

MUNICIPAL LAW AND PUBLIC FINANCE

THE DODD-FRANK ACT AND MUNICIPAL ADVISOR RULES

by Wendy R. Underwood

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") was signed into law by President Obama on July 21, 2010. The Dodd-Frank Act was enacted in response to the financial crisis that began in 2008 and was intended, among other things, to promote the financial stability of the United States by improving accountability and transparency in the financial system.

One important provision of the Dodd-Frank Act, as it relates to the financing of municipal projects, is to make it unlawful for a municipal advisor to provide advice to or on behalf of a municipal entity with respect to municipal financial products or the issuance of municipal securities, or to undertake a solicitation of a municipal entity, unless the municipal advisor is registered with the United States Securities and Exchange Commission (the "SEC"). Any person/firm that provides such advice or solicits a municipal entity as provided above and fails to comply with the registration requirements of the Dodd-Frank Act could be subject to civil and criminal penalties. In addition to requiring municipal advisors to register with the SEC, the Dodd-Frank Act also imposes a statutory fiduciary duty on municipal advisors when advising municipal entities.

The Dodd-Frank Act defines a "municipal advisor" 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, and includes financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors.

The Dodd-Frank Act specifically excludes the following from the definition of municipal advisor: (i) a broker, dealer, or municipal securities dealer serving as an underwriter, (ii) attorneys offering legal advice or providing services that are of a traditional legal nature, and (iii) engineers providing engineering advice. In Release No. 34-70462, dated September 20, 2013 (the "Release"), the SEC adopted new rules 15Ba1-1 through 15Ba1-8 and Rule 15Bc4-1 under the Securities Exchange Act of 1934, as amended (the "Rules"), implementing the provisions of the Dodd-Frank Act related to municipal advisors, and expanded on the exclusion of underwriters, attorneys and engineers from the definition of municipal advisor. The Rules are generally effective July 1, 2014.

Underwriters. Pursuant to Rule 15Ba1-1(d)(2)(i), the term municipal advisor excludes a broker, dealer, or municipal securities dealer serving as an underwriter of a particular issuance of municipal securities to the extent that the broker, dealer, or municipal securities dealer engages in activities that are within the scope of an underwriting of such

issuance of municipal securities. The underwriter exclusion covers advice on the issuance of municipal securities (including structure, timing, terms, and other similar matters) from the time of engagement as underwriter on a particular transaction for the issuance of municipal securities through the end of the underwriting period.

It is important to note that, unlike a municipal advisor, an underwriter is not subject to a fiduciary duty when advising a municipal entity client within the scope of an underwriting. Consequently, an underwriter is not required to act in the best interest of its municipal clients without regard to the underwriter's own financial or other interests. Under the Municipal Securities Rulemaking Board's Rule G-17, underwriters are, however, required to make certain disclosures to municipal issuers, including disclosures about their duty of fair dealing (but not a fiduciary duty) and their potential or actual material conflicts of interest.

Attorneys. Rule 15Ba1-1(d)(2)(iv) provides that the term municipal advisor shall exclude any attorney to the extent that the attorney is offering 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 a client of such attorney that is a municipal entity, obligated person, or other participant in the transaction. According to the Release, analysis, discussion, negotiation, and advice regarding the legal ramifications of the structure, timing, terms, and other provisions of a financial transaction by an attorney to a client fall within the attorney exclusion to the municipal advisor definition. The same holds true for legal advice and related legal services regarding Federal tax requirements for issues of municipal securities.

However, 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, the attorney is not excluded with respect to such activities under the attorney exclusion to the municipal advisor definition. According to the Release, the SEC would consider an attorney to be representing himself or herself as a financial advisor or financial expert if the attorney provides advice that is primarily financial in nature, including (i) advice concerning the financial feasibility of a project or financing, (ii) advice estimating or comparing the relative cost to maturity of an issuance of municipal securities depending on various interest rate assumptions, (iii) advice recommending a particular structure as being financially advantageous under prevailing market conditions, (iv) advice regarding the financial aspects of pursuing a competitive sale versus a negotiated sale, and (v) other types of financial advice that are not related to the attorney's provision of legal advice and services of a traditional legal nature.

