

## Upcoming Municipal Advisor Temporary Registration Deadline

The U.S. Securities and Exchange Commission (the “SEC”) recently adopted a Final Rule to establish a permanent registration regime for Municipal Advisors as required to implement the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”). The Dodd-Frank Act prohibits municipal advisors from soliciting or providing certain advice to municipal entities (which are defined to include both state and local government entities) without first registering with the SEC. The Final Rule requires municipal advisors to make a temporary registration filing by **January 13, 2014**, to be followed by a permanent registration filing later this year.

The Final Rule has raised a number of interpretive issues. Industry groups have requested that the SEC provide some guidance in the form of a “No-Action Letter” or an FAQ. Additionally, on January 2, 2014, the Investment Adviser Association and the Securities Industry and Financial Markets Association submitted a written request to the SEC to delay the January 13, 2014 effective date for “SEC-registered investment advisers that provide investment advice to municipal entities pursuant to an advisory agreement regarding a portfolio of investments that contains swaps and/or security-based swaps as part of ongoing portfolio management.” To date, the SEC has not responded to either request.

In the absence of SEC guidance, we believe the best interpretation of the Final Rule is as follows:<sup>1</sup>

1. Registered investment advisers to funds only (including registered investment companies and private funds) – not a municipal advisor.
2. Registered investment advisers to separately managed accounts for municipal entities<sup>2</sup> – not a municipal advisor, unless the account holds any swaps or securities-based swaps (which are broadly defined to include most derivatives instruments).
3. Unregistered investment advisers to funds only<sup>3</sup> – not a municipal advisor, unless a municipal entity has invested the proceeds of an issuance of municipal securities in one or more of the funds.
4. Unregistered investment advisers to separately managed accounts for municipal entities – not a municipal advisor, unless (i) a municipal entity has invested the proceeds of an issuance of municipal securities in the account or (ii) the account holds any swaps or securities-based swaps.

If an investment adviser does fall within the definition of a “municipal advisor”, it would be required to make a temporary registration filing on Form MA-T through the SEC’s website by **January 13, 2014**. Form MA-T is a short “notice filing” that requires a municipal advisor to provide (1) certain identifying information about the adviser (including SEC and CRD numbers), (2) a description of the municipal advisory activities

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<sup>1</sup> We have assumed that the only relationship between the investment adviser and the municipal entity is managing a portfolio of investments. Other relationships, such as providing advice to a municipal entity regarding whether and how to issue municipal securities or solicitation of a municipal entity on behalf of a third party, could result in a different conclusion. Additionally, we note that there may be other exemptions from municipal advisor registration. For example, registered commodity trading advisors have additional exemptions available to them.

<sup>2</sup> While not addressed in the Final Rule or otherwise, a separately managed account may include a “fund of one” for a municipal entity under certain circumstances.

<sup>3</sup> This category would include, for example, exempt reporting advisers.

conducted by the municipal advisor (in a “check the box” format) and (3) information on disciplinary history<sup>4</sup> with respect to itself and its “associated municipal advisor professionals.”<sup>5</sup>

Municipal advisors who are subject to the new registration regime will be subject to various requirements set forth by the SEC, including (among other things) making a permanent registration filing later this year,<sup>6</sup> filing annual updating amendments, filing “other than annual” amendments in the event certain information becomes inaccurate, and certain recordkeeping requirements. Additionally, municipal advisors must also register with, and will be subject to the regulatory authority of, the Municipal Securities Rulemaking Board (the “MSRB”). The MSRB registration is required to be made following the SEC registration as a municipal advisor, but before engaging in municipal securities and advisory activities.<sup>7</sup> Municipal advisors would also be subject to additional regulatory requirements set forth by the MSRB, including, among others, duties of fair dealing, requirements relating to conflicts, due care and excessive compensation, fiduciary duties, prohibitions on unfair and deceptive practices, prohibition on “pay to play” activities, supervisory rules, advertising rules, contract rules and preservation of certain records.<sup>8</sup>

Permanent registration will begin in July 1, 2014 and will run through October 2014. The deadline by which a municipal advisor must permanently register will depend on the municipal advisor’s temporary registration number. Permanent registration will take place on EDGAR.

A subsequent development relating to this topic is discussed in our Alert entitled *SEC Clarifies Definition of Municipal Advisor for Registered Investment Advisers*, which is available [here](#).

**We will continue to keep you apprised of any additional guidance we receive in respect of municipal advisor registration. Please contact your usual Ropes & Gray advisor with any questions.**

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<sup>4</sup> We note that the disciplinary information required in Form MA-T is nearly identical to that required by Form ADV (except it is largely only applicable to municipal advisory investment services and activities).

<sup>5</sup> “Associated Municipal Advisor Professionals” are similar in scope, but not the same as, advisory affiliates under Form ADV. Whereas advisory affiliates include all persons directly or indirectly controlling or controlled by the investment adviser, “Associated Municipal Advisor Professionals” include, in addition to those persons, any persons directly or indirectly under common control with the municipal advisor that are engaged in certain municipal advisory activities.

<sup>6</sup> The permanent registration filing requires significantly greater information than the temporary filing, and is similar in scope to Form ADV Part 1.

<sup>7</sup> Municipal advisors registering with the SEC under either the temporary or permanent regime must register with the MSRB.

<sup>8</sup> While there are no current MSRB requirements applicable to municipal advisors, other than a duty of fair dealing, the MSRB has proposed rules addressing the topics above.