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Higher Education Faces Infrastructure Uncertainty

Chuck Samuels, a partner at the Mintz law firm, has over 35 years of experience representing clients with diverse regulatory and legislative concerns. Speaking with Mary Bachinger, NACUBO's director of tax policy, Chuck outlines what may be in store for colleges and universities in upcoming legislation and shares observations related to bonds and other financing tools.

As a seasoned lawyer and advocate, you have followed changes to tax-exempt and municipal bonds over a few decades. Action on infrastructure is a top priority for the Biden administration and a bipartisan agreement recently emerged for a path forward. What issues related to bonds and tax-exempt financing should colleges and universities be watching for legislative action in the coming weeks?

There is every reason to believe that we will not have a better opportunity in the foreseeable future to enact infrastructure legislation that would provide benefits to higher education. There has been a huge push by a coalition of state and local governments and nonprofit higher education and healthcare interests, of which NACUBO is a key part, on three fronts: to reverse the abolition of advance refundings; to liberalize the small borrower or bank qualified financings that are so valuable to smaller institutions who borrow from their local banks; and, at least for public universities, but possibly private institutions as well, there has been support for making more viable and useful the direct pay bonds that we saw a number of years ago.

Unfortunately, as of this writing, (July 15, 2021) advance refunding and small borrower/bank qualified financings have been left out of the bipartisan Senate package, a proposal which actually has very little in it for the nonprofit sector. There is a direct pay bond provision, but it would be limited to governmental entities only and, at this point, it appears it would not be generous or even economically viable. There is a federal infrastructure bank provision, which ultimately may have no relevance to the nonprofit sector and is of questionable value.

If this bipartisan package passes more or less as it is now proposed, then we'll need to count on the much-more-partisan budget reconciliation bill, if it moves, to include tax-exempt bond provisions.

As you know, a big-impact issue enacted as part of the 2017 Tax Cuts and Jobs Act was the repeal of advance refunding of tax-exempt bonds. Public and private colleges and universities are hoping to see reinstatement of advance refunding, which can save an institution millions of dollars over the life of a bond. How big of a loss was this for higher education? How confident are you of this being achieved in legislation this year?

The loss of advance refunding was indeed a big loss. It was premised on a number of Washington myths relating to abuses, which in fact had been eliminated as far back as 1986 under a law that restricted advance refunding to one-time-only for governmental entities and nonprofits.

There has been bipartisan support in the House and the Senate for legislation to return advance refundings in some form. But, as noted, it is not at this point part of the bipartisan infrastructure package in the Senate. That partially is because of its cost and partially because it is not as clearly related to increased infrastructure projects as some of the other provisions. Advance refundings, however, were part of the House Democratic leadership bill in the last Congress, and we have every expectation that they will be included in the House bill again.

Direct pay bonds, or an updated version of the former Build America Bonds, are also of interest to higher education institutions. What do

you see happening on direct pay bonds and the potential for private institutions to gain access to this valuable financing tool?

Direct pay bonds were both popular and reviled as part of the Obama administration's recovery and stimulus package. Public higher education institutions took advantage of them, but there was much criticism of the way the program was administered and how the application of sequestration and offsets undermined the certainty of payment streams.

In this Congress, the idea has been revived in legislation introduced in the House and Senate with reasonable subsidy levels as well as ways to deal with problems of sequestration and offsets. The bipartisan Senate package appears to apply only to public, not private, institutions and does not appear to be particularly generous, but we will have to see the details.

More private higher education institutions, their associations, and the nonprofit hospital sector need to weigh in with Congress, or they will be disappointed when they see the benefits the public sector gets from these financings.

What are the forces or circumstances at play that could be working against repeal of advance refunding or an expansion of direct pay bonds to enable access by private institutions?

Advance refunding is considered by some to be inherently abusive because it maintains for a period of time two sets of tax- exempt bonds for the same project at the same time. It is a complicated financing not easily understood or justified on the Hill. There also is a mantra among Republicans not to undo anything that occurred in the Trump-era tax legislation, and advance refunding repeal was part of that.

I think there also is a sense in the Congress that through the various pandemic relief bills, both the public and nonprofit sectors have been provided with enormous sums of money in various programs, and that more relief or assistance may not be needed. That may be an unfair characterization, particularly for private or nonprofit education, but there definitely is that perception, in my opinion.

On direct pay bonds, as I mentioned, there has not yet been enough interest shown by private education or healthcare or other nonprofit institutions in being part of any new program, so it will be easy for lawmakers leave them out. In addition, there are questions about exactly how such borrowings would be organized.

Who are the champions of these issues in Congress, and when should institutions reach out to their representatives and senators to advocate their support for measures that may be included in final infrastructure legislation?

Bipartisan Senate infrastructure legislation was created by essentially a group of some 20 senators on both sides of the aisle, but now the management of that process has been very much taken over by Senate Majority Leader Chuck Schumer.

The development of the more-partisan budget reconciliation bill, which will be much larger, will be done more through regular order and work its way through the Ways and Means and Finance committees, so advocacy with House and Senate leadership and members of the Ways and Means and Finance committees should be conducted in the usual manner.

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