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Scoop and Toss: How To Keep the World's Most Expensive Ice Cream Cone from Collapsing

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Scoop and Toss: How To Keep the World's Most Expensive Ice Cream Cone from Collapsing*

In the face of budgetary crises, state and local governments traditionally have two options—raise taxes to generate revenue or cut spending. However, some municipal governments choose another route. Instead of paying the immediate political price associated with higher taxes or cuts to government aid, these municipalities issue bonds, using debt to fill gaps in the budget.

The officials creating this debt are typically not the ones responsible for its repayment. Often, a municipal bond is not due for twenty to thirty years after it is issued. For state and local officials, the obligation to repay bonds issued under a predecessor can be a difficult pill to swallow, leading some to engage in "scoop and toss" refinancing.

Scoop and tossing allows officials to scoop up a municipality's expiring bonds and toss the burden of repayment into the future, preferably onto the shoulders of a successor. The maneuver involves issuing new bonds to pay off expiring bonds—using new debt to pay off old debt—akin to using a new credit card to pay off an old credit card. In doing so, the government can create short-term flexibility by taking the money originally set aside to pay off the debt and using it elsewhere in the budget. However, all debt must be repaid, and scoop and tossing only delays the inevitable while adding to a municipality's tab.

The rise of COVID-19 has also brought an increase in scoop and tossing. Facing repayment deadlines and the demands of a pandemic, municipal governments across the country have chosen to toss the burden of repayment into the future. What effect these decisions will have on state and local budgets going forward is unclear.

This Comment asserts that changes to the current state and federal regulatory frameworks are needed to limit scoop and tossing, as any short-term flexibility afforded by the maneuver is outweighed by the need for long-term budgetary stability. In addition, this Comment advocates for greater public involvement in municipal budgets as a way to increase political accountability and decrease the use of short-sighted measures like scoop and tossing.

INTRODUCTION

Many state and local governments are still recovering from the economic fallout of the Great Recession.[1] Just over a decade later, municipalities face many of the same problems: dwindling tax revenue, rising unemployment, and increased public reliance on government aid.[2] Unfortunately, some experts believe that "the fiscal shock from COVID-19 is expected to be at least as great as that of the last recession."[3] Confronted with this harsh reality, state and local governments traditionally have two options—increase taxes to generate revenue or cut spending.[4] Neither is likely to win a popularity contest any time soon, and for elected officials, this poses an obvious problem. Still, when COVID-19 hit, officials made their decisions.[5] Pennsylvania laid off workers, Maryland froze spending, and Ohio announced a $775 million cut to education and Medicaid funding.[6]

1. Anshu Siripurapu & Jonathan Masters, *How the Coronavirus Will Harm State and City Budgets*, COUNS. ON FOREIGN RELS. (May 15, 2020), https://web.archive.org/web/20200523054344/https://www.cfr.org/backgrounder/how-coronavirus-will-harm-state-and-city-budgets [https://perma.cc/5Z68-CR6U (staff-uploaded archive)] ("Many still bear the scars of the 2008 financial crisis, which forced painful spending cuts to public services.").

2. *See id.* ("[The Great Recession] put many subnational budgets in unusually dire straits. [It] [d]epressed tax revenues, elevated spending on social welfare programs such as unemployment insurance and Medicaid . . . [and now] [t]ax revenues are falling sharply as states face record unemployment claims and rising public health costs").

3. *Id.*

4. *See id.*

5. *See id.*

6. *Id.*

Some municipalities went another route.[7] Faced with rising costs, pension obligations, and government programs that needed funding, some officials chose to avoid the potential backlash of raising taxes and issued municipal bonds to fill gaps in the budget instead.[8] However, municipal bonds must be repaid—often by those who did not take on the debt.[9] This can lead to a maneuver called "scoop and toss" refinancing.[10]

To illustrate, imagine you are the new mayor of Splitsville. During your first few months in office, you find out that the last mayor issued $1 million in municipal bonds to help cover city expenses, such as pensions for city workers, fixing potholes, and building a new park. Three years later, the time has come to pay back that $1 million, plus interest. What can you do? You can risk your reelection by raising taxes or cutting public programs, or you can scoop up all of that debt and toss it into the future for the next mayor to handle. How? By issuing new municipal bonds that need to be paid back *after* you leave office and using the money to pay off the debt from the old mayor. In essence, scoop and tossing is akin to paying off a credit card with another credit card, except taxpayers are the ones who eventually foot the bill.

Scoop and tossing poses many dangers to state and city budgets.[11] The most obvious is that it allows state and city officials to prioritize short-term needs over the long-term health of the municipal budget.[12] Another danger is that it potentially allows officials to avoid public scrutiny while making unsound budgetary decisions.[13] Admittedly, "scoop and toss" sounds less like a dangerous refinancing maneuver and more like the name of an ice cream parlor. However silly the name, the amount of debt that can pile up is not a joke.[14]

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7. *See, e.g.*, Yvette Shields, *Ohio Refunding Will Scoop and Toss Coronavirus Budget Relief*, BOND BUYER (June 16, 2020, 2:26 PM), https://www.bondbuyer.com/news/ohio-refunding-will-scoop-and-toss-for-coronavirus-budget-relief [https://perma.cc/U7A2-8HTD (dark archive)] (noting that Ohio will also use scoop and toss refinancing and issue $779 million in municipal bonds).

8. *Id.*

9. *See* ALEX HATHAWAY & JESSECA LIGHTBOURNE, CTR. FOR STATE & LOC. FIN., BUDGET MANEUVERS IN THE SOUTHERN STATES 6 (2018), https://cslf.gsu.edu/files/2018/10/Volcker-Series-Budget-Maneuvers-in-the-Southern-States-_-October-2018.pdf [https://perma.cc/SJ5H-Q7F6] ("Scoop and toss is a bond refinancing strategy in which a state issues new bonds to pay off old bonds and, in the process, extends the repayment schedule . . . . Extending the repayment schedule . . . leave[s] future taxpayers shouldering the burden of repaying old debt.").

10. *See id.*

11. *See id.*

12. Mike Cherney, *Borrowing Maneuver Catches Flak*, WALL ST. J. (Dec. 2, 2013, 8:40 PM), https://www.wsj.com/articles/borrowing-maneuver-catches-flak-1386034534 [https://perma.cc/38PL-Q8GJ (dark archive)] ("[S]coop-and-toss refinancings add to interest costs while allowing civic managers to overlook structural economic difficulties.").

13. For example, it is unlikely that your decision to scoop and toss as the mayor of Splitsville would meet as much public scrutiny as an increase in taxes.

14. *See* Shields, *supra* note 7 (noting that Ohio is scoop and tossing $779 million in municipal bonds to cover budget shortfalls).

So how do you keep the world's most expensive ice cream cone from collapsing? This Comment attempts to answer that question. In doing so, it focuses on past efforts to limit scoop and tossing at the federal and state levels. Specifically, at the federal level, this Comment explores alternatives to the Tax Cuts and Jobs Act of 2017, proposes a limit on municipal bond refundings, and argues for the return of tax-exempt advance refundings. At the state level, it surveys balanced budget requirements and advocates for stricter standards and uniformity across state lines. While some reform efforts have been marginally successful, changes are needed to balance the flexibility that municipal budgets need in times of crisis with the transparency and stability that citizens rely on. To that end, this Comment also argues that public engagement in local government and the municipal bond process can be an effective fail-safe to limit scoop and tossing. Creating a workable regulatory system is increasingly important as scoop and tossing remains a constant temptation for officials facing financial turmoil.

