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BROKER DEALER

SEC Adopts Municipal Advisor Registration Requirements

The Securities and Exchange Commission has issued final rules requiring municipal advisors to register with the SEC. The final rules define "municipal advisor" to include a person who provides advice regarding municipal financial products or the issuance of municipal securities to or on behalf of a municipal entity or obligated person (such as a nonprofit university or nonprofit hospital).

Whether a person is deemed to have provided "advice" is dependent upon all the relevant facts and circumstances, including whether the advice is particularized to meet the needs of a municipal entity. Providing general information is not considered "advice" for such purposes if such information does not involve a recommendation regarding municipal financial products or the issuance of municipal securities. Examples of general information include the following: (i) information of a factual nature without subjective assumptions, opinions or views; (ii) information that is not particularized to a specific municipal entity or type of municipal entity; (iii) information that is widely disseminated for use by the public, clients or market participants other than municipal entities or obligated persons; and (iv) general information in the nature of educational materials.

Certain persons are exempted from the definition of "municipal advisor," including municipal entities and employees of municipal entities, underwriters involved in a particular issuance of municipal securities, attorneys, engineers, banks, registered investment advisers, commodity trading advisors, independent registered municipal advisors and swap dealers. Similarly, persons who provide advice to a municipal entity or obligated person with respect to investment strategies also are exempt from registration if the advice does not relate to the investment of proceeds of municipal securities offerings, municipal escrow funds or municipal derivatives.

Persons required to register as municipal advisors must file all forms, including Form MA and Form MA-I, through the SEC's public website submission portal. Such persons are required to register on a staggered basis beginning July 1, 2014.

The SEC's adopting release is available here.

CFTC

CFTC Grants LCH.Clearnet Time-Limited No-Action Relief to Clear Swaps Executed on DCMs or SEFs

The Commodity Futures Trading Commission's Division of Clearing and Risk (DCR) has granted time-limited no-action relief stating that it will not recommend that the CFTC take enforcement action against (i) LCH.Clearnet Ltd. (LCH) for clearing swaps executed on designated contract markets or swap execution facilities (DCM/SEF Swaps) and (ii) current and future clearing members of LCH for clearing DCM/SEF Swaps through LCH. This relief is limited to the classes of swaps that LCH currently accepts for clearing and will expire upon the earlier of March 31,

2014, or the date on which the CFTC approves or denies LCH's application for an amended registration order authorizing LCH to clear DCM/SEF Swaps.

CFTC Letter No. 13-52 is available here.

LITIGATION

Ninth Circuit Rejects Securities Fraud Suit for Failure to Demonstrate Loss Causation

The US Court of Appeals for the Ninth Circuit recently affirmed the lower court's granting of summary judgment to the defendants in a federal securities fraud suit, holding that the plaintiffs had failed to provide sufficient evidence that defendants' conduct had caused the plaintiffs' economic loss.

In 2004, defendants City of Alameda, *et al.* (City), issued municipal bonds in order to fund the construction of a telecommunications system. Plaintiffs Nuveen Municipal High Income Opportunity Fund, *et al.* (Nuveen), purchased over $20 million of the telecom municipal bonds. The telecom system performed poorly, the City sold the system at a loss and Nuveen suffered substantial losses. Nuveen sued the City for federal securities fraud, alleging that Nuveen materially misrepresented the prospects of the telecom system in an official statement meant to induce investors to purchase the bonds. The City moved for summary judgment on the federal claims.

In a claim for federal securities fraud, plaintiffs must establish "loss causation": defendants' alleged misrepresentation must cause the claimant's financial loss. Nuveen argued that it had satisfied the loss causation requirement by offering evidence showing that "but for" the City's misrepresentations, the bonds would never have been issued in the first place. The Ninth Circuit rejected that argument, ruling that the loss causation element required Nuveen to offer evidence that the City's misrepresentations had caused Nuveen's economic loss. Since Nuveen had failed to offer proof that the City's misrepresentations had caused the bonds to decrease in value—which was the source of Nuveen's economic loss—the Ninth Circuit awarded summary judgment to the City on the federal securities fraud claims.

City of Alameda, et al. v. Nuveen Municipal High Income Opportunity Fund, et al., Civ. Nos. 11-17391, 11-17496, 2013 WL 5273097 (9th Cir. September 19, 2013).

Delaware Court Awards Attorneys' Fees for Opposition's Bad Faith Litigation Conduct

The Delaware Court of Chancery recently held that a prevailing party in a lawsuit may be awarded attorneys' fees when the opposing party engaged in bad faith litigation tactics, even when the prevailing party does not actually suffer damages in litigation because their counsel was working for free.

