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BDA In the News: BDA, Broker Dealers Have Constructively Engaged on MA Rule.

The BDA's Mike Nicholas was featured in a Bond Buyer commentary on the constructive manner that broker-dealers have worked with other industry participants to understand and ensure a smooth industry transition to meet the requirements of the the SEC's Municipal Advisor Rule, which went into effect on July 1, 2014.

This commentary was produced with significant membership input and in response to an article published in the Bond Buyer on June 27 entitled, "The Truth About MA Rule Distorted, Said Lawyer Who Worked on it,", which you can find linked here.

You can view the full commentary below.

Since the release of the Securities and Exchange Commission's final municipal advisor registration rule in September 2013, the Bond Dealers of America and its members have dedicated significant efforts and resources to work with regulators, educate issuers and ultimately be prepared to make a successful implementation of the rule.

Given the scope of these efforts, it was frustrating to read the June 30 article in the Bond Buyer, in which a former SEC staffer questioned the role that dealers have played in working to interpret and implement the MA rule.

While much of the BDA's efforts have been directed at clarifying and implementing the rule, the BDA strongly disagrees with comments made in this Bond Buyer article and with the SEC's Office of Municipal Securities with regard to the interpretation of the Dodd-Frank Act.

The intent of Congress in adopting the MA provisions of the Dodd-Frank Act was to regulate unregulated financial advisors, which is why the Dodd-Frank Act clearly and categorically excluded dealers serving as underwriters.

In lieu of remaining consistent with the statutory approach, the SEC adopted an "activities based" rule that requires underwriters to scrutinize each kind of communication they have with issuers and borrowers to determine whether they will become municipal advisors – even in situations in which their clients know full well that they are not their advisors. Setting aside what was a clear categorical exclusion in the Dodd-Frank Act has resulted in a very complex rule and has caused unnecessary and costly confusion, delays in implementation, and financial and operating burdens on the entire municipal bond industry.

Despite this fundamental policy concern, since the adoption of the rule, the BDA and its members have worked, and will continue to work, to understand and implement the rule.

The MA rule represents a fundamental shift in how the municipal markets are regulated. In fact, it took the SEC 778 pages and a couple rounds of Frequently-Asked Questions to articulate and explain the rule.

It is in that vein that we believe that the efforts of the BDA, its members and the entire dealer community have enormously contributed to a smoother and clearer implementation of the MA rule. It is completely inaccurate to portray the dealer community as intentionally seeking to obfuscate the rule. The dealer community was as active as any in trying to understand the meaning of the rule and communicate with the Office of Municipal Securities regarding areas of uncertainty and practical obstacles in the implementation of the rule. BDA has assisted issuers, borrowers and others concerning how the rule would change the manner in which municipal market participants interact with one another. With the implementation of a rule this complex and significant that directly impacts dealers' activities and communications with issuers, this is exactly what the dealer community must do.

We believe that the municipal marketplace and the implementation of the MA rule have been positively impacted as a result of dealers' efforts.

The statements made in the Bond Buyer article stating that the dealer community had intentionally distorted the MA rule for its own interests are completely untrue. One particular statement in the article that some of the "individual dealer communications about the MA rule are so distorted …they could be G-17 violations in and of themselves" is both untrue, disappointing and does nothing to further the process of implementing the MA rule.

Just to list a few of the efforts that BDA and its members have contributed to a successful implementation of the MA rule:

We have met with the SEC's Office of Municipal Securities multiple times and provided several written submissions to identify areas of potential uncertainty as to the application of the MA rule and offered proposed solutions to address those areas of confusion. A number of our suggestions were incorporated into the release by the Office of Municipal Securities of FAQs, which provided interpretative guidance concerning the MA rule.

We have coordinated multiple discussions with our members to allow for dealers to engage in real-world deliberations regarding the operation of the MA rule and to help them understand how their peers were planning to implement the rule. We believe these efforts have significantly helped dealers develop informed, effective and consistent approaches to the implementation of the MA rule.

We have worked with our members to develop guidance concerning how to implement policies and procedures to comply with the MA rule.

We have made efforts to assist issuers and borrowers understand how the MA rule will impact them and have helped our member firms develop communication plans for talking to issuers about the MA rule.

Ultimately the jury is still out on whether the added costs, confusion and complexity resulting from the MA rule, and the potential that issuers may obtain less information, will be matched or exceeded by the MA rule's benefits in protecting issuers. In any case, the BDA and its members will do their best to comply with the rule and to continue to help make it as workable as possible for all market participants.

by Michael Nicholas