

## **GFOA ISSUE BRIEF: SEC MUNICIPAL ADVISOR RULE (NOV. 2013)**

In September, the Securities and Exchange Commission (SEC) gave final approval to the definition of “municipal advisor” (MA). The rule will go into effect January 13. The definition and forthcoming MSRB rulemaking will be very important for issuers of municipal securities, whether tax-exempt or taxable. The SEC municipal advisor rule specifies which activities will be covered by the *Dodd-Frank Act* imposed fiduciary duty of a municipal advisor to its government client, may result in the need for new written representations by issuers, and may limit the manner in which the underwriters and other professionals interact with issuers. The SEC release may be found at <http://www.gpo.gov/fdsys/pkg/FR-2013-11-12/pdf/2013-23524.pdf>.

Most importantly for GFOA members, unlike the proposed rule, all state and local government employees, board members, committee members and others are clearly exempted from the rule when acting in their official capacity. The exemption also applies to government employees and officials who may have to participate on other government boards and committees as part of their job. The rule also specifically states that, if a government official is also a municipal advisor outside of his or her government responsibilities (e.g., a part time city council member may have a career as a financial advisor), those professionals are still bound by the municipal advisor rules for their work unrelated to their official government capacity.

### **Top Items Issuers Need to Know About the Rule**

- Takes effect January 13, 2014.
- Municipal advisors have an explicit fiduciary duty to their government clients.
- Once the rule goes into effect, underwriters and other professionals that do not have a fiduciary duty to issuers will not be able to recommend financings unless certain exemptions are met. For instance, an underwriter may not be able to recommend a specific type of financing to the issuer unless the issuer has a MA or has a RFP out for underwriting services.
- Underwriters will be able to communicate with issuers about general market issues and ideas, however, unless an exemption is met, they will not be able to offer recommendations or advice.
- When an issuer has a MA on a transaction and wants to receive certain types of advice or recommendations from the underwriter or other professionals, the issuer will need to represent to the underwriter or other professionals in writing that they have a MA.
- It is important to note that the GFOA’s Best Practices strongly recommend that governments hire a municipal advisor for their bond transactions (BPs – Selecting a Financial Advisor, Selecting and Managing the Method of Sale of State and Local Government Bonds).
- Responses to RFPs or RFQs (including mini RFPs) are not considered to be municipal advice. Recent comments by SEC officials indicate that the term RFP may not have to be a formal RFP process, although it must widely distributed – not just to one banker. Please note that GFOA recommends that all governments utilize an RFP process to engage professionals involved in their bond transaction (BPs – Selecting a Financial Advisor, Selecting Underwriters)
- Advice on the “issuance of municipal securities” includes advice during the entire lifespan of the transaction – from the earliest pre-planning stages through maturity or earlier redemption.
- MAs will be mandated to take professional exams, and adhere to forthcoming MSRB rulemaking.
- Issuers that want advice on how to invest monies that are not bond proceeds or in escrows to pay for bonds may be requested by their broker to represent in writing that those monies are not bond proceeds or in escrows to pay for bonds.
- GFOA has asked the SEC for clarification related to RFPs, an underwriter’s communication with issuers, and how best to engage with an MA and/or underwriter for an exemption to be valid.

Below is a 2-page summary of the rule, as well as more detailed discussion of the various provisions. Please note that throughout this document the term “municipal entities” refers to state and local governments and other political subdivisions within a state, as well as other types of entities as summarized on page 4.

## HIGHLIGHTS OF RULE

### Who is a municipal advisor?

- A municipal advisor is a person who provides “advice” to a state or local government on municipal financial products or the issuance of municipal securities. No compensation is required.
- Certain firms that are compensated by unrelated broker-dealers, financial advisors, or investment advisors to solicit business from municipal entities or obligated persons including state and local pension plans, local government investment pools, other participant-directed investment programs or plans, and state and local governments are also municipal advisors.
- Underwriters, attorneys, engineers, accountants, investment advisors, commodity trading advisors and swap dealers are not considered municipal advisors when meeting the exemption standards explained below. This includes when the issuer has made a written representation that it has hired an independent financial advisor for the transaction.

### What is advice?

- A recommendation on financial products entered into by state and local governments (“municipal financial products”) or the issuance of municipal securities is “advice” if the information communicated to the municipal entity is reasonably viewed as a “call to action” to be taken by the issuer. That would be the case if an underwriter or other professional recommends a course of action that is particularized to the government’s needs.
- Advice on the “issuance of municipal securities” includes advice throughout the life of an issue of municipal securities, from the pre-issuance planning stage for a debt transaction involving the issuance of municipal securities until the bonds mature or are redeemed.
- Advice on “municipal financial products” includes advice on swaps, GICs, and investment strategies (i.e., the investment of bond proceeds or municipal escrows established to pay for bonds). Investment strategies with respect to the investment of other state and local funds are exempted from the rule.

