
TAX - NEW HAMPSHIRE

Appeal of Kadle Properties Revocable Realty Trust

Supreme Court of New Hampshire - March 10, 2017 - A.3d - 2017 WL 951768

Property owner appealed decision of the Board of Tax and Land Appeals (BTLA) concluding that property did not qualify for educational use tax exemption.

The Supreme Court of New Hampshire held that even if tenant of office building that offered computer classes operated a school, property that included the office building did not qualify for educational use property tax exemption, even though property owner and tenant were jointly owned.

TAX - COLORADO

City and County of Denver v. Expedia, Inc.

Supreme Court of Colorado - April 24, 2017 - P.3d - 2017 WL 1449530 - 2017 CO 32

Online travel companies sought review of hearing officer's determination that they owed lodger's taxes, along with penalties and interest, to city that assessed those taxes in connection with fees charged by companies for facilitating hotel reservations.

The District Court affirmed in part and vacated in part. Companies and city appealed. The Court of Appeals affirmed in part and reversed in part. City petitioned for review.

The Supreme Court of Colorado held that:

- Companies were "vendors" with responsibility to collect lodger's tax and remit it to city, and
- Companies' markup for selling reservations to lodgers, which companies retained, was subject to tax.

Online travel companies were "vendors" with responsibility to collect lodger's tax and remit it to city. Companies set rate they would accept from lodgers, lodgers transacted with companies and prepaid for reservations, and companies retained difference between price paid by lodgers and amount paid to hotels.

Online travel companies' markup for selling reservations to lodgers, which companies retained, was subject to city's lodging tax, which included tax on purchase price paid or charged for lodging. Purchaser had no option to decline markup in making his purchase of lodging from companies, and it was therefore inseparable from selling price of lodging.

Think Trump Tax Cuts Spell Doom for Municipal Bonds? Think Again.

- **Top rate cut would be too small to sap demand, analysts say**
- **AMT debt, high-tax states' bonds may benefit from changes**

President Donald Trump's push to slash corporate and individual income-tax rates would appear to pose risks to the $3.8 trillion municipal-bond market, a haven for individuals seeking interest income that's exempt from federal taxes.

But the brief outline released by administration officials had little impact on the price of state and local government securities — and could even lead some segments of the market to outperform, considering that Trump's proposal to phase out deductions could boost demand in high-tax states.

Here's a look at the major ways it may impact the municipal market if ultimately enacted by Congress, according to Wall Street analysts and investors, who remained skeptical of its prospects.

Lower Taxes = Lower Demand?

Any reduction to tax rates, particularly those on the wealthiest earners, would in theory weaken demand, given that the tax breaks would be less valuable. Yet, the securities have outperformed since Trump's surprise election in November, even with talk that the muni tax-exemption could be done away with by Congress.

Since the vote, municipals have slipped 0.5 percent, one third the decline posted by U.S. Treasuries, according to Bloomberg Barclays indexes. While 10-year municipal bond yields edged up 0.02 percentage point Wednesday to 2.16 percent, those yields remain below those on comparable Treasuries — reflecting the value of the tax exemption.

The proposed cut in the top-rate — from 39.6 percent to 35 percent — is too small to dampen demand for tax-free bonds, said Matt Dalton, chief executive officer of Rye Brook, New York-based Belle Haven Investments. "If you go from 39.6 to 35 and your state income tax has been climbing, I don't think you're running away from the muni bond market," Dalton said. "And if I just lost my deductions, how do I minimize taxes? The way to do it is to own tax-free municipal bonds."

Buying Opportunity

Among Trump's proposals was phasing out the Alternative Minimum Tax. That could be a boon to the $140 billion of outstanding municipal bonds that are covered by that tax. Those securities, which finance airports, housing agencies and non-profits, pay yields that are about half a percentage point more than traditional tax-exempt bonds because the interest is covered by the AMT. If Trump succeeds in eliminating that levy, as his administration proposed, that gap should disappear. Barclays PLC analysts previously wrote that doing away with the AMT would be "extremely positive" for those bonds.

"By eliminating the AMT, those bonds that were issued with or exposed to the AMT, now will trade closer to general market levels," said Jeffrey Lipton, head of municipal research at Oppenheimer & Co.

More Demand, in High-Tax States

With lower tax rates, the Trump proposal would no longer allow Americans to deduct state and local taxes from their federally taxable income, a major deduction for residents of states with high taxes and property values, such as New York, California and New Jersey. That may actually prove positive for municipal bonds issued by governments in those states, as residents continue to seek out tax shelters.

“The deductions, except for charitable and mortgage are going away, including your state and local tax,” said John Miller, who oversees $120 billion of municipal bonds at Nuveen Asset Management in Chicago. “Your effective rate could easily migrate up. As your effective tax rate migrates up, your demand for munis — which are still tax free under this plan — would be increased.”

The biggest fear of the municipal market appeared to be averted: the elimination of the tax-exemption.

“Nobody is going after the municipal exemptions from what we know today,” Miller said. “Of course that could change, but I think it’s unlikely that they come up with guiding principles that don’t include municipals and throw municipals in later.”

Bloomberg BNA

by Martin Z Braun, Rebecca Spalding, and Molly Smith

April 26, 2017, 3:06 PM PDT

Owners of These Muni Bonds May Reap Windfall From Trump Tax Plan.

- **Repealing the Alternative Minimum Tax would affect some debt**
- **Bonds subject to AMT trade at lower prices, higher yields**

Anyone seeking to profit from President Donald Trump’s tax plan may want to look at a $140 billion corner of the municipal-bond market.

Those securities, which finance airports, housing agencies and non-profits, pay yields that are about half a percentage point more than traditional tax-exempt bonds because the interest is covered by the Alternative Minimum Tax. If Trump succeeds in eliminating that levy, as his administration proposed Wednesday, that gap should, in theory, disappear.

“With the potential repeal, any muni AMT bond would trade pretty much equivalent to a tax-exempt muni. That’d definitely be a boost in terms of their prices going forward,” said Tommy Chan, a credit analyst at Ziegler Capital Management who has been looking to buy the securities for clients. “With the repeal, yields would come down and prices would go up — those yields for AMT bonds would compress over time.”

The pricing discrepancy was on display this week, when the Port Authority of New York and New Jersey issued debt: 10-year bonds subject to the AMT were priced at a yield of 2.73 percent, 0.46 percentage point above the similarly-dated, tax-exempt debt issued by the agency, data compiled by Bloomberg show.

Bloomberg Markets

by Molly Smith

April 26, 2017, 12:09 PM PDT

State and Local Governments Express Concern About Trump's Tax Plan.

The seven largest organizations that represent state and local governments — including the National Governors Association, the National Conference of State Legislatures and the U.S. Conference of Mayors — say they strongly oppose President Donald Trump's plan to eliminate the federal income tax deduction for state and local taxes.

"Eliminating or capping federal deductibility for state and local property, sales and income taxes would represent double taxation, as these taxes are mandatory payments for all taxpayers," the groups said in a statement. "We fundamentally believe that Americans' income, property and purchases should not be taxed twice.

"Elimination could also effectively increase marginal tax rates and shrink disposable income, potentially harming the U.S. economy," they said.

Eliminating the deduction was included in a broad Trump tax plan that would scrap all personal federal tax deductions except for mortgage interest and charitable contributions.

Eliminating the deduction for state and local taxes would give the federal treasury an additional $1.3 trillion over a decade, according to the Tax Policy Center, a joint think tank of the progressive Urban Institute and the moderate Brookings Institution.

But states argue that getting rid of the deduction would increase taxes, particularly for higher-income residents in higher-income states like California, where 26 percent of taxpayers would see their tax bill rise. In New York, 27 percent of taxpayers would see their bills go up, and nearly 40 percent in Maryland and 35 percent in Connecticut would experience higher tax bills.

The governors, mayors and state lawmakers also warned that altering the deduction would upset "the carefully balanced fiscal federalism that has existed since the permanent creation of the federal income tax over 100 years ago."

Others signing the letter: the National Association of Counties, National League of Cities, the International City-County Management Association and The Council of State Governments.

By Elaine S. Povich

BY STATELINE | APRIL 28, 2017

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3 Ways Muni Bonds Could Benefit from Trump Tax Plan.

Overall, the muni market isn't reacting much — if at all — to President Trump's new tax plan. The iShares S&P National AMT-Free Municipal Bond Fund (MUB) has stayed right around $9.40 since news of the plan started to trickle out on Tuesday.

Not only is there not a lot of key details in the plan, but investors don't have high hopes for it passing as envisioned.

"One hundred days may not be a fair measure of performance, but given how much this administration has gotten done so far, you'd have to give about a 50-50 shot that nothing gets done on taxes," says Jim Robinson of Robinson Capital.

Still, John R. Mousseau of Cumberland Advisors, took a stab at pointing out some areas of the muni market that could benefit if the plan goes through in some semblance of its current form.

First, he thinks lower marginal rates are already priced into the muni market and now long-term bond yield ratios will come down, making munis a better bet than taxable bonds. He writes:

> Tax cuts have been baked into the muni market, thus the current yield levels – particularly in the long-maturity end – should stay around current levels, and yield ratios will most likely DRIFT DOWN over time. There is no current mention of capping municipal interest in this plan.

Second, bonds that are subject to the alternative minimum tax (AMT), which could go away, are likely to trade better than their non-AMT peers. Mousseau explains:

> The plan also calls for the elimination of the Alternative Minimum Tax. The AMT was enacted in 1982 to ensure that individuals paid a certain minimum income tax. The tax limited tax benefits from a variety of deductions (think state and local taxes among other things). One aspect of the bill mandated that income from certain private-activity municipal bonds (municipal bonds issued by corporations, housing bonds over certain cap limits, and other municipal issues that have a private end user) be included in the calculation of the AMT. This provision was one of the most poorly designed parts of the AMT, as individuals who would be subject to the AMT would not buy bonds subject to the AMT. The cumulative amount of tax raised from this aspect of the AMT has been negligible. But the provision has come at a cost to these private issuers… This difference should DISAPPEAR over time if the proposed tax plan is passed.

Finally, he thinks munis in high-tax states will see strong demand if the deductibility of state and local taxes from federal income tax is eliminated. He writes:

The demand for in-state tax-exempt bonds in high-tax states will climb, pushing yields down relative to yields for other munis.

He notes, however that it could be harder for those states to raise taxes in the future:

> There will be a decided pushback on state and local governments to forgo any tax increases and roll back tax rates if possible, since state taxes effectively increase suddenly and significantly from their current levels (which are partly subsidized by the federal deduction).

Barron's

By Amey Stone

April 27, 2017, 2:41 P.M. ET

Trump Tax Effort Could Boost Muni ETFs.

Even against the backdrop of rising interest rates, investors have shown some signs of devotion to municipal bond exchange traded funds and that faith could be rewarded. The iShares National AMT-Free Muni Bond ETF (NYSEArca: MUB) is the largest municipal bond ETF.

Munis also help diversify fixed-income portfolios. Investors who typically follow the Barclays U.S. Aggregate Bond Index will not have municipal bond exposure, so a muni bond ETF can complement core fixed-income positions.

Municipal bonds continue to experienced robust demand from U.S. investors as reliable source of yield, especially among taxable accounts due to the debt securities' favorable tax-exempt status. Recently, Japanese investors have gobbled up U.S. munis as a way of generating income as Japan maintains negative interest rates.

Low and even negative yields on global government bonds have made U.S. assets, including munis, increasingly more appealing relative to other fixed-income assets. For example, foreign investors have increased the amount of municipal debt they hold by 44% to $85 billion from 2009 through 2015, according to the Federal Reserve.

President Donald Trump's tax reform efforts, if realized, could be a significant catalyst for municipal bonds and ETFs like MUB.

"If the plan in President Trump's new tax proposal to eliminate the deductibility of state and local taxes from Federal income tax actually becomes law (still a big "if"), municipal bonds could benefit.

Interest income from municipal bonds are still tax-free, according to the Trump administrations tax reform plans outlined Wednesday," reports Amey Stone for Barron's.

Since muni bond interest is exempt from federal taxes, muni ETFs are a good way for investors seeking tax-exempt income, especially those in higher tax brackets. Due to its tax-exempt status, the asset category is also best utilized in taxable accounts. The tax-exempt status also creates high demand for municipal bonds. Consequently, the perceived bond yields are typically lower than their taxable counterparts.

The VanEck Vectors High Yield Municipal Index ETF (NYSEArca: HYD) and SPDR Nuveen S&P High Yield Municipal Bond ETF (NYSEArca: HYMB) can be used for investors looking for some extra yield in their muni ETF allocations.

"Muni prices could get dampened due to the proposal to drop the top tax rate, which in theory should make munis less attractive to high-net worth investors. But even if the tax-equivalent yield falls a bit, munis are still more attractive than other fixed-income options, analysts from Goldman Sachs wrote earlier this month," according to Barron's.

ETF Trends

April 28, 2017 at 10:23 am by Tom Lydon

Tax-Exempt Bond Market Left Worried by Proposed Trump Tax Plan.

WASHINGTON – Trump administration officials outlined a sweeping tax reform plan involving cuts in tax rates that would be paid for by economic growth and the elimination of tax deductions and loopholes for the wealthy, leaving municipal market participants in fear of losing the the tax exemption for municipal securities.

Top White House advisor Gary Cohn told reporters that the administration is proposing to save the deductions for mortgage interest and charitable contributions as well as the exclusion for retirement savings. “Other tax benefits will be eliminated,” he said, telling one reporter later that includes the deduction for state and local taxes.

Neither Cohn nor Treasury Secretary Steve Mnuchin specifically mentioned the tax exemption for municipal bonds. But market participants raised concerns about the exemption, which is a tax exclusion.

The one-page briefing paper handed out by the administration said, “Eliminate targeted tax breaks that mainly benefit the wealthiest taxpayers.”

Critics of tax-exempt munis have said they mostly benefit the wealthy, although municipal market participants contend they are critical for financing infrastructure.

“If accurate, we now know the Administration’s opening bid on muni bond tax exemption (unless preserved under infrastructure plan),” Ernie Lanza an attorney with Clark Hill tweeted.

“I think this should give pause to the industry because the tax exemption for municpal securities was not specifically mentioned in today’s announcement,” said Curt Beaulieu, senior counsel at the Bracewell law firm and former tax counsel for the Senate Finance Committee. “Based upon what we heard, one can deduce that the tax exemption for munis would be eliminated.”

“We should assume we are in play,” Chuck Samuels, with Mintz Levin, said referring to the muni tax exemption, “It makes no sense for the tax plan to marry tax reform with infrastructure and then restrict municipal bonds, but we should assume the worst.”

“The tax-exempt bond community is as organized as it’s ever been. We have lots of resources and ammunition and we’ll need to use it,” he added.

One concern for the muni market should be that tax experts say the Trump plan would be so expensive and administration officials are so unrealistic in thinking it could be partly paid for with strong economic growth, that there will be a huge need for revenue raisers to be used as “pay fors.” Historically lawmakers have looked at restricting tax-exempt muni bonds to create revenues. The Tax Reform Act of 1986 included a host of muni bond restrictions.

Tax experts also say the administration would have such a difficult time making this plan revenue neutral, that if it wants to push forward under a reconciliation bill that would need less votes in the Senate, the provisions would have to be temporary and last no more than 10 years.

This is the most significant tax reform legislation and one of the biggest tax cuts since 1986, said Cohn.

The plan, which Mnuchin and Cohn stressed must still be negotiated with the House and Senate, would reduce the seven personal income tax rates to three — 10%, 25% and 35%, while doubling he standard deduction for married couples. The top tax rate for individuals is now 39%.

“We are creating a zero tax rate for the first $24,000 of a married couples’ earnings,” said Mnuchin.

The plan would repeal the alternative minimum tax, which applies to most private activity bonds.

It would phase-out of the death tax and eliminate the 3.8% tax on capital gains and dividends that President Obama added under the Affordable Care Act.

The administration will reduce the rate on corporations and pass-throughs to 15% from 35% and wants a one-time tax on the repatriation of overseas earnings, but Mnuchin made it clear there will be an effort to focus on small businesses and prevent big firms from setting up pass-throughs to get the 15% rate.

Cohn and Mnuchin said they plan to hold “listening sessions” on the plan and will work with the House and Senate on legislation.

House and Senate Republican leaders said in a release that the principles released by the Trump administration are “critical guideposts for Congress and the administration as we work together to overhaul the American tax system and ensure middle-class families and job creators are better positioned for the 21st century economy.”

But Rep. Richard Neal, the top Democrat on the House Ways and Means Committee, said in a release, “President Trump’s tax proposal does not do nearly enough for working families and small businesses in this country. The tax cuts proposed by President Trump would disproportionately favor the wealthy and large corporations at the expense of our nation’s hardworking middle class.”

Rep Lloyd Doggett, D-Texas, ranking minority member of the committee’s tax policy subcommittee, added, “The claim that his multi-trillion dollar tax cut will pay for itself is as incredible as the claim that Mexico will pay for his multi-billion dollar border wall. Dripping in red ink, this proposal validates Trump’s boast that he is ‘the king of debt.”

The Bond Buyer

By Lynn Hume

April 26 2017, 5:06pm EDT

Trump's Tax Plan And Munis.

The Trump administration unveiled their tax plan yesterday, with details to follow. It will take a while to work the plan through Congress but this is our quick take on how the plan affects municipal bonds and municipal finance.

The plan calls for three tax rates – 35%, 25%, and 10%. These are whittled down from the existing seven levels of marginal rates. It eliminates the ObamaCare tax on investment income for families making over $200,000 and also eliminates the Alternative Minimum Tax (AMT). The result of that is that the *MARGINAL* federal tax rate will decline for the wealthiest individuals from 43.4% (39.6% +3.8%) to 35%. To put this in yield terms, a 3% tax-free municipal yield currently has a taxable equivalent yield of 5.30% (3.0/1-.434), which will fall to 4.61% at a 35% tax rate. While that is a pretty good change at the margin, it is important to realize that the *AVERAGE* federal tax rate paid by municipal bond holders is 25%. In addition, the elimination of a number of loopholes and deductions will keep municipal bonds in demand. For example, the AAA muni-yield-to-US-Treasury-yield ratios are 92% for 10-year levels and 101% for 30-year levels, which means that, for anything less than the most stellar of credits, the yield ratios are significantly higher currently. (Cumberland is still able to purchase some 4% AA-type yields in the long end, which means a 130% yield ratio). Tax cuts have been baked into the muni market, thus the current yield levels – particularly in the long-maturity end – should stay around current levels, and yield ratios will most likely *DRIFT DOWN* over time. There is no current mention of capping municipal interest in this plan.

The plan also calls for the elimination of the Alternative Minimum Tax. The AMT was enacted in 1982 to ensure that individuals paid a certain minimum income tax. The tax limited tax benefits from a variety of deductions (think state and local taxes among other things). One aspect of the bill mandated that income from certain private-activity municipal bonds (municipal bonds issued by corporations, housing bonds over certain cap limits, and other municipal issues that have a private end user) be included in the calculation of the AMT. **This provision was one of the most poorly designed parts of the AMT,** as individuals who would be subject to the AMT would not buy bonds subject to the AMT. The cumulative amount of tax raised from this aspect of the AMT has been negligible. But the provision has come at a cost to these private issuers. Attached is a Bloomberg graph showing the difference between AA Bonds subject to the AMT and AA bonds *NOT* Subject to the AMT over the past two-plus years. This difference should *DISAPPEAR* over time if the proposed tax plan is passed.

[Continue reading.](#)

Investing.com

By Cumberland Advisors – (John Mousseau) – Bonds – Apr 27, 2017 12:28PM ET

State and Local Governments Express Concerns About Trump Tax Plan.

Groups representing state and local governments said that they are “extremely concerned” about an aspect of President Trump’s tax plan.

The president’s plan, an outline of which was released Wednesday, would eliminate the deduction for state and local taxes.

Repealing the deduction is also a part of the House Republicans’ tax plan. Opponents of the deduction argue that it largely benefits the wealthy and subsidizes municipal spending that may be excessive. Also, repealing the deduction could raise revenue to help pay for lowering federal tax rates.

But the state and local groups said in a statement that the deduction should be preserved because it gives municipalities the flexibility to provide services to their residents.

“Any alterations to the deduction would upset the carefully balanced fiscal federalism that has existed since the permanent creation of the federal income tax over 100 years ago,” they said.

The state and local groups also said that curbing the deduction would amount to double taxation.

“We fundamentally believe that Americans’ income, property and purchases should not be taxed twice," they said.

In addition to urging Congress to preserve the state and local tax deduction, the groups urged lawmakers to keep the tax exemption for municipal bonds. State and local governments issue those bonds to finance infrastructure projects.

Trump's tax plan did not specifically mention the municipal bond exemption but proposed eliminating "targeted tax breaks that mainly benefit the wealthiest taxpayers."

"We urge Congress to maintain the state and local deduction and the tax exemption for municipal bond interest," the groups said. "We will work with Congress to ensure that states and local governments have the tools we need to foster healthy, safe and vibrant communities."

The groups that issued the statement are: the National Governors Association, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the International City/County Management Association, the National Conference of State Legislatures and the Council of State Governments.

THE HILL

BY NAOMI JAGODA – 04/26/17 09:58 PM EDT

States to Battle White House for Tax Deduction, Muni Exemption.

States and cities are fighting to preserve a deduction for taxes paid to local governments after the White House's tax plan said it would jettison the popular tool.

Local governments say elimination of the deduction amounts to double taxation of its residents. Supporters of the president's plan, however, say states are protecting a deduction for the wealthy, and elimination of the alternative minimum tax would offset losing the deduction.

President Donald Trump's tax proposal, announced April 26, calls for an end to all itemized deductions for individual taxpayers, with the exception of mortgage interest and charitable contributions.

It fails to mention the tax exemption given for the interest earned from municipal bonds, the popular funding source for public projects like bridges and roads that appeal to investors.

But since the proposal was unveiled, many states and cities said they feel attacked by the White House's plan.

'Extremely Concerned'

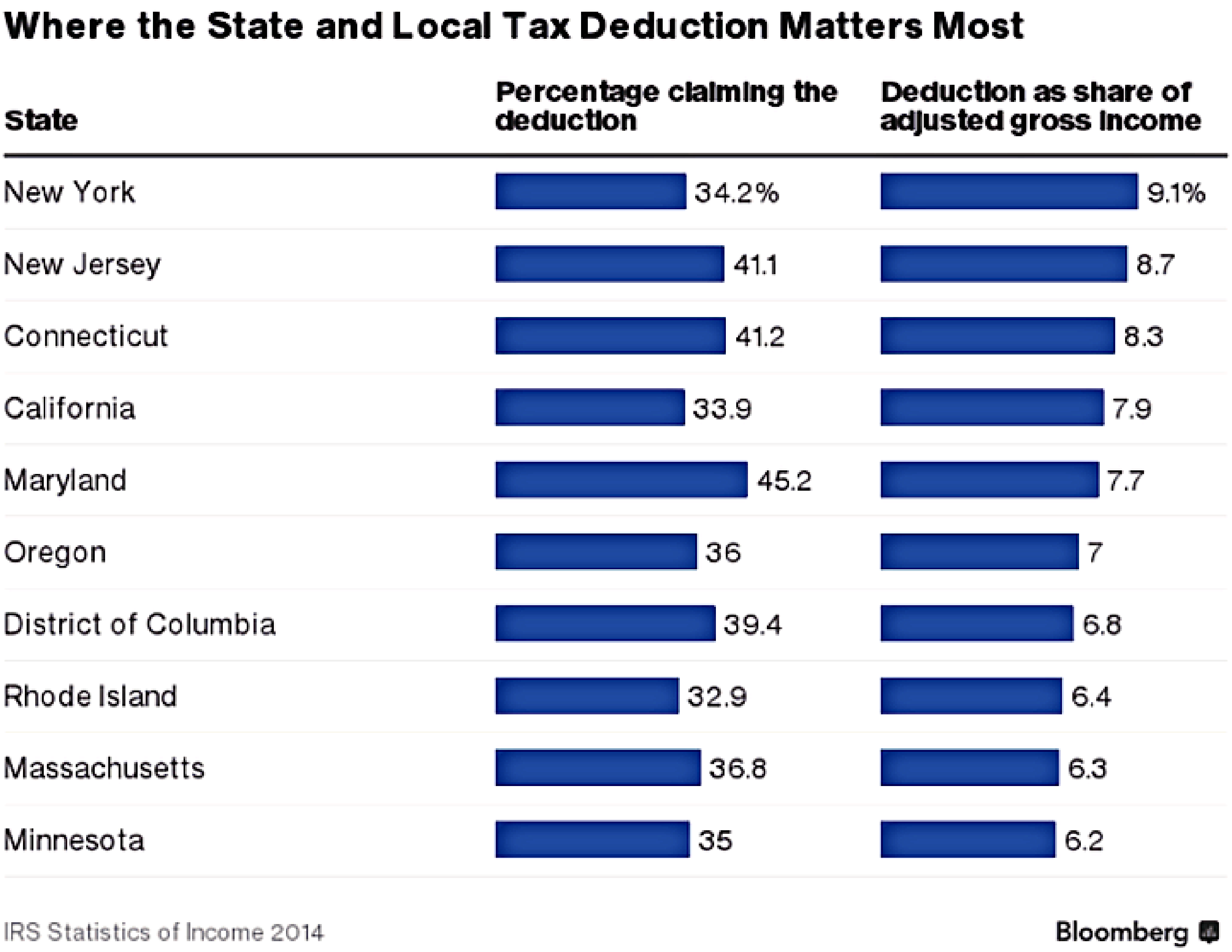
"We are extremely concerned that President Trump's proposal includes eliminating the deductibility of state and local taxes," said a statement from the Big Seven, a coalition of state and local government groups. "The state and local tax deduction and tax-exempt municipal bonds were part of the original tax code in 1913 and have long served to meet critical needs in our communities."

Representatives of local and state governments around the country immediately began calling members of Congress after the White House's tax plan was announced, according to a staff member of a ranking Republican member of the House.

“I’d be very surprised if either the deduction” or the municipal bond exemption “were seriously in danger, but you never know,” he told Bloomberg BNA. “If the president wants this, the president will lose, I think.”

Wealthier states, such as New York and California, will press the hardest to protect the deduction for state and local taxes, Jared Walczak, policy analyst for the conservative-leaning Tax Foundation, told Bloomberg BNA. Those states largely voted Democratic in November.

“Any meaningful program of tax reform will have to take on deductions, credits and exemption that some people really like,” he said, “and there’s no doubt that high-income taxpayers who benefit from the state and local tax deduction are a powerful constituency.”



Big Apple Deductions

New Yorkers claimed $68 billion in itemized deductions for state and local taxes in 2014, according to an analysis by the conservative Empire Center for Public Policy. The average deduction in New York for state and local taxes was $21,038 that year.

The hardest-hit New Yorkers will be those earning $1 million or more, E.J. McMahon, Empire Center’s founder and research director, said in a blog post.

Elimination of the deduction “would do serious damage” to New York City, city Comptroller Scott

Stringer said in a statement. “This isn’t a plan to deliver growth, it’s a recipe to destabilize our economy and widen the gaps between the wealthiest and those most in need,” he said.

Analysis conducted by the comptroller’s office showed that almost 40 percent of the city’s single parents would face an increased tax bill, Stringer said. That includes 47 percent of single parents who make $25,000 to $50,000 and 75 percent of those who make $50,000 to $100,000, he said.

More than 95 percent of city taxpayers with income between $500,000 and $1 million, and almost 92 percent of those with income above $1 million, would pay the same or less in taxes than they do today, according to the preliminary analysis.

On average, the tax bills of the city’s millionaires would decrease by $200,000 under Trump’s plan, Stringer said.

More than one-third of city taxpayers with incomes between $50,000 and $250,000 would pay more in taxes if the broad White House plan were enacted, he said.

California ‘Calculus’

California taxpayers would also be injured by the Trump proposal, state Sen. Robert Hertzberg (D) told Bloomberg BNA.

“It has changed the calculus tremendously,” he said. “It’s going to require us to modernize our tax code.”

Hertzberg favors a sales tax on services—or what he calls a consumption tax—that would be deductible. The pressure the Trump plan would put on state and local governments to reduce their own tax burdens creates an opportunity to enact wholesale changes such as those he proposes, Hertzberg said. Business and labor representatives are telling the senator that they would be more open to his proposal if the Trump plan is enacted.

More than 30 percent of federal returns from California taxpayers claim the state and local tax deduction, with an average claim of $17,100, according to 2014 data compiled by the Tax Policy Center at the Urban Institute and Brookings Institution. Only Connecticut, New Jersey and New York have more claims with higher average amounts.

Maryland was home to the greatest percentage of deduction takers. Forty-five percent of Marylanders claimed the deduction in 2014, according to the Tax Policy Center. The average deduction was $12,400.

Double Taxation?

Individuals who claim the deduction will face double taxation if the White House plan becomes law, according to the Big Seven, which represents the National Governors Association, the National Association of Counties, National League of Cities, the U.S. Conference of Mayors, Leaders at the Core of Better Communities, the National Conference of State Legislatures and the Council of State Governments.

Elimination could “effectively increase marginal tax rates and shrink disposable income, potentially harming the U.S. economy,” the Big Seven said in the statement. “Further, any alterations to the deduction would upset the carefully balanced fiscal federalism that has existed since the permanent creation of the federal income tax over 100 years ago.”

Colorado Gov. John Hickenlooper (D) said on CNBC April 27 that the loss of the deduction would mean double taxation.

“We’ve never done that before,” he said. “This is kind of a contract we’ve had between the federal and local and state governments.”

New Jersey Gov. Chris Christie (R), who was among Trump’s top advisers during the campaign, told reporters he has concerns about the loss of the deductions, but wants to “look at the entire plan” before passing judgment.

Christie told a group of reporters after the Commerce and Industry Association of New Jersey‘s annual luncheon “I haven’t seen the whole plan yet, so we can’t jump to conclusions about it. It raises a concern for the governor of a higher tax state if you’re going to take away the deductibility of state and local taxes.”

The White House plan, a one-page document, was unveiled April 26 by Trump’s top economic adviser Gary Cohn and Treasury Secretary Steven Mnuchin.

Pushback Coming

While Christie’s response was measured, lawmakers from other parts of the country, including Missouri, expect to push back strongly if the drive to end the deduction picks up steam.

“Pushback is likely putting it mildly,” Mark Haveman, executive director of the Minnesota Center for Fiscal Excellence, told Bloomberg BNA. “It would be an all-hands-on-deck assault. We are very dependent on our very progressive income tax and that dependency is enabled by state tax deductibility.”

Minnesota taxpayers would be disproportionally impacted because a high percentage seek the deduction and the state and local burden is relatively high, Haveman said. Internal Revenue Service data shows 35 percent of taxpayers claimed the deduction in 2014, and the average deduction was 6.2 percent of adjusted gross income, placing Minnesota on the top 10 list of states benefiting from the deduction.

Regressive or Not

Walczak said the state and local tax deduction is one of the more “unusual features” of the otherwise highly progressive federal income tax code because “it represents a transfer from lower income individuals and lower tax states and localities to higher income individuals and higher tax states and localities.”

The issue, for Walczak, is what the deduction incentivizes. The cost of government in wealthier states is being “subsidized by the rest of the country.”

“If you think that this cheaper cost of government in higher income states and localities leads to more spending on social assistance for lower income individuals, maybe the system as a whole isn’t that regressive even if the tax component is,” he said.

Alternative Minimum Tax

Elimination of the deduction isn’t the end of the story for taxpayers, McMahon said.

Trump’s proposal to double the standard deduction would essentially offset the elimination of deductibility of state and local taxes for taxpayers in lower brackets, he said. And when it comes to high-income taxpayers, elimination of the alternative minimum tax would offset a large portion of the loss of the deductibility of state and local taxes for those earning between $200,000 and $500,000, according to analysis by the Empire Center.

The alternative minimum tax is a supplemental income tax in addition to baseline income tax for certain individuals, corporations, estates and trusts that have exemptions or special circumstances allowing for lower payments of standard income tax.

Thomas Shimkin, legislative counsel and director of the Multistate Tax Commission, told Bloomberg BNA that the alternative minimum tax strips out some or all state and local deduction when they represent too high a proportion of deductions or income.

"Of course, the answer will vary by individual tax situation," Shimkin said.

Municipal Bond Exemption

Meanwhile, states will continue to protect the exemption to interest earned from municipal bonds, even though the White House didn't mention it in the tax proposal, Susan B. Hirschmann, chief executive officer of the independent Washington lobbying firm of Williams and Jensen PLLC, told Bloomberg BNA.

"I've been in D.C. long enough to know that an initial Executive Branch proposal, regardless of the administration, is a very long way from what eventually becomes law," she said.

That means those interested in "preserving the current tax treatment of municipal bonds as the most effective and efficient way to fund infrastructure projects need to continue working with the Municipal Finance Caucus to ensure this important tax treatment is maintained," she said.

Michael Decker, managing director and co-head of the municipal securities division of the independent Securities Industry and Financial Markets Association, said that some top congressional and White House leaders have suggested that curtailing or eliminating some tax deductions and exclusions should be a component of tax reform.

"And while the tax exclusion for municipal bond interest brings important economic benefits, municipal bonds are the single most important source of capital for financing infrastructure," he told Bloomberg BNA.

Hickenlooper said the federal government appears to be moving toward cost shifting.

"In other words, shifting the burden of costs back onto municipalities and counties, you know, local governments, just at a time when the federal government is telling us, 'Well, you're going to have to raise more money to build your bridges and your roads,'" he said. "It doesn't seem wise to me on the surface."

Philadelphia Mayor Jim Kenney said ending the exemption would be misguided.

"Anything that takes away incentives for municipalities to invest in infrastructure would be moving in the wrong direction," Mike Dunn, Kenney's spokesman, told Bloomberg BNA in an email.

Bloomberg BNA

By Che Odom

April 28, 2017

With assistance from Tripp Baltz in Denver; Michael J. Bologna in Chicago; William H. Carlile in Phoenix; John Herzfeld in New York; Laura Mahoney in Sacramento, Calif.; Leslie A. Pappas in Philadelphia; and Gerald B. Silverman in New York

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S&P: U.S. States May Have Solved The Riddle Of Lost Online Sales Tax.

States may finally have found a way to collect online sales tax, just in time to stem substantial losses in revenue. On April 1, 2017, Amazon increased the number of states in which it collects and remits sales taxes to all the states that impose them, although remittance does not apply to the third-party sellers that use its platform.

Continue reading.

Apr. 24, 2017

Overview Of Bond Financing For 501(c)(3) NonProfit Organizations.

INTRODUCTION

This memorandum provides a brief explanation and overview of tax-exempt Bond financing for 501(c)(3) nonprofit organizations under the Internal Revenue Code of 1986, as amended (the "I.R.C."). Tax-exempt 501(c)(3) Bonds may be issued for most facilities utilized for the exempt purposes of Section 501(c)(3) organizations, as outlined in this memorandum. The principal advantages of such bond financing are the low interest rates and the attractiveness of the debt to lenders and investors. Bond financing may permit a user to build its projects sooner, expand the scope of its projects, or direct its fundraising to other purposes. With facilities financed by low-interest, long-term bonds, fundraising can be directed to other purposes, as well as into debt reduction.

Purpose of this Overview. This brief overview discusses tax-exempt bond financing for 501(c)(3) nonprofit organizations (referred to herein as the "Nonprofit") under the I.R.C. The information provided may be useful in determining whether bond financing will be available in particular cases, how the transaction might be structured and proceed, what advantages exist, and what limitations are imposed. However, Bond Counsel should be consulted early to assist in determining whether a project qualifies and in assuring that the applicable legal requirements will be met.

BOND FINANCING

What is Bond Financing? Bond financing takes the form of loans, or some times leases or installment sales, from a local government entity, often a development authority or development corporation (the “Issuer”). State laws vary concerning Bonds, but they are available in most jurisdictions. The interest rate is low because Bonds issued by the Issuer can be qualified to pay tax-exempt interest to the investors under the I.R.C., and the low interest rate is passed on to the Nonprofit. The money raised from the Bonds is reloaned by the Issuer to the Nonprofit or used to acquire facilities to be leased or sold by the Issuer to the Nonprofit. The loan, lease or sale agreement is pledged by the Issuer as the payment source for the Bonds and the Issuer is not otherwise liable for the Bonds. Bonds offer considerable flexibility in structuring terms, such as variable and fixed interest rates, prepayment and long and short maturities. Tax-exempt Bonds issued to finance facilities for use by governmental bodies and by for-profit organizations are beyond the scope of this discussion, and are addressed in our “Overview of Governmental Financing” and our “Overview of Private Activity Bond Financing and Incentives,” available on request.

Why Use Bond Financing? Interest on a qualified 501(c)(3) Bond is exempt from Federal income taxation, alternative minimum tax and, usually, income taxation in the state in which the Bonds are issued. Bond borrowing rates are substantially lower than interest rates on conventional borrowings. Such Bond issues usually are exempt from SEC and blue sky registrations. Another advantage to the use of Bond financing is that the public involvement in the financing can generate substantial community interest in and support for the Nonprofit.

How are Bonds Repaid? Bond financing is normally backed solely by the Nonprofit’s credit and any credit enhancement that it furnishes, and sometimes by assets or other security that the Nonprofit may pledge for this purpose. Nonprofits commonly utilize bank letters of credit or other forms of “credit enhancement” such as bond insurance to back Bonds issued for their facilities. Credit enhancement assures that the Bonds can be readily sold and obtain the lowest interest rates, as investors examine and rely upon the credit enhancer’s financial strength and not the Nonprofit’s. The Nonprofit’s credit, financial position, operating history and fundraising must be satisfactory to the credit enhancer, however, in order to obtain this type of financing.

Who Buys the Bonds? Tax-exempt Bonds may be publicly sold or privately placed. Bonds, particularly if they are credit enhanced, may be sold to institutional investors and mutual funds, and sometimes individuals, through an underwriter or placement agent. Banks may buy 501(c)(3) Bonds and hold them as loans, although the I.R.C. results in increased rates on bank-held Bonds unless they are “Bank-Qualified” as discussed below.

What are “Bank-Qualified Bonds”? Generally, Banks and other financial institutions holding tax-exempt Bonds are not entitled to a tax deduction for their related carrying costs, or “cost of funds”, determined by the ratio of the institution’s borrowed funds to its equity, and banks and other financial institutions may find it relatively unattractive to hold tax-exempt Bonds. However, most Issuers that reasonably anticipate issuing not more than $10,000,000 of 501(c)(3) or governmental bonds during any calendar year may designate such Bonds as “Qualified Tax-Exempt Obligations.” Such “Bank-Qualified” Bonds are subject to only a 20% disallowance of the allocable carrying cost and are attractive for Banks to hold. For the purpose of determining compliance with the $10,000,000 limitation, obligations of the Issuer and any subordinate entities must be aggregated, together with some obligations of superior entities. Note that an Issuer’s Bank-Qualified Bonds may count against the ability of the superior entities to issue Bank-Qualified obligations.

Contents of this Memorandum. The remainder of this memorandum will outline who may issue 501(c)(3) Bonds and for what purposes, the limitations and requirements imposed by state and Federal law on 501(c)(3) Bond financing, the typical structures for such transactions, the steps necessary to complete the same, other incentives, and the role of Bond Counsel.

WHEN A PROJECT IS FINANCEABLE

What is Financeable? 501(c)(3) Bonds may be issued to finance most facilities used for the operation of 501(c)(3) non-profit organizations, such as charities and certain educational and healthcare organizations. No more than 5% of the proceeds of such Bonds may be used with respect to property that meets both of the “private business tests” described below. Outstanding conventional debt or loans in many cases can be refinanced with 501(c)(3) Bonds, if the debt paid costs that are financeable, and Bond Counsel is satisfied with the documentary record.

Private Business Tests. A 501(c)(3) Bond will be disqualified for tax exemption if more than 5% of the proceeds are put directly or indirectly to “private business use” and if payment of more than 5% of the Bonds is directly or indirectly secured by or to be derived from property put to “private business use” (or payments with respect to such property). “Private business use” means use by the 501(c)(3) organization that would be treated as “unrelated taxable business income” or use by others in any nongovernmental trade or business. In less technical terms, although property financed with 501(c)(3) Bonds may be used in the exempt operations of the 501(c)(3) organization and by the general public or governmental units, issues arise when property is used by other persons or entities or by the 501(c)(3) organization itself for non-exempt purposes. Of particular concern are leases, management contracts and similar user arrangements affecting financed property. A 501(c)(3) Bond also will be disqualified for tax-exemption if the private loan financing test is met. The private loan financing test is met if the lesser of 5% of Bond proceeds or $5,000,000 is used directly or indirectly to make or finance loans to persons other than governmental units. An indirect loan may be found, for example, if borrowings are used to finance facilities to be used by less than all of the general public and paid for by user fees. Any private business issues should be analyzed by Bond Counsel in the light of detailed regulations.

Management Contract Safe Harbors. Part or all of facilities to be financed by 501(c)(3) organizations, particularly healthcare organizations, are sometimes managed or operated by for-profit companies. “Safe harbor” guidelines can be used to assure that such arrangements do not impair the tax exemption of 501(c)(3) Bonds. Briefly, the guidelines require that the manager’s or operator’s compensation be determined by a periodic fixed fee, a capitation fee (an amount per person, regardless of services rendered), a per-unit-of-services fee, or a percentage of gross revenues or expenses, but in no case by a percentage of net revenues or profits. The permitted length of a contract (including all binding renewal options) is limited depending on the type of compensation; the more fixed compensation, the longer a contract may extend. If compensation is based on at least 95% fixed fees, contracts may be for a term up to 15-years; if at least 80% fixed fees, 10-years; if 50% fixed fees or 100% capitation fees (or a combination), 5-years (if the contract is cancellable by the 501(c)(3) within 3 years); if per-unit fees, 3-years (if the contract is cancellable by the 501(c)(3) within 2 years). A special rule applies to new facilities during a start-up period or to facilities primarily providing services to third parties: compensation can be based entirely on a percentage of fees charged, or a combination of per-unit-of-services fees and a fixed fee (or during the start-up period, a percentage of gross revenues, adjusted gross revenues or expenses), if the contract has a term of 2-years or less (cancellable by the 501(c)(3) within 1 year).

Intent to Finance Costs Must be Documented. For facility costs paid prior to the Bond issue to be financed with tax-exempt 501(c)(3) Bonds, an “official intent” to finance those costs must be declared not later than 60 days after the payment of such costs. A simple form of such declaration is a resolution of the board of directors of the 501(c)(3) organization evidencing such intent. An “official intent” must declare an intent to finance, establish a maximum amount of debt covered and generally describe the project. Bond counsel should be consulted to determine the sufficiency of an “official intent”. An “Inducement” (discussed below under “Procedural Steps”) by the Issuer also will serve as a declaration of official intent. If a declaration of official intent is made, Bonds generally may be issued as late as 3 years after the declaration and within 18 months after the facilities are completed. There is no downside to adopting an "official intent", as it only preserves the possibility of using Bonds in the future.

Disqualified Uses. In no event may proceeds of a 501(c)(3) Bond be used to provide an airplane, private luxury box, gambling facility or liquor store.

BOND ISSUERS

State Law. Bonds for 501(c)(3) organizations must be issued by governmental authorities. Virtually all states authorize Bond financing, and the types of Issuers and the projects that they may finance vary. Frequently included in financeable costs are preliminary studies, direct costs of the project, attorneys' fees and other financing and issuance costs, interest paid during construction and certain reserve funds. For illustrative purposes, several of the Issuers in the State of Georgia are described below.

Development Authorities. Created by statute in every Georgia city and county, and active in many, Development Authorities may issue 501(c)(3) Bonds to finance the acquisition, construction, improvement, modification, renovation or rehabilitation of any land, buildings, structures, facilities, fixtures, machinery, equipment, furniture or other property, provided that a majority of the directors of the Development Authority determines by resolution that the project will develop and promote trade, commerce, industry and employment opportunities for the public good and general welfare, and will promote the general welfare of the State. No facility may be financed by a Development Authority unless it will increase or maintain permanent employment in the jurisdiction to some degree. A number of regional Development Authorities also have been created in Georgia.

Downtown Development Authorities. Downtown Development Authorities also can be activated in any incorporated municipality in Georgia. A Downtown Development Authority may finance 501(c)(3) projects that the Authority determines will further the public purposes for which it was created. However, Downtown Development Authorities may finance projects only in designated downtown development areas.

Healthcare Authorities. Residential Care Facilities for the Elderly Authorities and Hospital Authorities also exist or can be activated in each county, with the capacity to issue 501(c)(3) Bonds for certain healthcare projects.

Constitutional Authorities. In approximately two-thirds of Georgia's counties, special authorities have been created by amendment to the Georgia Constitution with powers to issue Bonds. The particular legislation must be consulted in each instance.

ARBITRAGE

Arbitrage Restrictions. Bonds are not entitled to tax exemption if they are deemed "arbitrage bonds." Arbitrage rules are complex, and only a brief sketch is provided below. Bonds are arbitrage bonds if more than the lesser of 5% or $100,000 of amounts treated as bond proceeds are reasonably expected to be used, or to replace funds used, directly or indirectly to acquire higher yielding investments. Amounts treated as bond proceeds can include amounts pledged to payment of Bonds, or sinking funds or other funds from which repayment of Bonds may reasonably be expected to be made. The concept of "investments" is broad, including virtually any contract or property to which a rate of return can be ascribed. Exceptions are made for investment of proceeds during certain temporary periods, including the temporary investment of monies in a bona fide debt service fund and in a fund for proceeds awaiting use. The temporary period for investment of proceeds pending use for the acquisition or construction of property is three years. Amounts in a reasonably required reserve or replacement fund are not subject to investment yield restrictions, provided that the reserve or replacement fund cannot generally exceed 10% of the proceeds of the issue.

Replacement Funds and Fundraising. If Bonds finance facilities for which other funds were earmarked, these funds (as well as other School funds that secure repayment of the Bonds or having a sufficient "nexis" to the Bonds) may be subject to arbitrage yield restriction. This can occur when fundraising will be conducted in connection with the project. Bond counsel should be consulted early to ascertain whether such "replacement funds" are created.

Arbitrage Rebate. Even though Bonds may comply with the arbitrage rules referred to above, arbitrage earnings in excess of the yield on the Bonds must be rebated periodically to the federal government. The rebate rules require that periodic computations and filings be made. However, there are limited "2-year construction," "18-month" and "6 month" exemptions from the rebate requirement. The ability to comply with the appropriate exemption may influence the timing of when the Nonprofit will want to close the Bond issue.

2-Year Construction Exemption. The construction exemption applies to financings where at least 75% of the "net proceeds" of the obligations are to be used for construction, reconstruction or rehabilitation. The rebate requirement does not apply if the net proceeds are expended in accordance with the following minimum requirements: 10% within six months; 45% within one year; 75% within 18 months; and 100% within two years (except that the two year period may be extended to three years if the requirement would have been met within two years but for a reasonable retainage not exceeding 5% required to ensure compliance with the terms of a construction contract). "Net proceeds" includes the proceeds of the issue (except for amounts placed in a reasonably required reserve fund) plus investment proceeds earned before the close of the period. If, however, an election is made on the closing date, net proceeds excludes interest earnings on any reasonably required reserve fund, but interest earnings on such fund will be subject to the rebate requirement from the closing date, rather than from the end of the two-year expenditure period. If an election is made on or before the closing date to pay a penalty in lieu of payment of the rebate amount, the rebate requirement is deemed to be satisfied if the Issuer pays a penalty with respect to the close of each six-month period after the closing date equal to 1.5% of the amount of the net proceeds of the issue, which as of the close of such period are not spent as required.

18-Month Exemption. An exemption from the rebate requirement applies if all gross proceeds (except for proceeds placed in a reasonably required reserve fund) are expended in accordance with the following schedule: At least 15% within 6 months; at least 60% within 12 months; and 100% within 18 months (with an exception for reasonable retainage spent within 30 months).

Six-Month Exemption. An exemption from the rebate requirement applies if all gross proceeds (except for proceeds placed in a reasonably required reserve fund) are expended within six months.

Limitation of Exemptions. Compliance with the construction, 18-month or 6-month exemptions does not relieve the obligation to rebate arbitrage from investment of a reasonably required reserve fund or arbitrage on a bona fide debt service fund in excess of $100,000 per year.

OTHER LIMITATIONS

Length of 501(c)(3) Bond Financing. The average maturity of a 501(c)(3) Bond issue is limited by Federal law to 120% of the average reasonably expected economic life of the project financed. Average economic life must be weighed by taking into account the respective costs of the components of the project. Economic life is to be determined as of the later of the date a Bond is issued or the date facilities are placed into service. Midpoint lives under the old ADR system for personal property and guideline lives under Revenue Procedure 62-21 for buildings may be treated as safe harbors for determining economic lives. Land generally is not to be taken into account in determining the average.

Federal Guaranty Prohibition. 501(c)(3) Bonds are not entitled to tax exemption if the payment of principal or interest is directly or indirectly guaranteed in whole or in part by the United States or any of its agencies or instrumentalities. Bonds will be treated as guaranteed by the federal government if 5% or more of the proceeds are used to make loans guaranteed by the federal government or to invest in federally insured deposits or accounts. Exceptions are made to permit proceeds to be invested in United States Treasury obligations and to permit investments of bona fide debt service funds, reasonably required reserve funds, and funds to hold proceeds prior to their initial use.

Speculative Projects. Compliance with several provisions of Federal and state law requires that the particular assets to be financed with a 501(c)(3) Bond be ascertained with reasonable certainty prior to issuance. A 501(c)(3) Bond generally cannot be issued to finance undetermined projects or contingencies, or in an amount substantially in excess of that required for the project.

Issuance Costs. No more than 2% of the proceeds of a 501(c)(3) Bond may be used to pay costs associated with the issuance of the Bond. Any excess costs may be paid from other sources.

Change in Use. A change in use of a facility financed with a 501(c)(3) Bond to a use for which such a Bond could not have been issued may result in the interest on the Bond becoming taxable or other consequences.

INDUCEMENT

Inducement Resolutions. Although not necessarily required, the first step in a 501(c)(3) Bond transaction normally is obtaining an inducement resolution and agreement from the Issuer (the “Inducement”). This constitutes an agreement in principle by an Issuer to issue Bonds for a proposed Project. The Inducement can serve as the as the declaration of “official intent” discussed above, in lieu of a School’s board resolution.

Expiration. An Inducement may or may not have an expiration date. In any event, a 501(c)(3) Bond must be issued within three years after the declaration of official intent and eighteen months after the later of the date a Project is acquired or placed in service.

FORM OF TRANSACTION

General. Because a 501(c)(3) Bond transaction utilizes an Issuer as an intermediary, the transaction takes a form different from a conventional financing transaction. The exact form to be used depends on the desires of the parties and local requirements. In any transaction the Issuer sells the Bond and makes the proceeds available for the Project. Three forms of transaction commonly are used: loans, leases and installment sales.

Loans. An Issuer may be authorized by statute to loan 501(c)(3) Bond proceeds to a Nonprofit for use on a project. When this form is used, the Nonprofit enters into a loan agreement with the Issuer and usually gives its note to evidence the loan. The Issuer will assign the loan agreement and note as security for the Bond. The Nonprofit holds title to the project in such a transaction. This is the simplest and most common arrangement.

Leases. Most Issuers can, and some Issuers must, own the project financed and lease it to the Nonprofit. When such form is used, the project site normally is conveyed to the Issuer and the project is constructed or acquired in the name of the Issuer with the proceeds from the Bond. The project is then leased to the Nonprofit, which agrees to pay rents to be applied to service principal and interest on the Bond. The Issuer assigns its rights under the lease as security for the Bond. When the Bond is paid, the Nonprofit normally purchases the project at a nominal purchase price.

Installment Sales. An installment sale transaction sometimes is used. This type of transaction is similar to the lease transaction in that the Issuer takes title to the project. Instead of leasing the project to the Nonprofit, the Nonprofit enters into an installment sale agreement whereby it agrees to pay purchase price installments equal to debt service on the Bond. Title to the project may be conveyed to the Nonprofit immediately or upon payment of the Bond.

Nonprofit's Control Over Project. Under any arrangement, loan, lease or sale, the Nonprofit normally is responsible for insurance, taxes and maintenance, has freedom with respect to design and construction, and may be regarded as the project "owner" for all practical purposes. During the term of the financing, the Nonprofit has essentially the same control over the project as under conventional financing. Furthermore, covenants and security devices usual in conventional lending normally can be incorporated in the Bond transaction.

Credit for Bonds. Regardless of the form of the transaction, usually neither the Issuer, the local government nor the state provides any credit for the Bonds. The bondholders look to the underlying obligation of the Nonprofit and any guaranties, mortgages, security instruments, insurance, letters of credit or other funds or credit enhancements that may be provided as arranged by the Nonprofit to pay the Bonds.

"Variable Rate Demand Bonds" Specialized methods of financing have developed in the Bond area that provide highly favorable terms. The "variable rate demand bond (VRDB)" or "lower floater" method of financing accesses short-term markets for a longer-term stated maturity, but with a "put" option whereby the bondholder at regular intervals (usually weekly) may cause the Bond to be repurchased on behalf of the Nonprofit. Because of the "put" feature, a variable rate demand Bond can be sold in the short-term market, which involves the lowest interest costs. Such a Bond bears interest at rates that may be reset by a remarketing agent. A variable rate demand Bond may be held by a particular holder for any period and normally would be "put" if the holder has other needs for its funds or market interest rates have shifted upward such that the rate borne by the Bond is not currently attractive. If a lower floater Bond is "put" because of an upward shift in rates, the remarketing agent will set a new, higher rate at which a remarketing agent can re-place the Bond; if market rates fall below the Bond rate, the agent will reset the rate at the lowest rate that will avoid the Bond being "put." A credit facility of a rated institution must be available to advance the repurchase price of any variable rate demand Bond that is "put" back.

PROCEDURAL STEPS

Bond Placement. After an Inducement is obtained and Bond Counsel has determined that the transaction can be appropriately structured as a 501(c)(3) Bond project, generally the Nonprofit will place the Bonds, generally through an investment banker or underwriter. Bonds may be privately placed, for example, with an investor group or a financial institution, placed with a mutual fund or sold publicly. Disclosure documents normally are prepared when a bond fund or public sale is utilized. Depending on the nature and number of the bondholders, a trustee may be appointed for the issue.

Legal Documentation. When the type of Bond sale has been determined, the terms and provisions of the Bond and the related documents must be negotiated and settled upon. Bond Counsel will prepare most of the necessary documentation for the transaction. Provided that a declaration of official intent has been made, the acquisition and construction of the Project could be commenced during this period if funds are available.

"TEFRA" Hearing. Federal law requires that a public "TEFRA" hearing be held at least 14 days after the giving of published notice apprising the community of a proposed 501(c)(3) Bond and the nature and the location of the project. Following such public hearing, both the Issuer and an appropriate elected official or legislative body with jurisdiction over the project must approve the Bond.

Validation and Other Procedures. States frequently require additional procedural steps prior to the issuance of a Bond. For example, most Bonds in Georgia must be judicially validated in a proceeding to which the State, the Issuer and the Nonprofit are parties. Another public notice must be published in advance of this proceeding. Both the TEFRA and the state procedures affect the closing date.

Information Report. In connection with the closing of the transaction, an information report providing details of the 501(c)(3) Bond, the Issuer, the Nonprofit and the project must be filed with the Internal Revenue Service.

LIVING WITH A BOND ISSUE

After Bonds are issued, there are only a few obligations of the Nonprofit that are different from a conventional loan. Principally, the Nonprofit must remain its 501(c)(3) status and the project must not be used by for-profit entities or operations. The Nonprofit must avoid arbitrage practices and pay arbitrage rebate if an exemption does not apply.

BOND COUNSEL

Counsel experienced in municipal bond law should be retained to serve as Bond Counsel. The function of Bond Counsel is to structure and document the transaction and to issue an opinion on the validity and tax status of the Bond. Fees of Bond Counsel are payable by the Nonprofit from Bond proceeds. Bond Counsel may represent other parties or the Nonprofit, the Issuer and the Bond purchaser or underwriter may be separately represented. Smith, Gambrell & Russell, LLP is a "Red Book" listed Bond Counsel firm.

SUMMARY

This memorandum has been designed to provide a brief overview of 501(c)(3) Bond financing. Tax-exempt Bonds may provide significant advantages, but are subject to extensive regulation on the federal and/or state levels. This outline can do no more than touch upon some of the more salient issues and must not be regarded as an in-depth treatment on all legal issues. Instead, this Overview provides some basic information that may serve as the basis for further discussions with Bond Counsel.

Last Updated: April 26 2017

Article by James P. Monacell

Smith Gambrell & Russell LLP

Availability Of Tribal Economic Development Bond Allocations: Holland & Knight

Based on a recent Internal Revenue Service (IRS) announcement, the Published Value Cap Limit for Tribal Economic Development Bonds (TEDBs) is steadily shrinking.

The IRS reported on March 31, 2017, that the TEDB Published Volume Cap Limit for the period commencing April 1, 2017, has now been reset at $155 million per tribal applicant. This figure represents 20 percent of the amount of the total remaining available volume cap of $777 million. As described in Notice 2012-48, 2012-31, IRS guidance provides that no tribal government will receive an allocation that would cause the aggregate amount of volume cap allocated to that tribal government to exceed the Published Volume Cap Limit in effect. The Published Volume Cap Limit for any period is the greater of: 1) 20 percent of the amount of available volume cap as of the first day of such period, as described in the notice; or 2) $100 million. The notice also indicates that the IRS will allocate an amount of available volume cap equal to the amount requested in the application on a first-come, first-served basis by order of submission date.

In 2009, Congress initially designated a total of $2 billion in volume cap for TEDB allocations. Since that date, approximately 61 percent of the TEDBs allocations have been used by tribal governments. Initially, there was little use of TEDBs by tribal governments. Recently, however, the utilization of TEDBs by tribes has accelerated noticeably.

As the overall volume cap diminishes, the amount that can be requested by any one tribe is reduced. For example, at $500 million in overall available cap, the maximum request per tribe will be reduced to $100 million. Under the formula, it will stay at that level until the aggregate amount is used in its entirety. Once the overall TEDB Volume Cap is exhausted, it can only be reauthorized by an act of Congress.

Congress is likely to consider changes to the tax-exempt bond rules in the context of tax reform. While state and local governments are working diligently to preserve their current ability to issue tax-exempt bonds for a variety of uses, tribal governments are pressing for parity with other governmental issuers. Unfortunately, there is no guarantee that TEDB Volume Cap will be replenished or that other favorable legislative changes sought by tribes for many years, such as elimination of the “essential governmental function” test, will be achieved this year.

TEDB allocations may be used not only for bonds, but for tax-exempt bank loans, including draw-down loans. (See Holland & Knight alert, “IRS Amends TED Bond Volume Cap Rules to Accommodate Draw-Down Loans,” Dec. 8, 2015).

With interest rates on the rise and the economy improving, many tribal governments are considering whether to pursue tax-exempt financing for economic development projects.

Last Updated: April 19 2017

Article by Kathleen M. Nilles and Randolf A. DelFranco

Holland & Knight

Kathleen M. Nilles is a partner in Holland & Knight’s Washington D.C., office and Randolph A. DelFranco is a partner in Holland & Knight’s New York office.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

TAX - CONNECTICUT

[Fairfield Merrittview Limited Partnership v. City of Norwalk]

Appellate Court of Connecticut - April 11, 2017 - A.3d - 172 Conn.App. 160 - 2017 WL 1234223

Taxpayer appealed decision of city board of assessment appeals upholding fair market value of $49,036,800 for office building.

The Superior Court sustained appeal, concluded that fair market value was $34,059,753 and ordered a reduction in the assessment. City appealed. The Appellate Court reversed. Taxpayer appealed. The Supreme Court reversed and remanded.

On remand, the Appellate Court held that:

- Superior Court's finding that building's net rentable area was 243,586 square feet was not clearly erroneous;
- Superior Court did not clearly err by excluding from calculation of building's potential gross income $165,637 of interest income derived from taxpayer's money market account; and
- Superior Court did not clearly err by excluding from calculation of building's potential gross income $14,264 in purported income from use of conference room in common area.

On appeal of city's 2008 tax revaluation of office building, trial court's finding that building's net rentable area was 243,586 square feet was not clearly erroneous, since trial court reasonably could have discredited conflicting testimony of taxpayer's and city's appraisers related to net rentable area, and trial court acted within its discretion when it considered taxpayer's 2006, 2007, and 2008 rent rolls but ultimately determined that 2006 annual income and expense report was more reliable.

On appeal of city's tax revaluation of office building, trial court did not clearly err by excluding from calculation of building's potential gross income $165,637 of interest income derived from taxpayer's money market account, since parties' appraisers disagreed as to whether interest income was attributable to building itself, and trial court was therefore within its province to credit testimony of taxpayer's appraiser, who testified that interest and dividends should not have been included as income, under direct capitalization method, because income was unrelated to building, and that in his 25 years of experience he had never included interest income when calculating a property's fair market value pursuant to income capitalization approach.

On appeal of city's tax revaluation of office building owned, trial court did not clearly err by excluding from calculation of building's potential gross income $14,264 in purported income from use of conference room in common area, since trial court was presented with conflicting testimony as to whether conference room was amenity provided to tenants, or whether tenants were required to pay fee to use conference room, which could be considered as income, and thus trial court either could have reasonably concluded that building did not receive income from conference room, or reasonably could have found that it lacked sufficient evidence as to consistency of conference room's use for income-generating purposes.

TAX - FLORIDA

[Villages of Avignon Community Development District v. Burton]

District Court of Appeal of Florida, Second District - March 17, 2017 - So.3d - 2017 WL 1040739

County tax collector brought declaratory-judgment action against community development district to resolve the relative priority of tax liens and district's recorded assessment liens on three parcels of real property that the district owned after foreclosing on them due to unpaid assessments.

The Circuit Court declared that the tax collector could issue tax certificates but that the certificates would be sold subject to the assessment liens. Community development district appealed.

The District Court of Appeal held that:

- Tax liens were coequal to assessment liens, and
- Tax collector could issue tax certificates that would be subject to the assessment liens.

County's tax liens on three parcels of property were coequal and not superior to assessment liens held by the community development district. The plain language of the statute on community development district taxes said that a district's liens were coequal with the liens of the county.

County tax collector could issue tax certificates that would be subject to the community development district's recorded assessment liens on three parcels of property that district owned after it foreclosed on them due to the unpaid assessments. The district could have made county a party to its assessment lien foreclosure action so that the issue regarding the priority and satisfaction of the competing coequal liens could have been resolved before district took title to the parcels, and a district's liens survived the issuance of tax certificates and deeds per statute.

TAX - KANSAS

[Heartland Apartment Association, Inc. v. City of Mission]

Supreme Court of Kansas - April 7, 2017 - P.3d - 2017 WL 1294554

Landowner associations brought action against city for declaratory judgment and recovery of amounts paid, claiming that the city's transportation "user fee," which was assessed on developed real property based on a formula that attempted to estimate the number of vehicle "trips" a particular property generated, was a prohibited excise tax.

The District Court entered summary judgment in favor of city. Associations appealed, and city cross-appealed. The Court of Appeals reversed and remanded. City petitioned for review, which was granted.

The Supreme Court of Kansas held that:

- User fee was a tax rather than a fee, even though revenue generated from user fee was earmarked for maintenance of city streets, and
- User fee was a tax on the enjoyment of a privilege, and thus it was a prohibited excise tax.

City's transportation "user fee," which was assessed on developed real property based on a formula that attempted to estimate the number of vehicle "trips" a particular property generated, was a "tax" rather than a "fee" assessed against those who gained an exclusive benefit of a service, for purposes of determining whether user fee was a prohibited excise tax, even though revenue generated from user fee was earmarked for maintenance of city streets. User fee was levied against owners of all developed property in the city, user fee was a general revenue measure and not for specific improvements, and user fee was not voluntary.

City's transportation "user fee," which was assessed on developed real property based on a formula that attempted to estimate the number of vehicle "trips" a particular property generated, was a tax on the enjoyment of a privilege, and thus user fee was a prohibited excise tax. User fee was a tax on real property owners based on the use of their property rather than a tax on the property itself.

Counties Grapple with Short-Term Rentals.

Short-term rentals are a mixed bag of complaints and tax revenue for counties

When Airbnb, Homeaway or FlipKey move into town, the short-term rental surge they set off can be a blessing or a curse to local governments. The new business model can put an average of $6,100 a year in hosts' pockets, according to Airbnb, especially in areas that attract a lot of tourists, raising questions about tax rates and tax collection.

Even the prospect of companies like Airbnb moving into town can prompt local opposition and pit neighbor against neighbor with local governments stuck smack in the middle. Again raising another set of questions: this time, about zoning and regulation.

A look across the country shows a landscape of answers to the more perplexing questions.

Do we want short-term rentals in our county at all?

On one side of the issue, are hosts who want to make extra money from renting their home to tourists. On the other side are residents who prefer not to live next door to a quasi B&B or "party hotel."

Residents complain that guests aren't acting too neighborly. In Nashville and Davidson County, for example, the city received at least 975 complaints against 568 addresses with active short-term rental permits from April 2015 to February 2017, The Tennessean recently reported. The complaints were about everything from noise to trash to cars parking on grass to intoxicated persons and indecent exposure.

The Metro Planning Commission there is set to vote on phasing out growth of short-term rentals that aren't occupied by owners or placing a temporary moratorium on issuing new permits for short-term rentals. The commission has deferred the vote, requested by Airbnb and Homeaway, to April 13.

States attempt to assert control over short-term rentals

At the state level in Tennessee, two bills that have been introduced (and crafted with the help of Airbnb and Homeaway, the Knoxville News-Sentinel reported), in the state Legislature would curtail local control over short-term rentals. The proposed statewide law would limit local regulations to enforcing public health and safety issues. If passed, a new law would overturn any current bans on short-term rentals in the state, including one in Brentwood, a community in Williamson County, Tenn.

In Florida, counties are fighting similar proposed legislation that would take control of short-term rentals out of their hands. A Florida senator's bill says counties can't treat vacation rental homes differently from any other residential use.

"This bill would basically preempt local governments from making those decisions," said state Sen. Jose Javier Rodriguez (D-Miami). "Local government is the best level of government to mediating these issues."

Bills in the House and Senate have cleared several hurdles. The Florida Senate Community Affairs Committee postponed a vote April 3 on the bill after local government representatives noted that they would not be able to enforce local safety regulations if the bill passed. It's expected to come before the committee again the week of April 17.

Virginia hands control to local government

In Virginia, where Airbnb hosts raked in $41 million last year, Gov. Terry McAuliffe (D), signed a bill that allows localities to regulate short-term rentals. The new law allows local governments to require hosts to register with the county; counties would be allowed to charge fees to register and levy fines to anyone who violates regulations.

The law follows regulations made last year by Arlington County, Va., that requires hosts to register with the county. If taxes (a 7 percent transient occupancy tax) aren't paid, registration would be revoked and hosts would face misdemeanor charges and interest penalties on any unpaid taxes. If someone makes more than $10,000 a year from his short-term rental, they're also required to apply for a business license.

Arlington County legalized short-term rentals in December; rented units must be owner-occupied for at least six months of the year and meet state building codes. The county requires fire and smoke detectors and a fire extinguisher be on the property. It also sets limits on the number of visitors — six per unit or two per bedroom.

Collecting taxes

In tourism-heavy Florida, Broward County joined more than 30 other counties April 4 when it approved an agreement for Airbnb to begin collecting a 5 percent tax (the same amount that hotel guests in the county pay) they say could exceed $1 million a year. The agreement says both sides retain their options, including the county suing Airbnb over past due taxes, the Sun-Sentinel reported.

