In Response to the COVID-19 Pandemic, the IRS Releases Temporary Guidance to State and Local Issuers of Tax-Exempt Bonds

By: Todd L. Cooper and Adam C. Harden

On May 4, 2020 the Internal Revenue Service (IRS) released Notice 2020-21 (Public Hearing Notice) and Notice 2020-25 (Reissuance Notice). These Notices provide limited, temporary relief to issuers of tax-exempt bonds in two specific instances.

Public Hearing Relief.
The Existing Law. Section 147(f)(2)(B)(i) of the Internal Revenue Code of 1986 (Code) and Treasury Regulations (Reg) § 1.147(f)-1(c)(1) require an issuer of private activity tax-exempt bonds to hold a public hearing (often described as a TEFRA hearing because the requirement originated with the Tax Equity and Fiscal Responsibility Act of 1982), after proper published notice of the hearing, which hearing must be held prior to the approval of the issuance of the bonds. The published notice can be accomplished using several different means, including by a posting on the issuer’s website. Reg § 1.147(f)-1(d)(2) and (3) provide rules for the location of the public hearing and the procedures for conducting the public hearing, including a requirement that the location must be convenient for the residents of the jurisdiction. Reg § 1.147(f)-1(d)(4) provides additional rules regarding the content of the published notice for the hearing, including a requirement that the published notice state the time and place where the hearing will be held.

The Relief Sought. The American Bar Association Tax Section (Tax Section) and the National Association of Bond Lawyers (NABL) each submitted a request to the Internal Revenue Service to allow issuers of private activity tax-exempt bonds to hold a TEFRA hearing by teleconference.

The Temporary Relief Provided. For the period from May 4, 2020 to December 31, 2020, Notice 2020-21 allows issuers of private activity tax-exempt bonds to hold a telephonic TEFRA hearing but subject to one condition. The issuer must provide a toll-free (800 or similar) number in the published notice for the hearing and must make that toll-free number accessible to the residents of the affected jurisdiction. As long as a toll-free number is provided, the Public Hearing Notice does allow an issuer to also provide access to the public hearing by other telephone numbers and internet-meeting technology. An issuer may elect to apply the rules in the Public Hearing Notice retroactively to publications for and telephonic hearings held prior to May 4, 2020, if those hearings were held telephonically in response to the COVID-19 pandemic.

Relief for Issuers Holding Their Own Governmental Bonds.
The Existing Law. Section 1001 of the Code, Reg § 1.1001-3 and Notice 2008-41 (2008 Notice) set forth rules governing whether a bond is deemed to be “reissued” if an issuer buys its own bonds, holds those bonds for a period of time, and then remarkets the bonds back out to the marketplace. Generally, when a bond is purchased by the issuer, the bond is extinguished for federal tax law purposes and no longer treated as outstanding. If that issuer subsequently sold that bond back into the marketplace, it would be treated as a new bond and would have to meet all the requirements for a new bond and incur the costs of issuing a new bond. However, the IRS and Treasury have provided for certain exceptions. One important exception is for bonds that are regularly remarketed by design, which are described in Reg § 1.1001-3 as qualified tender bonds. During the extreme market conditions of the 2008 recession, the 2008 Notice allowed an issuer to buy and hold its own bonds, so long as those bonds were remarkeeted within 90 days of their acquisition by the issuer. The 2008
Notice also extended the 90 day limit to 180 days, but only for bonds purchased by the issuer before October 1, 2008.

The Relief Sought. The Tax Section and NABL each submitted a request to the IRS to allow issuers to purchase and hold their own bonds for more extended periods of time.

The Temporary Relief. The Reissuance Notice grants three forms of relief. First, it allows an issuer to purchase and hold a qualified tender bond up to 180 days, thus removing the October 1, 2008 deadline imposed by the 2008 Notice. Second, the Reissuance Notice expands the kinds of bonds covered by the 2008 Notice to include commercial paper. Third, the Reissuance Notice allows the governmental issuer to hold its bonds to the end of 2020 even if that means the bonds are held for more than 180 days.

Locke Lord’s Public Finance and Tax attorneys continue to closely monitor and provide insight into the legislative and regulatory response to the COVID-19 pandemic. Should you require any guidance on these or any other matters, our team members stand ready to assist.

For more information on the matters discussed in this Locke Lord QuickStudy, please contact the authors.

Todd L. Cooper | 513-688-8434 | todd.cooper@lockelord.com
Adam C. Harden | 512-305-4820 | adam.harden@lockelord.com

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