Tax-Exempt Bonds:

Their Importance to the National Economy and to State and Local Governments

The United States today is facing unprecedented challenges in job creation, infrastructure development and deficit reduction. These challenges are interrelated, and one of the key elements to addressing them is tax reform. Tax reform can induce more efficient allocation of capital, thereby stimulating economic growth and job creation. It can generate increased revenue to reduce the deficit. Tax reform can also encourage the investment in infrastructure that is necessary to support economic growth and jobs.

There is general agreement that tax reform should "close loopholes" and "eliminate tax preferences" in the current tax code in order to make the system fairer and more efficient. However, some provisions in the current tax code advance the goals of infrastructure investment and job creation, and with them the economic growth that will help reduce the deficit. This paper looks at one provision – the provision in the tax code that helps state and local governments invest in the infrastructure that forms the basis for economic growth. This provision—the exclusion from gross income of the interest on state and local bonds—supports investment in roads, bridges, schools and ports, among many other examples. This paper summarizes the current use of tax-exempt bonds and considers the impact the elimination, or limitation, of the bond tax exemption would have on state and local governments, their taxpayers and ratepayers, on other qualified tax-exempt bond borrowers and on bond investors.

I. Overview

The United States is simultaneously facing several critical challenges. Congress and elected leaders at all levels feel the need to enact legislation that encourages job creation. Dramatic events, such as bridge collapses on interstate highways, and more every day events, such as water main ruptures, highlight the desperate need for improvements to and repairs of our crumbling infrastructure. Infrastructure spending helps the overall economy by providing construction-related employment, stimulating demand for manufactured construction materials, and providing the roads, bridges and other support necessary for sustained economic growth.

At the same time, however, the President and Congress are under pressure to reduce the federal deficit and reform the federal income tax system, which requires changes to the Internal Revenue Code (Code). President Obama, Congress and various commissions and commentators recently have been considering proposals to address these interrelated issues.

Some proposals would eliminate or limit the exclusion of interest on state and local government bonds. For instance, the report of the National Commission on Fiscal Responsibility

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and Reform (also known as the Simpson-Bowles Commission) included, as an illustrative example for tax reform, the repeal of the exclusion for interest on newly-issued state and local bonds. Separately, the Obama Administration has proposed limiting the value of the exclusion, not only with respect to newly-issued bonds but also bonds that are currently outstanding and in the hands of investors.

There are several rationales for these proposals and others like them. One is that eliminating or limiting the exclusion will enhance "tax equity" by increasing the amount of taxes paid by high-income taxpayers. According to this view, the exclusion disproportionately benefits high-income taxpayers. Another rationale is that including state and local bond interest in gross income would increase federal tax revenues, helping to reduce the federal deficit. Third, some proponents of these proposals believe that the inclusion of state and local bond interest in gross income would broaden the tax base, thereby permitting a reduction in marginal income tax rates that is considered by many to be the key element in tax reform. These rationales are closely related, and all of them appear to be premised on the notion that the exclusion of state and local bond interest benefits high-income taxpayers and that eliminating or limiting the exclusion of such interest will generate significant new revenues to reduce the federal deficit.

There are serious flaws in these rationales. Moreover, the reduction in infrastructure investment that is likely to occur if the exclusion were eliminated or limited would likely impede economic growth, job creation and deficit reduction.

For one, the economic burden of the elimination or limitation of the exclusion of interest on state and local government bonds would not be borne exclusively by high-income taxpayers. Instead, much of the burden would be borne by state and local governments, their taxpayers and ratepayers, and by other qualified borrowers in the form of higher borrowing costs. By virtue of the subsidy provided by the exclusion of state and local bond interest under current law, investors today are content to require lower interest rates from bond borrowers, because investors do not have to pay tax on the interest they receive. If the exclusion from income tax were to be eliminated or reduced, investors would require bond borrowers to pay higher interest rates.

