

PROPOSED SECURITIES AND EXCHANGE COMMISSION RULES

BACKGROUND

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) amended Section 15B of the Securities Exchange Act of 1934 to make it unlawful for “municipal advisors” to provide certain advice to or on behalf of a municipal entity without registering with the Securities and Exchange Commission (SEC).

Pursuant to the Dodd-Frank Act, the SEC proposed new rules establishing a permanent regime for municipal advisors. These proposed rules interpret the term “municipal advisors” to include appointed board members of governmental entities (that are not elected *ex officio* members).

Based upon the SEC’s current interpretation of the proposed rules published in the Federal Register on January 6, 2011, appointed board members of state agencies, institutions of higher education, conduit issuers of private activity bonds and other boards appointed by cities, counties and other governmental entities and others that are not elected *ex officio* members and are responsible for issuing debt and investing public funds fall within the category of “municipal advisors” and the regulatory regime set forth in the Dodd-Frank Act.

In its release issuing the proposed rules, the SEC explicitly excludes appointed members of a governing body as employees, thereby including the appointed members as municipal advisors. The SEC explained its rationale for its interpretation in the release:

The [SEC] does not believe that appointed members of a governing body of a municipal entity that are not elected *ex officio* members should be excluded from the definition of a “municipal advisor.” The [SEC] believes that this interpretation is appropriate because employees and elected members are accountable to the municipal entity for their actions. In addition, the [SEC] is concerned that appointed members unlike elected officials and *ex officio* members, are not directly accountable for their performance to the citizens of the municipal entity.

EFFECT OF THE SEC’S INTERPRETATION

The Dodd-Frank Act’s amendments to the Securities Exchange Act of 1934 make it unlawful for a municipal advisor to provide advice to or on behalf of a municipal entity or an obligated person with respect to municipal products or the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person, unless the municipal advisor is registered with the SEC.¹

¹ Solicitation of a municipal entity is defined as a direct or indirect communication with a municipal entity made by a person for direct or indirect compensation, on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser that does not control is not controlled by, or is not under common control with the person undertaking such solicitation for the purpose of obtaining or retaining an engagement by a municipal entity of a broker, dealer, municipal securities dealer or municipal advisor for or in connection with municipal financial products [or] the issuance of municipal securities.

The SEC's interpretation including appointed members of governing bodies within the meaning of the term "municipal advisors" would, under the provisions of the Dodd-Frank Act, subject appointed board members such as the Texas Transportation Commissioners to the following requirements:

(a) Registration as a financial advisor with the Commission on Form MA-I. Form MA-I requires disclosure of:

- (i) basic identifying information,
- (ii) a five-year residential history,
- (iii) a ten-year employment history,
- (iv) information regarding other business activities currently engaged in,
- (v) disclosure of any past felony charges or convictions,
- (vi) disclosure of violations of the federal securities laws, the Commodity Exchange Act or any rules of the Municipal Securities Rulemaking Board (MSRB),
- (vii) disclosure of civil judicial actions or settlements involving the violation of any investment-related or municipal advisor-related statute or regulation,
- (viii) disclosure of consumer complaints or arbitration regarding investment-related or municipal advisor-related matters,
- (ix) disclosure of any discharges or resignations relating to violating investment-related or municipal advisor-related rules, fraud, wrongful taking of property, or failure to supervise in connection with a violation of investment-related or municipal advisor-related rules, and
- (x) disclosure of any bankruptcy or similar proceeding in the past ten years, unsatisfied judgments or any denial of bond. Such information would become publicly available (unless otherwise noted) and there is a possible fee associated with the filing.

(b) Compliance with MSRB rules and regulations [not yet promulgated]. Such rules may (and most likely will) provide for:

- (i) standards of training, experience, competence, and such other qualifications for municipal advisors as the MSRB finds necessary or appropriate in the public interest or for the protection of investors and municipal entities or obligated persons;
- (ii) the periodic examination of municipal advisors to determine compliance with applicable provisions of the Act and related rules and the rules of the MSRB;
- (iii) certain records to be made and kept by municipal advisors;
- (iv) payment by each municipal advisor to the MSRB of reasonable fees and charges
- (v) necessary or appropriate to defray the costs and expenses of operating and administering the MSRB; and
- (vi) regulations designed to prevent acts that are inconsistent with a municipal advisor's
- (vii) fiduciary duty, continuing education requirements and professional standards.

(c) Maintaining a fiduciary duty with respect to any municipal entity for whom such individual acts as a municipal advisor. Specifically Section 15B(c)(1) of the Dodd-Frank Act's amendments to the Securities Exchange Act provides "no municipal advisor may engage in any act, practice, or course of business which is not consistent with a municipal

advisor's fiduciary duty or that is in contravention of any rule" of the MSRB. [This may make it impossible for the municipal entity to waive any potential conflict, and probably will override state law exemptions.]

(d) Compliance with additional federal fraud regulations. Section 15B(a)(5) of the Act's amendments to Securities Exchange Act provides "[n]o municipal advisor shall make use of the mails or any means or instrumentality of interstate commerce to provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products, the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person, in connection with which such municipal advisor engages in any fraudulent, deceptive, or manipulative act or practice."

(e) Compliance with the MSRB's G-17 Rule on Fair Dealing and the G-5 Rule on MSRB disciplinary actions.

COMMENTS ON PROPOSED RULES

The SEC has specifically invited comments on the appropriateness of its interpretation of the term "municipal advisors" in terms of required compliance with the registration regime. Any comments should be received by the SEC within 45 days of publication of the proposed rules in the Federal Register (i.e., by February 22, 2011).

RESOLUTION

Whereas, the Securities and Exchange Commission (SEC) has proposed rules in furtherance of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) requirements to establish a registration regime governing the activities and advice provided by “municipal advisors” to state and local governmental entities; and

Whereas, in proposing rules to establish a permanent regime for municipal advisors, the SEC has interpreted the term “municipal advisors” to include appointed members of governing bodies such as the Texas Transportation Commission; and

Whereas, unless the final rules and their interpretation by the SEC are amended, Texas Transportation Commissioners will be treated under the Dodd-Frank Act as municipal advisors subject to the registration and other requirements of the regime established for municipal advisors;

Now, Therefore, Be It Resolved that the Texas Transportation Commission directs the Executive Director or his designee to prepare and submit written comments to the SEC urging that body to reconsider its interpretation of the term “municipal advisors” and exclude appointed members of governing bodies of state and local governmental entities from the regime being established for municipal advisors

Presented this day, Thursday, the 27th of January, 2011.

Chair, Texas Transportation Commission

Commissioner, Texas Transportation Commission

Executive Director