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Public Finance Municipal Bond, Disclosures and Tax Compliance Recap: Frost Brown Todd

Frost Brown Todd's (FBT) Public Finance Practice Group hosted its annual Public Finance 360° Seminar on Feb. 20, 2025. Webinar topics included a 2025 municipal bond market update, financial disclosure considerations, and tax laws for bond issuances. This article provides a summary of each panel, along with key takeaways for borrowing entities, banks, and state and local government entities.

2025 Municipal Bond Market Update

This year's municipal bond market update featured insights from financial advisors, underwriters, and traditional issuers, including Brian Carter, managing director at PFM Financial Advisors; Robin Redford, senior managing director at Ramirez & Co.; and Joe Glass, executive director and general counsel at the Indianapolis Local Public Improvement Bond Bank. Cheryl Rosenberg, an FBT partner in Houston, Texas, moderated the panel.

The key word of the day was "volatility," as Cheryl Rosenberg explained that the 2025 municipal bond market may have to absorb shocks from both unexpected and expected sources—specifically (1) the risk of municipal bonds losing federal tax-exemption status through proposed legislation amending the Internal Revenue Code of 1986, as amended (the "Code"), (2) the risk of losing other federal subsidies given the uncertainty associated with the potential freezing of federal funding; and (3) the possibility of losing tax-exempt status applied retroactively to bonds issued before any 2025 legislative change in the Code.

The panelists also discussed significant issues likely to face most municipal bond market participants in 2025, including:

1. The impact of federal policy changes on issuers identified to be most at risk, such as public and private universities, hospitals and other healthcare entities, and affordable housing borrowers;
2. How a decrease in the volume cap available for private activity bonds and affordable housing bonds would impact bond transactions, potentially resulting in more taxable bonds;
3. How to advise issuers or clients on transactions that cannot move forward if certain federal funds or federal guarantees are withheld or canceled;
4. The direct and indirect consequences felt in the municipal bond market due to the uncertainty with federal funds and federal legislative proposals;
5. The uncharted territory associated with the inverted yield curve seen in municipal bond transactions this year;
6. The impact of the current presidential administration's policies regarding the Federal Reserve interest rate and imposition of tariffs on inflation and the municipal bond market; and
7. The "'BAB'-a-lanche" regarding the expected increase in Build America Bonds (BAB) refundings due to the increasing interest rate and extraordinary optional redemption provisions associated with these deals.

The panel closed with the important note by Robin Redford that, in theory, all of these topics may lead to disclosure of these risks to investors in offering documents in future public bond transactions.

Primary, Secondary and Selective Disclosure Considerations

The second Public Finance 360° panel presentation covered primary and secondary disclosure considerations, selective disclosure and the applicability of anti-fraud rules to statements on websites and social media, as well as requirements for private placement/direct purchase transactions. The presentation was led by FBT partners Amy Condaras, Donnie Warner, and Emmett Kelly.

Amy Condaras discussed initial and secondary disclosure considerations that require underwriters to take certain actions in connection with securities pursuant to Securities and Exchange Commission (SEC) Rule 15c2-12. In addition, she explained that initial disclosure obligations prohibit underwriters from buying and selling securities without an offering document and without having a reasonable belief of continuing disclosure obligations following the issuance of the bonds, which is typically ascertained through a Continuing Disclosure Undertaking Agreement (CDUA). She also explained that continuing disclosure, by contrast, is governed by Rule 15c2-12, which requires disclosure when one of the 16 enumerated event notices occurs, and by the parties' agreement under the CDUA.

