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New Municipal Advisor Rules and Continuing Disclosure Initiative

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In an era of increased scrutiny and regulation of the municipal market, the final rules on what constitutes, and the registration of, "municipal advisors", became effective July 1, 2014. Concurrently, the SEC initiative to encourage issuers, obligated persons, such as hospitals in conduit financings (together, "issuer" or "issuers"), and underwriters to self-report possible violations of the continuing disclosure requirements of Rule 15c2-12 of the Securities Exchange Act of 1934 (the "Exchange Act") made in prior offering documents continues to be in effect until the deadline for self-reporting, September 10, 2014. Here is a brief summary of both.

I. "Tell It Like It Is"-- Municipalities Continuing Disclosure Cooperative Initiative ("MCDC").

Rule 15c2-12, which requires a continuing disclosure undertaking regarding: (i) a security, (ii) the issuer and its financial data and operations, and (iii) the occurrence of certain material events, also requires in the final official statement prepared in connection with the offering of securities the disclosure of any failure to comply with the disclosure requirements of the Rule 15c2-12 within the prior five years. MCDC solely addresses violations of such compliance assertions in the final offering statement. If such a failure occurs, the SEC may file enforcement actions against the issuer under Section 17(a) of the Securities Act of 1933 (the "Securities Act") or Section 10(b) of the Exchange Act. The SEC may also charge underwriters with violating anti-fraud provisions if they failed to exercise adequate due diligence in determining whether issuers have complied with the disclosure requirement in the final official statement. An underwriter cannot substantiate any reasonable basis for believing in the truth and accuracy of a key representation in the offering documents if the due diligence conducted was inadequate.

The advantage of participating in MCDC allows self-reporting issuers and underwriters favorable settlement terms. The SEC Enforcement Division will recommend the acceptance of a settlement in which the issuer consents to cease and desist proceedings under Section 8A of the Securities Act, and the underwriter consents to cease and desist proceedings under Section 8A of the Securities Act and administrative proceeds under Section 15(b) of the Exchange Act. In addition, the SEC Enforcement Division will recommend a settlement in which the issuer and underwriter neither admits nor denies the findings of the SEC. As part of the settlement, issuers must establish appropriate policies, procedures and training with respect to continuing disclosure; comply with existing continuing disclosure requirements; cooperate with any subsequent SEC investigation; disclose the settlement terms in any final official statement for a five year period; and provide the SEC with a compliance certification one year later. Underwriters must

retain an independent consultant to conduct a compliance review; enact that consultant's recommendations within 90 days; cooperate with any subsequent SEC investigation; and provide the SEC with a compliance certification one year later.

The Enforcement Division of the SEC will recommend no civil financial penalty for self-reporting issuers. For underwriters, for issues under $30 million, the recommended penalty will be $20,000 per offering containing a materially false statement, and for issues over $30 million, the recommended penalty will be $60,000 per offering containing a materially false statement. Total penalties are capped at $500,000.

Issuers who do not self-report are subject to potential financial sanctions. Underwriters who do not self-report are subject to increased financial sanctions. There is no ameliorative provision in the MCDC for individuals such as municipal officers or employees of underwriters that have engaged in violations of Rule 15c2-12.

The method of reporting is through the completion of a questionnaire, which can be found at http://www.sec.gov/divisions/enforce/municipalities-continuing-disclosure-cooperation-initiative.shtml#P53_8606.

II. "Who am I to give such advice?" -- Final Municipal Advisor Rules – Rule 15Ba1-1 through Rule 15Ba1-8, and Rule 15Bc4-1, under the Exchange Act.

The final municipal advisor rules (the "Rules") are effective July 1, 2014 with a phased-in compliance period ending October 31, 2014. Municipal advisors must register within such time with the SEC and the Municipal Securities Rulemaking Board ("MSRB") using the registration forms MA, MA-I, MA-W, and MA-NR.

The final municipal advisor rules clarify the scope of who is a "municipal advisor" and what constitutes "advice" requiring registration. In broad general terms, anytime proceeds of municipal securities are involved, whether in the actual transaction, in investments, in pension accounts, in Section 529 plans, or even involving equity used to defease municipal securities, advisors to such investments, accounts or activities may be subject to registration as a municipal advisor under the final rules.

