Last Updated on May 19, 2014

Registration of Municipal Advisors
Frequently Asked Questions
Office of Municipal Securities

In responding to these Frequently Asked Questions ("FAQs"), the Office of Municipal Securities ("staff") is providing general interpretive guidance on certain aspects of the final rules for the registration of municipal advisors.[1] Responses to these FAQs were prepared by and represent the views of the staff. These FAQs are not rules, regulations, or statements of the Commission. The Commission has neither approved nor disapproved these FAQs or the interpretive answers to these FAQs.

The staff may update these questions and answers periodically. Any updates will include appropriate references to dates of new or modified questions and answers.

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Background

Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act amended Section 15B of the Securities Exchange Act of 1934 ("Exchange Act") to add a new requirement that "municipal advisors" register with the Securities and Exchange Commission ("Commission" or "SEC"), effective October 1, 2010.

The Commission adopted, and subsequently extended until December 31, 2014, an interim final temporary rule to establish a temporary means for municipal advisors to satisfy the registration requirement ("Temporary Registration Rule").[2] On September 20, 2013, the Commission adopted final rules for municipal advisor registration ("Final Rules").[3] Among other things, the

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[1] The staff initially issued these FAQs on January 10, 2014. *See* Press Release, Interpretive Guidance on Municipal Advisor Registration Rules (January 10, 2014), available at http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540602870. On January 13, 2014, the Commission temporarily stayed the final rules for municipal advisor registration until July 1, 2014. *See* Registration of Municipal Advisors; Temporary Stay of Final Rule, Release No. 34-71288 (January 13, 2014), 79 FR 2777 (January 16, 2014), available at http://www.sec.gov/rules/final/2014/34-71288.pdf. On January 16, 2014, the staff modified certain references to the effective date in the Background and in the Answer to Question 9.2 to reflect the temporary stay of the final rules for municipal advisor registration until July 1, 2014. On May 19, 2014, the staff issued additional FAQs.

[2] *See* Extension of Temporary Registration of Municipal Advisors, Release No. 34-70468 (September 23, 2013), 78 FR 59814 (September 30, 2013), available at http://www.sec.gov/rules/interim/2013/34-70468.pdf.

[3] *See* Registration of Municipal Advisors, Release No. 34-70462 (September 20, 2013), 78 FR 67467 (November 12, 2013), available at http://www.sec.gov/rules/final/2013/34-70462.pdf.

Final Rules interpret the statutory definition of the term "municipal advisor." In addition, the Final Rules interpret the statutory exclusions from that definition and provide certain additional regulatory exemptions. In the Final Rules and the adopting release accompanying the Final Rules ("Adopting Release"), the Commission limited the scope of these exclusions and exemptions to certain identified activities as opposed to focusing on the status of the particular market participants.

The Final Rules were effective on January 13, 2014; however, on January 13, 2014, the Commission temporarily stayed the Final Rules until July 1, 2014 and made conforming, non-substantive amendments to Rule 15Ba1-8 regarding recordkeeping requirements to conform the dates referenced in certain provisions of that rule to the July 1, 2014 date ("Temporary Stay Release").[4] This stay of the Final Rules means that persons are not required to comply with the Final Rules until July 1, 2014. In the Adopting Release, the Commission provided a phased-in compliance period, beginning on July 1, 2014 and ending on October 31, 2014, for municipal advisors to comply with the requirement to register as municipal advisors using the final registration forms under the Final Rules.[5] The temporary stay of the Final Rules does not affect this phased-in compliance period.[6]

Responses to Frequently Asked Questions

SECTION 1: THE ADVICE STANDARD

Question 1.1: The General Information Exclusion from Advice versus Recommendations: What are some relevant considerations regarding the content, context, and manner in which a person may provide information (either in writing or in oral communications) to a municipal entity or obligated person without giving "advice" that would require registration as a municipal advisor?

Answer: *Overview of Advice Standard*. Under the Commission's interpretation in the Adopting Release of the term "advice" solely for purposes of the municipal advisor definition,[7] the term "advice" is not susceptible to a bright-line definition and can be construed broadly, and the determination of whether a person provides advice to or on behalf of a municipal entity or an obligated person regarding municipal financial products or the issuance of municipal securities depends on all of the relevant facts and circumstances. Further, in the Adopting Release, the Commission stated that "for purposes of the municipal advisor definition, advice includes, without limitation, a '*recommendation*' that is particularized to the specific needs, objectives, or circumstances of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues, based on all the

[4] *See* Registration of Municipal Advisors; Temporary Stay of Final Rule, Release No. 34-71288 (January 13, 2014), 79 FR 2777 (January 16, 2014), available at http://www.sec.gov/rules/final/2014/34-71288.pdf.
[5] *See* Adopting Release, 78 FR at 67581-67583.
[6] *See* Temporary Stay Release, 79 FR at 2777.
[7] Adopting Release, 78 FR at 67479.

facts and circumstances (emphasis added)."[8] Conversely, in the Final Rules, the Commission adopted new Exchange Act Rule 15Ba1-1(d)(1)(ii) which expressly provides that "advice" excludes, among other things, the provision of general information that does not involve a recommendation regarding municipal financial products or the issuance of municipal securities ("general information exclusion"). In the Adopting Release, the Commission provided certain examples of general information, including information of a factual nature without subjective assumptions, opinions, or views, and information that is not particularized to a specific municipal entity or type of municipal entity.[9]

The focus of the advice standard in the Final Rules is whether or not, under all the relevant facts and circumstances, the information presented to a municipal entity or obligated person is sufficiently limited so that it does not involve a recommendation that constitutes advice. In other words, the determination of whether a person provides advice under the advice standard for municipal advisor registration purposes generally involves whether the person makes a recommendation. In the Adopting Release, the Commission stated "for purposes of the municipal advisor definition, the Commission believes that the determination of whether a recommendation has been made is an objective rather than a subjective inquiry. An important factor in this inquiry is whether, considering its content, context and manner of presentation, the information communicated to the municipal entity or obligated person reasonably would be viewed as a suggestion that the municipal entity or obligated person take action or refrain from taking action regarding municipal financial products or the issuance of municipal securities."[10]

Examples of the General Information Exclusion from Advice. The staff believes that a person could rely on the general information exclusion from advice under the Final Rules when providing a municipal entity or obligated person with information that does not involve a recommendation, such as factual information that does not contain subjective assumptions, opinions, or views. Examples of this type of general information include: (a) information regarding a person's professional qualifications and prior experience (e.g., lists, descriptions, terms, or other information regarding prior experience on completed transactions involving municipal financial products or issuances of municipal securities); (b) general market and financial information (e.g., market statistics regarding issuance activity for municipal securities or current market interest rates or index rates for different types of bonds or categories of credits); (c) information regarding a financial institution's currently-available investments (e.g., the terms, maturities, and interest rates at which the financial institution offers these investments) or price quotes for investments available for purchase or sale in the market that meet criteria specified by a municipal entity or obligated person; (d) factual information describing various types of debt financing structures (e.g., fixed rate debt, variable rate debt, general obligation debt, debt secured by various types of revenues, or insured debt), including a comparison of the general characteristics, risks, advantages, and disadvantages of these debt financing structures; and (e) factual and educational information regarding various government financing programs

[8] Adopting Release, 78 FR at 67480.
[9] Adopting Release, 78 FR at 67479.
[10] Adopting Release, 78 FR at 67480.

and incentives (e.g., programs that promote energy conservation and the use of renewable energy).

In addition, the staff believes that information that is particularized to the municipal entity or obligated person in limited respects could be consistent with the general information exclusion from advice, provided that the information is factual in nature and does not contain or express subjective assumptions, opinions, or views, or constitute a recommendation. For example, the staff believes that a person could provide general market information regarding a municipal entity's particular outstanding bonds, such as current market prices and yields, without this information constituting a recommendation.

Potential Implied Recommendations. The staff further believes, however, that information that is particularized in more than the limited respects described above in the immediately preceding paragraph to a municipal entity or obligated person potentially could imply a recommendation that could constitute advice under the Final Rules, depending on all of the relevant facts and circumstances. The more individually tailored the information is to a specific municipal entity or obligated person or group of municipal entities or obligated persons that share similar characteristics, the more likely the information will be considered to be 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.

Effect of Disclosures and Disclaimers on Advice Analysis. The staff believes that disclosures and disclaimers regarding a person's intentions in providing information to a municipal entity or obligated person are factors that bear upon whether or not the person's communications would be a recommendation that constitutes advice under the Final Rules. The staff believes that the following disclosures and disclaimers, clearly and conspicuously stated, in written materials that accompany communications to a municipal entity or obligated person, would be factors that weigh against treatment of information as a recommendation that constitutes advice: (a) this person is not recommending an action to the municipal entity or obligated person; (b) this person 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; (c) this person is acting for its own interests; and (d) 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.

Effect of Overall Course of Conduct on Advice Analysis. The staff further believes that, while the presentation of information with the disclosures and disclaimers described above are factors that suggest that a person may not be making a recommendation that would constitute advice under the Final Rules, such disclosures and disclaimers are not controlling and must be considered in the context of a person's overall course of conduct, taking into account all of the

relevant facts and circumstances. Thus, any actions or communications that are inconsistent with these disclosures and disclaimers or inconsistent with the arm's length nature of a non-advisory business relationship between a person and a municipal entity or obligated person could suggest that the person is making a recommendation and acting as a municipal advisor, which, absent an available exemption, would require registration with the Commission as a municipal advisor. [January 10, 2014]

Question 1.2: Treatment of Business Promotional Materials Provided By Potential Underwriters Under the General Information Exclusion from Advice: What are some relevant considerations regarding the content, context, and manner in which a broker-dealer may provide business promotional materials (either in writing or in oral communications) to a municipal entity or obligated person for which the broker-dealer seeks to serve as underwriter on a future issuance of municipal securities under the general information exclusion from advice?

