



ACCESS TO CAPITAL

The Municipal Advisor Rule: How Could It Affect You?

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The Municipal Advisor Rule-Topics for Borrowers and Issuers to Consider

- What We'll Cover Today:
- Rule Background:
 - Dodd-Frank
 - Delayed Effectiveness until July 1, 2014
 - FAQ issued on January 16, 2014
- Investment banking perspective:
 - How will relationships change
 - Investment banking firms registering as municipal advisors



The Municipal Advisor Rule-Topics for Borrowers and Issuers to Consider (cont.)

- In-House Counsel perspective:
 - Not registered as Municipal Advisor
 - Compliance checkpoints
 - Unique situations
- Q&A with panelists
- Questions from attendees for the panelists



Rule Background and Current Status

■ Background

- Dodd-Frank amended the Exchange Act of 1934 to add a new requirement that “municipal advisors” register with the SEC (October 2010)
- September 2013, the Commission adopted final rules for municipal advisor registration
 - Final Rules were effective on January 13, 2014
 - January 13, 2014; the SEC temporarily stayed the Final Rules until July 1, 2014
 - Final Rules interpreted the definition of “municipal advisor” and interpreted exclusions and exemptions

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Rule Background and Current Status (cont.)

■ Status

- Temporary Stay (Release 34-71288) (January 13, 2014)
 - Persons are not required to comply with the Final Rules until July 1, 2014
 - Phased-in compliance period, beginning on July 1, 2014 and ending on October 31, 2014 for registration requirements
- Additional time to address (i) adapting policies and procedures, (ii) developing supervisory practices and controls, (iii) educating personnel and (iv) developing training programs

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Rule Background and Current Status (cont.)

- FAQ (January 16, 2014)
- Address questions in various “categories”
 - The Advice Standard
 - Exemptions
 - For Responses to RFPs/RFQs
 - For Independent Registered Municipal Advisors/Investment Advisors/Underwriters
 - Advice Post-Issuance



Who Is A Municipal Advisor?

- A person that
- Provides *advice*
 - On behalf of a *municipal entity* or *obligated person*
 - Regarding
 - *Municipal financial products*, or
 - *Issuance of municipal securities*
- or Undertakes a *solicitation*
- Unless exempted or excepted



Standards Applicable to Municipal Advisers

- Must register with SEC and MSRB
- Owe fiduciary duty to municipal issuers or duty of care to obligated persons
 - Cannot underwrite securities where provided municipal advisor services
- Record retention requirements
- MSRB has issued draft Rule 42 for comment and said it will issue additional requirements similar to those applicable to broker-dealers

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Unpacking the Definition - Advice

- No bright line definitions
- Does not include information of a general nature
- Does not include factual information without opinions, views or a recommendation
- Recommendation for action or not acting is “advice”
- Information tailored to the specific needs, objectives or circumstances of a borrower is “advice”
- Payment of compensation *not* relevant to whether information constitutes “advice”

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Unpacking the Definition - Solicitation

- Engaged by third party to
- Recommend that party to a
- Municipal issuer or obligated person

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Unpacking the Definition

- Municipal entity: state or local governmental entity with power to issue bonds
- Obligated person: non-governmental person ultimately obligated to pay debt service, excluding credit enhancers
- Issuance of municipal securities: both activities and timing construed broadly
 - Structure, timing, terms and other matters
 - Applies throughout life of an issue
- Municipal financial products: investment of the proceeds of municipal securities

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Exemptions from Serving as a Municipal Advisor

- Public officials and employees
- Underwriters
- Registered investment advisors
- Attorneys
- Engineers
- Accountants
- Banks
- Swap dealers
- Registered commodity trading advisors
 - But only within limited scope as defined by SEC

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Exceptions to Municipal Advisor Requirements

- Responses to RFPs/RFQs
- Advice regarding certain investment strategies
- Certain solicitations
- Participation by an Independent Registered Municipal Advisor (“IRMA”)
 - IRMA providing advice on same aspects of matter (limited scope)
 - No “association” with relying party within 2 years
 - Borrower states in writing that it is represented by IRMA and it is relying on IRMA

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Exceptions to Municipal Advisor Requirements (cont.)

- Disclosure from relying party to both Borrower and IRMA that it is not a municipal advisor and owes no fiduciary duty to Borrower

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How Could the Rule Affect the Marketplace?

