

Cornell Law School

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## 17 CFR 240.15Ba1-1 - Definitions.

### § 240.15Ba1-1 Definitions.

As used in the rules and regulations prescribed by the Commission pursuant to section 15B of the Act ( 15 U.S.C. 78o-4) in §§ 240.15Ba1-1 through 240.15Ba1-8 and 240.15Bc4-1:

**(a) *Guaranteed investment contract*** has the same meaning as in section 15B(e)(2) of the Act ( 15 U.S.C. 78o-4(e)(2)); *provided, however*, that the contract relates to investments of proceeds of municipal securities or municipal escrow investments.

**(b) *Investment strategies*** has the same meaning as in section 15B(e)(3) of the Act ( 15 U.S.C. 78o-4(e)(3)), and includes plans or programs for the investment of proceeds of municipal securities that are not municipal derivatives or guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments.

**(c) *Managing agent*** means any person, including a trustee, who directs or manages, or who participates in directing or managing, the affairs of any unincorporated organization or association other than a partnership.

**(d)**

#### **(1) *Municipal advisor.***

**(i) *In general.*** Except as otherwise provided in paragraphs (d)(2) and (d)(3) of this section, the term *municipal advisor* has the same meaning as in section 15B(e)(4) of the Act ( 15 U.S.C. 78o-4(e)(4)). Under section 15B(e)(4)(A) of the Act ( 15 U.S.C. 78o-4(e)(4)(A)), the term *municipal advisor* means a person (who is not a municipal entity or an employee of a municipal entity) that provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or undertakes a solicitation of a municipal entity or an obligated person. Under section 15B(e)(4)(C) of the Act ( 15 U.S.C. 78o-4(e)

(4)(C)) and paragraph (d)(2) of this section, a *municipal advisor* does not include a person that engages in specified excluded activities.

**(ii) Advice standard.** For purposes of the municipal advisor definition under paragraph (d)(1)(i) of this section, advice excludes, among other things, the provision of general information that does not involve a recommendation regarding municipal financial products or the issuance of municipal securities (including with respect to the structure, timing, terms and other similar matters concerning such financial products or issues).

**(iii) Certain types of municipal advisors.** Under section 15B(e)(4)(B) of the Act ( 15 U.S.C. 78o-4(e)(4)(B)), *municipal advisors* include, without limitation, financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors, to the extent that such persons otherwise meet the requirements of the municipal advisor definition in this paragraph (d)(1).

**(2) Exclusions from municipal advisor definition.** Pursuant to section 15B(e)(4)(C) of the Act ( 15 U.S.C. 78o-4(e)(4)(C)), the term *municipal advisor* excludes the following persons with respect to the specified excluded activities:

**(i) Serving as an underwriter.** A broker, dealer, or municipal securities dealer serving as an underwriter of a particular issuance of municipal securities to the extent that the broker, dealer, or municipal securities dealer engages in activities that are within the scope of an underwriting of such issuance of municipal securities.

**(ii) Registered investment advisers - In general.** Any investment adviser registered under the Investment Advisers Act of 1940 ( 15 U.S.C. 80b-1 *et seq.*) or any person associated with such registered investment adviser to the extent that such registered investment adviser or such person is providing investment advice in such capacity. Solely for purposes of this paragraph (d)(2)(ii), investment advice does not include advice concerning whether and how to issue municipal securities, advice concerning the structure, timing, and terms of an issuance of municipal securities and other similar matters, advice concerning municipal derivatives, or a solicitation of a municipal entity or obligated person.

**(iii) Registered commodity trading advisors.** Any commodity trading advisor registered under the Commodity Exchange Act ( 7 U.S.C. 1 *et seq.*), or person associated with a registered commodity trading advisor, to the extent that such registered commodity trading advisor or such person is providing advice that is related to swaps (as defined in Section 1a(47) of the Commodity Exchange Act ( 7 U.S.C. 1a(47)) and section 3(a)(69) of the Act ( 15 U.S.C. 78c(a)(69)), and any rules and regulations thereunder).

