**TAX - WASHINGTON**

## Lee v. State

**Supreme Court of Washington, En Banc - May 26, 2016 - P.3d - 2016 WL 3042994**

Taxpayers brought action to challenge adopted ballot initiative which provided for an immediate reduction in the sales tax rate unless the legislature proposed a constitutional amendment.

The Superior Court entered order voiding the initiative, and State appealed.

The Supreme Court of Washington held that:

- Action presented a justiciable controversy under the Uniform Declaratory Judgments Act (UDJA);
- Action was justiciable under the public interest exception;
- Title of adopted ballot initiative violated single subject rule and thus was unconstitutional; and
- Adopted ballot initiative altered the process for amending the state constitution and thus was unconstitutional.

Taxpayers' action for declaratory relief that adopted voter initiative, which provided for an immediate reduction in the sales tax rate unless the legislature proposed a constitutional amendment, was unconstitutional presented issues of substantial public interest which required prompt resolution, and thus was justiciable under the public interest exception. If constitutional, the initiative would result in either an immediate and yearly $1.4 billion reduction to the State's operating budget or a change to the State's constitution by essentially only a majority of voters.

Title of adopted ballot initiative which provided for decrease in sales tax rate unless the legislature amended constitution to requiring supermajority vote or voter approval to raise all taxes and legislative approval to increase any fees violated single subject rule and thus was unconstitutional, as sales tax reduction was unrelated to both a constitutional amendment, which would impact future legislatures, and to the way that future taxes and fees would be approved. While both subjects related to general title of fiscal restraint or taxes, they were not germane to each other, legislative action was not contingent on sales tax reduction, but rather was a means to avoid it, and there was no nexus between constitutional amendment and current sales tax rate.

Adopted ballot initiative which provided for decrease in sales tax rate unless the legislature amended constitution to require supermajority vote or voter approval to raise all taxes and legislative approval to increase any fees altered the process for amending the state constitution and thus was unconstitutional. while legislature would still have to go through the processes outlined in the constitution, the "do this or else" structure of the initiative established a new process for amending the constitution by simple majority vote.

## IRS PLR: Management Contract Will Not Result in Private Business Use.

The IRS ruled that a management contract between a bond issuer — which issued bonds for permanent financing of a hotel — and the manager of the hotel for payment of the manager of annual fees composed of both base fees and incentive fees based on gross revenue will not result in private business use of the hotel.

Read the Private Letter Ruling.

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## Winnetka Man Gets New Chance to Press Case Village Stormwater Fee is Unconstitutional Tax.

A Winnetka resident, whose lawsuit challenged whether the stormwater utility fee slapped on property owners by the north suburban village is actually a tax, has clearance to sail on, after a state appeals panel said the legal arguments in the challenge hold enough water to survive the village's attempt to sink it via motion to dismiss.

The Illinois First District Appellate Court on May 31 issued an unpublished order overturning the decision of Cook County Circuit Court Judge Kathleen G. Kennedy, who had dismissed the complaint brought against the village by Mark Green. That declaratory judgment action, filed Feb. 13, 2015, alleged Winnetka's stormwater fee actually is a tax. The lawsuit argued the fee violated the uniformity in taxation clause of the Illinois Constitution and Illinois Municipal Code.

Justice Sheldon A. Harris wrote the order, with Justice Joy V. Cunningham concurring. Justice Maureen E. Connors dissented. The order was issued under Supreme Court Rule 23, which restricts its use as precedent, except under very limited circumstances permitted by the Supreme Court rule.

Winnetka's motion to dismiss relied heavily on the 2005 Illinois Third District Appellate Court ruling in Church of Peace v. City of Rock Island, in which the court upheld Rock Island's stormwater fee. Kennedy granted the motion to dismiss on Aug. 19; Green appealed Aug. 28.

Winnetka responded to severe flooding in 2008 by seeking infrastructure improvements, then scuttled those plans after a 100-year flood in 2011 instilled a need for a more significant solution. The result was a stormwater master plan that, among other components, "called for the construction of a 7,900 foot long storm sewer running underneath Willow Road." The tunnel was to cost $34.5 million and would provide flood relief to half the village. Another $8 million in improvements would affect three other drainage areas.

The village, however, opted not to construct the Willow Road tunnel in mid-2015, after projected costs soared to more than $80 million, according to published reports.

A year earlier, however, the village had issued 30-year municipal bonds worth $61.5 million to pay for the stormwater management work. And to cover the debt service on those bonds, the village enacted the stormwater utility fee in March 2014.

In examining the ordinance, Harris noted the village "acknowledges that all real property in the village contributes to runoff and either uses or benefits from the maintenance of the stormwater system." However, the fee is based on the amount of impervious surfaces in the village, such as driveways, sidewalks and roofs. As such, "only those with developed property are subject to the" stormwater fee.

Green alleged the way the village structured the fee scale to cover the debt issuance "bears no relation to a property owner's actual use of the existing stormwater system." He further alleged, "and the Village concedes, no attempt is made to measure the actual stormwater discharged into the system by any property owner," the court documents said.

Harris and Cunnigham agreed with Green's assertion that his complaint states a valid cause of action. Specifically, Green argued the fee is incurred regardless of "whether a property owner actually discharges storm runoff into the system," and further that the fee does not provide a service to property owners, but rather to retire bonds to fund building the tunnel, "which the village has recently decided not to construct."

The order also notes the village's ordinance contradicts its claims the fee is compensatory, since the ordinance directly references the bond debt. The reliance on Church of Peace was misplaced, Harris noted, because that case was decided on summary judgment, whereas Green's complaint remains at litigation.

Ultimately, Harris wrote the court does not have an opinion on the ultimate question of whether the stormwater fee is indeed a tax, "only that the circuit court erred in dismissing this matter at the pleading stage." As such, Kennedy's ruling is reversed and the case remanded for further proceedings.

In her dissent, Connors contended Winnetka's "ordinance specifically contradicts Green's allegations" and said the Church of Peace decision "clearly states that stormwater service charges are a fee and not a tax."

**The Cook County Record**

By Scott Holland

Jun. 2, 2016, 12:52pm

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## New Reporting Rules Subject OID on Tax-Exempt Bonds to Information Reporting.

Generally, a person that pays interest on a debt to another person must report the amount of interest, usually on IRS Form 1099-INT. In the past, payments of tax-exempt interest did not have to be reported in this way; however, beginning in 2006, the statutory exclusion from information reporting for interest on tax-exempt obligations was eliminated. Since that time, interest on tax-exempt obligations has been reported in the same manner as taxable interest. Mercifully, for information reporting purposes, the amount of tax-exempt interest that must be reported has been limited to qualified stated interest (a fancy term which typically refers to the coupon on a debt instrument). Bond trustees and other payors of tax-exempt interest found refuge in a line item in the instructions to the Form 1099-INT that says "[n]o information reporting for tax-exempt OID under section 6049 [of the Internal Revenue Code] will be required until such time as the IRS and Treasury provide future guidance."

If you read the title of this post and your internet server has frozen so that you are unable to navigate away from this page, you have probably guessed that this "future guidance" has now arrived. The Treasury Department recently finalized Treas. Reg. § 1.6049-10 in TD 9750 (the "Final Regulations"). The Final Regulations, among other things, will now require bond trustees and other

payors to report original issue discount on tax-exempt obligations.[1] This post will discuss the motivations behind the change as well as the ramifications that the Final Regulations will likely have on the tax-exempt bond community.

**Why Would Congress Require the Reporting of Tax-Exempt Interest to the IRS?**

You likely know that when you receive a tax information return (e.g., a mortgage statement, Form 1099-INT, etc.) the person that sent it to you also sends the exact same information to the IRS a few weeks later.[2] This "dual reporting" enables the IRS to monitor the taxpayer-recipient to ensure that the taxpayer properly reports on its income tax return (Forms 1040, 1120, 1065 etc.) all of the income that was listed on the information return. For obvious reasons, the IRS has been less concerned with ensuring that tax-exempt interest (including OID) is properly reported on an information return, because tax avoidance is less of a concern when talking about interest that is tax-exempt.

Congress has imposed information reporting requirements on tax-exempt interest (including OID) for two reasons. First, in 2008, Congress enacted the Energy Improvement and Extension Act of 2008 (the "2008 Act"). Tucked away in Section 403 of the 2008 Act is a requirement that brokers use an information return to report "gross proceeds" from the sale of a "covered security."[3] Now, as you might expect when reading a blog dedicated to all things 103, tax-exempt bonds are considered "covered securities" provided they are acquired by the bondholder on or after January 1, 2014.[4] To comply adequately with the 2008 Act, brokers need to report the "adjusted basis" of tax-exempt obligations (to ensure that taxpayers are recognizing the correct amount of gain or loss upon the disposition of tax-exempt obligations[5]), which is calculated by taking into consideration original issue discount and original issue premium.[6]

Second, the information is required to enable the IRS to verify that bondholders are reporting the correct amount of tax-exempt interest (including OID) for alternative minimum tax and other purposes. Interest (including OID) on certain tax-exempt obligations, such as exempt facility bonds, is directly subject to the alternative minimum tax. In addition, even if not directly subject to the alternative minimum tax (e.g., interest on governmental use obligations, qualified 501(c)(3) bonds, etc.), tax-exempt interest (including OID) is frequently included in adjusted current earnings for corporations, which indirectly subjects the interest (including OID) to the alternative minimum tax.

**Final Regulations**

Pursuant to the Final Regulations, for "tax-exempt obligations" that are acquired on or after January 1, 2017,[7] a "payor" is required to report the daily portions of accrued OID to the holder as if the payor actually paid those daily portions to the holder in the calendar year.[8] "Tax-exempt obligations" include any obligations the interest on which is not includible in gross income under Section 103 of the Code or under any other provision of the law. OID is determined without regard to the de minimis rule in Section 1273(a)(3) of the Code.

"Payor" is broadly defined in the Final Regulations to include (i) every person who makes a payment of the type and of the amount subject to reporting to any other person during a calendar year, or (ii) every person who collects on behalf of another person payments subject to reporting or who otherwise acts as a "middleman" with respect to such payment.[9] A "middleman" includes any person, including a financial institution and a broker, who makes payment of interest for, or collects interest on behalf of, another person, or otherwise acts in a capacity as intermediary between a payor and a payee.[10] It is unclear to what extent, if any, that municipal issuers are considered payors; however, trustees and broker-dealers are almost certainly included.

**Conclusion**

Prior to 2006, interest as well as OID and original issue premium were exempt from all information reporting requirements. However, the desire to narrow the "Tax Gap" has led to the recent expansion of the information reporting requirements.[11] Although the Final Regulations do not expand on the definition of "payor" beyond the scope of persons previously obligated to report tax-exempt interest, the Final Regulations certainly expand the breadth of reportable payments subject to information reporting. In addition, this expansion signals a fundamental shift in certain payors' annual reporting obligations to include amounts not actually paid during the calendar year.

**Footnotes**

[1] Reporting bond premium (Box 13 of the Form 1099-INT) was introduced a few years ago in 2014. In addition, "Specified Private Activity Bond Interest" is reported in Box 9 of the Form 1099-INT so payments on a single tax-exempt obligation are often reported in multiple different boxes on the Form 1099-INT.

[2] The obligation to report various types of "reportable payments" could fall on any number of individuals or entities in addition to financial institutions.

[3] The form to be used is Form 1099-B, which was recently voted the "worst tax form" according to an informal survey of tax preparers.

[4] The January 1, 2014 implementation date was in response to practitioners concerns that the information needed to populate an information return with the details of tax-exempt obligations was not available on the Electronic Municipal Market Access if the obligation was outstanding as of November 1, 2012.

[5] Disclosures frequently say that original issue discount and original issue premium will have no impact on the bondholder if the bondholder holds the instrument to maturity. However, if the bondholder disposes of the bond prior to its maturity, there may be tax consequences that arise from the fact that the bond had original issue premium or discount.

[6] See Treas. Reg. 1.6045-1 (Definition of "adjusted basis" for a debt instrument).

[7] Although OID must be reported to the bondholder for obligations acquired on or after January 1, 2017, brokers have been required to monitor and compute OID on tax-exempt obligations since 2013 when the final basis reporting regulations were promulgated.

[8] See Treas. Reg. 1.6049-10(a) and Treas. Reg. 1.1272-1(2)(b) (for rules governing the accrual of OID and the determination of daily portions of OID).

[9] See Treas. Reg. 1.6049-4(a)(2).

[10] See Treas. Reg. 1.6049-4(f)(4).

[11] The most recent estimated tax gap for calendar years 2008-2010 is $406 billion each year with a net compliance rate of approximately 83.7 percent.

**Squire Patton Boggs**

**The Public Finance Tax Blog**

**by Joel Swearingen**

**June 2, 2016**

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## Local Governments Cry Foul Over Feds' Move to Limit Tax-Free Municipal Bonds.

Public officials in Minnesota and across the nation are scrambling to head off a proposal they say would deliver a devastating blow to their ability to fund infrastructure and economic development projects.

Affordable housing in Albertville, a community gym in Edina, a fire station in Pelican Rapids: These and other projects could become tougher to build and pay for if the IRS succeeds in clamping down on the use of tax-exempt municipal bonds.

“It affects everything in the country that has bonding,” said Lori Economy-Scholler, Bloomington’s chief financial officer. “It could affect every piece of public financing as it pertains to port authorities and economic development agencies.”

The IRS, she added, “is really overstepping their bounds.”

IRS officials did not respond to requests for comment on the proposal. The open period for comments on the proposed rules ended May 23, and a hearing is scheduled June 6 in Washington.

The agency is proposing strict new limits on municipal bonding — so strict, critics say, that they would virtually end the use of tax-exempt bonds by port authorities, housing authorities and other economic development agencies.

Some cities might no longer be able to issue tax-exempt bonds for schools, hospitals and other infrastructure.

The regulations would rewrite the rules for bond issuers, including a new requirement that elected officials must exercise significant control over the agency issuing bonds. That would restrict or eliminate the ability of appointed or semi-independent economic development authorities to issue bonds.

Another change would allow the use of tax-exempt bonds only if the project provides no more than “an incidental benefit” to a private entity. That could rule out using tax-exempt bonds to finance items such as parking decks at the Mall of America.

Schane Rudlang, administrator of the Bloomington Port Authority, said the IRS is concerned about the misuse of tax-exempt bonds in some areas of the country. But the severe limits the agency is proposing, he said, “is like using a sledgehammer to kill a mosquito.”

### Drawing the line

Last year alone, economic development authorities in Minnesota issued more than $275 million worth of bonds, according to Springsted Inc., a financial adviser to municipal governments. That figure doesn’t include bonds issued by cities themselves.

Nationally, more than $3.7 trillion in municipal bonds of all types are in force, according to the Municipal Securities Rulemaking Board.

Tax-exempt bonds allow cities and development agencies to borrow money for development projects at below-market interest rates. If taxes were assessed on the bonds, the interest rates would go up a percentage point or more. That doesn't sound like a lot, but it could amount to extra payments totaling hundreds of thousands or even millions of dollars over the life of a bond.

To make up the difference, cities would have to either assess local taxpayers more or scale back their projects.

That might not be a bad thing, said Jay Kiedrowski, a senior fellow at the Humphrey School of Public Affairs and state commissioner of finance under Gov. Rudy Perpich from 1985 to 1987.

"There have been many critics of states and cities who say that tax-exempt debt has been overused as an economic development tool," Kiedrowski said. "Tax-exempt debt makes sense for streets, water projects, sewers, parks, schools. But when tax-exempt debt is used for economic development, it's always been fuzzy as to where that line should be drawn to prevent bad projects vs. good projects."

Minnesota cities overall have a track record of using bonding for worthwhile projects, local officials said.

"Our housing and port authorities have existed for a long time and have done a lot of good work," said Tom Grundhoefer, general counsel for the League of Minnesota Cities. "And that's why we're concerned about these proposals."

Rudlang said the IRS proposal would endanger public infrastructure improvements planned over the next few years in Bloomington's South Loop district, which the city planned to finance with tax-exempt bonds of up to $100 million. The South Loop includes the Mall of America.

State Auditor Rebecca Otto called tax-exempt bonding "an extraordinary tool for local governments. We have 853 cities in Minnesota, and this tool is very important to make sure we can maintain and replace our infrastructure."

**The Star Tribune**

By John Reinan

May 31, 2016 — 8:07PM

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## Nonprofits' Tax-Exemption Battle Moves to the Courts.

*Legislative attempts to tax nonprofits have fallen short. But recent legal challenges could present a financial problem for nonprofits and a financial boost for governments.*

Faced with tight budgets and in search of new sources of revenue, municipalities increasingly have been eyeing the tax-exempt status of nonprofits. Legislators say that universities' record-high endowments and the corporate-like structure of nonprofit hospitals is making it harder and harder to swallow giving these institutions a tax break.

While many of the legislative attempts to start taxing nonprofits have failed, recent legal challenges have proved more promising. If the trend continues, it could present a financial problem for nonprofits and a financial boost for governments. So far, the focus of both legislation and legal action has been on hospitals and higher education institutions, but some worry they could spill over to smaller nonprofits and charities.

The dollars at stake are significant. According to a 2009 study by the Congressional Research Service, property tax exemption is worth $17 to $32 billion nationwide.

Also driving these challenges is the issue of tax fairness. Many nonprofits fork over an annual PILOT, or Payment In Lieu of Taxes, to help offset the governments' loss of revenue. But residents in the vicinity of hospitals or universities often feel that they still end up paying higher taxes to compensate for the revenue lost to nonprofits' exemptions.

But when lawmakers try to address these issues, their efforts often fall short. For instance, a bill in Connecticut proposed taxing earnings on university endowments valued above $10 billion. The law would have only applied to Yale University, but it died last month. Last year, Maine Gov. Paul LePage tried to strip nonprofits of their exemption as part of his overall tax reform package. It was rejected.

When towns and residents resort to lawsuits, however, they appear to be finding more success.

In New Jersey, the town of Morristown sued Memorial Hospital in a case that opened the door for other challenges. After the hospital agreed to pay more than $15 million in back taxes as well as future property taxes, more than a dozen New Jersey hospitals became embroiled in similar litigation.

Even more worrisome for nonprofits is a case in Princeton, N.J. Residents argue that the university there acts like a for-profit institution and that their property taxes are higher because Princeton doesn't pay any. In an unusual ruling, the judge determined that Princeton University must prove its tax-exempt status again. The case is expected to go to trial in the fall.

The Princeton case differs from previous legal challenges in one important way: It was brought by residents. The fee for filing a property tax challenge is typically very low — less than $100. If the residents of Princeton win, it could lead to copycat challenges aimed at nonprofits that have a controversial mission, said Linda Czipo, executive director of the New Jersey Center for Nonprofits. She warns that places like abortion clinics or alcohol and drug rehab centers would be particularly vulnerable.

David L. Thompson, vice president of public policy for the National Council of Nonprofits, argues the real issue is one of public finance and not tax fairness. Many governments' long-term liabilities — health care and pensions — are growing faster than their annual revenue streams. Because of that, said Thompson, it's tempting for politicians and policymakers in times of tight revenue to view nonprofits — however inaccurately — as freeloaders.

For instance, last year he testified before the Pennsylvania General Assembly, which has dealt with chronic budget deficits in recent years. Thompson spoke after the state auditor who testified that taxing the state's tax-exempt properties would net about $1.5 billion in new revenue — but, Thompson immediately clarified, government buildings account for most of that figure.

"They always talk about that dollar figure then say that's why we need to tax nonprofits," said Thompson. "But it's a bait-and-switch argument. And they don't even mention the tax breaks that

developers get in incentives. Nonprofits are typically only somewhere between 4 and 8 percent."

GOVERNING.COM

BY LIZ FARMER | JUNE 2, 2016

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## Political Tax Avoidance Chokes Off Infrastructure Investment.

Every state or municipal government will eventually face the question of whether to raise taxes. Since the era of George H.W. Bush, officials answer increasingly "No."

"It's politically hard to make a case for tax increases, and particularly at a time when people have less money in their pockets," said Lucy Dadayan, a senior policy analyst with the Nelson A. Rockefeller Institute of Government.

The nation's reluctance to talk taxes has resulted in a drop in borrowing for needed infrastructure as well as missed opportunities to take advantage of historically low interest rates to finance long-term projects.

The political response to rebuilding the Washington D.C. Metro, the nation's second-largest subway system, has been, don't expect a bailout.

States increased taxes by $33 billion in response to the Great Recession, 38 percent less than the $54 billion raised after the 1990 recession, according to a 2015 study by the Rockefeller institute.

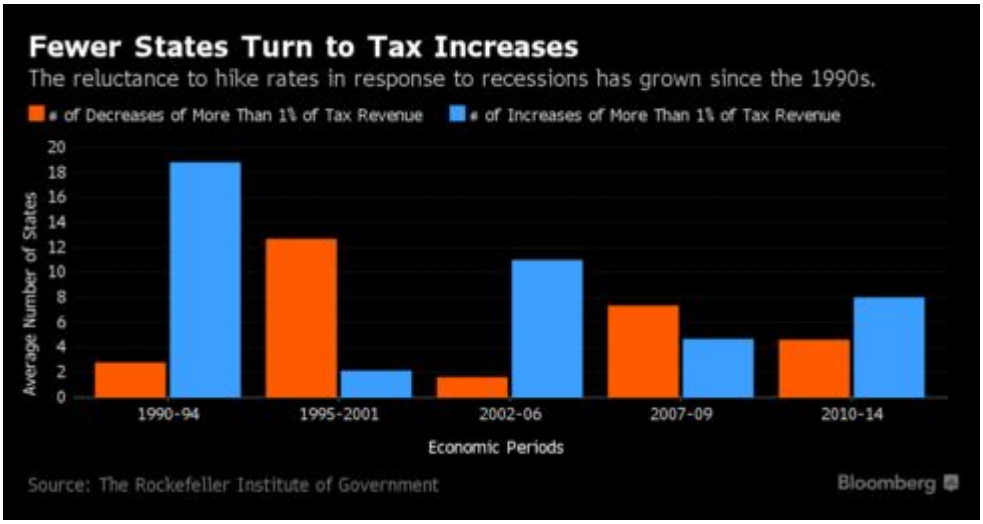
Meanwhile, some states still haven't recovered completely from the 2008- 2009 financial crisis. At some point, something will have to give. Sooner or later they'll have to raise taxes.

"It's inevitable," Dadayan said. "Otherwise, the fiscal systems are not going to be sustainable over a long period of time."

George H.W. Bush's famous 1988 mantra, "Read my lips: No new taxes," has stuck with state and local government officials to this day, said Emily Evans, a former Nashville councilwoman who is now a managing director at investment research firm Hedgeye Risk Management.

"We are not past that point at all," said Evans. It varies, "depending where you are. If you're in a really deep red state like Tennessee, we're really not past it. If you're in the purple and blue states, there's a whole lot more open mindedness about it."

While Bush's promise had an impact, so did what happened afterwards, she said. The president eventually raised taxes and didn't win a second term. "That stands in the minds of most elected officials as a serious problem," Evans said. "If I raise taxes, I won't get reelected. That's the equation. That still is a big part of the thinking that goes into those decisions to vote 'yes' or 'no' on new tax projects."




One example of a changing approach to tax increases can be seen in the state sales tax, said William Fox, a business professor at the University of Tennessee at Knoxville, who studies the subject.

During the 1980s recession, about 30 states raised their rates, he said. The number of states that enacted increases fell to about 20 during the 1990s and continued to decline during the 2000s to the mid-teens, Fox said.
"The pressure is ever-stronger on keeping taxes low," he said. "If you went back into the 1980s, when money got tight in state governments, particularly during recessions, what you would get is a wave of tax-rate increases," he said. "While that is true today, the propensity for that to take place has fallen over time."

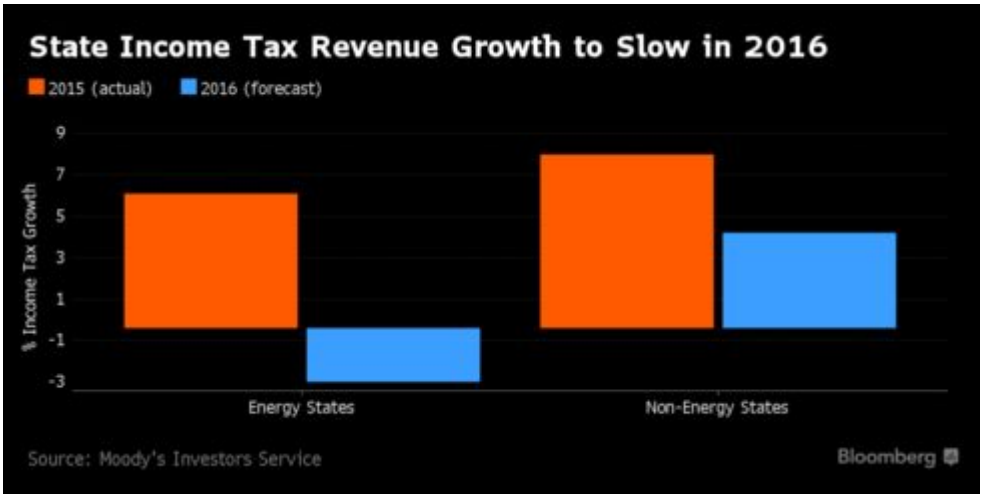
The impact of politicians' reluctance to raise taxes has been felt in the municipal market. New-money municipal issuance has averaged $150 billion annually from 2011 to 2015, which is a marked decline from the previous 10 years, according to an April report by Citigroup Inc.

New-money issuance averaged $242 billion annually during 2001 to 2010, Citigroup found. "In other words, state and local debt as a source of funding for needed projects has been running, on an inflation adjusted basis, at least 45 percent lower over the past five years than it was over the prior 10," Citigroup said in the report.

"State and local governments aren't able to keep up with new project funding needs and urgently needed major maintenance and replacements, and the extent to which they are falling behind continues to grow," Citigroup said.

This reduced level of borrowing is "astonishing" given the state of the country's infrastructure, said Citigroup strategist George Friedlander. "The Republican tax pledge still exists — 'we will not raise taxes in any way that is not offset by reductions in spending somewhere else,"' he said. "That's a big issue. The whole concept of cost-benefit when it comes to infrastructure has vanished. It is not part of the discussion right now.

"Is there a benefit in raising spending on infrastructure which, in terms of keeping us competitive with the rest of the world, will pay an economic benefit down the road? Well, probably, yeah, but nobody cares."




Additionally, politicians' concerns about raising taxes are preventing them from taking advantage of historic low interest rates, said Michael Mazerov, a senior fellow with the Center on Budget and Policy Priorities. "In most cases, those services and the infrastructure is going to be paid through bonding," he said. "Interest rates are so low now that this is a time when states should be investing in infrastructure."

Governments only have a few choices when budgets get tight — taxes are one of the only ways they can generate revenue. Another option is to refinance debt to delay final repayment. This can be a "trick" that state and local governments resort to instead of raising taxes, Evans said.

Evans saw this happen first hand during her time on the Metropolitan Council of the Metropolitan Government of Nashville and Davidson County in 2010. The council approved the issuance of $600.2 million in general obligation bonds, which included retiring commercial paper and refinancing debt. Evans said the refinancing resulted in about $48 million in additional debt service payments because it extended the life of the debt.

The council did so after the mayor at the time promised residents he would not raise property taxes, she said.

"Instead of doing one, cutting expenses, or two, raising revenue, [the mayor] opts for a refinancing of outstanding debt, which cost the taxpayers," she said. "There wasn't any other compelling reason to refinance that debt."

**Two Choices**

Richard Riebeling, the chief operating officer for Nashville's mayor's office, disputes the $48 million figure, and says the refinancing was one of the smartest things the city did from a financial standpoint during that time.

"It was real simple," he said. "We were in the middle of a recession. The city had two choices that were very poor. One was raise taxes on people during the middle of a recession, which was not a very good idea.

Or second, you significantly reduce services. And so neither of those were strong options, so the third was a slight restructuring of our debt to move back some principal a few years."

Nashville and Davidson County enacted a 53-cent property tax increase per $100 of assessed value

for fiscal 2012-13. Riebeling said economic conditions supported a property tax increase.

“There was a need to continue to fund schools and the other needs of the city,” he said. “We did a small property tax [increase] that year because we thought it was the right thing to do. Could we have re-done the debt again? Probably. Would it have been the right thing to do? No, it would have been the wrong thing to do. This restructuring of the debt is not something that you do very often at all.”

One of the first major modern instances of voters voicing their displeasure with tax policies was in 1978, when California voters enacted Proposition 13. The referendum enacted a limit on property tax rates. It was one of the first laws that put a hard limit on municipalities’ ability to raise revenue, Fox said.

To be sure, voters can also approve tax increases, like Californians did in 2012 with Proposition 30, which temporarily increased sales and income taxes.

Voters may be willing to raise taxes for specific issues such as education, said Vladimir Kogan, a political science professor at Ohio State University. “It’s not like voters are clamoring for this,” he said. “It’s a matter of selling it.”

**Bloomberg Business**

by Amanda Albright

June 3, 2016 — 5:42 AM PDT

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## NASACT Responds to IRS Proposal on Amending the Definition of Political Subdivision for Municipal Bond Purposes.

Read the comment letter.

**National Association of State Auditors, Comptrollers and Treasurers**

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## Using the Tax Structure for State Economic Development.

**Abstract**

Every state uses a different combination of taxes to fund government services. Some rely more heavily on income taxes, and others see the most revenue from consumption taxes, such as general sales taxes or excise taxes on select goods. The effect of a state’s tax structure on economic development includes not just the mix of taxes but specific features of those taxes as well. It also depends on the overall tax burden from the combination of different taxes levied. This brief is part of the State and Local Finance Initiative’s series on state economic development strategies.

Download the brief.

**The Urban Institute**

by Norton Francis

May 31, 2016

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## Airbnb Talking to 100-Plus Cities in Bid to Address Tax Concerns.

Airbnb Inc. is in talks with more than 100 cities about ways to collect taxes, following tactics that have helped it appease regulators in cities like Amsterdam and Paris.

“We’re actively trying to engage with cities — we’ve put out a pledge indicating our willingness to work with cities on things like taxes and transparency,” the San Francisco-based company’s Chief Technology Officer, Nathan Blecharczyk, said in Amsterdam at a startup conference. “New policies that have been passed have been overall favorable to home sharing.”

Airbnb has agreements to automatically collect tax on behalf of 30 cities upon client payment and the municipality gets a lump sum check at the end of the month, Blecharczyk said. Last year, 5.5 million euros ($6.1 million) were collected in Amsterdam for example, he said. There’s a similar deal in Paris, one of Airbnb’s biggest markets.

Other cities are proving tougher to crack. Legal woes in Berlin are leading the city to start restricting Airbnb rentals, AFP reported. That’s the delayed result of unfavorable policy that was put in place two years ago but wasn’t enforced, “a ticking issue that has gone unaddressed,” Blecharczyk said.

“Home sharing is thriving in Berlin,” he said. “I’m sure it’ll get solved over time, there are ups and downs with these issues.”

**Travelers, landlords**

The European piece of the puzzle is key for Airbnb. The region in 2015 generated about $3 billion in revenue for its hosts, and accounts for more than half of the site’s travelers and about half its landlords, Blecharczyk said.

But issues with taxation — namely whether clients declare income from renting property on an online platform and pay tax on it — are part of Airbnb’s challenges, not only in Europe, but also in the U.S.

While it can collect tourist tax on behalf of municipalities, Airbnb doesn’t plan on declaring how much its hosts make to governments because that would violate customer privacy, Blecharczyk said.

To convince local governments to get on board with Airbnb, Blecharczyk said, the company is highlighting the application’s positive influence on cities. It has encouraged tourists to spend more in less-visited residential areas, as well as use less energy and water during their stay, he said.

**Bloomberg Business**

by Marie Mawad

May 24, 2016 — 9:36 AM PDT

## Study Could Boost Fizzled Efforts to Tax Soda.

Despite many failed attempts, only one city in America taxes sugary drinks. The results of a new study might change that.

In Philadelphia, former Mayor Michael Nutter tried and failed several times to convince the City Council to tax soda and other sugary drinks. He wanted to use the money to help fund the financially struggling school district. The new mayor, Jim Kenney, is still pushing for a soda tax, and a recent study may persuade people in Philadelphia — and around the nation — to finally pass one.

According to a Harvard study released last month, if Philadelphia enacts a tax on soda, the city would prevent 36,000 cases of diabetes and save almost $200 million in health-care costs.

“I knew the findings would be big, but this was more than I expected,” said Philadelphia Health Commissioner Thomas Farley, who helped create New York City’s infamous-but-failed cap on the size of sodas. “It’s especially gratifying since the study came out so close to the City Council debate,” which will take place in the coming weeks.

If the City Council warms to the idea this year, Philadelphia would only be the second U.S. municipality to tax the sale of soda (Berkley, Calif., was the first). But the City of Brotherly Love isn’t the only place considering soda taxes this year. After statewide legislation in California died, two of Berkeley’s neighboring cities — Oakland and San Francisco — have put measures to tax soda on the ballot for this fall. A similar measure is also expected to appear on Boulder, Colo.’s ballot in November.

So far, though, these taxes haven’t been popular with voters. They’ve been rejected 43 times over the past several years at the state and local levels, according to Lauren Kane, senior director of communication for the American Beverage Association.

“These taxes are regressive, they fall hardest on people with the lowest [income],” said Kane. “It would also impact small businesses across the map, from delivery trucks to movie theaters to mom-and-pop corner stores.”

Mayor Kenney, however, argues that the soda tax would benefit the city by bringing in $400 million over the next few years — which he wants to use to fund universal pre-K. He has so far focused mostly on the economic windfall of the tax. But the study concludes that such a tax would have a positive impact on residents’ health as well.

“For an 18-year-old, one sugary drink a day adds up to 20 extra pounds a year,” said Steve Gortmaker, the study’s lead researcher. “When people with disposable incomes are forced to pay more for something, they’ll slow down with their consumption.”

Soda taxes have proven divisive, even among progressives. Hillary Clinton last month came out in support of the Philadelphia measure, while her Democratic presidential opponent Bernie Sanders called soda taxes regressive because they would impact low-income people the most.

In Philadelphia, Kenney’s proposal would add 3 cents per ounce to the cost of sugary drinks, which would increase the cost of a 12 oz. bottle of soda by 36 cents.

Farley is hopeful that the study will drum up support for councilmembers who might have been on the fence. But, he said, “we just don’t know what will happen at this point.”

GOVERNING.COM

BY MATTIE QUINN | MAY 26, 2016

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## Why Groups Are Demanding IRS Withdraw Proposed Political Subdivision Rules.

WASHINGTON – Municipal market participants are urging the Treasury Department and Internal Revenue Service to withdraw their proposed rules on political subdivisions, claiming they are unnecessary, possibly illegal and would disrupt the municipal bond market.

The National Association of Home Builders warned that if the proposed rules are adopted, they "could spark legal challenges" that create uncertainty in the market.

Historically, the determination of whether an entity was a political subdivision was based on whether it had the right to exercise a substantial amount of at least one of three sovereign powers: eminent domain, taxation, and policing.

But IRS officials, through audits, learned some developers had created political subdivisions and were in complete control of them, issuing tax-exempt bonds partly for their own benefit.

After an unsuccessful attempt to change the definition through the audit process, the Treasury and IRS proposed new rules in February that would add two new additional requirements, besides the sovereign powers one, to the definition of political subdivisions. They also would have to serve a government purpose "with no more than an incidental private benefit" and they would have to be governmentally controlled.

The rules had been retroactive, but following an outcry, Treasury and the IRS made them prospective. Political subdivisions would three years to comply with them and if they don't, they would no longer be political subdivisions and would no longer be able to issue tax-exempt bonds.

But the proposed rules have continued to draw strong opposition from muni market groups and participants.

In a May 23 letter, Securities Industry and Financial Markets Association managing director Michael Decker told IRS and Treasury that their position in the proposed rules "is not supported by existing legal authority" and that the proposed rules' departure from a longstanding principle used to evaluate political subdivisions is "unwarranted" and would be "disruptive to the market."

"We believe the federal government should not attempt to define a federal standard for what constitutes a governmental purpose," SIFMA wrote. Rather, this issue should be determined by state or local law, the group told the agencies.

"The new standard would substantially hinder financing of significant infrastructure needs in many states and local governments due to increased costs to issuers," SIFMA wrote. The higher costs would come from issuers having to use taxable instead of tax-exempt bonds to finance many projects or from the market demanding a risk premium from bonds due to the uncertainty created by the rules, it explained.

"For these reasons, we urge the [IRS] to withdraw the proposal," SIFMA wrote.

In a letter sent to the agencies on the same date, Bond Dealers of America also called for the rules to be withdrawn. Mike Nicholas' BDA's chief executive officer urged the proposed rules to be replaced with a new set that are more targeted to the IRS' concerns.

BDA said the proposed rules are "overly prescriptive" and that the government purpose section of them "will likely have a chilling effect on development projects."

"The proposed government control section introduces a new federal standard that BDA does not believe is necessary and will result in a market disruption as states have to adjust from sound, legal structures to a federally mandated political subdivision structure," the group wrote.

"The proposed rule[s] would unnecessarily disrupt the ability of projects serving the public interest, including hospital, school, road, water, sewer, gas, and electric projects to access the tax-free debt capital markets in the future," BDA said. It also would "cause significant confusion amongst issuers, legal professionals, underwriters, and investors about the current tax status and investment quality of the outstanding issuances of political subdivisions."

"These destabilizing factors outweigh the potential benefits of the proposal as drafted," the group wrote.

The Government Finance Officers Association also wrote the agencies on Monday, asking them to withdraw the rules and rewrite them "to directly address the specific types of abuses the IRS believes to exist."

"If the IRS and Treasury are concerned with new development districts as political subdivisions or perceived abuses within the current districts as they related to tax-exempt bond issuances, [they] should more carefully develop parameters to combat these real areas of concern rather than completely disrupt states' rights to create these entities and create roadblocks that would hinder [their] ability … to effectively, efficiently and economically serve communities," GFOA wrote.

The issuers' group told the agencies it objects to the proposed regulations "due to the far-reaching scope and negative impact to political subdivisions across the U.S." There are 38,572 special districts in the U.S., according to the 2012 U.S. Census of Governments. "These entities serve a purpose that is in the best interest of the particular state by which they are created and whose governing body has approved their existence," GFOA wrote.

These districts have the ability to issue tax-exempt bonds to help fulfill their purposes, the group added. State and local authorities in 2015 issued $177 billion on bonds, nearly half of the $404 billion issued that year, according to Thomson Reuters data that GFOA cited.

Florida Gov. Rick Scott told the agencies on Monday that his state is home to about 500 community development districts (CDDs), mostly created for residential projects and governed by state law, that have issued more than $12 billion of bonds to fund public infrastructure since the 1990s.

"Any change to the ability of Florida's governments to issue tax-exempt bonds could have severe consequences for hundreds of thousands of Floridians and for the Florida economy, which is growing and vibrant again after one of the worst real estate recessions in history," Scott wrote. "The proposed regulations also run contrary to the current stated Obama administration policy of finding solutions to solve our country's infrastructure needs."

Scott told the agencies that special districts, like CDDs, "have been a cornerstone of Florida's growth and development for nearly 100 years." They are, and have always been "creatures of Florida law," he added.

“The ability of CDDs and other local governments to continue to issue tax-exempt municipal debt for public improvements and services is vital to Florida’s economic growth,” Scott wrote. “I am committed to doing everything possible to ensure that Florida stays on its current path of economic prosperity,” he added, sending the letter to the states U.S. congressional delegation.

The National Association of Home Builders told the agencies that the proposed rules would “have far-reaching negative consequences for local communities and their residents, particularly in states that rely on development districts to finance the services needed to support new residential construction in the face of constrained municipal revenues.”

NAHB said the proposed rules are unnecessary based on available case law and congressional intent” and warned they could “spark legal challenges that would result in additional uncertainty.”

The National Association of Bond Lawyers told the agencies that the proposed rules are the result of the IRS position in audits of two CDDs in Florida – the Village Center CDD and the Sumter Landing CDD.

“There has been no independent development in the market or a change in the law that needed to be addressed, but rather only this instance of the IRS’ position in an examination causing significant uncertainty and disruption in the financial market and legal community,” NABL wrote, adding, “The IRS created the legal issue that the proposed regulations now seek to solve.”

As a result of the audits of the bonds of these CDDs, the IRS chief counsel issued a technical advice memorandum in May 2013 that concluded the Village Center CDD is not a political subdivision because its board is, and will always be, controlled by a private developer rather than by residents or other publicly elected officials. Under the TAM, millions of dollars of tax-exempt bonds issued by the CDD would become taxable.

But bond lawyers fought against the TAM, arguing it was an attempt to change existing standards retroactively through enforcement rather than prospectively through rulemaking, which gives market participants a chance to provide input. Eventually the TAM was made prospectively effectively and the IRS resorted to rulemaking and issued these proposed rules.

NABL cited a 1981 ruling by the U.S. Court of Appeals for the Third Circuit in Philadelphia National Bank v. U.S., in which the court found Temple University was not a political subdivision because it did not have a significant amount of any of the three sovereign powers: eminent domain; taxation and policy power.

“This standard was straightforward and easily applied for decades,” NABL told the agencies, referring to it as the “Shamberg rule.” This rule should continue to be the sole standard for political subdivisions, the bond lawyers group added.

NABL also wrote that the proposed rules “are not administrable” and would “create significant new burdens on governmental organizations seeking to qualify, or maintain qualification, as political subdivisions.”

The group included in its comments a one and half page analysis that entities would have to go through to determine if they comply with the proposed rules.

The bond lawyers group also warned that the proposed rules would have many unintended consequences, some outside the federal income tax law.

For example, NABL wrote, if an entity failed either of the three tests in the IRS proposed rules –

sovereign powers, governmental purpose and governmental control – "not only could it not issue tax-exempt bonds, but its use of bond-financed facilities would constitute private use and may, therefore be shut out from government borrowing programs such as the state clean water revolving loan programs." The entity also could be liable for federal income tax on its taxable income that it didn't have to previously pay because of a tax provision, according to NABL.

**The Bond Buyer**

By Lynn Hume

May 23, 2016

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**TAX - LOUISIANA**

## Yesterdays of Lake Charles, Inc. v. Calcasieu Parish Sales and Use Tax Dept.

**Supreme Court of Louisiana - May 13, 2016 - So.3d - 2016 WL 2879996 - 2015-1676 (La. 5/13/16)**

After his night clubs were subjected to a purported random audit by collector of revenue, taxpayer appealed sales and use tax assessments.

The District Court ruled in favor of taxpayer, denied collector's motion for new trial, and awarded attorney fees to taxpayer. Collector appealed. The Court of Appeal affirmed. Collector petitioned for writ of certiorari, which was granted.

The Supreme Court of Louisiana held that:

- Tax collector had no obligation to provide taxpayer with guidance regarding what constituted suitable records;
- Bank statements and deposit slips did not constitute suitable records of nightclubs' retail sales;
- Collector was not required to provide false or fraudulent intent in order to estimate taxpayer's retail sales;
- ULSTC did not require agreement between a taxpayer and the tax collector regarding the sampling procedure to be used to determine the correct tax to be in writing;
- Collector provided taxpayer with sufficient notice of sampling method to be used;
- Sampling method used was developed and applied in accordance with generally recognized sampling techniques; and
- Collector was prescribed from issuing amended assessments for 2005 and 2006 tax years.

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**TAX - OHIO**

## Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision

**Supreme Court of Ohio - May 18, 2016 - N.E.3d - 2016 WL 2908564 - 2016 -Ohio- 3025**

Following county auditor's valuation of commercial property at $2,205,000, property owner filed a complaint seeking a reduction to $1,000,000.

Board of Revision (BOR) reduced value. City board of education (BOE) appealed. The Board of Tax Appeals (BTA) affirmed. BOE appealed.

The Supreme Court of Ohio held that BTA was precluded from reverting to auditor's valuation of the property.

Pursuant to Bedford rule, when the board of revision (BOR) has reduced the value of the property based on the owner's evidence, that value eclipses the auditor's original valuation, and the city board of education (BOE) as the appellant before the Board of Tax Appeals (BTA) may not rely on the latter as a default valuation. Instead, the BOR's adoption of a new value based on the owner's competent evidence has the effect of shifting the burden of going forward with evidence to the BOE on appeal to the BTA.

Board of Tax Appeals (BTA) was precluded from reverting to auditor's valuation of commercial real property consisting of office space and a bank, where county board of revision (BOR) adopted new value based on owner's competent evidence of value, which shifted burden of going forward with evidence to city board of education (BOE), and no new evidence was presented at the BTA.

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## NABL and Others Call for Withdrawal of Political Subdivision Regs.

On May 23, the National Association of Bond Lawyers (NABL) submitted its comments on the proposed regulations on the definition of political subdivision (REG-129067-15). NABL urged the Treasury Department to withdraw the proposed regulations and affirm the applicability of the Shamberg rule as the sole standard for evaluating a governmental entity's status as a political subdivision. NABL said that the proposed regulations would increase uncertainty and disruption in the municipal market. Also, the proposed regulations would be unworkable and create significant uncertainty about whether governmental organizations qualify as political subdivisions because of multiple facts and circumstances tests.

In total, one hundred and five out of one hundred and seven comments submitted opposed the proposed regulations in whole or in part. Among the commenters, the Government Finance Officers Association wrote that the rules should be withdrawn and rewritten to directly address specific concerns that the Internal Revenue Service might have on possible abuses by political subdivisions. The Bond Dealers of America emphasized that the proposed regulations would have a profound effect on development projects, as states adjust "to a federally mandated political subdivision structure." The National Association of Home Builders also wrote in their comments that the proposed regulations would have profound effects on local communities, especially those that rely on developmental districts to finance projects "in the face of constrained municipal revenues."

NABL plans to submit more detailed comments in the future and will testify at the public hearing on June 6, 2016, along with eight other organizations.

NABL's comments are available here.

The full set of comments is available here.

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## Redefining 'Special Districts' Could Have Big Taxing Consequences.

If the IRS gets its way, it may be harder for special districts to issue tax-exempt municipal bonds.

Special districts spend more public money than all city governments combined, much of it raised through borrowing in the municipal bond market. But proposed new regulations from the Internal Revenue Service could make it harder for special districts to borrow that money tax-free. And that could be very expensive for states and localities.

All totaled, the Census Bureau counts 39,000 special-purpose district governments, which are usually created to address — and raise revenue for — specific functions, such as airports, libraries, wastewater, mosquito control and so on. They exist separately from general-purpose governments, and may cross the borders of cities, counties and states.

In order to issue tax-exempt bonds, an entity has to meet the definition of a municipality. In many ways, special distrcits do not. They aren't like traditional state or city entities at all. As creatures of the state, special-purpose districts have governing boards as determined by state law. But those boards may be appointed by public officials or by private entities. Or they may be elected by property owners within the special district — even though there may be only one or two residents, or in some cases, zero residents, to participate in a board election. While most special-purpose districts have employees, some don't, distinguishing them from every other kind of government in the country.

So if these entities don't resemble traditional state and local governments, why should they be allowed to borrow in the same tax-exempt way? That's just what the IRS wants to know. In February, the agency proposed regulations that would more clearly define the difference between a municipality and a special district. It may seem like a fine point, but in fact there's big money at stake. Special districts could see a nearly 30 percent increase in the costs of borrowing, which could work out to about $700 billion. It could be prohibitive enough to force many special districts out of existence.

Up until now, the IRS has defined a political subdivision — that is, any entity that's allowed to issue municipal tax-free bonds — by using a three-prong test. If an entity is authorized by the state to exercise at least one of three sovereign powers — the power of taxation, the power of eminent domain, or police power — then it qualifies to issue bonds tax free.

Under the proposed rule, those old tests of sovereign power still apply. But the new regulations would add another criterion: An entity must serve a governmental purpose and be governmentally controlled. That means that in order for a district to issue tax-free bonds, it must be controlled either by a general-purpose state or local government or by an electorate established by state or local law.

In short, the IRS has cast itself into the difficult role of defining when, and under what circumstances, there can be special districts (other than school districts, which wouldn't be affected by the new rule). Sussing out the definitions of 39,000 different districts would be a Herculean task, and it raises fundamental questions about just how we define government.

If finalized — and that decision won't be made for months — the new rules may cause special districts in some states to lose their right to issue tax-exempt municipal bonds, which could have huge taxing and governing consequences for states and localities.

GOVERNING.COM

BY FRANK SHAFROTH | MAY 2016

## The Final Allocation and Accounting Regulations - What Do They Mean For "Phantom Investment Proceeds"?

The flexibility to reallocate proceeds to expenditures using an accounting method other than direct tracing has been a well-recognized and much-appreciated opportunity under the allocation and accounting rules of IRC section 141. The former proposed section 141 regulations (REG-140379-02, Sept. 26, 2006) ("Proposed Regulations"), now replaced by the final section 141 regulations issued October 27, 2015 ("Final Regulations") on which we reported here, here, here, and here and cross-referenced the arbitrage allocation rules in 1.148-6 in allowing the reallocation of proceeds away from the expenditures for which the proceeds were actually spent to different expenditures producing more favorable tax results. If the expenditures to which the proceeds were reallocated were paid later than the proceeds were actually spent, the reallocation raised the question of whether the proceeds had to be treated as spent later for arbitrage purposes, resulting in additional, "phantom" (because they were never actually earned) investment proceeds that were deemed to arise during the time between the date when the issuer originally spent the proceeds, and the date of the expenditure to which it later reallocated proceeds. Fortunately, the Proposed Regulations included an explicit exception from the otherwise applicable consistency rule between the section 141 and section 148 allocation and accounting rules, thereby avoiding phantom investment proceeds. The Final Regulations do not include this rule. So where are we now? Might we have phantom investment proceeds?

**Background**

Proposed Regulation 1.141-6(a) stated:

> Except as otherwise provided in this section, for purposes of 1.141-1 through 1.141-15, the provisions of 1.148-6(d) apply for purposes of allocating proceeds and other sources of funds to expenditures (as contrasted with investments). Except as otherwise provided in this section, allocations of proceeds and other sources of funds to expenditures generally may be made using any reasonable, consistently applied accounting method. *Allocations of proceeds to expenditures under section 141 and section 148 must be consistent with each other. . . .* (Emphasis added.)

Had the Proposed Regulations stopped here, we would have been left with the question of the appropriate arbitrage analysis if proceeds were reallocated to different, later expenditures, e.g., to avoid private business use, and the expenditures to which the proceeds were reallocated were paid later than when the proceeds were actually spent. Specifically, would phantom investment proceeds be imputed for the period from the actual expenditure to the reallocated expenditure? Aside from the potential rebate cost of such a rule, the record-keeping burden would have been horrendous. Apparently to avoid this, Proposed Regulation 1.141-6(a) further provided:

> . . . For purposes of the consistency requirements in this paragraph (a), it is permissible to employ an allocation method under paragraph (a)(2), (c), or (d) of this section (for example, the general pro rata allocation method under paragraph (a)(2) of this section) to allocate sources of funds within a particular project for purposes of section 141 in conjunction with an accounting method allowed under 1.148-6(d) (for example, the first-in, first out method) to determine the allocation of proceeds or other sources of funds to expenditures for that project.

The Proposed Regulations have now been replaced by the Final Regulations. Section 1.141-6(a) of

the Final Regulations states: “The allocations of proceeds and other sources of funds to expenditures under §1.148-6(c) apply for purposes of §§1.141-1 through 1.141-15.” As supported by the preamble explanation, this rule apparently requires consistency in accounting between IRC sections 141 and 148. This consistency rule, however, is not followed (as it was in the Proposed Regulations) by an exception eliminating the concern of phantom investment proceeds. So we are left to determine whether phantom investment proceeds might arise.

As we previously reported in this blog (here),the Final Regulations automatically allocate tax-exempt proceeds to governmental use and qualified equity to private business use, to the extent possible. Moreover, the allocation of proceeds and qualified equity shifts from time to time if and when the location of private business use within the project shifts. Since this rule does not purport to allocate proceeds to particular expenditures and that allocation can shift over time, it appears reasonably clear that the application of this rule will not result in phantom investment proceeds.

The Final Regulations, however, would also appear to permit an affirmative allocation of proceeds to expenditures that is not inconsistent with the general rule described above. For example, assume that all of the proceeds of an issue are actually spent for a particular project (the “first project”). Assume further that the issuer would prefer to allocate a portion of those proceeds to a second, contemporaneous project while allowing the remainder of the issue proceeds to remain allocated to the first project. (Such a reallocation can enable the issuer to increase the benefit of its qualified equity, particularly if both projects are then financed in part with qualified equity.) The Final Regulations would appear to permit this affirmative allocation, but might this reallocation result in phantom investment proceeds?

While the Final Regulations (and the preamble) are silent on this question, it does not appear that issuers need to be concerned with the prospect of phantom investment proceeds. If there were a possibility of having to calculate and track additional investment proceeds, surely Treasury would have made that requirement clear, at least in the preamble if not in the Final Regulations themselves. For example, the method of determining the investment earnings rate alone would raise many unanswered questions that, if Treasury thought applicable, we should be able to assume would have been addressed. Accordingly, it appears appropriate to conclude that under no application of the Final Regulations should an issuer have to calculate phantom investment proceeds resulting from a potential difference in timing of actual proceeds expenditure versus reallocated proceeds expenditure.

I would further submit that such a result should obtain under IRC section 142 (exempt facility financings), where the consequences of phantom investment proceeds would be much greater. Rather than largely an arbitrage issue as in the case of governmental bonds, under section 142 the consequences would include qualification under the 95% qualified cost requirement. Again in the absence of any indication from Treasury or the IRS to the contrary, a reallocation of proceeds in a section 142 financing should not result in the possibility of phantom investment proceeds.

**Squire Patton Boggs**

The Public Finance Tax Blog

by Robert J. Eidnier

USA May 26, 2016

## SIFMA Submits Comments to the IRS on Proposed Regulations Defining Political Subdivisions.

SIFMA provides comments to the Internal Revenue Service (IRS) on proposed regulations defining political subdivisions. The Proposed Regulations provide guidance re-defining the definition of political subdivision for purposes of entities that may qualify as issuers of tax-exempt bonds under section 103 of the Internal Revenue Code of 1986.

Read the comment letter.

May 23, 2016

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**TAX - OHIO**

## Riverside v. State

**Court of Appeals of Ohio, Second District, Montgomery County - May 6, 2016 - N.E.3d - 2016 WL 2621415 - 2016 -Ohio- 2881**

City brought action against State, seeking declaration that statute creating exemption to municipal commuter income tax for Air Force base employees and contractors was unconstitutional.

On cross-motions for summary judgment, the Court of Common Pleas granted State's motion. City appealed.

The Court of Appeals held that:

- Statute was rationally related to legitimate government interest and thus did not violate equal protection clause;
- Trial court acted within its discretion in granting State's motion for protective order to prevent city from deposing State, through State's representative or designee; and
- Trial court's statement that city could not establish unconstitutionality of statute "beyond a reasonable doubt" did not establish that trial court applied improper standard in ruling on State's motion for summary judgment.

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## Tax-Exempt Bonds: Is It Possible for a Municipal Corporation Not to be a Political Subdivision?

With the recent issuance of the proposed regulations that would redefine the term "political subdivision" for purposes of determining which entities can issue tax-exempt bonds under Section 103 of the Internal Revenue Code, as amended (the "Code"), the answer to this seemingly rhetorical question is "yes," at least according to the Treasury Department. This is a significant, and startling, departure from the current Treasury regulations that define "political subdivision" for purposes of Code Section 103.

Current Treasury regulation § 1.103-1(a) provides that interest on an obligation issued by a political subdivision of a State is, except as otherwise provided, excluded from gross income of the holder of the obligation under Section 103(a) of the Code. Current Treasury regulation § 1.103-1(b) further

provides that "the term 'political subdivision' . . . denotes any division of any State or local governmental unit which is a municipal corporation . . . ." A municipal corporation is therefore by definition treated as a political subdivision for purposes of Code Section 103. Although the term "municipal corporation" is not defined for this purpose, it has been interpreted, as illustrated by Revenue Ruling 80-136, 1980-1 C.B. 25, with deference to the laws of the applicable State to mean a city, village, town, or borough that is treated under the constitution or laws of the applicable State as a municipal corporation and imbued under such constitution or laws with the powers of self-government.

Like existing Treasury regulation § 1.103-1(a), proposed regulation § 1.103-1(a) provides that, subject to certain limitations, interest on an obligation issued by a political subdivision of a State is, pursuant to Code Section 103(a), excluded from gross income of the holder of the obligation. Proposed regulation § 1.103-1(c), however, goes on to state that:

> The term political subdivision means an entity that meets each of the requirements of paragraphs (c)(2) (sovereign powers), (c)(3) (governmental purpose), and (c)(4) (governmental control) of this section, taking into account all of the facts and circumstances, or that is described in published guidance issued pursuant to paragraph (c)(5) of this section. Entities that may qualify as political subdivisions include, among others, general purpose governmental entities, such as cities and counties (whether or not incorporated as municipal corporations) . . . . (Emphasis added.)

