

## SEC Adopts Temporary Rule Requiring Advisors to Municipal Entities to Register by October 1, 2010

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As part of the financial regulatory reforms under the Dodd-Frank Act,<sup>1</sup> Congress amended the U.S. Securities Exchange Act of 1934 (the “Exchange Act”)<sup>2</sup> to make it unlawful for certain advisors to advise or solicit state and municipal entities (broadly defined to include state pension plans) without registering with the Securities and Exchange Commission (the “SEC”).<sup>3</sup> The Dodd-Frank Act imposes a fiduciary duty on such advisors and mandates their registration by October 1, 2010 — in about 10 days.<sup>4</sup> Such advisors must be registered on that date in order to continue providing specified categories of services to state and municipal entities. This memorandum provides a brief summary of the SEC’s new temporary Rule 15Ba2-6T (the “Temporary Rule”)<sup>5</sup>, which permits covered advisors to temporarily satisfy the new registration requirements by filing Form MA-T with the SEC by October 1, 2010.<sup>6</sup>

### Ban on Unregistered Municipal Advisors

Section 975 of the Dodd-Frank Act contains a broad prohibition making it unlawful for a “municipal advisor” to (i) provide advice to or on behalf of a “municipal entity” with respect to “municipal financial products”<sup>7</sup> or the issuance of municipal securities or (ii) undertake a solicitation of a municipal entity, unless the municipal advisor is registered with the SEC in accordance with the provisions of the Act.<sup>8</sup>

Although the term “municipal” is commonly understood to refer to local town or city government, the Dodd-Frank Act broadly defines a “municipal entity” as:

any State, political subdivision of a State, or municipal corporate instrumentality of a State, including —

- 1 The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (the “Dodd-Frank Act” or the “Act”). The Act was signed into law by President Obama on July 21, 2010. The Dodd-Frank Act also will require many currently unregistered investment advisers to register by July 21, 2011 with the SEC under the U.S. Investment Advisers Act of 1940, as amended (the “Advisers Act”), 15 U.S.C. §§ 80b-1 to 80b-21.
- 2 15 U.S.C. § 78a *et seq.*, as amended by the Dodd-Frank Act.
- 3 See Dodd-Frank Act § 975(a)(1)(B), 124 Stat. at 1915-16 (to be codified at 15 U.S.C. § 78o-4(e)(8)(a)(1)(B)).
- 4 See Dodd-Frank Act § 975(i), 124 Stat. at 1923.
- 5 The SEC adopted the Temporary Rule (to be codified at 17 C.F.R. § 240.15Ba2-6T) on September 1, 2010, and the adopting release was published in the *Federal Register* on September 8, 2010. See Temporary Registration of Municipal Advisors, Exchange Act Release No. 62824, 75 Fed. Reg. 54,465 (Sept. 8, 2010), available at <http://www.sec.gov/rules/interim/2010/34-62824.pdf> (the “Release”). References herein to “Form MA-T” refer to the Form as provided at the conclusion of the Release.
- 6 See Release at 3-4.
- 7 The term “municipal financial product” means municipal derivatives, guaranteed investment contracts (e.g., any investment that has specified withdrawal or reinvestment provisions and a specifically negotiated or bid interest rate, or forward supply contracts), and “investment strategies,” which include 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 Dodd-Frank Act § 975(e)(3), (5), 124 Stat. at 1921-1922 (to be codified as Exchange Act § 15B(e)(3), (5)), 15 U.S.C. § 78o-4(e)(3), (5)). Although there may be a factual issue as to whether a private investment adviser is providing advice regarding the investment of “proceeds,” the SEC has not yet provided guidance on how to make the determination.
- 8 See Dodd-Frank Act § 975(a)(1)(B) (to be codified as Exchange Act § 15B(a)(1)(B)), 15 U.S.C. § 78o-4(a)(1)(B)).

