

Bond Case Briefs

Municipal Finance Law Since 1971

BDA Advocacy 1st Quarter - 2018

Federal Regulatory and Legislative Priorities

FINRA Rule 4210

In 2016, the BDA was successful in getting FINRA and SEC to file a last-minute amendment to the rule that significantly expanded the “gross open position” exception from \$2.5 million to \$10 million. BDA had advocated for a more expansive gross open position limit throughout the rulemaking and the \$10 million level expands the universe of counterparties and trades where the transfer of margin will typically not apply.

More recently, the BDA was supportive of a delayed effective date and lobbied FINRA directly for the delay. In September 2017, the rule was delayed to June 2018.

In 2018, the BDA has met with SEC Chair Clayton and each SEC Commissioner in addition to FINRA CEO Cook and senior counsel advocating for excluding from the rule transactions from the “Covered Agency Securities” definition that do not pose systemic risk, such as specified pools and CMOs; transactions from the “Covered Agency Securities” definition that settle on the next or first good settlement date; and/or allowing dealers to take a capital charge instead of requiring them to enter into margining agreements with customers.

The BDA believes that FINRA should revise the amendments to allow dealers to either charge margin to counterparties or to take a regulatory capital charge to cover any mark-to-market deficiency in excess of the de minimis threshold. This would allow dealers to remain competitive with money manager accounts, prevent non-FINRA regulated banks from marketing their status as a non-FINRA regulated entity, and still manage any systemic risk. This idea was discussed with Robert Cook and senior FINRA staff in December 2017, and in February 2018, the BDA received word that FINRA is considering this proposal. FINRA has discussed this idea in-depth with BDA member firms, and an update is expected shortly.

Retail Confirmation Disclosure Rules

In the fall of 2017, at the request of Robert Cook of FINRA, a BDA working group submitted an amendment recommendation for the retail confirmation disclosure rules to both FINRA and MSRB. The BDA policy recommendation introduced the concept of “general market liquidity provider” to allow dealers that provide liquidity and offer bonds in support of their network of financial advisors to rebut the presumption that their cost is the best measure of prevailing market price for the purposes of the disclosure. The BDA also continued to advocate for a delay of the rules.

Throughout December 2017, BDA staff continued conversations with FINRA staff, and also reached out to SEC commissioners’ staffs to discuss our concerns in-depth after hearing that SEC commissioners were balking on a delay of the rules.

In January 2018, BDA members met with SEC Chairman Jay Clayton, SEC Commissioner Kara Stein, and senior staff to SEC Commissioner Mike Piwowar in support of a delay of the rule and to make clear to the SEC the numerous compliance problems small firms are facing with vendors, etc. The

BDA also explained to the commissioners the “general market liquidity provider” amendment.

The SEC commissioners held their position that the rules should not be delayed. However, the BDA felt that they did leave the door open for an extended timeline without enforcement. During the meeting with Chairman Clayton, he prompted the BDA to draft a “business plan” laying out the framework of steps to be taken if a delay of enforcement were to be granted. The plan BDA presented includes a “conformance period,” in which the regulations would not be enforced if broker-dealers acted in good faith and worked to come into full compliance with the rules by December 31, 2018.

As a follow-up, in March 2018, BDA members met with the two new SEC commissioners, Hester Peirce and Robert Jackson, Jr., regarding the markup rules.

In March 2018, the BDA was notified that regulators are seriously considering the BDA’s conformance period proposal. Currently, the BDA is in communication with member firms, industry groups and regulators to ensure a positive outcome. More information on this issue will be distributed soon.

Municipal Advance Refundings

The BDA is leading the advocacy push for H.R. 5003, legislation that would fully reinstate municipal advance refundings. While disappointed in the elimination of advance refundings in the Tax Cuts and Jobs Act of 2017, the BDA continues to work simultaneously with Capitol Hill, MBFA and the full issuer community and the U.S. Treasury to find a market-based, regulatory no cost solution for municipal bond issuers.