The proposed regulations are to be commended for providing that incorporation as a municipal corporation is not a prerequisite for qualifying as a general purpose governmental entity. Counties and townships of counties are unincorporated but, like municipal corporations, clearly have the characteristics of general purpose governmental entities. The proposed regulations should, however, be revised to define a "general purpose governmental entity" as "a county, township of a county, city, town, village, or borough that is created under the constitution or laws of a State, regardless of whether incorporated as a municipal corporation." Moreover, the proposed regulations should be revised to make clear that a general purpose governmental entity, as so defined, is a political subdivision without application of the sovereign powers, governmental purpose, and governmental control tests set forth in proposed regulations § 1.103-1(c).

The foregoing refinements of the proposed regulations would accord with existing Treasury regulation § 1.103-1(b), which automatically treats a municipal corporation as a political subdivision for purposes of Code Section 103, and with sound policy. Under the constitution or laws of each State, a general purpose governmental entity, as defined above, is no mere special district, but instead: (1) has a substantial amount of taxing, eminent domain, and/or police powers; (2) exists to govern the area that comprises its physical jurisdiction; and (3) is accountable to its electorate and is not susceptible to private control. Subjecting these entities to the sovereign powers, governmental purpose, and governmental control tests of the proposed regulations introduces unwarranted confusion regarding their status as political subdivisions under Code Section 103 without advancing any discernable policy objective. Further, the application of the sovereign powers, governmental purpose, and governmental control tests to general purpose governmental entities is unnecessary to prevent privately controlled special districts from issuing tax-exempt bonds.

Wednesday, May 18, 2016

**by Michael A. Cullers**

*Partner*

Michael Cullers focuses his practice on matters involving tax-exempt bonds, and state and local taxation. Michael has extensive experience in the tax aspects of state and local bond issues including governmental use bonds, qualified 501(c)(3) bonds and other tax-exempt private activity bonds, such as airport financings, as well as tax-advantaged bonds such as Build America Bonds and qualified school construction bonds. This experience includes private business use and private payment analyses; arbitrage issues in new money, refunding and multipurpose bond issues; multipurpose issue…

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## Colorado Lawmakers Aim to Head Off Challenges to Metro Tax Districts That Worry Developers.

Top Colorado lawmakers introduced legislation Thursday that would prohibit legal challenges to the qualifications of special district electors in all past elections.

The proposal, if approved, would deem all of the special district electors created in special district elections up until April 21, 2016 and in the upcoming May 3 special district elections as eligible and would consider all of the elections since 1981 valid.

The bill is a reaction to a Colorado Court of Appeals ruling earlier this month in a case titled Landmark Towers Association vs. UMB Bank case, which upheld the position of a group of Landmark condo owners that the creation of the Marin Metropolitan District was created by ineligible electors and that legitimate property ownes were cut out of the process.

The ruling has put bond traders, bankers and real estate lawyers on edge and some metropolitan districts that were ready to sell bonds are now in a holding pattern as millions of dollars in transactions came grinding to a halt in the wake of the ruling.

Lawyers who helped craft Senate Bill 16-207 said the situation is urgent. The majority of the state's metropolitan districts were created using the same mechanism used in the Marin metro district. In that case, electors that voted to form the district were qualified because they took out low-down payment options on real estate.

The fear is that the court ruling could lead to lawsuits challenging the eligibility of special district electors in districts created long ago by that very mechanism.

Senate Bill 16-207, wouldn't allow those challenges. It says, "No district election conducted prior to April 21, 2016 may be contested on the ground that any person who voted at such election was not an eligible elector unless such a contest was invalidated prior to April 21, 2016."

The bill, backed by Senate President Bill Cadman, Majority Leader Mark Scheffel and House Speaker Dickey Lee Hullinghorst and House Majority Leader Crisanta Duran, has 10 days to get through the Senate and House before the legislative session ends.

Brian K. Matise, shareholder of Burg Simpson law firm who represented Landmark Towers Association, said he doesn't understand what the urgency is all about. The ruling, he said, is very narrow and wouldn't affect special districts created long ago.

In the Landmark case, the special district was created and approved by six people who were qualified as electors because they bought options on tiny pieces of a 10-by-10-foot parcel of land in the proposed district. To be eligible electors in that district, the six organizers executed option contracts to purchase a sliver of land within the district and agreed to pay $500 each. Then, they held an election in 2007 that created the metro district and authorized the district to issue bonds. But those six electors never paid for the land or paid taxes on the land.

In addition, a group of condo owners in Landmark Towers were lumped into the taxing district but they received no infrastructure benefit from the taxes collected and they were excluded from voting in the tax election, which the appeals court ruled was a violation of the Taxpayers Bill of Rights (TABOR).

Landmark Towers Association argued that the organizers' contracts were a sham. A lower court judge ruled that even though the organizers never paid the down payments for the so-called "director's parcels" or paid any taxes on the land, the option contracts were a legitimate way to create eligible electors for the special district.

But the Court of Appeals disagreed, ruling that the option contracts weren't sufficient to make the organizers eligible electors. The ruling listed six reasons why the electors in the Marin district were ineligible, including that they never paid property taxes.

"The ruling did not say that using option contracts to qualify electors is illegal," Matise said. "What it says, is that you can't have sham contract to qualify the directors. That is different."

But Dee Wisor. a Denver attorney that specializes in public finance issues, said the ruling is unclear on whether it applies only to the electors of the Marin metro district or could be applied to other metro district electors as well.

The ruling did, however, put an immediate chill on bond activity. Sam Sharp, managing director of D.A. Davidson & Co., a brokerage and investment banking firm, said he knows of at least seven transactions representing about $70 million in bond transactions that are on hold since the ruling.

Jan Bilsborrow, a board member of the Red Leaf Metropolitan District in Broomfield, said the district was refinancing its bonds to take advantage of lower interest rates for its taxpayers. The district sold $4.6 million in bonds. But one day later – the day of the Landmark court ruling – the transaction was suspended.

Bond counsel wouldn't sign off on the deal because of questions the ruling raised, she said.

"The projected savings will not happen unless something can change," Bilsborrow said.

The refinancing would have saved each of the 492 property owners in the Red Leaf district about $1,370 in property taxes over the life of the bonds, she said. The timing is unfortunate, she said.

"The original board was fiscally responsible and was doing what was needed for the infrastructure of our neighborhood," she said. "It was done exactly how it should have been done."

**The Denver Business Journal**

by Monica Mendoza

Apr 29, 2016, 6:00am MDT Updated Apr 29, 2016, 8:43am MDT

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**TAX - NEW JERSEY**

## Palisadium Management Corp. v. Borough of Cliffside Park

**Tax Court of New Jersey - May 2, 2016 - N.J.Tax - 2016 WL 2343387**

Corporate taxpayer challenged tax assessments on property with improvements consisting of a building containing a banquet facility and a fitness/health spa facility.

The Tax Court held that:

- Cost approach was not an appropriate methodology for valuing the property;
- A hybrid approach, applying both the sales comparison and income capitalization approaches, was appropriate; and
- Expert's valuation adjustments were not credibly supported.

The cost approach was not an appropriate methodology in property tax assessment proceedings for valuing property consisting of two lots comprising approximately 4.19 acres, with an improvement on one of the lots consisting of 74,668 square feet, containing a banquet hall on the upper level and a fitness center and health spa on the lower level, notwithstanding borough's contention that the property's location, with its superior views of river and city skyline, and its unusual combination of uses, qualified it as a "unique" and "special-purpose" property. The subject properties were constructed more than thirty years before the first valuation date, neither a banquet hall nor a fitness center was unique or specially built, and there was unquestionably a market for the sale of banquet halls and the lease of health fitness centers.

A hybrid approach, applying both the sales comparison and income capitalization approaches, was appropriate in property tax assessment proceedings relating to property consisting of two lots comprising approximately 4.19 acres, with an improvement on one of the lots consisting of 74,668 square feet, containing a banquet hall on the upper level and a fitness center and health spa on the lower level. The sales comparison approach was appropriate for the banquet facility, and the income and expense approach was appropriate for the fitness/health spa.

Expert's valuation adjustments were not credibly supported in property tax assessment proceedings relating to property consisting of two lots comprising approximately 4.19 acres, with an improvement on one of the lots consisting of 74,668 square feet, containing a banquet hall on the upper level and a fitness center and health spa on the lower level. Expert's conclusion as to market conditions/time adjustment was not discernible from the evidence nor adequately supported by any objective facts, expert used same comparable sales to support multiple paired sales analyses, there was no objective data supporting conclusion that the reason the subject property was able to command higher prices than competitors was a result of its "above average" view of city skyline, and there was insufficient evidence to assess whether subject property actually charged higher prices than comparable venues.

**TAX - LOUISIANA**

## Trunkline LNG Co., LLC v. Calcasieu Parish School System

**Court of Appeal of Louisiana, Third Circuit - April 13, 2016 - So.3d - 2016 WL 1445938 - 2015-1062 (La.App. 3 Cir. 4/13/16)**

Taxpayer appealed decision of the Board of Tax Appeals reducing amount of refund of taxpayer's overpayment of sales taxes to parish school board.

The Court of Appeal held that:

- Taxpayer was not entitled to set off overpayment from some months against deficiency in other months, and
- Taxpayer was not entitled to call school board employee as a witness.

Taxpayer that was originally assessed sales tax excessively in some months and deficiently in others was not entitled to set off what it owed for months in which it was deficient with refund to which it was entitled for months in which it had overpaid, but was instead required to pay interest in amount of 15% for months it was deficient and was entitled to interest of 2–3% for months in which it had overpaid.

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**TAX - NEW HAMPSHIRE**

## Everett Ashton, Inc. v. City of Concord

**Supreme Court of New Hampshire - April 29, 2016 - A.3d - 2016 WL 1719255**

Manufactured housing park owner brought action against city for declaratory relief, injunctive relief, and damages, after city refused to issue demolition permits for abandoned manufactured homes until owner paid taxes owed by tenants.

The Superior Court held that city was required to issue the permits, that city could not place a lien on owner's land for its former tenants' unpaid water bills, and that owner was entitled to compensation and attorney's fees. City appealed.

The Supreme Court of New Hampshire held that:

- As a matter of first impression, city's refusal to allow owner to remove homes exceeded its discretion;
- Municipalities may place a lien on a park owner's property if tenants, who have individual meters, fail to pay their water bills; and
- City's decision to withhold demolition permits was not a regulatory taking that required just compensation.

City's refusal to allow manufactured housing park owner to remove valueless, abandoned homes until it paid taxes thereon, despite express statutory provision that park owners were not responsible for such taxes, exceeded scope of city's discretion, and therefore city was required to issue demolition permits for homes in park. City could not hold owner hostage by refusing to allow removal of derelict homes even though owner could not have been held liable for unpaid taxes, and legislature could not have intended for discretion granted to city to allow removal of structures taxed as real estate to be exercised in way that would allow city to nullify statute stating park

owners were not liable for taxes due upon manufactured housing.

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## NABL: Lawmakers Seek Guidance on Student Loan Bonds.

Bipartisan groups of House and Senate lawmakers have sent letters to the Treasury Department and the Internal Revenue Service (IRS), asking for guidance to facilitate the refinancing of student loans.

In similar letters from the House and Senate, lawmakers appreciated the guidance from Treasury and IRS in Notice 2015-78, which clarified that tax-exempt bonds can be used for a wide range of refinancings to allow student loan borrowers to take advantage of lower rates.

However, the lawmakers asked for further guidance on three issues: 1) guidance that bonds issued for refinancing purposes not be considered refunding bonds; 2) guidance for issuers to help them determine that the original student loans met loan size limitations for tax-exempt financing; and 3) guidance that a former student can refinance an original loan that was a parent loan and vice versa and that parents' current state of residence is not an impediment to refinancing.

The letter from the House members is available here. The letter from the Senators is available here.

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**TAX - LOUISIANA**

## Bridges v. Nelson Indus. Steam Co.

**Supreme Court of Louisiana - May 3, 2016 - So.3d - 2016 WL 2338036 - 2015-1439 (La. 5/3/16)**

Following remand of electricity producer's suit against parish for refunds of sales and use taxes and state's suit against producer to collect sales and use taxes, the District Court rendered judgments in favor of state and parish. Producer appealed. The Court of Appeal affirmed. Producer sought writ of certiorari.

The Supreme Court of Louisiana held that limestone bought and used by producer in producing ash was subject to "further processing" exclusion from sales tax.

Limestone bought and used by electricity producer for dual purpose of inhibiting sulfur in production of electricity and producing ash was subject to "further processing" exclusion from sales tax. Ash was an article of tangible personal property for sale at retail, chemical makeup of limestone was found in ash and was an integral part thereof, and limestone was purchased with purpose of inclusion in final product of ash although that was not the primary purpose for purchasing limestone.

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**TAX - FLORIDA**

## Island Resorts Investments, Inc. v. Jones

**District Court of Appeal of Florida, First District - March 21, 2016 - So.3d - 2016 WL 1085225 - 41 Fla. L. Weekly D721**

Owner of 99-year leasehold interest in unimproved 12-acre parcel filed action for a declaratory judgment that its interest could be taxed only as intangible personal property, and for an injunction

prohibiting the assessment and collection of ad valorem taxes on the land.

The Circuit Court entered judgment for county appraiser and tax collector, and leasehold interest owner appealed.

The District Court of Appeal held that leasehold interest owner was not the equitable owner of the leased land.

Owner of 99-year leasehold interest in unimproved land owned by county was not the equitable owner of the leased land and thus was not required to pay ad valorem taxes on the land, where owner did not have the right to the perpetual renewal of its lease or the right to purchase the property for nominal consideration at the end of the lease, owner bore all the burdens during the term of the lease, at the end of which all the rights to the property reverted, rental payments were due in consideration for the leasehold interest, and the property was not financed, acquired, or maintained through the issuance of bonds.

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**TAX - PENNSYLVANIA**

## City of Philadelphia v. Auguste

**Commonwealth Court of Pennsylvania - April 29, 2016 - A.3d - 2016 WL 1718844**

Property owner moved to set aside sheriff's sale after property was sold for nonpayment of real estate taxes.

The Court of Common Pleas set aside sale. City and assignee of tax sale purchaser appealed.

The Commonwealth Court held that city's service on owner of petition and rule to show cause why property should not be sold for nonpayment of real estate taxes was sufficient to meet requirements of Municipal Claims and Tax Liens Act.

City's service on property owner of petition and rule to show cause why property should not be sold for nonpayment of real estate taxes was sufficient to meet requirements of Municipal Claims and Tax Liens Act, despite argument that other addresses existed at which property's mortgagee could have been served, where city sent petition and rule via certified mail to owner, return receipt requested and by first class mail with prepaid postage, at mailing address listed on city's tax information certificate, service was also made in same manner on mortgagee at its registered agent for service of process, city filed affidavit of service, and petition and rule were posted on property.

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## Proposed Political Subdivision Regulations Recall Earlier Failed Regulations: Squire Patton Boggs

As we have discussed here before, we may be coming to the point where there are no new ideas in public finance tax law. Yet another example: The recent proposed political subdivision regulations hearken back to a similar regulation project on a related topic many years ago, which suffered from many of the same drawbacks found in the proposed political subdivision regulations.

In 1976, Treasury issued proposed regulations (41 Fed. Reg. 4829) that would have codified a specific definition of a "constituted authority" of a State or political subdivision that can issue tax-

exempt bonds on its behalf. These concepts are similar to the concepts that we find in the proposed political subdivision regulations, but the result is somewhat different. An entity can be a constituted authority of either a State or a political subdivision. (See here for prior coverage of this topic.) Prior to the proposed constituted authority issuer regulations, issuers looked to a series of revenue rulings (the first of which was Rev. Rul. 57-187) to determine whether an entity was a constituted authority of a State or a political subdivision.

Like the proposed political subdivision regulations, the constituted authority proposed regulations articulated tests that sound eminently reasonable when you hear them for the first time. And like the proposed political subdivision regulations, the devil (or devils) were in the details.

First, like the proposed political subdivision regulations, the proposed constituted authority regulations would have required the constituted authority to serve a public purpose of the governmental unit on whose behalf it was issuing bonds. But the test was quite a bit more specific than that.

Click here to view the image.

As the Preamble to the proposed constituted authority regulations noted: A constituted authority "must be specifically authorized pursuant to State law to issue obligations on behalf of the unit to accomplish a public purpose of the unit." The authorization would need to specify the public purpose of the governmental unit that would be accomplished by the constituted authority, and the authority would have to be created "solely to accomplish a public purpose of the governmental unit."

Second, like the proposed political subdivision regulations, the proposed constituted authority regulations would have required the constituted authority to be controlled by a State or local governmental unit. Again, the test was quite a bit more specific than that.

Click here to view the image.

The proposed regulations would have required a governmental unit to control the authority's board. In addition the proposed regulations had specific requirements for the composition of the board, and would have barred a private person from appointing even a small minority of the board. The proposed regulations would have imposed a requirement that certain board members not have a term of more than 6 years. In addition, the governmental unit would need to exercise either "organizational control" or "supervisory control" over the authority. The tests for each of these were exhaustive and exhausting.

Finally, to round out the tests, the proposed constituted authority regulations would have required that no part of the earnings of the constituted authority could inure to the benefit of any person other than the governmental unit and upon dissolution of the authority all property of the authority must vest in the governmental unit.

Each of the elements above are present in very general terms in the revenue rulings that preceded the proposed constituted authority regulations. In its attempt to codify the principles, though, Treasury went far beyond anything that might be considered workable.

After sustained criticism, Treasury withdrew the proposed constituted authority regulations on January 1, 1984. LR-8-73, 1984-1 C.B. 592 (Jan. 1, 1984). In the notice of withdrawal, Treasury stated that "A large number of comments were received, and a public hearing was held on April 26, 1976. After consideration of the comments it has been determined that this notice be withdrawn." Instead, the tax-exempt bond community could (and still does) continue to rely on prior revenue

rulings (such as Rev. Rul. 57-187) to determine whether an entity is a constituted authority of a State or of a political subdivision. Treasury has never again attempted to promulgate regulations on this topic.

It seems that a number of conditions that caused the on behalf of issuer regulations to fail are also present with the proposed political subdivision regulations. Treasury and the IRS have said that the proposed political subdivision regulations are based on commonsense principles and are an attempt to be surgical in responding to a particular perceived abuse – the issuance of tax-exempt bonds by special districts that in Treasury's view are politically unaccountable. But, as in the proposed constituted authority regulations from 1976, their attempt to codify these principles has gone far beyond even their modest stated goal. As with the 1976 proposed constituted authority regulations, the proposed political subdivision regulations take up the quixotic task of trying to tease apart what activities serve a "public" purpose and which do not. The response to this point so far has been a rather unsatisfying "but it's a federal subsidy!" That may be, but it seems that a fundamental change to a longstanding definition is better resolved by the fount of the subsidy – Congress – rather than an administrative agency. Given the many similarities between the proposed political subdivision regulations and the proposed constituted authority regulations from 1976, many in the tax-exempt bond community are hoping that the proposed political subdivision regulations suffer a similar fate.

**Squire Patton Boggs – John W. Hutchinson**

The Public Finance Tax Blog

USA May 12 2016

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## IRS Updates Start-Of-Construction Rule: Four Years For Project Completion.

On May 5, 2016, the US Internal Revenue Service released Notice 2016-31 (available here) (the "Notice"). The Notice updates previous guidance on satisfying the "start of construction" requirement to reflect the fact that wind, hydropower, geothermal, and biomass and trash facilities can now qualify for the full renewable electricity production tax credit ("PTC") under Section 45 of the Internal Revenue Code of 1986 (the "Code") (e.g., 2.3 cents per kilowatt) if construction starts before 2017 (or a reduced credit, if construction starts before 2020).

The Notice provides that the US Treasury Department and the IRS will issue separate guidance to address the application of these rules to solar energy facilities claiming the investment tax credit ("ITC") under Section 48 of the Code.

The basic rules regarding the "five percent safe harbor" and "significant physical work test" remain unchanged. The Notice provides projects with a four-year window for completion and provides additional guidance regarding multiple "facilities" that operate as a "single project."

**Background**

In the final days of 2015, the Consolidated Appropriations Act of 2016 (P.L. 114-113) (the "Act") extended the PTC to qualified facilities, such as wind facilities, that begin construction before January 1, 2020 (the previous expiration date was January 1, 2015). The Act also phased out the wind PTC, which generally is an amount equal to the product of 1.5 cents, adjusted for inflation (which, for 2016, results in a credit rate of 2.3 cents), multiplied by the kilowatt hours of electricity produced by the taxpayer and sold to an unrelated person, by providing that the amount of the credit

shall be reduced by 20 percent for facilities that begin construction during 2017, 40 percent for facilities that begin construction during 2018 and 60 percent for facilities that begin construction during 2019. For a more detailed analysis of the Consolidated Appropriations Act of 2016, see our December 28, 2015, Legal Update).

Prior to the extension, the PTC was available for a qualified facility, such as a wind facility, only if construction of the facility began before January 1, 2015. The IRS also had issued guidance in the form of a series of notices (the "Prior Guidance") to clarify when construction of a facility was deemed to have begun.

Under Notice 2013-29 (available here), a taxpayer can establish that construction has begun by starting physical work of a significant nature prior to January 1, 2014 (the "Physical Work Test") or by paying or incurring at least five percent of the total cost of the facility before January 1, 2014 (the "Five Percent Safe Harbor"). In addition, under the Physical Work Test, the taxpayer is required to maintain a continuous program of construction, while the Five Percent Safe Harbor requires that the taxpayer make continuous efforts to advance toward completion of the facility (for a more detailed analysis of Notice 2013-29, see our April 16, 2013, Legal Update). Subsequently, in Notice 2013-60 (available here), the IRS clarified that the continuous program of construction and continuous efforts requirements would be deemed satisfied if the facility were placed in service before January 1, 2016 (the "Continuity Safe Harbor") (for more complete coverage of Notice 2013-60, see our September 23, 2013, Legal Update). In Notice 2014-46 (available here), the IRS further clarified and modified Notices 2013-29 and 2013-60 (for a discussion of Notice 2014-46, see our August 8, 2014, Legal Update). Finally, the IRS issued Notice 2015-25, which updated previously issued guidance to reflect the one-year extension of the PTC until December 31, 2014, including the extension of the date of the Continuity Safe Harbor to January 1, 2017 (for more complete coverage of Notice 2015-24, see our March 12, 2015, Legal Update).

Until the issuance of the Notice, there was uncertainty as to whether the Prior Guidance would continue to apply with respect to the five-year extension. Of particular concern was how the IRS would roll forward the date of the Continuity Safe Harbor in light of the multi-year extension and the phase-out of the PTC.

**The Notice**

**Completion Window – Continuity Safe Harbor.** Previously, Notice 2013-29 had imposed a requirement that a project owner continuously advance the construction of the project from the time construction starts through the placed-in-service date. In reaction to industry comments, the IRS had created the Continuity Safe Harbor in Notice 2013-60 to deem continuous construction to have occurred if the project was placed in service before January 1, 2016. The Notice significantly expands the Continuity Safe Harbor to deem a project to meet the "continuity" requirement if the project is placed in service by December 31 of the year that includes the fourth anniversary of the date of the start of construction. The Notice provides the following example in which "construction begins on a facility on January 15, 2016, and the facility is placed in service by December 31, 2020, the facility will be considered to satisfy the Continuity Safe Harbor."

To head off gamesmanship with respect to the application of the four-year rule, the Notice provides that a project "may not rely upon the Physical Work Test and the Five Percent Safe Harbor in alternating calendar years." For example, a project owner that started physical work in 2016, and thus had until December 31, 2020, to place the project in service, may not in 2017 incur five percent of the cost of the project and take the position that it has until December 31, 2021, to place the project in service. Thus, taxpayers are advised to carefully select the year in which a project satisfies the Physical Work Test or Five Percent Safe Harbor, although the four-year window for satisfaction

of the Continuity Safe Harbor may take some pressure off this selection.

**Completion Window – Facts and Circumstances.** In addition to the Continuity Safe Harbor, Notice 2013-29 provided that a taxpayer may satisfy the continuity requirement based on all the relevant facts and circumstances. Notice 2013-29 further provided a non-exclusive list of excusable disruptions in the taxpayer's construction of a facility that will not be considered as indicating that a taxpayer has failed to maintain a continuous program of construction. The Notice adds additional excusable disruptions to the list, including interconnection-related delays and delays in the manufacture of custom components. The Notice also expands some of the already-listed excusable disruptions including by broadening safety related delays to include all matters of safety, not just public safety, and by eliminating the limitation of no more than six months on financing delays. As with Notice 2013-29, the list of excusable disruptions provided by the Notice continues to be non-exclusive.

**Physical Work Test.** Under Notice 2013-29, the Physical Work Test requires "physical work of a significant nature." Notice 2014-46 clarified that this test focuses on the nature of the work performed, not the amount or cost. To illustrate activities that constitute "physical work of a significant nature," Notice 2014-46 provided a non-exclusive list of activities that included (i) the beginning of the excavation for the foundation, the setting of anchor bolts in the ground or the pouring of the concrete pads of the foundation, (ii) physical work on a custom-designed transformer that steps up the voltage of electricity produced at the facility to the voltage needed for transmission and (iii) roads that are integral to the facility.

The Notice confirms that the Physical Work Test is satisfied with the performance of work of a significant nature, irrespective of the amount or value of the work performed. To illustrate physical work of a significant nature, the Notice provides a non-exclusive list of qualifying activities that, with respect to wind facilities, includes only the beginning of the excavation for the foundation, the setting of anchor bolts in the ground or the pouring of the concrete pads of the foundation. Although the Notice does not reiterate the other examples included in Notice 2014-46, nothing in the Notice suggests that the IRS is abandoning its earlier guidance. On the contrary, the Notice expressly provides that the Prior Guidance continues to apply except as otherwise provided in the Notice.

**Multiple Facilities as a Single Project.** The Notice and the Prior Guidance apply the start-o--construction rules to a "project," whereas other IRS guidance had viewed each turbine as a separate unit of property for federal income tax purposes. The definition of a single project is critical because whatever facilities are within the scope of a single project have the same start-o--construction date for purposes of determining the level of tax credits to which the project is entitled. For example, for a project using the Physical Work Test, this principle means the work need only occur with respect to the project generally and not with respect to each turbine.

The single project principle also makes it feasible to have a project built in large phases and have all of the phases have a common start-of-construction date for purposes of determining the level of tax credit eligibility.1

While Notice 2013-29 had generally provided that whether multiple facilities will be treated as a single project will depend on the relevant facts and circumstances, it also identified eight non-exclusive factors that indicate that the multiple facilities are operated as part of a single project. Some of the factors did not apply to certain projects. For example, a "merchant" project would not have a common power purchase agreement, and an equity-financed project would not have a common construction loan. The Notice retains the language indicating that the single project determination will depend on the relevant facts and circumstances; however, it does not identify any

specific relevant factors. Nevertheless, nothing in the Notice suggests that the IRS no longer considers the previously identified factors as indicating that multiple facilities are operated as part of a *single project* and, as previously noted, the Notice expressly provides that the Prior Guidance continues to apply. The omission of any specifically identified factors, however, could suggest that the emphasis is on how an individual project *operates*, as opposed to whether all eight identified factors are satisfied.

**Disaggregation.** The Notice also provides additional guidance with respect to the single project determination that was not addressed in the Prior Guidance.

First, the Notice clarifies that although multiple facilities may be treated as a *single project* for purposes of the Physical Work Test or the Five Percent Safe Harbor Test, the fact that some facilities may not satisfy the continuity requirement (and thus will not be eligible for the PTC) will not disqualify the other facilities that have satisfied that requirement from being eligible for the PTC. This is helpful guidance that resolves, in favor of the taxpayer, the considerable uncertainty as to whether the *single project* concept may be used, not only to qualify otherwise disqualified individual facilities within a single project, but to disqualify otherwise qualified individual facilities within a project as well.

Second, the Notice clarifies that the *single project* determination will be made in the year in which the last of the multiple facilities is placed in service. While this point was not entirely clear under the Prior Guidance, it is consistent with the Prior Guidance's focus on factors that have bearing on how a project will be operated once it is placed in service.

Retrofitted Facilities. A project must be originally placed in service (i.e., essentially be new) to be eligible for the PTC. The Notice clarifies that a facility may qualify as originally placed in service even if it contains some used property, as long as the fair market value of the used property is not more than 20 percent of the facility's total value (i.e., the cost of the new property plus the value of the used property). The application of the so-called 80/20 rule to a project claiming PTCs comes as no surprise, as the IRS in other guidance has indicated that the 80/20 rule would apply in such a situation (see Rev. Rul. 94-31). The Notice clarifies that, in the case of a single project comprised of multiple facilities, the 80/20 rule is applied to each individual facility comprising the single project, not to the project as a whole.

**Footnotes**

1."Phases" is an industry term, rather than nomenclature used in the notices.

**Mayer Brown**

Article by Jeffrey G. Davis, David K. Burton, Anne S. Levin-Nussbaum and Isaac L. Maron

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## Why House Panel Leaders Should Care About Munis.

WASHINGTON – Rep. Randy Hultgren, R-Ill., warned House subcommittee leaders considering tax reform proposals on Thursday that a cap or elimination of tax exemption for municipal bonds could raise the cost of infrastructure projects in their own districts.

Hultgren made the remarks during the House Ways and Means Committee's tax policy subcommittee's hearing for members of Congress to discuss proposals for tax reform.

He told subcommittee chairman Rep. Charles Boustany, R-La., that bonds issued last year by St. Martin Parish in his state to build new schools and improve existing ones would have had an additional $1.2 million in issuance costs had the tax exemption of the bonds been capped.

He told Rep. Richard Neal, D-Mass, the top Democrat on the subcommittee, that a recent issuance by Springfield, Mass. to fund 22 separate projects, including a school renovation project and heating ventilation and air conditioning work at its city hall, would have cost taxpayers an additional $7 million.

"While serving in local government in Illinois I saw firsthand the benefits provided by this reliable option of financing community development," Hultgren said of municipal bonds. "Washington disagrees on how to strengthen our infrastructure but I believe decisions made by local communities handling local products and projects tend to be more efficient than from one size fits all policy from Washington D.C."

Hultgren also cited a 2013 study that found if tax exemption is capped or eliminated that it will be more costly to issue debt. He also cited an example from his own state. The Red Gate Bridge that spans the Red Fox River in St. Charles would have cost the city an additional $617,000 in interest costs without the tax exemption, he said.

Hultgren and Rep. Dutch Ruppersberger, D-Md., in March launched a bipartisan Municipal Finance Caucus made up of House members that works to protect the tax-exempt status of municipal debt.

The two Congressmen also sent a letter to House leaders last year urging them to reject any cap on or elimination of the tax exemption for municipal bonds. That letter had more than 120 signatures.

Boustany said he would take the collective panel's remarks into consideration.

House Ways and Means Committee chairman Rep. Kevin Brady, R-Texas, said it has been "years" since the committee held a member day hearing on tax code reform, and called the hearing an

“important step” in creating opportunities for legislators to put forth tax ideas. Testimony was limited to members of Congress who have either introduced or co-sponsored tax legislation.

Brady, who chairs both the committee and the House Task Force on Tax Reform, has previously said tax reform should lower tax rates for families and businesses as well as eliminate special-interest carve-outs.

“We are deliberately and thoughtfully considering improvements to the tax code that will grow our economy and make the tax code fairer and simpler,” Brady said Thursday. “The fact that over 30 members are sharing their ideas today is a testament to our new process – and to our return after so many years to regular order.”

House Republicans in February announced the formation of the committee-led task force on tax reform that is to consider recommending limits to deductions, credits and exclusions, and will consider tax-exempt bond interest along with other tax preferences.

The tax policy subcommittee held its first hearing on tax reform on March 22, where its members considered shifting from an income tax base to a consumption or cash-flow tax base.

Several tax reform plans would either limit or eliminate tax-exempt bond interest in order to help pay for lowering tax rates and broadening the tax base.

In his fiscal 2017 and previous budget requests, President Obama has proposed capping the value of tax-exempt interest at 28 percent.

Former House Ways and Means Committee chair Dave Camp, R-Mich., floated an earlier tax reform plan that would have capped the value of tax-exemption at 25% and eliminated the tax exemption for both new private-activity bonds and new advance refundings. Hultgren argues that the elimination or cap on tax exemption would increase public borrowing costs and hamper state and local governments’ ability to invest in themselves.

Neal called for a bipartisan effort to pass tax reform legislative proposals sooner rather than later.

“If legislation is not controversial, opposed by the administration, and introduced in a bipartisan and fiscally responsible manner, the committee should work expeditiously to get it approved,” Neal said.

**The Bond Buyer**

By Evan Fallor

May 12, 2016

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## Why Is an Indianapolis Authority Settling a Rebate Dispute with the IRS?

WASHINGTON – The Indianapolis Airport Authority said this week that it has agreed to settle a dispute with the Internal Revenue Service over rebate liability in connection with $347 million of tax-exempt bonds, even though it disagrees with the IRS’ position on the bonds.

“Although the authority disagrees with and has opposed the field office’s position, the authority and the Internal Revenue Service have agreed to a settlement of the dispute that will close the examination with no change to the tax exempt status of the bonds,” authority officials wrote in an

event notice posted on the Municipal Securities Rulemaking Board's EMMA website on May 6. The authority said in the notice that the settlement agreement is to be executed on May 20.

Robert Thomson, the senior finance director for Indianapolis Airport Authority, declined to comment on the details of the proposed settlement, saying it hasn't been reviewed yet by the authority's board.

But Thomson said the disagreement centered on the interpretation of the federal tax law related to "replacement proceeds." When certain material terms of bonds are changed, the bonds can be considered to be newly issued to replace the earlier bonds so that they become subject to the latest tax laws.

Thomson added that the IRS examination was a "normal review" rather than an audit. Thomson said the IRS opened its examination of the bonds in 2013.

In the event notice, the airport authority officials stressed that neither it nor the bond bank had received a Notice of Proposed Issue from the IRS as of May 6.

"There was a difference in interpretation of the law," Thomson said. "We've ultimately been working on this for three years. It's been a while — lots of meetings and lots of data, so we said, 'Let's come to a settlement. Let's not continue this investment of services and time.'" The IRS requires issuers to pay a rebate at least every five years and after the final maturity of the bonds. Failure to comply with federal rebate requirements can lead to the loss of tax-exempt status of the bonds.

The $347 million of tax-exempt Series 2006F were issued by the bond bank, which loaned the proceeds to the airport authority. The proceeds were to be used to purchase airport revenue bonds issued by the authority, pay for the cost of issuance of both the 2006F bonds and series 2006A Authority bonds, and pay for certain program expenses of the bond bank, according to the official statement for the bonds. The authority issued $42.8 million in Series 2006G taxable bonds at the same time.

The proceeds of the Series 2006A authority bonds were used to fund the airport authority's 2001-2010 capital improvement program for the airport system, including the development of a 1.2 million-square-foot midfield passenger terminal.

The Series 2006F and G bonds were underwritten by a syndicate led by City Securities, Inc. Ice Miller LLP and Coleman Graham & Stevenson, LLC served as co-bond counsel and First Albany Capital Inc. was financial advisor for the issue.

The bond bank is independent of the city of Indianapolis and the airport authority, according to the official statement for the 2006 bonds. Its purpose is to "buy and sell securities of 'qualified entities'" and is governed by a board of five directors appointed by the mayor of Indianapolis. The bond bank routinely serves as the conduit issuer for the airport's bond deals.

The airport authority, the owner and operator of Indianapolis International Airport, in March cancelled a proposed $500 million medical center and sports complex that would have been developed on the site of the airport's former terminal. The proposal, which was seen as too ambitious by the board, included several medical office buildings and a 20,000-seat sports stadium.

Indianapolis International Airport served nearly 8,000,000 passengers in 2015, according to the Federal Aviation Administration. It also serves as a hub for FedEx Express.

**The Bond Buyer**

By Evan Fallor

May 11, 2016

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## IRS ACT to Submit Recommendations at June Meeting.

WASHINGTON — The Internal Revenue Service's Advisory Committee on Tax Exempt and Government Entities (ACT) will hold a public meeting on June 8, 2016, when the panel will submit its annual report and recommendations to the IRS.

The ACT includes external stakeholders and representatives who deal with employee retirement plans; tax-exempt organizations; tax-exempt bonds; federal, state, local and Indian tribal governments. They advise the IRS on operational policy and procedural improvements.

At the public meeting, the ACT subcommittee members will present their report that includes recommendations on:

- **Employee Plans:** Analysis and Recommendations Regarding Changes to the Determination Letter Program
  Exempt Organizations: Stewards of the Public Trust: Long-Range Planning for the Future of the IRS and the Exempt Community
- **Federal, State and Local Governments:** Revised FSLG Trainings and Communicating with Small Local Governments
- **Indian Tribal Governments:** Survey of Tribes Regarding IRS Effectiveness with Current Topics of Concerns and Recommendations
- **Tax Exempt Bonds:** Recommendations for Continuous Improvement and Enhancing Resources in the Tax Exempt Bond Market

The ACT was established under the Federal Advisory Committee Act to provide an organized public forum for discussion of relevant issues affecting the tax exempt and government entities communities.

The ACT's public meeting will begin at 2:00 p.m. ET on June 8, 2016, at the IRS headquarters at 1111 Constitution Ave. NW, Washington, D.C. The 2016 ACT report will be available on IRS.gov on the day of the meeting.

Due to limited seating and security requirements, members of the public interested in attending the public meeting should call Nicole Swire at 202-317-8736 (not a toll-free call) or email tege.advisory.comm@irs.gov to confirm their attendance. Attendees must have photo identification and are encouraged to arrive at least 30 minutes before the session begins.

**ACT Members Continuing on the Committee in 2016**

**Employee Plans**

- Susan Bernstein, Schulte Roth & Zabel LLC, New York, New York
- Judith Boyette, Hanson Bridgett, San Francisco, California
- Christopher W. Shankle, Argent Trust Company, Shreveport, Louisiana
- Matthew I. Whitehorn, Dilworth Paxton LLP, Philadelphia, Pennsylvania

**Exempt Organizations**

- Natasha Cavanaugh, Bill & Melinda Gates Foundation, Seattle, Washington
- Cindy Lott, Columbia Law School, New York, New York
- Amy Coates Madsen, Standards for Excellence Institute, Baltimore, Maryland
- Andrew Watt, Association of Fundraising Professionals, Arlington, Virginia

**Federal, State and Local Governments**

- Dean J. Conder, State of Colorado, Denver, Colorado
- Vandee V. DeVore, State of Missouri, Jefferson City, Missouri

**Indian Tribal Governments**

- Tino Batt, Shoshone-Bannock Tribes, Fort Hall, Idaho
- Marcelino Gomez, private practice, Phoenix, Arizona

**Tax Exempt Bonds**

- David Danenfelzer, Texas State Affordable Housing Corporation, Austin, Texas
- William Johnson, First Southwest, Dallas, Texas
- Floyd Newton III, King & Spalding, Atlanta, Georgia

IR-2016-73, May 3, 2016

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**TAX - NEW YORK**

## Highbridge Broadway, LLC v. Assessor of City of Schenectady

**Court of Appeals of New York - May 5, 2016 - N.E.3d - 2016 WL 2350154 - 2016 N.Y. Slip Op. 03544**

Owner of commercial property in city brought proceeding alleging that property was overassessed in first year for which business investment property tax exemption had been granted, because the exemption had been undervalued.

The Supreme Court, Schenectady County, granted summary judgment to owner, and ordered city, city school district, and county to issue refunds for multiple years. Thereafter, the Supreme Court denied owner's motion to hold city school board in civil contempt for failing to pay refunds for multiple years. On cross-appeals, the Supreme Court, Appellate Division affirmed as modified. Owner appealed.

The Court of Appeals held that owner's single petition alleging that property was overassessed in first year and that exemption had been undervalued preserved right to obtain tax refunds in subsequent years for taxes paid based on the initial assessment.

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**TAX - ALASKA**

## City of Valdez v. State

**Supreme Court of Alaska - April 29, 2016 - P.3d - 2016 WL 1719372**

Municipalities challenged Department of Revenue regulation, under which all appeals of oil and gas property tax valuation were to be heard by State Assessment Review Board (SARB), while appeals of oil and gas property taxability were to be heard by Department, arguing that regulation contradicted statute that granted SARB exclusive jurisdiction over all appeals from Department's assessments of oil and gas property.

The Superior Court upheld regulation as valid. Municipalities appealed.

The Supreme Court of Alaska held that:

- Regulation was subject to substitution of judgment standard of review;
- Regulation was not entitled to deference afforded to longstanding and continuous interpretations of enabling statutes; and
- As a matter of first impression, regulation was invalid.

Department of Revenue regulation, under which all appeals of oil and gas property tax valuation were to be heard by State Assessment Review Board (SARB), while appeals of oil and gas property taxability were to be heard by Department, did not implicate Department's expertise or fundamental policies, and thus substitution of judgment standard of review applied in assessing validity to Department's interpretation of enabling statute establishing overarching regime for statewide assessment of oil and gas property in municipalities' challenge to regulation. Case involved both statutory interpretation of a non-technical statutory term, a task in which courts were well versed, and question of scope of and relationship between Department's and SARB's jurisdictions.

Department of Revenue regulation, under which all appeals of oil and gas property tax valuation were to be heard by State Assessment Review Board (SARB), while appeals of oil and gas property taxability were to be heard by Department, was not entitled to additional deference afforded to longstanding and continuous interpretations of enabling statutes in proceedings on municipalities' challenge to regulation as conflicting with statute establishing overarching regime for statewide assessment of oil and gas property. Application of regulation was not consistent.

Department of Revenue regulation, under which all appeals of oil and gas property tax valuation were to be heard by State Assessment Review Board (SARB), while appeals of oil and gas property taxability were to be heard by Department, was invalid, since regulation had no reasonable basis in enabling statute establishing overarching regime for statewide assessment of oil and gas property. Department's interpretation of statute through regulation was inconsistent with statute's text, which indicated that assessment encompassed initial taxability determination, statute's legislative history, which indicated it was unlikely that legislature intended to create a bifurcated appeal process without expressly doing so, and statute's purpose.

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**TAX - FLORIDA**

## City of Fort Pierce v. Treasure Coast Marina, LC

**District Court of Appeal of Florida, Fourth District - April 27, 2016 - So.3d - 2016 WL 1660600**

After city was granted exemption from ad valorem taxes on two marinas it owned and operated, owner of private marina, which was not exempted, brought suit seeking declaratory and injunctive relief against application of the exemption to the city's marinas.

Both parties moved for summary judgment. The Circuit Court granted summary judgment to owner.

City appealed.

The District Court of Appeal held that city's marinas served a municipal or public purpose and thus, city was entitled to an ad valorem tax exemption.

City's marinas served a "municipal or public purpose" and thus, city was entitled to an ad valorem tax exemption, even though they competed with other private marinas in the area. The marinas were open to public use, were exclusively owned and operated by the city, and were part of a larger recreational park complex, providing recreation for local residents and supporting the local economy by attracting non-local residents.

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## Colo. Court Case Puts Spotlight on Special Districts that Issue Munis.

WASHINGTON – A broad ruling by the Colorado Court of Appeals in a case of a developer's egregious fraud has sent lawyers to the state's General Assembly for legislation to protect existing special districts that issue tax-exempt bonds.

The case could have been the poster child for English Comedian John Oliver's recent television segment skewering special districts and is an example of everything the Treasury Department is concerned about with such districts. But lawyers in Colorado say it shouldn't be used to taint other special districts that have been properly set up and followed the law.

The case involves a high-profile developer, Zachary Davidson, who used sham contracts to make him and five associates organizers or "eligible electors" who formed a special metropolitan district in Greenwood Village, Colo. that issued almost $35 million of bonds now in default. Davidson included nearby condominium purchasers in the district and obligated them to pay taxes to help pay off the bonds, even though the condo owners were unaware they were in the district or that bonds had been issued.

Davidson stole millions of dollars of bond proceeds for his personal use and was eventually indicted on 20 felony counts by an Arapahoe County, Colo. grand jury. He eluded law enforcement for months and ultimately committed suicide by hanging himself from a tree in Withlacoochee State Forest in Florida at age 46.

After several years of litigation, the Colorado Court of Appeals issued a ruling on April 21 favoring the condo owners' Landmark Towers Association, Inc., ruling in part that Davidson used sham contracts to give him and his associates control of the special district and the bond issue.

Muni market participants in Colorado fear the case will be used to try to undo previously existing special districts and their taxing powers.

"This case has exceptionally unique and bad facts," said Dee Wisor, a lawyer with Butler Snow in Denver. The appeals court's ruling "was broadly written" and "not limited to the facts" of the case, he said.

"The risk here is that lawyers will go out and recruit taxpayers in special districts to invalidate elections that happened many years ago to avoid paying taxes," said Wisor. "We're trying to get the General Assembly to adopt legislation to validate other special district elections that have been previously held and which are not the subject of previous disputes," he said.

“It’s common for the General Assembly to weigh in on legislative intent,” said Mary Kay Hogan, director of government affairs for R&R Partners. Special districts are governed by state laws.

There’s a lot at stake for special districts in Colorado, which were responsible for 240 general obligation bond deals totaling $2.9 billion in the six years from 2009 through 2014, according to the Special District Association of Colorado.

That group and the Colorado Municipal Bond Dealers Association, Inc. each filed friend-of-the-court briefs in the case, asking the appeals court to reverse certain findings of the district court. The two groups warned that the findings, if left standing, would hurt the muni bond market in Colorado.

**Beyond Colorado**

But the case may have national implications as well.

It comes as the Treasury and Internal Revenue Service have proposed controversial new rules for political subdivisions because of concerns that some special districts, or community development districts as they are called in Florida, are controlled by developers and their associates rather than taxpayers. Treasury and the IRS contend that developer-controlled districts should not be able to issue tax-exempt bonds.

Muni market participants argue that historically, many developers have set up special districts to issue bonds to pay for infrastructure improvements for projects such as retirement communities or business parks until homeowners or businesses can move in and begin to pay assessments or taxes to pay for the bonds.

For years, the test under the federal law for whether a district is a political subdivision that can issue tax-exempt bonds has been based on whether an entity has been delegated a substantial amount of at least one of three sovereign powers: eminent domain, taxation, and policing.

The Treasury and IRS are now proposing rules to expand that test to add two new requirements. Under rules they proposed February, a political subdivision that can issue tax-exempt bonds, would also have to serve a governmental purpose and be governmentally controlled “with no more than an incidental private benefit.”

The proposed rules have met with a firestorm of criticism from muni lawyers who have warned they would threaten existing special districts and potentially millions of dollars of bonds.

But this case epitomizes the concerns of Treasury and the IRS. Davidson, through 7677 East Berry Avenue Associates, L.P. where he was managing partner, built two high-rise residential condominium towers in Greenwood, Colo., called Landmark and Meridian, from 2005 through 2007, according to court documents.

He did not create a special district for the project and instead entered into agreements with Greenwood Village in 2005 to build the towers and to receive a rebate of 50% of city sales taxes collected by commercial activities conducted on the project site for 20 years. Sales and use taxes on the building and construction materials as well as building permit fees were waived.

The towers were to be completed in 2007 and 2008. By the end of 2006, Davidson’s company had 130 buyers for the condos under contract. The buyers paid $35,000 to $100,000 in nonrefundable deposits and agreed to pay pro-rated taxes for the year at closing, according to court documents.

That same year, Davidson, through Everest Marin, L.P., where he was also managing partner,

bought 11.1 acres adjacent to the towers to develop a residential community to be called European Village that was to include manor homes, brownstones and infrastructure.

Davidson decided to create a special district, called the Marin Metropolitan District, to issue up to $35 million of general obligation bonds to finance the project. But he found the village property would not provide a sufficient tax base to support the GO bonds. So, acting on behalf of both his 7677 East Berry and Everest companies, Davidson decided to include the Landmark and Meridian Towers in the special district, without telling the condo buyers, documents show.

**Contracts**

Davidson entered into option contracts with five associates to qualify them and him as "eligible electors" who then elected to form the district and issue the bonds. The option contracts were for the purchase of an undivided 1/20th interest in a 10 foot by 10 foot parcel. These six individuals were the only ones who received notices of elections and votes and the only ones who voted on anything.

The six "electors" of the district submitted a service plan to Greenwood Village stating the district would provide public infrastructure improvements to all property within the district and would finance them with bond proceeds.

The Marin Metropolitan District hired Piper Jaffray to assist it in issuing the bonds. In June 2008, nearly $30.49 million of district GO bonds were underwritten by Piper Jaffary and sold to Colorado Bondshares, a tax-exempt mutual fund. The bonds had an interest rate of 7.75% and a maturity of 20 years, according to bond documents. UMB Bank, N.A. was trustee. About $13 million of the bonds were redeemed after that. The bonds went into default last year, according to bond documents. Davidson, who as a managing partner of Everest and an "elector" of the district had unsupervised access to the bond funds, was hurting for cash. He withdrew about $8 million of the bond proceeds, using much of it for his personal benefit.

The Landmark condo owners would never receive any benefits from the use of those bond proceeds and yet all of a sudden, they were on the hook for paying back the bonds.

In 2011, the Landmark Towers Association began to uncover the fraud and filed a complaint in a Colorado district court against the Marin Metropolitan District, Colorado Bondshares and UMB Bank to enjoin them from the future levying of taxes under the state's Taxpayers Bill of Rights (TABOR).

Landmark claimed the bond and tax election was illegally conducted because the option contracts of the district's organizations were a sham and Landmark buyers had not been allowed to participate. It claimed the district had improperly disbursed bond funds for the benefit of Davidson. It also charged the district had set the property tax levy for debt service higher than allowed by law. Landmark said taxing the condo owners violated their constitutional right to due process because the bond-financed improvements would not benefit them.

The district court ruled in favor of Landmark on most of its claims and ordered the Marin district to refund to the condo owners the portion of the misused bond proceeds they had paid. The court also ordered the district to refund some of the property taxes collected and enjoined it from imposing further taxes on the condo owners.

But the court ruled that, even though district's organizers never made down payments for "director's parcels" or paid any taxes on the land, the option contracts were not a sham and were a legitimate way to create "eligible electors" of the district.

The defendants, including Colorado Bondshares, appealed the ruling, arguing in part that Landmark's challenge was untimely and that neither the taxes levied nor the misuse of bond funds violated TABOR. Landmark cross appealed disputing the court's findings that its challenge to the bond and tax election was time-barred. It also challenged the court's alternative determination that the election complied with TABOR and applicable statutes.

The appeals court affirmed parts of the district court's ruling, reversed other parts, and remanded the case back to the lower court.

Particularly important was that the appeals court disagreed with the district court's conclusion that the contracts were sufficient to make the organizers of the district eligible electors. It concluded instead that the organizers' contracts were sham agreements because of seven factors, including that none of the organizers (electors) made down payments or paid taxes, and that the parcel of land was too small to have any beneficial use.

"The purpose of requiring a district to gain approval from persons who own property within a district before it imposes a new tax is to allow the people who will have to pay the tax to decide whether the tax should be levied," the appeals court judges said in their ruling.

Wisor and other lawyers say they are trying to get the Colorado General Assembly to pass legislation before the session ends on May 11 validating existing special districts that have followed the law.

**The Bond Buyer**

By Lynn Hume

April 29, 2016

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## Bill Would Expand Indian Tribes' Ability to Issue Tax-Exempt Bonds.

WASHINGTON – A bipartisan bill introduced in the House would expand the ways in which Indian tribes can issue tax-exempt bonds and place them more on par with state and local governments under the federal tax law.

The Tribal Tax and Investment Reform Act of 2016 (H.R. 4943), introduced by Rep. Ron Kind, D-Wis. on April 14, would amend the federal tax code to remove special status for Indian tribal governments and instead establish a volume cap for their tax-exempt bonds similar to those for state governments.

Kind is a member of the House Ways and Means Committee, which writes tax laws. His bill is co-sponsored by Lynn Jenkins, D-Kan., who is also a member of that committee.

Tribes currently can issue governmental bonds only if the proceeds are used for an "essential government function" such as for projects involving schools, streets or sewers. They cannot issue bonds for activities for which state and local governments issue private activity bonds.

Congress removed the essential government function limitation for tribal government bonds in 2009 and 2010 under the American Recovery and Reinvestment Act. President Obama, in his budget requests in recent years, has proposed repealing the "essential governmental function" standards for tribal governments.

Under the bill, the Treasury Department would create a national bond volume cap for tribal governments based on a tribe's national population, similar to the population formula it uses for states.

Kind said that Indian tribes face "historic disadvantages" in accessing capital and that "codifying tax parity with respect to tribal governments is consistent with federal treaties recognizing the sovereignty of tribal governments."

The bill says that Indian tribes are also currently excluded from certain federal tax code provisions, which "results in unfair tax treatment for tribal citizens or unequal enforcement authority for tribal enforcement agencies."

"It is long past time that changes are made to give tribes fair treatment in the tax code and access to a full range of financing options," Kind said on Monday. "Tax exempt bonds are a critical tool for raising capital and I am pleased to have bipartisan support for this legislation. I will continue to work with my colleagues across the aisle to move this important legislation forward."

The bill has been referred to the House Ways and Means committee and House Education and the Workforce committee.

Kind introduced a similar bill last Congress, which was not acted upon.

The bill would also allow Indian tribal governments to offer pension plans to their employees and to have access to the Federal Parent Locator Service run by the Department of Health & Human Services.

Indian tribes have long called for repeal of limitations on the tax-exempt bonds they can issue, which they have contended puts them at a competitive disadvantage to state and local governments.

Perry Israel, a lawyer with his own firm in Sacramento, said Monday it would "be good" to eliminate special status and put an end to an issue he remembers as lasting more than three decades. Confusion over essential government functions, he said, also gave rise to Tribal Economic Development Bonds, the 2009-2010 bonds issued under the ARRA, which were not required to be issued for "essential governmental functions."

"I think it's about time we stopped having special rules for Indian tribes," Israel said. "There is this big question – what is an essential government function? We ought to go and treat tribes the same as we treat other states."

**The Bond Buyer**

By Evan Fallor

April 25, 2016

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## Hawkins Advisory: Internal Revenue Service Revenue Procedure 2016-25 Regarding Mortgage Revenue Bonds and Mortgage Credit Certificates.

Read the Advisory.

## IRS PLR: LLC's Restructuring Will Not Result in Gulf Opportunity Zone Depreciation Recapture.

The IRS ruled that restructuring transactions undertaken by two limited liability companies owned by the same individual will not result in the recapture of any Gulf Opportunity Zone bonus depreciation under section 1400N(d)(5) in connection with property transferred between the two companies.

Read the Letter.

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## Enhancing Tax Abatement Transparency.

As a follow-on to last week's blog post describing 3 steps economic developers should take to prepare for GASB 77 tax abatement disclosures, I want to share a set of recommendations from the Government Finance Officers Association (GFOA) that complement our suggestions for economic development groups.

GFOA is concerned, as we are, that the tax abatement disclosure guidelines will not provide complete information to citizens and other users of government financial reports because they do not include "the justification and expected long-term benefits of tax abatements."

GFOA offers several helpful recommendations on how and where to provide this information. The full, two-page best practice statement from GFOA on Enhancing Tax Abatement Transparency is available here. To summarize the recommendations:

**The government should disclose additional tax abatement information in its letter of transmittal**

The letter of transmittal accompanies the comprehensive annual financial report (CAFR), which includes the financial note providing the tax abatement disclosure. GFOA suggests that this letter include:

- a reference to other documents where a complete cost/benefit analysis can be found
- an explanation of how tax abatements are accounted for and incorporated into the budget
- a description of policies governing tax abatements, including what the government is hoping to achieve and methods used to determine the return on investment (ROI)
- an identification of those responsible for monitoring compliance with abatement agreements
- an explanation of the relationship between tax abatements and the government's goals as set forth in its strategic plan
- a five-year chart of benefits anticipated and received

**The tax abatement information in the letter of transmittal should be simple, straightforward and material**

The information should not be duplicative or provide unnecessary detail. Using charts and graphs to supplement written material can be helpful. GFOA also suggests aggregating information by government and tax abatement program, consistent with the GASB guidelines.

**Finance staff should communicate with economic development partners**

As we said last week, complying with GASB 77 will require cooperation between the economic development organization and the government's finance staff because, in many cases, neither will have all the information necessary to determine the financial disclosure. GFOA is also concerned with ensuring the proper flow of information to comply with disclosure guidelines.

**Build relationships and establish a timeline**

GASB 77 requires disclosure of tax abatements entered into by other governments that reduce the reporting entity's tax revenues. GFOA recommends establishing relationships with these other governments and creating a timeline for sharing information to prevent reporting delays.

As a reminder, the Governmental Accounting Standards Board (GASB) last year approved Statement No. 77, Tax Abatement Disclosures, which establishes guidance requiring state and local governments to disclose certain information about tax abatement agreements for periods beginning after December 15, 2015.

**Check out our previous blog posts on this topic for economic developers:**

- 3 steps economic developers should take to prepare for GASB 77 tax abatement disclosures
- What will tax abatement disclosures mean for economic development groups?
- Smart Incentives comments on tax abatement disclosure guidelines

**Smart Incentives**

Posted by Ellen Harpel | April 26, 2016

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**TAX - OHIO**

## Christian Voice of Cent. Ohio v. Testa

**Supreme Court of Ohio - April 14, 2016 - N.E.3d - 2016 WL 1459544 - 2016 -Ohio- 1527**

Nonprofit corporation that operated radio station broadcasting religious programming sought review of the tax commissioner's denial of a real-property tax exemption for houses used exclusively for public worship.

