HINCKLEY ALLEN

IRS Blesses "Dial-In" TEFRA Hearings and Enhances Bond Self-Purchase Guidance in Response to COVID-19 Emergency

Hinckley Allen Public Finance

May 6, 2020

On May 4, 2020, the Treasury Department and the Internal Revenue Service released two guidance pieces designed to address issues currently challenging the public finance markets as a result of the COVID-19 pandemic. The first release, Revenue Procedure 2020-21, offers guidance on the conduct of so-called "TEFRA hearings" by telephonic means—rather than in person—with respect to tax-exempt private activity bonds. The second release, IRS Notice 2020-25, provides extended periods during which governmental issuers of tax-exempt variable rate demand bonds ("VRDBs") or commercial paper notes may purchase and hold those VRDBs or commercial paper notes, without causing them to be treated as reissued or extinguished for federal tax law purposes. These helpful guidance releases were issued in response to a request for guidance submitted on March 25, 2020 by the National Association of Bond Lawyers ("NABL"), which noted that these issues were adversely affecting the tax-exempt bond markets during the COVID-19 outbreak.

Revenue Procedure 2020-21: "Dial-In" TEFRA Hearings

As noted in the NABL submission, the current public health emergency has prompted numerous state and local governmental bodies to limit, or even to prohibit, in-person gatherings by members of the general public, including at public meetings and hearings. NABL advised Treasury and the IRS that many of these governmental bodies were prepared to offer telephonic access, in lieu of in-person attendance, at their meetings and hearings, including at "TEFRA hearings" which are required to be held in advance of the issuance (or, occasionally, after the issuance) of tax-exempt private activity bonds pursuant to Section 147(f) of the Internal Revenue Code (the "Code") and Section 1.147(f)-1 of the Treasury Regulations. Prior to the release of Revenue Procedure 2020-21 earlier this week, the prevailing and perhaps virtually uniform practice had been to conduct these TEFRA hearings in person, and language in the preamble accompanying the promulgation of Section 1.147(f)-1 of the Treasury Regulations appeared to suggest that the conduct of TEFRA hearings without in-person access might not satisfy the requirements of Code Section 147(f).

Revenue Procedure 2020-21 provides temporary relief from this in-person meeting requirement, permitting TEFRA hearings held on or after May 4, 2020 and prior to January 1, 2021 to be conducted with toll-free telephonic access only. This relief also may be applied retroactively to public hearings held telephonically before May 4, 2020 in response to the COVID-19 pandemic. The TEFRA notices for hearings that are to be conducted pursuant to Revenue Procedure 2020-21 should include all of the information that members of the public will need to access the hearing telephonically, including the toll-free phone number to be used and any passcode or authentication that will be needed to participate in the hearing.

In addition, the Revenue Procedure includes a "supplemental public notice" provision for currently pending TEFRA hearings. This provision, which relates to TEFRA hearings for which a TEFRA notice was published on or before May 11, 2020 (including, in particular, TEFRA notices published prior to May 4, 2020 that did not provide for toll-free telephonic access), states that the hearing may be held exclusively by means of a teleconference, as long as:

- a supplemental public notice providing a toll-free access number for the hearing is posted at least 48 hours prior to the hearing on the issuer's public website, in an area of the website used to inform the public about its public meetings, and
- the requirements of Code Section 147(f) are otherwise met.

Revenue Procedure 2020-21 states that access to a TEFRA hearing can be offered by other telephonic means in addition to a toll-free line, or by means of internet-based meeting technology (e.g., streaming video services), but these additional means of access are not mandated.

Revenue Procedure 2020-21 makes no other changes with respect to the publication or promulgation of notices for TEFRA hearings, the conduct of TEFRA hearings or with respect to the requirement to secure public approvals under Code Section 147(f) following a TEFRA hearing.

IRS Notice 2020-25: Self-Purchases of VRDBs and Commercial Paper Notes

IRS Notice 2020-25 builds on and extends guidance offered by Treasury and the IRS in 2008, at the outset of the Great Recession, when many governmental bond issuers observed that their tax-exempt debt instruments structured as "variable rate demand bonds" (or VRDBs, which are also known as "qualified tender bonds"), could not be successfully remarketed, as required from time to time under the legal documents governing their terms, at reasonable rates of interest (i.e., at rates reasonably comparable to those at which the same VRDBs were remarketed prior to the advent of the Great Recession). Governmental issuers of tax-exempt commercial paper made similar observations at the time, when "rolling" their maturing commercial paper notes. The 2008 guidance (restated in proposed Treasury Regulations that were promulgated in 2018) assures that these issuers can, under certain conditions, repurchase their VRDBs or commercial paper, and thereby relieve themselves of exposure to unreasonable interest rate resets on these obligations, without the risk of causing them to be treated as reissued or extinguished for federal tax law purposes. Extinguishment, for most issuers, would be an untenable outcome, because it would mean that the debt in most cases could not be subsequently remarketed to the general public on a tax-exempt basis.

In its March 25 submission, NABL advised Treasury and the IRS that numerous reports have emerged indicating that the same market phenomenon has been occurring during the early days of the COVID-19 outbreak, with attendant disruptive effects on market stability. These market conditions are once again forcing governmental issuers of VRDBs and commercial paper to choose between (i) accepting unreasonably high interest rates in connection with current remarketings of VRDBs and renewals of commercial paper or (ii) instituting "self-purchase" programs with respect to these instruments, to hold them in their own portfolios until markets return to stability.

IRS Notice 2020-25 addresses this problem by permitting governmental issuers to self-purchase their tax-exempt VRDBs and commercial paper notes, and to hold them through the end of 2020, without causing these debt instruments to be reissued or extinguished (and, as a corollary, without causing any "qualified hedge" that is integrated with those debt instruments to be treated as terminated under the arbitrage bond rules of Code Section 148). Additionally, and in contrast to the counterpart guidance promulgated in 2008 for self-purchases, IRS Notice 2020-25 does not require issuers to use "best efforts" to remarket these obligations to the public during the 2020 self-hold period as a condition for avoiding extinguishment or reissuance.

The principles of IRS Notice 2020-25 may be applied retroactively to any self-purchase occurring on or after January 1, 2020. Moreover, the Notice provides that if a governmental issuer self-purchases its VRDBs or commercial paper notes in 2020 and holds them after the end of the current year, it can do so for an additional 180 days (i.e., until mid-2021) without causing them to be extinguished, or reissued, as long as the issuer commences best efforts to remarket these instruments to the public in 2021 in a manner that is consistent with the requirements of the 2008 guidance.

The preceding is a brief summary of the provisions of Revenue Procedure 2020-21 and IRS Notice 2020-25. Please contact Antonio Martini at amartini@hinckleyallen.com (or at (617) 378-4136), or any other member of Hinckley Allen's Public Finance Group, if you would like more information about these releases or about any other developments affecting tax-exempt bonds during the COVID-19 public health emergency.

Associated People

Antonio D. Martini

Related Practices

Public Finance

Coronavirus (COVID-19) Response Team