



# Municipal Market Regulatory Update

SEC DEFINITION OF “MUNICIPAL ADVISOR” AND WHAT TO EXPECT NEXT

FALL 2013

## INTRODUCTION

Since October 1, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) has required municipal advisors to register with the Securities and Exchange Commission (SEC).<sup>1</sup> On September 20, 2013, the SEC released its long-awaited final definition of “municipal advisor” for registration and record-keeping purposes.<sup>2</sup>

In late 2010, the SEC requested comment on a proposed definition of “municipal advisor,” which sparked serious concern among municipal market participants that the SEC’s definition would be overly inclusive. The SEC received over 1,000 written comments on its proposed definition. Ultimately, the SEC agreed with many of the comments and narrowed the applicability of its municipal advisor registration requirements by expanding the available exemptions and interpreting the exclusions from the municipal advisor definition broadly. Municipal advisor registration and record-keeping requirements are found in new SEC Securities Exchange Act Rules 15Ba1-1 through 15Ba1-8, new Rule 15Bc4-1, and new Forms MA, MA-I, MA-W, and MA-NR. The SEC’s definitions are found in SEC Rule 15Ba1-1. The SEC’s new rules become effective 60 days following publication in the *Federal Register*. Prior to July 1, 2014, municipal advisory firms and sole proprietors required to register will do so under the SEC’s temporary registration rule, with a new registration process to phase in on a staggered basis between July 1, 2014, and December 1, 2014.

The SEC’s definition of “municipal advisor” gives the MSRB the authority to proceed with its municipal advisor regulations, which were delayed pending this final SEC definition. The likely subject matter of some of the MSRB’s initial municipal advisor rules and interpretations is discussed below.

## MUNICIPAL ADVISOR DEFINITION

### WHO’S IN?

Subject to certain exclusions and exemptions discussed below, a “municipal advisor” is defined under the SEC Rule 15Ba1-1 as:

[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 or obligated person.<sup>3</sup>

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## IN THIS ISSUE:

Introduction .....	1
Municipal Advisor Definition.....	1
What’s Next .....	6

To the extent they meet this definition, financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors are required to register with the SEC as municipal advisors.<sup>4</sup> The SEC registration requirements only apply to municipal advisory firms and sole proprietors, not to individuals.<sup>5</sup>

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## WHAT CONSTITUTES ADVICE?

The SEC declined to provide a bright-line test for what constitutes advice, but rather is taking a “facts and circumstances” approach.<sup>6</sup> As a general matter, the advice must include some sort of recommendation about a municipal financial product or the issuance of municipal securities.<sup>7</sup> The type of information that constitutes a recommendation is also based on the facts and circumstances surrounding specific communications.<sup>8</sup> The SEC Release cites FINRA and MSRB guidance regarding what constitutes a recommendation for purposes of customer suitability rules.<sup>9</sup> Such guidance sets forth general parameters for determining the facts and circumstances under which a specific communication could be deemed a recommendation under MSRB and FINRA suitability rules, including the following:

- The determination of whether a “recommendation” has been made . . . is an objective rather than subjective inquiry.<sup>10</sup>
- FINRA and the MSRB consider “whether—given its content, context and manner of presentation—a particular communication from a firm or associated person to a customer reasonably would be viewed as a suggestion that the customer take action or refrain from taking action regarding a security or investment strategy.”<sup>11</sup>
- The more individually tailored the communication is to a particular customer or customers about a specific security or investment strategy, the more likely the communication will be viewed as a recommendation.<sup>12</sup>
- [A] series of actions that may not constitute recommendations when viewed individually may amount to a recommendation when considered in the aggregate.<sup>13</sup>

Furthermore, “general information” may be provided to a municipal entity or obligated person that is factual in nature, non-specific, widely disseminated, and educational without triggering registration and record-keeping requirements.<sup>14</sup>

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## WHAT IS A MUNICIPAL ENTITY?

