The Impact on Governmental Financings of Dodd-Frank's Newly Created "Municipal Advisor"

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The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank")

Stated Purpose:

To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end "too big to fail," to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.

Implementation

- Responsibility of Securities and Exchange Commission ("SEC")
- Dodd-Frank contains more than 90 provisions that *require* rulemaking and dozens that *allow* SEC rulemaking
- So far, SEC has proposed or adopted rules for approximately ¾ of Dodd-Frank

The Alleged "Gap" and the Rationale for a new "Municipal Advisor"

- "Broker": "any person engaged in the business of effecting transactions in securities for the account of others" Exchange Act §3(a)(4)
- "<u>Dealer</u>": "any person <u>engaged in the business</u> of buying and selling securities (not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants) for such person's own account through a broker or otherwise." Exchange Act §3(a)(5).
- "Investment Advisor": "any person who, for compensation, <u>engages in the business</u> of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities." Investment Advisers Act of 1940 §202(a)(11).

Municipal Advisor Exchange Act § 15B(e)(4)(A)

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.

Specific Inclusions

- Financial advisors the assumed primary target of the "municipal advisor" concept
- Guaranteed investment contract brokers
- Third-party marketers
- Placement agents
- Solicitors, finders, and swap advisors, if such persons are described above

Specific Exclusions

- A broker, dealer, or municipal securities dealer serving as an underwriter (as defined in section 2(a)(11) of the Securities Act of 1933) (15 U.S.C. 77b(a)(11))
- Any investment adviser registered under the Investment Advisers Act of 1940, or persons associated with such investment advisers who are providing investment advice
- Any commodity trading advisor registered under the Commodity Exchange Act or persons associated with a commodity trading advisor who are providing advice related to swaps
- Attorneys offering legal advice or providing services that are of a traditional legal nature, or
- Engineers providing engineering advice

Interim Final Temporary Rule 15Ba2-6T

- Registration with the SEC
- Fee to MSRB of \$100
- Few anticipated problems with the scope of Congress's definition

Proposed Permanent Rules

"In defining the term "municipal advisor" in Exchange Act Section 15B(e)(4), Congress <u>did not distinguish</u> <u>between those municipal advisors who are compensated for providing advice and those who are not compensated for providing advice</u> ...

[t]hus, consistent with Congress's definition of the term "municipal advisor," <u>the Commission does not believe the issue of whether a municipal advisor is compensated for providing municipal advice should factor into the determination of whether the municipal advisor must register with the Commission." 76 FR 832.</u>

Registration May Cover

- Accountants
- Appointed members of Governing Bodies of a Municipal Entity
- Attorneys
- Banks
- Broker-dealers if the U/W or Placement Agent solicits or advises an issuer to invest proceeds of municipal securities
- Commodity Trading Advisors
- Employees of Obligated Persons contrast municipal entities or their employees
- Engineers feasibility studies, cash flow models, etc.
- Investment Advisors under certain circumstances
- Solicitors of a Municipal Entity of Obligated Person

Governing Body Members? Municipal Advisors? Really?

- How does a member of a governing body advise herself?
- What is the fundamental purpose of such an inclusion?

Status

- Upcoming activity: July to December 2012
- http://www.sec.gov/spotlight/dodd-frank.shtml
- Comments: almost 1,000 (including from Barney Frank himself)
- Contrast to 1994 continuing disclosure body of law
- Ultimately (if fall under the definition of "municipal advisor":
 - Registration with SEC and MSRB
 - Record-keeping requirements
 - Interpretative notices
 - Fees
- Future oversight ... limited
 - See U.S. Securities and Exchange Commission: A Roadmap for Transformational Reform by Jack Katz
 - SEC focus historically on equities market; limited staff devoted to debt markets

Considerations

- What role will each professional play in a municipal financing?
- Necessity for artificially bifurcated roles between an underwriter and a financial advisor?
- Increased costs?
- It will be critical to identify (in writing?) each professional's role early in life cycle of a financing