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**CALIFORNIA  
DEBT AND  
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# REGULATION AND YOUR CONSULTANTS

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

ROBERT DOTY  
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# 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] ...

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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**

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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**

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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;

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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**

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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 ...

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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.**

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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

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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**

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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**

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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

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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

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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 ...**

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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”

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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 ...

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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**

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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**

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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)

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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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## Questions?

**Robert Doty**  
**AGFS, Annapolis, MD**  
robert.doty@agfs.com  
(916) 761-3432