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SIFMA: Alternative Issue Price Method 'Not Workable' As Proposed.

WASHINGTON - The Internal Revenue Service's alternative method for determining issue price is "not workable," though the overall issue price rules proposed in June are a "significant improvement" over those floated in 2013, the Securities Industry and Financial Markets Association told the IRS.

SIFMA made the comments and recommended how the proposed rules can be improved in a comment letter sent to the IRS on Thursday.

"We believe that the 2015 proposed regulations are a significant step forward and with certain clarifications and modifications, can establish a regulatory structure that will impede neither the efficient and aggressive marketing of new issues nor enforcement of the limitations mandated by Congress," SIFMA wrote in the letter, signed by managing director Michael Decker.

The general rule in the 2015 proposal is that the issue price of a maturity is the first price at which 10% is sold to the public. The public would be anyone other than the underwriters or a related party, with underwriters defined as the underwriting syndicate and anyone who enters into a contract or other arrangement to sell the bonds with any of the syndicate members.

If 10% of a maturity hasn't been sold by the sale date, an issuer could use the alternative method to determine issue price. Under this method, the issuer could use the initial offering price as the issue price for bonds sold to the public as of the sale date as long as certain conditions are met.

One condition is that underwriters fill all orders placed by the public and received by the underwriter on or before the sale date at the initial offering price. Another is that the lead or sole underwriter certifies that no underwriter will fill an order from the public after the sale date, and before the issue date, at a higher price than the initial offering price unless the market moves after the sale date.

The 2015 proposal is markedly better than rules proposed in 2013 and then withdrawn because it provides an alternative way to establish issue price when there are unsold maturities as of the sale date, SIFMA wrote. But because of ambiguities and constraints, the alternative method, as proposed, "does not provide a workable alternative for establishing issue price, principally due to the requirement that lead underwriters certify as to the actions of others," it added.

Lead underwriters can't certify about actions that haven't happened yet, and the lead underwriters can't certify that the syndicate members actually won't sell the bonds at a higher price during that period. Instead, SIFMA is recommending that under the alternative method, lead underwriters certify that all members of the syndicate have agreed in the agreement among underwriters or a related document to not sell bonds at a price higher than the initial offering price between the sale date and the closing date unless the market moves.

SIFMA also argued that it would be "exceedingly difficult" for the market change exception to be

implemented, since there's no effective way to demonstrate market movement. "Price indicators, such as the Thomson Reuters Municipal Market Data (MMD) AAA Curve, are not traded actively on a two-way basis and do not necessarily reflect actual sales, intraday market movement, or the localized nature of the tax-exempt market," the group wrote.

Decker told The Bond Buyer that there's no good way to clarify market movement, so SIFMA asked Treasury and the IRS to make clarifications about the period between the sale and the issue dates under the alternative method.

The group also wants Treasury and the IRS to clarify that underwriters are only restricted from selling bonds above the initial offering price during this period until 10% of the maturity is sold. SIFMA also wants the agencies to clarify that underwriters can fill orders at prices lower than the initial offering price during the period between the sale date and the closing date. Sales during this period should only establish the issue price under the general rule at a price lower than the initial offering price at the option of the issuer, SIFMA wrote.

SIFMA also had several suggestions for improvements to facilitate the application of the general rule.

One recommendation is for there to be a special rule for competitively bid and sealed bid offerings. It is common for bidders in these types of transactions to submit bids with little-to-no premarketing, and as a result, it is likely that many will not meet the 10% threshold on the sale date, SIFMA wrote.

For competitive and sealed bid transactions, SIFMA would like issuers to be able to treat the offering price specified in the winning bid as the issue price, without the restrictions on sales occurring between the sale date and the issue date that are set forth in the alternative method.

Other suggestions pertain to the definition of the public and the underwriter. SIFMA would like the agencies to include a provision similar to one in the 2013 proposal that would count as a sale to the public a sale to anyone, including an underwriter, who holds the bonds for investment and not for redistribution. SIFMA would also like Treasury and the IRS to clarify what is meant by an arrangement with an issuer to sell bonds, other than a contract, that would cause someone to be treated as an underwriter.

Additionally, SIFMA would like Treasury and the IRS to clarify the meaning of "the first price" at which 10% of the bonds are sold to the public.

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