- Limits advice that may be provided
- Advice limited by scope of engagement
- Use of disclaimers and waivers in presentations and agreements
- Early engagement or pre-engagement agreements
- Change in business models

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How to Keep Information Flowing

- Use of IRMA exception
- Independently monitor the market – seek “general” information
- Engage financing team early
- Use of pre-engagement letters
- Document compliance – retain copies of all communications, use disclaimers
- Beware of overlap between service areas; e.g., banks with dealer affiliates, underwriters providing swap advice

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SEC's Final Municipal Advisor Registration Rules – One In-House Counsel's Perspective

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*Views are my own and do not reflect those of BMO Financial Group



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Our decision *not* to register under the Final Rule

- As an SEC, FINRA and MSRB registered broker-dealer, we were engaged in infrequent financial advisory work.
- Registration under SEC's Temporary Rule – not burdensome (particularly compared to Final Rule).
- Our business model: underwriting assignments and P3 non-bond business.
 - This is inconsistent with fiduciary duty owed to Municipal Entity Clients under the Final Rule.

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Our decision *not* to register under the Final Rule (cont.)

- Upon release and analysis of the Final Rule, decision was made to discontinue financial advisory work and not to register under the Final Rule.
- Registration and record keeping requirements under Final Rule will be burdensome, particularly for a large, worldwide financial institution with many and varied affiliates.
- Expectation of significant MSRB rulemaking initiatives which will parallel broker-dealer regulations but could require duplicative compliance regimes.

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Compliance Checkpoints

- Guidance provided to our Public Finance personnel
 - Is the information being conveyed “advice”?
 - Is advice being conveyed in a response to a legitimate RFP?
 - Has the recipient of the advice validly engaged an independent registered municipal advisor (IRMA)?
 - Have we been engaged as an underwriter for an identified transaction?
- Documentation is key concern as we expect to be required to demonstrate compliance in FINRA and SEC exams.

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Unique Situations

- “Obligated Persons”
 - Special considerations
- Public Private Partnerships (P3s)
 - Proper documentation needed in RFP responses and engagement letters
 - Engagement of an IRMA

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Unique Situations (cont.)

- Bank Private Placements
 - Banks are exempt with respect to banking services such as providing letters of credit *but* this exemption does not extend to affiliated dealers.
 - Important for the affiliated dealer to do no more than introduce the client to the banking entity which also obviates the need to report the transaction as an underwriting and comply with various MSRB rules.

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Key Takeaway

- *Cooperation* – To the extent that municipal entities value the ability to solicit and receive ideas from investment banking firms, it is important to effectively and efficiently cooperate to perfect the IRMA, RFP and Underwriter exemptions.
- *Procedures and documentation* – Strict procedures must be followed and proper documentation must be promptly supplied.

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Conclusions

- Public Finance industry will change.
- More documentation will be required and some may be duplicative.
- Substantial compliance requirements could add cost and time to transactions.
- Procedures in dealing with smaller issuers likely to change the most (least likely to utilize RFP process and engage IRMAs).
- Education is essential and key:
 - From legal/compliance personnel to the public finance bankers and
 - From the public finance bankers to the municipal entity and obligated person clients.

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Questions

- How are you interpreting the “advice” standard and how will this affect how you work with clients? Where will you be drawing the line even when written materials are accompanied by “stock disclaimers”?
- Do you anticipate many investment bankers will register as municipal advisors?
- What will you be looking for to determine whether a borrower has engaged a municipal advisor?

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Questions (cont.)

- In your view, does that engagement need to be broadly categorized? Specifically, we work with clients that may have “deal-specific” engagements. For those clients that have such an engagement, what changes would you need to see before you can work with such a client?
- What is the effect if a “fiduciary duty” is extended to obligated persons?
- How do you view a “contractual engagement” as an underwriter? How might this change your relationship with a borrower—noting that often an engagement is not established right at the beginning of a transaction.



Questions (cont.)

- Do the rules surrounding “not switching roles”—that is, you cannot initially serve as a municipal advisor then switch to an underwriting role—present problems with how you approach borrowers?
- Often investment bankers provide “post-closing assistance”—how do you view the municipal advisor rules changing that assistance?
- Similarly, investment bankers frequently interact with borrowers during the remarketing of bonds—how do you view the rules changing the role of the remarketing agent?
- Please provide your overall impressions on the effect the rule will have on the industry.



Thank You

- Our next web conference will be in April – we'll be back with a new name:

