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Outline For Discussion Of New Issue Price Rules.

New tax rules relating to establishing the issue price of publicly offered tax-exempt bonds become effective soon. This outline describes the new issue price rules, provides a high-level strategic analysis to help guide a discussion between an issuer and its advisors, and sets forth (at the end) the regulations themselves.

Basic Principles

Effective Date: The new tax rules for establishing the issue price of bonds apply to all tax-exempt bonds sold on or after June 7, 2017. Some preparation is required in advance of the pricing date to make sure the provisions of a notice of sale or bond purchase agreement (and any related agreement among underwriters) allow for the issuer to implement the new rules in the manner desired.

Issue Price established by CUSIP: The rules apply on a CUSIP-by-CUSIP basis. The sum of the CUSIP issue prices is the issue price of the entire issue of bonds. It is best to focus on CUSIPs rather than maturity dates due to split coupons or other features that materially differentiate the terms of bonds of the same maturity. The issue price for each group of substantially identical bonds is established separately.

Actual Facts and Safe Harbors: The approach of the new rules is to provide a baseline rule that establishes issue price based on actual facts (i.e., the first price at which 10% of a CUSIP is actually sold to the public) and then to provide safe harbor rules that allow the issuer to use the initial offering price as the issue price if certain requirements are satisfied, regardless of whether 10% of each CUSIP is sold at the initial offering price. If satisfying a safe harbor is desired but not achieved, actual facts will control.

Sales to Public: Perhaps the most helpful rule is that all sales by an underwriter to a party that is not an underwriter are treated as sales to the public. Any party that is not connected to the issuer through a contract or series of contracts (e.g., BPA, AAU, retail distribution agreement) is treated as the public. A sale of bonds to a known “flipper” is as good as a sale of bonds to a buy and hold investor.

Actual Facts Rule: Issue price can always be established based on the first price at which 10% of the principal amount of a CUSIP is actually sold to the public. Note that this rule may not be as clear as it seems. The exact time of sales of bonds to different investors may not be easy to establish.

Hold-The-Price Rule: One safe harbor that can apply in all public offerings is the hold-the-price rule. The issue price of a CUSIP is the initial offering price for that CUSIP (as evidenced by the pricing wire), so long as the underwriters have agreed in writing not to sell or offer any bonds of that CUSIP at a price higher than the initial offering price for a period of five business days after the sale date. The five-day requirement ends early if at some point 10% of the principal amount of that CUSIP has actually been sold to the public at any combination of prices that are not higher than the initial offering price.

Competitive Sale Rule: For bonds sold in a typical competitive sale process, the issue price of a CUSIP is the initial offering price for that CUSIP (as evidenced by the pricing wire), so long as the issuer receives at least three bids for the bonds from reasonably competitive bidders. The detailed requirements of this safe harbor, set forth at the end of this outline, should be consulted. Note that if three bids are not received, the winning bidder can be required (for example, in the notice of sale as a condition of making the bid) to satisfy the hold-the-price rule. The two rules are not mutually exclusive.

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