

Current SEC Municipal Advisor Concerns

Hawkins Update

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Introduction

This Regulatory Update discusses several fact patterns involving municipal advisors that have recently been identified by the Securities and Exchange Commission (the “SEC”) as emerging areas of concern. The SEC’s final rules governing the regulation of municipal advisors were issued on September 18, 2013 (the “MA Rules”).^[1] The SEC has provided market guidance on the MA Rules in the form of the Adopting Release and “Frequently Asked Questions” posted on the SEC’s website, which have been updated from time to time (most recently in January 2025) (the “MA FAQs”).^[2] The MA Rules and the MA FAQs that initially established the regulatory framework remain generally applicable, but have been supplemented by additional guidance. The development of this framework was summarized and discussed in *Hawkins Advisories*, which are posted on the Firm’s website.^[3]

Unregistered Municipal Advisor Activity

After more than a decade of municipal advisor regulation, the SEC Staff remains focused on refining its views of the scope of regulated municipal advisor activities, with several recent SEC enforcement actions in the municipal market involving these market participants. Such actions have involved: (i) failures to register as a municipal advisor while providing advice with respect to municipal financings that require registration; and (ii) concerns over the municipal advisor’s fiduciary duty to its client and conflicts of interest.

Under federal law, municipal advisor registration with the SEC and the Municipal Securities Rulemaking Board is required for market participants that provide advice to or on behalf of a municipal entity or an obligated person with respect to municipal financial products or the issuance of municipal securities or undertakes solicitation of a municipal entity in such connection. Registration is required prior to engaging in regulated activities. In general, the municipal advisor registration process has been fairly straight forward and market participants have been quick to comply, especially where their activities fall squarely within the regulatory regime. SEC records for June 2025 showed more than 400 registered municipal advisors.

Municipal advisor activity is found where information communicated to the municipal entity can reasonably be viewed as a suggestion or recommendation that the municipal entity take action or refrain from taking certain action. The more the information given to the municipal entity is individually tailored to such entity’s needs, the more likely that information will be considered advice and subject to municipal advisor registration, absent any applicable exemption or exclusion. The MA Rules provide certain statutory exclusions and exemptions from the definition of “municipal advisor,” such as the RFP/RFQ exemption, the independent registered municipal advisor (or IRMA) exemption, the bank exemption, the underwriter exclusion, the attorney exclusion, and the engineer exclusion, among others.^[4]

Recent SEC enforcement actions and Staff guidance, however, have focused on a range of activities that may require municipal advisor registration in situations where this may not be recognized by all market participants. These have notably included activities in connection with charter school financings and public-private partnerships (“P3”) transactions.

For charter school financings, the SEC issued an Informational Bulletin in November 2024 highlighting the need for careful consideration “when working with anyone who provides advice on the issuance of municipal securities...or other related topics but is not registered as a municipal advisor.”^[5] Such individuals may self-define their role as a consultant, financial advisor, real estate developer, construction firm, bridge finance provider, or some other specialist, but might nonetheless be deemed to be a municipal advisor, depending on their specific advice or solicitation related activities.

The Informational Bulletin expressed particular concern with the potential vulnerability of charter schools to unregistered municipal advisors. It cautioned charter schools to be aware of municipal advisor regulatory framework and ensure that all outside consultants have adequate qualifications to provide their proposed scope of services. Further, the SEC has stressed that some consultants may be engaging in unregistered municipal advisor activity and may also have undisclosed conflicts of interest in violation of the fiduciary duty owed to the issuer. This guidance is sourced to several SEC enforcement actions that have outlined similar fact patterns in charter school financings.

