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17 CFR Parts 200, 240 and 249
Registration of Municipal Advisors; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 240 and 249

[Release No. 34–70462; File No. S7–45–10]

RIN 3235–AK86

Registration of Municipal Advisors

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: Section 975 of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') amended Section 15B of the Securities Exchange Act of 1934 (''Exchange Act'') to require municipal advisors, as defined below, to register with the Securities and Exchange Commission (''Commission'' or ''SEC''), effective October 1, 2010. To enable municipal advisors to temporarily satisfy this requirement, the Commission adopted an interim final temporary rule, Exchange Act Rule 15Ba2–6T, and form, Form MA–T, effective October 1, 2010. To enable municipal advisors to continue to register under the temporary registration regime until the applicable compliance date for permanent registration, the Commission is extending Rule 15Ba2–6T, in a separate release, to December 31, 2014. The Commission is today adopting new Rules 15Ba1–1 through 15Ba1–8, new Rule 15Bc4–1, and new Forms MA, MA–I, MA–W, and MA–NR under the Exchange Act. These rules and forms are designed to give effect to provisions of Title IX of the Dodd-Frank Act that, among other things, require the Commission to establish a registration regime for municipal advisors and impose certain record-keeping requirements on such advisors.

DATES: *Effective Date:* January 13, 2014, except that amendatory instruction 11 removing § 249.1300T is effective January 1, 2015.

Compliance Date: The applicable compliance dates are discussed in the section of the release titled ''V. Implementation and Compliance Dates''.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: The Commission is adopting Rules 15Ba1–1 to 15Ba1–8 (17 CFR 240.15Ba1–1 to 240.15Ba1–8) and 15Bc4–1 (17 CFR 240.15Bc4–1) under the Exchange Act; Forms MA, MA–I, MA–W, and MA–NR (17 CFR 249.1300, 1310, 1320, and 1330); and Rules 30–3a (17 CFR 200.30–3a) and 19d (17 CFR 200.19d) under the Commission's Rules of Organization and Program Management. The Commission is amending Rules 30–18 (17 CFR 200.30–18) and 19c (17 CFR 200.19c) under the Commission's Rules of Organization and Program Management.

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I. Executive Summary

Section 975 of the Dodd-Frank Act creates a new class of regulated persons, ''municipal advisors,'' and requires these advisors to register with the Commission. This new registration requirement, which became effective on

concerns about the proposed application to advice on investments of all municipal funds (versus investments associated with proceeds of municipal securities); and (3) potential effects on securities activities of banks for which there are no statutory exclusions from the definition of ''municipal advisor.'' The Commission staff discussed many issues with other U.S. financial regulators, commenters, and interested market participants in devising a final rule that requires registration of parties engaging in municipal advisory activities without unnecessarily imposing additional regulation.

One theme reflected in the statutory exclusions to the definition of a municipal advisor and in the Commission's consideration of additional regulatory exemptions involves an approach that focuses and limits the scope of these exclusions and exemptions based on identified activities (''activities-based exemptions'') rather than on the basis of the status of particular categories of market participants (''status-based exemptions''). This approach aims to ensure that exemptions apply in targeted circumstances to appropriate identified activities. By comparison, a concern with status-based exemptions is that they could provide inappropriate competitive advantages to covered categories of market participants.[14]

In consideration of the views expressed, suggestions for alternatives, and other information provided by commenters, the Commission is adopting the rules with significant modifications from the Proposal to narrow the scope of the registration requirement, including through certain activity-based exemptions from the definition of municipal advisor, and to provide additional guidance to market participants about what constitutes municipal advice and who is required to register as a municipal advisor. Some of the more significant changes made in this adopting release are summarized as follows.

Broad Exemption for Public Officials and Employees of Municipal Entities and Obligated Persons

The Exchange Act excludes municipal entities and employees of municipal entities from the definition of municipal advisor.[15] The Proposal did not extend the exclusion for ''employees of a municipal entity'' to include appointed officials. The Commission received approximately 670 comment letters to the effect that the proposed exclusion for employees of municipal entities was unduly narrow and that it failed to provide sufficient coverage for appointed board members and other public officials associated with municipal entities. The final rule provides a broad exemption from municipal advisor registration for all employees, governing body members, and other officials of municipal entities and obligated persons, to the extent that they act within the scope of their employment or official capacity.[16] The Commission does not expect that the ordinary performance of the duties of an appointed member of a governing body of a municipal entity—such as voting, providing a statement or discussion of views, or asking questions at a public meeting—would cause that individual to be a municipal advisor with respect to the municipal entity on whose board he or she serves.

Limitation to Investments Related to Proceeds of Municipal Securities Instead of All Public Funds

The Exchange Act provides that the term '''investment strategies' *includes* plans or programs for the investment of the proceeds of municipal securities that are not municipal derivatives, guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments'' (emphasis added).[17] In the Proposal, the Commission proposed to interpret the ''investment strategies'' definition broadly to cover not only the statutorily-identified matters but also plans, programs, or pools of assets that invest any funds held by or on behalf of a municipal entity.

The Commission received approximately 60 comment letters to the effect that the Proposal interpreted the ''investment strategies'' definition too broadly to cover advice to municipal entities regarding plans or programs for the investment of all public funds of municipal entities (rather than investments more narrowly associated with proceeds of municipal securities and the recommendation of and brokerage of municipal escrow arrangements). The Commission has determined to adopt the statutory definition of ''investment strategies,'' but is also adopting an exemption for certain persons that will result in a narrower application of ''investment strategies'' than originally proposed, limiting such strategies to matters relating to the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments, in lieu of all public funds of municipal entities.[18] This more circumscribed approach to ''investment strategies'' has a narrowing effect throughout the municipal advisor registration regime (*e.g.,* many investment advisers and a significant portion of the bank activities identified by commenters will not be subject to municipal advisor registration).

New Tailored Exemption for Banks

The Exchange Act does not exclude banks from the definition of municipal advisor. The Commission received approximately 300 comment letters to the effect that the Proposal did not provide needed exemptions for so-called ''traditional banking'' activities. Most of these comments regarding the impact on banks related to the proposed broad interpretation of the ''investment strategies'' definition. Many commercial banks and banking associations asserted that the Commission's interpretation of ''investment strategies'' was overly broad and would potentially cover traditional banking products and services, such as deposit accounts, cash management products, and loans to municipalities. As a result, according to commenters, banks or bank employees that provide advice regarding such products and services could be considered municipal advisors, adding ''a new layer of regulation on bank products for no meaningful public purpose.'' [19]

The narrowing of the application of ''investment strategies'' in the final rule is designed to address the main concerns raised by these commenters.[20] In addition, the final rule provides a new tailored exemption from the definition of municipal advisor for a bank providing advice with respect to the following: (1) Any investments that are held in a deposit account, savings account, certificate of deposit, or other deposit instrument issued by a bank; (2) any extension of credit by a bank to a municipal entity or obligated person, including the issuance of a letter of credit, the making of a direct loan, or the purchase of a municipal security by the bank for its own account; (3) any funds held in a sweep account; or (4) any investment made by a bank acting in the capacity of an indenture trustee

[14] *See infra* Sections VIII.D.5.b. (discussing alternatives to the exclusions from the definition of municipal advisor) and VIII.D.6.b. (discussing alternatives to the exemptions from the definition of municipal advisor).

[15] *See* 15 U.S.C. 78*o*–4(e)(4)(A).

[16] *See infra* Section III.A.1.c.i.

[17] *See* 15 U.S.C. 78*o*–4(e)(3).

[18] *See infra* Section III.A.1.b.viii.

[19] *See infra* note 876 and accompanying text (discussing comments regarding an exemption for banks from the municipal advisor registration rules).

[20] *See infra* Section III.A.1.c.viii.

The Commission has carefully considered these comments and is not adopting its proposed interpretation of when a pooled investment vehicle will be considered to be funds held by or on behalf of a municipal entity. It is also not adopting an interpretation that would tie the determination of whether a person providing advice to a pooled investment vehicle is a municipal advisor, to whether municipal entities are the primary investors in the pooled investment vehicle. Instead, consistent with the narrowed approach that the Commission is adopting for ''investment strategies,'' the Commission is interpreting a pooled investment vehicle to be an investment strategy, and an advisor to such a pool to be 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.[398] In such a case, an advisor to such a pooled investment vehicle will be required to register as a municipal advisor, unless an exclusion or exemption applies.

The Commission recognizes commenters' concerns that requiring advisors to pooled investment vehicles that include funds of municipal entities to register as municipal advisors could have the effect of limiting investment choices for municipal entities, including investment choices for public pension funds. As noted above, however, the Commission is exempting from the definition of municipal advisor persons that provide 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.[399] Contrary to the construction under the proposed definition of ''investment strategies,''[400] under the definition of ''investment strategies'' as adopted and the exemption in Rule 15Ba1–1(d)(3)(vii), whether or not the funds invested in a pooled investment vehicle are considered to be ''funds held by or on behalf of a municipal entity'' does not determine whether a person providing advice to such a vehicle is required to register as a municipal advisor. Rather, under the rule as adopted, the determination of whether a person providing advice to a pooled investment vehicle is required to register as a municipal advisor depends upon the narrower inquiry of whether the funds in the pooled investment vehicle constitute ''proceeds of municipal securities that are not municipal derivatives or guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments.''[401] Also, the Commission notes that many advisors to pooled investment vehicles will be registered investment advisers or employees of municipal entities. Therefore, many advisors would or could be either exempted or excluded from registration as municipal advisors.[402] Moreover, the Commission believes that this approach to pooled investment vehicles appropriately focuses protection on those activities related to investment of the proceeds of municipal securities and related escrow investments, with respect to which there has been significant enforcement activity.[403]

One commenter expressed concern that pooled investment vehicles whose investors are limited to one or more municipal entities (*e.g.,* a government retirement pension plan) would be considered investment strategies under the Proposal.[404] This commenter suggested that the term ''investment strategies'' should not include insurance company's separate accounts supporting variable annuity contracts (and their underlying investment vehicles) offered to or held by municipal entities, even if the assets of the separate account are limited only to contributions from municipal entities.[405]

To the extent that an insurance company's separate accounts supporting variable annuity contracts offered to or held by municipal entities do not include ''proceeds of municipal securities,'' persons providing advice with respect to such accounts would not be required to register as municipal advisors because they would be exempt with respect to such municipal advisory activity.[406] Specifically, the Commission notes that, as a result of the exemption in Rule 15Ba1–1(d)(3)(vii) adopted today, a person providing 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'' will be exempt from the definition of municipal advisor with respect to such activities. Further, the definition of ''proceeds of municipal securities'' is limited to the monies derived by a municipal entity from the sale of municipal securities, investment income derived from such monies, and other monies of a municipal entity (or obligated person) held in funds under legal documents for the municipal securities that are reasonably expected to be used as security or a source of payment for the debt service on the municipal securities, and investment income from the investment or reinvestment of such funds.[407] If, however, such separate accounts supporting variable annuity contracts offered to or held by municipal entities *do* include ''proceeds of municipal securities,'' advice with respect to such accounts would not be eligible for the exemption in Rule 15Ba1–1(d)(3)(vii) and such activity could be municipal advisory activity triggering the registration requirement.

x. Solicitation of a Municipal Entity or Obligated Person

The definition of municipal advisor in Exchange Act Section 15B(e)(4) includes a person that undertakes a solicitation of a municipal entity or obligated person on behalf of specified persons.[408] Exchange Act Section 15B(e)(9) provides that the term ''solicitation of a municipal entity or obligated person''

often the only available option for the short-term investment of operating funds and are subject to state laws, which often include a fiduciary duty. The commenter stated that the Proposal likely would reduce the number of local government investment pool options available to municipalities.

[398] *See* Rule 15Ba1–1(d)(1) (defining ''municipal advisor'') and Rule 15Ba1–1(b) (defining ''investment strategies'' as including the statutorily identified items: ''plans or programs for the investment of proceeds of municipal securities that are not municipal derivatives or guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments'').

[399] *See supra* Section III.A.1.b.viii. (discussing the exemption as it relates to the application of the statutory definition of ''investment strategies'').

[400] *See supra* note 389 and accompanying text.

[401] *See* Rule 15Ba1–1(b).

[402] *See infra* Sections III.A.1.c.v. and III.A.1.c.i. (discussing, respectively, the exclusion for registered investment advisers and their associated persons and an exemption for employees of municipal entities and obligated persons).

[403] *See supra* note 287.

[404] *See* Committee of Annuity Insurers Letter I.

[405] *See id.*

[406] *See* Rule 15Ba1–1(d)(3)(vii).

[407] *See supra* Section III.A.1.b.viii. (discussing the exemption pursuant to Rule 15Ba1–1(d)(3)(vii), and the terms ''investment strategies'' and ''proceeds of municipal securities'').

[408] *See* 15 U.S.C. 78*o*–4(e)(4)(A)(ii). The Commission notes that the definition of municipal advisor under Section 15B(e)(4)(A) means, in part, a person that ''undertakes a solicitation of a municipal entity.'' Also, Section 15B(a)(1)(B), which establishes the registration requirement, specifically refers to solicitations of obligated persons. Notwithstanding the omission of the term ''obligated person'' in the definition of municipal advisor, the Commission interprets the definition of municipal advisor to include a person who engages in the solicitation of an obligated person acting in the capacity of an obligated person for the reasons discussed above. *See supra* note 138 and accompanying text.

See also supra note 178 (citing Chapman and Cutler Letter and discussing that an obligated person does not become a municipal entity by virtue of issuing securities with respect to which it is an obligated person).

means ''a direct or indirect communication with a municipal entity or obligated person made by a person, for direct or indirect compensation, on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser (as defined in section 202 of the Investment Advisers Act of 1940 [15 U.S.C. 80b–2]) 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 or obligated person of a broker, dealer, municipal securities dealer, or municipal advisor for or in connection with municipal financial products, the issuance of municipal securities, or of an investment adviser to provide investment advisory services to or on behalf of a municipal entity.''[409]

In connection with the statutory definition, the Commission discussed in the Proposal its interpretation of ''solicitation of a municipal entity or obligated person'' and stated in the Proposal that, unless an exclusion applies, any third-party solicitor that seeks business on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser from a municipal entity must register as a municipal advisor.[410] The Commission noted that the determination of whether a solicitation of a municipal entity requires registration is not based on the number, or size, of investments that are solicited.[411] The Commission also specifically stated that the exclusion from the definition of municipal advisor for a broker-dealer serving as an underwriter would not apply to a broker-dealer acting as a placement agent for a private equity fund that solicits a municipal entity or obligated person to invest in the fund.[412]

The Commission received approximately 14 comment letters regarding the definition of ''solicitation of a municipal entity or obligated person.'' As discussed in more detail below, a number of commenters requested further clarification regarding the statutory definition of, and the Commission's proposed interpretations of, that term. The Commission has carefully considered issues raised by commenters on its proposed interpretation and is adopting a rule[413] to define ''solicitation of a municipal entity or obligated person.'' The Commission's interpretation of ''solicitation of a municipal entity or obligated person'' in Rule 15Ba1–1(n) is substantially the same as its proposed interpretation, and includes certain clarifications discussed below designed to address commenters' concerns.[414] In addition, the Commission notes that, both in its proposed interpretation and adopted rule, a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser, soliciting on its own behalf, as explained below[415]—or an affiliate of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser soliciting on behalf of such entity—would not fall within the definition of ''solicitation of a municipal entity or obligated person.'' Accordingly, such person would not need to register as a municipal advisor.