Answer: *Introduction and Overview*. The Final Rules permit a broker-dealer to communicate with a municipal entity or obligated person as part of an effort to obtain business and such communication could include business promotional materials that present factual information that does not involve a recommendation. In relevant part, the Adopting Release includes the following statement:

> The Commission notes that not all communications with a municipal entity or obligated person constitute municipal advisory activities. If the person has identified himself or herself as seeking to obtain business, such as serving as an underwriter on future transactions, whether such communications and analyses constitute municipal advisory activities or the provision of general information (as discussed further above) will depend on the specific facts and circumstances. For example, pursuant to the Commission's interpretation of the treatment of the provision of general information, the Commission believes that a broker-dealer who provides information to a municipal entity regarding its underwriting capabilities and experience or general market or financial information that might indicate favorable conditions to issue or refinance debt likely would not be treated as engaging in municipal advisory activity.[11]

Absent an available exclusion or exemption, such as the exclusion for a registered broker-dealer serving as underwriter on a particular issuance of municipal securities after engagement in such capacity, a broker-dealer cannot provide advice on an issuance of municipal securities without registering with the Commission as a municipal advisor.

Examples of the General Information Exclusion from Advice in the Context of Business Promotional Materials from Potential Underwriters. The staff believes that a potential underwriter could rely on the general information exclusion from advice under the Final Rules when providing a municipal entity or obligated person with information that does not involve a recommendation, such as business promotional materials that are factual in nature and do not contain subjective assumptions, opinions, or views. In addition to those examples set forth in

[11] Adopting Release, 78 FR at 67514.

"Examples of the General Information Exclusion from Advice" in the Answer to Question 1.1, examples of this type of general information include: (a) information regarding a broker-dealer's underwriting capabilities and experience (e.g., lists, descriptions, terms, or offering materials of municipal securities transactions previously underwritten by the broker-dealer); (b) general market or financial information that might indicate favorable conditions to issue debt or refinance outstanding debt; (c) certain educational materials[12] (e.g., information describing the requirements of state laws that authorize municipal entities to issue certain types of bonds to finance capital projects); and (d) factual information regarding the different types of debt financing structures available to such municipal entity to finance capital projects under applicable state law.

In addition, the staff believes that business promotional materials could include the following types of information without constituting a recommendation: (a) an indication of hypothetical new issue pricing range that takes into consideration current market conditions and certain factual information particularized to an issuer, such as the issuer's credit rating, geographic location, and market sector; (b) information regarding an issuer's outstanding municipal securities, such as current market prices and yields; (c) information regarding a range of hypothetical interest rates or debt service requirements for a new money debt with various maturities (e.g., a level debt service payment schedule for a fixed rate debt with a 20-year or 30-year maturity) based on the facts described in clause (a) of this paragraph; (d) public information regarding the terms and a range of interest rates for the special U.S. Treasury Securities of the State and Local Government Series ("SLGs") that are available for direct purchase from the U.S. Treasury Department for use as refunding escrow investments; and (e) mathematical calculations of a municipal issuer's hypothetical potential interest cost savings if it were to issue refunding bonds to refinance its outstanding municipal securities at a range of estimated current market rates, based on the assumption that the refunding bonds have the same debt structure (i.e., principal and interest is payable at the same times, in the same or proportionate amounts, and with the same final maturity date) as the issuer's outstanding bonds to be refunded and further based on the facts described in clause (a) of this paragraph.

For example, if a municipal entity had outstanding fixed rate municipal securities with a debt structure involving substantially level annual debt service payments and a 30-year final maturity date, the staff believes that the business promotional materials could include mathematical calculations showing hypothetical potential interest cost savings if the municipal issuer were to refund those municipal securities at a range of estimated current market rates, based on the assumption that the refunding bonds had the same debt structure involving substantially level annual debt service payments and the same final maturity date as the outstanding bonds without constituting a recommendation.

Potential Implied Recommendations in the Context of Business Promotional Materials from Potential Underwriters. The staff further believes that the more individually tailored the information is to a specific municipal entity or obligated person or group of municipal entities or obligated persons that share similar characteristics, the more likely the information will be

[12] *See* Adopting Release, 78 FR at 67480.

considered to be a recommendation. For example, if a broker-dealer provided debt structuring options that were tailored to address the specific needs, objectives, or circumstances of a municipal issuer, such as tailored sizing, maturity, or security structures to address particular needs, circumstances, or objectives of the municipal issuer within the issuer's overall debt structure, the staff believes that presenting these particularized debt structuring options likely would suggest a preferred financing approach that likely would imply a recommendation.

Similarly, in the case of a potential refunding or refinancing, while the provision of information regarding estimates of hypothetical potential interest cost savings for a refunding of outstanding debt at a range of estimated current market interest rates within the issuer's existing debt service structure and final maturity date generally represents a way to convey factual information about current market conditions that could meet the general information exclusion from advice, the staff believes that presentations of more particularized refunding options that involve restructuring the issuer's outstanding debt likely would imply a recommendation. For example, if a municipal issuer had outstanding fixed rate municipal securities involving a debt structure with level annual payment debt service payments and a 30-year final maturity date, the staff believes that if business promotional materials included mathematical calculations showing hypothetical potential interest cost savings if the municipal issuer were to issue refunding bonds to refinance those outstanding municipal securities using a different debt structure that had features tailored or particularized for the municipal issuer that went beyond the existing structure of the outstanding bonds to be refunded (such as a structure involving nonlevel annual debt service payments, non-interest paying capital appreciation bonds, or any extension of the final maturity date beyond that of the outstanding bonds to be refunded), those business promotional materials likely would imply a recommendation.

In addition, if business promotional materials include particularized or subjective views regarding interest rates that a broker-dealer expects that it can achieve for an underwriting of municipal securities for a municipal entity or obligated person (as contrasted with a range of hypothetical interest rates that takes into consideration current market conditions and factual information particular to the issuer), that particularized information likely would imply a recommendation.

Effect of Disclosures and Disclaimers on Advice Analysis in the Context of Business Promotional Materials from Potential Underwriters. In the context of broker-dealers seeking to serve as underwriters, the staff believes that the disclosures and disclaimers referenced in the Answer to Question 1.1 of these FAQs, together with the following additional disclosures and disclaimers, would be factors that weigh against treatment of business promotional materials as a recommendation that constitutes advice: (a) a statement that the broker-dealer seeks to serve as an underwriter on a future transaction and not as a financial advisor or municipal advisor consistent with the MSRB Rule G-23 interpretive guidance; [13] (b) a description of the arm's

[13] *See* Answer to Question 5.1 herein discussing how a broker-dealer's unilateral action to identify itself in writing as an underwriter and not as a financial advisor under MSRB Rule G-23 for purposes of that conflicts rule is insufficient to establish that the broker-dealer has been engaged to serve as underwriter on a particular issuance of municipal securities and thereby does not meet the underwriter exclusion.

length nature of the underwriter's role consistent with the disclosure required by MSRB Rule G-17 in this regard; and (c) a statement that the information provided is for discussion purposes only in anticipation of being engaged to serve as underwriter.

Effect of Overall Course of Conduct in the Context of Business Promotional Materials from Potential Underwriters. The staff further believes that, while the presentation of business promotional materials with the disclosures and disclaimers described above are factors that suggest that a broker-dealer may not be making a recommendation that would constitute advice under the Final Rules, such disclosures and disclaimers are not controlling and must be considered in the context of the broker-dealer's overall course of conduct, taking into account all of the relevant facts and circumstances. Notably, a broker-dealer's identification of itself in writing as an underwriter and not as a financial advisor under MSRB Rule G-23 is only a factor in this analysis and the broker-dealer's overall course of conduct, including written or oral communications made before and after the MSRB Rule G-23 disclosures, will inform the analysis as to whether the broker-dealer made a recommendation that constitutes advice under the Final Rules. Thus, any actions or communications that are inconsistent with these disclosures and disclaimers or that are inconsistent with the arm's length nature of the relationship between a broker-dealer seeking to obtain underwriting business and a municipal entity or obligated person could suggest that the broker-dealer is making a recommendation and acting as a municipal advisor, which, absent an available exception, would require registration with the Commission as a municipal advisor. [January 10, 2014]

Question 1.3: Indirect Advice: A municipal entity has engaged a registered municipal advisor to advise it on municipal financial products or a planned issuance of municipal securities. If a market participant provides advice to the municipal entity's registered municipal advisor regarding municipal financial products or such issuance of municipal securities without satisfying the independent registered municipal advisor exemption, would such market participant be required to register as a municipal advisor?

Answer: Yes, in the staff's view, absent an available exclusion or exemption, a market participant who provides advice directly to a municipal entity or obligated person or indirectly to a municipal entity or obligated person through a third-party professional engaged by such municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities would be required to register with the Commission as a municipal advisor. In relevant part, the Exchange Act and the Final Rules define a "municipal advisor" and "municipal advisory activities," respectively, to cover a person 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 . . . ."[14] These definitions cover both direct advice to a municipal entity or obligated person and indirect advice "on behalf of" a municipal entity or obligated person that is given through communications with third parties. Thus, for example, if a person provides advice regarding municipal financial products or the issuance of municipal securities to a third-party that is a registered municipal advisor to a municipal entity or obligated person without satisfying the independent registered municipal advisor exemption (which would

[14] *See* 15 U.S.C. 78o-4(e)(4) and Exchange Act Rule 15Ba1-1(e) (emphasis added).

permit provision of such advice without requiring municipal advisor registration) or another available exclusion or exemption, the staff believes that the person would be providing indirect advice "on behalf of" such municipal entity or obligated person through that third-party and would be required to register as a municipal advisor. [May 19, 2014]

Question 1.4: Terms for the Purchase of Securities in a Principal Capacity: An institutional buyer, such as a mutual fund, seeks to purchase municipal securities for its own account from a municipal entity. If this institutional buyer provides the municipal entity with the structure, timing, and terms under which the institutional buyer would purchase securities for its own account, would the institutional buyer be engaged in municipal advisory activity under the Final Rules?

