

MEMO# 27604

October 1, 2013

SEC Adopts Municipal Advisor Registration Rule

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TO: MUNICIPAL SECURITIES ADVISORY COMMITTEE No. 27-13
529 PLAN MEMBERS No. 9-13 RE: SEC ADOPTS MUNICIPAL ADVISOR REGISTRATION RULE

Recently, the Securities and Exchange Commission adopted its long-awaited final rule establishing a permanent registration regime for municipal advisors and imposing certain recordkeeping requirements on such advisors. [\[1\]](#) To address concerns raised by many of the 1000 comment letters, including those expressed by ICI, the final rule reflects significant modifications and improvements from the proposal to narrow the scope of the registration requirement, including through certain activity-based exemptions from the definition of municipal advisor, and to provide additional guidance to market participants about what constitutes municipal advice and who is required to register as a municipal advisor.

Importantly, as discussed below, the final rule clarifies exemptions from the municipal advisor definition for persons, including registered investment advisers, engaging in specific activities. The final rule also exempts employees and appointed officials of municipal entities from registration, and narrows the application of the term “investment strategies” to apply only to the investment of proceeds from the sale of municipal securities rather than to all public funds.

As part of this rulemaking, the SEC also designated FINRA as the examining authority for those municipal advisors that are registered with FINRA as a broker-dealer. The SEC will remain the examining authority for all other municipal advisors.

Defined Terms

The rule defines the following terms:

Advice. A person is providing “advice” to a municipal entity or an “obligated person” [\[2\]](#) based on “all of the relevant facts and circumstances,” including whether the advice:

- involves a “recommendation” to a municipal entity;
- is particularized to the specific needs of a municipal entity; or
- relates to municipal financial products or the issuance of municipal securities.

Advice, however, does not include giving out certain general information.

Investment Strategies. The term “investment strategies” includes plans or programs for the investment of proceeds of municipal securities that are not municipal derivatives or guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments. Importantly, a person providing advice to a municipal entity or an obligated person with respect to investment strategies only has to register if such advice relates to:

- the investment of proceeds of municipal securities;
- the investment of municipal escrow funds; or
- municipal derivatives.

Exemptions From the Municipal Advisor Definition

The final rule clarifies exemptions from the municipal advisor definition for certain persons engaging in specified activities. Accordingly, the following persons would not be required to register as a municipal advisor:

Registered Investment Advisers. Registered investment advisers and associated persons do not have to register if they provide investment advice regarding the investment of the proceeds of municipal securities or municipal escrow investments. This exemption helps ensure the rule does not create duplicative regulation of investment advisers. Importantly, this exemption does not apply to advice on the structure, timing, and terms of issues of municipal securities or municipal derivatives.

Public Officials and Employees. Public officials do not have to register to the extent that they are acting within the scope of their official capacity. This exemption addresses an unintended consequence of the original proposal that generated significant public comment and created the impression that public officials and municipal employees would be covered if they provide “internal” advice. This exemption covers persons serving as members of a governing body, an advisory board, a committee, or acting in a similar official capacity as an official of a municipal entity or an obligated person.

For instance, it covers:

- members of a city council, whether elected or appointed, who act in their official capacity; or
- members of a board of trustees of a public or private non-profit university acting in their official capacity, where the university is an obligated person by virtue of borrowing proceeds of municipal bonds issued by a state governmental educational authority.

Similarly, this exemption covers employees of a municipal entity or an obligated person to the extent that they act within the scope of their employment.

Underwriters. Brokers, dealers, and municipal securities dealers serving as underwriters do not have to register if their advisory activities involve the structure, timing, and terms of a particular issue of municipal securities. This exemption begins when the municipal issuer engages the underwriter on a particular transaction and continues until the end of the underwriting period for that transaction. The exemption does not apply to advice on investments of proceeds of municipal securities (or related municipal escrow investments in refinancings) or municipal derivatives.

Registered Commodity Trading Advisor. Commodity trading advisors registered under CFTC rules and their associated persons do not have to register if the advice they provide relates to swaps. This exemption helps ensure the rule does not create duplicative regulation with existing CFTC regulation of swap advisers.

Attorneys. Attorneys do not have to register if they are providing legal advice or traditional legal services with respect to the issuance of municipal securities or municipal financial products. This exemption does not apply to advice that is primarily financial in nature or to an attorney representing himself or herself as a “financial advisor” or “financial expert” on municipal advisory activities.

Engineers. Engineers do not have to register if they provide engineering advice such as feasibility studies and cash flow analysis and similar activities related to engineering aspects of a project. This exemption does not apply to activities in which an engineer provides advice regarding municipal financial products or the issuance of municipal securities.

Banks. Banks do not have to register to the extent they provide advice on certain identified banking products and services (such as deposit accounts, extensions of credit, or bond indenture trustee services). This tailored exemption does not apply to banks that engage in other municipal advisory activities such as providing advice on municipal derivatives or the issuance of municipal securities.

Accountants. Accountants do not have to register if they are providing accounting services that include audit or other attest services, preparation of financial statements, or issuance of letters for underwriters.

Independent Registered Municipal Advisor. People who provide advice in circumstances in which a municipal entity has an independent registered municipal advisor with respect to the same aspects of a municipal financial product or issuance of municipal securities do not have to register, provided that certain requirements are met and certain disclosures are made.

Swap Dealers. Swap dealers registered under CFTC rules do not have to register as municipal advisors if they provide advice with respect to swaps in circumstances in which a municipal entity is represented by an independent advisor. This exemption helps ensure that the rule does not create duplicative regulation with existing CFTC regulation of swap dealers and recognizes a similar exemption under CFTC rules. This exemption does not apply to swap dealers that engage in other municipal advisory activities, such as providing advice on the issuance of municipal securities or the investment of the proceeds of municipal securities or municipal escrow investments.

Registration Forms

The final rule requires municipal advisory firms to:

- File all forms through the SEC’s public online filing system (EDGAR).
- File Form MA to register as a municipal advisor.
- File Form MA-I for each individual associated with the firm who engages in municipal advisory activities.

The rule requires municipal advisors to register on a staggered basis beginning July 1, 2014. In a separate release, the SEC also extended the expiration date of the temporary

registration regime until December 31, 2014, in order to allow municipal advisors to continue to remain temporarily registered during the staggered compliance period. [3]

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endnotes

[1] Registration of Municipal Advisors, SEC Release No. 34-70462 (September 20, 2013), available at <http://www.sec.gov/rules/final/2013/34-70462.pdf>.

[2] An “obligated person” essentially means an entity, such as a non-profit university or non-profit hospital, that borrows the proceeds from a municipal securities offering and is obligated by contract or other arrangement to repay all or some portion of the amount borrowed.

[3] Extension of Temporary Registration of Municipal Advisors, SEC Release No. 34-70468 (September 23, 2013), available at <http://www.sec.gov/rules/interim/2013/34-70468.pdf>.

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