The SEC broadly defines “municipal entity” under its rule; determining this definition should not be limited to issuers of municipal securities.<sup>15</sup> A “municipal entity” is defined under SEC Rule 15Ba1-1 as “any State, political subdivision of a

State, or municipal corporate instrumentality of a State or of a political subdivision of a State.”<sup>16</sup> This definition specifically includes “[a]ny agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality.”<sup>17</sup> It also includes “[a]ny 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.”<sup>18</sup> Finally, the definition provides a catch-all for “[a]ny other issuer of municipal securities.”<sup>19</sup>

The SEC expressed a concern, among other concerns, that if it limited the definition of municipal entity to issuers of municipal securities, public pension plans would not be provided adequate protection.<sup>20</sup> The SEC noted that the solicitation of public pension plans related to investment advisory services has been the subject of recent SEC litigation, including a 2009 SEC enforcement action alleging a scheme by which the “finder” for the New York State Common Retirement Fund fraudulently obtained fees from firms seeking investment business from the Fund.<sup>21</sup>

Generally, charter schools would be included by the SEC in the definition of municipal entities under Rule 15Ba1-1.<sup>22</sup> However, to the extent a charter school is a conduit borrower “using and/or pledging solely monies derived from sources other than the state or political subdivision of a state,” it is an obligated person.<sup>23</sup> The SEC would likely apply this same method of categorization to public universities.

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## WHAT IS AN OBLIGATED PERSON?

To promote uniformity in federal securities law, the SEC adopted a definition of “obligated person” for registration and record-keeping purposes that is consistent with SEC Rule 15c2-12.<sup>24</sup> An “obligation person” is defined under SEC Rule 15Ba1-1 as “any person . . . 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” and would include entities such as hospitals and higher education institutions.<sup>25</sup> Similar to SEC Rule 15c2-12, this definition does not include an entity whose financials or operating data is not material to an offering of municipal securities.<sup>26</sup> It also does not include bond insurers, letter of credit providers, liquidity facilities, or the federal government.<sup>27</sup>

A financial advisor that merely presents a client with debt financing options that include a conduit borrowing is not required to register with the SEC.<sup>28</sup> SEC registration and record-keeping requirements are only triggered upon the initiation of a process to issue conduit bonds, meaning application to or entering into negotiations with a potential conduit issuer.<sup>29</sup> This threshold will be determined by the facts and circumstances surrounding a financial advisor’s conduct.<sup>30</sup>

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## WHAT IS A MUNICIPAL FINANCIAL PRODUCT?

SEC Rule 15Ba1-1 incorporates the Exchange Act definition of “municipal financial product,” which means “municipal derivatives, guaranteed investment contracts, and investment strategies.”<sup>31</sup> A “municipal derivative” is defined under SEC rules as a swap or security-swap to which either a municipal entity or an obligated person is a counterparty.<sup>32</sup> The obligated person must be “acting in such capacity” under SEC Rule 15Ba1-1, thus, advice provided by a financial advisor to an obligated person regarding a derivative transaction unrelated to municipal securities does not fall under this definition.<sup>33</sup> There is no similar carve-out for a municipal entity.

SEC Rule 15Ba1-1 also substantially incorporates the Exchange Act definition of “guaranteed investment contract,” which means “any investment that has specified withdrawal or reinvestment provisions and a specifically negotiated or bid interest rate, and also includes any agreement to supply investments on two or more future dates, such as a forward supply contract.”<sup>34</sup> However, SEC Rule 15Ba1-1 narrows the Exchange Act definition by requiring that the contract be “relate[d] to investments of proceeds of municipal securities or municipal escrow investments” to qualify as a guaranteed investment contract requiring municipal advisor registration and record-keeping.<sup>35</sup>

Finally, “investment strategies” are defined under SEC Rule 15Ba1-1 as “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.”<sup>36</sup> The SEC noted that the proceeds of municipal securities do not lose their character as such upon their commingling with other funds.<sup>37</sup>

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## WHAT IS AN ISSUANCE OF MUNICIPAL SECURITIES?