Mailings, Advertisements, and Other General Information

Commenters stated that the Commission should explicitly exclude certain activities from the definition of solicitation of a municipal entity or obligated person. For example, one commenter recommended that ''generic 'mass mailing' solicitations, or institutional advertising'' should not be considered solicitation under the proposed rules, especially if such mass mailings are not targeted to a small group of particular municipal entities or obligated persons.[416] This commenter noted that the same argument would apply with respect to newspaper or periodical ads, brochures, TV, radio, or Internet ads.[417]

The Commission agrees with commenters that advertisements[418] or solicitations do not trigger an obligation for a third-party to register as a municipal advisor, provided such activity is undertaken by a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser on behalf of itself as opposed to on behalf of a third party. Accordingly, the Commission is adopting Rule 15Ba1–1(n) with a clarification to address advertising and the scope of the rule with respect to solicitation of obligated persons.[419] Specifically, Rule 15Ba1–1(n), as adopted, clarifies that ''solicitation of a municipal entity or obligated person'' does not include ''advertising by a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser.''[420]

Assistance With Requests for Proposals

It is a relatively common industry practice for municipal entities to request that a financial advisor, bond counsel, or other market professional assist in the review of requests for proposals (''RFP'') for underwriter, financial advisory, or

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[409] 15 U.S.C. 78*o*–4(e)(9).

The Commission notes that Rule 15Ba1–1(n) (which, as adopted, provides that the term ''solicitation of a municipal entity or obligated person'' has the same meaning as Section 15B(e)(9) of the Exchange Act, with certain exemptions) is only applicable with respect to whether or not a person meets the definition of municipal advisor and therefore will be required to register with the Commission (unless an exemption or exclusion applies). The Commission is not otherwise altering its interpretation of ''solicitation'' as used in other contexts.

As the Commission has explained, the Commission generally views solicitation, in the context of broker-dealers, as including any affirmative effort intended to induce transactional business. *See* Registration Requirements for Foreign Broker-Dealers, Securities Exchange Act Release No. 27017 (July 11, 1989), 54 FR 30013, 30017–18 (July 18, 1989) (explaining that solicitation includes, among other things, calls encouraging use of a party to effect transactions).

[410] *See* Proposal, 76 FR 831. Thus, as stated in the Proposal, a third-party solicitor seeking business on behalf of an investment adviser from a municipal pension fund or LGIP would be required to register as a municipal advisor.

In addition, depending on the facts and circumstances, the third-party solicitor may also need to register as a broker-dealer pursuant to Section 15(a) of the Exchange Act. *See* 15 U.S.C. 78*o*(a)(1). *See also supra* note 409 (discussing solicitation in the context of broker-dealer regulation).

[411] *See* Proposal, 76 FR 831. As discussed in the Proposal, a solicitation of a single investment of any amount from a municipal entity would require the person soliciting the municipal entity to register as a municipal advisor.

[412] *See id.,* at 832, note 108 and accompanying text.

The Commission also noted that including such activities within the scope of municipal advisory activities is consistent with the Exchange Act. *See id.* (citing Exchange Act Sections 15B(e)(4)(A) and (B) (including placement agents and solicitors that undertake a solicitation of a municipal entity in the definition of municipal advisor); S. Rep. No. 176 at 148, 111th Cong., 2d. Sess. 148 (2010) (noting that Section 975 would not prohibit solicitation of a municipal entity, but would subject solicitors to the registration requirement and MSRB regulation); and letter from Senator Christopher J. Dodd, U.S. Senate Committee on Banking, Housing and Urban Affairs, to Elizabeth M. Murphy, Secretary, Commission, dated February 2, 2010).

[413] *See* Rule 15Ba1–1(n).

[414] *See id. See* notes 419–420 and 446–447, and accompanying text (discussing Rule 15Ba1–1(n)).

[415] *See* text accompanying *infra* note 418.

[416] *See* Kutak Rock Letter.

[417] *See id.*

[418] *See, e.g.,* FINRA Rule 2210(a)(5) (defining a ''retail communication'' as meaning ''any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar-day period'').

[419] *See* Rule 15Ba1–1(n).

[420] *Id.*

The Commission notes, however, that while such communications would not trigger the requirement to register as a municipal adviser under the solicitation prong of the definition of ''municipal adviser,'' depending on the facts and circumstances, including the content of such communications, such activity may be considered to be advice for purposes of the registration requirement. *See supra* Section III.A.1.b.i. (discussing the advice standard in general).

employer are acting as the agent of their employer and, consequently, are not third-party solicitors that fall within the definition of municipal advisor as a result of their solicitation activity.

Pursuant to Rule 15Ba1–1(d)(3)(viii) and consistent with the exemption from the definition of municipal advisor under Rule 15Ba1–1(d)(3)(vii) for 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,[464] the Commission is exempting from the definition of municipal advisor under Rule 15Ba1–1(d)(1) any person that undertakes a ''solicitation of a municipal entity or obligated person'' (as defined in Rule 15Ba1–1(n) (17 CFR 240.15Ba1–1(n)) for the purpose of obtaining or retaining an engagement by a municipal entity or by an obligated person of a broker, dealer, municipal securities dealer, or municipal advisor for or in connection with municipal financial products that are investment strategies, to the extent that such investment strategies are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments.[465] As with respect to the exemption in Rule 15Ba1–1(d)(3)(vii), the Commission believes that the exemption in Rule 15Ba1–1(d)(3)(viii) is consistent with the public interest, the protection of investors, and the purposes of Section 15B of the Exchange Act, because the exemption tailors protection of municipal entities to those activities related to the investment of the proceeds of municipal securities and related escrow investments.[466]

Marketing of Insurance Contracts

One commenter stated that solicitation should not include the marketing of insurance contracts by broker-dealers to retirement plans established by municipal entities.[467] The Commission agrees that the marketing of insurance contracts by broker-dealers is not solicitation for purposes of the municipal advisor definition if it is not performed on behalf of a third-party broker, dealer, investment adviser, municipal securities dealer, or municipal advisor. As described above, the definition of ''solicitation of a municipal entity or obligated person'' only applies to third-party solicitations on behalf of these specific kinds of entities.[468]

c. Exclusions and Exemptions From the Definition of ''Municipal Advisor''

In addition to the exemption described above for persons providing advice or soliciting engagements with respect to certain financial products, the Commission discusses below its interpretations of certain statutory exclusions, as well as specific activities-based exemptions it is granting from the definition of ''municipal advisor.'' [469] Also, the Commission discusses below exemptions of general applicability to the extent a person is responding to an RFP or a request for qualifications (''RFQ'') or to the extent a municipal entity or obligated person is otherwise represented by a registered municipal advisor, subject to certain conditions.

i. Public Officials and Employees of Municipal Entities and Obligated Persons

Exchange Act Section 15B(e)(4)(A) provides that the term ''municipal advisor'' excludes employees of a municipal entity.[470] As noted in the Proposal, one commenter suggested that the Commission clarify that this exclusion would include any person serving as an appointed or elected member of the governing body of a municipal entity, such as a board member, county commissioner or city councilman.[471] This commenter stated that, because these persons are not technically ''employees'' of the municipal entity (but rather ''unpaid volunteers''), they would not fall within the exclusion from the definition of municipal advisor for ''employees of a municipal entity.'' [472]

The Commission stated in the Proposal that the exclusion from the definition of municipal advisor for ''employees of a municipal entity'' should include any person serving as an elected member of the municipal entity's governing body to the extent that the person is acting within the scope of his or her role as an elected member. The Commission also stated that ''employees of a municipal entity'' should include a governing body's appointed members to the extent such appointed members are *ex officio* members by virtue of holding an elective office.[473] The Commission stated its concern that appointed members are not directly accountable for their performance to the citizens of the municipal entity.[474]

In the Proposal, the Commission requested comment on: (1) Whether there are any persons who engage in uncompensated municipal advisory activities, or municipal advisory activities for indirect compensation, that the Commission should exclude from the definition of municipal advisor; (2) whether ''employees of a municipal entity'' should include elected members of a governing body of a municipal entity, and appointed members of a municipal entity's governing body to the extent such appointed members are *ex officio* members of the governing body by virtue of holding an elective office, is appropriate; and (3) whether there are other persons associated with a municipal entity who might not be ''employees'' of a municipal entity but that the Commission should exclude from the definition of municipal advisor.[475]

The Commission received over 600 comment letters on its interpretation of ''employee of a municipal entity.'' Commenters represented a wide array of individuals and entities, including representatives of: city and state governments; [476] city and state retirement systems; [477] state university

[464] *See supra* Section III.A.1.b.viii.

[465] *See* Rule 15Ba1–1(d)(3)(viii).

[466] *See* note 328 and accompanying text.

[467] *See* Committee of Annuity Insurers Letter I.

[468] *See supra* note 463 and accompanying text. *See also* Rule 15Ba1–1(n).

[469] For the exclusions and exemptions that were discussed in the Proposal and that the Commission is adopting today, the Commission has made minor, non-substantive changes to provide greater clarity and consistency throughout the rules related to exclusions and exemptions.

[470] 15 U.S.C. 78*o*–4(e)(4)(A).

[471] *See* Proposal, 76 FR 834, n.140 and accompanying text (citing letter from John P. Wagner, Kutak Rock LLP, to Elizabeth M. Murphy, Secretary, Commission, dated September 28, 2010).

[472] *See id. See also* 15 U.S.C. 78*o*–4(e)(4)(A).

[473] This would include persons appointed to fill the remainder of the term for an elective office.

[474] *See* Proposal, 76 FR 834.

[475] *See* Proposal, 76 FR 837.

[476] *See, e.g.,* letter from Stevan Gorcester, Association of Washington Cities, dated February 22, 2011; letter from William G. Dressel, Jr., Executive Director, New Jersey League of Municipalities, dated January 27, 2011; letter from Ken Miller, Oklahoma State Treasurer, dated February 7, 2011; letter from Steve Ritter, Assistant Finance Director, City of Huntsville, Texas, dated January 10, 2011; letter from Jim D. Dunaway, City Manager, City of Taylor, Texas, dated January 13, 2011; letter from Jacqueline M. Kovilaritch, Assistant City Attorney, City of St. Petersburg, Florida, dated January 19, 2011 (''City of St. Petersburg Letter''); letter from Judith Hetherly, Mayor, City of Lampasas, Texas, dated January 20, 2011; letter from Gary Herbert, Governor, State of Utah, Salt Lake City, Utah, dated February 17, 2011; and National Association of State Treasurers Letter.

[477] *See, e.g.,* Utah Retirement Systems Letter; letter from R. Dean Kenderdine, Executive Director and Secretary to the Board, Maryland State Retirement and Pension System, dated February 17, 2011; letter from Ann Fuelberg, Executive Director, Employees Retirement System of Texas, dated February 18, 2011; letter from Anthony B. Ross, Chairperson and Stephen C. Edmonds, Executive Director, City of Austin Employees Retirement System, dated February 18, 2011; and Alaska Retirement Management Board Letter.

systems;[478] state housing, development, and port authorities;[479] city transit authorities;[480] special districts (such as healthcare, water, sanitation, and other districts);[481] public utility boards and associations;[482] airports, and airport authorities and commissions;[483] and individual volunteer or appointed board members.[484]

The comments dealt predominantly with the Commission's proposed view that ''employees of a municipal entity'' should include elected members of a municipal entity's governing body, and appointed members, to the extent such appointed members are *ex officio* members of the governing body by virtue of holding an elective office. Many commenters asserted that the Commission's proposed interpretation of municipal advisor is overly broad or overreaching and should exclude all members of a municipal entity's governing board.

The majority of commenters stated, in particular, that appointed board members should not be treated differently from elected board members or officials and disagreed with the Commission's statement that appointed board members are not directly accountable. Many of the commenters asserted that state and local laws applicable to officials of a municipal entity do not distinguish between appointed or elected members and that all members are subject to the same legal obligations, including fiduciary duties, codes of conduct, open meeting laws, and conflicts of interest and ethics laws.[485] For example, commenters asserted that appointed officials of municipal non-profit corporations, trusts, and pension funds have a duty to act in the interests of the corporation, trust, or the fund.[486] Many commenters also asserted that appointed board members are accountable to the elected officials that appointed them or for whom they work.[487] Many also noted that appointed board members may be removed for cause[488] and are subject to civil suit.[489] Others observed that appointed board members are more accountable than elected officials.[490]

Additionally, many commenters asserted that board members are the decision and policy makers who receive advice from third parties who are paid for providing services and that board members themselves are not

[478] *See, e.g.,* letter from Frank T. Brogan, Chancellor, State University System of Florida, dated February 21, 2011; letter from Calvin J. Anthony, Chairman, Oklahoma State University/Agricultural and Mechanical Colleges Board of Regents, dated January 7, 2011 (''Oklahoma State University/Agricultural and Mechanical Colleges Board of Regents Letter''); letter from Francisco G. Cigarroa, M.D., Chancellor, The University of Texas System, dated February 7, 2011; letter from Michael D. McKinney, Chancellor, The Texas A&M University System and Kent Hance, Chancellor, Texas Tech University System, dated February 14, 2011; letter from Richard D. Legon, President, Association of Governing Boards of Universities and Colleges, dated February 15, 2011; letter from Dr. Brian McCall, Chancellor of the Texas State University System, dated February 17, 2011; and letter from Peter J. Taylor, Executive Vice President—Chief Financial Officer, The Regents of the University of California, dated February 18, 2011 (''UCLA Regents Letter'').

[479] *See, e.g.,* letter from Rebecca L. Peace, Chief Counsel, Pennsylvania Housing Finance Agency, Jayne B. Blake, Chief Counsel, Pennsylvania Infrastructure Investment Authority, Stephen M. Drizos, Executive Director, Pennsylvania Economic Development Financing Authority, Carol A. Longwell, Deputy Chief Counsel, Pennsylvania Economic Development Financing Authority, and Doreen A. McCall, Chief Counsel, Pennsylvania Turnpike Commission, dated February 15, 2011 (''Pennsylvania Housing Finance Agency Letter''); and letter from Tracy V. Drake, Chairman, Ohio Council of Port Authorities and CEO, Columbiana County Port Authority, dated February 4, 2011.

[480] *See, e.g.,* letter from Carol B. Keefe, General Counsel, Washington Metropolitan Area Transit Authority, Washington, District of Columbia, dated February 14, 2011; and letter from David Levinger, Chief Financial Officer, Dallas Area Rapid Transit, dated February 22, 2011.

[481] *See, e.g.,* letter from John ''Chip'' Taylor, Executive Director, Colorado Counties Inc., Sam Mamet, Executive Director, Colorado Municipal League, and Ann Terry, Executive Director, Special District Association of Colorado, dated January 26, 2011; letter from Kathleen Durham, Chairman, South Broward Hospital District, dated February 8, 2011; letter from James F. Heekin, Counsel, Citrus County Hospital Board, Southeast Volusia Hospital District, West Orange Healthcare District, February 14, 2011; letter from Walt Sears, Jr., General Manager, Northeast Texas Municipal Water District, dated January 24, 2011; and letter from Robert M. Ball, A. A. E., Executive Director, Lee County Port Authority, dated February 18, 2011; and letter from Edward G. Henifin, General Manager and Steven G. deMik, Director of Finance, Hampton Roads Sanitation District, dated February 22, 2011.

