

New Registration Requirement in Dodd-Frank Legislation May Affect Advisors to State and Local Governments as Well as Persons Who Solicit Public Pension Funds

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"),¹ created a new registration requirement under the Securities Exchange Act of 1934 ("Exchange Act") for persons who fall within the definition of a "municipal advisor." Those who provide "municipal advisory services" (as described more fully below) to or on behalf of a "municipal entity" including, for example, state and local governments as well as public pension plans, will need to examine whether the new registration requirements apply to their activities.

Each person who falls within the definition of a "municipal advisor" must register with the Securities and Exchange Commission ("SEC") by October 1, 2010. On September 1, 2010, the SEC adopted an interim final temporary rule, Rule 15Ba2-6T ("Temporary Rule"), setting forth the requirements and means for registration, as well as related Form MA-T, a registration form to be used by municipal advisors for such purpose.²

Despite the rapidly approaching deadline, many questions remain to be answered by the SEC regarding the scope of activities that would cause a person be considered to be a municipal advisor, as well as exemptions from the registration requirement. This *DechertOnPoint* describes the scope of the Temporary Rule, the issues raised by the new municipal advisor registration requirement and the process for registration.

Overview

Section 15B of the Exchange Act provided for creation of the Municipal Securities Rulemaking Board ("MSRB") and requires registration of municipal dealers that participate in offerings of municipal securities. In the wake of scandals involving, among other things, the bankruptcy of various municipal entities due to unsuitable investments, the MSRB endorsed legislation to require the registration of previously unregulated persons that provide advice to municipal issuers relating to the offering of bonds or the

¹ Public Law No. 111-203.

² *Temporary Registration of Municipal Advisors*, Rel. No. 34-62824 (September 1, 2010) ("*Adopting Release*"), available at <http://www.sec.gov/rules/interim/2010/34-62824.pdf> (page cites herein are to the .pdf version). The SEC website includes a page (http://www.sec.gov/info/municipal/form_ma-t.htm) through which a municipal advisor can

access: (i) Form MA-T's instructions and glossary; (ii) a paper version of Form MA-T for reference; (iii) the SEC's portal through which municipal advisors may obtain registration credentials (*i.e.*, a username and password); (iv) the registration platform through which the Form MA-T can be completed, submitted and amended; and (v) the Adopting Release.

investment of bond proceeds.³ As adopted, however, the provisions of the Dodd-Frank Act may have far broader application.⁴ In particular, the Dodd-Frank Act includes amendments to Section 15B that require persons who fall within the new definition of a “municipal advisor” to register with the SEC,⁵ including, in some cases (as discussed below): investment advisers registered under the Investment Advisers Act of 1940 (“Advisers Act”); brokers, dealers or municipal securities dealers registered under the Exchange Act; and commodity trading advisers registered under the Commodity Exchange Act.

Expansive Definition of “Municipal Entity”

The “municipal advisor” registration requirements in Form MA-T apply to persons who provide “municipal advisory services” to “municipal entities.” In addition to various state and local governments and associated political subdivisions, agencies, instrumentalities and other issuers of municipal securities, the term “municipal entity” includes “any plan, program, or pool . . . sponsored or established by [a] State, political subdivision, or municipal corporate instrumentality or any agency authority or instrumentality thereof.”⁶ According to a recent advisory issued by the MSRB, the term “municipal entity” encompasses public pension funds,

³ See, e.g., Statement of MSRB Chair Ronald A. Stack on Transparency and Regulation in the Municipal Securities Market, before Committee on Banking, Housing and Urban Affairs United States Senate (March 26, 2009).

⁴ Specifically, Section 975 of the Dodd-Frank Act amends Section 15B of the Exchange Act, effective October 1, 2010, to state that, among other things, “[i]t shall be unlawful for a municipal advisor to provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person, unless the municipal advisor is registered in accordance with [Section 15B of the Exchange Act.]” In addition, Dodd-Frank Act creates, as a matter of law, a fiduciary relationship between a municipal advisor and its clients. See Section 15B(c) of the Exchange Act.

⁵ Municipal advisors will not have to become members of the Financial Industry National Regulatory Authority (“FINRA”), but will need to comply with new rules that will be adopted by the MSRB and also will be subject to examination by the SEC.

⁶ Section 15B(e)(8) of the Exchange Act.

529 plans, local government investment pools and other state and local governmental entities or funds.⁷

Who Must Register?

