

If you have questions or would like additional information on the material covered in this Alert, please contact one of the authors:

**Frederick C. Leech**

Partner, Pittsburgh  
+1 412 288 4178  
fleech@reedsmith.com

**George F. Magera**

Partner, Pittsburgh  
+1 412 288 7268  
gmagera@reedsmith.com

**Alicia G. Powell**

Partner, Pittsburgh  
+1 412 288 8240  
apowell@reedsmith.com

**Andrew P. Cross**

Partner, Pittsburgh  
+1 412 288 2614  
across@reedsmith.com

...or the Reed Smith lawyer with whom you regularly work.

## Municipal Advisor Registration Requirements: Are You Required To Register With the SEC by October 1, 2010?

The municipal advisor registration requirements under Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") become effective October 1, 2010. Generally, absent an exclusion, individuals and entities that provide advice to or on behalf of municipal entities or certain obligors, such as state and local governments, public pension funds, local government investment pools (or "LGIPs") and 529 plans, that constitutes municipal advisory services (i.e., advice with respect to municipal financial products, the issuance of municipal securities or the solicitation of a municipal entity as further discussed below) can be swept up into the municipal advisor registration requirements, depending upon their activities. On September 1, 2010, the SEC promulgated Interim Final Temporary Rule 15Ba2-6T ("IFTR 15Ba2-6T"), and Form MA-T,<sup>1</sup> to create a means for municipal advisors to temporarily register with the SEC. The Dodd-Frank Act registration requirements, as well as the SEC's interpretation of them in the Adopting Release, are less than clear, however, and can be read to expand the scope of the municipal advisor registration requirements beyond what one would logically expect. For example, as discussed in more detail below, although Section 975 of the Dodd-Frank Act on its face excludes from the definition of a "municipal advisor" investment advisers registered under the Advisers Act, given the SEC's interpretation of this exclusion in the Adopting Release, a registered investment adviser that provides advice to a municipal entity, such as a public pension fund, LGIP or 529 plan, regarding swaps or the structure of the pool or plan, or engages in certain solicitation activity, may be required to also register as a municipal advisor.

### General Discussion of Municipal Advisor Registration Requirements

#### *Legislative Intent/Policy Behind Municipal Advisor Registration*

Section 975 of the Dodd-Frank Act is Congress' attempt to regulate, and to prevent in the future, activities that are believed to have resulted in the municipal bankruptcies and other "scandals" that have impacted the municipal securities markets in recent years. To achieve that goal, Section 975 creates a registration regime for previously unregulated financial advisors, investment brokers and other municipal market intermediaries in an effort to prohibit fraudulent and manipulative practices by these previously unregulated persons when they work with municipal issuers.<sup>2</sup> As enacted, however, Section 975 appears likely to have a more expansive application.

#### *General Registration Requirement*

Among other changes,<sup>3</sup> Section 975 of the Dodd-Frank Act amended Section 15B(a) of the '34 Act to make it unlawful for a "municipal advisor" to engage in the following activities without being registered with the SEC:

- Providing advice to or on behalf of a "municipal entity" or "obligated person" with respect to "municipal financial products" or the issuance of "municipal securities"; or
- Undertaking a solicitation of a "municipal entity" or "obligated person."

As noted previously, the provisions of Dodd-Frank Act that relate to regulation of municipal securities, including the municipal advisor registration requirements, are effective October 1, 2010.

#### *Recent MSRB Announcement Regarding Municipal Advisor Registration*

Municipal advisors eventually will need to comply with applicable MSRB rules, and will be subject to examination by the SEC. The MSRB announced September 15, 2010, that it will commence its municipal advisor rulemaking and registration activities after October 1, 2010. After acknowledging that municipal advisors are required to register with the SEC by October 1, 2010, the MSRB indicated that it will begin its own registration process following the adoption of associated MSRB

administrative rules, and that, upon the seating of its new board of directors, the MSRB will begin working on a broad range of administrative and substantive rules to reflect its broadened investor and municipal entity protection mission under Section 15B of the '34 Act, as amended by the Dodd Frank Act. Importantly, the MSRB announced that no MSRB rules will apply to municipal advisors prior to such rulemaking by the Board, with the exception of broker-dealers and bank dealers providing financial advisory services to issuers of municipal securities. Dealer financial advisors are already subject to all MSRB rules.

