

# **Bond Case Briefs**

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## **SEC MA Rule Mostly Applauded.**

Market participants are generally pleased that the Securities and Exchange Commission has adopted a municipal adviser definition that addressed concerns from several sectors of the muni bond industry, but non-dealer MAs remain concerned that the registration exemptions might allow for abuses Dodd-Frank was intended to curb.

While the nearly 800-page final rule had not been released as of Thursday, the statements of SEC commissioners and a summary sheet distributed by the agency left broker-dealers and bond lawyers optimistic that the commission crafted a rule far more workable than a broader version initially proposed in December 2010. That rule would have required volunteer government board members, employees at banks, and possibly a wide range of other professionals to register as MAs with the SEC.

The final rule, adopted unanimously on Sept. 18, offers broad exemptions for public officials and draws a more narrow focus on which types of professionals will be subject to registration requirements.

The rule will become effective 60 days after its publication in the Federal Register, which may occur in a few days. Municipal advisors have already been required to register with the SEC under a temporary rule, but will need to re-register on a staggered basis beginning July 1, 2014.

Susan Collet, senior vice president for government relations at the Bond Dealers of America, praised the SEC for some of the new safeguards, which include another new broad exemption that applies in cases where municipalities have hired a registered municipal advisor. In those cases, unregistered entities could offer muni advice on the same subjects as the advisor without becoming subject to the federal fiduciary duty that the Dodd-Frank act imposes on MAs.

"The SEC worked really hard to get this right, Collet said. "I think they have been faithful to the intent of Dodd-Frank. We're pleased with this outcome. I think we've seen a regulatory process come together well here."

Collet said she was glad to see the registration standard finally codified in SEC rules, as broker-dealers have long complained that independent financial advisors have been operating without the same level of oversight as dealer-affiliated advisors. Collet said the next question will be how the Municipal Securities Rulemaking Board reacts, as it will need to issue new rules and interpretive guidance.

Charles Samuels, a lawyer at Mintz, Levin, Cohn, Ferris, Glovsky and Popeo PC, said he is extremely pleased to see the government official exemption. He had harbored concerns, as had many, that volunteer board members and other individuals who appear to be outside the intent of Dodd-Frank would be forced into a cumbersome regulatory regime. The new SEC rule prevents this as long as the individuals act within the scope of their duties.

"We will have to scrutinize the full text carefully," Samuels said. "I think it can be said that [SEC

muni chief] John Cross really delivered for issuers and borrowers.”

Samuels said that the SEC’s changes to its initial 2010 rule reflect the best of the regulatory process.

“This is an excellent example of a grassroots reaction to an overreaching regulator,” Samuels said. “But at the end of the day, it’s also a great example of a responsible reaction by a regulator.”

But National Association of Independent Public Finance Advisors president Jeanine Rodgers Caruso indicated her group might take issue with an expanded underwriter exemption included in the SEC’s definition. The SEC decided to allow underwriters to give advice on the structure and timing of a bond issue once the firm was engaged by an issuer. The exemption would not cover advice beyond those limited aspects of that specific offering, such as advice on the use of bond proceeds or what other bond offerings the issuer could or should do.

“NAIPFA is happy to see that the SEC has adopted a final registration rule and looks forward to working with the MSRB to craft appropriate MA rules and regulations,” Rodgers Caruso said. “We continue to be concerned that the registration rule will not capture those underwriter firms who provide advice to municipal entities relative to the issuance of municipal securities and we fear that this will lead to a continuation of the market abuses that were promulgated by these firms prior to the enactment of the Dodd-Frank Act. However, it is our hope that the registration rule has been drafted in such a way as to limit the likelihood of this possibility.”

Paul Maco, an attorney at Bracewell & Giuliani LLP, said the MSRB will have a lot of work to do in crafting rules parallel to the SEC definition. Maco said the commission has also sent a clear signal that it expects very rigorous economic analysis from the MSRB.

Lynnette Kelly, the MSRB’s executive director, said the board will have control over what aspects of the new rulemaking to take up first. One possibility could be a fiduciary duty rule, but it might take time.

“It’s important to take a measured pace and a measured approach,” Kelly said.

by: KYLE GLAZIER