



AMERICAN COUNCIL OF ENGINEERING COMPANIES

Dodd-Frank Wall Street Reform and Consumer Protection Act Municipal Advisor Registration Requirements

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act. Although the law primarily focuses on financial services reform, engineering firms should consult with their legal advisers to determine whether their business activities require registration as municipal advisors under Section 975 of the law. ACEC has written this white paper in order to give member firms a framework for such discussions with their legal advisers.

Municipal advisor definition

Under the law, a firm or individual whose business activities fall under the definition of a municipal advisor must register with the Securities and Exchange Commission (SEC) and the Municipal Securities Rulemaking Board (MSRB), and comply with associated regulations.

The statute defines municipal advisor as follows:

- (4) *the term ‘municipal advisor’—*
 - (A) *means a person (who is not a municipal entity or an employee of a municipal entity)that –*
 - (i) *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*
 - (ii) *undertakes a solicitation of a municipal entity;*
 - (B) *includes financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors, if such persons are described in any of clauses (i) through (iii) of subparagraph (A); and*
 - (C) *does not include a broker, dealer, or municipal securities dealer serving as an underwriter (as defined in section 2(a)(11) of the Securities Act of 1933)(15 U.S.C. 77b(a)(11)), any investment adviser registered under the Investment Advisers Act of 1940, or persons associated with such investment advisers who are providing investment advice, any commodity trading advisor registered under the Commodity Exchange Act or persons associated with a commodity trading advisor who are providing advice related to swaps, attorneys offering legal advice or providing services that*

are of a traditional legal nature, or engineers providing engineering advice;

The final phrase in the definition – that “municipal advisor” does not include “engineers providing engineering advice” – might seem to exempt engineering firms entirely from the registration requirement. However, such an interpretation would be incorrect. While many traditional engineering services are exempt from registration, some business activities may fit the SEC’s definition of municipal advisory services and trigger registration requirements. In its final rule implementing Section 975, effective July 1, 2014, the SEC defined the kinds of engineering advice that do not require registration ([link to SEC final rule](#)). The SEC elaborated on that definition in a frequently-asked questions document that it updated on May 19, 2014 ([link to SEC FAQ document](#)). Engineering firms and their legal advisers should review these documents and their business activities to determine whether they fall within the SEC’s definition of engineering advice.

Exclusions from registration

If an engineering firm’s business activities primarily fall within the SEC’s definition of engineering advice, the firm may be able to comply with the municipal advisor rule by relying on this and several other exclusions provided in the SEC’s final municipal advisor rule in connection with the registration requirement for municipal advisors. A brief description of each follows.

Engineering exclusion

As mentioned above, the statute states that “engineers providing engineering advice” do not have to register as municipal advisors. The SEC elaborated on the scope and application of this exclusion in its final rule and FAQs (Section 12). A key dividing line for engineers to keep in mind is that they cannot advise municipal entity clients on the structure, timing, or terms of municipal securities or other financial products without registering as municipal advisors.

In its proposed rule, the SEC initially defined engineering advice quite narrowly and determined that traditional services such as cash-flow modeling and feasibility services were financial advice. The agency received substantial feedback from ACEC and its member firms on the differences between engineering services and financial advice. The SEC clarified in the final rule that cash-flow analysis of the anticipated funding needs of an engineering project, or a funding schedule for such a project, are considered engineering advice. For example, as stated by the SEC in its final rule, “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 without engaging in municipal advisory activity.” However, it must be left to a registered municipal advisor to advise the municipal entity whether funding is sufficient to support the structure of any debt that may be issued in connection with the project.

In the final rule the SEC also clarified that feasibility studies related to the engineering aspects of a project are engineering advice. Firms should be cautious about feasibility studies for projects

funded by new municipal securities; in these cases, the municipal entity or a registered municipal advisor must structure the securities.

The SEC also outlined types of analysis related to the engineering aspects of a project that do not require registration as a municipal advisor. These include:

- Output capacity
- Utility project rates
- Projected market demand
- Projected revenues based on the engineering aspects of a project
- Projected operating and maintenance expenses
- Projected in-service date

In its FAQ document, the SEC states that for projects with existing debt, and no new debt or refinancing anticipated, engineers can provide a compliance report on the state of the physical plant, discuss capital improvements, and give advice on complying with covenants in existing bond documents. This clarification came in response to a question raised by ACEC and its members.

Finally, the FAQ document states that engineers can assist municipal entity clients with loan applications for state revolving funds without needing to register as municipal advisors.

General information exclusion

The final rule identifies circumstances in which the information being provided to a municipal client is general in nature and does not constitute recommendations on financing. General information of this kind does not require registration as a municipal advisor.

