

## ALERTS AND UPDATES

### U.S. Financial Reform: Municipal Securities

August 24, 2010

*The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("the Act") begins sweeping reform for the U.S. financial system. It requires new and existing regulatory agencies to undertake more than 50 studies of the financial system and more than 250 instances of rulemaking. Duane Morris has issued further Alerts on many of the broad topics addressed by the Act, accessible at [www.duanemorris.com/FinancialReform](http://www.duanemorris.com/FinancialReform).*

This *Alert* summarizes Subtitle H of Title IX, designated "Municipal Securities," of the Act. References herein are made to sections 975 through 979 of Subtitle H.

The Act establishes a new Office of Municipal Securities (the "Office") within the U.S. Securities and Exchange Commission (SEC). The Office will administer the rules of the SEC with respect to the practices of municipal securities advisors, brokers, dealers, investors and issuers, and will coordinate with the Municipal Securities Rulemaking Board (MSRB or the "Board") for rulemaking and enforcement actions.

In order to advance the goal of providing better oversight of the municipal securities industry and regulation of the participants in the municipal securities industry, the Act amends sections 15, 15A, 15B and 17 of the Securities Exchange Act of 1934 (the "Exchange Act") to require the registration of municipal advisors and imposes a fiduciary duty on municipal advisors and any person associated with them when advising municipal issuers. Municipal advisors, like municipal securities dealers and brokers, are now subject to the same laws, fiduciary requirements and MSRB rules enforced by the SEC. The Act amends section 15(b) of the Exchange Act to define a municipal advisor as a person who provides advice to or on behalf of a municipal entity with respect to municipal financial products or the issuance of municipal securities, including the structure, timing and terms of such financial products. Municipal financial products are municipal derivatives, guaranteed investment contracts and investment strategies. Municipal advisors include financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders and swap advisors. They do not include brokers or dealers serving as underwriters, registered investment advisors providing investment advice, registered commodity traders providing advice related to swaps, attorneys providing legal advice or engineers providing engineering advice. A municipal advisor and any person associated with a municipal advisor now has a fiduciary duty to any municipal entity it advises and may not engage in any act, practice or course of business that is inconsistent with the municipal advisor's fiduciary duty or that is in contravention of any rules of the MSRB. Municipal advisors are now, like brokers, dealers or municipal securities dealers, subject to censure, suspension or revocation of registration by the SEC for violations of the law as set out in section 15(b)(4) of the Exchange Act.

By the Act, the MSRB is now required to adopt rules providing for the continuing education of municipal advisors and establishing professional standards for municipal advisors. The MSRB may not, however, impose inappropriate regulatory burdens on small municipal advisors.

The Act alters the composition of the MSRB so that a majority of the minimum 15-member Board are independent of municipal securities brokers, dealers or advisors. The new composition of the Board meets the stated goal of the Act, to ensure that the public interest is better protected on the Board. The Board has a new charge to protect the public interest in addition to municipal entities and investors. The Board will consist of eight individuals known as "public representatives,"

independent of any municipal securities broker, municipal securities dealer or municipal securities advisor. At least one of the public representatives must be a representative of institutional or retail investors in municipal securities. At least one of the public representatives must also represent municipal entities, and another of the public representatives must have knowledge or experience in the municipal securities industries.

The remaining seven "regulated representatives" will consist of individuals associated with a broker, dealer, municipal securities dealer or municipal advisor. At least one of the regulated representatives will be a "broker-dealer," representative of nonbank brokers, dealers or municipal securities dealers. At least one individual must be a representative of banks, and at least one individual must be associated with a municipal advisor. The number of public representatives on the Board must always exceed the number of regulated representatives.

Under the Act, the Board is authorized, in conjunction with or on behalf of any federal financial regulator, to establish information systems and assess fees for such systems, which will serve as a repository for information from participants in the municipal securities market. The purpose of such repository is to assist the Board and any federal financial regulator or self-regulatory organization. The Board is authorized to provide guidance and assistance to the SEC and Financial Industry Regulatory Authority (FINRA) in examinations and the enforcement of the Board's rules and to retain half of any penalties collected by the SEC in such enforcement actions. The MSRB has expanded authority to regulate the advice provided by municipal advisors to or on behalf of municipal entities and "obligated persons." Obligated persons include any person committed to support the payment of all or part of the obligations on municipal securities. The MSRB is required to meet at least twice yearly with the SEC and FINRA to share information about the interpretation of MSRB rules and examinations, enforcement of such rules and compliance therewith.

The Act directs the U.S. Comptroller General to conduct a study and review of the disclosures required to be made by issuers of municipal securities within two years of enactment of the Act and report to Congress on the results of the study. The study must compare the amount, frequency and quality of disclosures that issuers of municipal securities are required by law to provide for the benefit of municipal securities holders; evaluate the costs and benefits to various types of issuers of municipal securities of requiring issuers of municipal bonds to provide additional financial disclosures for the benefit of investors; evaluate the potential benefit to investors from additional financial disclosures and make recommendations relating to disclosure requirements for municipal issuers, including the repeal or retention of the Tower Amendment, section 15(B)(d) of the Exchange Act. The Tower Amendment restricts the SEC and the MSRP from requiring issuers of municipal securities to file documents with these agencies before their securities are sold. The effect of the Tower Amendment is to place disclosure requirements and burdens on the underwriters of securities, rather than on the issuers. Repeal of the Tower Amendment will likely allow the SEC or MSRP to require issuers to comply with certain disclosure requirements for the benefit of the investing public as well as with generally accepted governmental accounting standards.

The Act also states that within 18 months of enactment, the Comptroller General must submit a report to the U.S. Senate Committee on Banking, Housing and Urban Affairs and the House Committee on Financial Services, detailing the needs of municipal security markets and investors and providing recommendations for improvements to transparency, efficiency, fairness and liquidity of trading, as well as the potential uses of derivatives in municipal securities markets.

Within 180 days after the date the Act is enacted, the Comptroller General is also required to conduct a study evaluating the role and importance of the Governmental Accounting Standards Board (GASB) in the municipal securities market and the manner and level at which the GASB has been funded. The Act now grants authority to the SEC to direct FINRA to assess and collect a fee on municipal securities dealers to fund the GASB.

## About Duane Morris

Duane Morris has an online **Financial Services Reform Center** – [www.duanemorris.com/FinancialReform](http://www.duanemorris.com/FinancialReform) – which includes videos and the firm's comprehensive series of *Alerts* analyzing the provisions of the Act and emerging policies, as well as links to relevant government websites. Duane Morris' attorneys will be monitoring the rules and regulations released under the Act, as well as the regulatory agencies' interpretive guidance. For subsequent Alerts on these and other topics, please revisit [www.duanemorris.com](http://www.duanemorris.com) and [www.duanemorris.com/FinancialReform](http://www.duanemorris.com/FinancialReform).

## For Further Information

If you have any questions about the Act or any of the topics described in this *Alert*, including how they may affect your company or its executives, please contact [Miles Plaskett](#), any member of the [Corporate Practice Group](#) or the attorney in the firm with whom you are most regularly in contact.

*As required by United States Treasury Regulations, you should be aware that this communication is not intended by the sender to be used, and it cannot be used, for the purpose of avoiding penalties under United States federal tax laws.*