

We Heard You Missed Us – We’re Back! To Talk about Business Days.

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It’s fall, and that means two things. Pumpkin spice everything, and a calendar that’s replete with holidays – Sukkot, Halloween, Thanksgiving, and Sweetest Day^[1] to name but a few. Diligent readers of The Public Finance Tax Blog will remember that we [previously posted](#) an exhaustive analysis of the “hold-the-offering-price-method” of establishing the issue price of tax-exempt bonds (the “HTOP Method”). These same readers no doubt remember Treasury regulation § 1.148-1(f)(2)(ii)(B), which requires that the underwriter agree in writing neither to offer nor sell a bond to which the HTOP Method will apply at a price that is higher than the bond’s initial offering price to the public for a period that begins on the sale date of the issue and that ends on the close of the fifth business day after the sale date.^[2]

These readers are now perhaps wondering whether, given the surfeit of autumnal holidays, they have correctly counted the number of business days to achieve a successful invocation of the HTOP Method. Don’t worry; we’re here to help.

The Internal Revenue Code does not set forth a definition for “business day.” Likewise, the Treasury regulations promulgated under Code Sections 148 and 150 do not provide such a definition. There are, however, at least three Treasury regulations that define the term business day – §§ 301.6708-1(f)(2), 31.3406(d)(-5(b)(3), and 31.6302-1(c)(2)(iii). These regulations define business day identically as “any day other than a Saturday, Sunday, or legal holiday (within the meaning of section 7503).”

It is a canon of statutory/regulatory construction that, absent a clear indication to the contrary, a term should have the same meaning when used in different statutes or regulations within the same body of law. Under this canon, “business day” as used in Treas. Reg. § 1.148-1(f)(2)(ii)(B) should have the same, uniform meaning as contained in other provisions of the Treasury regulations, because nothing in Treas. Reg. § 1.148-1(f)(2)(ii)(B) makes it clear that “business day” should have a different meaning. Saturdays, Sundays, and legal holidays as defined in Section 7503 of the Code should therefore be excluded from the count of business days to determine whether the HTOP Method has been satisfied.

Code Section 7503 defines a “legal holiday” as “a legal holiday in the District of Columbia.” [§ 28-2701 of the Code of the District of Columbia](#) specifies the following days as legal holidays in the District:

- New Year’s Day (January 1);
- Martin Luther King, Jr.’s Birthday (third Monday in January);
- District of Columbia Emancipation Day (April 16);
- Memorial Day (last Monday in May);
- Independence Day (July 4);
- Labor Day (first Monday in September);
- Indigenous Peoples’ Day^[3] (second Monday in October);
- Veteran’s Day (November 11);
- Thanksgiving Day (fourth Thursday in November);
- Christmas Day (December 25);
- Any day appointed by the President of the United States as a day of public feasting or thanksgiving; and
- The day on which the President is inaugurated (January 20 in every fourth year, commencing on January 20, 1981).

28-2701 of the D.C. Code further provides that if New Year’s Day, D.C. Emancipation Day, Independence Day, Veteran’s Day, or Christmas falls on a Saturday, the legal holiday is observed on the immediately preceding day (i.e., on Friday). Moreover, if any of these holidays fall on a Sunday, the legal holiday is observed on the immediately following day (i.e., on Monday).

And now you know the days that are excluded from the count of “business days” to determine compliance with the HTOP method. Exclude them accordingly.

^[1] Which fell on October 17, so it’s too late if you forgot.

^[2] This period will end on the date on which the underwriter sells at least 10% of the bond to the public at a price that does not exceed the bond’s initial offering price, if that date precedes the close of the fifth business day after the sale date.

^[3] Columbus Day in other jurisdictions.