Investment Management Regulatory Update

October 17, 2012

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SEC Rules and Regulations

SEC Grants No-Action Relief to Exclude Tax Blocker from Definition of Investment Company

On August 30, 2012, the staff of the Division of Investment Management of the Securities and Exchange Commission (the "**SEC**") issued a no-action letter to Linn Energy, LLC ("**LINN**"), an oil and natural gas company, stating that it would not recommend enforcement action to the SEC under Section 7(a) of the Investment Company Act of 1940 (the "**Investment Company Act**") against LINN or Linn Co, LLC ("**LinnCo**"), an entity created by LINN to own interests in LINN and structured as a tax blocker to allow tax-exempt and non-U.S. investors to indirectly invest in LINN, if LinnCo did not register as an investment company.

LINN is a Delaware limited liability company that is treated as a partnership for U.S. federal income tax purposes. As a tax partnership, LINN's income and deductions are allocated to the holders of its limited liability company interests (the "**Units**"), which are listed on the NASDAQ Global Select Market ("**NASDAQ**"). Because this tax treatment is unattractive to many tax-exempt and non-U.S. investors, LINN formed LinnCo, a Delaware limited liability company that will elect to be treated as a corporation for U.S. federal income tax purposes, as a means to raise additional capital in the public equity markets. As a tax corporation, LinnCo will offer tax-exempt and non-U.S. investors a means to invest indirectly in Units while allowing them to avoid the adverse tax treatment that would apply if they owned Units directly. Shares of LinnCo will also be listed on NASDAQ. LinnCo's activities will be limited to owning Units and distributing to its shareholders the cash that it receives in respect of its ownership of Units (net of reserves for taxes payable by LinnCo).

Following its initial public offering, LinnCo expects to own Units representing at least 13% of Units currently outstanding, which, together with cash and cash equivalents, will compose all of LinnCo's assets. Therefore, LinnCo might be deemed to meet the definition of investment company in Section 3(a)(1)(A) or 3(a)(1)(C) of the Investment Company Act.

LINN stated in its no-action request that because LinnCo would operate solely as a means for certain investors to invest indirectly in Units through a more favorable tax structure and hold interests that mirror the voting and distribution rights of holders of Units, LinnCo did not raise the concerns underlying the Investment Company Act and was not the type of entity intended to be covered by the Investment Company Act.

In granting the relief requested, the SEC noted that certain provisions of LinnCo's governing documents were intended to place LinnCo's shareholders in the same position with respect to governance and economics (other than taxes) as LINN's direct investors, including provisions requiring that LinnCo (i) maintain a one-to-one relationship between the number of Units it owns and the number of its own shares outstanding, (ii) vote the Units it holds proportionately at the direction of its shareholders thereby effectively giving each shareholder the same voting power with respect to LINN as if such shareholder directly owned an equivalent number of Units, (iii) issue a non-economic voting share to LINN so that LINN has the sole power to elect the board of directors of LinnCo and (iv) not engage in any activity other than holding Units and distributing the cash that it receives with respect thereto (net of reserves for taxes) to its shareholders. Additionally, in LinnCo's governing documents, LINN agreed to provide LinnCo with certain services and to pay on LinnCo's behalf certain expenses. Finally, the SEC noted that LinnCo will not hold itself out as being engaged in the business of investing, reinvesting or trading in securities, and will not acquire any investment securities (as defined in the Investment Company Act) except for Units and cash and cash equivalents.

Notably, the SEC emphasized the "very fact-specific nature" of this no-action request and stated that "the position expressed in this letter applies only to LINN and LinnCo, and no other entity may rely on this position."

- **See a copy of the SEC's no-action letter**
- **See a copy of LINN's letter requesting relief**

SEC Grants No-Action Relief from Surprise Examinations to Investment Advisers to 529 Plans

On September 5, 2012, the SEC's Division of Investment Management issued a no-action letter to the Investment Company Institute (the "**ICI**") stating that it would not recommend enforcement action to the SEC under Section 206(4) of the Investment Advisers Act of 1940 (the "**Advisers Act**") and Rule 206(4)-2 thereunder (the "**Custody Rule**") against an investment adviser that treats a state-created 529 plan trust that is a college savings plan for which it is a program manager (a "**529 Plan**") as a "pooled investment vehicle" for purposes of the Custody Rule.

