

Are You a “Municipal Advisor”?

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) may have a direct impact on you, your 501(c)3 organization, or your bond issuing authority.

On January 6, 2011, the Securities and Exchange Commission (“SEC”) issued proposed rules for the registration of municipal advisors. The proposed rules were part of the SEC’s implementation of the Dodd-Frank Act which President Obama signed into law on July 21, 2010. As part of the Dodd-Frank Act, Congress amended Section 15B of the Securities Exchange Act of 1934 to make it unlawful for municipal advisors to provide certain advice to, or solicit municipal entities or certain other persons without registering with the Commission. The proposed rule provides specific information on the registration requirements and outlines activities appropriate for municipal advisors.

Of concern is that the proposed SEC rule extends the definition of “municipal advisor” to include a broader group than the consulting, financial advisory, and investment banking firms one would expect. The proposed definition of municipal advisor includes a person (who is not a municipal entity or employee of a municipal entity) that:

- (i) provides advice to or on behalf of a municipal entity or **obligated person** with respect to municipal financial products or the issuance of municipal securities; or
- (ii) undertakes a solicitation of a municipal entity¹.

The catch is in the term **obligated person**. The SEC provided guidance that the term should be used as it is in Rule 15c2-12. Rule 15c2-12 is the rule governing disclosure in tax-exempt bond issues and applies to conduit borrowers and the officers thereof. Entities acting as conduit borrowers including nonprofit hospitals, long-term care providers and other 501(c)3 organizations are **obligated persons** under Rule 15c2-12. Individuals providing advice to or on the behalf of these entities may be considered municipal advisors. After review of the proposed rule several law firms have issued comments suggesting that the current definition of “municipal advisor” includes **appointed board members and key employees** (such as officers of the organization) while elected Board members are specifically excluded.

If approved as currently proposed, the rule would require obligated persons to register with the SEC as a municipal advisor and to provide disclosure of personal information and employment history, information regarding past felony charges or convictions, violations of securities rules and regulation, civil judicial actions, settlements involving the violation of investment or municipal advisor statutes or regulations, information regarding consumer complaints or arbitrations regarding investment-related matters, and information regarding bankruptcy or similar proceeds in the last ten years. Additionally, obligated persons will need to comply with certain other requirements restricting political contributions and maintaining certain records for a period of at least five years.

Many clients of Ponder & Co. have voiced deep concerns over the possible resulting effects of the proposed rule. Most notably, the possibility that the organization will be unable to attract board members willing to serve if required to register. Not only is it anticipated that potential board members will be reluctant to disclose the information required (and meet the activities deemed appropriate for a municipal advisor) but there is significant concern over the legal responsibility to investors and to the SEC that may arise if designated as an advisor on financial matters. Current board members and many officers that are aware of the proposed rule have voiced similar concerns.

The SEC is taking comments on the proposed rule through February 22, 2011. While the rule remains in its “proposed” state, Ponder & Co. suggests that you contact your organization’s general counsel and/or bond counsel to identify any concerns your organization may have. Then, if appropriate, notify your congressional delegation and the SEC to provide comments and express your concerns over such a far reaching definition of “municipal advisor”.

You may view comments previously submitted to the SEC by other organizations by visiting the SEC’s website at:

<http://www.sec.gov/comments/s7-45-10/s74510.shtml>

Additionally, you may download a complete version of the proposed rule at the SEC website by using the following link:

www.sec.gov/rules/proposed/2010/34-63576fr.pdf

As always, please let us know how we may be of service.

¹ - Part (ii) of the definition is generally accepted to broaden the meaning of municipal advisor to include third-party marketers, placement agents, finders, guaranteed investment contract brokers and other similar types of financial service and product vendors. For purposes of our discussion, this subsection is not directly relevant.