If you think you may be subject to registration or may fall under one of the exclusions or exemptions, you should consult with an attorney to determine how the Rules apply to you specifically. The following discusses some of the key points of the Rules, the Adopting Release, and the Frequently Asked Questions concerning the Rules published by the Office of Municipal Securities of the SEC. It is not intended to be a complete summary of what constitutes advice, advisory activities, or to whom the definition of municipal advisor applies, exempts or excludes.

Definitions.

Generally, the Rules require the registration of and impose a fiduciary duty on municipal advisors as defined in the Exchange Act as "a person (who is not a municipal entity or an employee of a municipal entity) that provides advice to or on behalf of a municipal entity or obligated person with respect to a 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 undertakes a solicitation of a municipal entity or an obligated person."

Municipal advisors include financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors unless such market participants qualify for an exclusion or exemption.

Excluded from the definition of "municipal advisor" are underwriters, investment advisors, commodity trading advisors, attorneys and engineers, but *only if* they fall within the

parameters of such exemption, as specifically delineated in the Rules. Exempted from the definition of "municipal advisor" are accountants, public officials and employees, banks, market participants providing responses to requests for proposals or qualifications, certain swap dealers registered under the Commodity Act, independent registered municipal advisor, investment strategist, and certain solicitations, but again, *only* to the extent each such person falls within the parameters of such exemption, as specifically delineated in the Rules.

"Obligated person" means "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 the payment of all or part of the obligations on the municipal securities to be sold in an offering of municipal securities" provided however that the final Rules do not include in this definition: (i) providers of bond insurance, letter of credit or other liquidity facilities, (ii) a person whose financial information or operating data is not material to a municipal securities offering, without reference to any bond insurance, letter of credit, liquidity facility, or other credit enhancement, or (iii) the federal government.

The "advice standard", for purposes of the Rule, "excludes, among other things, the provision of general information that does not involve a recommendation regarding 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)."

"Advisory activities", unless falling under one of the above exclusions or exemptions, means "(1) Providing 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 (2) the solicitation of a municipal entity or an obligated person."

Does the Rule apply to existing proceeds of municipal securities?

Investments and Proceeds of Municipal Securities.
The Rules apply to proceeds of municipal securities already existing on July 1, 2014 as well as proceeds arising after that date. Under the Rules, to determine whether funds to be invested constitute proceeds of municipal securities, and thus subject the market participant to registration, the market participant may rely on written representations of a knowledgeable official of the municipal entity or obligated person regarding the nature of the funds, provided the market participant has a reasonable basis for such reliance. The market participant may use other reasonable procedures to determine whether funds to be invested constitute proceeds of municipal securities.

For a transitional period, unless a market participant actually knows or reasonably should have known that an existing account or investment contains proceeds of municipal securities, the market participant may determine that such account or investment does not contain proceeds of municipal securities. The market participant could utilize a reasonable diligence process as a transitional means for such determination.

A reasonable diligence process should include a review of relevant information within the market participant's possession. For example, if the existing account or investment is held in the name of a municipal entity or the name suggests a connection to municipal securities, such as "debt service reserve fund", the market participant reasonably could know that it contains proceeds of municipal securities. Also as part of a reasonable due diligence process, the market participant could provide written notice to a client inquiring about the nature of the funds and stating that unless otherwise notified

in writing, will assume that such funds are not municipal securities. Factors to be considered under a facts and circumstances approach to due diligence, among others, would be the quantity of existing accounts and the relative administrative burden and costs on determining whether such funds contain proceeds of municipal securities, the nature and term of existing investments and the relative potential for future advice on those investments, and an assessment of the nature of the funds, taking into account the client's business.

With respect to investment advice offered after July 1, 2014 regarding investments of newly arising proceeds of municipal securities issued on or after that date, the market participant should develop policies and procedures consistent with the Rules to determine whether the advice provided involves investments of proceeds of municipal securities. The same advice applies to escrow investments.

Pension Obligations. Proceeds of pension obligation bonds issued to finance an unfunded actuarial liability that are contributed to a municipal entity's pension plan and commingled with other pension funds for collective investment, and which are treated under state law as spent for their authorized purpose upon their contribution, cease to be considered proceeds of municipal securities. However, if a municipality segregates such proceeds and continues to account for them separately as proceeds, or retains control over the ability to use such funds for other than the exclusive benefit of pension beneficiaries, such proceeds continue their designation as proceeds of municipal securities under the Rules until such time as they are used to pay pension benefits to the beneficiaries or to carry out other authorized purposes of the pension obligation bonds.

