



California Corporate & Securities Law

Commissioner Revises Broker-Dealer Release

By Keith Paul Bishop on December 5, 2011

In 2007, a California Court of Appeal upheld the convictions of two officers/directors for engaging in unlicensed broker-dealer activity in violation of Corporations Code Section 25210. *People v. Cole*, 156 Cal. App. 4th 452 (2007). Neither defendant contested that he fell within the definition of “broker-dealer” in Corporations Code Section 25004 (*i.e.*, any person *engaged in the business of effecting transactions in securities* for the account of others or for his own account). Instead, the defendants argued that they were not “agents” as defined in Corporations Code Section 25003.

The Agency Exclusion

The defendants were charged with being unlicensed broker-dealers, not unlicensed agents. Why then did they bother to argue that were not agents? The answer lies with Corporations Code Section 25004(a)(2) which excludes agents from the definition of “broker-dealer” when they are employees of a broker-dealer or issuer.

For Want Of A Commission, An Exclusion Is Lost

Corporations Code Section 25003(a) defines an “agent” as any person who represents either a broker-dealer or an issuer in effecting or attempting to effect purchases or sales of securities. Section 25003(d) provides that an officer or director comes within the definition of an agent *if he or she receives a commission for the purchase or sale of the securities*. The Court of Appeal found that the two defendants were far more than employees – they were corporate officers and/or directors. As such, they could only be agents if they received a commission for the sale of these securities.

A Shot Not Heard

Although the Court of Appeal’s opinion is in accord with the statutes, it departed sharply from what I believed to be the historic understanding of these two statutes. I provide a more in-depth analysis in “*A Shot Not Heard – The Court of Appeal Holds that an Issuer’s Directors and Officers Must Be Licensed as Securities Broker-Dealers*,” Business Law News, Issue 3 (2008).

Please contact **Keith Paul Bishop** at Allen Matkins for more information kbishop@allenmatkins.com

<http://www.calcorporatelaw.com/>

Commissioner Issues Revised Release

The Commissioner responded to the *Cole* decision by adopting a safe-harbor rule, 10 CCR § 260.004.1, which incorporates by reference a safe harbor rule for associated persons adopted by the Securities and Exchange Commission (Rule 3a4-1). Late last month, the Commissioner issued a revised [Release 119-C](#) concluding that under the Corporate Securities Law, an officer or director can be:

- Included in the definition of “broker-dealer” if he or she engages in the business of effecting transactions in securities.
- Excluded from the definition of “broker-dealer” if he or she does not engage in the business of effecting transactions in securities.
- An agent, if he/she is included in the definition of “broker-dealer”, and receives commission specific to effecting transactions in securities.
- Excluded from the definition of “broker-dealer” if he or she engages in the business of effecting securities transactions, but does not receive commission specific to effecting transactions in securities.
- Excluded from the definition of “broker-dealer” if he or she satisfies the conditions set forth in Section 260.004.1.

Please contact **Keith Paul Bishop** at Allen Matkins for more information kbishop@allenmatkins.com

<http://www.calcorporatelaw.com/>