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As we continue to deal with the ongoing COVID-19 pandemic and the accompanying disturbances to the marketplace, questions have arisen as to the ramifications for municipal issuers stemming from the response to the outbreak and its effect on the markets. This message is designed to convey the [Public Finance Tax group's](#) current guidance for attorneys and clients. We will keep you abreast of more changes and issues as they develop.

CONDUCTING TEFRA HEARINGS SUBJECT TO LIMITED MOVEMENT OR SHELTER-IN-PLACE ORDERS

The TEFRA regulations require that certain private activity bonds be approved by a governmental unit following a public hearing that is, “a forum providing a reasonable opportunity for interested individuals to express their views,” regarding the bonds and the location and nature of the proposed project to be financed. Issuers can generally select their own procedures for conducting the hearings as long as there is such reasonable opportunity afforded to the public. However, language in the preamble to the TEFRA regulations indicates that hearings conducted entirely online or by conference call may not give the public the requisite opportunity. In the current situation, many jurisdictions have limited the ability to conduct in-person meetings that are open to the public due to work-from-home policies, restrictions on assembly, or full shelter-in-place orders. NABL recently requested that the IRS release guidance specifically approving the use of virtual hearing procedures that provide for toll-free telephone access by members of the general public (with or without an option for online access).

Pending a response from the IRS, Kutak Rock’s [Public Finance Tax group](#) advises as follows: If an in-person TEFRA hearing can still be conducted in compliance with the applicable orders and guidance of a particular jurisdiction, then it can proceed as normal. Issuers can also provide toll-free telephone access to an otherwise in-person hearing, or an opportunity to submit written comments in advance, if they wish to accommodate members of the public who may not want to attend in person. If it is not possible in the current circumstance to hold an in-person meeting, then conducting the meeting via teleconference line (with or without an option for online access) is an acceptable way to fulfill the TEFRA requirements. For teleconference public hearings, toll-free telephone numbers should be used, i.e., those starting with the prefixes 800, 888, 877, 855, 844, and 833, and the TEFRA notice should include the telephone number (as well as any applicable web address). If an in-person meeting has already been announced with advance notice published, and subsequently it becomes impossible to hold the meeting in-person, then generally a supplementary notice providing the toll-free telephone number will need to be published at least 7 days before the meeting. Please direct any questions about unusual situations to the tax group.

VRDO PROGRAMS

As the economic impact of the COVID-19 pandemic has propagated through the marketplace, variable rate demand obligation (VRDO) issues have become less liquid and the interest rates on such obligations have risen. Issuers have inquired regarding the tax impacts of issuers buying and holding their own VRDOs. As a general matter, if the issuer of an obligation purchases its obligation, the debt evidenced by the obligation is extinguished. If the issuer subsequently re-sells the obligation, then the re-sold obligation must be treated as a new issue and must satisfy all requirements of the tax code at the time of re-sale as a condition to retaining tax-exempt status. In 2008, facing similar economic circumstances, the IRS released Notice 2008-41, which provides guidance and relief for issuers planning to purchase their own obligations until liquidity returns to the market. Notice 2008-41 allows an issuer to purchase and hold its own VRDO for a 90-day period without the

VRDO being extinguished as long as the purchase is done pursuant to a “qualified tender right.” Such a right may be optional or mandatory, but must be provided for under the terms of the original issuance, must be at par, and the issuer or the remarketing agent must use its best efforts to keep remarketing the bond after the purchase. Note that these limitations on purchases apply only in the case of an issuer purchasing its own VRDO; a third-party liquidity provider or another entity (such as a conduit borrower) purchasing and holding for more than 90 days is not generally a problem. Proposed regulations contained in Prop. Treas. Reg. § 1.150-3 include very similar provisions that may also be relied on by issuers.

While portions of the relief provided by Notice 2008-41 and its successors temporarily applied to commercial paper programs, those provisions have expired. Thus, an issuer repurchasing its own commercial paper would cause it to be extinguished, so that it would be treated as newly issued on any subsequent resale.

The IRS is aware of the difficulties with short-term obligation liquidity and guidance has been requested.

The [Public Finance Tax group](#) at Kutak Rock is working to keep you updated on the latest developments in this situation. Please do not hesitate to reach out to any of the attorneys listed below.

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