This Comment proceeds in three parts. Part I introduces budgets and municipal bonds and provides an overview of scoop and tossing. Part II covers past efforts to regulate scoop and tossing at the state and federal levels and the public's limited role in this process. Part III proposes changes to the federal and state regulatory schemes, advocates for greater public involvement in municipal budgets, and addresses potential critiques of these recommendations.

I. BUDGETS, BONDS, AND A MASTER CLASS IN AVOIDING RESPONSIBILITY

A. *Budgets and Municipal Bonds*

Like the federal government, state and city governments have budgets.[15] Commonly, state and city governments each have two different types of budgets.[16] The operating budget—usually just called "the budget"—funds ongoing expenses such as employee salaries, pensions, and interest on debt, while the capital budget funds major projects like roads and bridges.[17] The importance of municipal budgets,[18] and the vast array of local economies they support, cannot be overstated. There are more than 90,000 state and local governments in the United States.[19] On a macrolevel, these governments

15. Siripurapu & Masters, *supra* note 1.

16. *Id.*

17. *Id.*

18. Throughout this Comment, "municipal" will serve as a shorthand for "state and city."

19. CARMA HOGUE, U.S. CENSUS BUREAU, G12-CG-ORG, GOVERNMENT ORGANIZATION SUMMARY REPORT: 2012 (2013), https://www.census.gov/content/dam/Census/library/publications/2013/econ/g12-cg-org.pdf [https://perma.cc/2N72-47LD]. As of 2012, there are 38,910 general-purpose governments, such as counties, cities, and towns. *Id.* There are also 51,146 special purpose governments, which includes special districts for services like water and sewage, transit authorities, and mosquito control. *Id.*

account for about 11% of the national GDP, contribute 80% of the $441 billion spent nationally on water and transportation infrastructure, and are responsible for more than 90% of K-12 education funding.[20] At the local level, the decisions municipal governments make are more likely to impact the personal lives of citizens—after all, a cut to federal military spending or a change in international trade policy will have a more muted effect on residents than a vote by local government to cut teacher salaries. Indeed, it is municipal governments that will fix the pothole you hit every day on your way to work, maintain the park you visit on your lunch break, and employ the first responders that direct traffic around a fender bender on your way home.[21]

One major expense for municipal budgets is pension contributions.[22] A pension fund is a retirement fund to which an employer promises to contribute during the span of employment.[23] When times are tight, municipalities can quickly fall behind on these contributions.[24] From the perspective of an elected official, this makes sense. As the mayor of Splitsville, which would you choose: Immediate spending needs and funding projects you can point to during your next campaign or contributing the recommended amount to a retirement fund that may not be used for forty years?

But like all debt, pensions must be paid.[25] So when that time comes, what can municipalities do? As previously discussed, municipalities generally have two options—raise taxes or cut spending.[26] However, some governments have

20. Siripurapu & Masters, *supra* note 1. Specifically, of the total $678 billion spent on K-12 education in 2015, the federal government contributed 8%, local governments contributed 45%, and state governments contributed 47%. *Id.*

21. *See, e.g.*, *Municipal Bonds*, FINRA, https://www.finra.org/investors/learn-to-invest/types-investments/bonds/types-of-bonds/municipal-bonds [https://perma.cc/EN78-97D4] (noting that municipal bonds are used to "build roads, schools and a host of other projects for the public good").

22. *See, e.g.*, Ron Galperin, *L.A. City Revenues up, Pension Risks Remain*, L.A. CONTROLLER, https://lacontroller.org/press-releases/l-a-city-revenues-up-pension-risks-remain/#:~:text=However%2C%20Galperin%20noted%20that%20these,percent%20spent%2020%20years%20ago [http://perma.cc/U4GC-KTDP] (reporting that in 2018, Los Angeles spent 13% of the city budget, $1.2 billion, on pension contributions).

23. *What Is a Pension?*, PENSION BENEFIT GUAR. CORP., https://www.pbgc.gov/about/who-we-are/retirement-matters/post/2013/04/17/What-is-a-Pension [https://perma.cc/E84L-UGGW] (Feb. 26, 2021) ("[A] pension is a retirement arrangement in which your employer promises you a regular payment from the day you retire, for as long as you live.").

24. *See, e.g.*, *Debt and Liabilities*, LEGIS. ANALYST'S OFF. (Oct. 17, 2019), https://lao.ca.gov/Publications/Report/4106 [https://perma.cc/7LWJ-YRXU] (finding that California had unfunded pension liabilities of $93.1 billion); John W. Schoen, *State Pension Funds Continue To Fall Behind. Here's How Much You Owe*, CNBC (Oct. 18, 2017, 3:13 PM), https://www.cnbc.com/2017/10/18/state-pension-funds-continue-to-fall-behind-heres-how-much-you-owe.html [https://perma.cc/GHV5-96HB] (noting that as of 2017, New Jersey and Kentucky had only set aside 31% of what was needed to cover pension contributions).

25. *What Is a Pension?*, *supra* note 23 (including pensions and retirement liabilities as one of three broad categories needing to be repaid by the state).

26. *See* Siripurapu & Masters, *supra* note 1 (noting that when there is a budgetary crisis there are "two options: raise revenue or cut spending").

turned to a third option—municipal bonds.[27] Issuing municipal bonds is another way officials can keep the government running.[28] When a state or local government issues a bond, they take on debt and give an IOU to whoever buys the bond.[29] Usually, that IOU is redeemable for the amount of the loan, plus interest, after at least three years.[30] For a cash-strapped government, the ability to take on debt could be a blessing, given the alternatives. Borrowing money is extremely common for state and local governments,[31] and it is unlikely to cause as much immediate public backlash as a tax increase or spending cuts.

Municipal bonds may be used to fund new projects[32] or pay off old debts[33] and are secured, or backed, by two different sources depending on the type of bond.[34] The first type of municipal bond is the general obligation bond.[35] General obligation bonds are traditionally backed by the "full faith and credit" of the city or state issuing the bond.[36] This means that the municipality issuing the loan has full authority to raise taxes in order to pay back the bondholder.[37] These bonds are usually seen as more sound investments since they are backed by the municipality's taxing power,[38] but they may require voter approval before being issued.[39] This makes sense, considering voters may face higher taxes if the government fails to budget appropriately. The second type of municipal bond is the revenue bond.[40] Revenue bonds are backed by the money made from a particular project.[41] For example, bonds issued to build a road may be secured

27. *See* HATHAWAY & LIGHTBOURNE, *supra* note 9, at 4 (finding some states in the South used scoop and toss between fiscal years 2015 and 2018).

28. *See* Heather G. White, *Getting Local Governments Where They Need To Go Without Taking Taxpayers for a Ride: "CABs," Why They Are Used, and What Can Be Done To Prevent Their Misuse*, 49 ST. MARY'S L.J. 363, 369–70 (2018).

29. *See id.*

30. *See id.* at 369 ("[A municipal bond has] a maturity of more than three years; most bonds have a significantly longer term, frequently up to thirty years and, sometimes, even longer.").

31. *Id.* ("In 2015, state and local governments issued $403.6 billion of debt with maturities of at least thirteen months, and a total of approximately $3.7 trillion of state and local government debt was outstanding (including debt issued in prior years).").

