

# Session Four

## REGULATION AND YOUR CONSULTANTS:

### Drawing the Line

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# Expert Work Products and Experts

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- ❑ Examples of Expert Work Products
  - Financial Feasibility Studies
  - Appraisals
  - Tax Rate/Market/Demand Studies
  - Financial Projections
- ❑ Examples of Consultants Providing EWPs
  - Accountants (AICPA Standards)
  - Engineers (Engineering Standards)
  - Appraisers (MAI Standards)
  - Tax Rate Consultants
  - Market/Demand Consultants
  - “Fly by Night” Consultants

# Defining Municipal Advisors

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## General Rule

SEC Rule 15Ba1-1(d)(1)(i)

[T]he term *municipal advisor* means a person (who is **not a municipal entity or an employee of a municipal entity**) that—

- ☐ **Provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities**
- ☐ **Including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or**
- ☐ **Undertakes a solicitation of a municipal entity or an obligated person**

# Defining Municipal Advisors

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Certain Definitions—

## **Municipal Financial Products**

Securities Exchange Act of 1934, Section 15B(e)(5)

The term “municipal financial product” **means** municipal derivatives, guaranteed investment contracts, and investment strategies

**Advice**, SEC Rule 15Ba1-1(d)(1)(ii)—

[A]dvice **excludes**, among other things, the provision of general information that does not involve a recommendation ...

**Certain Types of Municipal Advisors**, SEC Rule 15Ba1-1(d)(1)(ii)—

[M]unicipal advisors **include**, without limitation, financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors [meeting the definition] ...

# Defining Municipal Advisors

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## Attorneys

SEC Rule 15Ba1-1(d)(2)(iv)

### Exclusion:

Any attorney 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

# Defining Municipal Advisors

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## Attorneys

SEC Rule 15Ba1-1(d)(2)(iv)

### **Not Excluded:**

**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, however, the attorney is not excluded with respect to such financial activities**

# Defining Municipal Advisors

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## Attorneys

SEC Rel. No. 34-70462, 78 FR 67468, 67529 (Nov. 12, 2013)

### Not Excluded:

- [I]f an attorney represents himself or herself as a financial advisor or expert and engages in municipal advisory activities ...
- [I]f 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;

# Defining Municipal Advisors

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Attorneys

SEC Rel. No. 34-70462, 78 FR 67468, 67529 (Nov. 12, 2013)

**Not Excluded:**

- (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.**



# Defining Municipal Advisors

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## Accountants

SEC Rule 15Ba1-1(d)(3)

### Exemption:

**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**

SEC Rel. No. 34-70462, 78 FR 67468, 67526 (Nov. 12, 2013)

Both audit and other attest services are generally subject to regulation and professional standards, including professional independence requirements. Such requirements could potentially conflict with municipal advisors' fiduciary duty ...

# Defining Municipal Advisors

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## Accountants

SEC Rel. No. 34-70462, 78 FR 67468, 67526 (Nov. 12, 2013)

### **Not Exempted:**

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.**

# Defining Municipal Advisors

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## Accountants

SEC Rel. No. 34-70462, 78 FR 67468, 67526 and n. 792 (Nov. 12, 2013)

### Not Exempted:

- ❑ [A]lthough 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, the accountant exemption includes only the attest portion of these engagements
- ❑ [T]he exemption would not apply to accountants that provide consulting services to municipal entities, including ... modeling future debt service coverage, suggesting future rate schedules, tax advice related to municipal securities and derivatives [e.g., arbitrage rebate services], and other non-attest services that constitute municipal advisory activities

# Defining Municipal Advisors

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## Engineers

SEC Rule 15Ba1-1(d)(2)(v)

### **Exclusion:**

**Any engineer to the extent that the engineer is providing engineering advice**

# Defining Municipal Advisors

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## Engineers

SEC Rel. No. 34-70462, 78 FR 67468, 67530-31 (Nov. 12, 2013)

### **Exclusion:**

- ❑ [T]his **exclusion covers** an engineer's provision of certain information to its client regarding a **project schedule and anticipated funding requirements of the project**
- ❑ [P]rovision 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**