Miami-Dade County also reached an agreement with the company April 4, voting 10-3 to approve a memorandum of understanding between the county tax collector and the provider. County Commissioner Joe Martinez, who voted no, argued the county should first come up with regulations before taxing Airbnb users. "It's putting the cart before the horse," the Real Deal, a local real estate newspaper, reported him saying. "I know a lot of people in my neighborhood who don't want it."

The Broward County Commission is also set to consider allowing county staff to pursue similar agreements with other online short-term rental platforms. Airbnb said it collected $20 million in tourist tax dollars in Florida in 2016. It currently has agreements in place to collect tourist taxes in 39 of Florida's 63 counties.

In New Mexico, a recent report by Southwest Planning and Marketing estimates counties and cities there are missing out on $2.6 million annually. An old state law from 1969 prevents counties from collecting taxes for short-term rentals. Local governments have gotten behind proposed legislation introduced last month in the state House and Senate that aims to remove the exemption.

In some areas of the country, counties might be sending a mixed message. In Shasta County, Calif., near Lassen Volcanic National Park, the county collected more than $100,000 in taxes from vacation rentals last year (and even provides a form on the county tax Web site for homeowners to fill out, to obtain transient occupancy tax certification) but recently sent letters to homeowners and managers telling them to stop renting out their homes because they were violating the county's zoning code.

Shasta County Supervisor Les Baugh said it confuses residents when one department says short-term rentals are OK and another says they're illegal, the Redding Record Searchlight reported. "There are those who thought they did right because they took the time to follow all the instructions that are on the Web site," he said.

Baugh said he thinks the county should revisit the issue to help bring more tourism dollars into the county. "It's not just the economics of the rentals," he said, "but when people come to visit, they leave their money."

NATIONAL ASSOCIATION OF COUNTIES

By MARY ANN BARTON

Apr. 17, 2017

Fitch: Medicaid Expansion May Benefit Some U.S. Nonprofit Hospitals.

Fitch Ratings-Chicago/New York-13 April 2017: Nonprofit hospitals in some states could see a fiscal benefit if their legislatures expand Medicaid under The Patient Protection and Affordable Care Act (ACA), according to Fitch Ratings.

The failure of recent proposed legislation that would have repealed the ACA may have contributed to broader support for Medicaid expansion. Among the 19 states that did not expand the program under the ACA, a number of legislatures have indicated a willingness to expand their Medicaid programs in recent weeks.

North Carolina's legislature filed a bill to expand and Maine will put Medicaid expansion to a voter referendum in November. Additional expansion bills may be introduced in Nevada and South Dakota, according to media reports. Expansion efforts in four states have failed though, as legislatures in Kansas and Virginia did not pass expansion bills while Georgia and Idaho legislatures adjourned without considering them.

Nonprofit hospitals in states that expand Medicaid benefits would initially see similar fiscal impacts to those in the states that expanded benefits following the implementation of the ACA's coverage provisions in 2014. For those providers, meaningful reimbursement benefits resulted in sharp declines in charity care and bad debt.

In subsequent years, providers in certain markets had steady or higher year-over-year inpatient and ambulatory volumes driven by a higher number of newly eligible Medicaid patients. This superseded a broader industry-wide trend of declining inpatient volumes as providers work to reduce unnecessary readmissions and length of stay, and as clinical care shifts further toward ambulatory settings.

Past experience suggests that more states will eventually opt to expand., About half of all states established programs within one year after Medicaid was created in 1965. After four years, all but two states had established programs.

However, the federal government will reduce the enhanced federal matching rate this year to states that expanded Medicaid eligibility effective January 2014. States such as Washington and Connecticut have announced reduced Medicaid reimbursement rates for 2017. This would likely also affect hospitals in the states that expand this year over the longer run.

The Trump administration may afford states more say in Medicaid program requirements. Reduced program funding could result if states choose to narrow coverage and/or eligibility from current levels. Furthermore, renegotiations of supplemental Medicaid funding systems in some states over the next few years could result in program changes or payment modifications.

Fitch has a negative sector outlook on nonprofit hospitals based on our long term view that the sector will be increasingly challenged by regulatory and political uncertainty, the growth in Medicare and Medicaid payor exposure and meager rate increases.

Nonprofit hospitals in all states will have to contend with additional stresses in the coming years whether or not their states decide to expand Medicaid. Improvement in the labor market is raising the demand for nurses and mid-level clinical staff, resulting in higher salary and benefits costs. The impact is more pronounced in areas with higher levels of hospital competition and population and economic growth.

We also expect nonprofit hospital margins to be pressured when the shift to value-based/risk-based contracts accelerates. The movement toward risk-based contracts by commercial payors is likely to grow around the integrated health systems that have developed in several major metropolitan areas.

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Fitch Ratings.

[You Paid Your Taxes. So How About a Receipt?]

Giving the public a detailed view of what their taxes pay for is a way to encourage citizens' involvement in how government spends their money.

Happy Tax Day! Once you've filed your federal taxes, wouldn't you like a receipt? After sending all that money to the IRS, don't you feel entitled to some detail on what you bought? If so, go to Balancing Act's FederalTaxpayerReceipt.com, which is based on a budget simulation produced by Bipartisan Policy Center. Answer a few quick questions, click submit, and the next page looks like a Home Depot receipt, itemizing how many of your tax dollars went to defense, health care, highways, national parks and more.

If your filing status is single, you earned the 2015 average income of $46,120 last year and you don't have any additional dependents, for example, you paid about $1,099 for defense, $37 for Temporary Assistance for Needy families (what used to be called welfare), $110 for highways and $101 for Obamacare subsidies. You can also get estimated figures for NASA, national parks, Social Security, interest on the debt and more. Try it out. You may be surprised at what you learn.

While it's certainly interesting to see where your federal taxes go, it can be just as instructive for other levels of government. In local government, for example, "the taxpayer receipt is a viable information-sharing tool that can be used to educate and inform citizens about numerous aspects of government at the community level," wrote Whitney Alfonso, an assistant professor in the University of North Carolina School of Government, in a 2014 paper on early governmental efforts to create taxpayer receipts.

Wheat Ridge, Colo., is one local government that has taken on this challenge. The Denver suburb of about 30,000 has published its own version of a taxpayer receipt based on estimates of sales and property taxes. Sales tax is estimated by asking for total income and age to get an approximation of how much income is available to purchase sales-taxable items. For property tax, users are directed to the assessor's website to look up assessed value.

Here's a typical example. A 43-year-old Wheat Ridge resident making the local average income of $31,828 who owns an average-value home of $253,337 (assessed value of $20,165) and who makes 70 percent of his purchases within city limits would pay approximately $297 toward city services, including $89 for police, $41 each for public works and parks and recreation, and $3 toward the city manager's operations.

Whether or not paying these amounts for these services is a good deal is, of course, in the eye of the beholder. But if you have ever dialed 911 at 3 a.m. and minutes later had a police officer at the door ready to put her life on the line for you, you might well have thought you were getting your money's worth.

However, the value of a government taxpayer receipt goes deeper than "simply an accounting of a taxpayer's total tax burden," writes Alfonso, by "encouraging even greater citizen involvement in the budgeting process." That can lead to better public understanding of tough public-finance issues and help create a fact-based dialogue about priorities.

Tax receipts also serve as an educational tool for hard-to-illustrate facts, such as how property-tax revenue is split among public entities such as municipalities, counties and school districts. An administrator in a town with high property values told me she wanted residents to know that even though they pay high property taxes only a sliver goes to the city. Municipal receipts can also be a subtle reminder to buy local by illustrating that purchases made elsewhere pay for someone else's sidewalks.

GOVERNING.COM

BY CHRIS ADAMS | APRIL 18, 2017

[Taxation Of Municipal Bonds?]

Is there a threat to the municipal bond interest deduction?

The new administration's focus on tax reform, especially as many of us pay our federal and state taxes this week, draws our attention to the taxation of interest on municipal bonds. I recently heard a presentation by Steve Benjamin, mayor of Columbia South Carolina and executive director of the board of Municipal Bonds for America (MBFA), a group that comprises state and local government officials, municipal industry groups such as the American Public Power Association, and Bond Dealers of America. The mission of the MBFA is to educate members of Congress about the benefits of municipal bonds. The organization, along with the National Association of Counties (NACo) and many others, have sent letters to Congress extolling the virtues of municipal bonds and urging Congress not to tax municipal bond interest or eliminate the federal deduction for state and local taxes. Individuals and organizations can learn more about the MBFA and even sign the letter to Congress at municipalbondsforamerica.org.

The letters specifically remind current members that Congress officially recognized the importance of the federal/state partnership on October 3, 1913, when the tax system was codified. The exemption of interest on municipal bonds was one of 12 personal deductions and exclusions considered essential to the functioning of the nation. The principle of reciprocal immunity, by which the federal government does not tax states and local governments and vice versa, was considered imperative. A description of the original tax code is on the MBFA website; and the NACo site has a copy of the 1862 Emergency Federal Income Tax (a tax that incidentally was later determined to be unconstitutional), which included deductions for state and local taxes.

Tax-exempt municipal bonds play an important role in our building of infrastructure – we see the results every day in roads and bridges, airports, mass transit systems and affordable housing, hospitals and universities. Tax exemption results in lower interest expense for issuers, thus reducing property or other taxes and fees for residents. Private activity bonds (not to be confused with the internationally utilized public–private partnership model) are a type of municipal bond that helps fund infrastructure. Some of the revenue for bond repayment derives from the activities of private entities (such as an airport's collecting gate fees from airlines) or accrues when a private developer builds a project, for example a city hall, and leases it back to the municipality. Private activity bonds (PABs) are currently subject to the alternative minimum tax (AMT). If the AMT were abolished, it would result in lower costs and wider market access for PAB funded projects as well. Federal taxation of interest on municipal bonds would drive up funding costs and make projects more expensive.

To provide offsets to the proposed reduction in personal and corporate tax rates, some lobbyists have suggested that everything is on the table, including taxation of municipal bonds. In Citibank's March 6 2017 Municipal Weekly, the bank concludes that the potential revenue over 10 years from the taxation of municipal bonds would not be significant and that the political fallout from such a drastic step could be extremely negative for incumbent members of Congress. A retroactive tax on outstanding municipals could cause wealth reduction of $450–$500 billion, as the value of the municipal bonds would erode. This tax option is considered unlikely because it would be a breach of trust since the buyer was sold the bond with tax-exemption and with clean legal opinions issued under then current law. The option would generate $272 billion over 10 years, while the option of taxing only new bonds would yield $196 billion over 10 years. By comparison, the House GOP tax plan estimates a revenue loss of $2.2 trillion over 10 years from the reduction in individual income and payroll taxes.

Tax exemption of municipal bond interest is often seen as a boon to the wealthy, and according to 2014 tax data, roughly 40% of municipal interest is received by individuals with adjusted gross incomes above $200,000, while another 15% goes to those with AGI between $100,000 and $200,000. However, Citi (NYSE:C) also points out that 62% of municipal interest is received by those over 65, while another 23% is received by those aged 55 to 65.

Some say municipal bonds are inefficient and have prevented the development of a healthy private system for funding our infrastructure. We pause for a moment here to recognize that many P3 (PPP: public–private partnerships) deals in Europe involve the government's guaranteeing the private operator a return on investment, e.g., a minimum level of toll revenue for a toll-road project. With the P3 model there can be efficiencies gained due to experience and reduced bureaucracy, and certain risks become the responsibility of the operator. Our infrastructure needs are so great that there is room for many financing schemes. Municipal bonds have financed over $1.65 trillion of infrastructure in the last 10 years; however, the 2017 Report Card by the American Society of Civil Engineers once again assigned our overall infrastructure a grade of D+, the same as it did in 2013, the last time the infrastructure survey was conducted. There was modest improvement in seven infrastructure sectors, including schools, rail, inland waterways, wastewater, hazardous waste, ports, and levees, while there were lower grades in parks and recreation, solid waste, and transit.

Simplification of our tax code and reductions in tax rates was widely anticipated by the market and had contributed to expectations of improved economic conditions. Now, however, the market assumes a slower realization of gains due to delays in the implementation of tax reform. The fear that municipal bond interest will be taxed has been one factor contributing to the muni–Treasury ratio's being higher than average. Additionally, Treasury bonds may have lower yields than usual due to their attractiveness in a world of low-to-negative interest rates. They may also be benefiting from a flight to quality.

The muni–Treasury ratio historical average is 76%, in line with taxable equivalent yield. Since the end of the 2008 financial crisis, the muni-Treasury ratio has remained above its historical average, and has at times spiked such as in 2011 when Meredith Whitney issued comments regarding municipal credit quality, during the taper tantrum in 2013 and again as municipal prices were hurt post-the election of President Trump.

At Cumberland we have taken advantage of this disruption in the markets to buy bonds when municipal bond yields exceed their normal relationship to Treasuries, a strategy that has resulted in out-performance when the ratios return to more normal levels. For example, as the reality of the difficulty of implementing President Trump's proposed changes to healthcare and taxation has become clear, the muni-Treasury ratio has shifted back to a more normal level.

We do not think municipal bonds will lose their tax-exempt status. Further, if the maximum tax rate is lowered to 33%, municipal bonds will still be attractive, since the average tax rate for municipal buyers is 25%. If certain deductions are not allowed at the personal and corporate levels, municipal bonds will be one of the few tax breaks that remain. However, it is clear that the exemption is in play and that there are folks fighting hard for its continuation.

Investing.com

by Cumberland Advisors

Apr 20, 2017 09:27AM ET

Is the Pendulum of Bond Pricing Beginning to Swing Back Toward Discount Bonds? If So, We Need to Be Prepared for the Resulting Bond Yield Calculations.

Premium bonds have been the choice of investors now for many years but is that preference beginning to shift in favor of discount bonds? Discount bonds are appearing in bond structures with increasing regularity in recent months. We lawyers leave that question for the underwriters and financial advisors as interest rates turn upward. However, we need to be prepared for the shift in bond yield calculations that accompany a re-emergence of discount bonds.

Continue reading.

By Bob Eidnier on April 21, 2017

The Public Finance Tax Blog

Squire Patton Boggs

Taxable Versus Tax-Exempt Bond Financing For Project Financing: Smith Gambrell & Russell

When an industrial expansion will create jobs, revenues and development, many communities will offer incentives to attract the location. Bonds are an important incentive, authorized by state law to provide advantageous financing for certain businesses. A government body may issue bonds to finance a qualifying project, and the company operating the facility must pay amounts to service the bonds.

Federal tax law changes have restricted the use of tax-exempt industrial development bonds (IDBs) prompting communities to develop alternatives. In many jurisdictions "Taxable Bonds" can be issued with some of the same advantages.

Tax-Exempt IDBs

Interest on qualified IDBs is exempt from regular federal income taxation and, usually, income tax in the state where the bonds are issued. Due to the tax-exemptions, borrowing costs are lower than with conventional loans.

The federal law authorizes tax-exempt IDBs for manufacturing operations. “Manufacturing” includes facilities used in the manufacture, production or processing of tangible personal property, and up to 25% of the financing can be used for on-site related and ancillary office, warehouse and other space. Tax-exempt IDBs are available, without size constraints, also for some transportation, waste-related and other specialized facilities. See our “Overview of Private Activity Bonds and Incentives.

What are Taxable Bonds?

In most jurisdictions, public bodies can issue “Taxable Bonds,” bonds that do not qualify for federal income tax exemption. Despite their name, Taxable bonds may bear interest that is exempt from state or local income tax and intangibles tax in the state in which they are issued, and other incentives might be utilized in connection with the bond financing.

Taxable Bonds may be issued without several size limitations imposed on tax-exempt IDBs. Tax-exempt IDBs are subject to an aggregate $1,000,000 limitation in any particular city or county, although this limitation can be increased to $10,000,000 if all capital expenditures in the jurisdiction made by users of the project during the six year period spanning the bond closing date are counted. Every user of tax-exempt IDB-financed facilities is subject to a further aggregate nationwide $40,000,000 limitation. Tax-exempt IDBs also must receive an allocation for a “volume cap” applicable to each state.

Taxable Bonds are not subject to many of the restrictions imposed on tax-exempt IDBs. Taxable Bonds often may be used for other-than-manufacturing projects, including warehouse, distribution, office, and research and development facilities. Tax-exempt IDBs are restricted when financing previously-used facilities, but Taxable Bonds are not. Limitations on and rebate of investment of funds borrowed with tax-exempt IDBs are also inapplicable to Taxable Bonds. Tax-exempt IDBs involve public hearing and approval, state volume cap, allocation and IRS reporting proceedings that are not required for Taxable Bonds.

Financial institutions cannot fully enjoy the benefits of tax-exempt IDBs they fund because their cost of funds is not tax deductible. Some banks buy IDBs at below-prime lending rates, but lesser rates are available when the bonds are sold to other investors. Financial institutions can purchase Taxable Bonds without the disallowance of their cost of funds, and Taxable Bonds can be attractive to banks.

Advantages of Taxable Bonds

Because interest earned on Taxable Bonds may be exempt from state and local income or intangibles taxes imposed in the state in which the bonds are issued, taxpayers in the state may purchase the bonds at reduced interest rates.

Furthermore, the participation of governmental bodies in a bond issue fosters community interest, often at the highest levels, in an industrial location. Government officials are likely to support such a project in other respects.

Perhaps most importantly, a bond issue is part of a total package of incentives in many jurisdictions, and may be a necessary vehicle for the use of some incentives. For example, there may be legal authority for the company to obtain a break in ad valorem taxes if the public body issuing the bonds takes title during the period a project is financed, although the company may be required to pay negotiated amounts in lieu of taxes. Some bond issuers taking title to a facility also may avoid the payment of sales tax on the project components. A community might have authority to contribute or discount land, other property or services in connection with a bond-financed project, or to provide a reduced rent.

Form of Transaction: Loan, Lease or Sale

A bond issuer sells the bonds and applies the proceeds to the project in one of three ways. Some issuers loan the bond proceeds to the company for use on the company’s project, and assign the company’s note to pay the bonds. Other issuers must own the project and lease or sell it on an installment basis to the company. When the latter methods are used, the project site is conveyed to the issuer and the project is constructed or acquired at the direction of the company with the bond proceeds. In such a case, the company enters into a lease or installment sale contract with the issuer which is assigned to pay the bonds, and the company obtains title to the project by the end of the contract term.

Whether a loan, lease or sale is used, the company has essentially the same control over the project as under conventional financing. The company normally is entitled to any depreciation and investment tax credit, is responsible for insurance, taxes and maintenance, and has freedom with respect to design and construction.

How to Obtain Taxable Bond Financing

Although bond financing appears to present a maze of technicalities, it can pay great dividends and Taxable Bonds involve fewer complications. The ability to use Taxable Bonds may exist even where local officials are not familiar with the technique. A company should consult recognized Bond Counsel experienced with Taxable Bonds early in the search process for advice on the availability of bond financing and other incentives in particular jurisdictions.

Bond may be issued by a development authority, board or agency, either at the state or local level. Usually a simple application is required to obtain an “inducement,” a preliminary approval of the use of bond financing. For tax-exempt IDBs, the inducement should be obtained prior to the incurrence of costs to be financed, but the inducement may not be critical in determining what costs can be financed by Taxable Bonds.

Following inducement the financing must be arranged. Although some bond issuers may handle the placement of the bonds, most serve merely as “conduits” to the bond purchasers and the company must arrange for the placement and sale of the bond through professionals it selects. Usually the governmental unit does not provide credit for the bonds. The bondholders look only to the company and any mortgages or other credit enhancements it provides.

When Bond Counsel has completed all proceedings and documentation, the bond issuer adopts a final authorizing resolution. In some states a further centralized approval or a bond validation is required. However, the transaction will shortly be closed and the proceeds from the sale of the bonds made available for the project.

Growing Awareness of Taxable Bonds

Tax-exempt bonds have long been the favored tool for industrial expansion. With the use of tax-exempt IDBs restricted, awareness is growing that Taxable Bonds can provide many similar cost savings and can be used in conjunction with other development incentives. A company considering expansion sites ought to explore whether the incentives associated with Taxable Bond financing are available.

Article by James P. Monacell

Last Updated: April 19 2017

Smith Gambrell & Russell LLP

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Reminder: New IRS Issue Price Rules Go Into Effect June 7.

The value at which a bond's price is determined at issuance is important to issuers of tax-exempt governmental debt because it is essential for determining the yield of a tax-exempt bond issue for arbitrage compliance purposes. It is also important for matters of compliance when a certain threshold is determined for the use of the proceeds—such as bank-qualified debt or voter-authorized debt. The final IRS issue price regulations are significantly different from prior regulations, which determined issue price by a reasonable expectation standard, established as the "first price at which a substantial amount of the bonds is reasonable expected to be sold to the public." This definition will change to the price at which bonds are actually sold to the public and it applies to bonds issued on or after June 7, 2017.

Ultimately, the documentation to accompany the debt issue, including underwriter certifications, Notice of Sale, and pricing wires will be required to establish issue price and should be should be discussed between the issuer, the issuer's municipal advisor, bond counsel, and the underwriter in advance of the sale. GFOA encourages state and local governments to consult bond counsel as to how these changes may impact upcoming bonds sales. Stay tuned in the next couple weeks for a member alert on the final rules and likely impact to issuers.

Government Finance Officers of America

Wednesday, April 12, 2017

IRS TEB Update: Automated Return Acknowledgement for Form 8038 Series Returns; Interactive Form 8038-CP.

Form 8038 series receipt acknowledgements
The return acknowledgement process for the Form 8038 series returns is automated. The IRS will send you a Notice CP152, CP152A or Letter 86C for each form you file. Don't include an acknowledgement copy of your return with your filing; it may delay processing or cause a duplicate filing.

Avoid Form 8038-CP processing delays
All required lines must be completed on your Form 8038-CP, Return for Credit Payments to Issuers of Qualified Bonds, before we can process it. We'll request any missing information from you by mail, leading to delays in getting your refund. To avoid these delays, use our interactive Form 8038-CP. Complete it in the order presented and you'll be alerted to missing fields and other errors.

Form 8038 Corner
The Form 8038 Corner on IRS.gov has links to the Form 8038 series returns, filing tips and the sequestration rates that affect Form 8038-CP filers.

NABL's Model Issue Price Certificates – Some Observations.

Joel Swearingen reported last week that the National Association of Bond Lawyers ("NABL") recently released exposure drafts of model issue price certificates that reflect the final Treasury regulations on issue price that take effect for tax-advantaged bonds sold on or after June 7, 2017. As Joel reported, the model issue price certificates cover the direct sale of tax-advantaged bonds by an issuer to a purchaser, the public offering of tax-advantaged bonds pursuant to a negotiated sale between the issuer and an underwriter(s), and the public offering of tax-advantaged bonds pursuant to a sale of the bonds from the issuer to an underwriter in a competitive bidding process.

Joel also promised that we would have more to come on the model issue price certificates that NABL released. If I learned anything from my mediocre high school athletic endeavors, it's that one should never show up, or let down, a teammate. In accordance with Joel's promise, herewith are some observations on NABL's model issue price certificates.

Continue reading.

The Public Finance Tax Blog

By Michael Cullers on April 12, 2017

Squire Patton Boggs

'Trump Trade' Reversal is Afoot as Money Flows to Bonds.

Muni inflows suggest investors scaling back tax-cut expectations: BAML

If fund flows are an indication, investors are giving up on the "Trump trade."

As doubts about the timing and scope of President Donald Trump's plans for corporate tax cuts, infrastructure spending and other policies grow, disillusioned investors have departed U.S. stock funds in favor of bonds, emerging markets and even European equities, according to weekly data compiled by analysts at Bank of America Merrill Lynch.

The fortunes of bonds have peaked as investors shift away from risky assets to haven investments, said Michael Hartnett, Bank of America Merrill Lynch's chief investment strategist, in a Friday note. Even though stocks accrued $6.3 billion of additional cash against the $6.1 billion rushing into bonds for the week ending April 14, the longer-term trend remains firmly in favor of fixed-income assets.

In the past four weeks, U.S. bond funds drew around $36 billion in flows compared with the $4.2 billion that moved into stock funds. As investors bid up Treasurys, the 10-year Treasury note yield TMUBMUSD10Y, +0.00% continued to fall, this week hitting 2.233%, the lowest since November. Yields and bond prices move in opposite directions.

Similar dynamics have benefited the municipal bonds sector. Municipal bond funds recorded their third largest inflows ever of $1.6 billion, which "hints at acceptance U.S. tax reform will be far more modest than initially advertised," Hartnett wrote.

The asset class's recent outperformance has enjoyed a bump from doubts surrounding the outlook for tax changes. Municipal bonds attract rich retail investors that benefit from their considerable tax exemptions. But if Trump brings down income-tax rates for the wealthy or waters down the existing tax exemption, the chief appeal of holding municipal bonds will fade.

Elsewhere, European stocks have gained ground as the region's economy shows signs of strength. European equity funds notched $1.8 billion of inflows, the highest they've been in 68 weeks, the analysts said.

Analysts say Trump's touted desire for the dollar to weaken strengthens the case for investing in emerging markets. Emerging market assets, especially bonds denominated in dollars, tend to gain in value when the U.S. currency is weaker as foreigners find it easier to service debt. Funds investing in emerging market debt have recorded 11 straight weeks of inflows.

MarketWatch

by Sunny Oh

Published: Apr 14, 2017 12:13 p.m. ET

Help! Why Did the Tax Lawyers Change the Issue Price Certificate?

New Issue Price Regulations for Municipal Bonds and Newly Released SIFMA and NABL Model Documents

On Jan. 9, 2017, the U.S. Department of the Treasury (Treasury) published in the Federal Register (81 FR 88999) final regulations under Section 148 of the Internal Revenue Code of 1986, as amended (the Code), amending the "issue price" definition (the New Issue Price Regulations). The issue price definition is used to determine yield on a tax-exempt bond issue, which is needed for determining whether the bond issue satisfies the arbitrage rules of Code Section 148. Notice 2010-35 applies this definition to other tax-advantaged bonds, including build America bonds and other qualified tax credit bonds. While the concept of issue price is used for many other purposes in the tax-advantaged bond rules, the Section 148 definition technically applies only for the arbitrage rules. The Issue Price Regulations apply for bonds sold on or after June 7, 2017.

The promulgation of the New Issue Price Regulations is the culmination of a somewhat contentious process that Treasury began in response to Internal Revenue Service (IRS) beliefs that underwriters were abusing how bonds were priced under the existing issue price definition in Treas. Regs. Section 1.148-1 (Existing Definition). Treasury published its first proposal to change the issue price definition in the Federal Register on Sept. 16, 2013 (78 FR 56842). This proposal faced significant public criticism, and was withdrawn and replaced with another proposed definition (the 2015 Proposed Regulations) that was published on June 24, 2015 (80 FR 36301). While the 2015 Proposed Regulations were more favorably received, they still generated significant comments, resulting in Treasury making substantive changes from the 2015 Proposed Regulations in the New Issue Price Regulations.

The New Issue Price Regulations set forth a procedural framework that allows issuers to determine issue price under a range of circumstances depending on the pricing mechanism the issuer employs for its bonds sale. Given this, the National Association of Bond Lawyers (NABL) and the Securities Industry and Financial Markets Association (SIFMA) drafted model documents for underwriters and issuers to use when the New Issue Price Regulations take effect. On March 30, SIFMA released draft riders for its model agreements, and on March 31, NABL released its model certifications. These model documents are designed to address the new regulatory requirements for various types of transactions (i.e., negotiated public offerings, competitively bid public offerings, and private placements) under various circumstances. This GT Alert discusses the regulatory framework and form documents to answer questions about why tax attorneys changed the issue price certificates.

Background on Existing Issue Price Definition

Under Code section 148(h), issue price is generally determined under Code sections 1273 and 1274; under Section 1273(b), the issue price of publicly-offered bonds issued for money is the initial public offering price at which a substantial amount of bonds is sold. The Existing Definition modified this rule for tax-exempt bonds and provided that "substantial amount" meant 10 percent and, importantly for bona-fide public offerings, permitted issuers to determine issue price as of the sale date based on reasonable expectations regarding the initial public offering price. Separate issue prices were established for bonds with different payment and credit terms and "public" did not include "bond houses, brokers, or similar persons or organizations acting in the capacity of underwriters or wholesalers." This one-paragraph definition dates back to 1993 (and the concept of using initial offering price, to 1979).

The IRS began expressing concerns about the Existing Definition around the time the Municipal Securities Rulemaking Board (MSRB) opened its electronic pricing system, EMMA (Electronic Municipal Market Access) in 2008-2009, which produced more transparency in bond pricing. Apparently, finding discrepancies in issue prices reported to the IRS and bond prices reported on EMMA, the IRS expressed concern that some underwriters were buying bonds from the issuer at one price and quickly reselling at a higher price with the financial benefit going to the underwriter. The tax problem, the IRS stated, was these actions understated issue price, likely resulting in an issuer incorrectly computing a higher yield on the bond issue and, thus, a higher permitted investment yield. We note that a recent release by the Securities and Exchange Commissioner supports the IRS concerns.

The 2015 Proposed Regulations

The 2015 Proposed Regulations were designed to reduce the potential for abuses by basing issue price not on reasonable expectations but on the actual price of the first 10 percent of each maturity of bonds sold. Using actual sales created problems, however, when the issuer needed certainty about issue price on the sale date. The underwriter may not have been able to sell 10 percent of each maturity in the bond issue by the sale date. The 2015 Proposed Regulations addressed this problem by allowing an issuer to use the initial offering price for undersold maturities if the underwriter made certain certifications and covenants about not filling orders at prices higher than the initial offering price. The 2015 Proposed Regulations:

- Generally removed the ability to base issue price on reasonable expectations; issue price was the price at which the first 10 percent of each maturity of the bonds was actually sold;
- Provided an alternative method for determining issue price when the issuer did not receive orders for 10 percent each maturity by the sale date. The issuer could treat the initial offering price to the public as the issue price, provided that:

    1. The underwriters filled all public orders at the initial offering price on or before the sale date and no underwriter filled an order at a price higher than the initial public offering price on or before the sale date;
    2. The lead underwriter certified to the issuer the initial offering price, that the above

requirements were met, and that no underwriter would fill an order from the public received after the sale date and before the issue date at a price higher than the initial offering price unless such higher price was the result of a market change, such as a change in interest rates (the hold-the-price-period);
3. The underwriter provided the issuer with supporting documentation for matters covered in the certifications; and
4. The issuer did not know or have reason to know, after exercising due diligence, that the underwriter's certificate was false.

- Defined public as any person other than an "underwriter" (and related entities) and defining "underwriter" as: (i) any person that enters into a contract with the issuer (or lead underwriter) to participate in the initial sale of the bonds to the public, and (ii) any person that, on or before the sale date, directly or indirectly enters into arrangement to sell the bonds with any of the foregoing.

Concerns with the 2015 Proposed Regulations

While the industry was more receptive to the 2015 Proposed Regulations than they had been to the withdrawn proposed regulations, there were still concerns and comments, including:

- Requests for special simple rules for private placements (for example, bankloans) and competitive sales (the commentators pointed out that competitive sales have their own check on issue price through the bidding process and thus, should not create the same concerns as negotiated sales);
- While agreeing a special rule was needed to allow the initial offering price to be used, commentators noted several problems with the proposed alternative rule, including the lead underwriter would have to certify for other underwriter's actions,and problems with the hold-th--price period including the length of the period, the lack of clear industry benchmarks supporting when the price could not be held firm, and the increased cost to the issuer of the hold-the-price rule because underwriters would want to be compensated for their risk in holding the price;
- The desire for issuers to have the flexibility to choose the method used to determine issue price when more than one method applies;
- Requests for a special rule based on a percentage of sales of the aggregate issue (rather than separate percentages for bonds with different payment and credit terms);
- Concerns about the underwriter definition, including concerns about what "arrangement" created an underwriter relationship with the issuer;
- Concerns that the diligence standard required of an issuer relying on an underwriter certification appeared to be higher than the general standard for reasonable expectations under Code section 148;
- The lack of conclusiveness about issue price on the sale date (for example, when the underwriter fails to hold the price firm, as required);
- Problems applying the rules to competitive sales;
- The desire to use the issue price definition for other tax-exempt bond rules.

The New Issue Price Regulations incorporate many of these comments and provide a somewhat simpler approach to determining issue price.

The New Issue Price Regulations

<u>1. Alternatives for Determining Issue Price:</u>

Under the New Issue Price Regulations, an issuer may determine the issue price of a maturity of bonds with the same payment and credit terms under one of the following methods:

- The first price at which a substantial amount (10 percent) of a maturity of the bonds is sold to the public (Actual Sales Price Rule);
- For private placements to a single buyer other than an underwriter (or related party), the price actually paid (the Private Placement Rule), which is an application of the Actual Sales Price Rule;
- For competitive sales, the reasonably expected initial offering prices to the public as of the sale date that was used in formulating the bid, provided the issuer obtains the required certification from the winning bidder and the competitive sale meets the specified definition, which include rules for a three-bid competitive process (the Competitive Sales Rule); or
- For all sales in which clearly defined conditions are agreed to and met, the initial offering price to the public on the sale date (the Initial Offering Price Rule, which replaced the alternative rule in the Proposed Regulations).

If more than one method applies, the issuer may elect on or before the issue date which method it wants to apply.

<u>2. The Initial Offering Price Rule</u>

The Initial Offering Price Rule may be used in a public offering when:

- The underwriters offer the bonds to the public at a specified initial offering price on or before the sale date and the lead underwriter certifies to that effect to the issuer and provides supporting documentation (such as pricing wire), on or before the issue date; and
- Each underwriter agrees in writing that it will neither offer nor sell the bonds to any person at a price in excess of the initial offering price during a period (the new "hold-the-price" period) starting on the sale date and ending on the earlier of 1) the fifth business day after the sale date, or 2) the date on which the underwriter sells a substantial amount (i.e., 10 percent) of the bonds to the public at a price no higher than the initial offering price.

<u>3. Competitive Sale Rule</u>

The Competitive Sale Rule may be used when an issuer sells its bonds under a defined competitive bidding process. That definition requires:

- The issuer disseminates the notice of sale in a manner reasonably designed to reach potential underwriters;
- All bidders have an equal opportunity to bid (the regulations refer to the three-bid requirements for guaranteed investment contracts at Treas. Reg. Section 1.148-5(d)(6)(iii)(A)(6));
- The issuer receives at least three bids from underwriters of municipal bonds with established industry reputations for underwriting new issuances of municipal bonds; and
- The issuer awards the bid to the bidder that submits a firm offer to purchase the bonds at the highest price (or lowest interest cost).

NOTE – When an issuer can use more than one method, it may elect which method it wants to apply up until the issue date. Thus, if an issuer is engaging in a competitive sale and cannot meet the competitive sale definition (e.g., the three-bid requirement), it can still elect to use the Initial Offering Price Rule if the requirements for that rule are met. Of course, the issuer could face problems making this election if the agreements with the underwriter do not contemplate this possibility. As discussed below, SIFMA's and NABL's model certificates and agreements have been designed to address these possibilities as well as to provide issuers with all underwriter certifications required by the regulations.

<u>4. Other Changes that Narrow Underwriter Definition and Change Issuers Due Diligence</u>

The New Issue Price Regulations narrow the definition of underwriter to remove the reference to an “arrangement,” and include only those persons in a contractual relationship with the issuer (or the lead underwriter) to participate in the initial sale of the bonds to the public, and any person that agrees pursuant to a written contract directly or indirectly with one of those persons in contractual relationship with the issuer to participate in the initial sale of the bonds to the public (e.g., under a retail distribution agreement). The New Issue Price Regulations also remove the issuer’s special due diligence requirement, relying instead on a general reasonable expectations requirement.

Model Documents to Help Issuers Effectuate the Issue Price Regulations

The New Issue Price Regulations necessitate changes to various documents between the issuer and the underwriter and among underwriters. To help issuers and underwriters comply with the new regulations, on March 30, SIFMA released draft riders to various model documents, and on March 31, NABL released model issue price certifications.

1. NABL’s Model Issue Price Certifications

NABL has produced five model certificates, each very concise and self-contained. These model certifications support determining issue price using:

- The Actual Price Rule for all maturities;
- The Initial Offering Price Rule for all maturities;
- A combination of the Actual Price Rule for some maturities and the Initial Offering Price Rule for other maturities;
- The Competitive Sale Rule (this certification includes a municipal advisor certificate about the bidding process); and
- The Private Placement Rule.

NABL also provided a consolidated form for negotiated sales that applies whether the issue price of one or more maturities is determined under actual sale prices and/or initial offering prices. This certification is similar to the combination certification except it provides options for when the issue price is determined solely under initial offering prices or actual sale prices.

2. SIFMA Draft Model Riders

SIFMA provided draft riders for the master Agreements Among Underwriters, the master Selling Group Agreement, the Retail Distribution Agreement, the Bond Purchase Agreement, and the Notice of Sale. Of particular note are the draft riders for competitive sales. These riders provide rights and obligations when, despite the issuer’s reasonable efforts, the competitive bidding process is not met (e.g., the issuer does not receive three bids). One alternative under these riders is the underwriter may revoke its bid if the issuer determines to apply the hold-the-price-firm requirement for any maturity, in which case the issuer may award the securities to another bidder under the notice of sale. If the underwriter does not revoke its bid, it will have agreed to meet those requirements (and through riders to agreements with other underwriters in the group or syndicate, for those underwriters to also meet the requirements). The draft riders also include an option that does not permit the underwriter to revoke its bid, and requires the underwriter(s) to meet the hold-the-price requirements.

The riders also help the lead underwriter to make certifications about actions of other underwriters in the syndicate, such as the prices at which the maturities were sold and, if necessary, that the underwriters in the syndicate followed the special-rule requirements.

In the end, the New Issue Price Regulations seem much less controversial than Treasury's interim proposals. Nevertheless, they represent a significant change in the law and will necessitate changes in contractual arrangements between issuers and underwriters. It will be interesting to see how their implementation affects larger practice over time.

by Linda L. D'Onofrio, Vanessa Albert Lowry and Rebecca L. Caldwell-Harrigal

April 11 2017

Greenberg Traurig LLP

After Postelection Rout, Money Moves Back to Muni Bond Funds.

Flows into munis serve as a gauge of investor expectations for tax reforms

Investors' hopes for a quick enactment of the Trump administration's pro-growth policies continue to wane.

Money is rushing back into municipal bonds. Some $1.6 billion moved into mutual and exchange-traded funds that own muni bonds in the week ended April 12, according to Bank of America Merrill Lynch and EPFR Global. It was the third-largest weekly influx on record and the largest in more than four years.

Flows into munis have served since the election as a gauge of investor expectations for tax reforms because interest payments from these bonds, often backed by revenues of states, cities and other services, are typically free from federal taxes.

Investors dumped muni bonds in the wake of November elections that handed Republicans control of the White House and Congress as anticipation for a tax overhaul and spending on highways and other big projects under the Trump administration soared. Lower personal tax rates could lessen the after-tax yield advantages that muni bonds have relative to Treasuries, or other types of taxable bonds. Additionally, a new supply of tax-exempt bonds to finance spending on infrastructure projects could saturate the market, some analysts said. Some $3 billion rushed out of muni bond funds in the week after the U.S. elections, the most in more than three years.

But as uncertainty about the White House's pro-growth policies has increased this year, money has moved back into muni bonds. To Michael Hartnett, chief investment strategist at Bank of America Merrill Lynch, the recent rush into municipal bond funds "hints at acceptance U.S. tax reform will be far more modest than initially advertised."

THE WALL STREET JOURNAL

By CHRIS DIETERICH

Apr 17, 2017 9:06 am ET

Why Bond Investors Should Avoid Big-Box Retailers.

Unless you are a commercial real estate expert, tax assessor or bond geek, you've probably not heard of the retail Dark Store theory. This may sound a bit hair-brained but it's 100% true.

Many big-box retailers—names with which you are familiar such as Target, Lowe's Home Improvement, Wal-Mart, CVS and Home Depot—are appealing their property tax assessments. They are claiming the appraisal should be based on the store's vacant or "dark" value.

It is abundantly clear that Internet sales are crushing the old brick and mortar retailers. This has given the large box retailers that are still standing new incentive to sue for massive property tax reductions. Arbitrations and lawsuits are flying. It's not happening just in little towns or counties. This property tax litigation wave is in Dallas, Houston, Indiana, Madison Wisconsin and Michigan, to name a few.

Litigation costs are soaring for these municipalities, already with scarce resources to fend off the lawsuits. Eventually, they will have to settle for a reduction in their property tax revenue rather than go broke trying to prove they're right.

What does this have to do with bond investing?

Everything! Everything you've grown to believe about why municipal bonds are secure. Think about it. A big-box retailer wins a major property tax reduction suit. That municipality's revenues decline. And in the process it incurred massive litigation expenses that were never budgeted. Any way you cut it, this contributes to revenue deficiencies.

According to a *Bond Buyer* February 21, 2017 article, "Dark-store assessment theory has prevailed in legal battles in Michigan, Indiana and other states, contributing to millions in lost local tax revenue."

I have railed for years that General Obligation bonds no longer take priority in our investment protocol. Nor should they in yours. Revenue bonds that have a dedicated revenue stream beat out GOs. Now, in some areas, property taxes are in decline and may be in permanent jeopardy as the Internet not only disrupts retailers but the areas in which they reside.

So keep it simple and safe. Invest in senior lien airport revenue bonds only from major hubs—no regionals. Invest in water & sewer municipal bonds in economic upscale areas. Invest in personal income tax bonds, toll bridges and turnpikes.

Internet disruption will only amplify. Don't let it affect your munis.

Forbes

Apr 17, 2017

by Marilyn Cohen, Contributor

Marilyn Cohen is founder and CEO of Envision Capital Management, a Los Angeles fixed-income money manager.

California Just Did What Trump and Congress Won't.

The Golden State passes a massive infrastructure plan—paid for by (gasp!) new taxes

Yesterday, the California legislature passed the largest gas tax increase in state history in a move projected to raise $52 billion over 10 years to fix the state's crumbling roads, bridges, and public transit systems. The state already has some of the highest gas taxes in the country. But the falling price of gas, increased fuel efficiency, and the popularity of hybrid and electric vehicles has recently crimped tax revenues, contributing to an estimated $135 billion backlog in road and bridge repairs. The new tax is designed to plug that gap with a 12-cent per gallon increase in the gas tax, as well as new taxes on diesel fuel, a $100 annual fee for electric cars, and higher vehicle registration fees.

California now joins 17 other states—half of them controlled by Republicans—that have enacted gas tax increases since 2013. Yet this approach remains a nonstarter for many Republicans on Capitol Hill and within the Trump administration, which are pushing a national infrastructure plan funded by granting tax credits to private investors.

"The Speaker of the House of Representatives is ideologically opposed to public investment in public infrastructure," says Rep. Peter DeFazio (D-Ore.), the ranking member of the House Transportation and Infrastructure Committee. Like California's plan, DeFazio's Penny For Progress Act would use increased gas taxes to fund federal highway and transit investment. But it has yet to receive a hearing in Congress. "Anything that involves a tax or a user fee, [Speaker Paul Ryan] is against it. So that's the roadblock here."

Passing the California tax was a major victory for 79-year-old Gov. Jerry Brown, who has positioned the Golden State as a bulwark against the right-wing policies and legislative incompetence of the Trump administration. In a mere eight days, the veteran governor went from announcing the bill to assembling the two-thirds supermajority of lawmakers required to enact a tax increase. All of the votes except one came from Democrats, and after the vote Brown slammed Republicans for their opposition. "I appreciate being a Democrat and what the Democrats did," he said. "There is a reason why the members of the other party have been going downhill for so many decades. That's because they are doing nothing. We did something to fix the roads of California."

Brown had crisscrossed the state to win over Democratic moderates from rural and suburban areas who were concerned about the tax's impact on farmers, truckers, and commuters. Taxing drivers is a sensitive issue in sprawling California; in 2003, Democratic Gov. Gray Davis was recalled in part due to a backlash over hiking vehicle registration fees. "Now is the time—don't blow it guys," Brown said at a press conference Tuesday in the Inland Empire district of Democratic state Sen. Richard Roth, one of the last holdouts. When his term ends in 2018, Brown said, "I'm going off to my ranch. You're going to be driving on these damn roads. Fix them now, or we may never get them fixed."

Brown's skill at legislative deal-making contrasts sharply with the progress of Trump's proposed $1 trillion infrastructure deal, which has been tied up in Republican infighting. Speaker Ryan and a faction within the Trump administration led by billionaire leverage buyout specialist-turne--Commerce Secretary Wilbur Ross want almost all of the spending to come from tax credits given to private investors who underwrite infrastructure projects such as toll roads. Ross argues that $137 billion in tax credits over 10 years could spur $1 trillion in infrastructure investment, matching Trump's campaign promise. But some conservative economists say the approach doesn't hold water.

"I don't think that is a model that is going to be viewed as successful or that you can use it for all of the infrastructure needs that the US has," Douglas Holtz-Eakin, president of the center-right American Action Forum think tank, told the Associated Press. It would only work for projects that generate tolls or user fees, Holtz-Eaken said, and even then, the plan might reward investors for projects that would have been built anyway.

In contrast, DeFazio's bill would raise $500 billion in infrastructure investment by issuing bonds that would be paid off by increasing federal gasoline and diesel taxes, which have lost 40 percent of their purchasing power since 1993 due to inflation. According to the Department of Transportation, the United States faces an $926 billion backlog in necessary highway, bridge, and public transit investments. DeFazio says many rank-and-file Republicans in Congress like his proposals but won't put their names on his bill because "House Speaker Paul Ryan thinks that only the private sector should do these projects, even if it's public infrastructure."

Even with the new gas tax, California still needs federal infrastructure investment. "States can't do it on their own," DeFazio says. "California can't raise enough money in and of itself, nor can any other state. And a substantial number of red states have raised their gas taxes in recent years and no one's been recalled and no one's lost their elections. Americans get it."

MOTHER JONES

JOSH HARKINSON

APR. 7, 2017 2:23 PM

IRS Published Volume Cap Limit for Tribal Economic Development Bonds.

The Published Volume Cap Limit for the period commencing April 1, 2017 is $155,597,589.70 (20% of the amount of available volume cap of $777,987,948.52 determined as described in Notice 2012-48).

In Notice 2012-48, 2012-31 I.R.B. 102 (July 30, 2012), the Treasury Department and the IRS provided guidance regarding applications for allocations of the available amount of national bond volume limitation authority (volume cap) for tribal economic development bonds. The Notice provides that, except as otherwise provided in the Notice, for applications filed with the IRS that meet the requirements detailed in the Notice, the IRS will allocate an amount of available volume cap equal to the amount requested in the application on a first-come, first-served basis by order of submission date (as defined in the Notice).

The Notice also provides that no Indian tribal government will receive an allocation of volume cap that would cause the aggregate amount of volume cap allocated to that Indian tribal government pursuant to the Notice (not including certain amounts forfeited as described in the notice) to exceed the Published Volume Cap Limit in effect for the period that includes the submission date. The Published Volume Cap Limit for any period is the greater of (1) 20% of the amount of available volume cap as of the first day of such period (determined as described in the Notice); or (2) $100 million.

For purposes of this limitation, an Indian tribal government includes the Indian tribal government, together with any political subdivisions of the Indian tribal government, and any entities controlled by the Indian tribal government. An application that requests an allocation of volume cap in an amount that would cause the Published Volume Cap Limit in effect on the date of submission to be exceeded will be treated as incomplete until the day the applicant supplements the application in a manner that complies with the requirements of the notice and does not cause such limit to be exceeded.

In accordance with the Notice, the IRS plans to publish updated Published Volume Cap Limits on the IRS website at Information for Tax Exempt Bonds.

TAX - OHIO

Nibco Inc. v. City of Lebanon

United States Court of Appeals, Sixth Circuit - February 27, 2017 - Fed.Appx. - 2017 WL 763908

Due to its employee's clerical error, a municipality mistakenly undercharged a customer for electricity over a period of 65 months and, upon realizing its mistake, demanded that the customer pay the full $1.27 million undercharge.

The parties' relationship was governed not by an individualized contract, but by a municipal ordinance, which had no provision authorizing the municipality to recoup undercharges arising from its own clerical error.

The district court declared the ordinance ambiguous, held that the customer's interpretation would lead to an "absurd result," and ordered the full payment.

The Court of Appeals reversed, finding that the ordinance was not ambiguous under Ohio law and that the customer was correct that the municipality had no authority to recoup this undercharge.

State and Local Governments Press Congress on Tax Reform Priorities.

Groups representing state and local governments on Tuesday urged Congress to preserve two tax preferences in tax reform legislation: the state and local tax deduction and the tax exemption for municipal bonds.

"These essential components of the tax code support vital investments in infrastructure, public safety and education, encourage economic growth and provide states and local governments with financial flexibility to meet our residents' needs," the groups wrote in a letter to lawmakers.

Tax reform is high on the agenda for congressional Republicans and President Trump.

House Republicans are working on legislation based on a blueprint they released last year, which would do away with the state and local tax deduction and does not explicitly mention the municipal bond tax exemption. Trump told a group of mayors in December that he supports the municipal bond tax exemption, and the most recent version of his campaign tax plan capped itemized deductions for high earners.

The state and local groups said that curbing the deductibility of state and local taxes would amount to double taxation. They also said that elimination of the deduction would reduce state and local governments' control over their own tax systems.

"Abolishing federal deductibility could also greatly constrain policy options available to states and local governments facing economic hardships and increased responsibilities due to the devolution of federal programs," they wrote.

The groups also said that the municipal bond tax exemption is important to them because it makes it less expensive for state and local governments to finance infrastructure projects.

"Any tax reform bill should not sacrifice – and drive up the costs – of one of our nation's most effective methods of financing for critical infrastructure," they wrote.

The groups that sent the letter were the Council of State Governments, the National Association of Counties, the National Governors Association, the National Conference of State Legislatures, the National League of Cities, the U.S. Conference of Mayors and the International City/County Management Association.

THE HILL

BY NAOMI JAGODA – 04/04/17 09:18 PM EDT

State Deduction Among Possible Targets If ACA Taxes Axed.

Republicans could try to eliminate the municipal bond interest tax exemption or the state income tax deduction after the failure of the House GOP health care bill undermined their ideal tax reform baseline.

Repealing the Affordable Care Act and its taxes had been Republicans' plan to find the savings for a revenue-neutral overhaul of the tax code, ending billions of dollars in spending on credits and subsidies and lowering the baseline to make tax reform a little easier. Since that effort fell apart, lawmakers may have to turn to alternatives.

"The question hinges on whether lawmakers will now seek to repeal some or all of the ACA taxes," Scott Greenberg, an analyst at the conservative-leaning Tax Foundation in Washington, told Bloomberg BNA.

The taxes include net investment income and medical device taxes.

U.S. House Speaker Paul Ryan (R-Wis.) withdrew the GOP-authored American Health Care Act March 24 when it became clear it lacked the votes to succeed. Ryan and President Donald Trump said they would move on to tax reform, returning to health care later.

"If lawmakers do try to repeal the ACA taxes as part of tax reform, then the budget math will become more difficult, and they may need to look more seriously at unpopular measures to raise additional revenue," Greenberg said.

Alternatively, lawmakers could decide that ACA taxes shouldn't be repealed until the health law itself is. In that case, the budget math for tax reform shouldn't be any harder as a result of the failure of ACA repeal, he added.

Hard to Predict

Charles Henck, an attorney and partner in the Washington office of Ballard Spahr LLP who specializes in tax matters, told Bloomberg BNA that the exemption for municipal bond interest and the state and local tax deduction are probably safe, but that he wouldn't be surprised if they were on the table.

"Predicting what Congress will do" is nearly impossible, he said, adding that municipal bonds, a popular method used by states and local governments to pay for roads, bridges and other public projects, often come up in congressional tax reform talks.

Border Adjustment

Other factors are at play for states. If Congress doesn't pass a border-adjustment tax, that also could put exemptions and deductions that states care about in jeopardy.

"If the border-adjustability piece, which raises close to a trillion dollars, is not completed, and we've heard mixed views on that, then everything is on the table," including the exemption for municipal-bond interest, said Jim Febeo, senior vice president of government relations at Fidelity Investments.

In general, imports would be taxed and exports would be exempt under the border adjustment plan.

Revenue-Neutral Goal

All of these issues are interrelated, even more than they otherwise would be, because Speaker Ryan and Senate Majority Leader Mitch McConnell (R-Ky.) have said they want a revenue-neutral tax plan so that it can pass the Senate with just 50 votes. Vice President Mike Pence could provide the tie-breaking vote, if needed. The picture is in flux, however, and some lawmakers have said they are less committed to revenue neutrality in a tax bill.

Scott Pattison, CEO of the National Governors Association, said his organization is asking congressional leadership to consult with governors on issues that might impact state budgets. The group and individual governors have been very active this term reaching out to House and Senate members, as well as the White House, Pattison said.

He said he has been pleased with the reception governors have received from lawmakers.

Bloomberg BNA

By Che Odom

April 3, 2017

To contact the reporter on this story: Che Odom in Washington at codom@bna.com

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TAX - LOUISIANA

Filmore Parc Apartments II v. Foster

Court of Appeal of Louisiana, Fourth Circuit - February 15, 2017 - So.3d - 2017 WL 605014 - 2016-0568 (La.App. 4 Cir. 2/15/17)

Taxpayer filed petition to recover ad valorem taxes, alleging that it provided public housing and, therefore, was exempt from ad valorem taxation.

The District Court granted summary judgment for parish assessor. Taxpayer appealed.

The Court of Appeal held that remand was required for determination of whether housing units were dedicated to public use.

Remand was required on appeal from trial court's determination that housing units did not constitute public housing for purposes of exemption from ad valorem taxes, where, after determining that the units were privately owned, trial court failed to examine whether the units were dedicated to public use.

Bill Would Ease PAB Restrictions for First-Time Farmers.

WASHINGTON – Rep. David Young, (R)Iowa, has introduced a bipartisan bill that would ease tax-exempt private activity bond restrictions for first-time farmers.

The Facilitating Farmers Access to Resources and Machinery Act, H.R. 1750, has five cosponsors – the other four Iowans in the House, Reps. Dave Loebsack, a Democrat, Rod Blum, a Republican, and Steve King, a Republican, as well as Reps. Collin Peterson, a Democrat from Minnesota and Darin LaHood, a Republican from Illinois.

Roughly 19 states in the nation provide financing programs for first-time farmers, with the largest being Iowa, according to the Council of Development Finance Agencies.

The federal tax code currently permits first-time farmers to use up to $450,000 of tax-exempt private activity bond proceeds for land or depreciable property. The law was amended in 2007 to provide a cost-of-living adjustment that effectively took that amount up to $524,200. The bill makes clear the amount is $524,200 and adjusts it annually for inflation going forward from 2017, rather than 2007.

The current tax code limits to $62,000 the amount of tax-exempt PAB proceeds that can be used to finance the purchase of used farm equipment. The bill would repeal this limit.

Under the law, the proceeds cannot be used for any issue if more than $250,000 of the net proceeds of the issue are used to provide depreciable farm property for which the principal user is or will be the same person or two or more related persons. The bill would raise the amount of net proceeds to $524,200 from $250,000.

Current tax law, in determining whether a farmer is first-time, says he or she must not have previously owned and operated "substantial farmland," defined as land equal in size or larger than 30% of the median size of farms in the same county. The bill would change "median" to "average," which would probably mean an increase in size because very large farms would affect the average more than the median. One Iowa official said that a number of small "hobby farms" have started up in some states and have been skewing the numbers downward.

The bill has been referred to the House Ways and Means Committee.

Six states issued tax-exempt agricultural bonds in 2015, according to an annual survey done by CDFA. Iowa issued $16.9 million, Pennsylvania $8.6 million, Nebraska $700,000, Minnesota $500,000, Maryland $300,000 and South Dakota at least $200,000, according to the survey.

Other states that can issue such bonds are: Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Missouri, Montana, North Dakota, Oklahoma, and Wisconsin, according to CDFA. Maine and New York are implementing programs, it said.

The Bond Buyer

By Lynn Hume

Published April 03 2017, 4:56pm EDT

Goldman: Munis Still Attractive Even If Top Tax Rate Falls.

For investors in a top tax bracket, muni yields on a tax-equivalent basis, are roughly 5% — far more attractive than investment grade corporates (3%), agency mortgage-backed securities (2%), or Treasuries at 1.5%.

But even if tax rates fall, munis are still more attractive than all those options, **Goldman Sachs Asset Management** shows in a new report. Strategists write:

> After adjusting the current highest tax bracket from 43.4% to a hypothetical 33%, municipal bonds remain attractive compared to other investment grade fixed income.

The tax equivalent yield just drops closer to 4%.

Another point in the same report is that investors should "stay dynamic, not just "ladder" their maturities and stick with that. Strategists write:

> Municipal bond investing has often been characterized by a static commitment to buy-and-hold "ladder" portfolios. However, we believe structural shifts in insurance, issuance, inventory, and the variable nature of returns are best addressed by a flexible approach that includes the capacity to shift duration, term structure, and credit quality.

In 2017 throught the end of February, the top performing muni sub-sectors are 30-year high yield munis and 5-year triple Bs. The worst-performing was 10-year triple-As.

The benchmark-tracking **iShares National Muni Bond ETF** (MUB) has a 2.3% current yield and is up 1.2% on a total return basis this year. The index it follows is up 1.68%.

Barron's

By Amey Stone

April 4, 2017, 4:50 P.M. ET

As Tax Season Arrives, 8 Ways You Can Get Taxed on Municipal Bonds.

It's tax season and the April tax filing deadline is less than two weeks away. Death and taxes are both supposed to be unavoidable. Most people do eventually come to the realization that death is the inevitable outcome in the game of life. When it comes to investing, some investors do manage to get tax-free income by investing in municipal bonds. Some muni-bond investments just might not be quite as tax-free as some investors hope.

After featuring the 19 mistakes that the IRS does not want you to make, 24/7 Wall St. wanted to remind investors that the world of muni bonds can still create instances in which investors may have to pay taxes.

What is generally not taxed at the federal level by the Internal Revenue Service is basic coupon payments and income. Other aspects of muni-bond investments may get taxed directly, while other aspects of them may inadvertently trigger other federal taxes. There can also end up being taxes at the state level.

It is always important for investors to understand exactly what it is that they own. It is each investor's responsibility to know whether or not they will get taxed on something they think is tax-free. Relying solely upon a broker to say a muni-bond is tax-free will not get investors out of a tax bill. Sadly, investors also might have to pay taxes even though a tax professional might have thought a muni-bond investment was tax-free.

Here are eight ways that investors can still get stuck with a tax bill on municipal bond investments. Unfortunately, there are likely other ways that investors may find out their tax-free investment wasn't quite as tax-free as they thought.

1. Capital gains taxes.

The most basic formula for bond investing is that yields and bond prices move inversely. As interest rates fall, the face value of a bond (all things being equal) will rise. If you own a 20-year municipal bond with a 4% coupon, and in just a few years the same municipality can issue debt at a 3% coupon, the value of that bond has likely risen considerably. If that investor sells out at a profit before maturity, then a capital gain was just created that can be taxed at the federal level. It may also be taxed as a capital gain at the state tax level, depending on the state in which the investor lives. One way to avoid getting a capital gains tax on a muni-bond is to "hold to maturity."

2. State income taxes in muni-bonds.

State and locally issued tax-free municipal bond income is not taxed at the federal level. Most states do not tax that income if the bond is issued in that same state, but they may have a tax on a muni-bond that is issued from another state. This varies greatly from state to state, and one rule of thumb is that the states with higher taxes tend to tax these out-of-state muni-bonds. Investors that reside in a state without a state income tax get to avoid a state-level tax on municipal bonds.

3. Some muni-bonds aren't even tax-free!

Unfortunately, not every single muni-bond is automatically tax-free on the income portion. A small amount of muni-bonds that have been issued are classified as taxable municipal bonds. Some of these bond issuances by a city, county or other district may be issued to help an underfunded pension system. Others might fall under the Build America Bonds program. These can be taxed at the federal level, even though they might still avoid certain state income taxes. A good rule of thumb is that taxable muni-bonds usually have higher yields than their tax-free counterparts — usually. It is each investor's responsibility to make sure that the high-yield tax-free coupon that sounded too good to be true might actually taxable after all.

4. Taxation on Social Security benefits.

You have paid into Social Security your whole adult life. Unfortunately, the IRS counts income from muni-bonds in each taxpayer's modified adjusted gross income, or MAGI, to determine how much of that Social Security benefit is actually taxable. Charles Schwab shows that if your combined income from Social Security checks and from investments (dividends and bond interest included) is over $34,00 for an individual or $44,000 for a married/joint filing, then about 85% of the taxpayer's Social Security benefit can be taxed at the federal level.

5. Higher Medicare premiums?

If your health insurance is through Medicare, you might not be quite as home-free as you thought. The tax-exempt interest earned from muni-bonds can sometimes increase the amount that you have to pay for Part B or prescription drug coverage. If your MAGI is more than $170,000 under a married or joint filing (half that for individual filers), then you may have to pay more for that Medicare Part B and Medicare prescription drug coverage. The good news about tax-free muni-bond income is not part of that 3.8% Medicare tax under Obamacare/ACA for those in the higher tax brackets.

6. That pesky Alternative Minimum Tax.

The IRS has known for many years that some muni-bond buyers buy these because they do not get taxed on the income. There is a dual tax system that allows the government to still tax people, even if they thought they might escape federal taxes. There is the ordinary income tax that hits most of us, but there is an Alternative Minimum Tax, the AMT, which blocks some of the deductions that are otherwise allowed by the IRS under the tax code for ordinary income. This was first designed to keep a few old wealthy people from avoiding federal taxes, but the AMT has reached more and more people over the years. It turns out that the IRS gets to tax you at the rate that would generate the higher tax bill. And some muni-bonds that fund more business-oriented efforts can also be subject to AMT. What looked like a great 5% yield might really be a 4% yield (or less) by the time AMT gets figured into the equation.

7. Taxing at the de minimis level.

You do not hear the term "OID" that much anymore, which was an Original Issue Discount bond in which the bond may have had a par-value (100) at maturity but was issued at a discounted price. What is far more common today is a bond value that falls and an investor buys the bond at a substantial discount to the 100 par value. This can trigger the de minimis rule in taxes. Investors buying bonds at a discounted price under 0.25% for each year (purchase date to maturity date), those incremental price gains in the discount get taxed as capital gains. If the rate is over 0.25% per year then that discount gets taxed at the investor's income tax rate. PIMCO, Fidelity, Schwab and other sites offer details about the de minimis tax rule, and there are warnings that rising interest rates may fuel more concerns on this front.

8. Bond funds versus individual bonds.

Many investors hate taking individual issue risks, whether they are in stocks, bonds, annuities, CDs or other instruments. That steers some investors into mutual funds or exchange traded funds. Many investors will see a bond yield in a muni-bond fund (open-end or closed-end) and they might believe they are avoiding the multiple catch-all tax buckets. Unfortunately, many bond funds use a bit of leverage to juice up their bond yields and that can create certain taxable events. Some muni-bond funds also buy bonds that are taxable munis or they may own muni-bonds that get hit by the AMT (sports arena bonds, pension fund bonds or airport bonds) and it can translate into the fund investor eventually getting a tax bill. Some muni funds also trade in and out of their bonds long before maturity, which can create capital gains that an investor might not have otherwise considered when investing. The Closed-End Fund Association (CEFA) website can help investors identify individual closed-end funds with AMT and which part of a dividend might have capital gains.

24/7 Wall St.

By Jon C. Ogg April 6, 2017 8:05 am EDT

States, Cities Ask Congress to Save Tax Deduction, Muni Exemption.

A coalition of nonpartisan groups representing state and local governments is asking Congress to preserve a popular income tax deduction, as well as an exemption on interest earned from municipal bonds.

The coalition, known as the Big 7, consists of the National Governors Association, the National Association of Counties, the Council of State Governments, the National League of Cities, the National Conference of State Legislatures, the U.S. Conference of Mayors and the International City/County Management Association.

The Big 7 sent members of Congress a joint letter late April 4, explaining that the deduction for state and local taxes and the exemption of municipal bond interest are "essential tools for states and local governments across the country."

They support "vital investments in infrastructure, public safety and education, encourage economic growth and provide states and local governments with financial flexibility to meet our residents' needs," the letter said.

The deduction and exemption have been around since the federal tax code's inception in 1913, but Republicans are under pressure to make sweeping changes to the tax code while they have control of Congress and the White House.

The exemption and deduction have many defenders in Congress. Early last month, more than 150 lawmakers asked the House Ways and Means Committee leadership in a letter to preserve the municipal bond exemption.

Recurring Target

Controversy over municipal bonds comes up every few years, said Charles Henck, an attorney and partner in the Washington office of Ballard Spahr LLP who specializes in tax matters.

The bonds are the primary method used by states and local governments to finance public projects, including roads, bridges, schools, hospitals and water infrastructure. They could become an important method for financing some of the $1 trillion worth of infrastructure spending advocated by President Donald Trump.

The exemption "reduces the cost of issuing municipal bonds," the Big 7 letter said.

Commerce Secretary Wilbur Ross, prior to joining Trump's cabinet, criticized the exemption, calling municipal bonds an inefficient way of paying for projects. Trump, however, reportedly told a group representing the U.S. Council of Mayors in December that he had no plans to end the exemption.

However, some tax attorneys and policy experts warn that Republicans might end or limit the exemption as a way to provide tax relief elsewhere. Some have said the exemption may be more in peril if Affordable Care Act taxes are targeted or Congress fails to pass a border adjustment business tax, which taxes imports while exempting exports.

Jim Febeo, senior vice president of government relations at Fidelity Investments, told Bloomberg BNA in March that if border adjustability, “which raises close to a trillion dollars,” is not enacted, then “everything is on the table.”

Bloomberg BNA

By Che Odom

April 6, 2017

Text of the letter is at http://src.bna.com/nEO.

Model Issue Price Certificates Released: Squire Patton Boggs

As Alexios wrote about a few weeks ago (here), we are in the middle of a dry spell when it comes to new guidance from the IRS. Thankfully, the National Association of Bond Lawyers (“NABL”) recently released exposure drafts of several model issue price certificates (see here and here). The draft certificates are the product of collaboration between NABL and the Securities Industry and Financial Markets Association (“SIFMA”) and are intended to help implement the final issue price regulations (discussed here). The final regulations take effect on June 7, 2017 and the draft certificates should help facilitate agreement between issuers, financial advisors, underwriters, purchasers, bond counsel, and any other interested parties within a working group. In order to finalize the drafts in advance of the effective date of the final regulations, NABL has requested comments to be submitted no later than Friday, April 14, 2017.

Continue reading.

The Public Finance Tax Blog

By Joel Swearingen on April 7, 2017

Squire Patton Boggs

U.S. Tax Cuts Could Drive Key Buyers Away From Muni-Bond Market.

- ‘Most realistic near-term threat to the market,’ says analyst
- Banks, insurers have swelled holdings of tax-exempt debt

President Donald Trump’s push to cut corporate taxes threatens to undermine a key pillar of the $3.8 trillion municipal-debt market.

Banks and insurance companies emerged as major buyers of U.S. state and local government bonds over the last seven years by adding $415 billion to their holdings, leaving them with their largest share of the market since the late 1980s, according to Federal Reserve Board data.

While the details, timing and scope of Trump's plans haven't taken shape, he's made it a priority to lower corporate tax rates — a step that would weaken demand for municipals, which are a draw because the interest payments are tax exempt.

"The corporate tax cut is probably the most realistic near-term threat to the market," said Mikhail Foux, head of municipal strategy at Barclays Plc.

The rollback could cause the price of municipal bonds to underperform other assets and increase costs to governments that rely on them to finance public works. Such concerns, though, have largely taken a back seat since Trump's election, with state and local debt outperforming Treasuries amid speculation that his tax and spending plans will stoke the economy and further increase interest rates.