Similar to its approach regarding other SEC Rule 15Ba1-1 requirements, whether advice has been provided “with respect to the issuance of municipal securities” will also be determined in light of the facts and circumstances of a particular transaction.<sup>38</sup> The relevant time period for an issuance of municipal securities is expansive under SEC Rule 15Ba1-1, beginning at the planning stages of a municipal market transaction and continuing throughout the life of the outstanding bonds.<sup>39</sup>

## WHAT CONSTITUTES A SOLICITATION?

Both a municipal entity and an obligated person can be subject to a solicitation. As with the SEC’s definition of “municipal derivative” discussed above, a solicitation of an obligated person only falls under the purview of SEC Rule 15Ba1-1 when the obligated person is acting in its capacity as an obligated person.<sup>40</sup> A “solicitation” under SEC Rule 15Ba1-1 is defined as:

[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.<sup>41</sup>

Whether or not an introduction to a municipal entity or obligated person constitutes a solicitation triggering municipal advisor registration and record-keeping requirements turns on whether or not the person arranging the introduction receives compensation.<sup>42</sup> Furthermore, advertising efforts by brokers, dealers, municipal securities dealers, municipal advisors, and investment advisors do not constitute a solicitation under SEC Rule 15Ba1-1.<sup>43</sup>

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## WHO’S OUT?

Excluded from the definition of “municipal advisor” under the Exchange Act and under SEC Rule 15Ba1-1 are five groups of persons consisting of:

- (1) Registered brokers, dealers, and municipal securities dealers serving as an underwriter
- (2) Investment advisors registered under the Investment Advisers Act of 1940 or persons associated therewith
- (3) Commodity trading advisors registered under the Commodity Exchange Act or persons associated therewith providing swap advice
- (4) Attorneys offering legal advice or traditional legal services
- (5) Engineers providing engineering advice<sup>44</sup>

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## UNDERWRITERS

Underwriters should take note that the SEC identified a finite period during which this exemption is available, beginning with engagement and expiring at the end of the underwriting period.<sup>45</sup> Although the SEC did not provide an exhaustive list of activities that would fall under the underwriter exclusion, it did provide examples including providing “advice regarding the structure, timing, terms, and other similar matters concerning a particular issuance of municipal securities”<sup>46</sup> and to retail order periods, preparing rating presentations and road shows, helping to prepare a preliminary official statement and official statement, coordinating CUSIP numbers and post-sale reports, structuring escrow cash flow requirements to allow for refunding and defeasance, and assisting with the transaction’s closing.<sup>47</sup> The SEC also provided numerous examples of activities falling outside the scope of the underwriter exclusion, including, among other activities, providing advice related to investment strategies, the method by which municipal securities are sold (competitive v. negotiated sale), and whether or not a governing body should approve the issuance of municipal securities.<sup>48</sup> Following the closing of the transaction and termination of the underwriting period, the SEC has taken the position that providing advice with respect to post-issuance compliance to issuers in filing their annual financials or event notices falls outside the scope of the underwriter exclusion.<sup>49</sup> Underwriters may also be able to avail themselves of an exemption from registration based on the presence of an independent municipal advisor as discussed below.

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## ATTORNEYS

With respect to attorneys, the SEC acknowledged that legal advice and traditional legal services of public finance attorneys “inherently involve a financial advice component.”<sup>50</sup> However, SEC Rule 15Ba1-1 will require registration by attorneys as municipal advisors “[t]o 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.”<sup>51</sup> Pursuant to SEC Rule 15Ba1-1, an attorney will be deemed to be making such a representation if he or she provides advice relating to financial feasibility, the borrowing cost of a municipal securities issue based on different interest rate assumptions, and the financial aspects of undertaking a competitive sale versus a negotiated sale.<sup>52</sup>

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## ENGINEERS

The engineer exclusion under SEC Rule 15Ba1-1 generally covers providing information related to project schedules and anticipated funding requirements as well as preparing feasibility

studies and cash flow analyses.<sup>53</sup> Among other activities that would also fall with the scope of the engineer exemption, an engineer can provide a municipal entity or obligated persons with information regarding potential tax savings, discounts, or rebates.<sup>54</sup> However, the SEC again adopts a facts-and-circumstances approach to determine whether the engineer exclusion is applicable, and will consider whether the sum of all of the pieces of information provided by an engineer to a municipal entity or obligated person results in advice requiring SEC registration as a municipal advisor.<sup>55</sup> Beyond the scope of the engineer exclusion is, however, “advice to a municipal entity or obligated person regarding municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, or other similar matters concerning such products or issuances.”<sup>56</sup>

