

**CDIAC**

**CALIFORNIA  
DEBT AND  
INVESTMENT  
ADVISORY  
COMMISSION**

**16<sup>TH</sup> ANNUAL  
PRE-CONFERENCE AT THE  
BOND BUYER CA PUBLIC FINANCE  
CONFERENCE**

**EXAMINING THE ROLES OF SPECIAL  
CONSULTANTS IN DEBT ISSUANCE  
AND ADMINISTRATION**

**September 25, 2017**

# SESSION ONE

## OVERVIEW OF VARIOUS MUNICIPAL FINANCE INDUSTRY CONSULTANTS and THEIR EXPERT WORK PRODUCTS

*Presented by*

Gilbert Southwell III, Vice President/Senior Municipal Analyst, Wells Capital Management  
Katie Koster, Managing Director, Public Finance Investment Banking, Piper Jaffray

# Definition of Expert Work Products

3

- What Are Expert Work Products
  - ▣ Products used in disclosure documents to support proposed work project
  - ▣ Can be found in Official Statements
  - ▣ Not updated as part of Continuing Disclosure



# Expert Work Products Means

4

- Feasibility studies and reports
- Economic and financial projections, forecasts and analysis
- Real estate appraisals and other asset valuations
- Other third party reports used by municipal market participants
- Used to illustrate the feasibility of start-up or expansion projects associated with bonds

# Utilized by Industry Sectors

5

- Land-based securities
- Multi-family housing
- Toll roads
- Water, sewer, electric, and other types of municipal utilities
- Airports and maritime ports
- Private activity projects
- Healthcare, continuing care, and assisted living projects
- Charter or independent schools
- Convention centers and related hotels
- Stadiums
- Project Finance

# Who Are Special Consultants?

6

- Assessment
- Accountants and auditors
- Appraisers
- Business valuation consultants
- Feasibility consultants
- Other Consultants (e.g., Lawyers)

# Sell-side Perspective- Example

7



In California, land-secured financing is a common approach in constructing infrastructure needs for schools, roads, freeways, sewer projects and other public facilities

Land Secured	Product
Market / Demand Consultants	Price Point Study Market Absorption Study
Appraiser	Asset Valuation / Appraisal
Special Tax Consultant	Special Tax Revenue Projections
Assessment Engineer	Assessment Revenue Projections
Tax Increment	Product
Fiscal Consultant	Tax Increment Revenue Projections

# Buy-side Perspective- Example

8

## Iowa Fertilizer Expert Reports

Expert	Consultant	Risk Covered	Report in OS
Fertilizer Market Consultant	Integer Research	<ul style="list-style-type: none"> <li>Fertilizer prices</li> <li>Natural gas prices</li> </ul>	Yes
Independent Engineer	Nexant	<ul style="list-style-type: none"> <li>Technology</li> <li>Permits</li> <li>Construction</li> <li>Performance</li> <li>Cost of operation and maintenance</li> </ul>	Yes
Model Auditor	Ernst & Young	<ul style="list-style-type: none"> <li>Mathematical accuracy of financial model</li> <li>"Tick and tie" assumptions to financial model</li> </ul>	No
Independent Insurance Advisor	AON	<ul style="list-style-type: none"> <li>Adequacy of insurance</li> </ul>	No

# QUESTIONS

Overview of Various Muni Finance Consultants and  
Expert Work Products

# SESSION TWO

## EVALUATING EWPS: RISK ASSESSMENTS

Facilitator: Gill Southwell III, Vice President /Senior Municipal Analyst, Wells Capital Management

Jim Miller, Senior Economist, San Diego Association of Governments

Lisa Greer Quateman, Principal, Polsinelli

Heidi Schrader, Manager, Eastern Municipal Water District

# Professional Standards and Guidance

11

- 1) Third Party Expert Reports/Are Commonplace in Municipal Deals to Assess Financial, Technological and Market Success and Challenges of a Project
- 2) Limited Industry Expert Report Preparation of Presentation Standards.
- 3) GASB Has No Standards to Guide Issuer's Generating "Financial Projections". See Exhibit B for GASB Preliminary Views (2011).
- 4) AICPA Has Standards to Generate Examination Opinions Only on Financial Projections – But No Other Economic, Technological and Market Aspects of a Transaction.
- 5) NMFA Has a Whitepaper on Expert Work Products (2011). See Exhibit C.