The ability of Trump to act swiftly on his agenda, however, been cast into doubt by the failure of his effort to repeal the Affordable Care Act, and his mixed signals on tax reform are vexing Republican hopes of achieving consensus. The House Republican blueprint endorsed by Speaker Paul Ryan envisions a 20 percent "border-adjusted" corporate tax rate that applies to domestic sales and imports, while exempting exports. Trump has floated a corporate tax rate as low as 15 percent, without specifying how — or if — the cost of doing so would be offset by other changes.

So far, no action has been taken in Congress. Representative Kevin Brady of Texas, a Ryan ally who chairs the tax-writing Ways and Means Committee, reiterated on Thursday his commitment to action on a bill this spring, while key Senate Republicans, including Finance Committee Chairman Orrin Hatch, have questioned on the prospects of passing permanent tax changes without Democratic support.

Any cut to the tax rate could sap demand for tax-exempt securities from businesses. While highly rated 10-year municipals would still provide a better after-tax yield than comparable corporate debt if the rate were cut to 25 percent, that wouldn't be the case if it were reduced to 20 percent, according to Matt Caggiano, who helps oversee more than $9 billion of municipals from insurance companies at Deutsche Bank AG.

For banks, their "sweet spot" are bonds due in 15 to 20 years, which otherwise have "no natural buyers" since retail investors prefer shorter maturities, said Foux, the Barclays analyst. Should banks scale back their purchases, that part of the curve would be most affected.

Insurers also gravitate toward longer-dated bonds. Property and casualty insurers have already started selling some securities and letting others mature without replacing them, said Foux and Caggiano.

Some municipal bonds are already trading above comparable Treasuries, despite the tax breaks. During the broad fixed-income selloff that followed Trump's election, the yields on 10-year benchmark tax-exempt debt jumped to as high as 108 percent of Treasuries, indicating that the price of municipals was cheap by comparison. While that has since declined, benchmark municipal bonds maturing in 13 years or more still yield more than U.S. government debt, according to data compiled by Bloomberg.

"Buying 15-year triple-A munis at almost 110 percent of Treasuries seem like a pretty good deal unless you believe taxes are going to zero," said James Iselin, head of the municipal fixed income team in New York at Neuberger Berman, which oversees about $10 billion in munis.

For investors concerned about the uncertainty ahead, seven- to 15-year maturities are attractive, said Deutsche's Caggiano. Iselin also advises steering clear of lower-rated municipals, which may be hit hardest if tax changes spur investors to yank money from mutual funds.

"If there's tax reform that has a real negative consequence on muni buying behavior, the greatest pain is going to be felt on the more duration you have and potentially the lower quality stuff that you have," Iselin said. "This is the time to be a little bit more cautious until we have more clarity."

Bloomberg

by Romy Varghese and Sahil Kapur

April 7, 2017, 6:26 AM PDT

[Learning from Buffalo and Denver: Can Tax Credits Help Restore Polluted Sites?]

Tax credits can help clean up pollution and renew communities, three experts from Buffalo and Denver told Oregon leaders and professionals during a visit to Portland last week – but it's important to think carefully as they're set up.

There are thousands of known or suspected polluted properties – often called "brownfields" – around greater Portland, ranging in size from big industrial sites to corner gas stations and dry cleaners. Leaders, advocates and business are all interested in finding workable tools to get these sites cleaned up and renewed for better uses, including jobs, homes and commercial opportunities.

The Legislature has expanded the brownfield toolbox several times in recent years, making tools like land banking and property tax abatements available to local governments that want to use them to help spur cleanup and development.

But Oregon still does not have a tool that more than a dozen other states are using to help with particularly troublesome brownfields – those where whoever is responsible for the pollution has gone bankrupt, disappeared or abandoned the site.

Last week, three brownfield experts shared how state tax credit programs have helped make cleanup of abandoned brownfields possible in Denver and Buffalo, New York. Their visit culminated with a lunchtime discussion at the Collaborative Life Sciences Building in Portland's South Waterfront, itself one of the region's ongoing brownfield cleanup stories.

They shared tips for how tax credits can help with brownfield cleanup. Here are a few of the highlights.

Continue reading.

Oregon Metro News

By Craig Beebe

March 29, 2017 10:40 a.m.

Scott: IRS Should Go After Developer, Lawyers in DC Bond Deal.

WASHINGTON – The District of Columbia is appealing the Internal Revenue Service's finding that some of its bonds are taxable, at the same time a former IRS official is urging the agency to go after the developer and bond counsel in the transaction.

Mark Scott, the former head of the IRS' tax-exempt bond office who now represents whistleblowers in private practice, said both the developer, LCOR New Oyster School LLC, and the bond counsel should have known the bonds did not comply with the federal tax requirements at the time they were issued.

DC issued the $11 million of PILOT revenue bonds in 1999 as part of a much-lauded public-private partnership to build the James F. Oyster Elementary School. The bonds were used to finance construction of the school and were to be entirely repaid by payments-in-lieu of taxes (PILOTS) to be made by LCOR. The school was built on .79 of an acre.

As part of the deal, D.C. sold LCOR about .88 of an acre next to the school, estimated to be worth roughly $3.7 million, on which the developer constructed a 211-unit luxury residential apartment complex. The district had no financial interest in the apartment building, but exempted LCOR from paying property taxes on the building's land in return for LCOR's making PILOTS to the district for debt service on the bonds.

Scott claims the bonds are actually taxable private activity bonds. He says that D.C., in essence, made an indirect loan to LCOR of about $3.7 million and then allowed the developer to pay for it with the PILOTS, based on a tax-exempt rate. Scott contends the bonds fall under the federal anti-abuse rule for private activity bonds and that, under that rule, the IRS commissioner can reallocate the $3.7 million value of the property as a loan to the developer.

Under tax requirements, bonds are PABs if they involve a private loan that is the lesser of 5% or $5 million. Five percent of $11 million of bonds would be $550,000. The bonds would be taxable because luxury apartment complexes do not fall into one of the qualified categories of projects that can be financed with tax-exempt PABs.

The IRS apparently agreed with Scott and on Feb. 2, it sent D.C. a Proposed Adverse Determination that its bonds were taxable.

On Monday, D.C. filed an appeal of that determination with the IRS' Office of Appeals. It announced the appeal in a notice filed on the Municipal Securities Rulemaking Board's EMMA website.

Scott said he doesn't think D.C. will prevail in the appeal.

"The chance of appeals coming up with a different decision is slim because this has already been reviewed for legal sufficiency by an IRS legal review team," Scott said, based on documents he obtained from the district through a Freedom of Information Act request.

The IRS "should go after the developer here, which is taking a deduction presumably for the full amount of property taxes and part of those taxes are actually payments on the loan that should not be deductible," said Scott. "LCOR duped D.C. and is now making millions from the Oyster P3 bond deal. Shouldn't they pay to resolve the adverse IRS exam?" he asked.

Scott said the IRS should also go after the bond counsel, too, because it never should have given the opinion that the bonds were tax-exempt. "They should go after Hunton & Williams under Section 6700" of the Internal Revenue Code, he said.

Hunton & Williams was listed on the official statement as bond counsel. But Andrew Kintzinger, counsel at the firm, said on Thursday, "The lawyers who handled this issue left Hunton soon after the issue was completed. Since that time, we have not been involved in that matter. We understand that Ed Oswald, as The Bond Buyer has reported, is handling the audit for the District."

Oswald, with Orrick, Herrington & Sutcliffe, is serving as tax controversy and representing the District in the IRS matter. The lawyers involved in the deal left Hunton & Williams and went to Orrick after the deal was completed, sources said.

Section 6700 allows the IRS to go after transaction participants, rather than the taxpayers, for violations of tax law requirements. But this section of the tax law does not appear to have been used in recent years.

The Bond Buyer

By Lynn Hume

March 23, 2017

Shake-Ups and Changes at the Tax-Exempt Bond Branch.

The IRS has announced that it will combine the Tax-Exempt Bonds Branch and the Indian Tribal Government Branch of the IRS Office of Tax Exempt and Government Entities (TE/GE). The new combined entity will be headed by Christie Jacobs, who has long been the Director of the Indian Tribal Government Branch. (Though Ms. Jacobs apparently does not have any experience with tax-exempt bonds, Sunita Lough, the Commissioner of TE/GE, assures us that Ms. Jacobs is a "very smart person" and "very capable.") The Tax-Exempt Bonds Branch has been without a permanent Director since Rebecca Caldwell-Harrigal left the post in December 2016 (Imraan Khakoo served as acting Director in the meantime).

Formerly, the IRS Tax-Exempt Bonds Branch was divided into a Field Operations division (focusing on examinations) and a Compliance and Program Management (CPM) division (which, among other things, oversaw the administration of the VCAP program). As part of the reorganization, CPM will cease to exist, and its operations will be spread between a Compliance, Planning and Classification group that will span the full breadth of TE/GE (which includes some areas other than TEB and the Indian Tribal Government Branch), and a smaller, core "technical support" group that will continue to exist within TEB after it is combined with the Indian Tribal Government group. It is unclear whether this reallocation of resources will allow TEB to focus more attention and energy on examinations.

Continue reading.

By Johnny Hutchinson on April 3, 2017

The Public Finance Tax Blog

Squire Patton Bogs

TAX - OHIO

State ex rel. Delaware Joint Vocational School Dist. Bd. of Edn. v. Testa

Supreme Court of Ohio - March 8, 2017 - N.E.3d - 2017 WL 939001 - 2017 -Ohio- 796

Joint vocational school district board of education sought writ of mandamus to compel State Tax Commissioner to apply reduction factors and calculate tax rates on levy that school district had sought to renew.

The Supreme Court held that Commissioner had no such duty absent valid election result ascertained and announced by proper authority.

There was no valid election result ascertained and announced by proper authority, and thus State Tax Commissioner had no duty to apply reduction factors and calculate tax rates for levy for multicounty joint vocational school district, where board of elections in largest county included in school district failed to send resolution to boards of elections in other counties that were part of district, levy was never voted on in those counties, and board of elections did not certify election results using form prescribed by Secretary of State and failed to list final vote totals of each county in school district.

The Oakland Raiders Sack the Taxpayers.

It's time to stop stadium financiers from exploiting a tax-code loophole that lets them use municipal bonds.

It's official: The Oakland Raiders are moving to Las Vegas. Beginning in 2020 they will play in a shiny new 65,000-seat stadium, outfitted with a retractable roof, that's expected to cost $1.9 billion. If you're an American taxpayer, you'll help fund it—even if you live nowhere near Nevada. About $750 million for the project will be financed through municipal bonds, which are tax exempt. The federal tax break is projected to amount to some $120 million, according to the Brookings Institution.

Congress and President Trump should take the Raiders' bad example as impetus for reform. As they consider a $1 trillion plan to restore America's aging roads, airports, waterways, bridges and rails, lawmakers should ask why so many stadiums are following the Las Vegas model.

The alternative is what Oklahoma City did in 1993. Residents there passed a temporary 1% increase in the sales tax to fund—without incurring debt—a building spree called Metropolitan Area Projects, or MAPS. Over five years, the plan raised $350 million for nine projects, including a stadium now called the Chesapeake Energy Arena, home of basketball's Oklahoma City Thunder.

This pay-as-you-go approach may sound unremarkable, but it is nothing short of exceptional. Most professional sports stadiums these days are financed with municipal bonds. But this kind of debt wasn't intended for lavish football or basketball arenas.

Municipal bonds were supposed to give communities a way to build public projects—hospitals, schools, roads—without having to pay federal taxes on the debt's interest. The point was to ease the financial burden on cities and states that invest in expensive but essential infrastructure.

Over the past 30 years, however, stadium financiers have exploited a loophole in the tax code to qualify professional sports arenas for municipal bonds. Because federal taxes aren't incurred on the interest of this debt, stadiums essentially receive multimillion-dollar subsidies from Washington.

Last year a Brookings study examined 45 stadiums built or seriously renovated since 2000. Thirty-six were funded at least in part with municipal bonds, resulting in forgone federal tax revenue of $3.7 billion. That's enough money to employ 88,000 military staff sergeants or give each state a $74 million block grant. Or it could help reduce the national debt.

To solve this problem, I have introduced the No Tax Subsidies for Stadiums Act, which would prohibit arena financiers from using municipal bonds. Instead of building enormous, lavish sports facilities on the backs of unsuspecting taxpayers across the nation, financiers should ask communities to "buy in" to their vision. If residents want a stadium to be built, they will be willing to pay for it—as they did in Oklahoma City. Otherwise, sports franchises and leagues always have the option to finance construction privately.

Funding an upgrade to America's core infrastructure shouldn't require Congress to use budget gimmicks or run up the national debt. Closing loopholes, such as requiring stadium financiers to pay federal taxes on bond interest, would move lawmakers hundreds of millions of dollars closer to the $1 trillion goal post.

THE WALL STREET JOURNAL

By STEVE RUSSELL

March 29, 2017 7:02 p.m. ET

Mr. Russell, a Republican, represents Oklahoma's Fifth Congressional District.

Jackpot! Las Vegas Raiders Shake Down Tax Payers For $750 Million Stadium.

$750 million.

That's how much Mark Davis and the Las Vegas Raiders want Nevada taxpayers to fork over in order to build a new 65,000-seat, $1.9 billion stadium, part of the deal to woo the team from their longtime home in Oakland.

ESPN's Kevin Seifert crunched the numbers, and determined that taxpayers have given almost $7 billion in tax money to the NFL to help fund the building of stadiums.

So will Nevada see a big economic boost for laying so much money on the table to help keep a bunch of billionaires rich? It's doubtful.

According to a study by the Brookings Institute, there is little evidence that new stadiums provide enough local economic benefit to pay back the hundreds of millions of dollars taxpayers forked over to build them.

"Decades of academic studies consistently find no discernible positive relationship between sports facilities and local economic development, income growth, or job creation," the authors of the study explained in their report. "And local benefits aside, there is clearly no economic justification for federal subsidies for sports stadiums."

And that price tag doesn't include the cost to federal taxpayers thanks to the use of tax-exempt bonds, which teams frequently employ to finance the constriction of their stadiums.

Take the New York Yankees, who finished construction on the new Yankee Stadium in 2009. The final bill was estimated to be $2.5 billion, but of that, nearly $1.7 billion was financed by tax-exempt municipal bonds issued by New York City.

"Because the interest earned on the municipal bonds is exempt from federal taxes, a large amount of tax revenue that would have been collected—had the bonds been issued as taxable—went toward the construction of the stadium," the authors of the report explained.

And we're not even talking about the costs to taxpayers for things like added infrastructure, gifting city-owned land, economic opportunity grants, a waiver from anti-trust laws, subsidies from the U.S. military… the list goes on and on.

All this while the NFL is making more money than they know what to do with. SportsBusiness Daily pegged the NFL's annual revenue at $14 billion annually.

While average people in Nevada will fork over their hard-earned money to help build the new stadium, only wealthy fans, wielding their expense-account, will be able to afford to set foot in the arena.

Where's the revolt? – Rob Tornoe

FORBES

MAR 30, 2017 @ 09:37 PM

[JCT's Flawed Analysis on Munis is Hurting Case for Tax-Exempts.]

WASHINGTON – The analysis used by the Joint Committee on Taxation to show tax-exempts are inefficient is flawed and unfairly hurts municipal bonds, George Friedlander, a managing partner at Court Street Group Research, said at a conference in Florida last week.

Friedlander has been making his case that the JCT is wrong as fears grow that Congress will propose revenue-neutral, comprehensive tax reform to lower individual and corporate tax rates and broaden the tax base, using caps or the elimination of tax-exempt bonds to pay for that.

At The National Municipal Bond Summit in Palm Beach, Fla., sponsored by The Bond Buyer and Bond Dealers of America last week as well as in a recent paper, Friedlander said the JCT estimates that eliminating tax exemption could raise up to $50 billion a year.

But this level of revenues can only be achieved if the elimination of tax exemption is applied retroactively – an outcome that would be devastating to the value of the $3.5 trillion to $3.7 trillion of outstanding bonds and that would cause a breach of promise made to bondholders. If the JCT's methodology is applied to only new bonds, the amount of additional revenues to Treasury would be only $20 billion over a five-year period, assuming current tax rates, he said.

The JCT has viewed tax exemption as an "inefficient subsidy" for years, based on its methodology, which it detailed in a report in July 2012. But Friedlander contends the JCT's methodology is flawed because it uses an "apples and oranges" comparison. It compares triple-A corporate bonds using a Standard and Poor's index to bonds rated A1/A+ in the Bond Buyer index, he said.

"They assume that because muni yields appear to be high as a percentage of corporate bond yields, the marginal tax rate of the marginal buyer of tax-exempt bonds must be low; and thus, everyone on a higher tax bracket must be earning a 'windfall,'" Friedlander said. "However … when muni yields are compared to what muni yields would have to be if these bonds came as taxable bonds, the low marginal tax rates for the marginal buyers of municipals disappears."

In comparing the two indices, Friedlander said, "We also noted that the Bond Buyer Index always yields sharply more than actual bonds in the muni market – at least 100 basis points more back then and at least 50-60 basis points more in the current, lower-yield environment."

In addition, he said, the JCT fails to take into account that the 20year corporates it compares to tax-exempts are essentially noncallable, while almost all munis have 10year calls. The committee also fails to take into account that corporates are typically very large bullet maturities preferred by institutional buyers of taxable bonds and have better disclosure, compared to munis, which often have smaller, serial maturities and less disclosure.

Taking all of these factors into account, "munis priced in comparison with what they would have to yield in the taxable market puts the marginal rate of the marginal buyer of munis at around 30% and eliminates a very large proportion of the purported windfall," Friedlander said.

The JCT and other critics of munis assume that if tax-exempts didn't exist, investors would buy fully taxable bonds and pay taxes at their marginal rates, which is "the underpinning of their entire analysis," Friedlander said. But this is "a highly flawed assumption" because many investors would buy equities instead or would stay in cash or near-cash investments, he said.

"And the cost to state and local governments of having to fund in the fully taxable market would be sharply higher than under the JCT analysis," Friedlander said.

"The bottom line is that the efficiency of the tax-exemption, when measured properly, is actually quite high," he said.

He also contends that the tax-exempt bond market provides a kind of "sort and selection mechanism" for infrastructure projects. "There just isn't any easy way to measure the 'right amount' of support for infrastructure projects, unless the recipient of the support is committing to pay for a portion of the project in the form of bond debt service," he said.

The Bond Buyer

By Lynn Hume

March 20, 2017

Bills Seek Infrastructure Funding Through Tax Reform.

DALLAS – More than $170 billion of revenue would be provided for infrastructure from the repatriation of $2 trillion of accumulated U.S. corporate overseas earnings through tax reform under a pair of bills filed Wednesday by a bipartisan trio of lawmakers.

The legislation would bridge the partisan gap in Congress over how to fund future infrastructure spending, said Rep. John K. Delaney, D-Md., the chief sponsor of both bills.

“Our broken tax code and our crumbling infrastructure are two problems that are dragging down productivity and economic growth,” Delaney said of the measures, which mirror legislation he sponsored in 2015.

The legislation was filed as a new study by Moody’s Investors Service forecasts a slow ramp up to increased federal infrastructure spending due to a lack of bipartisan agreement over funding mechanisms and how to implement a massive infrastructure program.

Moody’s expects additional infrastructure spending to be modest in 2017 and 2018 despite calls by President Trump and Senate Democrats for $1 trillion over 10 years of new funding in separate proposals, said AJ Sabatelle, a managing director at Moody’s and the lead author of the report.

“The pace of new project launches will be slow,” the report said. “Infrastructure spending will increase in the coming years, but … the rate of increase will more likely be in the low- to mid-single digits in the near term.”

The public-private partnerships, envisioned as the heavy lifter in the Trump plan, may not be applicable to projects without a revenue stream, while the direct public investments proposed in the Democrats’ plan would likely require higher levels of state and local borrowing, as well as increased taxes to support the debt, according to Sabatelle.

“Either proposal would amount to a $100 billion annual increase in spending on infrastructure,” Sabatelle said. “But finding a reasonable balance between direct government spending and private investment will take time.”

The Partnership to Build America Act sponsored by Delaney and Rep. Rodney Davis, R-Ill., would create a $50 billion infrastructure bank to provide financing for transportation, water, and education projects by states and local governments.

The American Infrastructure Fund would be financed by the proceeds from the purchase by corporations of $50 billion of 50-year bonds. The corporations would be allowed to repatriate an undetermined amount of overseas earnings with no federal tax liability for every $1 invested in the 1% bonds.

Those proceeds could be leveraged to provide $750 billion of low-interest loans and loan guarantees, Delaney said.

The fixed-rate infrastructure bonds would not be guaranteed by the federal government and are not intended as a good investment on their own, he said.

At least 35% of the projects financed by the infrastructure bank must have a minimum of 10% of their funding from private debt or equity.

The Infrastructure Act 2.0 introduced by Delaney and Rep. Ted Yoho, R-Fla., would provide six years of solvency to the Highway Trust Fund and establish a bipartisan House and Senate joint commission to develop a permanent solution that would bring additional revenues into the fund.

The bill would subject existing overseas corporate earnings by U.S. multinational corporations to a mandatory, one-time tax of 8.75% instead of the current 35% rate and sets an 18-month deadline for comprehensive tax reform.

The reforms would bring in $120 billion for the HTF, enough to cover the expected funding gap for six years and also provide $25 million for a pilot program of regional infrastructure accelerators, Yoho said.

If reforms were not enacted by the deadline, the corporate tax rate would be set at 12.25% for overseas profits for corporations not paying foreign income taxes and at 2% if they were paying a 25% tax rate.

The Bond Buyer

By Jim Watts

March 22, 2017

[Hawkins Advisory: (2017 Average Area and Nationwide Purchase Price Safe Harbor Limits)]

This issue of the Hawkins Advisory provides information of specific interest to single-family housing bond issuers regarding Average Area and Nationwide Purchase Price Safe Harbor Limits for 2017 (Rev. Proc. 2017-27).

Read the Advisory.

3/21/2017

[Orrick: IRS Revenue Procedure 2017-13 Safe Harbor Requirements for Services Contracts.]

IRS Revenue Procedure 2017-13 (the "***Revenue Procedure***") sets forth, and significantly liberalizes, the requirements for determining whether a contract (a "***Services Contract***") with a service provider or manager (a "***Service Provider***") can cause the Service Provider to be treated as a private business user of a facility financed with tax-exempt bonds (a "***Project***"). This guidance provides a safe harbor relating to government purpose and 501(c)(3) bonds. Satisfying the requirements means the Services Contract will not cause private business use ("***Private Use***").

SAFE HARBOR REQUIREMENTS
Reasonable Fee: The fee paid to the Service Provider must be reasonable. Fees determined through a competitive process or fees within a normal range for such services will be reasonable.

No Net Profits: Compensation to the Service Provider cannot be based, even in part, on the net profits of the Project. This includes directly sharing net profits, as well as designing incentives that are based on a combination of gross revenues and expenses. Incentive compensation based on performance metrics like quality of services or productivity is not necessarily treated as a net profits incentive. In practice, payments under most Services Contracts are split between (i) reimbursement for actual Service Provider costs, subject to the approval of annual budgets by the Project owner, and (ii) a separate management fee. The cost reimbursement payments generally are ignored in determining if there is a net profits interest. The IRS strongly prefers this split payment approach, as opposed to an “all-in” compensation structure in which the Service Provider is paid a comprehensive fee and is entirely responsible for paying all operating costs out of that fee. Such all-in contracts raise net profits concerns and may also conflict with the Control and Risk of Loss requirements described below. Finally, even in the context of all-in contracts, certain types of management fees defined in the Revenue Procedure (one or more of a capitation fee, a periodic fixed fee, a per-unit fee, or a fee based on certain performance metrics) are not considered to be net profits arrangements. Although subordinated management fees can raise net profits concerns, this feature is discussed in Net Losses, immediately below.

No Net Losses: Very similar to the net profits prohibition, compensation to the Service Provider cannot be based, even in part, on the net losses of the Project. The most common example of a net losses problem is if the fee paid to the Service Provider is subordinate to the payment of debt service and if the fee would never be paid if there are insufficient funds at the time the fee is due. Subject primarily to some timing limitations, a solution can be for any unpaid fees to accrue with interest. A Service Provider whose compensation is reduced by a stated dollar amount for failure to keep the managed property’s expenses below a specified target will not be treated as bearing a share of net losses as a result of this reduction. Like the net profits prohibition, all-in contracts raise significant concerns, the reimbursement of costs generally is ignored, and management fees that are capitation fees, periodic fixed fees, and per-unit fees are not considered to be net losses arrangements, even in all-in Services Contracts.

Term Limitation: The term of the Services Contract may not be longer than 30 years, or 80% of the remaining useful life of the Project if shorter. The useful life of a newly constructed Project that consists primarily of building construction or improvements should support a 30-year Services Contract.

Control: The Project owner must exercise control over the Project. This control requirement is met if the Project owner approves (i) the annual operating budget, (ii) any capital expenditures, (iii) the disposition of property, (iv) the rates charged for the use of the Project, and (v) the general nature and type of use of the Project. For Services Contracts with cost reimbursement plus a management fee, these control requirements should be satisfied under typical practices.

Risk of Loss: The Service Provider cannot be responsible for replacing the Project if there is a catastrophic loss. The Service Provider can, however, be responsible for obtaining adequate insurance, so long as the cost of the insurance is a cost reimbursement item.

Service Provider Tax Position: The Services Contract must state that the Service Provider will not claim any depreciation or amortization deduction, investment tax credit, or deduction for any payment as rent with respect to the Project.

Limitation on Rights: Finally, the Service Provider must not have a role or relationship with the Project owner, such as the CEO of the Service Provider being in a similar position with the Project owner, that as a practical matter would limit the Project owner’s rights to take action under the Services Contract.

PROFESSIONAL SERVICES CONTRACTS

The requirements described above apply in a specialized manner when the contract relates to services provided solely by individuals or groups of professionals, for example physician contracts. The control requirements relating to budgeting, capital expenditures and disposition are not meaningful in that context. Control over rates charged can be meaningful, but the Revenue Procedure allows for the rates in this context to simply be "reasonable and customary as specifically determined by, or negotiated with, an independent third party (such as a medical insurance company)." Similarly, it is difficult for these contracts to be anything other than all-in contracts, because the primary expense is simply the compensation to the professional.

EXCLUDED INCIDENTAL SERVICES
An important point that often is ignored is that contracts for ancillary or incidental services are not considered to be Services Contracts and therefore do not cause the Service Provider to be a private business user even if the term of the contract is longer than 30 years.

Incidental Services. Contracts for services that are solely incidental to the primary governmental function of the financed facility are not considered to be Services Contracts. Excluded incidental services include routine, hard asset services, such as repair and maintenance, that do not give the Service Provider control over the business represented by the Project (such as setting prices) or compensate the Service Provider directly based on the economic performance of the Project. For example, a 40-year, all-in contract to maintain and repair a Project will not result in Private Use, if the compensation to the Service Provider is not based on Project net profits and the Service Provider is not economically responsible for replacing components of the Project. Similarly, an asset manager retained by the Project owner purely to oversee the Service Provider is an excluded incidental contract.

Cost Reimbursement Contracts. Even if the contract is not for incidental services, if the only compensation payable to the Service Provider is the reimbursement of the Service Provider for actual and direct expenses paid by the Service Provider to unrelated parties, the contract is not considered to be a Services Contract. If the Project consists predominantly of electric generating facilities, electric transmission facilities or other public utility property, the contract also is not considered to be a Services Contract if the only compensation is (i) the reimbursement of actual and direct expenses of the Service Provider, and (ii) reasonable administrative overhead expenses of the Service Provider.

CONCLUSION
The Revenue Procedure replaces prior guidance, most notably Revenue Procedure 97-13, and provides a new approach. The old formulaic approach to balancing the contract term and the fixed portion of the compensation is entirely replaced. The main takeaways from the discussion above are (i) except in the context of certain contracts for professional services (e.g., physician contracts), Services Contracts generally should be structured so that the payments to the Service Provider are split between reimbursement for actual Service Provider costs, subject to an annual budgeting process, and a separate management fee that can include incentives and (ii) most of the tax analysis, even for very long term contracts, will focus on the net profits/losses limitation. Also, when contemplating a repair and maintenance services arrangement for a Project, the first question should be whether the contract is solely for excluded incidental services.

Orrick Public Finance Alert | 03.23.17

by Charles C. Cardall

Partner, Tax

The Regulatory Freeze: Where do we stand now?

The IRS tax exempt bond group ("TEB") continues to work on completing its 2016-'17 Guidance Plan, as Bob Eidnier wrote last week. However, it might be some time before we see that guidance because of executive branch actions intended to reduce regulations and regulatory costs. The restrictions on new guidance are very broad, and appear to apply to more than just regulations. Tax Notes reported on February 14 that it will be "a while" before new guidance is released by the IRS. For those of you who have lost track, see below for links to and a summary of President Trump's executive orders and related executive branch guidance concerning the regulatory freeze and regulatory reform.

Continue reading.

The Public Finance Tax Blog

By Alexios Hadji on March 24, 2017

Squire Patton Boggs

TAX - CALIFORNIA

California State University, Fresno Association, Inc. v. County of Fresno

Court of Appeal, Fifth District, California - March 2, 2017 - Cal.Rptr.3d - 2017 WL 818475 - 17 Cal. Daily Op. Serv. 2010

A nonprofit public benefit corporation that operated state university's on-campus arena brought a property tax refund action against county.

The Superior Court entered judgment for nonprofit corporation after bench trial. County appealed.

The Court of Appeal held that:

- Filing period for refund claim began to run when county assessment appeals board mailed written notice of determination to corporation;
- Refund claim was subject to a one-year filing period; and
- Equitable tolling did not apply to the one-year filing period.

The one-year filing period for taxpayer's property tax refund claim against county began to run when the county assessment appeals board made a final determination on the assessment reduction application and mailed a written notice of the determination to the taxpayer, not on the later date when taxpayer paid the tax.

Taxpayer's property tax refund claim against county was subject to the one-year filing period for a claim after "the county assessment appeals board makes a final determination on the application for reduction in assessment or on the application for equalization of an escape assessment of the property, and mails a written notice of its determination to the applicant and the notice does not advise the applicant to file a claim for refund," where board mailed a notice to taxpayer that did not advise taxpayer to file a claim for refund, taxpayer paid the outstanding taxes and penalties, and then taxpayer filed a refund claim.

Equitable tolling does not apply to the statutory one-year filing period for a refund claim after "the county assessment appeals board makes a final determination on the application for reduction in assessment or on the application for equalization of an escape assessment of the property, and mails a written notice of its determination to the applicant and the notice does not advise the applicant to file a claim for refund," since the statute is not a statute of limitations.

Changes in the Audit Process for Tax Advantaged Bonds Related to IRS Division Reorganization.

Last week at the National Association of Municipal Bond Lawyer's Tax and Securities Law Institute, the IRS Commissioner for the Office of Tax Exempt and Government Entities (TE/GE) announced changes to TE/GE's operations and structure. These changes will consolidate and standardize certain operations. In particular:

Effective May 1, 2017, TE/GE will implement the following changes:

- TE/GE will consolidate into a new Compliance, Planning and Classification Office (CP&C), discussed below,certain work being done in each of the TE/GE functions:

– Exempt Organizations (EO)
– Employee Plans (EP)
– Federal State and Local Government (FSLG)
– Indian Tribal Government (ITG)
– Tax Exempt Bonds (TEB)

- TE/GE will move FSLG, which largely deals with employment tax issues, to EO.
- TE/GE will restructure TEB and consolidate it with ITG under a new Director TEB/ITG, discussed below.
- Effective April 1, 2017, TE/GE will standardize the information document request (IDR) and related enforcement process for TE/GE IDRs, including IDRs for tax-advantaged bonds.

This Alert discusses these changes and is relevant to taxpayers, including issuers and borrowers, and their attorneys working with TEB, as well as attorneys who work with TE/GE's EO, EP, FSLG, and ITG Offices.

Compliance, Planning and Classification Office

CP&C is a new office that will be responsible for case selection and closed case quality review for all the TE/GE functions. For case selection, CP&C will conduct research and review data, identify issues with the help of technical experts from each of the functions, and select and assign cases to the functions. CP&C will be led by Steve Martin, who currently works on case classification and delivery in the Large Business and International (LB&I), transfer pricing office.

TEB Restructuring and Consolidation with ITG

TE/GE is consolidating TEB and ITG under a Director TEB/ITG, who will initially be Christie Jacobs, the current Director ITG. This Director will have the ITG and TEB examination functions to which CP&C will assign cases and a technical function. The TEB examination work will remain largely unchanged, but that office will be reduced from five to three workgroups. TEB's Compliance and Program Management Office will be eliminated and the operations of that office not consolidated within CP&C will be moved to the technical function that will be responsible for TEB's Voluntary

Closing Agreement Program (VCAP), direct-pay bond allocations, and Knowledge Management (K-Net) which is a formal structure created in 2015 to consolidate technical expertise and facilitate knowledge transfer. The Commissioner did not specify which function would perform education and outreach activities currently done by CPM and ITG.

IDR Process

Beginning April 1, TE/GE will implement new standard procedures and best practices for IDRs. This new process largely incorporates LB&I's IDR practice. In short, it reflects an effort to make the IDR process more collaborative and to provide standard IDR procedures.

Under the new process:

1. An agent will mail to the taxpayer the initial contact letter, which the procedures suggest should include the initial IDR.
2. After 10 business days, the agent will contact the taxpayer to discuss the issues being examined and the items being requested in the IDR.
3. The agent may refine the IDR based on that conversation and will attempt to arrive at a mutually agreed upon response date with the taxpayer; the Commissioner made clear that a request for significant time to obtain an attorney would likely not be granted. If a date cannot be agreed upon, the agent is to set a reasonable date.
4. The agent will review the response and notify the taxpayer whether the response is complete or whether additional information is needed.
5. If additional information is needed, the additional material will be also be subject to due dates, some of which are mandated in the procedures and may be as short as 15 business days.
6. If the request is not fully and timely met after a second extension to submit the additional information, the agent is instructed to begin the enforcement process, which could lead to a pre-summons and summons to supply the information.

by Rebecca L. Caldwell-Harrigal

March 15 2017

Greenberg Traurig LLP

[Introduction To Tax For Public Finance – Orrick Tax Presentation.]

Topics covered:

- Introduction to Tax for Public Finance
- Tax-Exemption for State and Local Bonds
- Inefficiency in Tax-Exempt Subsidy
- Types of Tax-Exempt Bonds
- Overview of Federal Income Tax Restrictions
- Use of Proceeds and Financed Project Private Activity Restrictions
- Privately Used Projects
- Arbitrage and Rebate
- Other Federal Income Tax Restrictions
- Tax Definitions—New Money vs. Refunding
- Tax Definitions—Issuer and "Issue"

Read Article.

Last Updated: March 9 2017

Article by John Stanley

Orrick

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

TAX - TEXAS

Valero Refining–Texas, L.P. v. Galveston Central Appraisal District

Supreme Court of Texas - February 24, 2017 - S.W.3d - 2017 WL 727276

Taxpayer, which owned oil refinery, filed petition for review of order by county appraisal review board regarding appraisal of refinery for property tax purposes, asserting that appraisal district had appraised refinery unequally as compared to other oil refineries.

Following jury trial, the District Court rendered judgment on jury verdict in favor of taxpayer. Appraisal district appealed. The Court of Appeals reversed and remanded. Appraisal district and taxpayer filed petitions for review, which were granted.

The Supreme Court of Texas held that:

- Trial court had jurisdiction over taxpayer's appeal of valuations from only certain tax accounts, as components of refinery;
- Some evidence supported jury's finding that medium conversion refinery was comparable to taxpayer's heavy conversion refinery;
- Component accounts of taxpayer's refinery could be compared to component accounts of comparable refineries without consideration of refineries' total valuation;
- Value of pollution control equipment was not required to be considered in determining whether taxpayers' processing operations had been taxed unequally; and
- Refineries' values could be adjusted by calculating equivalent distillation capacity.

Trial court had jurisdiction over taxpayer's appeal from valuations by county appraisal review board of only three tax accounts arising from appraisal district's division of taxpayer's oil refinery and its improvements into separate accounts and individual appraisal of those accounts, though district asserted taxpayer was required to challenge valuation of whole tract. Taxpayer filed separate protests of some, but not all, of account appraisals, board decided protests by separate orders for each account, taxpayer timely appealed those orders, taxpayer's petition sufficiently identified property covered by tax accounts, and nothing in provisions governing appeals required taxpayer to challenge all appraisal accounts used to appraise its property.

Some evidence supported jury's finding that medium conversion oil refinery was comparable to taxpayer's heavy conversion refinery located in same county, such that medium conversion refinery could be considered as comparable property in determining whether taxpayer's refinery was appraised unequally based on its appraised value exceeding the median appraised value of medium conversion refinery and other heavy conversion refinery, though medium conversion refinery had much less capacity and complexity. Taxpayer presented evidence that all three refineries had same business functions of processing crude oil, similar storage facilities, equal access to utilities, and on-site support facilities, and appraisal district used similar accounts and appraisal methods for all three refineries.

Component accounts created by appraisal district for determining value of components of taxpayer's refinery could be compared to component accounts of other comparable oil refineries, in determining whether processing operations components of taxpayer's refinery had been taxed unequally as compared to other oil refineries, without consideration of refineries' total valuation, though district asserted value of property in one tax account was affected by value of property in other accounts. Property in each account could be viewed in isolation, as district used separate accounts in appraising refineries, and property owner was entitled to have notice of what was in each account to ensure property was not double-taxed.

Value of pollution control equipment, as component of taxpayer's oil refinery, was not required to be considered in determining whether processing operations components of taxpayer's refinery had been taxed unequally as compared to other oil refineries, though appraisal district asserted that equipment was required to be included in comparing values of taxpayer's processing units and tanks, as such equipment was integral part of refinery, without which refinery could not operate and that excluding valuation substantially impacted equalized values calculations in taxpayer's favor. Since equipment could be appraised separately, then other account appraisals could be compared without regard to the pollution control equipment appraisals, and benefit to taxpayer's position was irrelevant.

Oil refineries' values could be adjusted by calculating equivalent distillation capacity, in determining whether processing operations components of taxpayer's refinery had been taxed unequally as compared to other oil refineries, though appraisal district asserted equivalent distillation capacity metric only measured what refinery process units took in and yielded and did not apply to buildings or tanks, where even appraisal district's experts agreed that equivalent distillation capacity was a useful factor in adjusting values for comparison.

TAX - COLORADO

City of Aurora v. Scott

Colorado Court of Appeals, Div. I - February 23, 2017 - P.3d - 2017 WL 710507 - 2017 COA 24

City and city's urban renewal authority brought action against county assessor, seeking an order for assessor to delay allocation of tax increment financing (TIF) following city's adoption of urban renewal plan under the Urban Renewal Law (URL).

The District Court entered judgment in favor of assessor. City and authority appealed.

The Court of Appeals held that:

- Arbitration was not the exclusive remedy for assessor's challenge to city's plan;
- Assessor was neither party to, nor in privity with a party to, public hearings in which city's urban renewal plan was approved, and therefore claim preclusion did not bar assessor's subsequent challenge to plan's timeline for allocation of TIF; and
- Provision of URL stating that TIF cannot "exceed [25] years after the effective date of adoption of [a TIF] provision" does not allow city, in adopting an urban renewal plan, to choose any date as the

effective date of adoption regardless of when the provision was actually approved.

County assessor's challenge to city's urban renewal plan's timeline for tax increment financing (TIF) under the Urban Renewal Law (URL) was not related to compliance with statutory TIF timeline, and therefore arbitration was not exclusive remedy for assessor's challenge, where challenge was unrelated to any requirement specifically enumerated in subsection of URL as subject to challenge through arbitration but rather was based on interpretation of different TIF subsection of URL.

County assessor was neither party to, nor in privity with a party to, public hearings in which city's urban renewal plan was approved, and therefore claim preclusion did not bar assessor's subsequent challenge to plan's timeline for allocation of tax increment financing (TIF), even if assessor had notice of public hearings, whether neither assessor nor county had any role in decision to adopt or reject plan.

Provision of Urban Renewal Law (URL) stating that tax increment financing (TIF) cannot "exceed [25] years after the effective date of adoption of [a TIF] provision" does not allow city, in adopting an urban renewal plan, to choose any date as the effective date of adoption regardless of when the provision was actually approved.

Even if home rule city's adoption of urban renewal plan was a legislative act, adoption of plan was not within scope of city's powers; urban renewal was matter of mixed state and local concern, and plan conflicted with state statute's timeline for tax increment financing (TIF).

Report from TSLI – What Can We Expect in the Near Term from the IRS?

Last week I attended the NABL Tax and Securities Law Institute, which always provides valuable insights from representatives of Treasury and the IRS. Vicky Tsilas, Chief, Branch 5, Financial Institutions and Products, was a panelist for Tax Hot Topics and gave a very interesting status report on the 2016-2017 Guidance Plan (first reported on here by Mike Cullers), which was issued on August 15, 2016. In addition to noting those projects that have been completed, she also discussed the remaining items, indicating her priorities and possibly the order in which they will be completed, recognizing of course that TEB does not have control over the timing of the necessary approvals within Treasury. (I'd also like to thank Ms. Tsilas for our subsequent discussion clarifying several points for this report.)

Continue reading.

The Public Finance Tax Blog

By Bob Eidnier on March 17, 2017

Squire Patton Boggs

CO Ruling Says Tax-Increment Financing Must Begin Immediately.

Tax-increment financing is something that just can't wait.

The Colorado Court of Appeals has affirmed a court ruling from one year ago that favored the

Arapahoe County Assessor's Office and its strict interpretation of the legally accepted timeline for when such approved financing plans should begin in a city's urban-renewal areas.

In 2015, then-Arapahoe County Assessor Corbin Sakdol was sued by the City of Aurora and the Aurora Urban Renewal Authority in a challenge to his interpretation of a state law on the start date of such plans.

Tax-increment financing is a tool municipal governments can use to finance the redevelopment of so-designated "blighted" property by diverting property taxes that would have been collected by counties, school districts and special districts for up to 25 years to help pay off certain costs associated with urban renewal.

In 2014, the City of Aurora approved two urban-renewal plans, each with its own tax-increment provisions, including a delayed start date of up to three years in some areas.

Sakdol, who retired in January, determined the 25-year clock was to begin as soon as the plans were adopted. Aurora filed an unsuccessful lawsuit in district court disputing that contention.

"Nothing in the plain language of [state statute] permits an urban-renewal plan's [tax-increment financing] provision to have a start date that is different than the effective date of approval of the plan itself," stated Sakdol's legal argument as now affirmed by both courts.

Assessor Marc Scott, who was appointed to the position upon term-limited Sakdol's voluntary retirement two months ago, was gratified by the Court of Appeals' decision.

"We are pleased that once again the courts have reaffirmed our interpretation of Colorado law as it pertains to urban -renewal authorities and [tax-increment financing]," Scott said. "We look forward to working with our municipalities and urban-renewal authorities on future projects that will benefit the citizens of Arapahoe County."

Aurora could appeal the case to the state Supreme Court.

THE VILLAGER

BY PETER JONES

March 15, 2017

Bond Documents Being Revised for Issue Price Rules.

WASHINGTON – Bond lawyer and dealer groups are drafting revisions to bond documents for market participants to begin using by June 7 when the Internal Revenue Service's issue price rules take effect.

The tax committee of the National Association of Bond Lawyers is drafting a model issue price certificate, Perry Israel, a lawyer with his own firm, told NABL members meeting here Thursday at the group's 15th annual Tax and Securities Law Institute. He is co-chairing TSLI.

Issue price certificates, which underwriters provide issuers, have been used for years and historically have been attached to the tax certificates at transaction closings. But in recent years, as sensitivity has grown over the issue price of bonds, lawyers and underwriters tried to add various sentences and clauses to the certificates.

NABL's tax committee is drafting model language that it hopes everyone will use. Israel said the model certificate has been circulated to NABL's board of directors, as well as SIFMA and the tax-exempt financing committee of the American Bar Association. It could be released as soon as the end of next week and, if not then, certainly later this month, he said.

SIFMA is working on revisions to its agreement among underwriters, the bond purchase agreement, and the notice of sale.

Leslie Norwood, SIFMA's co-manager of municipal securities who was at the NABL meeting, said the dealer group is revising the documents "in an effort to make sure that all of the parties are clear about the issue price rules and their requirements and responsibilities" and that everyone is "on the same page."

Some lawyers at TSLI talked about adding language about issue price to the notice of sale, so that an underwriter bidding on the bonds agrees to certify as to the issue price.

Issue price is important because it is used to help determine the yield on bonds and whether an issuer is complying with arbitrage rebate or yield restriction requirements. It is also used to determine whether the subsidy payments for direct-pay bonds such as Build America Bonds are appropriate.

Under existing rules that have been in place for years, the issue price of each maturity of bonds that is publicly offered is generally the first price at which a substantial amount, defined as 10%, is reasonably expected to be sold to the public.

But tax regulators became concerned that some dealers were "flipping" bonds — selling them to another dealer or institutional investor who then sold them again almost simultaneously — with the prices continually rising before the bonds were eventually sold to retail investors. The regulators worried that the "reasonably expected" issue prices for bonds were not representative of the prices at which the bonds were actually sold.

To address their concerns, the regulators adopted a general rule under which the issue price is the price at which the first 10% of a maturity of bonds is actually sold to the public. If 10% of a maturity is not sold, a special rule can be used under which the issue price is the initial offering price (IOP) as long as the underwriters hold at the IOP for five business days after the sale date.

The five-day "hold-the-offering-price" provision is an anti-flipping or an anti-abuse provision. The lead underwriter must certify the IOP to the issuer, as well as provide documentation, such as the pricing wire. Each underwriter in a syndicate must agree in writing that it will not offer or sell the bonds at a price higher than the IOP for five business days after the sale date.

Under a special rule for competitive sales, an issuer may treat the reasonably expected IOP of the bonds to be sold to the public as the issue price if the issuer obtains a certification from the winning underwriter bidder as to the reasonably expected IOP upon which it based its bid. To achieve a competitive sale: the issuer must disseminate the notice of sale in a manner reasonably designed to reach potential underwriters; all bidders must have an equal opportunity to bid; the issuer must receive bids from at least three underwriters "who have established industry reputations for underwriting new issuances of municipal bonds;" and the issuer must award the bonds to the bidder who offers the highest price or lower interest cost.

Issuers have the option of using any of these rules up until the closing (issue) date for their bond transactions.

The Bond Buyer

By Lynn Hume

March 9, 2017

How Poker Reminded Me That the Rev. Proc. 97-13 Safe Harbors for Management Contracts Live On: Squire Patton Boggs

Poker has a well-established hierarchy of winning hands. If you're holding a full house, you've got a right fine hand, but if you reach for the pot when the last bets are called and another player has four deuces, you will at best be the object of ridicule and at worst the subject of grievous bodily harm or death (it all depends on with whom you are playing). Legal authorities also have a strict order of priority. The most extreme adverse consequences that can befall one who forgets the priority of winning poker hands are unlikely to meet one who forgets which legal authorities take precedence over others, but it's good practice to be mindful of the hierarchy of legal authorities.

The recent issuance of Rev. Proc. 2017-13 is a case in point. As Bob Eidnier discussed in his recent post on this Revenue Procedure, the Internal Revenue Service issued it in response to requests from the National Association of Bond Lawyers and others for clarification of Rev. Proc. 2016-44 (which superseded Rev. Proc. 97-13)[1] that a management contract does not result in the manager receiving net profits from the managed facility (and, thus, in private business use of the tax-exempt bond proceeds that financed that facility) if the qualified user of the facility pays the manager a form of compensation permitted under Rev. Proc. 97-13 (percentage of gross revenue or expense (but not both), per-unit fees, capitation fees, periodic fixed fees, and certain types of incentive compensation) and the manager also bears some amount of the cost of operating the managed facility. Stated another way, NABL requested that the IRS make clear that the various management contract compensation arrangements permitted under the Rev. Prov. 97-13 safe harbors from private business use not be treated as the sharing of net profits of the managed facility under Rev. Proc. 2016-44.

Continue reading.

IRS Reorganizing Tax Exempt Bond Group in May.

WASHINGTON – The Internal Revenue Service's tax exempt bond office will undergo some major changes as part of a reorganization of the Tax Exempt & Government Entities Division in early May, the commissioner of that division told bond lawyers meeting here.

The tax-exempt bond office will be combined with the office of Indian tribal governments to form a new ITG/TEB office within TE/GE, Commissioner Sunita Lough said on panel at the National Association of Bond Lawyers' Tax and Securities Law Institute here on Thursday.

There will no longer be a TEB director as of May 1, Lough said. There has not been a director, only an acting director, of the office since Rebecca Harrigal, now Caldwell-Harrigal, left TEB in

December to become a shareholder at Greenberg Traurig here.

The new ITG/TEB office will be chaired by Christie Jacobs, who has been director of ITG, Lough said. Asked by NABL members about Jacobs' municipal bond experience, Lough said she has not practiced in the tax exempt bond area but "is a very smart person" and "very capable."

"You should not be worried about that at all," Lough told the lawyers.

The reorganization is aimed at increasing efficiency, she said.

The TEB part of ITG/TEB will be focused on audits and examinations going forward, Lough said.

IRS tax exempt bond field operations, which will fall the under ITG/TEB office, will be continue to be led by Allyson Belsome who will report to Jacobs. The number of managers for field agents (examiners) will drop to three from five, Lough said, adding that, with attrition, five was "just not sufficient to sustain."

The tax exempt bond field agents will stay in place under ITG/TEB. Arbitrage rebate and refunds will also be a function of the field offices, Lough said.

Steve Chamberlin will head up a technical support group within ITG/TEB that will be responsible for voluntary closing agreements.

A new compliance, planning and classification group that will span across TE/GE will be responsible for identifying issues and cases, as well as doing research, obtaining data, and planning, including for tax exempt bonds.

That CP&C group will determine what issues should be explored and where high levels of noncompliance exist. In the case of tax-exempt bonds, it will give this information to Belsome. She will assign it to agents in the field. The agents will get electronic files or packets of information explaining an issue and the legal analysis for the IRS' concerns.

On Friday, Lough talked about the new Information Document Request (IDR) process that will be put in place for tax-exempt bonds and other areas of TE/GE on April 1. The new IDR program, which has been very successful in the IRS' Large Business and International Division, is aimed at expediting audits and increasing communication with taxpayers.

Under the process, IDR's will be drafted and IRS agents will talk with muni issuers or their lawyers to make sure everyone understands what the issues are and what documents are needed before the IDRs are finalized.

Richard Chirls, a partner at Orrick, Herrington & Sutcliffe, said he likes the idea of increased effectiveness and communication, but thinks that issuers should think about having their lawyers on hand to talk to the IRS auditors, especially if substantive issues are being discussed.

"I'm a bit concerned about how well this is going to work in some instances in the governmental area," he said on a TSLI panel.

"We'll see how it all plays out," said Brad Waterman, a tax controversy lawyer with his own practice, who was also on the panel.

The Bond Buyer

By Lynn Hume

March 10, 2017

When It Comes to Tax Incentives, How Transparent Is Your City?

A new report highlights major holes in local governments' online disclosure of how economic development dollars are spent.

When it comes to tax breaks for economic development, following the money has never been easy.

Thanks to new accounting rules, states and localities have to disclose how much revenue they lose to such deals. But a new report finds that most of the nation's largest local governments fail to reveal other basic information online, like what companies are benefiting, how much money they receive or whether they deliver on promises to create jobs.

The Washington-based watchdog group, Good Jobs First, reviewed disclosure practices for 50 of the largest cities and counties and assigned scores based on how much information was made available on public websites.

Just 35 of the 85 economic development programs identified the companies receiving incentives, while only 19 listed dollar amounts paid to or claimed by businesses.

Continue reading.

GOVERNING.COM

BY MIKE MACIAG | MARCH 13, 2017

Dear Colleague Letter Supports Municipal Tax-Exemption.

Reps. Hultgren (R-IL) and Ruppersberger (D-MD) recently co-authored a letter to the Chair and Ranking Member of the House Ways and Means Committee, urging them to carefully consider any legislative proposal that would increase the cost of infrastructure financing for state and local governments. The letter was signed and supported by an additional 154 other Members from both sides of the aisle. The MBFA Coalition assisted in the effort to obtain these signatures.

You can view the letter here.

The letter highlights the value of the tax-exemption, including:

Over $400 billion in municipal bonds were issued to finance core infrastructure projects in 2015
Fiscal federalism–local control and local responsibility makes municipal bonds an effective and efficient financing tool
Municipal bonds are on pace to finance upwards of $3 trillion in new infrastructure investments by 2026

The Municipal Finance Caucus is also co-chaired by Reps. Hultgren and Ruppersberger and the

MBFA will continue to work with their staffs to obtain support to retain the current law status of the municipal tax-exemption in upcoming measures on tax reform and infrastructure.
For more information on the MBFA please visit www.munibondsforamerica.org

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TAX - FLORIDA

City of Largo v. AHF–Bay Fund, LLC

Supreme Court of Florida - March 2, 2017 - So.3d - 2017 WL 823607

City brought action against property owner, which was exempt from ad valorem taxes as non-profit operator of affordable housing, for failure to make annual payment under payments-in-lieu-of-taxes (PILOT) agreement.

The Circuit Court entered judgment in favor of city. Owner appealed. The District Court of Appeal reversed and remanded and certified question.

The Supreme Court of Florida held that:

- Affordable housing property exemption does not prohibit payment of ad valorem taxes that equal amount of taxes that would be due if property owner waived exemption and entered into contract;
- PILOT agreement was not void as contrary to public policy; and
- PILOT agreement did not violate state constitutional provision providing that cities could only impose taxes as permitted by law.

Statutory affordable housing property exemption does not expressly prohibit the payment of ad valorem taxes or payments that equal the amount of taxes that would be due if a property owner decides to waive the exemption and enter into a contractual agreement.

Payments-in-lieu-of-taxes (PILOT) agreement between city and property owner, under which owner that was exempt from ad valorem taxes as non-profit operator of affordable housing agreed to make annual payments to city in amount equal to portion of ad valorem taxes to which city would otherwise be entitled to receive for property if taxable, was not void as contrary to public policy. City and owner entered into voluntary agreement supported by valid consideration, parties agreed on method of calculating consideration for their agreement and performed their respective obligations for period of time, and contract supported public policy favoring affordable housing for low-income families by enabling owner to procure funding necessary for building of apartment complex.

Payments-in-lieu-of-taxes (PILOT) agreement between city and property owner, under which owner that was exempt from ad valorem taxes as non-profit operator of affordable housing agreed to make annual payments to city in amount equal to portion of ad valorem taxes to which city would otherwise be entitled to receive for property if taxable, did not violate state constitutional provision providing that cities could only impose taxes as permitted by law. Payments negotiated by city and owner were not taxes, as city did not act by sovereign right in entering into agreement, since its decision to accept owner's offer and enter into agreement was proprietary, as opposed to unilateral act by sovereign right for purpose of supporting government functions, and city's obligation under agreement was not citywide.

TAX - VERMONT

Vermont College of Fine Arts v. City of Montpelier

Supreme Court of Vermont - February 10, 2017 - A.3d ----2017 WL 562865 - 2017 VT 12

College brought action against city, seeking declaratory judgment that it was entitled to public schools or public use exemptions from property tax for its building, which was partially leased to the state during the years at issue.

The Superior Court granted summary judgment for city. College appealed.

The Supreme Court of Vermont held that:

- City's board of civil authority was authorized to rule on tax-exempt status, and thus college was required to appeal to board;
- Supreme Court would address merits of college's appeal, despite college's failure to exhaust administrative remedies;
- College was permitted to apply for exemptions under multiple clauses of governing subsection;
- College was not entitled to public schools exemption; and
- College was not entitled to public use exemption.

City's board of civil authority was authorized to rule on tax-exempt status, and thus college, in order to satisfy requirement that it exhaust administrative remedies before seeking a judicial remedy, was required to appeal to the board the city assessor's decision finding college's property did not qualify under public schools or public use exemptions from property tax; statute governing appeals to the board provided that the board would "hear and determine such appeals until all questions and objections [were] heard and decided."

Supreme Court would address the merits of college's claim that it was entitled to exemption from property tax under public schools or public use exemptions, notwithstanding college's failure to exhaust administrative remedies by failing to appeal to city's board of civil authority the city assessor's finding that college was not entitled to exemption, where Court's jurisprudence regarding exhaustion of administrative remedies in challenging the determination of tax exempt status under the public schools and public use exemptions was inconsistent.

College was permitted to apply for exemptions from property tax under multiple clauses of statute's subsection governing public schools and public use exemptions; public schools exemption was separate and independent from public use exemption.

College was not entitled to public schools exemption from property tax for its building for years in which the state leased a portion of the building and the college used another portion for storage of equipment; neither the fact that the building had been used for educational purposes in the past, nor the possibility that it could be used for such purposes in the future, impacted the analysis, but rather the relevant test was the use of the property during the tax years in question.

College was not entitled to public use exemption from property tax for its building for years in which the state leased a portion of the building, where college's nonprofit ownership and state's use lacked concurrence, such that the two did not have a single mission.

Hawkins Advisory: Modifications to Qualified Management Contract Rules.

The attached Hawkins Advisory summarizes IRS Revenue Procedure 2017-13, which was issued on

January 17, 2017. The Revenue Procedure addresses management contracts involving property financed with tax-exempt bond proceeds, and modifies and supersedes recently released Revenue Procedure 2016-44.

Read the Advisory.

IRS Publishes Population Figures for Housing Credit, Private Bonds.

The Internal Revenue Service (IRS) today published Notice 2017-19, which lists its 2017 calendar year resident population figures. These figures are used to determine states' 2017 low-income housing tax credit (LIHTC) ceiling and tax-exempt private activity bond caps. Under Rev. Proc. 2016-55, each state's LIHTC ceiling in 2017 is the greater of $2.35 multiplied by the state population or $2.71 million; a state's tax-exempt bond volume cap will be the greater of $100 multiplied by the state population or $305,315,000.

Tax Reform and the Forgotten Context of the Municipal Tax Exemption: Clark Hill

The municipal bond community views with concern the potential for federal tax reform, with a well-founded fear that tax reform may create an opening for the elimination of the federal tax exemption for municipal bonds. While many members of Congress have expressed support for continuing the municipal tax exemption, the general view is that any expansive reform of the tax code will involve laying all options on the table, and the dynamics of the legislative process will leave the exemption at risk.

The debate over the municipal tax exemption focuses, by and large, on the cost to the federal treasury of foregone tax revenues, the relative economic efficiency of the federal subsidy entailed by tax exemption as compared to direct federal subsidy payments, the distribution of the tax benefit among investors, the central role of states and localities in building and maintaining our nation's core infrastructure, and general notions of federalism. What receives scant attention, however, is the relationship between the origins of the federal income tax and the municipal tax exemption, and the related balance between the municipal tax exemption and the exemption from state tax for many federal debt securities. While, in an economic sense, there is a cost associated with the municipal tax exemption, such cost can be viewed as an agreed-upon "overhead cost" for maintaining an important component of our federal form of government.

As state and local governments, other municipal market participants and policymakers weigh the role of the municipal tax exemption in a revised federal tax code, they should be mindful that the federal government achieved an understanding with the states on enduring federalist principles of comity and reciprocity through the course of ratifying the 16th Amendment to the US Constitution1 to lay the foundation for the modern federal income tax system.

Municipal Tax Exemption, the 16th Amendment and the Federal Income Tax

The US Supreme Court's decision in *South Carolina v. Baker*2 marked the end of the Court's recognition of a Constitutional basis for the municipal tax exemption, overturning its pre-16th Amendment decision in *Pollock v. Farmers' Loan & Trust Co.*3 *Pollock's* expansive view of the intergovernmental immunity doctrine – that a tax on municipal securities interest "is a tax on the power of the States and their instrumentalities to borrow money, and consequently repugnant to the Constitution"4 – was based on an earlier Supreme Court decision invalidating a city tax on federal debt securities.5 *The South Carolina* opinion observed that this expansive view of the intergovernmental immunity doctrine had been "thoroughly repudiated" by the late 1930s, and that *Pollock* had not yet been overturned prior to 1988 due to "the historical fact that Congress has always exempted state bond interest from taxation by statute, beginning with the very first federal income tax statute."6

The incorporation of the municipal tax exemption as one of the original, and enduring, features of the modern federal income tax was no accident of history. Rather, it was one of the core planks of the bargain struck between the states and the federal government as the state legislatures voted to ratify the 16th Amendment. In explicitly granting authority to Congress to impose a tax on income from whatever source derived, the 16th Amendment eliminated any requirement for the apportionment of direct taxes (such as a tax on municipal securities interest, pursuant to the *Pollock* opinion) among the states based on population.7 While the belief that there was an inherent Constitutional immunity against taxation of interest on municipal securities still had adherents during the ratification process, there were many in state government and in Congress who felt that the 16th Amendment could serve as a basis for imposing such a tax.

For example, during the Congressional debate on the original 1913 income tax legislation, Congressman Charles Bartlett of Georgia observed, in connection with the ratification of the 16th Amendment two months earlier:

It is a fact that in my State and in a number of other States, when this amendment was up before the legislature for adoption, many people opposed the adoption of the amendment because there was nothing specifically said in the amendment that excepted State, municipal, and other subdivisions of State bonds from taxation under the proposed amendment: but the friends of the amendment felt justified in assuring them that except in great stress, except in time of war, Congress would never think it wise to tax the bonds of the State or the subdivisions thereof.8

Thus, a promise to maintain a legislative exemption from taxation for municipal securities served as a critical inducement to the states to ratify a Constitutional amendment that would eliminate state-based apportionment for taxation of investment earnings and permit direct taxation of interest on municipal securities. In fact, the 16th Amendment might never have been ratified without the bargain struck over the municipal tax exemption. True to this promise, the original federal income tax statute included the municipal tax exemption, as one of a very small number of deductions in that landmark tax legislation, and this exemption has existed continuously ever since. That the municipal tax exemption has been revised, restated and made partially conditional through various tax reform efforts over the years – and is now scored as simply another line-item "tax expenditure" like the large number of other exemptions, deductions, credits and preferences that have since been added – should not obscure the fact that the municipal tax exemption continues to stand as one of the original pillars of the federal tax code.

The Municipal-Treasury Trade-Off

The repudiation of the expansive view of the intergovernmental immunity doctrine cuts both ways, so that the more restricted modern intergovernmental immunity doctrine also no longer forbids, as a Constitutional matter, state taxation of income derived from securities issued by the federal government and its instrumentalities. Instead, such exemption currently is based on a series of statutory provisions exempting US Treasury securities and the securities of many other federal instrumentalities (collectively, "Treasury/federal tax-exempted securities") from most forms of state and local taxation, including income tax.9 In effect, just as the federal government can be viewed as "subsidizing" state and local governments through the municipal tax exemption, so to the federal government can be viewed, with equal justification, as imposing on state and local governments an obligation to subsidize the federal government through the state tax exemption of Treasury/federal tax-exempted securities.

In abiding by the bargain struck by the federal and state governments in connection with the adoption of the 16th Amendment and the enactment of the federal income tax, maintenance of the mutual exemption for municipal securities and Treasury/federal tax-exempted securities would clearly serve to undergird this bargain. Were the bargain to be broken by eliminating the municipal tax exemption in the course of tax reform, it could be argued that the statutory exemptions for Treasury/federal tax-exempted securities also should be eliminated – both to reciprocate the change to the treatment for municipal securities and to partially offset the negative economic repercussions of eliminating the tax exemption by permitting state and local governments to tax earnings on Treasury/federal tax-exempted securities. The elimination of the municipal tax exemption without regard to the likely collateral economic and market dislocations would strongly suggest that Congress should also discount any economic or market dislocations that might be caused by similarly eliminating the state tax exemption for Treasury/federal tax-exempted securities.

In truth, the better approach – from the vantage points of economics, federalism and our current critical need to revitalize America's infrastructure – would be to maintain the current tax-free status of both municipal securities and Treasury/federal tax-exempted securities.

While the ultimate treatment of municipal securities under the federal tax code is a matter for policymakers to decide, that decision should be based on factors important to the American people and their principles rather than merely as one input to be eliminated in a general rebalancing of the federal tax burden. To do otherwise would be to breach the bargain struck by the federal and state governments that characterizes our federalist system of governance.

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1 "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." US Constitution, Amendment XVI.

2 485 U.S. 505 (1988).

3 157 U.S. 429 (1895).

4 157 U.S. at 586.

5 Weston v. City Council of Charleston, 27 U.S. (2 Pet.) 449 (1829).

6 485 U.S. at 523, referring to Act of Oct. 3, 1913, ch. 16, 38 Stat. 114.

7 US Constitution, Article I, Section 2, Clause 3.

8 63 Cong. Rec. 507 (1913) (statement of Representative Charles Bartlett).

9 See, e.g., 31 U.S.C. 3124. Securities of certain federal instrumentalities or government-sponsored enterprises do not enjoy state tax exempt treatment and are not Treasury/federal tax-exempted securities.

by Ernesto Lanza | Clark Hill PLC

2/28/2017

Potential Changes for Churches and Charities Regarding Political Campaigning.

A few weeks ago, President Trump announced that he would advocate for the repeal of the prohibition against certain religious organizations (i.e., those exempt from paying federal income taxes under Section 501(c)(3)) from engaging in political campaigning. His statement was made at the National Prayer Breakfast to a group of religious leaders. However, since the prohibition applies to all Section 501(c)(3) entities (e.g., 501(c)(3) universities and hospitals), it seems likely that any such repeal would also apply to all Section 501(c)(3) entities.

To be clear, the prohibition on political campaigning does not apply to religious organizations or other charities per se. Rather, the ban only applies to those entities that have obtained Section 501(c)(3) status. A 501(c)(3) organization is exempt from federal income tax on what would otherwise be its taxable income (aside from taxable income derived from a trade or business that is unrelated to the organization's tax-exempt purpose), and donors to a 501(c)(3) organization may, subject to certain limits, claim a federal income tax deduction for contributions made to the 501(c)(3) organization. In other words, under current law, a Section 501(c)(3) organization has chosen to give up its right to engage in political campaigning in exchange for generous federal income tax benefits. The practical impact of the ban (also known as the Johnson Amendment) is that Congress has decided for the past 60 years that the federal government will not subsidize political campaigning by 501(c)(3) organizations.

Continue reading.

The Public Finance Tax Blog

By Cynthia Mog on March 1, 2017

Squire Patton Boggs

TAX - LOUISIANA

Cameron Parish Police Jury v. All Taxpayers

Court of Appeal of Louisiana, Third Circuit - February 21, 2017 - So.3d - 2017 WL 693927 - 2017-55 (La.App. 3 Cir. 2/21/17)

Parish police jury and school board brought action to validate proposed cooperative endeavor agreement and payment in lieu of taxes (CEA/PILOT) agreement with natural gas liquefaction facility operator.

The District Court entered judgment finding proposed agreement legally invalid. Police jury and school board appealed.

The Court of Appeal held that:

- As a matter of first impression, statutes providing for CEA/PILOT agreements did not authorize police jury to enter into an agreement to reduce or effectively exempt ad valorem taxes for a single taxpayer already operating in the area;
- Proposed agreement violated statutes setting forth procedure for assessing and collecting ad valorem taxes; and
- Proposed agreement violated uniformity provision of constitution.

Statutes providing for public-private partnerships in economic development projects, including through cooperative endeavor agreement and payment in lieu of taxes (CEA/PILOT) agreements and through tax increment or bond financing, did not authorize police jury to enter into an agreement to reduce or effectively exempt ad valorem taxes for a single taxpayer already operating in the area.