As a result, the burden of the elimination or limitation of the exclusion will largely fall not on high-income taxpayers because those taxpayers, as bond investors, can "pass-through" their increased federal taxes to the state and local governments. These governments, in turn, pay the interest on their bonds from sales taxes, property taxes, fees, tolls and to a lesser extent, income taxes.[1] As a result, the burden of the elimination or limitation will fall largely on lower and middle-income state and local taxpayers and ratepayers in the form of higher fees for such items as water and sewer, higher tolls on roads and bridges, and increased sales and property taxes. These governments could also reduce services, but those cuts would also fall disproportionately on lower and middle-income households.

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[1] On the whole, these state and local tax systems, which would be drawn on to service increased debt service on taxable bonds, are regressive and take a greater share of the income of lower and middle-income families than of upper-income families. See Davis, et al., *Who Pays? A Distributional Analysis of the Tax Systems in All 50 States, 3rd Ed.*, Institute on Taxation and Economic Policy, Nov. 2009, at 1.

Apart from these considerations, the most likely result of the elimination or limitation of the subsidy for state and local bonds would be decreased investment in our nation's infrastructure, with a resulting loss in infrastructure-related employment and the support that infrastructure provides to economic growth.

While the tax equity argument has serious problems, there remain the arguments that the elimination of or limitations on the exclusion would raise significant revenue for deficit reduction, lower marginal tax rates or both. However, the extent to which any change to the treatment of tax-exempt interest would result in additional taxes being paid by high-income taxpayers is not certain, since those investors would have an incentive to move their funds to other tax-favored transactions or investments.[2]

In order to maximize the amount of tax revenues resulting from a change to the exclusion of interest on municipal bonds, some of the proposals would apply the repeal or limitation to all outstanding bonds (i.e., retroactively apply the repeal or limitation to existing bonds that were bought by investors on the basis that the interest on such bonds would continue to be fully exempt from federal income tax). *A retroactive change in the taxation of outstanding state and local government bonds would result in an immediate decrease in the market value of much of such outstanding debt, a loss that will be felt by current holders of such bonds, more than three-fourths of whom are retail investors,[3] many of whom are middle income and at least some of whom are older Americans.* Over 5.3 million households with annual adjusted gross income under $250,000 reported tax-exempt income in 2009.[4] Those households reported over 55 percent of all the tax-exempt income reported that year.[5] In addition to the effect on the savings of those investors, if the investors sold those bonds at a loss, federal tax receipts could be lower in the near term.

Because the revenue that might be gained by the elimination or reduction of the exclusion may not be as significant as some think, the opportunity for deficit reduction and base-broadening also would not be as significant.

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[2] See *Portfolio Substitution and the Revenue Cost of the Federal Income Tax Exemption for State and Local Government Bonds*, James M. Poterba and Arturo Ramírez Verdugo, National Tax Journal, June 2011. The authors of this paper conclude that "the revenue gain from repealing interest tax exemption [is likely to be overstated], since at least some current holders of tax-exempt bonds would probably reposition their portfolios to hold other lightly-taxed assets, rather than heavily-taxed bonds, after interest payments on state and local government bonds became fully taxable." Id. at 2. See also Joint Committee on Taxation, *The Federal Revenue Effects of Tax-Exempt and Direct Pay Tax Credit Bond Provisions* (JCX-60-12), July 16, 2012, at 10-16 (noting that "[w]hile investigations into the revenue consequences of more realistic investor portfolio reallocations are important, determining whether the taxable bond substitution assumption either underestimates or overestimates the estimated revenue cost to these alternative assumptions is exceedingly difficult.").

[3] At the end of 2011 there were approximately $3.7 trillion municipal securities outstanding. Households held approximately $1.9 trillion directly, and approximately $930 billion were held in mutual, money market, closed-end and exchange-traded funds. Federal Reserve Board, *Flow of Funds Accounts of the United States*, March 8, 2012, Table L.211.

[4] Internal Revenue Service, Statistics of Income, *Individual Income Tax Table 1.4 All Returns: Sources of Income, Adjustments, and Tax Items, by Size of Adjusted Gross Income, Tax Year 2009.*

[5] Id.

