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Bond Attorneys' Workshop Round-up: Squire Patton Boggs

The National Association of Bond Lawyers recently held its 41st Annual Bond Attorneys' Workshop in Chicago. Below are some odds and ends from the conference.

1. I think I've finally nailed the punctuation on "Bond Attorneys' Workshop," a grammatical conundrum as bedeviling as the proper punctuation of the phrase "physicians/physician's/physicians' group contract" from the world of private business use.
2. From the IRS Tax-Exempt Bond Office (TEB), we learned that TEB (and the IRS as a whole) is implementing a program called the "IRS Future State Initiative," which is billed as addressing a need "to take advantage of the latest technology to enhance the entire taxpayer experience . . . in a way that meets the needs of taxpayers and the tax community in an efficient and effective manner." The website includes several "vignettes" that tell us the story of how fictional taxpayers would fare under the new program when the IRS fully implements it, including the tale of "Sheila," a state government employee in charge of making her state's employment tax payments. Although her story doesn't deal with tax-exempt bonds, you can read it and see by analogy how it might affect state and local governmental issuers.
3. "Future State" will manifest itself in several ways, including increased use of the website, increased use of what is called "prefiling education," and increased use of "interactive" forms. The IRS already uses an interactive Form 8038-CP (that's the one you've been using, right?), which is the form that issuers should use to request direct payments for tax-exempt bonds, which we've written about before. The Form is "interactive" in the sense that it will tell you if there are internal inconsistencies (for example, an interest payment date that is three years prior to the issuance date). It was noted at the conference that error rates have gone down significantly on Form 8038-CP since the IRS started using it. Expanding the interactive forms to the other 8038s would be a welcome development.
4. On the IRS's Voluntary Closing Agreement Program, it was noted that the IRS has received fewer requests by a significant margin, even though the IRS says that it has increased its efficiency in processing the requests and decreased the time it takes to process them. (One wonders whether the two points are related, that is, whether the drive for "consistency," which will necessarily lead to payment and bond redemption amounts that aren't tailored to each issuer's particular facts, has contributed to decreased interest in the program.)
5. You may have seen in The Bond Buyer that the IRS released "interim guidance" to examining agents that advises when agents may close an exam during an audit when the issuer redeems all of the bonds with funds other than an issue of tax-exempt bonds. (Theoretically, the IRS could assess income tax on interest on the bonds for years that would still be open under the bondholders' statute of limitations, if it were able to successfully assert that interest on the bonds is taxable.)
6. Where in the past there have been significant guidance projects that have been released soon before the conference, this year, there were no new major proposals, nor were there any new developments on the two major currently brewing proposals, which are the proposed (or now re-proposed) issue price regulations and the proposed regulations defining a "political subdivision" that can issue bonds on its own behalf. We were told by Treasury officials that the issue price regulations will be finalized by the end of the year, and that the political subdivision regulations

will probably be re-proposed.

7. On Rev. Proc. 2016-44, the new private business use safe harbor, which has now been out for two months, Treasury officials confirmed that many of the concepts that are now explicitly stated in Rev. Proc. 2016-44 come from private letter rulings (or ruling guidelines) and concepts that already lurked in the background of Rev. Proc. 97-13 (as modified by Notice 2014-67). The new revenue procedure also contains provisions that are designed to ensure that the contract in question is not, in substance, a lease to a private person.
8. What remains unclear is the extent to which Rev. Proc. 97-13 has any continuing vitality once Rev. Proc. 2016-44 finally replaces it, for contracts entered into or materially modified after August 18, 2017. Rev. Proc. 2016-44 clearly states that it "supersedes" Rev. Proc. 97-13, so Rev. Proc. 97-13 will not provide an actual legal safe harbor from private business use beyond that date. Rev. Proc. 2016-44 has been described as "expanding" or "liberalizing" Rev. Proc. 2016-44, and it certainly does that by eliminating the pigeon-holes of compensation and their corresponding permitted contract lengths.
9. But there are aspects of Rev. Proc. 2016-44 that look like they may be more restrictive, too. For example, Rev. Proc. 97-13 did not require service providers to affirmatively agree in the management contract to not take a tax position that would be inconsistent with their status as a service provider. It is likely that service providers would "agree" (in terms of logic) that they should not take a position contrary to their tax status as service providers, but under Rev. Proc. 97-13 they didn't have to say so in the contract.
10. At the conference, Treasury and IRS officials noted that the intent of Rev. Proc. 2016-44 was not to revoke prior rules, and that the intent was to provide continuity to Rev. Proc. 97-13. One option might have been to add the new, expanded safe harbor, with its arguable additional restrictions as the price of admission for the expanded safe harbor, as a "new" safe harbor grafted on to Rev. Proc. 97-13 (in which case it could have been said that Rev. Proc. 2016-44 "amplified" Rev. Proc. 97-13, rather than superseding it). An even better approach would be to amend Rev. Proc. 2016-44 to simply state that any contract that met or meets a Rev. Proc. 97-13 safe harbor will continue to be within a safe harbor from private business use.
11. Finally Treasury and IRS officials again told us that we may finally see the long-awaited final TEFRA regulations, which among other things would allow for TEFRA notices to be published on governmental websites (as well as disseminated through something called a "radio broadcast"), another setback for the much beleaguered print media. If other recent events in Chicago foretell the future, maybe yet another long-awaited event will come to pass.

By Johnny Hutchinson on November 3, 2016

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Squire Patton Boggs

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