- (A) any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality;
- (B) 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
- (C) any other issuer of municipal securities.<sup>9</sup>

In light of the specific registration regimes for investment advisers, broker-dealers and commodities pool operators, as well as the SEC's recent adoption of a final pay-to-play rule,<sup>10</sup> the intended legislative reach of Section 975 of the Act is unclear. The SEC has authority to exempt any municipal advisor or class of municipal advisor from registration, and it considered issuing a broad exemption prior to creating a permanent registration program.<sup>11</sup> Nevertheless, the SEC declined to do so on the basis that delaying registration would not achieve the purposes intended by Congress.<sup>12</sup>

Instead, the SEC recently issued the Temporary Rule, which is intended as a transitional step to permit advisors to temporarily satisfy the new registration requirements pending the implementation of a final registration program.<sup>13</sup>

### Who Is Required to Register as a Municipal Advisor; Exemptions

The definition of "municipal advisor" specifically includes financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders and swap advisors.<sup>14</sup>

9 Dodd-Frank Act § 975(e)(8) (to be codified as Exchange Act § 15B(e)(8), 15 U.S.C. § 78o-4(e)(8)).

10 Political Contributions by Certain Investment Advisers, Investment Advisers Act Release No. 3043, 75 Fed. Reg. 41,018, 41,069 to 41,071 (July 14, 2010) (adopting Advisers Act Rule 206(4)-5 (to be codified at 17 C.F.R. § 275.206(4)-5)).

11 See Release at 6-7.

12 See *id.*

13 The Temporary Rule is currently set to expire on December 31, 2011. *Id.* The SEC is soliciting comment on its decision to require temporary registration. See *id.*

14 Under the Act, the term "municipal advisor":

(A) means a person (who is not a municipal entity or an employee of a municipal entity) that —

(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; or

(ii) undertakes a solicitation of a municipal entity;

(B) includes financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors, if such persons are described in any of clauses (i) through (iii) [sic] of subparagraph (A); and

(C) does not include a broker, dealer, or municipal securities dealer serving as an underwriter (as defined in section 2(a)(11) of the Securities Act of 1933) (15 U.S.C. § 77b(a)(11)), any investment adviser registered under the Investment Advisers Act of 1940, or persons associated with such investment advisers who are providing investment advice, 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, attorneys offering legal advice or providing services that are of a traditional legal nature, or engineers providing engineering advice.

These entities are included if they provide advice to or on behalf of a municipal entity or “obligated person”<sup>15</sup> 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) or if they undertake a solicitation of a municipal entity or obligated person.<sup>16</sup> Municipal financial products also include “investment strategies”, a term that includes advice regarding the investment of “proceeds” of municipal securities.<sup>17</sup>

The following service providers are exempt from registration as a municipal advisor:

- brokers, dealers, or municipal securities dealers serving as underwriters as defined in the U.S. Securities Act of 1933,<sup>18</sup>
- any investment adviser registered under the Advisers Act providing investment advice,<sup>19</sup>
- any commodity trading advisor registered under the U.S. Commodity Exchange Act, as amended, providing advice related to swaps,
- and any of their respective associated persons providing such advice;
- attorneys providing services of a traditional legal nature; and
- engineers providing engineering advice.<sup>20</sup>

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15 The Act also covers advisors to “obligated persons,” which include “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.” Dodd-Frank Act § 975(e)(10), 124 Stat. 1376, 1923 (to be codified as Exchange Act § 15B(e)(10), 15 U.S.C. § 78o-4(e)(10)).

16 See Dodd-Frank Act § 975(e)(4)(A), 124 Stat. at 1921 (to be codified as Exchange Act § 15B(e)(4)(A), 15 U.S.C. § 78o-4(e)(4)(A)). The term “solicitation of a municipal entity or obligated person” means:

a direct or indirect communication with a municipal entity or obligated person made by a person, for direct or indirect compensation, 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 solicitation for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person of a broker, dealer, municipal securities dealer, or municipal advisor for or in connection with municipal financial products, the issuance of municipal securities, or of an investment adviser to provide investment advisory services to or on behalf of a municipal entity.