While the tax equity argument for and revenue benefits to be derived from eliminating or limiting the exclusion of state and local bond interest can easily be overstated, there are important policy reasons to maintain the current Code exclusion, including principles of federalism, encouraging local control over capital projects, and promoting infrastructure development by state and local governments.

II. Background

The municipal bond market has been a key, low-cost source of infrastructure financing in the United States since the mid-1800s. The municipal bond market is large and very diverse, with many different types and sizes of issuers of municipal bonds. As of the end of 2011, there were approximately $2.9 trillion of long-term tax-exempt state and local government securities outstanding, including securities issued to provide "new money" for infrastructure and refundings.[6] These securities were issued by approximately 51,000 state and local government issuers, ranging from villages, towns, townships, cities, counties and states, as well as special districts and authorities, such as school districts and water and sewer authorities.[7] The overwhelming majority of state and local bonds issued by these governmental issuers are issued to finance or refinance capital projects and infrastructure.[8] This is in contrast to the federal government's issuance of debt, which is used to fund current operating deficits.

Municipal bonds are used to finance a broad spectrum of public infrastructure, such as roads, bridges, airports, utility systems, schools, hospitals, courthouses, jails, administrative offices, and other public facilities. Some municipal bonds are issued for the benefit of private entities, often nonprofit 501(c)(3) organizations, who use the proceeds to finance educational facilities, health care facilities, senior living facilities, multifamily housing for low or moderate income persons, solid waste disposal facilities and manufacturing facilities. The amount of tax-exempt debt issued to finance new infrastructure projects undertaken by the public and private sectors totaled $1.7 trillion from 1991 to 2007.[9] About three-quarters of those bonds were used for capital spending on infrastructure by states and localities, and the remainder was to fund private capital investment for projects that serve a public purpose, such as non-profit schools and hospitals.[10] In 2009 alone, approximately $365 billion in bonds were issued to finance long-term projects.[11]

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[6] In addition, at the end of 2011 there was outstanding $52.3 billion in short-term state and local debt, $254.4 billion in tax-exempt debt of non-profit organizations and $497.4 billion in debt of other tax-exempt borrowers. Federal Reserve Board, *Flow of Funds Accounts of the United States*, March 8, 2012, Table L.211.

[7] *SEC Release 34-62184A (May 28, 2010)* at 8 & n. 22.

[8] A small portion of municipal bond issues finance cash flow or working capital needs of state and local governments. As a result of federal tax law limitations, these bonds are almost always issued as short term obligations.

[9] Congressional Budget Office and Joint Committee on Taxation, *Subsidizing Infrastructure Investment with Tax-Preferred Bonds* (October 2009) at 9. Note that this figure also includes other types of tax-preferred debt such as tax credit bonds (e.g., QZABs).

[10] Id.

[11] Aaron Barnes, *Municipal Bonds 2009,* Internal Revenue Service, Statistics of Income, Fall 2011.

The Code has provided an exclusion from gross income for interest on municipal bonds since the modern income tax system was enacted in 1913. Until late in the 20th century, the tax-exempt status of interest on state and local government bonds also was believed to be constitutionally protected under the doctrine of intergovernmental immunities, based on the Supreme Court decision in *Pollock v. Farmers Loan & Trust Co.*, 157 U.S. 429, *modified*, 158 U.S. 601 (1895) (holding earlier income tax unconstitutional for various reasons, including the taxation of state and local government bond interest). In *South Carolina v. Baker*, 485 U.S. 505 (1988), however, the Supreme Court concluded that the tax exemption of the interest on state and local government bonds is not constitutionally protected.

Although, under the holding in *South Carolina v. Baker*, Congress now has the constitutional power to eliminate or limit the federal tax exemption of interest on state and local government bonds, there are sound policy reasons for Congress not to do so.

The first is based on the fundamental principle that American government is organized as a federal system with co-existing layers of sovereign governments. The federal government was intended to be a limited government, with the powers not expressly delegated to it reserved to the states or to the people. For example, the states are not permitted to tax interest on U.S. Treasury obligations.[12] The exclusion from taxation under the Code of state and local bond interest can, and should, be viewed in this context as a reciprocal expression of federalist principles, recognizing the sovereign primacy of the states, and not as just another "tax expenditure."