529 Savings Plans. Monies derived from a security issued by a 529 Savings Plan are not considered proceeds of municipal securities. However, interests offered by a 529 Savings Plan are considered municipal securities and persons selling such interests must be registered as a broker, dealer or municipal securities advisor and comply with the applicable MSRB rules. Similarly, 529 Savings Plans may seek advice in connection with transactions involving municipal securities and are subject to the Municipal Advisor rules, as are third parties seeking to advise such 529 Savings Plans.

The advice standard – "When should I stop talking?"

The advice standard turns on whether a recommendation is made. Providing general information that qualifies as advice will depend on the facts and circumstances, using an objective, not subjective, standard. Factoring into this determination is content, context and manner of presentation, and whether the information would reasonably be viewed as a suggestion to take or refrain from taking action. General information would be, for example, information of a factual nature, without subjective assumptions, opinions or view; information that is not particularized to a specific municipal entity or *type of entity*; information that is widely disseminated for use by the public, clients or market participants other than municipal entities to obligated persons; or general information in the nature of educational materials. Thus, information tailored to a specific group such as school districts or hospitals, would more likely be construed to be a recommendation that constitutes advice, and the person providing such information would be required to register as a municipal advisor.

Information that is particularized in limited respects, such as the current market price or yields on a municipal entity's outstanding bonds, is not necessarily within the definition of "advice", provided that (i) the information provided is factual and does not contain subjective assumptions, opinions or views, or (ii) the information does not constitute a recommendation. However, the more particularized the information, the more likely it will be viewed as a recommendation constituting advice.

Disclaimers and disclosures such as: "this person is not recommending an action"; "this person is not acting as advisor

and does not owe a fiduciary responsibility for the information and material"; "this person is acting for its own interests; and the municipal entity should consult its advisors and experts before acting on the information and material", would be a factor in making the determination of whether the information constitutes advice, but is not controlling. Similarly, an underwriter's identification of itself as such for this or future transactions and not as a financial advisor will not be controlling. All facts and circumstances, written and oral communications, and overall course of conduct are considered.

Promotional materials from underwriters seeking business are not advice if they are generalized and provide information about the firm's capabilities and experience, general market or financial information that might indicate favorable market conditions for the issuance of debt, educational materials including the description of state law requirements, and information regarding the different types of debt financing structures available under state law.

Promotional materials of underwriters may include: (a) indications of hypothetical new issue pricing *range* that takes into consideration current market conditions and certain factual information particularized to an issuer, such as the issuer's credit rating, geographic location and market sector; (b) information regarding an issuer's outstanding municipal securities such as current market prices and yields; (c) information regarding a range of hypothetical interest rates or debt service requirements for new money debt with various maturities (e.g., level debt service for fixed rate 20 or 30 year bonds) and based on facts as described in clause (a) immediately preceding; (d) public information regarding the terms and a range of interest rates for SLGs for refunding escrows; (e) number-runs of the hypothetical debt service savings in refundings assuming the same debt structure as the outstanding bonds and based on facts as described in clause (a) immediately preceding.

However, if the sizing, maturity or structure of the debt were tailored to take into account an issuer's specific needs or objectives within the issuer's overall debt structure, such tailoring goes too far and implies a recommendation. Similarly in a refunding, changing the debt service from level to non-level or extending maturities goes beyond promotional materials and implies a recommendation, as do materials that include views as to the interest rate an underwriter expects to achieve (as opposed to a range of rates).

Absent an exclusion or exemption, a market participant providing advice to the financial advisor of a municipal entity is also required to register as a municipal advisor. Thus, advice may be direct or indirect.

An institutional buyer buying for its own account may specify the structure, timing and terms under which it would purchase from a municipal entity, without being considered a municipal advisor.

Certain exclusions, exemptions and how to determine when the "municipal advisor" designation begins.

When does the "municipal advisor" designation attach? For underwriters consulting with an "obligated person" such as a hospital or other conduit borrower, for new money issues, the process of applying to or negotiating with a municipal entity to issue conduit bonds on behalf of the obligated person is the point at which the municipal advisor designation kicks in for the market participant. If no application with a municipal entity has yet begun, consultations about financing alternatives with a market participant such as a broker-dealer do not give rise to "providing advice" to an obligated person for purposes of the Rules. However, once the application process has begun, the municipal advisor must register whether or not the financing comes to fruition.