### What is the duty of a municipal advisor?

- Municipal advisors have a fiduciary duty to their state and local government clients. They have a more limited duty of Fair dealing to their obligated person clients (e.g. conduit borrowers) if the obligated person is not a state or local government. Fair dealing in this context means that a proposal must be Fairly presented and executed. The material terms and risks of the proposal must be disclosed.

### Who is exempt from the definition of “municipal advisor”?

- **State and local government employee and official exemption.** All state and local employees, governing body members, and other officials are exempt from municipal advisor regulation to the extent that they act within the scope of their employment or official capacity.
- **When a government has an independent financial advisor exemption.** State and local governments that are represented by independent municipal advisors may receive advice from underwriters and others on the issuance of municipal securities or municipal financial products as long as an independent municipal advisor is providing advice to the issuer on the same aspects of the municipal financial product or issuance of municipal securities **AND** the municipal entity represents in writing it is relying on their own municipal advisors. Note: This exemption is not limited to underwriters. The rule does not specify who has to provide the representation on behalf of the municipal entity.

- **RFP exemption.** Firms responding to RFPs, include mini RFPs, may provide advice without becoming municipal advisors. Recent comments by SEC officials indicate that the term RFP may be interpreted broadly and does not have to be a formal RFP process, although it must be a broad outreach for ideas – not just to one banker.
- **Underwriter exemption.** Underwriters may provide advice on the structure, timing, terms, and similar matters concerning a transaction under the “underwriter exemption” only during the period of time beginning when they are engaged for a particular transaction and ending at the end of the underwriting period (the later of closing or the date the underwriter no longer has an unsold balance) (see page 6).  
Note: Underwriters may also provide further advice when the government has hired an independent MA and meets the requirements for that exemption or when within the “RFP” exemption applies. Underwriters may also provide many other types of information to municipal entities (including general market information and information about their qualifications) that does not rise to the level of advice without acting as a municipal advisor.
- **Others.** As discussed further below, the rule also provides specific exemptions for attorneys, engineers, accountants, registered investment advisors, commodity trading advisors, registered swap dealers, and most banking activities.

#### **When does the rule take effect?**

- All of the provisions of the rule except the registration provisions will take effect January 13, 2014. Permanent registration of municipal advisors by the SEC will start in July 2014. In the interim, the temporary registration rule expiration date has been extended to December 31, 2014. It is important to note that further MSRB rulemaking on issues such as fiduciary duty, political contributions, Fair dealing, gifts and gratuities, supervision, and professional qualifications will need to be completed before specific rules are in place for these professionals. However, the fiduciary duty is already in place, per the *Dodd-Frank Act*, although it has yet to be specifically defined by the MSRB.
- Municipal advisors are already required to register with the SEC and the MSRB. A state or local government can determine whether a firm is registered as a municipal advisor by the MSRB by going to <http://www.msrb.org/msrb1/PQweb/MARegistrants.asp>. A list of firms registered with SEC as municipal advisors may be found by going to <https://tts.sec.gov/MATR/index.html>.

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## DETAILED SUMMARY OF RULE

### Definition of “Municipal Advisor”

- A “municipal advisor” is a firm and its associated persons that provides “advice,” with or without compensation, to “municipal entities” or “obligated persons” on the “issuance of municipal securities” or “municipal financial products.” The term “municipal advisor” also covers those persons who, are compensated to solicit business on behalf of an unrelated broker-dealer, municipal advisor or investment advisor to be hired for the transaction or to provide investment advice.

### Definition of “Municipal Entity”

- “Municipal entity” means “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 other issuer of municipal securities; and
  - 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, including:
    - public pension funds,
    - local government investment pools
    - other state and local governmental entities or funds
    - participant-directed investment programs or plans such as 529, 403(b), and 457 plans.
  - Charter schools are considered “municipal entities” unless all of the funds they are pledging for a bond transaction come from sources other than government entities.