[482] *See, e.g.,* letter from David Modisette, California Municipal Utilities Association, dated February 22, 2011; letter from John S. Bruciak, Brownsville Public Utilities Board, dated February 18, 2011; letter from David H. Wright, City of Riverside, dated February 23, 2011; and letter from Susan N. Kelly, Senior Vice President of Policy Analysis and General Counsel and Diane Moody, Director, Statistical Analysis, American Public Power Association, dated February 22, 2011 (''American Public Power Association Letter'').

[483] *See, e.g.,* letter from Jeffery P. Fegan, Chief Executive Officer, Dallas/Fort Worth International Airport, dated January14, 2011, letter from Phillip N. Brown, A.A.E., Executive Director, Greater Orlando Aviation Authority, dated February 8, 2011; letter from Emily Neuberger, Senior Vice President & General Counsel, Wayne County Airport Authority, Michigan, dated February 14, 2011 (''Wayne County Airport Authority Letter''); letter from Elaine Roberts, President & CEO, Columbus Regional Airport Authority, dated February 16, 2011; letter from Thomas W. Anderson, General Counsel, Metropolitan Airports Commission, dated February 17, 2011; and letter from Breton K. Lobner, General Counsel, San Diego County Regional Airport Authority, dated February 22, 2011.

[484] *See, e.g.,* letter from Richard R. Vosburg, Chartered Financial Analyst, Germantown, Tennessee, dated January 24, 2011 (''Vosburg Letter''); and letter from William Dalton, dated February 28, 2011 (''Dalton Letter'').

[485] *See, e.g.,* Darrell Buchbinder, The Port Authority of New York and New Jersey, dated February 18, 2011; National Association of State Treasurers Letter; Letter from Martin R. Hopper, General Manager, M–S–R Public Power Agency, dated February 18, 2011 (''M–S–R-Power Agency Letter''); letter from Meredith J. Jones, NYCEDC, dated February 18, 2011 (''NYCEDC Letter''); and UCLA Regents Letter; letter from Laura King, Minnesota State Colleges and Universities, dated February 22, 2011.

Many of these commenters also explained that certain municipal entity governing boards are established or operating pursuant to state or local statute. *See id. See also* letter from JoAnn E. Levin, Chief Solicitor, City of Baltimore, dated February 3, 2011; and letter from Mark Page, Director of Management and Budget, The City of New York, dated February 22, 2011 (''NYC Management and Budget Letter'').

[486] *See, e.g.,* letter from Acting Governor Earl Ray Tomblin, Chairman of the Board; Glen B. Gainer, Auditor of the State of West Virginia and Roger Hunter, Chairman of the Investment Committee, and Guy Bucci, Chairman of the Legal Committee, West Virginia Investment Management Board, dated February 22, 2011; and letter from Joanne Handy, President and CEO, Aging Services of California, dated February 22, 2011; letter from Charles R. Noll, President, Pennsylvania Local Government Investment Trust, dated February 18, 2011 (''Pennsylvania Local Government Investment Trust Letter''); letter from Keith Bozarth, Executive Director, State of Wisconsin Investment Board, dated February 22, 2011; and letter from Peter H. Mixon, California Public Employees' Retirement System, dated February 22, 2011 (''CALPERS Letter'').

[487] *See, e.g.,* letter from John Murphy, Executive Director, National Association of Local Housing Finance Agencies, dated January 27, 2011; NYC Management and Budget Letter; and letter from Bob A. Newmark, Housing Finance Authority, dated February 11, 2011.

[488] *See, e.g.,* letter from Gottlieb Fisher PLLC, on behalf of the Boards of Trustees for King County Rural Library District, Fort Vancouver Intercounty Rural Library District, Pierce County Rural Library District LaConner Rural Partial-County Library District, Sno-Isle Intercounty Rural Library District, Spokane County Rural Library District, Walla Walla County Rural Library District, and Whitman County Rural Library District, dated February 11, 2011 (''Gottlieb Fisher Letter''); letter from Linda Beaver, Nebraska Educational Finance Authority, dated February 16, 2011 (''Nebraska Educational Finance Authority Letter''); Alaska Retirement Management Board Letter; Robert W. Barnes, Idaho Falls Redevelopment Agency, dated February 18, 2011; and letter from Jeffrey W. Letwin, Esq., Partner, Schnader Harrison Segal Lewis LLP, Pittsburgh, Pennsylvania, dated February 8, 2011.

[489] *See, e.g.,* letter from Jeffrey W. Letwin, Esq., Partner, Schnader Harrison Segal Lewis LLP, Pittsburgh, Pennsylvania, dated February 8, 2011; letter from Gary Kimball, President, Specialized Public Finance, Inc., dated February 22, 2011 (''Specialized Public Finance Letter''); letter from Gary Parsons, General Manager, Texas Municipal Power Agency, dated February 22, 2011 (''Texas Municipal Power Agency Letter''); and letter from John W. Rubottom, General Counsel, Lower Colorado River Authority, dated February 15, 2011.

[490] *See, e.g.,* letter from Bill Lockyer, Treasurer, State of California, dated February 22, 2011 (''California State Treasurer's Office Letter''); Texas Municipal Power Agency Letter; letter from John D. Clark, III, Executive Director/CEO, Indianapolis Airport Authority, dated February 22, 2011; and letter from Victor Vandergriff, Chairman, North Texas Tollway Authority, dated February 11, 2011.

''advisors.'' [491] Many commenters asserted that members of governing boards are the intended beneficiaries of the proposed regulation.[492] Further, some commenters asserted that the Proposal would usurp state laws governing duties and responsibilities of appointed board members of municipal entities.[493] Many commenters also stated that, in its current form, the Proposal would deter much needed citizen volunteers from serving on governing boards of municipal entities or would chill the deliberative process of such boards. These commenters reasoned that volunteers would fear that their participation in votes on, or discussions of, financial matters will be deemed ''advice'' that would subject them to registration.[494]

Commenters also stated that the Proposal is unclear with respect to whether: (1) Appointed, rather than elected, officials (such as city controllers, managers, and commissioners) would be ''employees;'' [495] (2) the employee of one municipal entity (such as an employee of a municipal entity that is the sponsor of a pension plan) would be covered by the exclusion when serving as an appointed member of the board of another municipal entity (such as on the board of the sponsored pension plan) or otherwise performing services for other related municipal entities; [496] and (3) board members that were ''elected,'' but were not elected by the citizens of the municipal entity, would be considered ''employees of a municipal entity.'' [497] Some commenters stated that designees of board members should also be covered by the exclusion.[498] One commenter suggested that ''employees and board members of a municipal entity should be excluded [from the definition of municipal advisor] to the extent they provide advice to an obligated person (and acting in the purview of their duties).'' [499]

Many commenters also stated that boards of municipal entities are legally inseparable from the municipal entity.[500] One commenter stated that if the governing body of a municipal entity, as a whole, is not a part of the ''municipal entity,'' then any third party soliciting or providing advice to the governing body with respect to municipal financial products or the issuance of municipal securities would not be subject to the registration requirements.[501]

Additionally, some commenters asserted that the Proposal would restrict municipal entities from soliciting advice from citizens, and would subject to the registration requirements members of the general public submitting written comments or giving oral statements to the board of a municipal entity.[502] Another commenter stated that the Proposal would require registration of a former board member, if the Chairman of the current board contacts that former board member with questions about a prior issuance.[503]

After considering the comments, the Commission has determined to exempt from the definition of municipal advisor, pursuant to its authority under Section 15B(a)(4), all members of a municipal entity's governing body, its advisory boards and its committees, as well as persons serving in a similar official capacity with respect to the municipal entity, to the extent they are acting within the scope of their official capacity, regardless of whether such members or officials are employees of the municipal entity. Specifically, Rule 15Ba1–1(d)(3)(ii) exempts from the definition of municipal advisor ''[a]ny

[491] *See, e.g.,* letter from Michael D. Nosler, General Counsel and Assistant Attorney General, Colorado State University System, dated February 21, 2011; letter from Barbara J. Thompson, Executive Director, National Council of State Housing Agencies, dated February 22, 2011; letter from Luther Strange, Attorney General, State of Alabama, dated February 22, 2011; CALPERS Letter; letter from Ronnie G. Jung, Executive Director, Teacher Retirement System of Texas, dated February 22, 2011; Stephanie L. Hamlett, Executive Director, Virginia Resources Authority, dated February 22, 2011; and Dalton Letter.

[492] *See, e.g.,* letter from David R. Fine, City Attorney, Denver, dated February 9, 2011 (''Denver Letter''); letter from James F. Zay, Chairman, Du Page Water Commission, dated February 11, 2011; letter from Angela I. Carmon, City Attorney, City of Winston-Salem, North Carolina, dated February 14, 2011; letter from David J. Kincaid, City Manager, City of Safford, Arizona, dated February 14, 2011 (''City of Safford Letter''); and letter from Donald Dicklich, County Auditor-Treasurer, Duluth, Minnesota, dated February 16, 2011.

[493] *See, e.g.,* letter from Steven J. Baumgardt, Finance Director, City of Tolleson, Arizona, dated March 3, 2011 (''City of Tolleson Letter''); letter from Joe Pizzillo, Vice Mayor, City of Goodyear, Arizona, dated February 14, 2011 (''City of Goodyear Letter''); letter from Patricia Branya, Director, Miami-Dade County, dated February 14, 2011; and letter from Elwood G. ''Woody'' Farber, President, New Mexico Educational Assistance Foundation, dated February 15, 2011. One commenter questioned whether, if an appointed member of a governing body is deemed a municipal advisor, the federal fiduciary obligations to the municipal entity override state and local law provisions for exculpation, indemnification, and other protections of board members. *See* NABL Letter.

[494] *See, e.g.,* City of Tolleson Letter; City of Goodyear Letter; letter from Richard D. Legon, President, Association of Governing Boards of Universities and Colleges, dated February 15, 2011; letter from Edward G. Henifin, General Manager and Steven G. deMik, Director of Finance, Hampton Roads Sanitation District, dated February 22, 2011; letter from Scott Jordan, Executive Office for Administration and Finance, dated February 22, 2011; letter from Granger Vinall, Chairman of the Board of Directors and Kevin J. Burns, Chief Executive Officer, UA Healthcare, Inc., dated February 22, 2011; and letter from Ronald H. Paydo, President, Medina County Port Authority, dated February 18, 2011.

[495] *See, e.g.,* Cynthia M. Davenport, Attorney at Law, Flynn & Davenport, LLC, Troy, Missouri, dated January 18, 2011; City of St. Petersburg Letter; Denver Letter; and City of Safford Letter.

[496] *See, e.g.,* letter from Michael Hairston, EFRC, dated February 22, 2011; NYC Management and Budget Letter; M–S–R-Power Agency Letter (explaining that the M–S–R Public Power Agency uses the services of employees of its member municipal entities to sit on standing committees of the agency and to fulfill the duties of offices of the agency; and commenting that employees of its members that are seconded to the agency should have the same exemption when they perform services for the agency as when the employees are acting within the scope of their employment responsibilities providing services for the benefit of the member entity); letter from Hawkins Delafield & Wood LLP, dated February 16, 2011 (commenting that ''an employee of municipal entity A who provides services to, but is not an employee of, municipal entity B, should be exempt under Section 15B(e)(4)(A) if both entities operate for the benefit of the same governmental unit, whether at the state, county, or municipal level''); letter from Susan Combs, Texas Comptroller of Public Accounts, dated February 22, 2011 (describing that employees of Texas's Office of the Comptroller may provide advice to other municipal entities within the state in connection with their duties to the Office of the Comptroller); and letter from Amadeo Saenz, Texas Department of Transportation, dated February 22, 2011 (commenting that employees of the Texas Department of Transportation that are appointed to the non-profit entity that issues bonds on behalf of the Texas Transportation Commission should be excluded because they are employees assuming a decision-making responsibility based on the duties of their employment).

One commenter also stated that the Proposal is unclear, in the case of a non-profit entity formed for the benefit of a municipal entity, whether employees of the municipal entity that sit on the board of such non-profit would be excluded from the definition of ''municipal advisor'' as ''employees'' of the municipal entity. *See, e.g.,* letter from Angela I. Carmon, City Attorney on behalf of North Carolina Municipal Leasing Corporation, dated February 22, 2011.

The term ''municipal entity'' means, in part, ''any State, political subdivision of a State, or corporate instrumentality.'' *See* Rule 15Ba1–1(g). The Commission notes that such employees would be ''employees of a municipal entity,'' and therefore excluded from the definition of municipal advisor, to the extent the non-profit entity is itself a municipal entity (*e.g.,* if the non-profit entity is a corporate instrumentality of a State).

[497] *See, e.g.,* Pennsylvania Local Government Investment Trust Letter.

[498] *See, e.g.,* NYC Management and Budget Letter; and letter from Tim Kenny, Nebraska Investment Finance Authority, dated February 22, 2011.

[499] Kutak Rock Letter. This commenter was concerned that otherwise, the municipal entity and obligated person would not be able to coordinate with respect to a financing for the obligated person.

[500] *See, e.g.,* Utah Retirement Systems Letter; Nebraska Educational Finance Authority Letter; State of Indiana Letter; NABL Letter; and letter from Gregory W. Smith, General Counsel/Chief Operating Officer, Colorado Public Employees' Retirement Association, dated February 22, 2011.

[501] *See* Utah Retirement Systems Letter.

[502] *See, e.g.,* letter from Annise D. Parker, Mayor, City of Houston, Texas, dated February 22, 2011; Squire Sanders & Dempsey Letter.

[503] *See* Indianapolis Local Public Improvement Bond Bank Letter.

person serving as a member of a governing body, an advisory board, or a committee of, or acting in a similar official capacity with respect to, or as an official of, a municipal entity or obligated person [504] to the extent that such person is acting within the scope of such person's official capacity'' [505] and ''any employee of a municipal entity or obligated person to the extent that such person is acting within the scope of such person's employment.'' [506]

The Commission agrees with commenters that like employees, a municipal entity's officials, as well as members of a municipal entity's governing body and other officials serving in a similar capacity (including members of advisory boards and committees), whether or not employed by a municipal entity, typically act on behalf of the municipal entity. The Commission also believes that if a local government official or appointed board member of a municipal entity, in the scope of his or her duties to that municipal entity, provides advice to another municipal entity, such advice would not require the person to register as a municipal advisor because such person would be acting within the scope of his or her duties to the municipal entity. Rule 15Ba1–1(d)(3)(ii) also clarifies the Commission's interpretation of the statutory exclusion from the definition of ''municipal advisor'' for employees of municipal entities by providing that such employees are exempt ''to the extent that such person is acting within the scope of such person's employment.'' [507] Consequently, as described above with respect to governing board members and officials, an employee of one municipal entity that provides advice, within the scope of his or her employment as such, to another municipal entity or obligated person would be exempt from the definition of ''municipal advisor.''

