



*Invested in America*

November 15, 2010

Ms. Martha Haines  
Director of the Office of Municipal Securities  
U.S. Securities and Exchange Commission  
100 F Street Northeast  
Washington, DC, 20549-2000

Dear Ms. Haines:

For your consideration, attached please find SIFMA's draft frequently asked questions and answers related to the recent temporary interim rules on registration of financial advisors. We would like to meet with you and other SEC staff, as appropriate, to discuss this document. These suggested frequently asked questions merely represent what our members feel are some easily clarified issues. We will review the proposed final rule, and plan to respond to that proposal with our full range of comments. In the meantime, I will be following up with you by phone to schedule a meeting at a mutually convenient time to discuss the frequently asked questions and answers.

Thank you,

A handwritten signature in black ink, appearing to be "L. Norwood", written over a faint, light-colored signature line.

Leslie M. Norwood  
Managing Director and Associate  
General Counsel

cc: David Shillman, U.S. Securities and Exchange Commission  
Victoria Crane, U.S. Securities and Exchange Commission

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## Municipal Advisor FAQs

### 1. Definition of Advice

#### 1.1. Question: What is “advice” for purposes of Section 975 of the Dodd-Frank Act?

**Answer:** Whether a given communication should constitute “advice” under Section 975 will depend upon the overall facts and circumstances. The essential factor is whether, under the prevailing circumstances, a municipal entity or obligated person would reasonably expect that it could rely upon and take action based upon such communication and would expect that the person providing the communication would be acting solely in the municipal entity’s or obligated person’s best interest and without any undisclosed conflicts.

The clearest evidence of the reasonable expectations of a municipal entity (or obligated person) with regard to whether another person is providing it with “advice” would be the content of the documentation of the relationship among the parties. For example, where municipal entity A retains Bank B under a written agreement for a period of one year, for specified compensation, to provide it with structural suggestions for refinancing specified existing debt through the issuance of new securities, including the terms and timing of the new issuance, recommendations provided by Bank B under this engagement would generally be regarded as advice.

Where there is, however, no agreement pursuant to which the bank has explicitly or implicitly assumed an obligation to provide advice, neither the provision by the bank of the terms on which it is prepared to transact nor the execution of the transaction should be regarded as advice. A determination of the absence of a municipal entity’s reasonable expectations could be supported by other factors, such as the municipal entity’s retention of an investment adviser who is independent of the bank, or an explicit statement to or acknowledgement by the municipal entity that the bank is not acting as an adviser or fiduciary to the municipal entity. However, the presence or absence of such factors would not be necessary to any such determination.

The following are examples of situations that would not generally be regarded as providing advice in the absence of an agreement between the parties:

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- A bank provides to a municipal entity a listing of the options available from the bank for the short-term investment of excess cash (for example, interest-bearing bank accounts and overnight or other periodic investment sweeps) and negotiates the terms of an investment with the municipal entity.
- A broker-dealer's trading desk provides a municipal entity with price quotations with respect to particular securities (or securities having particular characteristics) which the broker-dealer would be prepared to sell as principal or acquire for the municipal entity.
- A broker-dealer provides to a municipal entity a list of securities meeting specified criteria that are readily available in the marketplace, but without making a specific recommendation as to the merits of any investment that are particularized to the municipal entity's specific circumstances or investment objectives.
- A bank provides to a municipal entity the terms upon which the bank would purchase for the bank's own account (to be held to maturity) securities issued by the municipal entity, such as bond anticipation notes, tax anticipation notes, or revenue anticipation notes.
- A broker-dealer provides a municipal entity with a presentation containing various swap alternatives that it could consider entering into with the broker-dealer as counterparty and subsequently enters into a transaction with the municipal entity.
- A financial intermediary provides to clients generally impersonal investment advice, such as research information and generic trade ideas or commentary that does not purport to meet the needs or objectives of specific clients, and is provided to a municipal entity as part of its ongoing ordinary communications.
- Merely directing or executing purchases and sales of securities or other instruments with respect to funds in a trust account or other fiduciary account in accordance with predetermined investment criteria or guidelines, including on a discretionary basis.

