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Build America Bond Update: Power Agencies Petition U.S. Supreme Court to Review Federal Circuit Sequestration Ruling

On July 13, 2023, the plaintiffs in *Indiana Mun. Power Agency v. United States* filed a petition for a writ of certiorari with the U.S. Supreme Court for review of a ruling by the United States Court of Appeals for the Federal Circuit in which the Court of Appeals ruled that Build America Bond interest refund payments are subject to sequestration by federal agencies. The U.S. Supreme Court has not yet responded to the petition.

Background on Build America Bonds

In 2009, in response to the financial crisis, Congress passed the American Recovery and Reinvestment Act (the “ARRA”), which included a new program meant to incentivize infrastructure investments by state and local governments and increase federal tax revenues – the Build America Bonds program (the “Program”). Under the Program, state and local governments would issue taxable bonds instead of their normal tax exempt bonds through an irrevocable election that the bonds be taxable, and in exchange for paying the higher interest rates on taxable bonds, the issuers would receive federal refunds of 35% of the interest payments on said bonds. In reliance on the federal government’s commitment to provide refunds, state and local governments issued over \$181 billion in taxable Build America Bonds.

Sequestration

In 2013, the Office of Management and Budget (“OMB”), the Department of the Treasury (“Treasury”) and the Internal Revenue Service (“IRS”) determined that the Build America Bond refunds were subject to mandatory budget sequestration (reduction of spending) under the Budget Control Act (as supplemented and extended by subsequent statutes) and stopped making full refund payments under the Program.

Congress has extended sequestration through 2031, and thus the determination will continue to have a detrimental impact on issuers under the Program unless the U.S. Supreme Court rules that they are entitled to full interest payments and that the Program is exempt from sequestration. The consequence of this sequestration is estimated at over \$2 billion in unpaid refunds to state and local government issuers.

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The Case

Petitioners, a group of midwestern power agencies who issued taxable Build America Bonds under the Program, brought a case under the theories that: 1) because of Congress's express direction that Treasury "shall pay" the interest refunds, the ARRA was a money-mandating statute and any cancellation of obligations under a money-mandating statute must be done expressly by Congress, not federal agencies; and 2) by passing the ARRA, Congress created a contractual obligation to make the 35% interest payment refunds.

The Court of Appeals rejected both arguments, reasoning first that Congress impliedly repealed the payment obligation when it passed the American Taxpayer Relief Act of 2012 (the "ATRA") because the new ATRA contained sequestration provisions that conflicted with the provisions for the Program under the ARRA, and second, that for a statute to create a contractual payment obligation, the statute must frame any payments as a contractual obligation through language, and the ARRA did not do so.

Petitioners, in their submission to the U.S. Supreme Court, have argued that the Court of Appeals erred, because: 1) the ATRA contained provisions clarifying that sequestration only applies to programs not funded by appropriation acts, and the Program is funded by an appropriation act (the ARRA), thus there was no conflict between the ARRA and the ATRA; and 2) statutory contractual obligations are evaluated with respect to context, and the ARRA committed the government to "invest" in infrastructure through the Program thus clearly creating an offer, and state and local governments accepted that offer and provided consideration when they issued taxable Build America Bonds and forewent the opportunity to instead issue tax exempt bonds.

Unless and until the U.S. Supreme Court grants the petition and reverses the Court of Appeal's decision, issuers of Build America Bonds should continue to plan for reduced refunds under the Program.

If you have any questions about this, please contact Kutak Rock attorneys Frederic Marienthal or Anna Wilbourn, listed on the left. You may also visit us at www.KutakRock.com.

