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NABL Suggests a Dozen Tax Tweaks for the Muni Market.

NABL suggests a dozen tax tweaks for the muni market

WASHINGTON — The National Association of Bond Lawyers has a dozen suggestions for tax code tweaks that the Internal Revenue Service tax could make to benefit the municipal bond market, including clarification about the ability of local and state governments to engage in public-private partnerships.

None of the 12 requires congressional action and all are within the scope of the service's administrative powers, according to NABL.

Seven of the proposed changes relate toIRS Revenue Procedure2018-26, 2018-18 IRB 546 published last April regarding remedial actions to preserve the tax-advantaged status of bonds when non-qualified uses occur.

Five other NABL suggestions for are unrelated measures, including the ability of state and local governments to engage in public private partnerships.

All 12 were developed by an ad hoc committee of bond attorneys chaired by David Cholst, a partner at Chapman and Cutler in Chicago.

NABL President Dee Wisor sent the 35-pages of detailed suggestions and an accompanying two page executive summary to IRS Commissioner Charles Rettig and nine other top officials of the IRS earlier this month.

"The revenue procedure did a number of good things," Cholst said in an interview. "That's the way we started our comments. One big part was the ability to remediate for direct pay bonds without actually calling in bonds or defeasing bonds. People realize there ought to be a way to say the bond doesn't qualify anymore so I'm not going to ask for the subsidy payment."

Many Build America Bond issuances had what Cholst described as "onerous call provisions such as a make-whole calls at a premium."

"There is no reason from the U.S. government's policy point of view why the bond should be called so long as they can stop making the tax subsidy," he said.

The IRS revenue procedure also offered a cure for nonqualified uses that occur under long-term leases that's similar to the cure for a sale of property that was financed by tax-exempt bonds.

The NABL letter suggests that the cure should include shorter term leases as well.

"If it works for a 20-year lease it ought to work for a 10-year lease as well," Cholst said. "We don't see a policy reason for it to be longer term." NABL suggested there be no specific time limit.

The executive summary of the recommendations related to the 2018 IRS Revenue Procedure suggests that Treasury:

- Eliminate the double remediation that seems to be currently required by Rev. Proc. 2018-26 in the context of the remediation via removal of the tax advantage;
- Expand anticipatory remediation to apply to all permitted remedial actions;
- Make rules more consistent to avoid needless complexity;
- Limit required remediation to the amount of available funds created by the violation;
- Make the yield reduction mechanism of the Revenue Procedure more consistent with the arbitrage rules (and clearer at the same time);
- Modify the trigger for determining when nonqualified use occurs to be more consistent with Treas. Reg. §1.141-12; and
- Clarify the determination of the amount of nonqualified bonds resulting from a nonqualified use.

The other five recommendations propose that Treasury:

- Eliminate current expensive requirements, such as defeasance escrows, that do not further the purpose of the remediation provisions;,
- Expand the remedial action provisions to allow remediation of private payments;
- Add direct payment to the United States Treasury of taxpayer exposure as an alternative to redemption of nonqualified tax-exempt bonds;
- Expand anticipatory remedial action to cover all types of remediation otherwise available; and
- Provide more flexible remediation when a change in use preserves public access and some control over the financed facilities following the change in use.

The last recommendation is intended to make it easier for governments to engage in public private partnerships.

“If you do are doing something to improve public infrastructure that is going to be continued to be used by the public even though it is going to be privately used in some way….it shouldn’t require any additional actions,” Cholst said. “That’s really what’s going to allow the country to rebuild its roads and bridges and other public structures.”

Congress has the authority to enact legislation to also accomplish the same goal, but this administrative action by the IRS “would be more direct and easier to implement,” he said.

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