These examples are merely illustrative and do not represent an exhaustive list of circumstances in which a person would be regarded as providing, or not providing, advice for purposes of Section 975.

**1.2. Question: Would an investment adviser to a fund or other commingled investment vehicle in which a municipal entity is an investor along with other investors be regarded as providing advice to the municipal entity or obligated person?**

**Answer:** No. Consistent with general principles under other applicable law, an adviser to a fund is regarded as providing advice to the fund as a whole and not to the individual investors in the fund.

## **2. Scope of Fiduciary Duty**

**2.1. Question: If an employee of municipal advisor XYZ provided municipality ABC with advice regarding the investment of the proceeds of a recent bond offering issued by ABC, would XYZ be deemed to have a fiduciary duty to ABC with respect to such advice? Would XYZ be deemed to have a fiduciary duty with respect to other unrelated activities? What if the same employee that provided the advice noted above is involved in the activity? These activities might include:**

**2.1.1. acting as a counterparty to a derivative transaction that does not constitute the investment of the proceeds of the bond offering;**

**2.1.2. providing investment banking services with respect to an asset disposition being contemplated by ABC;**

**2.1.3. acting as principal in securities transactions that are not within the term “investment strategies”;**

**2.1.4. acting as principal in the purchase (to be held to maturity) of securities issued by the municipal entity (e.g., bond anticipation notes, tax anticipation notes, and revenue anticipation notes), including where the funds received by the municipal entity for such securities, whether from the bank or another purchaser, constitute the applicable “bond proceeds”;**  
**or**

**2.1.5. providing transition management services to ABC, whereby XYZ assists ABC transition from one portfolio manager to another and acts upon the direction of the new portfolio manager.**

**Answer:** The provision of advice regarding the investment of ABC’s recent bond offering would be subject to the fiduciary duty under Section 975. However, XYZ would not be deemed to have a fiduciary duty with respect to the unrelated activities described above, even if the same employee that provided the

advice that is subject to the fiduciary duty is also involved in providing the unrelated activities. A fiduciary relationship between two parties is necessarily a function of their mutual expectations. Thus, XYZ would not be deemed to have a fiduciary duty to ABC with respect to activities unrelated to the municipal advisory activities, unless ABC had a reasonable expectation that such a fiduciary relationship existed, for example, based on documentation.

**2.2. Question: When does a fiduciary duty under Section 975 terminate?**

**Answer:** The termination of a municipal advisor’s fiduciary obligations to a municipal entity under Section 975 turns upon the reasonable expectation of the municipal entity. In regard to the provision of advice by a municipal advisor in connection with municipal financial products or the issuance of municipal securities, the fiduciary duty would generally cease when the municipal advisor ceases providing such advice. The municipal entity’s reasonable expectations could also be based upon the content of any agreement or other documentation of the relationship between the parties or a course of dealing.

**2.3. Question: What are the duties of a person who is a municipal advisor solely under the solicitation prong of Section 975 and does not otherwise provide advice to a municipal entity or obligated person?**

**Answer:** A person who is a municipal advisor solely because it solicits municipal entities with respect to the engagement of third-party clients pursuant to clause (A)(ii) of the definition of “municipal advisor,” and does not otherwise provide advice to, or have a client relationship with, a municipal entity or obligated person, satisfies any duty that it may have under Section 975 by acting with due care and disclosing the identity of its third-party client, the nature of its relationship with such third-party client, the nature and source of any compensation it receives, and the basis for determining the amount of this compensation, subject to the consent of the municipal entity. This consent can be evidenced by the municipal entity proceeding with the solicited engagement after receiving the disclosure.

**3. Investment Strategies**

**3.1. Question: What is included within the term “investment strategies,” as defined in Section 975?**

**Answer:** The term “investment strategies” as used in Section 975 is limited to plans or programs for (i) the investment of the proceeds of municipal securities that are not municipal derivatives, (ii) guaranteed investment contracts and (iii) the recommendation of and brokerage of municipal escrow investments. It implies, as noted below, a series of specified investment-related actions or activities that would generally be akin to a financial plan, not merely advice incidental to a particular trade.

