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After the Bond Issuance
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Presented by:
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Outline

► Federal Tax Law Considerations
  ▶ Investment and Spending of Bond Proceeds
  ▶ Private Business Use
  ▶ Additional Post-Issuance Compliance Items

► Securities Law Considerations
  ▶ Annual Continuing Disclosure Filings
  ▶ Reportable Event Disclosure Filings
  ▶ Disclosure Policies and Procedures
Investing Bond Proceeds; Arbitrage Rebate

**Arbitrage for Tax Purposes**

- Difference between (i) what would have been earned if tax-exempt bond proceeds were invested at bond yield and (ii) the earnings on the investment of such tax-exempt bond proceeds in higher yielding securities.

**Rebate**

- Issuer must pay (or rebate) arbitrage profits to federal government.
- Anything above bond yield gets paid to the US Treasury, unless you meet one or more exceptions
  - Small Issuer Exception
  - Spend-Down Exceptions
3-Year Spend Down Requirement

- Bonds issued for capital projects generally qualify for a 3-year temporary period
  - A temporary period is a period of time during which bond proceeds may be invested at materially higher yields than the bond yield
  - Based on reasonable expectations at the time of issuance
    - Must expect to spend sale and investment proceeds:
      - Expenditure Test – 85% within 3 years
      - Time Test – 5% within 6 months
Beginning on the third anniversary of the issuance of the bonds, any unspent proceeds must:

- Be yield-restricted
  - Yield on investments can’t exceed the yield on the bonds
- Be invested in investments which are not guaranteed by the federal government
  - No FDIC-insured CDs
  - Exception for U.S. Treasury Securities
Arbitrage Rebate Post-Issuance Tasks

- Track Arbitrage Rebate (investment returns against bond yield)
- Keep separate account/accounting of expenditure of bond proceeds and bond-financed projects
- Monitor compliance with temporary period expectations for expenditure of bond proceeds
- Monitor compliance with 6-month, 18-month or 2-year spending exceptions to rebate, if relevant
- Arrange for timely computation of rebate liability and, if rebate is payable, for timely filing of Form 8038-T and rebate payment
Private Business Use

- Tax-exempt Bonds cannot be private activity bonds
- A Private Activity Bond is a bond that fails both:
  - The Private Business Use Test
  - The Private Payments/Security Test
- De Minimis Allowance
  - Private business use is limited to 10%, but
  - 5% limit for “unrelated” or “disproportionate” private business use (with little guidance from the IRS), so most tax counsel use the 5% limit as the baseline
Private Business Use and Payments

“Private business use”

- More than 5% of bond proceeds finance a public facility used by a non-governmental trade or business
- Examples of private use:
  - Sale, transfer or lease of property to private user
  - Management of property by private user under a management contract

“Private payment or security”

- More than 5% of debt service on the bonds is secured by an interest or derived from payments related to private use
- Example of private payment:
  - Payments of lease rentals to the issuer by a private operator
Private Business Use Post Issuance Tasks

- Allocate bond proceeds and funds from other sources to ensure that bond proceeds are used for qualifying costs
- Monitor private use of bond-financed facilities
  - Ensure compliance with applicable percentage limitations
- New sale, lease license, management contract?
  - Determine whether applicable exception applies or whether it triggers failure of test
- Keep records of leases and management contracts even if expired
Final Post-Issuance Tax Tasks

► Record Retention
  ▶ Retain records related to expenditure of bond proceeds and use of facilities for term of bonds plus 3 years
  ▶ Term of refunding bonds plus 3 years for refunded issues

► Post Issuance Compliance Policy with the following components:
  ▶ Designate a compliance officer
  ▶ Retain accurate records
  ▶ Implement procedures to timely identify and correct non-compliance
  ▶ Report periodically to elected officials
Continuing Disclosure Requirements
Record Retention

- Retain records related to expenditure of bond proceeds and use of facilities for term of bonds plus 3 years
- Term of refunding bonds plus 3 years for refunded issues

Post Issuance Compliance Policy with the following components:

- Designate a compliance officer
- Retain accurate records
- Implement procedures to timely identify and correct non-compliance
- Report periodically to elected officials
Continuing Disclosure

- Applies to any Issuer that has publicly-sold bonds outstanding
  - Does not apply to private placements
  - Exception – Par amount of Bonds is less than $1 million

- Three Components
  - Reportable Events
  - Audited Financial Statements
  - Annual Financial Information
    - Does not apply if, at time of issuance, issuer had less than $10 million outstanding
Filing Timelines

► Reportable Events
  ▶ Within 10 business days after occurrence of the event

► Audit/Annual Financial Information
  ▶ Determined by the Agreement
  ▶ Typically 210 days after the close of the fiscal year
Reportable Events

► Most common
  ▶ Rating Change
  ▶ Bond Call
  ▶ Payment Delinquency

► Two new events added after February 27, 2019
New Reportable Events

Either

- Incurrence of a Financial Obligation if Material, or
- Agreement to covenants, events of default, remedies, priority rights, in a Financial Obligation which affect security holders, if material

- Default, Acceleration, Termination, Modification of Terms or similar event with respect to a Financial Obligation reflecting financial difficulty
Consequence of CDU Filing Failure

- Bondholders may sue for specific performance
- Rule 15c2-12 requires issuers to disclose CDU non-compliance in official statements (five year look back)
- May impact access to market or result in increased interest rates on new issuances
- Districts that fail to make CDU filings may also face SEC action for other statements that reach the market, if materially misleading
Contact

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