Amy Condaras and Donnie Warner both discussed selective disclosure, which applies when an issuer gives material, non-public information to less than all of the public marketplace, such as disclosing information to certain investors at a road show or even posts on social media. Selective disclosure requires the issuer to disclose that material information to the entire public marketplace on the Electronic Municipal Market Access System (EMMA). Warner continued by describing the anti-fraud rules that apply to issuers with disclosure obligations, focusing on Rule 10b-5, which prohibits making an untrue statement of material fact (or omitting to state a material fact to make the statements not misleading) with the intent to defraud in connection with the purchase or sale of any security. Warner then explained how Rule 10b-5 is violated through discussing examples of SEC enforcement actions against issuers, municipal advisors, and underwriters. He also cautioned against issuer statements online, noting that the SEC has determined that information posted on websites (including social media) is reasonably expected to reach investors and is subject to the anti-fraud rules.

Next, Emmett Kelly discussed exceptions to Rule 15c2-12's initial and continuing disclosure obligations through the private placements/direct purchases exception. For this exception to apply, bonds must be purchased by qualified institutional buyers (QIBs) or accredited investors (typically banks), and the purchaser typically signs an investor letter that confirms that it meets the QIB or accredited investor status and intends to hold the bonds for the purchaser's own account. Even with the benefits of decreased costs of issuance and increased closing speed, market participants must still be mindful of their compliance obligations. To emphasize this, Kelly provided examples of SEC enforcement actions where an issuer and placement agent were liable for omitting material information in offering documents.

Overall, the disclosure considerations discussion reiterated the purpose behind Rule 15c2-12—assisting investors in determining the financial condition of the issuer and the risks associated with investing in the bonds—as a helpful guide to understand what, when, and how to disclose information.

2025 Tax Topics Impactful to Bond Issuances

FBT attorneys Steve Sparks, Patrick Woodside and Carrie Cecil presented on public finance tax topics most relevant to clients in 2025, including: (1) arbitrage and rebate considerations; (2) qualified tax-exempt obligations or “bank qualified” bonds; and (3) Reimbursement and Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) approvals.

Steve Sparks compared and contrasted arbitrage and rebate, explaining that both concepts focus on the difference between interest paid on tax-exempt bonds and the interest earned by investing bond proceeds. He also stated that arbitrage occurs when the yield on the investment of bond proceeds is greater than the yield on the tax-exempt bonds and that arbitrage rules scrutinize when someone is allowed to earn the excess from the investment. By contrast, rebate rules consider whether one can keep the profit or is required to pay it back to the IRS. Sparks clarified why it is important to consider these requirements for tax-exempt bonds now in light of the following: the U.S. Department of the Treasury interest rate was below 4% from October 2008 through October 2022, and it is currently above 4%. This increased interest rate means that investment yields are now higher than in the immediate past, potentially generating arbitrage and rebate compliance issues that have not been present since before October 2008.

Patrick Woodside discussed qualified tax-exempt obligations, also known as “bank qualified” or “BQ” bonds. BQ bonds are an incentive created by Congress allowing banks to deduct up to 80% of the interest allocated to tax-exempt bonds from their expenses, which can lower banks’ net income and, as such, lower amounts owed for income tax. Woodside also explained the eligibility requirements for bond transactions to meet the BQ status—such as having a qualified small issuer (and its exclusions) and an annual issue amount limitation of 10million dollars or less of tax-free debt.

Carrie Cecil reviewed reimbursement of bond proceeds and TEFRA approvals. Cecil explained that, when a client has expended funds and desires to be reimbursed through bond proceeds after issuance, it must issue a declaration of intent, usually in the form of a reimbursement resolution, within 60 days to reimburse capital expenditures. This does not include the cost of issuance or initial expenditures and must not exceed 20% of the aggregate capital expenditure. Additionally, Cecil elaborated that TEFRA approvals are required for tax-exempt private activity bonds and that the public must be notified of a public hearing that will be held where the issuer will provide information regarding an upcoming tax-exempt issuance and take questions from the public. Cecil pointed out that in the final regulations for TEFRA in 2019, the Treasury added flexibility to the TEFRA process by reducing the public notice timing requirement from 14 to seven days, adding the ability to post notice of the hearing to websites rather than physical newspapers, and adding flexibility to project descriptions.

by Ben Hadden, Alexandra Just, Glorify Batsirai Mandima

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