The exemption in Rule 15Ba1–1(d)(3)(ii) would extend to all designees of public officials or members of a municipal entity's governing body, to the extent such designation is made pursuant to existing rules of the municipal entity for designating or delegating authority. The Commission believes that under such scenario, the designee would be serving ''in a similar official capacity'' [508] as the person for whom they are acting. Further, the Commission notes that the exemption from registration includes members of advisory boards [509] and committees,[510] acting within the scope of their capacity as such [511] because, as with respect to members of the governing body or other government officials, when acting within the scope of their official capacity such persons are acting on behalf of the municipal entity.

The Commission does not intend to impede the deliberative process that municipal entities engage in with their citizens. Accordingly, the registration requirement for municipal advisors does not apply to persons who comment on municipal financial products or the issuance of municipal securities by making use of public comment forums provided by municipal entities or other public forums. Additionally, responding to factual questions about a past issuance by a former board member would not constitute municipal advisory activities, because providing such information in response to questions under such circumstances is factual and therefore does not constitute advice with respect to such issuance.[512]

The Commission agrees with commenters that individuals who engage in deliberative and decision-making functions with respect to municipal financial products or the issuance of municipal securities as part of their duties as members of a governing body should not have to register as municipal advisors. Such individuals represent the municipal entity that is the intended recipient of the protections of the municipal advisor registration regime, and the Commission does not consider such deliberative and decision-making functions to be advice. Additionally, board members and other officials (appointed and elected alike, as well as their duly appointed designees) may be subject to state and local law, including fiduciary duties and ethics laws, and the statutory qualifications for such members' board positions may be significant to the mission of the municipal entity. Accordingly, the Commission does not believe that imposing an additional layer of regulation, including the fiduciary duty imposed upon municipal advisors,[513] would provide a significant additional benefit. The Commission agrees with commenters that whether a public official or other member of a governing body of a municipal entity is appointed or elected is not the sole factor in determining whether such individual is accountable to the municipal entity he or she serves. Board members, officials, and employees would be required to register, however, if they are engaged by other municipal entities or obligated persons to provide services as compensated advisors in addition to their normal duties as an employee, official, or board member of the municipal entity.[514]

For the reasons described above, the Commission finds it consistent with the public interest, the protection of investors, and the purposes of Section 15B of the Exchange Act, to use its authority pursuant to Exchange Act Section 15B(a)(4) to exempt any person serving as a member of a governing body, an advisory board, or a committee of, or acting in a similar official capacity with respect to, or as an official of, a municipal entity to the extent that such person is acting within the scope of such person's official capacity.[515] Accordingly, such persons are not required to register as municipal advisors.

Employees and Officials of Obligated Persons

Section 15B(e)(4) of the Exchange Act excludes from the definition of municipal advisor persons who are employees of a municipal entity, but does not extend such exclusion to employees of obligated persons. In the

[504] Comments regarding the treatment of such governing persons and employees of obligated persons, and how this exemption addresses such comments, are separately discussed further below.

[505] Rule 15Ba1–1(d)(3)(ii)(A).

[506] Rule 15Ba1–1(d)(3)(ii)(B).

[507] *See* Rule 15Ba1–1(d)(3)(ii).

[508] *See id.*

[509] Commenters provided some examples of advisory board composition and activities. *See, e.g.,* Combs Letter (describing that the ''Comptroller's Investment Advisory Board,'' which advises the state's trust company which in turn manages state funds, is unlike an investment adviser in that it doesn't assist with the selection of specific investments or investment professionals; that it provides general guidance but has no control over what purchases and sales are made with state funds; and that although the board members have no fiduciary duty, they also have no decisionmaking power); and letter from Gregg Abbott, State of Texas, dated February 22, 2011 (''State of Texas Letter'') (noting that distinguishing between governing boards and advisory boards is unworkable as some advisory boards are subcommittees of governing boards, some are made up of a combination of governing board members and other citizen volunteers, and some have no governing board members).

[510] Some municipal entity boards also have committees that may or may not be comprised of members of the board. *See, e.g.,* letter from Jerome Cochrane, University of Pittsburgh, dated February 22, 2011 (certain committees of the boards of certain Pennsylvania State universities include ''non-voting committee members, representing members of the public, alumni, faculty, staff and student bodies'').

[511] The Commission notes that the exemption for advisory board and committee members includes volunteer members of such boards and committees.

[512] *See supra* Section III.A.1.b.1. (discussing the advice standard in general).

[513] Section 15B(c)(1) of the Exchange Act (as amended by the Dodd-Frank Act) imposes a fiduciary duty on municipal advisors when advising municipal entities. *See* Proposal, 76 FR 827, note 60 and accompanying text.

[514] *Compare with supra* note 507 and accompanying text.

[515] *See* Rule 15Ba1–1(d)(3)(ii)(A).

Proposal, the Commission asked whether employees of obligated persons should be excluded, to the extent they are providing advice to the obligated person, acting in its capacity as an obligated person, in connection with municipal financial products or the issuance of municipal securities.[516] In addition, the Commission asked whether there are types of persons, other than employees of obligated persons, who should be excluded from the definition of municipal advisor.[517] In response, the Commission received several comments.

Some commenters stated that employees, officers, and directors of obligated persons should be excluded from the definition of municipal advisor when they provide advice to the obligated person with respect to municipal financial products or the issuance of municipal securities.[518] More specifically, some commenters stated that board members of obligated persons acting within the scope of their duties do not give ''advice'' and that it is the obligation of board members to communicate with fellow board members and staff.[519] For example, one commenter stated that municipal advisors typically have multiple clients, hold themselves out as advisors, and generally do not exercise decision making authority for the municipal entity or obligated person.[520] On the other hand, according to this commenter, directors and employees of obligated persons act on behalf of and in the interest of entities with which they are affiliated and do not hold themselves out as advisors.[521] They act for obligated persons in connection with municipal offerings only as part of their responsibilities to the obligated person.[522] Other commenters stated that members of governing boards of obligated persons are already subject to state and federal laws, such as laws governing non-profit entities, conflict of interest laws, ethics laws, and open meeting laws.[523] Commenters also made similar statements with respect to employees of obligated persons.[524] Further, some commenters stated that officers, directors, and employees of obligated persons are no different from those of municipal entities,[525] and an obligated person can only act through its board and employees.[526] One commenter suggested, however, that individual board members and employees should not be exempt from registration if they are engaged to provide services for a nonprofit organization as compensated advisors.[527]

Several commenters stated that the MSRB Study,[528] the legislative history of the Dodd-Frank Act, and the Proposal indicate that the term ''municipal advisor'' is meant to capture professionals that offer advisory services in a financial marketplace.[529] One commenter stated that for decades, in regulating the market for financial advice, Congress and the Commission have expressly declined to regulate internal advice provided by employee to employer.[530] The commenter stated that a departure from this established practice should not be inferred, absent a clear indication from Congress, and nothing in the language or history of the Dodd-Frank Act signals that Congress intended to affect a fundamental shift in policy.[531]

Some commenters stated that the proposed rules would make it difficult for obligated persons to recruit and retain board members and employees,[532] discourage officers and board members from engaging in matters that are traditionally within their purview,[533] and disrupt the process of borrowing and operations of borrowers and issuers.[534] Other commenters stated that the proposed rules could substantially increase the cost of financing[535] and could cause a potential borrower to forego projects using the economic development options offered by states and avoid the issuance of municipal bonds.[536]

As discussed above, one commenter suggested that ''employees and board members of a municipal entity should be excluded from regulation to the extent they provide advice to an obligated person (and acting in the

[516] *See* Proposal, 76 FR 837.

[517] *See id.*

[518] *See, e.g.,* NABL Letter; ABA Letter; letter from Duncan Gallagher, EVP and Chief Financial Officer, Allina Health System, dated February 22, 2011 (''Allina Health System Letter''; letter from Jeffrey S. Bromme, Senior Vice President and Chief Legal Officer and C. Robert Foltz, Associate Chief Legal Officer—Treasury, Adventist Health System Sunbelt Healthcare Corporation, dated February 11, 2011 (''Adventist Health System Letter'').

[519] *See, e.g.,* letter from Charles A. Samuels, Mintz Levin Cohn Ferris Glovsky & Popeo, P.C., on behalf of the National Association of Health & Educational Facilities Finance Authorities, dated February 17, 2011 (''National Association of Health & Educational Facilities Finance Authorities Letter''). *See also* Allina Health System Letter; Chapman and Cutler Letter; letter from Latham & Watkins, dated February 22, 2011 (''Latham & Watkins Letter''); and letter from David W. Lowden, Chair, the Committee on Non-Profit Organizations, Association of the Bar of the City of New York, dated February 14, 2011 (''New York City Bar Letter'').

[520] *See* Latham & Watkins Letter.

[521] *See id.*

[522] *See id.*

[523] *See, e.g.,* Kutak Rock Letter; National Association of Health & Educational Facilities Finance Authorities Letter; Latham & Watkins Letter; letter from Susan Ellen Wagner, Executive Director, Healthcare Trustees of New York State, dated February 16, 2011 (''Healthcare Trustees of New York State Letter''); William C. Daroff, Vice President for Public Policy & Director of the Washington Office, Jewish Federations of North America, dated February 25, 2011 (''Jewish Federations of North America Letter'').

[524] *See, e.g.,* National Association of Health & Educational Facilities Finance Authorities Letter; Latham & Watkins Letter; New York City Bar Letter; and letter from Corinne Johnson, Executive Director, Colorado Health Facilities Authority, Cris White, Executive Director, Colorado Housing and Finance Authority, Jo Ann Soker, Executive Director, Colorado Educational and Cultural Facilities Authority, dated February 18, 2011 (''Colorado Health Facilities Letter'').

[525] *See, e.g.,* South Lake County Hospital District Letter. *See also* Latham & Watkins Letter.

[526] *See, e.g.,* Squire Sanders & Dempsey Letter. *See also* Latham & Watkins Letter; MSRB Letter.

[527] *See* New York City Bar Letter.

[528] In April 2009, the MSRB issued a study titled ''Unregulated Municipal Market Participants: A Case for Reform,'' in which the MSRB advocated for the regulation of intermediaries in the municipal securities market (such as swap advisors and financial advisors). This study was referenced by the Commission in the Proposal. *See* Proposal, 76 FR 825, n.8.

[529] *See, e.g.,* letters from Michael B. Koffler and James K. Hasson, Jr., Sutherland Asbill & Brennan LLP on behalf of Universities, dated February 22, 2011 (''Universities Letter''); Richard D. Legon, President, Association of Governing Boards of Universities and Colleges, dated February 15, 2011 (''Association of Governing Boards of Universities and Colleges Letter'') (stating that board members and employees of obligated persons are not discussed in the preamble and cost estimates of the Proposal). *See also* letters from Molly Corbett Broad, President, American Council on Education, dated February 22, 2011 (''American Council on Education Letter''); Daniel G. Kirch, M.D., President and CEO, Association of American Medical Colleges, dated February 16, 2011 (''Association of American Medical Colleges Letter'').

[530] *See* American Council on Education Letter (providing as an example in support of their statement that existing registration requirements, such as those under the Investment Advisers Act, cover firms and persons in the business of providing advice, and that the requirements do not regulate employment relationships). *See also* Association of Governing Boards of Universities and Colleges Letter (noting that Commission staff has taken the position, in the context of a No-Action Letter under the Investment Advisers Act, that internal relationships are unlike the commercial relationships between an investment adviser and its clients that the Investment Advisers Act was intended to regulate).

[531] *See* American Council on Education Letter.

[532] *See, e.g.,* letter from Richard L. Clarke, DHA, FHFMA, President and CEO, Healthcare Financial Management Association, dated February 22, 2011 (''Healthcare Financial Management Association Letter''); Latham & Watkins Letter; and New York City Bar Letter.

[533] *See, e.g.,* Association of American Medical Colleges Letter; and New York City Bar Letter.

[534] *See, e.g.,* National Association of Health & Educational Facilities Finance Authorities Letter.

[535] *See, e.g.,* letter from Christopher B. Meister, Executive Director, Illinois Finance Authority, dated February 22, 2011 (''Illinois Finance Authority Letter''). *See also* SIFMA Letter I.

[536] *See, e.g.,* State of Indiana Letter; National Association of State Treasurers Letter; and New York City Bar Letter.

purview of their duties).'' [537] Likewise, employees and board members of an obligated person should be excluded from regulation to the extent they provide advice to a municipal entity.[538] On the other hand, another commenter stated that employees, officers, and directors of an obligated person should be exempt to the extent they provide advice solely to the obligated person and not to a municipal entity.[539] One other commenter stated that when an obligated person solicits conduit issuers to issue bonds on behalf of the obligated person, such solicitation should not require the obligated person or its board members or employees to register as municipal advisors.[540]

After considering the comments, the Commission agrees with commenters that board members, officers, and employees of obligated persons should be treated in the same manner as board members, officers, and employees of municipal entities and is using its statutory authority to provide an exemption for such persons that is parallel to the exemption with respect to municipal entities described above.[541] The Commission believes that this exemption is appropriate, because such individuals, when acting in the scope of their duty to the obligated person, are accountable to the obligated person. Further, board members, officers, and employees of obligated persons serve similar functions as board members, officers, and employees of municipal entities. Consequently, the Commission is exempting from the definition of municipal advisor any employee of an obligated person acting within the scope of such person's employment, as well as any person serving as a member of a governing body, an advisory board, or a committee of, or acting in a similar official capacity with respect to, or as an official of, an obligated person to the extent they are acting within the scope of their duties.[542] The Commission believes that, like municipal entities, obligated persons and persons who perform decision-making functions for, or otherwise act on behalf of, obligated persons, when fulfilling their duty to the obligated person, are also the intended beneficiaries of the protections afforded by the municipal advisor registration requirement. As with respect to municipal entities, board members, officials, and employees of obligated persons would be required to register, however, if they are engaged by other municipal entities or obligated persons to provide services as compensated advisors in addition to their normal duties as an employee, official, or board member of the obligated person.[543]

For the reasons described above, the Commission finds it consistent with the public interest, the protection of investors, and the purposes of Section 15B of the Exchange Act, to use its authority pursuant to Exchange Act Section 15B(a)(4) to exempt any: (1) Person serving as a member of a governing body, an advisory board, or a committee of, or acting in a similar official capacity with respect to, or as an official of, an obligated person to the extent that such person is acting within the scope of such person's official capacity; and (2) employee of an obligated person to the extent that such person is acting within the scope of such person's employment.[544] Accordingly, such persons are not required to register as municipal advisors.

With regard to the application of the rules to employees or governing body members of an obligated person who solicit conduit issuers to issue bonds on behalf of the obligated person, the Commission notes that these persons are not acting as advisors.[545] Instead, they act as principals seeking an issuance of municipal securities by a municipal entity on behalf of the obligated person pursuant to an arm's-length loan (or similar) agreement under which the obligated person will be required to pay debt service and other costs upon bond issuance. The Commission notes that these individuals would not be required to register as municipal advisors, because they are not advising a municipal entity with respect to the issuance of municipal securities or soliciting a municipal entity on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser for the purpose of obtaining or retaining an engagement for such person. However, an employee, governing board member or other official of an obligated person could still be deemed to be engaged in municipal advisory activities (which include solicitation activities) if his or her recommendations cannot be properly characterized as negotiations of the terms by which the obligated person is agreeing to engage in the borrowing through the municipal entity.[546]

Regardless of an individual's title as a member of a governing body, an employee, or other official (appointed or elected) of a municipal entity or obligated person, the Commission notes that the exemptions described above do not apply to the extent such individual acts outside of the scope of authority of his or her position.[547]

ii. Responses to Requests for Proposals or Requests for Qualifications

In the Proposal, the Commission requested comment about banks that respond to municipal entities' RFPs regarding investment products offered, such as money market mutual funds or other exempt securities.[548] The Commission received a number of comments regarding responses to RFPs or RFQs by banks and other entities.[549]

Several commenters stated that responses to RFPs and RFQs should not require a person to register as a municipal advisor. For example, one commenter suggested that, with respect to municipal derivatives, responding to RFPs or RFQs from a municipal entity or obligated person does not constitute ''advice.'' [550] Similarly, another commenter stated generally that certain

[537] *See supra* note 499 and accompanying text.