Proposed cooperative endeavor agreement and payment in lieu of taxes (CEA/PILOT) agreement, by which police jury would accept fixed annual payments from taxpayer, an operator of a natural gas liquefaction facility, in lieu of ad valorem taxes based upon the facility's fair market value, violated statutes setting forth procedure for assessing and collecting ad valorem taxes, which required assessment at percentage of fair market or use value and prohibited omission of taxable property from assessment list.

Proposed cooperative endeavor agreement and payment in lieu of taxes (CEA/PILOT) agreement, providing for taxing authorities to obligate themselves not to collect ad valorem taxes from taxpayer, which operated a natural gas liquefaction facility, in excess of specified amount and for parish to certify fair market value of facility only in such amount as specified by agreement, violated uniformity provision of state constitution; uniformity provision granted exclusive authority to assessor to assess the facility, while police jury's authority was limited to one of review.

Proposed cooperative endeavor agreement and payment in lieu of taxes (CEA/PILOT) agreement, providing for taxing authorities to obligate themselves not to collect ad valorem taxes from taxpayer, which operated a natural gas liquefaction facility, in excess of specified amount and for parish to certify fair market value of facility only in such amount as specified by agreement, violated constitutional provision forbidding exemptions from ad valorem taxes except in enumerated exceptions; agreement operated as partial exemption of a manufacturer's taxes.

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375 Key Organizations Sign Letter to Save the Muni-Exemption.

Yesterday, the Municipal Bonds for America (MBFA) Coalition sent a letter to House and Senate Leaders, including House Ways and Means and Senate Finance Committee leaders, urging them to retain the current law status on municipal bonds as a part of their ongoing debate on comprehensive tax reform. The letter is signed by 375 organizations from across the United States, representing almost all 50 states. This letter brings continued attention to the value that municipal bonds provide as the strongest and most proven method of financing ongoing infrastructure needs for state and local governments and ultimately, the constituents of all Congressional representatives.

Specifically, the letter highlights:

- State and local governments have financed infrastructure and other community related projects using tax-exempt municipal bonds for over a century
- Reducing or eliminating the tax exemption for municipal bonds could raise infrastructure costs by 10 to 12 percent, with these costs being passed directly to taxpayers

- Preserving the current law status of municipal bonds is essential in rebuilding our nations economy and infrastructure

The letter will remain open for signatures at the MBFA website here. As we continue to grow support and receive additional signatures on the letter, we will update the website with new numbers.

Thanks again to all of those that helped in obtaining signatures for this very important effort. If you have any questions please feel free to reach out to Justin Underwood at justin@munibondsforamerica.org.

MBFA Chair Featured in The Hill: The Case for Tax-Exempt Municipal Bonds for 21st Century America.

Today, Steve Benjamin, Mayor of Columbia, SC and Chair of the Municipal Bonds for America (MBFA) Coalition, contributed an op-ed in The Hill, advocating for why preserving the current law status of municipal bonds is essential in rebuilding our nations economy and infrastructure. You can read the article online here.

Specifically, the article highlights:

- How municipal bonds play a vital economic role in small towns and large cities all across America
- The impact state and local governments may face if the municipal tax-exemption is capped or removed altogether
- How roughly two-thirds of America's core infrastructure is built by state and local governments using tax-exempt municipal bonds

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TAX - PENNSYLVANIA

In re Wilson

United States District Court, E.D. Pennsylvania - December 28, 2016 - B.R. - 2016 WL 7450468

Confirmation hearing was held on Chapter 13 plan proposed by taxpayer whose real property had been sold at prepetition tax foreclosure sale. The Bankruptcy Court entered order confirming plan, which provided for payment of redemption amount with interest over course of plan, and taxing authority appealed.

The District Court held that:

- City, in its capacity as taxing authority, was not "person aggrieved," with standing to appeal bankruptcy court order confirming plan that allowed debtor-taxpayer to redeem real property by paying redemption amount in full with interest over the course of plan, and
- City was not "party in interest" with standing to file objection in bankruptcy court to confirmation of proposed plan.

City, in its capacity as taxing authority, was not "person aggrieved," with standing to appeal bankruptcy court order confirming Chapter 13 plan that allowed debtor-taxpayer to redeem real property that had been sold at prepetition tax foreclosure sale by paying redemption amount in full with interest over the course of his debt adjustment plan, as any injury to city was purely speculative.

City, in its capacity as taxing authority, was not "party in interest" with standing to file objection in bankruptcy court to confirmation of proposed Chapter 13 plan that provided for payment of amount necessary to allow debtor to redeem real property that had been sold at prepetition tax foreclosure sale, with interest, over the course of his debt adjustment plan. Any injury to city was purely speculative and did not qualify as kind of concrete and particularized injury needed to make city a "party in interest."

H.R. 811 Would Treat Stadium Financing as Private Activity Bonds

H.R. 811, the No Tax Subsidies for Stadiums Act, introduced by Rep. Steve Russell, R-Okla., would treat sports stadium financing obligations as private activity bonds if the obligations meet the private business use test.

Bipartisan Bill Reintroduced to Ease Tax Curbs on Small Issuer IDBs.

WASHINGTON – House members have reintroduced a bill that would modernize and ease tax law restrictions for small bond issues used to finance manufacturing facilities.

The Modernizing American Manufacturing Bonds Act (H.R. 1115) was introduced on Friday by Reps. Randy Hultgren, R-Ill., Richard Neal, D-Mass., and Jim Renacci, R-Ohio. Neal is the top Democrat on the House Ways and Means Committee and Renacci is also a committee member.

Qualified small issue manufacturing bonds, also called small issue industrial development bonds (IDBs), are private activity bonds used to finance manufacturing facilities and related projects for small and mid -manufacturers. The federal law governing these bonds has not been updated in nearly 30 years.

The bill would expand the number of projects that are eligible for IDB financing. The three congressmen introduced similar legislation in 2015 but it failed to move forward. Hultgren and Neal offered a bill in 2014 as well.

"Illinois' manufacturers are ready for the challenge of increasing engagement in our global and technology-based economy," Hultgren said in a release. "Unfortunately, decades-old policies governing a key tool that manufacturers used to expand operations no longer address today's challenges, needlessly impeding growth and job creation in the Illinois manufacturing sector.

MAMBA is a bipartisan bill that sensibly reforms these outdated rules without raising taxes."

"It's vitally important that Congress does all it can to support the American manufacturing industry," Neal said. MAMBA "is a commonsense, bipartisan proposal that will ensure the struggling manufacturers in New England and across the country have access to the resources and capital they need to invest in their businesses and hire more workers in their local communities."

The bill would expand the definition of manufacturing facilities to include those that produce intangible property, such as software and patents, as well as tangible property. It would also allow IDBs to be used to finance facilities that are functionally related and subordinate to the production of tangible or intangible property, such as warehouses that temporarily store materials or laboratories that test raw materials. These provisions were in effect in 2009 and 2010 under the American Recovery and Reinvestment Act but expired.

The bill would increase the maximum size of an IDB issue to $30 million from $10 million. It also would increase IDBs' six year capital expenditure limit to $40 million from $20 million.

Currently a manufacturer can only issue IDBs for a project if their capital expenditures, including the bonds proceeds, would not be more than $20 million during six years – three years before the bonds are issued and three years after that.

The bill has the support of the Council of Development Finance Agencies. "We're thrilled that MAMBA has been reintroduced. It's a vital piece of legislation that will help lower the barriers for small manufacturers to access affordable capital," said CDFA president and CEO Toby Rittner.

"Representatives Hultgren, Neal, and Renacci have been great champions of manufacturing bonds and the development finance industry as a whole, and I'm thankful for their commitment to American manufacturing."

The bill, which also has the support of the Illinois Manufacturers' Association, is pending before the House Ways and Means Committee.

The Bond Buyer

By Lynn Hume

February 21, 2017

[TIF Jurisdiction, Future Projects Among County Officials' Annexation Concerns.]

Officials say existing Monroe County, Ind., tax increment financing districts will remain under the jurisdiction of the Monroe County Redevelopment Commission even if the city annexes areas within them.

County attorney Jeff Cockerill said the areas proposed for annexation touch all of the county's tax increment financing more commonly known as TIF districts. If there is existing debt in a TIF district, it would be treated as if annexation did not occur. That is, the county would still accumulate TIF revenue that could be used to make existing bond payments within the district as well as accumulate funds to use toward projects such as building roads.

However, by state law, if a road is annexed into the city, then it becomes a city road, Cockerill said.

If annexation is approved, the city would also collect revenue due to increased assessed value.

In addition, the city could see increased revenue from other sources as well, such as an increase in road mileage, equating to more motor vehicle highway revenue.

The county has existing debts for its Westside and Bloomington Township/Ind. 46 TIF districts.

For the Westside TIF district, where the commission has concentrated a number of its recent infrastructure projects, its last bond expires in 2040. At this time, there are no projects scheduled for the Bloomington Township/Ind. 46 district.

The Fullerton Pike TIF district is the only area that does not have any current debt. Within it, the county is preparing to begin construction on phase I of the Fullerton Pike project, starting just west of where Gordon Pike and Rhorer Road intersect with South Walnut Street and heading east to just beyond where the road intersects with Walnut Street Pike. Cockerill said the county is still investigating what would happen if the commission decides to issue a new bond for that area.

Barry Lessow, a redevelopment commission member, said knowing this, questions that remain include whether the commission wants to continue making investments in areas that they know would later fall into the city's jurisdiction and whether to invest in areas within the TIF districts that are outside of the areas proposed for annexation.

Jim Shelton, a fellow redevelopment commission member, said such questions are why collaboration with the city is important.

“I don't see we do anything necessarily different except we extend an invitation to the city to participate,” Shelton said. “As a community, we can't get hung up whether it is in the city or county or not.”

Public Works Director Lisa Ridge said a number of the road projects the redevelopment commission is looking to do within the Westside TIF district were suggested to help all area residents, regardless of jurisdiction. She said such projects for instance, extending Profile Parkway are meant to address connectivity issues and relieve traffic congestion in an area changing due to nearby construction of Interstate 69.

But Lessow agrees conversation with the city is essential to ensure clarity about any actions that might influence the districts later.

Redevelopment commission member Richard Martin said the county board knows the area much better than city officials do, which was very evident from the questions city officials had about the areas proposed for annexation.

“They just don't know enough at this point, and we need to educate them,” Martin said.

The Bond Buyer

By Ernest Rollins

February 16, 2017

BlackRock's Carney Says Tax Reform Won't Hurt Munis.

Sean Carney, head of municipal strategy at BlackRock, and Bob Michele, chief investment officer at JPMorgan Asset Management, discuss how U.S. tax reform may impact the tax advantage of municipal bonds. They speak on “Bloomberg Daybreak: Americas.”

Watch video.

Bloomberg

February 23, 2017

Bank of America to Trump: Taxing Munis Won't Raise Very Much.

- Bank reckons the tax break costs less than official estimate
- Mayors previously said Trump backs keeping munis tax exempt

If President Donald Trump and Congressional Republicans are looking for revenue to offset planned tax cuts, Bank of America Merrill Lynch analysts say taxing investors' interest on state and local debt wouldn't provide as much as it seems.

The tax break for the $3.8 trillion municipal market — which holds down the expense of financing state and local projects — cost the federal government about $39 billion in 2016, according to the U.S. Treasury Department's figures.

But Bank of America analysts led by Phil Fischer estimate that the revenue raised by repealing it would be much lower. Because taxing the interest would likely cause individual investors to move money elsewhere, many securities would wind up with buyers who don't pay income tax, such as overseas firms or 401(K) plans. Once that's factored in, taxing municipal bonds may only yield about $8.9 billion a year, the analysts reckon.

Moreover, the shift would foist about $7.6 billion of extra costs on state and local governments, assuming yields rise about 0.2 percentage points. That would push up the expense of financing the types of infrastructure projects Trump has vowed to promote.

The bonds have been targeted by previous proposals that stalled in Congress. Former President Barack Obama sought to cap the benefits the wealthiest earners can receive from municipal debt, while a deficit-cutting panel previously suggested eliminating the exemption outright. Lobbyists for state and local-government groups have fiercely opposed any change to the tax treatment of their bonds, given the cost it may impose.

"Hopefully, this helps clarify the point that the attack on the tax-exempt status of municipal bonds from time to time appears to be based more on political calculus than economic analysis," the analysts wrote. "This is becoming more widely recognized and we do not expect that the tax exemption would be targeted in any tax-reform legislation."

The president may agree: A delegation of mayors, after meeting with Trump in December, said he expressed support for keeping the tax break intact.

Bloomberg Markets

by Jordyn Holman

February 27, 2017, 11:30 AM PST February 27, 2017, 1:46 PM PST

The Countdown to August 18, 2017 – Something You Should Know.

The IRS has over the past three years issued significant guidance on the safe harbors from private business use for management contracts, and we've been dutifully reporting on this guidance (here, here, here, and here). This guidance has generally been well received, but some issues remain. In addition to questions raised by Bob Eidnier in his post a few weeks ago (link above), the recent spate of IRS guidance raises a concern that is the subject of this post. By correlating the permitted length of management contracts with the economic lives of the managed property, some management contracts that are materially modified after August 18, 2017 might not fit within the New Safe Harbors (defined below) even if the term of the modified contract is unchanged from the prior iteration!! (Tax lawyers use exclamation points to try and keep people awake).

Continue reading.

The Public Finance Tax Blog

By Joel Swearingen on February 25, 2017

Squire Patton Boggs

Senators Call for Tax Relief for Water Conservation Rebates.

Washington—Senators Dianne Feinstein (D-Calif.), Patty Murray (D-Wash.) and Michael Bennet (D-Colo.) today called on Treasury Secretary Jack Lew to confirm tax relief for individuals who receive water conservation and storm water management rebates that also result in energy conservation. These rebates have been treated as income but should qualify under an existing exemption in the tax code for energy conservation measures.

The senators wrote: **"There are many challenges impacting our nation's water supplies, and it is imperative to maintain the effectiveness of incentives for residents to participate in water efficiency and storm water management programs. We would like to request that you clarify that in cases where a public utility can attest to energy savings from water conservation and storm water management measures, such rebates issued by a public utility can be excluded from gross income under Section 136. This is in line with the process many utilities already follow for energy conservation measures."**

The full text of the letter follows:

December 20, 2016

The Honorable Secretary Jacob J. Lew
Department of Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

Dear Secretary Lew:

We are writing to follow up on our May 26, 2016, correspondence to request that the Department of the Treasury consider additional information in determining whether water conservation rebates and storm water management rebates, including the installation of green infrastructure, could be excluded from residents' taxable income. Since our initial correspondence to you, we have received additional information showing significant, measurable energy savings that result from water conservation. Given the compelling data we have received, we now have reason to believe that water conservation rebates should be considered exempt from inclusion in gross income under 26 U.S.C. § 136 (Section 136), which provides such an exemption for energy conservation measures.

We have attached a letter from the Director of the Center for Water-Energy Efficiency at the University of California, Davis, which details the Center's findings that water conservation in California in Summer 2015 resulted in energy savings equivalent to those of energy efficiency programs. Notably, their research found that water conservation-related greenhouse gas savings over the Summer of 2015 were equivalent to taking about 50,000 cars off the road for a year. Additionally, The Los Angeles Department of Water and Power has estimated total energy savings of approximately 24,400 MWh for fiscal year 2015/16 from the residential and commercial indoor and outdoor water conservation rebates that it provides. These figures are even higher after including energy savings from hot water heating and other customer end uses. In Colorado, water utilities have also been working to implement conservation programs that have the benefit of saving water and electricity or natural gas, including residential shower head exchange programs. Similar conservation measures are underway at urban utilities throughout the country, including in Arizona, Nevada, and Washington.

Section 136 was added in 1992, when there was a clear line between energy and water conservation. Today, that distinction is largely gone and the nexus between saving water and saving energy has been established. Commissioner Lopez of the Bureau of Reclamation has stated, "[W]ater and energy efficiency are intrinsically linked. When we conserve water, we conserve the energy it takes to move it." Water conservation also results in other energy savings, including reductions in energy use for heating and for treatment. We believe the federal agencies involved in energy and water conservation and the Department of the Treasury currently have the authority to interpret Section 136 more broadly.

It appears that many, if not all, water conservation rebates result in per capita energy savings. The same is true of rebates designed to collect, treat, and use storm water or reduce storm water inflows into combined sewers. There are many challenges impacting our nation's water supplies, and it is imperative to maintain the effectiveness of incentives for residents to participate in water efficiency and storm water management programs. We would like to request that you clarify that in cases where a public utility can attest to energy savings from water conservation and storm water management measures, such rebates issued by a public utility can be excluded from gross income under Section 136. This is in line with the process many utilities already follow for energy conservation measures.

We look forward to working with you to ensure the success of water conservation and water quality efforts in our states.

Sincerely,

Dianne Feinstein
U.S. Senator

Patty Murray
U.S. Senator

Michael Bennet

U.S. Senator

Municipal Bonds May Get Taxed If Border Tax Plan Fails.

Odds that interest on municipal bonds will continue to be exempt from federal taxes decrease if Congress doesn't approve a plan to alter the way imports and exports are taxed.

That's a concern for municipal-bond investors, as well as the state and local governments trying to get investors to buy their debt notes to pay for roads, bridges and other large public projects.

The Republican-controlled Congress is attempting to draft a revenue-neutral tax package to send to President Donald Trump this year, and a question remains as to whether border adjustments, which tax imports and exempt exports, will be included.

A revenue-neutral tax plan enables GOP lawmakers to pass a tax plan by a simple majority vote, without need of support from any Democratic members.

"If the border-adjustability piece, which raises close to a trillion dollars, is not completed, and we've heard mixed views on that, then everything is on the table," including the exemption for municipal-bond interest, Jim Febeo, senior vice president of government relations at Fidelity Investments, said at a Feb. 13 meeting of the National Association of State Treasurers (NAST) in Washington.

Retailers are lobbying against border adjustments, as is Koch Industries Inc., a financial supporter of conservative causes and candidates.

Some senators, including John Cornyn (R-Texas), Mike Lee (R-Utah) and Finance Committee Chairman Orrin G. Hatch (R-Utah), have said they have questions about the proposal, the details of which haven't been fleshed out.

Money for Change

House Speaker Paul D. Ryan (R-Wis.), who put forth the idea, has said the $1 trillion or so raised by border adjustments would allow for sweeping changes to federal taxes.

Without the money, "the municipal-bond exemption will be looked at," Susan Hirschmann, chief executive officer of Williams & Jensen, a Washington-based lobbying firm, said during the NAST event.

"There is a lack of clarity right now as to whether the Senate supports border adjustments, and there is a lack of clarity on whether President Trump supports it," Hirschmann said.

States Will Fight Back

State and local governments, which depend on bonds, will fight for the tax exemption, Charles S. Henck, a Ballard Spahr LLP partner who practices in public finance and tax law, told Bloomberg BNA.

"State and local governments will want to preserve the existing rule for tax exemption of municipal bond interest because to eliminate it would increase the cost of borrowing," Henck said.

Arizona Treasurer Jeff DeWit, who spoke at the NAST meeting, said states shouldn't worry because the exemption is too popular and the potential backlash against congressional members is too great.

"I don't think the municipal exemption will be on the table," he said. "Everyone is against doing that. If they really start to play with it, I don't think that will truly be on the table. Maybe for leverage."

'Everything' on Table

As House and Senate Republicans work on a package that appeals to Trump, elements of a 2014 tax plan offered by then-Rep. Dave Camp (R-Mich.) may give hints to "where we may be headed," Febeo said. Camp's plan proposed a 10 percent surtax on municipal-bond interest.

"I wish I had a crystal ball, but everything seems to be on the table right now," he said.

According to a delegation from the U.S. Conference of Mayors, Trump expressed support for maintaining the tax exemption in the weeks before his inauguration. Others close to him, however, don't support it.

Trump's nominee for Commerce secretary, private equity investor Wilbur Ross, has said municipal bonds aren't an efficient way to pay for public projects. One reason is that a percentage of the money goes to the bondholder. He has suggested private-public partnerships and tax credits to investors and construction companies to finance bridges, roads and other public projects.

Bloomberg BNA Tax Management

By Che Odom

February 17, 2016

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To contact the editor responsible for this story: Ryan C. Tuck at rtuck@bna.com

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Tax Guidance to Slow Under Trump. Even More Emphasis on Letter Rulings in Bond Transactions?

As the Trump Administration attempts to substantially reduce the amount of federal regulations, both the Deputy Tax Legislative Counsel of the Treasury Department and an Associate Chief Counsel at the Internal Revenue Service indicated this week that we are likely to see a virtual halt to formal tax law "guidance" for the foreseeable future. Such guidance includes regulations, revenue rulings, and revenue procedures, the principal means by which Treasury and IRS provide interpretations of tax statutes. However, both officials stated that the IRS will continue to provide taxpayer-specific private letter rulings (PLRs).

In addition to more PLRs being requested to resolve ambiguities in connection with particular transactions, the freezing of the formal guidance process could result in PLRs being given more weight than ever in the analysis of other transactions. Not only will bond attorneys have more incentive to read and rely upon the only available tea leaves as to the IRS's position, but IRS attorneys may write more substantive letter rulings with the expectation that they will guide practice beyond the particular transactions being ruled upon. While officially non-precedential, PLRs have long been of particular importance in the tax-exempt bond practice, where formal guidance is slow and case law is almost nonexistent.

The National Law Review

Wednesday, February 15, 2017

Support for Munis Seen on Capitol Hill; Tax Reform May Be Next Year.

WASHINGTON – Two corporate executives and lobbyists told treasurers meeting here on Monday that they are hearing positive things about municipal bonds from legislative staffers, but a senior tax staffer from the Senate Finance Committee said tax reform may slip into 2018.

Larry Chadwick, vice president of federal government relations for TIAA, said he has found support for munis on Capitol Hill. "We think municipal bonds are a critical funding mechanism for infrastructure," he said during a tax reform panel at the National Association of State Treasurers 2017 Legislative Conference.

Chadwick and other panelists, including a senior staffer for the Senate Finance Committee, said the key issue for the Trump administration and the Republican-led Congress is economic growth and infrastructure is viewed as the path for job creation and economic growth.

"I don't think we'll see tax reform without a serious infrastructure piece," the tax staffer said.

Chadwick said he would like to see Congress eliminate or ease the proration provision of the federal tax code so life insurance companies could buy more municipal bonds used for infrastructure.

Pierce Scranton, executive director for global relations & public policy at JPMorgan Chase, said, "The municipal bond [interest] exclusion seems to be in pretty good shape."

But Scranton cautioned, as did the other panelists, that with tax reform, "We're in an environment where everything is on the table."

Though a number of House Republicans talk about having tax reform legislation in August, the senior tax staffer said there are a number of obstacles to that and it may be pushed into 2018.

Nothing will happen with tax reform until the Republicans in Congress and the administration follow through with plans to repeal and replace the Affordable Care Act, the senior tax staffer said at the National Association of State Treasurers 2017 Legislative Conference here.

The lawmakers have to resolve the ACA issue, even if they do something less than repeal and replace or decide they can't do anything and leave it alone, he said.

Legislatively things are already moving slowly, as lawmakers found they could not get support for repeal without some sort of replacement, the tax staffer said. Trump's cabinet officials are not in place, though Congress confirmed Steve Mnuchin as Treasury Secretary Monday night, with only one Democrat, Sen. Joe Manchin, D-W.Va., voting for him. Given the Democrats' opposition to

Trump's nominees, including Mnuchin, there may be battles over assistant secretary positions, he said. Treasury's assistant for policy typically quarterbacks tax reform, he said.

Republican lawmakers hope to repeal and replace the ACA, as well as comprehensively reform the federal tax code, through the budget reconciliation process to expedite the legislation and get it through the Senate with only 51 instead of 60 votes. Normal legislation needs 60 votes to limit debate, avoid a filibuster and move forward. But reconciliation is only for legislation that changes spending, revenues and the federal debt limit. And provisions in a reconciliation bill cannot increase the deficit during a second 10-year window – two challenges to using that legislative vehicle.

The budget resolution for fiscal 2017 includes the ACA, but not tax reform. If Congress wants to do comprehensive tax reform through the reconciliation process, it will have to be for fiscal 2018. But it cannot start the process for fiscal 2018 until it finishes reconciliation for fiscal 2017.

Congress must also deal with other potentially controversial issues during the next few months. It will need to increase the federal debt limit on March 15. Also the latest continuing resolution keeping federal spending going in the absence of appropriations bills will expire on April 28, the tax staffer noted.

A "wild card" for any congressional action is April 30 expiration of legislation that temporarily shored up health care and pension benefits for retired miners. Manchin stopped work on the last CR until lawmakers provided the short-term fix. "Keep your eye on that," the tax staffer said.

Key financial issues will also affect how tax reform plays out, the staffer said. If the border adjustment tax envisioned in the Republican blueprint for tax reform doesn't pan out, then the $1 trillion in revenues it was to bring in will have to be found elsewhere. "If it fails, we'll need a whole lot of money from a lot of sources," the tax staffer said.

Medicaid is another issue to watch, he said, adding how it is dealt with in ACA action will also affect revenues for tax reform.

"But don't underestimate the president, the tax staffer said. If Trump decides to throw his weight behind tax reform, he can do a lot to push it forward, he said. The president has promised a phenomenal announcement on tax soon.

The Bond Buyer

By Lynn Hume

February 14, 2017

Membership Substitution Transactions – Why Are They So Misunderstood?

Membership substitution transactions are the most common form of business combination transaction in the nonprofit hospital industry. They are also widely misunderstood and the source of many mistakes. Many large 501(c)(3)s have become more acquisitive as a result of economic pressures of the ACA. Nonprofit health systems have been getting much better at participating in and winning competitive sale processes, resulting in an increased use of this business combination form.

In April 2013, St. Luke's Episcopal Health System announced its sale, via membership substitution, to Catholic Health Initiatives. In responding to a suit from physician owners (a minority faction) of a St. Luke's subsidiary, St. Luke's Sugar Land Hospital, St. Luke's attorney asserted: "the ownership of St. Luke's Sugar Land Hospital is totally unchanged by the Transaction." We have no opinion on this legal debate, but it points out something that repeatedly arises in these transactions – most participants don't really understand them to any depth.

Given the forecasted level of nonprofit hospital M&A activity in the coming years, as well as the increased use of the membership substitution specifically, it is important that these new and often inexperienced participants consider the implications of the structure. This article will explore the membership substitution structure – its history, use, pros, cons, and potential future applications. Issues such the impact on one's credit stature, bond covenants, and the legal handling of consolidating Master Trust Indentures are reviewed.

Description

Fundamentally, there are two means to acquire ownership and control of a company. One can either buy the assets of the business or its stock. Membership substitutions are analogous to a stock sale in corporate finance. A majority of public company mergers are completed via the acquisition of equity. Classic examples include Proctor and Gamble's acquisition of Gillette and Berkshire Hathaway's purchase of Heinz. In these arrangements, the legal entity of the target (Gillette and Heinz) remains intact with a new parent "stepping into Seller's shoes" as sole owner. This transaction structure has several advantages:

- It creates *successorship* for contractual agreements – employment, collective bargaining, management teams and similar operational matters are preserved.
- Business operations are uninterrupted – licensures, working capital, and leases are unchanged.
- The acquisition process is streamlined – timing and due diligence are simplified, regulatory scrutiny can be eased, and often there is no need for wind down corporation.
- Pensions, swaps, and other liabilities continue as a going concern – no need to terminate with the PBGC or unwind costly derivative instruments.
- Debt issues – avoid pre-payment penalties and defeasance costs associated with today's low interest rate environment.
- No need for tail insurance – beneficial if confronted with Stark or compliance issues that cause such coverage to be unattainable or unduly expensive.

It is easy to see that selling the stock of a business has certain advantages to sellers related to simplifying the transaction and costs. Conversely, buyers commonly prefer to acquire assets as it limits real and theoretical future legal obligations.

Asset purchase transactions certainly have merit as well. In industries with significant intellectual property, e.g., technology, this more focused structure can isolate certain attractive assets and exclude other components of the business. For the same reason, divestitures of a subsidiary division within a conglomerate are generally acquired via a purchase of assets.

Governance

In a membership substitution model, typically the buyer will become the sole equity holder (or "membership interest" in nonprofit language) of the seller. As a result, the buyer will achieve full ownership and control of the seller. Think of this relationship much like that of a parent company and subsidiary, where the parent ultimately retains senior controls of the subsidiary. In connection with a member substitution transaction, the bylaws of each of the buyer and seller will be amended and restated in order to reflect the new governance structure and to provide for reserve powers that rest with the buyer. Oftentimes, the seller may negotiate with the Buyer to have a limited minority number of board seats on the buyer's board.

Forms of Consideration

In either a membership substitution or asset sale, there are generally three forms of economic consideration that the buyer provides to the seller of a hospital: (1) a purchase price, (2) assumption of liabilities, and (3) a commitment to spend capital in the future. Together, the sum of these must equate to "fair market value." The mixture of these forms varies based on the capital structure of the target and objectives of the parties. In a nonprofit to nonprofit membership substitution, a purchase price is rarely paid, instead the Seller is relieved of its financial liabilities and secures a commitment to invest capital in the future. In many cases, nonprofit Buyers are now the highest bidders in sale processes due to: (1) the high use of financial leverage, and (2) the strategic importance of growth. So while for-profit conversations were popular a decade ago to extract a purchase price and create a community foundation with the proceeds, today the total economic consideration of a membership substitution transaction is often equal or greater. Evidence of the achievement of "fair market value" is critical to defend the transaction to any critics, notably the state attorney general.

Financial Features

- All assets are conveyed to the buyer.
- All liabilities should be assumed or guaranteed by the buyer.
- Capital expenditures are committed by the buyer for routine and strategic needs in the future.
- Rarely are charitable foundations created, if so it is most always restricted to supporting the hospital.

Liabilities of the new subsidiary either remain in place by being assumed or guaranteed by the new parent company (as part of the obligated group), or are retired via refinancing. Issues associated with assuming the debt can include intercompany loans (potentially with interest), a support or guarantee arrangement, or inclusion or exclusion within the system's obligated group.

Similarly, the handling of balance sheet assets is also customized for each setting. Can the cash be swept to corporate treasury? Who controls the foundation, where is it housed, who gets to select grant donations? Will the capital commitment be infused into the local subsidiary or simply be funded through retained free cash flow?

As a result of the change in the organizational structure, it is important for each party to review its Master Trust Indenture, as well as any and all material documents ancillary to or apart from the Master Trust Indenture between a bondholder and any member of the obligated group. With the assistance of investment bankers and legal counsel, the parties will want to determine whether each Master Trust Indenture may remain in place, and if so, whether this is the desired approach. Alternatively, the parties may determine that it is in the best interests of the combined organization and permitted pursuant to the terms of the Master Trust Indentures to consolidate the debt under one Master Trust Indenture. If consolidation is permitted and desired, then the parties will want to determine under which Master Trust Indenture they wish to proceed post-closing. For example, it may be advantageous to the parties to consolidate the debt under one of the Master Trust Indentures in order to take advantage of less restrictive and less burdensome covenants. In addition, there may be significant savings by capitalizing upon a more favorable cost-of-capital under one Master Trust Indenture over another.

The parties should also have an understanding of how the consolidation may affect the rating of the bonds as a result of the combination, which will require a review of the rating agencies on analysis of pro-forma ratios. As part of the review of the documents, the parties also will want to identify any consents that may be required of the bondholders and develop a timeline for reaching out to and obtaining such consents of the bondholders. Regardless of whether consent is required, there may be other covenants required by the Master Trust Indenture or ancillary documents, such as the delivery of legal opinions, officer's certificates and posting of additional collateral of which the parties should be aware. Finally, the parties will want to understand the terms of any other debt outside the Master Trust Indentures (including any swaps) that may be outstanding to determine if the combination will be in violation of any covenants, and consider whether it is best to obtain consent or alternatively, redeem or pay off such debt.

As a result of the modified structure via a membership substitution, the parties will need to review the contracts to determine whether the change of control will trigger any consent requirements of third parties, any terminations or defaults under any agreements or rights of first refusals. The parties will want to ensure that they abide by the terms of their agreements with third parties. In addition, in the event that the parties are members or partners in a joint venture, there may be transfer and consent requirements that are triggered as a result of the change of controls. Further, the parties will want to carefully review their contracts for non-competition restrictions, non-solicit restrictions and confidentiality provisions to fully understand the implications of the change of control.

Misnomers

Most of the confusion surrounding this structure in the nonprofit world centers on whether the parties acknowledge that a sale is occurring. Often there are incentives to obfuscate reality, namely easing the public relations messaging locally.

Part of the uniqueness of the membership substitution is the nonprofit nature of the partners entering the transaction. While for profit enterprises can access and variety of equity, debt, and synthetic markets to raise capital to finance strategic growth, nonprofit hospital companies are typically limited to the tax-exempt municipal bond market. Buyers of institutional debt are heavily reliant on credit rating (rather than growth prospects in the equity markets) in determination of the cost of capital or required yield. As a result, hospitals, and nonprofits generally tend to be more conservative with capital and have an affinity toward creative relationships to increase market share, revenue, and ultimately profits while not diluting one's rating and thus ability to raise capital.

Sellers are becoming more sophisticated, however, and are questioning what they're getting in return for selling their hospital. The give-away transactions of yesteryear are not likely to be repeated in the era of more commercially oriented partners.

Conclusion

From our standpoint, it seems as though M&A techniques in the nonprofit hospital industry are given too much credit for their uniqueness. Much of this stems from a heartfelt belief that M&A transactions in the nonprofit world are completed on more friendly terms. As the stakes get higher in the increasingly capital intensive, regulated, and complicated hospital industry, however, this is changing. Transactions now seem more adherent to corporate norms – following SEC conventions and Delaware Law. Negotiations surrounding the accounting treatment of financial statements and technical topics such as representations and warranties, escrows, and breakup fees are becoming more common. Overall, it seems like the cottage hospital M&A business is maturing and taking on characteristics of public company transactions.

The Bond Buyer

By Ken Marlow and Rex Burgdorfer and Alex Voss

February 14, 2017

Ken Marlow is a partner and chair of the healthcare department at Waller Lansden Dortch & Davis in Nashville, Tenn. Rex Burgdorfer and Alex Voss are with Juniper Advisory in Chicago, a specialized investment banking firm focused exclusively on hospital M&A. Sources for this research include Waller Lansden and Juniper Advisory's M&A experience, as well as information compiled by The Harvard Business Review, The American Bar Associate, and Latham & Watkins studies.

[New Proposed Legislation: PABs for Social Infrastructure and a Ban on Stadium Bonds.]

The new Congressional session is heating up, and we'll cover two new pieces of proposed legislation below. For the first time in several years, we can avoid giving the usual disclaimer that any new piece of legislation is "likely going nowhere." Tax reform appears to be a real possibility for the first time in many years, and it will probably involve expansions of some areas of the tax-exempt bond world and contractions of others. The two bills discussed below are an example of each.

The first bill would allow tax-exempt private activity bond financing for public buildings that have too much private involvement. The second bill goes in the other direction, and would forbid governmental bond financing for stadiums, which, as we'll see, would have the effect of preventing tax-exempt financing of any kind for stadiums.

[We are continuing to work with our industry-leading public policy group] to study the many new legislative developments that are sure to arise, and we will use the blog to provide resources and reactions to them.

[Continue reading.]

The Public Finance Tax Blog

By Johnny Hutchinson on February 17, 2017

Squire Patton Boggs

[BlackRock's Hayes Says Trump Unlikely to End Muni-Bond Tax Break.]

- Trump's plans to cut taxes could curb demand for local debt
- Elimination of tax-exemption 'highly unlikely,' Hayes says

Peter Hayes, who oversees municipal-bond investments for BlackRock Inc., the world's largest money manager, doesn't think President Donald Trump and the Republican-led Congress will do away with the tax break given to buyers of state and local government debt.

"The tax exemption of municipal bond interest is a key draw for issuers. And while it may be deemed alterable, we don't see it as dispensable," Hayes said in a blog post on the company's website. "We see the elimination of muni tax exemption as highly unlikely."

Speculation that Washington will move to tax the interest investors receive in the $3.8 trillion municipal market has increased since Trump's election, given that the revenue could help cover the cost of cutting corporate and individual income taxes. Former President Barack Obama proposed capping the benefits the wealthiest earners can receive from municipal bonds, though the plan stalled in Congress, and a deficit-cutting panel once proposed eliminating the tax exemption outright.

Such change would lead investors to demand higher yields on municipal bonds than they do now, an outcome that may be at odds with Trump's other goal of increasing spending on infrastructure projects.

That doesn't mean the municipal market will be spared the effects of any tax changes: Cutting income-tax rates would also lessen the appeal of the securities. But such reductions may not come this year, as lawmakers focus first on overhauling corporate taxes, according to BlackRock's Hayes.

"The individual tax code is very complicated and politically difficult to amend, even under one-party control," he wrote. "Change may well come, but not likely in 2017 as Washington focuses on the comparatively easier task of corporate tax reform."

Bloomberg

by Jordyn Holman

February 14, 2017, 10:48 AM PST

TAX - IOWA

Acciona Windpower North America, LLC v. City of West Branch, Iowa

United States Court of Appeals, Eighth Circuit - February 7, 2017 - F.3d - 2017 WL 490412

Wind turbine manufacturer brought action against city, alleging breach of tax increment financing (TIF) development agreement for urban renewal project.

After entry of partial summary judgment in manufacturer's favor, bench trial was held. The United States District Court entered judgment in manufacturer's favor, and city appealed.

The Court of Appeals held that:

- City was obligated by TIF development agreement to pay tax rebate to manufacturer once it paid its taxes for given fiscal year;
- Manufacturer did not make judicial admission that rebates were never appropriated;
- TIF agreement did not impermissibly limit city's ability to decline to pay rebates; and
- District court did not abuse its discretion in permitting manufacturer to change its damages calculation on eve of trial and declining to impose sanctions.

Under Iowa law, city was obligated by tax increment financing (TIF) development agreement to pay tax rebate to wind turbine manufacturer once it paid its taxes for given fiscal year, even though agreement provided that all rebate payments were "subject to annual appropriation of the City

Council," where agreement specified that city was required to annually certify "amount obligated for appropriation for rebate," and that, if city decided to obligate rebate for appropriation, "rebate shall be paid to [manufacturer] within thirty days of receipt by the City of the incremental taxes paid."

In manufacturer's action against city for breach of tax increment financing (TIF) development agreement, manufacturer's statement in its summary judgment papers that it was undisputed that "City did not appropriate the $265,140 rebate" to be paid to it for fiscal year was best read as poorly worded effort to admit that it is undisputed that rebates were never paid, rather than as judicial admission that rebates were never appropriated, where manufacturer had always argued that rebate was appropriated, just not paid.

Under Iowa law, tax increment financing (TIF) development agreement that required city to pay tax rebate to wind turbine manufacturer once it paid its taxes for given fiscal year did not impermissibly limit city's ability to decline to pay rebates. TIF agreements were clearly authorized by state law and were to be liberally construed.

District court did not abuse its discretion in permitting manufacturer to change its damages calculation on eve of trial and declining to impose sanctions in its action against city for breach of tax increment financing (TIF) development agreement, despite city's contention that manufacturer revealed too late that it would seek damages for two fiscal years, where manufacturer sought compensatory damages for multiple fiscal years from beginning of its lawsuit, its pretrial clarification that it would seek compensatory damages for both fiscal years was entirely consistent with theory of damages it articulated at outset of case, and damages calculation used by manufacturer appeared to have been based on information in parties' agreement and documents originally in city's control.

Why Some Bargain Municipal Bonds Aren't Tax Free.

When individuals invest in municipal bonds they expect 100% tax-free income. Right? Well, many may unknowingly be setting themselves up for a tax bill from the IRS. How can this be? After all, we're talking munis.

It's been many years since the municipal bond De Minimis rule was relevant. Here's how it works in plain English: Say you purchase a low coupon municipal bond for a 2%, 2.25%, 2.50%, or even 3% coupon at a discount from the face value in the secondary market. If that discount breaches the IRS De Minimis threshold, then a portion of that discount can be taxed as ordinary income.

It all depends on how deeply the bond price is discounted. The simple formula to compute the De Minimis threshold is:

De Minimis threshold = Lower of par or original issue discount – (.25% X the years to maturity)

The formula basically stipulates that if you purchase a bond at a discount and the discount is equal to or greater than a quarter of a point per year until maturity, then your gain at redemption is taxed at your ordinary income tax rate rather than the more favorable capital gains rate, which are as low as 15%.

If this sounds like IRS gobbledygook, you are right. The law was created to prevent taxpayers from converting ordinary income into capital gains. Remember the only IRS rule you should commit to memory is: Whatever is best for the government and worst for the taxpayer is the correct rule interpretation .

Here's an example: Assume you purchased 50 XYZ Unified School District municipals, 2.00% coupon maturing September 1, 2028 originally issued at par, 100. If you purchased the bonds in the secondary market today at 90.288 for a 3.00% yield-to-maturity because rates rose since issuance, you will owe $2,107.50 in tax on $50,000 face value of the bonds.

The market discount cutoff price was $97.25. Okay—paying $2,107.50 in tax on 50 munis isn't the end of the world. Still, it could blindside you if your weren't aware of the De Minimis rule.
Your rule of thumb for purchasing municipal bonds should now be: If you want all your return to be tax free then invest in higher coupon bonds at par or a slight premium.

Stay away from market discounted munis. If you're doing business with a retail broker ask them to run the analytics on Bloomberg. That will quickly compute your tax liability if purchasing at a discounted price.

One caution: If interest rates rise significantly, high coupon premium bonds can decline and breach the De Minimis threshold too.

The De Minimis rule also has a significant impact on your bond price. Should you decide to sell a bond subject to the De Minimis rule your sale of the bond will be at an even deeper discount. The buyer will demand compensation for that portion of their [now] taxable return.

The reason we have not been plagued until recently with the De Minimis rule is that issuers weren't issuing many 2%, 2.25%, 2.50%, or 3% municipal bonds until 2016 when yields touched such low levels. Then post-election muni yields rose and prices declined.

If you buy munis online and your platform does not supply a De Minimis calculator better get out your pencil and paper for hand computations. There are numerous articles online written by Piper Jaffray, Pimco, Schwab, RBC and others explaining the formulas and with grids showing allowable market discounts before treatment as ordinary income kicks in.

Let this column be a red flag warning: The De Minimis rule can bite the incautious. Oh…and if you think no one will notice the discounted price you paid, the 1099s issued by the brokerage industry are extremely accurate in their reporting to the IRS.

FORBES

by MARILYN COHEN

FEB 7, 2017 @ 11:48 AM

Marilyn Cohen is founder and CEO of Envision Capital Management, a Los Angeles fixed-income money manager.

Heller, Nelson, Kelly and Blumenauer Re-Introduce Bipartisan Public-Private Partnership Bill.

(Washington, DC) – Today, U.S. Senators Dean Heller (R-NV), Bill Nelson (D-FL), Congressman Mike Kelly (R-PA), and Earl Blumenauer (D-OR) released the following statements after re-introducing the

"Public Buildings Renewal Act." The bill enables communities to establish public-private partnerships (P3s) for needed public infrastructure improvements, such as in schools or public universities, by creating $5 billion in new private activity bonds for public buildings.

"In the past, P3 investment has produced enormous benefits across the nation in the form of transportation and infrastructure improvements. I want to see the same results right here in the Silver State, especially for Nevada's schools. Now is the time to use the success of P3s in the infrastructure industry as a financing model for Nevada's public buildings to repair cornerstones in our communities like public schools and libraries. This commonsense idea helps our public schools and universities do even more. By empowering the private sector to address these issues, innovation ensures these projects are completed in a more cost efficient manner," said Senator Dean Heller.

"This bill will help local governments build schools, libraries, fire stations and other public buildings that serve as the foundation of our communities," said Senator Bill Nelson.

"Our country's public buildings are in a historic state of disrepair and in need of a bold solution. That's where the Public Buildings Renewal Act can come to the rescue. This legislation became more urgent than ever for me after I visited several of our district's schools last year and saw the unacceptable damage up close. When public places like schools, hospitals, and court houses are allowed to crumble, the people they serve suffer, especially students. Our bill will channel a new stream of P3 financing into local communities for the ultimate goal of restoring public infrastructure from coast to cast. It will take advantage of private sector efficiency to create jobs and save taxpayer money by streamlining the delivery, design, and construction of these projects. I thank my colleagues in both chambers for supporting this commonsense solution and look forward to helping them advance it swiftly," said Congressman Mike Kelly

"Congress has failed to display the political courage necessary to adequately invest in infrastructure—from roads and light rail to schools and courthouses. Our nation is literally falling apart and falling behind. We need an 'all of the above' approach to infrastructure funding, and simple fixes to lower investment barriers are steps in the right direction," said Congressman Earl Blumenauer (OR-03)

Background:

These newly created private activity bonds mentioned above would provide much-needed financing to cash-strapped states to construct government-owned buildings such as public schools, state colleges, post offices, libraries, prisons and courthouses. Currently, the use of P3s to deliver public buildings is extremely limited because unlike the transportation sector, public buildings are not eligible for private activity bonds. This inhibits public building P3s from combining tax exempt financing with private financing, resulting in an increased cost of financing. Nearly every U.S. transportation P3 project that has moved forward has utilized federal financing, 75% of which have accessed Private Activity Bonds. Over $36 billion in transportation P3 projects have been undertaken since 2010 with a cost savings of nearly 20 percent for each project.

This bill will catalyze the use of P3s in public buildings just as PABs have for transportation. By empowering the private sector to tackle these projects, the bill would make these projects more cost effective, stretching every public dollar further. Additionally, the bill is a fiscally conservative solution to overhauling these public projects with an estimated cost from JCT of less than $50 million over ten years.

The House companion bill is [HR 960](HR 960).

Senator Heller was recently named Chairman of the Senate Committee on Finance's Subcommittee on Energy, Natural Resources, and Infrastructure. This role will give him the ability to promote infrastructure projects in Nevada like Interstate 11.

[Bills Would Allow States, Localities to Issue up to $5B of PABs for Public Buildings.]

WASHINGTON – House and Senate members have reintroduced companion bills that would allow state and local governments to issue up to $5 billion of private activity bonds to finance the repair or construction of schools and other public buildings under public-private partnership arrangements.

The "Public Buildings Renewal Act" was introduced in the House on Feb. 7 as H.R. 960 by Rep. Mike Kelly, R-Pa., and eight cosponsors, including six members of the House Ways and Means Committee such as Rep. Earl Blumenauer, D-Ore.

The measure in the Senate, which has not been assigned a number yet, is being introduced by Sens. Dean Heller, R-Nev., and Bill Nelson, D-Fla., both of whom sit on the Senate Finance Committee.

The bills they introduced last session were H.R. 5361 and S. 3177.

The legislation would create a new category of tax-exempt PABs that would allow states and localities to construct or renovate government-owned buildings such as public schools, state colleges, post offices, libraries, prisons and courthouses with private parties.

These kinds of projects cannot currently be financed with tax-exempt P3s because there is not a specific qualified PAB category for bonds for public buildings.

"Our country's public buildings are in a historic state of disrepair and in need of a bold solution," Kelly said. "That's where the Public Buildings Renewal Act can come to the rescue."

"Congress has failed to display the political courage to adequately invest in infrastructure – from roads to light rail to schools and courthouses," said Blumenauer. "Our nation is literally falling apart and falling behind. We need an 'all of the above' approach to infrastructure funding and simple fixes to lower investment barriers are steps in the right direction."

The Bond Buyer

By Lynn Hume

February 8, 2017

[Senate Panel Told P3s Won't Work for Rural Areas, Tax-Exempts Are Key.]

WASHINGTON – Municipal bonds are a "crucial component" of any infrastructure plan and their tax-exempt status must be preserved, a county official from Oklahoma representing the National Association of Counties told members of a Senate committee on Wednesday.

Transportation officials from rural states said during the hearing held by the Senate Environment and Public Works Committee that public-private partnerships won't work for them. The hearing was on "Modernizing our Nation's Infrastructure."

The comments were not exactly an endorsement of President Trump's $1 trillion infrastructure plan to bring in private investment to help finance the repair and development the nation's roads, bridges, and other infrastructure projects.

Cindy Bobbitt, a commissioner of Grant County, Okla., who was representing NACo, told committee members that, "Between 2003 and 2012, counties, states and other localities invested $3.2 trillion in infrastructure through long-term, tax-exempt municipal bonds, 2.5 times more than the federal investment."

Bobbitt, who noted that munis have low default rates and are often approved by both legislatures and the voters, said, "Simply stated, the tax exemption of municipal bond interest from the federal income tax represents one of the best examples of the federal-state-local partnership."

She pointed out that two thirds of the nation's 3,069 counties are considered rural with a combined population of 60 million and face challenges such as declining populations and a limited ability to raise revenue for capital projects.

Among her recommendations were that Congress should make federal highway dollars available for locally owned infrastructure. Local governments own 78% of the nation's road miles, including 43% of federal-aid highways and 50% of the National Bridge Inventory, she said.

Committee chairman Sen. John Barrasso, R-Wyo., asked Bill Panos, the director and CEO of the Wyoming Department of Transportation who also testified, whether rural or smaller states could use Build America Bonds for infrastructure, though they would have to be reauthorized.

"Wyoming has never borrowed for transportation" because its "high cost per capita … discourages borrowing," Panos said. But he later said the state has issued grant anticipation revenue vehicles, or Garvees.

Barrasso said data from the U.S. Treasury Department shows rural states issued a lot of BABs in 2009 and 2010 when they were authorized by the American Recovery and Reinvestment Act. BABs are taxable bonds for which Treasury makes subsidy payments to issuers equal to roughly 35% of their interest costs.

Panos, who was also speaking on behalf of the transportation departments in Idaho, Montana, North Dakota, and South Dakota, some of which issued BABs, told committee members that P3s and other approaches to infrastructure investment that depend on positive revenue streams from projects "are not a surface transportation infrastructure solution for rural states."

P3s would be unlikely to attract investors even with tax credits, he said. Part of the problem is that roads in rural states tend to have relatively low traffic volumes, he said.

Panos said Congress must strengthen the Highway Trust Fund, which will no longer be able to support surface transportation programs after 2020, when funding from the Fixing America's Surface Transportation Act (FAST) ends.

He also said certainty is important for transportation planners. He applauded the FAST Act's providing several years of transportation funding, but said Congress' track record of passing continuing resolutions, restricting funds to the previous years' levels, instead of annual appropriations bills, creates uncertainty.

Sen. Deb Fischer, R-Neb., a committee member, said she's proposed legislation (S. 271) to shore up the Highway Trust Fund and to provide states with more flexibility in how federal funding is spent on infrastructure projects. "I think it's really important to look at a federal revenue source without raising taxes," she said during the hearing. Her bill would transfer revenues from U.S. Customs and Border Protection to the HTF.

"If we have certainty we can make better plans" and that will lead to lower costs, said Shailen Bhatt, executive director of the Colorado Department of Transportation, who also testified.

Most of the witnesses agreed with the current funding formulas that divide federal funds between highway and transit programs and urged that they be continued.

While the committee paid particular attention to the needs of rural areas, Bobbitt pointed out that farms and businesses in agricultural-based rural areas need roads and bridges to deliver products to urban areas. "It's not rural vs. urban," she said, adding, "We're all in this together."

The Bond Buyer

By Lynn Hume

February 8, 2017

[The Timeline of Tax Reform and the Danger For Munis.]

AUSTIN – Federal tax reform efforts will accelerate in just a few weeks, and municipal market participants need to be pushing hard to protect the muni interest exemption right now, lawyers told attendees at a conference here Thursday.

Speaking at The Bond Buyer's Texas Public Finance Conference luncheon, Bracewell attorneys Curtis Beaulieu and Charles Almond warned that the exemption could be in danger very soon despite President Donald Trump's apparent support for leaving that part of the tax code unchanged. Republicans have been pushing to lower corporate and individual income tax rates, a goal that puts the muni exemption in danger of being limited or eliminated.

The momentum will pick up about six weeks from now, Beaulieu said, when House Ways and Means Committee chair Kevin Brady, R-Texas, releases the first draft of tax reform legislation. This draft, called the "chairman's mark," is crucial for the future of the muni exemption, said Almond. If the mark comes out and does not include a tax exemption for municipal bond interest, the lawyer warned, that means someone on the committee will then have to work to get it in.

"You really want things taken care of in the chairman's mark," Almond said, urging conference attendees to begin lobbying their representatives now if they hadn't already, warning them against waiting weeks to do so. Almond said that the "House blueprint" for tax reform that has already been publicly circulated could already be interpreted as limiting the tax exemption, and proposed eliminating "special-interest" deductions and credits.

A September estimate released by the Treasury pegs federal "tax expenditures" for tax-exempt bonds issued by state and local governments at about $565 billion over the 10-year period from 2017-2026. While that ranks only 15th on Treasury's list of tax expenditures, Almond said it still provides lawmakers with a potentially appealing way of helping to lower tax rates without adding to the deficit.

“To get those rates down, they’re going to go searching for other places to raise revenues,” said Almond.

Beaulieu said that even if the tax exemption is on the table, legislation would still be very unlikely to include a retroactive change to the status of outstanding tax-exempt bonds.

“Republicans typically do not support retroactive tax increases,” Beaulieu said. “So there’s probably no chance.”

Almond downplayed the comfort that market participants can take in then President-Elect Trump’s comments to the U.S. Conference of Mayors in December, during which Trump spoke about his proposed $1 trillion ten-year infrastructure plan and said that he plans to maintain the tax-exempt standing of municipal bonds.

“I don’t think you can rely on anything until it’s Tweeted,” joked Almond.

Beaulieu said that Republicans can pass tax reform legislation on a partisan basis in the House, where they GOP maintains a sizeable majority. But when the discussion moves over to the Senate, he said, Republicans will likely need to abandon their partisan approach and get some Democrats on board. Republicans control 52 Senate seats, but the upper chamber’s rules essentially require 60 votes to pass a bill because of the ability of Senators to filibuster and more easily amend bills they dislike.

“Everything slows down in the Senate,” said Beaulieu.

The Bracewell lawyers’ estimated timeline includes consideration of tax reform legislation by the full House by August. The full Senate could consider it by the end of 2017, and a conference report could produce a joint product by spring 2018.

The Bond Buyer

By Kyle Glazier

February 9, 2017

TAX - CONNECTICUT
Kettle Brook Realty, LLC v. Town of East Windsor
Supreme Court of Connecticut - January 24, 2017 - A.3d - 324 Conn. 544 - 2017 WL 194255

Property owner filed municipal tax appeal seeking reduction in property’s assessed value.

The Superior Court granted town’s motion to dismiss. Property owner appealed. The Appellate Court affirmed. Property filed petition for certification to appeal, which was granted.

The Supreme Court of Connecticut held that appeal was commenced when property owner served appeal documents on municipality, which was outside of two-month deadline, and not when appeal documents were filed with Superior Court, which was within two-month deadline, and thus appeal was untimely.

TAX - NEW HAMPSHIRE

[Bishop of Protestant Episcopal Diocese in New Hampshire v. Town of Durham]

Supreme Court of New Hampshire - December 9, 2016 - A.3d - 2016 WL 7177763

Church appealed town's assessment of property tax on 24 spaces in church parking lot that church leased to state university students. The Superior Court, Strafford County, Houran, J., entered summary judgment for town, and church appealed.

The Supreme Court of New Hampshire held that spaces in church's parking lot leased to state university students were not exempt from property tax.

Spaces in church's parking lot leased to state university students were not "used and occupied directly for religious purposes," within meaning of statutory exemption from property tax for "houses of public worship, buildings, and the lands appertaining to them owned, used and occupied directly for religious training or for other religious purposes by any regularly recognized and constituted denomination"; university students were using parking spaces for their own private and secular purposes, i.e., parking for about six hours each week, plus special event days and during snow plowing and repair operations, and church did not argue that leasing spaces to university students was reasonably necessary to carry out its mission.

[Mayors Fight to Keep Municipal Bonds Tax Free.]

Mayors present and past swear by the value of municipal bonds, while also swearing by the tax deduction for investing in them.

Hence their ongoing battle to preserve that tax benefit as Congress considers changes that could cut the deduction or trim it back in some way as part of an overall tax overhaul, despite some whispered assurance that the century-old exemption won't get touched.

Advocates don't want to take anything for granted.

Still, it doesn't hurt that they have easy allies on the House Ways and Means Committee, where legislative changes to the U.S. tax code begin. Multiple GOP members are former mayors who are fighting opposition to the tax break.

"As we go through the tax reform debate, I will be a voice in that camp," said Rep. Tom Reed (R-N.Y.), who ran City Hall in Corning, N.Y., in 2008 and 2009.

Municipal bonding is critical to building infrastructure such as roads, he told Bloomberg BNA, adding that no financing alternatives exist. That echoes a point raised by members of the U.S. Conference of Mayors in an effort to keep the tax benefit.

The group recently launched a formal campaign to ensure the status quo.

Local and state governments financed nearly $1.7 trillion in infrastructure projects through tax-exempt municipal bonds from 2003 to 2012, but would have paid nearly $500 billion more if investors couldn't use the deduction over that decade, according to data from the mayors' group.

That kind of impact would have caused higher taxes and job losses, a number of mayors argued at a recent gathering in Washington for their 85th winter meeting.

$195 Billion

The tax benefit for municipal bonds adds up to an estimated $195 billion in lost revenue from the 2016 federal fiscal year through 2020, according to an analysis released Jan. 30 by the Joint Committee on Taxation.

That federal subsidy for state and local outlays represents wasteful spending that accrues to top-income taxpayers, said Chris Edwards, director of tax policy studies at the libertarian Cato Institute. He has recommended repealing the provision because it favors government infrastructure over the private sector.

“It’s a distortion because it discourages state and local governments from making privatization reforms,” Edwards told Bloomberg BNA, repeating a message he has delivered directly to Ways and Means Chairman Kevin Brady (R-Texas) and committee staff.

Private ownership of airports, seaports and highways is much more common in countries like Canada and the U.K., Edwards said, adding that it is more efficient than government-run infrastructure.

But new water and sewer infrastructure would be imperiled without municipal bond financing in South Carolina’s state capital, Columbia, said its mayor, Steve Benjamin.

The project, which he said should service 300,000 people in the region when completed, hasn’t required higher taxes. In fact, the city hasn’t raised taxes in a decade and has ended five of the last six years with a budget surplus, Benjamin said.

“We don’t need rate increases simply based on the unavailability of additional capital,” he told Bloomberg BNA. “That’s the concern here. Certain cities will always be able to access the market. But if in fact we saw the tax exemption go away, or any other jolts to the muni market, there are several cities that wouldn’t be able to access markets.”

Trump Support

President Donald Trump agrees with keeping the tax benefit, according to Benjamin, who in December met with Trump in New York along with New Orleans Mayor Mitch Landrieu and Oklahoma City Mayor Mick Cornett, president of the U.S. Conference of Mayors.

Behind the scenes, some Ways and Means Republicans don’t expect change, according to two sources close to the talks who spoke on condition of anonymity so they could speak freely about the ongoing discussions, but the tax exemption’s defenders don’t feel safe.

“That alarms us because we know that that cuts directly into the amount of infrastructure that we’re able to finance in our nation’s cities,” Cornett said at a news conference during the group’s Washington meeting.

Several mayors had meetings with Ways and Means members and staff, Benjamin said, without providing specifics. He stayed in town through Trump’s inauguration, but didn’t have another meeting with the president.

“I can tell you it’s one of the potential things to look at as far as replacing and simplifying the tax code,” said Rep. James B. Renacci (R-Ohio), another former mayor among Ways and Means’ GOP roster.

Committee members are being petitioned on a host of tax benefits that could be on the chopping block as part of tax reform, for which legislation is being developed based on the loose framework released in June by Brady and House Speaker Paul D. Ryan (R-Wis.).

“Being on the front line of that debate previously, I think mayors—and myself included—tend to understand the need for municipal bonding, and if you don’t have it, how difficult it would be to meet the needs of local communities,” Reed said.

Still Waiting

Renacci has pushed back against the opposition, and like Reed, would prefer to maintain the tax exemption. But the former mayor of Wadsworth, Ohio, admitted that such decisions remain out of his hands for now.

“We don’t know what’s in or what’s out; we haven’t seen the bill in writing,” Renacci told Bloomberg BNA. “It’s the same old answer—we just have to continue to wait and see what the committee staff puts in writing and we’ll have a better answer.”

Other former mayors on Ways and Means include Reps. Kenny Marchant (R-Texas), who said bonding was an essential ingredient to funding municipal projects during his tenure running Carrollton, Texas.

Ways and Means ranking member Richard E. Neal (D-Mass.), the former mayor of Springfield, Mass., said bonds’ guarantees are essential for communities and investors, and that he couldn’t imagine changing tax policy to alter their attractiveness.

“It’s a public good,” Neal told Bloomberg BNA. “I don’t think that’s a difficult one.”

But the tax overhaul blueprint needs revenue to minimize more red ink on the federal ledger, something Brady has pledged to ensure when estimating economic upside that would come from the myriad tax cuts involved in the plan.

Both Reed and Renacci cautioned that changes to tax-exempt municipal bonds remain a possibility. But Reed said he won’t hold back his opinions.

“To me, it’s a tool that’s worked for years and years and years,” he said. “And as we go through tax reform I’m about fixing the broken parts of the tax code, but for the provisions that work, we’re a voice to say let’s continue that.”

Bloomberg BNA

By Aaron E. Lorenzo

February 6, 2016

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2017 – What lies ahead?

The year 2017 promises, and threatens, to be a potentially momentous one for public finance in the United States. The Trump Administration and the 115th Congress may put in place tax reforms and infrastructure programs that will have transformative consequences for the financing of public projects in all sectors and at all levels. These are only a few of the issues that state and local officials and public finance professionals will be following closely in the coming year:

- Will income tax rates be reduced and, if so, will lower rates reduce the relative attractiveness of tax-exempt municipal bonds?
- Will new restrictions be placed on the purposes for which tax-exempt bonds may be issued or on the manner in which they may be sold, or how their proceeds may be invested?
- Will the new Administration pursue the trillion-dollar, ten-year infrastructure program that President Trump proposed during the campaign? Will Congress approve it? If so, which categories of infrastructure improvements will be given priority?
- How will any major infrastructure program be paid for? As a candidate, President Trump indicated that he would propose new tax credits as a funding method. If enacted, would those tax credits enhance or undermine traditional municipal bond financing?
- Will the Alternative Minimum Tax be eliminated and, if so, will that increase the relative attractiveness of "AMT Bonds" (e.g., exempt facility bonds) commonly issued to finance certain types of large infrastructure projects?

Continue reading.

Squire Patton Boggs

The Public Finance Tax Blog

By Joel Swearingen, Johnny Hutchinson and Bob Eidnier on February 3, 2017

IRS Opens Probe Into Financing for Statler Redevelopment.

The Internal Revenue Service is investigating a deal that raised millions of dollars for the redevelopment of the Statler Hotel and Dallas Central Library, according to lawyers involved in the financing.

The *Dallas Morning News* recently signed a lease agreement to move into the old library building once it has been renovated. The library and 19-story hotel are on Commerce Street across from the Main Street Garden Park.

The IRS is examining a complex financing that raised $26.5 million for the $221 million project. Mehrdad Moayedi, a real estate developer known for building residential communities in North Texas, is spearheading the project though Commerce Statler Development LLC.

The financing to help pay for the redevelopment involved tax-exempt bonds, which are regulated by the IRS.

The bonds were sold by an agency in Wisconsin and were backed by future tax grants to the project from the city of Dallas. Local experts called that structure unusual when it was announced in August.

Lawyers involved in the tax-exempt bond sale published a notice Monday telling investors that the IRS is examining the deal because of concerns "that the debt issuance may fail one or more provisions" of the tax code. The notice said the concerns may have been raised by "external sources."

The agency did not respond to requests for comment Monday night.

The Public Finance Authority in Wisconsin "believes the bonds complied with all applicable provisions of the Internal Revenue Code," according to the law firm that posted the disclosure, Orrick, Herring & Sutcliffe. The firm declined to comment to *The News*.

The city of Dallas approved the bond sale based on the future payout of the tax incentives.

Moayedi's spokeswoman referred questions about the IRS inquiry to Kirk Wilson, a financial consultant for the project. Noting that the developer has not received any information directly from the agency, he said that the IRS is simply asking for more information in a routine audit.

The bonds are backed by so-called tax-increment financing, in which the city promises to give developers tax breaks over time for developing in designated areas. City representatives did not immediately respond to requests for comment.

The Dallas Morning News

by Terri Langford

Miles Moffeit contributed to this story

CDFA Agenda Includes Pushing for Bond Bills, Supporting Tax Exemption.

WASHINGTON – The Council of Development Finance Agencies this year will work to obtain separate bills that would ease certain tax restrictions for manufacturing bonds and remove water and sewer bonds from the private activity bond volume cap.

The goals are in the 2017 policy agenda the group is circulating to its members.

The CDFA also will work to preserve and strengthen tax-exempt bonds in general, obtain increased funding for the Water Infrastructure Finance and Innovation Act (WIFIA) and promote the launching of a federal urban tax increment finance program, among other things.

"The bond issues outlined in our agenda are our primary focus in 2017, said Toby Rittner, CDFA's president and chief executive officer. "Working with our partners in Congress to get MAMBA passed would be a great victory for issuers, and for our industry as a whole. Our efforts to protect the tax-exempt status of municipal and private activity bonds are also important. With tax reform likely coming this year, it's essential that we make sure members of Congress are fully aware of the importance of the tax exemption, and that they protect it at all costs."

MAMBA is the acronym for "Modernizing American Manufacturing Bonds Act," companion bills introduced by House and Senate members last year and the year before that would have loosened tax law restrictions for qualified small issue manufacturing bonds. These bonds are used to finance facilities for small and mid-sized manufacturers. They are also called industrial development bonds (IDBs). The bill (S. 3416) in the Senate was offered on Sept. 28 of last year by Sens. Sherrod Brown, D-Ohio, and David Perdue, R-Ga., The one (H.R. 2890) in the House was introduced on June 25, 2015 by Reps. Randy Hultgren, R-Ill., Richard Neal, D-Mass., and James Renacci, R-Ohio. Neal is now the top Democrat on the House Ways and Means Committee. The two congressmen had offered the bill the previous year as well.

The House and Senate bills would have made two tax law changes that had been put into effect in 2009 and 2010 under the American Recovery and Reinvestment Act. They would have expanded the definition of manufacturing facility to include intangible property, such as software, as well as tangible facility. The bills also would have allowed IDBs to be used to finance facilities that are functionally related and subordinate to the production of tangible or intangible property, such as warehouses that temporarily store materials and laboratories that test raw materials.

Additionally, the measures would have made two other tax law changes. They would have increased the maximum size of an IDB issue to $30 million from $10 million. The limit hasn't increased since 1979 and hasn't ever been indexed to inflation.

They also would have increased the capital expenditure limitation for IDBs. Currently, a manufacturer can only issue IDBs if their capital expenditures, including the bond proceeds, are not more than $20 million in the six-year period beginning three years before the date of the proposed new issue and ending three years after that date. Under the bills, that capital expenditure limitation would have increased to $40 million.

On tax-exempt financing in general, CDFA's agenda said, "The administration must commit to preserving and protecting tax-exempt bonds under any and all circumstances. The restriction, capping, and/or eliminating of the tax-exempt status for municipal and private activity bonds should be dismissed outright."

In addition, the group said, any tax reform measures considered by Congress should take into account the importance of private-sector led investment and "the critical role that tax-exempt bonds play in generating private investment."

CDFA also wants to push for the reintroduction of legislation that would remove PAB volume caps for water and sewer bonds. A bill (S. 2606) was introduced in the Senate on Feb. 29 last year by Sens. Robert Menendez, D-N.J. and Mike Crapo, R-Idaho. The one (H.R. 499) in the House was introduced by Reps. John Duncan, Jr., R-Tenn., and Bill Pascrell, DN.J., the year before in January.

