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### **Effect of SEC Municipal Advisor Rule on communications from underwriters:**

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The SEC has approved final rules (the “Rule”) governing the definition, registration and regulation of municipal advisors (“MAs”) which will become effective July 1, 2014. The Rule will change communications by underwriters with issuers of municipal securities. Under the Rule, many communications between public finance bankers seeking to serve as underwriter and municipal issuers would be treated as “advice”.

Providing “advice” as defined in the Rules without an exemption or exclusion, would result in an underwriting firm being deemed as a MA. The SEC has stated that they believe providing “advice” and triggering the required fiduciary duty by a MA is incompatible with serving as an underwriter, as an underwriter has financial and other interests that differ from those of the issuer. Therefore, if an underwriting firm was deemed as a MA, it would preclude that firm from serving as underwriter for the municipal issuer.

Without express exemptions, prospective underwriters can only provide general market information, marketing materials, and similar non-specific information to a municipal issuer. They cannot provide materials or information constituting recommendations, ideas or proposals.

However, the Rule provides for certain exemptions for firms from treatment as MA’s. Attached is a page describing the exemptions, particularly the Independent Registered Municipal Advisor (“IRMA”) exemption. The IRMA exemption will likely be the primary exemption sought by underwriters wishing to communicate with and provide information and recommendations to municipal issuers.

In order to rely upon the IRMA exemption, underwriters will be required to receive from a municipal issuer written representation that the issuer has engaged an independent registered municipal advisor and will rely on the advice of the municipal advisor regarding proposals and recommendations which are submitted.

Individual underwriting firms are submitting their own versions of certificates to municipal issuers, and most are requesting or requiring execution of written acknowledgement by the issuer. Instead, many municipal issuers are providing their own uniform version of the certificate, to be used with all desired prospective underwriters.

Also attached is a page containing a version of certificate that can be used for written certification of engagement of an IRMA or municipal advisor and which can be provided to underwriting firms. At your

choosing, this (or a similar) certificate can either be placed on your website (which would grant the exemption to all underwriting firms) or it can be sent/given to only certain underwriting firms.

Hopefully, this information is helpful in providing explanation of how the Rule affects underwriters in communication and interaction with municipal issuers.

Please call on me with any questions, or for any additional information concerning the Rule regarding requirements on underwriters. As always, we appreciate the opportunity to be of continuing service to you as financial advisor.

## **Municipal Advisor Rule** **Effective July 1, 2014**



The Municipal Advisor Rule states that when a firm offers what is construed as “advice” (a recommendation related to a transaction) that firm shall be construed as a municipal advisor.

In order to avoid registering with the Securities and Exchange Commission and the Municipal Securities Rulemaking Board, underwriters must either refrain from offering any suggestion that could be construed as advice or obtain one of the exemptions outlined below.

- **RFP Exemption** – the underwriter is responding to a request for proposals.
- **Underwriting Exemption** – the underwriter has been hired on a specific transaction. However, the Underwriting Exemption only applies so long as the recommendations fall within the boundaries of providing advice with respect to the structure, timing, and terms related to the issuance of municipal securities. Simply serving as a member of an underwriter pool does not permit the firm to rely upon the Underwriting Exemption.
- **Independent Registered Municipal Advisor (IRMA) Exemption** – the municipal entity or obligated person has engaged an independent municipal advisor. Satisfying the IRMA Exemption requires that several conditions be met.
  - I. The municipal advisor must be registered and independent, meaning the municipal advisor shall not have anyone working on the financial advisory team for a client who has been associated with the soliciting underwriter in the past two years.
  - II. The municipal entity or obligated person must represent in writing that it is being represented by a municipal advisor, will rely on the advice of that municipal advisor, and must define the scope of advice they are receiving from that municipal advisor. “Rely” means seek and consider advice.
  - III. The underwriter must confirm receipt of the municipal entity or obligated person’s representations for the IRMA Exemption and must disclose to the municipal entity or obligated person, with a copy to the IRMA, that the underwriter is not a municipal advisor and does not have a fiduciary duty to the municipal entity or obligated person.

As the IRMA Exemption allows the least amount of restriction to the underwriter in terms of providing advice to the municipal entity or obligated person, it is most likely to be the first exemption sought by the underwriter when seeking to avoid being registered as a municipal advisor.

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\*This summary of the Municipal Advisor Rule (the “MA Rule”) is provided as an overview for our clients’ information and convenience only. It is not intended to be a comprehensive analysis of the MA Rule, nor is anything contained herein to be construed as financial or legal advice. The information has been prepared based on the regulatory guidance available at this time. FirstSouthwest does not undertake to update this information based on future guidance or changes to the MA Rule. ©2014 First Southwest Company. All rights reserved. Member of FINRA/SIPC.

### Independent Registered Municipal Advisor Rule

The SEC's Municipal Advisor Rule imposes a registration regime and fiduciary duty upon firms that give advice to municipal entities and obligated persons with respect to (1) the issuance of municipal securities, (2) investment strategies and (3) municipal financial products unless an exemption applies.

The MA Rule grants underwriters and placement agents a broad exemption for advice with respect to the three topics above to the extent the municipal entity and/or obligated person is otherwise represented by an independent registered municipal advisor regarding the same subject matter. In order to rely on this exemption, an underwriter/placement agent must receive certain representations from the municipal entity/obligated person, and must have a reasonable basis for relying on these representations. The language below may be provided to municipal issuers if they have an independent registered municipal advisor and would like to continue to receive advice from underwriters/placement agents.

### Independent Registered Municipal Advisor Certificate

**[Date of Certificate]**

**[State or local government/Obligated Person]** has retained an independent registered municipal advisor. **[State or local government/Obligated Person]** is represented by and will rely on its municipal advisor **[Firm]** to provide advice on proposals from financial services firms concerning the issuance of municipal securities and municipal financial products (including investments of bond proceeds and escrow investments).<sup>1</sup> The individual[s] with primary responsibility for advising **[State or local government/Obligated Person]** on such matters is **[are] [Individual Name or Names]**. This certificate may be relied upon until **[Date]** or otherwise withdrawn by us.

- If posted on the governmental unit's or obligated person's website, add the following language at the beginning: By publicly posting the following written disclosure, **[State or local government/Obligated Person]** intends that market participants receive and use it for purposes of the independent registered municipal advisor exemption to the SEC Municipal Advisor Rule.

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<sup>1</sup> If applicable. The drafter should consider modifying the scope of services, as appropriate.