32. *Id.* These are commonly known as "new money bonds." *Id.*

33. *Id.* at 370. These are commonly known as "refunding bonds." *Id.*

34. *See* OFF. OF INV. EDUC. & ADVOC., SEC, MUNICIPAL BONDS: UNDERSTANDING CREDIT RISK 1–2 (2012), https://www.sec.gov/files/municipalbondsbulletin.pdf [https://perma.cc/TR96-E8A7].

35. *Id.* at 2.

36. *Id.*

37. *Id.*

38. *See id.*

39. *See, e.g.*, *Bonds*, LEGIS. ANALYST'S OFF., https://lao.ca.gov/BallotAnalysis/Bonds [https://perma.cc/ERU9-P97R] ("General obligation bonds must be approved by the voters and their repayment is guaranteed by the state's general taxing power.").

40. OFF. OF INV. EDUC. & ADVOC., *supra* note 34, at 2.

41. *Id.*

and repaid by the money made from tolls. Because revenue bonds are not backed by the municipality's taxing power, they usually do not require voter approval.[42]

Aside from having a reputation for being relatively sound investments,[43] municipal bonds may also have some tax benefits for investors.[44] Generally, the interest payments a bondholder receives are exempt from federal taxes.[45] In addition, interest payments may be exempt from state and local taxes if the bondholder lives in the state where the bond was issued.[46] However, one downside for investors is that these tax-exempt interest payments are usually less than what they would receive from taxable corporate bonds.[47] Further, while municipal bonds are seen as safe investments and municipalities rarely default or fail to pay bondholders back, it does happen.[48]

B. *What Is Scoop and Toss and Why Is It a Problem?*

Scoop and tossing involves issuing new bonds to pay off expiring bonds. A "refunding" is another term used to describe scoop and toss refinancing because the new bonds are used to refund, or pay back, the holders of the old bonds.[49] Scoop and toss refundings occur in two ways.[50] The first is an advance refunding.[51] An advance refunding occurs when the issuer (the municipality) pays off the expiring bond more than ninety days after issuing the new bonds.[52]

42. *See, e.g.*, *Bonds*, *supra* note 39 ("[Revenue] bonds also are not guaranteed by the state's general taxing power and do not require voter approval.").

43. *See* White, *supra* note 28, at 384 ("[D]efaults of local government bonds, and particularly of general obligation bonds, are extremely rare."); Leslie P. Norton, *The Coronavirus Crisis Is Starting To Hit Municipal Bonds. Why That Matters.*, BARRON'S (Apr. 24, 2020, 6:30 PM), https://www.barrons.com/articles/the-coronavirus-crisis-is-starting-to-hit-muni-bonds-why-that-matters-51587767452 [https://perma.cc/D4ED-TTEQ (dark archive)] ("According to Moody's, the municipal bond default rate between 1970 and 2018 was 0.1%.").

44. *See* OFF. OF INV. EDUC. & ADVOC., *supra* note 34, at 1.

45. *Id.*

46. *Id.*

47. *Id.*

48. *See* White, *supra* note 28, at 384 n.109 (noting that ninety-five issuers defaulted on bonds rated by Moody's between 1970 and 2014); *see also* Heather Gillers, *Risk Creeps into Municipal Bond Market, Yet Prices Stay High*, WALL ST. J. (Sept. 4, 2020, 4:49 PM), https://www.wsj.com/articles/risk-creeps-into-municipal-bond-market-yet-prices-stay-high-11599211800 [https://perma.cc/9SCC-LYEQ (dark archive)] ("Municipal bond defaults have reached their highest rate since 2011 . . . .").

49. *See* MSRB, REFUNDINGS AND REDEMPTION PROVISIONS 1 (2016) [hereinafter MSRB, REFUNDINGS AND REDEMPTION PROVISIONS], https://www.msrb.org/msrb1/pdfs/Refundings-and-Redemption-Provisions.pdf [https://perma.cc/JS5U-G2U3] ("Generally unique to municipal securities, a refunding is the process by which an issuer refinances outstanding bonds by issuing new bonds.").

50. *See id.* at 2 ("There are two general types of refundings . . . a current refunding and an advance refunding.").

51. *See id.*

52. *Id.* ("In an advance refunding, the proceeds of the refunding bonds are applied to pay principal, interest and any redemption premium on the refunded bonds more than 90 days after the date the refunding bonds are issued.").

Advance refundings are traditionally used when a state or local government wants to refinance the bonds at a lower interest rate.[53] For example, if Splitsville is paying old bondholders 4% interest and current market interest rates are 0.1%, it would be cheaper for the city to issue new bonds with the lower interest rate and pay off the older, more expensive bonds. Importantly, after the Tax Cuts and Jobs Act of 2017, bonds issued for an advance refunding are not exempt from federal taxes,[54] so an issuer will have to pay a higher interest rate to make them attractive to investors.

The second type of refunding, a current refunding, is a scoop and toss that happens less than ninety days after the new bonds are issued.[55] Unlike advance refundings, the interest earned on bonds used for current refundings is exempt from federal taxes.[56] As mayor, this helps attract more investors and raise money quickly to pay off the old bonds before they expire.

There are dangers associated with each type of refunding, despite their initial simplicity. As before, suppose you are the mayor of Splitsville. You run a successful campaign and take office in January 2020. In February, you learn that the last mayor issued municipal bonds: $1 million in general obligation bonds (which are backed by the city's taxing power) to cover pension contributions, and $1 million in revenue bonds (which are only secured by the revenue the projects produce) to build a new road. The bondholders are due to be repaid at the end of March. In mid-February, you learn that the mayor from twenty years ago also issued $1 million in municipal bonds and those are also due at the end of March. On March 17, Splitsville goes into lockdown due to COVID-19. No one leaves their home and tax revenues drop while the city's spending skyrockets. Regardless, the bondholders must be repaid at the end of

53. *See id.* at 3 ("In a high-to-low refunding, interest rates on the refunding bonds are lower than the rates on the refunded bonds. This option may be chosen to reduce or restructure an issuer's periodic debt service payments.").

54. *See* MSRB, MUNICIPAL SECURITIES PROVISIONS OF H.R. 1, THE "TAX CUTS AND JOBS ACT" 1 (2018) [hereinafter MSRB, MUNICIPAL SECURITIES PROVISIONS], https://www.msrb.org/Market-Topics/~/media/20AB21E90C3E4103885B4E8670B1F1E8.ashx [https://perma.cc/6AWP-SFCZ] ("The Tax Cuts and Jobs Act essentially eliminates advance refunding for municipal bonds issued after 2017 by making interest on advance refunding bonds taxable.").

55. *See* MSRB, REFUNDINGS AND REDEMPTION PROVISIONS, *supra* note 49, at 2 ("In a current refunding, the proceeds of the refunding bonds are applied to pay the principal, interest and any redemption premium on the refunded bonds within 90 days of the date the refunding bonds are issued.").