In addition, the group wants increased funding for WIFIA, which provides credit assistance in the form of loans for large water infrastructure projects.

The group's agenda also calls for the launch of a Federal Urban Tax Increment Finance Program that would allow local governments to redirect specific estimated tax revenue to finance urban revitalization efforts. Currently state and local governments set up TIF districts and use the revenue to back tax exempt bonds.

CDFA called for the creation of a State Clean Energy Finance Initiative (SCEFI) pilot program with the Treasury Department that would be authorized for five years with a onetime $5 billion appropriation. The program would leverage an additional $50 billion of private investment nationally for clean energy projects.

The two-plus-page agenda calls for other initiatives as well.

The Bond Buyer

By Lynn Hume

February 2, 2017

Making the Case for the High Efficiency of the Tax Exemption - It's in the Numbers.

As tax reform takes shape, a key challenge for the municipal market in maintaining full access to the tax exemption stems from a factually flawed methodology utilized by the Joint Committee on Taxation.

Over a long period of time, we have been told, “don’t try arguing with Joint Tax methodology, their methodology is accepted by Congress, the Administration and staff as being gospel.” However, what if the problems with the Joint Tax analysis stem not primarily from methodology, but from factual inaccuracies in the data underpinning the analysis?

Under its analysis, the JCT comes to three conclusions:

1. That municipal yields as a percentage of taxable yields are high;
2. That this high ratio results in the marginal tax rate of the marginal investor in municipals being low; and,
3. That, as a consequence, everyone in a higher tax bracket received a “windfall”—a higher yield than would be needed to needed to attract them to buy municipals.

Under their methodology, long-term municipal yields as a percentage of corporate yields are indeed quite high – roughly 94% on long-term A1/A+-rated paper. However, the high ratio vanishes when two simple but essential adjustments are made to the calculation: The first adjustment is to compare municipals to corporate bonds that are actually similar, which the Joint Tax report demonstrably did not. We stress that this adjustment does not reflect a change in methodology relative to the JCT. It simply makes sure that the analysis involves an “apples vs. apples” comparison.

The second adjustment is to increase municipal yields to the levels that would be needed to clear the market if these municipals came as taxable bonds. That is a higher yield than that which would show on corporate indices, because as currently constructed, municipals have certain disadvantages that would force them to pay a higher yield than corporate bond indices suggest, if they came in the taxable market. These disadvantages include weaker call provisions, lower liquidity on smaller maturities, and a weaker disclosure regime than on corporate bonds. Having shown how these two adjustments would look, we then discuss two other factors, which provide important pieces of evidence that the conclusions of Joint Tax are incorrect—the functioning of the market for “Private Activity Bonds” subject to the Alternative Minimum Tax, and the pattern during the second half of 2009 and 2010, when taxable “Build America Bonds” were available as an alternative to tax-exempts.

The bottom line is that in our view, the 2012 report out of Joint Tax on their methodology for determining the efficiency of the tax-exemption was severely factually flawed:

- Triple-A corporates were compared to A1/A+ municipals using the Bond Buyer 20-Bond Index (BBI);

- The fact that the BBI severely overstates actual borrowing costs in the municipal bond market was ignored;
- The fact that municipals with shorter maturities compare much more favorably than longer bonds in comparison with taxable bonds was ignored; and,
- The more favorable structure of corporate bonds with respect to call provisions, liquidity and disclosure, which reduces their borrowing cost relative to the likely cost of fully taxable municipals was ignored.

All of the above factors create an illusion the JCT analysis that muni yields as a percentage of corporate bond yields are much higher than they are in the real world.

Finally, the underlying assumption that, if tax-exempts did not exist, investors would only buy fully-taxed corporates as an alternative, is simply incorrect, as Joseph Poterba at MIT has shown. At the maximum 40% tax rate on corporate bond interest, a vast number of investors would, if they could not buy tax exempts, seek out an alternative with a lower Federal tax rate, such as the 20% maximum rate on dividends and capital gains.

Working Through the Numbers

In our analysis, we start with the yield ratio we would expect JCT to derive using its flawed data. Using this starting point, we would have a tripleA corporate bond index of roughly 3.50%, and a yield on the Bond Buyer 20-bond Index of roughly 3.87%. This provides a starting point ratio of roughly 107%.

Adjusting for the factual inaccuracies in the data as shown by JCT in its own analysis works out as follows:

1. Currently, municipal yields are inflated to a degree by tax risk fears. In our estimation, long-term municipal yields would be at least 30 basis points lower under “normal” conditions. Since the election, investors have become reticent to put cash to work in the municipal market as a result of fears that tax reform would damage the value of municipals by sharply cutting tax rates or putting a cap on the value of the tax-exemption. Pressures on the municipal market are shown in municipal bond fund flows, which have been a whopping negative $15 billion since the election. Adjusting for tax risk fears, and the ratio declines to 3.57% vs. 3.50%, or 102%.
2. Different quality bonds are being compared. A Triple-A rated Corporate Bond index is compared to the A1/A+ Bond Buyer Index. Use of comparably rated bonds would reduce the ratio on municipal yields to corporate yields considerably. (3.57% /3.60% would become 3.57%/4.10%). The yield ratio would thus move down from 102% to 87% – still very high, but wait…
3. The greatly inflated yield on the BBI. The Bond Buyer Index utilized by the JCT in their analysis ALWAYS yields considerably more than actual municipal bonds, as it did over the entire time period included in the JCT report. During their measurement period, the difference typically ran 80120 basis points. Now, with lower yields in all sectors, the difference still runs 50 basis points for similarly rated bonds due in 20 years. So, the 3.57% to 4.10% comparison above becomes 3.07% to 4.10% when real-world yield levels are used instead of the massively inflated BBI, and the ratio declines to 75%.
4. Differences in call provisions, liquidity and disclosure between A1/A+ corporates and A1/A+ municipals are ignored. To be sold in the taxable market without corporate-like attributes, we estimate that municipals would have to have roughly 40-basis-point higher yields than like-rated corporates, and 60 basis points more for smaller, less liquid issues. Differences include the lack of call risk on corporate bonds versus the ten-year call on nearly all municipals, stronger liquidity resulting from higher per-maturity issue size, and stronger disclosure requirements. So, the comparable ratios become 3.37% to 4.50%, and 3.37% to 4.70%, or the 74.9% to 73% range.

5. A focus on long maturities. As we discuss below, municipal yields as a percentage of taxable yields tend to be dramatically lower on bonds 11 years and shorter than they are on longer-maturity paper. By our estimate, the ratio in the 10year range would be at least 7 percentage points lower in 10years than it is in the 20-year bonds used in the JCT analysis, and on 5year paper would be another 7 percentage points lower. Using an average of a 10 percentage point drop for paper inside 10 years, and the ratio declines to from 64.9% to 63%.
6. Evidence for a very high clearing marginal tax rate on shorter maturities comes from BABs. During the period from mid-2009 through the end of 2010, nearly 40% of new issues came as Build America Bonds – fully taxable to the investor, but with a 35% subsidy provided to the issuer. Issuers thus had a choice: accept the reduced yield provided by access to the tax exemption, or accept a 35% subsidy. The two choices would essentially be break even when munis yielded exactly 65% as much as taxable BABs. In terms of measuring the efficiency of the tax exemption, here is the interesting result: during that period, a very large proportion of bonds with a maturity longer than roughly 11 years came as BABs, but nearly all bonds with a maturity inside 11 years came in the tax-exempt market. As far as the efficiency of the tax exemption is concerned, the implications are clear: inside roughly 11year maturities, municipal bonds were clearing with a ratio to taxable bonds lower than 65%. This compares with the implied tax rate for municipals during 2009 in the Joint Tax analysis of 13.2%. We estimate that the ratio actually stayed above 30% as far out as roughly 15 year maturities, a sizable component of the entire municipal market – roughly 60%-70%.
7. Thus, simply comparing apples to apples—similarly rated and structured municipals and corporates under current conditions takes the clearing marginal tax rate up from 8% to 34%-38.5%. However, even this purely factual analysis based upon current market conditions ignores an important invalid assumption in the Joint Tax Analysis: That investors who could no longer buy tax exempts would only buy taxable bonds taxed at their maximum income tax rate as an alternative. The problems with the assumption that taxable bonds are the only alternative in the absence of tax-exempts, is shown in the work of Joseph Poterba and teammates at MIT. (Example: *Portfolio Substitution and the Revenue Cost of the Federal Income Tax Exemption for State and Local Government Bonds*, Poterba, James M. and Verdugo, Arturo Ramírez, National Tax Journal, June 2011.)

It's Not Just Municipals vs Taxable Bonds

Having adjusted the yield comparison to provide an apples-versus-apples comparison, we arrive at an adjusted yield ratio of municipal yields to corporate yields, at various spots along the yield curve. While this adjustment suggests a marginal tax rate for the marginal buyer that is vastly higher than the JCT suggests, we then explain why the assumption that this ratio represents a complete comparison of the two markets is highly flawed. This assumption has been deconstructed by Poterba at MIT, among others.

In reality, in the absence of a tax-exemption, most investors would not buy taxable bonds taxed at their maximum marginal rate; they would hold more cash/nearcash (they currently hold 6X as much cash as the do municipals), or they would buy investments with a lower effective tax rate. Currently, dividends and capital gains are taxed at a maximum rate of 20%. With longterm corporate yields around 4.25%, investors in roughly the 40% tax bracket would earn roughly 2.50%, after-tax. As Drs. Poterba and Verdugo note, lacking access to tax-exempts, many of these investors would choose dividend paying stocks, or invest for a longterm capital gain, rather than buying fully taxable bonds. The idea that the difference between the ratio of municipal yields to corporate yields and investors' maximum tax brackets represents a "windfall" to the high bracket investor is simply incorrect, because investors have other choices.

Impact of a Cap on the Tax Exemption—Evidence From the Market for Bonds Subject to the AMT

Our message in the above is that, when comparisons between munis and corporates are measured properly, municipal yields as a percentage of taxable yields are vastly lower than that shown in the Joint Tax analysis. Quite simply, the low marginal efficiency of the tax-exempt market described by Joint Tax in its analysis results from inaccurate data. We do not attack the methodology, we simply show that the clearing marginal tax rate for municipals, properly measured, is quite high under most market conditions.

In addition, the question has come up as to what the impact would be of a 28% cap on the tax-exemption.

In our view there is already evidence of the impact from the functioning of the market for PABs subject to the AMT.

These bonds are subject to a "surtax" on the interest, but only for investors who pay the AMT. For other investors, the AMT has no effect. Even with this limited target for the surtax, bonds subject to the AMT cost issuers roughly 30 basis points more than nonAMT paper. To investors who do not pay the AMT, the extra yield is a "windfall" that provides no tax revenue to the Treasury. Now consider what would occur if all municipals were subject to a surtax in the form of a 28% cap: we would expect the cost of borrowing in the municipal market to rise substantially more than 30 basis points. In our estimate, the impact would range from 50 basis points to 75 basis points or more for the entire market. Please note that when municipals and corporates are compared properly, the clearing ratio of yields generally put the marginal tax rate above 28%. As a consequence, in our view, a 28% cap would be quite damaging the in the form of higher borrowing costs.

The Bottom Line

Decision makers often cite the Joint Tax methodology in explaining why they believe the tax exemption to be an inefficient subsidy. To a very significant degree, we believe that the JCT analysis is flawed, not because its methodology is incorrect, but because its data is wrong: its comparison is a clear "apples to oranges" comparison. When the data is adjusted to compare similar bonds in both sectors, we discover that muni yields as a percentage of corporate bonds actually provide a marginal tax rate that is impressively high. In addition, we site one comparison from the work of Joseph Poterba et al at MIT: we believe, as he does, that if the tax-exemption were eliminated, many investors would substitute other investments with a tax rate roughly half of that on full taxable bond interest. Given all of this, the premise that the muni market clears through investors with a low marginal tax rate—thereby giving a windfall to high bracket investors – is simply incorrect.

The Bond Buyer

By George Friedlander

February 1, 2017

George Friedlander is a managing partner at Court Street Group Research.

[Despite Budget Shortfalls, Some Governors Call for Tax Cuts.]

About half of the states are facing budget shortfalls this fiscal year, but many governors are still pushing to cut taxes in their proposed 2018 budgets.

The proposals vary in scope but generally fall within two categories: comprehensive and targeted.

Nebraska Gov. Pete Ricketts' proposal is of the comprehensive variety and may be the most aggressive call for tax cuts so far. He is asking for property and personal income tax cuts to be phased in beginning in 2019 — even as the state faces a $900 million budget gap. Property taxes would be reduced via a new valuation formula and income tax breaks would kick in incrementally and only in years when state revenue grows by more than 3.5 percent.

On the whole, most of the comprehensive proposals are part of ongoing efforts.

"Many of these ideas are either follow-ons to things they've already done," said John Hicks, the National Association of Budget Officer's executive director. "Or they are things they hoped to do and haven't been able to yet."

For instance, Maine Gov. Paul LePage is again proposing to expand the state's sales tax on services as a way to pay for income tax cuts. In the latest version, LePage has extended his sales tax proposal to include streaming services like Netflix and rental platforms like Airbnb.

South Carolina Gov. Nikki Haley, who, if approved, will be vacating her office to take over as the United Nations ambassador for the Trump administration, is pushing for a pared-down version of a previous income and corporate tax cut proposal.

In Alaska, which faces a $3 billion budget shortfall, Gov. Bill Walker has toned down his previous efforts to overhaul the state's finances. He still wants to reduce citizens' annual bonus checks from the Alaska Permanent Fund and divert some of the fund's investment earnings into the state budget each year. But he has backed off previous proposals for a new state income tax, instead leaving a $900 million budget gap in his proposal for the legislature to fill.

Meanwhile, some governors are taking a more targeted approach.

Indiana Gov. Eric Holcomb wants to exempt veterans' pensions from the income tax; Arkansas Gov. Asa Hutchinson would cut taxes for low-income workers; and New York Gov. Andrew Cuomo wants to preserve planned tax cuts for the middle class.

Cuomo is renewing his proposal for a millionaire's tax hike, which would help pay for that state's $3.5 billion budget deficit. In Montana, which is also facing a shortfall, Gov. Steve Bullock has proposed a tax hike on his state's wealthiest residents. And Washington Gov. Jay Inslee is proposing a new tax on capital gains to help pay for the state's court-mandated education funding increases.

Outside of raising income taxes, some states are looking to excise or sin taxes to fill needs or budget deficits.

Governors in California, Indiana and Tennessee have floated raising the gas tax to fund transportation projects. In recent years, roughly 20 other states have approved gas tax hikes to raise sorely needed money for infrastructure and overdue maintenance. Governors in Colorado and Nevada have pitched raising marijuana taxes, while Kansas Gov. Sam Brownback is proposing an alcohol and cigarette tax hike.

In both Colorado and Kansas, the tax increases would help cover projected budget deficits. That can be a dangerous habit, said Meg Wiehe of the progressive-leaning Institute on Taxation and Economic

Policy, because such tax increases tend to discourage consumption.

“Politically speaking they’re low-hanging fruit,” she said. “The problem in relying on this is it is a very unsustainable increase. When you increase taxes on cigarettes, smoking declines. If the motivation is for public health, then that’s a different story. But if you’re looking to address a short, medium or long-term budget hole … it’s a bad proposition.”

GOVERNING.COM

BY LIZ FARMER | JANUARY 25, 2017

TAX - ILLINOIS

Oswald v. Hamer

Appellate Court of Illinois, First District, Fourth Division - December 22, 2016 - N.E.3d - 2016 IL App (1st) 152691 - 2016 WL 7436113

Real property taxpayer brought action against Department of Revenue and the Director of Revenue, seeking declaration that statute governing property tax exemptions related to access to hospital and health care services was facially unconstitutional for granting a property tax exemption to a hospital applicant without regard to whether property was used exclusively for charitable purposes.

The Circuit Court granted summary judgment for defendants. Taxpayer appealed.

The Appellate Court held that statute was facially constitutional.

Statute governing property tax exemptions related to access to hospital and health care services was facially constitutional under state constitution’s provision permitting exemption from taxation for properties used exclusively for charitable purposes. Statute’s use of term “shall” was directory, rather than mandatory, and, thus, did not require an exemption without regard to whether property at issue was used exclusively for charitable purposes, General Assembly did not intend for satisfaction of statute to ipso facto warrant an exemption, but intended for requirements of the statute to considered on a case-by-case basis, and absence of exclusivity language in statute did not mean the statute was to be read separately from constitutional requirements.

TAX - NEW YORK

Congregation Ateres Yisroel v. Town of Ramapo

Supreme Court, Appellate Division, Second Department, New York - January 18, 2017 - N.Y.S.3d - 2017 WL 189197 - 2017 N.Y. Slip Op. 00287

Landowner, a religious not-for-profit corporation, brought action against town, town assessor, and Board of Assessment review, seeking declaration that owner’s real property was exempt from real property taxes.

The Supreme Court, Rockland County, granted defendants’ motion for summary judgment.

The Supreme Court, Appellate Division, held that landowner’s use of real property violated town zoning law, and thus landowner was prohibited from receiving real property tax exemption.

Use of real property owned by landowner, a religious not-for-profit corporation, violated town zoning law, and thus landowner was prohibited from receiving a real property tax exemption. Landowner had illegally erected two trailers on property without obtaining proper permits, and had used primary structure on property as a dormitory and living quarters for over 20 students in contravention of its certificate of occupancy.

TAX - ILLINOIS

Hertz Corporation v. City of Chicago

Supreme Court of Illinois - January 20, 2017 - N.E.3d - 2017 IL 119945 - 2017 WL 243395

Car rental companies brought declaratory judgment actions against city, asserting that ruling by city's department of revenue as to tax on use of vehicles leased by city residents was unconstitutional.

The Circuit Court declared ruling facially unconstitutional and entered permanent injunction. City appealed. The Appellate Court reversed. Companies sought to appeal, which was allowed.

The Supreme Court of Illinois held that city department of revenue ruling regarding applicability of personal property tax to cars rented from agencies outside of city violated home rule article of state constitution.

Ruling had an extraterritorial effect, and therefore city department of revenue ruling determining that suburban car rental agencies located within three miles of city were responsible for paying tax on use of personal property within city borders unless lessee was exempt from paying tax based upon use of leased vehicle outside of city violated home rule article of state constitution. No part of the transactions took place within city's borders, and 100 percent of the cost of a car's rental was taxed even though ruling required that the car be driven in city for only 50 percent of the time to be subject to the tax.

Revenue Procedure 2017-13: Management Contracts – Still Trying To Get It Right.

For the third time in less than three years, the IRS has issued major guidance – Revenue Procedure 2017-13 — on the safe harbor rules for management or service contracts to avoid private business use. The new revenue procedure follows closely behind the total rewrite of the safe harbor rules that the IRS issued as Rev. Proc. 2016-44 in August 2016, which was the subject of several of our posts (here, here, and here). A cynic might think the IRS was just looking for an excuse to renumber the management contract revenue procedure as 97-13 plus 20 years. But in fact there are some important modifications in the new revenue procedure.

Continue reading.

By Bob Eidnier on January 25, 2017

Squire Patton Boggs

IRS: Unspent Proceeds, Refunding Will Not Cause Loss of BABs' Subsidy.

WASHINGTON – Unspent proceeds at the time of a current refunding will not cause Build America Bonds to lose their qualified status for Treasury subsidy payments, the Internal Revenue Service recently found in a recent private letter ruling.

The private letter ruling (PLR) was written in response to a BAB issuer that sought a ruling on whether a proposed current refunding would cause the bonds to fail to meet a requirement that 100% of the proceeds, beyond those put into a reasonably required reserve, be used for capital expenditures.

In a current refunding, the issuer refunds previously issued bonds within 90 days from the issuance of the refunding bonds. The IRS concluded in the ruling that, based on the issuer's representations, "the existence of the unspent proceeds on the redemption date of the bonds will not retroactively cause the bonds to lose their status as 'qualified bonds.'"

Because of this, the IRS said, the issuer would not lose any credit under Section 6431 of the Internal Revenue Code for the bonds for the period prior to the date of redemption. IRS officials said the ruling is contingent on the issuer not spending any of the unspent proceeds for anything other than capital expenditures.

The four-page PLR, signed by IRS senior counsel Timothy Jones, states that the bonds in question were used to finance certain capital projects for an unidentified city. The bonds were to be treated as direct-pay BABs, and the issuer agreed to spend 100% of project proceeds of the bonds for capital expenditures. By an unspecified date, a percentage of the available project proceeds of the bonds remained unspent.

The names of all parties involved in the issuance were withheld in the PLR, which was released on Jan. 13. Both the issuer and city intended to refinance the BABs by issuing tax-exempt bonds.

The IRS also stated in the PLR that it was not expressing any opinion about whether the BABs could be considered reissued upon the deposit of the refunding bond proceeds into an escrow fund to pay principal and interest on the bonds at redemption.

Linda Schakel, a partner with Ballard Spahr in Washington, said she agrees with the ruling, especially considering that the BAB legislation was different than other tax credit subsidy bonds, which required proceeds be spent within three years of the issue date on permitted costs.

"I think this is definitely a very reasonable approach to the question of what happens when you have unspent proceeds at the time you do a refunding, particularly unspent proceeds more than three years after the bonds are issued," she said.

However, Schakel said the ruling does not provide details regarding what might have delayed expenditure or what factors confirm the issuer still expects to expend proceeds.

"I take [this] to mean that the ruling is not conditioned as being extraordinary circumstances justifying the outcome," Schakel said.

Tom Vander Molen, a partner at Dorsey and Whitney in Minneapolis, said he believes that the ruling is correct. He said that although he is not aware of this particular request for a PLR, this issue has come up in different contexts.

“Sometimes in audits, the IRS says maybe it’s a problem if you don’t spend proceeds before you refund,” Vander Molen said. “My position has always been it doesn’t matter as long as you use the proceeds you were going to in the time you were going to.”

“I think this is very consistent with that,” he said. “I think this ruling is exactly right.”

Created under the American Recovery and Reinvestment Act, roughly $181 million of BABs were issued to finance infrastructure during 2009 and 2010 before the program expired for new issuances.

The Bond Buyer

By Evan Fallor

January 19, 2017

IRS Modifies Safe Harbor Guidance and Deadlines for Section 45 and 48 Energy Credits: Grant Thornton

The IRS has issued new guidance (Notice 2017-04) updating and modifying deadlines and rules for the safe harbors for establishing that construction has begun and is continuous on projects qualifying for the renewable electricity production tax credit (PTC) under Section 45 and the energy investment tax credit (ITC) under Section 48.

The guidance extends the date by which a project can be placed in service and qualify for the continuity safe harbor, adds an effective date to a restriction on combining begin-construction safe harbor methods, and clarifies which expenses from a retrofitted facility are included in the 5% safe harbor calculation.

The Protecting Americans from Tax Hikes (PATH) Act of 2015 extended both the PTC and ITC credits. Under the bill, construction on qualified PTC projects must now have begun before the end of 2016 to be eligible for the full credit. The PTC will also be available at reduced rates for wind facilities if construction begins in 2017 (80% of normal credit), 2018 (60%) or 2019 (40%). Taxpayers may also elect to take the ITC in lieu of the PTC, but any PTC rate reductions will apply to the ITC.

In addition, the 30% ITC for commercial solar projects was extended. The rate was set to fall to 10% if construction began after 2016, but the full 30% rate will now be available if construction begins by the end of 2019. A 26% credit is available if construction begins in 2020, and a 22% credit is available if construction begins in 2021 and the facility is placed in service by the end of 2023. The credit is otherwise 10%.

Under guidance issued previously (Notices 2013-29, 2013-60, 2014-46, and 2016-31) the IRS said that taxpayers can establish that construction has begun by either satisfying a test showing “physical work of a significant nature” has begun or by incurring 5% or more of the total cost of the facility under a safe harbor. Taxpayers can aggregate multiple facilities based on the relevant facts and circumstances, but then disaggregate them for applying the placed-in-service deadline for the continuity safe harbor.

However, Notice 2016-31, issued last year, does not allow taxpayers to use two different beginning construction tests in alternate years to establish construction has begun in different years for the purpose of the separate begin-construction and continuity deadlines. Newly issued Notice 2017-04 limits this restriction only to projects that began after June 6, 2016 (the day Notice 2016-31 was issued).

Notice 2016-31 also provided that a retrofitted energy project can qualify if the used property represents less than 20% of the value. Notice 2017-04 clarifies that only costs related to new construction in these projects are included in the calculation for the 5% safe harbor.

Once construction is considered to have begun, taxpayers must make continual progress toward completion. The IRS created a continuity safe harbor to satisfy this standard, last modifying it under Notice 2016-31. Taxpayers are generally considered to have made continual progress toward completion if a facility is placed in service within four calendar years of the calendar year in which construction began. Notice 2017-04 now provides that a taxpayer will also fall under this safe harbor if the project is completed before Dec. 31, 2018, even if this more than four years after construction began.

Taxpayers who don't use the continuity safe harbor must generally use a facts-and-circumstances analysis to determine if construction is continual. Notice 2017-04 does not update the nonexclusive list of allowable disruptions. The following disruptions remain excusable:

- Severe weather conditions
- Natural disasters
- Certain licensing and permitting delays
- Delays at the written request of government for safety, security or similar concerns
- Transmission interconnection issues
- Labor stoppages
- Supply shortages
- Delays in manufacturing custom components
- Inability to obtain specialized equipment
- Financing delays
- The presence of endangered species

Notice 2017-04 also does not update the list of preliminary activities under Notices 2013-29 and 2016-31 that don't qualify as physical work of a significant nature. The following preliminary activities do not qualify:

- Planning or designing
- Securing financing
- Exploring
- Researching
- Conducting geologic mapping and modeling
- Obtaining permits and licenses
- Conducting geophysical, gravity, magnetic, seismic and resistivity surveys
- Conducing environmental and engineering studies
- Performing activities to develop a geothermal deposit prior to discovery
- Clearing a site
- Test drilling of a geothermal deposit
- Test drilling to determine soil condition
- Excavation to change the contour of the land (as distinguished from excavation for footings and foundations)
- Removing existing turbines, towers, panels or other components

Last Updated: January 24 2017

Article by Dustin Stamper

Grant Thornton LLP

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

IRS Clarifies New Management Contract Safe Harbors.

In August, 2016, the IRS issued Revenue Procedure 2016-44, the first comprehensive revision of its management contract safe harbors since Revenue Procedure 97-13. Rev. Proc. 2016-44 built upon and amplified principles laid out in private letter rulings issued over many years and in Notice 2014-67. Now, less than six months later, the IRS has published Revenue Procedure 2017-13, which clarifies and supersedes Rev. Proc. 2016-44 but does not materially change the safe harbors described therein. The clarifications are in response to questions received with respect to certain types of compensation protected under earlier safe harbors, incentive compensation, timing of payments, treatment of land when determining useful life, and approval of rates.

Tuesday, January 24, 2017

Should Tax Collectors Be Loan Collectors?

Investors love a federal green-energy program for property owners. But if there's a backlash, localities could be caught in the middle.

As proof that no good deed goes unpunished, a well-intentioned federal green-energy program has put local governments into a new alliance with finance companies, sparking a small frenzy on the bond market and turning county tax collectors into de facto home-loan servicers in 34 states and the District of Columbia.

Property Assessed Clean Energy (PACE) is an Obama-era Department of Energy program designed to help residential and commercial property owners finance renewable-energy systems and energy-efficiency improvements. PACE, according to The Wall Street Journal, has become the nation's fastest-growing loan category. Along the way, the property-tax assessment and payment system has morphed into a home equity loan repayment process, posing new perils for property owners and localities alike.

PACE works like this: Contractors offer special home-equity loans to homeowners to go green. Once the green upgrades are completed and the loan documents are signed, the loans are packaged with thousands of similar loans and sold to investors in the form of bonds. Any observer of the last great boom-and-bust cycle — along with any fan of the 2015 film "The Big Short" — will recognize the process.

But here's the rub: PACE loans aren't repaid like a car loan or a mortgage. Instead, localities serve as the middlemen by collecting payments once or twice a year as an assessment in the property owner's tax bill. Localities earn a fee and then forward the proceeds to finance companies.

The premise is a good one, at least in theory. It incentivizes property owners to make environmental upgrades, requiring no cash up front. The *Harvard Business Review* named the concept as one of 10 "Breakthrough Ideas for 2010," and *Scientific American* profiled the concept's creator.

Institutional investors are devouring the bonds because of their high credit ratings and green status. The first PACE program bond, structured by Deutsche Bank and issued in 2014, was awarded an AA credit rating by the Kroll Bond Rating Agency. The interest rate — the "coupon" in bond-speak — was 4.75 percent.

Recently the largest ever PACE bond was issued. It contained 13,432 assessments on homes in 31 California counties. The assessments had an average balance of about $24,400, an average interest rate of 7.96 percent and an average term of 14.95 years. This suggests an additional annual tax-bill payment averaging about $3,200 per property owner.

Critics in the banking industry argue that the PACE model gives these assessments priority lien status over mortgages. To placate lenders in California, which has been a laboratory for the concept and where PACE loans are known as HERO loans, a $10 million mortgage-loss reserve was established in 2014. Still, the banks don't like it.

Other critics contend that the program has been developed as fodder for the bond market and that environmental aims are secondary. PACE financing has been used to purchase everything from furnaces to pool covers to artificial turf. The National Consumer Law Center has reported abuses with the program, including some in which elderly homeowners were victimized.

From a public-policy standpoint, proponents see little difference between PACE and a locality paving a street and then assessing homeowners for the cost. PACENation, an industry group, argues that the increased investment has created stable work for local contractors — often family-owned businesses that have served their communities' needs for heating, air-conditioning, plumbing, roofing and landscaping for decades.

In the middle of all of this are participating localities, which sometimes deal with reports of abuse by contractors selling the loans with scant oversight, and homeowners, some of whom are shocked when their tax bills double or triple.

Even worse, localities fear that, if the home market goes bust again, they may be forced into wide-scale foreclosure proceedings, possibly leaving taxpayers on the hook to cover resulting loan-repayment shortfalls. And if and when a backlash comes from taxpayers or investors, it's likely to be local governments, the middlemen in all of this, that will have to deal with it.

GOVERNING.COM

BY JEREMY BAGOTT | JANUARY 25, 2017

Coming Soon to 6 States: Online Sales Taxes From Amazon.

Online retail giant Amazon will begin collecting sales tax in Missouri next month, as it does in dozens of other states.

The collection of state sales tax in Missouri will begin Feb. 1, Amazon spokeswoman Jill Kerr said in an email to the Post-Dispatch. The state sales tax rate in Missouri is 4.225 percent.

Items sold by Seattle-based Amazon.com and its subsidiaries already are subject to sales tax for merchandise shipped to more than 30 states. Amazon will also begin collecting sales tax on Feb. 1 in Mississippi, Rhode Island, South Dakota and Vermont, and in Wyoming in March.

Amazon does not yet have facilities in the state of Missouri, and online retailers aren't required to collect sales tax where they don't have a physical presence. Amazon charges sales tax in Illinois, where it has multiple distribution facilities, including in Edwardsville.

Amazon announced this month that it planned to hire 100,000 fulfillment employees nationwide over the next 18 months, leading to speculation that the company will open distribution facilities in Missouri. Amazon declined to comment on its distribution facility expansion plans.

"I gather they will be expanding in Missouri because there is a lot of warehouse space here," said David Overfelt, president of the Missouri Retailers Association, a Jefferson City-based trade group that supports requiring online retailers to charge sales tax.

"This is going to be good for Missouri and good for our communities because we provide a lot of services and finding resources is getting tougher and tougher," Overfelt said of Amazon's collection of sales tax. "This is a long time coming. We can't continue down the way we are without hurting Main Street businesses."

Several states and retail groups have pushed for years for Amazon to begin charging sales tax, arguing brick-and-mortar retailers that must charge sales tax are unfairly disadvantaged.

In 2013, a new tax law in Missouri required online retailers to collect sales tax if the company received business referrals from an affiliate in Missouri. After the law was passed, Amazon ended its Associates Program in Missouri that paid advertising fees to web entrepreneurs for customers referred to Amazon.com

Stephen Weiss, owner and president of Creve Coeur Camera, said he welcomed Amazon's announcement that it would begin charging sales tax. Shoppers often come to his eight stores to look at equipment but buy on Amazon because no sales tax is collected, making the purchase $50 or even more than $100 cheaper than buying at his stores, a practice retailers call "showrooming."

"It makes a huge difference," Weiss said about competing against Amazon's prices that don't include sales tax, which he said is an unfair disadvantage. "It kills us."

Creve Coeur Camera, a St. Louis County-based chain, is closing its Edwardsville store at the end of this month and is considering shuttering another store in part due to lost sales that Weiss blames on Amazon. Up until four months ago, Creve Coeur Camera sold some lenses through Amazon, but Amazon recently went directly to the manufacturer to supply the lenses, Weiss said.

Adding sales tax to goods sold in Missouri will help level the playing field for retailers, he said. "I think it'll help, no question."

A Missouri Department of Revenue spokeswoman did not immediately respond to requests for comment about the amount of new tax revenue that will be generated.

Carl Davis, research director for the Washington, D.C.-based think tank Institute on Taxation and Economic Policy, estimated the state of Missouri could collect between $30 million and $34 million annually from Amazon sales, based on an analysis of revenue generated in other states.

“We’re supporters of sales tax being collected on online purchases in the same way they’re collected at brick-and-mortar stores,” Davis said.

Some Missouri Amazon customers criticized the decision on social media Wednesday, saying it could make merchandise more expensive.

Judith Stallmann, a professor at the University of Missouri who studies state and local public finance and rural and economic development, said the change may prompt cost-conscious shoppers to shift their buying habits.

“This means you’re going to be paying sales tax on things you didn’t before,” Stallmann said. “There may be some people for whom paying sales taxes could weigh on their decision.”

BY TRIBUNE NEWS SERVICE | JANUARY 27, 2017

By Lisa Brown

How San Diego's Taxpayer Won by Letting the Chargers Bolt.

- Moody’s: voters’ rejection of new stadium credit positive
- Largest city-owned site could be redeveloped in better deal

The departure of a professional football team from San Diego means the city may not need to pay out $11.7 million annually from its general fund on the stadium for much longer.

The National Football League’s Chargers are decamping for a new Los Angeles area stadium after voters in November rejected a measure that would have pledged $1.1 billion in public backing for a new arena. Not only did residents dodge a debt burden, they now have a chance to see redevelopment of the city’s largest piece of real estate available. One proposal would bring a soccer franchise without public subsidies.

The ballot proposal, pushed by the Chargers, would have increased hotel taxes to 16.5 percent from 10.5 percent to pay for a new stadium and a convention center expansion. But analysis by consultants highlighted the uncertainty of the $1.8 billion price tag. Since the city would have borne any cost overruns and infrastructure improvements, the rejection of the measure by 56 percent of the voters was a credit positive, Moody’s Investors Service said.

“We’ve had a history of bad deals as a city,” said City Councilman Chris Cate, who opposed the ballot measure. “I firmly believe that taxpayers paying for a stadium has no economic benefit whatsoever to the city or the region.”

San Diego still owes $38 million in municipal bonds on the stadium, data provided by the city show. Debt service next year through 2027 will total about $4.7 million annually, which won’t be covered by the team’s $12.5 million payment to the city for breaking its lease. Still, it would be a “minimal” impact to the city’s general fund, said Kristina Alagar Cordero, a Moody’s analyst.

Investors in the city’s debt don’t appear to be put off by the loss of the football team. A San Diego

5.25 percent coupon 2040 revenue bond, callable in 2020, is trading at a 31 basis point spread to the BVAL AA Muni 5-Year Revenue Curve, compared to 28 basis points just before Election Day and 52 basis points on the day the Chargers made their departure official on Jan. 12.

Thanks to rebate agreements and legal settlements, San Diego actually ended up paying the Chargers to play for the past decade. "If anything, there will likely be a cost savings to the city by not having to provide public safety services" during games, said Craig Gustafson, a spokesman for Mayor Kevin Faulconer, in an e-mail.

The Chargers, who ended the season last in its division and with a home attendance that was second-worst in the league, will join the Rams in a new stadium in Inglewood, outside of Los Angeles, when it opens in 2019. Until then the team, renamed the Los Angeles Chargers, will play in a smaller complex in Carson.

Other leases, such as with San Diego State University, oblige the city to keep the stadium open through 2018. After then, it's up in the air. Since the facility is costing the general fund and also needs $90 million in upgrades, municipal officials are evaluating "the financial feasibility of continuing stadium operations beyond that point," Gustafson said.

The departure could yield a chance for long-term positive impact if the 166-acre site is redeveloped. "It does provide the city an opportunity," Cordero said.

Bloomberg Technology

by Romy Varghese

January 27, 2017, 2:00 AM PST

–With assistance from Eben Novy-Williams.

The Economy's Expanding. So Why Aren't Tax Revenues?

There are a couple of major reasons that the frustration is likely to continue for revenue estimators and policymakers.

It may still not feel like it to everyone, but we are at or near the top of the business cycle. By all definitions, we have been in expansion for nearly eight years, the third-longest period of expansion in modern American history. Gross Domestic Product growth is tracking at more than 2 percent, the unemployment rate is under 5 percent, and wage gains have finally begun to accelerate. But if you work for a state or a local government, you may not have noticed.

The same GDP reports that have shown such progress recently also show that states and local governments have subtracted from the pace of real economic growth in three of the past four quarters, and it doesn't take much detective work to find out why. That same year of strengthening growth coincides with five consecutive quarters of weak state tax-revenue growth, including an outright year-over-year decline in the second quarter of 2016. Combined, state tax revenues were unable to clear the pace of inflation in the past year, their worst performance since the Great Recession.

How can state taxes be in recession when the rest of the economy is in expansion? This has been the biggest puzzle for policymakers this year, and the leading cause of subnational budget weakness throughout the country. The growing disconnect is twofold and attributable to both structural and one-time factors.

The first source of frustration for revenue estimators and policymakers is temporary and has to do with prices. This is particularly relevant to sales taxes, which have been the largest underperformer for most states over the past year and a half. Price levels impact sales taxes because sales taxes are levied as a percentage of overall taxable value. Thus, even though consumers may have more money in their pockets and are buying a greater number of goods, the value of those goods may not be growing in line with expectations. In fact, the taxable value may be declining.

Typically, at this point in the business cycle, low unemployment and rising wages push prices — and therefore tax collections — higher. However, the extraordinary strength of the U.S. dollar and the energy bust are holding prices well below expansionary levels. Headline consumer prices are increasing in line with the business cycle at around 1.7 percent annually, but the components of the Consumer Price Index tell a more nuanced story. Looking solely at goods prices, which make up the lion's share of all taxable sales, we actually still see deflationary pressures weakening sales-tax collections.

Take homebuilding as an example. Housing construction is a major driver of sales taxes because of the large durable-goods purchases that go into building and furnishing a new home. Last year the number of housing starts increased significantly, which should have resulted in stronger sales-tax collections. However, the prices of most goods used in new-home construction declined significantly. Lumber prices, for example, were down by more than 10 percent at one point in 2016. So even though more housing units were being built, the sales-tax collections from each unit were much less than the year before.

With inflation expectations rising, this dynamic will only prove temporary. However, a second and more structural consideration will continue to give revenue estimators fits for some time to come.

Over time, state tax revenues have generally grown more disconnected from the underlying economies upon which they're levied. A study we performed several years ago found that state tax revenues in the first decade of the 2000s had become three times more volatile than the underlying economy. This was orders of magnitude larger than anything states had experienced before, and it led to state tax revenues underperforming nominal GDP for the first time since records have been kept.

This dynamic has progressed in line with two growing influences on state taxation over the past few decades. First, states have become increasingly reliant on highly progressive personal income taxes. This isn't necessarily a bad thing — an efficient tax structure should have at least some progressivity — but a side effect is increased volatility. By making their tax structures more progressive, states are relying on a smaller set of higher-income taxpayers for a larger portion of their revenues. This set of taxpayers typically has some of the most volatile incomes. A taxpayer in the top 1 percent of the income distribution can make $10 million one year and very easily lose $10 million the next. It is no anomaly then that some of the states with the biggest income-tax surprises are also those with some of the most progressive tax codes.

Adding to this disconnect is the growing number of targeted tax incentives being put to use by state and local governments for economic development. This isn't necessarily a bad thing either, as these incentives can be effective at spurring local growth. But these rarely tracked incentives can also create a scenario in which the fastest-growing parts of an economy are growing tax-free. This distorts the relationship between broad-based economic statistics and tax revenues, making life very difficult on revenue estimators.

As a result, revenues become more unpredictable and policymakers have to become more cautious. Unfortunately, it looks like that dynamic is here to stay.

GOVERNING.COM

BY DAN WHITE | JANUARY 19, 2017

Neal: Tax Reform Should Preserve Tax Exemption, Reinstate BABs.

WASHINGTON – Tax reform legislation should preserve the tax exemption for municipal bonds and reinstate Build America Bonds for infrastructure financing, Rep. Richard Neal, the top Democrat on the House Ways and Means Committee, told reporters Thursday.

But tax reform may have to wait until Republicans complete their repeal and replacement of the Affordable Care Act as they have proposed, the Massachusetts Democrat said.

Speaking at a news conference at the National Press Club here, Neal said he is “skeptical” that Congress can simultaneously tackle two projects of the magnitude of tax reform and the ACA.

Republican leaders in Congress as well as President-elect Donald Trump and Vice President-elect Mike Pence have made repealing and replacing Obamacare the top priority at the start of the new administration.

Neal said he met with House Ways and Means Committee Chairman Rep. Kevin Brady, R-Texas, last week, who told him that the GOP blueprint for tax reform released last June would be rolled out as formal legislation this year. Neal said he could not provide a more specific timeframe, but added that Brady made it clear he wants to get through tax reform “vigorously.”

He said he hopes the blueprint, which does not mention munis directly but proposes to generally repeal deductions, maintains the tax-exempt standing.

The former Springfield, Mass. mayor and longtime advocate of munis cited his municipal experience, calling himself a “pro-growth believer.”

“My DNA is in the mayor’s office and I know how we used tax-exempt bond financing,” said Neal, who was named ranking minority member of the House Ways and Means Committee in December. “It worked quite well.”

Although roads, bridges and other public use projects “beg” for a large infrastructure program, Neal said, infrastructure spending is not as easy to pass as it once was. That could mean reintroducing BABs, which were a “stunning success” when they were created and used in 2009 and 2010.

Neal introduced the Build America Bonds Act of 2015 two years ago, which would have permanently reinstated and expanded the BAB program.

About $181 billion of BABs were issued before the bonds expired at the end of 2010.

“I think investing in those sorts of initiatives can return us to a connection with … the middle class,” he said.

Neal also opposes the Republicans' plan to concentrate tax cuts at the top, a move that could raise taxes on the middle class. Although tax policy is complicated and consequential, he said, he suggested bipartisan efforts should be made, similar to those of former Michigan Republican Rep. Dave Camp several years ago when he included Democratic suggestions in his tax reform proposal.

"There could be an appetite here for some common ground on tax reform," Neal said, adding that the current system is underproductive and inefficient. "It's stuck in the eighties. It's a rotary phone in a smartphone world."

However, he is critical of what he believes are GOP tax cuts that could increase the federal budget deficit.

"All of this is being done without deficits in mind," Neal said. "I want our Republican friends to hold their party and president-elect to the same standard they held Barack Obama. Do deficits only count when there is a Democrat in office?"

Meanwhile, Brady and Neal have announced the tax policy subcommittee members for the 115th Congress. The Republicans include: Reps. Peter Roskam from Illinois; Dave Reichert from Washington State; Pat Tiber from Ohio; Tom Reed from New York; Mike Kelly from Pennsylvania; Jim Renacci from Ohio; Kristi Noem from South Dakota; George Holding from North Carolina; and Kenny Marchant from Texas.

Democrats on the subcommittee include ranking member Lloyd Doggett from Texas, as well as: Reps. John Larson from Connecticut; Linda Sanchez from California; Mike Thompson from California; Suzan DelBene from Washington State; and Earl Blumenauer from Oregon.

The Bond Buyer

By Evan Fallor

January 12, 2017

A Tax Credit Turns 30.

The low-income housing tax credit (LIHTC) has helped house millions, and it remains a vital driver of development. The 30-year track record of the LIHTC offers compelling evidence that affordable housing is good business, a stable asset class, and a strong driver of economic activity and neighborhood improvement.

Among the myriad ways the U.S. Internal Revenue Code affects commercial real estate is through a federal tax incentive that has become the most important tool to develop and rehabilitate affordable housing: the LIHTC. Since 1986, it has attracted enough private equity to produce nearly 3 million apartments for working-class families, seniors, and formerly homeless individuals. When one looks back over a generation of housing tax credit activity, several themes of importance to the entire real estate industry emerge:

Affordable housing can be a smart real estate investment. A 2015 survey of the housing credit throughout its history by New York City–based professional services firm CohnReznick found that equity investors have realized 98 percent of their anticipated federal tax credits (dollar-for-dollar reductions in federal income taxes owed) through calendar year 2014. The report also noted that yields on housing credit fund investments have maintained a healthy premium over yields on ten-year Treasuries, "with an approximate 400-basis-point buffer since 2011."

Affordable housing can be a viable development opportunity. Contrary to popular perception, most LIHTC-supported and other affordable developments are delivered by for-profit firms. According to a 2016 paper from Harvard University's Joint Center for Housing Studies, for-profit companies among the largest 50 developers were responsible for 79 percent of all affordable housing starts between 2009 and 2014. Nonprofit developers also are important players in LIHTC-supported development. Various studies have shown that both for-profit and nonprofit sponsors execute LIHTC-supported developments of similarly high quality and financial performance.

Affordable housing is a significant driver of overall multifamily construction activity. The housing tax credit drives the creation of roughly 50,000 new units per year—a significant share of overall multifamily development activity even during the current boom in new apartment construction. The LIHTC also supports the rehabilitation of another 50,000 existing units. The Washington, D.C.–based National Association of Home Builders estimates that the LIHTC annually generates 95,700 jobs; $3.5 billion in federal, state, and local tax revenue; and $9.1 billion in wage and business income.

Affordable housing development can strengthen struggling areas. Housing credit properties are found in many types of neighborhoods and usually—if not always—provide higher-quality housing than their residents could otherwise afford or access. A working paper from the National Bureau of Economic Research found that LIHTC-supported development delivers significant impact at the community level as well: each LIHTC-supported development in a low-income area generates aggregate benefit in the neighborhood of $116 million, increasing surrounding home prices by 6.5 percent (which boosts the local tax base) and lowering crime rates.

Housing credit development and management face challenges, however. Industry participants agree that total development costs for LIHTC-supported properties in some markets are high in relation to existing affordable units, and even some market-rate homes, for reasons that include higher construction quality and excessive state and local regulatory requirements.

The CohnReznick report found that 17 percent of LIHTC-supported properties operated below breakeven (a debt-coverage ratio less than one), but noted that this percentage is way down from ten years prior and that "the great majority of properties that did not achieve breakeven operations in 2014 failed to do so by relatively modest amounts." Analysis by certified public accountants Novogradac & Company, based in Bethesda, Maryland, has shown that net operating income as a percentage of total rental income had declined annually from 2010 through 2013 for LIHTC-supported units, with a small upward rebound in 2014, which slightly reversed a negative trend.

The biggest challenge facing the housing tax credit, though, is the overwhelming demand for the housing it enables developers to produce, which vastly exceeds the amount of tax credit authority available to states every year. In a broader housing market where supply is probably 3 million units short of demand, according to industry estimates, low-income renters—including millions filling critical jobs in the workforce such as teachers, nurses, firefighters, and police officers—are paying half or more of their income for housing, living in substandard units, and sacrificing on other basic needs to pay their rent.

An expanded LIHTC would help ease that crunch. Senators Maria Cantwell (D-Washington) and Orrin Hatch (R-Utah) have introduced a bill to increase credit authority by 50 percent. The proposed legislation would help create or preserve approximately 1.3 million affordable homes over a ten-year period—an increase of 400,000 more units than is possible with current authority. Efforts expected by Congress next year to reform the tax code could create an opportunity to enact the proposal. Tax reform could also endanger the credit or weaken its effectiveness, according to industry experts.

The 30-year track record of the LIHTC offers compelling evidence that affordable housing is good business, a stable asset class, and a strong driver of economic activity and neighborhood improvement. Regrettably, it is also a basic foundation for family success that a growing number of Americans cannot access.

Urban Land Institute

By Stockton Williams

December 13, 2016

Stockton Williams *is the executive director of the ULI Terwilliger Center for Housing.*

IRS Releases Interesting Private Letter Ruling on Build America Bonds.

On January 13, 2017, the Internal Revenue Service released Private Letter Ruling 201702009. The IRS held in this private letter ruling that the existence of unspent "available project proceeds" would not cause an issue of Build America Bonds ("BABs") to lose their status retroactively when they are redeemed with the proceeds of tax-exempt bonds.[1] The IRS further held that the issuer of the BABs would not lose any subsidy paid to it in respect of the BABs for the period that ends on the BABs' redemption date. This private letter ruling is most interesting for an opinion that the IRS expressly said that it was not giving but that is unavoidably implicit in the holding of the private letter ruling.

Continue Reading

By Michael Cullers on January 18, 2017

Squire Patton Boggs

Breaking News: Rev. Proc. 2017-13 Released

The IRS has released Rev. Proc. 2017-13, which provides updated safe harbors from private business use for management contracts. Click here for a copy; we will have more on this soon.

By Alexios Hadji on January 17, 2017

Squire Patton Boggs

US Mayors Raise Concerns Over Threats to Municipal Bonds.

US mayors have reiterated the importance of federal infrastructure investment and their concerns over the threat of municipal bonds losing their tax-exempt status, as Donald Trump takes office.

Three hundred mayors gathered in Washington DC at the US Conference of Mayors Winter Meeting with some using the platform to express their fears that the new administration will remove the exemption on one of the most important tools for funding infrastructure.

“We are fighting to protect [the tax exemption] so that we can build schools, roads, hospitals and protect jobs without costing middle-class taxpayers billions of dollars that they cannot afford,” said Steve Benjamin, Mayor of Columbia, and Second Vice President of the US Conference of Mayors.

Other concerns discussed over the three days of the conference included immigration reform, policing, and the repeal of the Affordable Healthcare Act, otherwise known as Obamacare.

Mitch Landrieu, Mayor of New Orleans and Vice President of the US Conference of Mayors, spoke out against any new plans for immigration reform that would force cities to become a “deportation force for federal government”.

“Everyone is welcome in our cities–they are not the dark foreboding places that people have talked about,” said Landrieu. “The President-elect paints with too broad a brush.”

Playing on Trump’s campaign slogan, Landrieu added: “Investment needs to take place in policing for safety and infrastructure for jobs. We need to make America safe again.”

But while the mayors are keen to air their views on what works best for US cities, they are looking to establish consensus with the new administration. Last month, Mick Cornett, Mayor of Oklahoma City and President of the US Conference of Mayors, took comfort in the fact that President-elect Trump expressed his support for continuing the tax-exempt status of municipal bonds when they met in Trump Tower.

Mike Pence, the Vice President-elect of the US joined a lunch meeting this week, the first time a Vice President-elect has attended a US Conference of Mayors meeting before being sworn in.

Although short on detail, Pence emphasised the importance of infrastructure, public safety and education.

“This administration is going to be a friend to America’s mayors,” he added saying that he and “Donald Trump are going to work in partnership with city halls all across America”.

Earlier Cornett had added that relations with the incoming Trump administration were “so far so good” and paid tribute to treatment received from the outgoing Obama administration over the past eight years.

“Although many of us mayors may differ on some of the policies of the administration we had good access to the executive branch and we were treated well and respected.”

CitiesToday

by Jonathan Andrews

17th January 2017

Pirates in the Desert: Oakland Raiders Charging Toward Biggest Taxpayer Subsidy in NFL History.

If the relocation is approved, a Las Vegas hotel tax hike would fund nearly 40 percent of the Raiders' new stadium

The Oakland Raiders moved one step closer this week to leaving the San Francisco Bay Area for Las Vegas. If the relocation deal is approved, a hotel-room tax increase at the nation's gambling hub would help pay for a shiny new $1.9 billion stadium.

The team filed its paperwork to win approval for the move from the National Football League, the NFL announced Thursday.

"The application will be reviewed in the coming weeks by league staff and the stadium and financing committees," the league said in a statement. The deal also requires the support from at least 24 of the 32 NFL team owners in a vote that would take place during a meeting in Phoenix on March 26-29.

If the relocation is approved (and Bay Area investors fail to entice the team to stay), then the new home of the Las Vegas Raiders would become the largest taxpayer-subsidized stadium deal in NFL history, blowing past the $600 million in public money used to build the Atlanta Falcons' $1.5 billion Mercedes-Benz Stadium and the nearly $500 million the public is picking up for the U.S. Bank Stadium in Minneapolis, the future $1.06 billion home of the Minnesota Vikings.

State officials have said the team would bring more tourists to Las Vegas, but critics question whether the benefits outweigh the costs.

"The big carrot being held out to Vegas residents is that it will bring in new tourism that will help pay for the hotel-tax increase," Neil deMause, co-author of the book "Field of Schemes," told Salon in an email. "The notion that there are currently tourists who aren't going to Vegas but will start to do so once there are Raiders games to be seen is, let's say, unproven at best — it's far more likely that existing visitors will just reschedule their planned trips around what NFL games they want to see, but the NFL boosters don't want to hear that."

With the help of Goldman Sachs, the NFL and Raiders owner Mark Davis would arrange $500 million in financing to fund the new Vegas stadium. Another $650 million would come from billionaire casino magnate and major Republican Party donor Sheldon Adelson, one of the richest men in America. The rest, $750 million, would come from a lodging tax paid primarily by tourists that was approved by state lawmakers in October. The subsidy deal explicitly excludes the public from sharing in the future profits from the stadium and would lock in the hotel tax even if the project comes in under budget, according to the San Francisco Chronicle.

Local officials and team backers often argue that deals like this ultimately benefit the public by creating jobs and generating peripheral economic activity and tax revenue. Yet the immense wealth of team owners and stakeholders has critics questioning why public funds are needed when the primary individual beneficiaries are private citizens with enough financial clout to fund and build these projects on their own. Adelson's net worth is estimated to be about $31 billion, according to Forbes, and Davis, who inherited the Raiders from his father, is worth an estimated $500 million.

The biggest issue for critics like DeMause is the sheer amount of public money going to stadium projects. Pitching in a few tens of millions of dollars on a big project that would benefit private investors might be justifiable if there's a proven net increase in jobs and tax revenue to help fund truly public projects like road maintenance and schools.

But evidence is scant about the long-term benefits (not just temporary spikes in construction jobs and other project-related economic activity) and the so-called multiplier effect, the claim that publicly-subsidized megaprojects increase incomes and therefore create more spending and economic activity. A study by economists Roger Noll and Andrew Zimbalist in the late '90s concluded that backers of these types of deals often radically overstate the long-term benefits.

"A new sports facility has an extremely small (perhaps even negative) effect on overall economic activity and employment," the authors wrote. "No recent facility appears to have earned anything approaching a reasonable return on investment."

Bay Area proponents of keeping the Raiders in Oakland are offering a new $1.25 billion stadium, but so far that proposal would be privately funded, and smaller. If business executives like Adelson believe in the magic of capitalism, perhaps they should play ball on a level playing field by declining handouts to subsidize their investments.

SALON.COM

ANGELO YOUNG

SUNDAY, JAN 22, 2017 06:00 AM PST

TAX - OREGON

Village at Main Street Phase II, LLC v. Department of Revenue

Supreme Court of Oregon, En Banc. - December 30, 2016 - P.3d - 360 Or. 738 - 2016 WL 7488855

Taxpayers challenged county assessor's real market value of improvements on their real property.

Assessor sought preliminary ruling that it had statutory right to pursue counterclaims alleged in its proposed amended answers challenging value of taxpayers' land.

The Tax Court granted preliminary ruling in favor of taxpayers. Department of Revenue and assessor appealed. The Supreme Court reversed and remanded. After taxpayers served notices of voluntary dismissal before assessor could file amended answers, the Tax Court entered judgment of dismissal, over assessor's objection, and denied subsequent motions for relief from judgment filed by Department and assessor. Department and assessor appealed.

The Supreme Court of Oregon held that as matter of apparent first impression, Supreme Court's remand following its determination that assessor had statutory right to pursue counterclaims required Tax Court to allow pending amended answers to be entered before turning to taxpayers' subsequently filed notices of dismissal.

Supreme Court's remand, which followed its determination that county assessor had statutory right to pursue counterclaims alleged in its proposed amended answers challenging value of taxpayers' land, required Tax Court to allow pending amended answers to be entered before turning to taxpayers' subsequently filed notices of dismissal of property tax appeals challenging assessor's value of improvements on their land. Although remand made no statement about Tax Court's dismissal rule, Tax Court's dismissal failed to implement Supreme Court's decision, which reversed Tax Court's only basis for denying entry of amended answers, and action was remanded for "further proceedings," which included implied directive to enter assessor's answers

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TAX SALES - UTAH

Jordan v. Jensen

Supreme Court of Utah - January 10, 2017 - P.3d - 2017 WL 104642 - 2017 UT 1

Purported owners of severed mineral interest brought quiet title action against successors to purchaser of real property at tax sale, and successors counterclaimed to quiet title and brought third-party complaint against lessor.

The Eighth District Court granted summary judgment to owners and lessor. Successors appealed.

The Supreme Court of Utah held that four-year statute of limitations could not be applied after tax sale was conducted in violation of owners' due process rights, overruling *Hansen v. Morris*, 3 Utah 2d 310, 283 P.2d 884.

Four-year statute of limitations applicable to challenges to tax titles could not be applied to bar quiet title action brought by mineral interest owners after tax sale was conducted in violation of owners' due process rights, despite contention that constructive notice of tax sale was sufficient to trigger statute of limitations without violating due process. Statute was not self-executing time bar, but was limitations period that was triggered by county's adversarial action and sale of property at tax sale, and names and addresses of owners were reasonably ascertainable, rendering constructive notice insufficient; overruling *Hansen v. Morris*, 3 Utah 2d 310, 283 P.2d 884.

GOP Expected to Take Aim at Local Tax Deductions.

State and local governments are fighting to avoid becoming big losers in tax reform — and they hope President-elect Donald Trump will be an ally.

Trump and congressional Republicans are aiming to pass tax-reform legislation this year that lowers rates and curbs and eliminates tax breaks.

In the process, two key preferences important to state and local governments, the deduction for state and local taxes and the tax exemption for municipal bonds, may be on the chopping block.

The two preferences are among the most expensive provisions in the tax code. They are also viewed as disproportionately benefiting upper-income people.

Of the two, the state and local tax deduction, which tends to benefit areas that lean Democratic, looks to be more endangered.

A 2015 paper from the Tax Foundation found that the 10 counties that benefit the most from the deduction are located in New York, New Jersey, California and Connecticut.

House Republicans are currently drafting a bill based on a tax-reform blueprint they released in June. That plan would eliminate the state and local tax deduction, since it does away with all itemized deductions except those for mortgage interest and charitable giving.

House Ways and Means Committee Chairman Kevin Brady (R-Texas) said at a Heritage Foundation event in December that he thinks there's "merit" to eliminating the deduction while also lowering rates.

"The added benefit here is that the federal tax code will no longer subsidize higher taxes at the local level," he said. Brady acknowledged that eliminating the deduction would be a big change and asked the public to look at his plan and provide feedback.

The tax plan Trump released in September did not specifically mention the deduction but would cap itemized deductions at $100,000 for individuals and $200,000 for married couples.

Groups representing state and local governments are concerned about the elimination of the deduction because it could reduce the government's flexibility to make tax changes.

"We're big proponents of federalism and we feel this strikes at the heart of it," said Brett Bolton, principal associate for federal advocacy at National League of Cities.

Emily Brock, director of the Government Finance Officers Association's federal liaison center, said her group is asking Congress "to honor the commitment they've made which is the partnership between the federal government and state and local governments."

Max Behlke, director of budget and tax policy at the National Conference of State Legislatures, said states with high income taxes are "very wary" about the deduction being eliminated. If the deduction is eliminated, the states could face pressure to lower their taxes.

It's "definitely possible" that Trump could be sympathetic to keeping the deduction because he's from a state with a high income tax. However, Trump may defer to Congress on taxes, Behlke said.

The municipal bond tax exemption is more likely to be preserved than the state and local tax deduction, and its preservation is the top tax reform priority for state and local governments.

The exemption allows state and local governments to have lower borrowing costs when they issue debt to finance infrastructure projects.

The House Republicans' tax-reform blueprint and Trump's tax plan are both silent on the municipal bond tax exemption, though the blueprint discusses eliminating tax breaks that benefit special interests.

But during a meeting at Trump Tower last month, Trump told a group of mayors that he supports the tax exemption.

While state and local governments are encouraged by Trump's comments, they are still concerned that changes to the tax exemption will be made. Many of the details about what will be included in tax-reform legislation is unknown, and many of the policy positions of the incoming administration are not firm.

"It's positive, but again, tax reform still has to go through Congress," said David Parkhurst, general counsel of the National Governors Association.

Groups held a briefing for Capitol Hill staff on the municipal bond exemption in late November, and they are meeting with lawmakers on the Hill to educate them about the importance of the exemption.

On Tuesday, groups in a public-finance network sent lawmakers a letter in support of tax-exempt bonds.

"They are the best way to implement the infrastructure needs of each community effectively, as the decision to issue bonds for various projects is determined and approved by either the citizens themselves through bond referenda or their elected legislative bodies," the groups said.

The exemption does have support on Capitol Hill, including from some Republicans. Last year, Reps. Randy Hultgren (R-Ill.) and Dutch Ruppersberger (D-Md.) launched a municipal finance caucus.

"Tax reform is complex and wrought with many pressures," Hultgren said in a statement. "I hope to see this key financial tool, which has worked for more than a century, maintained in a much-needed comprehensive tax reform package."

THE HILL

BY NAOMI JAGODA – 01/10/17

The Case Against Tax Money for Stadiums, Movies.

The Tampa Bay Rowdies owner has pledged to privately finance an $80 million renovation of Al Lang Stadium, envisioned above. If the Rowdies and other teams like the Orlando soccer team can pay for stadium renovations, why can't NFL teams?

Florida's state legislators from both political parties have resisted corporate welfare schemes in recent years, and taxpayers should celebrate.

Corporate welfare gives a select few industries special handouts at the expense of everyone else. Supporters of corporate welfare claim that such programs create jobs, but the facts demonstrate that's rarely the case. Even when jobs are created, each job comes at a tremendous cost to Floridians.

Take Enterprise Florida, for example, a public-private partnership that promised to create 200,000 jobs by 2005. After $1.7 billion in incentives, it had reached only slightly more than half of its goal as of 2013. And while the program was intended to be funded equally between public and private funds, an estimated 90 percent of its funding came from the taxpayers.

Some claim that while Enterprise Florida was a failure, other programs are still worth the taxpayer's dime. In fact, the Tampa Bay Times editorial board cited sports and tax film credits as worthy programs to keep intact, albeit with appropriate reforms.

But the facts tell another story.

When it comes to sports stadiums financed through Florida's Professional Sports Facilities Incentive Program, according to the state's own economists, for every dollar invested in sports renovation projects, the state sees only 30 cents returned in economic activity — a far cry from a sound investment.

What's more, plenty of sports owners can afford to renovate without a special taxpayer-funded deal.

Case in point: The Orlando City Soccer Club is building its own stadium. And while the Orlando team originally asked for $30 million from the state, it announced it would self-fund the stadium after citizens and lawmakers opposed state funding.

In St. Petersburg, Tampa Bay Rowdies owner Bill Edwards has pledged to privately finance an $80 million renovation of Al Lang Stadium in order to bring a Major League Soccer team to the region.

If these sports teams can renovate on their own, why do other teams such as the NFL's Tampa Bay Buccaneers, Miami Dolphins or Jacksonville Jaguars deserve taxpayer money?

As for film production handouts, they too have a storied past. The state's economists find that the film subsidy program only produces up to 43 cents for every dollar invested.

The program hurts taxpayers, while often going to projects that don't produce any long-term jobs in the Sunshine State. Of course, the film industry lobbying for the special favor alleges the program produces more revenue, but the estimates don't pass muster in comparison to the state estimates.

What's more, state after state that has gone down the road of film tax credits has paid the price of doing so. The University of Southern California conducted a national study on state programs, finding that since 1999 tax credits have created close to zero jobs, even in states like California and New York. Taxpayers, on the other hand, are still on the hook for over $10 billion to Hollywood producers and movie stars.

Floridians have enough legitimate demands on their tax dollars, such as education and transportation expenses. It's not our responsibility to ensure that Ben Affleck's new movie is profitable or that sports executives have enough extra cushion to ensure fans will flock to their fields.

For the past several years, lawmakers have rightly rejected some of these efforts to boost special interests — now is not the time to reserve course. Instead, lawmakers should keep fighting against all forms of corporate welfare so that everyone has a chance to succeed.

Tampa Bay Times

By Chris Hudson

Wednesday, January 11, 2017 3:09pm

Chris Hudson is the Florida state director of Americans for Prosperity, a conservative political advocacy group.

Munis Are Critical for Infrastructure, Groups Tell Lawmakers.

WASHINGTON – State and local groups told members of Congress that tax-exempt bonds are the cornerstone of infrastructure financing, as the lawmakers consider how to increase spending on roads and bridges as well as tax reforms that could entail restrictions on tax exemption.

Tax-exempt bonds are used by more than 50,000 state and local governments, and nearly 75% of infrastructure funding comes from munis, the 29 groups said in a joint letter to House and Senate members.

“We welcome the chance to work with you to develop new tools as a complement to tax-exempt municipal bonds,” the groups wrote. “We would note that even new ideas – including variations of public-private partnership models – will likely rely on municipal bonds.”

The two-page letter was signed by representatives of the Government Finance Officers Association, the National Governors Association, the U.S. Conference of Mayors (USCM), the National Association of State Treasurers, and the National Association of Counties (NACo) and other groups.

The organizations comprise the Public Finance Network, a coalition of state, local and utility issuers and stakeholders. While the GOP blueprint for tax reform released last year does not mention the muni exemption directly, its intention of repealing unnamed deductions have made state and local groups uneasy of a cap or repeal.

House Ways and Means Committee Republicans said Tuesday that they are “moving forward aggressively” to turn the blueprint into formal legislation that would eliminate special interest provisions they said keep rates high and “increase confusion.”

Michael Belarmino, NACo’s associate legislative director and associate general counsel, said the letter is meant to be a “refresher” for lawmakers as the 115th Congress kicks off.

“I’m hoping that this message continues to resonate with them,” Belarmino said. “It seems pretty clear that there are many things on their agenda at this point and where tax reform is going to fall is anybody’s guess.”

The coalition stressed that issuers save on average roughly two percentage points on borrowing costs to finance infrastructure investments through munis, which they said equates to “substantial” savings for taxpayers.

Munis have financed more than $2 trillion in new infrastructure over the past decade, and are on track to finance another $2 trillion over the next ten years, the coalition wrote.

“As the new administration and Congress seek ways to increase infrastructure investments, we would note an incredibly powerful tool already in hand – tax-exempt municipal bonds,” it wrote.

The groups argued that munis are the most effective method to finance community infrastructure, as bond issuances are determined and approved through citizen referenda or by elected legislative bodies.

Several state and local groups have told The Bond Buyer that they set their sights on Congress after President-elect Donald Trump told the USCM in December that he supports maintaining the muni exemption.

The Public Finance Network also cited as good resources on munis Reps. Randy Hultgren, RIll., and Dutch Ruppersberger, DMd., two major allies of the muni exemption who chair the bipartisan Municipal Finance Caucus in Congress.

