

# BURR ALERT

## Dodd-Frank Wall Street Reform and Consumer Protection Act

by Thomas K. Potter, III

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### Dodd-Frank Requires Registration, MRSB Regulation of Municipal Advisors

The "Dodd-Frank Wall Street Reform and Consumer Protection Act," Pub. Law. No. 111-203 (111th Cong.) (H.R. 4173 at Title IX, Subtitle H, Secs. 975-979) amended the Securities Exchange Act of 1934, specifically Section 15B -- the Municipal Securities provisions added by Congress in 1975 -- codified at 15 U.S.C. §78o-4(a), *et seq.*

The key Municipal Securities provisions of Dodd-Frank are:

#### Registration and Oversight of Muni Advisors

- **Who's Covered:** Anyone who solicits or provides advice to or for a municipality or *obligated person* regarding *municipal financial products* or securities (including structure, timing, terms or similar aspects).
  - **Expressly includes:** FAs, GIC brokers, third-party marketers, placement agents, solicitors, finders and swap advisors.
  - **Who's Not:** otherwise regulated brokers, dealers, municipal securities dealers who are acting as underwriters, or investment advisers, commodity trading advisers advising on swaps or lawyers or engineers as such.
- **Who's an *Obligated Person*?** Anyone obligated by contract or arrangement to support the payment of any part of the obligations on the municipal securities in an offering.
- **What's a *Municipal Financial Product*?** Beyond municipal securities, the Act now covers municipal financial products, which includes municipal derivatives, GICs and investment strategies.
- **Registration and Regulation will include:**
  - registration
  - oversight, e.g. examinations, record-keeping, testing, CE and fees
  - rule-making
  - compulsory arbitration (but not as to the public)
- **Fiduciary Standard:** A municipal advisor and any person associated with such 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 no municipal advisor may engage in any act, practice, or course of business which is not consistent with a municipal advisor's fiduciary duty or that is in contravention of any rule of the Board."
- **Anti-fraud Provisions:** mirroring long-standing securities anti-fraud rules proscribing "any fraudulent, deceptive, or manipulative act or practice." **Note:** MSRB Rules implementing the fiduciary standard will be much broader than mere anti-fraud rules.

## MSRB Composition and Oversight:

- Expanded Composition with "slots":
  - 15 total*
  - 8 independent (with at least: 1 investor; 1 municipality; 1 public)*
  - 7 industry (with at least: 1 bank; 1 non-bank; 1 advisor)*
- Expanded Jurisdiction
  - to protect municipalities*
  - to protect obligated persons*
  - over advisors*
  - over municipal financial products and investment strategies, not just securities*

## GAO Studies on:

- Municipal Disclosures, and particularly whether to repeal the Tower Amendment (prevents imposing disclosure requirements on state and local government).
  - Municipal Markets
  - GASB's role and importance

## SEC:

- Formalizes and elevates Office of Municipal Securities (previously part of Div. Trading & Markets) so reports to Chairman.
- Requires coordination among SEC, FINRA and MSRB.

**GASB Funding:** SEC can require FINRA member to pay an annual fee to fund GASB

**Effective Date:** Oct. 1, 2010, but implementation will require rule-making by both the SEC and MSRB and, unlike some other provisions, the Act specifies no deadline on that rule-making.

## Subsequent MSRB Releases:

MSRB's July 15 Release focused first on implementing the expanded Board, and then including Advisors in the promulgation of the substantive rules:

The MSRB staff and current governing Board have been working to ensure a smooth and effective transition to a majority public board. The MSRB expects to file soon with the Securities and Exchange Commission administrative rule changes needed for this transition. The transition will be coordinated with a rule-making program designed to ensure careful but prompt development of rules fulfilling the MSRB's expanded mission. The MSRB will develop rules in the areas of fair practice and fiduciary duties, pay-to-play and other conflicts of interest, gifts, disclosure, professional qualifications, continuing education and other areas identified by the new governing board.

An important element of this rule-making program will be an outreach effort to key market participants, including investors and municipal entities that the MSRB's rules are designed to protect, as well as municipal advisors, broker-dealers and banks subject to MSRB rules. The outreach effort will allow all participants to provide significant input to the MSRB during this transition period.

MSRB *Statement on Financial Reform Legislation* (July 15, 2010) at <http://www.msrb.org/News-and-Events/Press-Releases/2010/MSRB-Issues-Statement-on-Financial-Reform-Legislation.aspx>

On concluding its Quarterly Meeting the next week, the Board's release noted:

"We also plan to communicate in a timely way, information for municipal advisors so that they can ensure compliance with new rules that will cover the areas of fair practice, fiduciary duties, pay-to-play and other conflicts of interest, gifts, disclosure, professional qualifications and other areas identified by the new governing board," Chair Clarke said.

MSRB ...*Holds Quarterly Meeting* (July 26, 2010) at <http://www.msrb.org/News-and-Events/Press-Releases/2010/MSRB-Holds-Quarterly-Meeting.aspx>. In that Release, the Board also promised it soon would seek comment on additional amendments to present MSRB Rule G-23, regulating municipal securities dealers acting as FA's to issuers.

### For more information, contact:



**Thomas K. Potter, III**, Partner | Burr & Forman LLP

700 Two American Center | 3102 West End Avenue | Nashville, TN 37203

[tpotter@burr.com](mailto:tpotter@burr.com) | (P) 615-724-3231 | (F) 615-724-3331

Listed among the *BEST LAWYERS IN AMERICA*, Mr. Potter has over 25-years experience in securities regulatory, enforcement, compliance and disputed matters. He speaks and writes frequently on securities regulation issues, having been a featured speaker on pay-to-play issues at the 2009 national meeting of the National Society of Compliance Professionals.

He successfully defended a broker-dealer and its principal against charges they had engaged in 21 prohibited municipal securities transactions totaling \$1.1 billion. Termed by The Bond Buyer "the largest involving G-37 ever brought by the NASD," the case involved issues of first impression on the relation of MSRB's "pay-to-play" prohibition in Rule G37 to elected officials serving on Louisiana's Bond Commission, which oversees municipal-bond issues throughout the state. NASD's Enforcement Division sought over \$2.3 million in fines and a 2-year suspension from all municipal bond business in the state. *Dept. of Enforcement v. Sisung Securities Corp.*, No. C05030036-AWH (NASD Office of Hearing Officers, Nov. 19, 2004), *aff'd and rev'd in part*, (NASD National Adjudicatory Council, Aug. 28, 2006), *aff'd and vacated in part*, '34 Act Rel. No. 56741 (SEC Nov. 5, 2007). See *MSRB Press Release* (Nov. 5, 2007); *SEC Overturns Findings on Pay-to-Play by Louisiana Bond Dealer*, Bloomberg (Nov. 5, 2007); *SEC Partly Overturns NASD In Louisiana Muni-Bond Case*, Dow Jones Newswires (Nov. 6, 2007); *SEC Reverses Part of NASD's G-37 Ruling*, 362 The Bond Buyer 1 (Nov. 6, 2007); *MSRB to Weigh Tightening Pay-to-Play Rule After SEC Raises Matter in Ruling on Appeal*, 39 Sec. Reg. L. Rep. 1735 (Nov. 12, 2007); *MSRB Notice 2008-12* (Mar. 4, 2008); *MSRB Sticks by Rule G-37 in Wake of SEC Decision on Sisung*, 363 The Bond Buyer 4 (Mar. 5, 2008); *MSRB Won't Change Political Payment Rule*, Compliance Reporter at 3 (Mar. 10, 2008).

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