# Securities Law Issues With Expert Reports; Due Diligence Responsibilities & Liabilities

- 1) Under Section 11(a)(4) of the Securities Act, If Expert Report Not Prepared by an “Expert” (appraiser, Engineer, or CPA), the Issuer and Underwriter May Have a “Duty” of “Independent Investigation” That the Expert Report Does Not Contain a Material Fact Misrepresentation or Material Fact Omission. (See Exhibit F)
- 2) Lack of Consensus on Responsibilities & Liabilities of Issuers and Underwriters to “Vet” Expert Reports.
- 3) See Exhibit D: Excerpts From Disclosure Roles of Counsel, Third Ed., ABA Section of State & Local Govt (2009) Re Expert Reports Re Applicability of Section 11 to Municipal Offerings.

# Recent Securities Fraud Cases, SEC Enforcement Actions & Other Litigation/Bad Press

- 1) Greater Wenatchee Regional Events Center Public Facilities District—Disclosure of Prior Projections. Issuer & Underwriter SEC Liability. (See Exhibit G)
- 2) Las Vegas Monorail Deal—Bondholder Lawsuit Against Underwriter Re Disclosure of Prior Feasibility Report. (See Exhibit G)

# Key Problems with Feasibility Studies

14

- 1) Inexperienced Developer Provides Projections and Assumptions.
- 2) Feasibility Consultant That Is Not Held to Any Objective Standard (i.e. not CPA, Engineer or MAI Appraiser).
- 3) Does Feasibility Report Contain “Feasibility Opinion?”
- 4) What Does Rate Need To Be in Order To Make Project Work?”

# What Does Buy-Side Look for In Expert Reports?

15

- 1) Professional “Opinions” Not Just Recitation of Facts/Trends (E.g., Feasibility Opinion);
- 2) Address the Reasonableness of Assumptions Used by Borrower in Its Projections (Fiscal & Development);
- 3) Avoid Stale Information;
- 4) Address Existence & Findings of Prior Reports/Studies – Source of Securities Fraud Claims;
- 5) Independence of Expert-Disclose Prior Projects for Issuer, Borrower & Underwriter;
- 6) Expert Consent to Report Include in Offering Documents. If Not, No Expert Liability Under Section 11(a)(4) of Securities Act.

# What Does Buy-Side Look for In Expert Reports? (continued)

- 7) Missing Expert Reports – A **Red Flag!!**
  - a) If Not Requested – Explain Why.
  - b) If Obtained, But Not Included, Explain Why.  
If Unfavorable Report, Failure to Disclose May be Actionable Fraud.
- 8) Expert Qualifications: Besides CPA Certification and MAI Designated Member, Other “Experts” Need to Demonstrate Their Expertise:
  - a) Go Beyond Recitation of Academic Degrees;
  - b) Recite Studies Done in Last Five Years with Authors

# Expert Report Disclaimers: Must Be Reasonable

17

- 1) No Industry Disclaimer Standards.
- 2) Types of Expert Disclaimers:
  - a) Forecasts subject to risk and uncertainty
  - b) Differences caused by unforeseen events
  - c) Reliance on information provided by others
  - d) Consideration of the whole study (not select parts)
  - e) No responsibility for updating information beyond date of the report.
- 3) May Not Be Enforceable Under Federal Securities Laws.  
(E.g., “Forward Looking” Statement Disclosures)

# Expert Reports: Need Executive Summary with Conclusions & Opinions

- 1) Lengthy Expert Reports With Limited or Unstated Conclusions & Opinions Are not Helpful.
- 2) “Feasibility” Study Needs to identify Key Assumptions and Present A Feasibility “Opinion” That Project Can Be Accomplished by Borrower In the Know Time Frame & Budget.
- 3) Expert Reports Must Identify the Important Facts That Underlie the Key Assumptions Made by Borrower.

# Problem of Continuing Disclosure

19

- 1) If Expert Report Contains Material Information to Assess Future Results & Projections, Is It Publicly Available to be Updated? Example, City Specific Population Trends, Types of Taxpayers, Retail Sales Trends, Etc. See Exhibit E from ABA Disclosure Roles of Counsel, Third Ed (2009).
- 2) If Such Material Information Is Not Publicly Available, Should the Issuer/Borrower Be Required to Update as Part of Continuing Disclosure?
- 3) If Issuer/Borrower Cannot Update, Should Expert Report Be Used in POS or Should a Specific Risk Disclosure Be Used?

