Shelf Registration Extended Offering Period: Ready for Municipal Marketplace?

Article By:

Heidi H. Jeffery

Recently, a significant municipal issuer entered the market with its first sale under a $1 billion borrowing program that will use an offering statement style novel to the municipal market. For years, issuers of traditional corporate securities have used shelf registration for their securities. Shelf registration is a registration of a “new issue” which can be prepared up to two years *in advance* of the date on which the securities are actually issued and sold, so that the issue can be offered quickly as soon as funds are needed or market conditions are favorable.

There are several ways in which municipal securities issuers and conduit borrowers (including hospitals and health care systems) can implement a similar process to facilitate flexibility in the issuance of municipal securities, particularly during a turbulent market environment. So what are the benefits of such a process? What requirements would need to be considered in order for an issuer or conduit borrower to satisfy federal income tax laws and federal securities laws and standards applicable to the issuance of tax-exempt municipal securities? We’ll explore those questions and more in our two-part blog series.

Key Takeaways

- Most of the laws respecting registration of securities, including shelf registration, do not apply to municipal securities. However, the registration regime is a useful framework in which to develop a program similar in effect to that of shelf registration.
- The recent issuance allows a major public university to enter the market over a 16-month period with multiple issues under a single offering document with a supplemental bond document offered for each series.
- The design – which gives the university structuring flexibility – closely mirrors a corporate shelf registration program, allowing the university to move more nimbly when attractive market opportunities arise. The school published a “base” offering statement and a supplement was also released related to the individual series.
- The “base” document serves as a template and will address the “mechanics and security features applicable to all program bonds” and allows for flexible structuring that includes fixed-

and floating-rate and tax-exempt and taxable structures, according to an investor presentation.

- A "shelf registration" municipal securities disclosure program may be well suited to large health care borrowers, especially those with locations – and borrowings – in multiple states by allowing use of a substantially identical "base" document that describes the system, coupled with a supplemental front piece that is specific to each issue. Although a "shelf registration" approach to disclosure may have substantial utility for certain borrowers, there are a number of important issues that should be considered when setting such a program up. Set forth below are summaries of certain regulatory and contractual issues. In Part 2 of this blog, we will address considerations relating to implementation of such a program.

Regulatory and Contractual Considerations

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1. Governmental Approvals:

    1. **TEFRA Hearing and Approval** of a plan of finance for a particular facility or a project located generally at one site is valid for three years, provided the first series of bonds to finance that facility or project is issued within one year following the date of the approval. The projects should be described as comprehensively as possible consistent with a two-year extended offering period, but also meeting the specificity required by federal law, such as addresses or description of locations. If the series are to be issued on a multi-state basis, then advance TEFRA notices, hearings and approvals would be required in each jurisdiction.

    2. **The "Bond Resolution."** Some governmental issuers, by law, regulation or internal policy, require that "substantially final" documentation be approved by the board of the governmental issuer as a condition of the approval. A "substantially final" submission rule will most likely necessitate that the governmental issuer approve each series prior to issuance, if "substantially final" means that the actual terms of the bonds must be described in those documents, thus making an extended offering program less useful. Other governmental issuers, however, may be more flexible and approve the issuance of bonds on the basis of "parameters" resolutions, authorizing bonds the terms of which fall within those parameters (such as principal amount, interest rates or methods by which interest rates are determined, redemption provisions, compensation to the underwriter, and maturity), making these issuers a better bet for an extended offering program.

    3. **Regulatory Approval**. If bonds are intended to finance a project that requires regulatory approval under state law, such as certificate of need, then the duration of the validity of relevant state regulatory approval of that project will affect when bonds must be issued (or perhaps proceeds applied) during the extended offering period. The shorter the duration of the approval, the more the program can be compromised.

2. Corporate Approvals:

    1. Boards of non-profit corporations (including hospitals and health care systemts) that are more comfortable with relatively broad authorizing resolutions are more likely to benefit from an extended offering program, since such an approval can be prepared well in advance of issuance and address multiple issues.

3. Tax Issues:

    1. Although each new series of bonds issued during the extended offering period will be a new and separate “issue” for federal income tax purposes, it might be possible to structure a single series of bonds issued during that period that would be treated as a part of a single larger issue for tax purposes. In particular, the Treasury Regulations permit bonds issued pursuant to a “draw-down loan” to be treated as part of a single issue. The issue date of a draw down loan is the first date on which the aggregate draws under the loan exceed the lesser of $50,000 or 5 percent of the issue price. Little guidance under this provision exists, but it is possible that a program could be structured to be the functional equivalent of a “draw-down loan.” If so, it may be unnecessary to deliver new tax opinions to investors for each series. Such an approach could also avoid the risk of change of law between the first issue date and subsequent drawings.

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