# Defining Municipal Advisors

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## Engineers

SEC Rel. No. 34-70462, 78 FR 67468, 67531 (Nov. 12, 2013)

### Exclusion:

- ❑ **[F]unding 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**
- ❑ **[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**

# Defining Municipal Advisors

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## Engineers

SEC Rel. No. 34-70462, 78 FR 67468, 67531 (Nov. 12, 2013)

### Exclusion:

- ❑ [A] discussion of how much power might be generated by the installation of solar panels ... how to increase power output based on factors such as the placement of the panels or the number of panels ...
- ❑ [A]n engineer might provide estimates of water delivery capacity or a road's traffic capacity ...
- ❑ Engineers who report on the physical condition of infrastructure, such as roads, bridges, or water and sewer systems ...
- ❑ [A]n 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

# Defining Municipal Advisors

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## Engineers

SEC Rel. No. 34-70462, 78 FR 67468, 67531 (Nov. 12, 2013)

### **Exclusion:**

- ❑ 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 ...
- ❑ [A]n engineering company that informs a municipal entity or obligated person of potential tax savings, discounts, or rebates on supplies ...



# Defining Municipal Advisors

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## Engineers

SEC Rel. No. 34-70462, 78 FR 67468, 67531 (Nov. 12, 2013)

### **Not Excluded:**

- **Preparation of revenue projections to support the structure of an issuance of municipal securities**
- **[I]nclusion of revenue projections and debt service coverage calculations in a feasibility study**
- **Describing financing alternatives**
- **Introductions—May be “solicitation”**

# Defining Municipal Advisors

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## Rate Consultants

SEC Rel. No. 34-70462, 78 FR 67468, 67531 n. 846 (Nov. 12, 2013)

### **Not Excluded:**

**If a rate 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**

Like all persons, [rate consultants] could apply for no-action letters or exemptive relief ...

# Defining Municipal Advisors

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## Other Professionals Subject to General Definition

SEC Rule 15Ba1-1 and SEC Rel. No. 34-70462

### **No Specific Exclusion or Exemption—**

- ☐ **Real Estate Appraisers**
- ☐ **Other Asset Valuation Consultants**
- ☐ **Rate Consultants**
- ☐ **Financial Feasibility Consultants**
- ☐ **Market/Demand Consultants**
- ☐ **Consultants Preparing Financial Projections, Debt Service Schedules or Debt Service Coverage Calculations**

# Defining Municipal Advisors

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## Board Members, Employees

SEC Rule 15Ba1-1(d)(3)(iii)

### Exclusion:

- ❑ Any person serving as [an elected, appointed or *ex officio*] 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 to the extent that such person is acting within the scope of such person's official capacity
- ❑ 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

# Defining Municipal Advisors

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## Board Members, Employees

SEC Rule 15Ba1-1(d)(3)(iii)

### **Exclusion:**

- ❑ [P]ersons who **comment** on municipal financial products or the issuance of municipal securities by **making use of public comment forums**
- ❑ **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**  
...

# Defining Municipal Advisors

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## Board Members, Employees

SEC Rel. No. 34-70462, 78 FR 67468, 67508 and n. 543 (Nov. 12, 2013)

### **Not Excluded:**

- ❑ [W]ould 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
- ❑ [I]f such a person is engaged and compensated outside the scope of [official] duties, he or she would not be eligible for the exemption and would be required to register

# Defining Municipal Advisors

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## Solicitors

SEC Rel. No. 34-70462, 78 FR 67468, 67498-99 (Nov. 12, 2013)

### Definition

Exchange Act Section 15B(e)(9) provides that the term “solicitation of a municipal entity or 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** ... that does not control, is not controlled by, or is not under common control with the person undertaking such solicitation ...