# Expert Report Panel Materials

20

## **Exhibit A. AICPA Financial Projection & Forecast Standards**

**(Excel Spreadsheet: Types of AICPA Reviews)**

- 1) Examined Financial Projections and Opinions;
- 2) Compiled Financial Projections;
- 3) Agreed-Upon Review Procedures

# Expert Report Panel Materials

21

## Exhibit AB GASB Economic Condition Reporting – Issuer Financial Projections Project

- 1) Examined Financial Projections and Opinions;
- 2) Compiled Financial Projections;
- 3) Agreed-Upon Review Procedures

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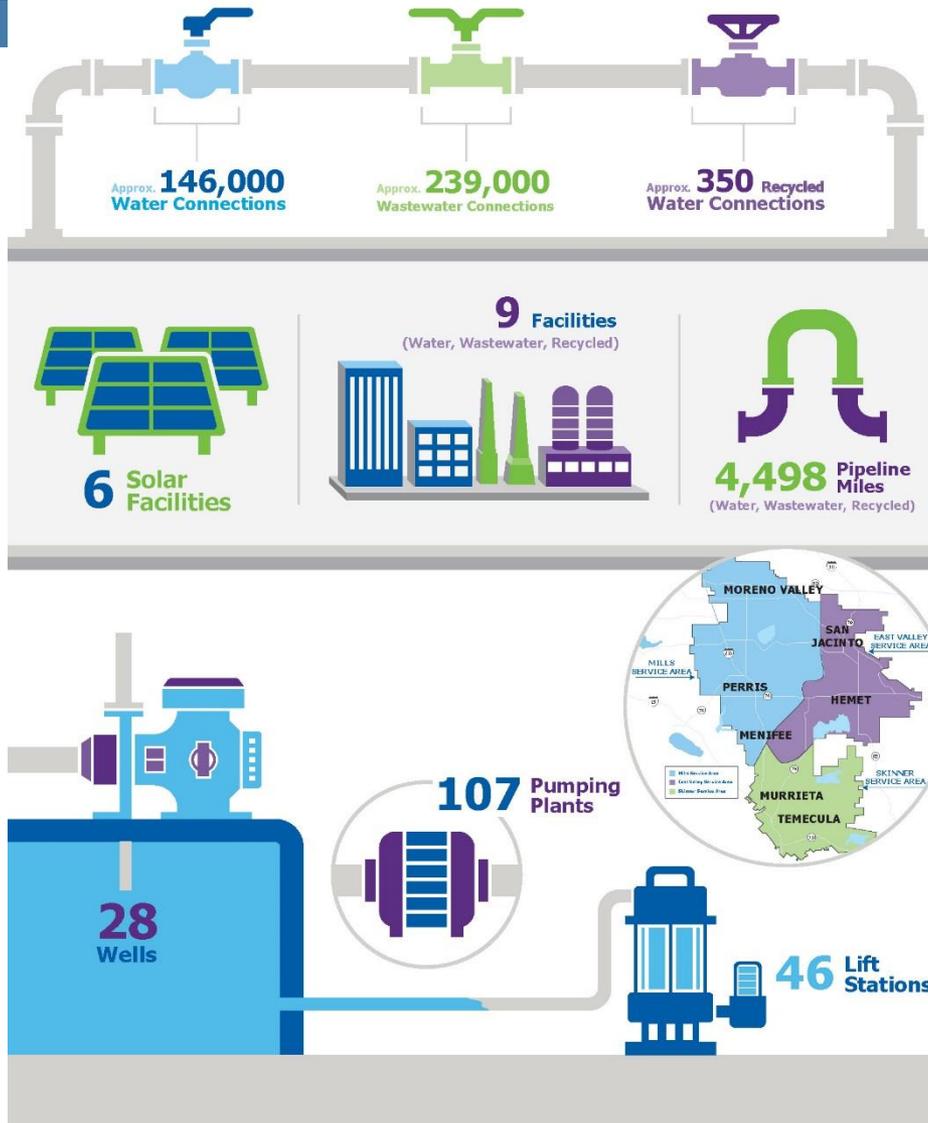
# EVALUATING EWPS: RISK ASSESSMENTS