The Custody Rule provides that "it is a fraudulent, deceptive, or manipulative act, practice or course of business" for an investment adviser that is registered or required to be registered under the Advisers Act "to have custody of client funds or securities" unless they are maintained in accordance with the requirements of the Custody Rule. The Custody Rule requires an investment adviser that has custody of client funds or securities to maintain them with a "qualified custodian" which includes, among others, certain banks, registered broker-dealers and future commission merchants and certain foreign financial institutions. The Custody Rule also requires that these client funds or securities be subject to an annual surprise examination by an independent public accountant. However, there is an exception to this surprise examination requirement for an investment adviser to a "pooled investment vehicle" that is subject to an annual audit (as defined in Regulation S-X) by an independent public accountant registered with the Public Company Accounting Oversight Board (the "**PCAOB**") and that distributes its audited financial statements to its beneficial owners within 120 days after its fiscal year-end. The ICI was concerned that 529 Plans may not be viewed by the SEC as pooled investment vehicles.

The SEC staff stated that it would not recommend enforcement action to the SEC against an investment adviser if the investment adviser treats the 529 Plan for which it is a program manager as a "pooled investment vehicle" under the Custody Rule and as a result would not be subject to an annual surprise examination, so long as the conditions set forth below are true:

- The 529 Plan is a college savings plan;
- The 529 Plan's record-keeper is a registered transfer agent with the SEC;
- The 529 Plan's custodian is a "qualified custodian" as defined in the Custody Rule;
- The assets of the 529 Plan are subject to annual audit (as defined in Regulation S-X) and the audit is conducted in accordance with U.S. generally accepted auditing standards;
- The annual audit is conducted by an independent public accountant registered with the PCAOB;
- The 529 Plan's audited financial statements are prepared in accordance with U.S. generally accepting accounting principles;
- The annual financial statements are annually provided to the state agency or instrumentality responsible for oversight of the 529 Plan within 120 days of the end of the plan's fiscal year;
- The annual financial statements are made available to all existing 529 Plan account holders via the plan's website; and
- The program manager will ensure that the 529 Plan account holders are provided written notification of the availability of the financial statements no later than the delivery of the account holders' next regularly scheduled quarterly account statement.

- **See a copy of the SEC's no-action letter**
- **See a copy of the ICI's letter requesting relief**

Industry Update

CFTC Provides Temporary Registration Relief to CPOs and CTAs that are Required to Register Solely Because of their Swap Activities; NFA Issues Notice that CPOs Relying on Rule 4.13(a)(4) Can Now Pre-file a Rule 4.7 Exemption

On October 11, 2012, the Commodity Futures Trading Commission (the "**CFTC**") issued a no-action letter that, among other things, provides temporary registration relief for commodity pool operators ("**CPOs**") and commodity trading advisors ("**CTAs**") (as well as their "associated persons" and certain other market participants) that are required to register with the CFTC "solely by virtue of their involvement with swaps" (a "**swap CTO or CTA**"). Absent the relief provided by the no-action letter, a swap CPO or CTA would have been required to register with the CFTC by October 12, 2012, which is the effective date of joint rulemaking between the CFTC and the SEC defining the term "swap."

According to the no-action letter, the CFTC staff will not recommend enforcement action to the CFTC against a swap CPO or CTA for failing to register with the CFTC as a CPO or CTA by October 12, 2012, as long as (i) the swap CPO or CTA files a registration application with the National Futures Association (the "**NFA**") on or before December 31, 2012 and (ii) on and after such date, the swap CPO or CTA "is subject to and makes a good faith effort to comply with" the Commodity Exchange Act (the "**CEA**") and the CFTC's regulations as if the swap CPO or CTA was, in fact, registered with the CFTC (regardless of whether the registration has become effective).