**(iv) Attorneys.** Any attorney to the extent that the attorney is offering legal advice or providing services that are of a

traditional legal nature with respect to the issuance of municipal securities or municipal financial products to a client of such attorney that is a municipal entity, obligated person, or other participant in the transaction. To the extent an attorney represents himself or herself as a financial advisor or financial expert regarding the issuance of municipal securities or municipal financial products, however, the attorney is not excluded with respect to such financial activities under this paragraph (d)(2)(iv).

(v) **Engineers.** Any engineer to the extent that the engineer is providing engineering advice.

**(3) Exemptions from municipal advisor definition.** The Commission exempts the following persons from the definition of municipal advisor to the extent they are engaging in the specified activities:

(i) **Accountants.** Any accountant to the extent that the accountant is providing audit or other attest services, preparing financial statements, or issuing letters for underwriters for, or on behalf of, a municipal entity or obligated person.

**(ii) Public officials and employees.**

**(A)** Any person serving as a member of a governing body, an advisory board, or a committee of, or acting in a similar official capacity with respect to, or as an official of, a municipal entity or obligated person to the extent that such person is acting within the scope of such person's official capacity.

**(B)** Any employee of a municipal entity or obligated person to the extent that such person is acting within the scope of such person's employment.

(iii) **Banks.** Any bank, as defined in section 3(a)(6) of the Act ( 15 U.S.C. 78c(a)(6)), to the extent the bank provides advice with respect to the following:

**(A)** Any investments that are held in a deposit account, savings account, certificate of deposit, or other deposit instrument issued by a bank;

**(B)** Any extension of credit by a bank to a municipal entity or obligated person, including the issuance of a letter of credit, the making of a direct loan, or the purchase of a municipal security by the bank for its own account;

**(C)** Any funds held in a sweep account that meets the requirements of section 3(a)(4)(B)(v) of the Act ( 15 U.S.C. 78c(a)(4)(B)(v)); or

**(D)** Any investment made by a bank acting in the capacity of an indenture trustee or similar capacity.

(iv) **Responses to requests for proposals or qualifications.** Any person providing a response in writing or orally to a

request for proposals or qualifications from a municipal entity or obligated person for services in connection with a municipal financial product or the issuance of municipal securities; *provided, however*, that such person does not receive separate direct or indirect compensation for advice provided as part of such response.

**(v) Swap dealers.**

**(A)** A swap dealer (as defined in Section 1a(49) of the Commodity Exchange Act ( 7 U.S.C. 1a(49)) and the rules and regulations thereunder) registered under the Commodity Exchange Act or associated person of the swap dealer recommending a municipal derivative or a trading strategy that involves a municipal derivative, so long as the registered swap dealer or associated person is not *acting as an advisor* to the municipal entity or obligated person with respect to the municipal derivative or trading strategy pursuant to Section 4s(h)(4) of the Commodity Exchange Act and the rules and regulations thereunder.

**(B)** For purposes of determining whether a swap dealer is *acting as an advisor* in this paragraph (d)(3)(v), the municipal entity or obligated person involved in the transaction will be treated as a *special entity* under Section 4s(h)(2) of the Commodity Exchange Act and the rules and regulations thereunder (even if such municipal entity or obligated person does not satisfy the definition of *special entity* under those provisions).

**(vi) Participation by an independent registered municipal advisor.** Any person engaging in municipal advisory activities in a circumstance in which a municipal entity or obligated person is otherwise represented by an independent registered municipal advisor with respect to the same aspects of a municipal financial product or an issuance of municipal securities, provided that the following requirements are met:

**(A) Independent registered municipal advisor.** An independent registered municipal advisor is providing advice with respect to the same aspects of the municipal financial product or issuance of municipal securities. For purposes of this paragraph (d)(3)(vi), the term *independent registered municipal advisor* means a municipal advisor registered pursuant to section 15B of the Act ( 15 U.S.C. 78o-4) and the rules and regulations thereunder and that is not, and within at least the past two years was not, associated (as defined in section 15B(e)(7) ( 15 U.S.C. 78o-4(e)(7))) of the Act) with the person seeking to rely on this paragraph (d)(3)(vi).