### Exclusion

Firm Advertisements, Rule 15Ba1-1(n)

# Defining Municipal Advisors

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## Other Parties with Specific Treatment in Rule

- ❑ Underwriters (Leslie Norwood)
- ❑ Registered Investment Advisors Solely Providing Investment Advice—  
Fiduciary Duty Under Investment Advisors Act
- ❑ Certain Registered Commodity Trading Advisors and Swap Dealers  
(Nathaniel Singer)
- ❑ Banks As to Deposits, Letters of Credit, Loans, Sweep Accounts, Trustee  
Services





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# REGULATION AND YOUR CONSULTANTS DRAWING THE LINE PRIMARILY UNDERWRITERS

LESLIE M. NORWOOD, SIFMA



Bond Buyer Pre-conference 2017

# Overview

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- In general, the regulatory focus is on the types of activities and services you are performing for a municipal entity or obligated person as opposed to the title of your role with respect to a transaction
- For example, if you are performing activities or services that, based on a *facts and circumstances inquiry*, are considered municipal advisory activities, it may not matter what role you THINK you have or WANT to have on the transaction – you may be considered a municipal advisor

# What is and is not covered “advice” under the Municipal Advisor Rule

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- Covered Advice is:
  - Involves a *recommendation or call to action* to a municipal entity or obligated person
  - That is *particularized to the specific needs* of a municipal entity or obligated person or targeted group of municipal entities or obligated persons that share common characteristics such as school districts or hospitals
  - With respect to *municipal financial products or the issuance of municipal securities*
- Covered advice is not:
  - General market information
  - Promotional information
  - Information unrelated to issuance of municipal securities, municipal financial products or the investment of municipal bond proceeds

# Exemptions and Exclusions from Municipal Advisor Definition

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- **The Final Rules provide for a number of exemptions and exclusions to the MA definition, including:**
- **Underwriter Exclusion:** Begins when formally engaged as an underwriter *on a specific transaction*, through the end of the underwriting period with respect to activities that are within the scope of an underwriting
  - No blanket “pool” exclusion
  - Narrower from a timing perspective than the definition of advice with respect to the issuance of municipal securities
- **RFP Exemption:** A response in writing or orally to a compliant RFP/RFQ from a municipal entity or obligated person for services in connection with a municipal financial

# Exemptions and Exclusions from Municipal Advisor Definition (cont'd)

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- **Independent Registered Municipal Advisor Exemption requires that:**
  - (1) An independent registered MA (“IRMA”) is providing advice on the same aspects of the related municipal financial products or issuance of municipal securities
  - (2) Firm receives a representation in writing from the municipal entity or obligated person that it is represented by, and will rely on the advice of, an IRMA (Reliance on that representation must be “reasonable”)
  - (3) Firm provides written disclosure to the municipal entity or obligated person and its IRMA that they are not a municipal advisor and are not subject to the statutory fiduciary duty applicable to municipal advisors
  - (4) IRMA (and key officers) must be independent of Firm for at least previous 2 years

# Exemptions and Exclusions from Municipal Advisor Definition (cont'd)

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- **Independent Registered Municipal Advisor Exemption requires that:**
  - (1) an independent registered MA (“IRMA”) is providing advice on *the same aspects* of the related municipal financial products or issuance of municipal securities
  - (2) Firm receives a representation in writing from the municipal entity or obligated person that it is represented by, and will rely on the advice of, an IRMA
  - (3) Firm provides written disclosure to the municipal entity or obligated person and its IRMA that they are not a municipal advisor and are not subject to the statutory fiduciary duty applicable to municipal advisors
  - (4) IRMA must be independent of Firm for at least previous 2 years



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# REGULATION AND YOUR CONSULTANTS

DRAWING THE LINE  
ATTORNEYS, ACCOUNTANTS, ENGINEERS,  
GOVERNMENT OFFICIALS AND A FEW OTHERS

NAT SINGER  
***SWAP FINANCIAL GROUP***



# Defining The Engagement

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## Qualifications of your MA

Swap Advisor

Bond Advisor

*Bond Pricing Advisor*

Engineers





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# REGULATION AND YOUR CONSULTANTS:

DRAWING THE LINE

LAKSHMI KOMMI, DIRECTOR OF DEBT MANAGEMENT  
CITY OF SAN DIEGO



# Understand the Need

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## Evaluate why do you need a special consultant?

- ☐ Is it a Debt Issuance?
  - Product to be used (directly or indirectly) for an Official Statement or other debt issuance function?
- ☐ Not a debt Issuance?
  - General Consulting and Advisory Work?
- ☐ Is it a stand alone or ongoing Post Debt Issuance consulting and advisory work?