Answer: If an institutional buyer only provides information regarding the terms under which the institutional buyer would purchase securities for its own account and does not provide advice to the municipal entity with respect to the structure, timing, terms, or other similar matters regarding an issuance of municipal securities to be offered to other investors, the staff believes that this institutional buyer would not be engaged in municipal advisory activity under the Final Rules. The Answer to Question 1.1 of these FAQs regarding the advice standard generally applies and is relevant to this analysis. In the staff's view, the information regarding the terms for this institutional purchase is in the nature of factual information that would meet the general information exclusion to advice under Exchange Act Rule 15Ba1-1(d)(1)(ii). Further, in the scenario described above, the institutional buyer is acting as a principal to purchase securities for its own account, which is consistent with the arm's length nature of a non-advisory business relationship. Absent other facts and circumstances evidencing advice, the staff believes this transaction would not constitute advice to a municipal entity with respect to an issuance of municipal securities. The staff notes that this advice analysis is applicable to a bank's purchase of municipal securities for its own account and that the bank exemption also expressly addresses this type of transaction in the particular context of banks, as discussed further in the Answer to Question 13.2 of these FAQs. [May 19, 2014]

SECTION 2: REQUEST FOR PROPOSALS / REQUEST FOR QUALIFICATIONS EXEMPTION

Question 2.1: Parameters and Formality of RFP/RFQ Process: Describe a request for proposals ("RFP") or request for qualifications ("RFQ") process that is consistent with the exemption to the municipal advisor definition for any person who provides a written or oral response to an RFP or RFQ? Does that process need to follow a municipal entity's formal procurement process?

Answer: The RFP exemption represents a way for municipal entities and obligated persons to solicit ideas, including advice, from market participants regarding municipal financial products or the issuance of municipal securities in a competitive process. In the staff's view, an RFP or RFQ process with the following parameters generally would be consistent with the requirements of the RFP exemption: (a) the municipal entity or obligated person, or a registered municipal advisor acting on their behalf, conducts the RFP or RFQ; (b) a particular objective is identified in

the RFP or RFQ (e.g., ideas on how to structure a particular issuance of municipal securities to finance an identified capital project or program); (c) the RFP or RFQ is open for a specified period of time that is reasonable under the facts and circumstances and that is not indefinite (e.g., absent particular complexity or exigent or other circumstances that might support a longer or shorter specific period of time, an open period of up to six months generally is considered reasonable); and (d) 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). These parameters represent an illustrative example for an RFP or RFQ process to be consistent with the RFP exemption.

In the staff's view, an RFP or RFQ does not need to be part of a municipal entity's formal procurement process to be consistent with the requirements of the RFP exemption. [January 10, 2014]

Question 2.2: Use of RFP Exemption to Solicit Ideas from Pre-Screened or Pre-Qualified Market Participants: A municipal entity or obligated person is interested in soliciting ideas on how to structure a financing involving the issuance of municipal securities or the use of municipal financial products from market participants that the municipal entity has pre-screened or pre-qualified. What are some relevant considerations regarding the parameters of the RFP exemption in this context?

Answer: The RFP exemption also covers responses to so-called "mini-RFPs" that may be distributed in a targeted way to market participants that the municipal entity or obligated person has pre-screened or pre-qualified. While it is permissible for a mini-RFP to be distributed in a more discrete and targeted manner than a general RFP or RFQ, the staff believes that, to be consistent with the RFP exemption, the process should still follow the types of parameters similar to those described in the Answer to Question 2.1 above, but with slight modifications that take into consideration that the recipients of the mini-RFP will already have been pre-screened and pre-qualified in a process administered by the related municipal entity or obligated person, or a municipal advisor acting on their behalf.

Accordingly, in the staff's view, a mini-RFP process with the following parameters generally would be consistent with the requirements of the RFP exemption: (a) a municipal entity or obligated person, or a registered municipal advisor acting on their behalf, conducts the mini-RFP; (b) one or more particular questions is identified in the mini-RFP; (c) the mini-RFP is open for a specified period of time that is reasonable under the facts and circumstances and that is not indefinite (e.g., absent particular complexity or exigent or other circumstances that might support a longer or shorter specific period of time, an open period of up to three months generally is considered reasonable); and (d) the mini-RFP is sent to either the entire pool of pre-screened or pre-qualified market participants or at least three members of such pool. [January 10, 2014]

SECTION 3: INDEPENDENT REGISTERED MUNICIPAL ADVISOR EXEMPTION

Question 3.1: Use of Independent Registered Municipal Advisor Exemption: How does the independent municipal advisor exemption operate to allow municipal entities and obligated persons to obtain advice from market participants?

Answer: The Final Rules include a new exemption for persons providing advice in circumstances in which a municipal entity or obligated person has an independent registered municipal advisor with respect to the same aspects of a municipal financial product or an issuance of municipal securities. Set forth below is a summary of the requirements for this exemption:

- *First*, the "independent registered municipal advisor" must be a person that is registered as a municipal advisor pursuant to the Exchange Act and that is not, and within at least the past two years was not, associated with the person seeking to use this exemption.

- *Second*, the person seeking to use this exemption must receive a written representation from the municipal entity or obligated person that the municipal entity or obligated person is represented by, and will rely on the advice of, the independent registered municipal advisor. The person seeking to use this exemption must have a reasonable basis for relying on this representation.

- *Third*, the person seeking to use this exemption must provide written disclosures to the municipal entity or obligated person, with a copy to the independent registered municipal advisor, stating that the person is not a municipal advisor and is not subject to the fiduciary duty to municipal entities that the Exchange Act imposes on municipal advisors. Furthermore, this disclosure must be made at a time and in a manner reasonably designed to allow the municipal entity or obligated person to assess the material incentives and conflicts of interest that such person may have in connection with the municipal advisory activities.

In the Adopting Release, the Commission stated that it does not seek to curtail the receipt of important advice and information so long as the municipal entities and obligated persons are represented by and rely on independent registered municipal advisors who are subject to a fiduciary or other duties and who can help the municipal entities and obligated persons evaluate the advice and identify potential conflicts of interest.[15] If the conditions in the exemption are satisfied, the independent registered municipal advisor will be positioned to help the municipal entity both to evaluate any advice the municipal entity receives from other market participants and to identify any potential conflicts of interest. [January 10, 2014]

Question 3.2: Registered Municipal Advisor Serving in a General Capacity: A municipal entity has an independent registered municipal advisor who serves in a general capacity (as compared, for example, to a municipal advisor that advises on a particular municipal securities transaction), on retainer. A person wants to rely on the independent registered municipal advisor

[15] Adopting Release, 78 FR at 67511.

exemption. Can the independent municipal advisor exemption apply in circumstances involving a registered municipal advisor that serves in a general capacity?

Answer: Yes. In the staff's view, the independent municipal advisor exemption can apply in circumstances involving a registered municipal advisor that serves in a general capacity, provided that the scope of that municipal advisor's representation of the municipal entity or obligated person covers advice with respect to the same aspects of the issuance of municipal securities or municipal financial products as the person who is seeking to rely on the exemption and all other requirements of the exemption are met. [January 10, 2014]

Question 3.3: Representations about Independent Registered Municipal Advisors: A municipal entity has engaged a registered municipal advisor to advise it on a planned issuance of municipal securities. There are multiple transaction participants who would like to rely on the independent registered municipal advisor exemption. If the municipal entity provides one written representation to all the transaction participants that it is represented by, and will rely on the advice of, its independent registered municipal advisor, would this written representation satisfy the requirement set forth in the second clause of the exemption (set forth in Rule 15Ba1-1(d)(3)(vi)(B) and described in the Answer to Question 3.1 above)? Would the analysis change if the municipal entity posted one written representation on its website that was intended for all market participants who may want to rely on the exemption?

Answer: The staff believes that a municipal entity could provide its required representations in any reasonable manner, including one written disclosure to multiple transaction participants, to show that it is represented by, and will rely on the advice of, its independent registered municipal advisor. The staff further believes that a municipal entity could provide the required representations in one written disclosure to multiple market participants by posting it publicly on its official website and clearly stating in the written disclosure that by publicly posting the written disclosure the municipal entity intends that market participants receive and use it for purposes of the independent registered municipal advisor exemption. [January 10, 2014]

Question 3.4: Communications When a Municipal Entity has an Independent Registered Municipal Advisor: A municipal entity has engaged a registered municipal advisor to advise it on a planned issuance of municipal securities. A market participant, such as a broker-dealer, would like to rely on the independent registered municipal advisor exemption. Assuming all the requirements of the exemption have been satisfied, may the broker-dealer discuss issues relating to the planned issuance of municipal securities with the municipal entity if the municipal advisor is not present?

Answer: Yes. It is the staff's view that the underwriter may discuss issues relating to the planned issuance of municipal securities with the municipal entity if the independent registered municipal advisor is not present if the municipal entity does not object. Since the independent registered municipal advisor is advising the municipal entity with respect to the same aspects of the issuance of municipal securities, it is the staff's view that the municipal advisor will be able to subsequently meet or have discussions with the municipal entity and evaluate any advice provided by the broker-dealer and does not need to be present for every conversation. The Final

Rules require the broker-dealer to provide to the independent registered municipal advisor a copy of the written disclosure it provides to the municipal entity stating that it is not a municipal advisor and is not subject to a fiduciary duty. Accordingly, the staff believes that the independent registered municipal advisor will be informed in a timely manner if the broker-dealer intends to rely on the independent registered municipal advisor exemption and that the broker-dealer may provide advice to the municipal entity beyond the type of advice permitted to be provided pursuant to the underwriter exclusion. [January 10, 2014]

Question 3.5: "Rely on" Advice of Independent Registered Municipal Advisor: A municipal entity has engaged a registered municipal advisor to advise it on a planned issuance of municipal securities. A participant in this transaction would like to rely on the independent registered municipal advisor exemption. Pursuant to the requirements to qualify for this exemption, the transaction participant requests a written representation from the municipal entity that the municipal entity is represented by, and will "*rely on*" (emphasis added) the advice of, the independent registered municipal advisor. For purposes of this exemption, what does it mean for the municipal entity to represent that it will "rely on" the advice of the independent registered municipal advisor?

Answer: The staff believes that the requirement under the independent registered municipal advisor exemption that the municipal entity or obligated person represent in writing that it is represented by, and will "rely on" the advice of, an independent registered municipal advisor, together with the transaction participant's required disclosures regarding its role, are intended to clarify the role of the independent registered municipal advisor (who, in the case of a municipal entity client, has a federal statutory fiduciary duty to the municipal entity) in comparison to the role of the transaction participant with respect to the municipal entity or obligated person. In the staff's view, for purposes of this exemption, the term "rely on" means that the municipal entity or obligated person will seek and consider the advice, analysis, and perspective of the independent registered municipal advisor. The staff does not believe, however, that, for purposes of this exemption, "rely on" means that the municipal entity or obligated person must follow the advice of the independent registered municipal advisor. [May 19, 2014]

Question 3.6: Independence of a Registered Municipal Advisor: What are some relevant considerations for determining whether a registered municipal advisor is independent from a transaction participant seeking to rely on the independent registered municipal advisor exemption under the Final Rules?

