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Proposed Tax Reform Puts Key Public Finance Tools On the Chopping Block

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On November 2, 2017, the Committee on Ways and Means of the U.S. House of Representatives released its highly anticipated proposed tax reform legislation (the "Proposed Legislation"). The Proposed Legislation deals a severe blow to issuers and conduit borrowers by **eliminating all tax-exempt private activity bonds (including qualified 501(c)(3) bonds) and tax credit bonds**. While preserving most aspects of tax-exempt "governmental" bonds, the Proposed Legislation **prohibits tax-exempt advance refundings and financing professional sports stadiums**. In addition, other provisions of the Proposed Legislation could potentially affect issuers and conduit borrowers, including changes to individual and business tax rates and repeal of the alternative minimum tax.

It is difficult to overstate the impact that the Proposed Legislation, if enacted, would have on the public finance market and the development of many important infrastructure projects. As the legislative process moves forward, it is important for issuers and other beneficiaries of tax-exempt and tax-advantaged financing that oppose the Proposed Legislation to work together to let members of Congress and the Trump Administration know their opposition and the impact of these proposed measures. We understand that the Senate will likely take up its own tax bill, which could be released as soon as next week, and the two bills will be moving concurrently. As such, time is of the essence in addressing the Proposed Legislation.

Termination of Private Activity Bonds (Section 3601)

Under the Proposed Legislation, the interest on any private activity bonds issued after 2017 would be included in income and, thus, subject to tax. This means that the following types of projects, among others, that have some private use component, but that provide important benefits to the general public, could not be financed on a tax-exempt basis:

- Projects owned by section 501(c)(3) organizations (e.g. hospitals, senior living facilities, private colleges and universities, independent and charter schools, museums and arts organizations);

- Low-income multifamily housing developments;

- Single family mortgages for veterans and low-income individuals;

- Airports;

- Docks, wharves and ports;
- Sewage and solid waste facilities;
- Mass commuting facilities; and
- Facilities for the furnishing of water.

Increasing the financing costs of these types of facilities by eliminating the tax-exempt status of bonds issued for these purposes could affect the feasibility of these projects and would, at a minimum, increase their cost. While the Proposed Legislation would not retroactively make the interest on already outstanding tax-exempt bonds taxable, we note that the loss of tax-exemption for private activity bonds would include any refunding or other tax law reissuance of already outstanding tax-exempt private activity bonds.

Repeal of Advance Refundings (Section 3602)
Governmental issuers and issuers of qualified 501(c)(3) bonds would lose the benefit of issuing advance refunding bonds on a tax-exempt basis. The Proposed Legislation would make taxable interest on all advance refunding bonds issued after 2017 (i.e., refunding bonds issued more than 90 days before the redemption of the refunded bonds), limiting the ability of issuers to lock-in debt service savings, restructure debt service or to achieve relief from unfavorable financing terms.

Repeal of Tax Credit Bonds (Section 3603)
Many governmental issuers also would be affected by the Proposed Legislation's elimination of "tax credit bonds," such as qualified school construction bonds, qualified zone academy bonds, and qualified energy conservation bonds. Although interest on tax credit bonds is not tax-exempt, these types of bonds have nevertheless allowed issuers to achieve a lower cost of capital on infrastructure projects by entitling the holder to a federal tax credit or, in certain cases, the issuer to receive a subsidy payment directly from the federal government. Holders and issuers of tax credit bonds issued before December 31, 2017, would continue to be entitled to receive the federal tax credit or federal subsidy payment, as applicable, but no new tax credit bonds could be issued after 2017.

No Tax-Exempt Bonds for Professional Stadiums (Section 3604)
The Proposed Legislation would eliminate the tax-exemption of interest on bonds issued to finance the construction of, or capital expenditures for, any facility that is used as a stadium or arena for professional sports exhibitions, games or training for at least five days in any calendar year. This provision of the Proposed Legislation, unlike others, would be effective for bonds issued after November 2, 2017.

Takeaway
If enacted as currently drafted, the Proposed Legislation would undoubtedly increase the costs of projects, all of which touch on the most basic functions of government or provide essential public services. Some would come at a higher cost users and/or taxpayers, and some would simply never come to fruition.

Bracewell will continue to closely monitor the Proposed Legislation and communicate new developments. It is safe to say that, having introduced these proposals as part of the Proposed

Legislation, members of Congress are unlikely to drop them of their own initiative. The proverbial ball is in the court of issuers and conduit borrowers to make both members of Congress and the Trump Administration and the public aware of the negative effect of these proposals. In that regard, our Public Finance team, as well as the members of Bracewell's D.C.-based ***Policy Resolution Group***, are on standby to assist. There are still opportunities in the process to remove these provisions, but things are poised to move quickly. With the introduction of the Proposed Legislation serving as an opening salvo, it is critical that stakeholders enter the discussion as soon as possible.

For more information regarding the Proposed Legislation, please contact any of Bracewell's Public Finance Tax Attorneys (***Charlie Almond***, ***Steve Gerdes***, ***Todd Greenwalt***, ***Victoria Ozimek***, or ***Brian Teaff***). Click ***here*** for the text of a section-by-section summary of the Proposed Legislation prepared by the Committee on Ways and Means.