Heidi Schrader  
Financial Manager III  
Eastern Municipal Water District

September 25, 2017

# About EMWD

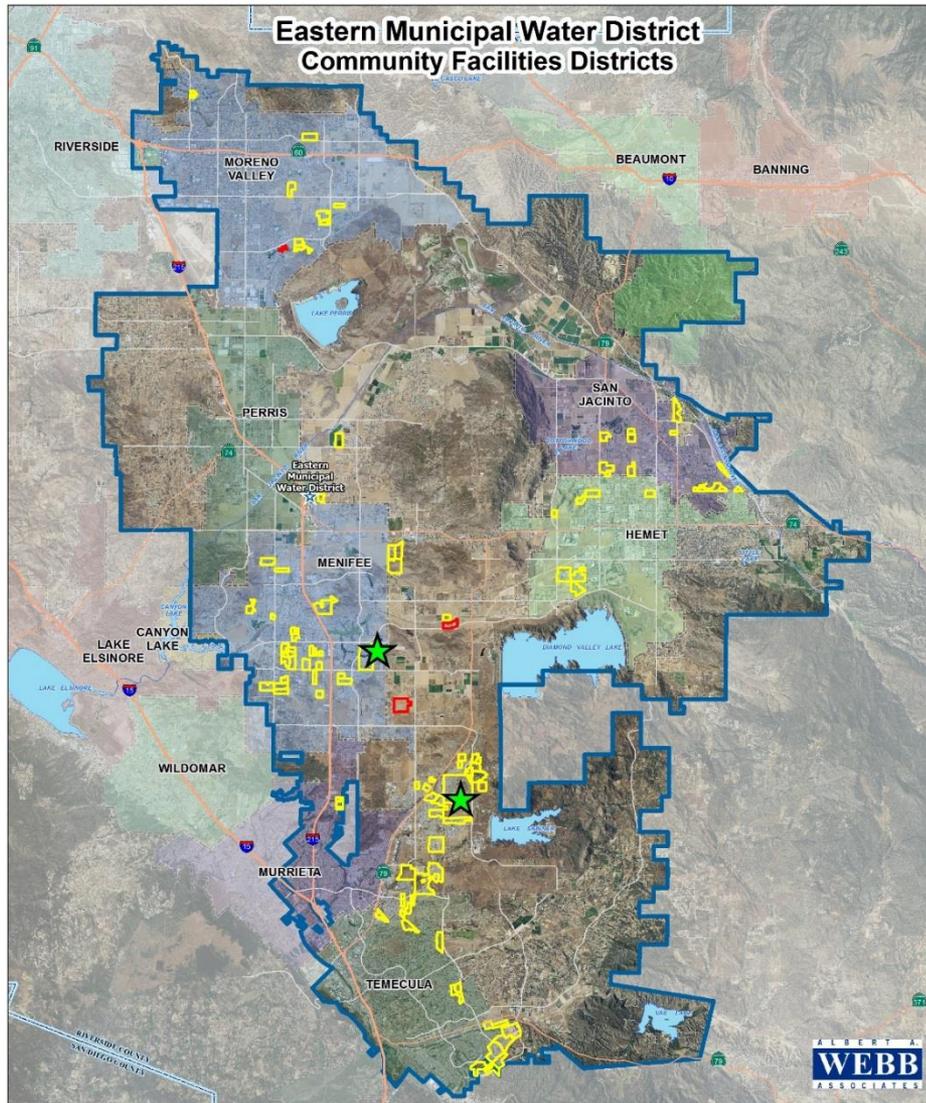
23



- Established in 1950
- Agency serving:
  - ▣ Water/wastewater/recycled
  - ▣ Wholesale and retail
- 555 square miles –Riverside County, California
- Population 804,000
- Five district-elected board members
- Annual operating & capital budget of \$398 million for FY 2017-18
- Debt Ratings – S&P/Fitch/Moody’s
  - ▣ Senior Lien AA+/AAA/Aa2
  - ▣ Working Lien AA+/AA+/Aa3
- 38 percent built-out