Definition of “Municipal Advisor”

The definition of a “municipal advisor” essentially covers two types of entities: First, it includes any “person (who is not a municipal entity or an employee of a municipal entity) that . . . provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues.”⁸ Second, it includes any person “who undertakes a solicitation of a municipal entity” on behalf of investment advisers, broker-dealers and others.⁹ Specifically included within the definition of “municipal advisor” are “financial advisers, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders and swap advisers” that provide the services described above.¹⁰

⁷ On its website, the MSRB states that the definition of a “municipal advisor” encompasses:

firms and individuals that are paid to communicate with municipal entities on behalf of broker-dealers, banks, other municipal advisors or investment advisers to secure certain types of investment banking, financial advisory or investment advisory work with municipal entities, such as public pension funds, 529 plans, local government investment pools and other state and local governmental entities or funds.

MSRB Market Topics, Municipal Advisors, available at <http://www.msrb.org/Market-Topics/Municipal-Advisors.aspx>.

⁸ Section 15B(e)(4)(A)(i) of the Exchange Act. An “obligated person” is “any person, including an issuer of municipal securities, who is either generally or through an enterprise, fund, or account of such person, committed by contract or other arrangement to support the payment of all or part of the obligations on the municipal securities to be sold in an offering of municipal securities.” Section 15B(e)(10) of the Exchange Act.

⁹ Section 15B(e)(4)(A)(ii) of the Exchange Act. The definition of “municipal entity” included in Glossary to Form MA-T is substantially identical to that in the Exchange Act.

¹⁰ Section 15B(e)(4)(B) of the Exchange Act.

Persons That Provide Services to a Municipal Entity

The first portion of the definition of “municipal advisor” includes persons that: (i) advise municipal entities or obligated persons on the offering of traditional municipal products; (ii) advise municipal entities or obligated persons on the investment of proceeds from securities offerings; (iii) offer non-securities products (including swaps and guaranteed investment products) to municipal entities; (iv) recommend investment options and brokerage for municipal proceeds held in escrow; or (v) prepare feasibility studies, tax and revenue projections or similar products in connection with offerings or potential offerings of municipal securities.

The broad language in the definitions of “municipal advisor,” “municipal entity” and other related terms means that those engaged in a wide spectrum of activities related to municipal financial products (such as municipal derivatives, guaranteed investment contracts and “investment strategies”)¹¹ or municipal issuances, in service to state and local governments, 529 plans, and local government investment pools, may be subject to the new registration requirement.

Solicitors, Placement Agents, and Third-Party Marketers

The second portion of the definition of municipal advisor focuses on those who “solicit” municipal entities, including public pension funds, on behalf of broker-dealers and investment advisers, among others.¹² Thus, independent finders and solicitors that market municipal advisory products or services to municipal entities will be required to register as municipal advisors.¹³ For example, unregistered

third-party finders, solicitors, placement agents or others who introduce investment advisers to public pension funds or market advisory products or services to municipal entities (and the registered advisers employing them) will need to consider the impact of the Temporary Rule’s registration requirements, as well as various Advisers Act rules, on these activities.¹⁴

Exclusions from the Definition of “Municipal Advisor”

As suggested above, the Dodd-Frank Act includes several exclusions from the definition of municipal advisor for regulated entities and professionals who, in the course of their business or profession, service municipal entities or obligated persons, including:

- a broker, dealer or municipal securities dealer serving as an “underwriter” as defined in the Securities Act of 1933 (“Securities Act”);
- a registered investment adviser and its associated persons, to the extent such service

solicitation.” As discussed below, certain exceptions are provided for registered entities (and their associated persons).

¹⁴ Solicitations on behalf of registered investment advisers are subject to Rule 206(4)-3 under the Advisers Act (“Cash Solicitation Rule”). Additionally Rule 206(4)-5 under the Advisers Act (“Pay-to-Play Rule”) governs certain political contributions by investment advisers, and those acting on their behalf, when the investment adviser seeks business from state or local government entities. Although the Pay-to-Play Rule, as proposed, would have included an outright ban on the use of third-party solicitors and placement agents to solicit government entities, the SEC ultimately determined to allow third-party solicitors and placement agents to solicit on behalf of a registered adviser, provided that the solicitor or placement agent is a “regulated person” (*i.e.*, registered investment advisers or broker-dealers that are members of a registered national securities association, provided that the rules of such national securities association with respect to pay to play are “substantially equivalent or more stringent . . . than . . . [and] consistent with [the Pay-to-Play Rule].”) Rule 206(4)-5(a)(2)(i) under the Advisers Act. This limitation becomes effective on September 13, 2011. Thus, the ability to use a registered municipal advisor (that is not also a registered investment adviser or a FINRA-member firm) to solicit clients that are covered by the Pay-to-Play Rule will depend on whether the SEC amends the Pay-to-Play Rule by September 13, 2011, to include municipal advisors within the definition of “regulated person.” See July 2010 *DechertOnPoint* “SEC Adopts Pay-to-Play Rule for Investment Advisers,” available at http://www.dechert.com/library/FS-13_%2007-10-SEC_Adopts_Pay-to-Play_Rules.pdf.