The Board of Tax Appeals affirmed. Corporation appealed.

The Supreme Court of Ohio held that corporation's property was exempt under the public-worship exemption.

Nonprofit corporation's appeal of denial of the public-worship property tax exemption for its property that was used to operate a Christian radio station presented a question of law, and Supreme Court's review was not deferential but de novo, where the parties' dispute concerned not the underlying facts but whether those undisputed facts indicated that the property and attendant lands were a house used exclusively for public worship and thus entitled to the exemption.

Primary use of nonprofit corporation's property, including a radio station that broadcast religious programming, was for public worship, and therefore the property qualified for exemption for houses used exclusively for public worship, where corporation conducted religious activities through its

broadcasts and on its premises, the majority of broadcasts were devoted to contemporary Christian music, corporation employed a full-time minister who led a weekly Bible study and gathered on a regular basis with other staff members in the on-site chapel to pray for intentions submitted by listeners, and corporation was active in community performing charitable acts.

Statute defining a church for purposes of real-property tax exemption does not require a congregation or worship activity; instead, its concern is whether the organization has a primarily religious purpose and is not for profit.

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**TAX - INDIANA**

## Angel v. Vanderburgh County Treasurer

**Court of Appeals of Indiana - April 15, 2016 - N.E.3d - 2016 WL 1535783**

Tax sale purchaser petitioned for tax deed. After granting purchaser's petition, the Superior Court, granted property owner's motion for relief, ordered tax deed rescinded, and denied purchaser's motion to establish a redemption amount. Purchaser appealed.

The Court of Appeals held that:

- Tax sale purchaser could recover from the owner of the real property, or any other person primarily liable for the payment of taxes and special assessments on the property, an amount which included the amount of purchaser's lien, together with interest, and
- Three-year limitation period for a tax sale purchaser to claim tax sale surplus funds upon redemption of a tract of real property did not apply to property that was not redeemed.

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## NABL: IRS Issues Final Regs on Determining AFRs for Tax-Exempt Bonds.

The Internal Revenue Service (IRS) published today in the Federal Register final regulations that provide the method to be used to adjust the applicable Federal rates (AFRs) to determine the corresponding rates under section 1288 of the Internal Revenue Code (Code) for tax-exempt obligations (adjusted AFRs) and the method to be used to determine the long-term tax-exempt rate and the adjusted Federal long-term rate under section 382. For tax-exempt obligations, the regulations affect the determination of original issue discount under section 1273 and of total unstated interest under section 483. The IRS final regs, which are effective today, April 26, 2016, adopt proposed regs (REG-136018-13) issued in March 2015 without substantive change.

The final regulations are available here.

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## NABL: Bill Would Expand Bond Issuance for Indian Tribes.

Rep. Ron Kind (D-WI) introduced the Tribal Tax and Investment Reform Act of 2016 (H.R. 4943), which would, among other things, establish a tax-exempt bond volume cap for Indian tribal governments, similar to the volume caps for state governments. The tax-exempt bond volume cap would be based on the total national tribal population and allocated to individual tribes by the Secretary of the Treasury. H.R. 4943 would also repeal the essential government function

requirement. H.R. 4943 has been referred to both the House Ways and Means Committee and the House Education and the Workforce Committee.

H.R. 4943 is available here.

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**TAX INCREMENT FINANCING - IOWA**

## Concerned Citizens of Southeast Polk School Dist. v. City of Pleasant Hill, Iowa

**Supreme Court of Iowa - April 22, 2016 - N.W.2d - 2016 WL 1612935**

Citizens filed petition for writ of certiorari and for a declaratory judgment and an injunction to prevent annexation near high school and amended urban renewal plan from taking effect. City filed motion for summary judgment, and school district intervened.

The District Court granted summary judgment in part. Citizens and school district appealed, and the Court of Appeals affirmed. The Supreme Court granted further review.

The Supreme Court of Iowa held that:

- City lacked authority to extend renewal area and tax increment financing (TIF) arrangement after consolidation of urban renewal areas;
- City could not use TIF revenue from original urban renewal area to fund street improvements and construction and other aspects of economic development outside the boundaries of the urban renewal area; and
- Amended urban renewal plan was not inconsistent with city's comprehensive plan.

City, which had consolidated urban renewal areas in order to use tax increment financing (TIF) from original renewal area across a greater area, lacked authority to extend renewal area and TIF arrangement in light of statute limiting a TIF division based upon an economic development determination to 20 years. While original urban renewal area pre-dated statute and thus was grandfathered, that original urban renewal area no longer existed due to consolidation and thus grandfathered right was lost.

City could not use tax improvement financing (TIF) revenue from original urban renewal area to fund street improvements and construction and other aspects of economic development outside the boundaries of the urban renewal area. While city could consolidate urban renewal areas and then use TIF revenue from one former area in another former area, city could not then extend former area, which no longer existed, while simultaneously treating that former area as integrated within the consolidated area.

Amended urban renewal plan, which contemplated street improvements and construction, conformed to city's comprehensive plan, which had designated area as commercial. Although city was working toward development of industrial warehouse on land, warehouse was not part of urban renewal plan, and street improvements were not themselves inconsistent with the general plan, which simply did not mention some of the improvements when describing goals for road development.

## Revenue Procedure 2016-25: Qualified Mortgage Bonds

On April 15, the Internal Revenue Service released Revenue Procedure 2016-25, which provides issuers of qualified mortgage bonds and issuers of mortgage credit certificates with (1) nationwide average purchase prices for residences located in the United States, and (2) average area purchase price safe harbors for residences located in statistical areas in each state, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, the Virgin Islands, and Guam.

Revenue Procedure 2016-25 is available here, and will appear in IRB 2016-18 dated May 2, 2016.

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## NABL: Bill Would Remove PAB Caps on Water Infrastructure.

On April 20, Sen. Ben Cardin (D-MD) introduced the True LEADership Act (S. 2821), which would provide $70 billion over the next ten years for water infrastructure and lead relief programs. Among other provisions, S.2821 would remove the cap on private-activity bonds for water and wastewater projects, and increase funding to the Environmental Protection Agency's clean water state revolving fund programs. S.2821 has been referred to the Senate Finance Committee.

A press release from Sen. Ben Cardin and a copy of the S.2821 are available here.

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## 3 Steps Economic Developers Should Take to Prepare for GASB 77 Tax Abatement Disclosures.

State and local governments will soon begin disclosing financial information about tax abatements in their annual financial reports. As a reminder, the Governmental Accounting Standards Board (GASB) last year approved Statement No. 77, Tax Abatement Disclosures, which establishes guidance requiring state and local governments to disclose certain information about tax abatement agreements for periods beginning after December 15, 2015.

Economic development organizations should consider taking these three steps now to help their communities comply with disclosure rules.

**1. Determine which tax incentives meet the criteria for disclosure**

This rule applies only to tax abatements – it does not include all tax breaks, nor does it include other types of incentives. It is not limited to business attraction tax abatements. GASB Statement 77 defines a tax abatement as:

> A reduction in tax revenues that results from an agreement between one or more governments and an individual or entity in which (a) one or more governments promise to forego tax revenues to which they are otherwise entitled and (b) the individual or entity promises to take a specific action after the agreement has been entered into that contributes to economic development or otherwise benefits the governments or the citizens of those governments.

It is critical to note that "a transaction's substance, not its form or title" determines whether the

transaction meets the definition. In other words, it doesn't matter what it's called or the form it takes: if it fits the criteria, it needs to be disclosed.

However, data may be aggregated by program. Individual transactions may be, but do not need to be, disclosed.

**2. Reach out to your government's finance staff to begin sharing information**

Complying with GASB 77 will likely require cooperation between the economic development organization and the government's finance staff because, in many cases, neither will have all the information necessary to determine the financial disclosure.

The Government Finance Officers Association has similarly recommended that, "finance staff initiate communication and develop/maintain relationships with its entity's economic development partners and/or budgetary officials charged with initiating, developing and affirming tax abatement to ensure the proper flow of information."

**3. Consider how to supplement the limited information that will be provided in the financial disclosures**

The disclosure rules focus on the costs, but not the expected benefits, of tax abatements. Accordingly, it will become important for economic developers to use other outlets to provide context and detail on the reasons for the tax abatement agreements and the anticipated outcomes. At a minimum, economic development organizations should prepare to respond to questions post-disclosure about how and why incentives were used. A better strategy would be to develop additional reports or material to be reviewed alongside the financial disclosures to convey how those funds are designed to achieve the community's economic development goals.

I've written previously on the specifics of the standard, including what needs to be disclosed and what does not, so I won't repeat that here, but you can follow this link to the blog post or this link to the GASB standard itself.

**Smart Incentives**

Posted by Ellen Harpel | April 19, 2016

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## Income Tax Reform Bills Could Drive Up Muni Borrowing Costs.

WASHINGTON – Two House Republicans presented a committee with their legislative proposals to reform or abolish the federal income tax system, sparking concerns from some members of the municipal bond community.

Speaking before the House Ways and Means Tax Policy Subcommittee Wednesday, Reps. Roger Williams, R-Tex., and Bob Goodlatte, R-Va., said their bills would lead to a fairer, flatter and simpler federal income tax system.

The hearing on Wednesday was the tax policy subcommittee's second on fundamental tax reform proposals, and this week's specifically focused on legislation targeting the income tax.

Williams talked about the Jumpstart America Act, a collection of seven tax reform bills introduced

last June and July. That package includes the Individual Rate Implication Act (H.R. 2842); Incentivize Corporate America Act (H.R. 2946); Invest in America Act (H.R. 3017); Bring Jobs Back to America Act (H.R. 3083); Fixed Asset Relief Act (H.R. 3213); and Paycheck Relief Act (H.R. 3267) as well as H. Con. Res. 69, which would keep the last-in, first-out method of accounting for inventories.

Williams' collective plan would lower the corporate tax rate to 20%, which he said would increase investment in infrastructure and make businesses more competitive on an international scale. It also would lower individual tax brackets to 20% and 30% and would cut payroll taxes by 2%.

The capital gains and dividends tax would be reduced to between 0% or a maximum of 15%, and the bill would allow for 100% depreciation of fixed assets. The inheritance tax would also be eliminated. Williams said his plan would provide relief for small businesses.

But Frank Shafroth, the director of the Center for State and Local Government Leadership at George Mason University, said that Williams' plan would radically increase the federal debt and deficit, which state and local governments cannot afford.

"Because of the singularly reduced rates, it would reduce incentives for Americans to purchase state and local bonds," Shafroth said. "It would perhaps better be named as the Mandatory Increase in the Cost of Education, Safe Drinking Water, & Transportation Act – as it would singularly increase the cost of the state and local public finance which provides the nation's critical infrastructure."

Goodlatte this year introduced the Tax Code Termination Act (H.R. 27), which would repeal the current tax code at the end of 2019. It would also require Congress to adopt a new tax system by July 2019. That plan, which uses the motto "sunset the tax code," would abolish all of the current code minus payroll taxes. It currently has 129 co-sponsors, and was referred to the House Rules committee in January.

The Virginia Congressman said he hoped setting such a deadline would move tax reform to the "front burner."

"While the bill does not advocate for one tax system over another, it does outline a framework for Congress to consider," Goodlatte said.

Shafroth said Goodlatte was simply seeking a state and local tax increase.

"There is something terrifically taxing to the nation's state and local leaders….to say one is going to eliminate the current code and make up some new code in the fuzzy future," he said. "That could only foist higher interest rates on municipal bonds issued by state and local governments – thereby forcing higher state and local taxes and higher rates on utilities."

In an opening statement Wednesday, tax policy subcommittee chairman Rep. Charles Boustany, R-La., said Goodlatte and Williams' proposed legislation make the current tax code "more conducive to economic growth."

Boustany called the current tax code "complex, unfair and outdated," while tax policy subcommittee ranking member Rep. Richard Neal, D-Mass., said a new code that "promotes job growth, lifts wages for all workers, and grows the middle class," needs to be developed. Developing a consensus plan will be unlikely, he added.

"If you really want tax reform, you're going to have to swallow some things you don't like," Neal said.

While tax reform is not likely in an election year, most involved in this week's hearing agreed that the current system is in need of improvement, and that time is of the essence.

"Ultimately, the Ways and Means Committee must weave the most pro-growth concepts and ideas into a bold plan that fundamentally and comprehensively reforms our tax system," Boustany said.

"We've been talking about it [tax reform] and now we need to get it done," added Rep. Jim Renacci, R-Ohio.

Thomas Barthold, the chief of staff of the Joint Committee on Taxation, also spoke Wednesday about the Tax Reform Act of 2014 (H.R. 1), the legislation introduced by former Ways and Means Committee chairman Dave Camp, R-Mich., in December of that year. The Camp bill proposed broadening the income tax base while lowering statutory tax rates, and Barthold used it as an illustration a roughly revenue neutral plan that would increase the cost of capital.

Camp's bill proposed capping the value of the exemption for munis at 25% and eliminating the tax exemption for qualified private-activity bonds and advance refunding bonds issued after 2014. It also would repeal the corporate and individual alternative minimum taxes.

Conversely, should Congress pursue a tax plan that reduces the cost of capital through expensing, Barthold said business tax receipts would be dramatically lowered.

"We'd probably run a larger deficit then," Barthold said. "That can drive up interest rates and real interest costs – which are a negative to cost calculation."

Several muni experts and a Treasury official told The Bond Buyer in 2014 that they had concerns with Camp's plan, specifically in regards to its curbing of the muni exemption to pay for other aspects of tax reform.

The tax policy subcommittee held its first hearing on tax reform on March 22. That hearing, which focused on shifting from an income tax base to a consumption or cash-flow tax base, included testimony from Reps. Devin Nunes, R-Calif.; Michael C. Burgess, R-Tex.; and Robert Woodall, R-Ga.

The committee has increased efforts to promote tax reform ahead of this year's income tax return filing deadline, which is April 18.

Rep. Kevin Brady, R-Tex., the chairman of the House Ways and Means Committee, is also leading a committee-led task force on tax reform that aims to limit the deductions, exclusions and credits in the current code.

**The Bond Buyer**

By Evan Fallor

April 15, 2016

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**TAX - KENTUCKY**

## Sewell-Scheuermann for Use and Benefit of City of Audobon Park v. Scalise

**Court of Appeals of Kentucky - April 15, 2016 - S.W.3d - 2016 WL 1534636**

Taxpayer filed action against city's mayor and members of city council, alleging that city council

diverted a portion of tax revenue generated from a sanitation tax and placed such funds in city's general fund in violation of state constitution and statutes.

City defendants filed motion to dismiss. The Circuit Court granted the motion.

The Court of Appeals held that, despite fact that diverted funds were used for the benefit of the city, allegations stated claim under private-right-of-action statute.

Allegations by taxpayer that city of the home rule class diverted a portion of tax revenue generated from sanitation tax and placed such funds in city's general fund stated claim against city's mayor and members of city council under statute providing private right of action when tax revenue was expended for purpose other than that for which the tax was imposed, despite fact that diverted funds were used for the benefit of the city. Statutes served as a check for the very conduct that appeared to have occurred, and while city may not have been damaged in the traditional sense, it was apparent that the statutes were violated.

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## D.C. And IRS In Muni Bond Tax Dispute Tied To Oyster School P3.

WASHINGTON – The Internal Revenue Service is preliminarily challenging the tax-exempt status of bonds issued by the District of Columbia as part of a much lauded public-private partnership to build a new elementary school.

The district, which issued $11 million of bonds in late 1999 for the James F. Oyster Elementary School P3, disclosed the IRS stance in a material event notice recently posted on the Municipal Securities Rulemaking Board's website.

The district said it had received a Notice of Proposed Issue (Form 5701-TEB) from an IRS examiner in February regarding $8.73 million of the bonds that are still outstanding. The IRS sends NOPIs to issuers when it believes tax laws have been violated. A NOPI contains the issues, facts, law and TEB examiner's preliminary position that the bonds are not tax-exempt.

The district said in the event notice that it "is currently discussing its options with respect to the notice and its counsel."

Mark Scott, former head of the IRS TEB office who now has a private practice focused on representing whistleblowers, recently tweeted that the Oyster School P3 "is a tax scam … that cost district residents millions in tax dollars."

He called the transaction a "PPP disaster" and asked whether this is the kind of project Mayor Muriel Bowser's new P3 office wants to support. Bowser launched an Office of Public-Private Partnerships in November of last year "to build collaborations between private sector businesses and [the district government] to support large-scale projects such as infrastructure development and enhancements."

The office is headed up by Seth Miller Gabriel who wrote in an Internet post last October that he'd been taking government officials on tours of P3 projects, including the Oyster school. "Could a PILOT structure, similar to the one used to save the Oyster School, also be the answer to the DC General Hospital-shelter (or temporary housing around the country)?" Gabriel asked in the post.

Scott, who is looking into the Oyster P3 for a client under the whistleblower program, claims the

bonds are actually taxable private-activity bonds because the district made an indirect private loan to the developer, LCOR New Oyster School LLC (LCOR).

Asked about the dispute with the IRS and Scott's statements, the District sent the following email to The Bond Buyer on Wednesday: "The District confirms that it has responded to an IRS inquiry regarding bonds issued in connection with the construction of the District's James F. Oyster Elementary School. The developer received no proceeds from the bond sale. One hundred percent of the bond proceeds were used to build a new public school and the developer has no right to use any school property. All property tax-related payments made by the developer to the District are dedicated to pay debt service on the bonds that funded the school's construction."

The email continued: "The District is confident that the bonds comply with federal tax law. The District has responded to the IRS preliminary findings."

According to descriptions of the Oyster school P3 in the official statement for the bonds and documents from district officials and staff, some of which were obtained by Scott through Freedom of Information Act requests, the district issued roughly $11 million in revenue bonds. The proceeds were used by the developer to finance the demolishment of an old school and the design and construction of a new Oyster Elementary School within two years.

The 32-year bonds are to be entirely repaid by payments-in-lieu of taxes to be made by the developer.

The school was built on .79 of an acre, owned by the district. But the district transferred to the developer .88 of an acre next to the school on which the developer constructed a 210-unit luxury apartment complex with an estimated value, at the time of the OS, of $23 million. The district would have no financial interest in the apartment project.

But the developer was exempted from paying property taxes on the property for the apartment complex in return for making PILOTS to the district for debt service.

At the time of the bond offering, the district estimated the value of the land for the apartment building to be between $3.2 million and $3.76 million and estimated that $6.6 million of property taxes would be abated, after taking into account the cost of capital for the revenue bond financing, assuming a 6% yield on the bonds.

The yields on each of two sets of term bonds maturing in 2015 and 2021 was 6.65% and 6 3/8%, respectively, according to the OS.

Scott contends that what really happened in the transaction was that the district made an indirect loan to the developer of between $3.2 million and $3.76 million and then allowed the developer to pay for it with PILOTS, based on a tax-exempt rate.

The district contends that the bonds proceeds were allocated to financing the school project. But Scott says the transaction is abusive and that the IRS commissioner should reallocate the $3.2 million to $3.76 million of bond proceeds as a loan to the developer.

Under federal tax laws, bonds are PABs if more than the lesser of 5% or $5 million of the bond proceeds are used directly or indirectly to make or finance loans to private parties. If a PAB-financed project doesn't fall within a specified category, the bonds are not "qualified" and therefore not tax-exempt.

In this case, 5% of the $11 million of bond proceeds would be $550,000 and that amount would be

less than $5 million for purposes of the private-loan test. Scott says $3.2 million to $3.76 million of the bond proceeds that should be allocated as a loan to the developer is roughly one third of the bond issue and substantially in excess of the private-loan 5% limitation.

Scott claims the bonds are PABs and taxable since they meet the private loan test for PABS and do not fall within a "qualified" category of projects that can be financed with tax-exempts.

Gabriel said he was not aware of the dispute. Ed Oswald, a partner with Orrick, Herrington, & Sutcliffe who is representing the district in the dispute with the IRS, could not be reached for comment.

**The Bond Buyer**

By Lynn Hume

April 20, 2016

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## IRS Webinar: TE/GE Worker Classification.

**Watch this free webcast about TE/GE Worker Classification: Employee or Independent Contractor?**

**When:** May 12, 2016; 2 p.m. (Eastern)

**How:** Register for this event. You will use the same link to attend the event.

**Learn about:**

- Why this matters
- How to recognize Control Factors
- Benefits of Voluntary Compliance
- How the Form SS-8 can help

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**SPECIAL ASSESSMENTS - MINNESOTA**

## Rehbein v. City of Lino Lakes

**Court of Appeals of Minnesota - March 28, 2016 - Not Reported in N.W.2d - 2016 WL 1175055**

Taxpayer appealed special assessment with regard to six of his properties to the District Court. Following a bench trial, the District Court concluded that each subject property received a greater special benefit than the amount assessed against them. Taxpayer appealed.

The Court of Appeals held that:

- City was authorized to finance highway interchange project with a special assessment, and
- Evidence was sufficient to support a finding that highway interchange project conferred a special benefit on taxpayer's real property parcels, as required to allow city to issue a special assessment against taxpayer.

Highway interchange project qualified as an improvement to a street, and thus, city was authorized to finance project with a special assessment; the main east/west street that stretched across city was a street, and it did not cease to be a street where it crossed interstate highway at interchange.

Evidence was sufficient to support a finding that highway interchange project conferred a special benefit on taxpayer's real property parcels, as required to allow city to issue a special assessment against taxpayer. City presented testimony that while the interchange would benefit the public at large, it conferred a special benefit on taxpayer because he was pursuing development of one parcel that would have been stalled until the failing interchange could be reconstructed, which the state Department of Transportation did not have plans for for another nine years.

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## Squire Patton Boggs: Tax-Exempt Stadium Financing? - There They Go Again.

Rep. Steve Russell, R-Okla., recently introduced a bill (H.R. 4838) in the House to prohibit tax-exempt financing of professional sports stadiums and for-profit entertainment facilities. This is only the most recent in a string of similar proposals, including by President Obama and former Senator Tom Coburn. In this case, tax-exempt financing would be prohibited for any "stadium or arena for professional sports exhibitions, games, or training" and for any "venue for any entertainment event (i) the live audience for which exceeds 100 individuals, and (ii) any net earnings from which inure to the benefit of an individual or any entity other than [the United States or any State or local governmental entity or certain tax-exempt organizations, including but not limited to 501(c)(3) organizations]," in each case if the facility is used for such purpose at least five days during any calendar year. (This post won't address the over-breadth of "entertainment facilities" included in this prohibition other than to note that, for example, many if not most public and private college arenas, theaters, etc. would be precluded from tax-exempt financing as a result of hosting performances, lectures, concerts, etc. provided by groups or individuals who are paid for their services.) The question considered in this post is not so much the propriety of permitting tax-advantaged financing of these sports and entertainment facilities but whether it is good policy to create targeted rules for certain facilities that may currently be out of favor rather than to rely on the fundamental principles of industrial development bond/private activity bond status that have limited the availability of tax-exempt financing for facilities with private involvement for almost 50 years.

Under current law, professional sports stadiums and arenas generally can be financed on a tax-exempt basis if the private security/payment limit is not exceeded. Some proposals to preclude these financings would impose a special rule to eliminate the private security/payment test for these facilities so that private business use by the teams alone is enough to prohibit tax-exempt financing. In contrast, Rep. Russell proposes an explicit prohibition against tax-exempt financing of professional sports and entertainment facilities. Both approaches reflect a fundamental departure from the private use and security/payment tests that have established the line between tax-exempt governmental financing and taxable governmental financing since 1968. As stated in Conference Report No. 1533, page 32, accompanying H.R. 15414, which first rendered interest on industrial development bonds taxable in 1968:

> On March 23 of this year the Internal Revenue Service published proposed regulations providing that the interest paid on industrial development bonds described in the proposed regulations would no longer be considered to be exempt under section 103. The proposed regulations represented a change in the position previously taken by the Internal Revenue Service and were based on the theory that industrial development bonds described in the proposed regulations were not "obligations of a State * * * or any political subdivision"

> within the meaning of section 103 since the primary obligor was not a State or political subdivision.

This underlying theory – that the governmental issuer was not the primary obligor of the bonds — explains why the private security/payment test has consistently been one of the two tests for the fundamental distinction between governmental bonds and private activity bonds (formerly known as industrial development bonds). (Of course it has long been recognized that even where the proceeds of state or local bonds are loaned to a private person and the loan payments are the sole source of payment of the bonds, the state or local issuer of the bonds is respected as the issuer for federal income tax purposes. Nevertheless, the above theory explains the presence of the private security/payment test.)

The basic question of whether private activity bond status should rest on both a use test and a security/payment test was seriously reconsidered in 1985-'86 when bills preceding the Tax Reform Act of 1986 were progressing through Congress. The House bill, H.R. 3838, would have eliminated the private security/payment test, explained as follows:

> The committee is concerned . . . because under present law, a significant amount of bond proceeds from a governmental issue are being used in many cases by nongovernmental persons for activities which have not been approved specifically by Congress for tax exempt financing. . . . [G]overnmental bond issues are intentionally structured to fail the present-law IDB security interest test, when the bonds otherwise would be considered IDBs and subject to the restrictions that Congress has placed on such conduit financing for nongovernmental persons or would be prohibited altogether. The committee believes that this diversion of governmental bond proceeds to nongovernmental users should be limited . . . .
> H.R. Rep. No. 99-426, page 515.

The Senate Finance Committee recognized the same concern but addressed it differently, by subjecting both "direct and indirect" payments by a private user to the private security/payment test:

> The bill clarifies that both direct and indirect payments to an issuer of bonds made by a private user of bond-financed facilities are considered when determining whether the security interest test . . . is satisfied. Thus, payments by such private users of bond-financed facilities equal to or exceeding 25 percent [now 5%/10%] of debt service result in the bonds being IDBs, whether or not the payments are formally pledged as security or are directly used to pay debt service on the bonds.

Rep. No. 99-313, p. 831.

The Conference Committee generally adopted the Senate proposal, with an even more inclusive definition of private security/payments. The important point is that Congress carefully reconsidered the propriety of the private security/payment test and determined to retain it. (It is also worth noting that this Congress eliminated the previous ability, preserved in H.R. 15414 mentioned above, to use tax-exempt industrial development bonds to finance sports facilities. Thus Congress chose to eliminate the advantageous treatment of these facilities and to subject them to the same tests generally applicable to other facilities used by private business.)

So is the argument here that today's Congress is somehow bound by the actions of Congress 30 or 48 years ago? Of course not. The point is that this most fundamental concept in the tax-exempt bond rules – the definition of private activity bonds — has been carefully addressed twice during the

existence of the tax-exempt bond rules and each time Congress has concluded that the private security/payment test, together with private business use test, are necessary. Maybe it did so in each case because of the resemblance of state or local bonds to private debt when a private person is effectively paying a significant portion of the debt service. Or maybe Congress didn't feel it should intrude on state or local governments that have decided to use their own tax or other revenues to subsidize a private business activity. Likely, given the overlap in these concepts, it was a combination of the two.

In light of this history, if state or local governments can issue tax-exempt bonds to finance other subsidies to private business, why should the federal government single out sports and entertainment facilities for worse treatment? Stated otherwise, why should the federal government substitute its judgment for that of the local government by picking winners and losers. It might be argued that the cost of the subsidy to the federal government gives it the right to choose. While undoubtedly true as a legal matter, it must also be recognized that the local government is making the policy decision to subsidize the activity despite its cost in doing so (which is much greater than the cost to the federal government since it won't be receiving material payments from the private entities).

While professional sports facility financings have suffered much negative publicity in recent years, the fundamental question of whether these facilities are more or less worthy of local government subsidies relative to other private activities seeking local government subsidies is a question that is and should remain the decision of the local government. Furthermore, to the extent that the federal government has historically meddled in the affairs of local government, as described above, it has repeatedly determined that the private security/payment tests properly preserve the interests of the federal governments. The historic tests for tax-exempt status – the private business use test and the private security/payment test – should apply to sports and entertainment facilities, just as they apply to all other facilities used in private business.

**Squire Patton Boggs**

The Public Finance Tax Blog

Robert J. Eidnier

USA April 14 2016

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## Butler Snow: Support the Tax-Exemption for Municipal Bonds.

Please ask your Congressmen to join the bipartisan House Municipal Finance Caucus. Why? What is this caucus? This caucus provides support for the federal tax-exemption for municipal bonds by directly opposing the President's cap of tax-exemption at the 28 percent bracket. The two Congressmen who established this caucus are Randy Hultgren (R-IL) and Dutch Ruppersberger (D-MD). Your Congressmen need to join because this caucus will help support the building of important infrastructure needed in your areas, and having this tax-exemption will allow more projects to come to fruition.

How to get your Congressmen to join? You have to ask them. Congressmen hear from their constituents on important matters, and this tax-exemption is important. Your congressmen need to know that this caucus can help area build the infrastructure you need to support and help your community grow. Contact your Congressmen and have them contact Randy Hultgren or Dutch

Ruppersberger to join.

You may want to use the following links to find contact information for your Congressional representatives:

https://www.usa.gov/elected-officials

https://www.nabl.org/DesktopModules/Bring2mind/DMX/Download.aspx?portalid=0&EntryId=1036

https://www.nabl.org/DesktopModules/Bring2mind/DMX/Download.aspx?portalid=0&EntryId=1035

Last Updated: April 10 2016

Article by Blake C. Sharpton

**Butler Snow LLP**

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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**TAX INCREMENT FINANCING - CALIFORNIA**

## Macy v. City of Fontana

**Court of Appeal, Fourth District, Division 1, California - February 23, 2016 - 244 Cal.App.4th 1421 - 198 Cal.Rptr.3d 867 - 16 Cal. Daily Op. Serv. 3133 - 2016 Daily Journal D.A.R. 1817**

Resident and community organizations petitioned for writ of mandate challenging redevelopment agency's, housing authority's, and city's alleged failure to use 20 percent of city tax increment revenues in support of low- and moderate-income housing under the Community Redevelopment Law (CRL).

The Superior Court sustained demurrer without leave to amend. Resident and organizations appealed.

The Court of Appeal held that:

- CRL did not subject city to its redevelopment agency's statutory duty to use tax increment revenues for affordable housing;
- Redevelopment agency dissolution law did not subject city to its redevelopment agency's statutory duty to use tax increment revenues for affordable housing; and
- City's agreement to receive tax increment revenues from redevelopment agency did not require city to use the revenues for affordable housing.

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## Squire Patton Boggs: Crossover Refunding - Does It Really Have to Come to This?

Suppose you, or a friend, issued build America bonds or another form of direct payment subsidy bonds in 2009 or 2010, as permitted by the American Recovery and Reinvestment Act, to do your bit

to stimulate aggregate demand during the depths of the Great Recession. You, or your friend, as applicable, did not, however, include an extraordinary optional call feature in the BABs that would allow for the immediate redemption of the BABs if the direct payment subsidy was reduced. Consequently, you've been suffering with the reductions to the direct payment subsidy mandated by sequestration (and that will continue through fiscal year 2024), which have increased the net cost of your BABs.

You would like to advance refund your BABs to replace them with (historically) low-coupon tax-exempt bonds, but you know that the Internal Revenue Service has taken the position that a legal defeasance of tax-advantaged bonds, such as BABs, results in the reissuance for federal tax purposes of those bonds as taxable bonds that are no longer entitled to a direct payment subsidy (even one reduced by sequestration). Under this position, the BABs would lose their direct pay subsidy long before they are called in an advance refunding, a result that's best avoided. Is there anything that can be done in this seemingly hopeless situation?

**Crossover Refunding – Back to the Future?**

Pretty much nothing from the 1980s, including, but not limited to, mullets, Members Only jackets, and the Laffer Curve, should be revived. But a limited number of items, such as Paul's Boutique, the Super Bowl Shuffle, and the television program ALF, are long overdue for a reprise. Into the latter category falls the technique of a crossover refunding, a tax-exempt financing concept from that era, which could prove useful to an issuer of BABs where the BABs lack an extraordinary optional redemption feature and cannot (at least at this point) be currently refunded.

A crossover refunding differs from a traditional advance refunding in that proceeds of the refunding issue are used to pay interest on the refunding bonds, rather than the refunded bonds, until the call date of the refunded bonds, at which point the balance of the refunding bond proceeds in the refunding escrow are applied toward the repayment of the refunded bonds. Under Treas. Reg. § 1.148-10(c)(4), the crossover advance refunding bonds will not be treated as taxable arbitrage bonds. Moreover, under Treas. Reg. §1.149(g)-1, the crossover refunding should not be treated as comprised of taxable hedge bonds if the refunding results in debt service savings (taking into account the direct payment subsidy on the refunded BABs) or relieves the issuer of significantly burdensome document provisions.

The allure of a valid crossover advance refunding to an issuer of BABs that are not subject to extraordinary optional redemption is that the crossover refunding does not effect a legal defeasance of the BABs for purposes of Treas. Reg. § 1.1001-3(e)(5)(ii)(A). Under that provision of the Treasury regulations, the legal defeasance of a debt instrument (other than a "tax-exempt bond" – more on this below) changes the nature of the debt instrument from recourse to nonrecourse, which results in a significant modification of the debt instrument and the treatment of that instrument as reissued for federal tax purposes. For this purpose, Treas. Reg. § 1.1001-3(e)(5)(ii)(A) describes a legal defeasance as a defeasance "in which the issuer is released from all liability to make payments on the [defeased] debt instrument."[1]

As noted above, the IRS has taken the position in Chief Counsel Advice Memorandum Number AM 2014-009 (the "Memo") that the legal defeasance of direct payment subsidy obligations, such as BABs, results in the reissuance of those obligations for federal tax purposes as obligations that are no longer entitled to the direct payment subsidy. A crossover advance refunding would not, however, result in the legal defeasance of the defeased BABs, because the issuer would remain liable for the payment of debt service on the BABs until their call date. In the absence of a legal defeasance, the BABs should not be treated as reissued for federal tax purposes upon the issuance of the crossover advance refunding bonds, and the issuer should retain the benefit of the direct payment subsidy (as

reduced by sequestration) on the BABs until their call date.

**Should a Crossover Refunding Really Be Necessary?**

The IRS reached its conclusion in the Memo by determining that BABs are not "tax-exempt bonds" within the meaning of Treas. Reg. § 1.1001-3(f)(5)(iii), which defines a tax-exempt bond as "a state or local bond that satisfies the requirements of [Internal Revenue Code] section 103(a)." Under Treas. Reg. § 1.1001-3(e)(5)(ii)(B), the defeasance of a tax-exempt bond does not result in a significant modification of the bond and therefore does not cause the reissuance of the bond for federal tax purposes.

Under Internal Revenue Code section 54AA(d)(1)(A), a bond cannot be a BAB unless that bond satisfies the requirements of Internal Revenue Code section 103. How then does the IRS justify a position in the Memo that is contrary to the plain wording of its own Treasury regulation? By citing the preamble of the Treasury Decision that promulgated the definition of "tax-exempt bond" for purposes of the reissuance regulations. As we have previously discussed, the IRS's citation to the preamble is flawed, but it is also unavailing where the language of the Treasury regulation in question is unambiguous. As the Tax Court held in *Woods Investment Company v. Commissioner*, 85 T.C. 274 (1985), the IRS's remedy if it disagrees with the clear language of a Treasury regulation that it has promulgated is to amend the regulation – not to enforce a position that is contrary to the express provisions of the regulation.

In light of this, there's no reason to fire up the flux capacitor to bring a crossover refunding from the 1980s to the present day, because the legal or economic defeasance of BABs simply should not result in their reissuance for federal tax purposes.

**Sequestration – Does it Result in the Repudiation of Debt Owed by the Federal Government?**

The question of whether BABs are tax-exempt bonds for purposes of the reissuance regulations arises because of the application of sequestration to the direct payment subsidies paid by the federal Treasury in respect of tax-advantaged bonds, such as BABs.

The effect of sequestration is to adopt mandatory reductions in items of discretionary spending that are subject to annual appropriation if expenditure levels exceed specified thresholds. The direct payment subsidy on tax-advantaged bonds is treated for federal tax purposes as the refund of an overpayment of tax (see IRS Notice 2009-26, Section 3.3, for discussion). The refund of a tax overpayment is not subject to annual appropriation – it is the repayment (albeit without interest) of a debt owed by the federal government to the taxpayer. If the refund is not paid in the full amount owed to the taxpayer, there has been a repudiation of some portion of the debt owed by the federal government to the taxpayer. Is the federal government therefore repudiating a portion of its debt by subjecting to sequestration the direct payment subsidies owed on tax-advantaged bonds?

We'll leave that as a rhetorical question for the time being.

[1] A legal defeasance is illustrated in Treas. Reg. § 1.1001-2(d), ex. 6, as the placement in trust "of government securities that provide interest and principal payments sufficient to satisfy all scheduled payments on the bond." The example concludes that such a defeasance is a modification of the defeased bonds for purposes of the reissuance regulations.

**Squire Patton Boggs**

The Public Finance Tax Blog

by Michael A. Cullers

USA April 6 2016

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## Political Subdivision Politics.

Recently released proposed Treasury regulations seek to change the requirements for municipal bond issuers to qualify as issuers of tax-exempt bonds. Many lawyer and industry groups, as well as many States and local government agencies, will be commenting unfavorably on this proposal by the Internal Revenue Service. There are a number of areas in which the proposed regulations seem to make the wrong policy choice and create ambiguity instead of clarity, but that is not the focus of this article. Instead, this article focuses on the intellectual integrity of the proposed rules and the misuse of the rulemaking process.

"The term 'State or local bond' means an obligation of a State or political subdivision thereof." Being a "State or local bond" is the threshold requirement for tax exemption, and this language from Section 103 of the Internal Revenue Code and the underlying definition of the term political subdivision has existed for a very long time. Essentially, a political subdivision is a government agency with substantial taxing power, eminent domain power or police power. The proposed regulations attempt to redefine the meaning of the term political subdivision for purposes of the issuance of tax-exempt bonds.

The proposed regulations spring from the controversy surrounding an IRS challenge to the tax exempt status of bonds issued by certain community development districts in Florida and an associated IRS Technical Advice Memorandum 201334038. The Technical Advice Memorandum appeared to create new requirements for issuers to qualify as political subdivisions, and practitioners clamored for a repeal of the Memorandum or at least a rulemaking process that allows for comments and deeper consideration. The IRS chose the rulemaking process.

**The Proposed Changes Impact the Tax Law Generally**

The federal tax definition of political subdivision is important for a number of purposes independent of whether an entity is qualified to issue tax-exempt bonds (for example, whether the entity is subject to income tax or excise tax liability). The definition of political subdivision under Section 103 has been widely referenced as definitive for all federal tax purposes. Rather than coordinate with other parts of the IRS, the drafters of the proposed regulations would make dramatic changes to a long-standing definition and claim that those changes are intended only to impact tax-exempt bond qualification. But the changes could significantly impact other areas of the federal tax law. Are each of the other impacted areas of the federal tax law now required to adopt their own definition, to apply an old definition that no longer exists in the income tax regulations or to simply go along with this change?

Moreover, if the new rules really do apply only to the issuance of tax-exempt bonds, the proposed regulations package is significantly incomplete. A large number of issuers of tax-exempt bonds (possibly the majority) are not political subdivisions under existing law. Rather, these issuers are constituted authorities, integral parts of political subdivisions or other "on behalf of" issuers. The true impact of the proposed changes cannot be assessed unless the IRS also states its intention with respect to these other entities. If an entity with significant governmental powers is disqualified as a political subdivision due to more than incidental private benefit (one of the proposed new regulatory

requirements), will a bond issuing agency of a State, city or county be disqualified if its bonds result in more than incidental private benefit? Perhaps such an authority would also qualify as an integral part entity, but the IRS has refused to provide any guidance, even informal guidance, on the integral part analysis, leaving the State and local government community in the dark.

**The IRS Is Changing the Wrong Regulation**

The new requirements are designed to thwart the abuse perceived by the IRS that certain tax-exempt, governmental purpose bonds are being issued for the impermissible benefit of private developers. The problem is that the proposed prohibition of non-incidental private benefit incorporates a private business use concept into a regulation relating to something entirely different – the authority to issue bonds. This is effectively changing the private business use rules (which exist under Section 141 of the Internal Revenue Code) through a new requirement under Section 103. This is a deeply flawed and troubling approach. The private business use rules are well-developed and intricate. If there is a legitimate concern about non-incidental private benefit, that concern should be dealt with in a rulemaking project under Section 141, so that the appropriate context and impact on other rules is apparent.

This is a bigger point than the mere placement of a new rule in the income tax regulations. To date, the regulatory requirements for an issuer to qualify to issue tax-exempt bonds has focused on the governmental powers held by the issuer because the related language in the Internal Revenue Code focuses on the attributes of the issuer, not on the attributes of the particular bonds or the project being financed. By comparison, the concepts relating to private business use have focused on the project being financed and the other attributes of individual bond issues because that is the focus of the related language in the Internal Revenue Code. If this distinction between issuer attributes and project/bond issue attributes is not maintained, the resulting requirements will conflict. For example, in at least some circumstances the proposed regulations would make the private security or payment test of Section 141 irrelevant. The point here is not to argue against an incidental private benefit prohibition. The point is that any such prohibition needs to be vetted as a change to the rules under Section 141 and not Section 103.

In fact, this new requirement is similar in many respects to heavily criticized and subsequently withdrawn general prohibitions relating to “economic benefit” and to the “discharge of a primary legal obligation” originally set forth in 1994 proposed regulations under Section 141. There were many negative comments on those proposed regulations. The comments focused on whether the mere existence of private economic benefit was enough to result in private business use and whether traditional assessment bond financing of government mandated infrastructure should be prohibited. In the end, the IRS correctly determined to focus on the use of the assets financed and not to take away from States and local government agencies one of their most powerful and consistently used infrastructure financing mechanisms.

Assuming that there in fact is a problem to fix, this proposal by the IRS to change the political subdivision definition is not an acceptable approach. At best, it raises significant questions about which entities qualify as political subdivisions for general tax purposes. Worse, it creates a new private business use limitation that is not consistent with the Internal Revenue Code or the existing regulatory framework. Thus, this new limitation creates significant uncertainty, because it exists outside the context of similar, well-developed rules. In municipal finance, where investors demand unqualified legal opinions, creating uncertainty is bad policy.

**The Bond Buyer**

By Chas Cardall

April 7, 2016

*Chas Cardall, a partner in the San Francisco office of Orrick, Herrington & Sutcliffe LLP, is the chair of the Tax Department and a member of the Public Finance Department.*

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## IRS: Understanding the Tax Exempt Bonds Examination Process.

The primary objective of a tax-exempt bond examination is to determine if a municipal debt issuance complies with Internal Revenue Code provisions.

This page discusses general rules and procedures that we follow in examinations and how to correct certain compliance problems.

**Selection of returns**
TEB uses a centralized case selection and review process to enhance the consistency of our enforcement activities and to focus resources on the areas that will have the most positive impact on the compliance of municipal debt issuances. This process includes identifying areas of noncompliance, developing corrective strategies, and assisting with those strategies. The reasons your municipal debt issuance may be selected for examination include as a part of a market segment's statistical selection, project or referral.

**Your role in the process**
The issuer of the municipal debt is treated as the "taxpayer" throughout the examination process. You, any conduit borrower, and any other party to the transaction are responsible for maintaining and producing adequate records to substantiate the tax-exempt status of the bonds. If the requested information is organized and complete, we can conduct the examination in a timely and efficient manner.

For certain tax credit bonds where direct payment of the allowable credit has been elected, the issuer of the debt is the party subject to taxation. As the taxpayer, the general provisions of Publication 556, Examination of Returns, Appeal Rights, and Claims for Refund, including those dealing with assessments, collections, and appeals, apply to you.

Publication 556 may also be useful in understanding the examination process of tax-exempt bonds. Your examiner can answer questions about the difference between tax-exempt and tax credit bond examination processes.

**Representation**
If you choose to have someone represent you on the examination, your representative must be a person eligible to practice before the IRS. You can submit Form 2848, Power of Attorney and Declaration of Representative, to authorize an individual to represent you before the IRS.

Your representative may have a conflict of interest if they also had a role in the issuance of your municipal debt, such as providing the approving opinion as to the qualifications of the municipal debt issuance, or is also representing other parties to the transaction, such as the conduit borrower. A representative with a conflict of interest may not represent a client before the IRS unless:

1. The practitioner reasonably believes that the practitioner will be able to provide competent and diligent representation to each affected client,
2. The representation is not prohibited by law, and

3. Each affected client gives informed consent, confirmed in writing.

You may find it appropriate to permit direct communication between the examiner and any conduit borrower. If the TEB examiner agrees to conduct the examination in that manner, you must provide us with a Form 8821, Tax Information Authorization. This form permits the examiner to discuss your tax matter with the conduit borrower.

During the examination, we may also need to contact various third parties, including underwriters, financial advisors, bond counsel, and any other parties (and their counsel) with a transactional relationship to the municipal debt issue.

**The examination**
A Tax Exempt Bonds examiner notifies you by phone or letter that a municipal debt issuance has been selected for examination. If the initial contact is by phone, a confirmation letter will follow. The letter details the required items for the examination and may indicate how the return was selected. We may request additional items at a later date.

The examination may include a comprehensive review of the municipal debt issuance, or focus only on specific aspects. The examination continues until the examiner is reasonably certain that the municipal debt issuance has met the applicable requirements.

The TEB examiner will discuss any potential compliance problems with you or your representative. In some instances, we may issue Form(s) 5701-TEB, Notice of Proposed Issue, and Form(s) 886-A, Explanation of Items, to identify any areas of noncompliance. Upon completion of the examination, all unresolved issues will be included in a Notice of Proposed Adverse Determination Letter and Form(s) 886-A, Explanation of Items.

**Resolving qualification issues – the closing agreement process**
With respect to tax-exempt bonds, a failure to comply with the federal tax laws that govern municipal debt issuances may result in the loss of the tax-exempt status of the bonds under examination. Holders of these bonds would be taxed on the interest they receive. With respect to tax credit bonds, a failure to comply with the federal tax laws that govern municipal debt issuances may result in the loss of the tax credit status of the bonds under examination. Holders of these bonds would lose the ability to claim tax credits with respect to the bonds.

However, in most situations, the IRS will allow the issuer to enter into a closing agreement where you agree to correct the compliance failures and pay a resolution amount to the U.S. Treasury. A violation corrected in a closing agreement will allow the bond interest that’s payable to the holders of tax-exempt bonds to retain its tax exempt treatment or the holders of tax credit bonds to maintain the ability to claim tax credits.

**Closing Letter**
The final step in the examination process is a letter explaining the examiner’s conclusions. Sometimes the conclusion results in a tax liability for related entities and/or individuals and may require coordination with other business units within the IRS.

**Appeal rights**
The Office of Appeals settles unresolved issues. Your appeal rights are explained in detail in Publication 5, Your Appeal Rights and How to Prepare a Protest if You Don’t Agree. Appeal requests must be in writing and timely. If not, we will issue a Notice of Final Adverse Determination. Fast Track Settlement, an expedited appeals process, may be used in certain situations. You should discuss this with your examiner. For more information about the appeals process, see Revenue

Procedure 2006-40, Administrative Appeal of Proposed Adverse Determination of Tax-Exempt Status of Bond Issue.

**Post-issuance compliance and the TEB Voluntary Closing Agreement Program**
TEB encourages issuers and other parties involved in bond transactions to adopt and follow procedures for monitoring and achieving post-issuance compliance with federal tax requirements applicable to their tax-exempt and tax credit bonds. Monitoring post-issuance compliance will significantly improve the issuer's ability to identify noncompliance and prevent violations from occurring, or timely correct violations to ensure the continued tax-advantage status of the bonds.

TEB's Voluntary Closing Agreement Program is available to issuers who are not under exam and who have discovered a violation of the law associated with the issuance of tax-exempt or tax credit bonds. TEB VCAP allows you to correct violations as expeditiously as possible before the violations are discovered during an examination. Generally, an issuer will receive more favorable resolution terms under TEB VCAP than for the same tax violation discovered during an examination.

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## S&P's Public Finance Podcast (State and Local Governments' Tax Increment Debt and Special Assessment Bonds)

In this segment of Extra Credit, Associate Director Sarah Sullivant discusses the highlights of our recent article about state and local government tax increment debt and Senior Director Michael Stock discusses our commentary on special assessment bonds.

Listen to the Podcast.

Apr. 4, 2016

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## NABL Submits Recommendations for 2016-2017 Priority Guidance Plan.

On April 7, the National Association of Bond Lawyers submitted recommendations for inclusion in the 2016-2017 Guidance Priority List in response to IRS Notice 2016-26. The list included updating the management and service contract safe harbors, issuing clarifying guidance concerning the application of the final allocation and accounting regulations in section 1.141-6 of the Treasury Regulations, revising and finalizing the proposed June 2015 regulations concerning issue price matters under section 148, and revising and re-proposing the February 2016 regulations concerning the definition of political subdivision.

The comment letter can be read here.

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## NABL: House Bill Prohibits Tax-Exempt Bonds for Sports Stadiums.

Rep. Steve Russell (R-OK) introduced the No Tax Subsidies for Stadiums Act (H.R. 4838), which would prohibit tax-exempt bonds from being used for professional sports stadiums and for-profit entertainment arenas. H.R. 4838 defines a professional sports facility as a location used as a stadium

or arena during at least 5 days per year for professional sports exhibitions, games or training. The bill would also prohibit tax-exempt financing for certain entertainment facilities. H.R. 4838 has been referred to the House Ways and Means Committee. The Obama Administration also proposed in its budget eliminating tax-exempt financing for professional sports facilities.

Click here to read the bill.

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**TAX - ALASKA**

## Pursche v. Matanuska-Susitna Borough

**Supreme Court of Alaska - March 25, 2016 - P.3d - 2016 WL 1168200**

Landowner filed objection to borough's tax foreclosure list. The Superior Court granted borough's motion for summary judgment and denied landowner's motion to dismiss. Pro se landowner appealed.

The Supreme Court of Alaska held that:

- As a matter of first impression, superior court properly exercised jurisdiction over the case, despite federal land patent in the property's chain of title, and
- Land once owned by federal government is subject to local property taxes after it is conveyed to a private party.

Superior court, as Alaska's court of general jurisdiction, properly exercised jurisdiction over tax foreclosure action brought by borough against landowner's property, despite federal land patent in the property's chain of title. There was no exception that removed patented property from superior court's broad jurisdictional grant.

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**TAX - OHIO**

## Veolia Water N. Am. Operating Servs., Inc. v. Testa

**Supreme Court of Ohio - March 2, 2016 - N.E.3d - 2016 WL 827776 - 2016 -Ohio- 756**

Taxpayer, a private owner and operator of a waste-water-treatment plant, treating both industrial and residential waste water, filed application for an exempt-facility certificate. The tax commissioner granted certificate for only a percentage of the personal property the commissioner deemed to be exempt. Taxpayer appealed. The Board of Tax Appeals affirmed. Taxpayer appealed.

The Supreme Court of Ohio held that Board's application of primary-purpose test to each article of plant's property was reasonable and lawful.

Board of Tax Appeals' application of primary-purpose test to each article of property of waste-water treatment plant individually, in determining tax exempt status of plant pursuant to statute governing tax exemption for industrial water pollution control facilities, was reasonable and lawful. Pollution-control statute imposed a direct functionality test, under which, plant's trucks and general buildings were not themselves designed, constructed, or installed for primary purpose of either "collecting or conducting industrial waste to a point of disposal or treatment," or of "reducing, controlling, or eliminating water pollution caused by industrial waste," as required for exemption.

## Hot Topics from the Tax and Securities Law Institute's Annual Meeting: Squire Patton Boggs

Every year, the National Association of Bond Lawyers ("NABL") hosts the Tax and Securities Law Institute ("TSLI"), which is an advanced conference with various workshops related to pressing issues confronting tax and securities lawyers in the public finance arena. Essentially, the annual TSLI is like Chrismukkah for tax and securities lawyers. This year's meeting was held on March 11th and 12th and was sure to be a barn burner in light of the meaningful guidance released by the IRS over the last year including the proposed issue price regulations, the allocation and accounting regulations (the "Allocation Regulations") and, most recently, the proposed political subdivision regulations (the "Proposed Political Subdivision Regulations"). This year's meeting did not disappoint as one tax practitioner loudly interrupted a panel consisting in part of IRS and Treasury agents to proclaim that the proposed political subdivision regulations were the worst piece of guidance to come out of the Treasury in recent history.

Below is a list of tax items discussed at TSLI that this blogger thought were particularly noteworthy. When reading the information below, please keep in mind that statements made by personnel from the IRS or Treasury reflect the individual's personal beliefs and are not necessarily reflective of an official position taken by the IRS or the Treasury.

**Helpful commentary on the Allocation Regulations**

The Allocation Regulations have been the subject of multiple prior blogs (see here, here, here, and here). The Allocation Regulations released last fall are extremely taxpayer friendly; however, there remain a number of important items regarding their application.

One open item is whether the definition of "mixed-use project" is broad enough to encompass projects financed exclusively with proceeds other than tax-exempt bond proceeds. The heightened value of "qualified equity" (discussed here) under the Allocation Regulations has encouraged practitioners to try to incorporate as much qualified equity as possible. To do this, one possibility is to expand the project to include ancillary projects that are not expected to have any private business use and that were not originally considered for tax-exempt financing. Confusingly, the inclusive definition of "project" in the Allocation Regulations would seem to permit this approach while the narrower definition of "mixed-use project" may not. A "mixed-use project" is any "project" that is financed with proceeds other than tax-exempt bond proceeds as well as tax-exempt bond proceeds. Therefore, an ancillary project financed exclusively with proceeds other than tax-exempt bond proceeds may fall outside the definition of "mixed-use project."

When considering what "mixed-use project" was intended to include, officials from the IRS and Treasury made two interesting observations. First, in response to a panelist suggesting that any ancillary project needs to be related to the bond-financed project, a senior Treasury official indicated there is no "relatedness" requirement when determining the scope of what constitutes a mixed-use project. Second, the same official indicated that there should be some "intent" to finance a portion of each component of the mixed-use project (including any ancillary project) with tax-exempt bond proceeds.

Issuers and borrowers often finance multiple, unrelated project expenditures with a single bond issue so disavowing any "relatedness" requirement was not surprising. However, suggesting that a project cannot be extended to incorporate ancillary projects not anticipated to be tax-exempt bond-financed would be a substantive limit. For an issue of qualified 501(c)(3) bonds, query whether

listing the ancillary project in a public notice for a TEFRA hearing would be sufficient? Alternatively, for qualified 501(c)(3) or other types of tax-exempt bonds, is it necessary to affirmatively allocate tax-exempt bond proceeds under Treas. Reg. Section 1.148-6(d) or by a reimbursement allocation to a component of a project not otherwise financed with proceeds of tax-exempt bonds?

**Applying the Allocation Regulations to Refunded Bonds**

In response to a question about how to apply the Allocation Regulations to bonds issued prior to the release of the Allocation Regulations, a senior Treasury official acknowledged that the application of the Allocation Regulations to bonds outstanding prior to October 27, 2015 (including bonds refunded subsequent to that date) is uncertain and that the Allocation Regulations were written primarily to address new money issues. In addition, that same Treasury official acknowledged that "qualified equity" excludes certain expenditures that could have been included such as invoices paid after the project's placed-in-service date and preliminary expenditures paid prior to the beginning of the period during which qualified equity can be contributed to a project.

**Political Subdivision**

As suggested in the introductory paragraph, the recently released Proposed Political Subdivision Regulations have been extremely controversial, initially because of the transition rule but also because of the introduction of what many practitioners consider to be new requirements that political subdivisions be shown to (i) operate in furtherance of a "governmental purpose" (with no more than an incidental benefit to private persons) and (ii) be "governmentally controlled". In response to a panelist's observation that the Proposed Political Subdivision Regulations shift away from the historic reliance exclusively on the Shamberg powers (discussed here),1 a senior Treasury official commented that the Proposed Political Subdivision Regulations were not intended to be a radical departure from the historic approach. Rather, notwithstanding the development of the law surrounding application of the Shamberg powers, the senior Treasury official suggested that the requirement that a political subdivision have a governmental purpose and operate under government control has always been a historic, albeit less developed, requirement for political subdivisions. The official emphasized that imposing heightened scrutiny on what entities qualify to be political subdivisions was not an imposition on a state's constitutional rights because the exemption is from *federal* income taxes.

In response to one panelist indicating that the incidental benefit limit is troubling, a senior Treasury official responded by requesting that those concerns be included in comment submissions. The same official emphasized that practitioners should take comfort in the historically broad definition of governmental purpose. Throughout TSLI, Treasury and the IRS emphasized the need to receive comments to the Proposed Political Subdivision Regulations and it seems likely there could be significant changes to the regulations before they become final.

In discussing the policy behind the proposed regulations, a senior Treasury official indicated that, historically, reliance on the Shamberg powers was predicated under the belief that states do not delegate certain rights very easily. However, in certain circumstances, the official indicated that this may not be the case.