[538] *See* Kutak Rock Letter.

[539] *See* ABA Letter.

[540] *See* NABL Letter. *See also* letter from James E. Potvin, Chair and Robert W. Giroux, Executive Director, Vermont Educational and Health Buildings Financing Agency, dated February 22, 2011 (''Vermont Educational and Health Buildings Financing Agency Letter''); and National Association of State Treasurers Letter; letter from Paul Goldstein, Vice President of Finance, Treasury/Accounting and Chief Financial Officer, Orlando Health, Inc., dated February 18, 2011 (''Orlando Health Letter''). Some commenters stated generally that obligated persons should not be required to register as municipal advisors. *See, e.g.,* Latham & Watkins Letter.

[541] *See* Rule 15Ba1–1(d)(3)(ii); and *supra* notes 504–505 and accompanying text.

[542] *See* Rule 15Ba1–1(d)(3)(ii). *See also* notes 504 and 506 and accompanying text.

[543] As described above, a local government official or appointed board member of a municipal entity would not be required to register as a municipal advisor if he or she provides advice, in the scope of his or her duties to that municipal entity employer, to another municipal entity. *See supra* notes and 496 and 507 accompanying text. In contrast, if such a person is engaged and compensated outside the scope of such duties, he or she would not be eligible for the exemption and would be required to register.

[544] *See* Rule 15Ba1–1(d)(3)(ii).

[545] *See supra* note 540 and accompanying text.

[546] *See supra* Section III.A.b.i. (discussing the advice standard in general) and Section III.A.b.x. (discussing solicitation of a municipal entity or obligated person).

[547] The exemption only applies ''to the extent such person is acting within the scope of such person's official capacity'' or ''employment,'' as applicable. *See* Rule 15Ba1–1(d)(3)(ii).

[548] *See* Proposal, 76 FR 837.

[549] *See also supra* notes 421–423 and accompanying text (discussing RFPs and RFQs in the context of the solicitation prong, including whether a market professional's activities assisting a municipal entity or obligated person in their selection of another market professional as part of an RFP process constitute municipal advisory activities); and *infra* Section III.A.1.c.vii. (discussing the treatment of responses by attorneys to RFPs from municipal entities and obligated persons).

[550] *See* BNY Letter.

business,[609] or (c) the advice is given when the municipal entity has engaged an independent registered municipal advisor.[610]

The Commission considers the following activities, identified by commenters,[611] to be outside the scope of the underwriter exclusion:[612] (1) advice on investment strategies; (2) advice on municipal derivatives (including derivative valuation services); (3) advice on what method of sale (competitive sale[613] or negotiated sale[614]) a municipal entity should use for an issuance of municipal securities; (4) advice on whether a governing body of a municipal entity or obligated person should approve or authorize an issuance of municipal securities; (5) advice on a bond election campaign; (6) advice that is not specific to a particular issuance of municipal securities on which a person is serving as underwriter and that involves analysis or strategic services with respect to overall financing options, debt capacity constraints, debt portfolio impacts, analysis of effects of debt or expenditures under various economic assumptions, or other impacts of funding or financing capital projects or working capital; (7) assisting issuers with competitive sales, including bid verification, true interest cost (TIC) calculations and reconciliations, verifications of bidding platform calculations, and preparation of notices of sale; (8) preparation of financial feasibility analyses with respect to new projects; (9) budget planning and analyses and budget implementation issues with respect to debt issuance and collateral budgetary impacts; (10) advice on an overall rating strategy that is not related to a particular issuance of municipal securities on which a person is serving as an underwriter, including advice and actions taken on behalf of a municipal entity or obligated person between financing transactions; (11) advice on overall financial controls that are not related to a particular issuance of municipal securities on which a person is serving as an underwriter; or (12) advice regarding the terms of requests for proposals or requests for qualification for the selection of underwriters or other professionals for a project financing and advice regarding review of responses to such requests, including matters regarding compensation of such underwriters or other professionals.

The Commission believes the above-listed activities are not within the scope of the underwriter exclusion because the activities are either not specific to a particular issuance of municipal securities for which a broker, dealer or municipal securities dealer could be serving as an underwriter or the activities are not integral to fulfilling the role of an underwriter.

Communications or Efforts to Win Business

A few commenters asked whether communications and analyses that are part of an effort to win business would be considered municipal advisory activity.[615] The Commission notes that not all communications with a municipal entity or obligated person constitute municipal advisory activities. If the person has identified himself or herself as seeking to obtain business, such as serving as an underwriter on future transactions, whether such communications and analyses constitute municipal advisory activities or the provision of general information (as discussed further above[616]) will depend on the specific facts and circumstances. For example, pursuant to the Commission's interpretation of the treatment of the provision of general information, the Commission believes that a broker-dealer who provides information to a municipal entity regarding its underwriting capabilities and experience or general market or financial information that might indicate favorable conditions to issue or refinance debt likely would not be treated as engaging in municipal advisory activity.

On the other hand, for purposes of this rule and in response to comments,[617] the Commission does not consider advice rendered by a broker-dealer in its capacity as a member of an ''underwriting pool'' for a municipal entity or obligated person (and in the absence of a designation of that broker-dealer to serve as underwriter on the particular issuance of municipal securities on which the advice is given) to be advice within the scope of the underwriting exclusion. An underwriting pool generally includes a group of underwriters selected by a municipal entity pursuant to an RFP or other process[618] from which the municipal entity may select one or more firms to underwrite a specific transaction. As noted above, a broker-dealer that is merely a part of an underwriting pool is not engaged to underwrite any particular issuance, and therefore, is not acting as an underwriter. As described above, however, depending on the particular facts and circumstances, the broker-dealer's activities as part of an underwriting pool may be within the requirements of one of the exemptions of general applicability,[619] may be considered to be an effort to obtain underwriting business on its own behalf, or may be otherwise exempt, which would not require municipal advisor registration.

Post-Offering Services

Commenters asked whether post-offering work performed by an underwriter would qualify for the underwriter exclusion or whether it would constitute municipal advisory activity requiring registration.[620] For purposes of this rule, the Commission considers post-offering work performed by an underwriter to be municipal advisory activity unless it is a request for information or services that would have been provided as part of the underwriting (such as resending cash flow and other similar information related to the offering) or is required for an underwriter to fulfill its regulatory

[609] *See infra* notes 615 and 616 and accompanying text (discussing communications or efforts to win business).

[610] *See supra* Section III.A.1.c.iii. (discussing the exemption when the municipal entity or obligated person is represented by an independent municipal advisor).

[611] *See, e.g.,* MSRB Letter II; NAIPFA Letter; NAIPFA Letter II; SIFMA Letter I; and Baum Letter.

[612] For broker-dealers serving as underwriters for a particular issuance of municipal securities, these activities would *not* be excluded from the definition of municipal advisor because they are *not* within the scope of an underwriting of such issuance of municipal securities. This list of activities includes examples of activities that the Commission considers to be outside the scope of the underwriter exclusion; the list does not purport to cover all possible activities not qualifying for the underwriter exclusion.

[613] Competitive sale is a method of sale chosen by an issuer, requesting underwriters to submit a firm offer to purchase a new issue of municipal securities. The issuer awards the municipal securities to the ''winning'' underwriter or syndicate presenting a bid complying with the terms of a Notice of Sale that provides the lowest interest rate cost according to stipulated criteria set forth in the Notice of Sale. *See* definition of ''Competitive Sale'' in MSRB Glossary.

[614] Negotiated sale is the sale of a new issue of municipal securities by an issuer directly to an underwriter or underwriting syndicate selected by the issuer. *See* definition of ''Negotiated Sale'' in MSRB Glossary.

[615] *See* SIFMA Letter I. *See also* letter from Nathan R. Howard, Esq., Municipal Advisor, WM Financial Strategies, dated February 22, 2011 (''Nathan R. Howard WM Financial Strategies Letter'') (stating that when the services provided by a broker-dealer are merely informational non-municipal advisory services, the broker-dealer should be excluded from the definition of municipal advisor).

[616] *See supra* Section III.A.1.b.i. (discussing, among other things, the provision of general information).

[617] *See* SIFMA Letter I.

[618] *See infra* Section III.A.1.c.ii.

[619] *See supra* notes 592 and 593 and accompanying text.

[620] *See, e.g.,* SIFMA Letter I.

such swap dealer does not express an opinion as to whether the special entity should enter into a recommended swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the special entity; the special entity represents in writing that it will not rely on recommendations provided by the swap dealer, and will rely on advice from an independent representative; and the swap dealer discloses to the special entity that it is not undertaking to act in the best interests of the special entity as otherwise required under the CFTC's standards.[754] Consistent with this approach and for the reasons described below, the Commission believes that it is appropriate to provide an exemption for certain swap dealers.

Specifically, to address commenters' concerns, the Commission is exempting any swap dealer registered under the Commodity Exchange Act or associated person of the swap dealer recommending a municipal derivative or a trading strategy that involves a municipal derivative, so long as the registered swap dealer or associated person is not ''acting as an advisor'' to the municipal entity or obligated person with respect to the municipal derivative or trading strategy pursuant to Section 4s(h)(4) of the Commodity Exchange Act and the rules and regulations thereunder.[755] For purposes of determining whether a swap dealer is ''acting as an advisor'' under Rule 15Ba1–1(d)(3)(v), the municipal entity or obligated person involved in the transaction will be treated as a ''special entity'' [756] under Section 4s(h)(2) of the Commodity Exchange Act and the rules and regulations thereunder (regardless of whether such municipal entity or obligated person is otherwise a ''special entity'').[757]

The Commission believes an exemption for swap dealers is appropriate because, as discussed below, the exemption will apply the standards that are applicable under the CFTC's existing regulatory regime. As under such regime, the exemption will also preserve consistent and comparable protections for municipal entities and obligated persons. For example, for the exemption for registered swap dealers to apply, a municipal entity or obligated person must have an independent representative who is subject to a duty to act in the best interests of its client.[758] The Commission notes that independent representatives would likely be commodity trading advisors, municipal advisors, investment advisers, or ERISA fiduciaries [759] that are also subject to, or may become subject to,[760] a fiduciary duty to their clients.[761] Moreover, regardless of whether a municipal entity or obligated person is a special entity, the swap dealer will need to comply with any applicable suitability standards and disclosure requirements, which should offer another measure of protection for municipal entities and obligated persons in addition to those noted above. Further, in the context of interactions between swap dealers and municipal entities and obligated persons, the exemptions will incorporate the standards provided by the CFTC's Business Conduct Standards for Swaps, which include a requirement that the swap dealer disclose that it is not undertaking to act in the best interest of the special entity.[762] Therefore, municipal entities and certain obligated persons may already be familiar with the notion that exempt swap dealers are not undertaking to act in their best interest when recommending a swap or a trading strategy involving a swap and could more appropriately evaluate such recommendation. In addition, the Commission believes the standards provided by the CFTC's Business Conduct Standards for Swaps are appropriate for the swap dealer exemption from the definition of municipal advisor, because they will help provide clarity about: (1) when a swap dealer must register as a municipal advisor; and (2) its relationship with municipal entities and obligated persons.

For these reasons, the Commission finds it consistent with the public interest, the protection of investors, and the purposes of Section 15B of the Exchange Act, to use its authority pursuant to Exchange Act Section 15B(a)(4) to exempt swap dealers from the definition of municipal advisor, subject to the limitations described above, and therefore not require such dealers to register as municipal advisors.

The Commission is not adopting, at this time, an exemption for security-based swap dealers. As a general matter, the Commission understands that municipal entities currently do not typically enter into security-based swap transactions.[763] The Commission also notes security-based swap dealers may, to the extent they would otherwise meet the definition of ''municipal advisor,'' qualify for a different exemption, such as the exemption in Rule 15Ba1–1(d)(3)(vi) when the municipal entity or obligated person is otherwise represented by an independent registered municipal advisor. Further, the Commission notes that such entities could apply for no-action or exemptive relief.[764] When the Commission considers adopting external business conduct rules for security-based swap dealers, the Commission may also consider amending the municipal advisor definition to include an exemption for security-based swap dealers that is similar to the exemption for swap dealers.[765]

vii. Accountants, Attorneys, Engineers and Other Professionals

The definition of municipal advisor in Exchange Act Section 15B(e)(4) excludes attorneys offering legal advice or providing services of a traditional legal nature and engineers providing engineering advice.[766] As discussed more fully below, the Commission proposed interpretations of the attorney and engineer exclusions and also

[754] *See* Business Conduct Standards for Swaps, *supra* note 275. *See also* CFTC Rule 23.440 (17 CFR 23.440).

[755] *See* Rule 15Ba1–1(d)(3)(v)(A).

[756] Special entity is defined in Section 4s(h)(2)(C) of the Commodity Exchange Act and the rules and regulations thereunder. *See* 17 CFR 23.401(c) (defining ''special entity,'' for purposes of business conduct requirements for swap dealers and major swap participants) and *supra* note 275 (discussing the protections provided by the Dodd-Frank Act for special entities with respect to derivative transactions).

[757] *See* Rule 15Ba1–1(d)(3)(v).

[758] This is consistent with the blanket exemption where a municipal entity or obligated person is represented by an independent registered municipal advisor. *See* Rule 15Ba1–1(d)(3)(vi).

[759] *See* Business Conduct Standards for Swaps, 77 FR 9738.

[760] The Commission notes that the CFTC has indicated that it is ''considering developing rules for [commodity trading advisors] that are comparable to rules adopted by the [Commission] or the MSRB for municipal advisors.'' *See* Business Conduct Standards for Swaps, 77 FR 9739. Additionally, the CFTC has stated that it believes it has harmonized its rules with the regulatory regime for municipal advisors and will continue to work with the Commission as the Commission's proposed rules for the registration of municipal advisors are finalized. *Id.*

[761] Municipal advisors, investment advisers, and ERISA fiduciaries all owe fiduciary duties to their clients.

[762] *See supra* note 754 (setting forth the disclosure requirements for swap dealers under CFTC Rule 23.440).

[763] *See, e.g.,* Transcript of the U.S. Securities and Exchange Commission Birmingham Field Hearing on the State of the Municipal Securities Market at 241 and 244.

[764] *See, e.g., supra* note 744.