**(B) Required representation.** A person seeking to rely on this paragraph (d)(3)(vi) receives from the municipal entity or obligated person a representation in writing that it is represented by, and will rely on the advice of, an independent registered municipal advisor, provided that the person receiving such representation has a reasonable basis for relying on the representation.

**(C) Required disclosures.**

(1) With respect to a municipal entity, such person discloses in writing to the municipal entity that, by obtaining such representation from the municipal entity, such person is not a municipal advisor and is not subject to the fiduciary duty set forth in section 15B(c)(1) of the Act ( 15 U.S.C. 78o-4(c)(1)) with respect to the municipal financial product or issuance of municipal securities, and provides a copy of such disclosure to the independent registered municipal advisor.

(2) With respect to an obligated person, such person discloses in writing to the obligated person that, by obtaining such representation from the obligated person, such person is not a municipal advisor with respect to the municipal financial product or issuance of municipal securities, and provides a copy of such disclosure to the independent registered municipal advisor.

(3) Each such disclosure must be made at a time and in a manner reasonably designed to allow the municipal entity or obligated person to assess the material incentives and conflicts of interest that such person may have in connection with the municipal advisory activities.

**(vii) *Persons that provide advice on certain investment strategies.*** A person that provides advice with respect to investment strategies that are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments.

**(viii) *Certain solicitations.*** A person that undertakes a solicitation of a municipal entity or obligated person for the purpose of obtaining or retaining an engagement by a municipal entity or by an obligated person of a broker, dealer, municipal securities dealer, or municipal advisor for or in connection with municipal financial products that are investment strategies to the extent that those investment strategies are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments.

**(4) *Special rule for separately identifiable departments or divisions of banks for municipal advisory purposes.*** If a bank engages in municipal advisory activities through a separately identifiable department or division that meets the requirements of this paragraph (d)(4), the determination of whether those municipal advisory activities cause any person to be a municipal advisor may be made separately for such department or division. In such event, that department or division, rather than the bank itself, shall be deemed to be the municipal advisor.

**(i) *Separately identifiable department or division.*** For purposes of this paragraph (d)(4), a *separately identifiable department or division* of a bank is that unit of the bank which conducts all of the municipal advisory activities of the

bank, provided that the following requirements are met:

**(A) *Supervision.*** Such unit is under the direct supervision of an officer or officers designated by the board of directors of the bank as responsible for the day-to-day conduct of the bank's municipal advisory activities, including the supervision of all bank employees engaged in the performance of such activities.

**(B) *Separate records.*** All of the records relating to the bank's municipal advisory activities are separately maintained in, or extractable from, such unit's own facilities or the facilities of the bank, and such records are so maintained or otherwise accessible as to permit independent examination thereof and enforcement of applicable provisions of the Act, the rules and regulations thereunder, and the rules of the Municipal Securities Rulemaking Board relating to municipal advisors.

(ii) [Reserved]

**(e) *Municipal advisory activities*** means the following activities specified in section 15B(e)(4)(A) of the Act ( 15 U.S.C. 78o-4(e)(4)(A)) and paragraph (d)(1) of this section that, absent the availability of an exclusion under paragraph (d)(2) of this section or an exemption under paragraph (d)(3) of this section, would cause a person to be a municipal advisor:

**(1)** Providing advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or

**(2)** Solicitation of a municipal entity or an obligated person.

**(f) *Municipal derivatives*** means any swap (as defined in Section 1a(47) of the Commodity Exchange Act ( 7 U.S.C. 1a(47)) and section 3(a)(69) of the Act ( 15 U.S.C. 78c(a)(69)), including any rules and regulations thereunder) or security-based swap (as defined in section 3(a)(68) of the Act ( 15 U.S.C. 78c(a)(68)), including any rules and regulations thereunder) to which:

**(1)** A municipal entity is a counterparty; or

**(2)** An obligated person, acting in such capacity, is a counterparty.

**(g) *Municipal entity*** means any State, political subdivision of a State, or municipal corporate instrumentality of a State or of a political subdivision of a State, including:

**(1)** Any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality;

(2) Any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof; and

(3) Any other issuer of municipal securities.