**Upcoming Guidance**

A senior Treasury official and a senior IRS official indicated that guidance on the following issues is "on the horizon":

- Finalize the 2007 and 2013 proposed arbitrage regulations;

- Update safe-harbors in Rev. Proc. 97-132 to include longer term contracts (possibly 15-years) and provide factors to distinguish management contracts from leases;3
- Finalize the proposed issue price regulations;
- Streamline the Voluntary Closing Agreement Program ("VCAP') to address an escrow agent's failure to reinvest proceeds in SLGS (see IRM 7.2.3.4.2(9)).4

In addition, although not imminent, the same senior Treasury official suggested that the following items will be next in line:

- Incorporating Notice 2008-41 (reissuance rules originally intended to apply to qualified tender bonds) into regulations under Section 150 of the Code to address certain issues that are present with refunding tax-advantaged bonds including Build America Bonds ("BABs");5
- Guidance involving change-in-use; and
- Finalize the proposed 2008 TEFRA regulations.

**Odds and Ends**

The following odds and ends were also discussed:

- In response to criticism that the IRS never utilizes its authority to waive the arbitrage rebate penalty for bonds under audit (a discussion of which is here), a senior IRS official said that the Service has not historically waived the penalty for fear that they could not do so on a consistent basis applying a consistent standard. However, the IRS official indicated that a "penalty committee" has recently been formed to determine how to consistently waive certain penalties, including the arbitrage rebate penalty; and
- When discussing the recent change in the IRM which indicates that it is no longer necessary to have written post-issuance compliance procedures, one senior IRS official indicated that the IRS is much more concerned about the content of procedures and that unwritten procedures (e.g., electronic monitoring) could be sufficient depending on the content of such procedures.

To view all formatting for this article (eg, tables, footnotes), please access the original here.

**Squire Patton Boggs**

by Joel Swearingen

USA March 30 2016

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**TAX - LOUISIANA**

## Board of Com'rs of Port of New Orleans v. City of New Orleans

**Court of Appeal of Louisiana, Fourth Circuit - March 16, 2016 - So.3d - 2016 WL 1061490 - 2015-0768 (La.App. 4 Cir. 3/16/16)**

Political subdivision of state, as taxable entity, filed suit against city tax assessor, challenging ad valorem tax assessments on properties owned by subdivision. The Civil District Court granted subdivision summary judgment. Tax assessor appealed. The Court of Appeal reversed. On remand, the Civil District Court granted summary judgment to subdivision. Tax assessor appealed.

The Court of Appeal held that lease improvements to several properties owned by subdivision were exempt from ad valorem taxation.

Improvements owned by port and leased to third-party, private, for-profit, commercial tenants were exempt from ad valorem taxation under constitutional article expressly providing that public property used for public purposes is exempt from ad valorem taxation. Activities of the tenants fit within the port's broad, legislating mission to maintain, develop, and promote the commerce and traffic of the port and city harbor.

Engaging in for-profit activities on public property does not preclude those activities from having a public purpose, under constitutional article expressly providing that public property used for public purposes is exempt from ad valorem taxation.

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**TAX - GEORGIA**

## Columbus, Georgia, Bd. of Tax Assessors v. Medical Center Hosp. Authority

**Court of Appeals of Georgia - March 22, 2016 - S.E.2d - 2016 WL 1102625**

Hospital authority and city tax board appealed county board of equalization decision finding one of eight parcels exempt from ad valorem taxes. The Superior Court entered summary judgment that all eight parcels were exempt public property. Board appealed.

The Court of Appeals held that:

- Authority parcels that contained parking lots and walking trails, but generated no income, were "public property" exempt from taxes, and
- Parcel purchased by authority with non-profit hospital and for-profit clinic was exempt from taxes.

Hospital authority parcels that contained parking lots and walking trails, but generated no income, were "public property" exempt from ad valorem property taxes. Even if the authority could not justify use as a free benefit to patients, the parking lots furthered hospital function by providing free parking for doctors patients, visitors, and employees, and walking trails in wooded lot on hospital grounds were available to patients, visitors, and employees.

Parcel purchased by hospital authority with non-profit hospital and for-profit clinic in separate buildings was exempt from ad valorem property taxes, where clinic square footage was less than half that of the hospital's square footage.

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## IRS Releases Model Closing Agreements for Tax-Exempt Bonds: Squire Patton Boggs

When an issuer of tax-advantaged bonds discovers a problem with the bonds, the issuer can resolve the problem by requesting a closing agreement through the IRS Voluntary Closing Agreement Program (VCAP). Similarly, where the IRS discovers a problem in the course of an audit of a tax-advantaged bond issue, and the issuer agrees that there is a problem, the issuer can resolve the problem by entering into a closing agreement with the IRS.

In the closing agreement, the IRS agrees not to attempt to tax bondholders or reclaim direct payments from the issuer, and in exchange the issuer agrees to cut a check and redeem the "nonqualified" bonds.

As part of its campaign for greater consistency and standardization, the IRS has released "standard form" closing agreements for each of these situations. In VCAP, issuers or borrowers must submit a draft of the closing agreement based on this new model agreement when they submit the VCAP request (in addition to new Form 14429 and the descriptive information it requires).

Somewhat strangely, it is usually easier to get the IRS to negotiate the amount of the closing agreement payment and the amount of bonds to be redeemed than it has been to get the IRS to change the factual statements and representations in the closing agreement. The IRS has been extraordinarily resistant to even minor, common-sense changes to the terms of the closing agreement, even its boilerplate provisions. The release of the model agreements could give issuers and borrowers some additional flexibility in proposing the terms that will necessarily vary from the terms of the draft agreement, because they now will be drafting it first, at least in the VCAP context. Or, more likely, it may signal the official calcification of many of the terms; the IRS notes that if the issuer and borrower want to change the model language, it will require "additional review" by the IRS. If prior experience in negotiating the language of these agreements is any guide, we should read the phrase "additional review" as "a slight delay before telling you 'no.'"

The model closing agreements can be found on the IRS's website by clicking here. The webpage provides some commentary on some of the provisions. We summarize the interesting points below.

First, click here for a comparison of the provisions of the model VCAP agreement table. As you will see, most of the provisions in the two model agreements are the same.

**Analysis**

**1. The closing agreement uses the example of an issue of tax-exempt qualified 501(c)(3) bonds**.

So, in the case of garden-variety governmental use bonds, the issuer usually will remove references to "the borrower." Other details may need to be added in the case of other private activity bonds, such as exempt facility bonds (e.g., solid waste disposal facility bonds).

Also, the agreement will need to be modified for tax-advantaged bonds that are not tax-exempt bonds, such as build America bonds.

**2. The closing agreement covers only the bond issues in Recital A and only the tax problems in Recital C for those bond issues.**

Recital A has a description of the bond issues that the closing agreement covers. This seems informational, but it is important. Only the bonds mentioned in Recital A will be covered by the closing agreement.

Recital C further specifies the tax problems with the bonds in Recital A that the closing agreement will resolve. This provision is also important – the closing agreement will cure only the violations listed in Recital C. If it's not explicitly there, it's not resolved.

Importantly, Recital C in each agreement says that the IRS "has a basis to conclude" that a violation has occurred. It does not say, for example, that a violation *"has occurred."* This subtle linguistic change could prevent situations like the recently-concluded New Hampshire student loan bond saga. Under Section 7121 of the Code, which governs closing agreements, the IRS does not have to conclude that a violation has occurred before it signs a closing agreement with an issuer.

**3. Recital B in the VCAP agreement describes the bond issues and the circumstances leading to the violation.**

This is the Recital that will vary the most from situation to situation. Most of the information for this recital will come from the VCAP request and Form 14429.

**4. Section 5 is the punchline – it notes that the closing agreement will prevent bondholders from having to include interest on the bonds in their gross income for tax purposes as a result of the violation described in Recital C.**

Where applicable, the issuer and borrower should modify Section 5 to address other collateral tax consequences that will be avoided because of the closing agreement. One example, which the IRS describes on its website, is a statement about whether the facilities acquired with bond proceeds by a taxable conduit borrower will continue to be treated as tax-exempt bond financed property under Section 168(g) of the Code and continue to be subject to less taxpayer-friendly (i.e., slower) rates of depreciation. Other examples can be found in Code Section 150(b).

**5. Section 7 waves a magic wand over the original proceeds of the nonqualified bonds and breaks the link between those proceeds and the expenditures the issuer originally spent them on.**

Take note of Section 7. This section states that proceeds of any bond redeemed as a condition of the closing agreement are treated as unspent proceeds for any future refunding of those bonds. The IRS website makes clear that this applies not just to unspent bond proceeds of the redeemed bonds, **but also to bond proceeds that were previously spent.**

The IRS website describes this provision as follows: "The effect of this paragraph is to sever the connection between bond proceeds and the expenditures to which they were originally allocated. Accordingly, should a taxable refunding of the nonqualified portion of the bonds subsequently be refunded with tax advantaged bonds the proceeds would not be considered as "spent," which could result in violations of tax rules regarding the expectation to use proceeds and certain arbitrage restrictions."

This provision appears to be intended as an anti-abuse rule that will prevent issuers from borrowing in the taxable markets to redeem nonqualified bonds and then using tax-advantaged bonds to refund that taxable borrowing at some later date. This provision will make it quite difficult to do so, because the issuer will be treated as essentially borrowing most of the bond issue twice, which will lead to any number of nightmares.

Not to get too metaphysical, but Section 7 treats the nonqualified bonds as irredeemably nonqualified (also the title of my upcoming memoirs). To illustrate: Assume that the reason for a closing agreement for a bond issue was excessive private business use of the bond-financed property, and assume that the issuer had to redeem the nonqualified bonds, which were a portion of the issue, but not all of it. To redeem the nonqualified bonds, the issuer borrowed money in the traditional taxable markets. Now assume that soon after that, the issuer ended the private business use, so that the bond-financed property could technically be eligible for tax-exempt bond financing. Even so, Section 7 of the model closing agreement prevents the issuer from refunding the taxable borrowing with tax-exempt bonds.

**6. The IRS reserves the right to audit the bonds in Section 8.**

Section 8 of the VCAP agreement notes that the closing agreement isn't based on an audit of the

bonds and that the IRS reserves the right to audit the bonds. This is somewhat troubling. The point of the closing agreement is to resolve, once and for all, the tax issue described in Recital C of the agreement. This provision seems to undercut that point. It would be nice to have the agreement modified to say that the IRS will not audit the bonds and challenge their tax-exempt status as a result of the violation described in Recital C of the agreement. This provision is omitted from the audit model agreement, but it would be better to add it back in and restrict it to the issue described in Recital C.

**7. Exhibit A requires a certification from the trustee that the issuer has redeemed the nonqualified bonds.**

Exhibit A will be a certificate from the trustee listing the amounts and CUSIPs of the nonqualified bonds. It will also contain a certification that the bonds were redeemed on a pro rata basis, in accordance with the requirements in Reg. 1.141-12(j). Where the bonds won't be redeemed until a date after the closing agreement is signed (for example, because the bonds aren't yet callable), the IRS will modify this exhibit to tell the issuer how to notify the IRS that the nonqualified bonds have been redeemed.

**8. Issuers and borrowers should incorporate a review of the model closing agreements into their post-issuance compliance planning.**

When deciding how to approach potential violations that issuers and borrowers discover looming on the horizon, or deciding tactics in an audit, issuers should include a review of the model agreements as part of their planning process, in addition to preparing a preliminary calculation of the potential closing agreement amount and the amount of nonqualified bonds to be redeemed.

**Article By John W. Hutchinson**

**Squire Patton Boggs (US) LLP**

The Public Finance Tax Blog

Thursday, March 24, 2016

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## IRS Publishes Population Figures for Housing Credit, Private Activity Bonds.

The IRS has published the 2016 resident population figures for the 50 states, the District of Columbia, Puerto Rico, and the U.S. possessions for use in determining the state housing credit ceiling under section 42(h) and the private activity bond volume cap under section 146.

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## IRS Issues Simplified Procedure to Extend Empowerment Zone Designation Period.

Notice 2016-28 provides a simplified procedure under the PATH Act for a State or local government to amend an empowerment zone nomination, extending the designation of the empowerment zone remaining in effect through December 31, 2016.

Notice 2016-28 will be in IRB 2016-15, dated April 11, 2016.

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**TAX - FLORIDA**

## Island Resorts Investments, Inc. v. Jones

**District Court of Appeal of Florida, First District - March 21, 2016 - So.3d - 2016 WL 1085225**

Owner of 99-year leasehold interest in unimproved 12-acre parcel filed action for a declaratory judgment that its interest could be taxed only as intangible personal property, and for an injunction prohibiting the assessment and collection of ad valorem taxes on the land. The Circuit Court entered judgment for county appraiser and tax collector, and leasehold interest owner appealed.

The District Court of Appeal held that leasehold interest owner was not the equitable owner of the leased land.

Owner of 99-year leasehold interest in unimproved land owned by county was not the equitable owner of the leased land and thus was not required to pay ad valorem taxes on the land, where owner did not have the right to the perpetual renewal of its lease or the right to purchase the property for nominal consideration at the end of the lease, owner bore all the burdens during the term of the lease, at the end of which all the rights to the property reverted, rental payments were due in consideration for the leasehold interest, and the property was not financed, acquired, or maintained through the issuance of bonds.

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**TAX - LOUISIANA**

## Coastal Drilling Co., L.L.C. v. Dufrene

**Supreme Court of Louisiana - March 15, 2016 - So.3d - 2016 WL 1050541 - 2015-1793 (La. 3/15/16)**

Taxpayer filed suit against parish tax collector to recover amount paid in use taxes for materials purchased for use in rebuilding inland marine drilling barge damaged by fire. The District Court

granted summary judgment to collector. Taxpayer appealed. The Court of Appeal affirmed. Taxpayer's application for writ of certiorari was granted.

The Supreme Court of Louisiana held that:

- Regulation permitting sales tax exemption if reconstruction restored ship, vessel, or barge to seaworthiness following its destruction by sinking, collision, or fire was constitutionally valid;
- "Seaworthiness" in the regulation has its general maritime meaning of fitness for its intended purpose;
- "Destruction" in regulation involves such extensive impairment from very specific event that vessel no longer can operate for its intended purpose; and
- Barge was destroyed making materials, equipment, and machinery eligible for the exemption.

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**TAX - LOUISIANA**

## Crowne Air, Inc. v. St. Tammany Parish

**Court of Appeal of Louisiana, First Circuit - February 29, 2016 - So.3d - 2016 WL 852480 - 2015-0741 (La.App. 1 Cir. 2/29/16)**

Sublessees under long-term subleases from city, which had leased land from parish and airport authority, brought action against parish tax collector, parish assessor, and chairman of state tax commission seeking declaratory judgment and to recover taxes paid under protest. The District Court entered summary judgment in favor of parish assessor. Sublessees appealed.

The Court of Appeal held that:

- Sublessees' leasehold improvements were not owned by the public, and thus were not exempt from ad valorem taxation, and
- Improvements were not for a public purpose, and thus were not exempt from ad valorem taxation.

Leasehold improvements made by sublessees, which subleased airport land from city for purpose of building hangars, were not owned by the public, and thus were not exempt from ad valorem taxation under applicable state constitutional provision, since language of sublease clearly contemplated that any permanent improvements made by sublessees during lease term remained property of sublessees until lease was terminated, and improvements were not translated into public domain, since sublessees did not let public use the land with intention of making dedication to public use.

Leasehold improvements made by sublessees, which subleased airport land from city for purpose of building hangars, after parish and airport authority had leased airport land to city, were not for a public purpose, and thus were not exempt from ad valorem taxation under applicable state constitutional provision, even though agreement between city, parish, and authority declared the land be used for non-commercial aeronautical activities essential to city's operation of its public airport and beneficial to city's economic development, where subleases did not contain such language, and subleases and operating agreements specifically provided that sublessees were permitted to lease of hangars to third parties for profit.

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## What Presidential Candidates' Tax Plans Mean For Munis

WASHINGTON – As the 2016 presidential race narrows down to a handful of candidates, it appears likely that business mogul Donald Trump and former Secretary of State Hillary Clinton will be the nominees with the most votes at the Republican and Democratic conventions.

Should Trump and Clinton secure the nominations, voters will be presented with two candidates whose tax plans share many similarities, but would have vastly different implications for the municipal bond market, in the eyes of some tax and muni bond experts.

Trump says his plan would simplify the tax code, cut taxes for the middle class and grow the economy without adding to the debt or deficit. But his plan, which would lower tax rates, could hurt munis, the experts said.

Clinton's plan, on the other hand, would maintain or raise tax rates for the highest earners, and that could spell positives for munis, they said. And as 2016 is a lame duck year, most experts agree that tax reform before January is not likely.

No matter who comes out on top in November, muni market participants will try to make sure they understand the importance of muni bonds. Bond Dealers of America CEO Michael Nicholas stressed that munis have funded critical infrastructure needs effectively for more than a century.

"They are the proven, economically efficient solution to the U.S. infrastructure problem that the presidential candidates have been discussing all across the country," Nicholas told The Bond Buyer this week. "BDA urges all the candidates to avoid eliminating or placing an unnecessary limit or cap on the value of the municipal bond interest exemption if they are truly serious about reducing fiscal burdens on localities while simultaneously putting people to work building roads, bridges, schools, and hospitals."

**Donald Trump**

Trump's plan is perhaps best defined by its across-the-board tax cuts, including an elimination of the individual income tax for 73 million households. The tax brackets would be reduced to four brackets from seven and set at rates of 0%, 10%, 20% with a top rate of 25%, according to Trump's campaign website. Those in the 10% bracket would keep all or most of their current deductions; those in the 20% bracket would keep more than half of their current deductions; and those in the 25% bracket would keep fewer deductions. The current top rate stands at 39.6%.

On the business side, Trump also calls for a reduction of the corporate income tax rate to 15 percent as well as an elimination of the death tax, the marriage penalty and the alternative minimum tax.

The Tax Foundation, a research think tank, estimated his plan would reduce tax revenues by $10.14 trillion, after taking into account an estimated 11% increase in GDP in the long term and an estimated 5.3 million new full-time jobs. The organization estimated a plan like Trump's, which would increase the federal deficit by more than $10 trillion on both a static and dynamic basis, would "greatly increase" the size of the U.S. economy in the long run.

Neither Trump nor Clinton mention municipal bonds specifically in their tax plans, but several experts have previously expressed concerns over what Trump's plan could mean for the market. Frank Shafroth, the director of the Center for State and Local Government Leadership at George Mason University, warned that Trump's plan would "lead to a fiscal double whammy for states and local governments and the nation's public infrastructure" because it would reduce the incentives for purchasing munis, while increasing the federal debt and failing to offset spending reductions. This would create "significant, adverse" impacts on the muni market and "debilitating" effects on public

infrastructure, he said.

Trump "would almost certainly force even deeper federal cuts in federal infrastructure programs – even as the dramatically reduced taxes proposed for the highest income Americans would equally reduce incentives for the purchase of municipal bonds," Shafroth said.

The plan would be paid for by a one-time repatriation of overseas-held corporate cash at a discounted 10% tax rate; ending the deferral of taxes on corporate income earned abroad; and the reduction or elimination of several loopholes available to the most wealthy. He would steepen the curve of the personal exemption phaseout and the "pease limitation" on itemized deductions. He would also phase out the tax exemption on life insurance interest for high-income earners and reduce or eliminate other loopholes for the very rich and special interests.

Speaking at the 2016 National Association of State Treasurers Legislative Conference here earlier this month, David Burton, a conservative, called Trump's tax plan "unusual," adding that many financial analysts have estimated it would cost the country roughly $1 trillion per year.

The Tax Policy Center, in a December report, predicted increased government borrowing under Trump's proposal would drive up interest rates and crowd out private investment, which could offset any positive incentive effects.

"Offsetting a deficit this large would require unprecedented cuts in federal spending," the center wrote in the report.

Trump has said he would take the $4 trillion spent toward toppling various regimes and instead put it toward what he has repeatedly called a "crumbling" domestic infrastructure.

Still, Susan Collet, president of H Street Capitol Strategies, but doesn't think the business mogul's plan is well-developed enough to assess the likelihood of its potential positives for infrastructure spending. "He definitely wants to fix the infrastructure of the nation," Collet said. "How to get there from his tax plan is a big question. The infrastructure spending has got to come from somewhere."

"With deficits and debt climbing that high, the future White House and Congress are going to have to grapple not only with the tax code but also entitlements and spending," she added.

"These federal cuts, and the resulting federal revenue losses would be unprecedented in U.S. history," Shafroth said.

**Hillary Clinton**

Clinton's plan is centered around a "Rising Incomes, Sharing Profits" tax credit that would award a two-year tax credit to companies that share profits with employees. The credit would be equal to 15 percent of the profits they share, and the profits would be capped at 10% on top of current employee wages.

The cost of the tax credit, estimated at $20 billion over a ten-year budget window, would be paid for through the closure of tax loopholes Clinton has said she will identity in the "weeks and months ahead."

Hillary Clinton's campaign recently released a detailed tax proposal, one that includes $1.1 trillion in tax increases. In its analysis of the report, The Tax Policy Center said the top 1% of households would pay more than three-fourths of Clinton's increases, while the bottom 95 percent would remain relatively unaffected by any cuts. Citing Clinton representatives, The Tax Policy Center said it also

anticipates a tax cut for low- and middle-income households to be released later in the campaign.

Clinton's proposals are expected to raise tax revenue by $498 billion over the next decade, the majority of which would come from the Buffett Rule, or a cap on itemized deductions, The Tax Foundation estimated in January,

The $1.1 trillion the plan is expected to raise over the next decade would effectively reduce the economy's size by one percent as a result of higher marginal tax rates on capital and labor income, the group said. Using its tax and growth model, the group projected a 1% drop in GDP and a 2.8% percent smaller capital stock.

A tax reform task force led by House Ways & Means Committee Chairman Kevin Brady, R-Texas, released a mission statement this month that stresses a limit of exclusions, deductions and credits in hopes of creating a stable tax code and a larger economy – quite the opposite from what experts believe would come from a Clinton tax plan.

As part of her plan to raise taxes on the wealthiest Americans, Clinton in January proposed a 4% surtax on those with an annual income of more than $5 million.

Howard Gleckman, a senior fellow at the Tax Policy Center, said that Clinton's plan, which would raise rates for the highest earners, lends itself more to a thriving muni industry than Trump's. He added that Trump's plan, barring any unreleased planned spending cuts, would add enormously to the budget deficit and create a "big challenge" for state and local governments.

"The general rule of thumb is the lower the tax rate for the individual, the worse it is for tax-exempt bonds," he said. "The higher the rate, the better it is."

"Trump plans to dramatically lower the tax rates, giving people a much less reason to buy tax exempt bonds. Clinton, on the other hand, by raising tax rates for people at the top would make tax exempt bonds more attractive," said Gleckman.

**Other candidates**

This week's third incarnation of Super Tuesday saw Sen. Marco Rubio, R-Florida, exit the race after losing by double digits to Trump in his home state, leaving Trump with Sen. Ted Cruz, R-Texas, as the closest remaining competitor in a previously overcrowded GOP field.

The Tax Foundation, the tax research think tank, estimated Cruz's plan would grow 10-year capital by 43.9%. Cruz, as he has mentioned throughout his campaign, has proposed a flat tax rate of 10%, and has plans to abolish the Internal Revenue Service. He would instead rely on a mail-in postcard tax payment system overseen by an office within Treasury.

He has proposed to replace the income tax with a consumption tax, which Shafroth said would cut taxes by an average of roughly $6,000, higher than any of remaining candidate. Cruz's plan, which reduces both the corporate and individual tax rate, could very well push the tax system toward pro-growth, according to Burton.

Shafroth said a Cruz or Trump presidency would spell many of the same problems for munis, but what stands out about Cruz's plan is what he called "disproportionately" proposed tax cuts – those in the top 1 percent would see an average federal tax cut of 26%, while middle income households would see just a 3.2 percent cut. This in itself, he said, would be disincentives for the purchase of general obligation and revenue municipal bonds both at the state and local level, Shafroth said.

Cruz has proposed an $8.6 trillion federal tax cut, roughly $1 trillion less than that of Trump.

“These two candidates would confront states, counties, and cities with much greater infrastructure or muni borrowing costs, even as federal investment resources for the nation’s infrastructure would be depleted,” Shafroth said.

The Tax Foundation said the plan of Sen. Bernie Sanders, I-Vt., the only other remaining Democratic presidential candidate, would result in a “substantial reduction” of the size of the U.S. economy in the long run. Sanders has proposed a number of increased payroll taxes and individual income taxes as well as four new income tax brackets for high-income households: 37%, 43%, 48% and 52%. The organization estimated that it would reduce the size of GDP by 9.5% in the long term, and increase federal tax revenues by $9.8 trillion over the next decade.

A report issued by the Tax Policy Center estimated Sanders’ plan would cost the government roughly $13.5 trillion.

The likelihood of any of the candidates’ plans coming to fruition is largely dependent on a number of factors, including the makeup of Congress and the Supreme Court, said the experts.

Chuck Marr, a self-described liberal and the director of federal tax policy for the Center on Budget and Policy Priorities, said at the NAST conference that the U.S. tax system is currently “bleeding,” and speculated a divided Congress and more modest tax reform, specifically in the corporate sector should Democratic frontrunner Hillary Clinton win the presidency, and a “steamroll” effect in terms of implementing new tax measures should a Republican win.

“The highest probability for big change is if Republicans win and control a whole Congress and presidency. Then they’ll have major tax cuts,” he said. “They’ll reduce rates on capital, and that is the most likely major action.”

**The Bond Buyer**

By Evan Fallor

March 20, 2016

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## Lawmakers, Bankers Discuss How to Ease Tax Laws for P3s.

WASHINGTON – Municipal finance leaders and a bipartisan group of lawmakers met Wednesday on Capitol Hill to discuss how tax laws might be eased so that more public-private arrangements could be used to finance public infrastructure projects.

The event, hosted by the Securities Industry and Financial Markets Association, included policymakers and industry executives with expertise in P3s. Some of the discussion focused on whether there should be more kinds of public infrastructure projects that can be financed with tax-exempt private-activity bonds and P3 arrangements.

At the roundtable discussion, several executives from investment banks provided information about P3s to members of Congress. They included Chris Hamel, the managing director and head of municipal finance for RBC Capital Markets; Stephen Howard, the director and head of infrastructure project finance for Barclays Capital; Howard Marsh, the managing director of municipal securities

for Citigroup; and Michael Decker, a managing director and co-head of municipal securities for SIFMA.

Following the roundtable discussion, which was closed to the press, Decker told The Bond Buyer the roundtable was a "constructive discussion" with input both from industry officials and members of Congress.

"There seems to be a lot of interest from members of Congress here, who asked a lot of questions like, 'What can Congress do to encourage this type of financing?'" he said.

Legislators who attended the discussion included Reps. Steve Stivers, R-Ohio; Terri Sewell, D-Ala.; and Randy Hultgren, R-Ill., all of whom serve on the House Financial Services Committee.

Hultgren said afterward that infrastructure financing is a subject that "needs to be discussed," adding that is a broader issue than just maintaining the tax-exempt status of bonds. He said the timing of the discussion does not mean there is imminent legislation, but it does follow the bipartisan Municipal Finance Caucus he launched earlier this month that would protect the tax-exempt status of municipal debt.

"There are so many times where it has worked well and a few times where it hasn't," Hultgren said. "We have to figure out what we can do to build on [the P3s that worked well and] to make sure bad decisions aren't made that would harm something that effective."

In an election year where leading presidential candidates have called infrastructure "crumbling" and "decimated," Stivers cited the $3.98 billion plan to replace the 61-year-old Tappan Zee Bridge connecting Nyack and Tarrytown, N.Y., as an example of a successful P3 that saved $1.1 billion in construction costs and 18 months of construction time.

Stivers said, "The threat to municipal bonds and capping of the benefit of the tax exemption would make tax-free bonds partially taxable and therefore make infrastructure projects more expensive and harder to complete."

"We just need to expand opportunities for public-private partnerships to be a viable means of financing along with the regular municipal financing that comes from state and local governments," he said.

Decker said much of the discussion at the roundtable centered on incentivizing states to adopt Design-Build policies to a greater extent and to use private sources of capital for infrastructure projects. Design-Build policies allow a state or local government or an authority to enter into a contract with a private partner that takes on the responsibility for both the design and the construction of a project.

Though the tax code generally prohibits the use of tax-exempt bonds for certain projects when there is a more de minimis level of private financing, Decker said there are exceptions such as for airport projects, which can be financed with tax-exempt PABs.

For "social infrastructure" projects, including city halls, courthouses and public parks, tax-exempt financing cannot be used if there is more than a de minimis level of private participation in the project, a hurdle Decker needs to be addressed.

Under federal tax law, a project must be financed with private-activity bonds if more than 10% of it is used by a private party and more than 10% of the debt service is paid or secured by a private party. But PABs are not tax-exempt unless the projects they are financing fall into specific

categories, one of which includes airports.

President Barack Obama has proposed eliminating barriers in the tax code to private use of tax-exempt bonds for public infrastructure projects.

“You can make a strong case that the tax code can be agnostic with regards to infrastructure projects when there is public access to the project and where there is local government oversight,” he said.

The roundtable was held the same day as the Flint Water Advisory Task Force released its final report on the water crisis facing Flint, Mich., which it called a “story of government failure, intransigence, unpreparedness, delay, inaction, and environmental injustice.”

Sewell, who represents both Birmingham and several rural communities in Alabama, said that many of the rural areas also face water and sewer issues. She said the U.S. Department of Agriculture helps with financing for these issues, calling them “the only game in town.”

“It’s not a capital problem. It’s a funding problem,” she said. “We need to figure out a better ways of trying to fund these infrastructure projects.”

Going forward Decker said he hoped discussions with legislators will continue, especially before a new administration enters the White House in 2017.

“Our focus is just raising awareness with the issues,” Decker said. “Like we did today, we just want to make sure policymakers in Washington understand the techniques being employed or can be employed for financing infrastructure in a broader array of investments and projects.”

**The Bond Buyer**

By Evan Fallor

March 23, 2016

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## Hospital Property Tax Exemption Under Attack In Illinois.

On Jan. 5, 2016, the Illinois Fourth District Appellate Court ruled in the Carle Foundation Hospital case that an Illinois state law providing for property tax exemptions for certain not-for-profit hospitals is unconstitutional. Since that time, there have been several developments including the following:

- The Carle Foundation announced that it plans to appeal the ruling to the Illinois Supreme Court.
- The Champaign County Board of Review voted to place Carle Foundation and Presence Covenant Medical Center in Urbana back on its tax rolls.
- The Illinois Department of Revenue said it will await the Supreme Court’s decision before issuing any new property tax exemptions.
- The Fourth District Appellate Court denied requests to delay enforcement of the decision pending further review by the Illinois Supreme Court.

If the ruling stands, not-for-profit hospitals in Illinois could be in danger of losing their property tax exemptions.

**Case details**

The case involved an action brought by Carle Foundation against the City of Urbana and other taxing authorities in which the hospital sought to recover real estate taxes which it paid under legal protest during the period from 2004 to 2011.

The case centered on a statute which uses a monetary test to determine which hospitals are eligible for a property tax exemption. 35 ILCS 200/15-86. Under this law, hospitals are eligible for a property tax exemption if the hospital's total dollar amount of charity care and other services equals or exceeds the hospital's estimated property tax liability for the year.

The legislative authority for the statute is from article IX, section 6 of the Illinois Constitution of 1970 which provides: "The General Assembly by law may exempt from taxation…property used exclusively for…charitable purposes."

The court held that the statute exceeds the terms and conditions of article IX, section 6 because it does not require the subject property to be "used exclusively … for charitable purposes" and instead "grants an exemption on the basis of an unconstitutional criterion, i.e., providing services or subsidies equal in value to the estimated property tax liability." Read the opinion.

**Trends in nonprofit hospital tax exemptions**

This ruling appears to be consistent with a growing trend in states' questioning property tax exemptions for nonprofit hospitals. As cities and counties continue to lose tax revenue because of property tax exemptions, nonprofit hospitals are becoming potential targets to increase revenue. For example, in November of 2015, Morristown Medical Center in New Jersey agreed to pay $26 million to the town of Morristown to settle a dispute involving the hospital's property tax exemption. Also, state leaders in Connecticut and Maine and the mayor of Pittsburg have recently raised the issue.

Last Updated: March 14 2016

Article by Nicole K. Jobe

**Thompson Coburn LLP**

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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## State, Local Taxes On Tribal Leases Vulnerable After California Court Order.

HIGHLIGHTS:

- A California district court recently issued an order that signals it is likely to invalidate Riverside County's imposition of a possessory interest tax on lessees of trust lands within the reservation of the Agua Caliente Band of Cahuilla Indians.
- The court analyzed several previous cases, the Bureau of Indian Affairs (BIA) leasing regulations and the Bracker balancing test, which is designed to determine whether the exercise of state authority violates federal law.
- As a result of the changing landscape, tribes are now in a position to argue that many lease-related state and local taxes are preempted by federal law even if those taxes have been upheld by courts

in the past.Continue reading.

Last Updated: March 13 2016

Article by Steven D. Gordon and Kenneth Parsons

**Holland & Knight**

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## Bond Lawyers Blast Proposed Political Subdivision Rules.

WASHINGTON – Bond lawyers on Thursday criticized the political subdivision rules recently proposed by the Treasury Department and Internal Revenue Service, claiming they would trample states' rights, alter the landscape for public financing, and jeopardize the tax-exempt status of millions of dollars of municipal bonds.

The lawyers pummeled Treasury and IRS officials with questions and concerns about the rules at the National Association of Bond Lawyers' 14th Tax and Securities Law Institute here.

The federal officials thought they might have minimized controversy by releasing a prospective effective date for the rules the night before the meeting. The initial rules faced a firestorm of criticism for proposing a technically complicated effective date that would have been prospective under certain tax-exempt bond provisions of the tax code, but not others.

But NABL members were still upset by the substance of the proposed rules. Richard Chirls, a lawyer with Orrick, Herrington & Sutcliffe who sat in the audience during a panel discussion, accused Treasury and the IRS of "stepping on the toes of state and local governments" and said, "I think it's quite offensive."

Chirls noted that states, for many years, have set up political subdivisions within their jurisdictions under state laws that specify that an entity is a political subdivision if it has been delegated a substantial amount of at least one of three sovereign powers: eminent domain, taxation and policing.

These proposed rules, however, would add two new requirements — that political subdivisions serve a governmental purpose and be governmentally controlled.

Under the proposed rules, the determination of whether an entity serves a governmental purpose would be based, in part, on whether the entity carries out the public purposes set forth in its enabling legislation and whether it operates in a manner that provides a significant public benefit "with no more than an incidental private benefit."

To be governmentally controlled, a political subdivision would have to be controlled by a state or local governmental unit or an electorate. The proposed rules set forth what Chirls later called "arbitrary new standards for voting" to ensure the political subdivision is not controlled by private parties.

Mike Larsen, a lawyer from Parker Poe Adams & Bernstein, said he did not see any demonstrated need for new rules and asked a Treasury official on the panel why they were proposed.

John Cross, Treasury's associate tax legislative counsel, told NABL members that IRS audits had exposed a vulnerability of political subdivisions to be controlled by private entities and that this had

“raised concerns at the highest levels of government.”

“We tried to be targeted with the way we addressed that” with the proposed rules Cross said, adding, “We don’t think there’s a big problem here.”

But Chirls insisted that the proposed rules’ attempt to expand on what states are allowed and not allowed to do “is offensive.”

Cross reminded the lawyers that that the tax exemption of munis “is a federal subsidy” and said the federal government plays a role in determining how that subsidy is used.

Many of the lawyers in the room were concerned that the rules would jeopardize political subdivisions that were initially temporarily controlled by developers who sold bonds to build infrastructure for retirement communities or water or irrigation districts before residents moved in or farmers could get water and play a part in governing the districts.

Cross said federal officials are aware that many political subdivisions are initially controlled by developers and that there’s plenty of opportunity to provide public comments to the Treasury and IRS on how they should deal with this issue.

Richard Moore, a lawyer with Orrick who was on the panel, worried that the proposed requirement for a political subdivision to operate in a manner that provides a significant public benefit “with no more than an incidental private benefit” would set up another “private use test” and would allow IRS auditors to audit anything they don’t like about a political subdivision. Many of the lawyers also complained the proposed requirement was too broad.

Spence Hanemann, an attorney in the IRS’ Office of Chief Counsel, said bond lawyers must tell the IRS how it can limit the “no more than an incidental private benefit” requirement to make it more reasonable. The best way to make the requirement more reasonable would be to get rid of it, said Mitch Rapaport, a lawyer at Nixon Peabody.

Hobby Presley, a lawyer with Balch & Bingham, said the rule will have unintended consequences for many public universities that are set up under state constitutions and have procedures for electing trustees. Those procedures might not comply with the proposed rules’ voting standards to demonstrate governmental control, he said.

Another lawyer in the audience said Pennsylvania has created a number of political subdivisions that have board members who are not elected on an ongoing basis and worried about how they would fare under the proposed rules.

Perry Israel, a lawyer in Sacramento who represents the Village Center Community Development District in Florida that is the subject of an IRS audit that led to the proposed rules, said he is grateful that rules were proposed that are subject to public comment and will be prospectively effective.

NABL members joked that Israel should win an award for sucking up to the Treasury and IRS and that his audit should be closed.

Treasury and IRS lawyers decided to write rules on political subdivisions after the IRS’ Chief Counsel’s Office issued a very controversial technical advice memorandum in 2013 concluding that the Village Center CDD was not a political subdivision, and therefore could not have issued millions of dollars of tax-exempt bonds as it did from 1993 to 2004, because its board was and will always be controlled by the developer rather than publicly elected officials. The audit had been ongoing for

years and has still not been resolved, although the bonds have been redeemed.

Lawyers argued that the TAM's assertion that control by elected officials is necessary for an entity to be a political subdivision was a new requirement and that such changes should be made through regulatory proposals that can be commented upon rather than through a TAM in an enforcement proceeding.

Meanwhile, the English comedian and television host of "Last Week Tonight," John Oliver, recently aired a segment on "special districts" that compared them to "cults" and said they can take your money without your even being aware you are in them. He said they are being replicated all over the country with little or no standards or regulatory oversight.

**The Bond Buyer**

By Lynn Hume and Evan Fallor

March 10, 2016

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## To TIF or Not to TIF: Podcast

Billionaire Under Armour CEO Kevin Plank is asking Baltimore City for $535 million to help fund redevelopment in Port Covington. The city would borrow against future property tax revenue to pay for streets, utilities, and other infrastructure related to the project. If approved, it would be the largest tax increment financing, or TIF, deal in city history. TIF is a common development tool across the country; the city of Baltimore has OK'd eleven deals since 2003. But tax increment financing is controversial. Supporters say it attracts private investment to blighted areas. Critics say it enriches developers at public expense.

Listen.

Our guests: Greg LeRoy, Executive Director of Good Jobs First, and Toby Rittner, President and CEO of the Council of Development Finance Agencies.

WYPR.ORG

By SHEILAH KAST & ANDREA APPLETON • MAR 15, 2016

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**TAX - VERMONT**

## Burgess v. Lamoille Housing Partnership

**Supreme Court of Vermont - March 11, 2016 - A.3d - 2016 WL 932908 - 2016 VT 31**

Taxpayers' son who had redeemed property brought action against town, town clerk, town's attorney, and landowner to obtain declaratory and injunctive relief in form of tax collector's deed or to recover damages for negligent misrepresentation by attorney. The Superior Court denied request for injunctive or declaratory relief and dismissed landowner. The Superior Court then entered summary judgment in favor of town, clerk, and attorney. Son appealed.

The Supreme Court of Vermont held that:

- The redemption did not unjustly enrich landowner;
- Town and town clerk lacked authority to transfer property to son;
- Son did not justifiably rely on attorney's alleged that son had right to tax collector's deed.

Nonprofit corporation that owned land and leased it to homeowners was not unjustly enriched when homeowners' son redeemed the property after tax sale and restored its interest, even though son paid redemption price in response to alleged statement by town attorney promising tax collector's deed.

Town and town clerk lacked authority to transfer property to taxpayers' son who had redeemed it, and, thus, son was not entitled to tax collector's deed, even if town attorney promised to deliver a deed. Redemption merely extinguished tax sale purchaser's contingent interest and returned the property to original owners free and clear of purchaser's claim.

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## U.S. Not-For-Profit Acute Health Care Ends 2015 With Positive Ratings Trends Due To Revised Stand-Alone Hospital Criteria And Credit Quality.

Upgrades dramatically exceeded downgrades in 2015 for the acute care sector including stand-alone hospitals and health systems. This is the first time upgrades have exceeded downgrades since 2012 and largely reflects rating actions associated with the revised stand-alone criteria implemented in late 2014 (see chart 1). Rating changes for stand-alone hospitals due solely to credit quality were roughly equally distributed between upgrades and downgrades which alone represents improvement over prior years. Despite the high number of rating changes in 2015, the ratings distribution remains largely unchanged because a majority of the changes were just one notch and within the same rating category. Also contributing to the above-average number of rating changes were credit shifts into and out of the stand-alone classification due to publication of our revised system definition. Health systems in general continue to have higher ratings due to geographic and financial dispersion, as well as size and scale benefits associated with system membership.

Although we expect fewer rating changes in 2016 as the criteria implementation period is now over, the 2015 rating actions that were driven by credit quality and not the criteria revision, support our view of a more stable sector (see "U.S. Not-For-Profit Health Care Sector Outlook Revised To Stable From Negative, Though Uncertainties Persist" published Sept. 9, 2015, and "U.S. Not-for-Profit Health Care Outlook Remains Stable In 2016 On Sector Recovery" published Feb. 25, 2016). Benefits from Medicaid expansion, mergers and acquisitions, and our criteria on group rating methodology also continue to improve the sector's credit profile, although we believe positive rating actions associated with these factors have started to wane. Weak year-to-date investment markets and the potential for rising interest rates could also be tempering factors in 2016. The presidential race could also slow progress toward greater adoption of Medicaid expansion in 2016, which has proven to have a positive credit impact over the past 18 months. Although there was increased rating action in 2015 due to the stand-alone criteria revision, a vast majority of our ratings were still affirmed, which is consistent with historical trends (see chart 2).

Continue reading.

17-Mar-2016

**TAX - CALIFORNIA**

## City of Bellflower v. Cohen

**Court of Appeal, Third District, California - March 3, 2016 - Cal.Rptr.3d - 2016 WL 858801**

Cities brought two actions against State Director of Finance, State Board of Equalization, the State Controller, and various local government entities to challenge the validity of statutes authorizing withholding of tax revenues from cities that failed to turn over dissolved redevelopment agencies' funds to county auditor-controllers.

The Superior Court found no violation of the state constitution in the withholding of property, sales, or use tax revenues. Cities appealed. The Superior Court found that the withholding of sales and use tax revenues from sponsoring agencies violated the state constitution. Director of Finance, Board of Equalization, Controller, and local government entities appealed.

The Court of Appeal held that the statute authorizing withholding of tax revenues for a successor agency's failure to turn over a dissolved redevelopment agency's funds violates the constitutional provision prohibiting reallocation of local government tax revenues.

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## IRS Makes Political Subdivision Rules Prospectively Effective.

WASHINGTON – The Internal Revenue Service issued a "correction" on Wednesday that makes its proposed definition of political subdivision truly prospectively effective.

The six-page "correction," which will be published in the Federal Register on March 14, is expected to lessen the ire of bond lawyers meeting here on Thursday who were prepared to blast Treasury Department and IRS officials for the initial proposed effective date, which had not been prospectively effective despite assurances it would be.

"This is a clean, clear prospective effective date for bonds that are either existing or issued within 90 days after the final issue political subdivision rules are published in the Federal Register with regard to all tax-exempt bond provisions of the federal tax code," said John Cross, the Treasury Department's associate tax legislative counsel.

The same effective date applies to refundings of those bonds, as long as the refundings don't extend the maturities of the underlying bonds, he said.

Treasury and IRS officials had faced a firestorm of criticism from bond lawyers over the technically complicated first proposed effective date that would have been prospectively effective under certain tax-exempt bond provisions of the tax code, but not others. As a result, the prospective effective date would not have been prospective at all.

The correction means that the old political subdivision definition will apply to all existing bonds or those bonds issued within 90 after the final political subdivision rules are published, as well as to refundings of those bonds that don't extend maturities of the underlying bonds. Under the old definition, an entity is a political subdivision that can issue tax-exempt bonds if it has a delegated right to exercise a substantial amount of at least one of three recognized sovereign powers of a state or local governmental unit: eminent domain, taxation or police.

For existing political subdivisions that want to issue new tax-exempt after 90 days after the final rules are published, the old definition applies temporarily, but issuers have three years to reorganize to comply with the proposed new definition of political subdivision. New issuers that want to issue tax-exempt bonds must also meet the proposed new definition of a political subdivision.

Under the new definition, an entity is a political subdivision that can issue tax-exempt bonds if it meets a three-prong test. It must: be delegated the right to exercise a substantial amount of at least one of the three sovereign powers; serve a governmental purpose; and be governmentally controlled.

The IRS says the determination of whether an entity serves a governmental purpose is based, in part, on whether the entity carries out the public purposes set forth in its enabling legislation and whether it operates in a manner that provides a significant public benefit "with no more than an incidental private benefit."

The IRS proposes at least three benchmarks of rights or powers that constitute control. These would be the right or power: to both approve and remove a majority of an entity's governing body; to elect a majority of the governing body of the entity in periodic elections of reasonable frequency; and to approve or direct the significant uses of funds or assets of the entity in advance of those uses.

Apart from these three arrangements, the determination of whether a collection of rights and powers constitutes control would depend on facts and circumstances. Control of an entity by a small faction of private individuals, businesses or corporations, trusts, partnerships or other persons "is fundamentally not governmental control," the IRS said.

Therefore the proposed rules would generally require that control be vested in either a general purpose state of local governmental unit or in an electorate established under an applicable state or local law of general application. If, however, a small faction of private persons controls an electorate, the electorate's control of an entity does not constitute governmental control of the entity. Under the proposed rules, an entity controlled by an electorate is not governmentally controlled with the outcome of the exercise of control is determined solely by the votes of an unreasonably small number of private persons.

The IRS provides two facts and circumstances tests that serve as brackets to determine if there is governmental control. On one hand, the number of private persons controlling an electorate "is always unreasonably small" if the combined votes of the three voters with the largest share of votes determine the outcome of an election, regardless of how the other voters vote, the agency said.

On the other hand, the number of private persons controlling an electorate "is never unreasonably small" if determining the outcome of an election requires the combined votes of more voters than the 10 with the largest share of votes. "For example, control can always be vested in any electorate comprised of 20 or more voters that each have the right to cast one vote in an election without giving rise to a "private faction," the IRS said.

**The Bond Buyer**

By Lynn Hume

March 9, 2016

# IRS Releases Proposed Regulations Defining a "Political Subdivision" For Purposes of Determining Eligibility to Issue Tax-Exempt Bonds: Butler Snow

On February 22, 2016, the Internal Revenue Service (the "IRS") released proposed treasury regulations (the "Proposed Regulations" ) to provide guidance as to how the IRS intends to prospectively define a "political subdivision" for purposes of allowing political subdivisions to issue tax-exempt bonds under Section 103 of the Internal Revenue Code (the "Code"). The Proposed Regulations have not yet been enacted as "final" regulations, and accordingly, until the Proposed Regulations are finalized, the existing IRS guidance continues to control. The Proposed Regulations will mainly impact special districts formed by developers to provide infrastructure for new development.

The IRS has solicited comments to the Proposed Regulations and a public hearing is scheduled for June 6, 2016. As these Proposed Regulations, when finalized, will have a significant impact on many of Butler Snow's clients, be assured that Butler Snow lawyers will be directly and actively involved with the preparation of comments on these Proposed Regulations directly with Treasury Department's Chief Counsel's Office, as well as through the National Association of Bond Lawyers and the American Bar Association.

Section 103 of the Code provides that interest on certain bonds issued by States and political subdivisions will be exempt from federal income tax. Traditionally, provided that a governmental entity possessed one or more substantial sovereign powers, including the power to tax, the power of eminent domain or the police power, the governmental entity was generally deemed to be a political subdivision, eligible to issue tax-exempt bonds under Section 103 of the Code. In 2013, however, the IRS issued Technical Advice Memorandum 201334038 (the "TAM") which challenged traditional belief that a governmental entity possessing one or more substantial sovereign powers alone was enough to ensure the entity was in fact a political subdivision eligible to issue tax-exempt bonds. As a result of the TAM, there has been a great deal of uncertainty as to whether many of our special district clients qualify as political subdivisions, and ultimately, remain eligible to issue tax-exempt bonds under Section 103 of the Code.

The Proposed Regulations provide a new three-part test for determining whether an entity qualifies as a political subdivision, taking into account all of the relevant facts and circumstances, which includes:

1. The entity must possess the right to exercise a substantial amount of at least one sovereign power (the "Sovereign Power Test");
2. The entity must serve a governmental purpose (the "Governmental Purpose Test"); and
3. A State or local government must exercise control over the entity (the "Control Test").

Unlike the Sovereign Power Test and the Governmental Purpose Test, the Control Test is a substantial deviation from the current regulatory regime.

The Proposed Regulations define control, for purposes of the Control Test, as an ongoing right or power to direct significant actions of the entity and suggest the following significant rights or powers, on a discretionary and non-ministerial basis, will constitute control:

1. Right or power to elect a majority of the governing body of the entity.
2. Right or power to elect a majority of the governing body of the entity in periodic elections of reasonable frequency.
3. Right or power to approve or direct the significant uses of funds or assets of the entity in advance of that use.

The Proposed Regulations further provide that control, for purposes of the Control Test, may be vested in one or both of the following:

1. State or local governmental unit possessing a substantial amount of each of the sovereign powers and acting through its governing body or through its duly authorized elected or appointed officials in their official capacities; or
2. An electorate established under applicable state or local law of general application, provided the electorate is not a "private faction."

For this purpose, an electorate is a "private faction" if the outcome of the exercise of control is determined by the votes of an unreasonably small number of private persons. The Proposed Regulations provide that whether the number of private persons is unreasonably small will be determined based on all of the facts and circumstances, but also conclusively affirm that a private faction will always exist if the combined votes of three voters with the largest shares of votes can determine the outcome. The Proposed Regulations provide a safe harbor whereby a private faction will not exist provided a combined vote of more than 10 voters with the largest shares of votes in the electorate can determine the outcome. So, for example, an electorate with 20 voters, each with 5% equal voting power, would satisfy the safe harbor as 11 voters would be required to determine the outcome. In contrast, an electorate with 20 voters with unequal voting power in which 10 or few members could determine the outcome, would not satisfy the safe harbor.

The Proposed Regulations, if enacted as drafted, could have a significant impact on many Butler Snow clients. These Proposed Regulations are scheduled to be effective 90 days after publication in final form, with certain transition rules. It is likely that these Proposed Regulations will be modified to some degree following the comment process and public hearing, and therefore, it is unlikely they will be finalized as currently drafted. Please note, for all entities in existence prior to March 25, 2016, the Proposed Regulations would not be effective until three years and 90 days after publication in final form, presumably to give existing entities an appropriate amount of time to restructure and become compliant.

Of note to the development community is that the Treasury Department and IRS are seeking public comment on whether it is necessary or appropriate to permit special districts formed for new developments to be political subdivisions during an initial development period in which one or two private developers elect the district's governing body and no other governmental control exists. The development community should consider commenting on the Proposed Regulations to make clear how important this tool is to new development.

As mentioned above, Butler Snow lawyers will continue working with IRS, the National Association of Bond Lawyers and the American Bar Association to ensure that the concerns of our Butler Snow clients are represented.

**Butler Snow LLP**

by Rene Adema Moore & Dee P. Wisor

March 1, 2016

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## Treasury Corrects Proposed Regulations on What is a Political Subdivision: Squire Patton Boggs

Recently, Treasury proposed a new test for an entity to qualify as a "political subdivision" that is entitled to issue tax-exempt bonds on its own behalf. (These are merely proposed regulations, and are not yet governing law.)

The proposed regulations included some transition rules that Treasury put in place to make sure that the proposed regulations would only apply prospectively. (Prop. Reg. 1.103-1(d)(2) – (4).)

One of the transition rules said that solely for purposes of determining whether outstanding bonds of an entity were issued by a political subdivision, the new, more restrictive definition of political subdivision would not apply to that entity with respect to its outstanding bonds that are issued no more than 30 days after Treasury finalized the proposed regulations. We immediately noted a nasty trap lurking in these new rules. If Treasury finalized the rules in their current form, this transition rule would mean that existing bonds would be treated as issued by a political subdivision (under the current definition of political subdivision), but the issuer itself would be treated as a private user (because the transition rule only applies for purposes of determining whether the bonds were issued by a political subdivision, and no further). The same trap would ensnare refunding bonds that were intended to qualify from the additional transition rule that would grandfather in refunding bonds that did not extend the weighted average maturity of prior bonds issued under the old definition of political subdivision.

Our immediate thought was that this trap could not have been what Treasury intended, and Treasury has agreed. Treasury corrected the proposed regulations yesterday. The corrections make it clear that the transition rules apply for all tax-exempt bond purposes, avoiding this potential trap. The revised provisions look like this:

Click here to view the image

The proposed regulations have many other substantive flaws that the tax-exempt bond community will continue to discuss, which are based on policy disagreements between Treasury and the tax-exempt bond community. Treasury should be commended for fixing this obviously unintended result in the meantime.

**Squire Patton Boggs – John W. Hutchinson**

March 10, 2016

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**TAX - OHIO**

## Oak View Properties, L.L.C. v. Franklin Cty. Bd. of Revision

**Supreme Court of Ohio - March 3, 2016 - N.E.3d - 2016 WL 827799 - 2016 -Ohio- 786**

City board of education appealed decision of Board of Tax Appeals (BTA) that affirmed reduced valuations of property ordered by county board of revision.

The Supreme Court of Ohio held that board of education failed to preserve for appeal to BTA its claim that BTA should not retain valuations set by board of revision.

Supreme Court of Ohio holds that city board of education failed to preserve for appeal to Board of

Tax Appeals (BTA) its claim that BTA should not retain valuations set by county board of revision, where board of education presented no arguments for reversing and reinstating auditor's valuation, which had been rejected by board of revision.

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**TAX - OHIO**

## Columbus City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision

**Supreme Court of Ohio - March 2, 2016 - N.E.3d - 2016 WL 827784 - 2016 -Ohio- 757**

City board of education appealed decision of the Board of Tax Appeals (BTA) affirming valuation of hotel property by county board of revision for tax purposes.

The Supreme Court of Ohio held that evidence supported decision of county board of revision and BTA not to rely on sale price of property.

Evidence supported decision of county board of revision and Board of Tax Appeals (BTA) not to rely on sale price of hotel property in valuing property for tax purposes. Record documented a decline in property values after sale not only for subject property but also for its competitive set of comparable hotels, and appraiser testified that sale lacked arm's-length character.

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**TAX - NEW JERSEY**

## New Jersey Turnpike Authority v. Township of Monroe

**Tax Court of New Jersey - February 22, 2016 - N.J.Tax - 2016 WL 741487**

Turnpike Authority brought action against township challenging local property tax assessments. Authority and township filed cross-motions for summary judgment.

The Tax Court held that:

- Tax exemption granted for real property acquired by an authority created by the State may be denied on grounds that the property was not used for a Turnpike purpose for a later tax year;
- Turnpike's acquisition of property to satisfy its mitigation obligations to Department of Environmental Protection for loss of environmentally protected lands was used for a "transportation project," and thus property was exempt from tax assessments under Turnpike's enabling statute; and
- Turnpike's claim for an exemption on property for an earlier tax year was time-barred, and thus Tax Court lacked subject-matter jurisdiction to consider claim.

Tax exemption granted for any real property acquired by an authority created by the State after written notice was provided to the assessor may be denied on the grounds that the property was not used for a Turnpike purpose for a later tax year.

Turnpike's acquisition of property to satisfy its mitigation obligations to Department of Environmental Protection for loss of environmentally protected lands was used for a "transportation project," and thus property was exempt from tax assessments under Turnpike's enabling statute, even if Turnpike obtained some acreage in excess of what was required by Department. Turnpike acquired property solely in furtherance of a project to widen and reconfigure portion of a highway to improve traffic, increase safety, and reduce motor vehicle congestion, Turnpike was required by law

to obtain permits from Department allowing it to disturb environmentally sensitive areas, and but for project, such areas would not have been impacted, and property was not being held for an indeterminate purpose or time, nor with an intention to sell it as surplus property.

Turnpike's claim for an exemption from tax assessments on property that it acquired and used for a transportation project was time-barred, and thus Tax Court lacked subject-matter jurisdiction to consider claim, even though Turnpike was granted an exemption in the prior tax year and there was no change in property's ownership or use. Turnpike did not challenge assessment in any forum, timely or otherwise, and raised right to exemption only in a summary judgment motion before the Tax Court.

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**TAX - OHIO**

## Lowe's Home Ctrs., Inc. v. Washington Cty. Bd. of Revision

**Supreme Court of Ohio - February 4, 2016 - N.E.3d - 2016 WL 427832 - 2016 -Ohio- 372**

On appeal of County Board of Revision's ("BOR") valuation before the Board of Tax Appeals ("BTA"), Lowe's and the county presented competing property appraisals. The BTA adopted the county's appraisal, and Lowe's appealed.

Lowe's argued that the BTA adopted the county's appraisal without addressing whether the evidence justified applying the special-purpose doctrine that was the basis for the Ohio Supreme Court's holding in *Meijer Stores*.

The Supreme Court of Ohio held that the BTA's adoption of the county's appraisal without addressing whether the evidence justified applying the special-purpose doctrine required vacation of the BTA's decision and remand for further proceedings.