[765] The Commission has proposed standards for security-based swap dealers that are similar to those that the CFTC has adopted. *See* Business Conduct Standards for Security-Based Swaps. Comments received by the Commission on this proposal are available at *http://www.sec.gov/comments/s7-25-11/s72511.shtml.*

[766] *See* 15 U.S.C. 78*o*–4(e)(4)(C).

proposed a limited exemption for accountants.[767]

Accountants Providing Attest Services

Exchange Act Section 15B(e)(4) does not explicitly exclude accountants from the definition of municipal advisor. In the Proposal, however, the Commission proposed to interpret the statutory definition of municipal advisor to exempt any accountant, unless the accountant engages in municipal advisory activities other than preparing or auditing financial statements or issuing letters for underwriters. In other words, the Commission proposed to exempt from the municipal advisor definition accountants preparing financial statements, auditing financial statements, or issuing letters for underwriters for, or on behalf of, a municipal entity or obligated person.[768] In the Proposal, the Commission noted that it was not appropriate to exempt accountants entirely, because accountants may provide advice to municipal entities that includes advice about the structure, timing, terms, and other similar matters concerning the issuance of municipal securities.[769]

The Commission requested comment on its proposed exemption for accountants. In particular, the Commission requested comment on whether the Commission should provide this exemption and whether there are additional types of accounting services that should fall under the exemption.[770]

The Commission received approximately 11 comment letters that addressed the proposed accountant exemption. Two commenters expressed support for the accountant exemption as proposed and did not suggest any changes.[771] Several commenters, however, believed that the proposed accountant exemption was too narrow and recommended including additional services under the exemption.[772]

Several commenters recommended that attest, not just audit, services should be part of the accountant exemption.[773] The performance of attest services is generally limited to certified public accountants by state regulation and professional standards.[774] One commenter noted that audit services are a subset of the broader category of attest services and both are subject to similar professional standards, including an ''independence'' requirement.[775] Another commenter also provided examples of services in this broader category of attest services, all of which it believed would be subject to professional standards: (1) Examinations, compilations, or agreed-upon procedures engagements on projections or forecasts using AICPA Statements on Standards for Attestation Engagements (''SSAEs''); (2) performance of other types of agreed-upon procedures engagements; (3) compliance audits (*e.g.,* opinions on compliance with federal, state, or local compliance requirements); and (4) review of debt coverage requirements on outstanding bonds and verification of calculations of escrow account requirements for advance refunding of bonds.[776]

Further, one commenter asked if the following services would be included or excluded from the accountant exemption: (1) The preparation of unaudited annual financial statements; (2) the provision of annual independent audits of a municipal entity; (3) the review and preparation of pro forma maturity schedules of principal and interest on proposed bond issues; (4) the provision of budget, audit, and other information to credit rating agencies; and (5) the preparation of the ''front end'' of offering statements and financial and demographic information.[777]

Several commenters also recommended extending the exemption to services that non-certified public accountants can provide but are subject to regulation and professional standards. For example, two commenters stated that advice related to Generally Accepted Accounting Principles (''GAAP'') and tax advice related to municipal securities and derivatives should also fall under the accountant exemption.[778]

In addition to these services, another commenter recommended, more generally, that the Commission extend the accountant exemption to the provision of non-attest services, such as certain tax and actuarial services.[779] Two other commenters stated that accountants and other consultants who provide feasibility studies should not be considered municipal advisors.[780]

One commenter suggested that accountants of conduit borrowers should be exempt as municipal advisors.[781]

The Commission has carefully considered issues raised by commenters on the Proposal and is expanding the accountant exemption to include accountants providing audit or other attest services. Specifically, Rule 15Ba1–1(d)(3)(i), as adopted, provides that the term ''municipal advisor'' shall

[767] *See* proposed Rule 15Ba1–1(d)(2)(iv)–(vi) and Proposal, 76 FR 833–834.

[768] *See* proposed Rule 15Ba1–1(d)(2)(vi).

[769] *See* Proposal, 76 FR 833. The Commission noted that accountants may also be engaged by municipal entities to provide other services, such as conducting feasibility studies or preparing financial projections and that, in defining municipal advisor in Exchange Act Section 15B(e)(4), Congress only excluded attorneys offering legal advice or services of a traditional legal nature or engineers providing engineering advice. *See id.,* at 833, notes 127–128 and accompanying text.

[770] *See id.,* at 837.

[771] *See* MSRB Letter (agreeing that the exemption should apply solely when an accountant is preparing financial statements, auditing financial statements, or issuing bring down, comfort or ''agreed upon procedures'' letters for underwriters); letter from Kim M. Whelan, Co-President, Acacia Financial Group, Inc., dated February 22, 2011 (''Acacia Financial Group Letter'') (stating that ''[t]o the extent accountants or engineers provide advice regarding municipal financial products or issuance of municipal securities, accountants and engineers should be considered Municipal Advisors'').

[772] *See, e.g.,* State of Indiana Letter; letters from Deloitte LLP, dated February 22, 2011 (''Deloitte Letter''); Gerald G. Malone, H.J. Umbaugh & Associates, dated February 22, 2011 (''Umbaugh Letter''); letter from Susan S. Coffey, Senior Vice President, Member Quality and International Affairs, American Institute of Certified Public Accountants (''AICPA''), dated February 25, 2011 (''AICPA Letter''); and Gary Higgins, President, Registered Municipal Accountants Association of New Jersey, dated February 22, 2011 (''RMAA Letter'').

[773] *See, e.g.,* Deloitte Letter (stating that ''[a]udit services are a subset of the broader category of attest services. . . . and we see no reason for the final rule to distinguish between the two''); Umbaugh Letter (stating that attest services and tax services (*e.g.,* arbitrage rebate calculations on behalf of issuers) do not appear to fit the ''municipal advisor'' definition); letter from KPMG LLP, dated February 22, 2011 (''KPMG Letter'') (recommending that the Commission include, at a minimum, specific exemptions for attest services in the accountant exemption).

Commenters referred to the definition of the term ''attest engagements'' by the AICPA as ''engagements . . . in which a certified public accountant in the practice of public accounting . . . is engaged to issue or does issue an examination, a review, or an agreed-upon procedures report on subject matter, or an assertion about the subject matter . . . that is the responsibility of another party.'' *See* Deloitte Letter (citing AICPA Attestation Standards AT § 101.01). The Uniform Accountancy Act, which has been used as a basis for state regulation of certified public accountants, incorporates similar concepts. (*See, e.g.,* Section 14(a) of The Uniform Accountancy Act (5th ed. 2007), available at *http://www.aicpa.org/Advocacy/State/StateContactInfo/uaa/DownloadableDocuments/UAA_Fifth_Edition_January_2008.pdf*).

[774] *See, e.g.,* AICPA Code of Professional Conduct ET 201.01, 202.01; *see also* AICPA Attestation Standards AT § 101.06 (providing that ''[a]ny professional service resulting in the expression of assurance must be performed under AICPA professional standards that provide for the expression of such assurance''); *see also, e.g.,* The Uniform Accountancy Act (5th ed. 2007), available at *http://www.aicpa.org/Advocacy/State/StateContactInfo/uaa/DownloadableDocuments/UAA_Fifth_Edition_January_2008.pdf.*

[775] *See* Deloitte Letter.

[776] *See* AICPA Letter.

[777] *See* RMAA Letter.

[778] *See* KPMG Letter; AICPA Letter.

[779] *See* Deloitte Letter.

[780] *See* Gilmore & Bell Letter; State of Indiana Letter.

[781] *See* South Lake County Hospital Letter.

not include any accountant to the extent that the accountant is providing audit or other attest services, preparing financial statements, or issuing letters for underwriters for, or on behalf of, a municipal entity or obligated person.[782] To the extent commenters requested clarification regarding whether specific activities would be exempted, such activities would be exempted if they constitute audit or other attest services,[783] the preparation of financial statements, or the issuance of letters for underwriters for, or on behalf of, a municipal entity or obligated person.

The Commission believes that it is appropriate to include attest services in general, and not just audit services in particular, among the services that fall under the exemption. Both audit and other attest services are generally subject to regulation and professional standards,[784] including independence requirements. Such independence requirements could potentially conflict with municipal advisors' fiduciary duty to the municipal entities they advise.[785] Accountants providing attest services are also required to meet general standards related to adequate technical training and proficiency, adequate knowledge of subject matter, suitability and availability of criteria, and the exercise of due professional care.[786] Accordingly, the Commission believes that attest services, and not just audit services, exemplify the types of services typically performed by accountants that should not constitute the provision of advice within the meaning of Exchange Act Section 15B(e)(4)(A)(i).[787]

The Commission has considered whether various non-attest services should also be included in the accountant exemption, such as tax services (including arbitrage rebate services[788]) and advice relating to GAAP. While the Commission acknowledges that such non-attest services may represent activities provided by accountants, such services are neither necessarily provided by certified public accountants, nor necessarily subject to similar regulation and professional standards as attest services. The Commission does not believe it is appropriate to expand the exemption to cover activities or services that non-accountants could perform. Accordingly, the Commission is not including non-attest services in the accountant exemption. Nevertheless, a person providing non-attest services would only be required to register as a municipal advisor if such services are within the scope of the municipal advisory activities definition.

Several commenters noted that non-attest services should be included because accountants are already subject to other regulatory regimes, including those of state boards of accountancy, the Commission, and the Public Company Accounting Oversight Board.[789] The Commission does not believe those regimes, which are principally focused on the certified public accountant's provision of attest services,[790] are sufficient to warrant further expansion of the accountant exemption.

As stated above and in the Proposal, accountants may provide advice to municipal entities, including advice about the structure, timing, terms, and other similar matters, and such advice may be the basis for an issuance of municipal securities. Therefore, the Commission does not believe that it is appropriate to exempt accountants from the definition of municipal advisor entirely. In addition, although attest services are often included as part of larger engagements, such as the examination of prospective financial information that is included as part of a feasibility study or acquisition study,[791] the accountant exemption includes only the attest portion of these engagements and does not cover all services that comprise such engagements.[792]

The Commission also notes that, according to the exemption provided by Rule 15Ba1–1(d)(3)(i), feasibility studies concerning the issuance of municipal securities or municipal financial products for which an accountant provides only audit or attest services would not require the accountant to register as a municipal advisor.[793]

Lastly, with respect to accountants of obligated persons, the Commission notes that such accountants will be treated consistently with accountants of municipal entities.[794]

For these reasons, the Commission finds it consistent with the public interest, the protection of investors, and the purposes of Section 15B of the Exchange Act, to use its authority pursuant to Exchange Act Section 15B(a)(4) to exempt accountants from the definition of municipal advisor, subject to the limitations described above.

Attorneys Offering Legal Advice or Providing Services of a Traditional Legal Nature

Section 15B(e)(4)(C) of the Exchange Act excludes from the municipal advisor definition attorneys offering legal advice or providing services that are of a traditional legal nature. In the Proposal, the Commission proposed to interpret the exclusion to mean that the term ''municipal advisor'' shall not include any attorney, unless the attorney engages in municipal advisory activities other than offering legal advice or providing services that are of a traditional legal nature to a client of the attorney that is a municipal entity or obligated person.[795] In addition, the Commission proposed to interpret advice from an attorney to his or her client with respect to the structure, timing, terms, and other similar matters concerning the issuance of municipal securities or municipal financial products to be services of a traditional legal nature, if such advice is provided within an attorney-client relationship specifically related to the issuance of municipal securities or such municipal

[782] *See* Rule 15Ba1–1(d)(3)(i). In addition to adopting an expanded accountant exemption, as compared to the Proposal, the Commission is also making minor, non-substantive modifications to provide greater clarity and consistency with other organizational changes the Commission is making to the exclusions and exemptions.

[783] *See supra* notes 776–777.

[784] *See, e.g.,* AICPA Code of Professional Conduct ET 201.01, 202.01; *see also* AICPA Attestation Standards AT § 101.06 (providing that ''[a]ny professional service resulting in the expression of assurance must be performed under AICPA professional standards that provide for the expression of such assurance'').

[785] *See* AICPA Attestation Standards AT § 101.35 (''The practitioner must maintain independence in mental attitude in all matters relating to the engagement.''), 101.36 (''The practitioner should maintain the intellectual honesty and impartiality necessary to reach an unbiased conclusion about the subject matter or the assertion. This is a cornerstone of the attest function.'').

[786] *See* AICPA Attestation Standards AT § 101.19 to 101.41.

[787] *See* 15 U.S.C. 78*o*–4(e)(4)(A)(i).

[788] *See, e.g., supra* note 773.

[789] *See, e.g.,* KPMG Letter.

[790] *See* Sarbanes-Oxley Act of 2002, as amended by Section 982 of the Dodd-Frank Act. 15 U.S.C. 7201 *et seq. See, specifically,* Section 102 of the Sarbanes-Oxley Act of 2002. 15 U.S.C. 7212.

[791] *See* AICPA Attestation Standards AT § 101.05.

[792] For example, the exemption would not apply to accountants that provide consulting services to municipal entities, including advice with respect to the structure, timing, terms, or other similar matters concerning an issuance of municipal securities or a municipal financial product, modeling future debt service coverage, suggesting future rate schedules, tax advice related to municipal securities and derivatives, and other non-attest services that constitute municipal advisory activities. The scope of the accountant exemption is different from the scope of the investment adviser exclusion because, unlike accountant engagements that include attest as well as other services, investment advice provided pursuant to an advisory agreement would be subject to the anti-fraud provisions of the Investment Advisers Act and a fiduciary duty. *See supra* note 671.

[793] This is consistent with the approach for engineers that provide feasibility studies discussed below in this section.

[794] *See* Rule 15Ba1–1(d)(3)(i). *See also* South Lake County Hospital Letter.

[795] *See* Proposal, 76 FR 833–834. *See also* proposed Rule 15Ba1–1(d)(2)(iv).

financial products in conjunction with related legal advice.[796] Further, in the Proposal, the Commission indicated that, for example, the following advice would be considered to be services of a traditional legal nature: (1) Advice comparing the structures, terms, or associated costs of issuance of different types of securities or financial instruments (such as fixed rate bonds or variable rate demand obligations) given by an attorney hired to advise a municipal entity client embarking on a bond offering; (2) advice concerning the tax consequences of alternative financing structures; or (3) advice recommending a particular financing structure due to legal considerations, such as the limitations included in existing contracts and indentures to which the issuer is a party.[797] The Commission, however, also stated in the Proposal that the following advice would not be services of a traditional legal nature: (1) advice concerning the financial feasibility of a project or a financing; (2) advice estimating or comparing the relative cost to maturity of an issuance, depending on various interest rate assumptions, or (3) advice recommending a particular structure as being financially advantageous under prevailing market conditions.[798]

The Commission requested comment on numerous aspects of the attorney exclusion, including whether the exclusion should only apply to legal services to an attorney's municipal or obligated person client; whether the Commission should provide an exclusion for all an attorney's activities as long as that attorney has an attorney-client relationship with the municipal entity or obligated person; and whether the meaning of the term ''services of a traditional legal nature'' is sufficiently clear.[799]

The Commission received approximately 20 comment letters regarding the attorney exclusion. Two commenters generally supported the proposed interpretation of the exclusion,[800] although one of these commenters recommended that the Commission continue to refine the attorney exemption. The commenter suggested that exempted activity ''consists of advice on legal matters such as the legal ramifications of such structure, timing, terms and other matters, the appropriate documentation thereof, and matters of a similar legal nature.'' [801] Meanwhile, two other commenters stated that they did not support the exclusion because advice provided by attorneys to financing teams is generally financial in nature and represents municipal advisory activity.[802]

The majority of commenters did not support the proposed interpretation of the statutory exclusion, stating that the interpretation is too limited in scope.[803] One commenter sought clarification that the statutory exclusion for attorneys covers all ''legal advice'' and that the ''traditional legal nature'' limitation applies only to ''services'' provided by attorneys.[804] Some commenters noted the difficulty of separating ''services of a traditional legal nature'' from advice that could be considered ''financial'' in nature.[805] These commenters also noted that roles of outside counsel are not neatly compartmentalized, and that municipal clients benefit from attorneys' ''financial'' advice.[806] Other commenters indicated that attorneys should feel free to provide advice to municipal entities and obligated persons without fear of falling subject to municipal advisor registration.[807] Some commenters questioned whether registration of attorneys was necessary, even if they provided financial advice. These commenters reasoned that attorneys already have a fiduciary duty to their clients, in addition to state ethics laws and well-established disciplinary processes for those who breach their fiduciary duties.[808]

Several commenters stated that the attorney exclusion should not depend on a pre-existing attorney-client

[796] As an example, the Commission stated that advice comparing the structures, terms, or associated costs of the issuance of different types of securities or financial instruments (such as fixed rate bonds or variable rate demand obligations) given by an attorney hired to advise a municipal entity client embarking on a bond offering, would be considered to be services of a traditional legal nature, as would advice concerning the tax consequences of alternative financing structures or advice recommending a particular financing structure due to legal considerations such as the limitations included in existing contracts and indentures to which the issuer is a party. *See* Proposal, 76 FR 834.