SEC Rule 15Ba1-1 also contains eight groups of persons granted limited exemptions from its registration and record-keeping requirements when engaging in certain conduct, consisting of:

- (1) Accountants
- (2) Public officials and employees of municipal entities and obligated persons
- (3) Banks
- (4) Persons responding, orally or in writing, to requests for proposals (RFPs) or qualifications (RFQs)
- (5) Swap dealers registered under the Commodity Exchange Act so long as they are not an advisor with respect to the municipal derivative or trading strategy pursuant to Commodity Exchange Act
- (6) Persons engaging in municipal advisory activities where a municipal entity or obligated person is concurrently represented by an independent registered municipal advisor
- (7) Persons providing advice regarding investment strategies that are not plans to invest municipal securities proceeds or providing a recommendation of and brokerage of escrow investments
- (8) Persons undertaking certain solicitations<sup>57</sup>

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## ACCOUNTANTS

The accountant exemption under SEC Rule 15Ba1-1 covers an accountant’s “audit or other attest services, preparing financial statements, or issuing letters for underwriters for, or on behalf of, a municipal entity or obligated person.”<sup>58</sup>



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## PUBLIC OFFICIALS AND EMPLOYEES OF MUNICIPAL ENTITIES

By definition, employees of municipal entities are not municipal advisors.<sup>59</sup> Many of the 1,000 comments submitted to the SEC regarding its proposed rules urged the SEC to extend this exclusion to appointed board members and other public officials of municipal entities.<sup>60</sup> Others urged the SEC to extend this exclusion to the board members, officials, and employees of obligated persons as well.<sup>61</sup> The SEC agreed with the comments and provided an exemption from registration and record-keeping requirements, for “[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 or obligated person” as well as municipal entity and obligated person employees to the extent they are acting within the scope of their official capacity or employment, respectively.<sup>62</sup> The SEC Release notes that the scope of this exemption is limited to members of such boards and committees who are volunteers.<sup>63</sup>

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## BANKS

With respect to banks, the SEC sought to exempt from registration requirements banks providing advice related to “traditional banking services” and other products the SEC “believes do not pose the types of risks that the Dodd-Frank Act was designed to address.”<sup>64</sup> Thus, SEC Rule 15Ba1-1 exempts banks providing advice to municipal entities and obligated persons related to any investments held in a deposit, savings account, or other deposit instrument; any extension of credit (including a letter of credit, the making of a direct loan, or the purchase of a municipal security); any sweep account funds; or any investment made by a bank in its capacity as an indenture trustee.<sup>65</sup>

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## RFPS AND RFQS

So long as a person is not compensated for advice provided in response to an RFP or RFQ, persons providing such responses are exempted from SEC registration and record-keeping requirements.<sup>66</sup> This RFP exemption covers “mini-RFPs” distributed to a limited number of service providers based on pre-qualifications set by a municipal entity or an obligated person.<sup>67</sup> By contrast, a person assisting a municipal entity or obligated person in the preparation of an RFP or RFQ or in the selection of a financial professional as part of the RFP process may be subject to SEC registration and record-keeping requirements.<sup>68</sup> Furthermore, such assistance would fall outside the scope of the underwriter exclusion, discussed above.<sup>69</sup>

## INDEPENDENT MUNICIPAL ADVISORS

SEC Rule 15Ba1-1 contains an exemption available to persons in situations where there is an independent registered municipal advisor concurrently providing advice related to “the same aspects of the municipal financial product or issuance of municipal securities.”<sup>70</sup> The person relying on the exemption must receive a written representation by a municipal entity or obligated person, upon which such person has a reasonable basis to rely, stating that the municipal entity or obligated person will rely on the advice given to it by the independent registered municipal advisor.<sup>71</sup>