According to the no-action letter, the relief will terminate on the date on which the NFA provides notice to the swap CPO or CTA that it is registered as a CPO or CTA or five days after a swap CPO or CTA receives notice from the NFA that it may be disqualified from registration.

In addition to providing temporary registration relief to CPOs and CTAs, the CFTC released a series of Q&As, FAQs and no-action documents last week providing relief or clarity to market participants regarding the implications of the definition of "swap" becoming effective on October 12, 2012, including relief excluding certain types of real estate investment funds and securitizations from the definition of "commodity pool" under the CEA. For a brief overview of this guidance, please see the October 13, 2012 Davis Polk Client Newsflash, ***CFTC Clarifies Temporary Application of Swap Regulations and Delays Some Swap-Related Requirements***.

Separately, the NFA published a notice on September 6, 2012 providing that CPOs who currently rely on the exemption from CPO registration provided by Rule 4.13(a)(4) may now pre-file for a new Rule 4.7 exemption with an effective date of January 1, 2013. Rule 4.7 exempts certain registered CPOs from a number of the disclosure and record-keeping requirements that would otherwise apply to them. According to the NFA's September 6, 2012 notice, by electing to pre-file, the CPO will not become subject to the additional reporting and disclosure requirements related to Rule 4.7 until 2013. In order to pre-file the exemption, the firm must be registered or pending registration as a CPO and must have previously filed with the NFA a Rule 4.13(a)(4) exemption or with the CFTC a related no-action request. The NFA's September 6, 2012 notice contains additional details on how to pre-file the exemption.

In addition, a notice published by the NFA on June 27, 2012 discusses the process of registering as a CPO and the option for persons currently relying on the exemption from CPO registration provided by Rule 4.13(a)(4) to begin the registration process immediately but defer the effectiveness of such registration until January 1, 2013.

- **See a copy of the CFTC's no-action letter**
- **See a copy of the NFA's September 6, 2012 notice**
- **See a copy of the NFA's June 27, 2012 notice**

FINRA Rule 5123 Regarding Filing Obligations in Private Placements to Take Effect on December 3, 2012

On September 5, 2012, the Financial Industry Regulatory Association ("**FINRA**") announced that new FINRA Rule 5123, approved by the SEC on June 7, 2012, will become effective December 3, 2012 and will apply prospectively to private placements (i.e., non-public offerings made in reliance on an available exemption from registration under the Securities Act of 1933 (the "**Securities Act**")) that begin selling efforts on or after that date. The new rule establishes certain filing requirements for FINRA members that participate in private placements, subject to significant exemptions.

Filing Requirement. Under Rule 5123, each FINRA member that sells a security in a private placement, subject to significant exemptions, is required to (i) file with FINRA a copy of any private placement memorandum, term sheet or other offering document used in connection with the private placement, including any materially amended versions of such documents, within 15 calendar days of the date of first sale or (ii) indicate to FINRA that no such offering documents were used. Filings under this rule are "notice" type filings and, therefore, will not be commented on or approved by FINRA.

Confidential Treatment. FINRA will keep confidential all documents and information filed pursuant to Rule 5123 and will utilize such documentation solely for determining compliance with applicable FINRA rules or for other regulatory purposes deemed appropriate by FINRA.

Private Placement Exemptions. Rule 5123 exempts a number of private placements from its requirements, including the following:

- offerings sold by a FINRA member or person associated with a FINRA member solely to any one or more of certain types of investors, including (i) institutional accounts as defined in FINRA Rule 4512(c), (ii) qualified purchasers as defined in Section 2(a)(51)(A) of the Investment Company Act, (iii) knowledgeable employees as defined in Rule 3c-5 under the Investment Company Act, (iv) accredited investors as defined in Securities Act Rule 501(a)(1), (2), (3) or (7) (i.e., institutional accredited investors), (v) employees and affiliates, as defined in FINRA Rule 5121, of the issuer and (vi) other types of investors enumerated in Rule 5123;
- offerings made pursuant to Securities Act Rule 144A or Regulation S;
- offerings of securities of a commodity pool operated by a commodity pool operator, as defined under Section 1a(11) of the CEA; and
- offerings of registered investment companies.

