



SEC Proposes Registration Requirement for Lawyers Providing Financial Advice to Municipal Entities

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Lawyers who represent municipal entities and other clients in connection with public finance transactions often provide advice relating to the costs and benefits, tax implications, and documentation necessary for various financing structures. In some financings, however, lawyers also can become involved in financial analysis that might alternatively be provided by a financial advisor. The Securities and Exchange Commission (SEC) may be looking to regulate lawyers who provide such financial advice.

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") amends the Securities Exchange Act of 1934 ("34 Act") to require municipal advisors to register with the SEC to provide advice to or solicit municipal entities and certain other persons. The SEC has proposed Rules 15Ba1-1 through 15Ba1-7 under the '34 Act to establish registration procedures and other requirements to effect these provisions of the Dodd-Frank Act.

Who Is Covered

A "municipal advisor" is defined in proposed Rule 15Ba1-1 to be a person (who is not a municipal entity or an employee of a municipal entity) (1) that provides advice to or on behalf of a municipal entity or obligated person about municipal financial products or the issuance of municipal securities, including advice on the structure, timing, terms, and other similar matters concerning such financial products or issues, or (2) that undertakes a solicitation of a municipal entity. Excluded from this definition are attorneys offering legal advice or providing services that are of a

traditional legal nature when the legal services are to a client of the attorney that is a municipal entity or obligated person.

The SEC release of these proposed rules states that

[g]enerally, the [SEC] interprets advice provided by a lawyer to its client with respect to the structure, timing, terms and other similar matters concerning municipal financial products or the issuance of municipal securities to be services of a traditional legal nature if such advice is provided within a lawyer-client relationship specifically related to such products in conjunction with related legal advice.

The release provides several examples:

[A]dvice 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, 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. However, advice which is primarily financial in nature, such as advice concerning the financial feasibility of a project or financing, advice estimating or comparing the relative cost to maturity of an issuance depending on various interest rate assumptions or advice recommending a particular structure as being financially advantageous under prevailing market conditions, would be primarily financial advice and not services of a traditional legal nature.

Under the proposed rule, a lawyer providing financial advice to a municipal client would not be considered to be providing legal advice and would be required to register with the SEC as a municipal advisor. In addition to individual lawyers, a law firm determined to be a “municipal advisory firm” (that is, a “municipal advisor”) would also be required to register.

How It Works

The proposed registration process involves filing detailed disclosure forms that include, among other things, personal information and employment history, information regarding prior felony or criminal convictions, and information regarding bankruptcy or similar proceedings within the last 10 years. Much of the information submitted would be made public. The SEC is considering whether to charge a filing fee. A municipal advisor required to register under the proposed rules will be deemed by the Commission to have a fiduciary duty to any entity for which the municipal advisor serves in such capacity, a duty attorneys already have to their clients under the Rules of Professional Conduct.

What are the penalties for failure to register? Generally, the SEC can impose civil penalties of up to \$500,000 and/or disgorgement of profits in administrative proceedings, and issue cease-and-desist orders against persons violating or about to violate securities laws, whether or not such persons are registered with the SEC. Further, the SEC can

enjoin violations of the securities laws by any person, which can elicit a contempt citation for future violations. Willful violations of the securities laws or rules promulgated there under are also punishable by imprisonment.

What other consequences may arise from providing financial advice to clients? The provision of law-related services along with legal services is addressed under Rule 5.7 of the ABA Model Rules of Professional Conduct (the “Model Rules”). Model Rule 5.7 provides that the lawyer would be subject to the Model Rules for the provision of law-related services. Thereby, the protections normally afforded as part of the client-lawyer relationship, such as protection of client confidences and obligations of a lawyer to maintain professional independence, extend to law-related services such as providing financial advice. This will be the case even if a different lawyer or staff person in a firm provides the law-related services, or the services are performed by a separate entity, unless the client is made aware that the law-related services are not legal services and client-lawyer protections do not apply, provided that the legal and law-related services are not so intertwined that they cannot be distinguished.

Remaining Questions

Although the Commission proposes to generally exclude attorneys from the registration requirements, attorneys could still be treated as municipal advisors if they engage in certain practices that fall outside the limited scope of the exclusion. Attorneys are often called on by clients to provide advice or evaluate the advice of others concerning all aspects of a particular transaction including the benefits of choosing one particular structure over another. For instance, would lawyer participation in a meeting on the alternative structures for or timing of a deal fall within the purview of the proposed rules? Further, attorneys often provide information to municipal entities and other participants in the municipal marketplace through participation in speaking engagements, client alerts, and newsletters. Would this form of uncompensated participation be considered “providing advice” under the proposed rules?

Changes Sought

The proposed definition of the term “municipal advisor” is broad. Without further modification and guidance, the proposed rules may have far-reaching and unintended negative implications for attorneys and the municipal entities they serve. The Municipal Securities Rulemaking Board and other groups have provided comments to the SEC encouraging it to clarify the proposed rule and enable bond counsel and other professionals to work with municipal entities without being deemed municipal advisors. This could be accomplished not only by limiting persons who would be considered municipal advisors, but also by defining “advice” in a way that permits activities such as those performed by lawyers representing clients in municipal finance transactions to occur without requiring those lawyers to be subject to registration as a municipal advisor. The SEC is expected to finalize these proposed rules around year-end.