In order to rely on this exclusion, the information provided must be factual information that does not include opinions or recommendations about financing options. In Section 1.1 of its FAQ document, the SEC gives several examples of this kind of factual information, including a person's professional qualifications or factual information regarding various government financing programs.

The SEC suggests that disclaimers stating that a firm is not acting as a municipal advisor, and is not providing financial advice or recommendations, can be helpful. However, the firm's actions must align with such disclaimers. For example, in its publication titled "Putting Into Practice: 2016 Compliance Advisory for Municipal Advisors," ([link to compliance advisory](#)) the MSRB cautions that "[p]roviding a specific suggestion or recommendation to a municipal entity to either act or refrain from acting with regard to municipal financial products or the issuance of municipal securities and providing a disclaimer that such suggestion or recommendation is not advice would violate MSRB Rule G-17, Conduct of Municipal Securities and Municipal Advisory Activities, which requires municipal advisors to "deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice." If a firm provides financing recommendations, that firm will be required to register as a municipal advisor, disclaimers notwithstanding. Newly revised 2015 contract documents available through the Engineers Joint

Contract Documents Committee ([EJCDC website](#)) include disclaimers that may be useful to firms that are relying on the general information exclusion.

Response to RFP/RFQ exclusion

The SEC also determined that responding to a request for proposals or request for qualifications (RFP/RFQ) does not require registration as a municipal advisor. In order to fall under this exclusion, the RFP/RFQ must be conducted by the municipal entity or its representative. The process must be competitive, although it does not need to be part of a formal procurement process.

There should be a particular objective for the RFP/RFQ, and it cannot be a backdoor way for a municipal entity to solicit advice without the firm registering as a municipal advisor. In addition, the RFP/RFQ should not be open indefinitely.

The exclusion also applies to “mini-RFPs” with the same parameters, as long as at least three members of a pre-screened pool are sent the mini-RFP.

Some municipal clients are asking that RFP/RFQ responses become part of engineering agreements. Consequently, firms should be careful not to provide financial advice in their RFP/RFQ responses, in case they are eventually included in a contract for engineering work.

Independent registered municipal advisor exclusion

The SEC’s final rule includes another exclusion that may be useful to engineering firms. The rule states that if a municipal entity has separately hired what it calls an “independent registered municipal advisor” (IRMA) to advise it on matters associated with financing of a project, then other professionals – such as engineers – who are working for the municipal entity on the same project may not have to register.

The IRMA must be registered with the SEC and the MSRB, and will have a fiduciary duty to the municipal entity client. The IRMA may be hired by the municipal entity either for a specific project or on general retainer; however, in either case, the IRMA must be providing advice to the municipal entity with respects to the same aspects of the municipal financial product or issuance of municipal securities as the engineer.

One key requirement for engineering firms that intend to rely on this exclusion is that the IRMA and the engineering firm cannot have been associated with each other in the past two years. Under the rule, association applies at both the firm level and the individual level. At the firm level, this means that the IRMA is not – and for the past two years was not – controlling, controlled by, or under common control with the engineering firm. Control is defined under the final rule as “the power, directly or indirectly, to direct the management or policies of a person, whether through ownership of securities, by contract, or otherwise.”

At the employee level, the question of association applies to partners, officers, directors, and employees engaged in the management, direction, supervision, or performance of municipal

advisory services. If an employee of the engineering firm served in this capacity for an IRMA (or vice versa) in the past two years, then the engineering firm and the IRMA are “associated” and the exclusion does not apply.

In addition, there must be written representations between the engineering firm and the municipal entity stating that the municipal entity has hired an IRMA and that the engineering firm is not a registered municipal advisor. They must also declare that there is no association between the IRMA and the engineering firm, as defined above. The engineering firm must provide a copy of its written representation that it is not a municipal advisor to the IRMA.

Engineering firms may encounter RFPs in which they would be hired to act as the prime contractor for a range of services, some of which they may subcontract to other firms. During a meeting with ACEC representatives and staff, the SEC indicated a clear preference that municipal entities procure municipal advisory services separately, rather than have the prime contractor subcontract municipal advisory services to the IRMA.

Registration requirements

Some engineering firms may find that certain business activities fall outside of the SEC’s definition of engineering advice and the exclusions in the final rule, and will need to register as municipal advisors with both the SEC and the MSRB. Registered firms must also comply with a series of requirements and regulations.

Registration with the SEC

Registered municipal advisors must complete and submit the [SEC municipal advisor registration form](#). The form must be updated on an annual basis, and amended whenever substantial changes occur.

Registration with the MSRB

Municipal advisors must complete and submit the [MSRB registration form](#). The MSRB also charges fees to registered municipal advisors. Registered firms must pay an initial fee of \$100 and an annual fee of \$500. On their registration forms, firms will identify the individuals who perform municipal advisory services and their supervisors, and must pay an annual fee of \$300 per municipal advisor professional.