Answer: Under the Final Rules, a registered municipal advisor is independent if it is not, and within at least the past two years was not, "associated" with the person seeking to rely on the independent registered municipal advisor exemption. In the Adopting Release, the Commission stated that "a two year cooling-off period represents an appropriate period of time to help remove any actual or perceived influence over a municipal advisor's ability to exercise independent judgment when engaging in municipal advisory activities."[16]

[16] *See* Adopting Release, 78 FR at 67510.

The Final Rules define the term "associated"[17] by reference to the definition of a "person associated with a municipal advisor" or an "associated person of an advisor" in Exchange Act Section 15B(e)(7), which defines such an associated person to mean the following persons: (A) any partner, officer, director, or branch manager of such municipal advisor (or any person occupying a similar status or performing similar functions); (B) any other employee of such municipal advisor who is engaged in the management, direction, supervision, or performance of any activities relating to the provision of advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities; and (C) any person directly or indirectly controlling, controlled by, or under common control with such municipal advisor.[18]

In the Adopting Release, the Commission stated that the criteria for association in Exchange Act Section 15B(e)(7) apply for purposes of the definition of independent registered municipal advisor under the Final Rules.[19] Therefore, as discussed further below, it is the staff's view that, in applying this standard, the determination of whether or not a registered municipal advisor is independent from another transaction participant seeking to rely on the independent registered municipal advisor exemption requires consideration of whether or not the registered municipal advisor has been "associated" with such transaction participant at an entity level or at an individual employee level during the relevant two-year period.

Entity Level Analysis. The entity level analysis focuses on whether the registered municipal advisor *firm* is independent from the transaction participant *firm* seeking to rely on the exemption. With respect to entities who may be associated persons of a municipal advisor firm, Exchange Act Section 15B(e)(7) provides, in relevant part, that such an associated person means "any person directly or indirectly controlling, controlled by, or under common control with such municipal advisor."[20] The Commission defines "control" for purposes of the Final Rules as "[t]he power, directly or indirectly, to direct the management or policies of a person, whether through ownership of securities, by contract, or otherwise."[21] Accordingly, in the staff's view, if the registered municipal advisor firm is not, and within the last two years was not, directly or indirectly, controlling, controlled by, or under common control with the transaction participant firm seeking to rely on the exemption, then such registered municipal advisor firm would be independent at an entity level from the transaction participant firm.

Individual Employee Level Analysis. The individual employee level analysis focuses on whether an individual, such as a current employee of a registered municipal advisor firm who formerly was employed by a transaction participant firm seeking to rely on the independent registered municipal advisor exemption, affects such municipal advisor firm's independence from the

[17] Exchange Act Rule 15Ba1-1(d)(3)(vi).
[18] 15 U.S.C. 78o-4(e)(7).
[19] *See* Adopting Release, 78 FR at 67510, note 566.
[20] 15 U.S.C. 78o-4(e)(7)(C).
[21] *See* Glossary of Terms, Adopting Release 78 FR at 67655, for definition of "control" and for specific examples of "control," (examples generally indicating that control is presumed if a person has rights with respect to 25% or more of an entity's voting power or capital, depending on the type of entity). The staff notes that an individual also would need to be taken into account as an associated person in the analysis if the individual controls an entity.

transaction participant firm due to the individual's actual or perceived influence over the registered municipal advisor firm's ability to exercise independent judgment when engaging in municipal advisory activities for a particular municipal entity client or obligated person client.

With respect to individuals who may be associated persons of a registered municipal advisor firm, Exchange Act Section 15B(e)(7) provides, in relevant part, that such an associated person means "(A) any partner, officer, director, or branch manager of such municipal advisor (or any person occupying a similar status or performing similar functions)" and "(B) any other employee of such municipal advisor who is engaged in the management, direction, supervision, or performance of any activities relating to the provision of advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities."[22]

For reference in these FAQs, the term "Associated Individual" shall be used to refer to an individual serving in one of the capacities described in Exchange Act Section 15B(e)(7)(A) or (B) with respect to either a municipal advisor firm or a transaction participant firm seeking to use the independent registered municipal advisor exemption, as applicable, including specifically the following individuals:

> (A) any partner, officer, director, or branch manager (or any person occupying a similar status or performing similar functions); or
>
> (B) any other employee who is engaged in the management, direction, supervision, or performance of any activities relating to the provision of advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities.

In the staff's view, a registered municipal advisor firm is not considered to be independent from a transaction participant firm for purposes of the independent registered municipal advisor exemption under the Final Rules if (1) an individual is a current employee of a registered municipal advisor firm in the capacity of an Associated Individual and that individual formerly was employed, within the past two years, by the transaction participant firm in the capacity of an Associated Individual; and (2) such Associated Individual of a registered municipal advisor firm participates in any matter, including participation in the management, direction, supervision, or performance of activities relating to the matter, that involves municipal advisory activity for a particular municipal entity or obligated person client in which such Associated Individual's former employer is involved in any role as a transaction participant firm, during the applicable two-year period.

Converse Situation. The fact pattern in this Answer focuses on the situation in which a current employee of a registered municipal advisor firm formerly was employed, within the past two years, by a transaction participant firm seeking to rely on the independent registered municipal advisor exemption under the Final Rules. It is the staff's view that the same "associated" person

[22] 15 U.S.C. 78o-4(e)(7)(A)-(B).

analysis described above also should apply to the converse situation in which a current employee of a transaction participant firm formerly was employed, within the past two years, by a registered municipal advisor firm. In the staff's view, this converse situation also informs the determination of whether or not a registered municipal advisor firm is independent from a transaction participant firm for purposes of the independent registered municipal advisor exemption under the Final Rules.[23] [May 19, 2014]

SECTION 4: REGISTERED INVESTMENT ADVISER EXCLUSION

Question 4.1: Scope of Advice Concerning Municipal Derivatives: Under the Final Rules, is an SEC-registered investment adviser required to register with the Commission as a municipal advisor if the registered investment adviser provides advice to a client that is a municipal entity or an obligated person on a municipal derivative that is or could be part of an investment portfolio on which this investment adviser provides investment advice?

Answer: In accordance with Section 15B(e)(4)(c), the Final Rules exclude from the definition of municipal advisor any "investment adviser registered under the Investment Advisers Act of 1940 [15 U.S.C. 80b-1 et seq.] or any person associated with such registered investment adviser to the extent that such registered investment adviser or such person is providing investment advice in such capacity."[24] The Final Rules further provide that, solely for purposes of this exclusion, "investment advice" does not include, among other things, the following types of advice: (a) advice concerning whether or how to issue municipal securities and advice concerning the structure, timing, and terms of an issuance of municipal securities and other similar matters; and (b) advice concerning municipal derivatives.[25]

It is the staff's view that the scope of "advice concerning municipal derivatives" under clause (b) in the previous paragraph that is outside the registered investment adviser exclusion is limited to advice concerning those municipal derivatives that are or would be entered into by a municipal entity or obligated person in connection with the issuance of municipal securities (e.g., debt-related swaps or other derivatives used to hedge interest rate risk in connection with a municipal entity's issuance of municipal debt securities as contrasted with investment asset-related derivatives used by a municipal entity in connection with its investment of municipal bond proceeds or other investment assets).[26]

Solely for purposes of "investment advice" in the registered investment adviser exclusion under the Final Rules, the staff believes that "advice concerning municipal derivatives" was intended to

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[23] *See generally* 15 U.S.C. 78o-4(e)(7) and Exchange Act Rule 15Ba1-1(d)(3)(vi)(A). *See also* Adopting Release, 78 FR at 67510, note 566 (stating that "[f]or purposes of the definition 'independent registered municipal advisor' in Rule 15Ba1-1(d)(3)(vi), the criteria for association set forth in Section 15B(e)(7) (15 U.S.C. 78o-4(e)(7) will apply").

[24] Exchange Act Rule 15Ba1-1(d)(2)(ii).

[25] *Id.*

[26] *See generally* S. Rep. No 111-176, at 38 (2010), which suggests a focus on those derivatives used by municipal issuers in connection with the issuance of municipal securities in the municipal securities markets (as contrasted with derivatives used with investments).

be limited to advice concerning those municipal derivatives used by municipal entities or obligated persons in connection with the issuance of municipal securities (as contrasted with investment advisory services regarding municipal derivatives in an investment portfolio). The staff believes that the scope of this interpretation would be consistent with the scope of advice under clause (a) in the first paragraph of this Answer that is outside the registered investment adviser exclusion (i.e., advice concerning whether or how to issue municipal securities and advice concerning the structure, timing, and terms of an issuance of municipal securities and other similar matters).

Therefore, the staff would not object if those SEC-registered investment advisers that provide advice on municipal derivatives in an investment portfolio for clients that are municipal entities or obligated persons do not register with the Commission as municipal advisors. [January 10, 2014]

SECTION 5: UNDERWRITER EXCLUSION

Question 5.1: Engagement to Serve as Underwriter: How can a broker-dealer demonstrate that a municipal entity or obligated person has engaged the broker-dealer to serve as an underwriter on a particular issuance of municipal securities so that the broker-dealer meets the underwriter exclusion under the Final Rules?

Answer: In regard to the underwriter exclusion to the municipal advisor definition, the Commission explained in the Adopting Release that, in order for a person to be "serving as an underwriter" with respect to the issuance of municipal securities within the meaning of the underwriter exclusion, there must be a relationship to a particular transaction, and that, for example, a contractual "engagement" by a municipal entity of a broker-dealer to serve as underwriter on a specific planned transaction for the issuance of municipal securities would constitute the requisite engagement on a particular issuance of municipal securities.[27]

In general, the staff believes that a broker-dealer can demonstrate that a municipal entity or obligated person has engaged the broker-dealer to serve as underwriter on a particular issuance of municipal securities so that the broker-dealer meets the underwriter exclusion under the Final Rules either through a writing, such as an engagement letter that has the features discussed in the paragraph below, or through other actions as discussed in the final paragraph of this Answer. Further, in the staff's view, an important basic component of the underwriter exclusion involves a decision by the municipal entity or obligated person to select a broker-dealer to serve as underwriter on a particular issuance of municipal securities that is affirmative in nature and is informed by the full disclosure about the role of the underwriter as required by MSRB Rule G-17.[28] (By contrast, in the staff's view, a broker-dealer's unilateral action to identify itself in

[27] Adopting Release, 78 FR at 67512.

