



LEGAL ALERT

February 21, 2012

Financial Institutions and the Municipal Advisor Provisions of Dodd-Frank

The Dodd-Frank Act of 2010 created a new registration requirement for persons who provide certain types of advice to municipalities.¹ Banks and bank holding companies were not specifically exempted from this requirement.

Definitions

Under Dodd-Frank, a **municipal advisor** is a person that 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 or undertakes a solicitation of municipal entity.

A **municipal entity** includes (A) any agency, authority or instrumentality of a state, political subdivision or municipal corporate instrumentality, (B) any plan, program or pool of assets sponsored or established by a state, political subdivision or municipal corporate instrumentality or any agency, authority or instrumentality thereof; and (C) any other issuer of municipal securities.

An **obligated person** means any person, including the issuer of the 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.

A **municipal financial product** includes municipal derivatives, guaranteed investment contracts and **investment strategies**.

Investment strategies is defined to include “plans or programs for 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.”

Applicability to Financial Institutions

As written, Dodd-Frank may require a financial institution that provides advice to a municipality with respect to the investment of proceeds from the sale of bonds by a municipal entity to register as a municipal advisor.

The SEC, which is the agency responsible for writing rules implementing municipal advisor registration, has stated its preliminary position that a financial institution that provides advice to a municipal entity as to “general monies being invested temporarily prior to their budgeted expenditure” is an **investment strategy** that requires registration as a municipal advisor even if the advice relates to placing monies in a deposit product, such as an MMDA and the origin of the monies is not from the proceeds of the sale of municipal securities.

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However, the SEC has extended the compliance date for its temporary municipal advisor registration rule until **September 30, 2012**.

American Bankers Association

Meanwhile, the American Bankers Association (ABA) has been very active in its efforts to secure an exemption for banks and bank holding companies from the municipal advisor registration requirement either through legislation or administrative interpretation in the final SEC rules.

Given the ongoing efforts by the ABA and the extension of the SEC temporary municipal advisor registration until September 30, 2012, staff of the ABA is advising its members to bide their time and await further developments.

Federal Legislation

The ABA has taken a two-pronged approach with respect to securing federal legislation to exempt financial institutions from registering as municipal advisors. The first approach was the introduction of “stand alone” legislation in the form of HR 2827 to exclude banks and bank holding companies from the municipal adviser registration requirement.

The second approach is to seek an amendment of existing legislation that provides regulatory relief with respect to shareholder thresholds applicable to banks and bank holding companies to register and de-register as public companies under SEC rules.²

In an election year, it is difficult to forecast what legislation may be considered and enacted before the current Congressional session ends.

If you are interested in these issues, you may want to contact your Congressman or Senator.

Footnotes

¹The registration regime includes not only registration with the SEC but also registration with the Municipal Securities Rulemaking Board (MSRB), a self-regulatory organization. MSRB registration includes not only the entity but also individuals who provide advice to a municipal entity. Membership in the MSRB entails compliance with a significant number rules governing the conduct of members, including prohibitions on “pay to play.”

²House Bill 1965 (which passed the House of Representatives on November 2, 2011 by a vote of 420-2 and is now in the Senate); Senate Bill 556; Senate Bill 1824 and Senate Bill 1941. Pennsylvania Senator Pat Toomey is a prime sponsor of Senate Bill 1824 and a co-sponsor of Senate Bill 1941. Generally, all of these bills would increase shareholder thresholds for banks and bank holding companies to register with the SEC as a public company from 500 to 2,000 shareholders and de-register from 300 to 1,200 shareholders.