### **Registration and Timing under SEC Temporary Interim Final Rule 15Ba2-6T**

IFTR 15Ba2-6T creates a means for municipal advisors to temporarily register with the SEC<sup>4</sup> by October 1, 2010. According to the SEC in the Adopting Release, “[a]bsent such means to register, municipal advisors would likely have to cease providing all municipal advisory services, which may have a significant adverse impact on their businesses and on municipal entities and obligated persons engaged in issuing municipal securities or other activities for which they obtain the advice of a municipal advisor.”<sup>5</sup>

To register with the SEC, a municipal advisor must establish an account, and a username and password for the SEC’s secure registration website and, must select and answer a security question. Once accepted by the website, the municipal advisor will be notified via e-mail that the account has been established.<sup>6</sup> At that point, the municipal advisor will be able to gain access to, and complete and file its Form MA-T through that website.<sup>7</sup> Any subsequent amendments, or a withdrawal of its Form MA-T, also must be done through that website.<sup>8</sup>

Form MA-T generally requires municipal advisors to disclose (a) the purpose for filing Form MA-T (e.g., registration, amendment, or withdrawal), (b) certain basic identifying and contact information regarding the municipal advisor (e.g., name, address, telephone and fax number, e-mail address, etc.), (c) certain regulatory identification information (e.g., CRD number and EIN number), (d) the general types of municipal advisory services the municipal advisor engages in, and (e) certain disciplinary information regarding the municipal advisor and its associated persons (similar to what is required by Form BD). The SEC staff has indicated that information filed by municipal advisors on Form MA-T will be made publicly available on the SEC’s website by October 1, 2010.<sup>9</sup>

Once a municipal advisor receives confirmation from the SEC that its Form MA-T has been accepted as filed, a municipal advisor’s temporary registration on Form MA-T will be effective until the earlier of: (1) the date that the municipal advisor’s registration is approved or disapproved by the SEC pursuant to a final rule adopted by the SEC establishing another manner of registration of municipal advisors and prescribing a form for such purpose; (2) the date on which the municipal advisor’s temporary registration is rescinded by the SEC; or (3) the expiration of IFTR 15Ba2-6T December 31, 2011.

### **Analysis of ‘Municipal Advisor’ and Related Definitions**

#### **Basic Definition (Without Exclusions)**

Section 975 of the Dodd-Frank Act defines a “municipal advisor” to mean, in general, (a) a person (b) who is not a municipal entity or employee of a municipal entity (c) that provides advice to or on behalf of a municipal entity or obligated person with respect to (i) municipal financial products or (ii) the issuance of municipal securities, including advice on the structure, timing, terms and other similar matters concerning such financial products or issues, or (d) who undertakes a solicitation of a municipal entity.<sup>10</sup>

The definition of “municipal advisor” also specifically includes financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisers. In the Adopting Release, the SEC clarified that these entities are only included if they provide the advice or services described above (i.e., with respect to municipal products or the issuance of municipal securities (including advice on the structure, timing, terms and other similar matters concerning financial products or issues)).

#### **Who is a “Person”?**

A “person” includes a natural person, company<sup>11</sup>, government, or political subdivision, agency, or instrumentality of a government. A person that is a municipal entity or an employee of a municipal entity would not be a municipal advisor.

