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Recent Securities Regulatory Developments

Rosenberg v. MetLife—Absolute Privilege extended to Employer Statements on Form U-5s: A March 29, 2007 decision handed down by the NY Court of Appeals held that statements made by an employer on a National Association of Securities Dealers ("NASD") employee termination notice (Form U-5) are subject to an absolute privilege in a defamation suit. *Rosenberg v. MetLife, Inc. (*No. 23, N.Y. 2d (March 29, 2007)[1] The court based its reasoning on the NASD's role as a quasi-governmental entity, whose central responsibility involves investigating and adjudicating suspected violations of the securities laws. Likening the Form U-5 to the preliminary or investigative statements made in a judicial or quasi-judicial proceeding, the court found the public's interest was best served by immunizing employers from any threat of litigation for statements made in the Form U-5. Background on the case, as well as further discussion of the implications of granting an absolute versus a qualified privilege, can be found in our Firm Memorandum dated July 28, 2006 titled *Form U-5 Termination Notices - Absolutely or Qualifiedly Privileged?*

Financial Planning Association v. SEC— vacates Investment Advisers Act exemption for certain broker-dealers:[2] On March 30, 2007, the Court of Appeals for the District of Columbia vacated the SEC's final rule[3] that created an exemption for certain broker-dealers from the fiduciary requirements of the Investment Advisers Act of 1940, as amended (the "Ad-

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1 Available at *http://www.courts.state.ny.us/reporter/3dseries/2007/2007_02627.htm)*

2 2007 WL 935733.

3 Investment Advisers Act Rule 202(a)(11)-1. Adopted in SEC Release Nos. 34-51523; IA-2376; File No. S7-25-99 (April 12, 2005), available at http://www.sec.gov/rules/final/34-51523.pdf

visers Act"). The SEC rule, adopted in April 2005, permitted broker-dealers receiving "special compensation" for giving advice incidental to brokerage services to be excluded from the definition of investment adviser, so long as specific disclosure is made to the customer. The controversial rule allowed qualifying broker-dealers to escape the regulations pertaining to, among other things, record keeping and certain contractual limitations which are applicable to investment advisers registered under the Advisers Act. The case was brought by the Financial Planning Association, which argued successfully that the SEC acted outside its authority in attempting to rewrite the protections afforded by Congress under the Advisers Act. The court also noted that the SEC's rule effectively distinguished between brokers and registered investment advisers solely on the basis of their fee structures, a distinction that was unwarranted under the Adviser Act.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or e-mail Jonathan I. Mark at (212) 701-3100 or jmark@cahill.com; or Linda Sharkey at (212) 701-3016 or lsharkey@cahill.com.