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Final Issue Price Regulations Issued: Squire Patton Boggs

The Treasury Department issued final "issue price" regulations on December 9, 2016 (T.D. 9801) (the "Issue Price Regulations"). Below is a summary of the general and special rules for determining issue price under the Issue Price Regulations:

- General Rule. The general rule, retained from the existing regulations, provides that issue price is determined by actual sales to the public of 10% of those bonds having the same credit and payment terms (generally, each maturity of an issue).
- "Hold the Price" Bonds. For bonds offered to the public, issue price may instead be determined based on a certification from the underwriter, accompanied by supporting documentation such as a copy of the pricing wire, that states the price at which the bonds were initially offered to the public. However, the underwriter or underwriters must each agree not to sell the bonds at a higher price until the earlier of more than five business days after the sale date or 10% of the bonds have been sold to the public.
- Competitive Sales. For bonds that have been sold in a competitive bidding process meeting specified requirements, including that at least three bids are received, the issuer may rely upon the reasonably expected initial offering price that is certified by the winning bidder.
- Private Placements. For private placements to a single buyer, the issue price is the actual price paid by the buyer.

If more than one issue price rule could apply, the issuer may select which rule to apply but must do so on or before the issue date. Read below for additional information regarding the Issue Price Regulation.

The Issue Price Regulation also adds and modifies definitions:

- "Public" now means any person other than an underwriter or a related person. Under the existing regulations, the term public did not include "bond houses, brokers, or similar persons or organizations acting in the capacity of underwriters or wholesalers."
- "Underwriter" means (1) any person who participates in the initial sale of bonds to the public pursuant to a written contract with the issuer (or with a lead underwriter) and (2) any person that participates in the initial sale to the public pursuant to a written agreement with a person described in the former clause (for instance, pursuant to a retail distribution agreement).

As discussed on this blog (here, and more light-heartedly, here), the Treasury has previously issued proposed regulations that were not well received. The preamble to the Issue Price Regulation notes that "overwhelmingly negative comments" were received regarding parts of the proposed regulations. In response to comments, various changes were made by Treasury (for example, the private placement rule was added, and an issuer may select which rule to apply.)

The Issue Price Regulations apply to bonds sold to the public on or after June 7, 2017, provided of course that Congress does not take action under the Congressional Review Act or otherwise.

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By Alexios Hadji on December 16, 2016

Squire Patton Boggs

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