**What is a “Municipal Entity” or “Obligated Person”?**

Section 975 of the Dodd-Frank Act defines a “municipal entity” as including any state, political subdivision of a state, or municipal corporate instrumentality of a state, such as:

- Any agency, authority or instrumentality of the state, political subdivision, or municipal corporate instrumentality,
- Any plan, program or pool of assets sponsored or established by the state, political subdivision, or municipal corporate instrumentality, or any agency, authority, or instrumentality thereof, or
- Any other issuer<sup>12</sup> of municipal securities.<sup>13</sup>

According to the MSRB’s September 15, 2010 announcement, this definition of “municipal entities” would encompass, among other municipal entities, public pension funds, 529 plans, local government investment pools or LGIPs, and other state and local governmental entities or funds.

An “obligated person” is defined to include any person, such as the issuer of municipal securities, who is either generally or through an enterprise, fund, or account of such person, committed by contract or other arrangement to support the payment of all or part of the obligations on the municipal securities to be sold in an offering of municipal securities.

**What Advice Requires Registration?**

In the absence of an exclusion (see discussion below) from the definition of “municipal advisor,” there are two types of advice that a person may provide to, or on behalf of, a municipal entity or obligated person that would result in such person being a municipal advisor: (i) advice with respect to municipal financial products; or (ii) advice with respect to the issuance of municipal securities. This includes advice with respect to the structure, timing, terms and other similar matters concerning such financial products or issues.

Section 975 of the Dodd-Frank Act defines a “municipal financial product” to include any municipal derivative, guaranteed investment contract, or investment strategy. While not defined in Section 975, a reasonable definition of “municipal derivative” in this context would appear to be an interest rate swap, rate lock, forward purchase agreement, basis swap or other instrument designed to hedge risk that is embedded within, entered into in connection with the issuance of, a municipal security, or regarding which a municipal entity is provided advice.<sup>14</sup> Section 975 of the Dodd-Frank Act defines a “guaranteed investment contract” as including (i) any investment that has specified withdrawal or reinvestment provisions and a specifically negotiated or bid interest rate, and (ii) any agreement to supply investments on two or more future dates, such as a forward supply contract. “Investment strategy” is defined by Section 975 of the Dodd-Frank Act as including “plans or programs for the investment of the proceeds of municipal securities that are not municipal derivatives, guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments.”<sup>15</sup>

Given the above, in the absence of an exclusion from the definition of “municipal advisor,” it appears that municipal advisors would include persons who provide advice to municipal entities or obligated persons regarding (A) swaps or guaranteed investment contracts, (B) the investment of proceeds from the issuance of municipal securities, or (C) the offering of municipal securities, or (D) that recommend brokerage and investment options for proceeds from the issuance of municipal securities held in escrow, or (E) that prepare feasibility studies, tax or revenue projections, or similar products in connection with offerings or potential offerings of municipal securities.

**When Does Solicitation Require Registration?**

As noted above, a “municipal advisor” also includes a “person” (who is not a municipal entity or employee of a municipal entity) who undertakes a solicitation of a municipal entity. “Solicitation of a municipal entity or obligated person” is defined in Section 975 of the Dodd-Frank Act to mean (i) a direct or indirect communication with a municipal entity or an obligated person made by a person, (ii) for direct or indirect compensation, (iii) on behalf of an *unaffiliated* broker, dealer, municipal securities dealer, municipal advisor, or investment adviser (iv) for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person (A) of a broker, dealer, municipal securities dealer or municipal advisor for, or in connection with, municipal financial products, the issuance of municipal securities, or (B) of an investment adviser to provide investment advisory services to or on behalf of a municipal entity.

Thus, for example, solicitation for advisory services by a solicitor that is *affiliated* with an investment adviser would not cause the affiliated solicitor to be a “municipal advisor.” Similarly, if a solicitor is not directly or indirectly compensated for its solicitation services, that solicitor would not be a “municipal

advisor.” Independent solicitors, marketers and finders that solicit municipal entities or obligors for municipal advisory services or products of a third party, or investment advisory services by introducing an investment adviser to a municipal entity, could be subject to registration as “municipal advisors.”<sup>16</sup>