Second, the ability of state and local governments to access readily available low-cost financing encourages infrastructure development throughout the United States. To the extent that the cost of borrowing to state and local governments increases, unless substantial amounts of other federal funds, including grants, are made available to compensate them for the higher costs of taxable debt, state and local governments will be discouraged from such infrastructure investments. Public infrastructure is critical to a healthy economy. Businesses depend on airports, highways, and electric, water and sewer utilities and upon quality education systems to provide an educated workforce. A lack of investment in infrastructure will hurt long-term economic growth and, in the short term, result in loss of construction-related jobs.

Moreover, the ability of state and local governments to issue bonds on a tax-exempt basis encourages local control over local capital projects. State and local governments set their priorities for infrastructure and economic development and shoulder the burden of these investments through the issuance of their own tax-exempt debt. They pay all of the principal of and interest on the debt, with the federal government contributing a relatively small portion through foregone tax revenue. If the current system were replaced with one in which the federal government provided grants or loans to replace the assistance now provided by the exclusion of interest on state and local bonds, the federal government would inevitably appropriate control over infrastructure and economic development decisions that are now made, effectively, at the state and local level.

Of course, an alternative to a reduction in infrastructure spending by state and local governments or to a new federal grant or loan program would be for state and local governments to keep the same level of infrastructure investment and fund it entirely on their own. The increased

[12] 31 U.S.C. § 3124

borrowing cost to state and local governments would be borne by taxpayers and ratepayers in every local jurisdiction through the imposition of increased taxes and fees (e.g., ad valorem property taxes, special assessments, sales taxes, toll charges and utility rates) or through service cuts. As pointed out above, these taxes or fees, including especially sales taxes, tolls or user fees, would fall disproportionately on lower and middle-income households, as would service cuts. This would be an ironic result for a change which may have been intended by some proponents to increase the amount of taxes paid by higher income taxpayers.

The same result would also occur with respect to state and local bonds issued for the benefit of nonprofit healthcare or educational institutions to finance hospitals, schools, senior facilities and the like, and for the benefit of certain specified for-profit borrowers, such as small manufacturers and low-income housing. In most if not all of these cases, increased borrowing costs will be passed on to end users, many of whom may be lower- and middle-income households, through higher tuition, bed rates, insurance premiums, rents, and similar charges.

III. Quantifying the Effects of Elimination of or Limitation on Exclusion of Interest on State and Local Government Bonds

Effects on Bond Borrowers

Quantifying the effect on the interest rates that state and local borrowers would pay in the event of the elimination of or limitation on tax-exempt interest is complicated, especially because there would likely be other changes to the Code occurring at the same time. However, investors would demand an increase in the interest rate paid to them so that their after-tax return remained approximately the same. The amount of that increase would depend in large part on how the elimination or limitation of the exclusion were written and on other changes that might be made in the Code as part of tax reform. In addition to the increased rate of return that investors would require to maintain the same after-tax return on their investment, it is also likely that they would demand a "risk premium" to account for the fact that the federal government would have demonstrated that it is willing to change the rules regarding state and local bonds and that, therefore, the federal government might well change the rules in the future. But regardless of the exact magnitude, the direction of the change is clear. State and local borrowers would pay higher interest rates.

State and local borrowers would pay these higher interest rates in two circumstances. First, they would pay a higher rate on newly issued bonds. Second, if the elimination or limitation on state and local bond interest were to apply retroactively to bonds that had already been issued, as proposed for instance by the Obama Administration, state and local governments would pay a higher rate on some of those already-issued bonds if those bonds are "variable rate" bonds. With variable rate bonds, the interest rate is reset periodically (e.g., daily, weekly, monthly, yearly) to whatever the then-current market rate is. For most variable rate bonds, the interest rate would increase shortly after the change in tax law to compensate the investor for the loss of tax exemption. As with newly issued bonds, these increased interest rates would be passed through immediately to the issuer and ultimately to taxpayers, users or ratepayers.

