



THE 43RD ANNUAL AGLF CONFERENCE

THE GRAND AMERICA HOTEL SALT LAKE CITY, UT
MAY 10-12, 2023



Municipal Advisor Rule

STAYING IN YOUR LANE

Nate Canova – Dorsey & Whitney LLP

Juliet Huang – Chapman and Cutler LLP

Maryann Santos – Capital One Public Funding, LLC





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Background

- 2007-2009
 - Great Recession
- 2010
 - Dodd-Frank Wall Street Reform and Consumer Protection Act
 - Section 15B of the Securities Exchange Act of 1934
 - “[i]t shall be unlawful for a municipal advisor to provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person, **unless the municipal advisor is registered [with the SEC].”** See 15 U.S.C. 78o-4(a)(1)(B)



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Background

- 2014
 - Securities and Exchange Commission (SEC) adopts final rules (the “MA Rule”):
 - to establish registration regime for MAs
 - to impose requirements on MAs
 - SEC Frequently Asked Questions (FAQs) published
- 2014-2015
 - Industry education
 - Approx. 650 registered MAs



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Background

- 2016–2017
 - SEC Enforcement Actions*
 - June 2016 – Keygent LLC
 - June 2016 – Dale Scott & Company, Inc.
 - June 2016 – School Services of California, Inc.
 - Updated FAQs (2017)

*** Does not include enforcements or settlements relating to MA disclosure and fiduciary duties**



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Background

- 2020–2023
 - SEC Enforcement Actions*
 - September 2020 – Funding the Gap, LLC
 - September 2021 – Choice Advisors LLC
 - September 2022 – Legacy Funding Services, LLC
 - September 2022 – Loop Capital Markets, LLC
 - < 450 registered MAs
 - Updated FAQs (2023)
 - MA Rule compliance is an SEC Enforcement Priority

*** Does not include enforcements or settlements relating to MA disclosure and fiduciary duties**



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Who is a municipal advisor?

- A person who solicits or advises municipal entities or obligated persons *with respect to municipal securities or municipal financial products*
- Solicitation:
 - Direct or indirect contact on behalf of another broker, dealer, MA, investment adviser, etc.
 - Does *not* include mailings, advertisements, solicitations on own behalf
- Advice:
 - No bright-line definition and construed broadly by SEC
 - Depends on all facts and circumstances
 - Is the information presented to a municipal entity or obligated person *sufficiently limited* so that it does not involve a recommendation that constitutes advice?
 - Includes provision of information that involves any recommendation, subjective assumptions, opinions or views related to structure, timing, terms, etc.
 - *Excludes* provision of general information that does not involve a recommendation
 - If reasonable person at municipal entity would view as a suggestion, it's a recommendation



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Who is not a municipal advisor?

- Those with a specific exemption or those not giving advice (i.e. stay within the limited general information exclusion).
- **IF THEY STAY IN THEIR LANE**, all of the following:
 - Public officials and employees
 - Any person providing advice to municipal entity already represented by MA
 - Underwriters
 - Registered investment advisers, commodity trading advisors and swap dealers
 - Accountants, attorneys, engineers and other professionals
 - Banks
 - Any person responding to RFP / RFQ (subsequent activities could require registration)
 - Any person that provides advice with respect to “investment strategies” unrelated to proceeds of municipal securities or municipal escrow investments
- **UNLESS YOU ARE REGISTERED WITH THE SEC AND MSRB, YOU MUST KNOW AND LIMIT YOUR ROLE.**



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Summary of MA Rule

- **778 pages of SEC guidance, rules and forms in six lines:**
 - Unless you have an exemption under the Rule
 - you cannot provide advice to municipal entities or obligated persons
 - with respect to municipal financial products or municipal securities
 - or solicit municipal entities or obligated persons
 - without having fiduciary duty and duty of fair dealing and
 - registering with the SEC and the MSRB



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Takeaway

- If you are a municipal advisor, register with the SEC and MSRB
- If not registered with the SEC and MSRB as an MA, do not give advice
- No opt out mechanism in MA Rule (even if municipal entity or obligated person does not think it is necessary to hire a financial advisor/fiduciary for deal)
- Strict liability – Anyone giving “advice” or a “recommendation” with respect to municipal securities or municipal financial products will be deemed an MA





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Limited Exclusion - General Information

- Factual in nature without subjective assumptions, opinions, or views
- Not particularized to a specific municipal entity or type of municipal entity
- Widely disseminated for use by the public, clients, or market participants
- Educational materials, if:
 - limited to instructional or explanatory information
 - does not include past or projected performance figures
 - does not include a recommendation
 - includes information about how to obtain additional information (if available)



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Limited Exclusion - General Information

- Examples:
 - Professional qualifications and prior experience
 - General market and financial information
 - Information regarding available investments
 - Factual information describing types of debt financing structures
 - Comparisons of general characteristics, risks, advantages and disadvantages of financing structures
 - Factual and educational information regarding government financing programs and incentives (*e.g.*, programs that promote energy conservations and renewable energy)
 - General market information



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Useful Exemptions – IRMA

- Anyone providing advice or municipal advisory activities if:
 - Municipal entity or obligated person is represented by a registered MA with respect to the same transaction and same aspects of the financing.
 - Registered MA is unrelated / unassociated (currently and historically (two-years)).
 - Municipal entity or obligated person represents in writing that they are
 - represented by a registered MA; and
 - will rely on the advice of the registered MA.



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Useful Exemptions – IRMA (cont.)

- Specific disclosures provided in writing, in time, in adequate detail, to:
 - municipal entity or obligated person; and
 - registered MA.
- Disclosure must provide:
 - We are not acting as a municipal advisor with respect to X transaction; and
 - We are not subject to the fiduciary duty imposed on municipal advisors.