# Land-Secured Financing

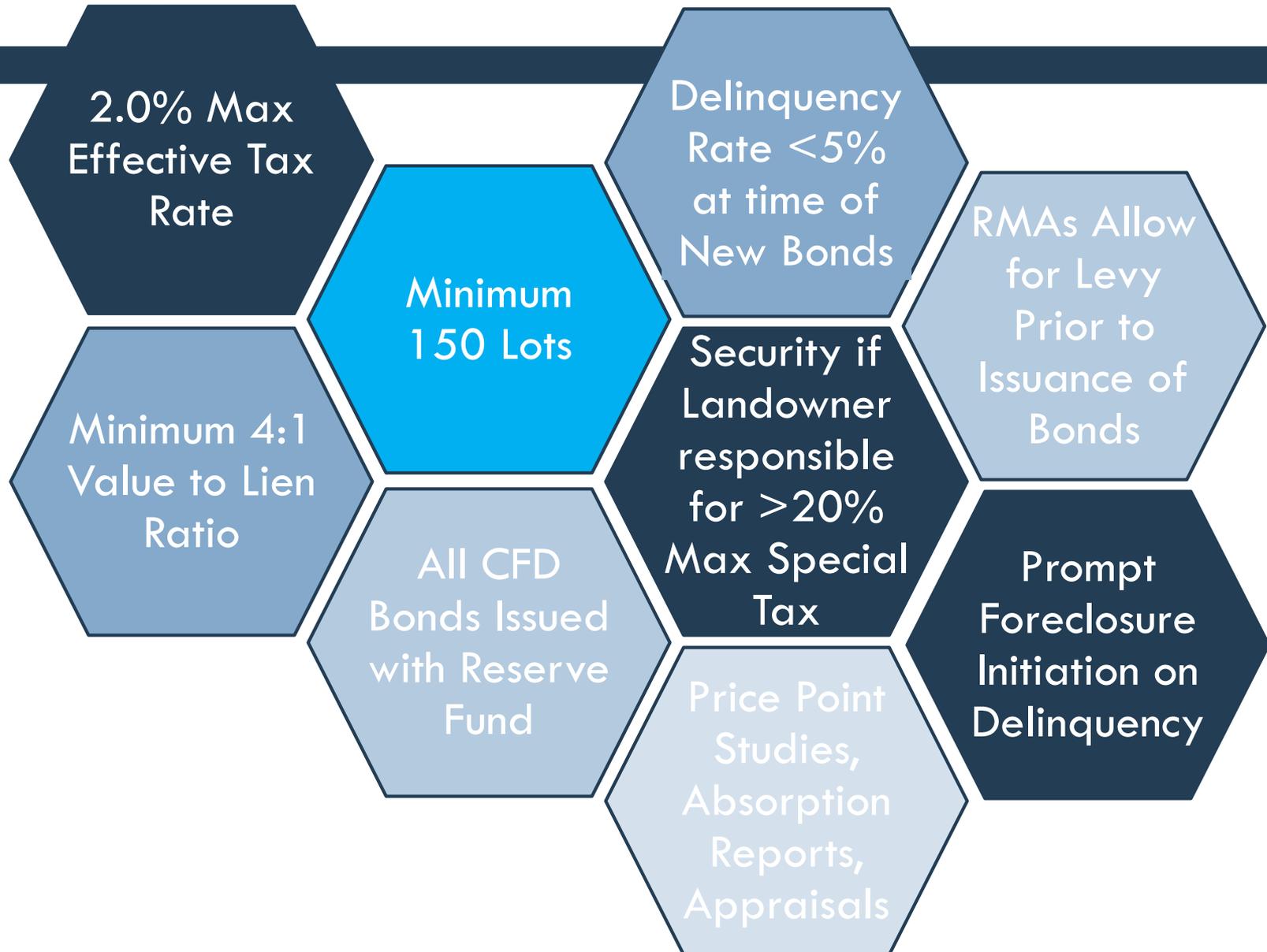
24



- Forming 78<sup>th</sup> CFD
- 55 Active Community Facilities Districts
  - ▣ 92 Separate Financing Areas
    - Improvement Areas/Tax Zones
- Actively levying 14,191 parcels
  - ▣ Total annual debt service \$13.7m
- Typically unrated
- Sometimes privately placed
- Pooled Financings issued through Western Riverside Water & Wastewater Financing Authority (WRWWFA)
- No Defaults or Draws on Reserves

# Policy Principles Mitigate Investor Risk

25



# Mitigating Risks with Consultant Engagement

- Consultant Contracts are Competitively Bid on Regular And Recurring Basis
- Consultants are Independent, Are Paid By The District, Not By Advocate Or Third-parties
- Consultant Contracts Include Insurance Requirements, Indemnifies District for Errors Related to Work Product
- Advocate (Developer) Makes A Deposit To Fund Initial Analyses, But District Hires Consultants, Oversees Work Product, And Pays For the Work
- EWPs Are Incorporated Into The Public Record
  - Staff Reports Include the EWP, Such As Appraisals, Special Tax Consultant Report, Price Point Studies, And Other Analyses