Dodd-Frank Act § 975(e)(9), 124 Stat. at 1922-23 (to be codified as Exchange Act § 15B(e)(9), 15 U.S.C. § 78o-4(e)(9)).

17 Please see note 7 above regarding the definition of “investment strategies.”

18 See Release at 8 & n.19. Section 2(a)(11) of the U.S. Securities Act of 1933 defines “underwriter” as “any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors’ or sellers’ commission.” 15 U.S.C. § 77b(a)(11).

19 See Dodd-Frank Act § 975(e)(4)(C) (to be codified as Exchange Act § 15B(e)(4)(C), 15 U.S.C. § 78o-4(e)(4)(C)); Release at 9. The SEC interprets this exclusion to mean that so long as the municipal advisory services that a registered investment adviser provides are considered investment advice for the purposes of the Advisers Act, a registered investment adviser is not required to register as a municipal advisor. See Release at 9.

20 See Dodd-Frank Act § 975(e)(4)(C), 124 Stat. at 1922 (to be codified as Exchange Act § 15B(e)(4)(C), 15 U.S.C. § 78o-4(e)(4)(C)).

Notwithstanding these exempt persons' other registrations/exemptions, however, the SEC has indicated that if they provide advice to a municipal entity in a capacity beyond those specified (*e.g.*, a broker-dealer providing investment advice or structuring a non-underwritten offering of securities), they also would be required to register as municipal advisors.<sup>21</sup>

We note that there appears to be no exemption for advisers otherwise exempt from registration under the Advisers Act (*e.g.*, a mid-size advisor or a bank), or for state-registered or foreign investment advisers. There is also no specific exemption for accountants and other service providers who provide financial and tax advice. Moreover, the Act does not specify a threshold dollar amount that triggers registration; hence, any advisor who charges even a nominal amount for services also would be covered by the registration requirements. We also note that the Act itself appears to contain a "look-thru," as it prohibits unregistered municipal advisors from providing advice "to or on behalf of a municipal entity."<sup>22</sup> Via informal telephone guidance, however, the SEC indicated that a fund manager providing investment advice to a fund with investors that are municipal entities is generally not intended to be covered by the Temporary Rule.

In many instances, the obligation to register will be clear. However, in some cases, where the application of statutory language to particular facts is not clear, it may be prudent to seek guidance from the staff of the SEC.

### How to Register; Filing Form MA-T

In order to satisfy temporarily the new registration requirement for municipal advisors, a municipal advisor must complete and submit new Form MA-T electronically through a link on the SEC's website at <http://www.sec.gov> by October 1, 2010.<sup>23</sup> Responses to Form MA-T will be made publicly available by the SEC.<sup>24</sup>

Form MA-T, a copy of which can be accessed at [http://www.sec.gov/info/municipal/form\\_MA-T.htm](http://www.sec.gov/info/municipal/form_MA-T.htm) requires a municipal advisor to complete the following four items:

- Item 1.** The purpose for which the registrant is submitting the form (*i.e.*, initial temporary registration, amendment, or withdrawal) and basic identifying and contact information concerning its business;
- Item 2.** The types of municipal advisory services provided, by means of a check-box for one or more of the following categories specified by Form MA-T:
  - (1) Advice concerning the issuance of municipal securities;
  - (2) Advice concerning the investment of the proceeds of municipal securities;

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<sup>21</sup> See Release at 8-10.

<sup>22</sup> See Dodd-Frank Act § 975(e)(4)(A)(i), (e)(9) (to be codified as Exchange Act §§ 15B(e)(4)(A), (e)(9), 15 U.S.C. § 78o-4(e)(4)(A), (e)(9)).