For P3 financings, P3 consultants with various professional expertise may be engaged by a variety of current and potential project parties at various stages of the project to analyze and make recommendations on the most cost effective manner to fund it. While some of this activity fits squarely in the category of advice on municipal securities, the applicability of municipal advisory requirements may be less clear in other situations. Dave Sanchez, the Director of the Office of Municipal Securities (the “OMS Director”), recently identified a range of concerns that might arise from unregistered municipal advisor activity in P3s.^[6] These included issues related to P3 consultants who advise on financing alternatives that might include the issuance of municipal securities and the sizing and structure of any debt. In particular, the OMS Director suggested that, given the unique nature of P3 transactions, with public entity and private sector participants who may consider the allocation of funding responsibility as part of a broader assignment of project risks, consultants who provide advice on the overall structure of the project may, under certain circumstances, be deemed to engage in municipal advisor activity.

Highlighting this point further, a recent SEC enforcement action found unregistered municipal advisor activity for a consultant to six private sector entities engaged in P3s as obligated persons of conduit financings, where the consultant’s services included advice on the structure, timing, and terms of municipal securities issuances.^[7] More specifically, the consultant “provid[ed] detailed information and analysis of debt financing structuring options in complex financial models, including the sale of municipal securities; provid[ed] advice on the structure, timing, and terms of the municipal securities offerings; coordinat[ed] the credit rating process; and solicit[ed] and select[ed] other parties to the financing, including underwriters.”^[8]

Other P3 Municipal Advisor Considerations

The OMS Director’s comments provide additional guidance on possible unregistered municipal advisor activity in the specific context of P3 transactions.^[9] The focal point is whether the particular P3 financing involves the consideration of municipal securities. In many cases, the answer is “no” and the municipal advisor concerns largely fall away. However, in some cases, there may be some analysis of whether or not to utilize a municipal securities component as part of a P3 financing. As noted by the OMS Director’s recent remarks:

P3s exist on a spectrum as an alternative form of procurement but also on a spectrum as an alternative form of financing. Financing packages come in all types of configurations: equity, debt, or a combination sourced from both public and private sources, including private activity bonds, federal credit assistance, state, or local funding, which may include the issuance of municipal securities.^[10]

One factor that differentiates the P3 process is that there is often a formal value for money (“VFM”) analysis, which is meant to illustrate the best combination of costs and quality for a project and assist in the exploration of various financing

alternatives for the same project. The VFM analysis often includes a “public sector comparator,” which is an estimate of the cost of a project if the municipal issuer were to finance it by itself. The VFM analysis with a public sector comparator is meant to increase the public party’s understanding of its decision by presenting all possible alternatives and the respective costs and risks. However, a consultant who prepares and presents such an analysis outside of an applicable exemption may be deemed to have been engaged in municipal advisor activities.

As noted above, P3 consultants provide financial, legal, and technical advice on P3s and often conduct the VFM analysis, which may downplay the public financing alternative. Further, having the municipal issuer choose to pursue the P3 option often directly benefits the P3 consultant. The SEC has highlighted particular concerns with these arrangements, namely, (i) the failure to disclose conflicts of interest between the P3 consultant and subcontractors hired to provide a VFM analysis, leading to the skewing of project costs in favor of a P3 procurement; (ii) a P3 consultant, with no experience in municipal financing, failing to include a public sector comparator as part of the VFM analysis and not showing that the P3 procurement would maximize VFM; and (iii) a P3 consultant providing misleading advice on the accounting treatment of private financing of a project versus a project procured with a mix of public and private funding sources.^[11]

Issuers should be aware of these concerns highlighted by the SEC when working with P3 consultants and considering how to finance a project. Early discussions may involve recommendations on how to deliver a project, with presentations on financing alternatives and sizing and structuring of the debt. Often, these presentations will constitute municipal advisor activity and issuers should be proactive in raising the need for clarity on this point with potential participants and its own P3 consultants and other advisors. As the OMS Director noted, the Adopting Release discussed the distinction between early and later stage discussions of potential financing plans in the context of private activity bonds. In the absence of reliable guidance addressing the specific context of P3 transactions and in view of the variety of factual circumstances presented by such transactions, project participants should exercise particular care in considering possible municipal advisor concerns in light of the specific facts presented by individual proposed projects.

