of Directors. The plan was adopted subject to a subsequent stockholder vote. The Court determined that the adoption of the plan was a reasonable response to a threat that the corporation's stockholders would relinquish control through a creeping acquisition without the benefit of receiving a control premium.

Mr. Schwartz thanked each of Ms. Bissell, Mr. Hansen, Mr. Berg and Mr. Sinai for preparing and providing their helpful and informative presentations.

Adjournment

On motion duly made, seconded, and unanimously approved, the meeting was adjourned at 5:30 p.m., local time.

/s/ Jerome M. Schwartz
Jerome M. Schwartz
Chairman and Secretary of the Meeting

**Minutes of the June 28, 2010 Meeting
of the Rules Subcommittee of the
Regulation of Securities Committee
of the Business Law Section of the State Bar of Michigan**

A meeting of the Rules Subcommittee (the "Subcommittee") of the Regulation of Securities Committee of the Business Law Section of the State Bar of Michigan was held at 3:00 p.m., local time, at the offices of Dickinson Wright PLLC at 500 Woodward Avenue, Suite 4000, Detroit, Michigan 48226.

The following members of the Subcommittee were present:

Loren Andrulis (by phone)
Jonathan Berg

Jerry Schwartz
Tim Horner (by phone)

Call Meeting to Order and Introductory Comments

Mr. Schwartz called the meeting to order and acted as Chairman and Secretary of the meeting. He welcomed everyone to the meeting, and confirmed that each person had a copy of the June 16, 2010 e-mail calling the meeting, to which was attached drafts of Articles 1, 2 and 3 of the rules for the new Michigan Uniform Securities Act (2002) (the "Draft Rules"). The Draft Rules had been provided to Mr. Schwartz by Diane Bissell of the Office of the General Counsel of the Michigan Office of Financial and Insurance Regulation.

Discussion of Draft Rules

Mr. Schwartz indicated that the purpose of the meeting was to discuss the Draft Rules, including comments that had been provided previously by members of the Subcommittee.

The Subcommittee discussed each proposed rule in Articles 1, 2 and 3 of the Draft Rules.

Mr. Schwartz offered to incorporate all of the Subcommittee's comments into a memorandum and forward it to Diane Bissell so she could consider the comments when she next revises the Draft Rules. The Subcommittee authorized Mr. Schwartz to prepare and submit the memorandum.

Mr. Schwartz thanked each of Messrs. Andrulis, Berg and Horner for attending the meeting and for their very helpful comments on the Draft Rules. He also expressed appreciation for comments provided by Mark Metz prior to the meeting.

Adjournment

On motion duly made, seconded, and unanimously approved, the meeting was adjourned at 4:45 p.m., local time.

/s/ Jerome M. Schwartz

Jerome M. Schwartz

Chairman and Secretary of the Meeting