

NEW SEC MUNICIPAL ADVISOR REGISTRATION RULES

Hodgson Russ Alert
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SEC delays implementation of certain new Municipal Advisor Rules until July 1, 2014

Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) amended Section 15B of the Securities Exchange Act of 1934 (“Exchange Act”) to create a new class of regulated persons, “municipal advisors,” and requires that these advisors register with the Securities and Exchange Commission (“SEC”). Temporary rules implementing this registration requirement (the “Existing Municipal Advisor Rules”) became effective on October 1, 2010, and makes it unlawful for any municipal advisor to provide certain advice to or on behalf of, or to solicit, municipal entities or certain other persons without registering with the SEC. The Dodd-Frank Act also provides that a person is deemed under the Exchange Act to have a statutory fiduciary duty to any governmental entity for whom such person acts as a municipal advisor.

On September 20, 2013, the SEC adopted permanent rules governing municipal advisor registration and record-keeping requirements (the “New Municipal Advisor Rules”). These New Municipal Advisor Rules have generated significant controversy in the municipal finance community. On Tuesday, January 13, 2014, the SEC announced that the effective date for the New Municipal Advisor Rules would be delayed until July 1, 2014.

Under the New Municipal Advisor Rules, a municipal advisor is a person who provides advice to a state or local government on municipal financial products or the issuance of municipal securities. No compensation is required. Certain firms that are compensated by unrelated broker-dealers, financial advisors, or investment advisors to solicit business from municipal entities or obligated persons (including state and local pension plans, local government investment pools, other participant-directed investment programs or plans, and state and local governments) may also be municipal advisors.

The New Municipal Advisor Rules expand on the exclusion of state and local government employees, underwriters, attorneys and engineers from the definition of municipal advisor. Generally, governmental employees, underwriters, attorneys, engineers, accountants, investment advisors, commodity trading advisors, and swap dealers are **not** considered to be municipal advisors, so long as the requirements for exemption set forth in the New Municipal Advisor Rules are satisfied.

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Government Employee Exemption

State and local government employees, board members, committee members and other similar government officials are exempted from the New Municipal Advisor Rules when acting in their official capacity. This exemption also applies to government employees and officials who may have to participate on other government boards and committees as part of their job.

However, note that the New Municipal Advisor Rules provide that, if a government official also acts as a municipal advisor outside of his or her government responsibilities (e.g., a part time city council member who also acts as a financial advisor in the private-sector), that government official, when acting as a municipal advisor outside of his or her government responsibilities, is still bound by the New Municipal Advisor Rules for such work unrelated to such official's government responsibilities.

Underwriter Exemption

The term municipal advisor excludes a broker, dealer, or municipal securities dealer serving as an underwriter of a particular issuance of municipal securities to the extent that the broker, dealer, or municipal securities dealer engages in activities that are within the scope of an underwriting of such issuance of municipal securities. This "underwriter" exclusion covers advice on the issuance of municipal securities (including structure, timing, terms, and other similar matters) from the time of engagement as underwriter on a particular transaction for the issuance of municipal securities through the end of the underwriting period related to such securities.

It is important to note that, unlike a municipal advisor, an underwriter is not subject to a fiduciary duty when advising a municipal entity client within the scope of an underwriting. Consequently, an underwriter is not required to act in the best interest of its municipal clients without regard to the underwriter's own financial or other interests. Under the Municipal Securities Rulemaking Board's ("MSRB") Rule G-17, underwriters are, however, required to make certain disclosures to municipal issuers, including disclosures about their duty of fair dealing (but not a fiduciary duty) and their potential or actual material conflicts of interest.

Certain Professional Exemptions

The New Municipal Advisor Rules exempt attorneys providing legal advice or providing services that are of a traditional legal nature with respect to the issuance of municipal securities or municipal financial products to clients of such attorneys that are municipal entities, obligated persons, or other participants in the transaction. The exemption does not apply to the extent an attorney represents himself or herself as a financial advisor or financial expert regarding the issuance of municipal securities or municipal financial products.

The New Municipal Advisor Rules also exempt engineers to the extent that they are providing engineering advice. Exempted activities include feasibility studies, cash flow analyses, and similar activities to the extent they do not include advice beyond the engineering aspects of a project. The exemption does not cover activities in which an engineer provides advice to a municipal entity or obligated person regarding municipal financial products or the issuance of municipal securities.

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The New Municipal Advisor Rules also exempt an accountant to the extent that the accountant is providing audit or other attest services, preparing financial statements, or issuing letters for underwriters for, or on behalf of, a municipal entity or obligated person.

Important Notice

It is important to note that further MSRB rulemaking on issues such as fiduciary duty, political contributions, fair dealing, gifts and gratuities, supervision, and professional qualifications will need to be completed before specific rules are in place for municipal advisors. However, a fiduciary duty standard is already in place, per the Dodd-Frank Act, although it has yet to be specifically defined in final rulemaking by the MSRB. A copy of the proposed MSRB rule, Rule G-42, can be found [here](#).

Municipal advisors are already required to register with the SEC and the MSRB. [Click here](#) to find a list of firms registered with SEC as municipal advisors.

In light of the preceding, state and local officials should be aware that underwriters that give financial advice within the scope of an underwriting engagement do not owe a fiduciary duty to their municipal clients.