

Bond Case Briefs

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State Groups Challenging G-37 Ask Court to Consolidate Cases.

WASHINGTON - Three state Republican parties challenging the constitutionality of a revised Municipal Securities Rulemaking Board anti-pay-to-play rule are asking a federal circuit court to streamline the legal process by consolidating their two pending cases.

The Tennessee Republican Party filed a challenge to the MSRB's revised Rule G-37 on political contributions for muni advisors as well as dealers on April 12 in the U.S. Court of Appeals for the Sixth Circuit in Cincinnati. The challenge named the Securities and Exchange Commission and MSRB as respondents because MSRB rules are subject to SEC approval. The court's jurisdiction covers Tennessee, Kentucky, Michigan, and Ohio.

Two other groups, the Georgia Republican Party and the New York State Committee, filed a petition against the MSRB and SEC on April 13 in the U.S. Court of Appeals for the Eleventh Circuit in Atlanta. That court's jurisdiction covers Georgia, Alabama, and Florida.

The cases are now both before the Sixth Circuit after SEC lawyers successfully argued that federal appellate procedure required the case filed in the Atlanta court to be transferred because it was filed after the first petition.

Now that the two cases are pending in the same circuit court, the lawyers for the three Republican parties are arguing that consolidating them will "conserve both the court's and the parties' resources and promote the interests of judicial economy and efficiency."

The parties are asking the Sixth Circuit to set aside and vacate revisions to the rule, which has applied to dealers since 1994 and was recently revised to include municipal advisors beginning on Aug. 17.

The MSRB, which is represented by Joseph Guerra, a co-leader of Sidley Austin's Supreme Court and appellate practice in DC, and MSRB general counsel for regulatory affairs Michael Post, previously asked that the petition filed in the Sixth Circuit be transferred to the U.S. Court of Appeals for the District of Columbia because the MSRB and SEC, as well as all counsel representing both sides in the case were located in the area.

Sixth Circuit judges denied that petition on June 30. The state parties plan to raise the same challenges to the rule in both cases, wrote one of their lawyers Christopher Bartolomucci, a partner with the law firm Bancroft in D.C., in the July 1 motion to consolidate. Edmund LaCour Jr., an associate with Bancroft, and Jason Torchinsky, a partner at Virginia-based Holtzman Vogel Josefiak Torchinsky, are also representing the Republican organizations.

Under the revised Rule G-37, municipal advisors, similarly to dealers, will be barred from engaging in municipal advisory business with an issuer for two years if the firm, one of its professionals, or a political action committee that is controlled by the firm or an associated professional, makes significant contributions to an issuer official who can influence the award of municipal advisory

business.

The revised rule contains a de minimis provision like the original rule. It would allow a municipal finance professional (MFP) or a municipal advisor professional (MAP) to give a contribution of up to \$250 to any candidate for whom he or she can vote for without triggering the two-year ban.

The Republican groups argue that the rule forces MAs and dealers, as well as their employees, to choose between exercising their constitutional right to support candidates through contributions and continuing to provide advisory and dealer services. That type of infringement is only allowed under Supreme Court precedent when it is done to prevent quid pro quo corruption, the parties' lawyers said, something that is not the case for political contributions that are not made in connection with efforts to control an officeholders' actions.

The state parties' lawyers also argued in previous filings that Congress did not empower the SEC or MSRB to regulate political contributions and instead made such regulation "the exclusive province" of Congress and the Federal Election Commission.

Rule G-37 was previously challenged after the SEC first approved it for dealers in 1994. Alabama bond dealer William Blount filed suit against the MSRB and SEC, arguing the rule violated his constitutional right to free speech. The D.C. Circuit rejected that argument in a 1995 ruling, saying the rule was "narrowly tailored to serve a compelling government interest."

The MSRB has maintained that the rule is a "vital measure promoting the integrity" of the muni market and has said it intends to "vigorously defend the policies it believes should be in place to address quid pro quo corruption and the appearance of this type of corruption."

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