<sup>23</sup> Release at 49; Temporary Rule 15Ba2-6T(a) (to be codified at 17 C.F.R. § 240.15Ba2-6T(a)).

<sup>24</sup> See *id.* at 35.

- (3) Advice concerning guaranteed investment contracts;
- (4) Recommendation and/or brokerage of municipal escrow investments;
- (5) Advice concerning the use of municipal derivatives (*e.g.*, swaps);
- (6) 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);
- (7) Preparation of feasibility studies, tax or revenue projections, or similar products in connection with offerings or potential offerings of municipal securities;<sup>25</sup> and
- (8) Other (if checked, the registrant is to include a narrative description specifying such activities).<sup>26</sup>

**Item 3.** Its disciplinary history and the disciplinary history of its “associated municipal advisor professionals”;<sup>27</sup> and

**Item 4.** Execution, which involves deemed representations and appointment of the SEC as the registrant’s agent for service of process.

With respect to Item 3 regarding the disciplinary disclosure, we note that this section of Form MA-T is structured as a series of questions intended to solicit information concerning any activities of the municipal advisor or its associated municipal advisor professionals that could subject the advisor to disciplinary action by the SEC.<sup>28</sup> The disciplinary history required to be disclosed on Form MA-T is substantially similar to the information required to be disclosed on Form BD by registered broker-dealers.<sup>29</sup> If the advisor has disclosed prior disciplinary history to the SEC or FINRA in connection with other filings, it may provide such information on Form MA-T by referencing the applicable public

25 The SEC indicated that activities (1) to (6) above are derived from the definition of “municipal advisor” in the Dodd-Frank Act; however, the SEC added activity (7) above (preparation of feasibility studies, etc.) because these services are sometimes provided by financial advisors (some of whom may be municipal advisors). See Release at 13-14.

26 See *id.*; see also Form MA-T, Item 2. Although the SEC did not provide guidance in the Release regarding what additional advisory activities may be covered by the “Other” category, the SEC indicated that it expects that this information will assist the SEC in understanding the scope of municipal advisor activities. See Release at 14.

27 Form MA-T, Item 3. For purposes of the temporary registration, the SEC limited the inquiry to a subgroup (associated municipal advisor professionals) rather than the broader group of associated persons covered by the Act, in order to obtain information about the persons who are primarily engaged in municipal advisory activities. See Release at 16-17. An “associated municipal advisor professional” is defined to include: (1) any associated person of a municipal advisor primarily engaged in municipal advisory activities; (2) any associated person of a municipal advisor who is engaged in the solicitation of municipal entities or obligated persons; (3) any associated person of a municipal advisor who is a supervisor of any person described in (1) or (2) above; (4) any associated person of a municipal advisor who is a supervisor of any person described in (3) above up through and including, the Chief Executive Officer or similarly situated official designated as responsible for the day-to-day conduct of the municipal advisor’s municipal advisory activities; and (5) any associated person of a municipal advisor who is a member of the executive or management committee of the municipal advisor or a similarly situated official, if any; and excludes any associated person of a municipal advisor whose functions are solely clerical or ministerial. Form MA-T, Glossary of Terms at “Associated municipal advisor professional.”

28 See Release at 15-16; Form MA-T, Item 3.

29 See Release at 16.

disclosure system (BrokerCheck or Investment Adviser Public Disclosure) that currently contains the disclosure, the CRD number of the entity under which the disclosure is listed, and whether the entity under which the disclosure is listed is a firm or individual.<sup>30</sup>

The individual who is required to execute Form MA-T varies depending upon the form of organization of the municipal advisor.<sup>31</sup> By executing Form MA-T, the municipal advisor also consents that service of any civil action brought by or notice of any proceeding before the SEC or any self-regulatory organization in connection with the municipal advisor's municipal advisory activities may be served upon the municipal advisor's named contact person.<sup>32</sup>