¹¹ The term “investment strategies” is defined in Section 15B(e)(3) of the Exchange Act to “include[] plans or programs for the investment of proceeds of municipal securities that are *not* municipal derivatives, guaranteed investment contracts, and the recommendation of brokerage of municipal escrow investments” (emphasis added).

¹² Section 15B(e)(4)(A)(ii) of the Exchange Act. Section 15B(e)(9) includes within the concept of a “solicitation” circumstances where a person is compensated, directly or indirectly, in connection with efforts to obtain business from or to retain the business of a municipal entity or obligated person.

¹³ Section 15B(e)(9) of the Exchange Act applies only where the solicitation is “on behalf of a broker, dealer, municipal securities dealer, municipal advisor or investment adviser . . . that does not control, is not controlled by or is not under common control with the person undertaking such

constitutes “investment advice” for purposes of the Advisers Act;¹⁵

- a registered commodity trading advisor and its associated persons, to the extent such service constitutes “advice related to swaps”;
- attorneys, to the extent such service constitutes “legal advice or . . . services that are of a traditional legal nature”; and
- engineers, to the extent such service constitutes “engineering advice”.

Application to Registered Investment Advisers and Others

Although the exclusion for registered investment advisers and their associated persons arguably is premised on their registration status as investment advisers, rather than the activities they engage in, the Adopting Release states that registered investment advisers are excluded from the definition of municipal advisors only as to “services [that] are investment advice for purposes of the Investment Advisers Act.” Consequently, a registered investment adviser or an affiliate “or an associated person of a registered investment adviser must register with the SEC as a municipal advisor if the adviser or associated person of an adviser provides any municipal advisory services *other than investment advice within the meaning of the Investment Advisers Act.*”¹⁶ Form MA-T, the Temporary Rule, and the Exchange Act do not define the term “municipal advisory services,”¹⁷ nor does the Adopting

¹⁵ Section 15B(e)(4)(C) of the Exchange Act states that the term municipal advisor “does not include . . . any investment adviser registered under the [Advisers Act], or persons associated with such investment advisers who are providing investment advice.” As written, this would appear to exclude any registered investment adviser regardless of the capacity in which it is acting, while excluding associated persons of a registered investment adviser only where such persons are providing investment advice for purposes of the Advisers Act. However, as discussed below, the SEC appears to have taken a contrary view.

¹⁶ *Adopting Release, supra n. 2*, at 9 (emphasis added). In addition, the requirement in Item 1.E. of Form MA-T for the provision of a registered investment adviser’s Advisers Act registration number appears to support the view that registered investment advisers do not enjoy a blanket exemption from registration as municipal advisors simply because they are registered under the Advisers Act.

¹⁷ As discussed below, Item 2 of Form MA-T includes a non-exhaustive list of potential services, as well as an opportunity to describe “other” services that are provided to

Release provide any significant guidance as to what constitutes municipal advisory services, beyond those items implicitly included in the definition of municipal advisor.¹⁸ However, Form MA-T requires each municipal advisor to identify which of the following municipal advisory services it provides:

- Advice concerning the issuance of municipal securities;
- Advice concerning the investment of the proceeds of municipal securities;
- Advice concerning guaranteed investment contracts;
- Recommendation and/or brokerage of municipal escrow investments;
- Advice concerning the use of municipal derivatives (e.g., swaps);
- Solicitation of business from a municipal entity or obligated person for an unaffiliated person or firm (e.g., third-party marketers, placement agents, solicitors and finders);
- Preparation of feasibility studies, tax or revenue projections, or similar products in connection with offerings or potential offerings of municipal securities; and
- Other (specify): _____

Based on this list, it would appear that registered investment advisers, or their associated persons or affiliates, that provide advice to municipal entities concerning the issuance of municipal securities, brokerage of municipal escrow investments, certain placement services, feasibility studies, tax or revenue

municipal entities by the municipal advisor. The SEC stated in the Adopting Release that (i) activities 1 to 6 were derived from the definition of municipal advisor in the Dodd-Frank Act and (ii) the activities in 7 were included because these types of services are sometimes provided by financial advisors to municipal entities. The SEC noted that the inclusion of an “other” category (as well as certain defined services) is intended to “assist the Commission in understanding the scope of activities in which a municipal advisor engages [and] to better understand the activities of municipal advisors.” *Adopting Release, supra n. 2*, at 14.