[28] *See* Adopting Release, 78 FR at 67512 (describing the Commission's belief that MSRB Rule G-17 disclosure requirements should assist a municipal entity or obligated person in clarifying the duties of underwriters to municipal issuers, identifying conflicts of interest, and appropriately evaluating the advice they receive from underwriters with that informed perspective).

writing as an underwriter and not as a financial advisor under MSRB Rule G-23 for purposes of that conflicts rule is insufficient to establish that the broker-dealer meets the underwriter exclusion and thus does not allow the broker-dealer to give advice in reliance on the underwriter exclusion, because such action lacks the required affirmative selection by the municipal entity or obligated person of the broker-dealer to serve as an underwriter on a particular issuance of municipal securities to enable the broker-dealer to come within the underwriter exclusion under the Final Rules.)

Thus, it is the staff's view that a requisite engagement as underwriter for purposes of the underwriter exclusion under the Final Rules may be established at an early stage of a transaction, with reasonable recognition that some aspects of the underwriting may be preliminary or subject to conditions at that time. In this regard, if a municipal entity or obligated person engages a broker-dealer on a preliminary basis to act as the underwriter for an issuance of municipal securities, such engagement could be consistent with the underwriter exclusion. The staff would view as consistent with the underwriter exclusion, an engagement by a municipal entity or obligated person of a broker-dealer to serve as an underwriter on a particular issuance of municipal securities if it were evidenced by an agreement, engagement letter, or letter of intent (an "engagement letter") with the following features: (a) the governing body or any duly authorized official of the municipal entity responsible for municipal finance has executed, approved, or acknowledged the engagement letter in writing; (b) the engagement letter clearly relates to providing underwriting services; (c) the engagement letter clearly states the role of the broker-dealer in the transaction; (d) the engagement letter relates to a particular issuance of municipal securities that the municipal entity or obligated person anticipates issuing and is not a general engagement for underwriting services that does not relate to any particular transaction; and (e) the engagement letter or a separate writing done at or before the time of the engagement provides all disclosures that are required to be made by underwriters by the time of an engagement under MSRB Rule G-17, including disclosures about the role of the underwriter, the underwriter's compensation, and actual or potential material conflicts of interest (excluding only those permitted to be disclosed after the time of engagement under MSRB Rule G-17). The staff is also of the view that, in the case of a conduit issuance of municipal securities, the engagement letter could be executed, approved, or acknowledged in writing by a duly authorized official of an obligated person responsible for municipal finance, even if the selection of the underwriter and the engagement of the underwriter are subject to the final approval of the conduit issuer.

In addition, in the case of an otherwise-qualified engagement letter that includes the factors described above, it is the staff's view that such an engagement letter would not disqualify a broker-dealer from meeting the underwriter exclusion under the Final Rules if the letter also included reasonable conditions or limitations under the circumstances, such as the following: (a) a statement that the engagement is preliminary in nature and that the issuer intends or reasonably expects to engage the broker-dealer as the underwriter for an identified issue of municipal securities; (b) a statement specifying that the engagement is subject to conditions, such as formal approval of the selection of the underwriter by the governing body or finalizing the structure of the issue of municipal securities; (c) a statement that the engagement is nonbinding and that it can be terminated by either party; or (d) a term that limits liability of a party to the engagement

letter. Moreover, a municipal entity or obligated person may furnish engagement letters to more than one underwriter, provided that the municipal entity or obligated person reasonably expects to engage each such underwriter to serve as an underwriter on the identified issue of municipal securities.

The parameters for an engagement letter described in the paragraphs above do not represent an exclusive means for establishing that a broker-dealer meets the underwriter exclusion under the Final Rules. The Final Rules do not require a broker-dealer to have a written engagement letter to demonstrate that the broker-dealer is serving as an underwriter with respect to a particular transaction, but a broker-dealer must be able to demonstrate that it is engaged to rely on the underwriter exclusion. While issuers may have different practices regarding engagement of underwriters (e.g., in some instances, there may not be a written agreement until the stage of the transaction where the municipal securities are priced and the bond purchase agreement is executed), it is the staff's view that a broker-dealer could demonstrate a sufficient relationship to a particular transaction if the broker-dealer received an oral or written acknowledgement of engagement from a duly authorized official of the issuer responsible for the area of municipal finance (e.g., a telephone call or e-mail from an issuer official to acknowledge the selection of an underwriter after the governing body of the issuer has met and voted to approve the selection of the broker-dealer as underwriter for a particular issuance of municipal securities) and if the broker-dealer has made the disclosures required to be made under MSRB Rule G-17 at or before the time of engagement. [January 10, 2014]

Question 5.2: Switching Roles From Municipal Advisor to Underwriter: May a broker-dealer that is also a registered municipal advisor serve as the municipal advisor to a municipal entity in the early stages of a financing transaction involving the issuance of municipal securities and then switch roles to serve as the underwriter when the municipal entity decides to proceed with that issuance of municipal securities?

Answer: No. If a broker-dealer acts as a municipal advisor to a municipal entity with respect to an issuance of municipal securities, it owes a fiduciary duty to the municipal entity with respect to that issue and must not take any action inconsistent with its fiduciary duty to the municipal entity. Additionally, the broker-dealer must comply with MSRB Rule G-23, which prohibits persons from switching from the role of financial advisor to the role of underwriter with respect to the same issuance of municipal securities. [January 10, 2014]

SECTION 6: ISSUANCE OF MUNICIPAL SECURITIES/POST-ISSUANCE ADVICE

Question 6.1: Updating Omissions in an Offering Document: A broker-dealer served as underwriter for an issuance of municipal securities. After the issuance has closed and the underwriting period has terminated, the broker-dealer realizes that there is a material omission in the offering document. If the broker-dealer contacts the municipal entity and advises it that a supplement should be prepared, can the broker-dealer continue to rely on the underwriter exclusion?

Answer: The Adopting Release provides that any advice with respect to the issuance of municipal securities given after the underwriting period has terminated would generally be municipal advisory activity outside the scope of the underwriter exclusion.[29] In this example, however, the broker-dealer would be providing advice that is (a) integral to its underwriting responsibility in connection with the issuance of municipal securities (i.e., to review the offering document and reasonably conclude that the municipal entity prepared materially sufficient disclosure) and (b) promoting compliance with the anti-fraud provisions of the federal securities laws. Accordingly, it is the staff's view that such advice would be within the scope of the underwriter exclusion. [January 10, 2014]

Question 6.2: Continuing Disclosure Filings: A market participant assists municipal entities with completing continuing disclosure filings. The assistance includes preparing annual disclosure forms and helping determine whether an event notice is required to be filed. Would such assistance be considered municipal advisory activity under the Final Rules?

Answer: The Answer to Question 1.1 of these FAQs regarding the advice standard generally applies and is relevant to this analysis. If the market participant provides advice, such assistance would be considered municipal advisory activity. For example, in the staff's view, absent the availability of another exemption,[30] a market participant could not assist a municipal entity with assessing whether an event is "material" under the federal securities laws and whether the municipal entity is required to file an event notice pursuant to a continuing disclosure agreement without falling within the scope of the municipal advisor definition. Such assistance would require the market participant to express an opinion that would be considered advice under the Final Rules.

If the market participant provides general information that does not involve a recommendation, such assistance would not be considered municipal advisory activity. For example, in the staff's view, a market participant could assist a municipal entity in compiling specific factual information to complete an annual disclosure filing so long as the assistance does not include subjective assumptions, opinions, or views. Such assistance could include collecting data to update charts originally included in the offering document (e.g., updating current property assessments or the realization rate for billing and collecting ad valorem property taxes). It is also the staff's view that, if a market participant learned that the credit rating for an issuance of municipal securities had been changed, the market participant could contact the municipal entity, notify it of the rating change, and remind the municipal entity that its continuing disclosure agreement requires the municipal entity to file an event notice upon a rating change without providing advice under the Final Rules. In this instance, the market participant only would be providing the municipal entity with factual information that does not contain or express an opinion or view. It is also the staff's view that a market participant could provide the following services without engaging in municipal advisory activity: (a) remind a municipal entity generally of its continuing disclosure filing obligations; (b) provide a municipal entity with

[29] *See* Adopting Release, 78 FR at 67515.

[30] For example, an attorney could assist a municipal entity with this assessment and rely on the exclusion for attorneys providing legal advice.

assistance submitting continuing disclosure filings to the MSRB's Electronic Municipal Market Access ("EMMA") system; and (c) notify a municipal entity whether, and to what extent, any of its continuing disclosure filings actually appeared on EMMA. [January 10, 2014]

Question 6.3: Offering Document Disclosure Regarding Continuing Disclosure Filings: A broker-dealer is engaged to serve as underwriter for an issuance of municipal securities. While performing due diligence to confirm the accuracy of statements included in the offering document, the broker-dealer discovers that the municipal entity failed during the past five years to comply with a continuing disclosure agreement it had entered into in connection with an outstanding issuance of municipal securities. Can the broker-dealer rely on the underwriter exclusion and advise the municipal entity to take corrective actions such as completing the missed filings and adopting written policies and procedures to ensure future compliance?