### **3.2. Question: What is a “plan or program” for the investment of proceeds of municipal offerings?**

**Answer:** A “plan or program” is a specific investment strategy offered by a person who holds himself out to a municipal entity or obligated person as an advisor with specific expertise concerning the investment of proceeds of municipal securities that are not municipal derivatives, guaranteed investment contracts, or the recommendation of and brokerage of municipal escrow investments. A “plan or program” is generally executed over a defined time horizon and is developed in light of a municipal entity’s particular investment objectives. In contrast, a “plan or program” does not include customary and usual brokerage activity, such as execution of orders at the direction of a municipal entity or providing recommendations for investments that are incidental to any such ordinary brokerage activity, or merely acting as a counterparty, such as with respect to a swap. Similarly, a “plan or program” does not include ordinary banking activities such as providing a municipal entity with the available options, including indicative rates or other terms, for the short-term investment of its excess cash.

### **3.3. Question: How does a person determine whether the person is providing advice with respect to funds that are “proceeds of municipal securities”?**

**Answer:** A person would not be viewed as advising on investment strategies with respect to proceeds of municipal securities if the person reasonably believes that the funds for the financial activity are from an account of the municipal entity other than an account specifically for proceeds or escrow funds that contained funds from multiple sources other than the initial proceeds of a municipal security, unless the municipal entity has communicated to the person that the investment strategies in question were specifically for the investment of the initial proceeds of municipal securities. In addition, after the initial proceeds of a municipal security offering have been invested, subsequent investments of such funds or revenues derived from the initial investment are not considered “proceeds of municipal securities,” unless the subsequent investment is part of a plan or program developed at the time of the initial investment. For example, a bank would not be deemed to know that one of the municipal entity’s bank accounts, normally used for day-to-day operational purposes, contained the proceeds of an offering of municipal securities unless it had actual knowledge of the same or if it was so advised by the municipal entity. Where a municipal entity has deposited the proceeds of a municipal securities issue in a demand deposit or similar general purpose account, the bank that maintains such account would not be considered to be rendering advice with respect to the investment of proceeds of such issue, even if it is aware that a credit has been made to the account in the amount of such proceeds, unless the municipal entity specifically communicates to a responsible officer of the bank, contemporaneously with the making of an investment, that such investment is being made with proceeds of an issue of municipal securities.

### **3.4. Question: What are “municipal escrow investments”?**

**Answer:** Municipal escrow investments are investments of funds in a segregated escrow account that was established by a municipal entity to hold funds that have been allocated for satisfying a specific and identified obligation of the municipal entity and maintained by an escrow agent for the municipal entity.

## **4. Municipal Derivatives**

### **4.1. Question: What is a “municipal derivative”?**

**Answer:** A “municipal derivative” is a swap or securities-based swap, as those terms are defined in the Dodd-Frank Act, or an over-the-counter option contract, with a municipal entity, and does not include a product that is composed of multiple components where one or more of such components is derivative in nature, such as a convertible bond or a structured note.

## **5. Solicitation**

### **5.1. Question: Do communications for purposes of obtaining principal investments in obligations of a municipal entity fall under the definition of “solicitation”?**

**Answer:** No. The term “solicitation of a municipal entity or obligated person” does not include situations where a person approaches, for direct or indirect compensation, a municipal entity on behalf of an unaffiliated person (such as a broker-dealer) for the purposes of such unaffiliated person making an investment as principal in municipal securities of such municipal entity.

### **5.2. Question: Does the term “solicitation of a municipal entity or obligated person” include communications on behalf of an investment fund, such as a hedge fund or private equity fund?**

**Answer:** No. The term “solicitation of a municipal entity or obligated person” applies to communications with a municipal entity or obligated person on behalf of specific categories of entities, *i.e.*, brokers, dealers, municipal securities dealers, municipal advisors, or investment advisers. A communication on behalf of an investment fund that is not one of these specified parties is not a communication that falls under the term “solicitation of a municipal entity or obligated person.” In particular, this communication on behalf of an investment in the fund would not be considered a communication for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person of an investment adviser to provide investment advisory services to or on behalf of a municipal entity.