Grassroots lobbying efforts are ongoing with BDA membership contacting their representatives in Washington. Municipal Bond Division Leadership has provided the BDA with advance refunding project data for Ways and Means comments on “expired tax provisions” in March, showing a wide variety of cost savings lost for state and local governments of all sizes. The BDA also plans to host a member fly-in surrounding “Infrastructure Week 2018” to help raise awareness for municipal advance refundings on Capitol Hill this May.

Private-Activity Bonds

In early 2018, the Trump Administration released an infrastructure guideline that would eliminate the AMT provision, provide change-of-use provisions to preserve the tax-exempt status and allow for the advance refunding of PABs. The BDA continues to work with its partners on Capitol Hill to promote these fundamental pillars in any infrastructure package.

The BDA plans to incorporate PABs into the “Infrastructure Week” fly-in this May.

MSRB Rule G-15 Minimum Denomination Rule

As a result of direct lobbying efforts of the BDA, the MSRB withdrew a proposed rule to amend MSRB Rule G-15 for minimum denominations (Proposed and withdrawn MSRB Rule G-49). The withdrawal of the rule took place after a BDA conversation with MSRB Counsel Mike Post that was supported by Dan Deaton from Nixon Peabody. During that call, BDA highlighted that the rule proposal and the existing G-15 framework was harming the marketplace, especially retail investors. After withdrawing the rule, the MSRB sought additional input from the BDA on a conference call with BDA members. The accomplishment is that BDA advocacy resulted in the rule being withdrawn. The BDA educated the MSRB and they appear committed to updating G-15 in a way that would focus the minimum denomination rule on issuances with minimum authorized denominations of \$100,000 and above, removing a significant burden on the retail municipal market. Pending regulatory discussions will continue in 2018.

DOL Fiduciary Duty / SEC Best Interest Standard

While the DOL fiduciary rule and exemptions are extremely burdensome, the BDA and dealer firms were successful in getting significant changes included in the final rule. Initially the Best Interest Contract Exemption (BIC) and the Principal Trading Exemption (PTE) excluded a series of assets including municipal bonds, UITs, CDs, and mortgage securities.

At present, the DOL fiduciary rule has been partially implemented; but several sections of the rule have also been delayed by the Trump Administration to examine if DOL or the SEC is best suited to take the lead on this issue. In June 2017, SEC Chairman Jay Clayton requested public comments on how the SEC might best approach a “fiduciary” standard. The BDA met with the Chairman Clayton, Commissioner Stein, and senior staff to Commissioner Piwowar in January 2018 and let them know that BDA will submit comments to the SEC soon.

The BDA supports a “best interest standard” and strongly believes that the standard should fit within the existing broker-dealer regulatory regime.

Review and Withdrawal of IRS Political Subdivision Rule

The IRS political subdivision rule was proposed in 2016. The BDA opposed the proposal. Due to market participant feedback the rule was not approved during the Obama Presidency. The Trump Administration reviewed IRS rule proposals and identified the political subdivision rule as a particularly burdensome rule.

The BDA and MBFA wrote to the IRS confirming that the rule was burdensome, unnecessary, and harmful for economic growth. The IRS repeatedly identified the comments of market participants as a reason why it identified this rule as particularly burdensome. The proposal was withdrawn on October 20, 2017.

SEC Proposes Amendment to 15c2-12 for Bank Loan Disclosure

The BDA supports the disclosure of bank loans and the most effective way to require the disclosure of bank loans would be for the SEC to amend 15c2-12. In 2017, the SEC released a proposed rule to amend 15c2-12 to require the disclosure of bank loans. This proposal is a BDA accomplishment. While the rule is not yet final, the BDA has engaged in direct advocacy with the SEC prior to and after the rule proposal on the subject of bank loans. Discussions are ongoing in 2018.

High Quality Liquid Asset (HQLA) Legislation/Regulation

Working in tandem with state, local and issuer groups, the BDA has supported the introduction and re-introduction in the House and Senate and passage through the House of legislation to define municipal bonds as HQLA under banking liquidity rules.

