Bond Case Briefs

Municipal Finance Law Since 1971

Bond Issuers Encouraged to Request Refunding Guidance.

Issuers should let the IRS know if refunding guidance is needed on Build America Bonds and whether a lack of clarity in section 54AA has a negative effect on bond issuance, James Polfer, branch 5 chief, IRS Office of Associate Chief Counsel (Financial Institutions and Products), said March 27.

When it is unclear whether an issuer can currently refund, it would be helpful for the IRS to know, Polfer said at the National Association of Bond Lawyers' Tax and Securities Law Institute in Boston.

"We are aware that in many of these one-off bond programs that it is ambiguous whether or not you can currently refund, so generally requests for guidance about currently refunding a specific program helps us to know that the ambiguity has a real-world effect," said Polfer.

Some attendees indicated that guidance is needed. "We don't have guidance on what to do or how to refund a Build America Bond," said Brent L. Feller of Chapman and Cutler LLP.

Polfer noted that the IRS has issued guidance on current refunding for other types of bonds, most recently in Notice 2014-9, 2014-5 IRB 455, which was released in January and provides that issuers can currently refund a recovery zone facility bond on a tax-exempt basis.

A recovery zone facility bond was an American Recovery and Reinvestment Act of 2009 bond that had to be issued in 2009 or 2010 for recovery zone property in the recovery zone. The bonds were tax-exempt private activity bonds, and the notice provides criteria for currently refunding them. The notice expressly states that it does not apply to Build America Bonds; recovery zone economic development bonds were a taxable variety of those bonds.

The notice provides that if an issuer met the criteria to issue the bonds in 2009 and 2010 and if the current refunding bonds are not in an amount greater than the refunded bonds, a current refunding is available. The values of the refunding and refunded bonds are measured by looking at the issue price of the refunded bonds versus the outstanding principal amount of the refunded bonds. But if the refunded bonds have more than the de minimis original issue discount, the present value must be used to determine the maximum issue price of the current refunding issue. Under the guidance, the current refunding bonds must meet the criteria as well.

Feller noted that the IRS has issued similar notices before: In 2012 a notice was issued regarding Gulf Opportunity Zone Bonds (Notice 2012-3, 2012-3 IRB 289), and in 2003 there was a notice on refunding of New York Liberty Bonds (Notice 2003-40, 2003-2 C.B. 10).

Polfer said the recovery zone facility bond and Liberty Zone Bond notices came about because issuers requested the guidance. "It was pointed out to us that it was not only an ambiguous provision and in the abstract was unclear, but this ambiguity has real-world effects and was holding up actual issuances," he said.

Feller noted that in the president's fiscal 2015 budget proposal, there is a measure providing for current refunding for bonds that don't have a statutory framework for refunding.

"This seems to be a goal of the executive branch to provide guidance on current refunding of [American Recovery and Reinvestment Act] bonds," said Feller.

Polfer agreed with Feller's point and added, "It's good to point out that this has been discussed in a number of budget proposals now and reflects a uniform view in tax administration about the policy advantages for current refunding, both to save interest rates for the reissuer and also to lower the subsidy."

However, Polfer added, "The fact that this has been memorialized in budget proposals also reflects a view that a widespread, all-encompassing piece of administrative guidance stating that current refundings will be allowed absent a statutory provision that says otherwise is probably beyond the authority of Treasury."

Polfer said that because comprehensive current refunding guidance is probably beyond Treasury's power, the result has been piecemeal guidance. "The three notices we put out do reflect the view that it is an advantage to refund these, both from the administration standpoint and the issuer standpoint," he said. "And we also encourage that if there are any suggestions, comments, or views about the ability to currently refund other programs, we would definitely like to hear that."

by William R. Davis