56. MSRB, MUNICIPAL SECURITIES PROVISIONS, *supra* note 54, at 1 ("Interest on current refunding bonds would remain tax-exempt."). One proposed rationale for why the Act made advance refundings taxable is that it helped Congress with "budget scoring" by offsetting part of the revenue lost from other tax cuts through the Act. *See* Caitlyn Smith Burchfield, *Tax-Exempt Advance Refunding Bonds: History and Legislative Updates*, JDSUPRA (Apr. 2, 2021), https://www.jdsupra.com/legalnews/tax-exempt-advance-refunding-bonds-5410962/ [https://perma.cc/7HBN-DZE5] ("The theoretical rationale for ending tax-exempt advance refundings was to eliminate duplicate tax-exemptions on the same financed assets; this change in law helped Congress' 'budget scoring' for the TCJA, offsetting part of the scored revenue reductions arising from the TCJA's tax rate cuts.").

the month or you risk going into default. What are your options? Unless you want to be forcibly removed from office or lose the next election in a landslide, you are not going to cut government programs or raise taxes during a pandemic. So, what do you do? You grab an ice cream scooper big enough to toss $3 million ten years into the future, issue new bonds, and worry about it later.[57]

Scoop and tossing raises three main concerns. First, and most obviously, scoop and tossing contributes to the debt a municipality must eventually repay. While scoop and tossing increases flexibility in the short term, this debt ties up funds and decreases the long-term flexibility a state or local government has in times of crisis. For example, consider New Haven, Connecticut.[58] In 2018, New Haven decided to refinance its debt for the seventh time in nine years.[59] The move, issuing $160 million in municipal bonds, was done to refinance part of the city's $755 million debt.[60] By avoiding repayment of $105 million over the next few years, New Haven was able to get some breathing room in their budget.[61] However, this short-term flexibility came at a big cost.[62] From 2027 to 2034, the city will have to pay back the $160 million principal with $96 million in interest.[63] During this seven-year period, the city's budget will be less flexible as capital gets earmarked to repay the bonds.[64]

New Haven is certainly not the only city guilty of scoop and tossing.[65] Chicago is probably the most famous culprit. During his term, former mayor Rahm Emanuel famously relied on scoop and tossing to balance the city's budget.[66] For the 2013 and 2014 city budgets, Emanuel scoop and tossed a total of $133.8 million worth of municipal bonds.[67] By the time some of these bonds are due in 2044, the city will have accumulated over $200 million in interest obligations.[68] These budgetary maneuvers led one credit rating agency to give

57. Specifically, you would issue enough municipal bonds to cover the deficit through a current refunding and set an expiration date that is after you plan to leave office.

58. *See* Christopher Peak, *Like Hartford, New Haven "Scoops & Tosses*,*"* NEW HAVEN INDEP. (July 31, 2018, 4:31 PM), https://www.newhavenindependent.org/index.php/archives/entry/scoop_toss_bond_debt_refinancing/ [https://perma.cc/S4GL-YSZ8].

59. *Id.*

60. *See id.* Some experts put the figure closer to $523 million. *Id.*

61. *See id.*

62. *See id.*

63. *Id.*

64. Of course, the city could find short-term flexibility again by scoop and tossing and contributing to the total debt that would eventually have to be repaid.

65. *See City Continues "Scoop and Toss" Borrowing To Balance the Budget*, CIVIC FED'N (Nov. 5, 2014), https://www.civicfed.org/civic-federation/blog/city-continues-scoop-toss-borrowing-balance-budget [https://perma.cc/A4VZ-4F4R].

66. *See id.*

67. *Id.*

68. *Id.*

Chicago's municipal bonds "junk bond status."[69] In a rare instance of public scrutiny, Emanuel vowed to end scoop and tossing by 2019.[70] Between 2015 and 2017, Emanuel reduced scoop and tossing from $225 million to $62 million.[71]

Second, scoop and tossing is "one of the least transparent budget maneuvers because the Official Statements, which describe[] the issued bonds, do not directly identify this refinancing technique."[72] Beyond a lack of documentation requirements, scoop and tossing exists in the shadows because it involves municipal bonds. Municipal bonds are the perfect vehicle to operate under the radar: they sound boring and do not immediately affect the public. Unlike a tax increase, the real impact of a bond may not be felt for thirty years.[73] Thus, officials may make unsound budgetary decisions without proper scrutiny.

Third, scoop and tossing shifts accountability. As has already been shown, scoop and tossing allows elected officials to place their budgetary burdens on the shoulders of their successors.[74] Indeed, "politicians can further their own careers by hiding the costs of popular governmental programs and ballooning public debt from constituents, while leaving the eventual fiscal collapses to be dealt with by their successors in office."[75] However, politicians are not the only people avoiding responsibility for municipal debt—citizens of the municipality can also benefit at others' expense. Why? Citizens move.[76] In fact, the majority of Americans have moved to a different community at least once in their lives.[77] Because people move, citizens can, much like a government official, shift accountability to future generations.[78] To illustrate, let us return to our hypothetical. Splitsville's old mayor was losing popularity and needed to gain voters. To garner support, he targeted millennials. These young professionals,

69. Matt Dietrich, *Scoop, Toss and Spin: Digging into Rahm Emanuel's Budget Claim*, POLITIFACT (Aug. 14, 2017), https://www.politifact.com/factchecks/2017/aug/14/rahm-emanuel/scoop-toss-and-spin-digging-rahm-emanuels-budget-c/ [https://perma.cc/959T-BVQ5].

70. *See id.*

71. *Id.* One of the ways Emanuel reduced scoop and tossing was by incorporating large expenses, such as judgments against the city, into the operating budget, instead of funding them through borrowing. *Id.*

72. HATHAWAY & LIGHTBOURNE, *supra* note 9, at 6.

73. *See* White, *supra* note 28, at 369 ("[M]ost bonds have a significantly longer term, frequently up to thirty years and, sometimes, even longer.").

74. In our example, the previous mayors were able to generate $3 million in funds while you were left to pick up the tab.

75. Julie A. Roin, *Retroactive Taxation, Unfunded Pensions, and Shadow Bankruptcies*, 102 IOWA L. REV. 559, 560–61 (2017).

76. D'VERA COHN & RICH MORIN, PEW RSCH. CTR., AMERICAN MOBILITY: WHO MOVES? WHO STAYS PUT? WHERE'S HOME? 3 (2008), https://www.pewresearch.org/wp-content/uploads/sites/3/2011/04/American-Mobility-Report-updated-12-29-08.pdf [https://perma.cc/VVZ8-B7R9] (finding that 11.9% of Americans moved between 2007 and 2008).

77. *See id.* ("[M]ost Americans have moved to a new community at least once in their lives . . . .").

78. *See* Roin, *supra* note 75, at 562 ("Such voters can have their proverbial cake—valuable public services—and 'eat it too' by foisting the costs of debt repayments onto some combination of continuing and new residents, investors, and public employees.").

desperate for a place to exercise in the city, lobbied for a new park. Despite a tight city budget, the mayor acquiesced. To free up money for the project, the mayor scoop and tossed some expiring bonds. The mayor then used whatever money was not used for the old bonds to build the park. However, as these young professionals matured into slightly-older young professionals, they decided to move out of the city and settle down in an adjacent suburb. Now, the debt that was scoop and tossed to fund the park needs to be repaid, and the very people who lobbied the city to extend this debt are not there to help pay it.

For citizens, scoop and tossing is a problem because it shifts the burden of repayment to portions of the public that never asked for the benefits. Of course, in the example above, the public has some plausible deniability as to their blameworthiness. They did not have a direct role in the mayor's decision because they did not know he would scoop and toss to finance the project; they just wanted a park. But this is not always the case. As I have already mentioned, some bonds, like general obligation bonds, typically require voter approval.[79] However, even without this direct input in the bond issuance, there is still a clear element of unfairness when voters allow or encourage municipalities to take on new projects—often by acquiring more debt—for their own benefit and then leave before repayment.

II. PAST EFFORTS TO REGULATE

Having established the background for scoop and tossing and the potential dangers it poses to municipal budgets, it is now time to turn to past efforts to regulate it. First, Section II.A discusses efforts at the federal and state levels and why those attempts have failed. Section II.B looks at the public's current role in approving municipal budgets and limiting scoop and tossing.

