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Issuing Bonds Under the SEC Municipal Advisor (MA) Rule

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- Background
- Roles of Parties
- Duties of Parties
- Municipal Advisor (MA) Rule Implementation
 - Who is an MA?
 - What is Advice?
 - When is Advice OK?
- The MA Rule in Effect

- As part of the fallout of the financial crisis in 2008, in July 2010 Congress passed a financial reform bill known as “Dodd Frank” to protect various parties, including issuers of municipal securities
- Dodd Frank caused a review of practices in the municipal marketplace and required the SEC to define financing roles, municipal advice and thus who should be regulated
 - Authorized the SEC to adopt rules for the registration of Municipal Advisors (MAs) and the Municipal Securities Rulemaking Board (MSRB) to adopt rules governing municipal advisors.
- The roles of a MA and Underwriter are distinct and separate

- MA Rule became effective July 1, 2014
 - 777 pages
- Objectives:
 - Defined categories of persons considered MAs
 - Established a permanent MA registration regime (with the SEC and FINRA)
 - Other MA requirements include: (1) training and continuing education, (2) supervision, (3) record keeping, (4) Code of Conduct and (5) Compliance exams
 - Examination of municipal advisory firms is conducted by the SEC and FINRA

- A person (not a municipal entity or an employee of a municipal entity) who provides advice to or on behalf of a municipal entity or obligated person with respect to the investment of the proceeds of municipal securities or the issuance of municipal securities
- A person who solicits a municipal entity or obligated person, but only if such person receives either direct or indirect compensation
- One does not have to be engaged or hired as a Municipal Advisor, financial advisor or in any other capacity whatsoever to be deemed a Municipal Advisor under the Rule

- The Municipal Advisor takes the lead on many services, including advising and assisting the college in formulating and executing a debt financing plan, including the bond structure, timing and process
 - The MA does not sell the bonds to investors, but it assists the college in determining the appropriate method of sale
 - The MA manages the competitive bond sale process
 - Assists the college with the selection of an underwriter, if a negotiated sale
 - Often prepares the Official Statement (which is still the college's disclosure document) and rating agency presentation
- The Underwriter's primary duty is to buy the bonds from the college and then market and sell them to investors
- A MA may not switch roles and become an Underwriter

- **Municipal Advisor (IRMA) – Fiduciary Duty**
 - Fiduciary duty requires the MA to act in the best interests of its client and place the client's interests ahead of its own
 - Disclose all material conflicts of interest
 - Review and provide inquiry into reasonable financial alternatives to the financing

- **Underwriter – Standard of Fairness**
 - Serves two clients: Issuer and Investors
 - Issuer and investors have differing interests
 - Results in holding Underwriter to a standard of fairness to both parties
 - Duties to Issuer include providing capital, selling bonds and providing advice specific to a bond issue
 - Fair dealing includes full disclosure and fair execution and requires balancing the interests of its issuer-client and investor-client
 - Dodd Frank imposed limitations on the manner and content of information communicated by underwriters to colleges prior to engagement, with some exemptions

Note: Same if you hire one or both of these professionals for a specific bond issue

- Advice is a:
 - recommendation or call to action;
 - relating to bonds or other financing instruments;
 - that is particularized to the specific needs, objectives or circumstances of the college;
 - including bond structure, timing and terms.
- Certain exemptions from advice exist

ADVICE

- Individually tailored recommendations
- Information that invites the Issuer to act or refrain from acting
- Subjective assumptions, opinions and viewpoints
- Advice given indirectly through a third-party professional retained by the Issuer

NOT ADVICE

- Professional qualifications and experience
- General market and financial information
- Educational information of various government financing programs
- Available investments and related prices
- Unspecific information or hypotheticals, i.e. vanilla (not tailored) refunding analyses

- So, anyone who provides advice without one of the exceptions to follow becomes a Municipal Advisor
 - Exemptions for engineers, lawyers, commercial bankers, auditors as well as college staff and board members
- Once a firm has served as Municipal Advisor related to a particular bond transaction, they cannot move into role of underwriter

What has changed since the MA Rule went into effect?

- Underwriters cannot provide advice and assistance relating to specific advice on bonds without meeting one of the exemptions:
 - Engaged
 - General and Factual information
 - RFP
 - Reliance upon an IRMA

SEC Municipal Advisor (MA) Rule Exemptions for Underwriters to Give Advice

- Underwriters can easily be considered a Municipal Advisor if information given to an Issuer is deemed “advice” and/or a “call to action”
- Providing any information deemed “advice” and/or a “call to action” would preclude a firm from underwriting the Issuer’s transaction
- Therefore, the Underwriter needs to put one of four MA Rule Exemptions in place:

Exemption #1

The Underwriting Exemption

- Underwriter disclosure states the following for a particular transaction:
 - Underwriter is not a fiduciary and is not acting as a municipal advisor
 - Underwriter is a principal and its interests differ from Issuer
 - Issuer should consult legal counsel or financial advisor it deems appropriate.

This is often referred to as an Underwriter letter of Intent or engagement letter that is non-binding.

Exemption #2

The IRMA Exemption

- Issuers retain an Independent Registered Municipal Advisor on same transaction that Underwriter is working on/proposing on
- Underwriter sends Issuer an email citing IRMA exemption and identifying IRMA
- Issuer must acknowledge named IRMA is on retainer and that they will rely on the IRMA’s advice respect to the issue/ program

Exemption #3

The RFP Exemption

- Underwriter is allowed to submit ideas, advice, etc. as part of a Request for Proposals/Qualifications process
- “Open ended” RFPs not allowed; must be issue or program specific
- States that the Issuer understands that respondent to RFP is not an MA
- The RFP must be sent to at least three qualified firms and/or be posted on the College’s website

- Outside of a specific engagement, an underwriter may also provide many other types of information to municipal issuers that does not rise to the level of advice without acting as a municipal advisor
 - General market information
 - Educational information
 - Professional qualifications
 - Level savings refundings
 - Factual descriptions and comparisons of financing alternatives

- Receiving information related to borrowing options and refundings is not as simple as it used to be.
- In order to assure that your college receives the most robust array of ideas regarding your existing debt and/or financing new projects, focus on:
 - Understanding the roles and responsibilities of the financing parties you engage
 - Understanding the professional standards that each financing role entails
 - Retain documentation that supports each role a financial professional is engaged to fill
 - Get contracts for financing engagements in place as early as possible
 - Ask questions and consult your legal professional if necessary



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