

Kirwan, Michael B.

From: Kirwan, Michael B.
Sent: Thursday, August 15, 2019 2:45 PM
To: Hyde, Kevin E.
Subject: RE: Kevin E Hyde sent you "JEA Request to Attorney General re Performance Plan"

Kevin,

If we view the performance units as being issued and sold by JEA, then the performance units are exempt from both the federal and state securities laws. The units are exempt from registration since they are being issued by a public instrumentality of a state. Section 3(a)(2) of the Securities Act of 1933 and Section 517.051(1) of the Florida Statutes provide this exemption.

The anti-fraud rules should always be considered to apply so an offering memorandum should describe the opportunity for the eligible JEA employees. Whether the municipal securities disclosures required for offerings of \$1,000,000 or more as provided by Rule 15c2-12 of the Securities Exchange Act of 1934 are triggered by an offering of \$1,000,000, I would defer to Chauncey for guidance.

Regarding the letter, a few observations:

1. Who is the letter coming from? The General Counsel's office?
2. In the fourth paragraph, a statement is made to "encourage employees to have 'skin in the game.'" This would seem to suggest that the units are an incentive which may contradict the statements in paragraph 16.
3. Paragraph 8 states that eligible employees can purchase a specified number of units. Do all employees get to subscribe for the same number or is the subscription limit tied to some other criteria?
4. Paragraph 10 refers to vesting of units. This is a new concept since the letter previously stated that the employees had to purchase the units. If the units are purchased, what is the vesting for?
5. Paragraph 10 states that a breaching employee would have to pay back amounts previously received. Paragraph 4 stated that the performance period would be 3 years so what would be the payments prior to 3 years?
6. Paragraph 11 states that the redemption price will include the purchase price. This suggests that the unit can't go negative. If it can't go negative, then it would seem there is no risk of loss other than time value of money. If there is no risk of loss, could argue there is no security being issued. But if no risk of loss, isn't this compensation? Paragraph 12 could be read to suggest that if the JEA's net position decreases, the redemption value decreases.
7. What is the formula for unit payouts, is it simply the percentage by which JEA's net position has changed? Should paragraph 12 be read to mean that it is only the last 12 months that are looked at?
8. Is there a cap on the unit payout? If not, could be very expensive which can expose a board to charges of corporate waste, etc.
9. Paragraph 16 states that the units are not incentives and not connected to services being rendered. If true, then what is the purpose?

Happy to discuss,
Michael

Michael B. Kirwan

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-----Original Message-----

From: Hyde, Kevin E. <KHyde@foley.com>

Sent: Wednesday, August 14, 2019 4:46 PM

To: Kirwan, Michael B. <MKirwan@foley.com>

Subject: Kevin E Hyde sent you "JEA Request to Attorney General re Performance Plan"

Michael;

See attached draft letter regarding the performance unit plan that JEA is offering its employees. This letter (which is being revised by JEA) seeks an advisory opinion from the AG regarding compliance with a specific Florida statute. But, JEA wants to know whether any blue sky laws (do we need to issue any blue sky letter?) are implemented or if this would be treated as a private placement (any requirements for someone being an accredited investor?) Melissa Coffee is looking at this from a securities law standpoint. Please review and let me know your thoughts. I will be out tomorrow but hopefully in some on Friday. Colleen can give you the number. Jacksonville Electric Authority General Advice.

Thanks.

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