Notably, a private offering made to individual accredited investors in reliance on Section 3(c)(1) of the Investment Company Act may not fall within an exemption to the Rule 5123 filing requirements.

Elimination of Certain Disclosure Requirements. As originally proposed, Rule 5123 would have required a participating FINRA member to deliver to each prospective investor a disclosure document containing information regarding the anticipated use of offering proceeds, offering expenses and offering compensation (and, if the issuer's disclosure documents did not contain the requisite information, to create and deliver a separate disclosure document containing such information). These disclosure requirements have been eliminated from the final rule. For further details on the proposed rule, see the ***November 18, 2011 Investment Management Regulatory Update and the February 21, 2012 Investment Management Regulatory Update***.

Private Placement Filing System. Any required filing under Rule 5123 must be made through FINRA's new electronic private placement filing system, which will be accessible through FINRA's online Firm Gateway. The new filing system will allow a FINRA member to submit filings on behalf of itself and other members involved in the sale of the private placement.

- **See a copy of the SEC's approval order**
- **See a copy of FINRA's regulatory notice**

Litigation

SEC Finds "In-Kind" Contributions Violate Pay-to-Play Rules

On September 27, 2012, the SEC announced in a press release that it had charged a firm that is a registered broker-dealer and municipal securities dealer and one of the firm's former employees with Municipal Securities Rulemaking Board ("**MSRB**") "pay-to-play" violations involving undisclosed campaign contributions to then-Massachusetts state treasurer Timothy P. Cahill while he was a candidate for governor. The rule at the heart of this enforcement action is MSRB Rule G-37, which prohibits firms from underwriting offerings for municipal issuers within two years after any contribution to an official of such issuer. SEC enforcement actions under the MSRB pay-to-play rules are relevant for investment advisers because the rules serve as the model for other federal, state and local pay-to-play rules, including the play-to-play rule under the Advisers Act (Rule 206(4)-5)), and, therefore, shed light on the types of activities that may be viewed as violations of pay-to-play rules. For more information regarding the pay-to-play rule under the Advisers Act, please see the ***July 14, 2010***, ***April 15, 2011***, ***February 21, 2012*** ***and April 19, 2012 Investment Management Regulatory Updates***.

This enforcement action against the firm and its employee is the first SEC enforcement action involving "in-kind" non-cash contributions to a political campaign. MSRB Rule G-37 (and Rule 206(4)-5 under the Advisers Act) broadly defines "contribution" to mean any gift, subscription, loan, advance or deposit of money or anything of value made: (A) for the purpose of influencing any election for federal, state or local office; (B) for payment of debt incurred in connection with any such election; or (C) for transition or inaugural expenses incurred by the successful candidate for state or local office. According to the SEC's press release, the employee conducted campaign activities from his office during work hours and used firm resources in support of Cahill's campaign, including the firm's telephone and e-mail. The SEC determined that the use of firm resources and the employee's voluntary work on behalf of the campaign during work hours were valuable "in-kind" contributions in violation of MSRB Rule G-37.

In addition, the SEC determined that the employee's activities described above were attributable to the firm and, therefore, should have disqualified the firm from engaging in municipal securities business with certain Massachusetts municipal issuers for the two-year period following the contributions. According to the SEC, the firm nevertheless participated in prohibited underwritings with Massachusetts municipal issuers during such period. The SEC's order against the firm found that, among other things, the firm had failed to make or keep records of the contributions and had failed to effectively supervise the employee. The firm consented to the SEC's order without admitting or denying the charges and in settlement agreed to pay approximately $7.6 million in disgorgement, $670,000 in prejudgment interest and a $3.75 million penalty.

In a National Examination Risk Alert (the "**Risk Alert**") and accompanying press release issued by the SEC on August 31, 2012 regarding the MSRB pay-to-play rules, the SEC noted that "SEC examiners have observed practices that raise concerns about firms' compliance with their obligations under MSRB Rule G-37," including practices with respect to record-keeping, adequate supervision and compliance with the two-year ban. The Risk Alert also described procedures related to MSRB pay-to-play compliance that the SEC has observed firms adopt, including training programs, self-certification of compliance with restrictions on political contributions, surveillance for unreported political contributions and preclearance or restrictions on political contributions when permitted by state or local law.