### “Definition of Advice”

- “Advice” includes a recommendation that is particularized to the specific needs, objectives, or circumstances of a “municipal entity” or “obligated person” with respect to municipal financial products or the issuance of municipal securities, including with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues, based on all the facts and circumstances.
- “Advice” does **NOT** include:
  - Information of a factual nature without subjective assumptions, opinions, or views.
  - Information that is not particularized to a specific municipal entity or type of municipal entity, with a call to action.
  - Information that is widely disseminated for use by the public, clients, or market participants other than municipal entities or obligated persons.
  - General information in the nature of educational materials.
- Advice on the “issuance of municipal securities” includes advice throughout the life of an issue of municipal securities, from the pre-issuance planning stage for a debt transaction involving the issue of municipal securities until those securities are redeemed or mature. Advice on municipal financial products is defined on page 9 of this summary.

## Fiduciary Duty

- A municipal advisor has a fiduciary duty to its “municipal entity” clients.
- “Fiduciary duty” is generally understood to encompass a duty of loyalty and a duty of care, although the MSRB has not yet issued guidance on the “fiduciary duty” of municipal advisors.
  - Under the duty of loyalty, a fiduciary is required to act in its client’s best interests without regard to its own financial or other interests. The fiduciary is also required to disclose conflicts of interest that might impair its ability to fulfill its duty of loyalty and not to undertake engagements if it cannot manage those conflicts. Certain conflicts may be determined to be unmanageable and will not be allowed.
  - Under the duty of care, a fiduciary must be qualified to undertake its engagement and consider alternatives to those presented to the client that might better serve its client’s interests.

## Exemptions to Definition of “Municipal Advisor”

The SEC muni advisor rule provides certain exemptions to the definition of “municipal advisor.” They are based on activities rather than status.

- **State and local government employee and official exemption.** The rule excepts from the definition of municipal advisor “[a]ny person serving as a member of a governing body, an advisory board, or a committee of, or acting in a similar official capacity with respect to, or as an official of, a municipal entity to the extent that such person is acting within the scope of such person’s official capacity” and “any employee of a municipal entity to the extent that such person is acting within the scope of such person’s employment.” A similar exemption applies to employees and officials of obligated persons (e.g., conduit borrowers).
- **Exemptions for certain professionals.**
  - **Attorneys.** The rule exempts attorneys providing legal advice or providing services that are of a traditional legal nature with respect to the issuance of municipal securities or municipal financial products to clients of such attorneys that are municipal entities, obligated persons, or other participants in the transaction. The exemption does not apply to the extent an attorney represents himself or herself as a financial advisor or financial expert regarding the issuance of municipal securities or municipal financial products.
  - **Engineers.** The rule exempts engineers to the extent that they are providing engineering advice. Exempted activities include feasibility studies, cash flow analyses, and similar activities to the extent they do not include advice beyond the engineering aspects of a project. The exemption does not cover activities in which an engineer provides advice to a municipal entity or obligated person regarding municipal financial products or the issuance of municipal securities.
  - **Accountants.** The rule exempts an accountant to the extent that the accountant is providing audit or other attest services, preparing financial statements, or issuing letters for underwriters for, or on behalf of, a municipal entity or obligated person.
  - **Registered investment advisers.** The rule exempts federally-registered investment advisers and their associated persons to the extent they are providing investment advice. “Investment advice” does not include advice concerning whether and how to issue municipal securities, advice concerning the structure, timing, and terms of an issuance of municipal securities and other similar matters, advice concerning municipal derivatives, or a solicitation of a municipal entity or obligated person, even if such activities are under an advisory agreement. State-registered investment advisers are not covered by this exemption.

## Exemptions for certain professionals, continued

- **Commodity Trading Advisors.** The rule exempts CFTC-registered swap advisors to the extent they are providing swap advice.
- **Swap Dealers.** The rule exempts CFTC-registered swap dealers that are not “acting as an advisor” to a municipal entity or obligated person under the provisions of the Commodity Exchange Act.
- **“Bank Exemption”**
  - Banks are exempted from the definition of “municipal advisor” to the extent they provide advice on:
    - investments that are held in a deposit account, savings account, certificate of deposit, or other deposit instrument issued by a bank;
    - any extension of credit by a bank to a municipal entity or obligated person, including the issuance of a letter of credit, the making of a direct loan, or the purchase of a municipal security by the bank for its own account;
    - funds held in certain sweep accounts; or
    - any investment made by a bank acting in the capacity of an indenture trustee or similar capacity.
  - The bank exemption does not apply to the extent that banks are providing advice to municipal entities or obligated persons on the issuance of municipal securities or municipal financial products, including swaps
- **“Underwriter Exemption.”**
  - The **“underwriter exemption”** applies when a dealer has been engaged to underwrite a particular issue of municipal securities and continues until the end of the underwriting period for that issue. "Private placements" of municipal securities are treated like underwritings for purposes of this rule.
  - The “underwriter exemption” allows the underwriter to provide advice in these specific areas in a non-fiduciary capacity:
    - Advice regarding the structure, timing, terms, and other similar matters concerning a particular issue of municipal securities (except as otherwise provided below).
    - Preparation of rating strategies and presentations related to the issue being underwritten.
    - Preparations for and assistance with investor “road shows” and investor discussions related to the issue being underwritten.
    - Advice regarding retail order periods and institutional marketing if the issuer has decided to engage in a negotiated sale.
    - Assistance in the preparation of the POS and OS.
    - Assistance with the closing of the issue, including negotiation and discussion with respect to all documents, certificates, and opinions needed for the closing.
    - Coordination with respect to obtaining CUSIP numbers and the registration of the issue with DTC.
    - Preparation of post-sale reports for the issue.
    - Structuring of refunding escrow cash flow requirements, but not the recommendation of and brokerage of particular municipal escrow investments.

