

NAHEFFA Spring 2017 Conference

Hot Topics in Tax Law

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National Association
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Hot Topics in Tax Law Panel

Moderator:

Jeremy A. Spector, Executive Director, New Jersey Educational Facilities Authority

Co-Panelists:

John J. Cross III, Assistant Tax Legislative Counsel, U.S. Department of Treasury

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Panelist Agenda

- Introduction
- Treasury and Tax Reform Update
- NABL Project Update
- The Final Issue Price Regulations
- IRS Management Contract New Guidelines
- Allocation and Accounting



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NABL Projects Update

- Recent activities
 - Advocacy in support of preserving tax exemption
- Recent projects
 - DTC paper
 - Issue price project
- Ongoing (and potential future) projects
 - Rule 15c2-12 proposed amendments
 - Bank direct placements
 - Other securities law papers
 - Tax: Remedial action, arbitrage, reissuance



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Final Issue Price Regulations

- The rules/alternatives:
 - Actual sale to the “public” of 10% of the bonds
 - The “hold-the-offering-price” rule
 - Special 3-bid rule for competitive sales
- Rule of application:
 - Rules applied to groups of bonds with the same credit and payment terms (*e.g.*, separate maturities).
- Definition of “underwriter”
- Private placements



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The “Hold-the-Offering-Price” Rule

Requirements:

- The underwriter(s) **offered the bonds** to the public at a specified initial offering price on or before the sale date.
- The underwriter certifies (before issuance) to the effect of the above bullet point and provides “**reasonable supporting documentation**” such as a copy of the **pricing wire** (or equivalent communication).
- Each underwriter agrees in writing that it will not offer or sell the bonds to any person at a price higher than such bonds’ initial public offering price from the sale date until the earlier of:
 - the close of the **5th business day** after the sale date, and
 - the date on which the underwriters have **sold at least 10%** of the bonds **at or below** the initial public offering price.



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Competitive Sales

Requirements:

- Issuer offers bonds for sale to underwriters at specified written terms.
- Issuer disseminates notice of sale in a manner reasonably designed to reach potential underwriters.
- Winning bidder provides certification of bonds' reasonably expected initial public offering price as of sale date upon which price in winning bid is based.
- Equal opportunity to bid.
- Bids from **three or more** underwriters with **established industry reputations** for underwriting new issuances of municipal bonds.
- Bonds awarded based on highest price (or lowest interest cost).



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Management Contracts Revenue Procedure 2017-13

- Reasonable compensation.
- **No compensation** may be based on **net profits** from operation of facility.
- Contract does not cause service provider (manager) to bear **net losses**.
- Periodic fixed fee, capitation fee and per-unit fee do not cause sharing of net profits or losses.
- **Timing** of payments is **not contingent** on net profits or losses.



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Management Contracts Revenue Procedure 2017-13

- **Term of contract** (including renewal options) does not exceed lesser of **30 years** and 80% of economic life of “managed property.”
- Owner exercises significant degree of **control** over managed property.
- **Contract provision:** Service provider will not take tax position inconsistent with its role as service provider.
- No relationship that substantially limits owner’s ability to exercise its rights under contract.



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Allocation and Accounting – Mixed-Use Projects

- Mixed-Use Projects
- “Default” proportionate allocation of sources of funds
- Special “targeting” rule for “eligible mixed-use projects”
 - Bond proceeds allocated first to governmental uses.
 - “Qualified equity” allocated first to private business use.
- Definition of “**qualified equity**”
- Same “plan of financing”



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Allocation and Accounting – Special Provisions and Other Considerations

- Partnerships (“aggregate” treatment)
 - *E.g.*, joint ventures among 501(c)(3) organizations
- Anticipatory remedial action
- Scope of regulations
 - Governmental bonds and qualified 501(c)(3) bonds
 - What rules apply for “exempt facility” bonds and for other provisions of the Code (*e.g.*, 2% COI limit)?
- Refundings



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