“Municipal Advisor” or “Financial Advisor”?

In a second recent speech, the OMS Director highlighted another nuanced point that OMS is continuing to monitor, which revolves around whether certain issuer consultants should be properly referred to as municipal advisors or as financial advisors in the issuer’s offering documents or in RFPs for such professional services.^[12] The OMS Director’s view is that the regulatory term – “municipal advisor” – should be used, on the basis that this may: (i) indicate to investors that the entity is subject to the rules and regulations designed to protect investors and municipal entities and obligated persons; (ii) avoid confusing or ambiguous statements in disclosures to investors; (iii) inform investors that the SEC is monitoring such entity for compliance; and (iv) indicate the entity must disclose to the issuer any material conflicts of interest.^[13]

There does seem to be a lack of uniform usage of these terms throughout the market and it would be prudent for issuers to discuss this designation with the working group to determine how to properly characterize such consultants. With OMS signaling that it is looking at this issue and how these terms are used in an issuer’s disclosure documents, it seems possible that this could become an area of future enforcement activity.

Conclusion

With the SEC continuing to focus on municipal advisory activity more broadly and zeroing in on segments of the market that may have been prone to unregistered municipal advisors (whether intentionally or inadvertently), issuers are reminded that they play an important role in ensuring that market participants are in compliance with applicable regulations. .

Enforcement in these areas of the market often highlights that a transaction may not have been the most cost effective alternative. A transaction that includes a registered municipal advisor whose advice reflects a fiduciary duty to the issuer

or obligated person may result in a lower cost of borrowing and ensure that all alternatives are properly vetted before a funding path is chosen.

Regardless of the SEC's particular enforcement priorities in the future, it is likely that unregistered municipal advisors will remain in their crosshairs, and municipal entities should be proactive in ensuring compliance.

[1] See SEC Rel. No. 34-70462 (Sept. 20, 2013) (the "Adopting Release"), available at <https://www.sec.gov/files/rules/final/2013/34-70462.pdf> (last visited August 7, 2025).

[2] See "Registration of Municipal Advisors, Office of Municipal Securities, Frequently Asked Questions," available at <https://www.sec.gov/about/divisions-offices/office-municipal-securities/registration-municipal-advisors> (last visited July 24, 2025).

[3] See "SEC Approves Municipal Advisor Rules" (October 3, 2013), "Municipal Advisor Rules – SEC Staff posts FAQs; SEC Delays Effective Date" (January 24, 2014), and "SEC Staff Posts Additional FAQs and Related Responses Regarding Municipal Advisor Rules" (May 30, 2014). These are available at <https://www.hawkins.com/about/publications>.

[4] These are described in the *Hawkins Advisories* referenced in footnote 3.

[5] See "Informational Bulletin: What Charter Schools Should Know About Municipal Advisor Regulation," available at <https://www.sec.gov/about/divisions-offices/office-municipal-securities/informational-bulletin-charter-schools-110524> (last visited July 30, 2025).

[6] See "Unregistered Municipal Advisory Activity in Public-Private Partnerships," available at <https://www.sec.gov/newsroom/speeches-statements/sanchez-speech-unregistered-municipal-advisory-activity-09-17-24> (last visited July 30, 2025).

[7] See *In the Matter of Agentis Capital Advisors General Partnership*, SEC. Rel. No. 34-103154 (May 30, 2025), available at <https://www.sec.gov/files/litigation/admin/2025/34-103154.pdf>.

[8] *Id.* at 2.

[9] See footnote 6.

[10] *Id.*

[11] *Id.*

[12] See "Issues Revisited: Titles, Amendments to Rule 15c2-12 Undertakings and Voluntary Disclosure," available at <https://www.sec.gov/newsroom/speeches-statements/sanchez-speech-gfoa-06302025-issues-revisited-titles-amendments-rule-15c2-12-undertakings-voluntary-disclosure> (last visited July 30, 2025).

[13] *Id.*

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