If the independent registered municipal advisor exemption described above is sought in connection with a municipal entity, the person relying on the exemption must disclose that it does not owe the municipal entity a fiduciary duty.<sup>72</sup> If the exemption is sought in connection with an obligated person, such person must disclose that it is not a municipal advisor.<sup>73</sup> In both instances, a copy of the disclosure must be provided to the independent registered municipal advisor.<sup>74</sup> The timing with which a municipal entity or obligated person is provided with such disclosures must be adequate to consider the material risks and potential conflicts of interest associated with such municipal advisory activities.<sup>75</sup> Similar to the disclosure requirements imposed on underwriters by the MSRB under its “fair dealing” rule, MSRB Rule G-17, the level and timing of disclosures required by the independent registered municipal advisor exemption may vary in accordance with a particular issuer’s knowledge and experience.<sup>76</sup> SEC Rule 15Ba1-1 requires that the person seeking to employ the exemption be unassociated with the municipal advisor for a “cooling-off period” of at least two years.<sup>77</sup>

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## PERSONS UNDERTAKING CERTAIN SOLICITATIONS

Finally, SEC Rule 15Ba1-1 contains an exemption for certain solicitation activities, including solicitations undertaken by persons to obtain or retain a municipal entity or obligated person engagement for a broker, dealers, municipal securities dealers, or advisor related to investment strategies that “are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments.”<sup>78</sup>

## WHAT'S NEXT?

The Dodd-Frank Act expanded the MSRB's jurisdiction to include municipal advisor regulation.<sup>79</sup> After completing SEC registration, municipal advisors must also register with the MSRB.<sup>80</sup> The MSRB opened its registration system to municipal advisors on November 15, 2010.<sup>81</sup> If a municipal advisor engages in municipal advisory activities after December 31, 2010, without first completing MSRB registration, it will be in violation of MSRB rules.<sup>82</sup> Currently, there are far more municipal advisors registered with the SEC than with the MSRB.<sup>83</sup> As the final definition of "municipal advisor" under SEC Rule 15Ba1-1 is generally narrower in scope than the SEC's proposed definition, persons currently registered with the SEC and MSRB as municipal advisors may withdraw their registrations if they are not included in the SEC's final definition.<sup>84</sup>

Effective October 1, 2010, municipal advisors owe a federal fiduciary duty to their municipal entity clients.<sup>85</sup> Pursuant to the Dodd-Frank Act, the MSRB is to:

- Prescribe means reasonably designed to prevent acts, practices, and courses of business as are not consistent with a municipal advisor's fiduciary duty to its clients
- Provide continuing education requirements for municipal advisors
- Provide professional standards
- Not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud<sup>86</sup>

In addition to certain definitional and administrative rules, the MSRB extended its fair dealing rule to municipal advisors in late 2010, which provides that "[i]n the conduct of its municipal securities or municipal advisory activities, each broker, dealer, and municipal securities dealer, and municipal advisor shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice."<sup>87</sup>

The MSRB subsequently filed with the SEC several municipal advisor rules and interpretations, including standards similar to those imposed by the MSRB on dealers, such as pay-to-play restrictions,<sup>88</sup> fair dealing requirements,<sup>89</sup> and gifts and gratuities limitations.<sup>90</sup> The MSRB also filed a proposed fiduciary duty rule and interpretation applicable to municipal advisors, a layer of protection not currently present in a municipal entity's arm's-length relationship with its underwriter.<sup>91</sup> The MSRB also undertook activities to develop minimum professional qualifications for municipal advisors.<sup>92</sup> In September 2011, the

MSRB withdrew all of these filings pending the SEC's finalizing the definition of "municipal advisor" for registration purposes.<sup>93</sup>

The MSRB has continued to consider its draft municipal advisor rules and interpretations and, following the adoption of SEC Rule 15Ba1-1, has stated that it "will advance a regulatory framework for municipal advisors that includes rules for professional conduct, professional qualification examination requirements as well as education and outreach to municipal advisors."<sup>94</sup> Thus, it is likely the MSRB will soon request comment and/or file (or re-file) with the SEC proposed municipal advisors rules and interpretations containing similar provisions to those it requested comment on and proposed in 2011.