Because filing Form MA-T will require securing access credentials (*i.e.*, username and password) on the temporary registration system, the SEC advises municipal advisors to allow sufficient time to establish an account and obtain the credentials. The SEC anticipates that registrants will ordinarily obtain access credentials the same day that they are requested.<sup>33</sup> There is currently no filing fee to file Form MA-T with the SEC.<sup>34</sup>

Municipal advisors must amend Form MA-T promptly if information provided in response to Item 1 (identifying and contact information) or Item 3 (disciplinary information) becomes inaccurate in any way.<sup>35</sup> Failure to update Form MA-T could lead to revocation of a municipal advisor's temporary registration.<sup>36</sup>

### Effectiveness of Registration

A municipal advisor that completes Form MA-T and receives confirmation from the SEC that the form was filed will be temporarily registered for purposes of Exchange Act Section 15B until the earlier of: (1) the date that the municipal advisor's registration is approved or disapproved by the SEC pursuant to a final rule adopted by the SEC; (2) the date on which the municipal advisor's temporary registration is rescinded by the SEC; or (3) December 31, 2011.<sup>37</sup> Following registration, municipal advisors will be subject to the authority of the SEC and the Municipal Securities Rulemaking Board ("MSRB"), including SEC inspections and examinations.<sup>38</sup>

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30 Form MA-T, Item 3, Note.

31 "For a sole proprietorship, the sole proprietor should sign. For a partnership, a general partner should sign. For a corporation, an authorized principal officer should sign. For [any other form of organization], an authorized individual who participates in managing or directing the municipal advisor's affairs should sign." Form MA-T, Gen. Instructions ¶ 7 (internal bullet points omitted).

32 See Form MA-T, Item 4; Release at 22-23. The individual who executes Form MA-T must represent that the information and statements made on Form MA-T are current, true and complete, and the Form also contains a warning to the effect that intentional misstatements or omissions of fact constitute Federal criminal violations. See Form MA-T, Item 4.

33 See Release at 25; Form MA-T, Gen. Instructions ¶ 8.

34 See Form MA-T, Gen. Instructions ¶ 9.

35 See Release at 23-24, 49; Temporary Rule 15Ba2-6T(b) (to be codified at 17 C.F.R. § 240.15Ba2-6T(b)); see also Form MA-T, Gen. Instructions ¶ 5.

36 Form MA-T, Gen. Instructions ¶ 5.

37 See Release at 50; Temporary Rule 15Ba2-6T(e) (to be codified at 17 C.F.R. § 240.15Ba2-6T(e)). Approval of a municipal advisor's registration under the SEC's final rule will replace and supersede its temporary registration. See Release at 26 n.48.

38 See Dodd-Frank Act § 975(h), 124 Stat. at 1923 (amending Exchange Act § 17(a)(1), 15 U.S.C. § 78q(a)(1)); see also Release at 14 & n.26.

## **Fiduciary Duty of Municipal Advisors**

The Act also imposes a fiduciary duty on such advisors. It provides that “[n]o municipal advisor may engage in any act, practice, or course of business which is not consistent with a municipal advisor’s fiduciary duty or that is in contravention of any rule of the [MSRB].”<sup>39</sup> To date, neither the SEC nor the MSRB have provided guidance on the scope or extent of such fiduciary duty.

## **SEC Comment Period**

Although the Temporary Rule becomes effective on October 1, 2010, the SEC is requesting comments on all aspects of the rule and Form MA-T.<sup>40</sup> Comments should be submitted to the SEC on or before October 8, 2010.<sup>41</sup>

## **Further Information**

If you have any questions, please contact any of the attorneys listed on page 1 or your regular Skadden contact.

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39 Dodd-Frank Act § 975(c)(2), 124 Stat. at 1920 (to be codified at Exchange Act § 15B(c)(1), 15 U.S.C. § 78q(c)(1)).

40 See Release at 3.

41 See 75 Fed. Reg. at 54,465.