<u>**Effect of Retroactive Date In Tax Legislation**</u>

The pending Tax Cuts and Jobs Act, H.R. 1, contains a general effective date of January 1, 2018. This is a scenario familiar to those municipal bond professionals who were involved in public finance in 1985. That year the U.S. House of Representatives passed the Tax Reform Act of 1985 (H.R. 3838), with a general effective date of January 1, 1986. However, the Senate did not take up tax reform until 1986, and because of the general effective date of H.R. 3838, there was widespread uncertainty in the tax-exempt market. In fact many areas of public finance were effectively paralyzed, unable to come to market.

Today many municipal bond industry participants who came "of age" after 1985 (which is a majority of market participants) seem surprised to hear that municipal bonds that would be prohibited for being issued after 2017 under H.R. 1 (*i.e.*, private activity bonds, advance refundings and tax credit bonds) generally cannot come to market while H.R. 1 is "merely pending."

Thus, for example, presume that H.R. 1 passes the House in 2017 with its current provisions as to municipal bonds, but the Senate does not pass its version of tax reform in 2017, or passes a version different than H.R. 1, and a Conference Committee must meet and resolve the differences, and the two Houses have not finally passed the Conference Committee's bill in 2017. Why should that stop the issuance of bonds in 2018 before the proposed new provisions are enacted?

As the National Association of Bond Lawyers ("NABL") stated in May 2000 (when I was President of NABL) when it released a "Statement of the Board of Directors of NABL Regarding Retroactive Tax-Exempt Bond Legislation:"

"The fact that the effective date in a bill as introduced is not binding on Congress and can, and often is, changed as the bill works its way through the legislative process to enactment does not solve the problem. In the tax-exempt securities market, the mere [pendency] of a bill with [a retroactive] effective date can halt financings that could be adversely affected by the bill, regardless of whether the bill ever has a hearing or is even considered by a Congressional committee....

"To some extent, this consequence is a result of the unique characteristics of the tax-exempt bond market. Buyers will not purchase bonds bearing a tax-exempt rate of interest unless the bonds are accompanied by an unqualified opinion of bond counsel that interest on the bonds is excluded from gross income for federal income tax purposes. Bond counsel cannot render a customary unqualified opinion regarding the tax-exempt status of interest on the bonds if a bill that would adversely affect that status is pending with a retroactive effective date. The bonds may be exempt from tax under existing law, but bond counsel's opinion must be qualified by reference to the pending bill and its retroactive effective date."

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