The Bond Buyer

By Evan Fallor

January 10, 2017

Trio of Lawmakers to Seek Tax Reform Revenues for Infrastructure.

DALLAS – A bipartisan trio of lawmakers intends to file a pair of House bills that would use revenues from international tax reform to fund infrastructure projects.

Rep. John Delaney, DMd., said Monday that he and Rep. Rodney Davis, RIll., will propose the Partnership to Build America Act that would create the American Infrastructure Fund to finance local and state projects.

As part of the effort, Delaney and Rep. Ted Yoho, RFla., will sponsor the Infrastructure 2.0 Act that would dedicate additional revenues through repatriation of corporate overseas earnings to stabilize and expand the federal Highway Trust Fund.

The proposals would provide an incentive for corporations to bring into the U.S. an estimated $2 trillion in overseas earnings, Delaney said, spurring private sector reinvestment and growth.

Delaney proposed similar measures in 2014 and again in 2015 with significant bipartisan support, but neither gained traction in Congress.

His third attempt at linking the repatriation of overseas earnings by U.S. corporations could be the answer to calls for more infrastructure funding, Delaney said.

"If the next President and leaders in Congress want to rebuild America in a fiscally responsible way that has deep bipartisan support, we've given them a blueprint," he said. "A bold infrastructure-tax deal that combines legitimate support for new projects and progrowth reform would be transformative for the country, for our economy and our quality of life."

However, Rep. Kevin Brady, RTexas, chairman of the House Ways and Means Committee, has said any revenue resulting from corporate tax reform should be used for overall tax reforms rather than just dedicated to infrastructure.

House Speaker Paul Ryan, RWis., and other House Republicans support Brady's stance, but Senate Republicans seem to be more open to the idea of linking tax reform with infrastructure funding.

"I think there's an interest among our members, in both the House and the Senate in doing something on infrastructure, but my guess is if that gets done, it probably hitches a ride on tax reform," said Sen. John Thune, RS.D., chairman of the Senate Commerce Committee and third ranking Republican in the Senate.

"I don't know that just an infrastructure bill on its own, a standalone, would go anywhere,"

Thune told reporters last week. "I think it would have to be coupled with something that we view to be really advantageous in terms of stimulating the economy."

The Partnership to Build America Act would capitalize the infrastructure fund with $50 billion of proceeds from the sale of 50year, 1% fixed rate bonds that would be purchased by companies willing to bring back overseas earnings.

These bonds are not intended to be a good investment on their own but would be transferable, Delaney said.

For every $1 invested in the bonds, the companies would be allowed to bring back an estimated $4 of foreign profits without paying any U.S. tax. The ratio would be set through a reverse Dutch auction, which Delaney said would allow the market to set final rates of return.

Local governments could use low-interest loans from the AIF for transportation, communications, education, and water projects.

At least 25% of the projects financed through the AIF must be public-private partnerships with at least 20% of project financing coming from private capital.

The Infrastructure 2.0 Act would provide six years of Highway Trust Fund solvency by supplementing revenues from federal fuel taxes and other dedicated fees, Delaney said.

The measure would levy a mandatory onetime tax of 8.75% on existing overseas corporate profits to replace the current rate of 35% on earnings brought into the U.S.

The tax proposal would generate $120 billion for the HTF and $25 million for a pilot program of regional infrastructure planning groups, according to Delaney.

The legislation also would create a bipartisan House and Senate joint commission tasked with developing a solution for permanent solvency of the HTF, he said.

The Bond Buyer

By Jim Watts

January 10, 2017

Slowing of Muni Tax Regs Seen in 2017, But Three Projects Watched.

WASHINGTON – Municipal market participants see a slowing of Treasury Department and Internal Revenue Service guidance and rules in 2017, but plan to closely watch rules on political subdivisions, tweaks to management contract guidance, and rules for public approval of private activity bonds.

“The change in the White House to a Trump administration will certainly put a severe damper on any regulatory activities for most of [2017],” said Matthias Edrich, a tax partner with Kutak Rock in Denver. “Not just for public finance but for any regulatory efforts.”

Emily Brock, director of the Government Finance Officers Association’s (GFOA) federal liaison center, agreed. “I think what we will see is a bit of a calming down of the priority list,” Brock said. “One thing that drew our attention … is the political subdivision definition. We’ll continue to keep an eye on that.”

John Cross, Treasury’s associate tax legislative counsel, said that while he can’t comment on regulatory priorities that will be set by the incoming policymakers for the new administration, Treasury’s two most active existing muni projects at the staff level are The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) public rules for private activity bonds (PABs) and bond reissuance regulations.

He also said the staff has been considering some discrete, clarifying changes to the recent more flexible management contract safe harbors under Rev. Proc. 2016-44, which was issued last year.

In October, the Treasury and IRS released their final 2016-2017 priority guidance plan, which included seven projects for tax-exempt bonds. Three projects were completed in 2016 – final issue price rules, guidance on management contracts, and final rules on arbitrage investment restrictions. The remaining ones are bond reissuance rules, guidance on remedial actions for tax-advantaged bonds, final regulations for public approval of PABs, and a new definition of political subdivisions for this year.

TEFRA Regulations

Perhaps no other pending regulatory measure is as long-awaited as the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), which originally date back nearly 35 years.

Bond attorneys and other market participants have long clamored for a clarification of public approval requirements for private PABs, which were written in temporary form in 1983 by Treasury and the IRS.

In 2008, proposed regulations, which were well received by market participants, were released, but have yet to be finalized.

Officials from the National Association of Bond Lawyers (NABL) have previously told The Bond Buyer they believe, and hope, the TEFRA rules will finally be completed in 2017.

NABL has called for a clarification of the TEFRA public approval requirements for PABs, which it said were burdensome. The group has recommended regulators broaden the allowance for PAB proceeds to be used for working capital without the public notice specifically mentioning that purpose.

In order to be tax exempt, PABs must be approved by the issuer and, in some cases, the governmental entity that has jurisdiction over the area where the bond-financed facility will be located. The bonds can be approved by voter referendum or by elected officials following a public hearing.

Ed Oswald, a partner with Orrick, Herrington, and Sutcliffe in Washington, said he will be tracking TEFRA developments closely, which he said are long overdue.

“The original regulations came out in 1983 and are very antiquated,” Oswald said. “I think the muni market would love to have the TEFRA regulations in final form.”

Stefano Taverna, an attorney with McCall, Parkhurst & Horton in Dallas, and the chair of the American Bar Association’s tax-exempt financing committee, was cautiously optimistic about final regs in 2017.

“TEFRA regs have been active for quite some time so hopefully they get that out and publish something later this year,” Taverna said.

Edrich said that the release of final issue price rules last month may indicate the agency is trying to “clear the deck” of its highest priority guidance projects, but warned that the TEFRA regulations could be stalled during the first year of the Trump presidency.

Taverna said he expects market participants to spend the coming months trying to determine the issue price regulations’ impact on certain transactions, particularly competitive sales, since they do not become effective until June of this year.

The issue price regs contain special allowances for competitive sales and establish that the issue price for competitive sales will be the reasonably expected initial offering price under certain conditions.

The final rules are meant to be more flexible and workable, Cross said.

Political Subdivisions

Several muni market participants also said they will be watching developments on definition of a political subdivision for purposes of tax-exempt, tax credit and direct pay bond provisions — another project outlined in the guidance plan.

Most muni market participants felt the political subdivision rules proposed in February of last year by Treasury and the IRS were overly restrictive and could jeopardize the tax-exempt status of some outstanding bonds.

John Vahey, managing director of federal policy for Bond Dealers of America (BDA), said his group is hoping for more clarification for incidental private benefit rules that he feels raise more questions than answers. Vahey said BDA has questions tied to community development projects and how land purchases, for example, impact incidental private benefit.

The proposed rules say, among other things, that political subdivisions must serve a governmental purpose "with no more than an incidental private benefit."

"We're hoping for more clarification for incidental private benefit," Vahey said. "There's a few points that we've raised and that's one of the biggest ones."

The tax regulators began writing rules on political subdivisons after the IRS issued a technical advice memorandum in 2013 that found the Village Center Community Development District in Florida was not a political subdivision and could not have issued tax-exempt bonds because its board was developer-controlled rather than by publicly elected officials.

Bond lawyers complained the IRS was trying to change standards through the enforcement process rather than through public rulemaking, which would allow for public input.

The Treasury and IRS proposed rules on the definition of a political subdivision last February.

Under the current definition, an entity is a political subdivision that can issue tax-exempt bonds if it has a right to exercise a substantial amount of at least one of three recognized sovereign powers of a state or local governmental unit: eminent domain, taxation or police. The proposed rules would add two new requirements: that a political subdivision serve a governmental purpose "with no more than an incidental private benefit" and that it be governmentally controlled.

The agencies received many comments on the proposed rules, most of them critical, saying they were unworkable and could upend the muni market. They asked the rules be reproposed, at a minimum, or simply withdrawn.

Edrich, meanwhile, said that any efforts to "fix uncertainties" in the market created by the proposed regulations relating to the definition of a political subdivision may be stalled during Trump's first year.

Management Contracts

Another regulatory issue for the bond community in 2017 is guidance pertaining to management contracts.

In August, the IRS released Rev. Proc. 2016-44, which extended terms of long-term management contracts to up to 30 years from the previous 15-year limit, and also removed the formulaic fixed fee requirements for manager compensation.

Bond lawyers initially lauded the new management contract safe harbors, which they found to be more liberal than restrictive safe harbors established under Rev. Proc. 97-13 released in 2013.

But questions and concerns soon arose regarding the guidance, which was meant to allow for more incentive compensation, bond-financed infrastructure projects, and public-private partnerships.

NABL said the guidance is confusing and could limit the usefulness of safe harbors in short-term contracts. Concerns were also raised about how the guidance should be implemented.

Questions also surfaced regarding whether the term of a contract is retested when one is modified or a new one is entered into.

Taverna while the guidance made strides in liberalizing management contract guidelines, he hopes comments submitted to Treasury in November will lead to clearer guidance in the coming year.

The guidance "liberalized a lot of guidelines but in that process, it left open some questions," Taverna said. "Particularly what it means to have sharing of land losses and sharing of net profits."

"The purpose of the comments is to ask Treasury for more narrow guidance in respect to the revenue procedure and to provide more certainty to the corners of that guidance," he added. "Other than that I think they've done a very good job with the guidance plan."

Oswald agreed. "We're hoping for some additional guidance or amplification regarding the guidance which is otherwise helpful," Oswald said. "This would fill the void that other practitioners have observed in terms of details."

The safe harbors under Rev. Proc. 2016-44 apply to any management contract entered into on or after Aug. 22, but issuers can also apply the safe harbors to management contracts entered into before that date.

The guidance created three provisions containing limits ensuring no private ownership or leases: a state or local government "must exercise a significant degree of control of the managed property," the state or local government must bear the risk loss for damage of managed property, and the private party must agree not to take any tax position that is inconsistent with being a service provider.

Both Oswald and Taverna said they will also be tracking bond reissuance regulations, another Treasury guidance plan item that has not moved forward.

"The reason they're important is that the rules had been put out over years, somewhat on an ad hoc basis, and a lot were issued during the 2008 downturn when the market needed relief," Oswald said. "The reissuance guidelines need to be reformatted and reorganized."

Taverna said a common concern he has heard in the industry is what type of effect the Trump administration could have on published regs.

“What I find interesting and what a lot of folks are wondering is if the new administration will have an effect on the types of regulations published,” Taverna said. “[Donald] Trump said that for all new regulations that come out you’ll have to take two out. I don’t know if that will have an impact on the streamlining of regs.”

TEB

All eyes for the time being will be on Imraan Khakoo, the acting director of the IRS’ Office of Tax Exempt Bonds (TEB) who replaced Rebecca Harrigal late last year.

Khakoo had been Harrigal’s acting assistant. IRS officials did not specify how long Khakoo will be acting director of TEB.

Mark Scott, a former director of TEB who now has a private practice focused on representing whistleblowers, said he believes Khakoo’s lack of muni tax law knowledge, an area where agents are struggling to apply tax law and where enforcement is lacking, “doesn’t help anything.”

“Efficiency in TEB has gone down and it is getting worse at identifying good cases,” Scott said. “Even when they are identified, [TEB] is struggling to get agents to complete cases. The cases are there and the work can be done. Still, I anticipate this trend continuing.”

The number of agents doing audit work is roughly 60-65 overall, which is lower than the 70-75 agents Scott said he had in his peak when he served as TEB head.

According to IRS spokesman Dean Patterson, TEB closed 570 audits in fiscal 2016 and entered into 18 closing agreements in the same period.

TEB entered into 61 settlements under the voluntary closing agreement program (VCAP), a substantial drop from the 105 VCAP settlements reached during the prior fiscal year.

The 570 closed audits were two more than TEB closed in fiscal 2015, while the 18 closing agreements were one less compared to the prior fiscal period.

The total dollar amount from audit settlements in fiscal 2016, which ended on Sept. 30, was $10.72 million, and $11.68 million for VCAP settlements.

Patterson also noted that TEB does not have any webcasts planned for 2017.

Scott speculated that a reason VCAP figures have been dropping is due to a decrease in refundings, which had spiked several years ago. This trend may continue, he said, due to over-auditing in some areas, and allocating resources inefficiently.

“When you have a strong enforcement program, the voluntary closing agreement program motivates issuers to identify a problem before enforcers come in.,” Scott said. “When an audit program weakens, this motivation is reduced, and the impact of this will eventually be reflected in a lower number of requests for voluntary closing agreements.”

The IRS provided numbers, but not comments for this story.

The Bond Buyer

By Evan Fallor

January 12, 2017

GFOA and Issuer Groups' Message to Congress: Munis Build Infrastructure.

On January 10, 2017, GFOA and 28 other issuer groups, including our state and local sister organizations, sent a message to the entire Congress in support of the preservation of the tax exemption of municipal bond interest. The message reiterated that the municipal bond is the only infrastructure financing tool that is accessible to jurisdictions of all sizes to effectively access the capital markets. We emphasize that the municipal bond is the best way to effectively implement the infrastructure needs of each community because decision making is made at the local level. Read our letter.

Will you join the effort? Tell us your story!

GFOA continues to develop information for distribution to Congress about the tax exemption on municipal bond interest, including data showing the costs local governments may incur should the tax exemption come under review in comprehensive tax reform.

But the most effective communication comes from you.

What have municipal bonds built in your jurisdiction? Will you share pictures of the projects built by bonds? Jump on the hashtag #BuiltByBonds and @GFOA along with your Congressional representatives. Please let the Federal Liaison Center know of any communication heading up to your senator or representative, or let us know how we can help your efforts. Contact Emily S. Brock.

New Year, New Action on Marketplace Fairness.

On January 3, 2017, the City of Roanoke, Virginia, passed a resolution urging the U.S. Congress to act on legislation that will enable state and local governments to collect revenues due to local government. Congressional inaction over the past several years has resulted in an increase in the Virginia state sales tax from to 5.3%, from 5%, and has placed significant limitations on the jurisdiction.

The resolution asks the new Congress to act on legislation this year that would collect and remit sales taxes structured on a system of collection based upon the purchaser's location. Passing this legislation during the 115th Congress would "send the clear and unequivocal message to states and localities that the United States Congress supports small business women and men who create jobs, produce revenues to support essential infrastructure improvements, and create a stronger and more resilient economy for the benefit of all Americans," as stated in the resolution, which the City of Roanoke's City Council passed unanimously at its first meeting of 2017.

This resolution sends a clear message not only Roanoke's representative, Bob Goodlatte, Chairman of the House Judiciary Committee, but also to the state legislature and its governor, Terry McAuliffe, who has recently proposed a collection on certain out-of-state online retailers to collect sales taxes.

GFOA's Federal Liaison Center is working with our colleagues at the National League of Cities, U.S. Conference of Mayors, and National Association of Counties to distribute a template of this resolution and work toward a solution that would give marketplace fairness the chance to be considered and passed this year. Stay tuned for more details on this grassroots movement.

Read the resolution here.

Thursday, January 5, 2017

Why Texas Is Cheering a Tax Lawsuit Loss.

As gloomy government budget news stacks up in Austin, a state appeals court ruling issued Friday appears to erase a huge worry about the state's business franchise tax.

The parent company of AMC movie theaters sued the state over what it is allowed to include in non-taxable cost of goods sold. An initial ruling in the company's favor in May 2015 contained what the state thought was an overly broad definition of "costs" — one that Comptroller Glenn Hegar feared could require $6 billion in tax refunds to various businesses and a $1.5 billion annual reduction in state franchise taxes.

Friday's ruling from the 3rd Court of Appeals leaves the company's victory in place, but uses a narrower definition of costs of goods that apparently won't apply to most other taxpayers.

The difference could be worth billions to the state, allowing it to continue to collect franchise taxes much the way it does now.

The case turns on a legal definition in the state's tax code? of "tangible personal property" that includes "personal property that can be seen, weighed, measured, felt or touched, or that is perceptible to the senses in any other manner."

AMC takes "perceptible to the senses" to include movies and contends all of its costs for space should be included in its cost of goods sold. The comptroller argued that AMC is selling intangible property or a service and that it shouldn't be considered tangible personal property.

To compute its franchise taxes, the movie chain (like other businesses) subtracts its cost of goods sold from its total revenue and pays taxes based on the difference. Increasing the costs lowers the amount being taxed. The court ruled that AMC can include costs of exhibiting films in that calculation — a decision that means the theater chain will get $1.1 million in refunds for taxes it already paid.

The new ruling relies on a less encompassing definition that includes "films, sound recordings, videotapes, live and prerecorded television and radio programs, books, and other similar property embodying words, ideas, concepts, images, or sound, without regard to the means or methods of distribution or the medium in which the property is embodied…"

The state still lost the case, but according to Lauren Willis, a spokeswoman for the comptroller, this ruling doesn't present the kind of threat to other franchise revenue that the earlier ruling did.

The state will have to refund $1.2 million, plus interest and penalties, to AMC. But other taxpayers looking for the same treatment will have to fit within the narrower definition of tangible personal property to get refunds.

AMC's case is one of two lawsuits that threatened to knock big holes in the state's pocketbook. The other big tax case with potentially large implications — involving Midland-based Southwest Royalties — went to the Texas Supreme Court, with Hegar worrying publicly that an adverse ruling would cost the state as much as $4.4 billion. The state won that one in June.

On Monday, a day before the legislative session begins, Hegar will unveil his official revenue estimate which will tell lawmakers how much money will be available for them to write the next two-year budget. Money is expected to be tight, but it won't be because the state lost in court.

THE TEXAS TRIBUNE | JANUARY 9, 2017

By Ross Ramsey

[2016 Year-End Review: Squire Patton Boggs]

Despite an increase in the federal funds rate by the Federal Open Market Committee in December, municipal bond interest rates throughout 2016 were (and still are) extremely low when compared to historic rates. As a result, the volume of municipal bond issues reached an all-time high in 2016.

As discussed below, the Treasury Department released a number of highly anticipated and significant proposed and final regulations during 2016. In addition, to accommodate public-private partnerships, Treasury issued Revenue Procedure 2016-44, which allows issuers to enter into longer-term management contracts without resulting in private business use.

[Continue reading.]

The Public Finance Tax Blog

By Joel Swearingen on January 9, 2017

Squire Patton Boggs

[States Will Have Increase in PAB Capacity in 2017.]

WASHINGTON – States will have a modest increase in their capacity to issue private activity bonds in 2017 due to population increases and higher cap space allowed by the Internal Revenue Service.

The 50 states, the District of Columbia and the Commonwealth of Puerto Rico will have a total of roughly $35.69 billion of new capacity in 2017, an increase of 9.84% from the $32.49 billion in 2016.

[Click here to see PAB chart]

The 9.84% increase is more than nine percentage points higher than the increase heading into 2016, which was a 0.76% increase from the prior year.

The increase is due to the higher minimum amount of cap allowed by the Internal Revenue Service as well as population gains across the board. The PAB volume cap limit is based on the latest state population estimates released by the U.S. Census Bureau on Dec. 20 and a revised PAB cap formula published by the Internal Revenue Service in October.

The 2017 PAB volume cap for each state is the greater of $305.32 million or $100 per capita for each state for 2017. That's a slight change from the 2016 cap formula, which had the same per capita amount but a lower minimum of $302.88 million. The 2016 U.S. population as of July 1, 2016 was 326.54 million, up from the 324.37 million revised estimate for 2015.

A total of nine states will have PAB volume caps of $1 billion or greater in 2017. California, the nation's most populous state, will have a $3.93 billion cap in 2017, followed by Texas at $2.79 billion and Florida at $2.06 billion.

The remaining states with a cap of greater than $1 billion are Georgia, Illinois, New York, North Carolina, Ohio, and Pennsylvania. All had populations of 10 million or greater in 2016.

All but six states or territories will see increases in their new capacity to issue PABs in 2017.

Florida, at 1.68%, will have the biggest percentage increase in cap in 2017 compared with 2016. The Sunshine State had a $2.03 billion volume cap in 2016. Washington State is next, with a 1.64% increase in cap to $728.80 million, followed by Oregon with a 1.60% gain in cap to $409.35 million.

Connecticut, Illinois, New Jersey, New York, Pennsylvania, and Puerto Rico will all have decreased PAB volume caps next year compared with 2016. All but New Jersey experienced population decreases between 2015 and 2016.

Puerto Rico, at 1.81% to $341.13 million, will have the biggest drop in capacity for the coming year, followed by Illinois, with a 0.45% decrease to $1.28 billion, and Connecticut, with a 0.40% reduction to $357.65 million.

A total of 21 states and the District of Columbia will use the minimum amount of $305.32 million in 2017.

Private activity bonds are used by state and local governments to provide low-cost financing for projects that provide some kind of public purpose but include some private involvement.

Qualified PABs subject to the volume cap are exempt facility bonds such as water and sewage facilities, hazardous waste facilities and other utility facilities, as well as qualified mortgage revenue bonds, small issue bonds, student loan bonds and redevelopment bonds.

Qualified PABs not subject to the volume cap include exempt facility bonds such as airports, docks and wharves, as well as qualified veterans' mortgage revenue bonds and qualified 501(c) (3) bonds.

No states or territories will have an increase or decrease of 2% or higher in 2017; nine will have a fluctuation of greater than 1%.

The Bond Buyer

By Evan Fallor

December 23, 2016

Will Trump's Lower Income Tax Rates Really Hurt Muni Bonds?

There was some paranoia a couple years back surrounding the muni market. Those fears are cropping up again, but infrastructure momentum could make munis a safe bet.

It feels like deja vu all over again in the municipal bond market.

All the chatter of how President-elect Trump's lower income tax rates may hurt munis reminds us of the Meredith Whitney scare back in 2011.

She went on CBS's 60 Minutes program and claimed that more than 100 American cities could go bankrupt.

Oops.

O.K., we'll give her Puerto Rico and Detroit, but other than that, the muni market basically has been just fine.

Until recently. Remember, the income on a municipal bond is generally tax-free. As a result, lower income tax rates decrease a muni's attractiveness, at least on the tax front. So there are a bunch of naysayers, channeling their inner Meredith Whitney and claiming the sky may fall again in the muni world.

"And just the potential for lower tax rates immediately hit the bond market and brought municipal bond returns [yields] up and values [prices] down," says Bernie Kent, tax expert and Chairman, Schechter Investment Advisors, in Birmingham, Mich. (Remember, a bond's price moves in the opposite direction of its yield.)

But let's not panic.

We don't know when (or even if) tax rates will officially change, and history has shown it can take a while.

"Don't forget that both Reagan and Bush took a full year to get a tax cut in place," reminds Jim Robinson, bond expert and founder of Robinson Capital in Grosse Pointe, Mich.

Plus, there are some other variables to consider.

Granted, Lower Rates Could Make a Difference

The top federal tax rate for those making $500,000 or more, realistically could be over 44% these days. The top federal tax rate is currently 39.6%. Then you have to throw in the 3.8% Obamacare surtax and this pesky stealth surtax on high net worth individuals, says Kent. Without getting into the weeds of the calculation (it's called the Pease tax), you could find yourself taxed at 44%.

So if the top bracket drops to 33%, as both Trump and Paul Ryan suggest, the tax benefits of a municipal bond decrease.

A quick calculation shows you why.

In really simple terms, divide the municipal bond rate by (1 minus your tax rate).

Let's say the muni is yielding 5% and your tax rate is 40%. So the equation looks like this: 5/(1-0.40)

= 8.3%.

Consider that your cut-off when choosing between a corporate bond and a municipal one. If you find a corporate bond yielding more than 8.3% (good luck with that), take it, because you may be better off with that bond even if you have to pay taxes on the income.

But let’s say your rate drops to 33%, 7.46% becomes your cut-off. Granted it’s lower, but it’s still tough to beat in the corporate world.

The decision is never based on just one factor, though. Don’t forget about the quality of the bond, the duration, fees etc., says Kent.

But Trump Is a Big Infrastructure Guy

So he’s not going to want to kill the funding.

Remember, muni bonds are debt obligations issued by states, cities, counties and other governmental entities to raise money for schools, highways, hospitals or other public projects.

So when you buy a muni, you’re essentially lending money to the project in return for your money back and some additional interest. And as we mentioned, a bigger perk is that the income is often federal and state tax free.

And while we don’t have details, Trump may promote policies that actually help these bonds, says Mark Luscombe, principal analyst at Wolters Kluwer, a tax and accounting services company.

We know that some Trump’s infrastructure proposals may include tax incentives to create private-public partnerships for infrastructure. He also has signaled that he’d consider Build America Bonds.

And We Know There Will Be Interest Rate Increases

But even that is hedged into the calculation, says Robinson.

Short-term debt is already the optimal choice compared to longer-term bonds, because no one really knows what the interest-rate future looks like either.

There is Talk of Decreasing the Tax on Interest Income

One potential tax change that could benefit corporate bonds is if the tax on interest income is reduced. Bonds pay interest to their holders (usually) semi-annually. Currently that interest is taxed at the ordinary income rates, which could be as high as 44%, as we mentioned above.

“There is talk of implementing a cap at 16.5%,” says Robinson, (which is basically 50% of the highest proposed rate of 33%).

“If that happens, we’ll see a rally in corporate bonds as opposed to munis getting beaten up,” Robinson adds.

So What Should You Do?

Rates have gone up and down over the years and munis have managed to beat out their taxable counterparts. And even with all this noise, the relationship between munis and corporates is about the same as it was 12 months ago, notes Robinson.

If you are a high-net worth individual, you probably still will need municipal bonds in your portfolio regardless of what happens.

And many will argue that now's a good time to buy them. Especially with variables like market volatility and the Fed and Trump presidency.

To boot, municipalities may have to increase their yields to keep investors coming, which will only help investors.

So don't overreact like the market did. Just take advantage of it.

TheStreet

by Tracy Byrnes

Jan 3, 2017 1:33 PM EST

TAX - WASHINGTON

City of Snoqualmie v. King County Executive Dow Constantine

Supreme Court of Washington, En Banc - December 22, 2016 - P.3d - 2016 WL 7421401

City brought action challenging the constitutionality of statutory provision, which required Indian tribes taking advantage of property tax exemption for tribal property to make payment in lieu of leasehold excise taxes if property was not leased.

The Superior Court granted partial summary judgment in favor of the city. Department of Revenue appealed to Supreme Court, and Supreme Court retained the case for review.

The Supreme Court of Washington held that:

- City had direct standing to challenge constitutionality of statutory provision under more liberal standing requirements for cases of public importance, and
- Payment in lieu of leasehold excise taxes was not a "tax," and thus, payment was not subject to State Constitution's tax requirements.

City had direct standing to challenge constitutionality of statutory provision, which required Indian tribes taking advantage of property tax exemption for tribal property to make payment in lieu of leasehold excise taxes if property was not leased, under more liberal standing requirements for cases of public importance. Issue of whether payment in lieu of taxes was a tax would impact Indian tribes throughout the state, and several other tribes would be directly affected by invalidation of exemption and accompanying payment in lieu of taxes.

City had representative standing on behalf of its residents to challenge constitutionality of statutory provision, which required Indian tribes taking advantage of property tax exemption for tribal property to make payment in lieu of leasehold excise taxes if property was not leased. Residents had been subjected to tax shift, payment in lieu of taxes could not compensate for the total loss, and residents suffered injury from the exemption and payment in lieu of taxes.

Payment to county by Indian tribes, which took advantage of property tax exemption for tribal property, in lieu of leasehold excise taxes was not a "tax," and thus, payment was not subject to

State Constitution's tax requirements. Purpose of payment was to offset the burden created by property tax exemption in order to compensate county for services that tribal exempt land required, payment was essentially reimbursement or prospective payment for municipal services rendered, and payment was made because of municipal services the land received, as evidenced by negotiation process between tribe and county.

TAX - CONNECTICUT

Nutmeg Housing Development Corporation v. Town of Colchester

Supreme Court of Connecticut - December 27, 2016 - A.3d - 324 Conn. 1 - 2016 WL 7374650

Taxpayer sought judicial review of decision of town's board of assessment appeals upholding town's valuation, for property tax purposes, of taxpayer's land, on which age and income restricted apartment complex was located.

The Superior Court rendered judgment for town. Taxpayer appealed.

On transfer from the Appellate Court, the Supreme Court of Connecticut held that:

- Clear error standard governed review, and
- Taxpayer failed to demonstrate aggrievement, as initial burden in obtaining relief from town's valuation.

Supreme Court would review under the deferential clear error standard the trial court's decision rejecting taxpayer's challenge to town's valuation of taxpayer's land for property tax purposes, where trial court's rejection of taxpayer's valuation was based on court's credibility determination in light of flaws it perceived in the data used by taxpayer's appraiser, rather than a determination as to the proper standards governing the valuation.

Taxpayer failed to demonstrate aggrievement, as initial burden in obtaining relief from town's valuation, for property tax purposes, of taxpayer's parcel, on which age and income restricted apartment complex was located. Valuation of taxpayer's appraiser relied on unrestricted market properties to determine reasonable income and expense figures, town's appraiser testified that adjustments were required given the age and income restrictions, and taxpayer provided no testimony to support its calculation under statute providing capitalized value of net rental income as basis for property valuation.

TAX - VIRGINIA

Western Refining Yorktown, Inc. v. County of York

Supreme Court of Virginia - December 15, 2016 - S.E.2d - 2016 WL 7242276

Taxpayer challenged county's valuation of refinery's machinery and tools for purposes of levying machinery and tools tax.

The Circuit Court upheld valuation. Taxpayer appealed.

The Supreme Court of Virginia held that:

- Evidence supported finding that tax assessor did not overvalue refinery's machinery and tools by valuing them at a static 25% of original cost;
- County commissioner of the revenue adequately considered appraisal submitted by taxpayer's expert;
- Evidence supported finding that commissioner adequately considered market conditions; and
- County did not impermissibly assume inconsistent positions by arriving at higher value of machinery and tools than value it had determined for refinery in separate real estate litigation.

Evidence supported finding that tax assessor did not overvalue refinery's machinery and tools by valuing them at a static 25% of original cost, regardless of age or value, in levying machinery and tools tax. Legislature had authorized assessment of machinery and tools based on percentage of original cost, county commissioner of the revenue testified that methodology tended to approximate fair market value over time, refinery was regularly upgraded and maintained, and taxpayer's need for cash could have had dampening effect on price of sale of refinery that occurred shortly after relevant period.

In assessing refinery's machinery and tools when levying machinery and tools tax, county commissioner of the revenue adequately considered appraisal submitted by taxpayer's expert. Record established that commissioner reviewed appraisal and conducted additional research to determine whether it was well-founded, commissioner issued detailed written explanation for why she rejected expert's appraisal, and commissioner concluded that cost approach would yield unknown result due to lack of information about cost to restart refinery.

Evidence supported finding that county commissioner of the revenue, in levying machinery and tools tax, adequately considered market conditions in valuing refinery's machinery and tools. Taxpayer had told its shareholders through securities filings and state through tax returns that refinery was worth a great deal more than commissioner's assessment, and taxpayer made a business decision to sell refinery at low value due at least in part to its need for cash and to gain tax advantage.

In levying machinery and tools tax on refinery, county did not impermissibly assume inconsistent positions by arriving at higher value of machinery and tools than value it had determined for refinery in separate real estate litigation. Expert had no occasion to value machinery and tools in real estate litigation and had expressly stated that he was valuing real property only, there was evidence that equipment could have been returned to use when market conditions improved and that equipment did not have "salvage" value only, and taxpayer had sold refinery when it found itself short of cash and decided to sell refinery when entire refining industry was in slump.

Muni Investors: Beware Of The De Minimis Tax Rule.

- The recent rise in interest rates has exposed certain municipal bonds priced at a market discount to the de minimis tax rule.
- This rule causes the accretion of the bond discount to be taxed at the marginal income tax rate.
- Muni investors unaware of the de minimis rule could buy a bond at a seemingly attractive yield to later find out the effective yield is much lower.

The recent rise in interest rates has created a situation where tax-exempt municipal bonds trading at a discount could be subject to what is known as the "de minimis" tax rule. The rule applies to bonds purchased at a market discount below a threshold determined by the IRS.

This is a problem because most investors choose municipal bonds for tax-free income. Giving up a portion of your return to the IRS is not something any investor wants to do.

Your broker or bond salesman should advise you if a bond you are considering purchasing or selling qualifies for the de minimis tax. Don't rely on your broker. Become an informed investor by learning about the rule for yourself.

Continue reading.

Seeking Alpha

Joshua Hudson, CFA

Jan. 1.17

TAX - WISCONSIN

Regency West Apartments LLC v. City of Racine

Supreme Court of Wisconsin - December 22, 2016 - N.W.2d - 2016 WL 7407487 - 2016 WI 99

Owner of apartment complex subject to low income housing tax credits brought actions against city to recover refunds from claimed excessive taxation.

The Circuit Court dismissed the claims. Owner appealed, and the Court of Appeals affirmed. The Supreme Court granted owner's petition for review.

The Supreme Court of Wisconsin held that:

- Income approach required calculation of net operating income based on income and expenses specifically projected for the complex;
- Appraiser could not derive the capitalization rate from market-rate properties;
- Sales of three properties were not "reasonably comparable" arms-length sales as required for assessor to rely on the sales when assessing apartment complex; and
- Evidence was sufficient to meet burden of showing that city's assessed value of $4,169,000 was excessive.

Using best information available, income approach to valuing apartment complex property required calculation of net operating income based on income and expenses specifically projected for the subject property, rather than calculation of net operating income through mass appraisal techniques.

An appraiser must not value federally regulated housing as if it were market-rate property, as doing so causes the assessor to pretend that the subject property is not hindered by federal restrictions. The restrictions and underlying agreements implicit in federally regulated housing will affect the property's value.

Sales of three properties were not "reasonably comparable" arms-length sales as required for assessor to rely on the sales when assessing apartment complex. While subject complex was built using tax credit program, one comparable sale property was mostly market-rate rentals, while others used Section 8 rent subsidy credits, and rents at subject property were not subsidized by the government.

Apartment complex owner's evidence in tax refund action was sufficient to meet burden of showing that city's assessed value of $4,169,000 was excessive. Complex used third tier direct capitalization of income appraisal which employed actual expenses and income for the property upon which the net income was calculated, appraisal derived its capitalization rate from a market for tax credit properties, and appraisal determined that the property's value was $2,730,000.

Tax-Exempt Bonds Already Pinched by Proposed Trump Tax Cuts.

Investors pulled another $2 billion from U.S. municipal bond funds in the latest week, underscoring fears that potential sweeping tax changes under President-elect Donald Trump and a Republican Congress will undermine the tax-exempt debt market.

Trump's plans to cut taxes and increase fiscal spending have already boosted inflation expectations. As a result fixed-income markets, already weighed down by forecasts for tighter U.S. monetary policy, have see prices slump while stocks have reached record highs.

Since the Nov. 8 election, munis suffered more than any other fixed-income sector with a negative total return of 3.229 percent, according to Bank of America Merrill Lynch indices.

Trump wants to reduce the current seven tax brackets to three: 12 percent, 25 percent and 33 percent. This mirrors a June tax proposal by U.S. House Republicans but the House proposal would also allow taxpayers to deduct 50 percent of their capital gains, dividends and interest income, shrinking overall taxes even further.

"It just seems that municipals would have to readjust in terms of yield, a little bit higher yield, to bring itself back into parity proportionately with other asset classes to remain competitive," said Jim Colby, chief municipal strategist at VanEck.

Tax-exempt bonds, which outperformed other fixed-income assets in 2015, are on track to have the only negative return, albeit a small one, for all of 2016.

As of last Wednesday, munis returned a negative 0.078 percent versus positive returns of 0.551 percent for Treasuries and 5.158 percent for corporate bonds, BAML reported.

The corporate tax rate, as envisioned by Trump, would fall to 15 percent from 35 percent, making muni bonds less attractive for tax-exempt debt buyers like banks and property and casualty insurance companies.

Wealthy investors subject to federal income tax rates currently as high as 39.6 percent are traditional buyers of tax-free bonds sold by states, cities, schools, nonprofits and other issuers.

Investors are fleeing from muni bond funds. The net outflows have grown for six straight weeks to $13.5 billion since the U.S. election, according to Thomson Reuters Lipper service. The muni market is $3.7 trillion overall and until recently was the beneficiary of 54 straight weeks of fund net inflows.

DO TAX RATES MATTER TO MUNIS?

While there is talk of a tax reform bill moving through the House relatively quickly, past history indicates a vote by the August recess, setting up a Senate vote in the fall and potential signing by Trump before year-end. If progress stalls, tax reform could lay dormant during 2018's election year.

Some question the tax impact on the municipal bond market though.

Philip Fischer, municipal research strategist at BAML, said tax rates are no longer the driving force behind muni purchases and that tax-sheltered investment vehicles have replaced competition from other fixed-income assets.

“What is going on is that munis have to yield enough so they are competitive with other tax sheltered instruments like 401k’s,” he said.

The tax-exempt market should have some time to adjust before the first major U.S. tax changes materialize since 1986’s massive reform law.

“We really believe if it really does happen it’s more of a 2018 event not a 2017,” said Dan Heckman, national investment consultant at US Bank.

Meanwhile, muni issuers are facing higher borrowing costs than just six months ago.

A rise in yields on Municipal Market Data’s benchmark triple-A scale from record lows reached this summer accelerated after the election.

The yield on top-rated 30-year bonds ended Friday at 3.11 percent, which is 118 basis points up from its 1.93 percent low. For 10-year bonds, Friday’s 2.39 percent yield was 110 basis points over the all-time low of 1.29 percent.

Issuers took advantage of historic low rates to refund old debt and sell new bonds, pushing 2016 issuance to $423.5 billion as of Friday, just short of 2010’s record $430.35 billion supply, according to Thomson Reuters data.

“We could envision a market totaling $350 billion (in 2017), about $100 billion less than this year, but this of course depends heavily on how the proposals play out,” Natalie Cohen, a senior analyst at Wells Fargo, said in a December report on potential tax changes.

Refundings of existing bonds, which accounted for about 61 percent of 2016 issuance, would not screech to a halt given the impending 10-year call on hefty amounts of debt issued in 2007, she added.

Reuters

By Karen Pierog

Tue Dec 27, 2016 | 7:00am EST

(Reporting By Karen Pierog, additional reporting by David Morgan in Washington; Editing by Daniel Bases)

IRS Issus New Guidance On The Beginning Of Construction Safe Harbor For Renewable Energy Projects: Foley & Lardner

The IRS recently issued Notice 2017-4 (the “Notice”) which makes two important changes to its “beginning of construction” rules for taxpayers seeking to take advantage of the section 45 renewable electricity production tax credit (PTC) for wind and other renewable energy facilities including geothermal, biomass, landfill gas and certain hydropower and marine hydrokinetic energy projects. Under prior IRS guidance, including Notice 2016-31 discussed in our blog post here, taxpayers have two ways to establish that they started construction. They can either show that they began physical construction of a significant nature (the “Physical Work Test”), or incurred at least 5% of the total cost of the eligible facility (the “5% Safe Harbor”). However, once construction has begun or cost have been paid or incurred, the IRS requires taxpayers to make continuous progress towards completion to satisfy both the Physical Work Test and the 5% Safe Harbor (“Continuous Construction Requirement”). Taxpayers are deemed to satisfy the Continuous Construction Test provided they began construction on the facility prior to January 1, 2015, and place it in service prior to January 1, 2017 (the “Continuity Safe Harbor”).

The Notice now permits taxpayers to fall within the Continuity Safe Harbor provided that they place the facility in service by the later of (1) a calendar year that is no more than four calendar years after the construction of the facility began or (2) December 31, 2018. This provides additional time for developers that have satisfied the Physical Work Test or 5% Safe Harbor to complete construction and place the facility in service without having to demonstrate that the Continuous Construction Requirement was satisfied. For example, if construction begins on January 15, 2013, and the facility is placed in service by December 31, 2018, the facility will meet the Continuity Safe Harbor.

The Notice also provides that the prohibition on taxpayers using both the Physical Work Test and 5% Safe Harbor methods in alternating years to push forward the facility’s placed in service deadline does not apply to taxpayers that began construction on a project under either test prior to June 6, 2016. (The date that Notice 2016-31, which established this rule, was published.) Accordingly, taxpayers that began construction before this deadline can show that they have made continuous progress towards construction by relying on the Physical Work Test in one year and then relying on the 5% Safe Harbor the following year after they have paid enough costs to meet the 5% threshold. This is helpful because taxpayers acquiring projects may not have been satisfied with the manner in which the prior developer demonstrated the commencement of construction. The new rule permits them to “requalify” the project under a different method.

Last, the Notice provides guidance for developers using the 5% Safe Harbor for repowering and retrofitting existing projects. In order to take advantage of the tax credit, the facility must be “new” as determined by the 80/20 rule, which means that the cost of new parts must be four times the value of the used parts. The Notice clarifies that for purposes of satisfying the 5% Safe Harbor, the cost of the new property includes all costs properly included in depreciable basis, meaning that indirect costs that are allocated to the new property’s depreciable basis should count towards the 5% Safe Harbor.

Last Updated: December 28 2016

Article by John A. Eliason, David B. Weisblat and Kurt R. Rempe

Foley & Lardner

The New Issue Price Regulations – "Bought Deals," Bored Bidders, and Other Problems.

As you have heard, and as we noted last week, Treasury and the IRS recently released final regulations that tell issuers how to calculate the "issue price" of tax-advantaged bonds that are issued for money. The regulations don't take effect until June 7, 2017, so we can spend some time luxuriating in their nuances and preparing for the new order of things until the appointed hour arrives. As ever, though the new regulations seem to carve out some discrete rules, interesting [sic] questions lurk in the margins.

Continue reading.

By Johnny Hutchinson on December 22, 2016

The Public Finance Tax Blog

Squire Patton Boggs

TAX - CALIFORNIA

In re Transient Occupancy Tax Cases

Supreme Court of California, California - December 12, 2016 - P.3d - 2016 WL 7187624

Online travel companies petitioned for writ of mandate challenging city's determination that companies were responsible for paying transient occupancy tax on their service fees.

The Superior Court granted writ of mandate. City appealed, and the Court of Appeal affirmed. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

The Supreme Court of California held that tax was not payable on amounts retained by travel companies above the amounts remitted to hotels as the agreed wholesale costs of room rentals plus the hotel-determined markup.

City transient occupancy tax, which was charged as percentage "of the Rent charged by the Operator," was not payable on amounts retained by online travel companies above the amounts remitted to hotels as the agreed wholesale costs of room rentals plus the hotel-determined markup. Travel companies were not "operators" under the ordinance and did not act as agents for purposes of setting and collecting additional markups from room occupants, and contractual provisions between hotels and travel companies apportioning tax responsibility did not create tax liability.

MBFA: Sign Our Letter to Save the Muni-Exemption.

Municipal Bonds For America will be sending a letter to all House and Senate Leadership, House Ways & Means and Senate Finance Committee Members urging them to retain current law on municipal bonds as a part of their upcoming legislative debate.

The letter was intentionally drafted to be short and simply focuses on urging Members to oppose any efforts to limit or repeal the exemption.

The intent of the letter is not to get Members to focus on its content, but to get them to focus on who signed the letter from their state or district.

MBFA's goal is to collect a minimum of 300 signatures for this letter.

We strongly encourage each of you and your organizations to immediately take the following action:

1. Obtain sign-off from your parent organization to have your organization's name affixed to the letter–and follow the instructions (below) to make that happen.
2. Alert your organization's individual members regarding the opportunity to join with other like-minded organizations in supporting municipal bonds. MBFA wants to include the signatures from as many airports, hospitals, education entities, transportation authorities, mayors, broker/dealers, construction companies, and all others as signatures to this letter.
3. To view and add your signature to the letter please click here.

The deadline for affixing your signature to this letter is Thursday, January 19, 2017.

Thanks for your help. If you have any questions please feel free to reach out to Justin Underwood at justin@munibondsforamerica.org.

For more information on the MBFA please visit www.munibondsforamerica.org

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Help GFOA Preserve Muni Bond Tax Exemption.

On Wednesday, December 14th and Thursday December 15th select members of Ways and Means will convene to discuss the Blueprint for Tax Reform, a legislative proposal for comprehensive tax reform that will be introduced in the 115th Congress that begins in January.

In order to achieve Chairman Brady's overall objectives to simplify the tax code, all tax exemptions are at risk, with the exception of the mortgage interest deduction and the deduction for charitable donations.

The Federal Liaison Center is still not certain about the specific contents of the Blueprint, but we would like to be sure that the tax exemption on municipal bond interest is not at risk.

Now is the time for GFOA members to engage your member of Congress to explain how the municipal bond underpins our infrastructure and drives our local economies. Reach out today and tell them:

- Tax-exempt bonds are the primary financing mechanism for state and local infrastructure projects—they have been used for more than 100 years and provide essential funding for states, counties and localities.
- Three-quarters of all public infrastructure projects in the U.S. are built by states and localities, and tax-exempt bonds are the primary financing tool utilized to satisfy these infrastructure needs.
- If the tax exemption is eliminated or reduced, states and localities will pay more to finance projects, leading to fewer projects and fewer jobs, or project costs will be transferred to local tax and rate payers.
- ***Describe to them specific projects in their districts that municipal bonds have built!***

Reaching out to your members of Congress and describing how the muni bond has been used to provide essential infrastructure in your jurisdiction is now more important than ever. Please feel free to access materials and to stay in touch during this hectic and exciting time via the FLC's Federal Tax Exemption on Municipal Bond Interest Resource Center.

Local Governments Suffer Tax Blow at California Supreme Court.

In a loss for local governments, the California Supreme Court decided Monday that online travel companies such as Expedia Inc. are exempt from paying hotel occupancy taxes.

The ruling came in one of several lawsuits filed by California cities and counties against the online firms, including Hotwire Inc. and Priceline.com.

The local governments have been attempting to get the firms to pay hundreds of millions of dollars in back taxes.

Lawyers for the government argued the tax should be based on the total amount the companies collect from consumers, not the lower dollar figure the hotels receive. Cities and counties wanted the online sites to pay the difference.

The state high court agreed the tax should be based on the higher amount but said the online companies were not obligated to pay it.

"It changes the rules in California," said Kent L. Richland, who represented the city of San Diego in the case decided Monday. "It is going to affect all these cases because they are going to have to be decided under new rules."

Several cities and counties still have cases pending, including a lawsuit by Los Angeles.

So far, the online travel firms have won most of the disputes, which have been litigated across the country.

California's top court, examining a San Diego transient occupancy ordinance, said it applied only to hotel operators, not the online businesses.

Online travel companies "are not operators," the court said in a unanimous decision written by Justice Kathryn Mickle Werdegar.

San Diego sued the companies in an attempt to recover about $21 million in back taxes.

Hotels contract with online sites to provide rooms at discounted rates. The sites charge a higher rate and require consumers to pay a charge for taxes and fees.

Hotels have been paying occupancy taxes based on the amounts they received for their rooms, not the higher price paid by consumers to the travel firms

Industry officials say online travel companies typically mark up the wholesale price by 8% to as high as 22%, but there is no standard for this.

Local governments may still be able to recover the additional tax revenue by suing hotels, which were not a party in Monday's case.

If hotels are sued, the Internet firms could end up footing the bill anyway, Richland said.

Most hotels have contracts that obligate online travel companies to compensate them for any taxes eventually owed, Richland said.

San Diego has not yet decided what to do to next, he said.

A spokesman for the California Hotel and Lodging Assn., a trade group for the state's hotels and inns, said the good news is that the ruling calls on online travel companies to pay taxes based on the rate they charge guests, not on the wholesale price charged to them by the hotels.

But it also means that hotel owners will be responsible for finding out from the online travel companies how much they marked up the rooms and collect tax on that higher rate. "It means more work on the part of the hotels," said Lynn Mohrfeld, president and chief executive for the trade group.

In order to change city laws to make online travel companies pay taxes on the total charged to guests, Mohrfeld said an ordinance must be placed before voters and approved by a two-thirds majority.

"Getting a two-thirds majority is an awfully tall order," he said.

The Travel Technology Assn, the trade group that represents online travel companies such as Expedia and Orbitz, declined to comment on the court ruling.

BY TRIBUNE NEWS SERVICE | DECEMBER 13, 2016

By Maura Dolan

IRS Releases Final Issue Price Regulations with Significant Changes: Andrews Kurth

On December 9, 2016, the Internal Revenue Service (the "IRS") released final regulations regarding issue price for tax-exempt obligations (the "Final Regulations") that will be effective for bonds sold on or after June 7, 2017.

Summary of Current Law

The Existing Regulations define issue price generally as the first price at which ten percent of the bonds of any maturity is sold to the public. The Existing Regulations further provide that the issue price of bonds for which a bona fide public offering is made may be determined as of the sale date based on reasonable expectations regarding the initial public offering price. Most bond counsel now interpret this rule to permit issuers to determine the issue price of any maturity of bonds for which at least 10% was not sold to the public based on a certificate of the underwriters regarding their reasonable expectations on the sale date.

Summary of Final Regulations

The Final Regulations provide three options for determining issue price: the general actual facts rule, a special reasonable expectations rule, and a special rule for competitive sales. Underwriters will be required to provide certain certifications in order to fall under the special reasonable expectations rule and special rule for competitive sales. An issuer may use its discretion to select among the rules and may select a different rule for different maturities of the same issue, but must identify the rules selected in its books and records on or before the issue date of the bonds.

1. General Rule (Actual Facts Test)

A. Public Offerings

The Final Regulations provide that generally the issue price of bonds issued for money is the first price at which a substantial amount (ten percent) of the bonds is sold to the public.

B. Private Placements

For a bond issued for money in a private placement to a single buyer that is not an underwriter or a related party to an underwriter, the issue price of the bond is the price paid by that buyer.

2. Special Reasonable Expectations Rule (Hold-the-Offering Price Rule)
In addition to the general rule, an issuer may treat the initial offering price to the public as the issue price of the bonds if:

A. The underwriters offered the bonds to the public at a specified initial offering price on or before the sale date, and the lead underwriter in the underwriting syndicate or selling group (or, if applicable, the sole underwriter) provides, on or before the issue date, a certification to that effect to the issuer, together with reasonable supporting documentation for that certification, such as a copy of the pricing wire or equivalent communication; and

B. Each underwriter agrees in writing that it will neither offer nor sell the bonds to any person at a price that is higher than the initial offering price to the public during the period starting on the sale date and ending on the earlier of (1) the close of the fifth (5th) business day after the sale date, or (2) the date on which the underwriters have sold at least 10% of the bonds of that maturity to the public at a price that is no higher than the initial offering price to the public of that maturity. Sales of bonds to anyone at a price that is lower (rather than higher) than the initial offering price to the public during the holding period are allowed.

We expect the certifications required in (B) will be included in bond purchase agreements and any agreements among underwriters for bonds sold after the Final Regulations take effect on June 7, 2017.

3. Special Rule for Competitive Sales

For bonds issued for money pursuant to an eligible competitive sale, an issuer may treat the reasonably expected initial offering price to the public as of the sale date as the issue price of the bonds if the issuer obtains a certification from the winning bidder regarding the reasonably expected initial offering price to the public of the bonds upon which the price in the winning bid is based.

For purposes of this special rule, the Final Regulations define “competitive sale” to mean a sale of bonds by an issuer to an underwriter that is the winning bidder in a bidding process in which the issuer offers the bonds for sale to underwriters at specified written terms and that meets the following requirements:

A. The issuer disseminates the notice of sale to potential underwriters in a manner reasonably designed to reach potential underwriters;

B. All bidders have an equal opportunity to bid;

C. The issuer receives bids from at least three underwriters of municipal bonds who have established industry reputations for underwriting new issuances of municipal bonds; and

D. The issuer awards the sale to the bidder who offers the highest price (or lowest interest cost).

4. Definitions

"Public" is defined for purposes of determining the issue price of tax-exempt bonds to mean any person other than an underwriter or a related party to an underwriter.

"Underwriter" is defined to mean:

A. Any person that agrees to participate in the initial sale of the bonds to the public by entering into a contract with the issuer or with a lead underwriter to form an underwriting syndicate; and

B. Any person that, on or before the sale date, directly or indirectly enters into a contract with any of the foregoing to sell the bonds.

5. Standard for Reliance on Certifications and Consequences of Violations

The Existing Regulations treat an issuer's expectations or actions as reasonable only if a prudent person in the same circumstances as the issuer would have those same expectations or take those same actions, based on all the objective facts and circumstances. The Preamble to the Final Regulations states that the existing due diligence standard under the Existing Regulations will apply to any certificate under the Final Regulations and that a certificate from the underwriter of the first price at which 10% of a maturity of bonds were sold to the public is an example of reasonable supporting documentation for establishing the issue price of the bonds of any maturity under the general rule in the Final Regulations.

If the issuer selects a rule for determining issue price but a specific eligibility requirement of that rule is not met, issue price may not be determined under that rule and a redetermination of issue price under a different rule will occur. An example of failing to meet a specific eligibility requirement is an underwriter's breach of its hold-the-offering-price agreement under the special reasonable expectations rule.

A false statement by an underwriter in a certification or in the agreement among underwriters under one of these special rules may result in a penalty against the underwriter under section 6700, depending on the facts and circumstances.

Effective Date

These regulations are effective for bonds sold on or after June 7, 2017.

History of Issue Price Regulations

On June 18, 1993, the Department of the Treasury (Treasury Department) and the IRS published comprehensive final regulations in the Federal Register (TD 8476, 58 FR 33510) on the arbitrage investment restrictions and related provisions for tax-exempt bonds under sections 103, 148, 149, and 150. Since that time, those final regulations have been amended in various limited respects, including most recently in final regulations published in the Federal Register (TD 9777, 81 FR 46582) on July 18, 2016 (the regulations issued in 1993 and the various amendments thereto are collectively referred to as the Existing Regulations).

A notice of proposed rulemaking was published in the Federal Register (78 FR 56842; REG-14865--07) on September 16, 2013 (the 2013 Proposed Regulations), which, among other things, proposed to amend the definition of "issue price."

Subsequently, the Treasury Department and the IRS withdrew §1.148-1(f) of the 2013 Proposed Regulations regarding the definition of issue price and published another notice of proposed rulemaking in the Federal Register (80 FR 36301; REG-138526-14) on June 24, 2015, which re-proposed a definition of issue price (the 2015 Proposed Regulations).

National Law Review

by Cathleen Chang, Robert M. Collie, Jr., Gregg Jones, Barbara Jane League

Andrews Kurth Kenyon Law Firm

Tuesday, December 13, 2016

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.

The Public Finance Tax Blog

By Alexios Hadji on December 16, 2016

Squire Patton Boggs

Final Issue Price Regulations Significantly Change Current Rules.

On Dec. 9, the IRS released final Treasury Regulations (the “Final Regulations“) relating to the “issue price” of tax-exempt bonds for purposes of arbitrage investment restrictions. Although on balance an improvement to the proposed Treasury Regulations released in 2015, the Final Regulations represent a departure from the current Treasury Regulations (the “Current Regulations”) and will affect long-held practices regarding the documentation of issue price. As such, issuers, underwriters, financial advisors and others involved in the municipal bond market will need to determine how they will comply with the Final Regulations, which are effective for bonds sold on or after June 7, 2017.

Set forth below is a general summary of pertinent provisions of the Final Regulations.

Actual Sales Test Adopted for Publicly Offered Bonds
Unless the issuer elects to use one of the two “special rules” for determining issue price, the issue price of bonds that are publicly offered is the first price at which a substantial amount (i.e.,10%) of the bonds is sold to the public. However, unlike the Current Regulations, which allow the issue price to be determined as of the sale date based on reasonable expectations regarding the initial public offering price, the Final Regulations provide that the “issue price of bonds issued for money is the first price at which a substantial amount [defined as 10%] of the bonds is sold to the public.” Thus, the Final Regulations adopt an actual sales test to determine issue price for publicly offered bonds, a significant change from the Current Regulations.

Special Rule for Use of Initial Offering Price to the Public
As an alternative to the “actual sales” test, the Final Regulations include a “special rule” for determining the issue price of publicly offered bonds, pursuant to which an issuer may treat the initial offering price to the public as of the sale date as the issue price of the bonds if the following

requirements are met:

- The underwriters offered the bonds to the public for purchase at a specified initial offering price on or before the sale date, and the lead underwriter in the underwriting syndicate or selling group (of, if applicable, the sole underwriter) provides, on or before the issue date, a certificate to that effect to the issuer, together with reasonable supporting documentation for that certification, such as a copy of the pricing wire or equivalent communication; and
- Each member of the underwriting syndicate agrees in writing that it will neither offer nor sell the bonds to any person at a price that is higher than the initial offering price to the public during the period starting on the sale date and ending on the earlier of (i) the close of the 5th business day after the sale date or (ii) the date on which the underwriters have sold a substantial amount (i.e., 10%) of the bonds to the public at a price that is no higher than the initial offering price to the public.

Special Rule for Competitive Sales
Recognizing that competitive sales inherently "favor competition and price transparency that may result in better pricing for issuers," the Final Regulations include a special rule for competitive sales. Specifically, the Final Regulations provide that, for bonds issued in an eligible competitive sale, the issue price is the price produced based on the winning bid and requires the winning bidder to provide an appropriate certification regarding the reasonably expected initial offering prices of the bonds.

An eligible "competitive sale" is a sale of bonds by an issuer to an underwriter that is the winning bidder in a bidding process in which the issuer offers the bonds for sale to the underwriters pursuant to specified written terms and that meets the following requirements:

- The issuer disseminates the notice of sale to potential underwriters in a manner reasonably designed to reach potential underwriters;
- All bidders have an equal opportunity to bid;
- The issuer receives bids from at least three underwriters of municipal bonds who have established industry reputations for underwriting new issuances of municipal bonds; and
- The issuer awards the sale to the bidder who offers the highest price (or lowest interest cost).

Issue Price in Private Placements
The Final Regulations expressly provide that, for a bond issued for money in a private placement to a single buyer that is not an underwriter or a related party to an underwriter, the issue price of the bond is the price paid by the buyer.

Determining Issue Price when More than One Rule is Available
The Final Regulations include more than one way to determine issue price (i.e., the general rule, the special rule, and the competitive bid rule). Accordingly, the Final Regulations provide that for bonds for which more than one rule for determining issue price is available, an issuer may select the rule it will use to determine the issue price at any time on or before the issue date of the bonds by identifying the selected rule in the books and records maintained for the bonds.

Definition of Underwriter
The Final Regulations define "underwriter" to mean (i) any person that agrees pursuant to a written contract with the issuer (or with the lead underwriter to form an underwriting syndicate) to participate in the initial sale of the bonds to the public and (ii) any person that agrees pursuant to a written contract directly or indirectly with a person described in (i) to participate in the initial sale of the bonds to the public (for example, a retail distribution agreement between a national lead underwriter and a regional firm under which the regional firm participates in the initial sale of the

bonds to the public).

Conclusion
Although it is too soon to tell exactly how the Final Regulations will affect the way in which issuers, underwriters, financial advisors and others approach issuances of tax-exempt bonds, the Final Regulations will affect the way that issue price is established and documented and may have other ancillary effects on the municipal bond market. Market participants should review the Final Regulations carefully and consult their advisors, as appropriate.

The Bond Buyer

By Victoria Ozimek and Brian Teaff

December 14, 2016

Victoria Ozimek is a member of Bracewell LLP's Public Finance practice in Austin, and Brian Teaf is a member of its Public Finance practice in Houston.

Charles L. Almond, Stephen H. Gerdes and Todd Greenwalt, members of Bracewell Public Finance practice in Houston, contributed to this article.

Mayors Startled When Trump Promises to Keep Tax-Exempt Bonds.

Tax exemptions on municipal bonds are hardly the sexiest political issue surrounding Donald Trump's transition. But a group of mayors, meeting with the president-elect at Trump Tower on Thursday, were surprised with welcome news when they pressed Trump to keep the exemptions.

"He's the president-elect, and he said he would keep it," said Tom Cochran, the CEO and executive director of the U.S. Conference of Mayors. "My lobbyist has been up on the Hill, and they said to us everything is on the table. We didn't know what would happen."

He added: "As soon as the sun comes up, I will be contacting the authorities in Speaker Ryan's office and others on the Democratic side that we were encouraged by the president-elect."

A spokesman for Trump, who convened the mayors in Trump Tower for about 30 minutes, didn't respond to a request for comment. Trump has vowed to overhaul the country's tax code when taking office, and mayors have feared the exemption could be in jeopardy. It has been targeted by some Republicans as too pricey, particularly when the bonds are used to build sports arenas and stadiums.

In a 2009 report, the Congressional Budget Office called the tax-exempt bonds a "costly mechanism." A 2015 report from the Joint Committee on Taxation said the tax-exempt bonds will cost the government more than $180 billion between that year and 2019.

The exemptions are vitally important to mayors, they say, because they enable cities and counties to build roads, schools and other projects without paying the burden of taxes on the borrowing. Between 2003 and 2012, states and local governments financed $3.2 trillion in projects, according to the National Association of Counties. Trump seemed to understand that and emphasized how committed he was to spending money on infrastructure, the mayors said.

Two other mayors in the room said they were also surprised with Trump's declaration. "I didn't necessarily think we'd hear an opinion back," said Mick Cornett, the Republican mayor of Oklahoma City. "I was very encouraged."

"He definitely said he would keep the exemptions," said Steve Benjamin, the Democratic mayor of Columbia, S.C. A spokesman for New Orleans Mayor Mitch Landrieu, a Democrat also present at the meeting, said he wasn't available for comment.

The U.S. Conference of Mayors, had struggled to secure Trump's attention during the presidential race. And a number of liberal mayors have vowed to oppose many of Trump's proposals, like on immigration.

On Thursday the mayors present said he seemed interested in attending their next meeting and sending members of his Cabinet.

The mayors said they discussed a number of other municipal issues, like community block grants for cities. Trump seemed interested in how cities received money, the mayors said, and how they spent it.

Benjamin said that while he vociferously opposed Trump's candidacy, he was trying to be "optimistic" after the meeting. Cornett said "because Trump has lived in cities, I think he has a good understanding."

"You didn't know what to expect going in," Cochran, the CEO and executive director said. "We're in uncharted waters with this president-elect. We felt like that he was listening to us. We're trying to get to know him. He's the president. We got to get to know him."

POLITICO

By JOSH DAWSEY

12/15/16 07:21 PM EST

TAX - NEW HAMPSHIRE

Bishop of Protestant Episcopal Diocese in New Hampshire v. Town of Durham

Supreme Court of New Hampshire - December 9, 2016 - A.3d - 2016 WL 7177763

Church appealed town's assessment of property tax on 24 spaces in church parking lot that church leased to state university students.

The Superior Court entered summary judgment for town, and church appealed.

The Supreme Court of New Hampshire held that spaces in church's parking lot leased to state university students were not exempt from property tax.

Spaces in church's parking lot leased to state university students were not "used and occupied directly for religious purposes," within meaning of statutory exemption from property tax for "houses of public worship, buildings, and the lands appertaining to them owned, used and occupied directly for religious training or for other religious purposes by any regularly recognized and constituted denomination." University students were using parking spaces for their own private and secular purposes, i.e., parking for about six hours each week, plus special event days and during snow plowing and repair operations, and church did not argue that leasing spaces to university students was reasonably necessary to carry out its mission.

TAX - LOUISIANA

[Arrow Aviation Company, LLC v. St. Martin Parish School Board Tax Sales Dept.]

Supreme Court of Louisiana - December 6, 2016 - So.3d ----2016 WL 7118912 - 2016-1132 (La. 12/6/16)

Taxpayer petitioned to recover amount of sales and use tax paid under protest, claiming collector failed to apply a legislative tax exclusion.

The 16th Judicial District Court, St. Martin Parish, ruled in favor of the collector, finding the exclusion to be unconstitutional. Taxpayer appealed

The Supreme Court of Louisiana held that:

- A legislative tax exclusion must treat all local governmental subdivisions, school boards, and other political subdivisions the same, otherwise it is prohibited by the constitution's uniformity provision, abrogating *Anthony Crane Rental, L.P. v. Fruge*, 833 So.2d 1070;
- State constitution's uniformity provision did not act to compel statewide local tax authorities to apply a permissive tax exclusion adopted by a different local tax authority;
- Statutory exclusion from state and local sales tax, of charges for repairs to tangible personal property that was delivered to customers out of state, was constitutional as applied to taxpayer for audit periods during which the exclusion could be applied by tax authorities in all parishes in the same form, manner, or degree; but
- The exclusion was unconstitutional as applied for audit periods during which the exclusion was mandatory for tax authorities in one particular parish, but optional for tax authorities in all other parishes; and
- Unconstitutional portion of the statute would be severed and removed.

State constitution's uniformity provision placed a limitation on the legislature, rather than on local tax authorities, and therefore, did not act to compel statewide local tax authorities to apply a permissive tax exclusion from sales and use taxes adopted by a different local tax authority, as permitting one local tax authority to direct the actions of another would undermine each authority's power to tax.

Statutory exclusion from state and local sales tax, of charges for repairs to tangible personal property that was delivered to customers out of state, was constitutional as applied to taxpayer for audit periods during which the exclusion could be applied by tax authorities in all parishes in the same form, manner, or degree.

Statutory exclusion from state and local sales tax, of charges for repairs to tangible personal property that was delivered to customers out of state, was unconstitutional as applied for audit periods during which the exclusion was mandatory for tax authorities in one particular parish, but optional for tax authorities in all other parishes, as an example of non-uniformity prohibited by the constitution.

Unconstitutional portion of statute mandating tax authorities in one parish apply tax exclusion from state and local sales tax, of charges for repairs to tangible personal property that was delivered to customers out of state, would be severed and removed. Because earlier versions of the exclusion did not mandate that only one parish apply the exclusion, the purpose of the statute was not dependent on the unconstitutional portion.

With Trump's Support, Muni Exemption Advocates Take Battle to Congress.

WASHINGTON – U.S. mayors and other municipal market participants are stepping up pressure on Congress to maintain the tax exemption on municipal bonds, after President-elect Donald Trump said he supports the tax break that they say is crucial for funding infrastructure projects.

Mike Belarmino, associate legislative director and associate general counsel for the National Association of Counties, said although the group is "highly encouraged" by Trump's statement, it will now focus its efforts on making sure lawmakers also recognize the importance of the muni exemption.

"We will remain vigilant and stay focused on protecting the tax exemption as a top priority for counties, because it will take a combined effort of the administration and the U.S. Congress to achieve any comprehensive tax reform," Belarmino said.

Jessica Giroux, general counsel and managing director of federal regulatory policy for Bond Dealers of America, called Trump's support of the muni exemption an "encouraging development" that she said comes as a result of the lobbying and education BDA and other organizations have been engaged in on the Hill. However, she added that Trump's statements do not mean the groups' work is done.