However, advice given on refunding an outstanding issue *either* with equity funds or refunding bonds, *does* constitute advice to an obligated person with respect to the issuance of municipal securities and does require registration, absent an exclusion or exemption fitting the transaction. The nexus here is established through the outstanding bonds, not the source of monies used to refund them. "Advice with respect to the issuance of municipal securities" is construed broadly from a timing perspective to include advice throughout the life of an issuance of such securities, from the pre-issuance planning stage for a debt transaction to the repayment stage for those securities. Consequently, absent an available exclusion or exemption, the broker-dealer's advice with respect to early refinancing or redemption of an outstanding issue would fall within the scope of the municipal advisor definition and the registration requirement of the Rules.

Qualification for the exclusion can be established through an engagement letter that follows certain prescribed rules, or it can be established by certain actions.

Any assistance given by a market participant (other than an attorney for whom the attorney exclusion would apply) in determining when an event is material for the continuing disclosure filing requirements would be considered to be municipal advisory activity. For underwriters, assistance with filing annual financial information, audited financial statements, or material event notices required by Rule 15c2-12 after an issuance has closed and after the underwriting period has terminated would generally be outside the scope of the underwriter's exclusion.

Underwriter's Exclusion. For underwriters, the exclusion only applies with respect to activities within the scope of underwriting of such municipal securities. Such underwriting period is the later of the closing of the underwriting or the sale of the last of the securities by the syndicate. However, if the underwriter discovers any material omissions in an offering document post-issuance, the underwriter's exclusion will continue to apply to advice given by the underwriter to the issuer to supplement the offering document.

The underwriter's exclusion does not apply to broker-dealers acting as placement agents for private equity funds that solicit a municipal entity or obligated person to invest in the fund. But registered broker-dealers acting as placement agents that participate in a particular issuance of municipal securities and that perform municipal advisory activities that would otherwise fall within the scope of the underwriter's exclusion, could qualify for such exclusion

A broker-dealer acting as dealer-manager for a tender offer would not be participating in municipal advisory activity because tender offers typically involve only the purchase of municipal securities and the purchase itself is not an advisory activity. Similarly, a broker-dealer acting as dealer-manager for an exchange offer would generally involve only two transactions - the purchase of one security in the tender offer and the underwriting of a particular issuance of municipal securities in exchange for such tendered securities. The former is not advisory activity and the latter is excluded under the underwriter's exclusion.

A broker-dealer acting as remarketing agent for variable rate demand securities after the close of an issuance of municipal securities is considered to be giving advice with respect to an issuance of municipal securities. The broker-dealer in this instance is not covered under the underwriter exclusion. A remarketing that constitutes a primary offering should be examined in light of the broker-dealer's role to determine what, if any, exclusions apply. If the remarketing agent sets the rate, remarkets tendered bonds and provides factual information regarding current market conditions and regarding how the interest rate could be impacted by a change in modes, for example from a weekly to a daily rate, or a change in liquidity provider, such information may not rise to the level of advice. But, although the information can be particularized to the municipal entity, it still must be limited

to factual information. Views, opinions or recommendations turn the information into advice subject to the registration requirement of the Rules, as would advice with respect to the investment of proceeds.

Registered investment advisor exclusion. The registered investment advisor exclusion, which exclusion does not include investment advisors giving advice concerning municipal derivatives, only contemplates those instances where municipal derivatives are used in connection with the issuance of municipal securities, such as swaps and other hedges, and does not apply to cases where the investment advisor is giving investment portfolio advice to the municipal entity clients. In other words, investment advisors giving advice on derivatives with respect to a general investment portfolio of a municipality are not required to register as municipal advisors under these Rules. Registered investment advisors giving advice on municipal derivatives in connection with the issuance of municipal securities do not fall under this exclusion and are required to register.

Independent registered Investment advisor exemption. To qualify for the independent registered investment advisor exemption when there is a registered municipal advisor advising the municipal entity in the transaction, the independent advisor generally must (i) receive written representation from the municipal entity or obligated person stating that it will rely on the registered municipal advisor, (ii) provide written disclosure to the municipal entity or obligated person that it is not a municipal advisor and is not subject to the fiduciary duty applicable to municipal advisors under the Rules, (iii) provide copies of such disclosure to the municipal entity or obligated person's registered municipal advisor; and (iv) not be or have been associated with the registered municipal advisor for at least two years.