Plaintiffs ASB Allegiance Real Estate, *et al.* (ASB), prevailed against defendants Scion Breckenridge Management, *et al.* (Scion), in a dispute over three joint venture agreements between the parties and obtained reformation of the agreements to correct an error by ASB's attorneys. ASB's attorneys agreed to represent ASB in the reformation action to avoid a malpractice claim. The joint venture agreement contained fee-shifting clauses that would award attorneys' fees to the prevailing party in any dispute over the agreements. However, because ASB's attorneys had represented ASB free of charge, and therefore ASB did not incur any actual fees, the Delaware Supreme Court held that ASB could not enforce the fee-shifting provisions, and remanded for a determination of whether fees could be awarded on equitable grounds.

On remand, ASB argued that it was entitled to its fees based on Scion's bad faith litigation conduct, including the fact that Scion had pursued litigation in three districts and offered expert testimony that the Delaware Court of Chancery Court characterized as "unfounded." The court found that both Scion's dubious expert testimony and Scion's "three-front" litigation strategy constituted attempts to litigate in bad faith. The court found that Scion's expert had "made stuff up," and that the expert's testimony "conflicted directly" with the expert's experience and the prevailing views in his field of expertise. The court also held that when Scion chose to sue ASB in three separate forums, Scion was not defending itself in good faith, but instead attempting to "intimidate" ASB. Accordingly, the court awarded ASB attorneys' fees in connection with its defense against Scion's expert testimony and three-pronged litigation strategy, even though ASB did not actually pay any fees to defend the litigation.

ASB Allegiance Real Estate, et al. v. Scion Breckenridge Management, et al., C.A. No. 5843-VCL (Del. Ch. September 16, 2013).

EXECUTIVE COMPENSATION AND ERISA

IRS Provides Special Rules for Refund of Employer-Paid Taxes Related to Imputed Income for Same-Sex Spouse Benefits

On September 23, the Internal Revenue Service released Notice 2013-61, which provides special rules for those making claims for refunds or adjustments of Federal Insurance Contributions Act (FICA) taxes and federal employment taxes resulting from the Supreme Court's decision in *United States v. Windsor*, 133 S.Ct. 265 (2013).

The *Windsor* decision found that Section 3 of the Defense of Marriage Act, which restricted the federal government from recognizing marriages between two individuals of the same sex that were otherwise valid for state law purposes, was unconstitutional. Based on *Windsor*, the IRS recently announced in Revenue Ruling 2013-17 that the determination of whether a couple is married for federal tax purposes will be based on whether the marriage was legal where it was performed.

Prior to *Windsor*, an employer that made benefits available to the same-sex partners of its employees was required to impute the value of the benefit as income to the employee, and then withhold and pay FICA and employment taxes based on that imputed income amount. However, as a result of Revenue Ruling 2013-17, employers need no longer impute income for those employees with same-sex partners that are validly married.

By its terms, Revenue Ruling 2013-17 has a retroactive effect to all open tax years (currently, this would typically include 2010, 2011 and 2012). As a result of *Windsor* and Revenue Ruling 2013-17, employers are now entitled to recover FICA and employment taxes previously paid by employers on imputed income for validly married employees. Such recovery would typically involve the filing of amended quarterly returns for each affected period. Notice 2013-61 eases the process of recovering those overpayments of FICA and employment taxes by allowing employers to file one annual amended return for each year (including 2013).

Notice 2013-61 gives employers two optional methods to correct 2013 overpayments. The first correction method allows an employer to use its 2013 fourth quarter quarterly tax return (IRS Form 941) to correct any overpayments made during the first three quarters of 2013. The second correction method allows an employer to file one amended employer's quarterly tax return (IRS Form 941-X) for the fourth quarter of 2013 to correct overpayments of FICA taxes for all four quarters of 2013.

Notice 2013-61 also provides an optional correction method for an employer to use for overpayments of FICA taxes that an employer may have made for years before 2013. Specifically, it provides that, rather than filing a Form 941-X for each calendar quarter for which a refund or adjustment needs to be made, an employer may file a single Form 941-X for each calendar year for which a refund or adjustment is desired.

Notice 2013-61 concludes by stating that the special rules are optional. If an employer desires to use regular procedures for correcting employment tax payments instead of the special administrative procedures (e.g., submitting amended returns for each quarter), the employer may still do so.

A copy of Notice 2013-61 is available here.

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