Given the SEC's broad reading of the pay-to-play rules and its recent focus on violations thereof, firms should review their compliance programs and ensure they cover the areas highlighted by the SEC in the Risk Alert and account for both cash contribution as well as "in-kind" contributions such as those found in this enforcement action.

- **See a copy of the SEC's press release**
- **See a copy of the SEC's Risk Alert**

SEC Settles Charges Against Investment Advisers for Failure to Disclose Revenue Sharing Arrangement and Other Conflicts of Interest

On September 6, 2012, the SEC announced the settlement of charges against two affiliated registered investment advisers—Focus Point Solutions, Inc. ("Focus Point") and The H Group, Inc. (the "H Group")—and their owner, Christopher Keil Hicks ("Hicks"), for failure to disclose to their clients a revenue sharing arrangement and other conflicts of interest. According to the SEC, the case against Focus Point, the H Group and Hicks is part of a new initiative developed by the SEC's Asset Management Unit and the SEC's San Francisco Regional Office aimed at undisclosed revenue sharing arrangements that may "corrupt [investment advisers'] ability to provide impartial advice to their clients."

According to the SEC, Focus Point provides non-discretionary investment advice and back-office custodial support to related and unrelated investment advisers. When an adviser hires Focus Point, Focus Point provides the adviser with access to Focus Point's proprietary asset allocation models made up of mutual funds and exchange traded funds. The SEC alleged that Focus Point entered into a revenue sharing agreement in September 2007 with a registered broker-dealer whereby Focus Point agreed to provide certain custodial support services to the broker-dealer and, in exchange, the broker-dealer agreed to pay Focus Point a percentage of every dollar that Focus Point's adviser clients invested in certain mutual funds offered by the broker-dealer. The SEC alleged that Focus Point failed to disclose the revenue sharing arrangement to its adviser clients and also failed to disclose that it had an incentive to recommend the broker-dealer's mutual funds over other investments since such recommendations would generate additional revenue for Focus Point under the revenue sharing agreement. The SEC also noted that Focus Point's Form ADV did not disclose the compensation arrangement. Based on this conduct, the SEC alleged that Focus Point willfully violated (and that Hicks willfully aided and abetted and caused Focus Point's violations of) Sections 206(2) and 207 of the Advisers Act.

The SEC also alleged that there were two additional conflicts of interest in connection with Focus Point being approved as a sub-adviser to a mutual fund that were not disclosed. According to the SEC, the first undisclosed conflict of interest arose during the process of obtaining the approval of the mutual fund's trustees to the sub-advisory agreement. The SEC alleged that Focus Point misrepresented to the trustees that Focus Point would not receive any payments beyond its sub-advisory fee when, in fact, the primary adviser and Focus Point had a separate compensation arrangement whereby the primary adviser would pay Focus Point an additional fee. Although required under Section 15(c) of the Investment Company Act to furnish to the trustees "information as may reasonably be necessary to evaluate the terms" of the sub-advisory agreement, Focus Point, according to the SEC, failed to disclose the separate arrangement to the trustees thereby preventing the trustees from having information reasonably necessary to evaluate the sub-advisory agreement.

The SEC alleged that the second undisclosed conflict of interest arose during the process of obtaining the approval of the mutual fund's shareholders (the vast majority of whom were clients of Focus Point's affiliated investment adviser, the H Group) to the sub-advisory arrangement. According to the SEC, the H Group's affiliation with Focus Point created a conflict of interest and, therefore, the H Group's proxy voting policy required that the proxies be voted by the clients themselves. Instead, the H Group voted the clients' proxies in favor of the arrangement. Based on the conduct relating to the approval of the sub-advisory arrangement by the mutual fund's trustees and shareholders, the SEC alleged that Focus Point willfully violated (and that Hicks willfully aided and abetted and caused Focus Point's violations of) Section 15(c) of the Investment Company Act and that the H Group willfully violated Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-6 thereunder.