In sum, if there are changes to the interest exclusion for state and local government bonds, it is likely that interest rates will increase and the cost will be borne by the issuing state and local

governments. These governments would have three basic choices to get the money to pay for those increased interest rates - increases in taxes or fees, decreases in spending or a combination of increased taxes and fees and decreased spending. However, because the political pressures on state and local governments may limit their ability to implement spending cuts and revenue increases, it is likely that there would be a net reduction in their issuance of bonds and their spending on infrastructure projects. That reduction in infrastructure investment will harm the long-term economic growth of the country and result in a loss in construction-related employment.

Effects on Bond Investors

Investors in state and local bonds would be adversely affected if the elimination or limitation on tax-exempt interest applied to existing bonds, as has been proposed by President Obama. With respect to fixed rate bonds (and those variable rate bonds where the interest rate cannot be adjusted immediately to reflect a change in tax status) the holders of these bonds, whether individuals or financial institutions such as banks or insurance companies, would experience a loss in the market value of their bonds due to the change in tax treatment of the existing bonds..

For example, suppose an investor owns a tax-exempt bond maturing in 10 years with a 5 percent fixed interest rate that was purchased at par for $1000. Under current law, the investor receives the full 5 percent as the after-tax return on the investment. If the exclusion of tax-exempt interest were eliminated or limited for existing bonds, that investor would discover that prospective purchasers would not be willing to pay $1000 for the bond because a holder of the bond would not receive the full 5 percent as an after-tax return. The loss in value could be substantial. If the exclusion for state and local bonds were completely eliminated for existing bonds a purchaser would only be willing to pay about $815 for the bond that originally was worth $1000.[13]

The effect of President Obama's proposal to limit the value of the exemption to 28 percent would similarly reduce the value of a $1000 bond maturing in 10 years by more than 5 percent to less than $950.[14] As noted above, there are trillions of dollars of tax-exempt bonds outstanding and about three-fourths of those bonds are held, directly or indirectly, by individuals.[15] Over 5.3 million households with incomes under $250,000 a year reported tax-exempt income in 2009.[16] Retroactive application of changes to tax-exempt status could have dramatic effects on the savings of millions of Americans who are by no means rich.

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[13] Certain fixed rate bonds, typically sold in private placements, have been issued with a mechanism whereby the interest rate on the bond would be modified if there are changes in the marginal rate under the Code. It is unclear whether those provisions would be triggered by any particular change to the municipal interest exclusion since some of the proposals would not actually affect the marginal rates but would affect the exclusion itself.

[14] These calculations reflect the lower price that would be necessary to maintain the equivalent post-tax yield. The effect may in fact be larger than these calculations indicate, however, if investors demand a risk premium to account for the fact that the federal government would have demonstrated that it is willing to change the tax rules retroactively.

[15] See footnote 3 above.

[16] See footnote 4 above.

Conclusion

The extent of the effect of eliminating or limiting the exclusion of interest on state and local bonds would depend in part on whether any change is applied retroactively to all outstanding tax-exempt bonds or only prospectively. If a particular proposal applies retroactively to all outstanding tax-exempt bonds, the loss in value in existing bonds and the increase in the interest rates on many floating rate bonds would be almost immediate. In contrast, applying a change in the Code prospectively to newly issued debt would at least protect investors with respect to their current portfolios but would have an adverse effect on municipal issuers going forward with respect to all newly-issued bonds.

Regardless of whether the change is prospective only or retroactive, the effect on state and local borrowers will be some combination of lower infrastructure spending, higher tax and ratepaying burdens on the public, and lower spending in other areas. These burdens would fall mainly on lower and middle-income households.

Finally, high-income taxpayers have historically been quite resourceful with respect to tax planning. While their current tax planning may include the ownership of tax-exempt bonds, if there are material changes to the Code provisions with respect to tax-exempt bonds, high-income taxpayers may adjust their holdings, either at once or over time, to other tax-advantaged investments and strategies to reduce the taxes they pay. To the extent that taxpayers reallocate their portfolios in that manner, the expected revenues from the elimination or limitation of the tax-exemption may well not be realized.