¹⁸ That is, “advice with respect to the structure, timing, terms and other similar matters concerning” municipal financial products or municipal securities.

projections or similar products,¹⁹ could be required to register as municipal advisors since these types of services are likely to be considered to be outside the scope of “investment advice” for purposes of the Advisers Act.²⁰

A number of questions remain regarding the registration and regulation of municipal advisors, particularly those who are already registered with the SEC or other regulators in other capacities, including an investment adviser registered under Advisers Act, a commodity trading advisor registered under the Commodity Exchange Act, or a broker, dealer or municipal securities dealer serving as an “underwriter” as defined in the Securities Act. Currently, it appears that a “municipal advisor” (i) that is not already registered or regulated in any of the capacities noted above or (ii) whose municipal advisory activities are outside the scope of its current registration or regulation by federal regulators, will need to complete its Form MA-T prior to October 1, 2010, in order to continue to provide municipal advisory services to municipal entities. Moreover, in contrast to the Advisers Act, neither the relevant provisions of the Dodd-Frank Act nor the Temporary Rule provides an exception for banks or accountants (each of which has traditionally been excepted from the definition of an “investment adviser” and, therefore, can provide certain advisory services without registering as an investment adviser under the Advisers Act). It is unclear how the Temporary Rule and any substantive regulation will apply when such persons provide municipal advisory services.

Registration Process and Timing

As noted above, any municipal advisor that fails to register by October 1, 2010, will no longer be able to provide municipal advisory services to a municipal entity or obligated person. To facilitate registration by municipal advisors in advance of the October 1 deadline, the SEC has provided a web-based platform for

¹⁹ As noted above, the preparation of feasibility studies, tax or revenue projections or similar products was not based on the Exchange Act definition of municipal advisor. See *supra* n. 17.

²⁰ While not addressed by the SEC, it would appear reasonable that a dual registrant (*i.e.*, one registered as both a broker-dealer and an investment adviser) could provide investment advisory (for purposes of the Advisers Act) and underwriting services without being required to register as a municipal advisor.

such purpose.²¹ In order to register, a municipal advisor must first obtain a username and password (“Credentials”) through a portal on the SEC’s website.²² Once the municipal advisor has obtained its Credentials, it may complete, submit and later amend or withdraw its Form MA-T through a platform maintained on the SEC’s website.²³ Both the credentialing portal and the registration platform are currently open and operational.

Form MA-T requires a municipal advisor to provide certain basic identifying information (including the municipal advisor’s name, address, SEC File Number and CRD²⁴, and a contact person),²⁵ the types of municipal advisory services provided²⁶ and the disciplinary history of the municipal advisor and its associated persons.²⁷ Form MA-T is considered to be a “report” for purposes of the Exchange Act and also constitutes the municipal advisor’s consent to service of process. Therefore, the Form MA-T must be executed by an appropriate officer, general partner or similarly situated person of the municipal advisor.²⁸

²¹ The Adopting Release focuses considerable attention on timing concerns, noting that “absent such means to register, municipal advisors would likely have to cease providing all municipal advisory services, which may have a significant adverse impact on their businesses and on municipal entities.” *Adopting Release, supra* n. 2, at 27.

²² Municipal advisors may access the portal directly by clicking on this link or by copying this text into the address bar of any web browser: <https://tts.sec.gov/eaua-request-ent/do/requestAccount?applicationId=689>. In order to obtain Credentials, the SEC requires municipal advisors to provide certain basic information (*e.g.*, name, address, employer ID number, EDGAR CIK) and supply a username and password.

²³ Municipal advisors may access the platform directly by clicking on this link or by copying this text into the address bar of any web browser: <https://tts.sec.gov/matr/web/sec/jsp/ExternalLoginFormRealm.jsp>.

²⁴ For example, if the municipal advisor seeking to be registered is also a registered investment adviser or registered broker, dealer or municipal securities dealer.

²⁵ Item 1 of Form MA-T. Item 1 must be amended promptly if the information therein becomes inaccurate in any way.

²⁶ Item 2 of Form MA-T.

²⁷ Item 3 of Form MA-T. Item 3 must be amended promptly if the information therein becomes inaccurate in any way.

²⁸ Item 4 of Form MA-T.

Although Form MA-T itself is fairly basic, given the rapidly approaching registration deadline, the SEC has recommended that “municipal advisors . . . allow ample time to . . . obtain access credentials and submit the Form MA-T.”²⁹ Once the Form MA-T is filed with the SEC by a municipal advisor, the municipal advisor’s registration will be effective until the earlier of: (i) the subsequent approval of such municipal advisor’s registration pursuant to a final rule adopted by the SEC; (ii) the SEC’s rescission of such registration; or (iii) the expiration of the Temporary Rule on December 31, 2011.

Conclusion

The provisions of the Temporary Rule adopted by the SEC are intended to comply with timeframes established by the Dodd-Frank Act. No rules have been

adopted by either the SEC or MSRB setting compliance requirements for those entities or persons that must register as municipal advisors. Nor has the shortened time period provided by the legislation allowed either the SEC or the industry to consider the implications of the registration requirements or to address potential problems with the Temporary Rule.



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²⁹ *Adopting Release, supra* n. 2, at 25.

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