Bond Case Briefs

Municipal Finance Law Since 1971

IRS Revamps Proposed Issue Price Definition For Municipal Bonds: Mintz Levin

Treasury and IRS today announced a decision to withdraw the much-criticized portion of the notice of proposed rulemaking published in the Federal Register on September 16, 2013 (the "2013 Proposed Regulations") related to the definition of issue price for tax-advantaged obligations and to propose a revised definition of issue price in its place. A determination by the IRS that the "issue price" has been erroneously calculated can have ramifications, including for the calculation of arbitrage yield, that could ultimately cause loss of tax-exempt status in the case of tax-exempt bonds and loss of federal subsidy in the case of Build America Bonds (BABs), hence the importance to the tax-exempt bond community of a clear and predictable definition.

The new proposed regulations (the "2015 Proposed Regulations") are scheduled to be published in the Federal Register on June 24, 2015 and can be found here. A 90-day comment period will be followed by a hearing on October 28, 2015.

The 2015 Proposed Regulations eliminate most of the troublesome features of the 2013 Proposed Regulations, including maintaining a 10% standard rather than the 2013 Proposed Regulations 25% standard for what constitutes a "substantial amount" of obligations sold to the public. However, the 2015 Proposed Regulations do not maintain the long-established "reasonable expectations" standard for establishing issue price. Instead, the 2015 Proposed Regulations look to actual facts as the general rule.

In recognition of the need in the tax-advantaged debt world for certainty as of the sale date (particularly in the case of advance refundings), the 2015 Proposed Regulations helpfully provide an alternative method in the event a substantial amount of bonds have not been sold to the public as of the sale date. The alternative method allows reliance on the initial offering price if certain conditions are satisfied.

Procedures for satisfying the conditions for use of this alternative method will have to be developed, and underwriters may conclude that compliance will be difficult. In particular, a preclusion of sales at prices above the initial offering price unless it can be demonstrated that the differential is based on market changes could be problematic.

The 2015 Proposed Regulations will be effective for obligations that are sold on or after 90 days after final regulations are published in the Federal Register. However, issuers may rely upon the 2015 Proposed Regulations with respect to obligations that are sold on or after June 24, 2015, the date the 2015 Proposed Regulations will be published in the Federal Register.

Last Updated: June 24 2015

Article by Maxwell D. Solet and Christie L. Martin

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.