"We have a complicated road ahead with regard to tax reform," Giroux said.

"Still, this is a very important public step with what the president-elect has said," she added. "It's extremely encouraging and we're happy the meeting went as well as it did."

Trump told the U.S. Conference of Mayors (USCM) during a 15-t0-20 minute conversation on his infrastructure plan on Thursday that he plans to maintain the tax-exempt standing of municipal bonds. The Republican president-elect's 10-year infrastructure plan utilizes $137 billion of tax credits that he says will leverage $1 trillion of private investments.

Speaking to reporters at Trump Tower in New York City on Thursday, Columbia, S.C., mayor and USCM second vice president Stephen Benjamin said that Trump "was clear that his support of the tax exemption was there and that was wonderful news." "Protecting the tax exemption on municipal bonds … is sacrosanct to us delivering on infrastructure.

"[Trump] listened to our issues and concerns and our desire to see a significant investment in infrastructure and the protection of the tax exemption of municipal bonds as a key part of that plan," he added.

Because Trump's tax plan still lacks details and doesn't mention munis directly, state and local groups had expressed concern that the muni exemption could be in jeopardy.

Earlier this year, House Republicans proposed a blueprint for tax reform, which doesn't mention munis directly, but does suggest limiting or repealing unnamed special-interest provisions.

Because roughly 75% of U.S. infrastructure has been financed using munis, Benjamin said the exemption was an "important piece" of the discussion with Trump.

"A focus on infrastructure goes hand-in-hand with a commitment to preserving the exemption on municipal bond interest," said Emily Brock, director of the Government Finance Officers Association's federal liaison center. "But our work isn't done. We will continue to work with our champions in the House and the Senate to ensure the exemption stays intact during the 115th congress, especially as discussions on tax reform proceed."

USCM has stressed the low-cost borrowing the muni exemption provides issuers as well as the $1.65 trillion in debt issued for infrastructure by state and local governments from 2003 through 2012. Opponents, meanwhile, have argued that the exemption is an inefficient method for financing infrastructure and costs the federal government in the long run.

In addition to infrastructure investment, USCM representatives discussed public safety, unfunded federal mandates and immigration priorities with Trump, according to the group.

At its bipartisan meeting earlier this fall, the mayoral organization stressed that the next president must maintain the tax exemption for municipal bonds or risk costing cities up to $500 billion in spending.

USCM is scheduled to hold its winter meeting in Washington next month, where nearly 300 mayors are expected to meet with representatives from the Trump administration.

The Bond Buyer

By Evan Fallor

December 16, 2016

Bond Market's Silver Lining Playbook: Slicing Next Year's Taxes

- Record stock market meets worst muni returns since 2013
- 'Tremendous volume' of tax-loss swaps, Breckinridge CIO says

Investors see a silver lining in the municipal-bond market rout: Tax-loss swaps.

Thanks to the technique, bondholders are selling securities that have tumbled in value and reinvesting the cash in similar, higher-yielding bonds. The losses that locks in are offsetting gains from a record-setting stock prices, cutting next year's tax bills.

"There is a tremendous volume of this going on," said David Madigan, who oversees $25 billion of municipal bonds as chief investment officer at Breckinridge Capital Advisors in Boston. "We are aggressively pursuing what we can get done."

The rush stems from a financial-market schism that's widened since Donald Trump's presidential victory last month, with his pledge to cut income taxes and boost spending on infrastructure stoking speculation that that the Federal Reserve will need to increase interest rates more rapidly.

The Dow Jones Industrial Average of stocks has risen 14 percent this year and is closing in on 20,000. Meanwhile, the prospect of higher rates caused municipal bonds to tumble in November, putting the securities on pace for the first loss since 2013. Investors who bought state and local government debt this summer — when prices reached a record high — have seen the value tumble by as much as 6.3 percent, according to Bank of America Merrill Lynch indexes.

The ability to use such losses to reduce coming tax bills are a rarity for municipal-debt investors. Before 2013, when the Federal Reserve's decision to wind down its bond-buying spree caused investors to pull out their money, the municipal market hadn't dropped since the 2008 financial crisis. The last money-losing year before that was 1999, another record-setting time for stocks.

This year, tax-loss swaps are giving investors a money-saving opportunity to adjust their portfolios before Trump takes office, said Kathleen McNamara, a municipal strategist at UBS Wealth Management in New York. The Republican's election has changed market expectations about inflation, tax policy and the trajectory of federal spending.

"There are so many factors that changed people's view on how they should be positioned," said McNamara.

To comply with Internal Revenue Service rules, investors executing tax-loss swaps need to avoid a wash sale, when securities are sold for the purpose of establishing a tax loss but the same or a "substantially identical" security is purchased 30 days before or after the sale.

Complying with the rule is easier in the municipal market, where there are more than 50,000 issuers and more than 1 million outstanding bonds.

Tax-loss swaps make the most sense for investors who bought bonds between May and August, otherwise transaction costs minimize the benefit, Breckinridge's Madigan said. He said his firm has executed $60 million tax-loss swap block trades in the last three weeks.

"It's a rare instance," Madigan said. "We had a big market rally and then in November we had a big market sell-off, so we actually have losses now that it makes sense to try to capture."

Bloomberg

by Martin Z Braun

December 16, 2016, 2:00 AM PST

The Looming Threat to Tax-Free Munis.

Donald Trump and House Republicans have proposed lower rates on taxable investment interest; such moves would lessen the advantages of munis

Thousands of municipal-bond investors have benefited from tax advantages for much of the past three decades. Pretty soon, those advantages could shrink dramatically.

That is because both President-elect Donald Trump and Republicans in the House of Representatives have proposed lower rates on taxable investment interest. Such moves would lessen the advantages of tax-free munis in ways that range from relatively minor to severely disruptive.

The most radical proposal, advanced by House Republicans led by Paul Ryan (R., Wis.) and Ways and Means Committee Chairman Kevin Brady (R., Texas), would lower the top rate on interest on taxable bonds, such as Treasurys and corporate debt, to 16.5% from 43.4%, a 62% drop.

Here is how the math works: Say an investment in a taxable bond pays annual interest of 5%. Of that interest, the government currently collects as much as 43.4 cents on every dollar. If the tax rate drops, the investor keeps more of the payout on the bond.

By comparison, tax-free municipal bonds are just that, tax-free, meaning that they don't benefit from a tax-rate cut, while taxable bonds do. This means tax-free bonds would be less desirable to investors, potentially denting prices, while demand would rise for taxable bonds.

"The math on munis is changing, and structurally the tax exemption will be less valuable—we just don't know to what degree," says Robert Gordon, who heads Twenty-First Securities, a tax-strategy firm in New York.

The smallest change, and the one with the broadest support, is repeal of a 3.8% surtax on net investment income such as interest, dividends and capital gains. This levy takes effect at a threshold of $250,000 of income for married couples and $200,000 for singles, and both Mr. Trump and many in Congress have called for its elimination.

Without this surtax, the top rate on interest from munis' taxable competition would be 39.6% rather than the current 43.4%. Other things being equal, the recent benchmark yield of 2.37% on a 10-year muni would need to rise to about 2.55% for top-bracket investors in order to provide an equivalent return, says Richard Ciccarone, a muni specialist who heads Merritt Research Services in Chicago. Bond yields rise as prices fall.

In another proposal, Mr. Trump has called for lowering the top rate on "ordinary" income such as wages and interest to 33% from 39.6%. If this is enacted along with the surtax repeal, then the recent benchmark yield would need to rise to about 2.80%, says Mr. Ciccarone. Absent other market changes, the value of a $10,000 investment would shrink to $9,627, according to Mr. Gordon.

The third and most disruptive proposal is in the House GOP tax reform blueprint. It would give investment interest the same tax-favored treatment that long-term capital gains and certain dividends now receive, ending the decadeslong practice of taxing interest at ordinary-income rates.

The blueprint's proposed top rate on taxable interest is 16.5%. In that case, the yield would need to rise nearly 50%, from 2.37% to 3.50%, according to Mr. Ciccarone, in order to provide an equivalent return for top-bracket investors.

Not since the 1986 tax reform lowered the top rate on taxable interest from 50% to 28% have munis faced such a big shift. During that period, the yield on a common muni index rose from 6.54% to a high of 9.17% as Treasury yields also rose, says Mr. Ciccarone.

How likely is a 16.5% top tax rate on interest for individuals? It's a serious proposal, say tax policy specialists, but it's part of a package that also denies net interest deductions to businesses. This denial "will face opposition from leveraged businesses that don't want to lose deductions," says Alan Cole, an economist with the Tax Foundation in Washington.

Ahead of possible tax shifts, Natalie Cohen, who heads municipal-bond research at Wells Fargo Securities, counsels caution both in buying and selling. Other factors besides tax rates affect munis, she says, such as the perception that they are a safe investment.

Muni-fund investors raced out of the sector immediately after the election, sending yields higher, but prices have rebounded a bit lately. Meanwhile, holders of individual bonds can collect their coupons regardless of what happens in the market.

"Tax reform is still full of unknowns," says Ms. Cohen.

THE WALL STREET JROUNAL

By LAURA SAUNDERS

Dec. 16, 2016 11:02 a.m. ET

Write to Laura Saunders at laura.saunders@wsj.com

Final Issue Price Rules Make Allowances for Competitive Sales.

WASHINGTON – The Treasury Department and Internal Revenue Service have finalized issue price rules that contain special allowances for competitive sales.

Under the rules, which are to be published in the Federal Register on Dec. 9 and would take effect 180 days later, the issue price for competitive sales will be the reasonably expected initial offering price if several certain conditions are met, including that the issuer receives bids for the bonds from three underwriters.

The rules also clarify that, for bonds issued for money in a private placement to a single buyer that is not an underwriter or related party, the issue price is the price paid by that buyer.

In addition, the rules contain a simplified "hold-the-offering-price" anti-abuse rule, place less emphasis on certifications, and narrow the definition of an underwriter.

"We tried to respond to the comments and make the final rules more flexible and more workable," said John Cross, Treasury's associate tax legislative counsel.

On competitive sales, Cross said, "As a policymaker, we think that competitive sales promote competition and price transparency and we wanted to provide a workable rule to accommodate this important market sector."

Market participants praised some aspects of the new rules, but said they have questions about and want to review other provisions more closely.

Emily Brock, director of the Government Finance Officers Association's federal liaison center, said, "We are pleased to see the Treasury and IRS addressed our concerns with regard to competitive pricing." She said the GFOA's debt committee plans to discuss the three-bid requirement for competitive sales and the five-day "hold-the-offering-price" requirement with Cross at its meeting here tomorrow.

Cliff Gerber, president of the National Bond Lawyers Association, also is pleased to see the special rule for competitive sales. "And they've now created a modified hold-the-offering-price rule, which I think is good," he said. But he worried that bad underwriter behavior could hurt issuers' bonds under the final rules.

Michael Decker, managing director and co-head of municipal securities for the Securities Industry and Financial Markets Association, said, "We are pleased that the issue price rule is now final. While we are still reviewing the release, several provisions of the final rule represent welcome changes. In particular, we support the provision specifying that the general rule will apply at any time the 10-percent sales threshold is met as well as the clarification that underwriters can sell bonds at prices below the initial offering price without breaking the rule. We are also pleased about the provision for special treatment for competitive offerings."

John Vahey, Bond Dealers of America's director of federal policy, said, "BDA appreciates the efforts of the IRS and Treasury to adopt improvements to the issue price rule. However, we have concerns with how the final rule's requirement to hold the initial offering price for five days will alter the market and, also, how the three-bid requirement for competitive deals has the potential to negatively impact the competitive offerings of smaller issuers."

Issue price is important because it is used to help determine the yield on bonds and whether an issuer is complying with arbitrage rebate or yield restriction requirements. It is also used to determine whether federal subsidy payments to issuers for direct-pay bonds such as Build America Bonds are appropriate.

Under existing rules that have been in place for years, the issue price of each maturity of bonds that is publicly offered is generally the first price at which a substantial amount, defined as 10%, is reasonably expected to be sold to the public.

But tax regulators became concerned several years ago that some dealers were "flipping" bonds — selling them to another dealer or institutional investor who then sold them again almost simultaneously — with the prices continually rising before the bonds were eventually sold to retail investors. The regulators worried that the "reasonably expected" issue prices for bonds were not representative of the prices at which the bonds were actually sold.

To address their concerns, the Treasury and IRS proposed issue price rules in 2013, eliminating the reasonable expectations standard and basing the determination of issue price on actual sales. They also proposed raising the "substantial amount" of bonds standard to 25% from 10%.

The rules were strongly criticized as unworkable by issuers and underwriters. They complained about the 25% standard and said they often don't sell 10% or 25% of every maturity right away.

The tax regulators scrapped those rules and re-proposed them in June 2015. Under the re-proposed rules, the issue price for each maturity of bonds generally would be the price at which the first 10% of the bonds are actually sold to the public.

Issuers could use an "alternative method" of determining issue price when 10% of a maturity was not sold by the sale date. The issue price would be the initial offering price of the bonds sold to the public as of the sale date, as long as the lead or sole underwriter certified to the issuer that no underwriter filled an order from the public after the sale date and before the issue date at a higher price, unless market changes justified the higher price. The lead underwriter would then have to document any market changes that justified a higher price.

Dealers complained about the lead underwriter having to provide certifications about the actions of other underwriters.

The final rules contain a general rule under which the issue price is the price at which the first 10% of a maturity of bonds is actually sold to the public.

The rules include a special rule, under which the issue price is the initial offering price as long as the underwriter sticks with the IOP for bond sales during the five business days after the sale date (or a shorter period if 10% of a maturity of bonds is sold to the public at a price that does not exceed the IOP).

The five-day “hold-the-offering-price” provision is an anti-flipping or an anti-abuse provision. The lead underwriter must certify the IOP to the issuer, as well as provide documentation, such as the pricing wire. Each underwriter in a syndicate must agree in writing that it will not offer or sell the bonds at a price higher than the IOP for five business days after the sale date.

Under a special rule for competitive sales, an issuer may treat the reasonably expected IOP of the bonds to be sold to the public as the issue price if the issuer obtains a certification from the winning underwriter bidder as to the reasonably expected IOP upon which it based its bid.

To achieve a competitive sale: the issuer must disseminate the notice of sale in a manner reasonably designed to reach potential underwriters; all bidders must have an equal opportunity to bid; the issuer must receive bids from at least three underwriters “who have established industry reputations for underwriting new issuances of municipal bonds;” and the issuer must award the bonds to the bidder who offers the highest price or lower interest cost.

Issuers have the option of using any of these rules up until the closing (issue) date for their bond transactions.

The IRS also modified the definition of “underwriter” in response to concerns that it was vague and unworkable.

The definition still says “an underwriter is any person that contractually agrees to participate in the initial sale of the bonds to the public by entering into a contract with the issuer or into a contract with a lead underwriter to form an underwriting syndicate.”

But the final rules remove the phrase “or other arrangement” from provisions that say an underwriter “includes any person that, on or before the sale date, directly or indirectly enters into a contract or other arrangement with any of the foregoing to sell the bonds.”

The tax regulators certified that the final rules “will not have a significant economic impact on a substantial number of small entities.

The Bond Buyer

By Lynn Hume

December 8, 2016

TAX - PENNSYLVANIA

City of Philadelphia v. Lerner

Supreme Court of Pennsylvania - November 22, 2016 - A.3d - 2016 WL 6873039

City brought collection action against taxpayer. Following a bench trial, the Court of Common Pleas found taxpayer waived his right to challenge net profits tax and/or business income and receipts tax assessments, and awarded city $280,772.67, which included principal liability of $74,907, $85,828.05 in interest, and $120,037.62 in penalties.

Taxpayer appealed. The Commonwealth Court affirmed. Taxpayer appealed.

The Supreme Court of Pennsylvania held that taxpayer waived for purposes of appeal his argument that his failure to exhaust administrative remedies within the Department of Revenue did not prevent him from challenging city's assessments, where taxpayer failed to raise the issue in the trial court.

COUNTIES - ILLINOIS

Blanchard v. Berrios

Supreme Court of Illinois - December 1, 2016 - N.E.3d - 2016 IL 120315 - 2016 WL 7007820

County inspector general brought action against county assessor for declaratory judgment that it was obligated to comply with inspector's investigation into circumstances surrounding grant of exemptions from property tax and to comply with subpoena.

The Circuit Court entered order requiring assessor to produce subpoenaed documents. Assessor appealed. The Appellate Court affirmed. Assessor's leave to appeal was granted.

The Supreme Court of Illinois held that:

- County ordinances creating office of inspector general and imposing duty on elected county officials to cooperate with investigation by inspector general were proper exercise of county board of commissioners' constitutional authority to exercise those duties, powers and functions provided by law and those provided by county ordinance";
- Ordinances were proper exercise of board' statutory authority to "alter any other duties, powers or functions or impose additional duties, powers and functions upon county officers";
- Assessor did not have authority to oversee or supervise its office free from oversight or investigation by inspector general;
- Ordinances did not impermissibly conflict with county assessor's home rule authority to assess property taxes and grant exemptions from same;
- Board had home rule authority to enact ordinances creating office of inspector general and imposing duty on elected county officials to cooperate with investigation by inspector general; and
- County assessor, as elected official, was not separate from county, as local unit of government recognized under Illinois Constitution, and thus, was subject to ordinances enacted by board.

What Happens When the IRS and Issuer Agree to Disagree?

My last blog post was about how, as a result of a change in the Internal Revenue Code (the "Code"), the IRS will be altering the manner in which it audits many partnerships (and limited liability companies that are taxed as partnerships under the Code). In a nutshell, for tax years beginning on or after January 1, 2018, the IRS may assess a tax deficiency against certain partnerships rather than flowing the taxable income adjustment at the partnership level through to the individual partners and then collecting the additional tax from each individual partner. This change in the Code was deemed to be a revenue raiser due to the increased efficiency in assessing the tax against the partnership rather than the individual partners. This streamlined partnership audit process is similar to the IRS being permitted to settle an IRS audit involving tax-exempt bonds with the issuer or conduit borrower rather than having to assess a tax deficiency against the various bondholders and collecting the tax from each individual bondholder. This got me thinking . . . what happens if the issuer or conduit borrower and IRS cannot agree to a resolution when the IRS believes the tax-exempt bonds are taxable?

As you know, the IRS treats the issuer as the "taxpayer" when it begins an audit of tax-exempt bonds even though the bondholders will ultimately be the "taxpayers" if the tax-exempt bonds become taxable. For example, under IRS guidelines, the IRS sends the information document requests ("IDRs") to the issuer of the tax-exempt bonds and is authorized to reach a settlement with the issuer. In addition, it is the issuer of the tax-exempt bonds that has the ability to either (a) request a technical advice memorandum ("TAM") from the IRS national office with respect to one or more issues relating to the tax-exempt bonds, or (b) after receiving a proposed adverse determination from the IRS agent, request that the matter be referred to the IRS' Office of Appeals ("Appeals"). Although the goal of Appeals is to settle cases with the Appeals' officer acting as an independent reviewer, sometimes the parties cannot agree. If settlement attempts at Appeals between the IRS agent and issuer are unsuccessful, the IRS will issue a final adverse determination that the tax-exempt bonds are now taxable. If the IRS has not already done so, around the same time that the IRS issues the final adverse determination, the IRS will contact the trustee for the subject bonds and request the names and address of all bondholders thereof.

Once the final adverse determination is made that the tax-exempt bonds are taxable, the issuer no longer has any rights in the audit process. Rather, the IRS will begin treating the bondholders as the "taxpayer" from that point until final resolution of the tax controversy. In general, the IRS has three years from the date that a bondholder filed his or her income tax return reporting tax-exempt interest to assess a tax on the now allegedly taxable interest. The IRS will assess this tax by sending each bondholder a statutory notice of deficiency that is oftentimes referred to as a "90 Day Letter." The 90 Day Letter sent to each bondholder will set forth the basis for the tax deficiency and will also set forth the amount of tax, interest and penalties owed by such bondholder. The bondholder will have 90 days to respond by filing a petition challenging the assessment in the U.S. Tax Court. In the alternative, the bondholder could pay the assessed tax, interest and penalties due, but then file a claim for refund. At this point, the bondholder could attempt to reach a settlement with the IRS, although there is no formal procedure in place to do so. The incentive for both the bondholder and IRS to settle, however, would be to avoid the costly litigation process discussed below.

After the bondholder's refund is denied by the IRS (which it presumably would be), the bondholder could then file a claim for refund in the U.S. district court with jurisdiction over his or her tax residence or in the U.S. Court of Federal Claims located in Washington D.C. If the bondholder was to lose at the district court or Tax Court, the bondholder could appeal to the appropriate U.S. Court of Appeals. Similarly, if the bondholder was to lose at the U.S. Court of Federal Claims, he or she could appeal to the U.S. Court of Appeals for the Federal Circuit, which is also located in Washington D.C. If the bondholder then loses at the appellate level, the bondholder could appeal to the U.S. Supreme Court. However, as you know, the U.S. Supreme Court could decide not to hear the case (i.e., by denying the taxpayer's writ of certiorari), thus affirming the appellate court's decision.

Assuming that the bondholder hires legal counsel to help navigate the above-described litigation, the process could become very costly for the bondholder even if he or she ultimately wins the case. This bondholder-by-bondholder litigation process would also be very expensive for the IRS. Accordingly, it is a good thing that the vast majority of tax controversies involving tax-exempt bonds are settled by the issuer and IRS before a final adverse determination is issued by the IRS. This is because the issuer has a very strong incentive to settle with the IRS so that the marketplace does not react negatively the next time the issuer wants to issue tax exempt bonds. In addition, from the IRS' standpoint, it is far more efficient to settle with the issuer than to pursue each bondholder. Therefore, thankfully, it is very rare for the IRS and issuer to agree to disagree.

Squire Patton Boggs

The Public Finance Tax Blog

By Cynthia Mog on December 7, 2016

IRS Publishes Issue Price Definition for Tax-Exempt Bonds.

Final issue price regulations in Treasury Decision 9801 were publicly filed with the Federal Register on December 8 and have been published as of December 9. The effective date will be 180 days after publication of the final regulations.

The final regulations include a special rule for competitive sales.

Federal Register Final Regulations

How Big-Box Retailers Weaponize Old Stores.

Merchants such as Walmart are using a novel legal tactic to sharply lower their property taxes.

Tucked away on the northern edge of Michigan's rugged Upper Peninsula, Sault Ste. Marie is bracing for the battle of its life. The tourist town is heading to court in early 2017 to fight Walmart Stores, which seeks to cut $286,000 off its annual property tax bill on a local store. Using what critics call the "dark store loophole," Walmart is following in the footsteps of big-box merchants including Lowe's and Target by arguing that its bustling store should be assigned about the same value for tax purposes as one that's been vacant for years, hundreds of miles away.

The financially strapped town of 14,000 faces legal bills of about $100,000 to take on the retailing giant. The cost of the battle that started in 2014 already has forced local authorities to slash budgets for everything from senior meals and the local animal shelter to police and fire pensions. Now its leaders have decided they've been pushed around long enough. "It is like David and Goliath," says Jim German, the county administrator in Chippewa County, which includes Sault Ste. Marie. "We are going to give it our best shot, because it isn't fair."

The city has tried for years to keep the dispute out of court to avoid the legal fees, agreeing with Walmart in 2014 and 2015 to lower the store's local taxes by a total of $103,000. This year, Walmart has gone too far, German says. It wants its store, currently assessed at $63 a square foot, to be valued at $16 a square foot based on sales of similar-size vacant properties across the state—less than what some local small businesses pay. Chippewa County is hedging its bets in case of a loss, freezing salaries for all nonunion employees.

Walmart, which annually pays $3.3 billion in property taxes, state income taxes, and franchise taxes plus $15 billion in state and local sales taxes, says it pays its "fair share" of property tax in Michigan based on standard appraisal methodology. "When we can't reach an agreement, we seek clarification through the legal process for a fair market value of our property," says Walmart spokesman Lorenzo Lopez.

The dark store tax argument has been gaining use since a Michigan court accepted it in 2010. In that case, the judge agreed that a Target store in a depressed Detroit suburb was worth about half the city's valuation. From that one ruling, which turns on its head the traditional way municipalities value businesses based on the cost of acquiring the land and building the structure, big-box retailers including Lowe's, Best Buy, and Menards have spread out across the country, taking to court more than 100 townships, cities, and counties in at least a dozen states over the past four years. In most cases the stores have prevailed, saving millions of dollars in property taxes, according to the National Association of Counties. Two-thirds of Michigan's counties have lost more than $75 million in property taxes since 2012 as a result of the ruling. Indiana estimates it could lose $120 million in tax revenue annually if the strategy takes hold.

That's left many municipalities scrambling to cope with lost revenue. Library hours have been curtailed, roads have gone unpaved, and police and fire departments have made do with aging equipment. County officials in Alabama and Texas, where Lowe's only recently began filing dark store suits, say they fear a similar fate.

"If the big-box folks do this, then you'll have it spill down to the banks, the fast-food places, the drugstores," says Don Armstrong, property tax commissioner for Shelby County, Ala., where Lowe's is pursuing a challenge. "It would just multiply and have a domino effect."

Target, noting that it wants to ensure its properties are assessed at fair market value, said in a statement that it "remains committed to supporting the communities in which we do business, and this includes paying a fair share of property taxes."

Michael Shapiro, a Detroit real estate tax attorney who pioneered the dark store argument, says he's not insensitive to the financial needs of communities, but "whether it is unfair or not doesn't have anything to do with me. I'm just looking at what the law is." For more than 40 years, Shapiro has made a career out of helping businesses challenge property tax bills. A lawyer with the Detroit firm Honigman Miller Schwartz and Cohn, he made a name for himself representing car companies, successfully arguing their plants' taxes should be based on the values of closed factories. Years later, he saw a similar opportunity in big-box stores. He made his first such successful case in 2010.

Typically, local property tax assessors set values of such stores based on the purchase price of the land plus the cost of construction, less depreciation. Shapiro believed a more accurate way to measure the value was to use comparable sales of similar properties, the way a house is valued for tax purposes.

He began amassing comparable sales data to make a case that the value of a big-box store on the market was far lower than what tax assessors had determined because they were built to suit the needs of a specific owner—the way "a suit would lose its value once it was tailored to a specific person," says Shapiro.

There's now a thriving cottage industry of lawyers, tax representatives, and appraisers helping retailers initiate dark store challenges. Larry Clark, director for strategic initiatives at the International Association of Assessing Officers in Kansas City, Mo., says lawyers and tax representatives typically target smaller towns that are less able to mount a vigorous defense. "They pick the low-hanging fruit," he says. "It probably costs $50,000 or more to litigate one big-box chain," says Jack Van Coevering, who's represented small towns in Michigan that have faced big-box valuation challenges. "If you are a township with a whole bunch of these properties, imagine that."

Towns can find it hard to attract companies to fill vacant buildings that bring down valuations. Often a closed store has deed restrictions that prevent another big-box retailer from moving in, sometimes for years, significantly limiting the pool of potential buyers. Buildings can sit vacant for years and deteriorate or end up repurposed for low-revenue uses such as roller-skating rinks or flea markets.

Probably no community has suffered more from Shapiro's brainchild than Marquette, a three-hour drive west of Sault Ste. Marie. In 2012, Lowe's argued that its two-year-old store there, which cost about $10 million to build, was worth just $3.5 million based on the resale value of shuttered big-box stores in other parts of the state. A judge with the Michigan Tax Tribunal agreed, and Lowe's tax bill was slashed by two-thirds, forcing Marquette to pay the company nearly $450,000 in back taxes and lowering its tax bill by more than $150,000 a year going forward.

"Lowe's pays property tax, income tax, sales and use tax, and, just like homeowners, we want to be taxed on the fair value of our buildings and land," the retailer said in a statement. "It's Lowe's intention to always pay our fair share of taxes."

The home center chain's suit opened the floodgates for Marquette's other retail chains. Even car dealerships made the same case. In the almost five years since, the timber and mining community on the edge of Lake Superior has lost more than $2 million in property tax revenue from retailers including Target, Best Buy, and Kohl's.

Shortly after the ruling, a county-funded group home for troubled teens was forced to close, and the local library has slashed its hours. Ron DeMarse, the township's fire chief, worries his 23-year-old fire truck and battered two-way radios won't weather another winter. That would be a disaster, since he has no money left to replace them. DeMarse says the $56,000 he's lost in this year's budget from Lowe's tax challenge would have been enough to cover annual payments on a new engine to replace his aging one—the only truck the department has with a pump and ladder large enough to put out a fire at a building the size of Lowe's. Now his only option is a ballot initiative that would raise the needed money from the township's residents. "Maybe we just won't replace it," he says, and Lowe's might be forced to pay higher insurance premiums. "Maybe that would be fair."

Sentiments are equally raw in Sault Ste. Marie, where civic leaders are gearing up to keep its tax dollars in town rather than hand them back to Walmart. "It is an attack on all the services we provide: the sheriff's department, the health department, the schools, everyone is going to suffer here," Chippewa County Commissioner Jim Martin told residents at a recent county meeting. "That money will leave our community and go to their corporate offices."

The bottom line: *Big-box retailers are often thriving businesses. Now some are petitioning to pay the same property tax as shuttered stores.*

Bloomberg

by Shannon Pettypiece

December 8, 2016 — 5:01 AM EST December 8, 2016 — 9:47 AM EST

New Information Document Request (IDR) – What's the Point?

On November 21, as most of us were preparing for a relaxing Thanksgiving holiday, the IRS publicly released two internal guidance memoranda (both available at TEGE-04-116-0028) addressed to "All

TE/GE Examiners," the first of which describes new procedures for the preparation and issuance of IDRs in connection with tax-favored bond audits and procedures for the enforcement of responses to those IDRs, and the second sets forth IDR "Best Practices." The announcement of the new procedures on the IRS website describes their purposes:

"The updated process will:

- Provide for open and meaningful communication between the IRS and taxpayers.
- Reduce taxpayer burden and provide consistent treatment of taxpayers.
- Allow the IRS to secure more complete and timely responses to IDRs.
- Provide consistent timelines for IRS agents to review IDR responses.
- Promote timely issue resolution."

A review of the new procedures, however, gives the clear impression that they are primarily designed to provide IRS agents increased leverage to force issuers and their counsel to respond more quickly to the often lengthy and burdensome IDRs that the IRS has been lately issuing, while imposing no pressure on the IRS to resolve audits more quickly.

The following are some key excerpts from the new IDR procedures, with a little commentary of my own.

Continue reading.

Squire Patton Boggs

The Public Finance Tax Blog

By Bob Eidnier on December 1, 2016

TAX - TEXAS

City of Austin v. Travis Central Appraisal District

Court of Appeals of Texas, Austin - November 10, 2016 - S.W.3d - 2016 WL 6677937

City brought action seeking judicial review of appraisal review board's order, which denied city's challenge to level of appraisal for vacant land and commercial real property for 2015 tax year, and challenging constitutionality of provisions of Tax Code concerning unequal appraisal protests by property owners.

The District Court granted a plea to the jurisdiction filed by a group of commercial property owners and a motion for summary judgment filed by a separate commercial property owner. City appealed.

The Court of Appeals held that:

- City failed to plead injury sufficient to confer standing to challenge constitutionality of Tax Code provisions, and
- City failed to exhaust its administrative remedies in connection with its challenge to appraisal levels.

City failed to establish injury sufficient to confer standing to challenge constitutionality of provisions of Tax Code allowing appraisal district to defeat property owner's unequal appraisal protest by demonstrating that median appraised value of reasonable number of comparable properties exceeded appraised value of owner's property. City was not charged with giving effect to provisions or ensuring their fulfillment, as provisions did not describe or concern any mechanism by which tax units to were to access, impose or, collect ad valorem taxes, and fact that city would eventually calculate and impose ad valorem taxes based on property values determined by appraisal district failed to demonstrate an injury that was concrete and particularized to city, as opposed to its property owners.

City failed to exhaust its administrative remedies in connection with its challenge to level of appraisals for vacant land and commercial property for 2015 tax year, and district court thus lacked subject-matter jurisdiction to consider city's petition for judicial review of appraisal review board's order denying city's challenge petition. Although city's attorneys and representatives attended hearing on its challenge petition, it did not present a case on the merits of its challenge, but rather presented a joint motion requesting that the review board enter an order denying its challenge petition, thus depriving the review board of any opportunity to decide the merits of the petition.

TAX - SOUTH CAROLINA

Olds v. City of Goose Creek

Court of Appeals of South Carolina - November 16, 2016 - S.E.2d - 2016 WL 6776295

Taxpayer appealed decision of city council regarding computation of gross income under business license tax ordinance, and further asserted claims against city for violation of equal protection, violation of procedural due process, abuse of process, violations of state and federal constitutions, and violation of the South Carolina Freedom of Information Act, against city administrator and city finance director for conspiracy, and against city's department of public works for breach of contract.

The Circuit Court affirmed the city council's decision regarding the meaning of gross income under city ordinance, and granted city summary judgment on taxpayer's other claims. Taxpayer appealed.

The Court of Appeals held that:

- City's power to levy a business license tax under statute governing the powers conferred upon municipalities was not limited by the meaning of the term "gross income," as used in the remainder of the statute;
- Taxpayer's gross income for business license tax purposes constituted the total revenue of his business, before deducting expenditures for any purpose;
- On appeal to the Circuit Court from decision of city council regarding computation of gross income under business license tax ordinance, any evidence of animus that existed between taxpayer and city employees was irrelevant in determining the meaning of gross income under the ordinance;
- Affidavit of law professor offered by taxpayer on appeal to the Circuit Court was inadmissible because it constituted nothing more than a legal argument;
- City council's refusal to allow taxpayer to participate in appellate hearing with regard to appeal from business license tax assessment, and city's decision to withhold water service until taxpayer paid past due business license tax, did not prejudice defendant, as required to support due process claim; and
- No evidence existed to demonstrate that city singled out taxpayer for disparate and arbitrary tax treatment, and shut off the water supply to his properties in an attempt to force him to capitulate to city's position in a business license tax dispute.

City's power to levy a business license tax under statute governing the powers conferred upon municipalities was not limited by the meaning of the term "gross income," as used in the remainder of the statute. The only limitation on the broad grant of power was that the ordinance could not be inconsistent with the constitution or general laws of the state, and taxpayer challenging city's interpretation of "gross income" made no argument explaining how the ordinance was inconsistent with the constitution or general laws.

Notwithstanding city ordinance's later explanation that gross income for business license tax purposes shall conform to the gross income reported to the State Tax Commission and that gross income may be verified by the inspection of state and federal tax returns, taxpayer's gross income for business license tax purposes constituted the total revenue of his business, before deducting expenditures for any purpose, and thus, the term "gross income" applied to the total sale price of any real property, rather than merely to the business's gain.

On appeal to the Circuit Court from decision of city council regarding computation of gross income under business license tax ordinance, any evidence of animus that existed between taxpayer and city employees was irrelevant in determining the meaning of gross income under the ordinance.

On appeal to the Circuit Court from decision of city council regarding computation of gross income under business license tax ordinance, affidavit of law professor offered by taxpayer was inadmissible because it constituted nothing more than a legal argument.

City council's refusal to allow taxpayer to participate in appellate hearing with regard to appeal from business license tax assessment, and city's decision to withhold water service until taxpayer paid past due business license tax, did not prejudice defendant, as required to support due process claim. Because the issue regarding the interpretation of the ordinance was one of statutory construction, and taxpayer was able to raise the issue of water service again in the circuit court, the circuit court, in its appellate capacity, was able to review the issues without deference to the city council's decision.

Counties Urge Preservation of Tax-Exempt Municipal Bonds.

For over 100 years, municipal bonds have served as a key tool for county and state governments to finance roads, bridges, schools and other facilities while saving taxpayers money.

At a Capitol Hill briefing today, National Association of Counties Executive Director Matthew Chase urged Congress to preserve the tax exemption of municipal bond interest in any potential rewrite of the federal tax code. Removing the interest deduction would increase state and local borrowing costs by over $500 billion, costs that would be ultimately shifted to local taxpayers and potentially result in decreased infrastructure investment.

"Much of the complex infrastructure counties, states and cities deliver can only be delivered through municipal bond financing," said Chase.

Through municipal bonds, state and local governments have invested more than $3 trillion in infrastructure between 2003 and 2012.

For America's counties, it's a substantial portfolio of responsibility, as counties:

- own and maintain 46 percent of the nation's public roads

- own nearly 40 percent of all public bridges
- are involved with nearly a third of the country's transit systems and airports
- operate 91 percent of all local jails, and
- operate 976 hospitals and over 1,500 local health departments.

Additionally, taxing municipal bond interest would violate the principle of sovereign tax immunity — states cannot tax the powers, the operations or the property of the United States, nor how the United States executes its powers, nor can the United States tax either the instrumentalities or the property of the states.

"Municipal bonds are not only a fundamental building block of the federalism system, but they also help to build America's infrastructure," said Chase.

For more information, visit http://www.naco.org/advocacy/action-centers/municipal-bonds

National Association of Counties

Nov. 29, 2016

TAX - WEST VIRGINIA

Matkovich v. CSX Transportation, Inc.

Supreme Court of Appeals of West Virginia - November 16, 2016 - S.E.2d - 2016 WL 6833988

Tax Commissioner appealed decision of the Office of Tax Appeals (OTA) which determined that taxpayer that paid motor fuel use tax was entitled to sales tax credit for the sales taxes it paid on motor fuel purchased from the cities, counties, and other municipalities of other states.

The Circuit Court affirmed. Tax Commissioner appealed.

The Supreme Court of Appeals held that dormant Commerce Clause required that taxpayer, which paid motor fuel use tax, receive sales tax credit for the sales taxes it paid on the motor fuel both to other states and to the subdivisions of other states.

Both the motor fuel use tax imposed on taxpayer and the corresponding sales tax credit allowed for sales taxes that taxpayer paid on motor fuel purchased from other states had substantial nexus with the State, as required for use tax and sales tax credit to comply with the dormant Commerce Clause. Taxpayer operated interstate rail transportation service in the State and purchased fuel outside the State which it used in its operations in the State.

Motor fuel use tax imposed on taxpayer that purchased motor fuel from other states which it used in its interstate rail transportation operations in the State was fairly apportioned, as required for use tax to comply with the dormant Commerce Clause. Use tax was calculated with specific reference to the amount of motor fuel that taxpayer used in the State, and use tax charged to taxpayer directly correlated to the fuel that it used for the miles it traveled within the State.

Dormant Commerce clause required that taxpayer, which paid motor fuel use tax, receive sales tax credit for the sales taxes it paid on the motor fuel both to other states and to the subdivisions of other states. Disallowance of sales tax credit for sales taxes imposed by subdivisions of other states would produce total tax burden on interstate commerce that was higher than purely intrastate transaction, and allowing sales tax credit only for sales taxes paid to other states would unfairly discriminate against interstate commerce.

TAX - ILLINOIS

Village of Arlington Heights v. Pappas

Appellate Court of Illinois, First District, Sixth Division - November 10, 2016 - N.E.3d - 2016 IL App (1st) 151802 - 2016 WL 6651591

Village appealed order of Circuit Court granting summary judgment in favor of the county treasurer on the village's declaratory judgment action and finding that the treasurer had the authority to seek repayment from the village for refunds the treasurer made to taxpayers of certain incremental tax payments received by the village during the lifetime of two tax increment financing (TIF) districts.

The Appellate Court held that legislature authorized treasurer to be reimbursed by village for her post-TIF refunds of protested property taxes.

Legislature authorized county treasurer, in Property Tax Code, to be reimbursed by village for her post-tax increment financing (TIF) refunds of protested property taxes. Although legislature never set forth a reimbursement mechanism specifically for post-TIF refunds, it did set forth a general mechanism for the refunding and reimbursement of overpaid taxes in the Code, and thus, policy adopted by treasurer, in making the post-TIF refunds out of Class A fund and then seeking reimbursement from next property taxes collected by village, was consistent with the Code.

TAX - CALIFORNIA

City of San Jose v. Sharma

Court of Appeal, Third District, California - November 3, 2016 - Cal.Rptr.3d - 2016 WL 6520123

City petitioned for writ of mandate to compel county to give city tax increment revenue from county's ad valorem tax on real property. County cross-petitioned for writ of mandate.

The Superior Court ruled that city was entitled to the tax increment portion of the tax proceeds to put toward the winding down of city's former redevelopment agency, but that tax increment revenue not needed to pay bond debt of the former redevelopment agency was subject to a passthrough agreement requiring the revenue to be passed through to the county. City and county appealed.

The Court of Appeal held that:

- Tax increment revenue from county's ad valorem tax on real property had to be used to pay obligations of city's former redevelopment agency, and
- The amount necessary to service former redevelopment agency's bond debt could be deducted from the amount that passed through to the county.

Under the constitutional provision stating that tax increment "shall be allocated to and when collected shall be paid into a special fund of the redevelopment agency," tax increment revenue from a county's ad valorem tax on real property had to be used to pay the obligations of a city's former redevelopment agency, even though the tax was a special tax to finance county's participation in the

Public Employees Retirement System (PERS), where the tax increment portion of the special tax had been, for 60 years, a tax on real property within the former redevelopment agency's project area to finance redevelopment in that area.

The constitutional provision stating that tax increment "shall be allocated to and when collected shall be paid into a special fund of the redevelopment agency" prevails over the statute providing that "revenues from any special tax shall be used only for the purpose or service for which it was imposed," since the constitutional provision applies to all ad valorem taxes on real property, without regard to whether the tax is a general or special tax.

City's use of tax increment revenue associated with county's ad valorem tax on real property to pay the obligations of city's former redevelopment agency did not constitute an unconstitutional gift of public funds, since the tax increment revenue never belonged to the county, and since redevelopment in the city was a public purpose of general interest to the county, where the tax increment portion of the retirement levy was collected within the city's former redevelopment agency's project area, by law, for the purpose of paying the obligations of the redevelopment agency.

City's use of tax increment revenue associated with county's ad valorem tax on real property to pay the obligations of city's former redevelopment agency did not violate county employees' vested contractual rights to continuation of retirement benefits or of the funding for such benefits, even though the tax was a special tax to finance county's participation in the Public Employees Retirement System (PERS), since distribution of the tax increment portion of the retirement levy did not prevent the county from paying the required amount to PERS for the county employees' benefits.

Under the statute authorizing deduction of a trust fund deficiency from payment of passthrough funds in the "waterfall" payment schedule for the benefit of the holders of former redevelopment agency enforceable obligations, the amount necessary to service a former redevelopment agency's bond debt could be deducted from the amount that passed through to the county under a contractual passthrough agreement between the county and the former redevelopment agency, and thus tax increment revenue that would have passed through to a county could be used to pay the former redevelopment agency's enforceable obligations listed in the Recognized Obligation Payment Schedule (ROPS), where the passthrough agreement made payment of passthrough funds to the county subordinate to the former redevelopment agency's "debt service payments."

Under the statute authorizing deduction of "funds for servicing bond debt" from payment of passthrough funds in the "waterfall" payment schedule for the benefit of the holders of former redevelopment agency enforceable obligations, the amount that could be deducted from the ad valorem tax revenue proceeds that passed to a county under a passthrough agreement was limited to the amount necessary to service a former redevelopment agency's bond debt.

TAX - SOUTH CAROLINA

Olds v. City of Goose Creek

Court of Appeals of South Carolina - November 16, 2016 - S.E.2d - 2016 WL 6776295

Taxpayer appealed decision of city council regarding computation of gross income under business license tax ordinance, and further asserted claims against city for violation of equal protection, violation of procedural due process, abuse of process, violations of state and federal constitutions, and violation of the South Carolina Freedom of Information Act, against city administrator and city finance director for conspiracy, and against city's department of public works for breach of contract.

The Circuit Court affirmed the city council's decision regarding the meaning of gross income under city ordinance, and granted city summary judgment on taxpayer's other claims. Taxpayer appealed.

The Court of Appeals held that:

- City's power to levy a business license tax under statute governing the powers conferred upon municipalities was not limited by the meaning of the term "gross income," as used in the remainder of the statute;
- Taxpayer's gross income for business license tax purposes constituted the total revenue of his business, before deducting expenditures for any purpose;
- On appeal to the Circuit Court from decision of city council regarding computation of gross income under business license tax ordinance, any evidence of animus that existed between taxpayer and city employees was irrelevant in determining the meaning of gross income under the ordinance;
- Affidavit of law professor offered by taxpayer on appeal to the Circuit Court was inadmissible because it constituted nothing more than a legal argument;
- City council's refusal to allow taxpayer to participate in appellate hearing with regard to appeal from business license tax assessment, and city's decision to withhold water service until taxpayer paid past due business license tax, did not prejudice defendant, as required to support due process claim; and
- No evidence existed to demonstrate that city singled out taxpayer for disparate and arbitrary tax treatment, and shut off the water supply to his properties in an attempt to force him to capitulate to city's position in a business license tax dispute.

City's power to levy a business license tax under statute governing the powers conferred upon municipalities was not limited by the meaning of the term "gross income," as used in the remainder of the statute. The only limitation on the broad grant of power was that the ordinance could not be inconsistent with the constitution or general laws of the state, and taxpayer challenging city's interpretation of "gross income" made no argument explaining how the ordinance was inconsistent with the constitution or general laws.

Notwithstanding city ordinance's later explanation that gross income for business license tax purposes shall conform to the gross income reported to the State Tax Commission and that gross income may be verified by the inspection of state and federal tax returns, taxpayer's gross income for business license tax purposes constituted the total revenue of his business, before deducting expenditures for any purpose, and thus, the term "gross income" applied to the total sale price of any real property, rather than merely to the business's gain.

TE/GE Announces New Information Document Request Management Process.

The Tax Exempt and Government Entities Division of the Internal Revenue Service has issued new internal guidance for its agents on issuing information document requests (IDRs). The IRS issues IDRs to gather information during an examination. The new process will go into effect on April 1, 2017. Prior to its implementation, TE/GE will provide training to its agents on the new process.

Under the new process:

1. Taxpayers will be involved in the IDR process.
2. Examiners will discuss the issue being examined and the information needed with the taxpayer

prior to issuing an IDR.
3. Examiners will ensure that the IDR clearly states the issue and the relevant information they are requesting.
4. If the taxpayer does not timely provide the information requested in the IDR by the agreed upon date, including extensions, the examiner will issue a delinquency notice.
5. If the taxpayer fails to respond to the delinquency notice or provides an incomplete response, the examiner will issue a pre-summons notice to advise the taxpayer that the IRS will issue a summons unless the missing items are fully provided.
6. A summons will be issued if the taxpayer fails to provide a complete response to the pre-summons letter by its response due date.

The new process requires the examiners' managers to be actively involved early in the process and ensures that IRS Counsel is prepared to enforce IDRs through the issuance of a summons when necessary. Throughout this process, the IRS will respect taxpayer rights and the changes will reflect the agency's commitment to the Taxpayer Bill of Rights.

The updated process will:

- Provide for open and meaningful communication between the IRS and taxpayers.
- Reduce taxpayer burden and provide consistent treatment of taxpayers.
- Allow the IRS to secure more complete and timely responses to IDRs.
- Provide consistent timelines for IRS agents to review IDR responses.
- Promote timely issue resolution.

How Did Arbitrage "Rebate" Get its Name?: Squire Patton Boggs

Rick Weber of Norton Rose Fulbright is the Editor-in-Chief of The Bond Lawyer, NABL's quarterly journal. He writes a wonderful column on language that introduces each issue, and in the Summer 2016 issue, he posed the following question: When issuers are required to pay arbitrage profits earned on investments of tax-exempt bond proceeds to the federal government, why is it called "rebate," when the arbitrage profits were not the federal government's money in the first place? "In order to have a "return" or "refund" or "pay-back" of funds to the US government," Weber notes, "the funds must start there." We venture an explanation below.

Continue reading.

Squire Patton Boggs

By Johnny Hutchinson on November 21, 2016

TAX - CALIFORNIA

City of San Jose v. Sharma

Court of Appeal, Third District, California - November 3, 2016 - Cal.Rptr.3d - 2016 WL 6520123

City petitioned for writ of mandate to compel county to give city tax increment revenue from county's ad valorem tax on real property. County cross-petitioned for writ of mandate.

The Superior Court ruled that city was entitled to the tax increment portion of the tax proceeds to put toward the winding down of city's former redevelopment agency, but that tax increment revenue not needed to pay bond debt of the former redevelopment agency was subject to a passthrough agreement requiring the revenue to be passed through to the county. City and county appealed.

The Court of Appeal held that:

- Tax increment revenue from county's ad valorem tax on real property had to be used to pay obligations of city's former redevelopment agency, and
- The amount necessary to service former redevelopment agency's bond debt could be deducted from the amount that passed through to the county.

Under the constitutional provision stating that tax increment "shall be allocated to and when collected shall be paid into a special fund of the redevelopment agency," tax increment revenue from a county's ad valorem tax on real property had to be used to pay the obligations of a city's former redevelopment agency, even though the tax was a special tax to finance county's participation in the Public Employees Retirement System (PERS), where the tax increment portion of the special tax had been, for 60 years, a tax on real property within the former redevelopment agency's project area to finance redevelopment in that area.

The constitutional provision stating that tax increment "shall be allocated to and when collected shall be paid into a special fund of the redevelopment agency" prevails over the statute providing that "revenues from any special tax shall be used only for the purpose or service for which it was imposed," since the constitutional provision applies to all ad valorem taxes on real property, without regard to whether the tax is a general or special tax.

City's use of tax increment revenue associated with county's ad valorem tax on real property to pay the obligations of city's former redevelopment agency did not constitute an unconstitutional gift of public funds, since the tax increment revenue never belonged to the county, and since redevelopment in the city was a public purpose of general interest to the county, where the tax increment portion of the retirement levy was collected within the city's former redevelopment agency's project area, by law, for the purpose of paying the obligations of the redevelopment agency.

City's use of tax increment revenue associated with county's ad valorem tax on real property to pay the obligations of city's former redevelopment agency did not violate county employees' vested contractual rights to continuation of retirement benefits or of the funding for such benefits, even though the tax was a special tax to finance county's participation in the Public Employees Retirement System (PERS), since distribution of the tax increment portion of the retirement levy did not prevent the county from paying the required amount to PERS for the county employees' benefits.

IRS Publishes Arbitrage Guidance for Tax-Exempt Bonds.

Read the IRS Guidance.

The Tax Man Demands a Rain Check - Er . . . Stormwater Fee.

An EPA mandate to reduce runoff is inspiring a new levy on precipitation in my Virginia town.

When it rains, it pours—and where I live, stormy weather will soon be subject to a new tax. Such is life in a deep-blue Washington suburb that's trying to comply with a mandate from the Environmental Protection Agency.

Six years ago, the EPA issued a regulation forcing D.C. and the states in the Chesapeake Bay watershed to control the quality of their rainfall runoff. Alexandria's solution is to implement a new "stormwater management fee" to fund green pet projects like rooftop gardens on municipal buildings and permeable pavement in parks.

Maryland tried a similar approach under Gov. Martin O'Malley, a Democrat, in 2012. The state law required nine counties and Baltimore to levy a fee on every property owner in their jurisdiction. But the "rain tax," as it came to be known, was a point of public anger—and mockery. Republican gubernatorial candidate Larry Hogan made its repeal central to his 2014 campaign, and he fulfilled his promise by devolving the mandate down to local jurisdictions.

Virginia's system is roughly the same. It allows counties and independent cities like Alexandria to decide for themselves how to best comply by minimizing or treating runoff. But higher taxes seem to be what politicians are most eager to entertain.

That's certainly the case in Alexandria. Last month residents received an email inviting them to a public meeting with the city's Environmental Policy Commission, which would detail its proposal to meet the runoff mandate. My interest was piqued by a line suggesting that the city had decided not to "raise taxes or cut spending" but would instead pursue a "fee" on residents.

On the night of the meeting, several people—a mix of citizens, environmental activists and state and federal bureaucrats—crowded into the small conference room to watch a slideshow and ask questions. From the start, the committee described the new levy as a matter of fairness, that great progressive principle.

Currently, 70% of the money that the city is spending to comply with the mandate comes from the general fund, with the rest coming from property taxes. According to the city's math, this means residential properties—including homeowners like me—pay about 58% of the total cost, although we contribute only 37% of the rainfall runoff.

The committee's solution is a fee based on the percentage of a property's land that is covered with non-permeable surfaces—meaning it contributes to runoff. That way all parties would pay "their fair share." Commercial properties that contribute 63% of the runoff would pay 63% of the new fee. Homeowners would pay about $145 a year for a typical single-family dwelling, according to the city. That might seem low, but local taxes and fees add up quickly.

There are also a number of fictions hiding under the surface. Most glaring is the claim that the fee isn't a tax. This is a distinction without a difference—especially since the fee will be assessed annually with property taxes.

Nor does the facade of "fairness" hold up. Alexandrians might assume that the new fee will replace the existing taxes they pay toward complying with the mandate. It won't. When pressed by several attendees, city officials conceded that the fee will exist on top of the old revenue stream. The committee tried to deflect criticism by saying that the city council could decide to return that money to taxpayers later.

This elicited a few disbelieving laughs. The man seated next to me asked a pointed question: Had Alexandria ever passed a tax cut or refund in conjunction with a new fee? The city official couldn't think of an example—hardly a shock in a town as blue as mine.

Naturally, the rain tax will increase over time. One slide, which the committee sped by, indicated that the fee is expected to rise by 32% in its first four years. When one attendee pointed this out, another ruefully shook her head and mumbled, "That's how it always goes." After four years the city provides no projections, but the fee will probably keep on rising.

One official expressed hope that the rate would level off after a few years, but he also said the city's environmental projects will only require more capital over time. Although the updates to the city's infrastructure are supposed to be completed in 10 years, the fee will doubtless outlast it.

Judging by the meeting, it's unlikely that my fellow Alexandrians will respond the way voters did in Maryland. The general mood was one of approval, even excitement. One aging hippie could hardly contain his glee; another resident thought the tax didn't go far enough. By my count, only three people, including me, seemed opposed.

Before we broke for the evening, the Environmental Policy Committee reminded us that the rain-tax proposal was still subject to change. Lowering or eliminating the storm-water fee for churches, which will average $2,000 in the first year, was mentioned. But the City Council—composed entirely of Democrats—is all but guaranteed to include some version in its 2018 budget. Here's hoping it rains the day they vote.

THE WALL STREET JOURNAL

By STEPHEN FORD

Nov. 25, 2016 5:07 p.m. ET

Mr. Ford is a writer in Virginia.

As Soda Taxes Gain Wider Acceptance, Your Bottle May Be Next.

For more than a decade, Coca-Cola, Pepsi and other beverage companies have fought mightily against efforts to tax sugary sodas, defeating more than three dozen such proposals around the country.

But this month, voters in San Francisco, Oakland and Albany, Calif., as well as Boulder, Colo., stunned the industry by approving ballot measures in favor of soda taxes. Cook County, Ill., followed a few days later, bringing a soft-drink tax to Chicago and surrounding areas. They are joining Berkeley, Calif., which passed a tax two years ago, and Philadelphia, which passed one in June, bringing to seven the number of American communities with soda taxes.

With that public momentum, a soda tax may be coming to a city near you.

Advocates say the recent sweep represents a watershed moment in the fight for soft-drink taxes. Once viewed as measures likely to find support only in largely health-conscious cities like Berkeley and Boulder, soda taxes have emerged as a bountiful revenue source for cash-strapped local governments to fund early childhood education, public safety and deficit reduction. Soda tax advocates say they believe more cities will now consider their own taxes on sweetened beverages to combat obesity and to finance local programs.

“There’s a momentum with these taxes that will be hard for the industry to stop,” said Kelly Brownell, dean of the Sanford School of Public Policy at Duke University, who met with some ridicule when he first proposed a “sin tax” on junk food in 1994. “I expect a year or two from now that the taxes will be widespread.”

All of the new measures so far impose a tax of at least a penny per ounce of sugary drinks, including sodas, sweetened iced teas and some fruit drinks. Soda tax supporters say they are taking inspiration from the fight against tobacco, which included successful efforts to impose hefty taxes on cigarettes as a way to curb consumption. They have even taken to calling the industry “Big Soda,” a not-so-veiled reference to Big Tobacco.

The tax measures came as soft-drink sales were already slumping — more and more consumers have switched to bottled water and other drinks they consider healthier options than carbonated soft drinks. Viewing taxes as another threat to its core products, the beverage industry has fought vigorously, organizing local business coalitions, lobbying politicians, and spending millions of dollars on advertising and direct mail. The American Beverage Association, an industry trade group, spent $38 million opposing the fall ballot proposals, though it lost every one.

Even so, beverage makers say they are not convinced that soda taxes will be widely adopted. With the help of the beverage association, they have effectively painted the taxes as unfair nanny-state measures that are bad for business and impose a disproportionate burden on the poor.

“I’m originally from Iowa, born and bred, and I just don’t see this discriminatory, regressive tax being embraced by Iowans or Midwesterners or Southerners and others in a large swath of the country,” said Susan Neely, the president of the American Beverage Association. “I just do not believe that this is going to be a tax sweep throughout America.”

But public opinion on soda has turned more negative in recent years, with a growing share of Americans believing that sugary drinks contribute to obesity, Type 2 diabetes and other maladies. And the industry now faces a more sophisticated and well-financed opposition. Soda taxes, once a fanciful cause of amateur health crusaders and academics like Dr. Brownell, have drawn the support of politically active billionaires. Michael R. Bloomberg, the former New York City mayor, poured nearly $20 million into the Bay Area soda tax campaigns, hiring political consultants and media experts with extensive experience lobbying city councils and shifting public opinion.

In 2012, when the mayor proposed a limit of 16 fluid ounces on sugary drinks sold in New York, he was pilloried by opponents and ridiculed by late-night comedians as a fun-hating scold. The measure was rejected in court. Four years later, Mr. Bloomberg said, he is still met at speaking engagements with Big Gulp cups, a gibe at his failed soda regulation effort.

But now he sees soft-drink regulation gaining mainstream acceptance.

“While we may have lost that battle in the courts, you can make the very good case that we won the war,” Mr. Bloomberg said.

The industry remains adamant that it will continue fighting soda taxes. The beverage association argues that sugary drink consumption has not increased obesity, and that soda taxes will not reduce it. But the trade group also claims it is doing its part to reduce obesity by encouraging consumers to drink its diet and low-calorie options instead of full-calorie sodas. Ms. Neely, the beverage association president, has been trumpeting industry efforts to market lower-calorie choices as proof of a commitment to public health.

"One thing we'll continue to do with full gusto is try to reduce calories and sugar in the American diet," Ms. Neely said. "We don't want to fight with public health. We agree that more needs to be done, and we're trying to do it in a very serious and systematic way. We believe we have a responsibility to help address the obesity problem, and we're doing it in a way that we think is powerful and will yield lasting results."

Research from Mexico, which approved national taxes on sugary drinks and junk food in 2013, has found that taxes did drive down soft-drink sales, particularly among low-income populations that tend to drink the most of those. Research on Berkeley's soda tax found a similar trend. But it is too soon to know whether those drops in sales will lead to lower rates of obesity or diabetes.

Still, not every politician has needed a public health argument to embrace a soda tax. Jim Kenney, the mayor of Philadelphia, sold a tax there to City Council members by linking it to a popular initiative to expand prekindergarten. Cook County officials described the tax revenue as crucial to closing budget shortfalls so they could save public safety jobs. And Santa Fe, N.M., the latest city to propose a soda tax, presented it as a way to raise much-needed money for early childhood education.

John Arnold, a hedge fund billionaire who invested heavily in the Philadelphia and California campaigns, said he became interested in soda taxes for public health reasons, but also believes soda taxes have advantages over other ways to raise municipal money. "Do you do it by increasing sales taxes or increasing income taxes, or can you find ways, like through soda taxes, where you get an added benefit of improving the health at the local level in addition to raising money?" he asked.

Both Mr. Arnold and Mr. Bloomberg said they hoped the recent election successes would make soda taxes a more popular idea, able to attract political support and a wider array of financial supporters. Mr. Bloomberg said he was committed to funding well-organized efforts as they continue to emerge.

"We certainly aren't going to walk away from this," he said.

THE NEW YORK TIMES

By ANAHAD O'CONNOR and MARGOT SANGER-KATZ

NOV. 26, 2016

TAX - MINNESOTA

Minnesota Energy Resources Corp. v. Commissioner of Revenue

Supreme Court of Minnesota - November 9, 2016 - N.W.2d - 2016 WL 6635550

Taxpayer, a natural gas utility, sought judicial review of determination by Commissioner of Revenue valuing its natural-gas pipeline distribution system for purposes of taxing personal property.

The Tax Court reduced valuation and ordered recalculation of tax liability. Taxpayer and Commissioner appealed.

The Supreme Court of Minnesota held that:

- Evidence supported Tax Court's exclusion of company-specific risk factor in calculating taxpayer's cost of equity;
- Tax Court failed to adequately explain its determination of beta factors used in calculating taxpayer's cost of equity, thus requiring remand for further explanation;
- Evidence supported Tax Court's rejection of build-up method of calculating taxpayer's cost of equity;
- General evidentiary principles, rather than heightened standard, applied to determination of whether taxpayer demonstrated external obsolescence, abrogating *Guardian Energy, LLC v. Cty. of Waseca*, 2014 WL 7476215, *Am. Crystal Sugar Co. v. Cty. of Polk*, 2009 WL 2431376;
- Taxpayer's intangible assets and working capital were exempt from taxation;
- Taxpayer acted within its discretion in deviating from formula for making specific deductions under regulation;
- Evidence supported Tax Court's use of 5% deductions for working capital and intangible assets; and
- Tax Court did not clearly err in declining to consider prior sale when estimating market value of system.

Tax Court's decision to exclude company-specific risk factor from its calculation of cost of equity for taxpayer, a natural-gas utility, as a component used to calculate value of pipeline distribution system under income approach to valuation of system for purposes of taxing personal property, was factual determination subject to clear error standard of review, not legal issue subject to de novo standard of review. Tax Court excluded company-specific risk factor from taxpayer's cost of equity based on lack of evidentiary support in record for proposition that taxpayer's business was riskier than the market, not because it determined, as a matter of law, that a regulated entity's cost of equity could never be augmented to account for additional risk.

Evidence supported Tax Court's exclusion of company-specific risk factors from calculation of cost of equity for taxpayer, a natural-gas utility, as component used to calculate value of pipeline distribution system under income approach for purposes of taxing personal property, though taxpayer's expert appraiser opined that addition of risk factor to cost of equity for small, undiversified firms was appropriate based on business valuation publication. Independent appraiser testified that there was no conclusive empirical evidence supporting risk premium, and Department of Revenue's employee largely agreed with independent appraiser, stating that he had not seen support for application of additional risk factor other than one relied on by taxpayer's expert.

Tax Court, in calculating taxpayer's cost of equity, as component used to calculate value of taxpayer's natural gas pipeline distribution system under income approach for purposes of taxing personal property, failed to adequately explain adoption of beta factor of less than one to account for relative volatility of specific investment compared to volatility of market as whole, and thus remand was warranted for further explanation. Other than stating that beta factor was less than one for each tax year in question, Tax Court did not specify value of beta factors it used for each year, much less explain how or why it selected them.

Evidence supported Tax Court's decision to reject build-up method of calculating cost of equity for taxpayer, a natural-gas utility, as component used to calculate value of pipeline distribution system under income approach to valuation for purposes of taxing personal property, though taxpayer's expert incorporated build-up method into his calculation. Independent appraiser identified problems with use of build-up method by taxpayer's appraiser, and nothing relied on by taxpayer contradicted independent appraiser's testimony regarding appropriate use of build-up method.

General evidentiary principles, rather than heightened standard requiring taxpayer claiming external obsolescence for natural gas pipeline distribution system to offer probative evidence of cause of claimed obsolescence, quantity of obsolescence, and that asserted cause of obsolescence actual affected subject property, applied to determination of whether system suffered from external obsolescence, so as to support downward adjustment to estimated value of system under cost approach to valuation for purposes of taxing personal property. Fact that taxpayer could not identify specific causes of external obsolescence and precisely calculate contribution of each to decreased revenues or profit margins did not mean that property did not suffer from external obsolescence, and external obsolescence could exist and be difficult to quantify, resulting in variation amongst experts in their estimation of impact of external factors on fair market value of certain properties; abrogating *Guardian Energy, LLC v. Cty. of Waseca*, 2014 WL 7476215; *Am. Crystal Sugar Co. v. Cty. of Polk*, 2009 WL 2431376.

Intangible property, including intangible assets and working capital, of taxpayer, a natural-gas utility, was not subject to tax as personal property under statute and relevant regulations granting Commissioner authority to tax pipeline systems' mains, pipes, and equipment attached thereto, and thus was required to be deducted from valuation of taxpayer's pipeline distribution system under income approach for valuation of property, though Commissioner of Revenue asserted intangible assets and working capital were taxable as reflecting going-concern value of property. Statute and relevant regulations allowed Commissioner to tax only tangible property, and deduction for intangible assets did not reduce taxpayer's going-concern value.

Tax Court, in determining valuation of taxpayer's natural gas pipeline distribution system under income approach for purposes of taxing personal property, acted within its discretion in making specific deductions for value of taxpayer's nonoperating and tax-exempt property, namely deductions of 5% for working capital and 5% for intangible assets, from income indicators of value, rather than following process set forth in regulations and making deductions after each indicators of value had been considered and weighed in calculating property's unit value, since regulations allowed for exercise of discretion when deviating from formula would lead to more accurate valuation.

Tax Court did not clearly err when it declined to consider prior sale of natural gas pipeline distribution system to taxpayer in calculating estimated value of system under market approach for valuing pipeline for purposes of taxing personal property. Taxpayer's purchase did not just include system, purchase price captured overall value of entire enterprise, including intangible assets, goodwill, investments, and working capital, some of which was nontaxable, as well as appliance-repair business that was completely separate from system, trial court was authorized to reject market approach after determining it was unreliable and unhelpful, and experts did not rely on market approach or sale in their valuation analyses.

NABL: Tax Reform On Its Way.

The election of Donald Trump and the Republicans holding their majorities in the House of Representatives and the Senate means that there will be an effort, probably a successful one, to enact tax reform. The exemption of interest on state and local obligations is at serious risk of being curtailed or even eliminated.

The Trump campaign put out its tax reform proposals that largely mirrored the tax reform plans put out by the House Republican leadership earlier in the year. Neither mentions municipal bonds, but the House proposal does include a provision that says that interest would have a 50 percent exclusion. It is unclear whether this refers just to currently taxable interest or to all interest, including interest on state and local obligations. It is also possible that some version of the proposals by the Obama administration to cap the value of the tax exemption at the 28 percent bracket could be proposed.

NABL members should contact their members of Congress, and urge their issuers clients to do so also, and make sure they understand the importance of municipal bonds. NABL has a tax reform resource page with information and sample letters.

Read more here.

TAX - WEST VIRGINIA

University Park at Evansdale, LLC v. Musick

Supreme Court of Appeals of West Virginia - October 26, 2016 - S.E.2d - 2016 WL 6407491

Taxpayer appealed decision of county commission, sitting as board of equalization and review (BER), which determined that taxpayer's protest to county assessor's assessment of its leasehold interest in property located on campus of State University was issue of taxability, rather than valuation, reviewable only by Tax Commissioner.

The Circuit Court denied petition for appeal. Taxpayer appealed.

The Supreme Court of Appeals held that taxpayer's challenge to assessment of its leasehold interest on the basis that leasehold purportedly did not have separate, independent value from freehold estate presented issue of valuation, rather than taxability, and thus was reviewable by BER, rather than by Tax Commissioner.

Although taxpayer alleged that leasehold's value was $0 resulting in lack of taxability, value of leasehold was threshold issue distinct from taxability, and taxpayer did not contend that its property was exempt from taxation.