Leased comparables will typically need to be adjusted in determining the value of a subject property that is itself unencumbered by such a lease; however, adjustments may not be necessary when the special-purpose doctrine applies.

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**STANDING / TAX APPEAL - CONNECTICUT**

## Fairfield Merrittview Ltd. Partnership v. City of Norwalk

**Supreme Court of Connecticut - March 1, 2016 - A.3d - 320 Conn. 535 - 2016 WL 730546**

Limited partnership appealed board of assessment appeals' decision upholding municipal property tax assessment on commercial office complex. The Superior Court granted partnership's motion for permission to amend appeal to add limited liability company (LLC) as plaintiff, and, subsequently, the Judge Trial Referee, valued complex at $35,059,753. City appealed. The Appellate Court reversed and remanded. Partnership and LLC appealed.

The Supreme Court of Connecticut held that:

- LLC had standing to appeal decision upholding tax assessment, and
- Mistake should be construed in its ordinary sense, rather than as connoting absence of negligence, abrogating *DiLieto v. County Obstetrics & Gynecology Group, P.C.*, 297 Conn. 105, 998 A.2d 730.

Limited liability company (LLC), which was added as plaintiff by limited partnership, had standing to appeal board of assessment appeals' decision upholding municipal property tax assessment on commercial office complex, despite claim that LLC had not appeared before board. LLC was aggrieved by board's refusal to reduce claimed overassessment of complex, LLC was owner of property on date of board's assessment and was legally responsible for payment of any taxes levied on basis of assessment, city did not object to amendment of appeal, which named LLC as plaintiff, and naming of partnership, instead of LLC, was due to error, misunderstanding, or misconception.

Mistake should be construed in its ordinary sense, rather than as connoting an absence of negligence, as used in statute allowing a court, when necessary for determination of real matter in dispute, to substitute or add a plaintiff when any action has been commenced in name of the wrong person as plaintiff through mistake, abrogating *DiLieto v. County Obstetrics & Gynecology Group, P.C.*, 297 Conn. 105, 998 A.2d 730.

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**EXEMPT FACILITIES - NEW YORK**

## Community Humanitarian Ass'n, Inc. v. Town of Ramapo

**Supreme Court, Appellate Division, Second Department, New York - March 2, 2016 - N.Y.S.3d - 2016 WL 802981 - 2016 N.Y. Slip Op. 01458**

Non-profit corporation that provided residential housing for low-income families filed action seeking declaratory judgment that real property owned by the corporation was fully exempt from property taxes. The Supreme Court, Rockland County, granted summary judgment in favor of town. Owner appealed.

The Supreme Court, Appellate Division, held that:

- Alleged violation by non-profit corporation of zoning ordinance could not support denial of property tax exemption for use of property for charitable purposes, and
- Fact issue barred summary judgment.

Alleged violation by non-profit corporation of village zoning ordinance, by exceeding certificate of occupancy for building corporation owned which allowed only two residential apartments, could not, without more, support denial of property tax exemption for use of property for charitable purposes.

Genuine issue of material fact as to whether or not non-profit corporation that provided residential housing for low-income families used its real property in a manner consistent with a charitable purpose precluded summary judgment, in corporation's action seeking declaration that its property was fully exempt from property taxes as property used for charitable purposes.

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**TAX INCREMENT FINANCING - CALIFORNIA**

## Macy v. City of Fontana

**Court of Appeal, Fourth District, Division 1, California - February 23, 2016 - Cal.Rptr.3d - 2016 WL 702297**

Resident and community organizations petitioned for writ of mandate challenging redevelopment

agency's, housing authority's, and city's alleged failure to use 20 percent of city tax increment revenues in support of low- and moderate-income housing under the Community Redevelopment Law (CRL). The Superior Court sustained demurrer without leave to amend. Resident and organizations appealed.

The Court of Appeal held that:

- CRL did not subject city to its redevelopment agency's statutory duty to use tax increment revenues for affordable housing;
- Redevelopment agency dissolution law did not subject city to its redevelopment agency's statutory duty to use tax increment revenues for affordable housing; and
- City's agreement to receive tax increment revenues from redevelopment agency did not require city to use the revenues for affordable housing.

Nothing in the Community Redevelopment Law (CRL) itself makes a municipality responsible for the obligations of a redevelopment agency.

.The redevelopment agency dissolution law did not subject city to city redevelopment agency's statutory duty to use 20 percent of redevelopment agency's tax increment revenues in support of low- and moderate-income housing, even though city was the successor agency to the redevelopment agency.

The redevelopment agency dissolution follow-up audit legislation does not expressly or by implication expand the liability of municipalities to include redevelopment agency's statutory duty to use 20 percent of redevelopment agency's tax increment revenues in support of low- and moderate-income housing, even though it included an expanded definition of "cities" and "counties" for purposes of the audits

City's role as a party to an Owner Participation Agreement (OPA) requiring city redevelopment agency to pay part of its tax increment revenues to developer and part to the city did not subject city to redevelopment agency's statutory duty to use 20 percent of redevelopment agency's tax increment revenues in support of low- and moderate-income housing, even though the OPA expressly required that the city and the agency do nothing that would adversely impact developer's right to receive the pledged tax increment revenue, and even though the Community Redevelopment Law (CRL) was amended to more strictly limit the ways in which a redevelopment agency could meet its low- and moderate-income housing obligations after the agency and the city brought their successful validation action approving the city's participation in the OPA.

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## IRS Disputes Tax-Exempt Status of Solid Waste Bonds in S.C.

WASHINGTON – The Internal Revenue Service is preliminarily challenging the tax-exempt status of bonds issued in December 2010 by the Three Rivers Solid Waste Authority in South Carolina to provide permanent financing for a system to treat and deliver methane gas from a landfill site to Kimberly-Clark Corp.

The authority, which sells the gas to Kimberly-Clark for its manufacturing facility in Beech Island, S.C. under an agreement according to the official statement for the bonds, described the dispute with the IRS in its audited financial statement for the year ending on June 30, 2015. The audit was opened in the authority's fiscal 2015, according to that document.

“The IRS has preliminarily asserted in an ‘Information Document Request’ that the 2010 bonds do not satisfy the federal tax requirements on ‘solid waste disposal facilities’ because the [gas] conveyance system, which comprised the majority of the project, was not part of a solid waste disposal function,” the authority said in its financials. “If the IRS is correct, the conveyance system would not be permitted to be financed with tax-exempt bonds.”

Based on that description, the IRS appears to be questioning how tax-exempt bonds could be issued to finance a treatment and pipeline system designed to deliver landfill gases the authority is selling to a private company. The authority said that it and its legal counsel “disagree … with the conclusions reached by the IRS” and that “management is preparing a response to the IRS rebutting its claims.”

Tim Fox, general manager for the authority said on Monday that, “We’re optimistic that we’ve moved through that situation.” But he referred questions about the dispute to the authority’s tax controversy counsel, Mike Larsen, a partner at Parker Poe in Charleston. Larsen could not be reached for comment.

The $11.21 million of December 2010 solid waste disposal facilities refunding revenue bonds were used in part to refund $11.25 million of lease revenue bond anticipation notes that also were sold in 2010. The BANs, in turn, were used to refund solid waste disposal facilities tax-exempt certificates of participation that were issued in 2007 to finance the development of the treatment and conveyance system from the landfill to Kimberly-Clark’s manufacturing facility.

The landfill consists of 1,378 acres on the U. S. Department of Energy’s Savannah River Site in Aiken County, S. C. There is a memorandum of understanding, a permit agreement, and a business agreement between the authority and DOE. But the involvement of the federal government does not appear to be an issue in the audit, based on the authority’s description of it.

The dispute has its roots in a series of actions that took place in the 1990s, according to the official statement for the bonds. In May 1991, the governor of South Carolina signed into law the Solid Waste Policy and Management Act, which, in an effort to stop disposing of waste in unlined trenches throughout the state, toughened regulations and resulted in the closing of many landfills. The act encouraged the development of regionalized efforts to deal with waste and charged the state’s counties with the responsibility for the waste generated within their jurisdictions.

The counties formed a solid waste authority and tasked it with coming up with a comprehensive solid waste plan for them. At that time, DOE was investigating several locations to site a landfill and wanted to explore partnerships with private or public entities. That led to the agreements between DOE and the Three Rivers Solid Waste Authority.

Under the 50-year permit agreement, DOE will not incur any costs in the construction, operation, maintenance, closure or monitoring on the premises or of any authority facilities or structures without DOE’s written consent. DOE agrees to provide water, sewer, leachate treatment and other services. Under
the business agreement, the authority must ensure landfill activities comply with all applicable federal and state laws and regulations. The authority agreed to contribute $1.00 per ton of municipal solid waste received at the landfill to an escrow account for the Solid Waste Technology Center for as long as the
landfill is in operation.

The authority began solid waste disposal operations in July 1998 after completion of the first of 11 cells of the landfill. It has agreements to take solid waste from nine counties.

Initially, the authority had proposed to deal with the methane generated from the landfill by flaring it into the atmosphere. But the authority decided that the most economically-feasible method of disposing of the landfill gas would be to sell it to Kimberly-Clark for its manufacturing facility. Bond counsel and disclosure counsel for the 2010 refunding revenue bonds was Howell Linkous & Nettles in Charleston.

Underwriters counsel was Drinker Biddle & Reath in Philadelphia. The Mosteller Law Firm in Barnwell, S.C. was counsel to the authority.

Municipal Advisors Group of Boston, Inc., in North Scituate, Mass. was financial advisor to the authority. The bonds were underwritten by Oppenheimer & Co. and Morgan Keegan.

**The Bond Buyer**

by Lynn Hume

Feb 29, 2016 12:30pm ET

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## Hundreds of Local Officials Defend Municipal-Bond Tax Exemption.

WASHINGTON — The prospects for a tax overhaul this year are nil, yet hundreds of state treasurers, mayors and other officials are mobilizing to protect a cornerstone of the $3.9 trillion market for municipal debt: the tax breaks the bonds offer investors.

Some 600 state and local officials are calling on Congress to stay away from taxing the interest paid to municipal-bond investors, warning the municipal market is a vital mechanism for financing schools, roads, transit systems and other infrastructure projects that create jobs. They fear Congress may try to do just that in 2017.

“Proposals to change this commitment to tax-free municipal bonds would not only be costly for state and local taxpayers, but also result in fewer projects, fewer jobs and further deterioration of our infrastructure,” the officials wrote in a letter they plan to send Wednesday to top lawmakers on the tax-writing committees of the House and Senate.

The letter, organized by the National Association of State Treasurers, reflects a heightened state of anxiety among officials in states and localities that Washington policy makers will move to limit or kill the exemption, after years of trying—and failing—to do so.

While no broad tax-code overhaul is expected this year, state and local officials are taking pre-emptive steps to protect their bonds’ tax exemption from any deal that might materialize down the road.

President Barack Obama has repeatedly advanced the idea of capping the tax exemption on the grounds that too much of the roughly $30 billion a year in forgone federal tax payments from a century-old interest exemption goes to higher-income households. Top lawmakers in both parties have said they, too, are willing to consider curbing the bonds’ tax-exempt status.

Investors are willing to accept lower yields for municipal bonds than corporate debt because their interest income is exempt from federal income taxes as well as taxes in the state in which the bonds were issued. In some high-tax areas, such as California, the bonds are also exempt from local income

taxes.

By exempting municipal bond interest from federal taxes, the government creates an incentive for investors to buy them, which helps hold down the borrowing costs of the states, cities and other entities that issue them. Curbing the exemption would likely reduce demand for the bonds, pushing those borrowing costs higher, critics say.

Mr. Obama's proposal, floated several times since 2011 including in a budget he released last month, would place a 28% cap on the tax exemption for interest earned on municipal bonds. That means a wealthy household—in a top tax bracket of 35%—with $100,000 in previously tax-free municipal-bond interest income would have to pay 7% in taxes, reducing their income from the bonds to $93,000.

Capping or eliminating the tax-exemption would hurt taxpayers in every state, the officials wrote, because "municipalities will have to either curtail infrastructure projects or raise taxes on sales, property or income" to attract investors.

State officials said the harm is more than theoretical: In December 2012, the municipal market experienced a spike in rates as investors recognized a cap on exemption was under consideration, they said.

THE WALL STREET JOURNAL

By ANDREW ACKERMAN

March 1, 2016 6:00 a.m. ET

Write to Andrew Ackerman at andrew.ackerman@wsj.com

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## Big Win for Marketplace Fairness Act in the Tenth Circuit Court of Appeals.

On February 22, 2016, the Tenth Circuit United States Court of Appeals upheld a Colorado law requiring remote sellers to provide Colorado purchasers with an annual summary of their purchases, and to send the same information to the Colorado Department of Revenue. Broadly, this important step taken by the Tenth Circuit upholds the constitutionality of use tax reporting requirements in any state. Reporting requirements are a step in the right direction until Congress acts on legislation that would allow states to enforce the collection of sales taxes on remote online vendors.

Since 2010, the State of Colorado has required remote sellers to provide Colorado purchasers with an annual summary of their purchases and to send the same information to the Colorado Department of Revenue. The Direct Marketing Association (DMA) sued Colorado in federal court, claiming the law was unconstitutional. In *Direct Marketing Association v. Brohl*, the Tenth Circuit disagreed. The court concluded the Colorado law doesn't discriminate against interstate commerce because DMA was unable to show that the notice and reporting requirements imposed on out-o--state retailers are more burdensome than the sales tax collection and administration requirements imposed on in-state retailers.

GFOA, along with "Big Seven" members of the State and Local Legal Center (SLLC), have filed amicus briefs in every stage of *DMA v. Brohl*, citing the devastating impact that the 1992 *Quill Corp. v. North Dakota Supreme Court* ruling has had on state and local governments in light of the rise of

Internet purchases, Congress's failure to pass the Marketplace Fairness Act, and states' need to improve use tax collection through statutes like Colorado's. Justice Anthony Kennedy wrote a concurring opinion, upon considering DMA, which appeared to rely on the SLLC's brief; it stated that the "legal system should find an appropriate case for this court to reexamine Quill," the Tenth Circuit's opinion actually cited the SLLC's amicus brief, which provided an estimate of the very low rate of use tax compliance and also quoted Justice Kennedy's recent criticism of *Quill.*

GFOA continues to work with the SLLC to help communicate the necessity of states' ability to enforce the collection of use taxes already due to the Courts. We will continue to keep members up to date on any developments of this case, as well as the keeping the success of the Marketplace Fairness Act a priority in our legislative activities.

**Government Finance Officers of America**

Tuesday, March 1, 2016

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**TAX - OHIO**

## Rural Health Collaborative of S. Ohio, Inc. v. Testa

**Supreme Court of Ohio - February 16, 2016 - N.E.3d - 2016 WL 671433 - 2016 -Ohio- 508**

Tax commissioner appealed decision of Board of Tax Appeals which granted a charitable-use property tax exemption to leased facility that provided dialysis services.

The Supreme Court of Ohio held that:

- Board's finding that healthcare provider lessor was a charitable organization was reasonable and lawful, but
- Board's failure to fully consider whether dialysis clinic, as lessee, could qualify as a charitable organization, required remand.

Board of Tax Appeals' finding that health care provider, which constructed and leased a dialysis clinic, was a charitable organization under charitable-purpose property tax exemption, was reasonable and lawful. The Board viewed the construction and leasing of the dialysis clinic within context of provider's larger body of activities, obtaining grants for tobacco-cessation funding, pregnancy care and education, diabetes prevention and education, and managed-care planning, along with community-care initiatives such as blood drives.

Board of Tax Appeals' failure to fully consider whether dialysis clinic, as lessee, could qualify as a charitable organization, in granting lessor's application for charitable-purpose property tax exemption, required remand. Under provision of charitable-purpose tax exemption statute, both parties to a lease were required to qualify as a charitable institution in providing service to those in need, without regard to race, creed, color, or ability to pay.

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## Don't Like It? Sue Me.

Tired of waiting for Congress to approve a tax on Internet sales, more than a dozen states — including Alabama, South Dakota and Utah — are moving to pass bills or change regulations in ways

that deliberately invite lawsuits from Internet retailers. The goal? Landing the issue before the U.S. Supreme Court.

Alabama, for its part, will start enforcing an old law it says allows it to tax out-of-state sellers. The state will audit companies that don't file returns.

"We're confident that some remote sellers will not comply and therefore it will lead to litigation," Alabama Deputy Revenue Commissioner Joe Garrett told The Wall Street Journal. "We have been very open about what we're doing."

The move won instant praise from brick-and-mortar businesses, who say they can't compete with online retailers who don't collect a sales tax. A bill allowing states to collect sales taxes from online purchases has stalled in Congress for a half-decade. By some estimates, states are collectively missing out on more than $23 billion annually in potential online sales tax revenue.

"Despite the ways this disparity distorts the market, and despite pleas from Main Street retailers in every state, Congress continues to dodge the issue," said Stacy Mitchell, co-director of the Institute for Local Self-Reliance.

But online retailers and others argue that a universal Internet sales tax wouldn't level the playing field, as some hope. Large companies that have a presence in multiple states generally have the infrastructure in place to collect a sales tax. "But it's more challenging for smaller retailers that don't have the computer systems and accounting staff to ensure compliance with 10,000 nationwide tax jurisdictions and 46 state tax auditors," argue NetChoice, a trade association promoting e-commerce.

If the issue does make it to the nation's top court, it would challenge a 1992 Supreme Court decision, Quill Corp. v. North Dakota. Under the ruling, states can apply sales taxes only to companies with a physical presence in the state.

GOVERNING.COM

BY LIZ FARMER | FEBRUARY 26, 2016

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## IRS Proposed Political Subdivision Rules Would Be Big Change for Munis.

WASHINGTON – The Internal Revenue Service is proposing new rules for political subdivisions issuing tax-exempt bonds that lawyers say will completely change the regulatory landscape and the way infrastructure has been financed in a number of states.

Under the proposed rules, which are slated to be published in the Federal Register on Tuesday, an entity is a political subdivision that can issue tax-exempt bonds if it meets a three-prong test. It must exercise sovereign powers, serve a governmental purpose, and be governmentally controlled. The requirement to be governmentally-controlled is new.

Historically, community development districts in Florida, metropolitan districts in Colorado, and rural utility districts in California and other states have been set up to issue tax-exempt bonds to finance public infrastructure such as roads, sewer and water systems for a variety of development projects. Initially the districts are controlled by developers, but as homes, business parks or shopping areas are built and irrigation systems are set up, that control is passed onto to users such

as homeowners, businesses or farmers.

Now the IRS wants political subdivisions to be controlled by state or local governments or a group of elected officials that do not constitute a "private faction."

"This changing the landscape, it's such a change from how the rules were done before," said Vicky Tsilas, a partner at Ballard Spahr here and former associate tax legislative counsel at the Treasury Department. "But the good news is that they are only proposed and there's the ability to comment on them."

Tsilas noted that the proposed rules would restrict the financing of infrastructure at a time with the federal government is trying to promote it.

"This is a big shift in the law in many people's views," said Carol Lew a shareholder at Stradling Yocca Carlson & Rauth in Newport Beach, Calif. "Some of the tests – the three-prong test – are going to be difficult to apply, particularly for small districts such as small irrigation districts" where there may only be three famers that own the land.

"I think it will surprise the IRS as to how many districts are potentially affected by these," said Perry Israel, a lawyer with his own practice in Sacramento, Calif. who represents the Village Center Community Development District in Florida in a current dispute with the IRS that served as the impetus for these proposed rules.

The proposed rules would take effect beginning 90 days after they are finalized. However, they would not apply to existing tax-exempt bonds or to refundings that do not extend the maturities of the underlying bonds. Also, there would be a three-year transition period, under which entities in existence "prior to 30 days after the proposed rules are published" could continue to issue tax-exempt bonds while restructuring to comply with the new rules.

Comments on the new rules and requests to speak at a June 6 public hearing are due by May 23.

Dee Wisor, an attorney at Butler Snow in Denver, said the transition rule might cause a "rush to market" to issue tax-exempt bonds or refunding bonds for existing political subdivisions. He said the infrastructure in these developments has been financed in part with five- to seven-year bank loans with the intent of replacing the short-term loans with longer term tax-exempt bonds. But this wouldn't comply with the restrictions on refundings.

"If they're saying a developer can't form a district and issue tax-exempt bonds, that's going to be a big deal," Wisor said.

In a section of the proposed rules called "Possible Relief for Development Districts," the IRS asked for public comments on whether development districts should be political subdivisions during an initial development period in which one or two private developers could elect the district's governing body and no other government control exists.

"The Treasury Department and IRS recognize that the governmental control requirement may present challenges for [some] development districts," the agencies said, adding that they are "concerned about the potential for excessive private control by individual developers, the attendant impact of excessive issuance of tax-exempt bonds, and inappropriate private benefits form this subsidy."

Lawyers and other market participants have been seeking guidance on the definition of a political subdivision ever since the IRS issued a very controversial technical advice memorandum in 2013.

The TAM concluded the Village Center CDD was not a political subdivision, and therefore could not have issued millions of dollars of tax-exempt bonds as it did from 1993 to 2004, because its board was and will always be controlled by the developer rather than publicly elected officials.

Lawyers argued that the notion that control by elected officials is necessary for an entity to be a political subdivision is a new requirement and that such changes should be made through regulatory proposals that can be commented upon rather than through a TAM. Historically, the determination of whether an entity was a political subdivision was based on whether it had the right to exercise substantial sovereign powers, such as the power to tax for services, they said. The IRS has since said the TAM would not be retroactively applied.

In its proposed rules on political subdivisions, the IRS would provide at least three benchmarks of rights or powers that constitute control. These would be the right or power: to both approve and remove a majority of an entity's governing body; to elect a majority of the governing body of the entity in periodic elections of reasonable frequency; and to approve or direct the significant uses of funds or assets of the entity in advance of those uses.

Aside from these three arrangements, the determination of whether a collection of rights and powers constitutes control would depend on facts and circumstances. Control of an entity by a small faction of private individuals, businesses or corporations, trusts, partnerships or other persons "is fundamentally not governmental control," the IRS said.

Therefore the proposed rules would generally require that control be vested in either a general purpose state of local governmental unit or in an electorate established under an applicable state or local law of general application.

The IRS provides two facts and circumstances tests that serve as brackets to determine if there is governmental control. On one hand, the number of private persons controlling an electorate "is always unreasonably small" if the combined votes of the three voters with the largest share of votes determine the outcome of an election, regardless of how the other voters vote, the agency said.

On the other hand, the number of private persons controlling an electorate "is never unreasonably small" if determining the outcome of an election requires the combined votes of more voters than the 10 with the largest share of votes. "For example, control can always be vested in any electorate comprised of 20 or more voters that each have the right to cast one vote in an election without giving rise to a "private faction," the IRS said.

The proposed rules would place more emphasis on the fact that an entity must serve a governmental purpose to be a political subdivision. "Arguably, this was there before," Israel said. "This puts more emphasis on it."

Finally, the rules would maintain the existing longstanding requirement that a political subdivision be empowered to exercise a substantial amount of at least one of three generally recognized sovereign powers: eminent domain, or the power to take private property for public use, as well as the powers to police and tax.

THE BOND BUYER

BY LYNN HUME

FEB 22, 2016 12:58pm ET

**TAX - CONNECTICUT**

## Wheelabrator Bridgeport, L.P. v. City of Bridgeport

**Supreme Court of Connecticut - February 2, 2016 - A.3d - 2016 WL 347925**

Taxpayers, which were a waste-to-energy (WTE) facility and its owner trustees, appealed assessor's valuation as to their real and personal property on the Grand Lists. Appeals were consolidated. The Superior Court dismissed in part, and entered judgment. Taxpayers appealed, and city cross-appealed.

The Supreme Court of Connecticut held that:

- Trial court's improper rejection as a matter of law of the cash flow approach required a new trial;
- Trial court was required to determine whether the appraisals by experts included the value of personal property;
  Evidence that the city engaged in wrongdoing was admissible;
- Any failure by taxpayer to provide a copy of an appraisal would not deprive the trial court of jurisdiction;
- An otherwise qualified expert is not disqualified merely because of a lack of a Connecticut real estate appraiser's license; and
- Trial court did not abuse its discretion when it deducted developer's profit of 15% from its reproduction cost approach calculations.

Trial court's improper rejection as a matter of law of the cash flow approach to valuation of property of taxpayers, which were a waste-to-energy (WTE) facility and its owner trustees, required a new trial at which the court could exercise its discretion to determine the credibility of expert testimony regarding the appropriate valuation method and expert's calculations, where court strongly suggested that it believed there were problems with the approach itself, implied that approach was inherently improper for tax assessment of a property that had no rental market, noted with approval another court's disparagement of the approach, and never explained why it found not credible the expert testimony from both sides that the approach was best.

Evidence that the city engaged in wrongdoing was admissible in appeal from valuation as to real and personal property of taxpayers, which were a waste-to-energy (WTE) facility and its owner trustees, for the purpose of determining whether taxpayers were entitled to interest on overpayments to the city.

Any failure by taxpayer, through refusing to provide a copy of an appraisal, would go, at most, to the merits of the trial court's decision sustaining taxpayers's appeal, and would not deprive the trial court of jurisdiction to hear the appeal.

A person who otherwise would be qualified as an expert witness to testify regarding the value of real property is not disqualified merely because the person is not a licensed real estate appraiser in Connecticut. In contrast to the evidentiary and procedural rules governing expert testimony, the purpose of the statutory scheme governing the licensure of real estate appraisers is to protect members of the general public.

Trial court did not abuse its discretion when it deducted developer's profit of 15% from its reproduction cost approach calculations when reviewing city's assessment of property of taxpayers, which were a waste-to-energy (WTE) facility and its owner trustees, where city cited no evidence that would support a finding that the property's historical cost basis did not include developer's

profit, and trial court reasonably could have concluded from the record that expert had assumed that it did not.

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## Police Misconduct Costs Prompt U.S. Cities to Increase Taxes.

The costs of police confrontations with citizens are mounting in U.S. cities, forcing many to spend millions more on training and some to seek tax increases to pay for federally mandated reforms in departments that used excessive force.

New Orleans voters in April will consider raising property taxes to pay the costs of a 2010 consent decree, one of 16 enforced by the Justice Department in the past six years. Cleveland Mayor Frank Jackson on Feb. 1 proposed a half-percentage point increase in the local income tax to improve policing, after a 2015 decree that will cost $10.6 million this year and a projected $7.1 million in each of the next four years, city documents show.

Spending on police training in 23 of the 25 most populous U.S. cities has increased by 17 percent since 2013 to $317.9 million last year, with at least $332.5 million budgeted in 2016, according to data provided in response to public-records requests and compiled by Bloomberg. The numbers don't capture all the training costs because some cities don't track it separately.

"Cities just don't have this kind of money," said Kevin Kelley, president of the Cleveland City Council. "Nobody advocates unconstitutional policing, but the point is this is going to be very expensive."

**Budget Whack**

In Ferguson, Missouri, where the 2014 shooting of an unarmed black 18-year-old caused civil unrest, the St. Louis suburb says the costs associated with a consent decree could consume more than one-quarter of its $14.5 million annual operating budget.

Ferguson's city council balked at signing a proposed agreement Feb. 9. The city, which projects a $2.8 million deficit and last September had its credit reduced to junk status by Moody's Investors Service, estimates the costs could be as high as $10 million over a three-year period. The day after the council's decision, the federal government sued the suburb of 21,000 people, alleging in a civil-rights lawsuit the city violates residents' rights and misuses law enforcement to generate revenue.

Unlike the 1990s, when the federal government provided large grants to police departments for crime fighting, the costs of misbehavior are now borne by municipalities.

"There's never been a concerted national effort to really spend a lot of money to address police misconduct," said Stephen Rushin, a professor at the University of Alabama School of Law who studies consent decrees. "We're finally coming to the recognition that correcting police misconduct is an expensive proposition."

**Video Evidence**

Even where the federal government isn't intervening, municipalities are facing higher costs from lawsuit judgments after videotaped incidents in which black victims died at the hands of officers.

In July 2014, a white New York police officer was recorded using an apparent chokehold to subdue

Eric Garner, who was selling cigarettes illegally. Garner, who was black, died and his death was ruled a homicide, but the officer was cleared by a grand jury.

Subsequent incidents in Ferguson, Baltimore and Chicago drew attention as well as civil-rights investigations. Videotape evidence gave weight to allegations of excessive force.

The risk of litigation involving police "has become very substantial," said Marshall Davies, executive director of the Public Risk Management Association, which is in the business of evaluating and minimizing financial exposure for governments.

"The risk has been there forever, as long as there have been police forces," Davies said. "Suddenly, the risk has greatly increased in size."

Los Angeles has seen its payouts for cases involving excessive or unlawful use of force and civil-rights violations reach $23.6 million for the fiscal year ended June 30 from $4.6 million in the year ended June 30 2012, according to records provided by the city attorney's office.

City Councilman Mitchell Englander, the chairman of the public safety committee, said the city often settles cases even when they lack merit to eliminate the risk of going to court.

"I haven't seen a spike in misconduct at the LAPD," Englander said. "What I have seen is a spike in awareness and concern both nationally and locally. We may get punished for the sins of our siblings, so to speak."

Chicago paid the family of Laquan McDonald $5 million last year before the release of a video showing a white police officer shooting him 16 times, even as he lay crumpled on the ground. The Justice Department began a civil-rights investigation of the city's police department in December. The nation's third-largest city is financially vulnerable, facing a $20 billion unfunded pension liability. Moody's has also cut Chicago's credit to junk status.

New York City reached a $5.9 million settlement last year with Garner's family. Cleveland agreed to pay $3 million to settle a lawsuit brought by the family of Tamir Rice, a 12-year-old black boy fatally shot by police in 2014 while holding a toy gun.

These incidents have forced the bill for police training to jump. At a cost of $35 million, the New York Police Department is teaching all 22,000 patrol officers new techniques for street encounters with civilians, particularly in minority neighborhoods, an initiative that grew out of the Garner incident.

Seattle's annual budget for police training has increased about $5 million to $13.6 million after a 2012 consent decree forced changes, said Sergeant Sean Whitcomb, a spokesman for the department.

Training is a major component of managing risk, and cities that are able to afford more robust training "are the ones that are less likely to suffer," said Chuck Thompson, executive director of the International Municipal Lawyers Association in Washington.

In a Feb. 18 report, Moody's said legal bills related to Ferguson's fight with the Justice Department "will exacerbate the city's financial challenge that already include large deficits and rapidly dwindling reserves."

Federal officials have begun their investigations of the Baltimore and Chicago police departments. Cleveland's Kelley said both places should be ready to open their wallets.

“Cities need to know that when the Justice Department comes in, there will be a financial burden,” Kelley said.

**Bloomberg Business**

by Tim Jones, Mark Niquette & James Nash

February 23, 2016 — 2:00 AM PST

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**TAX - SOUTH CAROLINA**

## Duke Energy Corp. v. South Carolina Dept. of Revenue

**Supreme Court of South Carolina - February 17, 2016 - S.E.2d - 2016 WL 626180**

Taxpayer sought review of South Carolina Department of Revenue’s denial of corporate income tax refund. The Administrative Law Court granted Department summary judgment. Taxpayer appealed. The Court of Appeals affirmed. Taxpayer appealed.

The Supreme Court of South Carolina held that as a matter of first impression, taxpayer could not include principal recovered from sale of short-term investments in denominator of formula used to apportion income between states in calculating income tax obligation.

The return of investment principal to taxpayer from short-term investments was not a “sale” as that term was defined by statute, and was therefore not includable in denominator of formula used to apportion its income between states in calculating its South Carolina corporate income tax obligation. Inclusion of principal recovered from sale of short-term securities would produce absurd results, which could not have been intended by the General Assembly.

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**TAX - TEXAS**

## HDSA Westfield Lake, LLC v. Harris County Appraisal District

**Court of Appeals of Texas, Houston (14th Dist.) - February 11, 2016 - S.W.3d - 2016 WL 552156**

Community housing development organizations (CHDOs) appealed county appraisal review board’s decision upholding appraisal district’s denials of ad valorem tax exemptions for apartments owned by CHDOs. The District Court granted summary judgment to appraisal district. CHDOs appealed.

The Court of Appeals held that CHDOs were “owners” of apartments and were thus entitled to continuation of exemptions.

Community housing development organizations (CHDOs) were “owners” of apartments that had previously received tax-exempt status and were thus entitled to a continuation of ad valorem tax exemptions, even though entity that acquired apartments and then transferred legal title to the CHDOs was not itself a qualifying CHDO, where CHDOs undisputedly held legal title at time they filed timely applications for continuation of exemptions establishing that they were qualifying CHDOs.

**TAX - OHIO**

## State ex rel. Cornerstone Developers, Ltd. v. Greene Cty. Bd. of Elections

**Supreme Court of Ohio - January 29, 2016 - N.E.3d - 2016 WL 427839 - 2016 -Ohio- 313**

Business sought writs of mandamus and prohibition against county board of elections, township, Secretary of State, and city, to prevent a tax levy from appearing on the township ballot.

The Supreme Court held that:

- Two-resolution process is required to place tax levy on ballot;
- The Supreme Court would not issue writ of prohibition to board of elections;
- Laches did not bar business's action; and
- Business was not entitled to writ of mandamus against Secretary of State.

To levy taxes, a taxing authority is required to first adopt a resolution of necessity and, once the auditor responds, the taxing authority must then adopt a resolution to proceed.

Supreme Court would not issue writ of prohibition to board of elections in business's dispute over township's placement of tax levy on ballot, where there was no statutory obligation upon board to conduct hearing.

Laches did not bar business's action for writs of mandamus and prohibition in dispute over township's placement of tax levy on ballot without passing required two resolutions, despite contentions that business should have brought action when township approved first resolution, when township certified levy to board of elections, or when board approved matter for ballot. Action brought after approval of first resolution would have been premature, as ballot measure was not pending before board, business was not on notice of when township certified levy to board, and business brought action four business days after board approved levy for ballot.

Business was not entitled to writ of mandamus against Secretary of State in dispute over township's placement of tax levy on ballot, where Secretary had not acted at all.

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## IRS Proposed Political Subdivision Rules Would Be Big Change for Munis.

WASHINGTON – The Internal Revenue Service is proposing new rules for political subdivisions issuing tax-exempt bonds that lawyers say will completely change the regulatory landscape and the way infrastructure has been financed in a number of states.

Under the proposed rules, which are slated to be published in the Federal Register on Tuesday, an entity is a political subdivision that can issue tax-exempt bonds if it meets a three-prong test. It must exercise sovereign powers, serve a governmental purpose, and be governmentally controlled. The requirement to be governmentally-controlled is new.

Historically, community development districts in Florida, metropolitan districts in Colorado, and rural utility districts in California and other states have been set up to issue tax-exempt bonds to finance public infrastructure such as roads, sewer and water systems for a variety of development projects. Initially the districts are controlled by developers, but as homes, business parks or shopping areas are built and irrigation systems are set up, that control is passed onto to users such

as homeowners, businesses or farmers.

Now the IRS wants political subdivisions to be controlled by state or local governments or a group of elected officials that do not constitute a "private faction."

"This changing the landscape, it's such a change from how the rules were done before," said Vicky Tsilas, a partner at Ballard Spahr here and former associate tax legislative counsel at the Treasury Department. "But the good news is that they are only proposed and there's the ability to comment on them."

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In a section of the proposed rules called "Possible Relief for Development Districts," the IRS asked for public comments on whether development districts should be political subdivisions during an initial development period in which one or two private developers could elect the district's governing body and no other government control exists.

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Lawyers and other market participants have been seeking guidance on the definition of a political subdivision ever since the IRS issued a very controversial technical advice memorandum in 2013.

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Lawyers argued that the notion that control by elected officials is necessary for an entity to be a political subdivision is a new requirement and that such changes should be made through regulatory proposals that can be commented upon rather than through a TAM. Historically, the determination of whether an entity was a political subdivision was based on whether it had the right to exercise substantial sovereign powers, such as the power to tax for services, they said. The IRS has since said the TAM would not be retroactively applied.

In its proposed rules on political subdivisions, the IRS would provide at least three benchmarks of rights or powers that constitute control. These would be the right or power: to both approve and remove a majority of an entity's governing body; to elect a majority of the governing body of the entity in periodic elections of reasonable frequency; and to approve or direct the significant uses of funds or assets of the entity in advance of those uses.

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Therefore the proposed rules would generally require that control be vested in either a general purpose state of local governmental unit or in an electorate established under an applicable state or local law of general application.

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Finally, the rules would maintain the existing longstanding requirement that a political subdivision be empowered to exercise a substantial amount of at least one of three generally recognized sovereign powers: eminent domain, or the power to take private property for public use, as well as the powers to police and tax.

THE BOND BUYER

BY LYNN HUME

FEB 22, 2016 12:58pm ET

## NABL: IRS Issues Proposed Political Subdivision Regulations.

The Internal Revenue Service issued proposed regulations (REG-129067-15) revising the definition of political subdivision for the purpose of tax-exempt bonds. The proposed regulations include transition rules under which the definition of political subdivision will not apply (1) for determining whether outstanding bonds are obligations of a political subdivision, and (2) to existing entities for a transition period.

A public hearing is scheduled for June 6, 2016 at 10:00 AM. Comments and requests to speak must be submitted by May 23, 2016.

Click here to view the proposed regulations.

For more information about political subdivision, attend the Tax Hot Topics panel at NABL's Tax and Securities Law Institute. The panel will include John J. Cross III, Associate Tax Legislative Counsel at the Department of Treasury, and a discussion on these proposed regulations.

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## Big Box Tax Appeal Could Cost Indiana Municipalities Big Dollars.

A state tax court ruling that changes the way big box stores are assessed could take a significant financial toll on some local communities, according to financial consultants, who are warning government officials to be prepared in case they have to cover possible shortfalls.

"You can plan for a disaster if you know it's happening," Jim Bennett, Merrillville's financial consultant, told the Town Council recently.

A December 2014 ruling by the Indiana Board of Tax Review found a Meijer store in Marion County should have been assessed according to the value of similar stores nearby that were vacant and sold, not on the sales taking place inside its building.

As a result, the court decided the Marion County store should be assessed at $30 per square foot instead of the $83 per square foot it was being assessed.

The case is still pending before the Indiana Tax Court, and a court conference call is scheduled for Tuesday on the matter, according to online court records.But communities are now bracing for appeals from Meijer and other big box stores — such as Wal-Mart, Target, Lowe's and Costco — which could see the stores' tax bills cut substantially as a result.

What's more, the appeals could cover the past 10 years or more, which means some communities would have to give refunds to stores.

Experts in municipal finance say they don't know how many appeals there will be but added they could hit some communities harder than others.

"It could hit their bottom lines at the end of the year. It would not be good. We're talking multimillion dollar refunds, depending on the scope of the appeal," said Michael Wieser, director of finance in the Lake County Auditor's office.

Wieser said while he doesn't know what the scope of any appeals filed would be, he did some

preliminary scenarios two years ago when first hearing of the court's decision. He found that St. John Township, particularly Schererville, would be hard hit in Lake County, due largely to the fact that its big box stores are along U.S. Route 41, which is in a tax increment financing district.

Wieser said he calculated that Schererville could have to give refunds of about $700,000 a year for six years, plus interest.

"Interest in 2009 was 9 percent," he said.

He said St. John could have to pay a couple hundred thousand dollars a year, but Dyer looks like it will pay next to nothing.

He explained that in a TIF district, the community's Redevelopment Commission issues bonds that pay for infrastructure improvements in that area to bring in businesses. The increment in the assessed valuation of the businesses in the district is used to repay the bonds.

"There are so many variables, but it could be devastating to Redevelopment Commissions. The bonds are for 25 to 30 years, and the commission has to pay X amount every year. It doesn't go down as you pay it," Wieser said.

Karl Cender, the financial consultant for Portage and Valparaiso in Porter County, said he doesn't know if anyone has done an analysis in Porter County on how communities would be affected.

"It could be substantial," he said.

Cender said communities should begin looking at ways to protect themselves in the event appeals are made by some of the big box stores and refunds are awarded.

"In general, they need to look at other ways to cut expenses or other measures to increase revenues," Cender said.

He said Valparaiso should have enough money in its reserves to weather the storm. Portage has some reserves, but should start preparing, he said.

Hobart Clerk-Treasurer Deborah Longer said that city shouldn't be affected too badly as its commercial retail area isn't in a TIF district.

Hobart Councilman Dave Vinzant, D-4th, called this another example of the pro-business state helping businesses and putting the extra burden onto its residents.

Merrillville's Bennett suggested some of the communities work together as a team to fight the assessment change.

Merrillville Town Councilman Shawn Pettit, D-6th, said the town should contact Indiana Association of Cities and Towns about the issue.

"It's important for us to look at this collectively as a group to see what could happen." Merrillville Council President Richard Hardaway, D-2nd, said.

"All we can do is sit back and wait to see what happens," said Merrillville Councilwoman Chrissy Barron, D-5th.

**Chicago Tribune**

Karen Caffarini

Karen Caffarini is a freelance reporter for the Post-Tribune.

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## Changes to Federal Tax Code Could Impact Revenues of Most States.

WASHINGTON – Comprehensive or targeted reform of the federal tax code could significantly impact the revenue of most states, The Pew Charitable Trusts found in a report released Wednesday.

That's because, of the 41 states and the District of Columbia with broad-based personal income taxes, 40 states and D.C. have incorporated a range of federal tax expenditures, including the exclusion for tax-exempt bond interest, into their state tax codes.

"Understanding the extent to which state income taxes are linked to the federal system is important for policymakers at both levels of government when evaluating federal revisions or reforms," the report said. "In considering reforms, federal policymakers should realize that changes can affect state revenue, requiring states to decide whether to revise their tax policies …. State leaders need to weigh the trade-offs of linking to federal tax expenditures, given the possible impacts of revisions."

Pew looked at how the state and D.C. tax systems conformed to the federal tax code in 2013 and then simulated the repeal of 42 major nonbusiness individual tax expenditures, which account for roughly 80% of the total forgone federal revenue associated with all personal tax expenditures from 2015 to 2024.

In the simulation, federal taxes also were reduced by about 40% to offset the expected revenue increase resulting from the repeal of the tax expenditures. Additionally, the alternative minimum tax was repealed to reduce interaction effects. The analysis assumed that the states linked to federal provisions in 2013 would maintain their conformity also follow the federal government by also repealing the tax expenditures.

One of tax expenditures repealed was the exclusion of tax-exempt muni bond interest. The report said that, even for states that don't conform to the federal tax code, the repeal or restriction of the federal exclusion of tax-exempt interest from muni bonds would increase borrowing costs for state and local governments. However, it did not estimate the impact on borrowing costs.

But for the states and the District that conform to the federal tax code, the report found that overall, state individual income tax revenue would increase by about 34% or $100 billion. The revenue increases ranged widely, from about 5% to 50%, depending on the degree of state conformity to the federal tax code.

State revenues increased the most for: Iowa, up 61.4%, Louisiana, up 57.4%, and Nebraska, up 57.2%. Each of these states conforms to the federal tax code for exclusions and adjustments, federal itemized deductions and federal earned income tax credit.

The lowest percentage increase was New Jersey, up only 2.1%. That state only conforms to the federal tax code for federal earned income tax credit. The next lowest increase was Mississippi, up 12.6%. That state only conforms for federal itemized deductions.

The report also found that repeal of the tax expenditures related to health insurance and retirement had the largest impact on state revenue because many states conform to them, they include a large amount of untaxed income, and they benefit a significant portion of the population.

Repeal of the employer-provided health insurance exclusion and deductions for self-employed health plans would account for 36% of the revenue increases for all of the states. The repeal of pension and savings tax preferences would account for 25% of the state revenue gains.

The simulation also showed federal income taxes paid rose in 29 states and fell in 21 states and D.C. Most of the revenue changes were not significant, with all of them totaling 10% or less. Nevertheless, the variations could contribute to the diverse economic impacts by changing the disposable income in different ways across the states, according to the report.

Pew found some federal tax code changes that can have implications for states that are unrelated to conformity, one of which was the exclusion of tax-exempt bond interest. This category also included the federal deduction for state and local taxes paid. Federal tax filers who claim itemized deductions are able to deduct state and local property taxes and income or sales taxes, reducing the overall cost of those taxes for these filers. Repealing or restricting these deductions would make state and local taxes more expensive for those taxpayers.

Other federal tax code changes could affect state revenue by altering taxpayer behavior, according to the report. For example, it said, if federal capital gains rates were to rise, taxpayers might sell investments beforehand to avoid paying higher taxes.

**The Bond Buyer**

by Lynn Hume

FEB 17, 2016 11:00am ET

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## GFOA: State and Local Governments Lose Battle against Federal Preemption.

Despite strong sustained opposition from GFOA and other groups representing local government, Senate leaders announced a legislative deal that would compromise local governments' ability to deliver essential services to their communities. Senators dropped their objections to the inclusion of the Permanent Internet Tax Freedom Act (ITFA) in the Trade Facilitation and Trade Enforcement Act conference report (HR 644) and approved the legislation in exchange for a commitment from Senate majority leadership to provide floor time for a discussion on the Marketplace Fairness Act (MFA) later this year. The move permanently removes local tax policy control on telecommunications services in exchange for mere consideration of MFA, with no guarantee as to the outcome.

The deal was made on February 10, but the ITFA has long legislative history. For nearly 15 years, GFOA has pressed Congress to lift the temporary moratorium prohibiting states and their local governments from raising revenue to supplement the costs they bear, including expanding the infrastructure used to facilitate the expansion of broadband fiber. The ITFA moratorium, originally passed in 1997 to protect the then-nascent internet industry, is now not only permanent, but also lifts the clause protecting seven states' grandfathered ability to collect these revenues (over a four-year period). The legislation, to be enacted in 2016, will essentially exempt an entire (and enormously fast-growing and prosperous) sector of the economy – the telecommunications and cable industries – from state and local taxation.

Turning our sights to the other side of the bargain, it is now more important than ever for state and local governments to help members of Congress understand the considerable importance of passing MFA. Although there is no indication of when MFA will be called up for discussion on the floor of the Senate, GFOA's Federal Liaison Center will continue to urge Congress to support any efforts to advance legislation that would finally bring federal law into the digital age by enabling state and local governments to collect sales taxes on online purchases that are already owed. To help you with this outreach, please feel free to visit and use materials on the Marketplace Fairness Act Resource Center.

**Government Finance Officers of America**

Tuesday, February 16, 2016

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## NABL: IRS Provides State QZAB Limits.

On February 12, 2016, the IRS issued Notice 2016-20, which allocates to each state its portion of the national limitation on the Qualified Zone Academy Bonds (QZABs) for calendar years 2015 and 2016. The national limitation for QZABs issued for each of calendar years 2015 and 2016 is $400 million.

Click here to view Notice 2016-20.

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## Brownstein Hyatt Farber Schreck's Colorado TIF Update.

Read the Update.

Brownstein Hyatt Farber Schreck | Feb. 12

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## IRS: Form 990-N Submission Website Will Change Feb. 29, 2016.

Beginning February 29, 2016, Form 990-N electronic submissions will be accepted through IRS.gov instead of Urban Institute's website.

Form 990-N, *Electronic Notice (e-Postcard) for Tax-Exempt Organizations Not Required to File Form 990 or Form 990EZ,* is used by small, tax-exempt organizations for annual reporting and can only be submitted electronically.

**Registration required**

Aside from the submission site change, 990-N filers will be required to complete a short, one-time registration before submitting their electronic form to IRS.gov.

Previously-registered organizations may continue using the Urban Institute website through February 28, 2016.

For more information, visit the Form 990-N webpage.

## From Camps to Campaign Funds: The History, Anatomy, and Activities of 501(c)(4) Organizations.

**Abstract**

501(c)(4) “social welfare” organizations are the second-most common type of nonprofit organization registered with the Internal Revenue Service. They are also the legal home of some of the most powerful political interest groups in the country. In 2013, the US Treasury Department proposed regulations that attempted to clarify the rules governing 501(c)(4) political activity. In light of such attention and the still-looming potential for a regulatory overhaul, the need for objective information about 501(c)(4) organizations is greater than ever. This report is an overview rather than an exhaustive examination of the 501(c)(4)s that reveals knowledge gaps.

Read the full report.

**The Urban Institute**

by Jeremy Koulish

January 28, 2016

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## S&P Medians Report: U.S. Not-For-Profit Cultural Institutions.

U.S. not-for-profit cultural institutions rated by Standard & Poor’s Ratings Services remained on stable financial footing in 2015 despite more modest investment returns than the two previous years (which were buoyed by record stock market growth).

Continue reading.

Feb. 4, 2016

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## Grand Jury Report Slams Miami-Dade’s Anti-Blight Tax Districts.

A Miami-Dade grand jury report released Thursday slammed county taxing districts created to fight slum and blight, saying some appear to fund pet projects of elected officials and flirt with “slush fund” status while shunning desperate needs for affordable housing.

The report takes aim at districts called Community Redevelopment Agencies, which siphon property taxes from general services like police and transit in order to focus spending within their boundaries. While billed as anti-poverty initiatives, CRAs have been used to subsidize museums, concert halls and a production studio in downtown Miami, tapped to cover county cultural expenses as it pursued funding for Marlins Park, and enlisted for a string of neighborhood amenities.

“It is unfathomable to us that in this day and age, citizens in our community live in housing units where sewage backs up within their apartments or overflowing sewage being released on the grounds of their apartment buildings are a regular occurrence,” the grand jury wrote in the report.

“This, while millions of dollars are being spent annually to fund ball stadiums, performing arts centers and dog parks is an outrage.”

Supporters see CRAs, which are authorized by state law, as important tools in helping revive neighborhoods where seed money from government can spur private investment. But critics see them as ways to circumvent public scrutiny of tax expenditures, and reserve millions of dollars for projects that otherwise would lose out in the normal budget process.

They’re set to cost Miami-Dade about $37 million in the current budget year — twice what it spends on Animal Services — and new CRAs have been floated as ways to subsidize the planned Miami Wilds amusement park in south Miami-Dade and expanding transit to accommodate a David Beckham soccer stadium. The dollars in play can be significant: a recent report predicted that downtown Miami’s Omni and Overtown CRAs would cost the city and county $1 billion in lost property-tax revenues through 2030.

The grand jury report urges reforms of how CRAs are run, noting elected leaders rarely appoint civilians to boards so that, instead, elected leaders themselves can be in charge of the money. (Read the full report by clicking here.)

“We discovered several examples of CRA boards spending large amounts of taxpayer dollars on what appeared to be pet projects of the elected officials,” the report said. “Additionally, there is, at a minimum, a perception and appearance that certain CRA boards are controlled by the commissioner or councilman within whose district boundaries the CRA operates.”

“Under these circumstances,” it continued, “we believe there is a significant danger of CRA funds being used in slush funds for the elected officials.”

The report also noted that the Miami-Dade County Commission, which has authority over spending, routinely provides required approval of CRA budgets well after the fiscal year begins. As a result, it is retroactively approving expenditures of property-tax dollars nominally under its control.

Use of CRAs has long been controversial, and release of this report comes during a recent contretemps over a potential extension of a downtown district’s 2030 retirement date. The Omni CRA, in Miami’s northern downtown, is being eyed as potential source for an operating subsidy at the Frost Museum of Science, a non-profit named after billionaire philanthropists that is now seeking county hotel taxes to boost its $275 million construction effort.

Miami-Dade Mayor Carlos Gimenez wants to borrow $45 million for the Frost against a stream of county hotel taxes that had been earmarked for a $4 million yearly Frost operating subsidy. Gimenez said that planned budget support would be scrapped to instead fund the construction dollars.

Separately, he also recommended that, if Miami and Miami-Dade agree to extend the Omni CRA’s life another 15 years, that money be found to subsidize operations at Frost as well as its sister property in Museum Park, the Perez Art Museum Miami, and the nearby Adrienne Arsht Center for Performing Arts.

To the south, controversy ensued when Miami’s Overtown CRA agreed in late 2014 to provide up to $108 million in tax refunds to help finance the massive Miami Worldcenter project in Park West. A larger deal is currently being negotiated with a developer planning an 1,800-room hotel and expo center on the old Miami Arena site. Both agreements hinged on local workforce hiring commitments and enhanced wages.

In exchange for the subsidies, developers have agreed to hire from within Overtown and other poor

Miami communities and pay elevated wages. Redevelopment executives argue that tax incentives spur investment that in turn finances improvements in residential neighborhoods, lures in important retail and commercial businesses and brings jobs to the community. In Overtown, new development allowed the CRA to borrow $60 million to help finance the construction of several affordable and mixed-income rental projects, as well as rehab residences in the low-income Town Park communities.

Miami Commissioner Keon Hardemon, who is chairman of the Overtown CRA, said during a community meeting Wednesday at Trinity CME Church in Overtown that bringing new development to Overtown has also allowed the agency to fund rehabs of existing co-op and townhome communities, and rehab low-income apartment buildings.

“It takes money to get things to happen,” he said.

Kevin Crowder, a CRA consultant working with North Miami and North Miami Beach, said the grand jury seemed to misunderstand the emphasis state laws place on the creation of affordable housing by redevelopment agencies. He said parts of the report were inaccurate, and glossed over the way economic activity can rebuild entire communities.

“It’s not just housing. It’s about investment, it’s about jobs, creating wealth for everybody in the area,” said Crowder, director of economic development for the RMA consultancy.

The grand jury report does not name names and largely avoids singling out specific CRAs or parties that may be responsible for questionable actions. It notes “we also found several CRAs which effectively and efficiently used their funds to accomplish the intended goals.”

But its most pointed passages paint a picture of taxing districts spending millions largely out of the normal public oversight. It noted that CRAs regularly borrow money on the board’s authority alone, using the same property-tax dollars that otherwise would require a public referendum before being used to backstop government debt.

And for districts charged with helping Florida’s most blighted neighborhoods, the grand jury found a string of expenditures that seemed aimed at less pressing needs. One unnamed CRA spends most of its money running the CRA itself. Because of failed projects, the report said, tax revenue coming into the district amounted to $400,000 a year while the CRA’s administrative budget amounted to $300,000.

“The CRA board was spending $300,000 in salary and benefits to 3 employees who were managing the remaining $100,000,” according to the report.

New CRAs are assigned a portion of all property-tax revenue generated either by higher property values or new construction, allowing the existing property-tax base to continue flowing into the regular government coffers.

The idea is that removing slum and blight would improve property values, and generate a stream of revenue for the CRA. But the grand jury said affordable-housing projects lose out in the calculation, since their creation doesn’t tend to boost tax values.

“CRAs are not formed to see how profitable they can become,” the report stated. “They are formed to address the needs of the community. In many of these communities, one of the major needs is that of safe and sanitary affordable housing.”

MIAMA HERALD

BY DOUGLAS HANKS AND DAVID SMILEY

FEB 4, 2016

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**TAX - TEXAS**

## Jack County Appraisal District v. Jack County Hospital District

**Court of Appeals of Texas, Fort Worth - January 14, 2016 - S.W.3d - 2016 WL 299703**

County hospital district appealed county appraisal review board's appraisal of leased computerized tomography (CT) scanner. The District Court granted summary judgment in favor of hospital district. Appraisal district appealed.

The Court of Appeals held that hospital district was the owner of the scanner, and, therefore, scanner was exempt from taxation.

Hospital district, a political subdivision of state, was "owner" of leased computerized tomography (CT) scanner, for purposes of statute exempting from taxation tangible personal property owned by political subdivision and providing that political subdivision was owner of such property if property was subject to lease-purchase agreement providing that political subdivision was entitled to compel delivery of legal title at lease's end, even though purchase price was undetermined and lease payments were not credited. Hospital district had right to compel delivery of legal title at end of lease by buying scanner at fair market value or at average of values determined by two appraisers if hospital district and lessor could not agree on fair market value.

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**TAX - ILLINOIS**

## WKS Crystal Lake, LLC v. LeFew

**Appellate Court of Illinois, Second District - December 23, 2015 - N.E.3d - 2015 IL App (2d) 150544 - 2015 WL 9460075**

Taxpayers brought action challenging propriety of tax levy ordinance enacted by city. The Circuit Court granted summary judgment in favor of taxpayers. City appealed.

The Appellate Court reversed, holding that:

- Tax levy ordinance was not ordinance directed at expenditure of money requiring stricter voting requirements;
- City's adoption of Robert's Rules of Order was not inconsistent with Municipal Code; and
- Ordinance's reference to Municipal Code did not render Code's voting requirements applicable to passage of ordinance.

City's tax levy ordinance was not directed to the expenditure of money, and therefore provision of Municipal Code governing adoption of ordinances did not require the affirmative vote of all elected members city council in order to pass ordinance, rather ordinance was directed at raising of money through a tax levy.

Home rule city's adoption of Robert's Rules of Order was not inconsistent with Municipal Code, and therefore Municipal Code provision governing city council meeting voting requirements did not

apply to city council's adoption of tax levy ordinance. City's adoption of Robert's Rules of Order to provide the voting procedures generally applicable in city council meetings operated as a statute "governing the passage of ordinances" within the city, and Municipal Code explicitly yielded to such home rule ordinances.

Tax levy ordinance's reference to "Illinois Municipal Code" did not render Code's city council voting requirements, which required more affirmative votes than did city code's requirements, applicable to passage of ordinance, where applicable section of Municipal Code expressly permitted adoption of other voting procedures.