**(h) *Municipal escrow investments.***

(1) ***In general.*** Except as otherwise provided in paragraph (h)(2) of this section, *municipal escrow investments* means proceeds of municipal securities and any other funds of a municipal entity that are deposited in an escrow account to pay the principal of, premium, if any, and interest on one or more issues of municipal securities.

(2) ***Reasonable reliance on representations.*** In determining whether or not funds to be invested or reinvested constitute municipal escrow investments for purposes of this section, a person may rely on representations in writing made by a knowledgeable official of the municipal entity or obligated person whose funds are to be invested or reinvested regarding the nature of such investments, provided that the person seeking to rely on such representations has a reasonable basis for such reliance.

(i) ***Municipal financial product*** has the same meaning as in section 15B(e)(5) of the Act ( 15 U.S.C. 78o-4(e)(5)).

**(j) *Non-resident*** means:

(1) In the case of an individual, one who resides in or has his principal office and place of business in any place not subject to the jurisdiction of the United States;

(2) In the case of a corporation, one incorporated in or having its principal office and place of business in any place not subject to the jurisdiction of the United States; or

(3) In the case of a partnership or other unincorporated organization or association, one having its principal office and place of business in any place not subject to the jurisdiction of the United States.

**(k) *Obligated person*** has the same meaning as in section 15B(e)(10) of the Act ( 15 U.S.C. 78o-4(e)(10)); *provided, however*, that the term *obligated person* shall not include:

(1) A person who provides municipal bond insurance, letters of credit, or other liquidity facilities;

(2) A person whose financial information or operating data is not material to a municipal securities offering, without reference to any municipal bond insurance, letter of credit, liquidity facility, or other credit enhancement; or

(3) The federal government.

**(l) *Principal office and place of business*** means the executive office of the municipal advisor from which the officers, partners, or managers of the municipal advisor direct, control, and coordinate the activities of the municipal advisor.

**(m)**

**(1) *Proceeds of municipal securities - In general.*** Except as otherwise provided in paragraphs (m)(2) and (m)(3) of this section, *proceeds of municipal securities* means monies derived by a municipal entity from the sale of municipal securities, investment income derived from the investment or reinvestment of such monies, and any monies of a municipal entity or obligated person held in funds under legal documents for the municipal securities that are reasonably expected to be used as security or a source of payment for the payment of the debt service on the municipal securities, including reserves, sinking funds, and pledged funds created for such purpose, and the investment income derived from the investment or reinvestment of monies in such funds. When such monies are spent to carry out the authorized purposes of municipal securities, they cease to be proceeds of municipal securities.

**(2) *Exception for Section 529 college savings plans.*** Solely for purposes of this paragraph (m), monies derived from a municipal security issued by an education trust established by a State under Section 529(b) of the Internal Revenue Code ( 26 U.S.C. 529(b)) are not proceeds of municipal securities.

**(3) *Reasonable reliance on representations.*** In determining whether or not funds to be invested constitute proceeds of municipal securities for purposes of this section, a person may rely on representations in writing made by a knowledgeable official of the municipal entity or obligated person whose funds are to be invested regarding the nature of such funds, provided that the person seeking to rely on such representations has a reasonable basis for such reliance.

**(n) *Solicitation of a municipal entity or obligated person*** has the same meaning as in section 15B(e)(9) of the Act ( 15 U.S.C. 78o-4(e)(9)); *provided, however*, that a solicitation does not include:

**(1)** Advertising by a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser; or

**(2)** Solicitation of an obligated person, if such obligated person is not acting in the capacity of an obligated person or the solicitation of the obligated person is not in connection with the issuance of municipal securities or with respect to municipal financial products.

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