# Outreach

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## Be Upfront in your RFQ/RFP

- Describe the project
- Describe desired role and services from a Special Consultant
- If the debt Issuance will have a separate transaction advisor state that fact upfront
- Ask and evaluate project qualifications, knowledge and expertise to provide informed advice in the special area
  - Due diligence - If the Special Consultant's Scope and Services are deemed non exempt from MA Rule, ask if the special consultant is registered and qualified to serve

# Contract Management

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Write the special consultant contract before the advisory work commences -

- ☐ Services to be provided
- ☐ Timeline for the Product
- ☐ End Date
- ☐ Fee Structure

# Municipal Advisor Registration Status

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## Registration Status

Access lists of brokers, dealers, municipal securities dealers and municipal advisors registered with the MSRB and the executing broker symbols for MSRB registrants that effect municipal securities transactions.

- [Click here for a list of registered dealers.](#)
- [Click here for a list of registered municipal advisor firms and their Series 50-qualified municipal advisor representatives.](#)
- [View a list of executing broker symbols \(EBS\) for MSRB registrants that effect municipal securities transactions.](#)



### MSRB Registration

Brokers, dealers, municipal securities dealers and municipal advisors are required to register with the MSRB. Read more about MSRB registration.

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# Municipal Advisor Registration Status

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## MSRB-Registered Municipal Advisor Firms and Associated Series 50 Representatives

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The Firms tab displays municipal advisor firms registered with the MSRB as of 8/9/2017 2:24:30 PM.<sup>1</sup> The Representatives tab displays associated persons who have passed the MSRB's Municipal Advisor Representative Qualification Examination (Series 50).<sup>2</sup> After September 12, 2017, only those associated persons that have passed the Series 50 may engage in municipal advisory activities. Qualification information is updated weekly and is dependent on the quality of the data a municipal advisor submits to the Securities and Exchange Commission (SEC) on SEC Form MA-I.<sup>3</sup>

[Municipal Advisor Firms](#)

[Series 50 Qualified Representatives](#)

Includes representatives who have passed the Series 50 examination as of 8/4/2017

Find a Representative:

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Representative Name ^	Firm Name ◇	State ◇
Aagaard, Maik	Development Planning and Financing Group, Inc	CA
Aasrvold, Jason	Ehlers & Associates, Inc	MN
Abrams, Merrill	Millco Advisors, LP	DC
Abrantes, Emily	Public Financial Management, Inc.	PA
Abrantes, Emily	PFM Financial Advisors LLC	PA
Abrantes, Emily	Prager & Co., LLC	CA
Acampora, Roberta	Phoenix Advisors, LLC	NJ

<http://www.msrb.org/MARegistrants.aspx>

# Municipal Advisor Registration Status

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**Municipal Advisors**

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Municipal Market Reports

Speeches and Statements

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Contact Information

Career Opportunities

    

## Municipal Advisors

### Municipal Advisor Rule and FAQs

- [Final Municipal Advisor Registration Rule \(Sept. 20, 2013\) Federal Register Version \(Nov. 12, 2013\)](#)
- [Temporary Stay of Final Municipal Advisor Registration Rule \(Jan. 13, 2014\) Federal Register Version \(Jan. 16, 2014\)](#)
- [Registration of Municipal Advisors Frequently Asked Questions | \(PDF\) \(updated May 19, 2014\)](#)

### Municipal Advisor Registration Forms

- [Instructions for the Form MA Series](#)
- [Form MA](#)
- [Form MA-I](#)
- [Form MA-NR](#)
- [Form MA-W](#)

### Municipal Advisor Information and Resources

- [List of Registered Municipal Advisors](#) (updated monthly)
- For free access to a registered municipal advisor's SEC filings (e.g., Form MA and Form MA-I) refer to the [EDGAR Company Filings website](#)
- 2016 Compliance Outreach Program for Municipal Advisors - [Webcast Archive](#) (Feb. 3, 2016)
- 2014 Compliance Outreach Program for Municipal Advisors - [Transcript](#) (Nov. 3, 2014)
- [Municipal Advisor Exam Initiative](#) (Aug. 19, 2014)

<https://www.sec.gov/municipal/municipal-advisors.html>

# QUESTIONS