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**TAX - VERMONT**

## Adams v. Town of Sudbury

**Supreme Court of Vermont - January 22, 2016 - A.3d - 2016 WL 275303 - 2016 VT 11**

Taxpayer, who owned three units in a condominium community located in two towns, sought judicial review of town's property tax assessment of portion of common lands within its boundaries. Following a bench trial, the Superior Court upheld the assessment. Taxpayer appealed.

The Supreme Court of Vermont held that:

- Statute providing how to tax common lands whose condominium units lie entirely in another town was constitutionally valid;
- Appraisal method used by town to value portion of taxpayer's land located within its boundary was accurate; and
- Town's apportionment of property tax burden among condominium unit owners in relation to their percentage interest in condominium community was reasonable.

Statute that expressly created two different property tax classifications, one for common elements of condominium community located entirely in one town and another for common elements located in two towns, created a tax regime that was not only reasonable but also resulted in fair and uniform tax treatment if implemented properly, and did not violate equal protection clause of federal constitution, nor proportional contribution clause of state constitution. Pursuant to the statute, towns were prevented from taxing lands located outside their boundaries, but were free to raise funds in accordance with the amount and value of land located within their boundaries.

Appraisal method used by town to value portion of taxpayer's land located within its boundary conformed to proportional contribution clause's fair market value requirement. Method began with general land schedule provided by state based on actual sales in the town over previous three years, it then made adjustments based on factors including terrain, accessibility, septic systems, and quality of structures, and its assessed values were very comparable to actual sales.

Town's apportionment of property tax burden among condominium unit owners in relation to their percentage interest in condominium community comported with statute prohibiting taxing common areas as a separate parcel only if those common areas lie in the same town as the community's units. None of the condominium community's units were within the town, so town could tax portion of common lands lying within its boundaries.

## Growth Expected for Tax Allocation Districts, But Redevelopment Concerns Remain, Study Says.

ATLANTA–Revenues from Atlanta's 10 tax allocation districts (TADs), districts where incremental growth in property tax revenues is used to finance economic development projects, are expected to be up significantly in the current tax year, according to a new Georgia State University report.

The report finds Atlanta's TADs are expected to post strong growth in 2016 with a projected revenue increase of nearly 30 percent, or $21.5 million overall, based on preliminary assessment data for tax year 2015. The highest projected increase of nearly 43 percent is in the Atlanta BeltLine district. Popular destination Atlantic Station is expecting an increase of about 27 percent. The new projections are the first glimmer of progress following years of lackluster growth blamed on the Great Recession.

"Despite the Great Recession's effects on redevelopment activity in Atlanta's TADs, the city's use of tax increment financing has created nearly $2.5 billion in new taxable value, a better than 10 percent increase," said Dick Layton, an expert in Georgia municipal finance and author of the report, released by the Center for State and Local Finance.

The study shows that several of Atlanta's 10 self-financing districts have been quite successful despite recent troubling times. Assessed values have more than doubled in six of the districts, including an increase from $7 million to $538 million at Atlantic Station. Still, the Great Recession created hurdles that may have a lasting impact on Atlanta's future use of these districts, Layton said.

Tax collections peaked in fiscal years (FY) 2010 and 2011, but then declined nearly across the board. Atlantic Station saw a 21 percent decline from FY 2011 to FY 2012; Atlanta BeltLine, a 30 percent drop; and Eastside, a 36 percent drop. In one example of economic fallout, developers at Atlantic Station converted newly constructed condos into lower-valued apartments when available space went unused.

The study also discusses concerns raised about management over the years of Atlanta's redevelopment program, including the accumulation of unused funds in certain TADs, high administrative costs for some TADs, the overcommitment of Atlanta BeltLine funds to Atlanta Public Schools, as well as issues associated with the ongoing evaluation of TAD progress in meeting economic development goals.

"It should be noted that many, if not all, of these concerns originated as and when the TADs were being created, leaving subsequent city administrations to deal with them," Layton said.

The report notes that Atlanta has been one of the most active users in the country of this form of financing. Outside of California cities, Atlanta is second only to Denver. With the economy picking up, self-financing districts will likely regain some of their popularity. As Atlanta considers new uses for tax increment financing, the report suggests the city should pursue more aggressive oversight and evaluation of each TAD's progress toward meeting goals and objectives.

Download a copy of the report.

January 27, 2016

Andrew Young School of Policy Studies, Center for State and Local Finance

**TAX - INDIANA**

## In re 2014 Johnson County Tax Sale

**Court of Appeals of Indiana - December 22, 2015 - N.E.3d - 2015 WL 9306974**

Following tax sale, town brought petition seeking issuance of tax deed. The Superior Court denied issuance of tax deed, ruling that the property owner had redeemed the property. Town appealed, arguing that property owner was not entitled to equitable relief because he did not file an objection to the Town's petition for a tax deed.

The Court of Appeals held that:

- Trial court's findings were not clearly erroneous, and
- Trial court was not prevented from exercising its equitable power in favor of property owner by denying town's petition.

Trial court, in granting equitable relief to property owner by denying town's petition for issuance of tax deed, did not clearly err in finding that he went to auditor's office to determine amount due to redeem property and paid amount he was provided, that he did not have unclean hands, and that he relied upon information provided by auditor.

Trial court was not prevented from exercising its equitable power in favor of property owner by denying town's petition for issuance of tax deed, by property owner's failure to file objection and request hearing pursuant to statute governing petitions for issuance of tax deed, where court did hold hearing and town did not object to hearing.

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**TAX - OHIO**

## Cuyahoga Cty. v. Testa

**Supreme Court of Ohio - January 19, 2016 - N.E.3d - 2016 WL 259380 - 2016 -Ohio- 134**

County appealed decision of the Board of Tax Appeals (BTA) affirming tax commissioner's denial of exemption of marina/restaurant portion of real property acquired by county.

The Supreme Court of Ohio held that:

- County failed to preserve for appeal its claim that tax-exempt status of portion of property containing marina and restaurant should not have been considered separately from tax-exempt status of portion containing park, and
- Evidence supported BTA's decision that marina and restaurant were not used exclusively for a public purpose.

On appeal to Board of Tax Appeals (BTA) from tax commissioner's denial of tax exemption to county-owned marina/restaurant portion of real property that also included park, county failed to preserve its claim that tax-exempt status of marina/restaurant portion should not have been considered separately from tax-exempt status of park portion, where county's notice of appeal to BTA failed to specify the separate treatment of the two uses as error.

Evidence supported decision of Board of Tax Appeals (BTA) that county-owned marina and restaurant were not used exclusively for a public purpose by county, but were instead operated with

a view to profit, and thus county was not entitled to tax exemption for portion of property containing marina and restaurant. Marina was operated by a for-profit entity, marina served as a revenue source for developing county-owned park on another portion of the property, and marina used long-term leases that limited general public's access.

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## IRS Examining Arborwood CDD Board, Land Purchase.

WASHINGTON – The Internal Revenue Service is stepping up its audit of $80 million of Arborwood Community Development District's 2006 bonds and appears to be focusing in part on the Florida CDD's board and land
possibly purchased at too high a price.

IRS tax-exempt bond revenue agent Debbie Arceneaux asked for nine items from the CDD last month, including whether any members of the board of supervisors have been elected by CDD residents as well as a list of landowners along with the number of acres they owned and voting units they held when the bonds were issued.

She also asked for the status of the bonds, including how many are outstanding and if any defaulted or were refunded. Arceneaux wanted the sources and amounts of revenues being used to pay debt service and copies of sales or acquisition agreements between the CDD and developers for any transfer of assets using the bond proceeds.

She made the requests in a Dec. 8, 2015 letter that was included in documents recently posted on the Municipal Securities Rulemaking Board's EMMA website. The letter asked for the information to be provided by Dec. 31.

The Arborwood CDD, located near Fort Myers, has been under audit since 2012. This is the IRS' fourth request for information, according to Michael McElligott, who works in finance at Special District Services, Inc., which manages the CDD. The audit is one of a number IRS investigations of CDDs in Florida, one in particular of which is being closely watched by the bond law community. The IRS has claimed the Village Center Community Development District, in Lady Lake, Fla., is not a political subdivision and therefore can't issue tax-exempt bonds because its board is tied to the developer and isn't made up of any elected CDD residents.

Bond lawyers have complained the agency is trying to set new standards for political subdivisions through enforcement cases rather than rulemaking. They typically have defined a political subdivision as one that has been delegated the right to exercise sovereign powers, such as eminent domain or taxation. As a result of the controversy, the Treasury Department and IRS are working on new rules for defining a political subdivision that they say will be subject to public comment and will be prospectively effective.

Wes Habor, a shareholder at Hopping Green & Sams, counsel to the Arborwood CDD, said it differs from the Village Center CDD in that it has more than 250 residents and its board is elected by residents.

But the website of the Arborwood Homeowners Association, Inc. showed 151 units at the end of 2015, with each charged $115.50 per month for a total of $17,440.50 per month and $209,286 per year. Association officials could not be reached for comment.

Kathleen Dailey, who joined SDS last year and manages the CDD, said the board has been made up

entirely of residents since 2014. She didn't have information on the number of residents but said it could be obtained from the homeowners association.

Dailey said the CDD only oversees the lakes and stormwater system, the acquisition of which was financed with the bonds. The CDD oversees the assessments on property owners used to pay the bonds and obtains permits for the preserved lands and wetlands. Those include a panther reserve and a bat habitat, she said.

There is very little descriptive information about the Arborwood CDD on its website, though its key officials and financial documents are posted. A 2004 engineer's report provided to the CDD and posted on its website said Arborwood was a proposed 2,467 acre master planned community in Fort Myers, Fla. that was to be approved for 4,050 single family homes, 2,450 multi-family units, 36 holes of golf, commercial space, wetland preserves infrastructure, landscaped roadways and gated entries. Dailey doesn't know if that's changed.

McElligott said at least three major developers are currently building homes in the CDD, including PulteGroup, which acquired Centex in 2009. The documents posted on EMMA show the IRS is particularly interested in roughly 561 acres of preserves and wetlands, which the CDD acquired from the developer (under contract at that time to Centex Homes) with proceeds from $67.34 million of bond anticipation notes issued in 2005. The land was used as collateral for $80 million of capital improvement revenue bonds issued in 2006 to refund the 2005 notes.

The documents posted on EMMA include an assessment of the value of the land by senior IRS appraiser Howard Kanter that was sent to IRS officials in September. Kantor said the 561 acres were part of 1,826 acre parcel that was purchased at $67,167 per acre for a total purchase price of $122.65 million in 2003. Kanter said the 561 acres can't be commercially developed. He estimated their value at $2,500 per acre or $1.4 million.

Vanessa Albert Lowry, a shareholder at Greenberg Traurig in Philadelphia who appears to be representing the CDD in the IRS audit, could not be reached for comment.

**The Bond Buyer**

by Lynn Hume

JAN 20, 2016 3:32pm ET

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**TAX SALE - NORTH DAKOTA**

## Estate of Glasoe v. Williams County, N.D.

**Supreme Court of North Dakota - January 19, 2016 - N.W.2d - 2016 WL 225224 - 2016 ND 18**

Heirs of property owner brought action to recover and quiet title to property that was sold at public auction following tax lien foreclosure. Following a trial, the District Court dismissed action. Heirs appealed.

The Supreme Court of North Dakota held that:

- Service of notice of foreclosure by certified mail on deceased property owner and by personal service on resident complied with statutory requirements;

- Service of notice of foreclosure on non-resident constituted valid personal service;
- Auditor was not statutorily required to provide final notice of expiration of redemption period; and
- Purchaser's successful bid and county's acceptance of down payment precluded redemption.

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**TAX - RHODE ISLAND**

## DePasqual v. Cwiek

**Supreme Court of Rhode Island - January 14, 2016 - A.3d - 2016 WL 166477**

Taxpayers who allowed installation of wind turbine on their property filed suit challenging decision of Tax Board of Review that denied taxpayers' appeal from local property tax bill based on assessment of wind turbine. The Superior Court entered summary judgment for taxpayers, and assessor appealed.

The Supreme Court of Rhode Island affirmed the decision of the Superior Court, holding that:

- Taxpayers were manufacturers, within meaning of exemption from property tax for manufacturer who used premises primarily for purpose of transforming raw materials into finished product for trade;
- Wind turbine did not come within statutory exception to definition of "manufacturer"; and
- Statute granting municipality authority to enact ordinance exempting from property tax any renewable energy system located in municipality did not impose any qualification on taxpayers' entitlement to exemption from property tax as "manufacturer" of electricity.

Taxpayers who owned property where wind turbine was built were "manufacturers," within meaning of statute granting exemption from tax for manufacturer who used any premises primarily for purpose of transforming raw materials into finished product for trade, where turbine was used exclusively for purpose of transforming raw materials—namely, wind—into finished product—namely, electricity.

Wind turbine that converted wind to electricity, which product was not sold to public but instead was sold directly to National Grid pursuant to standard power purchase agreement, did not come within statutory exception to definition of "manufacturer" exempt from property tax for non-regulated power producer that commenced commercial operation by selling electricity at retail or taking title to generating facilities as of designated date.

Statute granting municipality authority to enact ordinance exempting from property tax any renewable energy system located in municipality did not impose any qualification on existing statutory right of wind turbine owner to exemption from property tax as "manufacturer" of electricity from raw materials, namely, wind, based on use of "any premises, room, or place in it primarily for the purpose of transforming raw materials into a finished product for trade."

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**TAX - NEVADA**

## City of Fernley v. State, Dep't of Tax

**Supreme Court of Nevada - January 14, 2016 - P.3d - 2016 WL 166087 - 132 Nev. Adv. Op. 4**

City filed complaint against state, challenging constitutionality of Local Government Tax Distribution Account and seeking declaratory and injunctive relief and damages for violations of state

constitutional prohibition on special or local legislation.

The First Judicial District Court granted state summary judgment and awarded state costs. City appealed.

The Supreme Court of Nevada affirmed, holding that:

- City knew or had reason to know of its claim for retrospective relief against state on date of it's incorporation;
- Failure to file claim within default statute of limitations did not bar claim for injunctive and declaratory relief;
- Local Government Tax Distribution Account was a general law; and
- Distribution classifications applied uniformly and legislature had legitimate purpose for enacting different classifications.

Trial court did not abuse its discretion in awarding costs to state in city's suit against state challenging constitutionality of Local Government Tax Distribution Account and seeking declaratory and injunctive relief and damages for violations of state constitutional prohibition on special or local legislation. Even though city's lawsuit involved a good-faith challenge to tax distribution legislation, state was prevailing party in action for recovery of money damages where city sought to recover more than $2,500.

City knew or had reason to know of its claim for retrospective relief against state that Local Government Tax Distribution Account was unconstitutional under constitutional provision prohibiting legislature from passing local or special laws for assessment and collection of taxes, triggering default statute of limitations of four years, on date of its incorporation as city, since city was aware that its base distributions under Local Government Tax Distribution Account would be calculated as of that date.

City's failure to file claim within default four-year statute of limitations that Local Government Tax Distribution Account was unconstitutional under state constitutional provision prohibiting legislature from passing local or special laws for assessment and collection of taxes did not bar city's claims for injunctive and declaratory relief from allegedly unconstitutional statute. City retained right to prevent future violations of constitutional rights.

Local Government Tax Distribution Account was general law, as required to defeat city's claim that tax distribution legislation was unconstitutional under state constitutional provision prohibiting legislature from passing local or special laws for assessment and collection of taxes. City was not singled out in legislation, but rather was classified with similarly situated local governments.

Distribution classifications under Local Government Tax Distribution Account applied uniformly to all entities that were similarly situated and legislature had legitimate government purpose for enacting different classifications, as required to defeat city's claim that tax distribution legislation was unconstitutional under state constitutional provision prohibiting legislature from passing local or special laws for assessment and collection of taxes. Tax distribution legislation did not specify recipients, but rather had different formulas it used for any entity that fell within that classification, and classifications that legislature used when enacting legislation were rationally related to achieve its legitimate government interests of promoting general-purpose governments.

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**TAX - SOUTH DAKOTA**

## Flandreau Santee Sioux Tribe v. Gerlach

**United States District Court, D. South Dakota, Southern Division - December 18, 2015 - F.Supp.3d - 2015 WL 9273931**

Following decision by South Dakota Office of Hearing Examiners that nonmember purchases at casino owned and operated by Indian tribe on tribal lands were subject to state's use tax, brought action in federal court against state and governor, alleging that state lacked authority to impose its use tax scheme on reservation land against nonmember casino patrons. Defendants moved to dismiss.

The District Court held that:

- Under South Dakota law federal claims were not precluded by any res judicata effect of Hearing Examiner's final order;
- Younger abstention and "Our Federalism" doctrine did not preclude federal jurisdiction;
- Tribe adequately pleaded that state taxation of nonmember purchases of goods and services at casino was preempted by IGRA;
- Tribe's complaint that imposition of taxes was unlawfully discriminatory met threshold requirement of plausibility;
- Claim was ripe for judicial determination; and
- Tribe adequately pled that tax remittance was unrelated to alcohol regulation, and thus invalid.

Decision by South Dakota Office of Hearing Examiners, in compelled review of state's alcohol license denial, that nonmember purchases at casino owned and operated by tribe on tribal lands were not subject to state's use tax, did not consider tribe's Ex parte Young federal questions of state taxation on reservation land, federal preemption law, operation of IGRA, and jurisdiction over Indian tribes, and which did not involve § 1983 claim, and thus under South Dakota law federal claims were not precluded by any res judicata effect of Hearing Examiner's final order, which tribe had not appealed to state court, although Hearing Examiner discussed that application of use tax on tribe violated neither IGRA nor Tribal-State Compact.

Younger abstention and "Our Federalism" doctrine did not preclude federal jurisdiction over Indian tribe's federal claims not yet litigated in state court against state and governor, alleging state's taxation on reservation land contravened IGRA, although tribe had initiated state administrative proceeding seeking to compel reissuance of its alcohol license. State proceeding was licensure hearing, not enforcement proceeding, brought by tribe and not state, and thus was not judicial in nature.

Indian tribe, which owned and operated IGRA-sanctioned casino on tribal lands, adequately pleaded that state taxation of nonmember purchases of goods and services at casino was preempted by IGRA. Taxes were result of casino activity, compact existed between tribe and state but did not direct state's authority to tax alcohol sales at tribe's casino, state could have negotiated for taxes on alcohol sales on casino floor depending on use to which those funds were to be put, questions remained regarding whether state waived its right to such tax imposition, and whether sales of alcohol and other services was directly related to gaming, and tax interfered with IGRA's purpose of amplifying tribal development as it related to gaming.

South Dakota's tax imposition on nonmember patrons of casino on reservation land of not only goods presumably purchased by tribe off reservation for resale to casino patrons, but also services provided to patrons on reservation, required weighing of interests of tribe, state, and federal government to determine if taxes were permissible, and thus tribe's complaint that imposition of taxes was unlawfully discriminatory as applied to tribe met threshold requirement of plausibility, as

required to adequately plead claim, even though tribe erroneously relied on case involving off-reservation tax.

Indian tribe's claim that South Dakota's use tax and remittance requirements as applied to on reservation patrons and that was necessary to retain alcohol license at tribe's casino were preempted by Indian Commerce Clause of Federal Constitution, federal common law, and infringed on inherent tribal sovereignty was neither hypothetical nor speculative given that state declined to renew tribe's license after tribe failed to collect and remit tax, and thus claim was ripe for judicial determination.

Indian tribe adequately pled that alcohol licenses conditioned on tax remittance was unrelated to alcohol regulation and as such was violative of statute granting state's authority to regulate and control use of alcohol on tribal lands, and thus was invalid as improper exercise of state regulatory authority.

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**TAX - OHIO**

## Warrensville Hts. City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision

**Supreme Court of Ohio - January 13, 2016 - N.E.3d - 2016 WL 147273 - 2016 -Ohio- 78**

City board of education appealed decision of the Board of Tax Appeals, which found that the value of a racetrack was approximately $30 million less than the purchase price at a bankruptcy sale six months after tax-lien date.

The Supreme Court of Ohio held that:

- Purchase price did not establish true value, and
- Evidence was sufficient to support valuation.

Purchase price of racetrack at bankruptcy sale six months after tax-lien date did not establish property's true value, and therefore Board of Tax Appeals properly considered appraisal evidence in valuing property, where racetrack was sold at auction, which was forced sale other than in ordinary course of business and not between typically motivated parties, and sale occurred at least in part to liquidate assets for benefit of creditors.

Evidence was sufficient to support Board of Tax Appeals' decision to value racetrack at $13.8 million, as opposed to $43 million, which was purchase price at bankruptcy sale, as advocated by board of education. Board of education presented nothing apart from price at forced auction to establish value of property, purchaser's appraisal indicated that $27,950,000 of purchase price was attributed to obtaining racing license and that furniture, fixtures, and equipment were worth approximately $1,200,000, and other evidence, including recitals in purchase agreement, corroborated appraisal's valuation.

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**TAX - VERMONT**

## Rasmussen v. Town of Fair Haven

**Supreme Court of Vermont - January 8, 2016 - A.3d - 2016 WL 99839 - 2016 VT 1**

Taxpayer appealed Board of Civil Authority (BCA) decision finding taxpayer withdrew his property assessment appeal. The Property Valuation and Review Division's Property Tax Hearing Officer concluded that the BCA had correctly dismissed taxpayer's appeal. Taxpayer appealed.

The Supreme Court of Vermont held that:

- Taxpayer's refusal to allow a complete inspection of the properties comprising his single parcel, including an inspection of the interior of any dwelling, constituted a withdrawal of his assessment appeal, and an affirmance of the lister's assessment of the property, and
- Town did not need to file an objection to taxpayer's appeal in order to enable the hearing officer to consider if he had the authority to consider the appraised value of the property de novo.

Because taxpayer's lands were one parcel for tax purposes, he was obligated to make any lands comprising the parcel available for inspection, and thus, his refusal to allow a complete inspection of the properties comprising his single parcel, including an inspection of the interior of any dwelling, constituted a withdrawal of his assessment appeal, and an affirmance of the lister's assessment of the property.

Inspection of a taxpayer's property for property tax assessment by town listers, the Board of Civil Authority (BCA), or a Property Valuation and Review Divsion's Property Tax Hearing Officer, would not constitute an unreasonable search under the Fourth Amendment. While a taxpayer could refuse to allow an inspection, the consequence would be that the taxpayer would not be allowed to challenge the assessment of his or her property.

The scope of taxpayer's appeal of a Board of Civil Authority (BCA) decision finding that taxpayer withdrew his property assessment appeal when he refused to allow an inspection of a portion of his property was not limited to the issues identified by taxpayer in his notice of appeal, and town did not need to file an objection to the appeal in order to enable the hearing officer to consider if he had authority to consider the appraised value of the property de novo. Due to taxpayer's refusal to allow an inspection, the BCA could not and did not make any findings or rulings on the merits.

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## New England Tax Wars.

With Massachusetts' unofficial nickname being "Taxachusetts," some may be wondering why General Electric (GE) announced this week that it's moving its corporate headquarters from Connecticut to Boston. The move follows a contentious fight in Connecticut over the state's corporate tax structure that would have eventually increased GE's tax burden.

The bulk of the fight was over Connecticut's move toward "combined reporting," which basically makes a corporation declare any tax havens it may have in other states that presumably have lower (or no) taxes on corporate and individual income. About half the states have implemented combined reporting as a way of discouraging companies from using havens to evade taxes. If GE stayed in Connecticut, its income earned elsewhere would have been subject to the state's 9 percent corporate tax rate, which is one of the highest in the country. Connecticut has also increased taxes several times in recent years, and a committee is currently studying broader tax reform.

When GE threatened to leave Connecticut over these changes last year, Gov. Dannel Malloy quickly backtracked and delayed the tax hikes until this year. But it turns out he was just buying time for GE to scout out its next move.

Oddly enough, Massachusetts already has combined reporting requirements and a similarly high corporate income tax rate. But it has a much lower individual income tax rate (a flat rate of 5.1 percent, versus Connecticut's highest tax bracket of 6.99 percent). Massachusetts and Boston also sweetened GE's deal by providing tax credits totaling $145 million.

After spending the past 40 years in Connecticut, GE's relocation sends a sobering message to states as they continue to see their revenue from corporate income taxes shrink. "[General Electric] becomes just another company that has chosen to relocate due to a state's decision to alter its tax code," said Nicole Kaeding of the Tax Foundation.

GOVERNING.COM

BY LIZ FARMER | JANUARY 15, 2016

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## GFOA: Lend Your Support to Preserve the Tax Exemption on Municipal Bond Interest.

As Congress and the White House return to discussions on comprehensive federal tax reform in 2016, GFOA is urging our members to help engage federal lawmakers regarding the need to preserve the tax exemption on municipal bond interest. In addition to the resources already available for your use on our federal government relations page, GFOA is urging members to sign their jurisdictions onto this letter to the leaders of the House and Senate tax writing committees, expressing support for the tax exemption. Beyond GFOA's membership, the letter is also being distributed by our colleagues at the National League of Cities, U.S. Conference of Mayors, National Association of Counties, and the National Association of State Treasurers. Our aim is to secure the support of hundreds of jurisdictions on this letter to demonstrate to Congress the immense support for this provision of the tax code. Jurisdictions that are interested in signing on should contact Emma Heydlauff by February 15.

**Download:**

Letter Expressing Support for Tax Exemption

Thursday, January 14, 2016

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**SCHOOL FINANCE - ALASKA**

## State v. Ketchikan Gateway Borough

**Supreme Court of Alaska - January 8, 2016 - P.3d - 2016 WL 106156**

After making its contribution to fund local school district, borough brought suit against state asking the superior court to declare the required local contribution unconstitutional, to enjoin the state from requiring the borough to comply with the statute, and, to direct the state to refund its protested $4.2 million payment. Both parties moved for summary judgment. The Superior Court partially granted borough's motion. State appealed and borough cross-appealed.

The Supreme Court of Alaska held that:

- As a matter of first impression, local school funding formula was not a state tax or license within meaning of state constitutional prohibition against dedicated taxes, and
- Required local contribution did not violate the appropriations clause or the governor's veto clause of the Alaska Constitution.

State's local school funding formula, requiring that a local government make a contribution to fund its local school district, was not a "state tax" or "license" within meaning of state constitutional prohibition against dedicated taxes. Minutes of the constitutional convention and the historical context of those proceedings suggested that the delegates intended that local communities and the State would share responsibility for their local schools.

State's local school funding formula, requiring that a local government make a contribution to fund its local school district, did not violate the appropriations clause or the governor's veto clause of the Alaska Constitution; plain language of both the appropriations and governor's veto clauses indicated that the clauses restrict the State's power after money enters the state treasury, not before.

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## Gambling Tax Upheld by Illinois Supreme Court.

A recent decision by the Illinois Supreme Court will allow Cook County to collect about $3 million in unpaid taxes from Des Plaines' Rivers Casino.

The decision also will allow the county to continue to collect another $1 million in yearly tax revenue from Midwest Gaming, the casino's owner and operator. A separate recent state appellate court decision also upheld the county's legal right to tax gambling machines.

The Supreme Court decision effectively ends a three-year legal battle over a gambling tax approved by the Cook County Board of Commissioners in late 2012. The high court denied Midwest Gaming's petition to appeal an earlier ruling by an appellate court.

The county lost in circuit court and won in appellate court. The appellate court's decision was upheld when the state's high court declined to hear the case.

As a result of the decision, the county's Department of Revenue anticipates receiving an about $3 million one-time payment for outstanding taxes from 2013, 2014 and 2015.

"We are pleased with the Supreme Court's decision confirming our long-held belief that the county's tax on video gaming machines is legitimate and lawful," said Cook County Board President Toni Preckwinkle in a news release. "The revenue generated from the gambling tax will help provide important funding for critical public safety services to county residents."

Rivers Casino spokesman Dennis Culloton offered a different opinion.

"We respectfully disagree with the court's ruling, and we are considering our options," he said in an emailed statement.

When asked about the issue, Des Plaines City Manager Michael Bartholomew said the city was aware of the lawsuit but that it had little bearing on the municipality. He said the tax revenue the city receives from Rivers Casino is remitted by the state, not the county.

State Rep. Marty Moylan, D-Des Plaines, said in an emailed statement that he opposed the 1 percent

sales tax increase passed by the Cook County board last year and would “continue to oppose any tax increase that hurts our local economy and middle-class families,” but did not specifically mention the county’s gambling machine tax.

After approval of the tax, Midwest Gaming filed suit against Cook County in circuit court. An agreement reached during the hearing process stipulated that the county would not enforce the tax or issue non-compliance citations while the case was still being fought. Midwest Gaming also agreed to pay any unsettled taxes after a final decision by the court.

Tax decals for gambling machines found in casinos in Cook County cost $1,000, while those for video poker machines in bars and restaurants cost $200 per the county ordinance. Based on the number of gambling machines at Rivers Casino, the county expects to receive $1 million in annual tax revenue.

BY TRIBUNE NEWS SERVICE | JANUARY 5, 2016

By Lee V. Gaines

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## How States' Dependence on Corporate Taxes Has Declined.

For most states, corporate income taxes represent a slow growing source of revenue. A story in the January issue of Governing explores how Michigan and other states have experienced sharp drops in these tax collections.

The Census Bureau collects tax data from states as part of its Annual Survey of State Government Finances. To see how these sources of revenue have changed over time, we’ve compiled financial data for each state dating back to 1950.

Corporate income taxes account for a small slice of a state’s total budget, ranging from just over 5 percent of total revenues in Illinois and New Hampshire to nothing in states that don’t collect any. On average, states’ reliance on such taxes has gradually dwindled over the past few decades:

Continue reading.

GOVERNING.COM

BY MIKE MACIAG | JANUARY 6, 2016

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## NABL: ABA Section of Taxation Submits Issue Price Comments.

On January 4, 2016, the American Bar Association (ABA) Section of Taxation submitted its comments on the proposed issue price regulations.

In the comments, the committee requested four primary points of clarification or revision to the proposed regulations, including:

1) revision of the definition of underwriter to limit the risk of misapplication of the definition in

enforcement proceedings and provide greater certainty to market participants;
**2)** clarification of diligence and documentation issues, such as the issuer diligence requirement under the alternative method;
**3)** revisions to achieve workable solutions to potential yield restriction issues that may arise under the alternative method in connection with advance refunding transactions; and
**4)** an adjustment to the proposed rules to allow for more definite price determinations at more certain dates and times.

To read the ABA comments, please click here.

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**TAX - CALIFORNIA**

## Gillette Co. v. Franchise Tax Bd.

**Supreme Court of California - December 31, 2015 - P.3d - 2015 WL 9589602 - 14 Cal. Daily Op. Serv. 21**

This case evaluated California's calculation of income taxes on multistate businesses.

In 1974, California joined the Multistate Tax Compact, which contained an apportionment formula and permitted a taxpayer election between the Compact's formula and any other formula provided by state law. The Legislature later amended the Revenue and Taxation Code to specify a different apportionment formula that "shall" apply "[n]otwithstanding" the Compact's provisions. (Rev. & Tax.Code,1 § 25128, subd. (a) (section 25128(a)).)

Taxpayers here contended that they remained entitled to elect between the new statutory formula and that contained in the Compact.

The Supreme Court of California concluded that the Legislature may properly preclude a taxpayer from relying on the Compact's election provision, holding that:

- Multistate Tax Compact is not binding under constitutional contract clauses;
- Amendment of Uniform Division of Income for Tax Purposes Act (UDITPA) apportionment formula did not violate constitutional reenactment rule; and
- Amendment of UDITPA amended the Multistate Tax Compact.

The Multistate Tax Compact is not a binding contract among its member states to preserve the Uniform Division of Income for Tax Purposes Act (UDITPA) apportionment formula, and thus the UDITPA formula does not take precedence over other state law under the contract clauses of the federal and state Constitutions, since states may unilaterally join and withdraw from the Compact, and the Multistate Tax Commission has no binding regulatory authority upon member states.

Amendment of Uniform Division of Income for Tax Purposes Act (UDITPA) apportionment formula providing that "all business income shall be apportioned to this state" under a new formula did not violate the constitutional reenactment rule, even though there was no reenactment of the Multistate Tax Compact to eliminate its provision authorizing election of a different apportionment formula, where the UDITPA amendment referenced the Compact provision.

Amendment of Uniform Division of Income for Tax Purposes Act (UDITPA) apportionment formula providing that "all business income shall be apportioned to this state" under a new formula amended the Multistate Tax Compact to require the use of the new formula.

**PENSIONS - FEDERAL**

## Kaplan v. Saint Peter's Healthcare System

**United States Court of Appeals, Third Circuit - December 29, 2015 - F.3d - 2015 WL 9487719**

Participant in Employee Retirement Income Security Act (ERISA) plan brought putative class claim against employer, a religiously affiliated hospital, alleging that, as a mere qualifying agency of a church, hospital was precluded from establishing a church plan entitled to certain exemptions under ERISA.

The District Court denied employer's motion to dismiss. Employer appealed.

The Court of Appeals held that:

- Relevant ERISA provision was unambiguous in requiring a church to establish a church exempt plan;
- Legislative history indicated that agencies were precluded from establishing church exempt plans; and
- Provision did not violate Free Exercise Clause.

ERISA provision granting exemptions for churches and qualifying church agencies was unambiguous in requiring that a church, rather than a qualifying church agency, establish such a church exempt plan. Statute was clear in defining a church exempt plan as one "established and maintained" by a church for its employees, ignoring "established" language would render it superfluous by removing a careful limitation, language permitting a qualifying agency to establish a plan was expressly omitted, and court would construe exemption narrowly in favor of plan participants.

Even assuming ERISA provision permitting churches to create benefit plans exempt from certain requirements was ambiguous as to whether qualifying church agencies could also establish such plans, legislative history demonstrated that qualifying agencies were not permitted to create such exempt plans. History did not demonstrate that Congress was concerned about the ability of agencies to establish exempt plans, rather it demonstrated that Congress did not intend to open up the exemption broadly.

Informal determination of Internal Revenue Service (IRS) in general counsel memorandum that qualifying church agencies could establish and maintain church exempt plans under ERISA was contrary to plain language of ERISA provision that only permitted churches to establish such plans, and thus was not entitled to deference.

Congress did not ratify Internal Revenue Service (IRS) interpretation of ERISA provision permitting qualifying church agencies to establish church exempt plans. IRS interpretation was contrary to plain language of statute, and there was no indication that Congress had detailed knowledge of provision and its interpretation.

ERISA provision permitting only churches to establish church exempt plans did not violate Free Exercise Clause of First Amendment. Requirement that such plans be established by churches rather than their qualifying agencies did not prohibit church agencies from having their employees covered by a church exempt plan.

## Not-for-Profit Hospital Borrowing Rebounds in 2015.

Hospitals borrowed 50% more from long-term investors this year than in 2014, as potential savings from refinancing drew not-for-profit hospitals into the market, new data show.

Hospitals sold investors $18 billion in fixed-rate municipal bonds this year, according to healthcare financial advisers HFA Partners. That's compared with 2014, when hospitals borrowed $12 billion.

Rates were also low in 2014, but hospitals had additional incentives to capitalize on cheap debt this year—including the much-anticipated action by the Federal Reserve to raise interest rates. The nation's central bank announced earlier this month it would finally raise rates from zero after years of halting economic recovery from the Great Recession. In fact, more rate hikes are expected.

Interest rates were also further depressed this year by the small number of hospitals looking to borrow in 2014. Hospital debt entering the market dropped to a 10-year low in 2014. Investors had fewer hospital bonds to buy, which held down the interest rates that hospitals had to pay.

Rates were so low entering 2015 that some hospitals sought to refinance bonds, despite terms that prohibit them from doing so for a few more years.

Hospitals often agree not to refinance, or call, bonds for a few years after borrowing money. Borrowers can get around that agreement with "advance refunding," but that can be costly.

Still, some hospitals found they could save money regardless of advance refunding costs this year. "If rates are low enough, it works," said Pierre Bogacz, managing director at HFA Partners.

Not all hospitals benefit equally from low rates. Borrowers with higher interest rates on existing debt stand to gain the most, Bogacz said. Advanced refunding is often most attractive to hospitals that are close to the date—one or two years—when their bonds can be refinanced.

Reid Health in Richmond, Ind., will save $1 million a year on interest after refinancing $92 million in February, said Christopher Knight, vice president and chief financial officer for the central Indiana hospital.

In 2005, Reid Health went to municipal bond markets to finance construction of a replacement hospital, which opened three years later. The financial crisis that erupted that year forced Reid Health and other not-for-profits into costly refinancing deals. Reid ended up with an average coupon rate of 6.5% and agreed not to refinance the bonds again until 2019.

Now, newly issued 30-year bonds will save the hospital money even after the $25 million cost of an advanced refunding. "I think everybody was surprised," by the amount, Knight said. Reid rushed to enter the market in February to refinance before the Federal Reserve boosted borrowing costs. "That's why we got in as early as possible," Knight said.

Hospital leaders have also sought to capitalize on the large supply of investors and the small number of borrowers in the industry. Hospitals have borrowed less in recent years, despite low rates, as they scale back on construction and invest in more information technology. Demand for Reid Health's bonds was so high that not all investors could buy bonds.

Refinancing surged in the first months of the year when Reid Health entered the market, accounting for three-quarters of the $5.8 billion in first-quarter bonds issued by hospitals, an HFA Partners

analysis shows. That's compared with 20% of the $1.4 billion hospitals borrowed in 2014.

Interest rates are more favorable now than in 2009, when "the market was anything but normal," Bogacz said. Hospitals also save from an advance refunding with debt that must be paid back more quickly, or when hospitals' credit rating has improved, both of which typically lower interest rates, he said.

**Modern Healthcare**

By Melanie Evans | December 28, 2015

Melanie Evans writes about healthcare finance, hospital management and governance issues. She has been part of the Modern Healthcare staff since 2004. Earlier in her career she covered healthcare and not-for-profits as a reporter at the Duluth (Minn.) News Tribune. She received a bachelor's degree in international relations from Boston University and a bachelor's in journalism from the University of Minnesota.

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## Outlook: What's Ahead for Tax Regulation, Enforcement in 2016.

WASHINGTON – The biggest tax regulatory issue for municipal market participants in 2016 are the issue price rules and what changes the Treasury Department and Internal Revenue Service will make as they finalize them, dealer and issuer group representatives said in interviews about the coming year.

"Our biggest issue is the issue price rules," Michael Decker, a managing director and co-head of municipal securities for the Securities Industry and Financial Markets Association, said when asked about the tax arena.

"Issue price continues to be a big issue for underwriters and issuers," said John Vahey, director of federal policy for Bond Dealers of America.

"As far as what we can envision going on on the regulatory front in 2016, [issue price] springs to mind," said Dustin McDonald, director of the Government Finance Officer Association's federal liaison center here. "I know it's a big priority of John Cross to get it done."

Cross, the Treasury Department's associate tax legislative counsel, agreed with that assessment.

"Issue price is an important priority and broadly applicable topic," he said in an interview. He said he hopes the agencies can get those final rules out sometime in the spring of next year.

Cross told GFOA's debt committee members at their winter meeting earlier this month that tax regulatory officials "are going to take another good look at whether we can do something more on competitive sales."

"I thought John's remarks were very encouraging and hopefully we'll end up with an issue price rule that's workable," said Decker.

In addition, muni market groups have asked for some clarifications in the proposed rules, which were published in July after the Treasury and IRS withdrew earlier ones proposed in September 2013 because of complaints they were unworkable.

Issue price is important because it is used to help determine the yield on bonds and whether an issuer is complying with arbitrage rebate or yield restriction requirements, as well as whether federal subsidy payments for direct-pay bonds such as Build America Bonds are appropriate.

Under existing rules, the issue price of each maturity of bonds that are publicly offered is generally the first price at which a substantial amount, defined as 10%, are reasonably expected to be sold to the public.

But tax regulators became concerned that some dealers were "flipping" bonds — selling then to another dealer or institutional investor who then sold them again almost simultaneously, with the prices continually rising before the bonds were eventually sold to retail investors.

Treasury and the IRS tried to tighten the rules in 2013 by proposing new ones that replaced the "reasonable expectations" standard with actual sales and increased the definition of "substantial amount" to 25% instead of 10%. But those rules drew many complaints so Treasury and IRS scrapped them and proposed new rules in June, under which the issue price of a maturity would generally be the price at which the first 10% of the bonds are actually sold to the public.

If 10% of a maturity hasn't been sold by the sale date, the issue price will be the initial offering price of the bonds sold to the public, as long as the lead or sole underwriter certifies to the issuer that no underwriter filled an order from the public after the sale date and before the issue date at a higher price than the initial offering price. An exception can be made if the market moved after the sale date, but the underwriter must document any market movements justifying a higher price.

Dealers and issuers want a safe harbor or special rules for bonds sold in competitive deals, where there is less opportunity for pricing abuses.

Cross' statements on possibly considering special rules for competitive deals are "very helpful," said Stefano Taverna, a partner at McCall, Parkhurst & Horton in Dallas who heads the tax-exempt financing committee of the American Bar Association's taxation section.

"The fact that he's open to it is a good thing," said Vahey.

Muni market groups also want clarification on actions that underwriters or issuers must take if less than a 10% of a maturity is sold to the public. "I don't see him backing away from the actual sales approach," said Vahey. Other market participants said the same thing.

**Political Subdivision**

But the Treasury and IRS may move even earlier in the year to propose rules that will be open for public comment and prospectively effective on the definition of a political subdivision, according to Cross.

Market participants and lawmakers have been seeking guidance on the definition of a political subdivision ever since the IRS issued a technical advice memorandum in 2013 that concluded the Village Center Community Development District in Florida was not a political subdivision, and therefore could not have issued tax-exempt bonds from 1993 to 2004, because its board was and will always be controlled by the developer rather than publicly elected officials. In June, the IRS said it will not apply the TAM retroactively.

Lawyers have said that the notion that control by elected officials is necessary for an entity to be a political subdivision is a new requirement and that such changes should be made through regulatory proposals that can be commented upon rather than in a TAM. Historically, the determination of

whether an entity was a political subdivision was based on whether it had the right to exercise substantial sovereign powers, such as the power to tax for services.

Cross told bond lawyers meeting in Chicago in September that the Treasury and the IRS were considering having the rules include "a possible objective governmental control standard" and other principles beyond the sovereign powers analysis.

**Management Contracts**

The Treasury and IRS also are working to update and liberalize safe harbors in longer term management contracts so that the contracts do not create a significant amount of private use and payments that would make tax-exempt bonds taxable.

Bond and tax lawyers have complained that the tax agencies' previous guidance on management contracts is not flexible enough to allow tax-exempt bonds to be used in transportation or infrastructure projects financed by public-private partnerships.

The IRS issued guidance in 2013, Rev. Proc. 97-13, that set up safe harbors for longer term management contracts. For a contract up to 10 years, at least 80% of the manager's annual compensation had to be based on a fixed fee. For one of 15 years, at least 95% of the annual compensation had to be based on a fixed fee.

Then in October 2014, the IRS issued Notice 2014-67 covering management contracts that included most types of fixed or variable rate compensation for contracts of five years or less. But it did not permit compensation based on a share of net profits.

Both the NABL and the ABA's tax-exempt financing committee have made recommendations on how this guidance could be modernized.

"I hope they will be able to turn to the management contract rules. I think that the White House still has a push for public-private partnerships" and these rules would help with that, said Linda Schakel, a partner at Ballard Spahr here.

Cross said there is a lot of interest at Treasury on this topic because of the work being done by a task force chaired by Treasury Secretary Jack Lew and Transportation Secretary Anthony Foxx. "This is a fairly early priority in the coming year," he said.

The Treasury and IRS also want to consider new guidance or rules that show what remedial actions could be taken with regard to leases under change of use rules so that bonds could remain tax-exempt if a bond-financed facility was leased to a private party.

"Those would be two very good pieces of guidance that we need," Taverna said, referring to management contracts and leases. "They would be particularly helpful in certain contexts, particularly with regard to transportation, water facilities and other types of long term assets."

The ABA taxation section's tax-exempt financing committee has "focused a lot over the past couple of years on transportation projects, particularly P3s and allocation and accounting and management contract" rules, he said.

The tax regulators also are considering issuing guidance or rules that would provide issuers of direct-pay bonds with an easier "cure" than a defeasance of the bonds in change of use situations, when too much private use and payments threatens the federal subsidy payments. They are exploring whether it would be possible, instead, to halt or lower subsidy payments instead of forcing

the bonds to be defeased.

The Treasury and IRS are working on a big project to consolidate and finalize arbitrage rules that were proposed in 2007 and 2013. The issue price rules had been part of the 2013 arbitrage proposals, but were broken out as a separate regulatory project.

Other ongoing projects involve finalizing the so-called TEFRA rules, which implement provisions of the Tax Equity and Fiscal Responsibility Act of 1982 requiring public approval for private-activity bonds. The Treasury and IRS issued temporary rules in 1983 and then modified them in rules proposed in 2008. Muni groups seemed to like the 2008 proposed rules, but they were never finalized.

NABL submitted recommendations on the final rules to the Treasury and IRS in June.

Another ongoing project is to tweak reissuance notices published in 2008 and put them into reissuance rules for tax-exempt bonds. One incentive to get this project finished fairly soon is that a lot of debt was restructured into bank debt with shorter, five to seven year maturities in 2008 and issuers are going to want to convert that into long-term debt as it matures, Cross said.

“We’re starting to see some reissuance questions,” said Cross.

**TEB**

Meanwhile, IRS officials said the tax-exempt bond office is finding some ongoing problem areas in audits. These include: impermissible private use of bond-financed jails and prisons; total return swaps that result arbitrage rule violations; users of small issue industrial development bonds exceeding capital expenditure limits, direct-pay qualified zone academy bonds issued under volume cap that should not have been carried forward; arbitrage rebate payments that were not determined and paid on time; and sales of bond-financed property that created compliance issues.

The IRS tax-exempt bond office closed 568 audits and entered into 19 closing agreements during fiscal 2015, which ended on Sept. 30. An IRS spokesman said TEB will be adding market segments to audit in the coming year to those already under audit like governmental bonds, 501()(3) bonds, private-activity bonds and tax credit bonds. He was not specific about what might be added. He said TEB also is still looking at arbitrage issues and whether Form 8038-Ts on arbitrage rebate have been accurately filed.

“We’re seeing a lot of audit notices come out and it takes time for issuers to respond to them,” said Schakel, adding, “Some of the questions surprise us.” TEB entered into 105 settlements under the voluntary closing agreement program, about twice as many as in fiscal 2014.

VCAP settlements involved 501(c)(3) ownership problems, arbitrage problems, tax-credit bond issues and exempt facility bond issues. IRS officials declined to provide the dollar amounts of audit and VCAP settlements and said it would be difficult to project how many settlements might be reached in fiscal 2016.

TEB plans two substantial webcasts in 2016, but declined to specify the topics. The office plans to update publications on its website on governmental, private-activity and 501(c)(3) bonds. It is also working on an arbitrage publication.

Some lawyers noted that the costs of applying to the IRS for private-letter rulings has skyrocketed in recent years. The fee has more than doubled during the last five years, rising to $28,300 in 2015 from $14,000 in 2011. “It’s jumped dramatically over the past couple of years and I think it’s due to

budget cuts, said Schakel. Issuers are supposed to seek PLRs when they fail to spend all of their proceeds for qualified school construction bonds, she said, adding, some of them don't want to spend $28,000 over a few thousand dollars of unspent proceeds.

Finally, an IRS spokesperson said TEB is no longer sending newsletters to state and local officials because "we found that we were usually posting the same material on our website."

**The Bond Buyer**

by Lynn Hume

DEC 29, 2015 11:10am ET

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**TAX - NEW JERSEY**

## Seaboard Landing, LLC v. Borough of Penns Grove

**Tax Court of New Jersey - December 3, 2015 - N.J.Tax - 2015 WL 8006052**

Taxpayer sought reduction of assessments on real property, pursuant to the Freeze Act.

The Tax Court held that:

- Square corners doctrine did not preclude municipality from opposing taxpayer's application for Freeze Act relief; and
- Application of Freeze Act to preclude relief for tax year in which districtwide reevaluation was implemented as well as for following year did not render Act in violation of uniformity clause, even if assessments for the two tax years at issue exceeded property's true market value; but
- Freeze Act does not preclude availability of relief in a year in which a taxpayer's complaint is dismissed for failure to pay taxes.

Square corners doctrine did not preclude municipality from opposing taxpayer's application for Freeze Act relief, in proceeding in which taxpayer sought reduction in assessments of real property, even though, during discovery, municipality commissioned expert report that opined that property's true market value was more than 50% lower than equalized assessed value for certain tax years, where taxpayer did not file complaints in tax court challenging assessments for those particular tax years, and municipality, aware that the opinion of its expert, if adopted by the court, would require a reduction in the challenged assessments, proceeded to call its expert witness to offer testimony damaging to the municipality's own position.

Application of Freeze Act to preclude relief for tax year in which districtwide reevaluation was implemented as well as for following year did not render Act in violation of uniformity clause, even if assessments for the two tax years at issue exceeded property's true market value. There was no mandate in uniformity clause that all assessments which evidence suggested exceeded true market value must be revised.

Freeze Act does not preclude availability of relief in a year in which a taxpayer's complaint is dismissed for failure to pay taxes.

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**TAX - NEW YORK**

## Maimonides Medical Center v. U.S.

**United States Court of Appeals, Second Circuit - December 18, 2015 - F.3d - 2015 WL 9261236**

Not-for-profit corporation – Maimonides Medical Center (MMC) – brought action against the United States to recover overpayments of employment taxes.

The parties agreed that MMC was entitled to a refund for an overpayment of taxes, but disagreed as to the interest rate to be applied under I.R.C. § 6621(a)(1). MMC argued that the lower interest rates applicable to "corporation[s]" applied only to for-profit corporations, and that because it is a nonprofit corporation, it was entitled to the higher standard rate.

The United States District Court for the Eastern District of New York applied the lower interest rate. Taxpayer appealed.

The Court of Appeals held that the lower corporate interest rates provided by § 6621(a)(1) are also applicable to nonprofit corporations.

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## McGuire Woods: President Signs Extender Package for PTC and ITC - Renewable Energy Tax Credits.

Nearly two weeks ago, Congress passed the omnibus Consolidated Appropriations Act, 2016 (the "Omnibus Bill"), and the Protecting Americans from Tax Hikes Act of 2015 (the "Act"), both parts of a package that President Obama signed into law on Friday, December 19, 2015. Both the Omnibus Bill and the Act make substantial changes to numerous expiring or already expired tax provisions, many of which will directly impact renewable energy development.

The more important provisions of the Omnibus Bill and the Act affecting renewable energy projects include:

- **Production Tax Credits (PTC)** – The PTC under Section 45 of the Code had expired at the end of 2014 and the Act extends the PTC through the end of 2019 for wind; however, the credit is phased out beginning in 2017 (i.e., 100 percent PTC in 2015 and 2016, 80 percent for 2017, 60 percent for 2018 and 40 percent for 2019). Other technologies − such as geothermal, municipal waste, landfill gas, and open- and closed-loop biomass − received only a two-year extension of the PTC, through the end of 2017. The ability to elect from the PTC into the ITC was extended on the same basis, and with the phase-out for wind beginning in 2017. The PTC still contains the requirement that construction must have "begun" before the applicable tax year.
- **Investment Tax Credits (ITC)** – The ITC under Section 48 of the Code also received a favorable extension through 2019 for qualifying solar projects. The ITC was set to phase down from its current 30 percent credit to 10 percent for qualifying solar equipment at the end of 2016. The Omnibus Bill maintains the 30 percent ITC for qualifying solar projects through the end of 2019.
- **Residential Solar Tax Credit** – The residential solar tax credit under Section 25D of the Code was set to expire at the end of 2016 and now has been extended through the end of 2019. The residential solar tax credit allows the homeowner to take a 30 percent tax credit related to the construction costs of a qualifying solar installation, most commonly residential rooftop solar panels.
- **Bonus Depreciation** – The 50 percent bonus depreciation was extended through 2019 but begins phasing out in 2018 (i.e., 50 percent in 2015, 2016 and 2017; 40 percent in 2018; and 30 percent

in 2019).
- Among other renewable tax provisions included were extensions for credits applicable to alternative fuel, renewable diesel and biodiesel.

Additionally, there was a two-year extension through 2016 for the deduction applicable to energy-efficient commercial buildings under Section 179D of the Code. Lastly, there was a five-year extension of the New Markets Tax Credit Program under Section 45D of the Code. The extension applies for the five years beginning 2015 and ending 2019, with $3.5 billion in allocation for each year. The carryover availability for unused limitation has been extended through 2024.

**December 28, 2015**

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## OUTLOOK: Tax Reform Bill Unlikely But Muni Market Must Remain Vigilant.

WASHINGTON – Congress will not act on comprehensive tax reform next year, but House Republicans could try to move forward with international or corporate tax reform, according to tax experts.

In any case, muni market groups must remain vigilant in educating lawmakers about the importance of municipal bonds, the experts and market participants said in interviews about 2016.

“There will be no important tax legislation next year, nothing’s going to get to the finish line,” said Howard Gleckman, senior fellow at the Tax Policy Center.

Senate Majority Leader Mitch McConnell, R-Ky. “has made it clear that it’s a nonstarter and Obama’s just not interested,” he said.

Just after he replaced John Boehner as House Speaker, Rep. Paul Ryan, R-Wis., said he wanted the House to pass a tax reform bill by July 18-21, when the Republican presidential convention is to be held in Cleveland. More recently Ryan said it would impossible to do comprehensive tax reform while president Obama is still in office, but he did not close the door on international or corporate tax reform.

“I understand Ryan’s enthusiasm,” said Gleckman of the former House Ways and Means Committee chairman who was, and is expected to continue to be, very focused on tax reform. “I just don’t see it.”

Several congressional observers said that by enacting the $1.1 trillion omnibus spending bill and the tax bill this month, lawmakers do not have much left to do next year.

“Everyone would agree that what Congress ended getting done at the end of the session was a larger package than expected,” said Micah Green, a partner and co-head of government affairs and public policy group at Steptoe & Johnson. The tax bill extends expired tax provisions through the end of 2016, he said.

“Congress has basically completed its to-do list,” said John Godfrey, senior director of government relations at the American Public Power Association. “The pressure to act has been lifted.”

However, Godfrey cautioned that tax policy is driven by headlines as well as deadlines, and said that if there is more controversy over U.S. companies moving their headquarters overseas to avoid U.S. taxes, that could spur efforts at international tax reform.

New House Ways and Means Committee Chair Kevin Brady, R-Texas, recently told reporters he wants to focus on international tax reform in 2016 and set the stage for a broader tax overhaul after the presidential election. In November, just after replacing Ryan, Brady said he planned to solicit the views of House members on tax reform over the next few months.

“I suppose you could see a scenario where there is agreement on international tax reform,” said Green. “But as you build up to the elections, making hard choices is harder and harder to do.”

“I don’t think we’re going to see anything in the form of comprehensive tax reform until after the elections,” said Jessica Giroux, general counsel and managing director of federal regulatory policy for Bond Dealers of America. “I think there will continue to be discussions.”

“There are two areas of risk,” said Michael Decker, managing director and co-head of municipal securities at the Securities Industry and Financial Markets Association.

First, in broader discussions on comprehensive tax reform, tax-exempt interest “will most certainly be on the table,” he said.

Second, if some form of tax reform legislation that is not comprehensive is considered and there is a need for revenue raisers to pay for provisions, “there’s always the risk that some tweaking of the tax-exempt bond statutes will find itself in that discussion,” Decker said.

“Even if you don’t have comprehensive tax reform there’s still substantial risk that municipal bonds will be on the table for corporate tax reform as a pay for,” Godfrey agreed.

Bill Daly, director of governmental affairs for the National Association of Bond Lawyers pointed out that corporate tax reform could very well involve munis, as there are tax provisions that limit the amount of tax-exempt bonds that some companies like banks or insurers can hold.

But he added that, “It’s hard to see [Congress] doing much with the truncated session” for next year’s presidential election. Members will be out part of July, all of August, all of October and most of November.

Still, he said, “The muni market needs to be vigilant no matter what.”

Green agreed. “I’ve always said that the time to make the case for the value, the efficiency of municipal bonds is before there’s movement on tax reform,” he said.

Muni market participants in past years have had confront Obama’s repeated budget proposals for capping the value of tax exemption at 28% for higher income earners. Former House Ways and Means Committee chair Dave Camp in 2014 released a draft comprehensive tax reform proposal that would have imposed a 10% surtax on muni bond interest for higher earners and eliminated the tax exemption for new private-activity bonds.

“Once you’re on the menu, you’re always on the menu,” said Godfrey.

Giroux said BDA is going to continue to try to educate congressional staff and members about the importance of municipal bonds. She said she assumes the group will do another educational seminar for staff next year.

Obama and other lawmakers have proposed reinstating direct-pay bonds like Build America Bonds, but with lower subsidy rates.

“We think you can make a strong argument to revive BABs,” said Decker. “But there seem to be key members of Congress that just don’t like that product and if that continues to be the case, it’s hard to imagine there’d be much movement in Congress.”

Both he and Giroux said BABs have lost some support among issuers because of sequestration, which has reduced their federal subsidy payments. “Sequestration needs to be addressed,” said Decker.