# Land-Secured Financing: EWPs

27

- Formation – Special Tax Consultant/Program Manager Prepares Preliminary Formation Analysis
  - Development Status/Lots
  - Estimated Revenue Constraint, VTL, Overlapping Tax Rate
  - Proposed Use of Proceeds
- Change Proceeding to Increase Special Tax Rates - Absorption Analysis and/or Price Point Study from Economics Consultant
- Bond Sale – Special Tax Consultant/Program Manager Provides Update of Formation Analysis for Review Prior To Moving Forward
- Analysis of Overlapping Debt
- Depending on Development Activity
  - Absorption Report and/or Price Point Study
  - Independent Appraisal
  - Calculation of Landowner Security if responsible for >20% Max Special Tax

# San Diego: State Route 125 Debt Restructuring



- 10-mile toll road in southern San Diego County
- Opened in 2007, Acquired by SANDAG in 2011 from bankrupt for-profit consortium
- SANDAG Purchase financed with high-interest loans
- Restructuring should save ~\$60 million
- *Need a Traffic and Revenue Study*

# San Diego: State Route 125 Debt Restructuring



## Key Traffic and Revenue Study Assumptions:

- Traffic
  - Demographics of catchment area
  - Traffic on alternate routes
- Toll assumptions and customer response
- Economic Conditions/Development

# QUESTIONS

**LUNCHEON 11:30 AM – 1:00 PM**

**JOIN CDIAC FOR LUNCH**

*Keynote Presentation:*

*The Honorable John Chiang, CA State Treasurer*

# Session Three

## SETTING STANDARDS OF PRACTICE FOR CONSULTANTS

Facilitator: Susan Gaffney, Executive Director, National Association of Municipal  
Advisors

Leo J. Karwejna, Managing Director/Chief Compliance Officer, PFM Asset  
Management LLC

Gary Caporicci, Partner, The Pun Group

Robert Doty, President and Proprietor, AGFS

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# EXAMINING THE ROLES OF SPECIAL CONSULTANTS IN DEBT ISSUANCE AND ADMINISTRATION

Leo Karwejna, Chief Compliance Officer  
PFM

September 25, 2017

# Start at the Basics for Hiring a Consultant

34

- What should be done “in-house” versus tasks completed by Consultant(s) – build the scope first
- Internal expectations and performance measurement criteria for the project and Consultant contribution
- Governance – sponsorship, accountability, and oversight of Consultant
- Budget realities and resources
- Due diligence, competency, and procurement

# Recognizing Important Consultant Obligations and Duties

35

- Statutory versus contractual
- Documentation
- The nature of the relationship
- Reasonable expectations

# Recognizing Important Consultant Obligations and Duties – Examples for Discussion

36

- Municipal Advisor
- Investment Advisor
- Underwriter
- Dissemination Agent
- Engineer
- Sub-contractors

# Establishing the Relationship

37

- Once the contract is signed and the chosen consultant comes in the door, the honeymoon is over and the challenging work begins.
- No matter how rigorous the due diligence and negotiation process, each side will probably have a different concept of what they signed up for.
- If both issuer and consultant are vigilant, they can work together to minimize the impact of any differences.

# Critical Success Consideration - #1

38

- Defining Roles and Responsibilities Expectations
  - Effective consultant management requires that the negotiation and agreement clearly defines what the roles are between the issuer and the consultant.
  - Effectively stated as a part of the Statement of Work or Scope of Services, prior to contract award. Expressly defining roles, responsibilities and expected work-product beforehand helps to avoid potential disputes down the line.

# Critical Success Consideration - #2

39

## □ Communication

- One of the communication tools that issuers use successfully with their vendors are regular reporting routines or meetings where end users can provide input to their consultants on the services provided.
- These checks and balances allow the consultant as well as the issuer to share information and be on the same “page” in terms of service expectations.

# Critical Success Consideration - #3

40

- Performance Measurement
  - Consultant reporting on changes to service levels, employee turnover, staffing levels, disaster recovery, security, customer satisfaction, etc. is important to effective service management.
  - Performance results and issues should be discussed regularly.

# Key Inhibiting Factors Working with Consultants

41

- ❑ Reliance on a handshake or, conversely, the lack of due diligence.
- ❑ Lack of trust in original decisions to source will undermine working relationships.
- ❑ Relying on a consultant as a business advisor, strategic advisor, thought leader unless this is specifically the service they are contracted to provide.
- ❑ Assuming that cost savings will be the overriding benefit.
- ❑ Significant personnel change at the consultant.
- ❑ Sourcing your problem to an outside consultant will simply yield an externally sourced problem.