**Limited Exclusions from ‘Municipal Advisor’ Definition**

Certain persons are specifically excluded from the definition of “municipal advisor” by Section 975 of the Dodd-Frank Act. These persons would not be municipal advisors subject to the municipal advisor registration requirements even if their activities would otherwise require them to register with the SEC. The persons excluded from the definition of “municipal advisor” include, in pertinent part:<sup>17</sup>

- A broker, dealer, or municipal securities dealer serving as an underwriter as defined in Section 2(a)(11) of the ‘33 Act;<sup>18</sup>
- Any investment adviser registered under the Advisers Act, or persons associated with such investment advisers who are providing investment advice;<sup>19</sup> and
- Any commodity trading advisor registered under the Commodity Exchange Act, or persons associated with a commodity trading advisor who are provided advice relating to swaps.

Regarding registered investment advisers, on its face, Section 975 of the Dodd-Frank Act appears to exclude investment advisers based solely on their registration status; only associated persons of investment advisers would need to be providing investment advice to be excluded from the “municipal advisor” definition. In the Adopting Release, however, the SEC indicated that a registered investment adviser (or an associated person thereof) is excluded from the definition of “municipal advisor” if the investment adviser or associated person provides municipal advisory services, “so long as those services are investment advice for purposes of the Advisers Act.”<sup>20</sup> According to the SEC in the Adopting Release, a “registered investment adviser or an associated person of an investment adviser must register with the [SEC] as a municipal advisor if the adviser or associated person of an adviser provides any municipal advisory services other than investment advice within the meaning of the [Advisers Act].” Thus, the SEC appears to have taken a position contrary to a plain reading of Section 975 of the Dodd Frank Act.<sup>21</sup>

The staff did not elaborate on the meaning of “investment advice” for purposes of the municipal advisor registration requirements. “Investment advice” could be interpreted as advice that, if provided by a person, would cause the person to be an “investment adviser” under the Advisers Act. Under the Advisers Act, such activity generally would include providing advice as to the value of securities or as to the advisability of investing in, purchasing or selling securities, or issuing or promulgating reports concerning securities. Under the Advisers Act, providing advice on non-security products, such as swaps, for example, would not be considered providing advice regarding the value of, or investing in, purchasing or selling “securities.”<sup>22</sup> If this is the case, registered investment advisers that are exempt from registration as commodity trading advisers could be considered not to be providing “investment advice” (and, therefore, required to register as municipal advisors) if they implement investment strategies for municipal entities or obligated parties that include investments in swaps.

A better interpretation of “investment advice” for purposes of the definition of “municipal advisor” may be any advice provided by a registered investment adviser pursuant to a written agreement with a client to whom the registered investment adviser owes a fiduciary duty as an investment adviser under the Advisers Act. This interpretation would be consistent with a plain reading of the definition of “municipal advisor” in Section 975 of the Dodd-Frank Act, and would be consistent with the intent behind Section 975 of the Dodd-Frank Act given that registered investment advisers would be acting as fiduciaries and subject to the anti-fraud provisions in Section 206 of the Advisers Act. Given the definition of “security” in the Advisers Act, the position taken by the SEC, and the lack of guidance provided by the SEC, in the Adopting Release, when a registered investment adviser would not be excluded from the definition of “municipal advisor” is somewhat unclear.

Like investment advisers providing advice on swaps that may be exempt from registering as commodity trading advisers, the status of other entities, such as banks, that are exempt from registering as investment advisers and commodity trading advisers, is unclear under the municipal advisor registration requirements.

Those who provide advice to or on behalf of municipal entities or certain obligors, such as state and local governments, public pension funds, local government investment pools and 529 plans, and those who solicit such municipal entities and obligors, must carefully review their business practices in light of Section 975 of the Dodd-Frank Act and IFTR 15Ba2-6T to determine whether they must register with the SEC on Form MA-T. The review of these rather complex and somewhat ambiguous statutory and regulatory provisions, an analysis of business practices through the lens

of these provisions, and the determination as to whether an entity must register with the SEC, must be undertaken in short order, given the October 1 registration deadline. Reed Smith has deep experience in representing regulated entities in complying with federal securities laws and SEC regulations. If you have questions or would like additional information on Section 975 of the Dodd-Frank Act, IFTR 15Ba2-6T or Form MA-T, please contact one of the authors of this Alert or the attorney with whom you regularly work.

