Legislative, Treasury and Internal Revenue Service Update. This panel will discuss: (i) an update on “new” Office of Tax Exempt Bonds; (ii) the status of the Final Reissuance Regulations; (iii) the proposed regulations addressing reference rates other than Interbank Offered Rates; (iv) the Internal Revenue Service Business Plan items for 2019-2020; (v) the Internal Revenue Service Audit Plan (Fiscal Year 2020 Compliance Program); and (vi) Indian River County case update.

I. The “New” Office of Tax Exempt Bonds.

The IRS announced that it would reverse a May 2017 reorganization that consolidated the Tax Exempt Bonds office with the Indian Tribal Government office. This change went into effect November 23, 2019.

Allyson Belsome was named senior manager of the “new” Office of Tax Exempt Bonds. Belsome served as senior manager of ITG/TEB Technical that was responsible for generating computer-driven guidance for field exams since the May 2017 reorganization, and she oversaw the VCAP program, compliance reviews, technical assistance to agents, and direct pay bonds, among others.

This separation is not expected to change the number of annual audit examinations, which totaled 480 in FY 2018 and was expected to be around 500 in FY 2019.

New Structure (as of November 23, 2019):
II. Update on Final Reissuance Regulations.

The United States Department of the Treasury and the Internal Revenue Service released the proposed reissuance regulations on December 31, 2018. The proposed reissuance regulations will take effect 90 days after they are published as final regulations in the Federal Register, but issuers of tax-exempt obligations may elect to currently apply the proposed reissuance regulations. Alternatively, issuers may apply Notice 88-130 or Notice 2008-41.

In November 2019, John Cross III announced that he resigned from his position as associate tax legislative counsel at the Office of Tax Policy, creating a temporary vacancy at the top Treasury Department position that oversees municipal finance tax issues. As a result of this vacancy, all tax-related regulatory initiatives will likely remain on hold until a successor is hired. Although Mr. Cross’s former position as associate tax legislative counsel at the Office of Tax Policy is not a political appointment, but there is no public word yet on when the position is anticipated to be filled. Once a successor to Cross is appointed, the expectation is that the Department of Treasury and the Internal Revenue Service can finish the final phases of producing the final Regulations on reissuance.

III. Proposed Regulations Addressing Reference Rates Other than Interbank Offered Rates.

On October 9, 2019, the United States Department of the Treasury published proposed regulations that address the federal tax consequences of the expected phase-out of the London interbank offered rate (LIBOR) after 2021 and possible elimination of all interbank offered rates (IBORs). The intent of these proposed regulations generally is to provide federal tax relief that minimizes the economic impact of the elimination of IBORs, including LIBOR.

The proposed regulations address both debt instruments and other financial instruments that reference an IBOR, e.g., a debt instrument providing for interest based on U.S. dollar LIBOR and derivatives.

Timing of the Proposed Regulations. The proposed regulations may be applied immediately and regardless of whether, or when, LIBOR is actually phased out. The proposed regulations generally would be required to be applied after the date of publication of final regulations, although the exact wording of the effective date differs somewhat depending on the type of financial instrument.
Sale or Exchange of Debt Instruments. The proposed regulations generally provide that a change from an IBOR-referencing rate to another rate will not result in a tax reissuance if the fair market value of the debt instrument after the alteration is substantially equivalent to the fair market value of the debt instrument before the alteration. For this purpose, the proposed regulations provide two safe harbors. The proposed regulations also permit certain associated alterations to include the obligation of one party to make a one-time payment in connection with the replacement.

The first safe harbor is based on a comparison of historic average rates. The safe harbor is met if the historic average of the original rate does not differ by more than 25 basis points from the historic average of the replacement rate (taking into account any one-time payment that is made in connection with the alteration).

The second safe harbor is met if the parties to the debt instrument are not related and they determine, based on bona fide, arm’s length negotiations between the parties, that the fair market value of the debt instrument before the alteration is substantially equivalent to the fair market value after the alteration. For this purpose, the fair market value of the debt instrument must take into account the value of any one-time payment that is made in connection with the alteration, but query whether an issuer may use tax-exempt bonds to finance this one-time payment, or, if the issuer is the recipient of the one-time payment, whether the issuer must treat this payment as proceeds of a tax-exempt issue. It is expected that this second safe harbor will be relied upon heavily by the public finance community.

As Treasury responds to comments received in the wake of the proposed regulations, we can expect that the final regulations will likely see thoughtful changes. However, practitioners should take comfort that the proposed regulations appear to evidence Treasury’s willingness to provide meaningful and flexible guidance that sets forth alternative paths that do not cause widespread reissuances, an outcome that many practitioners feared inevitable in the wake of the LIBOR phase out announcement.


On October 8, 2019, the U.S. Department of the Treasury and the Internal Revenue Service announced the release of the annual Priority Guidance Plan, which sets forth guidance priorities for Treasury and the IRS. The 2019-2020 Priority Guidance Plan contains guidance projects that will be the focus of efforts during the twelve-month period from July 1, 2019, through June 30, 2020 (the plan year). The 2019-2020 Priority Guidance Plan contains 203 guidance projects, and items that relate directly or indirectly to tax-exempt financing include the following:

A. Exempt Organizations

2. Guidance on circumstances under which an LLC can qualify for recognition under §501(c)(3).

B. Tax-Exempt Bonds


2. Guidance under §§144(b) and 150 on qualified student loan bonds.
3. Revenue procedure on the recovery of rebate under §148.