A. *Regulation at the Federal Level*

By far the most significant recent legislation affecting municipal bonds was the Tax Cuts and Jobs Act of 2017 (the "Act").[80] However, before getting to its impact, it is important to understand the system it replaced.

As discussed, there are advance and current scoop and toss refundings.[81] A current refunding occurs when the refunding bonds are used to pay off the expiring bonds less than ninety days after the refunding bonds were issued.[82] The interest investors earn on current refundings is exempt from federal taxes.[83]

79. *See, e.g.*, *Bonds*, *supra* note 39.

80. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (codified as amended in scattered sections of 16, 26, 42, and 43 U.S.C.).

81. *See* MSRB, REFUNDINGS AND REDEMPTION PROVISIONS, *supra* note 49, at 2.

82. *See id.*

83. MSRB, MUNICIPAL SECURITIES PROVISIONS, *supra* note 54, at 1.

An advance refunding occurs when the refunding bonds are used to pay off the expiring bonds more than ninety days after the refunding bonds were issued.[84] Municipalities mostly use advance refundings to refinance their debt at a lower interest rate.[85] Prior to the Act, advance refundings, like current refundings, were exempt from federal taxes.[86]

Before the Act, there was also a limit on the number of times a bond could be advance refunded,[87] but there was no limit on current refundings.[88] Specifically, an expiring bond could only be advance refunded once.[89] However, there was a major loophole.[90] Refunding bonds that were taxable did not count toward the "one refunding" maximum.[91] This meant that debt could be refunded as many times as needed, so long as the municipality convinced enough people to invest in a taxable bond.[92]

Now, enter the Act itself. The Act was passed on December 22, 2017.[93] Municipal officials were probably not thrilled to find what the federal government had put in their stockings. The Act did two major things.[94] First, the Act actually helped municipalities, at least in the short term, by eliminating limits on the number of times a bond can be advance refunded.[95] However, whatever relief municipal officials may have gained from this was likely short-

84. *See* MSRB, REFUNDINGS AND REDEMPTION PROVISIONS, *supra* note 49, at 2.

85. *See id.* at 3.

86. Amber Sherrill, *Tax Law Eliminates Advance Refunding*, BKD CPAS & ADVISORS (Mar. 1, 2018), https://www.bkd.com/article/2018/03/tax-law-eliminates-advance-refunding [https://perma.cc/D935-M5HK] ("The Tax Cuts and Jobs Act (TCJA) makes previously tax-exempt interest on advance refunding bonds taxable, essentially eliminating the advantages and appeal of advance refunding bonds after December 31, 2017.").

87. *See Advance Refunding Bond Limitations Under Internal Revenue Code Section 149(d)*, IRS, https://www.irs.gov/tax-exempt-bonds/advance-refunding-bond-limitations-under-internal-revenue-code-section-149d [https://perma.cc/646K-8PE4] [hereinafter *Bond Limitations Under Section 149(d)*] (noting that prior to the Act "IRC Section 149(d)(3)(A)(i) provide[ed] limitations on the number of times a bond [could] be advance refunded").

88. MUNICIPAL BONDS FOR AMERICA, ADVANCE REFUNDINGS OF TAX-EXEMPT MUNICIPAL BONDS 1 (2017), https://www.munibondsforamerica.org/wp-content/uploads/2017/11/Advance-Refunding-One-Pager.pdf [https://perma.cc/75QK-DZ7Q] ("Bond issuers may advance refund a bond only once. There is no similar limit on current refundings.").

89. *See Bond Limitations Under Section 149(d)*, *supra* note 87 ("If the original bond was issued after 1985, only one advance refunding is permitted with respect to that bond, including any bond that refunds that bond."). This meant that as long as an issuer used the new bonds within ninety days of issuing them, there was no limit. *See id.*

90. *See id.*

91. *See id.* ("[G]enerally, for purposes of the limitation on the number of advance refundings . . . taxable advance refunding issues are not counted.").

92. *See id.*

93. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (codified as amended in scattered sections of 16, 26, 42, and 43 U.S.C.).

94. *See id.* § 13532, 131 Stat. at 2154 (removing the limits on the number of advance refundings); *see also* Sherrill, *supra* note 86 (noting that the Act prohibited tax-exempt advance refundings).

95. *See* Tax Cuts and Jobs Act of 2017, § 13532, 131 Stat. at 2154.

lived because the Act also limited tax-exempt advance refundings.[96] As I have discussed, advance refundings are often used when a municipality wants to take advantage of low interest rates, refinance its debt, and allocate savings toward things like infrastructure or other projects.[97] By making advance refundings taxable, municipalities are forced to charge a higher interest rate on the bonds to attract investors that are wary of taxes. Municipalities are still free to advance refund. However, the Act essentially gave municipalities unlimited use of the car, slashed all the tires, and then told them to try to convince the neighbors to help push. The alternative, current refundings, are still tax-exempt.[98] Thus, if a municipality still wants to refinance, and they do not want to pay a higher interest rate to offset taxes, they are "[forced] to accept market conditions in the 90-day current refunding window."[99]

In 2018, the IRS clarified how the Act changed advance refundings.[100] The IRS tried to soften the blow to municipal budgets, saying that while tax-exempt refundings were limited by the Act, they were not eliminated.[101] According to the IRS, tax-exempt advance refundings can be used to refund a taxable bond.[102] However, this is of little solace to municipal governments because municipal bonds that are not refundings are generally tax-exempt.[103] The IRS's exception is certainly not a major loophole, and municipalities still face the challenge of refinancing without tax exemptions that effectively act like a subsidy for municipal activity.[104]

The Act has two major shortfalls. First, it hamstrings a municipality's ability to refinance existing debt at a lower interest rate, costing state and local governments money in the long run.[105] Second, the Act fails to adequately address scoop and tossing. Prior to the Act, there was no limit on the number of times a bond could be repaid with a current refunding, but there was a limit

96. *Id.*

97. *See* MSRB REFUNDINGS AND REDEMPTION PROVISIONS, *supra* note 49, at 3.

98. Sherrill, *supra* note 86 ("Interest on current refunding bonds—refunding bonds issued within 90 days or less of the redemption or call date of the refunded bonds—will remain tax-exempt.").

99. *Id.*

100. *See* I.R.S. Gen. Couns. Mem. 201843009 (Oct. 26, 2018).

101. *See id.* ("Section 149(d), as amended by § 13532 of the 2017 Act, does not preclude the issuance of tax-exempt bonds to advance refund non-tax-advantaged, taxable bonds . . . .").

102. *Id.*

103. *The State of State (and Local) Tax Policy*, TAX POL'Y CTR. (May 2020), https://www.taxpolicycenter.org/briefing-book/how-does-deduction-state-and-local-taxes-work [https://perma.cc/H23C-846S] ("Since its inception in 1913, the federal income tax has exempted interest payments received from municipal bonds from taxable income.").

104. *Id.* Tax exemptions act like a subsidy for state and local governments as they make it possible for local governments to effectively borrow money at a lower price. *Id.* For fiscal year 2020, the size of this subsidy was estimated at $28 billion. *Id.*

105. *See* MSRB, REFUNDINGS AND REDEMPTION PROVISIONS, *supra* note 49, at 3.

on advance refundings.[106] The Act hollowed out what little substantive limits there were and eliminated the prior limitation on the number of times a bond can be repaid with an advance refunding.[107] While this could be seen as a small win for municipalities because it allows more budgetary flexibility, it comes at a major cost to the overall stability of the budget. Even though advance refundings are typically used to take advantage of low interest rates,[108] they can still be abused by government officials looking to scoop and toss unfavorable budgetary obligations. To that end, allowing multiple refundings, current or advance, on the same bonds only muddies the waters of political accountability as the original parties responsible for repayment get further and further removed.