As these regulations roll out, municipal advisors should adopt policies and procedures to ensure compliance with the rules. Such policies and procedures have been key in the SEC's consideration of mitigating circumstances when determining the extent and severity of non-compliance in its recent investigations and enforcement actions.<sup>95</sup> Municipal advisors should note the general uptick in the SEC's enforcement actions related to the municipal market, with a record number of enforcement actions brought in 2012.<sup>96</sup> Thus far in 2013, the SEC has already brought two enforcement actions against investment advisors in connection with their public pension plan services.<sup>97</sup> Municipal advisors should expect the SEC's aggressive approach to extend to municipal advisor investigations and enforcement actions.

Ballard Spahr's Municipal Securities Regulation and Enforcement Group helps municipal market participants navigate a rapidly evolving regulatory, investigative, and enforcement environment, enabling them to anticipate and address compliance issues and respond effectively to investigations when necessary.

Our attorneys provide representation in proceedings involving the SEC, the Municipal Securities Rulemaking Board (MSRB), the U.S. Department of Justice (DOJ), the Financial Services Regulatory Authority (FINRA), and state securities commissions.

1. Exchange Act Rule 15B(a).
2. SEC Release No. 34-70462, pp. 43-44 (Sept. 20, 2013) (hereinafter “SEC Release”).
3. SEC Rule 15Ba1-1(d)(1)(i).
4. SEC Rule 15Ba1-1(d)(1)(iii).
5. SEC Rule Rule 15Ba1-3.
6. SEC Release, pp. 43-44.
7. SEC Rule 15Ba1-1(d)(1)(ii).
8. SEC Release, n.165.
9. *Id.*
10. FINRA Regulatory Notice 11-02, *Know Your Customer and Suitability*, Jan. 2011, available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p122778.pdf>; NASD Notice to Members 01-23, *Online Suitability-Suitability Rule and Online Communication*, Apr. 2001, available at [www.finra.org/Industry/Regulation/Notices/2001/P003887](http://www.finra.org/Industry/Regulation/Notices/2001/P003887); MSRB Notice Regarding Application of Rule G-19, *On Suitability of Recommendations and Transactions to Online Communications*, Sept. 25, 2002, available at <http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-19.aspx?tab=2>.
11. *Id.*
12. *Id.*
13. FINRA Regulatory Notice 11-02, *Know Your Customer and Suitability*, Jan. 2011, available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p122778.pdf>
14. SEC Release, p. 45; See SEC Rule 15Ba1-1(d)(1)(ii).
15. SEC Release, p. 48.
16. SEC Rule 15Ba1-1(g).
17. *Id.*
18. *Id.*
19. SEC Rule 15Ba1-1(g).
20. SEC Release pp. 53-55. The SEC’s interpretation is consistent with the MSRB’s interpretation that its expanded mission mandated by the Dodd-Frank Act to protect “municipal entities and obligated persons” includes public pension plans. See, e.g., MSRB Press Release, *MSRB Reminds Municipal Advisors of Registration Requirement*, Dec. 13, 2010.
21. *Id.* (citing SEC v. Henry Morris, Litigation Release No. 20963 (March 19, 2009)).
22. SEC Release p. 69.
23. *Id.*
24. SEC Release p. 57.
25. Exchange Act Section 15B(e)(10); SEC Rule 15Ba1-1(k). See Securities Exchange Act Release No. 26985 (June 28, 1989), 54 FR 28799, note 89 (July 10, 1989). See also Securities Exchange Act Release No. 62184A (May 27, 2010), 75 FR 33100, 33107 (June 10, 2010) (stating: “[a]s noted in [Securities Exchange Act Release No. 60332 (July 17, 2009), 74 FR 36831 (July 24, 2009)], the Commission believes that information regarding conduit borrowers is material to investors in credit enhanced offerings and therefore should be included in the official statements”). See also SEC Release n. 221.
26. SEC Rule 15Ba1-1(k).
27. *Id.*
28. SEC Release p. 66.
29. *Id.*
30. *Id.*
31. Exchange Act Section 15B(e)(5); SEC Rule 15Ba1-1(i).
32. SEC Rule 15Ba1-1(f).
33. *Id.*; SEC Release pp. 74-75.
34. Exchange Act Section 15B(e)(2); SEC Rule 15Ba1-1(a).
35. *Id.*; SEC Release pp. 79.
36. Exchange Act Section 15B(e)(3); SEC Rule 15Ba1-1(b).
37. SEC Release p. 98.
38. *Id.* at p. 82.
39. *Id.*
40. SEC Rule 15Ba1-1(n).
41. Exchange Act Section 15B(e)(9).
42. SEC Release p. 121.
43. SEC Rule 15Ba1-1(n).
44. Exchange Act Section 15B(e)(4)(C); SEC Rule 15Ba1-1(d)(2)(i)-(v).
45. SEC Release p. 170.
46. Although when the MSRB adopted its rule prohibiting role-switching on a new issuance of municipal securities it stated that its interpretation did “not address whether provision of the advice permitted by Rule G-23 would cause the dealer to be considered a ‘municipal advisor’ under the Exchange Act and the rules promulgated thereunder,” the SEC’s interpretation of the underwriter exemption under 15Ba1-1 allows the advice permitted by Rule G-23. See *MSRB Guidance on the Prohibition on Underwriting Issues of Municipal Securities for Which a Financial Advisory Relationship Exists Under Rule G-23*, Nov. 27, 2011.
47. SEC Release p. 165-166.
48. *Id.* at 166.
49. *Id.* at pp. 170-171.
50. SEC Release p. 219.
51. SEC Rule 15Ba1-1(d)(2)(iv).
52. SEC Release p. 221.
53. *Id.* at 227-228.
54. *Id.* at 229.
55. *Id.* at 228-230.
56. *Id.* at 229.
57. SEC Rule 15Ba1-1(d)(3)(i)-(viii).
58. SEC Rule 15Ba1-1(d)(3)(i).
59. SEC Rule 15Ba1-1(d)(1)(i).
60. SEC Release pp. 10-11.
61. *Id.* at 146.
62. SEC Rule 15Ba1-1(d)(3)(ii).
63. SEC Release n. 511.
64. *Id.* at pp. 235, 243.
65. SEC Rule 15Ba1-1(d)(3)(iii).
66. Rule 15Ba1-1(d)(3)(iv).
67. SEC Release p. 150.