Answer: Yes, if a broker-dealer who is engaged to serve as underwriter for an issuance of municipal securities learns during the due diligence process that a municipal entity has failed during the past five years to comply with a continuing disclosure agreement entered into pursuant to Exchange Act Rule 15c2-12, the staff believes that the broker-dealer could rely on the underwriter exclusion and advise the municipal entity to take corrective actions such as completing the missed filings and adopting written policies and procedures to ensure future compliance. In this instance, in the staff's view, the broker-dealer would not be providing the municipal entity with post-issuance advice on an outstanding issuance of municipal securities. Rather, the staff believes that the broker-dealer would be fulfilling its obligation under the federal securities laws to ensure that the offering document for the current issuance of municipal securities is materially accurate and complete and its obligation to reasonably determine that the municipal entity had entered into an undertaking to provide continuing disclosure for the current issuance of municipal securities. In the staff's view, the broker-dealer's action also would be promoting compliance with the anti-fraud provisions of the federal securities laws, which would help to ensure investors who purchase the municipal securities of this municipal entity in the secondary market received annual continuing disclosure filings and event notices in a timely manner. Accordingly, in the staff's view, this type of advice would be consistent with the underwriter exclusion. [January 10, 2014]

SECTION 7: REMARKETING AGENT SERVICES

Question 7.1: Remarketing Agent Services and Advice: A broker-dealer has been engaged by a municipal entity to remarket its variable rate demand municipal securities from time to time. If the broker-dealer serving in its capacity as remarketing agent provides advice, would it be considered advice with respect to an issuance of municipal securities covered by the Final Rules? If it is covered by the Final Rules, may the remarketing agent rely on the underwriter exclusion? If not, what services may the remarketing agent provide that would not be considered advice?

Answer: The Answer to Question 1.1 of these FAQs regarding the advice standard generally applies and is relevant to this analysis. If the remarketing agent provides advice to a municipal entity in the scenario described above, the staff believes it would be advice with respect to an issuance of municipal securities covered by the Final Rules. The Adopting Release provides that, generally, if an issuance has closed and the underwriting period has terminated, a broker-

dealer serving in the role of remarketing agent is not acting as an underwriter with respect to the issuance of municipal securities. Accordingly, in the staff's view, this broker-dealer could not rely on the underwriter exclusion.

If there were a remarketing of the issue of the municipal securities that constituted a primary offering, the remarketing agent should reevaluate its activities to determine if an exclusion from registration (such as the underwriter exclusion) applies. The remarketing agent may be able to perform all of the standard services that are typically covered by the remarketing agreement and related authorizing documents because these services may not constitute advice. For example, in the staff's view, the remarketing agent could set the rate, remarket tendered bonds, and provide factual information regarding current market conditions. It is also the staff's view that the remarketing agent could provide factual information on how the interest rate would be impacted by a change from a weekly to a daily interest rate mode or change in the liquidity facility provider. While the information presented can be particularized to the municipal entity, the staff cautions that it must be limited to factual information. If the remarketing agent's communications with the municipal entity also included a recommendation, opinion, or view as to whether the interest rate mode or liquidity facility provider should or should not be changed, this communication would constitute advice in the staff's view. [January 10, 2014]

SECTION 8: PUBLIC DISCOURSE; PUBLIC OFFICIALS AND EMPLOYEES OF MUNICIPAL ENTITIES AND OBLIGATED PERSONS

Question 8.1: No Impediments to Public Discourse: The exemption for public officials excludes advice by appointed and elected officials acting within the scope of their official capacity, but does not expressly exclude opinions or advice offered by citizens. May a concerned citizen publish an op-ed piece proposing, supporting, or opposing the issuance of municipal securities? May a business owner oppose an issuance of municipal securities that would facilitate a taking of his or her business through eminent domain proceedings? May a political supporter or community leader express his or her views concerning the issuance of municipal securities?

Answer: Yes. The Final Rules do not impede public discourse. The Adopting Release provides, in relevant part, as follows:

> The Commission does not intend to impede the deliberative process that municipal entities engage in with their citizens. Accordingly, the registration requirement for municipal advisors does not apply to persons who comment on municipal financial products or the issuance of municipal securities by making use of public comment forums provided by municipal entities or other public forums.[31]

In all the examples described in Question 8.1, it is the staff's view that each citizen is providing comments and opinions in a public forum and would not be required to register as a municipal advisor. [January 10, 2014]

[31] Adopting Release, 78 FR at 67506.

Question 8.2: Employees Acting Within the Scope of Official Capacity or Employment: The Final Rules provide a broad exemption for public officials and employees of municipal entities and obligated persons to the extent that such persons act within the scope of their official capacity or employment.[32] May an employee in a state's office of the treasurer provide advice on an issuance of municipal securities to a municipal entity located within such state without being required to register as a municipal advisor?

Answer: Yes, an employee of a state-level municipal entity may provide advice to another municipal entity within the state to the extent the employee acts within the scope of his or her employment. In the Adopting Release, the Commission stated that "an employee of one municipal entity that provides advice, within the scope of his or her employment as such, to another municipal entity or obligated person would be exempt from the definition of municipal advisor."[33] [May 19, 2014]

SECTION 9: EFFECTIVE DATE OF THE FINAL RULES AND COMPLIANCE PERIOD FOR USING THE FINAL REGISTRATION FORMS

Question 9.1: Effective Date of the Final Rules: When are municipal advisors required to comply with the Final Rules, other than the requirement to register using the final registration forms?

Answer: The Final Rules were effective on January 13, 2014; however, on January 13, 2014, the Commission temporarily stayed the Final Rules until July 1, 2014 to provide market participants with a limited amount of additional time to analyze, implement, and comply with the Final Rules.[34] This stay of the Final Rules means that persons are not required to comply with the Final Rules until July 1, 2014. Thus, to illustrate, absent an available exclusion or exemption, the Final Rules apply to any person who provides "advice" that occurs on or after July 1, 2014 to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, and to any person that undertakes a "solicitation of a municipal entity" that occurs on or after July 1, 2014, all within the meaning and interpretation of the Final Rules.

A person who meets the definition of "municipal advisor" and does not qualify for an exclusion or exemption on or after the July 1, 2014, must register with the Commission using Form MA-T under the Temporary Registration Rule, unless this person is already registered with the Commission under the Temporary Registration Rule. A person who meets the definition of "municipal advisor" and does not qualify for an exclusion or exemption on or after October 1, 2014 is not required to register with the Commission using Form MA-T under the Temporary Registration Rule (and instead is required to register using the final forms as discussed in the Answer to Question 9.2 below). The compliance period for municipal advisors to register using

[32] Exchange Act Rule 15Ba1-1(d)(3)(ii).
[33] Adopting Release, 78 FR at 67506.
[34] *See* Temporary Stay Release, 79 FR at 2778.

the final registration forms is discussed in the Answer to Question 9.2 below. [Modified on January 16, 2014]

Question 9.2: Compliance Period for Using the Final Registration Forms: When are municipal advisors required to comply with the requirement to register as municipal advisors using the final registration forms under the Final Rules?

Answer: The Commission provided a phased-in compliance period, beginning on July 1, 2014, for municipal advisors to comply with the requirement to register as municipal advisors using the final registration forms under the Final Rules. Municipal advisors that register with the Commission under the Temporary Registration Rule before October 1, 2014 receive a temporary registration number. As set forth in the table below, a municipal advisor's temporary registration number determines the applicable compliance period during which the municipal advisor is required to file a complete application for registration as a municipal advisor on the final registration forms under the Final Rules.

Temporary Registration Number Range	**Period for Filing Complete Application for Registration**
866-00001-00 through 866-00400-00	July 1, 2014 - July 31, 2014
866-00401-00 through 866-00800-00	August 1, 2014 - August 31, 2014
866-00801-00 through 866-01200-00	September 1, 2014 - September 30, 2014
After 866-01200-00	October 1, 2014 - October 31, 2014

A person who becomes a municipal advisor on or after October 1, 2014 is required to register as a municipal advisor using the final registration forms under the Final Rules. In the interim period, pending registration of municipal advisors on the final registration forms under the Final Rules, all municipal advisors are required to be registered under the Temporary Registration Rule.

The Final Rules require municipal advisors to submit complete applications for registration to the Commission's Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system. To access EDGAR, municipal advisors need an access code. To obtain such code firms must electronically submit a Form ID using the SEC's website. To minimize processing delays municipal advisors should submit a Form ID as soon as possible. [January 10, 2014]

SECTION 10: OBLIGATED PERSONS

Question 10.1: Obligated Person Capacity: Advice on a New Money Issuance of Municipal Securities: A market participant, such as a broker-dealer, provides advice to a private nonprofit university regarding debt financing alternatives to implement the university's capital program, including advice on the possible option to seek financing from a new money issuance of municipal securities by a municipal entity, such as a state educational authority. The debt financing alternatives do not relate to any outstanding issues of municipal securities. If the university is considering its debt financing alternatives and has not begun the process of applying to, or negotiating with, a municipal entity to issue the new money municipal securities on the

university's behalf, would such broker-dealer be providing advice to an obligated person with respect to the issuance of municipal securities under the Final Rules?

Answer: No. In the Adopting Release, the Commission stated as follows:

> A person will not be a municipal advisor to an obligated person until the obligated person has begun the process of applying to, or negotiating with, a municipal entity to issue conduit bonds on behalf of the obligated person. Activity that never results in solicitation of or actual contact with a municipal entity does not have a sufficient nexus to municipal financial products or the issuance of municipal securities to require registration as municipal advisor. Merely advising a client on debt financing alternatives that include conduit financing is not a municipal advisory activity, because the client would not be sufficiently close to being an obligated person with respect to an issuance of municipal securities.[35]

Accordingly, if the university is considering its debt financing alternatives and has not begun the process of applying to, or negotiating with, the municipal entity to issue the new money municipal securities on the university's behalf, the university is not an obligated person with respect to such issuance of municipal securities. Therefore, the broker-dealer's advice would not be provided to the university in its capacity as an obligated person with respect to the issuance of municipal securities and such advice would not have a sufficient nexus to the issuance of municipal securities to require the broker-dealer to register with the Commission as a municipal advisor. Once the university determines to seek financing from a new money issuance of municipal securities and begins the process of applying to, or negotiating with, a municipal entity to issue the new money municipal securities on the university's behalf, however, the broker-dealer's activities would fall within the scope of the municipal advisor definition under the Final Rules. Absent an available exclusion or exemption, such as the underwriter exclusion, the broker-dealer would be required to register with the Commission as a municipal advisor. [May 19, 2014]

Question 10.2: Obligated Person Capacity: Advice on an Outstanding Issue of Municipal Securities: If a market participant, such as a broker-dealer, provides advice to a private nonprofit university regarding an outstanding issue of municipal securities on which the university is an obligated person, such as either advice to redeem that outstanding issue early from equity funds or advice to refinance that outstanding issue with the proceeds of a refunding issue of municipal securities, would such broker-dealer be providing advice to an obligated person with respect to the issuance of municipal securities under the Final Rules?

