National Association *of* Bond Lawyers

**PRACTICE POINTERS FOR BANK LOANS AND OTHER PRIVATE PLACEMENTS**

The use of bank loans and other debt structures that do not include publicly offered securities has been on the rise, and several issues have surfaced among the NABL membership, many of which will be discussed at NABL's Tax and Securities Law Institute, March 8-9, at the Westin Savannah, Georgia. Specifically, Session S-7, "What Should You Know About Direct Purchases" will cover the related securities law topics and Session T-4, "Arbitrage, Rebate and Reissuance" will cover the related tax law topics.

In the meantime, the following bullet points are intended to provide an outline of the issues that have come to NABL's attention with respect to federal securities law and federal tax law issues. Members are invited to submit additional federal securities law and federal tax law issues encountered in these transactions for further discussion at TSLI.

## SECURITIES LAW ISSUES

- Applicability of Certain MSRB Rules. See MSRB Notice 2011-52 issued September 12, 2011 ("Notice 11-52"), and MSRB Notice 2011-37 issued August 3, 2011 ("Notice 11-37"), providing a review of pertinent MSRB rules and a discussion of how these rules might apply in a direct placement/bank loan transaction. Highlighted rules include: G-32 (reporting requirements), A-13 (payment of assessments), G-3 (broker dealer exam requirements), G-14 (reporting requirements), G-17 (duty of fair dealing), G-34 (obtaining CUSIPs), and G-37 (two-year ban on engaging in municipal securities transactions after non-de minimis political contributions). As indicated in Notice 11-52 and Notice 11-37, the applicability of these rules turns on whether the transaction involves the making of a loan or the issuance of a municipal security. (See "Loan vs. Security Analysis" below).

- Applicability of Anti-Fraud Provisions. If the transaction involves the issuance of a municipal security (see "Loan vs. Security Analysis" below), then the anti-fraud provisions of federal securities laws apply, and consideration should be given to whether some type of investor/purchaser letter or certificate is appropriate.

- Applicability of Rule 15c2-12. If the transaction is a municipal security, Rule 15c2-12 may apply, but the private placement exemption would likely be available.

- Loan vs. Security Analysis. Does the transaction involve the making of a loan or the issuance of a municipal security? As described in Notice 11-52, the principal legal authority on the distinction between a note that is a security from one that is not is the U.S. Supreme Court case of *Reves v. Ernst & Young, Inc.*, 494 U.S. 56 (1990). In Reves, the Court analyzed the issuance of notes by a corporation and determined that the notes were securities under the Securities Exchange Act of 1934 based upon, among other things, the public trading of the notes and the lack of countervailing factors that would dislodge the perception of the notes as investments. Some things to consider in structuring a transaction under this analysis is whether the nature of the transaction consistent with a commercial loan or an issuance of securities. For example:
    - Will CUSIP numbers be obtained?
    - Will the note/bond be issued in a single denomination?
    - Are there transfer restrictions?
    - Is the debt being purchased with a view toward distribution?
    - If multiple series or purchasers, are all purchasers treating the transaction in the same manner?

- Voluntary Market Notice. Consider whether, regardless of whether a loan or a security, a voluntary filing on EMMA might be beneficial from an investor relations perspective. Holders of other outstanding obligations of the issuer that are similarly secured, may be interested to know about provisions of the private loan documents including cross collateralization and acceleration provisions as well as liquidity issues if the loan is subject to a rate adjustment or a put from the purchaser prior to maturity. See Standard & Poor's, "The Appeal of Alternative Financing Is Not Without Risk for Municipal Issuers" (May 17, 2011).

## FEDERAL TAX MATTERS

- From a federal tax law perspective, see Treas. Reg. §§ 1.1001-3, 1.1275-4 and 1.1275-5, and IRS Notices 88-130 and 2008-41.

- Reissuance Analysis. For variable rate transactions, will a future change in the interest rate or a tender of the obligation by the holder (whether optional or mandatory) cause a reissuance of the obligation for federal tax purposes? The answer to this question will depend on, among other things:
    - how the new interest rate is determined (e.g., remarketing agent, pre-set formula in underlying documents, negotiation between issuer and holder), and
    - what triggers the new rate being set (e.g., end of a pre-set interest rate mode period, conversion to new mode, optional or mandatory tender, amendment to underlying documents).

  The effects of a reissuance can range from relatively minor to extremely serious. Careful review, and possible alteration, of the transaction structure during the planning phase may prevent unintended consequences.

- Contingent Payment Debt Instrument? Separate from reissuance concerns, do the underlying documents have rate-setting or rate-changing mechanisms that lead to the obligation being considered a contingent payment debt instrument? If so, the tax consequences can range from

an impact on the timing of when interest is treated as received to the potential conversion of tax-exempt interest to taxable gain from a deemed sale or exchange of the instrument.

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