Engineers. Rule 15Ba1-1(d)(2)(v) provides that engineers are excluded from the definition of municipal advisor to the extent that the engineer is providing engineering advice. Pursuant to the Release, the SEC believes that activities that fall within the scope of the engineering exclusion may include feasibility studies, cash flow analyses, and similar activities. Further, it should be noted that the Release interprets the engineering exclusion to cover an engineer's provision of certain information regarding a project schedule and anticipated funding requirements as well as feasibility studies that include certain types

of projections, including projections of output capacity, utility project rates, project market demand, or project revenues that are based on considerations involving engineering aspects of a project.

According to the Release, activities of engineers fall outside the scope of the engineering exclusion if they include advice 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. As an example, the Release specifically notes that an engineer that is engaged to prepare revenue projections to support the structure of an issuance of municipal securities would be providing advice outside the scope of the engineering exclusion and would be engaging in municipal advisory activity.

In light of the foregoing, attorneys and engineers should not be providing financial advice to municipal entities unless they have registered as municipal advisors with the SEC. Furthermore, municipal issuers should be mindful that underwriters that give financial advice within the scope of an underwriting engagement do not owe a fiduciary duty to their municipal clients.

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ATTORNEYS SCOTT SMITH & ROGER SWETS JOIN DICKINSON WRIGHT'S MUNICIPAL LAW & PUBLIC FINANCE GROUP

Dickinson Wright's Municipal Law & Public Finance Group continues to grow with the additions of Attorneys Scott G. Smith and Roger A. Swets to the firm's Grand Rapids office as Members.



Scott Smith concentrates his practice in the areas of municipal law, municipal finance law, environmental law, American Indian law, and condemnation law. He has extensive experience in all aspects of local governments and their endeavors, representing cities, townships, villages, counties, and a myriad of authorities and intergovernmental entities. Mr. Smith serves as general legal counsel for the communities of Allegan, Grand Haven, Mt. Pleasant, Plainwell, Saline, and South Haven. He also serves regularly as special counsel for Grand Rapids, Greenville, Lake Odessa, Portland, and Wyoming.

Mr. Smith is a member of the State Bar of Michigan, the Grand Rapids Bar Association, the National Association of Bond Lawyers, and the Michigan Association of Municipal Attorneys. He has spoken at numerous conferences and seminars on such topics as property acquisition and condemnation, environmental considerations in municipal property transactions, blight enforcement, legislation affecting local governments, medical marijuana, open meetings and freedom of information issues, zoning, planning and land use, relationships between municipalities and non-profit entities. He is recognized as a leader in his field by Best Lawyers in America and Michigan Super Lawyers. Mr. Smith received his B.A. from Wheaton College and his J.D. from the University of Michigan Law School.



Roger Swets practices in the area of public sector finance law, acting as bond counsel, underwriter's counsel and bank counsel in tax-exempt financings. He works with cities, counties, drain commissioners, libraries, schools, townships, villages and a wide range of authorities on bond and finance matters. He also works with these clients on a broad range of public sector issues including ballot proposals, millage issues, special assessments and utilities and other issues. He also specializes in economic development law, including work on brownfield redevelopment projects, tax increment financing projects, economic development corporation projects and the issuance of tax-exempt bonds for non-profit organizations and expanding businesses.

Mr. Swets is a member of the State Bar of Michigan, the Grand Rapids Bar Association, the International Municipal Lawyers Association, the National Association of Bond Lawyers, and the Michigan Association of Municipal Attorneys. He received his B.A. from Calvin College and his J.D. from the University of Michigan Law School.

Dickinson Wright's Municipal Law & Public Finance practice lawyers have served as bond counsel in virtually every type of public financing transaction. We serve as bond counsel to the State of Michigan, its agencies, and many local units of government. We also act as underwriter's counsel, trustee's counsel, counsel to credit enhancement providers, counsel to purchasers of municipal bonds and borrower's counsel in connection with all types of tax-exempt and tax-credit bond financings.

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