In short, the Act is like a first grader's art project. Yes, there are some familiar features—advance refundings, current refundings, taxes—but, put together, it is unclear precisely what you are looking at. From one angle, the act tries to help state and local governments by giving them more flexibility and opportunities for refundings. However, if you turn your head just a little bit and squint your eyes, you notice that the Act undermines the overall stability of the budget by inviting multiple rounds of scoop and tossing. In addition, it continues to harm state and local governments by limiting the one sound practice related to refundings: refinancing a bond to take advantage of interest rates.

B. *Regulation at the State Level*

Nearly all states exempt municipal bonds from state taxes.[109] However, state regulation of municipal bonds varies widely across the country, reflecting the different approaches municipalities take to ensure balanced budgets.[110] Before going any deeper into the link between balanced budgets and municipal bonds, it is important to understand balanced budget requirements.

Generally speaking, a balanced state "budget" includes the operating budget, not the entire budget.[111] As noted above, operating budgets usually fund ongoing expenses such as pension contributions and employee salaries.[112] The

106. *See* MUNICIPAL BONDS FOR AMERICA, *supra* note 88, at 1 ("Bond issuers may advance refund a bond only once. There is no similar limit on current refundings.").

107. *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 13532, 131 Stat. 2054, 2154 (codified as amended at 26 U.S.C. § 149).

108. *See* MSRB, REFUNDINGS AND REDEMPTION PROVISIONS, *supra* note 49, at 3.

109. *See* OFF. OF INV. EDUC. & ADVOC., *supra* note 34, at 1.

110. *See* NAT'L CONF. OF STATE LEGISLATURES, NCSL FISCAL BRIEF: STATE BALANCED BUDGET PROVISIONS 5 (2010) ("The stringency of state [balanced-budget] requirements varies substantially."), https://www.ncsl.org/documents/fiscal/StateBalancedBudgetProvisions2010.pdf [http://perma.cc/3D6C-G7V3].

111. *Id.* at 1 ("For state policymakers, the requirement of a balanced budget largely refers to the operating budget.").

112. Siripurapu & Masters, *supra* note 1.

operating budget is typically subject to approval every year or two and is usually the place where most state tax dollars end up before being earmarked for various expenses.[113] In contrast, the capital budget, which is used to fund projects such as infrastructure improvements, is typically not subject to a balanced budget requirement.[114] The capital budget may be funded by grants from the federal government or municipal bonds.[115] To review, the municipal bonds used to fund specific projects from the capital budget would likely be revenue bonds that are secured by the future proceeds of the project, not the government's taxing power.[116]

Nearly all states require a balanced budget.[117] However, the strictness of these requirements varies.[118] Balanced budget requirements, whether in a state's constitution or a statute, can be broken down into three different categories: (1) a requirement that the governor's proposed budget be balanced; (2) a requirement that the budget that gets passed must balance; and (3) a prohibition against deficits carrying from one fiscal year to the next.[119] Obviously, the weakest requirement is that only the governor's *proposed* budget has to balance. However, even the strictest requirement, that there cannot be a deficit carried over from one fiscal year to another, has loopholes.[120] For example, Michigan still allows unavoidable deficits to be resolved in the next fiscal year without defining "unavoidable."[121] It is not hard to imagine how such an ambiguity could be exploited by cash-strapped governments. After all, as the mayor of Splitsville, would you prefer an outright prohibition on deficits or the option to argue a deficit was "unavoidable"?

There are two types of municipal bonds—general obligation bonds and revenue bonds.[122] General obligation bonds are backed by the state's taxing power[123] and usually require a public vote.[124] In contrast, revenue bonds are only backed by the proceeds of the specific project and usually do not require a

113. *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 110, at 1.

114. *See The State of State (and Local) Tax Policy*, *supra* note 103 ("[Balanced budget requirements] typically only apply to states' operating budgets, while capital and pension funds are usually exempt from these limitations.").

115. *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 110, at 7.

116. *See Bonds*, *supra* note 39 ("[Revenue] bonds also are not guaranteed by the state's general taxing power and do not require voter approval.").

117. *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 110, at 2. Vermont is the one clear exception, although some sources also argue Wyoming, North Dakota, and Alaska do not have a balanced budget requirement. *Id.*

118. *See id.* at 5.

119. *Id.* at 2.

120. *See id.*

121. *Id.*

122. *See* OFF. OF INV. EDUC. & ADVOC., *supra* note 34, at 1–2.

123. *Id.* at 2.

124. *See Bonds*, *supra* note 39.

vote.[125] How do these bonds interact with municipal budgets and state balanced budget requirements? While issuing bonds to fund the operating budget is rare, it does happen.[126] In fact, it is happening right now.[127] In September 2020, New Jersey announced that it would issue municipal bonds to cover millions in operating expenses.[128] While this move is generally discouraged by economists, faced with rising unemployment and decreased tax revenues to fund the operating budget, the state had to make a decision.[129] Rather than opting for more traditional solutions like raising taxes or cutting spending,[130] and despite already carrying the fourth-highest bond debt in the country, New Jersey issued $4.5 million in bonds.[131] Of note, New Jersey's balanced budget requirement does not prohibit the state from carrying a deficit from one fiscal year to the next.[132]

Borrowing to cover expenses from the capital budget is much more common.[133] However, as I noted, the capital budget is not usually the "budget" required to balance.[134] Thus, any prohibitions on carrying deficits, or similar requirements, do not apply. Of the bonds used to finance the capital budget, revenue bonds, which do not require voter approval,[135] are the most common.[136]

125. *Id.*

126. *See* Luis Ferré-Sadurní, Jeffery C. Mays & Jesse McKinley, *Virus Forces N.Y.C. To Consider Tactic That Nearly Led To Ruin in '75*, N.Y. TIMES (May 29, 2020), https://www.nytimes.com/2020/05/29/nyregion/budget-borrow-coronavirus-ny.html [https://perma.cc/6N98-EQ78 (dark archive)] (noting that borrowing to cover operating expenses brought New York "to disrepair and the brink of bankruptcy in the 1970s").

127. *See* Tracey Tully & Mary Williams Walsh, *N.J. Will Borrow $4.5 Billion as Pandemic Pain Hits States*, N.Y. TIMES (Sept. 24, 2020), https://www.nytimes.com/2020/09/24/nyregion/new-jersey-coronavirus-budget.html [https://perma.cc/GT9Z-LLFV (dark archive)].

128. *Id.*

129. *See id.* ("Normally, many economists warn that states should avoid borrowing to pay for operating costs, arguing that doing so can lead to spiraling debt that can force major spending cuts or significant tax increases.").

130. *See id.* (noting that officials "argued that the step was needed to avoid deep cuts to essential services, including education, transit and health care").

131. *Id.* ("New Jersey is already burdened by the fourth-highest level of bond debt in the nation, representing a cost of $4,125 per resident . . . .").

132. *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 110, at 3 (showing that New Jersey requires the governor's proposed budget and the enacted budget to be balanced).

133. *See id.* at 7 ("A growing amount of state capital finance also comes from the issue of debt. State governments borrow substantial amounts for capital expenditure[s] . . . .").

134. *Id.* at 1.

135. *See Bonds*, *supra* note 39.

