

# Rate Review Challenges, Electronic CCRs, and More . . .



There has been some recent debate by engineering firms and others concerning the Municipal Securities Rulemaking Board (“MSRB”) requirement that firms may be engaging in activities as “municipal advisors,” as defined in the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”), without having registered as such with both the MSRB and the Securities and Exchange Commission (“SEC”).

In 2010, the Dodd-Frank Act amended the Securities Exchange Act of 1934 (“Exchange Act”) to require “municipal advisors” who solicit or provide certain advice to municipal entities and certain other persons to register with the SEC. “Municipal advisor” is defined generally as a person who: 1) provides advice to a municipal entity or obligated person regarding

municipal financial products or the issuance of municipal securities, including advice regarding structure, timing, terms and similar matters; or, 2) that undertakes a solicitation of a municipal entity. The definition is broad; it includes certain financial

## What’s allowed, and not allowed?

In response to the Dodd-Frank Act, KRWA obtained a legal opinion in 2011 to address the whether or not KRWA staff could provide information on “funding options”, etc. That opinion by Stumbo Hanson, LLP, stated: “Informing municipalities about the general existence and availability of KDHE loans, reviewing a systems financial status, projecting future revenues and expenses, and assisting KDHE with financing improvements through revolving fund loans does not require registration.”

In mid-January 2014, KRWA requested a legal opinion concerning whether or not engineers need to be registered with the MSRB board as engineers routinely provide basic rate reviews as part of project feasibility studies. Here is the response to that request:

“According to Section 15B(e)(4)(c) of the Exchange Act, engineers are excluded as long as they are providing “engineering advice”. If the engineer engages in advisory activities other than providing “engineering advice”, they would be subject to the statute. The proposed final rules and commentary attempt to clarify this requirement. The commentary states that certain activities would be the provision of “engineering advice”, including:

- ◆ Feasibility Studies
- ◆ Cash Flow Analysis
- ◆ Anticipating Funding Requirements and Timing
- ◆ Utility Rates and Utility Rate Studies/Market Demand Studies
- ◆ Projected Utility Revenues

“Engineers can use information, data and assumptions provided by the municipality or its advisor as to interest rates or debt levels to incorporate into any of the above activities.

“The comments have also stated what is not allowed as “engineering advice”. These would include:

- ◆ Advice on the structure, timing and terms of debt obligations or instruments
- ◆ Revenue projections based upon a bond or loan payment structure
- ◆ Debt service coverage calculations

“There are some other matters to note for engineers to consider. Engineers can provide general financing information but cannot provide recommendations on how to proceed under those general options. Also, the rules about solicitation remain in effect restricting engineers from providing contacts with Municipal Advisors for compensation. Finally, these rules would not apply (i.e., the engineer is not restricted in the type of advice given) if the municipal entity at issue is represented by an independent and registered Municipal Advisor.

“The rule goes to great length to avoid a precise definition of what “advice” may only be given by an MA. Accordingly, to address comments, the Commission is adopting Rule 15Ba1-1(d)(1)(ii), which provides that 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.”

advisors (including broker-dealers), investment advisers, and third-party marketers and solicitors. A ‘municipal financial product’ is defined to include “investment strategies,” which the SEC has interpreted to include plans for the investment of any funds held by a municipal entity.

So the question is if anyone conducting a “rate review” needs to be registered with the MSRB?

Engineering firms and other service providers including technical assistance providers such as KRWA and a myriad of other similar organizations, provide basic water or wastewater rate reviews, as well as persons who provide such service as a business.

The Act exempts public officials and employees of municipal entities and obligated persons. Here are the categories that are exempt:

- ❖ Any person serving as a member of a governing body, its advisory boards and committees, and persons 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 the person’s official capacity

- ❖ Any employee of a municipal entity to the extent that such person is acting within the scope of the person’s employment; and
- ❖ Any board member, officer or employee of an obligated person to the extent that such person is acting within the scope of the person’s employment or capacity.

### Electronic CCRs

The Kansas Rural Water Association was among the lead proponents of eliminating the requirement by public water systems to mail the Consumer Confidence Report (CCR) to each customer. Members of the Kansas Congressional Delegation were among the first co-signers of draft legislation to force the issue. However, EPA then determined that it had the flexibility to drop the mailing requirement. That change became effective in 2013. As a result, cities and RWDs and other public water systems have dramatically reduced costs of providing the CCRs in 2013. System interest in posting reports online is increasing as the requests continue to arrive at KRWA daily.

In order to help systems reduce the cost of printing and mailing, KRWA has formatted CCRs for water systems since 2002. In 2013, KRWA formatted and posted the water quality reports for 289 cities and water districts on the KRWA Web site. Compare that to the prior year when the Association prepared a similar number but also ran 129,000 copies. I recall the estimate about five years ago that Dave Waldo at KDHE made that the cost of delivering the CCRs in Kansas was approximately \$900,000.

Posting the reports online allows a greater chance of someone reading them and also, the report remains available. It’s a win-win for water systems and their customers.

### It’s Annual conference time

The program for the 47th Annual Conference & Exhibition is reprinted in this issue.

The KRWA conference has grown to be one of the largest and most respected water and wastewater conferences in America. This year, 327 exhibit spaces are filled and there are eight companies on a waiting list. The conference provides opportunities for people to attend technical training sessions, learn about new products and services in EXPO Hall, meet with agencies to discuss funding or other matters and exchange ideas with others. And there is good fun and social and top caliber entertainment as a bonus. You won’t find a friendlier, down-home crowd than at this event. I encourage you to attend. This is YOUR conference and attending is a good investment of your time.



### The Kansas RATES Program

As for its efforts to help water and wastewater systems, KRWA will continue to provide basic rate reviews – and at no charge to systems. Rate reviews by KRWA don’t consider a particular financing, or for that matter even the affordability of a project that would require financing. Rate reviews primarily look at income and expenses for the system from a number of aspects, some of which are simply intended to catch inefficiencies, recordkeeping issues, illogical rate structures, etc. Rate reviews that KRWA conducts and generally those by anyone else, do not make recommendations regarding municipal securities. Readers can find any reports KRWA has provided mixed in with other technical assistance letters on the KRWA Web site at [www.krwa.net](http://www.krwa.net), then under “Technical Assistance”. The direct link is [www.krwa.net/ops/water.asp](http://www.krwa.net/ops/water.asp).

The Kansas RATES Program is for water, sewer and other utilities. KRWA conducts the simpler rate reviews. When reviews become more complex, Carl Brown Consulting, LLC (CBC), under the direction of KRWA, will perform comprehensive rate analyses for utilities. To learn more about the program, see the information on the KRWA Web site at [www.krwa.net/ratereviews/ratereviews.shtml](http://www.krwa.net/ratereviews/ratereviews.shtml).

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