## “Underwriter Exemption”, continued

- The “underwriter exemption” does NOT allow the underwriter to provide advice in the following areas:<sup>1</sup>
  - Advice on what method of sale (competitive sale or negotiated sale) an issuer should use for an issue of municipal securities.
  - Pre-selection activities (e.g., RFP responses or other business solicitation activities).
  - “Advice” to an issuer as part of an underwriting pool when the firm has not been selected to be the underwriter on a specific issue.
  - Advice to an issuer when the firm has been selected as underwriter for a period of time but not for a specific issue.
  - Advice on “municipal financial products,” as defined later in this summary.
  - Advice on whether a governing body of an issuer should approve or authorize an issue of municipal securities.
  - Advice on a bond election campaign.
  - Advice that is not specific to a particular issue of municipal securities for which a firm is serving as underwriter and that involves analysis or strategic services with respect to overall financing options, debt capacity constraints, debt portfolio impacts, analysis of effects of debt or expenditures under various economic assumptions, or other impacts of funding or financing capital projects or working capital.
  - Assisting issuers with competitive sales, including bid verification, true interest cost (TIC) calculations and reconciliations, verifications of bidding platform calculations, and preparation of notices of sale.
  - Preparation of financial feasibility analyses with respect to new projects.
  - Budget planning and analyses and budget implementation issues with respect to debt issuance and collateral budgetary impacts.
  - Advice on an overall rating strategy that is not related to a particular issue of municipal securities for which a firm is serving as an underwriter, including advice and actions taken on behalf of an issuer between financing transactions.
  - Advice on overall financial controls that are not related to a particular issue of municipal securities for which a firm is serving as an underwriter.
  - Advice regarding the terms of RFPs or RFQs for underwriters or other professionals for a project financing and advice regarding review of responses to such requests, including matters regarding compensation of such underwriters or other professionals.
  - Advice with respect to municipal derivatives
  - Advice with respect to the investment of proceeds

## **Other Exemptions**

- Certain activities that involve “advice” but do not qualify for the underwriter exemption may qualify for either the “RFP exemption” or when the government has hired an “independent financial advisor”. Note: These exemptions are not limited to underwriters.
  - The **“RFP exemption”** applies to responses to issuer RFPs and RFQs. This exemption also covers responses to “mini-RFPs” sent by issuers to firms it has already selected as part of its underwriting pool. SEC officials have recently indicated that the term RFP may be interpreted more broadly than just a formal RFP process, including more general call for ideas. It is important to note, however, that an issuer would have to put out such a request to a number of firms, and not just to one. RFP responses are subject to Fair dealing, suitability, or other standards even if the RFP exemption applies.

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<sup>1</sup> To avoid being considered a “municipal advisor,” a dealer that is providing “advice” must be covered by another exemption (i.e., the independent municipal advisor exemption or the RFP exemption).