## 6. Underwriter Exception

**Question: What is the scope of the exception for underwriters from the definition of municipal advisor?**

**Answer:** The underwriter exception applies where a broker, dealer, or municipal securities dealer provides advice regarding the issuance of municipal securities, municipal financial products, or any other securities (including interests in a private fund) in the context of an underwriting (including a private placement), unless the broker, dealer, or municipal securities dealer has otherwise agreed to act as a municipal advisor with regard to the underwriting or private placement. These excepted activities include providing a municipal entity with structuring alternatives or information or analysis regarding market conditions, practices, trends, or timing, or terms or other similar matters concerning an underwriting.

The underwriter exception also applies to similar communications and other activities by such underwriter or private placement agent made (i) in response to a request for proposal; (ii) as part of a pitch to obtain business from the municipal entity; (iii) as a part of executing the underwriting assignment; (iv) while a member of an underwriting pool for the municipal entity; or (v) while otherwise under engagement to serve as an underwriter (including as a private placement agent) on future transactions. These communications and activities are covered by the underwriter exception even if the municipal entity does not ultimately provide the person engaging in such communications or activities with an underwriting mandate.

Furthermore, the underwriter exception would apply where a broker, dealer or municipal securities dealer serving as an underwriter (including as a private placement agent) also provides assistance on related transactions, related tranches of the underwritten or private offering or serves as a dealer-manager on a related tender offer for outstanding securities, or proposes to act as principal on related transactions.

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**7.1. Question: For purposes of determining whether an associated person of a municipal advisor is an “associated municipal advisor professional,” what criteria should be used to determine whether such person is “primarily engaged” in municipal advisory activities?**

**Answer:** A municipal advisor can use any reasonable methodology that is applied consistently throughout its firm to determine whether an associated person of a municipal advisor, because it is “primarily engaged” in municipal advisory activities, is an “associated municipal advisor professional.”

For example, such criteria may include, but are not limited to: (i) a comparison of the amount of time spent by such associated person on municipal advisory activities versus the person's time spent on other firm activities; (ii) a comparison of the amount of revenue that such associated person generates from (or is attributable to) municipal advisory activities versus the person's revenues generated from (or attributable to) other firm activities; and (iii) the percentage of such associated person's overall compensation or commissions from the firm that the person receives in connection with its municipal advisory activities.

**7.2. Question: For purposes of determining whether an associated person of a municipal advisor is an “associated municipal advisor professional,” may activities that are excluded from the definition of “municipal advisor” be excluded?**

**Answer:** Yes. Activities that are excluded from the definition of “municipal advisor” may be excluded when determining whether an associated person of a municipal advisor is an “associated municipal advisor professional.”

For example, an associated person of an underwriter or private placement agent who is engaged in underwriting or private placement activity with a municipal entity or obligated person should exclude such underwriting or private placement activity when determining whether it is an associated municipal advisor professional.

Similarly, a person associated with a registered investment adviser who is providing investment advice to a municipal entity or obligated person should exclude such investment advisory activity when determining whether it is an associated municipal advisor professional.

**7.3. Question: What is the scope of the definition of an “associated municipal advisor professional” as it applies to an employee who is engaged in the solicitation of a municipal entities or obligated persons and does not otherwise provide advice to the municipal entity or obligated person?**

**Answer:** The term “associated municipal advisor professional” does not include an employee who is engaged in the solicitation of a municipal entity or obligated person if (i) such employee's role is limited to solicitation and not the provision of advice and (ii) the employee's solicitation activities are themselves limited or infrequent.

**7.4. Question: If a bank is required to register, can the bank do so by establishing a separately identifiable department or division and registering such unit?**

**Answer:** Yes. A bank that is required to register can do so by establishing a separately identifiable department or division and registering only such unit.