Asked about some lawmakers’ attempts to push for more tax credit bonds, Decker said, “It’s just a structure that doesn’t work well, that’s never been proven even on a small scale basis.”

When Congress in 2010 offered certain bonds in both direct-pay and tax credit modes, and allowed issuers to choose between them, none chose tax credit bonds.

Gleckman said rising interest rates may take more of the spotlight than tax reform in 2016.

“Probably the most important thing in the municipal market is the Federal Reserve Board and what’s going to happen to interest rates.”

If the Fed continues to raise rates, he said, “It’s going to make it more expensive to borrow money” and it’s going to “close the window” on advance refundings.

THE BOND BUYER

BY LYNN HUME

DEC 30, 2015 10:52am ET

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## NABL: Certain Tax-Exempt Bonds Extended in PATH Act.

On December 17, 2015 the House passed The Protecting Americans from Tax Hikes (PATH) Act of 2015, a $680 billion tax extender bill. Section 164 of the PATH Act authorizes the issuance of $400 million of qualified zone academy bonds in 2015 and 2016. Section 171 of the PATH Act extends through December 31, 2016 tax benefits, including tax-exempt bonds, in empowerment zones. Section 171 also modifies Section 1394 of the Internal Revenue Code, concerning tax-exempt enterprise zone facility bonds. The modifications are effective for bonds issued after December 31, 2015.

The Senate is expected to approve and the President to sign the PATH Act.

Click here to view the PATH Act (See page 69 for Section 164 and page 77 for Section 171).

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## Mind The GAAP: Financial Reporting Impact Of New Accounting Standards For Not-For-Profits.

In April of this year, the Financial Accounting Standards Board ("FASB") circulated a series of proposed changes to generally accepted accounting principles ("GAAP") applicable to certain not-for-profits. These changes, which are intended to provide clearer information to donors, creditors, and other users of financial statements, may have a significant impact on not-for-profit financial reporting (which has remained largely unchanged for nearly twenty years) and will, among other things, (i) impact the reporting of operating performance in an entity's statement of activities and related metrics in the statement of cash flows, (ii) require the use of the direct method for preparing the statement of cash flows, and (iii) modify the reporting disclosure of net assets and "underwater" endowments.

The new standards will apply to most not-for-profit organizations, including public charities and private foundations, but not to entities that provide dividends, lower costs, or economic benefits to owners, members or participants such as mutual insurance entities, credit unions, farm and rural electric cooperatives, or employee benefit plans.

FASB has not offered a timeline for when these GAAP changes will take effect and they remain subject to revision.

Some highlights of the proposed changes are:

**Defining Operating Activities**

Not-for-profit entities (other than healthcare entities) are currently required to report their "change in net assets," a metric which is similar to the comprehensive income of a for-profit business. While entities now have flexibility regarding how that metric is calculated, the proposed standards will require the classification of all revenues, expenses, gains, losses or other changes in net assets as either operating or nonoperating activities, with operating activities consisting of all resources derived from or directed at carrying out an entity's mission and available for use in the current reporting period.

**Cash Flows**

The proposed operating activity reporting changes will be reflected on the statement of cash flows. Specifically, certain expenditures, gifts of cash to acquire property and equipment, and cash invested for programmatic purposes will be classified as operating cash flows. Returns from non-programmatic investments will be considered investing inflows, while interest on financing will be classified with financing activities. In addition, entities will be required to report operating activity cash flows using direct method reporting (which generally involves breaking out cash flows on a line item basis, rather than showing net income as modified by certain adjustments).

**Net Asset Reporting**

Currently, not-for-profit entities classify net assets as unrestricted, temporarily restricted and permanently restricted. Under the proposed standards, a new category, "net assets with donor-imposed restrictions," will replace the temporarily restricted and permanently restricted categories, with the differences among funds being described in the footnotes to the financial statements. In addition, the unrestricted category will be renamed "net assets without donor restrictions."

**Underwater Endowments**

Finally, the proposed standards will change the way entities report so-called "underwater" endowment funds. An endowment fund is considered to be "underwater" if the fair value of the assets and accumulated returns of the fund are less than the historical amount of the gift. Currently,

GAAP requires entities to report a deduction in net assets without donor restrictions to the extent of the deficit. Under the proposed standards, entities will present the entire endowment fund, including whatever is underwater, in “net assets with donor restrictions” and disclose (i) the aggregate fair value of the underwater endowment funds, (ii) the original gift amount or the amount the entity must maintain according to donor requirements or the law, and (iii) the amount by which funds are underwater.

Apart from the administrative and reporting impact on not-for-profits, these changes may influence how donors view a not-for-profit’s health and prospects. Not-for-profits can expect more questions about their financials, both because of these changes, in the near term, and because the proposed standards will lessen the similarities between for-profit and not-for-profit reporting.

Staff and board members of not-for-profit entities should familiarize themselves with the proposed changes, and should plan to meet with their auditors and counsel to evaluate how the new standards may affect their financial reporting and to determine whether any bookkeeping changes should be implemented in advance to prepare.

**Patterson Belknap Webb & Tyler LLP**

Article by Dahlia B. Doumar and Justin Zaremby

Last Updated: December 14 2015

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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**TAX - PENNSYLVANIA**

## Fish v. Township of Lower Merion

**Supreme Court of Pennsylvania - December 21, 2015 - A.3d - 2015 WL 9282331**

Taxpayers sought declaratory judgment, challenging township’s imposition of its business privilege tax on taxpayers’ lease revenue and application of registration requirements for any “business, trade, occupation or profession.”

The Court of Common Pleas found in favor of township. Taxpayers appealed. The Commonwealth Court affirmed in part and reversed in part. Review was allowed.

The Supreme Court of Pennsylvania held that Township’s application of business privilege tax to businesses whose sole income consisted of rent payments on leased real property was not barred by provision of Local Tax Enabling Act precluding “any tax” on leases or lease transactions. Prohibition on lease taxes did not encompass a similar proscription as to privileges related to leases; disapproving *Cheltenham Twp. v. Cheltenham Cinema, Inc.*, 548 Pa. 385, 697 A.2d 258, and *F.J. Busse Co. v. City of Pittsburgh*, 443 Pa. 349, 279 A.2d 14.

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**TAX - UTAH**

## DIRECTV v. Utah State Tax Com'n

**Supreme Court of Utah - December 14, 2015 - P.3d - 2015 WL 9016406 - 2015 UT 93**

Satellite television providers brought a constitutional challenge to Utah's pay-TV sales tax scheme. The scheme provides a sales tax credit for "an amount equal to 50%" of the franchise fees paid by pay-TV providers to local municipalities for use of their public rights-of-way. Not all pay-TV providers pay franchise fees, however. Cable providers employ a business model that triggers franchise fees (and, by extension, the tax credit); satellite providers use a different model that triggers no such fees (or credit).

The satellite providers filed suit, asserting that Utah's tax scheme unconstitutionally favors local economic interests at the expense of interstate commerce. In this challenge, the satellite providers assert claims under the dormant Commerce Clause of the U.S. Constitution and the Uniform Operation of Laws Clause of the Utah Constitution.

The Fourth District Court dismissed claims. Satellite providers appealed.

The Supreme Court of Utah held that:

- Tax credit did not violate dormant Commerce Clause, and
- Credit did not violate Uniform Operation of Laws Clause of State Constitution.

State did not violate dormant Commerce Clause by providing sales tax credit in amount equal to 50% of franchise fees paid by pay-television providers to local municipalities for use of their public rights-of-way, even though cable providers benefited from credit and satellite providers did not. Credit provided no benefits to business entities based in state at expense of those who were not, and credit was triggered only by a company's self-chosen business model.

State did not violate Uniform Operation of Laws Clause of State Constitution by providing sales tax credit in amount equal to 50% of franchise fees paid by pay-television providers to local municipalities for use of their public rights-of-way, even though cable providers benefited from credit and satellite providers did not. State had a rational basis for limiting tax credit to cable providers because only cable companies incurred franchise fees.

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**TAX - ALABAMA**

## City of Pike Road v. City of Montgomery

**Supreme Court of Alabama - December 11, 2015 - So.3d - 2015 WL 8569354**

Property owner filed interpleader action to resolve dispute between the City of Montgomery and the City of Pike Road concerning police jurisdiction over manufacturing plant located in unincorporated section of County and the corresponding right to sales and use taxes.

The Circuit Court entered judgment in favor of Montgomery and Pike Road appealed.

The Supreme Court of Alabama held that:

- Police jurisdiction could expand to include area within three miles of city limits only after either a federal decennial census or a municipal census established that population exceeded 6,000 inhabitants, and
- City's population was not proper subject of judicial notice.

Municipality's police jurisdiction could expand to include area within three miles of its city limits only after either a federal decennial census or a municipal census established that population

exceeded 6,000 inhabitants, and, the jurisdiction could not expand based on United States Census Bureau's estimate showing population in excess of 6,000. (Per Justice Stuart with three Justices concurring and a Special Justice concurring in result).

City population between federal decennial censuses was not proper subject of judicial notice in cities' dispute over whether population of smaller city grew to exceed 6,000 residents and smaller city's police jurisdiction grew to three miles beyond its city limits. City's population was the subject of dispute. (Per Justice Stuart with three Justices concurring and a Special Justice concurring in result).

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## Tax-Exempt Hospitals Face Payments to Host Towns in New Jersey.

New Jersey's nonprofit hospitals, which have long enjoyed a tax exemption, would have to make payments to their host communities to cover the cost of municipal services under a bipartisan measure making its way through the state legislature.

Lawmakers are responding to a June court ruling which found that the 40-acre Morristown Medical Center owed local property taxes because of "blurred lines" between its nonprofit and for-profit businesses. The 687-bed hospital's owner agreed in November to pay the town $15.5 million over the next decade.

The decision opened the door for other municipalities that host nonprofit businesses, including hospitals and universities, to challenge their tax-exempt status. Hospitals in Illinois, Pennsylvania and Iowa also have faced challenges as towns struggle to balance budgets.

"It's not a stretch to say that every nonprofit that owns property should be looking at this," Linda Czipo, executive director of the Center for Non-Profits, an organization based in Mercerville, New Jersey that advocates for the groups in Trenton and Washington. "We're concerned about how the whole property-tax issue might play out for the broader nonprofit community."

The judge who issued the Morristown ruling is also presiding over a lawsuit against Princeton University, New Jersey's only Ivy League school. Residents are challenging its exemption because it collects drug-patent royalties that it shares with faculty.

**Tax Code**

The Morristown hospital's tax-exemption challenge, like those in other states, arose in part from President Barack Obama's signature 2010 legislation designed to shrink the number of Americans without health insurance, and in large measure due to a wave of consolidations in the hospital industry. While the existence of a new generation of joint operations and profit-based services cropped up in order to trim costs, hospitals were still operating under a tax code put in place around the turn of the last century.

"The law as it was written in 1913 really didn't apply today," said Senator Joseph Vitale, a Democrat from Woodbridge. "It's a new day of doing business for hospitals."

Vitale is co-sponsoring a bill that would establish a payment formula for nonprofit hospitals that have for-profit businesses, such as doctor groups. The new payments would be less confusing for the governments who would have to decide how to assess the bills for the hospitals, and are designed to be lower than the full levies they might otherwise face, said Senator Robert Singer, a Republican

from Lakewood who is also a co-sponsor.

“This is an opportunity for hospitals to keep their heads above water,” Singer said. “As municipalities get cash-strapped, they are looking at every resource, and the Morristown case was a ’my ship has come in’ moment.”

The legislation would obligate the hospitals to make “community service contributions” of $2.50 per bed a day to host municipalities to defray costs such as police, fire and ambulance crews. Many poor, inner-city hospitals or those deemed money-losing by the state would be exempt under the bill, which passed a Senate committee this month.

**Statewide Solution**

Hospitals account for 140,000 jobs in the state and see more than 18 million patients a year, according to the New Jersey Hospital Association, the state-level trade group representing almost 400 health-care organizations. The association supports the measure.

“Clearly, the Morristown tax court decision has created a great deal of uncertainty, for hospitals and municipalities alike,” Betsy Ryan, NJHA’s president, said in a statement. “Our goal was to support a statewide solution that would strike a fair balance.”

In New Jersey, property taxes make up almost all of the local revenue used to fund town, county and school budgets. While hospitals can serve as a community’s economic anchor, the towns — and their residents — are footing the bill for the cost of services such as police and fire.

Nonprofits employ 314,000 people in New Jersey, nearly 10 percent of the state’s private workforce.

Nicole Sizemore, a spokeswoman for Governor Chris Christie, declined to comment on pending legislation.

“What folks forget is that for most non-profits the margin is razor thin,” said Andrew Dick, an Indianapolis attorney who represents hospitals in tax-exemption cases for Hall, Render, Killian, Heath & Lyman P.C. “If they had to pay the property taxes, that could be enough to push them into the red.”

**Bloomberg News**

by Terrence Dopp

December 28, 2015 — 4:57 AM PST

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## NABL: Tribal Economic Development Bonds, New CREBs.

On December 4, 2015, the IRS published Notice 2015-83 on Tribal Economic Development (TED) Bonds issued under a draw-down loan structure. Notice 2015-83 adds a new Section 10 to Notice 2012-48. Notice 2012-48 provided that any allocated bond volume unused after 180 days from the date of the allocation letter would be forfeit. Under Notice 2015-83, if a tribal government received a TED bond allocation and issues at least 10 percent of the allocation within 180 days, then the tribal government will have two years, or in some cases three years, to issue the remaining amount. The application for the allocation of volume cap must include a commitment letter from a financial

institution stating that the institution reasonably expects to advance the total principal amount of the draw-down bonds no later than three years after the date of the allocation letter.

Notice 2015-83 also requests comments on whether similar rules should be provided for New CREBs.

The rule is effective for applications for TED bond volume cap submitted on or after December 4, 2015.

Allocations that did not expire before December 4, 2015 may also be able to rely on Notice 2015-83.

To read Notice 2015-83, please click here.

Notice 2012-48 is available here.

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**TAX - KANSAS**

## In re Equalization Appeal of Kansas Star Casino, L.L.C.

**Court of Appeals of Kansas - November 20, 2015 - P.3d - 2015 WL 7375845**

Kansas Star Casino, L.L.C. appealed from the ruling by the Kansas Court of Tax Appeals (COTA) that the appraised value of its property, a 195.5 acre tract of land located in the northeast corner of Sumner County and used for casino operations, was $80,510,000 for the tax year 2012. In reaching its conclusion, COTA determined that the value for Kansas Star's land was $16,931,250. This amount was based on the actual price Kansas Star's parent company paid for the land.

On appeal, Kansas Star argued that COTA erroneously inflated the value of its land and that the land should have been valued based on sales of agricultural property in the surrounding area. The County cross-appealed, arguing COTA erred in declining to include various additional costs as part of its valuation.

The Court of Appeals affirmed, holding that:

- Highest and best use of land was for casino operations, and, thus, appraisal complied with the law;
- Value added to land due to taxpayer's selection as gaming facility manager was not exempt from taxation;
- Option acquisition payment was properly included in property value;
- Taxpayer did not purchase land under undue compulsion; and
- County did not meet its burden to prove that taxpayer's marquee sign was personal property.

In appraising property for purposes of ad valorem taxation, highest and best use of tract of land was for operation of casino, where taxpayer was hired by state pursuant to Expanded Lottery Act as gaming facility manager via management contract to construct and own casino improvements and infrastructure and manage gaming operations, and no other entity was permitted to build a casino in south central gaming zone.

Value that was added to taxpayer's tract of land by Kansas Expanded Lottery Act (KELA) and management contract that allowed taxpayer to construct and own casino improvements and infrastructure and manage gaming operations on tract did not represent value that was separate from tract's property value so as to be exempt from ad valorem taxation.

In assessing ad valorem taxes, option acquisition payment was required to be included as part of value of real property, on which taxpayer was entitled under management contract with state to construct and own casino improvements and infrastructure and manage gaming operations on property. Without buying option, there would have been encumbrance on the tract, and taxpayer would not have possessed a fee simple interest.

Taxpayer's purchase of real property, on which taxpayer would operate casino pursuant to management contract with state, was not result of undue compulsion, and thus use of purchase price to determine fair market value property for purposes of ad valorem taxation was warranted, where taxpayer entered into options for property voluntarily in open and competitive market, and taxpayer was neither forced to pay a certain price nor to exercise its options after it was awarded contract.

County did not meet its burden to prove that taxpayer's marquee sign was personal property for purposes of valuing property for ad valorem taxation, where county pointed only to testimony that was largely conclusory.

Costs associated with trailer rentals for Racing and Gaming Commission (RGC) was not a "soft cost" subject to ad valorem taxation regarding real property used for casino operations by taxpayer, which was hired by the State pursuant to the Expanded Lottery Act as gaming facility manager via a management contract to construct and own the casino improvements and infrastructure and manage the gaming operations, although presence of RGC employees was necessary for licensing and approval of vendors. Requirement that RGC employees be present related to the management contract, not the construction of the casino itself.

Costs in organizational, administrative, and legal expenses were not "soft costs" subject to ad valorem taxation of property used for casino operations by taxpayer, which was hired by the State pursuant to the Expanded Lottery Act as gaming facility manager via a management contract to construct and own the casino improvements and infrastructure and manage the gaming operations, where the costs were for business start-up and preopening expenses, such as regulatory fees, preopening payroll, preopening marketing, preopening training and uniforms.

County did not meet its burden to prove that financing costs were soft costs subject to ad valorem taxation of property used for casino operations by taxpayer, which was hired by the State pursuant to the Expanded Lottery Act as gaming facility manager via a management contract to construct and own the casino improvements and infrastructure and manage the gaming operations, where appraiser's projected financing costs were called into question because they were based on 12 months, rather than the actual nine-month production cycle.

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## IRS Amends TED Bond Volume Cap Rules To Accommodate Draw-Down Loans: Holland & Knight

**HIGHLIGHTS:**

- The Internal Revenue Service (IRS) has issued Notice 2015-83, which will make it easier for Indian tribal governments to use tribal economic development (TED) volume cap for "draw-down" loan structures in which the lender advances funds for the loan on different dates.
- Draw-down loans are often a preferred means for tribal governments to borrow money for new construction projects because construction funds are borrowed in stages as needed, thereby reducing the "negative carry" associated with notes or bonds in which the full construction costs

are borrowed and interest begins to accrue upon the sale of the securities.
- In addition, since draw-down loans are not considered securities subject to registration with the U.S. Securities and Exchange Commission (SEC), tribes can utilize them to borrow funds without incurring such increased costs.

The Internal Revenue Service (IRS) issued Notice 2015-83 on Dec. 4, 2015, a change that will make it easier for Indian tribal governments to use tribal economic development (TED) volume cap for "draw-down" loan structures in which the lender advances funds for the loan on different dates. Under a legislative provision enacted in 2009 as part of the American Recovery and Reinvestment Act, tribal governments may apply for TED volume cap in order to finance on-reservation, non-gaming economic development projects with tax-exempt debt. However, relatively few tribal governments have taken advantage of TED bonds or loans since they first became available in 2010.

Draw-down loans are often a preferred means for tribal governments to borrow money for new construction projects because construction funds are borrowed in stages as needed, thereby reducing the "negative carry" associated with notes or bonds in which the full construction costs are borrowed and interest begins to accrue upon the sale of the securities. Further, securities – such as bonds or notes – issued by a tribal governments are not exempt from registration requirements of the U.S. Securities and Exchange Commission (SEC) under the federal securities laws, often resulting in higher rates of interest and closing costs. Since draw-down loans are not considered securities subject to registration with the SEC, tribes can utilize them to borrow funds without incurring such increased costs.

In 2012, the IRS issued Notice 2012-48, under which a tribal government would have to issue debt obligations utilizing its allocated TED volume cap within 180 days of receiving the allocation. It was not clear how the IRS' 180-day rule, which was put in place administratively to encourage tribal governments use allocation awards promptly, would apply to draw-down loans. Arguably, draw-down loans were at odds with the IRS timing requirements because typically the loan proceeds would be drawn down over a longer period of time, sometimes two or three years.

**Overview of Notice 2015-83 Requirements**

Under Notice 2015-83, the IRS established new rules that accommodate the use of TED volume cap in the draw-down loan context. If a tribal government receives a TED allocation for a tax-exempt draw-down loan and spends at least 10 percent of the borrowed money within 180 days, it will have up to three years from the date of the allocation to spend the remaining volume cap amount. To have a full three years from the original allocation date, the tribal government must not only meet the 10 percent requirement above, it must also spend at least 50 percent of the proceeds of the draw-down loan within the first two years.

Notice 2015-83 also requires tribal governments to meet certain information reporting requirements to demonstrate readiness and compliance. First, a tribal government applying for a TED allocation must submit a commitment letter from a financial institution stating that the institution reasonably expects to advance the total principal amount of the draw-down loan no later than three years after the date of the allocation letter. Second, a tribal government awarded a TED allocation must submit notices of issuance to the IRS not later than 15 days after:

- the 180-day period
- the 2-year period
- the 3-year period

Each of the notices must indicate the amounts drawn and the remaining unused allocation (if any)

for each period.

Notice 2015-83 states that the new rules are effective for applications for TED bond volume cap submitted on or after December 4, 2015. It also applies to applicants that have received TED volume cap that has not expired before December 4, 2015.

**Considerations for Tribal Governments**

In summary, Notice 2015-83 offers useful guidance for tribal governments that would like to participate in the advantages associated with tax-exempt financing without having to issue bonds that may have disadvantages when compared with draw-down loans.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

Last Updated: December 8 2015

Article by Kathleen M. Nilles and Randolf A. DelFranco

**Holland & Knight**

Kathleen Nilles is a Partner in Holland & Knight's Washington D.C. office
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## IRS Helps Tribes Use TED Bond Volume Cap for Draw-Down Loans.

WASHINGTON – The Internal Revenue Service issued a notice Friday that will make it easier for Indian tribal governments to use tribal economic development bond volume cap for draw-down loans.

Notice 2015-83 "is very important" for financing new construction projects, said Townsend Hyatt, a partner at Orrick, Herrington & Sutcliffe in Portland, Ore.

"It's really designed to deal with the borrowing reality, which is that in most cases tribes borrow through loans rather than through bonds," he said.

Because tribal economic development bonds are not exempt from registration requirements under the federal securities laws, most tribal governments borrow from banks, according to Hyatt.

For new construction projects, tribal governments would typically draw down the loan money over time as needed to cover costs.

But draw-down loans were at odds with IRS requirements set forth in a previous notice published in 2012 (Notice 2012-48), under which a tribal government would have to use all of its allocated TED bond volume cap within 180 days of receiving it.

This requirement made it very difficult to obtain TED bond volume cap allocation for the total cost and the total amount of a tax-exempt draw-down loan needed for a project because typically the money would be drawn down over a period of time, sometimes two or three years.

Under the notice issued Friday, if a tribal government receives a TED bond allocation for a tax-

exempt loan and spends at least 10% of the borrowed money within 180 days, it will have the rest of two-year period from the date of the allocation to spend the remaining amount.

If the tribal government spends at least 50% of the proceeds of the loan within two years, it will have the remaining amount of time in the three-year period since the allocation to spend the rest of the money.

The IRS, however, requires tribal governments to file several notices with it. The tribal government applying for an allocation of TED bond cap for a draw-down loan must file one or more notices with the IRS that includes: its name and taxpayer identification number; the issue price of any bonds issued, the issue date of the bonds, a description of the project being financed; and any amount of the allocation that is being forfeited.

The applicant also must submit a notice of issuance not later than 15 days after the final draw for the draw-down loan. Other notices are required as well.

“There are numerous notice requirements but the basic substance of the rule is good,” Hyatt said.

The notice said the rule is effective for applications for TED bond volume cap submitted on or after Dec. 4, 2015. It also applies to applicants that have received TED bond cap that did not expired before Dec. 4, the IRS said.

The published volume cap for the period that began Dec. 1 is almost $1.365 billion and the maximum amount of cap that any single borrower can apply for is $272.90 million, according to the IRS.

The IRS and Treasury Department, in the notice, also asked for public comments on whether they should provide special volume cap allocation rules for New Clean Renewable Energy Bonds issued as draw-down bonds or loans.

THE BOND BUYER

By Lynn Hume

DEC 4, 2015 4:00pm ET

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## Fitch: WIFIA Tax Exempt Ruling Is Positive for US Water Credits.

Fitch Ratings-New York-10 December 2015: Recent legislation lifting a ban on the use of tax-exempt bonds in conjunction with federal loans provided by the Water Infrastructure Finance and Innovation Act (WIFIA) pilot program will result in lower borrowing costs for US water utilities, Fitch Ratings says.

Utilities are facing significant costs to replace, rehabilitate, and improve their aging infrastructure. The American Water Works Association estimated the cost of maintenance of existing systems and expansion at $1 trillion over the next 25 years. Utilities will benefit from an overall lower cost of financing to the extent they are able to use low-cost loans from the five-year WIFIA pilot program in combination with tax-exempt bond proceeds. The legislation could also temper the need of some issuers to obtain rate increases related to capital.

WIFIA allows utilities to borrow up to 49% of the project cost at Treasury rates with 35-year

amortization periods. However, the original legislation prohibited issuers from using tax-exempt financing for the remaining 51% of the cost. This recent legislation lifts that ban.

WIFIA was modeled after the more established Transportation Infrastructure Finance and Innovation Act program and was enacted in 2014 to provide $350 million in loans over five years for water, wastewater, storm water and water reuse projects, allowing for leverage of at least $3.5 billion. The WIFIA loans, authorized by the Water Resources Reform and Development Act, are the first new federal water finance tool established since the 1996 Drinking Water State Revolving Fund.

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## Allowing Tax-Exempt Use with WIFIA Loans Will Lower Borrowing Costs.

WASHINGTON — A provision in the new transportation funding law that lifts the ban on using tax-exempt bonds in conjunction with federal loans will result in lower borrowing costs for water utilities, Fitch Ratings said on Thursday.

The provision in the Fixing America's Surface Transportation (FAST) Act that President Obama signed on Dec. 4 removes the ban that had been included in the Water Infrastructure Finance and Innovation Act (WIFIA). WIFIA was part of the Water Resources and Reform Development Act enacted last year.

The five-year, $350 million WIFIA pilot program, modeled on the Transportation Infrastructure Finance and Innovation program, allows utilities to borrow up to 49% of the costs for large drinking water, wastewater, stormwater and water reuse projects. The loans can be used to leverage at least $3.5 billion.

However, as written, the program could not be used in conjunction with tax-exempt bonds. FAST lifts that ban.

"Over the long run, this will help some utilities with capital costs and rate increases related to

capital," Shannon Groff, director of U.S. public finance for Fitch who authored the release issued by the rating agency, said in a brief interview.

"Utilities are facing significant costs to replace, rehabilitate and improve their aging infrastructure," Groff said in the release.

Water groups also cited the importance of the FAST provision.

"By removing the ban on using tax-exempt bonds with WIFIA loans, Congress has freed WIFIA to do its important work in addressing America's enormous water infrastructure challenge," said David LaFrance, chief executive officer of the American Water Works Association.

The AWWA estimates the cost of maintaining and expanding existing water systems will reach $1 trillion over the next 25 years.

Rep. Bob Gibbs, R-Ohio, chairman of the House Transportation and Infrastructure Committee's water resources and environment subcommittee who was a key proponent for WIFIA and lifting the ban, said recently, "I am pleased to see a provision included [in FAST] that supplements the funding of public water infrastructure. Municipalities across the country are dealing with expensive and necessary improvements to public water systems. The ability to combine WIFIA funding with tax-exempt bonds gives cities and counties the ability to affordably address their public health needs."

Another champion of the WIFIA fix was Sen. Barbara Boxer, D-Calif.

LaFrance said water groups, including the AWWA, the National Association of Clean Water Agencies, the Association of Metropolitan Water Agencies, and the Water Environment Federation fought for the ban to be lifted and are now urging Congress to provide WIFIA loans and state revolving fund programs in fiscal year 2016, which began Oct. 1.

"The sooner WIFIA is making loans for large water projects, the better," LaFrance said.

THE BOND BUYER

BY LYNN HUME

DEC 10, 2015 1:38pm ET

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## Fitch Replay: USPF Nonprofit Healthcare 2016 Outlook.

Fitch Ratings hosted a teleconference on Friday, December 4th to discuss the outlooks for the US Healthcare sector. Presenter Jim LeBuhn shared insights on key issues for 2016.

Key insights will include:

-Improving liquidity and leverage position cushion greater operating variability
-Impact of changing reimbursement deferred but not diminished
-Need for size and scale increasingly important

Listen to the teleconference replay.

## NABL: Transportation Bill Allows Tax-Exempt Bonds for WIFIA.

The House and Senate passed and sent to the President this week the Conference Report on H.R. 22, the Fixing America's Surface Transportation Act or FAST Act. Section 1445 of the Act repeals Section 5028(a)(5) of the Water Resources Reform and Development Act of 2014 (33 U.S.C. 3907(a)(5)), which prohibits the use of tax-exempt and tax credit bonds in conjunction with the Water Infrastructure Finance and Innovation Act (WIFIA), a new program administered by EPA similar to the better-known transportation program TIFIA. The President has said he will sign the bill.

More information on WIFIA is available here.

The text of the H.R. 22 is available here.

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## Tribal Economic Development Bonds: Use of Volume Cap for Draw-down Loans.

Notice 2015-83 provides special rules regarding the process for allocation of the available amount of national volume cap for tax-exempt tribal economic development bonds under § 7871(f) of the Internal Revenue Code (TEDBs) for bonds issued under a "draw-down" loan structure in which the lender advances funds for the loan on different dates. The notice allows additional time to use allocated volume cap for issuance of TEDBs as draw-down loans if an issuer meets certain requirements.

Notice 2015-83 will be in IRB 2015-51, dated December 21, 2015.

Read the Notice.

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**TAX - OHIO**

## Megaland GP, L.L.C. v. Franklin Cty. Bd. of Revision

**Supreme Court of Ohio - December 3, 2015 - N.E.3d - 2015 WL 7766712 - 2015 -Ohio- 4918**

City's board of education appealed interim order of the Board of Tax Appeals (BTA) denying board's motion to reassign case regarding valuation of landowner's property to BTA's regular docket from its small-claims docket.

The Supreme Court of Ohio held that:

- The Supreme Court had jurisdiction to consider challenge to interim order, and
- Board was not "a party that is a taxpayer" under statute requiring reassignment of certain cases upon taxpayer's request.

Supreme Court had jurisdiction to consider city board of education's claim that interim order from Board of Tax Appeals (BTA) erroneously denied board's motion to reassign case regarding valuation of landowner's property to BTA's regular docket from its small-claims docket. Board had substantial right to participate in landowner's BTA appeal by virtue of its status as countercomplainant below,

and BTA's retention of case on small-claims docket effectively foreclosed any appeal from ultimate BTA decision, preventing possibility of board's position being vindicated on later appeal. (Per curiam, with three justices concurring and one justice concurring in judgment only.)

City board of education was not "a party that is a taxpayer" under statute requiring Board of Tax Appeals (BTA) to reassign certain appeals assigned to small claims docket upon request by party that is taxpayer, even though board owned taxable property in county during time period at issue in case, where board was party only by virtue of its countercomplaint, its standing to have filed countercomplaint depended on its being a board of education, and its status as property owner was completely irrelevant. (Per curiam, with three justices concurring and one justice concurring in judgment only.)

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**TAX - CALIFORNIA**

## Golden Gate Hill Development Company, Inc. v. County of Alameda

**Court of Appeal, First District, Division 5, California - November 25, 2015 - Cal.Rptr.3d - 2015 WL 7690054**

Taxpayer brought action against county and school district for refund of special parcel taxes imposed under two voter-approved measures, alleging that tax rates were improper because different rates were imposed on residential and nonresidential properties, as well as nonresidential properties of different sizes.

The Superior Court sustained county's and school district's demurrer without leave to amend, and taxpayer appealed.

The Court of Appeal held that taxpayer's action seeking refund of special parcel taxes imposed under voter-approved measures, although not a reverse validation action, was based on the alleged illegality of the tax scheme enacted by the measures, which imposed different rates on residential and nonresidential properties, and thus, as measures had been deemed valid by operation of validation statutes, taxpayer failed to state a claim for a refund. Refund claim did not involve a matter beyond the validity of the measures themselves, claim that measures imposed an illegal tax could have been adjudicated in validation action, and, while measures specified procedure for refund, they did not specify a validation procedure different from that proscribed by validation statutes.

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**MILL LEVY - COLORADO**

## Prospect 34, LLC v. Gunnison County Board of County Commissioners

**Colorado Court of Appeals, Div. III - November 5, 2015 - P.3d - 2015 WL 6746441 - 2015 COA 160**

Reserve Metropolitan District No. 2 (RMD2) is a special district located entirely within the town of Mt. Crested Butte (Town) in Gunnison County. RMD2's service plan — a document statutorily required to organize a special district — states that RMD2's mill levy "shall not exceed 50 mills, subject to Gallagher Adjustments," and that any levy beyond 50 mills requires Town approval.

By 2013, the mill levy totaled 52.676 mills, including the Gallagher Adjustment of 2.676 mills. Then the RMD2 board approved certifying to the BOCC 55.676 mills, 3.000 mills in excess of the cap in

the 2000 service plan. Although the maximum mill levy provision in the service plan had never been increased, the BOCC levied 55.676 mills on December 21, 2012.

The Town council protested the mill levy increase, noting that it "does not consent to any increase above 50 mills 'gallagherized' in the mill levy…." The Town sued in Gunnison County Court to enjoin the excess mill levy and for a declaratory judgment that the excess mill levy was void. The court denied the council's motion for summary judgment on this issue. That action remains pending.

When RMD2 taxed Prospect Development Company, Inc., and Prospect 34, LLC (together, Prospect) at a higher rate, Prospect petitioned the Gunnison County Board of County Commissioners (BOCC) to abate the excess taxes. After the BOCC denied the petition, Prospect appealed to the Board of Assessment Appeals (BAA). The BAA did not independently examine the legality of the excess mill levy. Instead, it relied sonly on the County Court's denial of summary judgment to conclude that the 3.000 mills were levied legally. Prospect appealed.

Section 39–10–114(1)(a)(I)(A) provides, as relevant here:

[I]f taxes have been levied erroneously or illegally, whether due to erroneous valuation for assessment, irregularity in levying, clerical error, or overvaluation, the treasurer shall report the amount thereof to the board of county commissioners, which shall proceed to abate such taxes in the manner provided by law.

Thus, the court was was obligated to examine if an excess mill levy

The Court of Appeals concluded that section 39–10–114(1)(a)(I)(A) provided a statutory basis for Prospect to challenge the excess mill levy before the BAA, the BAA had authority to decide whether the excess mill levy was illegal, the BAA abused its discretion by instead relying on an order denying summary judgment as making a final determination, and the excess mill levy was illegal.

The Court reversed the BAA's decision and remanded for the BAA to order the BOCC to grant the petition and abate the excess taxes.

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## Mintz Levin: Helpful News from IRS on Student Loan Bonds.

On November 13, the IRS issued Notice 2015-78, providing favorable guidance on topics of interest to providers of "supplemental" or "alternative" student loans financed with tax-exempt bonds and to underwriters of such student loan bonds. Such guidance confirms that loans financeable under such programs include (i) parent loans as well as student loans and (ii) loans that refinance or consolidate prior loans that were or could have been financed on a tax-exempt basis.

Tax-exempt bonds used to finance student loans, so-called "qualified student loan bonds," come in two flavors under the Internal Revenue Code, those issued to finance federally-guaranteed loans made under the Federal Family Education Loan Program ("FFELP") and those issued to finance certain loans issued under programs created by the states, generally known as "supplemental" or "alternative" loan programs. While the FFELP program, historically much larger, terminated in 2010, tax-exempt financing for new loans under state supplemental programs has continued in approximately fifteen states.

Notice 2015-78 appears to have been prompted by recent efforts by governmental issuers to provide refinancing of student loan debt through non-federally guaranteed "consolidation loans", which

presented questions on which the IRS had not previously provided guidance. The IRS also used the notice as an opportunity to address selected other issues applicable to all tax-exempt financed supplemental loans, not just refinancing loans. The Notice clarifies the following:

**Eligible Borrowers.** Notwithstanding the widespread practice of making higher education loans to parents, a practice provided for by statute under FFELP through the Parent Loan to Undergraduate Students (PLUS) program, the IRS had expressed concerns in the context of ruling request discussions about whether loans to parents were bond-financeable student loans. Notice 2015-78 clarifies that the student, the parent, or both can be an eligible borrower of a bond-financed "student loan." The Notice attempts to provide a similar rule for refinancing loans, stating, "An eligible borrower of a refinancing loan … is the student or parent borrower of the original loan." In the refinancing loan context the Notice's particular wording leaves unclear whether if the sole borrower on the original loan was the parent, the sole borrower on the refinancing loan can be the proud young graduate who wishes to take on the debt through a consolidation loan. Such a fact pattern clearly satisfies the policy underlying this otherwise expansively drafted notice.

**Nexus to State.** The Internal Revenue Code requires the student to be a resident of the state which provides the "volume cap" allocation for the bonds or enrolled at an educational institution in that state. In the case of a refinancing or consolidation loan, there has been some question whether such "nexus" is required to be established at the time the original loan was made or at the time the refinancing loan is made. The Notice provides the broadest rule, stating that a "refinancing loan," including a loan which allows the borrower to consolidate prior debt, complies with the statutory nexus requirement either if that requirement was satisfied at the time of the original loan or if it is satisfied at the time of the refinancing loan. If reliance is placed on nexus at the time the original loan is made, in the case of a consolidation loan care may need to be exercised to establish nexus for all underlying loans.

**Loan Size.** The Code limits supplemental loans to "the difference between the total cost of attendance and other forms of student assistance … for which the student borrower may be eligible." The "may be eligible" language has resulted in troublesome challenges in IRS audits, where IRS agents have suggested that issuers might be responsible for documenting that students actually had applied for all other potentially available student assistance, or obligated to downsize loans by the amount of other student assistance that was hypothetically available but not received by the student. The Notice confirms that tax-exempt bond issuers may rely on certifications from the student's school as to total cost of attendance and as to other student assistance. Further, the school may rely on definitions provided under the Higher Education Act, including a definition of "estimated financed assistance" which looks only to assistance the student "will receive."

**Type of Loans Eligible for Refinancing.** The Notice states that supplemental student loan bonds can be used to refinance not only original loans which were themselves supplemental loans but also other loans, "for example, a FFELP loan or a student loan made by a private lender, provided that the refinancing loan meets all of the requirements for a State Supplemental Loan." Although not addressed by the Notice, it should be noted that tax-exempt bonds issued to refinance prior loans, including consolidation of prior loans, generally will require an allocation of state volume cap, which in some states is a scarce commodity. The need for volume cap may be avoided to the extent the refinancing loans made with proceeds of a bond issue refinance loans financed with other tax-exempt bonds issued by the same issuer or a related issuer and the payoffs on the refinanced loans are applied to redeem such other tax-exempt bonds in a manner that qualifies for the volume cap exception for current refunding

bonds.

As a general proposition, the national student loan market is growing and dynamic. Notice 2015-78 will assist governmental issuers in fulfilling their intended role.

**Article by Maxwell D. Solet**

**Last Updated: November 20 2015**

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

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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## NABL Recommends Revisions to Management Contract Safe Harbors.

NABL has sent to the IRS and Treasury Department suggested revisions to expand the safe harbors against private business use in Rev. Proc. 97-13. NABL made three basic recommendations.

First, safe harbors for contracts having a term greater than five years relying on the "fixed fee" framework should be made more flexible in a manner comparable to the flexibility provided in Notice 2014-67 for five-year contracts, and certain principles developed in private letter rulings should be reflected in published guidance.

Second, there should be additional safe harbors that are not based on "fixed fee" limitations.

And third, the limitation set forth in the existing regulations prohibiting management and other service contracts "based, in whole or in part, on a share of net profits" should be reconsidered, and a more flexible rule focusing on control relationships should be adopted.

Read NABL's Comment Letter.

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**TAX - INDIANA**

## Union Tp., St. Joseph County v. State, Dept. of Local Government Finance

**Tax Court of Indiana - November 12, 2015 - N.E.3d - 2015 WL 7010912**

In July of 2012, Union Township, together with the Union–Lakeville Fire Protection Territory, requested the Department of Local Government Finance's (DLGF) permission to impose an excess property tax levy. Their appeal documentation asserted that due to a $40 million "error" in calculating Union Township's 2010 net assessed valuation, they each suffered a property tax revenue shortfall in 2011. More specifically, they explained that the error was the result of the DLGF certifying Union Township's 2011 budget based on a net assessed valuation of $159,424,430, but St. Joseph County subsequently issuing the tax bills using a lower net assessed valuation of $119,968,732. Union Township and the Union–Lakeville Fire Protection Territory therefore requested the DLGF to increase the current net assessed valuation by at least $40,000,000 and allow a levy for 2012 payable 2013 sufficient to make up for the cumulative effect of that error.

On October 16, 2012, Union Township submitted a second request for the DLGF's permission to

impose an excess levy. This second appeal again identified the $40 million error as the cause of a property tax revenue shortfall in 2011; it specifically sought a levy increase in the amount of $51,929.

On December 7, 2012, the DLGF issued two final determinations that denied both excess levy appeals. On January 8, 2013, Union Township initiated an original tax appeal.

The Tax Court reversed the final determinations of the DLGF, remanding to the DLGF so that it may determine whether an error caused the $40 million discrepancy between the net assessed valuation used to certify Union Township's 2011 budget and the net assessed valuation the St. Joseph County Auditor used in issuing the property tax bills related to that budget.

"DLGF has not answered 'the $40 million question:' whether or not an "error" existed. Indeed, even assuming that 1) the St. Joseph County Auditor failed to timely certify Union Township's 2010 pay 2011 net assessed valuation and 2) the DLGF was therefore authorized to certify Union Township's 2011 budget using its 2009 pay 2010 net assessed valuation does not explain why the St. Joseph County Auditor subsequently issued the 2010 pay 2011 tax bills using a number that was $40 million lower."

If an error did in fact occur, the DLGF shall order a correction to be applied to Union Township's levy limitations, rate, and levy for the ensuing calendar year to offset the cumulative effect that the error caused.

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## 3 Things the New Tax Incentive Disclosures Rule Won't Reveal.

Kraft Heinz announced this month that it's closing six plants across North America and eliminating 2,600 jobs. That's bad news for several states, except, perhaps, Iowa, which was able to negotiate a deal with the company to keep about a third or 1,400 jobs at its Davenport plant in exchange for more than $20 million in state and local subsidies.

It's hard in deals like these to definitively say who the winner is, particularly when Iowa's tax incentive package includes money for job retention even though the state is losing nearly 1,000 jobs. But a new rule could change that. Starting next year, Iowa and other governments have to start tracking, tallying up and reporting the tax incentives awarded on their annual financial statements as lost tax revenue. The new rule, mandated by the Governmental Accounting Standards Board (GASB), is a big step toward disclosing what has been a relatively difficult area of public finance to measure.

But there are at least three key areas the rule doesn't cover, starting with who gets the money. When it files its 2017 financial report, Iowa won't have to identify Kraft Heinz by name because the new rules only require voluntary disclosure of subsidy recipients. GASB thinks the reporting would be burdensome for reporting entities, especially if they've given out numerous awards.

But critics disagree, arguing that governments should at least be required to disclose the names of the largest recipients. One reason for this is that many believe subsidies don't generally help small, homegrown businesses flourish. That belief and the increasing occurrence of so-called mega deals between states and companies, led the advocacy group Good Jobs First to conduct a survey on how some states spend certain types of tax incentives. The survey showed that an average of 70 percent of deals states reached were with large businesses (those with more than 100 employees). Those deals represented 90 cents of every $1 in incentives a state doled out.

Greg LeRoy, Good Jobs First's executive director, says the survey gives ammunition to businesses owners who are tired of seeing their states spend money to keep or woo big business. "We're not saying don't spend money on economic development," LeRoy said. "But we've heard overwhelmingly that small business owners don't want them to allocate money in same way."

Another area the rules ignore involves how rebates are spent. Take film tax credits. While they're on the way out in many states, they remain a robust business in Massachusetts. The Bay State reasons that film tax credits attract productions that employ local workers — a boon for small businesses. But a recent examination by the Boston Herald revealed a stunning black market of sorts for Massachusetts' film tax credits. At least $335 million of the state's film tax credits were actually sold off to corporations and individuals who had little to do with the movie that won the tax credit in the first place.

So how does that work? The film tax credit is a 25 percent refund filmmakers earn if they spent at least $50,000 in Massachusetts. Many projects ultimately don't end up owing enough in state taxes to use the entire credit, so instead they transfer it to someone else who needs it. In other words, a filmmaker who earns, say, a $1 million credit can sell it to a broker for $900,000. The broker then sells it to a corporation for $920,000. The broker earns a $20,000 profit and the corporation gets a $1 million credit it can claim on its taxes. At least a dozen other states, according to the Herald, have transferable film tax credits.

Finally, a point of ire for some governments is that they have to report their subsidies as lost income. While GASB reasons that doing so gives a better picture of a government's overall financial health, the requirement will likely negatively affect a government's bottom line. While governments also report the criteria that businesses must meet for their abatement, it doesn't reflect potential income on a balance sheet. "I think a lot of governments are afraid it's only going to tell half the story," said Ted Williamson, a partner in RubinBrown's Public Sector Services Group.

The rule applies to fiscal years that begin after Dec. 15. Most governments start their new fiscal years on July 1 so the first disclosures would go out in financial reports issued in 2017.

GOVERNING.COM

BY LIZ FARMER | NOVEMBER 24, 2015

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## IRS: Mailing Address for Notices of Defeasance and Certain Elections Required by Treasury Regulations.

The Treasury Regulations at 1.141-12(d)(3), 1.142(f)(4)-1(b)(1), and 1.142-2(c)(2) require that written notice be given to either the Commissioner [Internal Revenue Service] or the Internal Revenue Service within 90 days of the establishment of the defeasance escrows under Regs. 1.141-12 and 1.142-2, or the election under 1.141(d)(4)-1.

Treasury Regulations 1.150-5 provides that the notices required by these regulations be filed with the. Internal Revenue Service, 1111 Constitution Avenue, NW, Attention: T:GE:TEB:O, Washington, DC 20224.

## First Time Issuers of Tax-Advantaged Bonds – Part I Introductory Module - IRS Webinar.

**An Introduction to Tax-exempt Bonds for First Time Issuers**

Learn about the basics of tax-advantaged bonds, including certain requirements and post-issuance compliance.

Launch the Webcast.

Wednesday, September 16, 2015

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## First Time Issuers of Tax-Advantaged Bonds – Part II Private Business Use Module - IRS Webinar.

**Information for First Time Issuers of Tax Exempt Bonds – Introduction to Private Business Use**

Learn about fundamentals of private business use and its impact on tax-advantaged bonds.

Launch the Webcast.

Wednesday, September 16, 2015

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## First Time Issuers of Tax-Advantaged Bonds – Part III Arbitrage Module - IRS Webinar.

**Information for First Time Issuers of Tax Exempt Bonds – Introduction to Arbitrage**

Launch the Webcast.

Wednesday, September 16, 2015

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## Ballard Spahr: New Rules Encourage Use of P3s.

The recently released Internal Revenue Service (IRS) rules in the final allocation and accounting regulations encourage the use of public-private partnerships (P3s). Under these rules, a private party can form a partnership with a public party and use both tax-exempt bonds and equity to finance a facility. Previously the tax rules did not permit these types of partnership structures.

**What do the final regulations do?**

In general, allocation and accounting rules play a role in determining whether tax-exempt bonds,

including tax-exempt bonds issued to pay a portion of the capital costs of a P3, are categorized as governmental bonds or private activity bonds (PABs) under the Internal Revenue Code. Governmental bonds are bonds where the proceeds are primarily used to finance governmental functions or which are repaid with governmental funds. PABs are bonds in which the state or local government serves as a conduit, providing financing to private businesses or individuals. Regulations already exist for measuring the extent of use by a party other than a state of local government (private business use) in a bond financed facility. The existing regulations provide that if a facility is financed exclusively with tax-exempt bonds, up to 10 percent private business use generally is permitted.

*Mixed-use facilities.* The accounting rules are relevant when a facility being financed with tax-exempt bonds is used by both governmental users and private users (referred to as a mixed-use facility). The final regulations provide guidance on when more than 10 percent private business use of a facility can be permitted in circumstances where there is less than 100 percent tax-exempt bond financing. The final regulations provide a method to identify the portion of a mixed-use project that is governmentally used. Mixed-use financing is permitted where the financing reflects the proportionate benefit derived by the users.

**P3s and the partnership piece of the final rules**

In a major step forward, the final regulations permit partnerships between private and governmental partners without jeopardizing the tax-exempt status of bond-financed facilities and provide rules for measuring the use of bond-financed property by a private partner. In doing so, the IRS and U.S. Treasury Department specifically indicated that the change was made to accommodate pP3s and remove barriers to tax-exempt financing of the government's (or 501(c)(3) organization's) portion of the benefit of property used in joint ventures.

Measuring private business use. The final regulations set forth a method for measuring the private business use of a tax-exempt bond-financed property resulting from the use of the property by a partnership that includes a partner that is a nongovernmental person. The amount of the use by the private partner will be based on that partner's greatest share of the partnership items (income, gain, loss, deduction or credit) in any one-year period.

The final partnership rule is a great step forward for private parties seeking to enter into arrangements with public entities because it permits flexibility in structuring arrangements that will not jeopardize the tax-exempt status of the bonds. The need for this type of rule is evidenced both by the increased interest and the discussions regarding flexibility in structuring P3s for infrastructure projects. Moreover, the implementation of the Affordable Care Act has highlighted the need for recognition of the proportionate benefit to a governmental person or 501(c)(3) organization participating in a joint venture with private partners.

**When can these regulations be applied?**

The final regulations generally apply to bonds sold, and deliberate actions that occur, on or after January 25, 2016. Issuers also may elect to apply the partnership provisions and the allocation and accounting rules in whole but not in part to any bonds to which the current regulations apply.

by Vicky Tsilas, J. Brian Walsh, and Charles S. Henck

November 20, 2015

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Attorneys in Ballard Spahr's Public Finance Group have participated in every kind of tax-exempt bond financing and have extensive experience with the rules and regulations set by the IRS and U.S. Treasury. Working closely with attorneys in Ballard Spahr's P3/Infrastructure Group, they routinely monitor and report on new developments that impact federal and state infrastructure programs related to transportation and other types of projects.

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## Hawkins Advisory: Final Allocation & Accounting Regulations under Section 141 of the Internal Revenue Code.

The attached Advisory describes in brief final Treasury Regulations promulgated under section 141 of the Internal Revenue Code of 1986, as amended, for purposes of allocating the proceeds of tax-advantaged bonds to assets or portions of assets and accounting for the use of such assets or portions thereof.

Read the Advisory.

**Hawkins Delafield & Wood LLP**

November 18, 2015

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**TAX - CALIFORNIA**

## Carloss v. County of Alameda

**Court of Appeal, First District, Division 3, California - November 12, 2015 - Cal.Rptr.3d - 2015 WL 7008872**

Son of deceased former resident of tax-defaulted property brought action against county for declaratory relief challenging county's denial of son's claim for excess proceeds of the tax sale. The Superior Court sustained demurrer without leave to amend. Son appealed.

The Court of Appeal held that:

- Statute of limitations began to run when decision was mailed, and
- Recorded grant deed is not the exclusive means of proving a person's "title of record."

The 90-day statute of limitations for an action to review the decision of a board of supervisors on a claim for excess proceeds from a default tax sale begins to run from the date the decision is mailed.

A petition for writ of administrative mandamus was the proper method for the son of a deceased former resident of tax-defaulted property to challenge county's denial of son's claim for excess proceeds of the tax sale, even though son argued that the refund statute was facially unconstitutional, where son's complaint and appeal rested primarily on the contention that the statute, even if constitutional on its face, was interpreted too narrowly by the county when ruling on his claim.

While a recorded grant deed may be the best evidence of "title of record" establishing a claimant's right to excess proceeds from a default tax sale, a recorded grant deed is not the exclusive means of proving a person's title of record, and such proof may consist of recorded instruments of various types, the assessor's records, and testimony that, as a whole, establishes that the claimant or the claimant's predecessor in interest held title of record immediately prior to the tax-default sale.

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**TAX - GEORGIA**

## Glynn County v. Coleman

**Court of Appeals of Georgia - November 16, 2015 - S.E.2d - 2015 WL 7162162**

Taxpayers filed three class action lawsuits against county seeking a refund of ad valorem taxes, declaratory judgment, and equitable, injunctive, and mandamus relief. The trial court granted class action certification. County appealed.

The Court of Appeals held that statute governing tax refund actions against counties and municipalities permitted class action certification of taxpayers.

Motion to dismiss asking trial court to dismiss taxpayers' class action claims because complaint generally was subject to dismissal based upon sovereign immunity, limitation periods in tax refund statute, and alleged flaws with taxpayers' claims for non-monetary relief, was not proper procedure to avoid certification of a class action, in taxpayers' action against county for refund of ad valorem taxes; rather, issue to be resolved was whether requirements of class action statute had been met.

Statute governing tax refund actions against counties and municipalities permitted class action certification of taxpayers in action against county seeking refund of ad valorem taxes. While general assembly had modified a different tax refund statute to disallow class action certification, it left statute in question intact.

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## The Hidden Cost to 'Pay for Success'.

Nonprofits have discovered a hidden cost in preventative social programs that's keeping many from even trying to start one.

Lili Elkins spends a lot of time planning and negotiating. It's her job as chief strategy officer of the Boston-area youth nonprofit Roca. But nothing could have prepared Elkins for the project that came across her desk in 2012: It was to help design what is so far the country's largest social impact bond.

The “bond” funds a program to help reduce recidivism and increase employment among young ex-offenders. Over seven years, Roca will provide counseling and job training to 929 young men in the probation system or exiting the state juvenile justice system.

In Elkins’ prior experience at Roca negotiating grants, project design was generally ironed out in a few meetings over the course of a month. The social impact bond project for Massachusetts, however, took two years of negotiating. “I teach financial management to graduate students and I’m a lawyer,” said Elkins,” and I still needed help understanding the financing.”

Social impact bonds, which many are now calling pay for success programs, work like this: Private funders pay a government to establish a preventative social program aimed at achieving a certain measurable result. The only way investors get their money back is if the program meets those results.

The Massachusetts project, which launched in late 2014, rounded up more than $20 million from investors. But the time and cost it took to design the project exposes a major, potential deterrent to other nonprofits interested in developing a pay for success project for a government.

Part of the problem is that each pay for success project — and there are only eight up and running across the country — is unique. That means that project designs aren’t easily transferrable from one government to another. So each project requires a nonprofit to surrender their best talent for great lengths of time. To help with the burden, Roca was able to utilize $250,000-worth of free legal aid to help with the negotiating. Still, Roca ended up devoting more of its top staff time than it bargained for when it started.

It’s because of this that Living Cities, one of the funders of the Massachusetts recidivism program, is creating a new funding option for nonprofits interested in getting involved in pay for success projects. The foundation has secured investors for a revolving loan fund that would help nonprofits pay for designing a project, which includes things like data gathering, analysis of that data, economic modeling, evaluation design and program training.

Called a “construction loan,” it would be paid back by the nonprofit only if a pay for success project moves forward. The cost of the construction loan could be built into the overall financing of the project by private funders. If the project launches, part of the money the nonprofits receive in funding could be used to pay back the loan. Living Cities has so far advanced a total of $350,000 to support projects in Illinois, New York and Salt Lake County, Utah.

Eileen Neely, Living Cities’ director of capital innovation, hopes it will help governments recognize the full cost of paying for social preventative programs. “Currently they just assume the service provider will find grant money for the other costs and that’s part of the reason we don’t have as many projects,” she said. “This is another way to make sure we are being honest about the entire cost of pay for success.”

GOVERNING.COM

BY LIZ FARMER | NOVEMBER 12, 2015

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## S&P Webcast Replay: U.S. Not-For-Profit Health Care Median Ratios.

Standard & Poor’s Ratings Services held an interactive, live Webcast and Q&A on Thursday,

September 10, 2015, at 2:00 p.m. Eastern Time where the discussion included the U.S. not-for-profit health care median ratios reports.

Listen to the webcast.

Download the slides.

Sep. 10, 2015

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**TAX - NEW JERSEY**

## Fields v. Trustees of Princeton University

**Tax Court of New Jersey - November 5, 2015 - N.J.Tax - 2015 WL 6859580**

Taxpayers filed a complaint challenging property tax exemptions that had been granted by municipal tax assessor for twenty-one individual parcels owned by university. University moved for a determination as to which party had burden of proof.

The Tax Court held that:

- Appealing taxpayer has burden of proving that assessment is erroneous;
- Presumption of validity afforded property tax assessor's original tax assessments does not extend to tax exemptions; and
- Taxpayers had right to appeal property tax exemption.

When challenger of a property tax exemption is the municipality proper, burden of proving tax-exempt status is always upon the claimant, even when taxing district initiates the action to overturn a county board judgment.

Burden of persuading Tax Court that a tax exemption is merited is on claimant even when county board has granted exemption and appeal is by municipality.

