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Ridding Trust Indentures of Pesky Bearer Bond Language: Butler Snow

The euphemistically-named Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), that became law on September 3, 1982, required that tax-exempt obligations be in registered form (as well as denying certain tax benefits to non-tax-exempt obligations that are not in registered form). Prior to the enactment of TEFRA, virtually all municipal bonds were bonds payable to bearer, with payment coupons attached, and the bonds were printed by a handful of specialty printers, most notably Northern Banknote in Chicago. From the enactment of TEFRA until 1999, when The Depository Trust Company ("DTC") and National Securities Clearing Corporation combined and DTC began clearing municipal securities, tax-exempt bonds were typically printed by the same bond printers with a blank following "Registered Owner" into which would be typed the name of the owner of the bond. Beginning in 1999, tax-exempt bonds began being issued in book-entry form with the registered owner being Cede & Co., the nominee of DTC. Initially, bonds, which were now typically typewritten, had to be delivered physically to DTC prior to closing the bond issue. Within a few years, it became customary for bonds to delivered to the indenture trustee to be held in custody under the DTC Fast Automated Securities Transfer ("FAST") program.

Despite approaching 40 years since bearer bonds were eliminated and over 20 years since printed bonds were customary, 2021 trust indentures still often contain bearer-bond and printed bond concepts. A confession by the author – he is still attempting to weed out these concepts and definitions.

Temporary Bonds.

One still sees the following provision on occasion. Temporary bonds were infrequently issued in the days of printed bonds, but have unlikely been used since the early 2000s.

Pending preparation of definitive Bonds, or by agreement with the purchasers of all the Bonds, the Issuer may issue, and, upon its written direction, the Paying Agent shall authenticate, in lieu of definitive Bonds one or more temporary printed or typewritten Bonds in Authorized Denominations of substantially the tenor recited above.

Presentation of Bonds.

Book-entry bonds are not presented for payment – all payments of principal, premium, and interest are wired to DTC. Occasionally in private activity bond financings, subordinated bonds are issued as physical bonds rather than book-entry bonds and these provisions would be appropriate. In most instances, the requirements for presentment should be eliminated.

The principal of, and premium, if any, on the Bonds shall be payable upon presentation and surrender thereof at the principal office of the Trustee, or of its successor in trust.

Each notice of redemption shall specify the date fixed for redemption, the principal amount of Bonds or portions thereof ($5,000 or any integral multiple of $5,000 in excess thereof) to be redeemed, the

redemption price, the place or places of payment, that payment will be made upon presentation and surrender of the Bonds to be redeemed, that interest accrued to the date fixed for redemption will be paid as specified in said notice, and that on and after said date interest thereon will cease to accrue.

Use of the term Bondholder.

Bondholder is a bearer bond concept – once bonds were held by the owners of the bonds, but for nearly four decades that has not been the case. It is still common to see various provisions in indentures require consent or direction of Majority Bondholders, often defined as follows,

"Majority Bondholders" means, at the time of determination, the Owners of a majority in principal amount of Bonds then Outstanding.

"Bondholders" or "Bondowners" or "Owners" means the Persons in whose names any of the Bonds are registered on the books kept and maintained by the Paying Agent as bond registrar.

DTC is the Owner under these definitions and DTC is simply a nominee for its participants which hold bonds on behalf of the beneficial owners, the "true" owners of the bonds. Better defined terms are "Registered Owner" for DTC as the person in whose name the bonds are registered on the books kept by the bond registrar and "Beneficial Owner" for the true owners of the bonds who would give consent or direction.

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