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# **BOND BUYER PRE CONFERENCE WITH CDIAC AUDITING OF FINANCIAL STATEMENTS**

**GARY M. CAPORICCI, CPA, CGFM, CFF  
PARTNER**

**Monday, September 25, 2017**

# Auditing of Financial Statements

43

- What is Auditing?
- Hiring the Auditor and Importance of Independence
- Professional Standards for Auditors
- GFOA Best Practices
  - ▣ Hiring Auditor
  - ▣ Offering Statements
- Importance of Internal Controls

# GFOA Best Practice: Audit Procurement (2002)

44

- **Selecting Auditing Services:**
  - Scope should encompass individual funds and component units, in addition to basic financial statements
  - Governments should ensure contracts state that auditors will conform to the GAO's Government Auditing Standards
  - Contracts should be for at least five years
  - Competitive process should be used for securing auditing services
  - Selection process should focus on the the ability for provider to perform a quality audit
  - Government should approve any non-audit services provided by independent auditors

# GFOA Advisory: Offering Statements and the Auditor's Role (2006)

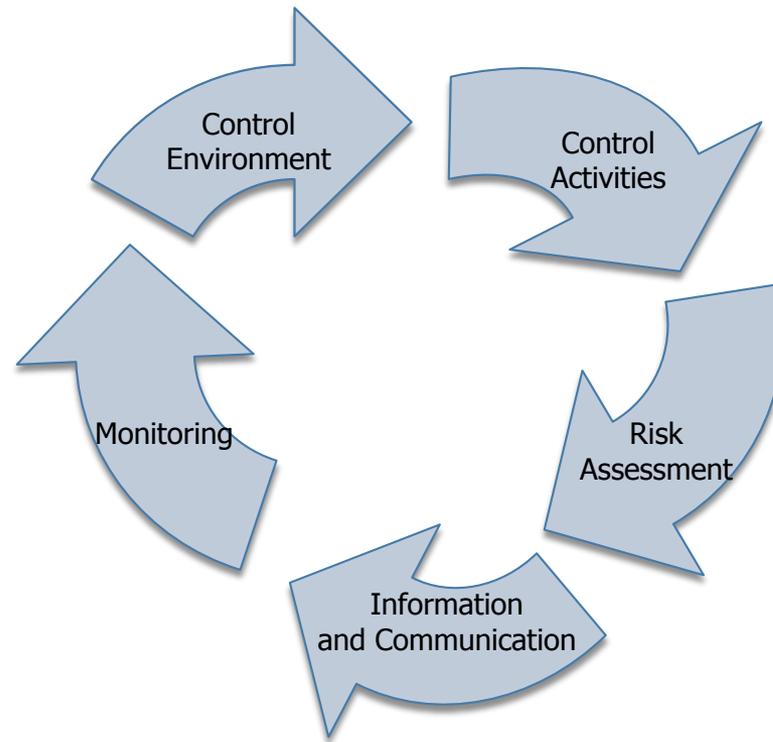
- Having paid for the independent audit, a government owns the audited financial statements and should feel free to use them in any appropriate manner.
- The independent auditor should not be permitted to create an essentially artificial “association” with audited financial statements included in offering statements or posted on the government’s website simply by inserting a clause to that effect in the audit contract.
- When the independent auditor actually does happen to become associated with audited financial statements included in an offering statement, a state or local government should take steps to avoid unwarranted delays and unjustified costs.
- The audit contract should clarify that the government is free to post its audited financial statements on its website.

# COSO Internal Controls Overview

46

- Internal Controls
  - ▣ GFOA Best Practices
    - Internal Control Framework
    - Internal Control and Management Involvement
    - Internal Control Deficiencies in Audits
  - ▣ COSO Internal Controls Framework Purpose:  
overhaul and enhance the definition of internal control to discourage  
fraudulent financial reports
    - 5 Internal Control Framework

# COSO IC Framework Components



# COSO IC Basic Principles

48

- COSO Internal Controls Overview
  - 20 Basic Principles
  - AREA FOCUS: Control Environment
  - AREA FOCUS: Risk Assessment

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# SETTING STANDARDS OF PRACTICE FOR CONSULTANTS

ROBERT DOTY  
AGFS  
ANNAPOLIS

Published Standards and Market Guidance

# Expert Work Products and Experts

(More in Session 4)