Banks exemption. Banks providing advice with respect to certain products and services such as custody accounts and trust services (other than as indenture trustee or similar capacity) would not be required to register as a municipal advisor unless such accounts contain proceeds of municipal securities or escrow investments. Banks that engage in municipal advisory activities, including those that provide advice with respect to the issuance of municipal securities or with respect to municipal derivatives to municipal entities or obligated persons are not, however, exempt, unless the bank qualifies for another exemption or exclusion such as the limited exemption for certain swap dealers.

If a bank provides municipal advice through separately identifiable departments or divisions ("SID"), the SID may register under the Rules, rather than the bank itself. The fact that directors and senior officers of the bank may from time to time set broad policy guidelines affecting the bank as a whole and which are not directly related to the day-to-day conduct of the bank's municipal advisory activities, does not disqualify the SID or require that the directors or officers be considered as part of the SID. Similarly, a bank's municipal advisory activities conducted in more than one geographical unit does not preclude a finding that the bank has a SID for purposes of the Rule, provided all such units are identifiable and that the requirements of the Rule are met with respect to each unit. The SID clarification originally in the proposed Rule is considered applicable even although it was removed from the final Rule.

Investment strategist exemption. An investment strategist is defined as a person that provides advice with respect 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.

This exemption does not permit a person to avoid registering as a municipal advisor by stating its advice is isolated or incidental and not within the meaning of "plan or program". Any advice or recommendation with respect to the investment of proceeds of municipal securities not otherwise

subject to an exclusion or exemption would be municipal advisory activity, even if not part of a series of investment-related actions or articulated as part of the investment plan for the proceeds at or before the time the proceeds are received.

Municipal escrow investments are defined as proceeds of municipal securities and any other funds of a municipal entity that are deposited in an escrow account to pay the principal of, premium (if any) and interest on one or more issues of municipal securities.

A pooled investment vehicle is an investment strategy, and an advisor to such a pool is a municipal advisor when the pooled investment vehicle contains proceeds of an issuance of municipal securities, regardless of whether all funds invested in the vehicle are funds of municipal entities.

Actuaries providing actuarial services to public pension plans, 403(b) plans, and 457(b) plans, governmental benefit plans and trusts such as retiree medical plans, voluntary employee benefit associations and related trusts (VEBA's) and other post-employment benefits (OPEB) plans and trusts generally would be exempt under the investment strategies exemption if the plan does not consists of proceeds of municipal securities. If the plan does contain proceeds of municipal securities, actuarial service generally does not involve advice with respect to the investment of the proceeds, and thus would not generally constitute municipal advisory activity subject to registration.

Solicitation exemption. Advertisements or solicitations do not trigger an obligation to register provided such activity is undertaken by the broker, dealer, municipal securities dealer, municipal advisor or investment adviser on behalf of itself as opposed to on behalf of a third party. Third party endorsement arrangements, typically investment advisers, broker-dealers, and mutual fund companies endorsed by associations through a royalty arrangement, however, are not exempt from registering. An organization that receives compensation for endorsing a broker, dealer, municipal securities dealer, municipal advisor or investment advisor is soliciting a municipal entity or obligated person within the meaning of the statute. However, if such endorsement qualifies as advertising, it may not be required to register. The determination would be based on the facts and circumstances.

In the case of introductions sought by municipal entities or obligated persons, for purposes of the Rules, a solicitation determination is based on whether the person providing the introduction receives direct or indirect compensation for providing the introduction, which would trigger the registration requirement. The term "direct or indirect compensation" has been construed broadly in other contexts. For example, under the Investment Advisers Act, the staff of the SEC has taken the position that compensation generally includes receipt of any economic benefit, whether in the form of an advisor fee, some other fee relating to services rendered, a commission or some combination of the foregoing. Other regulatory agencies have interpreted indirect compensation to include non-monetary compensation.

Solicitations of obligated persons only trigger the registration requirement if the obligated person in acting in its capacity as such. The solicitor should make reasonable inquiry to a person who is in the position to know as to whether its solicitations are for services related to the issuance of municipal securities or municipal financial products and whether the person being solicited is an obligated person. The solicitor may rely on the written representation of the obligated person unless the solicitor has information that would cause a reasonable person to question the accuracy of the representation.