



## Will Appointed Members of Boards of Municipal Bond Issuers Be Caught Under SEC's Proposed Regulations for Municipal Advisors?

The Securities and Exchange Commission's (SEC) proposed final regulations for the registration of municipal advisors (the Rules), if approved in the form proposed, will affect more than traditional municipal advisors. Specifically, appointed board members of a municipal or other public bond-issuing authority (municipal entity) will find themselves subject to the restrictions and registration requirements imposed by the regulations. Under the Rules as proposed, anyone providing advice to a municipal entity or obligated person, whether solicited or unsolicited, compensated or not, will be required to register with the SEC as a "municipal advisor" and be subject to the scrutiny of the SEC regarding competence and background information, in addition to paying any required filing fees. Elected officials and municipal employees are excluded as are attorneys, accountants and engineers (to a limited extent). The proposed Rules have been met with a firestorm of criticism from municipal issuer groups and their advocates and must be approved in final form by the SEC before they become effective.

If the proposed Rules concern you, you should let the SEC know by filing a comment with the SEC by February 22, 2011. The SEC has specifically requested comment on this and many other aspects of the proposed Rules. The full text of the proposed Rules, as well as a link to submit comments directly to the SEC, can be found on [the SEC's website](#).

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The proposed Rules implement the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Section 975 of Dodd-Frank makes it unlawful "for a municipal advisor to provide advice to or on behalf of a municipal entity... with respect to municipal financial products or the issuance of municipal securities... unless the municipal advisor is registered in accordance with this subsection."

Dodd-Frank defines "municipal advisor" as "a person (*who is not a municipal entity or an employee of a municipal entity*) who (i) 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..." (emphasis added). Under Dodd-Frank, municipal advisors include financial advisors, guaranteed investment contract brokers, placement agents and swap advisors, and exclude broker-dealers (when acting in a capacity as an underwriter) and certain other persons.

The current controversy arises from the SEC's interpretation of the definition of municipal advisor and those whom the SEC believes should be excluded from, and included in, that definition. In response to a comment received when the temporary registration system was instituted by the SEC on September 1, 2010 (prior to the October 1, 2010 effective date of the registration requirement), the SEC stated that elected members of a municipal bond-issuing authority are excluded from the definition, but appointed members should be included. The SEC explained its position by stating:

The Commission does not believe that appointed members of a governing body of a municipal entity that are not elected *ex officio* members should be excluded from the definition of a 'municipal advisor.' The Commission believes that this interpretation is appropriate because employees and elected members are accountable to the municipal entity for their actions. In addition, the Commission is concerned that appointed members, unlike elected officials and elected *ex officio* members, are not directly accountable for their performance to the citizens of the municipal entity.

At least for now, appointed members of the governing body of a municipal issuer (such as a state-level bond authority, industrial development authority, housing finance authority, joint powers authority, municipal utility authority or similar entity) are not excluded from the definition of municipal advisor for purposes of the

proposed Rules. This leads to the question of what it means to "provide advice to" a municipal entity or an obligated person. Would the simple act by an appointed member of the governing board of a municipal entity of publicly stating a basis for a vote in favor of or against a particular bond issue constitute "advice"? The answer is not clear under the Rules as proposed by the SEC, and the uncertainty has been met with sharp criticism in the financial press from state and local government officials and their advocates.

The SEC should be urged to reverse its position by stating clearly in the final Rules that all governing board members are exempt under the Rules and all statements made or positions taken by any governing board member of the municipal entity will not be considered to be advice if the statements are made or actions taken as part of the fact-finding, deliberative or decision-making process of the governing board. Additionally, the SEC should be urged to exclude from the reach of these proposed Rules casual statements made or opinions offered to a municipal entity by any person who is not acting in any professional advisory capacity.

Being required to register with the SEC as a municipal advisor has significant consequences – time, money and legal obligations, as well as becoming the subject of scrutiny by the SEC. The proposed application requires, among other things, that an individual certify that he or she has "sufficient qualifications, training, experience and competence;" will meet, within any applicable required time frames, "such standards of training, experience and competence and other qualifications, including testing, for a municipal advisor, required" by the SEC or other regulatory organizations; and have "necessary understanding of... all applicable regulatory obligations" under federal securities laws, as well as applicable rules promulgated by the SEC and Municipal Securities Rulemaking Board or other relevant self-regulatory organizations. Intentional misstatements in, or omissions of fact from, an application constitute a federal criminal violation. The proposed Rules also impose recordkeeping requirements, permit the SEC to inspect those records and require annual updates. Failing to comply with the Rules could subject a person to civil fines and sanctions, as well as criminal penalties. These and other issues raised by the proposed Rules are likely to be the subject of many comments to the SEC.

Lawyers in the [Squire Sanders Public & Infrastructure Finance Practice Group](#) are available to answer any questions about or further discuss the implications of the proposed Rules.



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