68. *Id.* at 151.
69. *Id.* at 168.
70. SEC Rule 15Ba1-1(d)(3)(vi)(A).
71. SEC Rule 15Ba1-1(d)(3)(vi)(B).
72. SEC Rule 15Ba1-1(d)(3)(vi)(C)(1).
73. SEC Rule 15Ba1-1(d)(3)(vi)(C)(2).
74. SEC Rule 15Ba1-1(d)(3)(vi)(C)(1) and (2).
75. SEC Release at pp. 154-155.
76. *Id.* at 155 (citing Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (August 2, 2012), available at <http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-17.aspx?tab=2>).
77. *Id.* at 153; SEC Rule 15Ba1-1(d)(3)(vi)(A).
78. SEC Rule 15Ba1-1(d)(3)(viii).
79. Exchange Act Rule 15B(b)(2).
80. MSRB Rules A-12, A-14, and G-40.
81. MSRB Notice 2010-49, *MSRB Amends Registration Rules for Dealers and Municipal Advisors*, Nov. 15, 2010, available at <http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2010/2010-49.aspx?n=1>.
82. *Id.*
83. Compare SEC List <https://tts.sec.gov/MATR/> with MSRB List <http://www.msrb.org/msrb1/PQweb/MARegistrants.asp> (last visited Sept. 20, 2013).
84. SEC Form MA-W; MSRB Rule A-15.
85. Exchange Act Section 15B(c)(1).
86. Exchange Act Section 15B(b)(2)(L). The SEC noted this small municipal advisor burden in its release. SEC Release n. 2010. The MSRB recently adopted a policy to incorporate an economic analysis into its rulemaking process, available at <http://www.msrb.org/About-MSRB/Financial-and-Other-Information/Financial-Policies/Economic-Analysis-Policy.aspx>.
87. MSRB Notice 2010-59, *Fair Dealing Rule for Municipal Advisors Approved*, Dec. 23, 2010, available at <http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2010/2010-59.aspx?n=1>.
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