# Bond Case Briefs

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## Move America Bonds – Close Enough for Government Work.

Senator Ron Wyden (D-Oregon) and Senator John Hoeven (R-North Dakota) have sponsored a bill to encourage private parties to help repair the nation's infrastructure by encouraging the broader use of public-private partnerships, or P3s. The bill, called "The Move America Act of 2015," proposes a new type of tax-exempt bond, the "Move America Bond." (Move America Bonds will undoubtedly be described as "MABs" and will undoubtedly adopt the B(b)uild America B(b)ond convention of ignoring Congress's capitalization.)

Move America Bonds are a variation on the theme of "qualified public infrastructure bonds," or "QPIBs," which we first encountered in the president's budget earlier this year. Both QPIBs and MABs are tax-exempt bonds, so neither program has the "direct pay" feature notably used by Build America Bonds that has since fallen into disfavor because of sequestration. Both programs seek to encourage private investment in infrastructure by putting private activity bonds that are issued to finance public infrastructure on a more equal footing with governmental use bonds that are issued for the very same purpose. Each program tries to do this by exempting interest on these private activity bonds from the alternative minimum tax, which does not apply to interest on governmental use bonds.

**Comparing Move America Bonds and QPIBs**

As we noted in our QPIB post, the key to enacting QPIBs would be to strip them off of the President's budget, which like it or not stood little chance of blossoming into actual legislation, and attach the QPIB pieces to a free-standing piece of legislation. Move America Bonds are a step in this direction. (We are of course only speculating about what QPIBs would look like, because a budget proposal by its nature speaks only in terms of general concepts rather than specific legislative language.) It's a useful exercise to compare QPIBs and MABs at this stage, so we've prepared a chart that does that.

**Some additional thoughts:**

**MABs go beyond the existing list of exempt facility projects and would not require "governmental ownership" of the bond-financed project.**

The two big benefits of MABs over QPIBs are that an issuer can use MABs to finance a project even if the economic owner of the property is not a state or local government entity (so long as the project is available for use by the general public) and that MABs greatly expand the list of projects that can be financed well beyond the existing list of projects that are eligible for exempt facility bond financing. The main drawback of MABs as compared to QPIBs is that QPIBs would not be subject to any volume cap, but MABs are subject to a new, independent volume cap system, capped at the level of 50% of the current state private activity bond volume cap. In addition, although the general descriptions of the MAB proposal state that the project must be available to the general public, the MAB legislation does not create a new, separate "general public use" requirement (or even a link to the existing general public use rules in the Treasury Regulations) apart from the existing exempt facility bond rules.

**MABs would create a new Code Section and a new volume cap system, which likely would take time to learn before MABs became widely used.**

Prior, we discussed the difficulty that always arises when Congress creates a new type of tax-advantaged bond – everyone has to take time to learn the new rules and this can delay the start of the activity that Congress intends to encourage with that new tax-advantaged bond program. Although we have not seen legislative language, QPIBs seemed like they would operate within the existing framework of exempt facility bonds under Section 142 of the Code, with fairly few changes.

The draft MABs legislation, however, would create a new Code Section – 142A – which contains some rules that are similar to the existing rules in Section 142, but the relationship isn't fully fleshed out. For example, Proposed Section 142A(b)(1) authorizes Move America Bond financing for "airports," without an explicit link to Code Section 142(a)(1). It leaves open the question of whether the body of existing law regarding airport financings (private letter rulings about what constitutes an "airport," for example) applies to both provisions. Logic would tell you yes, and Proposed Section 142A(a)(1) does say that "[e]xcept as otherwise provided . . . a Move America bond shall be treated for purposes of this part as an exempt facility bond," but these kinds of questions are what can slow things down.

In addition, the Move America Bond legislation includes new types of facilities that have not been financeable with tax-advantaged debt as an exempt facility. There are several references to laws that are probably outside of the common working areas of public finance and public finance tax lawyers. For example, the MAB legislation would allow Move America Bond financing for "railroads (as defined in section 20102 of title 49, United States Code) and any associated rail and road infrastructure for the purpose of integrating modes of transportation." It will take time for stakeholders to learn what this does and does not include. (In some ways, it is ironic that MABs would allow railroads to be financed with tax-exempt bonds. After all, some of the very first municipal bonds were issued to finance railroad lines shortly after the Civil War. Unfortunately, many of those railroad bond issues went into default when the recession of 1871 overcame the country. That may explain why railroads were never a permitted category of exempt facility bond in the next 144 years since that recession hit. We certainly hope that unfortunate circumstance will not be repeated if railroads can be financed in the future.)

In addition, the MAB legislation expands the definition of "docks and wharves" to include "waterborne mooring infrastructure, dredging in connection with a dock or wharf, and any associated rail and road infrastructure for the purpose of integrating modes of transportation." Presumably the definitions of these items will be left up to the IRS, which will further delay the use of MABs for these projects.

**MABs would create a separate volume cap system that is similar to the existing private activity bond volume cap, but distinct.**

The Move America Bond legislation exempts Move America Bonds from the traditional state private activity bond volume cap in Section 146 of the Code, but instead creates a new volume cap for these bonds. The amount of the volume cap is allocated among the states similar to the way that the existing volume cap is allocated. It is capped at 50% of the amount of the existing volume cap, but Move America Bonds would not count against the traditional private activity bond volume cap. One nice feature of the MAB volume cap is that any carried-over volume cap not used after three years is reallocated to States that have fully utilized their MAB volume cap.

**As an alternative, the Move America Act creates a tax credit available to private investors.**

The Move America Act also proposes "Move America Credits," which would be transferable tax credits in exchange for equity investments in eligible projects. Currently, the complicated partnership structures that often are beneficial for purposes of tax credit programs such as the low-income housing tax credit program make it difficult to fully integrate these programs with the tax-exempt bond provisions. Move America Credits would allow states to "trade in" their Move America Bond volume cap ($1 of MAB volume cap = $0.25 of MAC credit authority) for Move America Credits. Like many existing tax credit programs, the tax credit would be claimed proportionately over a set period (here, 10 years), with a recapture mechanism if the project ceases to qualify under the MAC provisions. The Move America Credits could be combined with MABs and other federal or state funding, including TIFIA loans or FHWA grants.

**All in all, QPIB supporters should be encouraged by MABs.**

As noted above, proposals like Move America Bonds are the next step if qualified public infrastructure bonds are to be enacted. While Move America Bonds contain some drawbacks from the broad outlines of QPIBs in the President's budget, it also has some benefits, such as removing the governmental ownership requirement and recognizing that the transportation projects that are eligible for MAB financing are effectively already public projects. Although the legislative language itself is not without its faults, it is a good start and a good first attempt at doing the difficult work of hashing out the actual legislative language for enactment of the QPIB concepts.

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