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IRS Says Some Advance Refundings Still OK.

WASHINGTON — The Internal Revenue Service is publicly affirming that last year's tax law changes do not preclude the issuance of tax-exempt bonds to advance refund non-tax-advantaged, taxable bonds.

The assurances were made in an IRS Chief Counsel Memorandum released Oct. 26 after Treasury and IRS officials told bond attorneys that at a conference earlier this year during discussions about the limitations on the termination of advance refundings under the Tax Cuts and Jobs Act enacted in December.

The memo appears to respond to a March 29 written request by the National Association of Bond Lawyers to Christie Jacobs, director of the IRS Indian Tribal Governments/Tax Exempt Bonds Office to clarify the new law.

Three tax attorneys who are members of NABL told The Bond Buyer that this newly released memo should address any uncertainty in the municipal bond market over the scope and limitations of the termination of advance refundings for tax-exempt bonds.

"I think this is going to be good enough for probably everyone," said Matthias Edrich, a partner at Kutak Rock in Denver.

Perry E. Israel, a sole practitioner in Sacramento, Calif., described the IRS memorandum as "big news."

The memo "specifically addresses" whether tax-exempt bonds can be used to advance refund Build America Bonds, Israel said.

"It says if you defease the BABs, they are reissued and you no longer can get the subsidy for the BABs," Israel said. "There is only one tax-advantaged thing outstanding and, so yes, you can advance refund that as long as you defease them."

The timing of the news is important because Build America Bonds were issued in 2009 and 2010 and most of them had 10-year call dates.

"There probably are a lot of issuers who may have been undecided about the economics and they will be callable in the next two years," said Johnny Hutchinson, chair of the NABL Tax Law Committee and a partner at Squire Patton Boggs in Houston.

A significant percentage of attorneys who attended the NABL Tax and Securities Law Institute in February were uncertain whether advance refundings still were legal in any instance.

"The folks at Treasury and the IRS thought that it was obvious that this pre-existing Treasury regulation that allows you to ignore tax-exempt advance refundings on taxable bonds continued to apply," Hutchinson said.

Hutchinson was particularly encouraged that the IRS memo went to the IRS enforcement staff, which means “you wouldn’t have to spend a lot of time on an audit trying to convince the enforcement folks that the position the policy folks were taking was the right position.”

“It also makes clear that the same logic will extend even to a tax-advantaged taxable bond as long as it is legally defeased in the course of the refunding,” Hutchinson said. “There’s only maybe a very small subset of bonds, some general obligation bonds in some states, that can’t be legally defeased. But for any for any tax-advantaged, taxable bonds that can be legally defeased, they will lose their subsidy on the date that they were defeased, which is usually the issuance date of the advance refunding bonds.”

Although the memo from the IRS Office of Chief Counsel was released publicly on Oct. 26, it is dated Aug. 31.

Johanna Som de Cerff, a senior technician reviewer in IRS Branch 5 of the Chief Counsel’s Office, sent the memo to Patricia P. Wang, area counsel for the Pacific Coast area of the Tax Exempt & Government Entities Division.

By Brian Tumulty

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