## Other Exemptions, continued

- **“Issuer has hired an independent financial advisor exemption.”** When a government has hired an independent financial advisor, and has made that representation known in writing to the proposed underwriter or person seeking to rely on the exemption, the underwriter or person may make proposals that will be evaluated by the MA. Note: The MA must have been hired to evaluate proposals such as the one the proposed underwriter wants to present.
  - An MA is “independent” of the proposed underwriter if it has not been an “associated person” of the proposed underwriter within the last 2 years. Note there is a difference between this test for “independence” and that of the CFTC for swap advisors, which imposes a 1-year test among other factors.
  - For an underwriter or other types of professionals to rely on the “issuer has hired an independent MA” exemption, the underwriter or other firm must:
    - ✓ Obtain a written representation from the issuer that it is represented by, and will rely on the advice of, an independent registered municipal advisor.
    - ✓ Provide written disclosure to the issuer and its MA that, by obtaining such representation from the issuer, the firm is not a municipal advisor and is not subject to the fiduciary duty established in Section 15B(c)(1) of the Exchange Act with respect to the municipal financial product or issuance of municipal securities.
    - ✓ Such disclosure must be made at a time and in a manner reasonably designed to allow the issuer to assess the material incentives and conflicts of interest that such person may have in connection with the municipal advisory activities. The level and timing of disclosure required may vary according to the issuer’s knowledge or experience. Note: The timing and content of these disclosures seem to be a mix of the current MSRB Rule G-23 and MSRB Rule G-17 disclosures.
- **Possible Limits on the Role of Underwriter when No Specific Exemption Applies:** If there is no specific exemption that the underwriter or other professional may use (issuer has a MA, there is an RFP), then the underwriter or professional may not provide “advice” on the issuance of municipal securities or municipal financial products to the issuer. It is important to note that **GFOA’s Best Practice recommends that issuers hire a financial advisor. Relevant to this rule, doing so will allow the issuer to receive a greater amount of advice from underwriters and other professionals.**

## **Obligated Persons**

- Similar rules apply to “advice” provided to “obligated persons,” although a municipal advisor does not have a fiduciary duty to an obligated person that is not a municipal entity.
- An “obligated person” is broader than the concept of “conduit borrower.” It is defined under the SEC muni advisor rule the same way it is defined under SEC Rule 15c2-12. Rule 15c2-12 defines the term “obligated person” 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 payment of all, or part of the obligations on the municipal securities to be sold in the Offering (other than providers of municipal bond insurance, letters of credit, or other liquidity facilities).” The federal government is also not considered to be an “obligated person.”
- If a client is only considering a conduit financing as opposed to some other form of financing, the client is not an obligated person. A firm will not be a municipal advisor to an obligated person until the obligated person has begun the process of applying to, or negotiating with, a municipal entity to issue conduit bonds on behalf of the obligated person.



### **Obligated Persons, continued**

- An entity is considered an “obligated person” only when it is acting in its capacity as such. For example, a firm providing advice to a non-profit hospital on the sale of a building that was not financed with bond proceeds and does not otherwise secure a conduit borrowing of the hospital would not be a MA.

### **Municipal Financial Products**

- “Municipal financial products” are “municipal derivatives,” “GICs,” and “investment strategies.”
- “Investment strategies” are advice on the investment of the proceeds of municipal securities and the recommendation and brokerage of municipal escrows.
- The SEC MA rule adopts the same definition of “proceeds” as that of the IRS arbitrage rebate rules (i.e.):
  - monies derived by a municipal entity from the sale of municipal securities,
  - investment income derived from the investment or reinvestment of such monies,
  - any monies of a municipal entity or obligated person held in funds under legal documents for the municipal securities that are reasonably expected to be used as security or a source of payment for the payment of the debt service on the municipal securities, including reserves, sinking funds, and pledged funds created for such purpose, and
  - the investment income derived from the investment or reinvestment of monies in such funds.
- The mere fact that bond proceeds are comingled with other funds does not mean that they are spent for tax purposes. However, if certain investment proceeds are deposited in a comingled fund with substantial tax or other revenues from governmental operations of a municipal issuer and reasonably expected to be spent within six months of the comingling, they will be treated as spent at the time of comingling.
- On whether amount are proceeds, a firm may reasonably rely on the written representations of a knowledgeable official of the municipal entity or obligated person whose funds are to be invested regarding the nature of such funds.
- “Municipal derivatives” are “swaps” or “security-based swaps” with a counterparty that is a municipal entity or obligated person.

### **Public Pensions**

Many of the placement agents and third-party marketers that solicit business from public pension funds on behalf of investment advisors are considered municipal advisors. To be municipal advisors they must receive compensation for soliciting business on behalf of an unrelated third party. The types of business covered are investment advisory business, municipal securities business, and municipal financial products business. Placement agents and third-party marketers do not owe a fiduciary duty to the pension funds they solicit, because the pension funds are not their clients. However, they do have a duty of fair dealing to the pension funds and will be covered by other MSRB rules.

### **Local Government Investment Pools**

Many smaller local governments invest their funds in local government investment pools. The same rules that apply to advisors to pension funds also apply to local government investment pools. Therefore, those firms that are paid to solicit investment advisory business from LGIPs on behalf of unrelated third parties will be considered municipal advisors.