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**TAX - MICHIGAN**

## Hartland Glen Development, L.L.C. v. Township of Hartland

**Court of Appeals of Michigan - October 20, 2015 - Not Reported in N.W.2d - 2015 WL 6161517**

In 2005, the Township of Hartland levied a $792,000 Special Assessment for 144 Residential Equivalent Units ("REUs") for residential unit sewer taps on property owned by Hartland Glen Development.

The special assessment district originally allocated the REUs to the various ownership groups in the district, which were then divided equally across the various tax parcels each group owned. However, in 2011 the REUs were reallocated across the various tax parcels based on acreage, along with creating an additional supplemental assessment district to assess additional costs incurred by the district. This reallocation resulted in the transfer of 459.14 REUs to Hartland, for a total of 603.14 REUs, a levy of $2,364,596.85 for those REUs, and a Supplemental Special Assessment of $199,488.76.

The Michigan Tax Tribunal affirmed the special sewer assessments, including the Township's changes in 2011 to the initial assessments that were made in 2005. Hartland appealed.

The Court of Appeal held that:

- Hartland was not entitled to relief on the basis of either collateral or judicial estoppel;
- The Township possessed the statutory authority to reallocate the REUs; and
- The special assessment was valid because the benefits of the special assessments to the subject property outweighed the costs.

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## IRS Changes to the EO Determinations' Additional Information Request Process Beginning September 2015.

We're making changes to how we ask for additional information in the Exempt Organizations (EO) determination letter program. The revised procedures will generally apply to determination letter requests and will improve the program's efficiency and consistency. General application processing procedures are described in Revenue Procedure 2015-9.

These revised procedures will be effective for letters requesting additional information mailed on or after the effective date of an Interim Guidance memorandum to be issued in early September 2015.

**EO Determinations reviews every request**

EO Determinations reviews every determination letter request to determine if it meets applicable requirements.

> **1. If the request contains sufficient information,** we consider the request and issue a determination letter.
>
> **2. If additional information is needed to make a determination,** we'll ask for it by letter and give you a period of time (generally 28 days) to submit the information. We'll also attempt to contact you or your designated representative by telephone to alert you to the coming letter.
>
> **3. If you don't respond within the provided time frame,** we'll close your request without making a determination. We won't return any submitted documents or any portion of your user fee. However, we'll attempt to contact you or your designated representative by telephone before closing the request. We'll no longer place requests that have no response in a suspense status for a period of time before closing the request.

**What if my request is closed?**

If your application is closed because you didn't respond within the allowable time frame, you'll need to submit a new determination letter request and user fee.

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## IRS Changes to the EO Determinations Process: Rejecting Incomplete

## Applications Beginning November 2015.

We continue to make changes to our Exempt Organizations (EO) determination letter program to improve the program's efficiency and consistency.

**EO Determinations will no longer process substantially incomplete applications**

Effective November 18, 2015, if you submit a substantially incomplete determination letter request (Form 1023, Form 1024, Form 1028, Form 8940 or other letter request), we'll return the application package and user fee to you with a letter of explanation.

Revenue Procedure 2015-9, Section 3.08 (updated annually), lists the requirements of a substantially complete application as:

- The current version of the application form found at www.irs.gov
- The correct user fee
- A signature by an authorized individual
- An employer identification number
- A statement of receipts and expenses
- A copy of your organizing document that meets the requirements of a conformed copy
- A detailed narrative of your proposed activities
- A copy of your bylaws or similar governing rules, if adopted

Note: If your particular letter request doesn't require a listed element, we won't consider that element when determining whether your application is substantially complete.

If we return your application package, our records won't show a pending application for a determination letter. If you still want a determination letter, you must resubmit your entire application package, including the missing information, and the correct user fee.

If your request is substantially complete, we'll review it to determine if it meets the requirements for the type of request and ask for any additional information needed. You can find information on case processing in Revenue Procedure 2015-9 as well as on the website at IRS processing of exemption applications.

**Non-acceptance of Form 1023-EZ**

We continue to not accept/reject an incomplete Form 1023-EZ. Generally, if you attempt to electronically submit an incomplete Form 1023-EZ, www.pay.gov won't accept the submission. Also, once submitted, if we determine your Form 1023-EZ is incomplete or otherwise not accepted for processing based on Revenue Procedure 2015-5, Section 4 (updated annually), we'll send you a letter of explanation, and we'll refund your user fee (certain exceptions apply).

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## NABL: IRS Issues Guidance on Student Loan Bonds.

The IRS today issued Notice 2015-78 providing guidance on qualified student loan bonds under Section 144(b) of the Code. The Notice addresses (1) the eligibility of parents to borrow for their child's education; (2) how the student nexus requirement applies in the context of refinancing loans; (3) the loan size limitation; and (4) the types of student loans that may be refinanced with a State Supplemental Loan. The Notice applies to loans originated on or after February 11, 2016, but

issuers may apply this notice to loans originated before February 11, 2016.

The Notice will be published in the Internal Revenue Bulletin on November 30, 2015 (IRB 2015-48). The text of the Notice is available here.

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## Nonprofit-Government Contracts and Grants: The State Agency Perspective.

Public agencies, at all levels, increasingly rely on nonprofit organizations to address social issues and deliver publicly funded human and cultural programs and services. Therefore, strengthening relationships between nonprofits and government is essential to enhancing the quality of service delivery. This report provides information and insights on the nonprofit-government contracting and grants relationships from the state government perspective. The findings convey challenges administering government contracts and grants and strengthen the need for state government policymakers to strategize with their nonprofit and government partners about how to better align their efforts to address specific problems and improve nonprofit-government relations.

Read the full report.

**The Urban Institute**

by Saunji D. Fyffe

October 29, 2015

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## Foley: New IRS Regulations For Mixed Use Projects Financed With Tax-Exempt Bonds Have Practical Importance.

On October 27, 2015 the U.S. Treasury Department and Internal Revenue Service published final regulations concerning the treatment of "mixed-use" projects financed with tax-exempt bonds. These new regulations have significant and immediate importance for tax planning and tax compliance of tax-exempt bond issuers and borrowers.

A copy of the new final regulations can be obtained here. See 80 FR 65637.

The new regulations, which are published as "general allocation and accounting regulations" most importantly provide rules for the measurement of private use of a project that is financed in part with proceeds of tax-exempt bonds and in part with other funds of an issuer or borrower. The new regulations also facilitate the use of tax-exempt bonds in certain "public-private partnerships." In addition, the new regulations clarify the rules for taking "remedial actions" to correct noncompliance.

The new regulations apply to both bonds issued for the benefit of State and local government projects ("governmental bonds") and bonds issued for the benefit of borrowers that are section 501(c)(3) exempt organizations ("qualified 501(c)(3) bonds").

For convenience, references in this alert to "issuers" of tax-exempt bonds refer to both State or local government issuers of governmental bonds and borrowers that are section 501(c)(3) organizations.

Reference to “private persons” in this alert refer to nongovernmental persons, in the case of governmental bonds, and to nongovernmental persons and persons that are not governmental persons or section 501(c)(3) organizations, in the case of qualified 501(c)(3) bonds.

**Background**

The Internal Revenue Code generally restricts the amount of “private business use” of projects to small amounts (generally, 10% for governmental bonds and 5% for qualified 501(c)(3) bonds, although other limitations apply in some circumstances). Although tax-exempt bond issues technically fail to comply only if the bond issue also fails to comply with a second “private security or payment” test, in most cases issuers rely on the private business use test to comply. Over the years, application of these “private business tests” has become increasingly burdensome and complex. In particular, in 1997 the Treasury Department published final regulations that require private use compliance to take into account “deliberate actions” after the date of issuance, which rule requires tax compliance monitoring throughout the term of a bond issue.

One of the most helpful strategies that issuers use to manage compliance with these complex rules is to finance the costs of a project that will be used for private uses with funds other than proceeds of tax-exempt bonds. Under that approach, the proceeds of the tax-exempt bonds are not treated as used for private uses, because the portion of the project paid with the “equity carve out” is instead treated as privately used. The new regulations set forth detailed new rules for how and when this commonly-used “equity carve out” approach works.

The Treasury Department published proposed regulations on this topic on September 26, 2006. Since the publication of the proposed regulations in 2006, issuers and practitioners have looked to the proposed regulations for general themes about how mixed-used projects should be treated, but have not been bound to follow all the specific details of the proposed regulations.

The 2006 proposed regulations also suggested that the Treasury Department would consider permitting projects financed with tax-exempt bonds to be used by a partnership including private persons. The Service has historically taken the position that use of projects financed with tax-exempt bonds by a partnership including private persons results in private business use.

**Summary of the Final Regulations**

**Rules for equity contributions that are generally more flexible, but not in all cases more favorable.** The new regulations provide that private business use of a project is allocated first to the portion of the project financed with “qualified equity.”

**The rules for “qualified equity” contain important limitations.** Qualified equity generally means proceeds of taxable bonds (other than taxable bonds that are tax-advantaged, such as tax credit bonds) and funds that are not derived from proceeds of a borrowing. For example, qualified equity includes an issuer’s cash derived from revenues and cash donations. Qualified equity does not include equity interests in real property or personal property. This approach is consistent with prevailing practice and the proposed regulations.

The rules for “qualified equity” also contain new limitations that may be problematic in some cases. Qualified equity must be contributed to a project as part of the “same plan of financing” as the tax-exempt bonds and must pay for capital expenditures of the project on a date that is not earlier than the date on which the expenditures would be applicable to reimbursement by proceeds of the applicable tax-exempt bonds. Among other things, this appears to mean that the tax-exempt bonds generally can qualify for the “qualified equity” benefits only to the extent bonds are issued no later

than 18 months after the date of the expenditure (or 18 months after the placed in service date of the project, if later, but no more than three years after the date of the expenditure), although a definitive interpretation of certain aspects of this timing limitation may require clarification from the Service. This timing rule is new, and may raise a number of problems, including particular problems for projects that have a long construction period. Similarly, the new regulations may present difficulties in some cases where a single project is financed with a series of bond issues.

The new regulations also state that qualified equity contributions must be made before the placed in service date of the financed project, except for reasonable retainage.

**"Floating use" is expressly permitted.** The new regulations expressly and helpfully permit "floating" use of the portion of a project treated as financed with qualified equity. For example, suppose the costs of a 10-story building are funded 70% with tax-exempt bonds and 30% with an issuer's cash. The new regulations generally provide that private use of three floors will not be treated as private use of the tax-exempt bonds, even if the particular three floors change from year to year. The new regulations remove certain limitations on "floating" use that were set forth in the proposed regulations.

**A "project" that may be treated as funded in part with qualified equity is defined very broadly.** One of the most favorable rules in the new regulations is a very flexible definition of a "project." These rules are particularly important in light of the rules that permit private use to "float" within a mixed-use project. The new regulations permit an issuer to treat as a single "project" one or more facilities or capital projects, including land, buildings, equipment, or other property financed in whole or in part with the proceeds of a bond issue. The proposed regulations generally permitted only certain functionally related facilities, such as adjacent buildings, to be treated as part of the same project. The more flexible rule in the new regulations may present significant tax planning opportunities and tax compliance relief, although it may in some cases be complex to apply.

**Annual measurement is required, except for output facilities.** The final regulations expressly provide that the "qualified equity" rule must be applied on an annual basis, except for "output facilities." In an example in the new regulations, a building is funded 70% with tax-exempt bonds and 30% with the issuer's cash. In one year, 44% of the building is used for a private business use. The example states that the amount of private business use for that year is 20% (that is, 14% divided by 70%), regardless of whether there is any private business use in any other year.

The rules for "output facilities" are significantly more flexible. Output facilities generally consist of electric and gas generation, transmission, distribution and related facilities and water collection, storage and distribution facilities. In the case of output facilities, the benefits of "qualified equity" may generally be applied on an average basis over the term of a bond issue. This more flexible approach is consistent with the special treatment in the regulations for output facilities, including more flexible rules for how private business use is measured.

**No special elections or recordkeeping requirements.** The new regulations helpfully do not require any special elections or record retention requirements to make use of the "qualified equity" rules. The proposed regulations contained a number of such requirements that could have been traps for the unwary. Thorough and rigorous identification of qualified equity contributions to projects and retention of records relating to such contributions and identifications, however, will continue to be important in practice. In addition, the time limits for making allocations of bond proceeds in the existing final regulations may have relevance for taking actions under the new regulations. The existing regulations generally require that an issuer must allocate proceeds to expenditures no later than 18 months after a project is placed in service.

**Favorable treatment of partnerships.** The new regulations facilitate "public-private partnerships" by permitting tax-exempt bonds to be used to finance an issuer's contribution to a partnership which includes private persons. Under this new rule, the amount of private business use by a private person resulting from the use of property by a partnership is the nongovernmental partner's greatest percentage of any partnership item of income, gain, loss, deduction, or credit attributable to the period the partnership uses the property during the period private use needs to be taken into account. The rule generally requires that a State or local government (or, in the case of qualified 501(c)(3) bonds, a 501(c)(3) organization) be one of the partners.

This favorable rule for partnerships expressly applies to qualified 501(c)(3) bonds issued to benefit 501(c)(3) organizations. For that purpose, ownership by a partnership does not violate the requirement that all bond-financed property needs to be owned by a 501(c)(3) organization or a State or local government.

This rule can be expected to make tax-exempt financing eligible to some extent for public-private partnerships not previously eligible for tax-exempt bond financing to any extent.

**Clarification of "remedial action" rules.** Since 1997, the regulations have permitted certain remedial actions to correct noncompliance with the private use rules. One remedial action is the redemption or defeasance of "nonqualified bonds." The new regulations make important revisions and corrections to these remedial action rules.

The most important "remedial action" rule in the new regulations concerns "anticipatory" remedial actions. The prior regulations expressly permitted remedial actions only in response to a deliberate action that resulted in noncompliance. Prevailing practice has been to permit redemption or defeasance in anticipation of such a deliberate action, but practice standards have varied. The new regulations permit redemption or defeasance of bonds in an anticipatory remedial action, but only if the issuer first declares an official intent on or before the date on which it defeases or redeems such bonds which identifies the financed property or loan with respect to which the anticipatory remedial action is being taken and describes the deliberate action that potentially may result in the private business tests being met. This rule states that it applies in a manner "similar" to the rules for declarations of intent for tax-exempt bond reimbursements. The required degree of specificity for declarations of intent for these anticipatory remedial actions will require consideration on a case-b--case basis.

Subsequent to 1997, the Treasury Department has published proposed regulations to make certain technical corrections to make the remedial action rules more readily administrable. The final regulations adopt in final form these favorable technical provisions. First, the final regulations confirm that an issuer may pick and choose the maturities of the nonqualified bonds that are required to be redeemed or defeased, provided that the weighted average maturity of the nonqualified bonds is not less than the weighted average maturity of the other bonds of the bond issue. Second, the new regulations confirm that the amount of nonqualified bonds does not need to correct all private use, but only an amount so that the remaining bond issue is compliant.

**Clarification of "multipurpose allocation" rules.** The new regulations include additional examples explaining how the rules for "multipurpose allocations" apply. The "multipurpose allocation" rules permit an issuer to break a bond issue into different portions, and to apply the private activity bond rules separately to each portion. The most helpful new example clarifies that an issuer may make a multipurpose allocation to treat governmental bonds and qualified private activity bonds for airport facilities as separate issues, even when sold on the same date pursuant to the same plan of finance.

The multipurpose allocation rules can be applied at any time and can be an important and useful tax planning and tax compliance tool, but may be complex to apply in many contexts.

**Effective dates.** Issuers are generally required to apply the new regulations to bonds that are sold on or after January 25, 2016, although certain special effective date rules apply.

Issuers are generally required to apply the rules for remedial actions to any "deliberate actions" that occur on or after January 25, 2016, even if the bonds were sold before that date. In this regard, it is important to note that, although the remedial action rules in the new regulations are generally favorable, the new regulations contain certain new requirements. In particular, the new rule for "anticipatory" remedial actions will generally apply to any deliberate action occurring on or after January 25, 2016. The new regulations also contain a special transition rule for remedial actions that is intended to accommodate existing bond indentures that require optional redemptions of a portion of a term bond to be applied first to reduce the earliest mandatory sinking fund payments on that bond; that special transition rule only applies to bonds issued before January 25, 2016.

Issuers may apply the new regulations to bonds sold before that date, but the effective date rules impose certain limitations on such retroactive application. An important limitation is that the effective date provisions provide that retroactive application is generally permitted only if all of the provisions of the new regulations are applied in whole. The clarification in the new regulations for "multipurpose allocations," however, may be applied separately.

Except as described above, the application of the new regulations to bonds sold before the effective date is expressly permissive. There is no implication that bonds sold before the effective date need to comply with the new regulations, although as a practical matter issuers and practitioners may look to principles in the new regulations in taking positions with respect to pre-effective date bonds.

**Implications for tax-exempt bond compliance procedures.** Many issuers may wish to consider whether to revise their tax-exempt bond compliance procedures to reflect certain provisions of the new regulations. For example, an issuer may be able to make best use of the favorable provisions in the new regulations by adopting a formal process to review how those provisions can be applied to particular bond issues.

**Expected future developments.** In 2014, the Treasury Department published Notice 2014-67, which provided for more flexible safe harbors for management contracts for use of property financed with tax-exempt bonds that have a term not exceeding five years. Accordingly, the new regulations are the second significant recent action by the Treasury Department to facilitate more flexible public/private arrangements involving projects financed with tax-exempt bonds. In that light, there is reason to anticipate that the Treasury Department may follow the new regulations with guidance that provides additional safe harbors for longer-term management contracts involving projects financed with tax-exempt bonds.

Last Updated: October 29 2015

Article by Michael G. Bailey, David Y. Bannard, Chauncey W. Lever and Mark T. Schieble

**Foley & Lardner**

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

**TAX - OHIO**

## Sears, Roebuck & Co. v. Franklin Cty. Bd. of Revision

**Supreme Court of Ohio - November 3, 2015 - N.E.3d - 2015 WL 6742213 - 2015 -Ohio- 4522**

School board sought review of valuation of property by the Board of Tax Appeals.

The Supreme Court of Ohio held that:

- Board had no obligation to make particularized findings of fact and conclusions of law in upholding appraiser's valuation, and
- Evidence supported appraiser's methodology.

Board of Tax Appeals had no obligation to make particularized findings of fact and conclusions of law in upholding appraiser's valuation of property. Board determined a value based on record that contained owner's appraisal as the only substantive evidence of value, and Board predicated its determination on that value and said so.

Evidence supported appraiser's methodology, which lumped together automobile service center and mall department store in order to create one building that was then valued as a mall department store. Appraiser advanced several grounds in support of her method, school board that opposed method did not remotely negate appraiser's reasons, and appraiser had valued analogous properties using same method.

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## McCarter & English: At Long Last – Allocation and Accounting Rules.

Good things come to those who wait. The tax-exempt bond industry has waited 18 years for a missing reserved section of the private activity bond regulations, the allocation and accounting regulations, Treas. Reg. Section 1.141-6. The regulations released by the IRS in final form October 27, 2015, (the "Regulations") provide welcome guidance on allocation of bond proceeds and equity to expenditures and to particular uses within a financed project. The Regulations also take steps to accommodate public-private partnerships by providing for aggregate as opposed to entity treatment of a partnership that includes governmental entities or 501(c)(3) organizations and private persons. In addition, the Regulations amend Treas. Reg. Section 1.141-12 to provide a rule for anticipatory remedial action that permits bonds to be redeemed or defeased prior to an expected action that would cause the private activity limits to be exceeded.

The promulgation of the Regulations gives issuers and conduit 501(c)(3) borrowers the opportunity to rethink relationships with private entities as potential users of bond-financed property and consider the use of different, non-tax-exempt bond funding sources as part of a financing package to accommodate these relationships. The Regulations also provide planning opportunities relating to disposition of bond-financed property and remedial action. At the heart of all of these changes continues to be the IRS' focus on effective post-issuance compliance procedures. The efforts by the IRS to provide simpler and more straightforward rules should make post-issuance compliance more manageable.

**Undivided Portion Allocation**

The Regulations provide a special, undivided portion allocation method as the exclusive method of

allocation of sources of funding to expenditures and uses for eligible mixed-use projects. Under this method, qualified equity is allocated first to private business use of the eligible mixed-use project and then to governmental use, and tax-exempt bond proceeds are allocated first to governmental use and then to private business use. This allocation method inherently permits "floating private use"—private use that may move within a building from time to time.

An eligible mixed-use project is a project wholly owned by one or more governmental persons (or 501(c)(3) organizations) or by a partnership with at least one governmental partner that is financed with governmental bonds (or qualified 501(c)(3) bonds) and with qualified equity pursuant to the same plan of financing. Qualified equity includes proceeds of taxable bonds other than tax-credit bonds, and funds not derived from a borrowing. The qualified equity is treated as financing the project under the same plan of financing if it pays for capital expenditures of the project on a date no earlier than the date on which such expenditures would be eligible for reimbursement under the reimbursement regulations and no later than the date the measurement period begins, generally the placed-in-service date.

Read in conjunction with the allocation timing rule of Treas. Reg. Section 148-6(d)(1), which requires allocation of proceeds to expenditures not later than the later of 18 months after the expenditure is paid or the date the project is placed in service, and in no event later than 60 days after the fifth anniversary of the issue date, the issuer will at that time be able to identify qualified equity that was part of the plan of finance and allocate private business use to that equity.

**Partnerships**

In response to recent pressure for the development of tax-exempt bond rules that accommodate the participation of private entities in partnership with governmental entities in financing major projects, the Regulations permit the governmental share of a project used in joint ventures to be financed with governmental bonds by treating the partnership of governmental entities and private entities as an aggregate of the partners rather than as a separate taxable entity. The private business use by a private entity partner will be determined based on that partner's greatest percentage share of any of the specified partnership items, income, gain, loss, deduction or credit attributable to the partnership during the measurement period. Taken together with the undivided portion allocation method, this treatment will permit qualified equity to be allocated to the private entity partner's private business use.

**Anticipatory Remedial Action**

The Regulations provide a rule that would permit an issuer to redeem or defease bonds in advance of an action that would cause the private activity limits to be violated, a remedial action not addressed by current regulations. To meet this new remedial action rule, an issuer must declare its official intent to redeem or defease all the bonds that would become nonqualified bonds as a result of a subsequent deliberate action and redeem or defease such bonds prior to the action occurring. The declaration of intent must precede the redemption or defeasance, identify the financed property with respect to which the remedial action is being undertaken and describe the deliberate action that is expected to occur. The redemption or defeasance of the nonqualified bonds must not result in an extension of the weighted average maturity of the bonds, subject to a limited transition rule.

**Effective Dates**

The Regulations generally apply to bonds sold on or after January 25, 2016, and the new remedial action rule applies to deliberate actions that occur on or after January 25, 2016. The partnership rules and the allocation and accounting rules may be permissively applied in whole, but not in part,

to any bonds to which the private activity bond regulations apply.

**McCarter & English LLP**

by Jeannette M. Bond

November 3, 2015

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## Discerning the True Policy Debate over Donor-Advised Funds.

This brief summarizes discussion at a June 2015 Tax Policy and Charities Project session where the nation's leading Donor Advised Fund (DAF) providers, nonprofit leaders, and policy experts sought to clarify and distinguish the policy issues and debates surrounding DAFs, as well as to lay out a research agenda for the DAF field. This brief also contains a useful summary comparison, prepared by Victoria Bjorklund, retired partner of Simpson Thacher, of major differences in the laws and regulations applicable to public charities providing DAFs, other public charities and private foundations.

Download the brief.

Tax Policy Center

by C. Eugene Steuerle, Ellen Steele

Published: October 21, 2015

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**TAX - ILLINOIS**

## Village of Bedford Park v. Expedia, Inc. (WA)

**United States District Court, N.D. Illinois, Eastern Division - September 28, 2015 - F.R.D. - 2015 WL 5693596**

Fourteen Illinois municipalities – on behalf of a putative class of 154 municipalities – filed putative class action in state court against online travel companies seeking unpaid taxes owed under their municipal hotel tax ordinances. Following removal, pursuant to Class Action Fairness Act (CAFA), municipalities moved to certify class.

The District Court held that:

- Common questions did not predominate;
- Class action was not superior to other methods of resolving claims; and
- Class was ascertainable.

Questions affecting only individual members predominated over questions of law or fact common to class members, precluding certification of Illinois municipalities' class action claims against online travel companies for unpaid taxes owed under multiple municipal hotel tax ordinances. Although claims had been organized into subgroups that included like-worded ordinances, any statutory analysis to determine whether the ordinances set materially identical legal standards would require an individual inquiry into whether any relevant amendments had been enacted over time, as well as

the nature and effect of these amendments, and individual analysis would be required to determine whether the same terms in different ordinances had the same legal meaning.

Class action was not superior to other available methods for fairly and efficiently adjudicating claims of 154 Illinois municipalities against online travel companies for unpaid taxes owed under multiple municipal hotel tax ordinances, precluding certification of the claims. Although, absent certification, a multitude of individual lawsuits would be filed against the online travel companies, the 154 ordinances at issue could not be easily arranged into a modest number of subclasses, given possibility that materially different legal standards applied between the individual ordinances.

Proposed definition of class was clear, and it defined membership by objective criteria, so as to ensure ascertainability of members, as required for certification of class action against online travel companies for unpaid taxes owed under multiple municipal hotel tax ordinances, where definition described putative class members as Illinois municipalities that had enacted and collected tax on a percentage of a retail rate that consumer occupants paid owners or operators of hotels for lodging within their cities. Although travel companies asserted that definition promoted only a proscribed fail-safe class, in that membership was defined in terms of success on the merits, definition did not include only those who were entitled to relief, given possibility of varying definitions of "owner" or "operator" in the ordinances, which might or might not include travel companies.

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## IRS Official Tells Issuers to Monitor Compliance.

PROVIDENCE, R.I. – Municipal issuers should monitor bond activity for compliance violations no matter how inadvertent, an Internal Revenue Service tax law specialist for tax-exempt bonds said Tuesday.

"It's up to municipal issuers and conduit borrowers to identify and report these violations to assure continued tax-exempt borrowing. Otherwise, problems arise," James Held said at The Bond Buyer's Healthcare and Higher Education Finance Conference.

Institutional finance professionals and other muni market participants are discussing the challenges of these two sectors at the Omni Providence Hotel.

Many compliance failures related to 501(c)(3) nonprofit issuance are inadvertent in nature, according to Held, often because of misunderstanding legal complexities and lack of attention.

"We also know that bond counsel and other advisors are not around every day," he added.

Self-correction steps are available, according to Held.

"The clock starts ticking on the day of the violation, not the day of discovery," he said. Such steps could include redemption or defeasance of the non-qualified bonds or using the funds for alternative qualified use.

The federal tax code requires the use of 95% of the proceeds of the tax-exempt bonds toward the exempt activities of the 501(c)(3) organization. "We call it the 95% test," said Held.

Ownership violations, according to Held, can involve a sale of a facility, a change in facility or a change in use.

“If the bonds are still outstanding, there could be a problem,” he said.

Held works with the IRS’ voluntary compliance, educational guidance and compliance analysis and review programs related to tax-exempt bonds, tax credit bonds and Build America Bonds. He works on self-reporting cases, and compliance initiatives within the muni bond market.

Earlier Tuesday, Rhode Island General Treasurer Seth Magaziner said his state is transitioning from low-cost jobs and manufacturing to an economy based on technology innovation.

“The good news is that we are well-positioned and you already see signs of that transformation,” he said in his morning keynote.

Magaziner, elected last fall after predecessor and fellow Democrat Gina Raimondo won the governor’s race, cited Ivy League Brown University’s $3 billion capital campaign with its emphasis on life sciences and biotech and the strong presence of Rhode Island School of Design.

“Industrial design is one of the most important disciplines,” he said.

THE BOND BUYER

BY PAUL BURTON

OCT 27, 2015 11:57am ET

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## Disclosure of Determination Letters Issued by the Exempt Organizations Rulings & Agreements.

The IRS shares information with the public whenever possible. This includes exemption letters issued by the National Office in Washington, DC.

In the past, the IRS shared exemption letters processed in Washington with some members of the press. Due to changes in the approval process starting in 2014, applications for exemption are no longer processed in the National Office. The National Office is currently working on a few remaining applications and when a final disposition is made, EO will provide determination letters or denial letters, as applicable, for those organizations in the Electronic Reading Room as well as to the members of the media.

The IRS continues to release redacted copies of denial letters it issues to organizations. Denial letters also are released through the electronic reading room.

The IRS provides a list of all 501(c)(3) organizations that have received a favorable determination letter on our EO Select Check tool. We also provide additional information on all organizations exempt from tax on our Exempt Organizations Business Master File Extract page.

A copy of an application and/or a determination letter of an exempt organization may be requested from the Internal Revenue Service by submitting Form 4506-A to:

Internal Revenue Service
Attn: Correspondence Unit
P.O. Box 2508, Room 4024

Cincinnati, OH 45201

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## NABL Past President Testifies for NABL at IRS Hearing.

Linda Schakel, former NABL President and partner at Ballard Spahr, testified on behalf of NABL at the October 28 Internal Revenue Service (IRS) hearing on the proposed issue price regulations published in June. Ms. Schakel reiterated the points made in NABL's comments, which were submitted on September 22, particularly regarding the due diligence to be required of issuers.

NABL's written comments are available here.

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## Fitch: ACA Exchange Drop May Pressure Hospitals Long Term.

Fitch Ratings-New York/Chicago-21 October 2015: The long-term impact on not-for-profit hospitals of a continued decline in buyers of health insurance through federal and state insurance marketplaces will depend on their state's Medicaid program and the portion of their patients that have benefits, Fitch Ratings says. The impact of the decline in the short term is expected to be slight even as enrolees through these exchanges fell from 11.7 million to 9.9 million from February to June of this year.

The cost of health insurance in the 19 states that have not expanded Medicaid benefits under the Affordable Care Act (ACA) is likely the biggest factor in the declines. Although many enrolees received federal subsidies for the majority of the cost, wage stagnation and other personal budget factors may make the uncovered cost of the benefits untenable for some. The New York Times reported that Mississippi, where 95% of enrolees received subsidies, saw an 8% decline in enrolment from March 31 to June 30.

The long-run impact on hospitals would depend, in part, on their state's Medicaid program. In New York, which already had a robust Medicaid program in place, the subsidized healthcare exchanges have proven more beneficial to hospitals, as the underinsured have fuller coverage, helping increase utilization in a state where medical costs to patients can be high.

However, we would expect critical access hospitals (CAHs), which are inherently vulnerable to shifts in reimbursement due to their limited revenue base, to be at greater risk. The decline in the rural population that CAHs were created to serve is also pressuring the sector. This population shift is more common in the South and Midwest regions. Those regions are home to the most states that have not expanded Medicaid eligibility under ACA.

We believe the decline in enrolees could continue if stagnant wage growth for earners in the lowest quartile persists. According to the Bureau of Labor and Statistics, since 2000 the average hourly wage for non-management private-sector workers in the lowest quarter (when adjusted for inflation) has declined by 3%.

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**EXEMPT PROPERTY - WISCONSIN**

## SSM Health Care of Wisconsin, Inc. v. City of Fitchburg

**Court of Appeals of Wisconsin - September 24, 2015 - Slip Copy - 2015 WL 5598829**

SSM Health Care of Wisconsin, Inc., which owns and operates St. Mary's Hospital, sought a refund for property taxes levied by the City of Fitchburg against all of SSM's personal property that was located in a renal center and a sleep center owned and operated by SSM in Fitchburg during the 2009, 2010, and 2011 tax years.

On summary judgment, the circuit court held that some of SSM's personal property in the two centers was exempt from tax under WIS. STAT. § 70.11(4m)(a) (2013–14), the non-profit hospital tax exemption, and that SSM was entitled to a refund for that tax-exempt personal property.

The City appealed, arguing that the circuit court erred in granting summary judgment in favor of SSM for two reasons: (1) the non-profit hospital tax exemption under WIS. STAT. § 70.11(4m) does not apply here because the renal center and the sleep center are each used as a "doctor's office" and, therefore, all of the personal property located in each center is taxable; and (2) SSM initially sought tax exemption for "all" personal property in each center and, according to the City, SSM cannot subsequently "convert a request for a total tax exemption into a partial exemption in the midst of litigation."

The Court of Appeals affirmed, holding that:

- Neither the renal center, nor the sleep center are "doctor's offices" and
- Although SSM did not provide an itemized list of non-exempt property when it initially filed the tax-exemption requests, it does not follow that this bars SSM from entitlement to a refund for taxes levied against property that is tax-exempt.

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**TAX - NEW YORK**

## Allegany Mountain Resort, LLC v. Town of East Otto

**Supreme Court, Appellate Division, Fourth Department, New York - October 9, 2015 - N.Y.S.3d - 2015 WL 5894848 - 2015 N.Y. Slip Op. 07361**

Taxpayer brought proceeding to challenge town's tax assessments for property on which it operated a campground resort facility. The Supreme Court, Cattaraugus County, granted taxpayer's motion for summary judgment, and town appealed.

The Supreme Court, Appellate Division, held that measurements based upon the size of the chassis of each trailer at taxpayer's campground resort facility could not be used to establish that the trailers were 400 square feet or less in size, as required to qualify for exemption from property taxation.

Measurements based upon the size of the chassis of each trailer at taxpayer's campground resort facility could not be used to establish that the trailers were 400 square feet or less in size, as required to qualify for exemption from property taxation for recreational vehicles that are 400 square feet or less, self propelled or towable by an automobile or light duty truck and used as temporary living quarters for recreational, camping, travel or seasonal use. Trailers were vehicles, and their dimensions were thus required to be measured inclusive of load and bumpers.

## While Arizona Cardinals Soar, Legal Battle Puts Stadium Investors in Red Zone.

Dispute over rental-car taxes that help cover stadium's payments highlights risks for bond investors

The Arizona Cardinals are one of the National Football League's hottest teams, leading their division with a 4-2 record.

Their stadium, however, is on a losing streak with investors. Its operator, along with state tax collectors, have lost two court rulings since last year over the legality of rental-car taxes used to fund the $455 million University of Phoenix Stadium in Glendale. The battle threatens the authority's capacity to collect revenue that accounts for nearly a third of the stadium's bond payments.

A lawyer for the operator, the Arizona Sports and Tourism Authority, said he expects the state agency to prevail on appeal.

The legal fight highlights the risk borne by investors who buy stadium bonds.

U.S. state and local governments from Florida to Arizona have financed stadium construction and improvements by linking bonds to tourism taxes, such as on hotels and rental cars. But the practice can backfire when collections decline, leaving taxpayers on the hook and investors facing downgrades and falling bond prices.

"These fluctuate and people cut back on things like tourism expenses when the economy's down," versus, say, a bond backed by water or utility fees, said Howard Cure, director of municipal research at Evercore Wealth Management.

Now, litigation is proving another risk. Rental-car agencies contend that the fees Arizona levies are a vehicle tax, which the state's constitution limits to supporting roads. A state court last year agreed, and in August, the state was ordered to refund what could amount to tens of millions of dollars while it appeals the case.

Those taxes make up about one-third of the payments on the authority's almost $270 million of municipal bonds. Without them, the Arizona stadium debt may be downgraded, ratings firms have warned. The bonds enjoy an investment-grade rating now. But Fitch Ratings said in an August report that the absence of legislative action to replace the money "could result in ratings dropping to below investment-grade levels."

Some Arizona Sports and Tourism Authority bonds maturing in 2036 traded recently at yields around 4%, about half a percentage point above comparably rated debt, according to Thomson Reuters Municipal Market Data. Yields rise as prices fall.

Tourism taxes are one of the most-common sources of public money for stadiums nationwide. U.S. cities and states owe around $3.5 billion in bonds backed in some part by hotel and rental-car payments, according to a Wall Street Journal analysis of Bloomberg and Electronic Municipal Market Access data. The money has helped build stadiums for teams including the Houston Texans, San Antonio Spurs and the under-construction ballpark for the Atlanta Braves.

Fitch downgraded bonds that paid for Orlando's basketball arena to junk in 2010, citing fluctuations in revenue from tourism taxes and warning officials would need to tap reserves to pay investors. The rating firm upgraded the bonds this year.

The use of tourism taxes is the result of public officials' attempting to make stadium borrowing more palatable to voters by passing on the cost to outsiders, several analysts said.

"For local officials, it makes it more appealing to say this particular tax is going to fall on nonresidents," said David Swindell, director of the Center for Urban Innovation at Arizona State University. "We saw that in authorities across the country during the recession—they took a big hit because they were so dependent on tourism dollars." That can leave taxpayers facing higher bills to make up the difference.

Now, lawyers for rental-car companies suing the stadium authority are asking a judge to escrow the taxes while the state appeals, a process that could mean years of uncertainty for bondholders. Shawn Aiken, who represents the plaintiffs, said that in Arizona, those taxes are reserved for highways and he is confident the state can find other sources of money to pay investors.

"The building of a football stadium is clearly a non-highway purpose," he said.

Timothy Berg, a lawyer who represents the stadium authority, said it will oppose the motion to withhold the taxes while it appeals.

While bonds sold for stadiums tend to be lower-rated and more volatile than other municipal debt, even the worst-off facilities typically avoid long-term distress, said John Miller, co-head of fixed income at Nuveen Asset Management LLC. His firm holds some of the Arizona bonds, as well as those that paid for Chicago's Soldier Field, ballparks for the New York Yankees and Mets, and Houston's venues.

"They tend to be lower rated, because of the reliance on these entertainment and travel sources of revenue," Mr. Miller said. "They're more economically sensitive, but they've come back stronger since 2009," as tourism rebounded after the recession.

The problems with the rental-car taxes are just the latest wrinkle in the region's misadventures hosting big league sports, Mr. Swindell said.

The city of Glendale suffered downgrades after it built a hockey arena for the Arizona Coyotes and spent tens of millions covering the team's losses, amid broader financial difficulties for the city.

The state stadium authority has already struggled to make ends meet. A legislative audit last month found tourism revenue was insufficient to fulfill its financial obligations, which include promoting tourism and funding youth sports. Tourism money has also fluctuated widely, exacerbating shortfalls, while debt payments are scheduled to increase in coming years.

THE WALL STREET JOURNAL

By AARON KURILOFF

Oct. 24, 2015 5:33 a.m. ET

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**TAX APPEAL - OHIO**

**Columbus City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision**

**Supreme Court of Ohio - October 20, 2015 - N.E.3d - 2015 WL 6288275 - 2015 -Ohio- 4304**

Court-appointed receiver for former owner of property brought real property valuation complaint seeking reduction of valuation of real property. Following remand from the Court of Common Pleas, the county board of revision (BOR) dismissed complaint. School board and former owner appealed. The Board of Tax Appeals (BTA) dismissed appeal for lack of jurisdiction. School board and former owner appealed.

The Supreme Court of Ohio held that:

- Former owner's failure to serve subsequent owners with notice of appeal did not warrant dismissal of appeal;
- Initial appeal to court of common pleas did not deprive BTA of jurisdiction to consider subsequent appeal; and
- BOR was precluded by law of the case doctrine from dismissing complaint for lack of standing.

Former property owner's failure to serve subsequent owners with notice of appeal from dismissal of former owner's real property valuation complaint did not require dismissal of appeal. Although serving subsequent owners was required by statute, counsel for former owner had also appeared on behalf of subsequent owners, and counsel had pursued previous appeal on behalf of both former owner and subsequent owners.

Property owner's initial appeal to court of common pleas did not deprive Board of Tax Appeals (BTA) of jurisdiction, pursuant to subsequent-appeal rule, to consider property owner's and school board's subsequent appeal after court's remand to county board of revision (BOR). Although, in the context of appeals from decisions of county boards of revision, county courts of common pleas and the BTA had concurrent jurisdiction, school board was only statutorily permitted to appeal to BTA.

County board of revision (BOR) was precluded by the law of the case doctrine on remand from dismissing former owner's real property valuation complaint for lack of standing, where common pleas court had already determined that former owner had standing to file complaint.

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## Treasury, IRS Issue Rules that Will Help Facilitate P3s.

WASHINGTON — The Treasury Department and Internal Revenue Service have released final allocation and accounting rules that bond lawyers say will help in administering public-private partnerships for transportation and joint ventures involving hospitals.

"These final regulations are a great step forward for encouraging public and private funding for projects and therefore for encouraging public-private partnerships," said Vicky Tsilas, a partner at Ballard Spahr in Washington.

The rules, which lawyers said are much better than those proposed in 2006, were released Monday and are scheduled to be published in the Federal Register on Tuesday. Some provisions of the proposed rules were withdrawn rather than finalized.

The rules will generally apply to bonds sold on or after a date that is 90 days after publication in the Federal Register, and the provisions regarding remedial actions will apply to deliberate actions that occur on or after that date. The rules provide issuers with guidance for applying the private-activity bond restrictions. Under federal tax law, for governmental bonds, no more than 10% of the proceeds can be used by private parties and no more than 10% of the debt service can be paid for or secured by private parties. The thresholds are lowered to 5% for 501(c)(3) bonds. If these limits are

exceeded, bonds become private-activity bonds and are not tax-exempt unless they fall within specific categories.

Two key parts of the rules are the flexible proportional allocation provisions for mixed-use projects and the look-through treatment of public-private partnerships, said John Cross, Treasury associate tax legislative counsel.

Issuers may want to develop "mixed-use" projects that have some governmental use and some private use, finance the public portion with tax-exempt bonds and finance the private portion with equity. Under the rules, qualified equity is allocated first to the private-business use of the mixed use project and then to governmental use, while bond proceeds are allocated first to governmental use and then to private business use.

Carol Lew, a shareholder at Stradling Yocca Carlson & Rauth in Newport Beach, Calif, said that the concept of allocating equity first to private business use is helpful and "issuer sensitive."

"These allocation provisions look good," said Matthias Edrich, an attorney at Kutak Rock in Denver, though there's a lot for bond lawyers to still consider.

The allocation rules for mixed-use projects are simpler in the new guidance than they were in the proposed rules, lawyers said. Under the proposed rules, there were two different allocation methods that could be used for mixed-use projects, and issuers had to elect to use one of the methods. But under the final rules, issuers do not have to make elections and bond proceeds and equity are always allocated using the "undivided portion" method, which is based on the percentage of use by an entity rather than the percentage of physical space used.

The rules expand the definition of a project that can be treated as partially financed with tax-exempt bond proceeds and partially funded by other means, a feature that bond lawyers praised.

"Under the new regulations, an issuer can choose to treat any property financed with the same bond issue as the same 'project' regardless of any functional relationship. That flexibility could provide for substantial post-issuance compliance relief," said Michael Bailey, a partner at Foley & Lardner in Chicago.

However, Bailey expressed concerns that the time limits placed on when equity contributions can be made might be overly restrictive for projects with long construction periods.

The rules also address allocating bond proceeds and other funds in cases where property is used by public-private partnerships.

In the proposed rules, partnerships were automatically treated as private entities unless all of its members were public. But the final rules take a different approach and treat partnerships as aggregates of their partners. Under the rules, the amount of private business use is the private partner's share of the amount of the use of the property by the partnership. The share is defined as the private partner's greatest percentage share of any of the partnership items attributable to the time during the measurement period that the partnership uses the property.

Tsilas said that "permitting aggregate treatment for all partnerships has become particularly important in recent years because of the need to implement policies of the Affordable Care Act that are intended to promote cooperation between the public and private sectors."

The look-through treatment of partnerships is in line with the recommendations made by the National Association of Bond Lawyers and the tax-exempt financing committee of the American Bar

Association's taxation section.

The rules also provide guidance about when and how issuers can take "anticipatory remedial actions" and redeem tax-exempt bonds before they take actions that would cause there to be excessive private-business use. The proposed rules had set a lot of conditions that issuers had to meet to take anticipatory remedial action. The final rules are simpler and allow issuers to redeem or defease bonds if they declare their intent in advance. The declaration of intent has to identify the financed property or loan that the anticipatory remedial action would concern and describe the action that potentially may result in the private business tests being met.

Tom Vander Molen, a partner at Dorsey and Whitney in Minneapolis, praised the availability of anticipatory remedial actions under the rules but said, "the need to describe possible future private business use for anticipatory remedial actions is unnecessarily detailed."

Treasury and the IRS are also working on a separate project relating to remedial action rules, Cross said. One of the items that project will address is how leases fit with the remedial action rules.

THE BOND BUYER

BY NAOMI JAGODA

OCT 26, 2015 3:12pm ET

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## Treasury Issues Final Private Activity Bond Allocation and Accounting Regs.

Treasury has issued final allocation and accounting regulations under Section 141 of the Code. The regulations are expected to be published in the Federal Register tomorrow. The Final Regulations generally apply to bonds sold on or after 90 days after publication in the Federal Register. The rules regarding remedial actions, however, apply to deliberate actions that occur on or after 90 days after publication.

The Final Regulations allow permissive application of (1) the partnership provisions, the allocation and accounting rules, and certain corresponding rules for qualified 501(c)(3) bonds in whole, but not in part, to bonds to which the 1997 Final Regulations apply; and (2) the multipurpose rule to bonds to which the refunding rules apply.

The text of the final regulations is available here.

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## IRS Announces Inflation Adjustments for 2016.

On October 21, 2015, the Internal Revenue Service (IRS) released Rev. Proc. 2015-53 setting out amounts for items in the tax code that are adjusted for inflation. The state PAB volume caps for 2016 will be the greater of $100 per capita or $302.88 million, a slightly higher minimum amount than 2015. The Revenue Procedure includes the 2016 figures for other bond-related items as well, such as safe harbor rules for brokers' commissions for GICs and yield restricted defeasance escrows.

Click here to read the Revenue Procedure (see pages 15-16).

**SCHOOL TAX REFERENDUM - DELAWARE**

## Young v. Red Clay Consolidated School District

**Court of Chancery of Delaware - October 7, 2015 - A.3d - 2015 WL 5895838**

After voter referendum to increase school-related property taxes paid by owners of non-exempt real estate located within school district passed in special election, owners who opposed tax increase but did not vote filed suit against district, asserting under § 1983 that district deprived owners of their right to vote without due process of law and of equal protection, and that district violated Elections Clause of state constitution by discouraging and raising impediments to voting by elderly and disabled residents. District filed motion to dismiss for failure to state a claim.

The Court of Chancery held that:

- District's interventions in special election was not constitutionally-protected government speech under First Amendment right to advocate;
- Elections Clause was not equivalent to government speech doctrine, and thus it was not appropriate to interpret Clause in lockstep with cases applying doctrine;
- Elections Clause had meaning independent from federal protections for voting rights developed under Fourteenth Amendment;
- Owners sufficiently pled that district's interventions affected result of election, as would support voiding result;
- Attorney General's decision not to bring charges against school district did not dispose of owners' civil claim;
- Owners stated a claim under § 1983 for due process and equal protection violations; and
- Owners stated a claim for violation of Elections Clause.

School district's interventions in special election, during which voters passed referendum to increase school-related property taxes paid by owners of non-exempt real estate located within school district, was not constitutionally-protected government speech under First Amendment right to advocate. Government speech doctrine responded to Free Speech Clause claims, and did not mean that there were no restraints on government speech.

State constitutional Elections Clause was not equivalent to government speech doctrine under First Amendment, and thus it was not appropriate to interpret Elections Clause in lockstep with federal jurisprudence applying doctrine. Government speech doctrine only responded to Free Speech Clause claims and did not provide defense to claim under state law, federal parallel for Elections Clause was not the Free Speech Clause and cases applying government speech doctrine, but rather was federal regime of implied constitutional protection for voting rights that developed under Due Process and Equal Protection Clauses, and Elections Clause was both separate from and more protective of electoral rights than implied federal regime.

Elections Clause of state constitution had meaning independent from federal regime of implied constitutional protection for voting rights developed under Due Process and Equal Protections Clauses, and thus it was not appropriate to interpret Elections Clause in lockstep with federal jurisprudence developed under Fourteenth Amendment. Unlike state constitution, federal constitution did not explicitly provide individual with right to vote or explicit guarantee of free elections, history of Elections Clause indicated that it had meaning independent from Fourteenth Amendment, and differences in structure between federal and states constitutions demonstrated independent meaning of Elections Clause.

Complaint filed by residents who opposed increase in school-related property taxes but did not vote in special election in which increase was passed sufficiently pled that school district's interventions affected result of election in resident's action seeking to void result, based on district's alleged actions in discouraging and raising impediments to voting by elderly and disabled residents. According to complaint, district affected outcome by systematically encouraging and facilitating voting by residents with school-aged children who were more likely to vote in favor of increase, and that district's family-focused get-out-the-vote events reduced turnout by elderly and disabled voters by interfering with their ability to access polls.

Failing to contact Department of Elections on day of special election, in which residents voted on and passed referendum to increase school-related property taxes paid by owners of non-exempt real estate located within school district, did not preclude owners who opposed tax increase but did not vote in special election from bringing civil action against district, seeking to invalidate election. Statutory provisions create post-election day private rights of actions.

Attorney General's decision not to bring criminal charges against school district did not dispose of civil claim filed by residents to invalidate special election, alleging that district discouraged and raised impediments to voting by elderly and disabled residents on referendum to increase school-related property taxes paid by owners of non-exempt real estate located within district. Assuming that Attorney General concluded that there was insufficient evidence to prove guilt beyond a reasonable doubt as to criminal conduct, that assessment did not mean that evidence did not establish electoral misconduct under preponderance-of-the-evidence standard for purposes of civil claim, and Attorney General had no authority to enforce civil election violations.

School district residents who opposed increase in school-related property taxes but did not vote on referendum that proposed increase stated a claim under § 1983 against district for due process and equal protection violations based on district's electoral interventions as a whole. Although district's interest in fostering informed electorate was sufficient to justify engaging in government campaign speech, complaint alleged that district's intervention in election by providing rewards for voting designed to appeal to demographic group that district believed was likely to support tax increase had purpose and effect of discouraging voting by identifiable group district believed would oppose increase, and for pleading purposes, district's desire to educate electorate did not justify selective get-out-the-vote efforts.

In challenging school district's electoral interventions as a whole, district residents who opposed increase in school-related property taxes but did not vote on referendum that proposed increase stated a claim against district for violation of Elections Clause of state constitution. Residents contended that district provided selective rewards for voting, which allegedly made election less free and equal, residents alleged that district violated Elections Clause based on its government campaign speech, which included engaging in electioneering in close proximity to voting rooms, and complaint alleged that district engaged in selective get-out-the-vote efforts directed towards an identifiable group, which had negative effects on the elderly and disabled.

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## Arizona Cardinals Stadium Debt Jeopardized by Car-Tax Challenge.

To money manager Todd Curtis, the decade-long fight over a tax that helped build the stadium for the National Football League's Arizona Cardinals didn't look good for bondholders.

Last year, a state judge ruled that a vehicle-tax that pays for about a third of the stadium's $266

million of debt is illegal. Then August brought another legal blow: The state was ordered to pay tens of millions of dollars in refunds while it appeals the case, threatening to reduce funding for the Arizona Sports & Tourism Authority, which issued the bonds. Curtis sold the securities.

“If they lose, they could probably still make their bond payments, but they couldn’t pay for much else,” said Curtis, a portfolio manager with Aquila Group of Funds in Phoenix who runs a $280 million Arizona bond fund. “The sports authority has always run on a very thin line.”

While stadiums in cities including Indianapolis and Oakland have put taxpayers on the hook for subsidies to professional sports teams, the challenge over funding behind the Glendale, Arizona, coliseum has left another constituency at risk: Investors who bought its bonds.

**Financial Toll**

The loss of the car-tax money, if upheld on appeal, would put an added squeeze on the financially struggling tourism authority, whose credit rating is at risk of a downgrade from Moody’s Investors Service and Fitch Ratings. The operator of the stadium, which hosted this year’s Super Bowl, has already failed to bring in enough tax money to cover its operations, which include promoting tourism and assisting professional baseball teams that come to Arizona for spring training.

“If they can’t collect this tax, that compounds the issue,” said Heather Macre, a Phoenix attorney who represents Saban Rent-A-Car LLC and others that are challenging the tax.

The companies say that the subsidies violate the law because Arizona’s constitution requires vehicle taxes to be used for roads. On Oct. 5, the companies filed a motion to put the disputed funds into an escrow account until the case is resolved, which may take years.

**Pricing Risk**

The legal risk has lingered in the background since not long after the first bonds were issued in 2003, and the prices of the securities were little changed after the recent court decision. On Oct. 16, the $19 million of stadium bonds maturing in 2028 traded for an average yield of 3.3 percent, about 1.7 percentage points more than benchmark securities, according to data compiled by Bloomberg. That yield is down from 3.8 percent in early August.

“Depending on what level they’re at, the risk can make it more attractive,” said Craig Brandon, a portfolio manager of Eaton Vance Management, which holds $29.7 billion of municipal bonds, including some of the stadium debt. “If it’s not going to continue generating income, we will be concerned. From an income perspective, we’re comfortable with the level we’re at.”

While Brandon considers the risk of default to be low, he said the bonds may be downgraded if the authority can no longer collect the rental-car tax. Fitch Ratings and Moody’s Investors Service put negative outlooks on the bonds in 2014 after the first decision, a first step toward a rating cut. Fitch grades the senior bonds A, the sixth-highest investment grade. Moody’s rates them A1, one step higher.

“The negative outlook is a flashing red light,” said Steve Murray, an analyst with Fitch in Austin. “Until this plays out, we’re watching very closely.”

**Victory Seen**

The authority expects to prevail in its appeal, which has yet to be filed, Timothy Berg, the agency’s attorney in Phoenix, said in an e-mail. The final verdict could take as much as three years if it goes

all the way to the state Supreme Court, said Macre, the lawyer for the plaintiffs.

So far the case has had no impact on the state budget, said Daniel Scarpinato, a spokesman for Governor Doug Ducey. What happens if the tax is struck down will be up to the governor and state lawmakers, who so far have taken no steps to find a backup revenue source.

“I don’t think the state is going to let the sports authority go under,” said Curtis, the portfolio manager with Aquila Group. “But they aren’t going to do anything until their back is up against the wall.”

**Bloomberg Business**

by Darrell Preston

October 18, 2015

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## Appellate Court Upholds TIF District Levy and Collection of Taxes.

The Illinois Appellate Court recently upheld the actions of a city council in its establishment and implementation of a TIF district (*Devyn Corp. v. City of Bloomington*). In this case, the Court addressed the adequacy of a TIF district’s financial statements as well as when a TIF district’s authority to collect taxes terminates.

This case arises out of the creation of the Downtown Bloomington Tax Increment Redevelopment Plan (“the TIF District”) by the Bloomington City Council in December of 1986. The TIF District was scheduled to last 23 years and had an estimated date of completion of December 21, 2009. Through the duration of the TIF District, the city generated approximately $1.9 million, which was used to fund a number of projects focused on infrastructure improvements within the TIF District. During the city council meeting to approve the use of funds from the TIF District, Devyn Corp. objected, stating that the City’s use of the funds was a violation of the TIF Act. Soon thereafter it filed a complaint alleging that the City’s financial statements failed to account for certain expenditures and that the City unlawfully appropriated taxes from the TIF District by collecting taxes after the December 21, 2009 estimated date of completion.

The trial court found in favor on the City on both issues, holding that Devyn Corporation failed to establish that it lacked an adequate remedy at law to obtain the financial statements of the City regarding the funds collected from the TIF District. Additionally, the trial court held that the estimated date of completion for the TIF District served only as an estimate and therefore did not bar the City from levying taxes after December 21, 2009.

On appeal, the Fourth District Appellate Court affirmed the trial court’s ruling. Specifically, the Court found no basis for an equitable accounting of the funds received and spent from the TIF District since Devyn Corp. could also obtain this information through the Freedom of Information Act or through discovery. The Court noted that Devyn Corp. did in fact make such a request after filing this lawsuit and received all financial information that would have been turned over in an equitable accounting. With respect to the estimated date of completion, the Court held that the legislature’s intent was an estimate as opposed to a hard date of termination. As such, the City’s levy and collection of incremental taxes on December 28, 2009 (after the estimated date of completion) was lawful.

This decision ultimately preserves the wide latitude municipalities are given in administering TIF Districts. Given this wide latitude afforded to municipalities, other taxing agencies should make the most of all the opportunities available to them to influence and monitor the creation of TIF Districts.

by Ares Dalianis, Jamel Greer, Scott R. Metcalf | Franczek Radelet P.C.

10/12/2015

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**TAX - NEW YORK**

## Level 3 Communications, LLC v. Erie County

**Supreme Court, Appellate Division, Fourth Department, New York - October 2, 2015 - N.Y.S.3d - 2015 WL 5750574 - 2015 N.Y. Slip Op. 07104**

Taxpayers brought hybrid article 78 proceeding and declaratory judgment action against city and school district, claiming that taxpayers' fiber optic cables did not conduct electricity and thus were not taxable real property. The Supreme Court, Erie County, dismissed the petition-complaint. Taxpayers commenced proceeding in the nature of mandamus.

The Supreme Court, Appellate Division, held that the Supreme Court could not dismiss taxpayers' hybrid article 78 proceeding and declaratory judgment action challenging a city's and school district's tax assessment on the basis of grounds not considered in administrative proceedings challenging the tax assessment, no matter how sound those grounds might be.

The appeals court remitted the matter to respondents for reconsideration of petitioners' applications, including determining whether the applications were timely and procedurally proper, whether the taxes that petitioners paid may be recovered despite the lack of protest by them, and whether the fiber optic cables at issue constitute taxable real property within the meaning of the RPTL.

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