136. *See* Cooper Howard, *Understanding Municipal Revenue Bonds*, CHARLES SCHWAB (Dec. 10, 2020), https://www.schwab.com/resource-center/insights/content/understanding-revenue-bonds [http://perma.cc/8WAC-M788] ("Revenue municipal bonds, or revenue bonds, account for nearly two-thirds of all investment-grade munis outstanding, but they tend to get less attention than their more popular counterpart, general obligation bonds.").

The deficiencies in this system are fairly obvious. First, there is no uniformity for balanced budget requirements across the country.[137] This means that some municipalities are held to a strict standard while others continue to employ unsafe budgetary practices, inviting instability into the broader financial system. Second, even when there are strict budget requirements, there may be loopholes.[138] While these loopholes are likely in place to give some flexibility to the municipal budget in the short term, they may be inviting long-term instability. Where this instability exists, scoop and tossing lurks.

To illustrate, imagine you reprise your role as the mayor of Splitsville. The fiscal year is coming to a close. Tax revenues have dwindled, and it looks like you will have to cut spending dramatically or else you will have a deficit on your hands. But do not worry, you have a plan. Splitsville is located in a state like Michigan, where deficits can be carried over if they are "unavoidable."[139] That is exactly what you do, and the plan works! After all, what is more unavoidable than a global pandemic? However, the economic recovery is slower than expected, and by the end of the next fiscal year, the deficit grows. Nervous that your "unavoidable" deficit argument is not as strong this year, you take another route. To help cover the deficit and provide some short-term liquidity, you issue millions in bonds, like New Jersey. Luckily for you, the bonds will not expire until you are out of office. Fast-forward thirty years and there is a similar downturn in the economy right as the bonds expire. What is the new mayor of Splitsville going to do? By this point, you know the answer.

C. *The Public's Role*

Now I turn to the public's role in municipal bond issuance and scoop and tossing. Currently, public involvement in bond issuance is limited and depends on the type of bond.[140] As I discussed earlier, general obligation bonds are backed by the government's taxing power[141] and usually require voter approval.[142] However, revenue bonds, which are backed by the future revenue of projects, do not require any voter approval.[143]

The issue with this setup is a glaring one. While revenue bonds are not backed by taxpayers, they do affect them. First, whether it is a general obligation bond or revenue bond, it is still a government debt that must be repaid.[144] Maintaining debt on the books, whether there is a balanced budget or

137. *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 110, at 3.

138. *See id.* at 2.

139. *See id.*

140. *See Bonds*, *supra* note 39 (noting that general obligation bonds require voter approval).

141. *See* OFF. OF INV. EDUC. & ADVOC., *supra* note 34, at 2.

142. *See Bonds*, *supra* note 39.

143. *Id.* ("[Revenue] bonds also are not guaranteed by the state's general taxing power and do not require voter approval.").

144. *See id.*

not, is a weight on the municipal budget and decreases the government's ability to respond to crises or fund new projects, thus limiting the government's ability to respond to the needs of the public. Second, if the debt is not repaid and the government defaults, regardless if it is a revenue or general obligation bond, it will likely decrease the rating of future government bonds.[145] A decreased rating means that the municipality will have to pay more interest to attract investors and borrow money.[146] After all, would you jump at the opportunity to invest in a state's bonds if it just defaulted? These increased borrowing costs only decrease the return municipalities receive and make it harder to raise funds. Unfortunately, municipalities are defaulting on bonds at a rate unseen for nearly a decade.[147] Lastly, the majority of outstanding municipal bonds are revenue bonds.[148] This means that the majority of outstanding municipal bonds likely did not receive voter approval.[149] If that lack of accountability worries you, keep in mind that a revenue bond issued as a refunding to scoop and toss expiring debt would not require voter approval either.[150]

Beyond bond issuance, what role does the public play when a government decides to scoop and toss? The answer to that question varies. While scoop and tossing is a somewhat common practice,[151] public outrage over it is rare. By far the most famous example is a city I have already touched on, Chicago.[152] As discussed, Rahm Emanuel, Chicago's former mayor, relied heavily on scoop and tossing to fund the city's operations, using the maneuver to refinance hundreds of millions of dollars.[153] However, the public played a significant role in stopping Emanuel from scoop and tossing. Emanuel inherited scoop and tossing

145. *See* James Chen, *Bond Rating Agencies*, INVESTOPEDIA, https://www.investopedia.com/terms/b/bond-rating-agencies.asp [https://perma.cc/7QAY-4V9V] (July 5, 2020) (noting that credit agencies issue ratings to "convey to investors whether a bond carries a low or high default risk and whether the issuer is financially stable").

146. *See* HATHAWAY & LIGHTBOURNE, *supra* note 9, at 3 ("Higher credit ratings can translate into lower borrowing costs for states, and investors value a high credit rating because it demonstrates a state's ability to meet its financial obligations.").

147. Garphil Julien, *'You're Cornered if You're a City.' How Concentration in the Municipal Bond Market Is Raising Borrowing Costs.*, BARRON'S (Sept. 22, 2020, 4:21 PM), https://www.barrons.com/articles/youre-cornered-if-youre-a-city-how-concentration-in-the-municipal-bond-market-is-raising-borrowing-costs-51600806087 [https://perma.cc/KF5V-R8SS] ("Cities and states are in a fiscal crisis. Municipal bond defaults are now at their highest in a decade.").

148. *See* Howard, *supra* note 136 ("Revenue municipal bonds, or revenue bonds, account for nearly two-thirds of all investment-grade munis outstanding . . . .").

149. *See Bonds*, *supra* note 39.

150. *See* James Chen, *Refunded Bond*, INVESTOPEDIA, https://www.investopedia.com/terms/r/refundedbond.asp [https://perma.cc/4DXW-2BNN] (Sept. 22, 2020).

151. *See* MSRB, REFUNDINGS AND REDEMPTION PROVISIONS, *supra* note 49, at 2–3 (noting that advance refundings were a common tool to refinance debt at a lower interest rate before the Tax Cuts and Jobs Act of 2017).

152. *See City Continues "Scoop and Toss" Borrowing To Balance the Budget*, *supra* note 65.

153. *See id.*

from his predecessor, Richard M. Daley.[154] However, this did not spare him any criticism.[155] Indeed, Emanuel's practices generated considerable backlash in the opinion section of Chicago newspapers.[156] Under this pressure from the public, Emanuel announced that he would stop scoop and tossing by 2019, which inspired a literal burst of applause from one audience.[157] Unfortunately, such strong public involvement in municipal budgets is rare.[158]

III. CORRECTING PAST EFFORTS: A THREE-PRONGED APPROACH

Changes must be made to the current regulatory framework to minimize scoop and tossing and other unsound budgetary maneuvers. However, any changes must also ensure that governments still have the flexibility to operate effectively. This Comment proposes changes to all three levels of the current framework. First, at the federal level, the Tax Cuts and Jobs Act must be undone and tax-exempt advance refundings must be reimplemented. Second, there must be a limit on the number of times a bond can be refunded. Next, at the state level, there must be greater uniformity in balanced budget requirements. Finally, the public must be more involved in municipal bond issuance. Specifically, revenue bonds should receive voter approval and the public must be more invested in municipal budgets going forward.

