
ABA Meeting: IRS Official Listens as Proposed Bond Arbitrage Regs Are Panned.

An official in the IRS Tax-Exempt Bonds Office listened quietly September 20 while tax attorneys criticized proposed regulations (REG-148659-07) on arbitrage restrictions on tax-exempt bonds that his agency and Treasury just published.

Todd Mitchell, group manager for compliance and program management (tax-exempt bonds), IRS Tax-Exempt and Government Entities Division, spoke briefly in San Francisco at the beginning of the meeting of the American Bar Association Section of Taxation's Tax-Exempt Financing Committee, providing an update on various projects his office is working on. But when the discussion turned to the proposed regs and private letter rulings, he took a seat in the audience, explaining that his superiors did not want him to take part in the conversation. He said nothing about the proposed regs except that comments are welcome.

Moderator Stefano Taverna of McCall, Parkhurst & Horton LLP called the proposed regs a "significant departure from what the understanding of the market is." He and other practitioners complained about undefined terms in the proposed regs.

Practitioners seemed particularly concerned about the proposed removal of the definition of "substantial amount" of bonds sold to the public as 10 percent and its replacement by a safe harbor. The preamble to the regs states that under the safe harbor, an issuer could treat as the issue price the first price at which a minimum of 25 percent of the bonds in an issue (with the same credit and payment terms) is sold to the public, "provided that all orders at this price received from the public during the offering period are filled (to the extent that the public orders at such price do not exceed the amount of bonds sold)."

Taverna and other practitioners appeared unhappy with that approach. "They say that basically they are not redefining what a substantial amount is for purposes of issue price; they're just providing a safe harbor under which issue price is defined," he said. "So now that leaves, obviously, the other question unanswered, which is: What is a substantial amount? It's been taken away from the regulations; nobody really knows what that means."

Taverna said he and other practitioners met with Treasury officials shortly after the proposed regs' September 16 publication and expressed their concerns about the guidance, including the 25 percent threshold, which he said is too high, and the difficulty in trying to ascertain when the mandatory 25 percent safe harbors hit. He said the officials were asked how they arrived at 25 percent.

"There are a lot of undefined terms in the regulations that I think need to be discussed," Taverna said. "I think the Treasury is aware of all that, and they requested comments on every single item that we brought up."

New TEB Director

Before the discussion of the proposed regs, Mitchell provided an update on other things TEB is working on. He said Rebecca Harrigal will be TEB's new director; an IRS spokesman later confirmed that she will start that position October 6. Mitchell said Harrigal has a lot of experience in exempt bonds, including service as the branch chief for the bonds office in the IRS Office of Chief Counsel.

Examinations

Mitchell said TEB will continue its market segment examinations, which cover different types of bond issues. The amount of time spent on a particular segment depends on the characteristics of the segment, the volume of bond issuance in the segment, and the significance of the segment's compliance issues, he explained.

Mitchell also said subject matter experts in each market segment will help examiners during the examination process, although he added that he thinks the first point of contact when an examination begins will continue to be the examiner. The idea behind using subject matter experts is to make the process more efficient, he said.