- 
- 1 See *Temporary Registration of Municipal Advisors*, SEC Release No. 34-62824 (Sept. 1, 2010), available at [www.sec.gov/rules/interim/2010/34-62824.pdf](http://www.sec.gov/rules/interim/2010/34-62824.pdf) ("Adopting Release"). IFTR 15Ba2-6T is effective from October 1, 2010, through December 31, 2011. The comment deadline for IFTR 15Ba2-6T is October 8, 2010.
  - 2 See *Enhancing Investor Protection and the Regulation of Securities Markets – Part I: Testimony before the U.S. Senate Committee on Banking, Housing and Urban Affairs*, 111th Congress, U.S. Senate (2009) (Testimony of Mr. Timothy Ryan); see also *Statement of Municipal Securities Rulemaking Board Chair Ronald A. Stack on Transparency and Regulation in the Municipal Securities Market before the Committee on Banking, Housing and Urban Affairs*, 111th Congress, U.S. Senate (2009) (MSRB supporting registration of previously unregistered persons that provide advice relating to municipal bond offerings or the investment of bond proceeds). As discussed below, in the Adopting Release, the SEC also recognized that it was the goal of the Dodd-Frank Act to regulate a category of previously unregulated individuals.
  - 3 Section 975 of the Dodd-Frank Act also, in relevant part: (1) amended Section 15(B)(a) of the 1934 Act to prohibit a municipal advisor from using the mails or any means or instrumentality of interstate commerce to engage in any fraudulent, deceptive or manipulative act or practice while engaging in the above activities; (2) amended Section 15B(b) to authorize the MSRB to prescribe means reasonably designed to prevent acts, practices and courses of business that are not consistent with a municipal advisor's fiduciary duty to its clients; provide continuing legal education requirements for municipal advisors; and provide for professional standards; and (3) amended Section 15B(c) to provide the SEC with certain disciplinary powers over municipal advisors; to provide that a municipal advisor and any person associated with a municipal advisor shall be deemed to have a fiduciary duty to any municipal entity for whom such municipal advisor acts as a municipal advisor; and to preclude a municipal advisor from engaging in any act, practice or course of business that is not consistent with that fiduciary duty, or that is in contravention of a rule of the MSRB.
  - 4 The SEC staff has indicated that the SEC expects to promulgate a permanent rule later in 2010. See *SEC Adopts Temporary Rule Requiring Municipal Advisors to Register With Agency*, SEC Press Release 2010-162 (September 2, 2010), available at [www.sec.gov/news/press/2010/2010-162.htm](http://www.sec.gov/news/press/2010/2010-162.htm).
  - 5 In the Adopting Release, the SEC defines "municipal advisory services" as meaning "advice with respect to municipal financial products, the issuance of municipal securities, and the solicitation of a municipal entity." Advice regarding the structure, timing, terms and other similar matters concerning municipal financial products or the issuance of municipal securities also would likely be included in the definition of "municipal advisory services." Form MA-T requires a municipal advisor to identify the categories of services it performs, and these also are instructive as to the types of activities that would be included in "municipal advisory services." See footnote 16 below for a listing of these Form MA-T categories.
  - 6 While the SEC indicated in the Adopting Release that it expected a municipal advisor to normally be able to establish an account in one day, the SEC requested municipal advisors to begin the process early in order to allow sufficient time to establish the account, obtain the access credentials and complete Form MA-T.
  - 7 The form and instructions for establishing an account and obtaining access credentials can be obtained through a link provided at [www.sec.gov/info/municipal/form\\_ma-t.htm](http://www.sec.gov/info/municipal/form_ma-t.htm).
  - 8 Form MA-T constitutes a municipal advisor's consent to service of process and is considered to be a "report" for purposes of the 1934 Act. Form MA-T must be executed by an authorized principal officer, general partner, sole proprietor, or similarly situated person of the municipal advisor depending upon its corporate form. Both the person who signs the form and the municipal advisor will be required to represent that the information and statements made in Form MA-T are current, true and complete.
  - 9 See *SEC Adopts Temporary Rule Requiring Municipal Advisors to Register With Agency*, SEC Press Release 2010-162 (September 2, 2010), available at [www.sec.gov/news/press/2010/2010-162.htm](http://www.sec.gov/news/press/2010/2010-162.htm).
  - 10 In the Adopting Release, the SEC recognized that it was the goal of the Dodd-Frank Act to regulate persons and entities that are not regulated as investment advisers or commodity trading advisers, and who provide advice to state and municipal bodies regarding the issuance of municipal securities, the use of municipal securities in connection with the issuance of municipal securities, the investment of proceeds of the issuance of municipal securities, or the solicitation of state and municipal bodies (i.e., a category of persons previously unregulated). In an announcement September 15, 2010, the MSRB stated: "Municipal advisors include a variety of different types of firms and individuals that provide advice on municipal securities or municipal financial products to state and local governments and other municipal entities, as well as to certain beneficiaries of municipal bond issues – such as hospitals, colleges and other obligated persons. Municipal advisors also include firms and individuals that solicit business on behalf of broker-dealers, bank dealers, other municipal advisors or investment advisers from municipal entities . . ."
  - 11 A "company" includes a corporation, a partnership, an association, a joint-stock company, a trust, a fund, or any organized group of persons whether incorporated or not; or any receiver, trustee in a case under Title 11 of the United States code, or similar official or any liquidating agent for any of the foregoing, in his capacity as such.
  - 12 Under the 1934 Act, the term "issuer" is defined to mean any person who issues or proposes to issue any security; except that with respect to certificates of deposit for securities, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having

