California's Phantom Stock Plan Exemption

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Some issuers prefer not to issue actual shares to their employees but want their employees to share in any appreciation in the value of their shares. A phantom stock plan is one way to achieve this result. Of course, their are tax (including IRC § 409A), accounting, cash flow and other issues to be addressed before implementing such a plan. This posting is focused on whether the award of an interest in a phantom stock plan by an employer must be qualified under the Corporate Securities Law of 1968.

Rule 260.105.5 answers the question by exempting from the issuer qualification requirement (Corp. Code § 25110) any transaction whereby an issuer allocates to its employees or employees of its parent or subsidiaries "units" representing a right eventually to receive cash (but not stock) measured by (i) dividends paid on shares of capital stock; (ii) the market value of shares of capital stock of the issuer; or (iii) both.

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