[797] *See id.*

[798] *See id.*

[799] *See id.,* at 837.

[800] *See* MSRB Letter I (supporting the language of the attorney exclusion, ''including in particular that such exclusion applies solely when an attorney is providing legal advice or services that are of a traditional legal nature to a client that is a municipal entity or obligated person''); letter from Robert Doty, AGFS, dated March 1, 2011 (''Doty Letter II'') (stating that: ''[i]n the municipal securities market . . . it has long been recognized that attorneys providing other services are stepping beyond their recognized roles'').

[801] *See* MSRB Letter I.

[802] *See* letter from John J. Haas, President, Ranson Financial Consultants, LLC, dated February 17, 2011 (''Ranson Financial Consultants Letter'') (''How an attorney can give advice on whether an entity should be rated or not, and/or to walk and [sic] entity through the rating process without being a registered Municipal Advisor is not understandable . . . . The Commission, in principal [sic], is allowing bond attorney and local attorneys to continue to act as Municipal Advisors without the requirement to be registered as one.''); Acacia Financial Group Letter (stating that attorney advice comparing the structures, terms or associated costs of issuance of different types of securities or financial instruments (such as fixed rate bonds or variable rate demand obligations) is not service that should be included in the definition of traditional legal services as it is at the heart of the advice that a municipal advisor provides and is directly financial in nature).

[803] *See, e.g.,* NABL Letter (''[A]ttorneys have an obligation to give frank advice to their clients and . . . not to limit their advice to strictly legal issues if their clients otherwise would be prejudiced . . . . The attorney should be free to discuss the possible pros and cons of different transaction structures if more than one is legally authorized, including practical consequences that are financial in nature . . . . [T]he exclusion for attorneys should not be afforded only for advice given to clients, but should apply to all advice that one must be licensed as an attorney to give or that is given as part of a traditional legal nature, or that is incidental to such services.''); letter from Wm. Raymond Manning, President & CEO, Manning Architects, dated February 21, 2011 (''Manning Architects Letter'') (''[B]y requiring attorneys for the government entity to register if they stray beyond pure legal advice . . . the SEC will be chilling some of the most effective advice that a lawyer can provide. Attorneys often challenge the analysis of experts and other advisors to their clients and if that challenge strays beyond the purely legal, then those lawyers may be fearful to fully and ably represent their clients. The Commission should consider carefully if chilling a lawyer's advice to a client serves the interests it seeks to protect.''); Sherman & Howard Letter (''We believe that in so limiting the exemption for attorneys, the Commission is going beyond what Congress intended, as shown by the language of the Act, and beyond what Congress has authorized.'').

[804] *See* NABL Letter.

[805] *See, e.g.,* letter from Joe B. Allen, Allen Boone Humphries Robinson LLP, dated February 21, 2011 (''Allen Boone Humphries Robinson Letter'') ('''[S]ervices that are of a traditional legal nature' is vague, especially for bond counsel. Bond counsel's consultation with a client necessarily includes 'structure, timing, terms and other similar matters.'").

[806] *See, e.g.,* American Municipal Power Letter; Squire Sanders & Dempsey Letter (''[C]ertain advice and services the Commission may identify as financial in nature are in fact an integral part of and inseparable from legal advice and services that attorneys have traditionally been expected to provide to their clients in connection with municipal finance transactions'' and attorneys should be excluded from the application of the proposed rules ''when the attorney is providing legal advice or services, including ancillary financial or related advice or services relating to a municipal finance transaction or municipal financial product, or providing information concerning developments in the municipal marketplace.''); letter from Edward G. Henifin, General Manager and Steven G. de Mik, Director of Finance, Hampton Roads Sanitation District, dated February 22, 2011 (''Hampton Roads Sanitation District Letter'').

[807] *See, e.g.,* NABL Letter; American Municipal Power Letter; Hampton Roads Sanitation District Letter; Rose Letter; letter from Susan Combs, Texas Comptroller of Public Accounts, dated February 22, 2011 (''Texas Comptroller of Public Accounts Letter'').

[808] *See, e.g.,* NABL Letter; State of Indiana Letter; Squire Sanders & Dempsey Letter.

relationship.[809] Some commenters generally noted that attorneys are often expected to provide counsel to all financing team members, and not only to the attorney's clients that are municipal entities and obligated persons.[810] One commenter stated that ''others in the bond issue clearly rely upon the legal advice of bond counsel, including the . . . obligated person in a conduit financing. The very role of bond counsel is to provide advice to the entire group relative to the state law authority for the issuance of the bonds (the approving legal opinion) and the federal and state tax status of the interest on the bonds.'' [811] Similarly, another commenter noted that bond counsel has at times been described as representing ''the transaction'' rather than any particular party to an offering.[812] Accordingly, the commenter asked the Commission to clarify if in such instance the bond counsel would be viewed as having a municipal entity or obligated person as a client. Finally, commenters also stated that attorneys representing parties other than municipal entities and obligated persons, such as underwriter's counsel, are called upon to provide their views or advice to the entire team, yet the attorney exclusion, as proposed, would not pertain to these attorneys.[813]

Some commenters noted that, if an attorney is required to register as a municipal advisor in order to provide advice to non-clients on the financing team, the resulting municipal advisory relationship would create a fiduciary duty for the attorney to the non-client. According to these commenters, such a fiduciary duty would directly conflict with the attorney's pre-existing fiduciary duties to its clients, and thus potentially infringe upon state rules of professional responsibility.[814]

Other commenters indicated that many law firms provide to both clients and non-clients educational material about municipal bond financings through newsletters and emails and expressed concern that such activity would not be covered under the proposed interpretation of the attorney exclusion.[815] Moreover, some commenters indicated that attorneys typically provide legal advice to a client, both before a formal attorney-client relationship is formed and after the attorney-client relationship has ended (*e.g.,* upon the closing of a bond transaction).[816] One commenter noted that it is often asked to provide its view or advice on matters relating to prior transactions for which it served as bond counsel or in another legal capacity.[817]

The Commission has carefully considered issues raised by commenters on the Proposal and is modifying its interpretation of the statutory attorney exclusion to provide that attorneys are excluded from the definition of municipal advisor to the extent that the attorney is offering legal advice or providing services that are of a traditional legal nature with respect to the issuance of municipal securities or municipal financial products to a client of such attorney that is a municipal entity, obligated person, or other participant in the transaction. The Commission recognizes that legal advice and services of a traditional legal nature in the area of municipal finance inherently involves a financial advice component. By contrast, to the extent an attorney represents himself or herself as a financial advisor or financial expert regarding the issuance of municipal securities or municipal financial products, the attorney is not excluded with respect to such financial activities under Rule 15Ba1–1(d)(2)(iv) as this type of advice and services would be outside the statutory exclusion.[818]

By revising its interpretation of the exclusion in this way and providing guidance, the Commission intends to clarify that all legal advice or services of a traditional legal nature involving the issuance of municipal securities or a municipal financial product are covered under the attorney exclusion. This approach addresses many comments received by the Commission noting the negative impacts of requiring attorneys in municipal finance transactions to limit their advice and services to those related strictly to legal issues and describing the difficulty involved in complying with such limitations given the nature of the legal advice and services attorneys traditionally have provided, and are expected to provide, in municipal finance transactions.[819] In addition, if another participant in the issuance or transaction, who is not a client of the attorney, receives and acts upon the legal advice the attorney provides to its client, the attorney will not have to register as a municipal advisor. In this situation, the attorney is still only advising its client, even if the advice affects the actions of other participants in the transaction. This approach addresses commenters' concerns that bond counsel and other attorneys routinely share their views with non-client parties in a municipal finance transaction in the context of working group discussions.[820] Because such attorney would not be required to register as a municipal advisor, he or she would not be subject to an additional fiduciary duty that could potentially conflict with the attorney's existing fiduciary duty to his or her client.[821] By revising its interpretation of the exclusion to include a client of such attorney that is a municipal entity, obligated person, or other participant in the transaction, the Commission intends to be responsive to the comments received that attorneys representing participants other than a municipal entity or obligated person should be included in the exemption.[822]

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[809] *See, e.g.,* State of Indiana Letter (''Not all attorneys who are integrally involved in a typical municipal finance transaction have an attorney/client relationship with the municipal entity issuing the bonds . . . . The responsibilities of these counsel are relatively standard at the core, but can be varied in accordance with the agreements of the various parties to the transaction to produce the most efficient and effective final product for the municipal entity . . . . All these attorneys need absolute comfort that their contributions will not be considered municipal advisory services which are outside the scope of the exemption simply because they are not engaged by the municipal entity.''); Squire Sanders & Dempsey Letter (stating that imposing a federal fiduciary duty upon an attorney with respect to a non-client municipal entity or obligated person will create potential ethical dilemmas regarding conflicts of interest rules under state professional conduct rules that already impose a prior competing fiduciary duty in favor of the attorney's client); Chapman and Cutler Letter; Gilmore & Bell Letter; Sherman & Howard Letter; and Texas Comptroller of Public Accounts Letter.

[810] *See, e.g.,* Gilmore & Bell Letter; NABL Letter.

[811] *See* Gilmore & Bell Letter.

[812] *See* MSRB Letter.

[813] *See, e.g.,* State of Indiana Letter; Squire Sanders & Dempsey Letter; Sherman & Howard Letter; NABL Letter.

[814] *See, e.g.,* NABL Letter (recommending that the Commission clarify the attorney exclusion to prevent the imposition of fiduciary duties to issuers that are inconsistent with the duties of lawyers under their state professional conduct rules); Sherman & Howard Letter; Squire Sanders & Dempsey Letter.

[815] *See, e.g.,* NABL Letter; Squire Sanders & Dempsey Letter; Sherman & Howard Letter.

[816] *See, e.g.,* State of Indiana Letter; Squire Sanders & Dempsey Letter; NABL Letter.

[817] *See* Squire Sanders & Dempsey Letter.

[818] Rule 15Ba1–1(d)(2)(iv). In addition to the modifications discussed above, the Commission is adopting the attorney exclusion with minor, non-substantive modifications to provide greater clarity and consistency with other organizational changes the Commission is making to the exclusions and exemptions.

[819] *See supra* notes 803–807 and accompanying text.

[820] *See supra* notes 809–813 and accompanying text (discussing comments on the role of bond counsel in a municipal securities transaction and the expectation that attorneys share their advice with the financing team).

[821] *See supra* notes 809 and 814 and accompanying text (discussing comments on potentially conflicting duties if an attorney is not counsel to the municipal entity or obligated person, but would be required to register as a municipal advisor to the extent they provide advice on the transaction).

[822] *See supra* note 813 and accompanying text (discussing role of underwriter's counsel in a municipal securities transaction).

If, however, in connection with the issuance of municipal securities or municipal financial products, an attorney represents himself or herself as a ''financial advisor'' or ''financial expert,'' the attorney will be required to register as a municipal advisor if the attorney engages in municipal advisory activities. As provided in the Proposal, the Commission would consider an attorney to be representing himself or herself as a ''financial advisor'' or ''financial expert'' if the attorney provides advice that is primarily financial in nature, such as: (1) The financial feasibility of a project or financing; (2) advice estimating or comparing the relative cost to maturity of an issuance of municipal securities depending on various interest rate assumptions; (3) advice recommending a particular structure as being financially advantageous under prevailing market conditions; (4) advice regarding the financial aspects of pursuing a competitive sale versus a negotiated sale; and (5) other types of financial advice that are not related to the attorney's provision of legal advice and services of a traditional legal nature.[823] In these examples, attorneys would be providing services that are primarily financial in nature and that are beyond their traditional legal roles and outside of the statutory exclusion. The Commission believes that if an attorney represents himself or herself as a financial advisor or expert and engages in municipal advisory activities, the attorney is acting outside the scope of the statutory exclusion (*i.e.*, the attorney is not offering legal advice or providing services that are of a traditional legal nature).[824]

The Commission recognizes that analysis, discussion, negotiation, and advice regarding the legal ramifications of the structure, timing, terms, and other provisions of a financial transaction by an attorney to a client are essential to the development of a plan of finance. In turn, these services become, among other things, the basis for a transaction's basic legal documents, the preparation and delivery of the official statement or other disclosure document that describes the material terms and provisions of the transaction, the preparation of the various closing certificates that embody the terms and provisions of the transaction, the preparation and delivery of the attorney's legal opinion with respect to the transaction that is relied upon by the client and investors in the municipal securities marketplace, and advice and documentation with respect to post-closing policies and procedures that are necessary for compliance with federal and state law during the term of the municipal securities or municipal financial product. Similarly, attorneys often provide legal advice and related legal services regarding Federal tax requirements for issues of municipal securities, such as, for example, legal advice and services in determining ongoing compliance of an issue of municipal securities with the Federal tax law requirement to ''rebate'' excess arbitrage earnings on investments of tax-exempt bond proceeds to the Federal Government at periodic intervals during the term of the bond issue. The legal advice and legal services described in this paragraph would be within the attorney exclusion to the municipal advisor definition. Thus, attorneys providing this advice or these services would not be required to register as municipal advisors.

In addition, the Commission recognizes that attorneys seeking to represent municipal entities and obligated persons are often required to respond to RFPs and RFQs, and to participate in interviews during which they are requested to, and do, offer advice regarding the structure, timing, terms, and other provisions of a proposed offering of municipal securities or municipal financial products before being retained as counsel and that these requests may not be limited to legal questions. As discussed above in Section III.A.1.c.ii, the Commission does not believe that a response to an RFP or RFQ is advice with respect to the issuance of municipal securities or municipal financial products, and the Commission is adopting an exemption from the definition of municipal advisor for any person providing a response to an RFP or RFQ, provided such person does not receive separate direct or indirect compensation for advice provided as part of such RFP or RFQ. The Commission notes that responses to RFPs and RFQs are provided at the request of the municipal entity or obligated person. Thus, anyone responding to an RFP or RFQ in accordance with the exemption, including an attorney, will not have to register as a municipal advisor.