Answer: The staff believes that the broker-dealer's advice to the university with respect to an outstanding issue of municipal securities on which the university is an obligated person, including advice to redeem that outstanding issue early from equity funds or advice to refinance that outstanding issue with the proceeds of a refunding issue of municipal securities would constitute advice to an obligated person with respect to the issuance of municipal securities under

[35] *See* Adopting Release, 78 FR at 67485.

the Final Rules. The staff believes that, in the case of either type of advice, the broker-dealer is providing advice to the university in its capacity as an obligated person because the university has an established nexus to the outstanding issue of municipal securities since it already is serving in the capacity as an obligated person with financial responsibilities on that issue. Thus, in the staff's view, the broker-dealer is providing advice with respect to an outstanding issue of municipal securities on which the university is an obligated person. Additionally, in the Adopting Release, the Commission stated that "'advice with respect to the issuance of municipal securities' should be construed broadly from a timing perspective to include advice throughout the life of an issuance of municipal securities, from the pre-issuance planning stage for a debt transaction involving the issuance of municipal securities to the repayment stage for those municipal securities."[36] Absent an available exclusion or exemption, such as the underwriter exclusion, the staff believes that the broker-dealer's advice to the university with respect to early redemption or refinancing of an outstanding issue of municipal securities would fall within the scope of the municipal advisor definition under the Final Rules and would require that the broker-dealer register with the Commission as a municipal advisor. The Answer to Question 10.1 of these FAQs generally applies and is relevant to the analysis of the broker-dealer's advice on the refunding issuance of municipal securities. [May 19, 2014]

SECTION 11: INVESTMENT STRATEGIES AND PROCEEDS OF MUNICIPAL SECURITIES

Question 11.1: Transitional Guidance for Identifying Proceeds of Municipal Securities: A market participant may have municipal entity or obligated person clients who, prior to July 1, 2014, have deposited proceeds of municipal securities in existing accounts and invested such proceeds in existing investments held by the market participant. In determining whether or not such existing accounts and existing investments contain proceeds of municipal securities under the Final Rules, is the market participant required to obtain a written representation from its municipal entity or obligated person client regarding the nature of the funds held in existing accounts or existing investments or may the market participant rely on another process?

Answer: In general, the Final Rules apply to a market participant who provides investment advice on or after July 1, 2014 to a municipal entity or obligated person regarding investments of proceeds of municipal securities, including those proceeds already existing on that date or those proceeds arising after that date. Thus, the provision of such covered investment advice regarding proceeds of municipal securities constitutes municipal advisory activity that, absent an available exclusion or exemption, would require the market participant who provides such advice to register with the Commission as a municipal advisor under the Final Rules. Under Exchange Act Rule 15Ba1-1(m)(3), in determining whether or not funds to be invested constitute proceeds of municipal securities, a market participant *may* rely on representations in writing made by a knowledgeable official of the municipal entity or obligated person regarding the nature of such funds, provided that the market participant seeking to rely on such representation has a

[36] Adopting Release, 78 FR at 67490.

reasonable basis for such reliance.[37] In the staff's view, this written representation process does not represent an exclusive means for determining whether or not funds to be invested constitute proceeds of municipal securities, and market participants may use other reasonable procedures to determine whether funds to be invested constitute proceeds of municipal securities.

Transitional Guidance and Relief for Identifying Proceeds Held in Existing Accounts or Existing Investments. In recognition of the administrative burdens and challenges market participants raised with respect to identifying existing proceeds of municipal securities, and as transitional guidance and relief for purposes of the Final Rules with respect to investment advice provided on or after July 1, 2014 regarding investments of existing proceeds of municipal securities that already were held in existing accounts or existing investments before that date,[38] the staff believes that, unless a market participant actually knows or reasonably should have known that an existing account or existing investment contains proceeds of municipal securities, a market participant may determine that such existing accounts or existing investments do not contain proceeds of municipal securities. For purposes of this transitional guidance and relief, a market participant could utilize a reasonable diligence process as a transitional means for determining whether funds in existing accounts or existing investments constitute proceeds of municipal securities for purposes of the Final Rules.[39]

The staff believes that, for this purpose, a reasonable diligence process should include a review of relevant information within the market participant's possession. Thus, for example, a market participant reasonably could know that an existing account or existing investment may contain proceeds of municipal securities if the account holder is a municipal entity or the account name suggests a connection to municipal securities (e.g., the name of the account refers to municipal securities, municipal bonds, or fund names commonly known to be related to municipal securities, such as a debt service reserve fund account).

The staff also believes that, as part of a reasonable diligence process, a market participant could provide written notice (including by electronic or other means) to a client and make provision for a contingent approach in the event that the client fails to respond. For example, for clients with existing accounts or existing investments prior to July 1, 2014, a market participant could provide written notice to such clients inquiring whether the funds on deposit or held in existing investments in the client's account include proceeds of municipal securities and requesting that clients return written representations to the market participant, with a contingency provision that the market participant will assume, unless notified otherwise, that the funds on deposit or held in existing investments in the client's account do not include proceeds of municipal securities.

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[37] *See* Adopting Release, 78 FR at 67495 (describing the Commission's belief that a determination of whether or not a person has a reasonable basis to rely on a written representation requires reasonable diligence based on all the facts and circumstances, including review of the written representation and other relevant information reasonably available to the person).

[38] The Final Rules were effective on January 13, 2014; however, on January 13, 2014, the Commission temporarily stayed the Final Rules until July 1, 2014.

[39] The staff notes that documentation of the steps undertaken in a reasonable diligence process to determine whether funds in an existing account or existing investment constitute proceeds of municipal securities could help to support a market participant's determination if this determination were questioned.

In the staff's view, a reasonable diligence process could permit a market participant to form a reasonable belief, based on all the facts and circumstances, that the funds in an existing account or existing investment do not constitute proceeds of municipal securities. Examples of factors that a market participant may consider in its reasonable diligence process could include, but are not limited to, the quantity of existing accounts and the relative administrative burdens and costs of determining whether such accounts contain proceeds of municipal securities, the nature and term of existing investments and the relative potential for future advice on those investments, and an assessment of the potential likelihood that a particular client uses proceeds of municipal securities in light of the nature of the particular client's business.

Identifying Proceeds Received On or After July 1, 2014. With respect to investment advice provided on or after July 1, 2014 regarding investments of newly-arising proceeds received from municipal securities that are issued on or after that date, market participants should develop policies and procedures consistent with the Final Rules and the Commission's guidance in the Adopting Release to determine whether or not the advice provided involves investments of proceeds of municipal securities.[40] The staff notes that the same guidance applies to municipal escrow investments under Exchange Act Rule 15Ba1-1(h)(2). [May 19, 2014]

Question 11.2: Proceeds of Pension Obligation Bonds: Suppose a municipal entity issues pension obligation bonds to finance an unfunded actuarial liability for a municipal entity's public pension plan[41] and contributes those proceeds to such public pension fund where they are commingled with other pension funds for collective investment and treated as spent to carry out their authorized purposes to fund the public pension plan under applicable state law upon their contribution to the public pension plan. Funds in these public pension plans are required to be used for the exclusive benefit of the pension beneficiaries. In these circumstances, do such proceeds of pension obligation bonds cease to be considered "proceeds of municipal securities" under the Final Rules upon their contribution to the public pension plan?

Answer: Yes, in the staff's view, under the circumstances described in Question 11.2, such proceeds of pension obligation bonds lose their character as proceeds of municipal securities under the Final Rules upon their contribution to the public pension plan. Exchange Act Rule 15Ba1-1(m)(1) provides that proceeds of municipal securities cease to be treated as proceeds of municipal securities when they are spent to carry out the authorized purposes of municipal securities. The staff notes that, under existing accounting practices, municipal entities commonly treat proceeds of taxable[42] pension obligation bonds as spent for their authorized

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[40] *See id.* (describing reliance on representations in writing made by a knowledgeable official of the municipal entity or obligated person whose funds are to be invested regarding the nature of such funds).

[41] Public pension plans broadly include "governmental plans" and other types of public pension plans that are sponsored by municipal entities, as described generally in note 191 in the Adopting Release, 78 FR at 67482.

[42] The staff notes that, in general, municipal entities do not issue tax-exempt bonds to fund public pension plans because the Federal tax arbitrage investment restrictions under Section 148 of the Internal Revenue Code treat proceeds of such bonds as unspent and subject to arbitrage investment restrictions until used to carry out their governmental purpose to pay retirement benefits.

purposes under applicable state law upon contribution to public pension funds and thereafter they no longer segregate, account for, or track such funds as proceeds of municipal securities.

By contrast, however, in the staff's further view, if a municipal entity segregates proceeds of pension obligation bonds and continues to account for them separately as proceeds of the pension obligation bonds or retains control over the ability to use such funds for any purpose other than the exclusive benefit of pension beneficiaries, such proceeds continue to constitute proceeds of municipal securities under the Final Rules until used ultimately to pay pension benefits to pension fund beneficiaries or to carry out other authorized purposes of the pension obligation bonds. [May 19, 2014]

SECTION 12: THE ENGINEERING EXCLUSION

Question 12.1: Scope of the Engineering Exclusion: What are some relevant considerations regarding the scope of advice an engineer may provide to a municipal entity or obligated person under the exclusion for engineers providing engineering advice if such advice relates to a new project that will be financed, in whole or in part, by an issuance of municipal securities? Does the analysis change if the advice relates to an existing project that was financed, in whole or in part, by one or more outstanding issues of municipal securities?

