

SEC Adopts Rule to Register Municipal Advisors

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The Securities and Exchange Commission (the “SEC”) has adopted an interim final temporary rule under the Securities Exchange Act of 1934 (“Exchange Act”) in order to permit municipal advisors to temporarily satisfy their registration requirement under the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”). The Dodd-Frank Act amended Section 15B(a) of the Exchange Act to make it unlawful for municipal advisors to provide certain advice or solicit municipal entities or certain other persons without registering with the SEC. The registration requirement for municipal advisors becomes effective on Oct. 1, 2010.

Section 15B(e) of the Exchange Act, as amended by the Dodd-Frank Act, defines the term “municipal advisor” to mean a person (who is not a municipal entity¹ or an employee of a municipal entity) (1) who provides advice to or on behalf of a municipal entity or obligated person² with respect to municipal financial products³ 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, or (2) who undertakes a solicitation of a municipal entity. The definition specifically includes financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors that provide municipal advisory services. The definition of “municipal advisor” explicitly excludes a broker, dealer, or municipal securities dealer serving as an underwriter, as well as attorneys offering legal advice or providing services that are of a traditional legal nature and engineers providing engineering advice.

There is also an exclusion for “any investment adviser registered under the Investment Advisers Act of 1940, or persons associated with such investment advisers who are providing investment advice.” The SEC interprets this exclusion to mean that a registered investment adviser or an associated person of a registered investment adviser is excluded from the definition of “municipal advisor” if the investment adviser or associated person of the adviser provides municipal advisory services, so long as those services are investment advice for purposes of the Investment Advisers Act of 1940 (“Advisers Act”). A registered investment adviser 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 Advisers Act. Thus, for example if a municipal advisor provides advice with respect to municipal financial products

¹ “Municipal entity” is defined to mean any state, political subdivision of a state, or municipal corporate instrumentality of a state, including: any agency, authority, or instrumentality of the state, political subdivision, or municipal corporate instrumentality; any plan, program, or pool of assets sponsored or established by the state, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof; and any other issuer of municipal securities. *See* Section 15B(e) of the Exchange Act, as amended by Section 975(e) of the Dodd-Frank Act.

² “Obligated person” is defined to mean 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. *See id.*

³ “Municipal financial product” is defined to mean municipal derivatives, guaranteed investment contracts, and investment strategies. “Investment strategies” includes plans or programs for the investment of the proceeds of municipal securities that are not municipal derivatives, guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments. *See id.*

other than municipal securities, *e.g.*, certain derivatives, it may be unable to rely on its registration under the Advisers Act to exclude it from registration as a municipal advisor.

The SEC similarly interprets the exclusion in the Dodd-Frank Act of “any commodity trading advisor registered under the Commodity Exchange Act or persons associated with a commodity trading advisor who are providing advice related to swaps” to exclude a commodity trading advisor or any person associated with a commodity trading advisor from the definition of “municipal advisor” if the commodity trading advisor or associated person of the commodity trading advisor provides municipal advisory services, so long as those services are advice related to swaps. A commodity trading advisor or an associated person of a commodity trading advisor must register with the SEC as a municipal advisor if the commodity trading advisor or an associated person of a commodity trading advisor provides any municipal advisory services that are not advice related to swaps.

The SEC’s adoption of new Rule 15Ba2-6T is intended to serve as a transitional step to the implementation of a final permanent registration program, make relevant information available to the public and municipal entities, and permit municipal advisors to continue their business after Oct. 1, 2010. A municipal advisor

may temporarily satisfy the statutory registration requirement by submitting certain information electronically through the SEC’s public web site on new Form MA-T, which is designed for this purpose. The information on the form will not be confidential and will be made publicly available via the Internet.

Form MA-T asks for certain identifying information about municipal advisors, as well as their activities and disciplinary information. There is no filing fee.

Because the entry of information into Form MA-T will require establishing an account and securing access credentials (username and password) the SEC is advising municipal advisors to allow ample time to establish an account and obtain such credentials and complete the form before Oct. 1, 2010.

The SEC is soliciting comments on all aspects of the interim final temporary rule. The SEC expects to consider a proposal for a final permanent registration program, including detailed requirements for the registration of municipal advisors, and to seek public comment on the proposal before its adoption.

Winston & Strawn LLP represents a broad range of financial institutions on all regulatory matters. If you have any questions regarding how the matters discussed in this briefing might apply to your situation, please contact any of the Winston & Strawn attorneys listed below or your usual Winston & Strawn contact:

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