MSRB regulations

The MSRB has been charged with writing regulations that govern the conduct of municipal advisors. The following rules are key parts of the regulatory scheme for municipal advisors. The agency also recently released a [Compliance Advisory for Municipal Advisors](#) that may be useful to registered municipal advisors.

Fiduciary duty

The Dodd-Frank statute specifies that registered municipal advisors will have a fiduciary duty to their municipal entity clients. [MSRB Rule G-42](#), which takes effect in June 2016, discusses in detail the fiduciary responsibilities of municipal advisors.

ACEC commented several times to the MSRB that there is a potential conflict between the engineer's ethical duty to public safety and welfare, and a fiduciary duty to a client. The MSRB declined to directly address this conflict and simply suggested that engineers may want to limit their business activities in order to stay outside of registration as a municipal advisor.

Engineering firms that register as municipal advisors should confer with their insurance providers to determine whether their existing liability insurance will cover fiduciary responsibilities.

Professional qualifications exam

[MSRB Rule G-3](#) took effect on April 27, 2015, and implements the qualifying exam for municipal advisors. The rule establishes two categories of municipal advisor professionals: representatives and principals. As noted above, municipal advisor firms must designate on their registration forms those professionals who provide municipal advisory services (representatives) and at least one supervisor (principal). All representatives and principals must take and pass the Series 50 exam.

From January 15, 2016 to February 16, 2016, the MSRB will administer a pilot test. Anyone who takes and passes the pilot test will be qualified as a municipal advisor and not required to take the permanent exam. Once the permanent exam is implemented in 2016, the MSRB will provide a one-year grace period for representatives and principals to take and pass the exam. Additional information on the professional qualifications exam can be found [here](#).

Pay-to-play

The MSRB has finalized a rule that will restrict political contributions from registered municipal advisors and their employees. A similar rule has been in place for securities dealers since 1994, and has survived court challenges on constitutional grounds because of the way the rule is structured.

Under the [amendments to MSRB Rule G-37](#), most political contributions to state and local candidates who can influence the selection of municipal advisors for their municipality will trigger a two-year period when the firm cannot provide municipal advisory services for that municipality. There is a *de minimis* exception of \$250 per election in contributions to someone for whom a municipal advisor professional can vote.

The restrictions on political contributions will apply to registered municipal advisor firms, their political action committees (PACs), employees who provide municipal advisory services, their supervisors, and senior leadership. In addition, there will be a two-year lookback period for new

hires, as well as a six-month lookback period for supervisors. Firms should put in place procedures to educate employees and monitor any political contributions.

Registered municipal advisor firms may want to be cautious about making contributions to or allowing their employees to make contributions to PACs for trade associations that contribute to candidates for state and local offices. The rule includes an anti-circumvention provision that prohibits municipal advisors from using other persons or means to make political contributions that would trigger the two-year cooling-off period. This provision could apply to association PACs if the municipal advisor is determined to have control over contributions made by the PAC.

Gifts

The MSRB received approval from the SEC to implement [amended MSRB Rule G-20](#), which places limits on the size and types of gifts that municipal advisors can give to municipal entity clients. There are related record-keeping requirements with which registered municipal advisors must comply. This rule will take effect on May 6, 2016.

Supervision

The MSRB also requires municipal advisors to have a plan in place to supervise its municipal advisory activities. The purpose of [MSRB Rule G-44](#) is to ensure compliance with applicable securities laws and regulations. This rule has been in effect since April 23, 2015; an [amended version](#) will take effect on April 23, 2016.

Conclusion

ACEC member firms that work with municipal government clients are encouraged to discuss the information presented in this white paper with their legal advisors. The white paper will be updated as the regulators provide additional information.

Copyright © 2015 by the American Council of Engineering Companies (ACEC). All rights reserved. No part of this document may be reproduced, stored in any form of retrieval system, or transmitted in any form or by any electronic, mechanical, photographic, or other means without the prior written permission of ACEC.

The material in this publication is for informational purposes only and is not to be regarded as a substitute for technical, legal, or other professional advice. While ACEC has made every effort to present accurate information consistent with standards of best practice in this publication, we recognize that views and standards of practice may change over time. Therefore, the reader is encouraged to review any information contained in this publication carefully and evaluate its applicability in light of particular situations, as well as to confer with an appropriate professional consultant or attorney. ACEC and its officers, directors, agents, volunteers, and employees are not responsible for, and expressly disclaim, liability for any and all losses, damages, claims, and causes of action of any sort, whether direct, indirect or consequential, arising out of or resulting from any use, reference to, or reliance on information contained in this publication.