Answer: *Overview.* In accordance with Exchange Act Section 15B(e)(4)(C), the Final Rules exclude engineers from the definition of municipal advisor "to the extent that the engineer is providing engineering advice."[43] In the Adopting Release, the Commission provided several examples of engineering activities within the scope of the engineering exclusion (those activities where the engineer's advice focuses on a project's engineering aspects and considerations) and several examples of engineering activities outside the scope of the engineering exclusion (those activities where the engineer's advice focuses on advice relating to the structure, timing, terms, and other similar matters for the issuance of municipal securities or municipal financial products).[44]

New Project to be Financed by an Issuance of Municipal Securities. The staff believes an engineer could rely on the engineering exclusion when providing advice on the engineering aspects of a new project that will be financed, in whole or in part, by an issuance of municipal securities; provided that such advice does not include advice with respect to structure, timing, terms, or other similar matters concerning such issuance of municipal securities. For example, an engineer could provide a municipal entity or obligated person with advice on a new project's specifications, including overall cost, a projected construction schedule, anticipated funding requirements, and a projected in-service date. The municipal entity, obligated person, or other financing transaction participant, in turn, could use such information to structure the related issuance of municipal securities, including determining the length of any capitalized interest period and the amount of capitalized interest to be financed from bond proceeds. The staff believes, however, that an engineer providing advice on how to structure the related issuance of

[43] Exchange Act Rule 15Ba1-1(d)(2)(v).
[44] Adopting Release, 78 FR at 67530-67531.

municipal securities, including the length of any capitalized interest period and the amount of capitalized interest to be financed, would constitute municipal advisory activities outside the scope of the engineering exclusion. Absent an available exclusion or exemption, the staff believes that an engineer providing such advice would fall within the scope of the municipal advisor definition under the Final Rules and would be required to register with the Commission as a municipal advisor.

In the Adopting Release, the Commission stated its belief "that the provision 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 are within the scope of the engineering exception." [45] Similarly, as part of providing advice on the engineering aspects of a new project, an engineer could provide a municipal entity or obligated person with projected gross revenues that are derived from the physical connections to the project (e.g., water and sewer system), as well as projected operating and maintenance expenses and net revenues for such project. The municipal entity, obligated person, or other financing transaction participant, in turn, could use such information to structure the timing and terms of debt service payments on the related issuance of municipal securities and, based on such debt service structure and projected net revenues, provide a projected debt service coverage table for inclusion in the offering document for the issuance of municipal securities. The staff believes, however, that an engineer providing advice on how to structure the related issuance of municipal securities, including the timing and terms of debt service payments, would constitute municipal advisory activities outside the scope of the engineering exclusion. Absent an available exclusion or exemption, the staff believes that an engineer providing such advice would fall within the scope of the municipal advisor definition under the Final Rules and would be required to register with the Commission as a municipal advisor.

Existing Project Financed by an Issuance of Municipal Securities. The staff believes an engineer could rely on the engineering exclusion when providing advice on the engineering aspects of an existing project that was financed, in whole or in part, by one or more outstanding issues of municipal securities; provided that such advice does not include advice with respect to restructuring or refinancing such issuance of municipal securities. For example, a municipal entity engages an engineer to provide a compliance report with respect to an existing project that includes evaluating the state of the physical plant, the useful life of parts, the routine maintenance being conducted, and the proposed capital improvements program and, based on such evaluation, the engineer provides the municipal entity with advice on complying with covenants in existing bond documents. In such a compliance report, the engineer may provide advice on rates and whether the proposed rate structure is sufficient, or recommend a rate increase to achieve compliance with an existing rate covenant. The staff believes, however, that an engineer providing advice on how to structure a new issuance of municipal securities for the

[45] *See* Adopting Release, 78 FR at 67531. By contrast, absent other relevant facts and circumstances, the staff believes that an engineer providing a municipal entity or obligated person with projected gross revenues for a new project that are based exclusively on market forces, such as ticket sales for a sports arena (as distinguished from engineering aspects), would not be within the scope of the engineering exclusion under the Final Rules.

proposed capital improvement program or restructure or refinance an outstanding issuance of municipal securities to achieve compliance with covenants in existing bond documents would constitute municipal advisory activities outside the scope of the engineering exclusion. Absent an available exclusion or exemption, the staff believes that an engineer providing such advice would fall within the scope of the municipal advisor definition under the Final Rules and would be required to register with the Commission as a municipal advisor. [May 19, 2014]

Question 12.2: Engineering Advice Regarding Loan Applications for State Revolving Funds: If an engineer assists a municipal entity or obligated person with completing a loan application for state revolving funds, would such assistance be considered municipal advisory activity under the Final Rules?

Answer: The Answer to Question 1.1 of these FAQs regarding the general information exclusion from advice generally applies and is relevant to this analysis. If the engineer provides general information that does not involve a recommendation with respect to a municipal financial products or the issuance of municipal securities, such assistance would not be considered municipal advisory activity. The Answer to Question 12.1 of these FAQs regarding engineering advice on a new project to be financed by an issuance of municipal securities also generally applies and is relevant to this analysis. If the engineer provides advice on the engineering aspects and consideration of a project to be financed by the proceeds of the state revolving loan funds, the staff believes such advice would be within the scope of the engineering exclusion. If the engineer's advice includes advice with respect to structure, timing, terms or other similar matters concerning a related municipal financial product or issuance of municipal securities, it would constitute municipal advisory activity outside the scope of the engineering exclusion. Absent an available exclusion or exemption, the staff believes that an engineer providing such advice would fall within the scope of the municipal advisor definition under the Final Rules and would be required to register with the Commission as a municipal advisor. [May 19, 2014]

SECTION 13: THE BANK EXEMPTION

Question 13.1: Advice by Dual Employees: An individual is employed by a bank and is an associated person of the bank's broker-dealer affiliate (a "dual employee"). May a dual employee provide advice to a municipal entity or obligated person within the scope of the bank exemption under the Final Rules when acting in the employee's capacity as a bank employee and advice within the scope of the underwriter exclusion under the Final Rules when acting in the employee's capacity as a broker-dealer?

Answer: The staff believes that a dual employee may provide advice within the scope of the bank exemption while acting in the capacity of a bank employee and may provide advice within the scope of the underwriter exclusion while acting in the capacity of a broker-dealer if such dual employee discloses to the municipal entity or obligated person the capacity in which the dual employee is acting in advance of providing any advice. To provide advice in both capacities, the dual employee must meet and fulfill the requirements of the bank exemption and the underwriter exclusion under the Final Rules. The staff notes that, in each such capacity and absent additional

facts and circumstances, the nature of the relationship between the dual employee and the municipal entity or obligated person would be an arm's length and non-advisory relationship. The staff further notes, however, that persons serving in more than one capacity on the same transaction should consider any potential conflicts of interest that may arise. [May 19, 2014]

Question 13.2: Direct Purchase of Municipal Securities by a Bank: A bank seeks to purchase municipal securities directly from a municipal entity for the bank's own account. May the bank rely on the bank exemption under the Final Rules to make recommendations concerning the structure, timing, terms, and similar matters with respect to such securities to be purchased and held by the bank for its own account?

Answer: Pursuant to an express provision in the bank exemption in the Final Rules, a bank may provide advice to a municipal entity or obligated person with respect to "the purchase of a municipal security by the bank for its own account."[46] In the Adopting Release, the Commission stated in relevant part that "banks providing municipal entities or obligated persons with the terms under which they would purchase securities for their own account are not engaging in municipal advisory activity."[47] Accordingly, a bank may rely on the bank exemption in the Final Rules to give advice to a municipal entity regarding the structure, timing, and terms under which the bank would purchase securities for its own account.

In the staff's view, however, if a bank provides advice to a municipal entity or obligated person regarding the structuring, timing, terms, and similar matters with respect to an issuance of municipal securities that extends beyond those municipal securities that the bank plans to purchase for its own account, such advice would constitute municipal advisory activity that is outside the scope of the bank exemption under the Final Rules. For example, if a bank provides advice to a municipal entity or obligated person regarding the structure, timing, terms, and other similar matters with respect to an issuance of municipal securities to be offered in the public markets, the staff believes that such advice would be outside the scope of the bank exemption. In this regard, the Answer to Question 1.1 of these FAQs regarding the advice standard generally applies and is relevant to this analysis. [May 19, 2014]

SECTION 14: THE ATTORNEY EXCLUSION

Question 14.1: Advice Provided by Bond Counsel: A municipal entity engages bond counsel in connection with an issuance of municipal securities involving conduit bonds for the benefit of an obligated person. The municipal entity has asked the obligated person to contact bond counsel directly regarding certain legal questions. May bond counsel rely on the attorney exclusion to provide legal advice directly to such obligated person regarding the issuance of municipal securities?

Answer: Exchange Act Section 15B(e)(4)(C) excludes from the municipal advisor definition attorneys offering legal advice or providing services that are of a traditional legal nature with

[46] *See* Exchange Act Rule 15Ba1-1(d)(3)(iii)(B).
[47] Adopting Release, 78 FR at 67535, note 894.

respect to the issuance of municipal securities or municipal financial products. The Final Rules limit the scope of the attorney exclusion to such advice or services the attorney provides to the attorney's client that is a municipal entity, obligated person, or other participant in the transaction.[48] In the Adopting Release, the Commission stated that "if another participant in the issuance or transaction, who is not a client of the attorney, receives and acts upon the legal advice the attorney provides to its client, the attorney will not have to register as a municipal advisor. In this situation, the attorney is still only advising its client, even if the advice affects the actions of other participants in the transaction."[49]

The role of bond counsel on a transaction to issue municipal securities customarily includes providing an objective legal opinion with respect to the validity of the bonds and other subjects, including the tax treatment of interest on the bonds. To fulfill this function, bond counsel may need to share its views with, or provide legal advice to, members of the transaction team other than bond counsel's client regarding state law authority for issuing the bonds and the federal and state tax status of the interest on the bonds. In the staff's view, an attorney may state its client's position (or provide advice that it would provide to its client if asked) without requiring the client to be present, provided that the attorney's client does not object to such arrangement. The staff notes that attorneys are required to comply with rules of professional conduct and ethical standards for attorneys under applicable state law. Accordingly, in the case of conduit bonds, in the staff's view, if bond counsel's statements to the obligated person are within the scope of its representation of the municipal entity and its role as bond counsel and are otherwise consistent with applicable law, bond counsel would not be required to register as a municipal advisor.[50]
[May 19, 2014]

[48] Exchange Act Rule 15Ba1-1(d)(2)(iv).
[49] Adopting Release, 78 FR at 67528.
[50] The content of such statements must also be consistent with the requirements of the exclusion included in the Final Rules. 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, the attorney would not be excluded with respect to such financial activities. *See* Exchange Act Rule 15Ba1-1(d)(2)(iv).