An Open Letter to the IRS on Revenue Procedure 2016-44: Squire Patton Boggs

Dear Internal Revenue Service:

At the Bond Attorneys' Workshop this past October, certain of your officials indicated that you will be considering the issuance of clarifications and amendments of Revenue Procedure 2016-44 to address concerns that have been raised about particular provisions of this Revenue Procedure (which, by and large, is an excellent piece of guidance regarding which management contracts will not result in private business use of facilities financed by tax-exempt bonds). These officials indicated that there was no intent to change any law under the safe harbors from private business use for management contracts and that continuity was intended between Revenue Procedure 2016-44 and the safe harbors set forth in Revenue Procedure 97-13 (which is superseded by Rev. Proc. 2016-44).

When you issue these clarifications and amendments of Rev. Proc. 2016-44, please don't forget to address the concern raised by The Public Finance Tax Blog on September 27, 2016.

As detailed in that post, a manager is treated under Rev. Proc. 2016-44 as receiving compensation from the qualified user of the managed facility if the qualified user reimburses the actual and direct expenses (and related administrative overhead expenses) paid by the manager. Revenue Procedure 2016-44 further provides that the reimbursement of actual and direct expenses paid by the manager to unrelated parties is disregarded as compensation for purposes of determining whether the management contract attempts an impermissible sharing of net profits of the bond-financed facility through the payment of compensation that takes into account both the revenues and expenses of the managed facility. However, in direct contrast to Rev. Proc. 97-13, as interpreted by Private Letter Rulings 200222006 and 201145005, Rev. Proc. 2016-44 expressly provides that an employee of the manager is not an unrelated party to the manager. A literal interpretation of Rev. Proc. 2016-44 could therefore result in the conclusion that a manager of a tax-exempt bond-financed facility shares in the net profits of that facility in the not-uncommon arrangement where the manager is reimbursed for its employee expenses and also receives a percentage of the managed facility's gross revenues.

Subsequent to the post on The Public Finance Tax Blog, you issued Private Letter Ruling 201641002 on October 7, 2016, which continues the trend established by Private Letter Rulings 200222006 and 201145005 that the reimbursement of a manager's direct and actual employee expenses is disregarded as compensation to the manager under Rev. Proc. 97-13. Given your statements at the Bond Attorneys' Workshop that Rev. Proc. 2016-44 was not intended to effect a change in law and that continuity between Rev. Proc. 2016-44 and Rev. Proc. 97-13 was instead intended, please include in your amendments of Rev. Proc. 2016-44 an amendment to treat a manager's employees as unrelated to the manager so that the reimbursement of the manager's direct and actual employee expenses does not result in the conclusion that the manager shares in the net profits of the managed facility if the manager is reimbursed for such expenses and also receives a percentage of the facility's gross revenues.

Sincerely,

Everyone Who Cares About Good Administrative Guidance

Squire Patton Boggs

The Public Finance Tax Blog

By Michael Cullers on November 16, 2016

Arizona Court Of Appeals Permits Utility To Seek Preemption Of State Property Taxes On Power Plant Located On Tribal Land.

On November 3, 2016, the Arizona Court of Appeals allowed South Point Energy Center, LLC ("South Point") to pursue challenges to the assessment of property taxes for tax years 2010 and 2011 and for 2012 and 2013 on its power plant on the Fort Mojave Indian Reservation. The appeals court reversed the decision of the Arizona Tax Court that granted summary judgment to the Arizona Department of Revenue and Mohave County. The Tax Court held that a prior unsuccessful challenge to property tax assessments levied against the plant for 2003 and 2004 barred South Point from pursuing the current challenges. The opinion, *South Point Energy Center, LLC v. ADOR/Mohave County*, Case Nos. 1 CA-TX 15-0005, 1 CA-TX 15-0006 (Consolidated), can be accessed on the Arizona Court of Appeals at the website here.

South Point filed its actions arguing that federal law preempted the assessments, making the assessments at issue erroneously assessed taxes (A.R.S. § 42-16524(G)), and that, under A.R.S. § 42-11005, it could lawfully seek to recover illegally collected taxes. The defendants argued that, because the plant's prior owner, Calpine, had unsuccessfully challenged assessments against the plant, South Point was precluded from seeking relief for the later tax years. Calpine had argued that, for Arizona property tax purposes, the plant should have been deemed to be owned by the Tribe and, therefore, not subject to Arizona property taxation. The tax court denied Calpine's challenge, ruling that, because Calpine owned the improvements on the land, the improvements were subject to taxation. *Calpine Constr. Fin. Co. v. Ariz. Dep't of Revenue*, 221 Ariz. 244, 246, 248-49, ¶¶ 1, 17-22 (App. 2009). The Arizona Supreme Court denied Calpine's petition for review.

In view of this history of challenges to property tax assessments against the plant, the Defendants argued that, because Calpine could have raised the preemption argument in the prior proceedings, South Point was collaterally estopped from raising the preemption and illegal tax arguments for later tax years. The Tax Court accepted this argument and entered summary judgment for the defendants. On appeal, South Point argued that collateral estoppel did not bar its pursuit of legal theories neither raised nor adjudicated in the prior litigation. The Court of Appeals accepted South Point's arguments. It held that, because Calpine did not litigate the question of preemption, "the fact that it could have been litigated is of no consequence here." South Point at ¶11 (emphasis in original). The Court further held that South Point could challenge whether the assessment was erroneous under the "error" correction statute, reasoning that, "[i]f the correct property tax rate is zero because of preemption, the imposition of any other tax rate is necessarily an illegal tax rate, and constitutes 'error' under the statute." South Point at ¶14. The court remanded the proceedings to Tax Court to resolve the preemption issues.

In sustaining South Point's appeal, the Court of Appeals did not resolve South Point's preemption argument. The court stated that "[w]e offer no opinion as to the merits of South Point's preemption theory. But because the issue was not previously litigated, issue preclusion cannot bar it." Id. at ¶11.

On remand, South Point will have the ability to litigate the preemption question. The owners of power plants – and their successors in interest – will be well-served to be precise in the issues raised before the tax court and thus certain that Arizona law permits plant owners to bring later challenges on new legal theories that were both not raised and not resolved on the merits in earlier proceedings.

Last Updated: November 10 2016

Article by Gregory Y. Harris

Lewis Roca Rothgerber Christie LLP

TAX - WISCONSIN

Medical College of Wisconsin Affiliate Hospitals, Inc. v. United States

United States District Court, E.D. Wisconsin - September 14, 2016 - Slip Copy - 2016 WL 4916811 - 118 A.F.T.R.2d 2016-5798 - 2016-2 USTC P 50, 409

The Medical College of Wisconsin Affiliated Hospitals, Inc. overpaid its Federal Insurance Contributions Act (FICA) tax and received a tax refund with interest calculated at the rate for corporations. It filed this lawsuit to recover additional interest at the higher, noncorporate rate. IRC § 6621(a)(1)

"Under § 6621(a)(1) noncorporate taxpayers receive interest on tax refunds at a higher rate than corporate taxpayers receive. Hence, the question here is whether for purposes of IRC § 6621(a)(1) a § 501(c)(3) nonprofit is considered to be a corporation. When the pending summary judgment motions were briefed initially, the identical legal issue had been decided in the government's favor by district courts in New York and Michigan and presented on appeal to the Second and Sixth Circuits. Both circuit courts have since issued their decisions affirming the judgments in the government's favor."

"This court has fully considered the parties' arguments here, the statutory and regulatory language cited, the opinions of the two district courts, the Second Circuit's Maimonides Medical Center v. United States, 809 F.3d 85 (2d Cir. 2015), the Sixth Circuit's United States v. Detroit Medical Center, No. 15-1279, ––– F.3d ––––, 2016 WL 4376431 (6th Cir. Aug. 17, 2016), the Court of Federal Claims' Eaglehawk Carbon, Inc. v. United States, 122 Fed. Cl. 209 (2015), and the Tax Court's Garwood Irrigation Co. v. Commissioner of Internal Revenue, 126 T.C. 233 (2006). Because this court's determination is in accord with the decisions of the Second and Sixth Circuit, there is no need to add a lengthy opinion to the mix. In short, this court rejects the Hospital's argument that the parenthetical in the "flush language" of § 66211 incorporates the "C corporation" limitation of (c)(3)(A), notwithstanding that the flush language cites only "(c)(3)." The flush-language parenthetical more naturally refers only to the definition of "taxable period" in (c)(3)(B), especially as the flush language does not use the defined term "large corporate underpayment" (or, as possibly adjusted, "large corporate overpayment"). And this court is unpersuaded that perfect symmetry between the overpayment and underpayment provisions was intended by Congress. Instead, it appears that where Congress intended to use "C corporation" in § 6621 it did so and where it used only "corporation" it included all corporations—C, S, and § 501(c)(3) together. Although the Hospital's policy arguments for a higher interest rate for refunds to nonprofits have merit, those arguments are better aimed at Congress. Here the text of the statute expresses Congress's intent. For these reasons and the reasons discussed by the Second Circuit and Sixth Circuit in Maimonides and Detroit Medical College."

Trends And Tips – Tax Equity For Mid-Market Energy Projects: Mintz, Levin

Last week's "Financing Renewable Energy" tax credit conference, by Novogradac and Company, affirmed some market trends that we have seen in recent project finance deals. Perhaps most striking was the slow expansion of small and mid-market tax equity investors, compared to their counterparts upmarket. The result is that developers of projects and project portfolios under $50 million may need to look harder to find the right partner to monetize their tax credits.

Looking back even a couple of years, we saw a tax equity market that was dominated by a small handful of large players, most of whom were focused on big investments investing large amounts of capital into utility-scale projects. Today, the number of investors has increased (JPMorgan Chase reports at least 20 wind investors and 28 solar investors in 2015), as has the amount of tax equity investment (up 14% between 2014 and 2015, according to JPMorgan Chase). Our anecdotal experience, affirmed by investors and developers we have spoken with, is that the bulk of that expansion has been among large banks, insurers and Fortune 500-sized corporate investors, which have grown increasingly comfortable with the risk profile of renewable energy projects and the diligence required to evaluate a prospective investment.

A similar trend has been lagging among smaller investors. Smaller tax equity investments are not necessarily simpler to diligence, negotiate or document than large deals, and renewable energy continues to be seen as a "new" industry to many banks, insurance companies and other potential investors. Despite this friction slowing the entry of new investors into the marketplace, there are some encouraging signs. First, we see evidence of increasing cross-over from investors in other tax credit-driven spaces (new market, low income housing, etc.). Second, when they do enter the market, smaller investors are often more nimble at the investment-stage and can be better at building ongoing relationships that can ease future investor interactions (e.g., when seeking consent to refinance project debt).

These trends suggest some actionable advice for mid-market project sponsors:

1. Don't be afraid to look outside the usual pool of energy tax credit investors. Cross-over investors have existing experience with some of the same structures used in Section 45 and Section 48 investments, but there is an educational process to help them become comfortable with the diligence process and risk profile for energy projects. A willingness to work through that learning curve may open the door to new investor relationships.
2. Look for opportunities to build long-term relationship that can support multiple deals. It is an unfortunate reality that doing an $8 million tax equity deal is not one tenth as complicated and costly as doing an $80 million deal. Working with an investor that can be a longer-term partner creates potential economies of scale as the parties replicate and recycle investment terms, documents and diligence standards across multiple deals.
3. Consider who will be a strong partner after closing. A typical tax equity investor will have consent rights over material events in a project's life, such as a debt refinancing. Demands for hefty consent fees, lengthy diligence reviews and other requirements can strain the relationship between a project sponsor and the tax equity investor. If the parties have a relationship that extends beyond the immediate project (see #2 above), then motivations will be better aligned at these important milestones.

Last Updated: November 9 2016

Article by Eric Macaux

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Management Contracts For Projects Financed With Tax-Exempt Bonds: Faegre

Government and nonprofit borrowers recently received some favorable new rules from the IRS regarding management contracts for projects financed with tax-exempt bonds. Rev. Proc. 2016-44 provides flexible guidance to determine when management contracts and similar service agreements involve problematic private use. It establishes a new safe harbor for identifying whether such contracts exceed the private business use limitation applicable to governmental bonds and tax-exempt bonds issued on behalf of 501(c)(3) organizations.

The new safe harbor is effective for agreements entered into on or after August 22, but issuers can apply it to any management contract entered into before that date.

Rev. Proc. 2016-44 replaces Rev. Proc. 97-13 which established separate safe harbors for management contracts based on the term of the contract. For longer-term contracts it required that a minimum percentage of the manager's compensation be based on a fixed fee depending on the length of the contract. These formulaic tests are replaced with a flexible safe harbor for contracts up to 30 years based on such things as control, risk of loss, economic levies of managed projects and consistency of tax positions taken by the service provider. The general principle that compensation may not be based on a share of the net profits from the managed property is retained.

The other features of a safe-harbor management contract are as follows:

- Compensation may be fixed or variable, but must be reasonable compensation for the service provided. Incentive compensation based on the service provider's performance in meeting one or more standards that measure quality of services, performance or productivity is expressly permitted.
- The contract must not require the service provider to share the burden of net losses from operation of the managed property.
- The term of the contract, including renewal options, may not exceed the lesser of 30 years or 80% of the weighted average reasonably expected economic life of the managed property.
- The service recipient must exercise significant control over the use of the managed property.
- The service recipient must bear the risk of loss upon damage or destruction of the managed property.
- The service provider must not take a tax position inconsistent with being a service provider, such as taking depreciation, investment tax credits or rent deductions.
- The service provider must not have a role or relationship with the service recipient that limits the service recipient's ability to exercise its rights under the contract. A safe harbor is provided if (a) no more than 20% of the voting power of the governing body of the service recipient is vested in the directors, officers, shareholders, partners, members and employees of the service provider; (b) the governing body of the service recipient does not include the chief executive officer of the service provider or the chair of the service provider's governing body; and (c) the chief executive officer of the service provider is not the chief executive officer of the service recipient or any of its related parties.

The economic life restriction in the new safe harbor applies to the "managed property" under both long-term and short-term contracts, while the economic life restriction in Rev. Proc. 97-13 applied to "financed property" under only long-term contracts. Managed property is defined as the portion of a project (as defined in the regulations) with respect to which the services are provided. These wording changes may have unexpected substantive consequences, including possibly requiring issuers to determine the scope of the project being financed and the useful life of property other than financed property and regardless of the term of the contract.

While the new safe harbor can be applied to existing contracts, the safe harbors of Rev. Proc. 97-13 may be applied to a contract entered into before August 18, 2017, and that is not materially modified or extended on or after August 18, 2017, other than pursuant to a renewal option.

Last Updated: November 8 2016

Article by Stephen C. Rosholt and Stefanie N. Galey

Faegre Baker Daniels LLP

An Inconvenience of Qualified Equity: Squire Patton Boggs

Like me, at some point in your childhood, you were probably told not to "look the gift horse in the mouth." After reading this blog post, the same could be said to me. We have written in great detail (see here, here, and here) about the increased flexibility afforded issuers by the recently promulgated Final Treasury Regulations governing, among other things, allocating proceeds of tax-exempt bonds and other sources to projects that involve both qualified and private uses (the "Allocation and Accounting Regulations"). The Allocation and Accounting Regulations permit "qualified equity" to be allocated first to private business use and then to governmental use. As discussed in the prior posts, "qualified equity" is essentially defined as amounts other than tax-exempt proceeds. However, there are timing and other restrictions on what is eligible to be considered "qualified equity."[1] These restrictions have led to an inconvenience that is the topic of this blog.

The reimbursement window is larger than the qualified equity window

Qualified equity includes amounts other than proceeds of tax-exempt bonds that are spent on the same eligible mixed-use project as the proceeds of the applicable bonds. To be spent on the same eligible mixed-use project, the qualified equity must be spent pursuant to the "same plan of financing."

The preamble to the Allocation and Accounting Regulations says that qualified equity is spent under the same plan of financing if

> "the qualified equity is spent on capital expenditures of the project no earlier than the earliest date on which the expenditure would be eligible for reimbursement were the bonds from which the proceeds are derived issued as reimbursement bonds . . . ."

The rule, as enunciated in the preamble, makes perfect sense. However, the actual language of the rule in the Allocation and the Accounting Regulations says that qualified equity is spent under the same "same plan of financing" if

> "the qualified equity pays for capital expenditures of the project on a date that is no earlier than a date on which such expenditures would be eligible for reimbursement by proceeds of the applicable bonds under [Regulations] 1.150-2(d)(2) . . . ."

Regulations 1.150-2(d)(2) says that a reimbursement allocation must be made not later than 18 months after the later of (a) the date of the original expenditure or (b) the date the project is placed in service or abandoned, but in no event more than 3 years after the original expenditure is paid (collectively, the "Reimbursement Period").

If you are reading this blog, you may know that there are certain expenditures that are eligible to be reimbursed even though they were paid before the Reimbursement Period began. Specifically, a de minimis amount of pre-Reimbursement Period expenditures may be reimbursed as well as a certain amount of preliminary expenditures. Therefore, the window of time during which qualified equity can be used to finance a project begins after the period of time that expenditures would be eligible to be reimbursed under the reimbursement rules!

In reality, this discrepancy is less significant than it may initially seem. As discussed in the previous paragraph, the pre-Reimbursement Period expenditures are eligible for reimbursement even though the amounts paid to finance such expenditures are not eligible to be qualified equity. Therefore, a reimbursement allocation could be made on or after the issue date and the issuer could be reimbursed for the amount of equity that it used to finance the pre-Reimbursement Period expenditures. The issuer could then contribute the equity made available by the reimbursement allocation to finance a portion of the mixed-use project. Because the equity contribution occurs within the Reimbursement Period (assuming the mixed-use project has not yet been placed in service), it is contributed pursuant to the same plan of financing.

[1] As a technical matter, the restrictions do not preclude amounts other than tax-exempt bond proceeds from being qualified equity; rather, the restrictions prohibit the qualified equity from financing a project under the same plan of financing.

By Joel Swearingen on November 11, 2016

Squire Patton Boggs

TAX - OHIO

New York Frozen Foods, Inc. v. Bedford Hts. Income Tax Bd. of Rev.

Supreme Court of Ohio - November 3, 2016 - N.E.3d - 2016 WL 6519128 - 2016 -Ohio- 7582

Municipal income taxpayer sought judicial review of decision of the Board of Tax Appeals (BTA) affirming decisions of the Regional Income Tax Agency (RITA) and municipal income tax board of review denying taxpayer's refund claim.

The Supreme Court of Ohio held that:

- Change from filing separate return to filing consolidated return was prohibited change in method of accounting, and
- State statute did not preempt city ordinance placing limitation on refund claims.

Municipal income taxpayer's change from filing a separate return to filing a consolidated return was a change in method of accounting prohibited by city ordinance in pursuing a refund claim. Amended return took broadly different approach to basic computation of taxable income, and term "method of accounting" was not limited to only cash versus accrual accounting under federal law.

State statute governing municipal income taxes did not preempt municipal ordinance placing limitation on refund claims to prohibit amendment of returns to change method of accounting. Plain language of the state law did not expressly override city's power to bar a change of accounting or apportionment method when filing an amended return, and preemption of local tax law could not be accomplished impliedly.

Trump's Tax, Infrastructure Plans Jeopardize Exemption for Munis.

WASHINGTON — Donald Trump's presidency and the Republican-controlled Congress set the stage for historic tax reform and increased spending on infrastructure next year, which has the potential to jeopardize the tax exemption for municipal bonds, according to market participants.

Both Trump and House Republicans are pushing for tax reform plans that would lower individual and corporate tax rates and broaden the tax base, repealing or restricting tax deductions and exemptions.

"The win, because it means that the GOP will control the executive office and both houses of Congress, almost surely means the next Congress will act on major tax legislation focused on cutting rates," said Frank Shafroth, director of the Center for State and Local Government Leadership at George Mason University. "I would guess it will be the most significant, early bill signed into law by the new president."

"They're going to strike while the iron is hot," agreed Chuck Samuels, a partner at Mintz Levin.

They could propose tax reform legislation that would be the most significant since the 1986 Tax Reform Act, which contained major restrictions for municipal bonds, said Shafroth.

The Trump and House Republican plans do not contain many details and do not specify what deductions might be repealed. Market participants worry that the exclusion on interest for tax-exempt bonds could be capped or eliminated to raise revenue for other tax reforms or increased infrastructure spending.

"In the last 24 hours, tax exemption under possible tax reform in 2017 or 2018 has gone from a concern/priority to 'hair on fire,'" said John Vahey, managing director of federal policy for Bond Dealers of America.

Charlie Henck, a partner with Ballard Spahr here, said it's a given that the tax exemption for municipal bonds will be on the table during the tax reform debate. "In the years I've been watching Congress and all of the new administrations, you can take it as a given that the economic folks at the Treasury Department and the Joint Committee on Taxation will put the tax exemption for munis on their hit list," Henck said. "It's generally thought by those folks to be an inefficient incentive."

Henck said he expects state and local groups to rally together to maintain the tax-exemption for muni bond interest, which is currently excluded from taxes.

Infrastructure

Trump's victory speech placed heavy emphasis on his plans to shore up the nation's infrastructure. "We are going to fix our inner cities and rebuild our highways, bridges, tunnels, airports, schools, hospitals," he said. "We're going to rebuild our infrastructure, which will become, by the way, second to none. And we will put millions of our people to work as we rebuild it."

Trump has proposed a $1 trillion, 10-year infrastructure plan. While that would normally be strongly supported by state and local governments and bankers, there is some uncertainty about the plan's reliance on $137 billion of tax credits that Trump would ask Congress to authorize.

"The little we know about Trump's plan is that it focuses on tax credits," said Jessica Giroux, BDA's general counsel. “Our concern is that it says nothing about munis. But with lowering individual rates under tax reform we wonder if munis are going to be as attractive anymore.”

Trump’s lack of detail in how he would raise revenue for his proposed infrastructure spending as well as other unspecified changes to deductions is concerning, said Vahey.

“This is going to be a very big item for the muni market in the coming years,” he added. “With a unified executive branch and legislative branch, it’s a whole new ballgame.”

Trump advisors Wilbur Ross, a billionaire private-equity investor, and Peter Navarro, a professor at the University of California at Irvine, said the infrastructure plan’s tax credits could be used by investors to leverage $167 billion in private funds.

Companies taking advantage of the tax credits would be able to borrow money on the private market at low interest rates to finance $1 trillion of projects without the need for any new taxes, they said.

“Trump’s plan will harness market forces to help raise construction funds by incentivizing private sector investors through tax credits, thereby revolutionizing American infrastructure finance,” Navarro said.

Companies would be able to bring overseas earnings back to the U.S. at Trump’s proposed reduced tax rate of 10% rather than the current 35%. With the credits, companies could avoid any tax liability by investing $122 million of the repatriated profits in infrastructure projects, Ross and Navarro said.

Repatriation would take away a significant amount of tax revenue available for tax reform, thereby increasing the pressure on Congress to look even harder at cutting tax deductions and exemptions.

The Joint Committee on Taxation has estimated that American companies hold a total of $2.6 trillion of foreign income in overseas banks.

Transportation groups also have some concerns about Trump’s infrastructure plan. Bud Wright, executive director of the American Association of State Highway and Transportation Officials, said tax credits are not a long-term solution.

“We’re sort of agnostic about the tax credits,” Wright said. “We’re not opposed to the idea, but it is not the long-term funding solution that we need to repair the deficit in the Highway Trust Fund.”

Federal tax credits are not transportation user fees, he said.

“A one-off, short-term type of program like that would be useful but it does not do anything for the long-term sustainability of federal transportation funding,” Wright said. “Corporate tax reform is not really a transportation issue either, but in some circles it has been linked to infrastructure funding as well. Again, it’s not something we oppose but it is not a solution.”

However, Wright concedes that Increases in the federal gasoline tax are not likely. “The fuel tax is the best understood and most administratively effective revenue source there is but it is about as politically volatile as any issue I’ve seen in Washington,” he said. “That goes for Democrats as well as Republicans. There’s just a knee-jerk reaction to oppose it.”

Jim Tymon, chief operating officer and director of policy at AASHTO, said, “I think we’ll see an infrastructure package coming out of Congress, probably not quickly but certainly within the first year.”

As always, the sticking point will be how to pay for increased infrastructure spending, he said. "We'll have to see what sort of pay-fors and offsets are available and acceptable," Tymon said.

Regulatory Moratorium

Trump has also proposed a moratorium on new regulations, which could thwart the Municipal Securities Rulemaking Board initiatives on markup disclosure, pre-trade price transparency, and syndicate practices. He has also joined Republicans in calling for a rollback of some existing laws and rules, such as the Dodd-Frank Act, which provided more funding for the MSRB from the enforcement of muni rule violations and subjected muni advisors to federal oversight and regulation.

The moratorium and rollback raise questions about whether the Securities and Exchange Commission and MSRB will continue to move forward with muni market initiatives, said Vahey.

"As of right now, if you look at the types of things that have been impacting the muni market, especially on the retail and regulatory side, they're all born out of the 2012 [Report on the Municipal Market]," he said. The report came out of the SEC with bipartisan support, but the expected changeover in the administration raises questions about whether such support will continue.

Vahey said that from BDA's perspective, the biggest issue with regulation specifically in the muni market has been its scope, pace, and the amount of change that has come in the last five years.

"Could dealers use a breather from reg compliance changes and time to adapt to a new environment? Yes," Vahey said. "Is there at the same time some potential negatives out there to a regulatory moratorium across the entire economy? Potentially, yeah."

Matt Fabian, a partner with Municipal Market Analytics, said that it is easier to imagine Trump would appoint industry-friendly individuals to fill the chair and vacant commissioner slots at the SEC. Mary Jo White is expected to step down as chairwoman.

Uncertainty

But one of the biggest concerns about Trump, reflected in the plummeting financial markets Tuesday night and Wednesday, is the uncertainty surrounding him.

Fitch Ratings said Trump's policies would be "negative for U.S. public finances" because of uncertainties about the detail of his proposals, the degree to which he'll promote them, and his ability to implement them. Senate Democrats will still be able to filibuster Republican legislation they don't like, the rating agency pointed out.

Samuels stressed that Trump is a "great unknown" for the municipal market because of his campaign's overall lack of detail regarding economic advisors and plans. "We really don't understand who will be running economic and tax policy," he said. "The situation is very unclear."

Vahey said, "He's not an in-the-box Republican, adding, "He doesn't have a voting record and is very light on details."

The Bond Buyer

By Evan Fallor, Jack Casey, Jim Watts, and Lynn Hume

November 9, 2016

TAX - NEW YORK

[T-Mobile Northeast, LLC v. DeBellis]

Supreme Court, Appellate Division, Second Department, New York - October 26, 2016 - N.Y.S.3d - 2016 WL 6270168 - 2016 N.Y. Slip Op. 07031

Cellular telephone service provider brought hybrid article 78 proceeding and declaratory judgment action against city and school district, seeking to compel city to determine and approve provider's petitions for property tax refunds for tax paid related to its equipment and antennas housed on rooftops of office buildings within its service area.

The Supreme Court, Westchester County, denied the petition and dismissed the proceeding. Provider appealed.

The Supreme Court, Appellate Division, held that:

- Fiber optic and coaxial cables constituted taxable real property;
- Base transceiver station cabinets constituted taxable real property;
- Rooftop antennas were fixtures that were taxable as real property.

Fiber optic and coaxial cables, as well as connections between cellular telephone services provider's equipment housed on rooftops of buildings in its service area and that of local exchanger carrier, were "lines" or "wires" under tax statute permitting taxation of real property, and thus constituted taxable real property.

Cellular telephone service provider's base transceiver station cabinets housed on rooftops of buildings in its service area constituted "inclosures for electrical conductors" within meaning of statute permitting taxation of such inclosures as real property, and thus constituted taxable real property.

Cellular telephone provider's rooftop antennas, which were flat and four to five feet in both length and width, could properly be characterized as "inclosures for electrical conductors" within meaning of tax statute permitting taxation of real property, inasmuch as they were a part of base transceiver station cabinet, and thus constituted taxable real property.

Cellular telephone provider's rooftop antennas constituted fixtures within meaning of tax statute permitting taxation of real property, and thus constituted taxable real property. Equipment was fastened to host buildings by bolts, frames, pipes, and brackets, and was weighted down with I-beams and cinder blocks, and provider demonstrated its intent to make equipment permanent for term of the leasehold.

IRS Releases Three-Part Video Series on Conduit Issuers.

Conduit Issuers for Tax-exempt Financings – Overview

Conduit Issuer Responsibilities

Conduit Issuer Policy and Procedural Considerations

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

The Public Finance Tax Blog

Squire Patton Boggs

Why New York City Gave Up $3 Billion in 2016.

New York City is the first major government this year to release what it gives up in economic development-related tax incentives to corporations, following new financial reporting requirements. In its annual financial report, the city disclosed that it waived more than $3 billion in potential tax revenue in 2016 alone, mostly in uncollected property taxes.

The tax abatements represent a little under 4 percent of the city's nearly $80 billion in general fund revenue in fiscal 2016, which ended on March 31.

The most expensive abatement was for the commercial conversion program, which cost nearly $1.3 billion in forgone revenue last year. The program encourages new housing in the city by offering a property tax discount on new construction or on commercial space that was converted into residential housing. Developments have to meet certain requirements, like reserving one-fifth of the units for affordable housing.

The Takeaway: New York has an earlier fiscal year than most of the country, so it's not a surprise that it's the first out with its tax incentives data. Still, it's commendable that the city's assessment of its tax abatement program also includes 2015's data, which was not required by the new accounting rules. It allows for observers to start tracking trends sooner than previously thought.

The other notable detail from the annual financial report is that of the 11 city programs listed offering abatements, only two of them had any provisions for recapturing the abated taxes. The two programs, which both encourage commercial development, accounted for about $130 million in forgone revenue in 2016. That means that, for the remainder of the $3 billion in abatements, the government has no established means of ensuring the deal continues to be worth the cost. This is likely just the tip of the iceberg of tax giveaways in this country that have few strings attached.

GOVERNING.COM

BY LIZ FARMER | NOVEMBER 4, 2016

Cato: Bonds Are Taxes.

On Nov. 8, voters where I live in Fairfax, Va., will be asked to approve general obligation bonds to finance subway maintenance, park renovations, and other run-of-the-mill local spending. There will be hundreds of similar questions on ballots across the country to issue billions of dollars in new debt.

Voters typically approve state and local bonds by large margins. Bond Buyer data show that bond approval rates in presidential election years have been more than 80 percent. Apparently, voters think that there are prudent and practical reasons for governments to issue general obligation bonds. But there usually aren't.

Using debt allows politicians to claim credit for spending while evading responsibility for the resulting higher taxes, which hit citizens down the road. By putting bonds on the ballot, politicians are really asking voters to hike taxes, to enrich finance industry middlemen, and to make government budgets more complex and opaque.

State and local governments issue bonds to finance infrastructure, such as schools. The interest and principal on bonds is paid back over time from taxes. The states have been issuing debt for infrastructure since at least 1818, when New York floated bonds to finance the Erie Canal.

However, debt is not the only way to pay for investments. Indeed, much of state and local infrastructure is financed on a pay-as-you-go basis. Under that approach, governments construct needed facilities in sequence over time with a portion of annual revenues.

Pay-as-you-go financing is more transparent and less risky than debt financing. The Erie Canal was a success, but it spurred many other states to borrow heavily and spend lavishly on their own, more dubious, canal schemes. Politicians at the time overestimated the demand for canals and underestimated the costs. As a result, most state-sponsored canals turned out to be money-losing failures that damaged state finances.

Those debt-financed failures led to sweeping budget reforms. Nineteen states imposed constitutional limits on government debt issuance between 1840 and 1855, and other states followed in later years. Reformers recognized that political incentives to spend combined with easy access to money is a combustible combination. In recent years, we've seen places such as Greece, Puerto Rico, and

Detroit burn their fiscal houses down from their debt-fueled spending.

Today, all state governments operate within statutory and/or state constitutional limits on debt. But voters should be asking their governments why they need to borrow at all. Why can't they plan ahead for the schools and parks that are needed, and allocate a portion of ongoing tax revenues for construction and renovation?

Debt financing costs more than pay-as-you-go financing because of the interest payments, but also because governments pay fees to the municipal bond industry. Thousands of high-paid underwriters, traders, advisors, bond insurers, and other finance experts are the overhead costs of bond financing. That means billions of dollars a year of taxpayer money going to Wall Street, not to schools and parks.

A further cost of state and local debt is corruption. The municipal bond industry has been plagued by scandals related to political influence. If you Google "muni bonds" and "pay-to-play," you find story after story about finance firms using campaign contributions and other payments to win bond business from government officials.

Debt financing also makes budgeting less transparent to citizens, especially given the complex ways that governments borrow these days. Also, citizens have less appreciation for the costs of government projects if they do not feel the bite of current taxes to pay for them.

Total state and local government debt now totals more than $3 trillion. While some states such as New York are heavily indebted, other states such as Idaho issue very little debt and finance their capital expenditures primarily on a pay-as-you-go basis.

It is true that for particularly large capital projects, general obligation debt may be appropriate in some cases. But if you have bonds on the Nov. 8 ballot where you live, they are probably for routine spending that should be funded by ongoing tax revenues. Next door to Fairfax is Arlington, Va. It has bonds on the ballot next week to fund street paving, park maintenance, playground improvements, school renovations, and similar sorts of projects.

Bonds don't magically make these spending projects free. Instead, the projects will end up costing taxpayers more than they should have because of the debt servicing costs.

I benefit from local parks and schools, but I always vote "no" on bond questions.

The Cato Institute

By Chris Edwards

This article appeared on The Hill (Online) on November 2, 2016.

Chris Edwards is editor of DownsizingGovernment.org at the Cato Institute.

[What a Shift In Power in the Senate Could Mean for Munis.]

WASHINGTON – A Democratic takeover of the Senate, as has been predicted by some polls, could mean good news for tax reform as well as maintaining the tax exemption of municipal bonds, according to several muni market participants.

Micah Green, a partner with Steptoe and Johnson in Washington, said that the formula to accomplish tax reform after at least six years of debate would be perfect under three very possible conditions.

"If the Senate turns Democrat, the House stays Republican, and Secretary [Hillary] Clinton wins the presidency, what was the makeup of the House and Senate when The Tax Reform Act of 1986 passed?," he asked, adding, "A Republican president, Republican House and Democratic Senate."

In addition, Sen. Chuck Schumer, D-N.Y., who is in line to become Senate Majority Leader if the Democrats win the Senate, has made tax reform a top priority, as has House Speaker Paul Ryan, R-Wis., who spearheaded the GOP blueprint for tax reform released this year, he said. This bipartisan agreement is necessary for comprehensive tax reform, Green noted.

"The lesson from '86 is, if the White House is committed to some form of tax reform discussion, then I think Chuck Schumer and Paul Ryan would try and get it done," he said. "The pure policy idea of having a serious discussion or action on tax reform is very much in the wheelhouse of both Schumer and Ryan."

As of Wednesday, Democrats had a 59% chance of taking back the Senate in next week's election, according to the New York Times, which bases its data on state and national polls. The House of Representatives is widely expected to remain Republican.

Republicans currently hold 54 Senate seats, while Democrats hold 44 and independents hold two. Of the 34 seats up for election next week, 24 are Republican-held. For Democrats to re-take the Senate, they must win 15 seats. To maintain control, Republicans would need to win 21 seats.

Several muni participants have taken note and have begun to analyze how a shift in the balance of power in Congress could shape their goals for the next administration.

John Godfrey, the senior government relations director for the American Public Power Association, said APPA has been in talks with Republicans regarding their blueprint for tax reform released in June, which proposes repealing unnamed special-interest provisions, leading some muni participants to believe the tax-exempt standing of munis could be in jeopardy.

Godfrey said whichever party controls Congress, their message should be consistent: maintain the muni exemption to keep borrowing costs low for issuers.

"Some Democrats believe munis are inefficient and want to increase inefficiency by changing them," Godfrey said. "We think they're wrong."

"Some Republicans think munis over-encourage spending," he added. "We also think they're wrong."

Still, Godfrey said there are plenty of members from both parties of Congress who understand the importance of municipal bonds as an efficient financing tool and that he is "heartened" by the Democratic platform, which supports the exclusion of interest for tax-exempt munis.

"I think that was significant," Godfrey said. "One of the problems has been that for a long time there's been an assumption that the tax exemption of munis was a given and there was not a whole lot of advocacy in support. Suddenly that's not a given."

Godfrey cited several proposals to tax or place a surtax on munis that have surfaced in recent years, including those in President Obama's budget requests that would cap the value of the muni exemption at 28%.

Clinton has proposed a 28% limit on the tax benefit from specified deductions and exclusions, but has not said if that will include the muni tax exemption.

Proponents like Godfrey stress the low costs the muni exemption provides for issuers in financing infrastructure costs, while opponents contend it is an inefficient method of borrowing that leads to federal revenue losses.

Emily Brock, director of the Government Finance Officers Association's federal liaison center, said she could not comment on what a party change would mean for munis.

"There are many legislators from both sides of the aisle who have offered unwavering support of the muni and recognize its importance as the primary financing tools across the U.S. to satisfy infrastructure needs," she said.

Sen. Orrin Hatch, R-Utah, is the current chairman of the Senate Finance Committee. He would likely be replaced by Sen. Ron Wyden, D-Ore., the ranking minority member, if Democrats seize control of the Senate,

Wyden, who has previously expressed support for municipal bonds, would be welcomed as the finance committee head, said Justin Underwood, federal policy advisor for Bond Dealers of America.

Underwood said that although Wyden does not have an extensive legislative record on munis, Oregon's has had $26 billion of infrastructure construction and improvements financed through munis over the past decade.

"We know that he is following the issue very closely, both in terms of how the pieces of the puzzle fit in tax reform discussions and, possibly, into negotiations on an infrastructure plan," Underwood said. "We hope that Sen. Wyden will continue to place the benefits of municipal bonds and preserving their full tax-exempt status at the top of his priority list."

BDA will be tracking any legislation effecting municipal finance and attempts to limit the tax exemption of munis, including bills in both the House and Senate that would treat certain munis as high quality liquid assets under bank rules and raise the limit for bank-qualified bonds. Pending before the Senate Finance Committee is The Municipal Bond Market Support Act of 2016 (S. 3257), which would raise the annual issuer limit for issuers of bank-qualified bonds to $30 million from $10 million and index it for inflation.

The bill was introduced in July by Sen. Bob Menendez, D-N.J., as an identical companion bill to The Municipal Bond Market Support Act of 2015 (H.R. 2229) introduced in the House in May of last year by Rep. Tom Reed, R-N.Y.

Brock said that when Congress' temporary increase to a $30 million issuer limit in 2009 and 2010 provided state and local governments with significant benefits. GFOA is now asking Congress to permanently increase the limit.

"We remain hopeful that this issue will be addressed this year and remain committed to work with Senators Menendez and Cardin to make this happen," Brock said. "If it isn't completed this year, it will remain a priority for GFOA in 2017."

The House passed a bill (H. R. 2209), and a similar one is pending in the Senate (H.R. 3404), that would require federal banking agencies to treat as high quality liquid assets (Level 2A) any muni obligations that are liquid, readily marketable and investment grade as of a certain date.

Another bill pending before the Senate Finance Committee is The Green Bank Act of 2016 (S. 3382), which was introduced by Connecticut Democrats Sens. Chris Murphy and Richard Blumenthal as well as Sen. Sheldon Whitehouse, D-R.I., in September.

The bill would create a federal green bank to attract larger private investments in clean energy and energy efficient projects. An identical companion bill was also introduced in the House.

The Bond Buyer

By Evan Fallor

November 4, 2016

TAX - MISSISSIPPI
Pascagoula-Gautier School District v. Board of Supervisors of Jackson County
Supreme Court of Mississippi - October 20, 2016 - So.3d - 2016 WL 6125423

School district and city brought action against county board of supervisors, challenging board's approval of tax assessor's methodology in assessing taxes on lessee of county property located in school district but not within city boundaries.

The Circuit Court granted board's demand for jury trial, denied plaintiffs' motion to join lessee as party, and ultimately granted board's motion to dismiss for lack of standing. Plaintiffs appealed.

The Supreme Court of Mississippi held that:

- Plaintiffs experienced adverse effect different than that of general public due to tax assessment of leased property and, thus, plaintiffs had standing to bring action against board, and
- Trial court abused its discretion by refusing to order joinder of lessee of county property.

City and school district in which leased county property was located, as taxing authorities and direct recipients of revenue from taxes collected on property, experienced adverse effect different than that of general public due to approval by county board of supervisors of tax assessor's methodology in assessing taxes on such property and, thus, school district and city had standing to bring action against board challenging tax assessment, despite lack of statutory authority to sue. City and school district funding was reduced by any allegedly improperly low tax assessment, city was required to set higher millage rate for rest of taxpayers in order to meet budget, and school district had to incur costs encountered in raising millage rates.

Trial court abused its discretion by refusing to order joinder of lessee of county property, in action by city and school district challenging approval by county board of supervisors of tax assessor's methodology in assessing taxes on leased property, which was located in school district. Lessee was subject to joinder either as party that needed to be joined for just adjudication, or had waived right to object to being joined due to unfettered participation in the case.

IRS PLR: Intergovernmental Organization Qualified as Wholly Owned

Instrumentality of Member Cities.

Intergovernmental organization requested a letter ruling that donations to the organization are tax deductible under § 170 because the organization, as a consolidated department of all incorporated cities in the State, is a wholly owned instrumentality of political subdivisions of the State.

The IRS ruled that the organization qualified as a wholly owned instrumentality of its member cities of the State within the meaning of Rev. Rul. 57-128.

Read the Private Letter Ruling.

What's in your Partnership Agreement? Why Non-Taxpaying Entities Should Care About Allocations of Taxable Income.

Even before the advent of P3s (public-private-partnerships), it was not uncommon for a governmental entity or a 501(c)(3) to enter into a joint venture with a for-profit, taxpaying entity. Sometimes these joint ventures take the form of either a state law partnership or a state law limited liability company ("LLC"). Most LLCs are taxed as partnerships for federal income tax purposes, which generally means that they are pass-through entities. In other words, the partnership itself does not pay tax on its taxable income (like a corporation would). Rather the taxable income flows through to the partners who are required to pick up their respective distributive shares of the partnership's items of income and loss on their own separate federal income tax returns.

Why would a non-taxpaying entity care about allocations of taxable income? Because the manner in which "taxable income" is determined, and its allocation among the various partners in the partnership could impact the amount of cash flow available to be distributed to the partners in the partnership. Even non-taxpaying entities should care about their cash flow from partnerships and/or LLCs. This is especially important in light of new legislation that changes the manner in which partnership audits by the IRS are resolved.

Over the past several decades, most partnership audits were conducted by the IRS under the rules set forth in the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA" yes, that TEFRA, the same act that gave us the notice, hearing, and approval requirements for qualified private activity bonds). Under the audit rules set forth in TEFRA, the IRS would determine what adjustments needed to be made at the partnership level. The IRS would then recalculate each partner's tax liability after flowing the adjustments through the partnership to the separate partners, and collect any additional tax owed from the individual partners rather than the partnership. Especially for large partnerships, this has been a cumbersome process for the IRS. It would be similar to the IRS trying to collect from the bondholders rather than the issuer the additional tax owed on bonds that were issued as tax-exempt bonds but that were ultimately determined to be taxable.

For tax years beginning on or after January 1, 2018, the manner in which a lot of partnership audits are conducted by the IRS will change. Most significantly, for many partnerships, any additional taxes owed to the IRS will be assessed against the partnership rather than the individual partners. This change can have inequitable results under certain circumstances. For example, assume that the IRS finalizes an audit of a partnership's 2018 tax year in 2020. Any additional taxes resulting from partnership adjustments made to the 2018 taxable year will normally be paid by the partnership in 2020. Thus, a partner that joined the partnership in 2019 will, as a result of the partnership's reduced cash flow (used to pay the 2018 tax liability), own a less valuable partnership interest in

2020, and have a decreased chance of receiving distributions from the partnership beginning in 2020.

The new IRS audit rules do allow partnerships to adopt certain procedures intended to alleviate the unfairness outlined above. First, the partnership agreement can require that each person who was a partner from the adjustment year (2018 in the above example) file an amended tax return picking up its distributive share of the audit adjustment. This would benefit tax-exempt partners, because only the taxable partners would be required to file an amended income tax return to report the distributive share of taxable income that arises from the audit adjustment. Second, the partnership can make an election to transfer its obligation to pay the additional tax to the partners that were partners in the audit year who would then pay the tax in the year the audit was finalized (2020 in the above example). This election would shift the economic burden of the additional tax liability from the partnership (and, thus, all of its current partners, including tax-exempt partners) to the taxable persons who were partners in the partnership for the year under audit.

Although the new IRS audit rules for partnerships do not apply until January 1, 2018, partnerships can elect into them now, and once they are effective, certain partnerships may elect out of them. Accordingly, it is important that all partners, including non-taxpaying partners, understand the economic ramifications of these rules and know what the partnership agreement says about them. In other words, each partner should be able to answer the question: What’s in your partnership agreement?

Squire Patton Boggs

The Public Finance Tax Blog

By Cynthia Mog

October 26, 2016

[Tax on a Haircut? Missouri Voters Weigh Sales Tax Limits.]

JEFFERSON CITY, Mo. — Missouri voters will be the first in the nation to decide whether to amend their state constitution to prohibit sales taxes from being expanded to services such as auto repairs, haircuts, legal work and financial accounting.

The proposal on the Nov. 8 ballot is a backlash against efforts in numerous cash-hungry states that have considered extending sales taxes beyond goods to keep pace with the service-based economy.

Concerned that states could try to tax services related to home sales, national and local organizations representing real estate agents have poured about $7 million into a campaign to pass the amendment, with hopes of a trend-setting victory.

“If we can do this here, it would be a model for the rest of the country,” Missouri Realtors CEO John Sebree said.

Opponents have not reported raising any money to fight the measure. But the Missouri Municipal League warns there could be “dire consequences” for police, fire and road departments if governments are constitutionally barred from enlarging their sales tax base.

“It’s a short-sighted attempt to solve a problem that doesn’t exist,” said the league’s deputy director, Richard Sheets.

Sales taxes have long provided an important financial foundation for governments. They are levied by 45 states and more than 10,000 local jurisdictions. But only a few states currently charge sales taxes on a wide array of services.

State revenue from general sales and gross receipts taxes has rebounded more slowly than individual income taxes following the recession that ended in 2009, according to U.S. Census Bureau figures.

Some states have sought to compensate for sluggish sales tax growth with proposals to apply the tax more widely. The rise of Republican-led statehouses since 2010 has also spawned proposals to cut income taxes and offset the cuts with higher sales taxes on a greater number of goods and services.

In March, North Carolina began charging sales tax on labor for a number of services, including vehicle maintenance, flooring and cabinet installation and jewelry repairs. The expansion was part of a new law that also will cut individual income tax rates starting in 2017.

Many customers initially questioned the new sales taxes and some decided to delay repairs, said Dean Bailey, owner of King’s Auto Service in Raleigh, North Carolina.

But, he added, “It’s a thing that now we’ve sort of grown accustomed to.”

Over the past five years, about half the states have considered some sort of proposal to expand sales taxes to services, according to bill tracking by the National Conference of State Legislatures, the American Institute of Certified Public Accountants, the National Association of Realtors and research by The Associated Press. Many of those proposals have failed.

Missouri is the first state where voters will consider a constitutional amendment putting a halt to sales tax expansions, according to the NCSL. Amendment 4 would bar state and local sales taxes from being applied to any transaction or service not already taxed as of Jan. 1, 2015.

The campaign has drawn support from a broad coalition, including associations for accountants, attorneys, banks, funeral homes, newspapers and broadcast media.

Mark Ewers, who runs a home siding and window business in Jefferson City, was among several dozen people who recently attended a free lunch hosted by the committee backing the initiative. He said he already pays sales tax on materials, but calculating a tax for his installation work would be a paperwork headache.

“I can’t imagine having to tax for all of the services that I provide,” he said.

How voters will react remains unclear. There is scant public polling on the ballot proposal, although focus groups have shown some voter confusion over the wording of the measure.

A similar idea was proposed in Florida after legislators in 1987 expanded the sales tax to dozens of services that included construction and advertising. But the petition drive for that ballot measure subsided after lawmakers repealed the services sales tax just six months after it began.

During the past decade, Maryland, Massachusetts and Michigan also have quickly repealed expanded sales taxes on services in the face of public disapproval.

Missouri lawmakers for several years have considered expanding the sales tax base in exchange for phasing out the state income tax, but those bills gained little traction this year.

Republican lawmakers contend recent decisions by courts and the state Department of Revenue have nonetheless gradually expanded the sales tax base. For example, the revenue agency sent a letter to businesses in July notifying them that delivery services are subject to taxes if included with certain retail sales.

By THE ASSOCIATED PRESS

OCT. 28, 2016, 11:01 A.M. E.D.T.

TAX - MAINE

Angell Family 2012 Prouts Neck Trust v. Town of Scarborough

Supreme Judicial Court of Maine - October 13, 2016 - A.3d - 2016 WL 5940101 - 2016 ME 152

Taxpayers challenged increased property tax assessment levied by town.

The Business and Consumer Court found that taxpayers lacked standing, and taxpayers appealed.

The Supreme Judicial Court of Maine held that:

- Taxpayers had standing to challenge town's excess land program;
- Town's abutting property program violated state constitution;
- Town's board of assessment review was compelled to conclude that abutting property program resulted in an unequal apportionment of tax burden;
- Town's large lot program was not discriminatory;
- Town had legitimate basis for its increased assessments; and
- Town assessor's decision to increase assessments did not constitute unjust discrimination.

Taxpayers had standing to challenge town's excess land assessment programs which provided a method for valuing single residential lots larger than one acre, and permitted owners of multiple contiguous lots to combine those lots for assessment purposes, even though taxpayers did not qualify for the programs, where taxpayers did not benefit from the favorable tax treatment that town gave to owners of qualifying lots.

Town's abutting property program, which permitted owners of multiple contiguous lots to combine those lots for assessment purposes, violated state constitutional requirement that an individual parcel of real estate be assessed separately according to just value.

Town's abutting property program, permitting a taxpayer who owns multiple abutting lots to elect to have the separate lots assessed as a single unit, resulted in an unequal apportionment of the tax burden in violation of the state constitutional requirement that an individual parcel of real estate be assessed separately according to just value, since some taxpayers received a major benefit as a result of the program, and those who did not own abutting lots were subjected to taxes not imposed on owners of lots that happen to be abutting.

Town's large lot program, which applied to the valuation of a single parcel larger than one acre, was not discriminatory against taxpayers who did not qualify for program, where the program resulted in an assessment reflecting the just value of taxpayers' waterfront property.

Town had legitimate basis for its increased assessments of waterfront property owned by taxpayers, where town assessor's reevaluation of properties was grounded in an ongoing analysis of sales data, and although some of the sales used in the analysis were private sales, there was no evidence that those sales were not arm's length transactions.

Town assessor's decision to increase assessments on waterfront properties in area of property owned by taxpayers, but not to raise assessments of comparable properties in another area, did not constitute unjust discrimination against taxpayers, where the waterfront properties in the comparable area were not similarly situated to those in taxpayer's area, the other properties were generally larger, and were located a significant distance from the taxpayer's area's amenities.

State Tax Commissions: 2000-2016

Abstract

Tax policy is one of the most challenging and controversial components of state governance. Determining how and from whom to collect revenue involves questions of equity, fairness, efficiency, and simplicity. As a result, states often create special tax commissions before attempting major tax reform. This brief discusses who establishes commissions, who serves on commissions, who advises commissions, what commissions recommend, and if and when their reports lead to changes in state tax policy.

Download the brief.

The Urban Institute

by Richard C. Auxier

October 16, 2016

How State Tax Commissions Approach Economic Development.

Abstract

Nearly all state tax commissions—independent groups that study and make recommendations for improving a state's tax system—are tasked with improving economic development within the state. Their report introductions include phrases such as "growth-friendly," "unleash innovation," and "optimum competitor." And many commissions cite economic development to justify their concluding recommendations. But most reports ultimately contain little exploration or explanation on how taxes and economic development are (or are not) linked. This is a missed opportunity because most commissions thoroughly investigate their state's tax structure, often with the assistance of respected tax and budget experts.

Download the brief.

The Urban Institute

by Richard C. Auxier

October 16, 2016

Former TEB Head Says IRS Ignoring Violations.

WASHINGTON – The former head of the Internal Revenue Service's tax-exempt bond office is accusing the office of ignoring alleged tax law violations in a $228 million tax-exempt financing for a Syracuse mall that benefited from tax breaks sought by Hillary Clinton when she was a Senate candidate.

The bonds were issued in February 2007 by the Syracuse Industrial Development Agency (SIDA), which loaned the proceeds to Destiny USA Holdings LLC to finance an expansion of the Carousel Center shopping complex in Syracuse. They were supposed to be "qualified green building and sustainable design project" bonds issued under tax law provisions pushed for by Clinton and Sen. Chuck Schumer, DN.Y.

The IRS began auditing the bonds in March 2011 after SIDA and Destiny told the IRS in a letter that, because of a legal dispute and the recession, it had failed to meet the green bond requirements. The IRS later closed the audit with no change to the tax-exempt status of the bonds because SIDA had reasonably expected the requirements would be met.

Mark Scott, the former TEB director who spent 18 years at the IRS and represents whistleblowers in a private practice here, thinks the IRS is ignoring alleged tax law problems with the transaction because of politics.

Scott said he alerted IRS officials to roughly $30 million in fees paid to SIDA and Syracuse from bond proceeds as well as issuance costs that violated a 2% limit, both alleged tax law violations. The IRS told him it would not pursue these allegations.

Scott has written a five-page analysis of the transaction on his website detailing the alleged violations and warning that, by ignoring them, TEB is opening the door for other issuers to commit similar violations.

"In a stunning reversal of more than 30 years of existing law and its own Publication 5005, `Your Responsibilities as a Conduit Issuer of Tax Exempt Bonds,' the IRS Office of TaxExempt Bonds … has [decided] to not apply any limits on the amount of fees a government conduit issuer may be paid out of bond proceeds," Scott said in analysis.

IRS Publication 5005 states that while conduit issuers may charge fees payable out of bond proceeds, Section 148 of the Internal Revenue Code generally limits the size of such fees to prevent bonds from becoming taxable arbitrage bonds.

Scott argues that the issuer fees should have been added to the investment yield on the conduit borrower's obligation. Under the tax law, that investment yield should have been limited to one eighth of one percent. Instead, it was much higher, making the bonds arbitrage bonds.

"IRS officials are ignoring upwards of $30 million in issuer fees," Scott said, calling this "the largest violation of this provision I have ever seen."

“Any member of Congress worth his or her mettle would not allow their state or local government agencies to be penalized for behavior that the IRS has openly permitted to a much larger degree for another government agency,” he added.

Scott also said the IRS is ignoring issuance costs that significantly exceed the limit of 2% of bond proceeds for private activity bonds. The issue price of the 2007 bonds was $238.5 million, which should limit issuance costs to $4.8 million. But the underwriters’ discount for the bonds, in and of itself, took up most of the issuance costs, at $4.77 million.

Scott claims the 2% limit was exceeded by $2.6 million, which if included, would have pushed issuance costs over 3% of bond proceeds.

“As with its complete waiver of enforcing the previously described `issuer fee’ limit, the IRS will be hard pressed to walk back this broader [issuance cost limit] waiver policy now that it is publicly known,” Scott said in the analysis.

Scott told The Bond Buyer on Tuesday that his article is meant to prevent the TEB from hiding behind a “wall of secrecy” and to level the playing field for smaller issuers, who he believes would have been targeted for similar, but much smaller violations.

Scott said the decision not to proceed to pursue the alleged tax law violations was not made by one agent, but rather involved at least two IRS senior bond agents, a field manager, multiple senior managers, multiple senior analysts and multiple officials of the Tax Exempt & Government Entities Division, as well as Office of Chief Counsel officials,. As of Tuesday, neither the IRS TE/GE Division nor the Office of Chief Counsel had released formal or informal guidance on the issue. IRS officials did not respond to a request for comment. SIDA representatives also could not be reached for comment.

Scott believes the IRS has backed off this deal because of the appearance of impropriety and the election.

“In my view, there’s an appearance of impropriety because the developer was a Friend of Bill [Clinton] who contributed to the Clinton Foundation and because of Hillary Clinton’s involvement in getting legislation passed for this project,” he said.

In early 2009, Hillary Clinton told The New York Times, “I’ve been a big supporter of Destiny. I worked successfully to get the green bonds bill passed. I think it would be a big shot in the arm. It would be a destination site for the area.”

The mall has been rebranded Destiny USA.

The NYT reported that developer, Robert J. Congel, contributed about $100,000 to the Clinton Foundation at about the time Hillary Clinton helped secure the tax breaks. At that time, Congel told the NYT reporter: “There was no connection with Bill Clinton and the ‘green bonds’ and the contribution – none at all.”

A spokesman for Clinton told the NYT that she supported the expansion of the mall “purely as part of her unwavering commitment to improving upstate New York’s struggling economy and nothing more.”

Scott noted in his analysis that the bonds were “issued to finance a not-so-green shopping mall.”

Scott said he expects SIDA will issue refunding bonds this week to refund the 2007 bonds, adding that the roughly $30 million issuer fee and issuance cost problems will likely be carried forward into the new financing.

Scott said both of the alleged violations will "continue to taint" the tax-exempt status of the interest paid to holders of the 2007 bonds for at least three more years.

The Bond Buyer

By Evan Fallor

October 20, 2016

TEB Says Muni Audits Can Be Closed After Full Redemption.

CHICAGO — The Internal Revenue Service's Office of Tax-Exempt Bonds has told its auditors that, if an issuer redeems 100% of the outstanding principal amount of its tax-exempt or tax-credit bonds, the audit can be closed without further TEB action.

But the interim guidance, which was released this week in a memo from Rebecca Harrigal, TEB's director to amend the Internal Revenue Manual (IRM) to include a new resolution method for audits, has drawn criticism from a former TEB director who says it could lead to more tax law violations.

The guidance gives four factors auditors must consider when closing an audit with no further action: the reasons for noncompliance and whether it falls under an anti-abuse rule; whether the underwriter, conduit borrower or other user of proceeds with a financial interest in the transaction were involved in aspects of the deal that led to noncompliance; and whether the issuer or borrower took reasonable steps to ensure the bonds complied with law or attempted to self-correct the problem before the audit.

Speaking at the National Association of Bond Lawyers' Bond Attorneys' Workshop here on Wednesday, Harrigal said that the guidance "generally won't affect bond issues."

"If the guidance is going to resolve a problem you see then it is worth putting effort into the audits," Harrigal said. "Certain times – yes it makes sense to close audits and other times that doesn't make sense and we should continue audits."

"The rules for re-opening a TEB exam are not as clear as I hope they would be," she added. "There are very strict rules of re-opening a case that has already been reviewed."

Should an auditor determine the bonds don't comply with law, it can issue a closing Letter 5859, Full Bond Redemption – Compliance Issue Identified.

The new guidance does not apply if the bonds are redeemed with other tax-advantaged bonds or if they are direct-pay bonds. It also does not apply if the issuer did not make appropriate rebate payments on the bonds or if the issuer asks for a closing agreement. The guidance is applicable for two years.

Mark Scott, the former head of TEB who is now in private practice representing whistleblowers, said that IRS officials are "clearly walking away from doing their job" and are trying to prevent the payment of what is owed. This could lead to bond counsel opinions that do not meet the NABL standard, he warned.

Because IRM provisions are not law and can be changed at will, Scott said the “unthinkable” provision should be revoked.

“This sounds like a pass for a bad bond counsel opinion,” Scott said. “This could lead to significantly aggressive tax opinions given by bond counsel in an industry that is already out of control.”

“If the only penalty that applies is redeeming and refunding bonds, then it is essentially encouraging tax counsel to not comply with tax laws,” he added.

Although redemption of bonds is important, he said, this guidance will lead to inappropriate actions and does not clearly state whether the issuer took reasonable steps if bond counsel gives an incorrect tax opinion.

The interim guidance comes as TEB continues to work with a diminished staff and limited resources. At BAW, Harrigal said that TEB lost eight employees in the past year for various reasons, including transfers and retirements. The office is now down to roughly 65 employees, she said, including 14 tax law specialists.

For this fiscal year, TEB will work on selecting audits with a higher risk of noncompliance, including specific returns as well as classes of returns.

She said the office is using market segments where there is information that there may be a high level of noncompliance for targeted audits, including sports facilities, advance refundings and government facilities with private activity. None of those market segment audits are closed, she said, though some are more than 80% complete, Harrigal said.

“We identify issues and fact patterns we hypothesize have a higher risk of noncompliance,” she said. “What we do with those is create a sample. We will pick out a statistical sample of returns and examine them. Some in there will be perfectly fine.”

In March, TEB released model closing agreements for both the general examination program and the Voluntary Closing Agreement Program (VCAP) to expedite and increase consistency. Harrigal said that VCAP “continues to be a priority and we will devote resources based on that,” but added that the office has gotten significantly fewer VCAPs since then.

TEB also said in its two-page work plan for fiscal 2017, which began this month, that the highest priority would be given to claims and referrals warranting audit resources.

Because of revisions made to the direct-pay bond refund process, TEB said it expects fewer direct-pay referrals in fiscal 2017, but that they will likely to have a higher risk of noncompliance than under the prior process.

Mike Bailey, a partner with Foley & Lardner in Chicago and chair of Wednesday’s panel, noted TEB typically audits bonds five-to-six years after their issuance to give it time to see how the proceeds were spent and other determining factors. He also noted that it marks six years since the issuance peak of direct-pay bonds and Build America Bonds (BABs), and asked Harrigal if a wave of audits can be expected.

Harrigal said it is “happening under the radar,” adding that BABs are included in the market segment audits.

The Bond Buyer

By Evan Fallor

October 20, 2016

Chicago Schools' Labor Deal Boosted by TIF Infusion.

CHICAGO – Chicago's tax-increment financing program is in the spotlight after the city said it would release a bigger-than-planned chunk of surplus TIF revenues to help Chicago Public Schools pay for a new teachers' contract.

Mayor Rahm Emanuel unveiled a proposed 2017 budget Tuesday that declares a $175 million TIF surplus.

Based on the distribution formula, the city will receive about $40.5 million while about $88 million will flow to the financially distressed school district.

CPS had only built $32 million of TIF money into its fiscal 2017 budget, expecting the city to declare a more modest $60 million surplus.

The remainder will go to other area taxing bodies. CPS received $103 million in fiscal 2016.

Word began to circulate of the expected action in the early morning hours of Tuesday shortly after CPS and the Chicago Teachers' Union reached a tentative agreement on a new four-year contract that averted a strike set to begin Tuesday.

The city has annually freed up surplus TIF revenue but it has resisted political pressure by limiting the amount with the annual releases varied in size.

The action — promoted and endorsed by some city council members and union officials and initially resisted by Emanuel — has prompted debate over a series of issues.

They include questions over the appropriate use of TIF revenues, which are supposed to be set aside for development purposes, whether even more should be freed, and whether the funds provided too easy a political escape hatch for the district, which was seeking deeper concessions from the Chicago Teachers' Union.

They also have spurred questions over whether or not the revenue represents a non-recurring revenue stream that can't be counted annually to cover an annual operating expense, a position Emanuel seemed to previously back in statements.

That position has now changed.

"I don't see TIF surplus at this stage as a one-time revenue," city budget director Alexandra Holt said when asked about the issue during a meeting with Crain's Chicago Business' editorial board. "I see it as an ongoing revenue."

Much of the surplus funding being freed up comes from frozen, canceled, and expiring TIFs as well as the "declared" amount.

Holt projected that surpluses will be available for well over a decade, and therefore should not be considered a so-called one-shot.

Holt made her case during an interview along with Emanuel and chief financial officer Carole Brown that Crain's posted on Facebook.

The majority of this year's surplus comes from the seven downtown TIF districts that were frozen last year and will be retired when existing projects are paid off.

Those districts will generate about $250 million in surplus revenue over the next five years, according to the city's annual financial analysis.

Market participants, rating agencies, and budget watchdogs warn against relying on non-recurring revenue streams to cover recurring operational expenses as they drive up structural gaps.

The district's heavy use of one-shots, from debt restructurings to a three-year partial pension holiday to cover past deficits, have driven the school district's structural deficit up to $1 billion and helped sink its ratings deep into junk territory.

One of Emanuel' top council allies acknowledged TIF funding is only a temporary salve.

"TIF is a one- or two-year fix," Emanuel's floor leader, Alderman Patrick O'Connor, said on WTTW's Chicago Tonight program. "We've done it this year so we can keep the schools open…but what we need to do is find a permanent solution."

TIF has long been used to support school capital projects — the city committed funds to bond issues in 2007 and 2010 under former Mayor Richard Daley's school modernization program — so it's not improper to now use to help with an operating expense, O'Connor added.

Chicago's 146 TIF districts are expected to generate $475 million next year. The program began in 1984 and Daley used it heavily to spur development resulting in criticism that it provided subsidies for wealthy downtown developers for areas some might not consider "blighted."

Once designated a TIF district, the amount of property taxes that flows to general government coffers is frozen and revenue growth goes to fund qualified work in the district to support development for 23 to 24 years. The city has also issued bonds backed by the revenue.

Emanuel implemented reforms after taking office in 2011 and signed an executive order in 2013 that required the city to declare a surplus from TIF districts annually of at least 25 % of the available cash balance after accounting for current and future projects or commitments.

Emanuel froze the downtown TIFs last year.

Since 2011, a total of $853 million of surplus revenue has been distributed but the amount has varied significantly.

In 2011, a $276 million surplus was distributed to taxing bodies.

That dropped to $97 million in 2012, $43 million in 2013, $65 million in 2014, $84 million in 2015, $113 million in 2016, and now $175 million will be released in 2017.

The use of revenue that can't be relied upon annually, at least at the level being freed up in 2017, heightens worry over the district's prospects because of its precarious liquidity, reliance on credit lines to keep afloat, and the uncertainty over some funding streams in its budget.

The state committed $215 million to help fund teachers pensions' but only if Gov. Bruce Rauner and Democratic lawmakers can bridge their partisan divide that has blocked passage of a state budget and agree on state pension reforms. An additional $130 million of state aid is also uncertain beyond fiscal 2017.

CPS has further fueled concerns by failing to provide a price tag for the new teachers contract.

"For the district, not only does this deal provide teachers with a raise and secure their pensions, it also achieves meaningful savings that helps stabilize our finances," CPS spokeswoman Emily Bitner said in a statement that offered no dollar figures.

The union's House of Delegates will meet next week and decide whether to recommend a rank-an--file vote.

The district's $5.4 billion fiscal 2017 budget was based on figures from a January offer that was rejected by union delegates.

It counted on $30 million in savings this year assuming the district would phase out the $130 million annual expense of covering 7% of teachers' 9% pension contribution.

But the tentative agreement leaves intact that benefit for existing teachers. It phases the cost out for teachers hired after Jan. 1 but gives them a 7% base pay raise.

Cost-of-living raises proposed in January were scaled back and occur in only year three and year four.

Teachers also agreed to healthcare concessions.

An early retirement offer for some teachers adds to the unknown costs of the deal.

The contract would be retroactive to last year, when the previous pact expired.

"Chicago Public Schools are in big financial trouble, they did not budget anything for additional spending," said Laurence Msall, president of the Civic Federation, adding that the budget is "already over reliant on things coming from Springfield that haven't been fully settled."

Emanuel defended the deal and denied that it too generously favored the union.

"Getting the agreement that didn't adversely affect the classroom was the goal," he said, acknowledging that the district had to relent on the pension pickup.

Emanuel argued the present value of the contract is not that far off from the January offer after the raises were scaled back.

But his administration offered no figures to support that assessment.

The Bond Buyer

By Yvette Shields

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