a board of directors or of the fixed, restricted management, or unit type, the term “issuer” means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; and except that with respect to equipment-trust certificates or like securities, the term “issuer” means the person by whom the equipment or property is, or is to be, used.

- 13 Under the 1934 Act, the term “municipal securities” means securities that are direct obligations of, or obligations guaranteed as to principal or interest by, a state or any political subdivision thereof, or any agency or instrumentality of a state or any political subdivision thereof, or any municipal corporate instrumentality of one or more states, or any security that is an industrial development bond (as defined in section 103(c)(2) of Title 26), the interest on which is excludable from gross income under section 103(a)(1) of Title 26 if, by reason of the application of paragraph (4) or (6) of section 103(c) of Title 26 (determined as if paragraphs (4)(A), (5), and (7) were not included in such section 103(c)), paragraph (1) of such section 103(c) does not apply to such security. The term “security,” as amended by the Dodd-Frank Act, includes any note, stock, treasury stock, security future, *security-based swap*, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a “security”; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance that has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof, the maturity of which is likewise limited.
- 14 A definition of “municipal derivative” was deleted from the final, enacted version of the Dodd-Frank Act. Under S.3217, a “municipal derivative” had been defined by the Senate in Section 975 as “any financial instrument or contract designed to hedge a risk (including interest rate swaps, basis swaps, credit default swaps, caps, floors, and collars).” Given the removal of the definition from the final, enacted version of the Dodd-Frank Act, what is meant by a “municipal derivative” is subject to uncertainty and regulatory “gloss.”
- 15 The categories of services that Form MA-T requires a municipal advisor to identify that it performs are instructive as to the types of advice and services provided to a municipal entity that would require a person to register as a municipal advisor, and are as follows: (1) advice concerning the issuance of municipal securities, (2) advice concerning guaranteed investment contracts, (3) advice concerning the investment of the proceeds of municipal securities, (4) recommendation and/or brokerage of municipal escrow investments, (5) advice concerning the use of municipal derivatives (e.g., swaps), (6) solicitation of business from a municipal entity or obligated person for an unaffiliated person or firm (e.g., third-party marketers, placement agents, solicitors and finders), and (7) preparation of feasibility studies, tax or revenue projections, or similar products in connection with offerings or potential offerings of municipal securities.
- 16 Under Advisers Act Rule 206(4)-5 (the “Pay to Play Rule”), municipal advisors are not included with registered investment advisers and (provided certain prerequisites are satisfied) registered broker-dealers in the definition of a “regulated person.” After September 11, 2011, regulated persons will be the only types of entities that a registered investment adviser will be permitted to engage as solicitors with respect to government entities, such as public pension funds. See *Political Contributions by Certain Investment Advisers*, SEC Release No. IA-3043 (July 1, 2010); see also *SEC Adopts Rule to Curtail ‘Pay to Play’ Practices Involving State and Local Government Entities*, Reed Smith Client Alert (Aug. 11, 2010), available at [www.reedsmith.com/publications/search\\_publications.cfm?widCall1=customWidgets.content\\_view\\_1&cit\\_id=28601](http://www.reedsmith.com/publications/search_publications.cfm?widCall1=customWidgets.content_view_1&cit_id=28601).