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Useful Exemptions – Professionals

- Attorneys offering legal advice or providing services of a legal nature
 - Not covered if attorney represents himself or herself as a financial advisor or expert
- Engineers providing engineering advice
 - Not covered if providing more than engineering advice
 - Engineering advice *includes*:
 - Project schedules
 - Funding requirements
 - Feasibility studies, including projections of output, demand, revenues, etc.
 - Cash flow analyses
 - Engineering advice *does not include*:
 - Any advice with respect to structure, timing, terms or other matters relating to a financing
 - Revenue projections to support structure of a financing
 - Debt service coverage calculations



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Useful Exemptions – Professionals (cont.)

- Accountants providing audit or attest services
 - Not covered if providing anything other than audit or attest services
- Others (*e.g.*, vendors)
 - “[T]he provision of advice and recommendations by vendors (or any other person including, for example, lease financing companies affiliated with vendors) to municipal entity or obligated person clients regarding specific financing options for the purchase of products **could, depending on the facts and circumstances, be a municipal advisory activity.**”



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Useful Exemptions – Banks

- Any bank (or institutional buyer) acting in an arm's length and non-advisory relationship to the extent the bank provides advice with respect to:
 - Investments held in deposit, savings, CD or other deposit instruments
 - Extensions of credit, including letters of credit, direct loans, purchase of a security ***for its own account***
 - cannot give advice or make comparisons of bank's deal versus other securities
 - cannot give advice regarding structure, timing, and terms of securities the bank is not offering to purchase
 - Funds held in a sweep account
 - Investments made while acting in the capacity of a trustee



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Useful Exemption – RFP / RFQ

- Anyone providing a response in writing or orally if process is similar to this:
 - the municipal entity or obligated person, or a registered MA conducts the RFP or RFQ
 - a particular objective is identified in the RFP or RFQ
 - the RFP or RFQ is open for a specified period of time that is reasonable;
 - the RFP or RFQ involves a competitive process under the facts and circumstances (e.g., the RFP or RFQ is sent to at least three reasonably competitive market participants or the RFP or RFQ is publicly disseminated by posting it on the official website of the municipal entity or obligated person)
 - no direct or indirect compensation for advice provided as part of RFP or RFQ
 - no helping in preparation of RFP or RFQ



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Best Practices Education, Training, Policies and Procedures

- Regular education and training on MA rules.
- Policies and procedures relating to MA rules.
- Disclosures and disclaimers, clearly and conspicuously stated in written materials in all communications to municipal entity or obligated person, including emails:
 - Firm X is not recommending an action to the municipal entity or obligated person;
 - Firm X is not acting as an advisor to the municipal entity or obligated person and does not owe a fiduciary duty pursuant to Section 15B of the Exchange Act to the municipal entity or obligated person with respect to the information and material contained in this communication;
 - Firm X is acting for its own interests; and
 - The municipal entity or obligated person should discuss any information and material contained in this communication with any and all internal or external advisors and experts that the municipal entity or obligated person deems appropriate before acting on this information or material.



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Words of Caution

- SEC may *imply a recommendation*
 - Depends on all facts and circumstances
 - The more individually tailored to entity, its needs, objectives, etc., the more likely the SEC will imply a recommendation
 - “For example, if a person provided information regarding debt financing structuring options that was tailored to address the specific needs, objectives, or circumstances of a municipal entity or obligated person, such as information tailored to address particular fiscal needs or to incorporate particular revenue projections, the staff believes that **presenting these particularized options likely would suggest a preferred financing approach that likely would imply a recommendation.**”
- SEC can disregard disclosures and disclaimers. Overall course of conduct inconsistent with disclosures and disclaimers could be a problem.



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Words of Caution

- Don't forget the MA Rule covers municipal securities AND **municipal financial products**.
- **Only a registered MA can provide advice regarding municipal financial products** such as municipal derivatives, guaranteed investment contracts, and investment strategies, including any advice on plans or programs for investments of financing proceeds (e.g., swaps, security-based swaps, refunding escrows, project fund escrows).
- Terms and conditions regarding a municipal financial products are a permitted component of term sheets and communications regarding the terms on which a bank will engage in a proposed transaction, but you must refrain from providing any recommendation or expression of opinion on what is in the municipal entity or obligated person's best interest or what its best alternative or option may be regarding a municipal financial product.



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Conclusion

- Big picture:
 - Dodd-Frank and MA Rule set out to impose a fiduciary duty on every MA.
 - “[N]o municipal advisor may engage in any act, practice, or course of business which is not consistent with a municipal advisor’s fiduciary duty.”
 - Per SEC, fiduciary duties protect municipal entities, obligated persons, and municipal market participants.
 - Ask yourself: “Does client view my input as suggestions, recommendations or advice?”
 - Ask yourself: “Does the municipal entity or an obligated person think I represent their interests?”
 - If yes, you must be registered with the SEC and you must represent their interests.
 - If not, it should be clear to the municipal entity / obligated person **and the SEC** that you do not have their interests in mind.
 - **REMEMBER THE DEAL TABLE IS NOT ROUND. THE SEC WANTS YOU REGISTERED OR ACROSS THE TABLE.**



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Conclusion

- Federal securities laws are creeping into our direct purchase / leasing industry
 - The SEC has never held that a “whole” lease is a municipal security
 - Some lease structures and many bond / note structures could be securities
 - We compete against participants in the municipal securities markets
 - The SEC is very focused on enforcement efforts
 - Find an exclusion or exemption.
- Understand the limits of your exclusion or exemption.
- **STAY IN YOUR LANE.**



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THANK YOU
AND PLEASE

