THE ELEPHANT IN THE ROOM

THREE KEY TOPICS IN MUNICIPAL FINANCE

MUNICIPAL LAWYERS ASSOCIATION
2011 ANNUAL CONFERENCE – CHICAGO, ILLINOIS

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Today's Topics

- Regulation of Municipal Advisors
  - MSRB and SEC Rules/Dodd-Frank Act.
- Post-Issuance Compliance Written Procedures
  - An IRS Priority.
- The Rise of Multi-State Issuers
  - Important Considerations for Local Governments.

I. Regulation of Municipal Advisors – MSRB and SEC Rules/Dodd-Frank Act

Who is a "Municipal Advisor"?

- Those who engage in "Municipal Advisory Activities"
  - Provide advice to municipal entities and obligated persons on municipal financial products or the issuance of municipal securities.
  - Solicit certain types of business from municipal entities on behalf of third-party broker-dealers, investment advisors, and municipal advisors.
- Not the municipal lawyer or registered broker-dealer acting on behalf of a municipal entity.

Who can be deemed a Municipal Advisor if engaged in municipal advisory activities?

- Financial Advisors.
- Guaranteed Investment Contract Brokers
- Placement Agents
- Swap Advisors
- Third-party Marketers

Sample of Municipal Advisors Registered at MSRB as of August 1, 201

- Abacus Investments, Inc.
- Bank of America, N.A.
- Barclays Capital , Inc.
- BMO Harris Bank, N.A.
- Cabrera Capital Markets, LLC
- Credit Suisse Securities (USA) LLC
- Deutsche Bank Securities, Inc.
- J.P. Morgan Securities, Inc.
- Loop Capital Markets
- Merrill Lynch Pierce Fenner & Smith/Fixed Income
- Oppenheimer & Co., Inc.
- Popular Securities, Inc.
- Ramirez & Co., Inc.
- U.S. Bank Municipal Securities Group
- Wells Fargo Bank, N.A. Municipal Products Group

Regulation of Municipal Advisors

- Fiduciary Duty and Fair Dealing
- Registration
- Supervision
- Political Contributions
- Gifts and Gratuities
- Latest Developments

MSRB
Municipal Securities Rulemaking Board

Timetable of Municipal Advisor Rule Effective Dates

Last updated August 5, 2011

MSRB Rule	Effective Date	Effective upon Approval Date of SEC Municipal Advisor Definition	Effective upon Effective Date of SEC Municipal Advisor Definition
Rules A-7 and A-8 on Registration	As of November 1, 2010		
Proposed Rule A-11 on Assessments*	As of October 1, 2011		
Rules A-12 and A-14 on Registration	As of November 9, 2010		
Rules D-11, D-13 and D-14 on Definitions	As of November 15, 2010		
Rule G-5 on Disciplinary Actions	As of December 23, 2010		
Rule G-17 on "Fair Dealing"	As of December 23, 2010		
Rule G-17 Draft Interpretive Notice for Municipal Advisors*			✓
Proposed Rule G-20 Amendments on Gifts*			✓
Draft Rule G-36 on Fiduciary Duty and Draft Interpretive Notice*			✓
Rule G-40 on Electronic Mail Contacts	As of November 15, 2010		
Draft Rule G-42 on Political Contributions*		✓†	
Draft Rule G-44 on Supervision*		✓	

*"Draft" indicates the MSRB has requested comment on the proposed rule change; "proposed" indicates the rule change has been filed with the SEC for approval. Effective dates for all draft or proposed rule changes are included upon filing with the SEC and are subject to change.

†No political contributions made during the six-month period after the effective date of Draft MSRB Rule G-42 would trigger a ban on business and no records would be required until after this six-month period, except for dealer financial advisors that are already subject to Rule G-37.

II. Post-Issuance Compliance Written Procedures – An IRS Priority

- The IRS has indicated that best practices require that municipalities create written post-issuance compliance procedures
  - Amended Form 8038
  - Advance Refunding Questionnaire
- Why municipalities should adopt post-issuance compliance written procedures.

Recommendations

- **Prepare and adopt post-issuance compliance written procedures.**
- **Identify parties responsible for implementing procedures.**
- **Include the monitoring of:**
  - **Use/ownership of project**
  - **Expenditure of tax-exempt debt proceeds**
  - **Investment of tax-exempt debt proceeds**
  - **Private use**
  - **Financial contracts**
  - **Change of use**
  - **Remediation procedures**
  - **Arbitrage rebate procedures**
  - **Record retention**
  - **Advance refunding of bonds**
- **Enter agreement with conduit borrowers outlining procedures for IRS inquiries.**

III. The Rise of Multi-State Issuers – Important Considerations

- **Two General Categories**

  1. Issue tax-exempt debt to finance out-of state projects for borrowers who have a nexus where the Multi-State Issuer is incorporated

  2. Issue tax-exempt debt to finance out-of-state projects for borrowers whether or not the borrower has a nexus to where the Multi-State Issuer is incorporated

Multi-State Issuers

- Public Finance Authority
- Colorado Educational and Cultural Facilities Authority
- Missouri Health & Educational Facilities Authority
- Industrial Development Authority-City of Phoenix Arizona
- California Statewide Communities Development Authority
- Virginia Small Business Financing Authority
- California Municipal Finance Authority
- Indiana Financing Authority
- Colorado Health Facilities Authority

Control and Oversight By Local Governments

- Issuing Authority of Multi-State Issuers
- Minimal Local Government Oversight and Control
- Issues for Local Government Consideration
- Local Government Leverage - TEFRA Host Approval
- Local Government Policy Regarding Projects Financed By Multi-State Issuers

Recommendations

- Local Governments should consider:
  - Familiarity with the conduit borrower
  - Consistency with public policy
  - Risk to community
  - Accountability if project fails
  - Financial strength of project
  - Economic impact of the project
  - Local community's opinion regarding the project
  - Compliance with all applicable laws and regulations

Recommendations (continued)

- Local Governments should adopt a formal policy that addresses above considerations and includes the following:
  - Application process
  - Gathering Information
  - Fees
  - Indemnifications
  - Continuing oversight
  - Adopting written post-issuance compliance procedures
  - Procedures for responding to IRS

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