In early 2018, municipal securities were classified as level 2B HQLA in 2155, the Economic Growth, Regulatory Relief, and Consumer Protection Act, which also is expected to pass the Senate soon.

SEC Fixed Income Market Structure Committee

In 2017, the BDA recommended four candidates (Craig Noble, Brad Winges, Horace Carter, Mike Marz) for the SEC’s Fixed Income Market Structure Advisory Committee (FIMSAC). The BDA is pleased that Horace Carter (Raymond James) was selected for the committee, as were BDA members Amar Kuchinad, (Trumid Financial) and Richard McVey (MarketAxess). The BDA continues to monitor FIMSAC activities and will look for ways to actively engage the SEC on these topics.

Additional BDA Priorities 2018

PCAOB Exemption Legislation

The BDA is working with other industry participants and trade groups on potential legislation that would exempt privately-held, non-custodial brokers and dealers from the requirement to have a Public Company Accounting Oversight Board (PCAOB)- registered audit.

The PCAOB requirements do not make sense for privately-held, non-custodial firms. The one-size-fits-all PCAOB audit standards that were designed for public companies, and are priced accordingly, have inflicted substantial harm on small businesses around the country.

Currently, the BDA is waiting to see final bill text, and once the legislation is introduced, the BDA plans to actively advocate for it on Capitol Hill.

MSRB Seeks to Establish Rule for Municipal Advisors/Update Dealer Standards on Advertising
The BDA has been active in submitting comments in opposition to the MSRB's proposed new rule, MSRB Rule G-40, on advertising by municipal advisors, and amendments to MSRB Rule G-21, on advertising by municipal securities dealers.

Most recently, the BDA submitted comments in February 2018 to the SEC in response to the MSRB's proposed new rule. While the rule is not yet final, the BDA continues to be active in direct advocacy with the SEC prior to the implementation of new advertising standards.

Bank Qualified Debt

The BDA continues to support the reintroduction of the Municipal Bond Market Support Act or inclusion of this Act in an infrastructure package. Bank-qualified debt legislation would increase the annual volume limit for bank-qualified bonds from \$10 million to \$30 million and index for inflation. Past legislation has also allowed for the use of pooled financings and calculates the volume cap at the issuer, rather than issuance, level. The BDA has lobbied Congress extensively on the bank-qualified issue during the past seven years and we will continue to do so in 2018.

FINRA Government Securities Initiative

In February 2018, FINRA issued a request for comment (Notice 18-05) on the application of various FINRA rules to government securities including U.S. Treasury securities and debt securities. The BDA believes that the application of FINRA rules to government securities will place undue compliance burdens and staffing challenges and opposes the proposal. The BDA is working with its various committees to draft comments in response to FINRA 18-05.

Debt Research

The BDA submitted comments to FINRA in mid-2017 concerning the proposed limited safe harbor from FINRA debt research rules for desk commentary. The letter outlined the belief that the best solution to help facilitate the timely flow of commentary to investment managers would be a clear interpretation of "research report" that demonstrates that the vast majority of desk commentary is not fundamental research. The BDA also asked that if and when FINRA proposes rule text for the safe harbor, it should provide clarity on desk commentary content. The BDA continues to monitor this proposed rule.

Update: Municipal Bonds for America coalition (MBFA)

In February 2017, 385 organizations and individuals signed an advocacy letter, representing nearly all-50 states, to House and Senate leaders urging them to retain the current law status of municipal bonds as they began deliberation on comprehensive tax reform. The MBFA Coalition was extremely active in its advocacy efforts to preserve all tax-exempt financing options for municipal bonds, including PABs and advance refundings, in the Tax Cuts and Jobs Act. In 2018, MBFA Executive Chair Steve Benjamin will become the president of the

U.S. Conference of Mayors, and will further advocate for the tax-exemption in this highly-visible position. The Coalition will continue to educate Congressional leaders and staff members through its Muni Bonds 101 seminars on Capitol Hill, meetings with staff members of influence at the White House, and developing and maintaining its relationship with members of Congress to preserve the tax- exempt status of municipal bonds.

Bond Dealers of America

March 15, 2018

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