50

- ❑ **Examples of Expert Work Products**
  - Appraisals/Asset Valuations
  - Tax Rate/Market/Demand Studies
  - Financial Feasibility 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

# Issuer's Central Role

51

- ❑ Issuer's Central Role, Expectations and Responsibilities
  - Ultimately in Charge
  - Ultimately Responsible
  - Issuer Should Contract with Experts
  - Reliance Must Be Reasonable (More to Come)
- ❑ Use of RFPs, Interviews
- ❑ Involving Other Professional Team Members in Selection Process
- ❑ Fees
  - Issuer Pay
    - ✓ Can Be Reimbursed by Developer/Project Promoter
    - ✓ Can Recoup from Bond Proceeds
  - Hourly, Lump Sum Fees
  - Contingent Fees Involve Severe Conflict of Interest, Destroy Expert Independence  
Disclosure Endangers Bond Sale, Bond Prices; Conflict Places Issuer at Risk
  - Expert's Independence Is Crucial

# Standards, Disclosure for Expert Reports

52

- ❑ Expert's Qualifications, Experience
  - Any Defaulted, Troubled Projects?
- ❑ Expert's Identification of Assumptions
  - Should Fit Facts of Bond Issue, Project
- ❑ Expert's Opinion on Reasonableness of Assumptions
- ❑ Expert's Methodology
- ❑ Expert's Identification of Applicable Professional Standards
  - If none, so state
- ❑ Did Expert Apply Those Standards?
- ❑ Expert's Sources of Information
  - Was Information Obtained from an Interested Party?

# Standards, Disclosure for Expert Reports

53

- ❑ Conflicts of Interest and Independence
  - Relationships with Developer/Promoters, Other Team Members
- ❑ Who Retained/Paid Expert?
  - Should Be Issuer
- ❑ Consider Alternative Conclusions Presented
  - e.g., in Appraisal
- ❑ Existence of Other Reports
  - Including Project Opponents
- ❑ Careful Review by Issuer, FA and Underwriters
- ❑ Discussions With Expert
  - Discuss, Question, Understand Methodology & Assumptions
- ❑ Consent To Use In OS

# Standards, Disclosure for Expert Reports

54

## “REASONABLE” RELIANCE ON EXPERTS, PROFESSIONALS

### Four Factors Applied by Courts

- ❑ Seek Professional Advice as to Appropriateness of Specific Conduct
  - General Participation in Transaction Inadequate
  - Cannot Rely If Do Not Read, Understand EWP
  
- ❑ Complete Disclosure to Professional of Relevant Information
  
- ❑ Receipt of Advice that Conduct Is Appropriate
  - Preferably in Written Form
  - Not Merely Negative Assurance Letter
  
- ❑ Reliance on Advice in Good Faith

Miami Jury Verdict Found None of the Factors Present

# QUESTIONS

# Session Four

## REGULATION AND YOUR CONSULTANTS:

### Drawing the Line

Facilitator: Robert Doty, President and Proprietor, AGFS

Lakshmi Kommi, Director of Debt Management, City of San Diego

Leslie Norwood, Managing Director and Associate General Counsel, SIFMA

Mary Simpkins, Senior Special Counsel, Office of Municipal Securities, SEC

Nat Singer, Managing Director, Swap Financial Group

# Expert Work Products and Experts

57

- ❑ 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

58

## 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

59

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

60

## 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

61

## 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

62

## 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

63

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

64

## 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

65

## 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

66

## 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

67

## Engineers

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

### **Exclusion:**

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

# Defining Municipal Advisors

68

## 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

69

## 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

70

## 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

71

## 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

72

## 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

73

## 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

74

## 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

75

## 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

76

## 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

77

## 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

78

## 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

79

## 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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CONSULTANTS  
DRAWING THE LINE  
PRIMARILY UNDERWRITERS**

**LESLIE M. NORWOOD, SIFMA**

**Bond Buyer Pre-conference 2017**

# Overview

81

- 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

- 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

83

- **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)

84

- **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)

85

- **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

87

## 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

89

## 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

90

## 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

91

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

[Export to Excel](#)

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-1.<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:

Show  entries

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 Market Reports
- Speeches and Statements
- Additional Resources
- Enforcement Actions
- 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

# CLOSE OF PROGRAM

Completion of Post Evaluations

General Conference