- 17 Attorneys offering legal advice or providing services that are of a traditional legal nature, and engineers providing engineering advice, also are excluded from the definition of “municipal advisor” by Section 975 of the Dodd-Frank Act.
- 18 Section 2(a)(11) of the ‘33 Act defines “underwriter” to mean any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors’ or sellers’ commission. As used in this definition, the term “issuer” includes, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.
- 19 The Private Fund Investment Advisers Registration Act of 2010, a title within the Dodd-Frank Act, eliminated the “private adviser” exemption under the Advisers Act. Therefore, many of the advisers who relied on it for an exemption from Advisers Act registration (e.g., hedge fund managers) will be required to register under the Advisers Act by July 21, 2011. The SEC did not provide an exclusion from the municipal advisor registration requirements for this class of investment advisers who are not yet required to register with the SEC under the Advisers Act. The Dodd-Frank Act also adjusted the rules for when an investment adviser is eligible to register with the SEC, essentially raising the AUM threshold from \$25 million to \$100 million, subject to certain exceptions beyond the scope of this bulletin. An investment adviser that will no longer be eligible to register as an investment adviser under the Advisers Act will need to be mindful of the municipal advisor registration requirements.
- 20 As noted above, in the Adopting Release, the SEC defines “municipal advisory services” as meaning “advice with respect to municipal financial products, the issuance of municipal securities, and the solicitation of a municipal entity.” Advice with respect to the structure, timing, terms and other similar matters concerning municipal financial products or the issuance of municipal securities also would likely be included in the definition of “municipal advisory services.” The categories of services that Form MA-T requires a municipal advisor to identify that it performs also are instructive as to the types of activities that would be included in “municipal advisory services.” See footnote 15 above for a listing of these Form MA-T categories.

- 21 In the Adopting Release, the SEC took a similar position on commodity trading advisors: "A commodity trading advisor or an associated person of a commodity trading advisor must register with the [SEC] as a municipal advisor if the commodity trading advisor or an associated person of a commodity trading advisor provides any municipal advisory services that are not advice related to swaps." In the Adopting Release, the SEC rightfully took a similar position on brokers, dealers, or municipal securities dealers who provide municipal advisory services other than in the capacity of an underwriter; this position, unlike the positions taken by the SEC with respect to registered investment advisers and registered commodity trading advisers, is consistent with a plain reading of Section 975 of the Dodd-Frank Act.
- 22 Unlike the definition of "security" under the 1934 Act, the Dodd-Frank Act did not amend the definition of "security" in the Advisers Act to add the term "security-based swap." Under the Advisers Act, a "security" means any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guaranty of, or warrant or right to subscribe to or purchase any of the foregoing. Swap contracts, however, generally are not considered securities under the Advisers Act definition of "security."