The Commission also recognizes that attorneys who represent municipal entities or obligated persons with respect to the issuance of municipal securities or municipal financial products are often asked to provide interpretation of the provisions of the legal documents throughout the term of the municipal securities or municipal financial products, including before and after the formal attorney-client relationship with respect to the issuance or municipal financial product exists.[825] Although the attorney-client relationship may not be in existence, if the advice is with respect to an issuance or transaction in connection with which the municipal entity was or will be a client of the attorney, the Commission considers such advice to be ''to a client.'' Accordingly, such advice will not require the attorney to register as a municipal advisor.

Finally, as discussed above, the Commission is clarifying that provision of general information, including the provision of educational materials to an attorney's clients and non-clients does not constitute advice, and therefore, will not require the attorney to register as a municipal advisor.[826]

Engineers Providing Engineering Advice

Section 15B(e)(4)(C) of the Exchange Act excludes engineers providing engineering advice from the municipal advisor definition. In the Proposal, the Commission proposed to interpret this exclusion to mean that the term ''municipal advisor'' shall not include ''[a]ny engineer, unless the engineer engages in municipal advisory activities other than providing engineering advice.'' [827] In the Proposal, the Commission stated that costing out engineering alternatives would not subject an engineer to registration because such activity would be considered ''engineering advice.'' [828] The Commission, however, further proposed that this exclusion would not include circumstances in which the engineer is engaging in municipal advisory activities, including cash flow modeling or the provision of information and educational materials relating to municipal financial products or the issuance of municipal securities, even if those activities are incidental to the provision of engineering advice.[829] The Commission also proposed that the exclusion would not include preparing feasibility studies concerning municipal financial products or the issuance of municipal securities that provide analysis beyond the engineering aspects of the project. Therefore, under the Proposal, engineers engaging in the types of activities described above

[823] *See* Proposal, 76 FR 834.

[824] *See* 15 U.S.C. 78*o*–4(e)(4)(C).

[825] *See supra* notes 816–817 and accompanying text.

[826] *See supra* Section III.A.1.b.i. (discussing the provision of general information) and note 815 and accompanying text.

[827] *See* proposed Rule 15Ba1–1(d)(2)(v).

[828] *See* Proposal, 76 FR 834.

[829] *See id.*

would have been required to register as a municipal advisor.[830]

The Commission requested comment on whether it should expand its proposed interpretation of the statutory exclusion beyond engineers providing engineering advice.[831] The Commission also asked how the term ''engineering advice'' should be interpreted and whether the engineering exclusion should include circumstances in which the engineer is preparing feasibility studies concerning municipal financial products or the issuance of municipal securities that include analysis beyond the engineering aspects of the project.[832]

The Commission received approximately 32 comment letters regarding the proposed interpretation of the statutory engineering exclusion. Some commenters supported the proposed interpretation of the exclusion.[833] One commenter stated that the Commission ignored the statutory exclusion altogether.[834] Most commenters, however, suggested that the Commission's proposed interpretation of the engineering exclusion was too narrow and that activities such as cash flow analyses and feasibility studies represent an integral part of an engineer's services.[835] Some commenters suggested that the terms ''cash flow analysis'' and ''feasibility studies'' have very specific meanings within the engineering industry.[836] One commenter specifically recommended that engineering firms reporting on the condition of water and sewer systems should be excluded from the definition of municipal advisor.[837] Another commenter noted that the Brooks Act,[838] which was enacted in 1972, delineates what constitutes ''engineering services.'' [839]

A number of commenters highlighted energy services and solar energy companies, in particular, as a sector of the engineering industry that would be especially affected by the Commission's proposed interpretation.[840] Three commenters suggested that energy service companies should be able to provide disclosure statements to municipalities without being considered municipal advisors,[841] and one commenter suggested that solar energy companies acting in an engineering role and providing just information and education related to cost savings integral to solar engineering should be included in the exemption.[842]

The Commission has carefully considered the issues raised by commenters on the Proposal and is adopting its interpretation of the statutory engineering exclusion, substantially as proposed, to provide that engineers are excluded from the definition of municipal advisor ''to the extent that the engineer is providing engineering advice,'' [843] with modifications and clarifications regarding the scope of its interpretation of the statutory exclusion in response to public comment.[844] In general, the Commission believes activities within the scope of the engineering exclusion may include feasibility studies, cash flow analyses, and similar activities; provided, however, that the engineering exclusion does not cover activities in which an engineer provides advice to a municipal entity or obligated person regarding municipal financial products or the issuance of municipal securities, as discussed further herein.

Activities within the scope of the engineering exclusion include, among other things, certain activities discussed below. The Commission believes that this exclusion covers an engineer's provision of certain information to its client regarding a project schedule and anticipated funding requirements of the project. The Commission further

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[830] *See id.*

[831] *See id.,* at 837.

[832] *See id.*

[833] *See* MSRB Letter (''The MSRB supports the language of proposed Rule 15Ba1–1(d)(2)(v) regarding the exclusion for engineers, including in particular that such exclusion applies solely when an engineer is providing engineering advice. Thus, to the extent that an engineer provides advice with respect to municipal financial products, the issuance of municipal securities or other financing structure that is not considered engineering advice (such as advice on how to structure an issue to cover the costs of a project), the engineer would be considered a municipal advisor.'') and Acacia Financial Group Letter.

[834] *See* letter from Spencer Bachus, Chairman, United States House of Representatives, Committee on Financial Services, dated February 23, 2011 (''Bachus Letter'').

[835] *See, e.g.,* letters from David King, President, Virginia/DC/Maryland Chapter, American Public Works Association, dated February 16, 2011 (''APWA Letter'') (stating that engineering professional services for infrastructure evaluations, studies, and design contracts by their very nature involve and require cost analyses); David A. Raymond, President & CEO, American Council of Engineering Companies, dated February 18, 2011 (''ACEC Letter'') (stating that in many cases, analysis of cash flow requirements is inextricable from the design of an engineering project, and that engineers often provide guidance regarding alternative phasing of projects to match available revenues or to maximize the infrastructure given limited resources); Parsons Brinckerhoff Inc., dated February 18, 2011 (''Parsons Brinckerhoff Letter'') (noting that in the engineering context, cash-flow modeling often involves (1) a cost-loaded design and construction schedule, or (2) a record-keeping cash flow analysis that facilitates periodic reporting); Kutak Rock Letter (stating that the Commission should treat an engineer's preparation of a project feasibility study as a part of routine engineering advice); Honeywell Letter (stating that ''the provision of such [feasibility studies and other activities that currently do not fall under the engineer exemption] is simply necessary for the municipality to initially understand the costs associated with a proposed engineering project and the range of potential options for financing such project, not to assist it in specifically evaluating or recommending financing options''); NAESCO Letter (stating that ''engineering includes a continuum of services . . . including the provision of general and specific information about financing options for energy projects, preparation of studies including information about cash-flows and other financial projections, and identification of, and introduction to brokers, dealers, municipal advisors (including financial advisors) and municipal securities dealers with expertise in financing energy service projects''); letter from David A. Raymond, President & CEO, HNTB Holdings Ltd, dated February 22, 2011 (''HNTB Holdings Letter'') (stating that ''[t]he conception of engineering advice expressed in the proposing release does not reflect engineering as it is practiced today, particularly in the context of infrastructure projects, and excludes many activities that are intrinsic to the profession of engineering'').

[836] *See, e.g.,* Parsons Brinkerhoff Letter.

[837] *See* letter from Mark Page, Director of Management and Budget, The City of New York, dated February 22, 2011 (''NYC Management and Budget Letter''). This commenter also stated that sewer rate consultants issuing reports relating to the sufficiency of water and sewer rates to satisfy obligations of a city's water authority are not providing advice relating to municipal securities or municipal financial products; and that rate consultants providing advice regarding rates and revenues should, like engineers providing engineering advice, be excluded from the definition of ''municipal advisor.''

[838] 40 U.S.C. 1102. The Brooks Act is a federal law that sets forth policies and certain procedures for selection by the federal government of engineering and architecture firms and related services.

[839] *See* letter from Mark A. Casso, President, Construction Industry Round Table, dated February 22, 2011 (''Construction Industry Round Table Letter'').

[840] *See, e.g.,* letters from Senator Daniel Coats, Congressmen Dan Burton, Larry Bucshon, Todd Rokita, and Todd Young, dated May 27, 2011 (''Senator Coats et al. Letter'') (highlighting the ''unnecessarily dire impacts'' that the proposed rule would have on energy services companies); Senator Landrieu, Senator Coons, and Chairman Bingaman, United States Senate Committee on Energy and Natural Resources, dated June 22, 2011 (''Senator Landrieu et al. Letter'') (stating that ''the Commission's proposal undermines [the engineering] exemption by suggesting that any [energy services company] that so much as provides a cash flow analysis or feasibility study to a municipality would not be providing 'engineering advice' and would therefore be subject to registration as a 'municipal advisor'''); Honeywell Letter; letter from Katherine Gensler, Director, Regulatory Affairs, and Emily J. Duncan, Policy Specialist, Solar Energy Industries Association, dated November 9, 2011 (''Solar Energy Industries Association Letter'').

[841] *See* NAESCO Letter; Honeywell Letter; Chevron Letter.

[842] *See* Solar Energy Industries Association Letter. For purposes of the engineering exclusion discussion, the Commission treats energy services and solar energy companies as engineering companies.

[843] *See* Rule 15Ba1–1(d)(2)(v). The Commission is adopting the engineering exclusion with minor, non-substantive modifications from the version proposed to provide greater clarity and consistency with other organizational changes the Commission is making to the exclusions and exemptions.

[844] *See supra* notes 835–836 and accompanying text (discussing comments related to cash flow analyses and feasibility studies).

believes that the provision of engineering feasibility studies that include certain types of projections, such as projections of output capacity, utility project rates, project market demand, or project revenues that are based on considerations involving engineering aspects of a project are within the scope of the engineering exception.

For example,[845] an engineer who provides funding schedules and cash flow models that anticipate the need for funding at certain junctures in a project or engineering feasibility studies based on analysis of engineering aspects of the project will fall within the Commission's interpretation of the statutory engineering exclusion from the municipal advisor definition. An engineering feasibility study, for example, might include a discussion of how much power might be generated by the installation of solar panels, and such a discussion would not constitute a municipal advisory activity. Similarly, recommendations about how to increase power output based on factors such as the placement of the panels or the number of panels would also not constitute a municipal advisory activity. Moreover, an engineer might provide estimates of water delivery capacity or a road's traffic capacity without engaging in municipal advisory activity. Engineers who report on the physical condition of infrastructure, such as roads, bridges or water and sewer systems, would also not be engaged in municipal advisor activity.[846] Absent other facts and circumstances which indicate that an engineer is providing advice to a municipal entity or obligated person regarding the issuance of municipal securities, an engineer's use of assumptions provided by a municipal entity or obligated person regarding interest rates or debt levels in preparing an engineering feasibility study or cash flow analysis alone will not result in municipal advisory activity.

With respect to services related to cash flow analysis, a municipal entity might seek input from an engineering company about whether a project could be accomplished with estimated available funding, including the timing of such funding. As noted above, engineers that provide input about the anticipated funding requirements of a project would not be engaging in a municipal advisory activity.[847] Thus, an engineer could advise a municipal entity about whether a project could be safely or reliably completed with the available funds and provide engineering advice about other alternative projects, cost estimates, or funding schedules without engaging in municipal advisory activity. Further, the Commission would consider an engineering company that informs a municipal entity or obligated person of potential tax savings, discounts, or rebates on supplies to be acting within the scope of the engineering exclusion.

By contrast, however, activities of engineers are outside the scope of the engineering exclusion if they include advice to a municipal entity or obligated person regarding municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, or other similar matters concerning such products or issuances. For example, an engineer that is engaged by a municipal entity or obligated person to prepare revenue projections to support the structure of an issuance of municipal securities would be providing advice outside the scope of the engineering exclusion and would be engaging in municipal advisory activity. Further, while the inclusion of an engineering feasibility study in an official statement or other offering document for an issuance of municipal securities alone does not cause an engineer's activities with respect to the feasibility study to be treated as municipal advisory activity, other facts and circumstances, such as the inclusion of revenue projections and debt service coverage calculations in the feasibility study, may suggest municipal advisory activity.

Engineering companies may also provide advice to their clients regarding financing of products and services delivered to such clients. As noted previously, the Commission is clarifying that provision of general information that does not involve a recommendation regarding municipal financial products or the issuance of municipal securities (including general information with respect to financing options) would not be municipal advisory activity.[848] Depending on all the facts and circumstances, however, the provision of information describing financing alternatives that may meet the needs of a municipal entity or obligated person may be considered a recommendation with respect to municipal financial products or the issuance of municipal securities that would be municipal advisory activity.[849]

One commenter stated that another standard service offered by engineers involves the provision of introductions of municipal entities to brokers, dealers, municipal advisors, and municipal securities dealers and that such introductions should be within the engineering exclusion.[850] One commenter recommended that the Commission ''refine its approach'' to register only those solicitors that receive compensation for introductions to funding sources.[851]

The Commission does not believe it is necessary or appropriate to provide a separate exemption for engineers engaging in introductions. The Commission notes that introductions provided by engineers would be subject to the same analysis as any other ''solicitation of a municipal entity or obligated person.'' [852] Thus, if an introduction does not result in direct or indirect compensation to the engineer, the introduction will not constitute such a solicitation and the engineer will not be required to register as a municipal advisor.

Finally, as discussed previously, the Commission is providing an exemption for advice given to municipal entities and obligated persons in circumstances in which the municipal entity or obligated person separately is represented by an independent registered municipal advisor.[853]

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[845] *See, e.g., supra* note 835 and accompanying text.

[846] *See supra* note 837. Whether a rate consultant providing advice regarding rates and revenues would be a ''municipal advisor'' will depend upon the facts and circumstances. For example, if such consultant provides advice on whether certain rates and revenues would support debt service on an issue of municipal securities, such activity would be municipal advisory activity that would subject the consultant to the registration requirement. Although the Commission is not adopting an exemption for persons performing such activities, the Commission notes that like all persons, such entities could apply for no-action or exemptive relief. As noted above, when requesting exemptive relief pursuant to Section 15B(a)(4), a person may follow the procedures for requesting exemptive relief pursuant to Section 36 of the Exchange Act, as set forth in Rule 0–12 under the Exchange Act. *See* 17 CFR 240.0–12.

[847] In the Proposal, the Commission gave as an example of activity that would be engineering advice the costing out of engineering alternatives. *See* Proposal, 76 FR 834.

[848] *See supra* note 168 and accompanying text. *See also supra* Section III.A.1.b.i. (providing guidance on the term ''advice'' and discussing the provision of general information).

[849] *See supra* Section III.A.1.b.i. (providing guidance on the term ''advice'' and discussing the provision of general information).

[850] *See* NAESCO Letter.

[851] *See* letter from Jennifer Schafer, Coordinator, Federal Performance Contracting Coalition, dated February 22, 2011 (''Federal Performance Contracting Coalition Letter'').

[852] *See supra* Section III.A.1.b.x. (discussing ''solicitation of a municipal entity or obligated person'').

[853] *See supra* Section III.A.1.c.iii. (discussing the exemption when a ''municipal entity or obligated person represented by an independent municipal advisor'').