4. Guidance on direct payments for tax-advantaged bonds under §6431.

5. Guidance on the tax-advantaged bond appeals procedures.
   [“Guidance on tax-advantaged bond appeals procedures” appeared as the final item on the 2018-2019 Priority Guidance Plan for Tax-Exempt Bonds.]

V. 2020 Annual Audit Plan.

In October 2019, the office of the Treasury Inspector General for Tax Administration (TIGTA) released its 2020 Annual Audit Plan. Noteworthy items include:

1. Internal Revenue Code Section 6700 Tax Promoter Penalty Consideration Documentation
   Audit Number: 201810023
   Determine whether IRS management has controls in place that provide reasonable assurance that examiners consider I.R.C. §6700 Abusive Tax Shelter promoter penalties when performing tax-exempt bond examinations.
   [This appeared in TIGTA’s 2019 Annual Audit Plan.]

2. Direct Pay Bond Refund Claims Process
   Audit Number: 201910015
   Determine whether the Tax Exempt Bonds Office has developed and implemented controls to accurately and timely pay direct pay bond refund claims and prevent the disbursement of erroneous payments.
   [This appeared in TIGTA’s 2019 Annual Audit Plan.]

3. Noncompliant Activity by Exempt Organizations
   Audit Number: 201910021
   Determine whether IRS processes are sufficient to detect potentially noncompliant activities by tax-exempt organizations.

4. Tax Exempt and Government Entities Division’s Examination Workload Selection
   Audit Number: 201910022
   Assess the overall effectiveness of the Tax Exempt and Government Entities Division’s Compliance, Planning, and Classification Unit Exempt Organization’s examination selection process.

5. Tax Exempt and Government Entities Division’s Examinations of Unrelated Business Income Tax
   Audit Number: 201930025
   Review the Tax Exempt and Government Entities Division’s efforts to identify and examine organizations with unreported or underreported unrelated business income tax.

6. Excise Taxes on Tax-Exempt Organizations with Highly Compensated Employees
   Audit Number: 202010012
   Assess the IRS’s efforts to ensure that tax-exempt organizations with highly compensated employees comply with the excise tax reporting requirements.

7. Indian Tribal Governments Noncompliance
   Audit Number: 202010013
   Assess the Indian Governments function’s efforts to identify noncompliant activity.
8. Excise Tax on Investment Income of Private Colleges and Universities  
*Audit Number: 202010014*
Evaluate the IRS’s processing controls and guidance related to excise taxes on the net investment income of certain private colleges and universities.

9. Tax Compliance of Taxpayers with Tax Exempt Requirements  
*Audit Number: 202010311*
Assess the implementation of the Patient Protection and Affordable Care Act provisions that impose additional tax-exempt requirements on hospital organizations.

VI. Indian River County Case Update.

The U.S. Department of Transportation properly determined that Florida’s privately owned passenger train project qualified to use federal private activity bonds, according to the U.S. Court of Appeals for the District of Columbia. In a unanimous decision penned by Senior Circuit Judge Harry T. Edwards on Dec. 20, the appellate court said that Indian River County, Florida, had standing to bring its complaint challenging the USDOT’s allocation of PABs for Virgin Trains USA and to contest the project’s environmental impact statement, or EIS, as part of the National Environmental Policy Act review process. The county, however, failed to prove that Virgin Trains improperly benefited from federal funds allocated under Title 23, the federal code defining the projects eligible for credit assistance that USDOT used to determine that the passenger train project was qualified for PAB financing.

Judge Edwards stated in his 32-page decision, “We hold that DOT permissibly and reasonably determined that the project qualifies for tax-exempt PAB financing [and] we also hold that the EIS for the project adheres to the commands of NEPA.”

The appellate ruling confirmed findings by U.S. District Judge Christopher Cooper in a Dec. 24, 2018 decision, in which he granted motions for summary judgment sought by the USDOT and Virgin Trains USA, also known as Brightline and All Aboard Florida.

Judge Cooper’s decision cleared legal obstacles for the PABs at the federal district court level, which led to the sale of bonds through the Florida Development Finance Corp. as the conduit issuer.

Since federal litigation over the project began in 2015, the USDOT has authorized three tranches of tax-exempt PABs — $600 million issued in 2017; $1.15 billion issued in April; and $950 million issued in June. The $600 million of bonds issued in 2017 were redeemed in conjunction with the April sale.

The appellate panel consisting of Chief Judge Merrick B. Garland, Judge Sri Srinivasan, and Edwards heard oral arguments in September, and the panel endorsed the District Court’s opinion, calling it “an impressively thorough and thoughtful examination of the record.”

The appellate justices concluded, “The bottom line is that the final EIS clearly complies with the requirements of NEPA.”

Indian River County may still appeal the ruling to the U.S. Supreme Court.