Without admitting or denying the SEC's findings, Focus Point, the H Group and Hicks agreed to settle the charges. The SEC censured them, ordered them to cease and desist from future violations of the relevant provisions of the Advisers Act and the Investment Company Act and ordered them to pay civil penalties ($100,000 for Focus Point and $50,000 for each of the H Group and Hicks). In addition, Focus Point agreed to (i) disgorge $900,000 and pay prejudgment interest, (ii) provide a copy of the SEC's order to its existing advisory clients and to prospective advisory clients for a one-year period and (iii) retain an independent compliance consultant to conduct a comprehensive compliance review of Focus Point's policies and procedures and adopt all of the consultant's recommendations (or propose an alternative policy if any recommendation is considered unduly burdensome).

- **See a copy of the SEC's press release**
- **See a copy of the SEC's order**

Supreme Court to Address the Statute of Limitations for SEC Penalty Claims

On September 25, 2012, the U.S. Supreme Court granted certiorari to review Gabelli v. SEC (2d Cir. August 1, 2011), a securities fraud case against two executives of a mutual fund. The question before the Supreme Court is when the five-year statute of limitations period for civil penalty claims brought by the government begins to run. The case originates from a decision in the U.S. Court of Appeals for the Second Circuit holding that the statute of limitations does not begin to run for a claim based on fraud until the SEC discovers, or could have discovered with reasonable diligence, the alleged fraud. The Supreme Court's decision may have a significant impact on the SEC's ability to seek civil penalties many years after the alleged fraud occurred.

The Gabelli Case

The SEC filed a complaint in April 2008 claiming that Marc Gabelli, the portfolio manager of a mutual fund advised by Gabelli Funds, LLC (the "**Adviser**"), and Bruce Alpert (together with Marc Gabelli, the "**Petitioners**"), the chief operating officer of the Adviser, secretly permitted an investor in the mutual fund to engage in market timing transactions from 1999 until 2002 to the detriment of other fund investors. According to the SEC's complaint, during this same period, the Petitioners banned other investors from engaging in market timing. The SEC alleged that the Petitioners misled the mutual fund's board of directors and other investors into believing that market timing of the mutual fund's shares was not a permitted activity. The SEC claimed that, because of the secret nature of the Petitioners' wrongdoing and their affirmative misrepresentations to the board of directors and the other mutual fund investors, the SEC did not discover the fraud until late 2003.

The SEC's complaint sought, among other things, civil penalties in connection with the Petitioners' alleged aiding and abetting violations of the antifraud provisions of the Advisers Act. The Petitioners moved to dismiss the Advisers Act claims on the grounds that the alleged violations occurred (and therefore the related claims first accrued) more than five years before the SEC filed its complaint and, therefore, the claims were time-barred under 28 U.S.C. § 2642. Section 2642 sets forth the applicable statute of limitations and provides that "[e]xcept as otherwise provided by Act of Congress," a claim for civil penalties must be brought within five years "from the date when the claim first accrued." The SEC argued that the claims were timely because the discovery rule—a common law doctrine that delays accrual of a claim until the claim is discovered, or should have been discovered with reasonable diligence, by the plaintiff—delayed the accrual of the claims and the statute of limitations period under section 2642. The U.S. District Court for the Southern District of New York held that the discovery rule did not apply to claims subject to section 2642 and dismissed the Advisers Act claims. The Second Circuit reversed, holding that the discovery rule should be read into section 2642 for claims that "sound in fraud" and that the SEC is not required to plead that the defendants took affirmative steps to conceal their fraud.

Circuit Split

According to the Petitioners, the Second Circuit's holding creates a circuit split with respect to when a claim "first accrues" for purposes of the statute of limitations period for government penalty actions under section 2642. Under the Second Circuit's ruling, the SEC could bring a fraud action seeking civil penalties within five years of discovery of the alleged violation, which could be significantly longer than five years after the alleged violation occurred. In contrast, other circuit courts have construed section 2642 as requiring the government to bring a penalty claim within five years from the date of violation.

- **See a copy of the Second Circuit's opinion**

DavisPolk

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