A. *Walking a Tightrope: Reinstituting Tax-Exempt Advance Refunding*

Changes must be made at the federal level. The most obvious changes involve the Act. The Act severely limited a municipality's ability to issue tax-

154. Hal Dardick, *Six Years After Daley, Emanuel Still Using High-Cost Borrowing Practices*, CHI. TRIB. (Jan. 9, 2017, 5:00 AM), https://www.chicagotribune.com/politics/ct-rahm-emanuel-borrowing-met-0109-20170109-story.html [https://perma.cc/LH49-USTQ (dark archive)] ("Emanuel inherited the costly borrowing practices . . . from predecessor Richard M. Daley.").

155. *See* April Leachman, *Mayor Rahm Emanuel's "Scoop and Toss" Debt Management Requires Chicago Residents To Pick Up Much of the Tab*, CHICAGONOW (Jan. 11, 2017, 10:16 AM), http://www.chicagonow.com/chicago-on-the-radar/2017/01/mayor-rahm-emanuels-scoop-and-toss-debt-management-requires-chicago-residents-to-pick-up-much-of-the-tab/ [https://perma.cc/VD6S-ARZM (dark archive)] ("Admittedly, his predecessor relied on similar tactics, but that doesn't give Emanuel an excuse to perpetuate them. . . . Instead of holding officials accountable, we just keep giving them leeway to continue detrimental policies that just postpone a fiscal crisis rather than address underlying causes and mismanagement.").

156. *See, e.g.*, Scott Stantis, *Rahm Emanuel's Scoop and Toss*, CHI. TRIB. (Mar. 16, 2017, 3:32 PM), https://www.chicagotribune.com/opinion/ct-rahm-emanuel-s-scoop-and-toss-20170316-story.html [https://perma.cc/XBW4-HQTH] ("Chicago Mayor Rahm Emanuel kicks the can further down the road with more scoop and toss budget borrowing. This go-round it will cost the taxpayers of Chicago over $1 billion in interest payments alone. Given this level of mismanagement, is it any wonder the city's bond rating is hovering somewhere around junk rating?").

157. *See* Dietrich, *supra* note 69 ("'Scoop and toss' is such a bad practice that the audience at the Aug. 9 Chicago Investors Conference burst into applause when Emanuel mentioned in his speech his intent to stop it entirely by 2019."). Emanuel's strategy for reducing scoop and tossing involved funding large expenses through the city's operating budget, instead of through borrowing. *Id.*

158. *See* Howard, *supra* note 136.

exempt advance refundings to refinance outstanding debt at a lower interest rate.[159] While exceptions do exist for advance refundings of taxable bonds,[160] the vast majority of bonds do not fit this exception.[161] As a result, municipalities must operate without a major federal benefit that subsidizes state and local activities.[162] Without this subsidy, municipal governments are forced to offer higher interest rates to attract investors. In the long run, limiting tax-exempt advance refundings only hurts municipal governments. Thus, the federal government should reinstitute tax-exempt advance refundings because it gives state and local governments more flexibility and tools to reduce long-term debt.

However, the flexibility accompanying tax-exempt refundings must be limited to hold state and local governments accountable and decrease scoop and tossing—something the Act failed to do.[163] Prior to the Act, there was no limit on the number of times a bond could be repaid with a current refunding, but there was a limit on advanced refundings.[164] The Act did away with this limitation.[165] As a result, bonds can potentially be scoop and tossed, with a current or advance refunding, without limit. The solution here is a simple one.[166] The federal government must implement a strict limit on the number of times a bond can be refunded. While refundings do provide greater flexibility, a line must be drawn somewhere to protect the overall health of the budget and hinder the efforts of self-interested officials. Where that line should be is outside the scope of this Comment. However, establishing an effective federal limit is important because, as I have shown, state regulations lack uniformity and may fail to prevent scoop and tossing and other unsound budgetary practices.[167] While a federal limit will not completely close all loopholes in state regulations, it is certainly a step in the right direction.

Some may argue that reinstituting tax-exempt advance refundings will only make it easier to scoop and toss. However, any potential increase in scoop and tossing will be muted by enforcing a limit on the number of times a bond

159. *See* MSRB, REFUNDINGS AND REDEMPTION PROVISIONS, *supra* note 49, at 3.

160. *See* I.R.S. Gen. Couns. Mem., *supra* note 100 ("Section 149(d), as amended by § 13532 of the 2017 Act, does not preclude the issuance of tax-exempt bonds to advance refund non-tax-advantaged, taxable bonds . . . .").

161. *See The State of State (and Local) Tax Policy*, *supra* note 103 ("Since its inception in 1913, the federal income tax has exempted interest payments received from municipal bonds from taxable income.").

162. *Id.* For fiscal year 2020, the size of this subsidy was estimated at $28 billion. *Id.*

163. *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 13532, 131 Stat. 2054, 2154 (codified as amended at 26 U.S.C. § 149).

164. *See* MUNICIPAL BONDS FOR AMERICA, *supra* note 88, at 1 ("Bond issuers may advance refund a bond only once. There is no similar limit on current refundings.").

165. *See* Tax Cuts and Jobs Act of 2017, § 13532, 131 Stat. at 2154.

166. While the solution is simple, implementation would require an act of Congress, an increasingly difficult feat.

167. *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 110, at 3.

can be refunded. Thus, municipalities should only refinance through an advance refunding when it is absolutely necessary. While there certainly may still be some increase in refundings, this is outweighed by the flexibility it gives municipalities in times of crisis and the long-term benefits of refinancing debt at a lower interest rate.

B. *Fixing the State of State Regulation*

State regulations also need improvement. In the current system, the strictness of state balanced budget requirements varies widely across the country.[168] Some states, like Hawaii, only require the mayor's proposed budget to balance.[169] However, even in states like Michigan that have the strictest requirement (that a deficit cannot be carried over from one fiscal year to another), there may be loopholes.[170] If a state is strict and has no loopholes, the effectiveness of the regulations may still be limited because most balanced budget requirements only apply to the operating budget.[171]

Going forward, two changes are needed. First, state balanced-budget requirements must be strengthened across the country. As municipalities continue to bear the economic burden of the COVID-19 pandemic, flimsy requirements invite shortsighted budgetary maneuvers like scoop and tossing.[172] Such tactics likely make sense to elected officials who do not want to make more overt and immediate unpopular decisions like raising taxes. However, the long-term stability of the municipal budget is more important than any one official's career. Admittedly, making these budgetary decisions is certainly not easy, but it must be done. Arguably, implementing stricter balanced budget requirements helps officials by taking away the temptation of a shortsighted third option.

Second, state balanced budget requirements should also apply to capital budgets. While most tax revenue does end up in a municipality's operating budget,[173] capital budgets still present a risk to the health and stability of the overall budget. After all, borrowing to fund the capital budget is extremely common,[174] and bonds originally issued for capital projects can just as easily be scoop and tossed. By strengthening balanced budget requirements and applying them to capital budgets, states will close existing loopholes in the regulatory structure and decrease the deficits municipalities carry between fiscal years.

168. *See id.*

169. *Id.*

170. *See id.* at 2 ("Constitutional provisions in other states, such as Michigan, allow unavoidable deficits to be resolved in the next fiscal year, without defining 'unavoidable.'").

171. *See id.* at 1.

172. For example, as noted earlier, New Jersey took the ill-advised step of issuing millions of dollars in bonds to cover gaps in the operating budget. *See* Tully & Walsh, *supra* note 127.

173. *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 110, at 1.

174. *See id.* at 7.

The most likely argument against these measures is that strengthening balanced budget requirements decreases budgetary flexibility. This is true. However, this decrease in flexibility serves a valuable purpose. It makes it harder for officials to use shortsighted budgetary maneuvers like scoop and tossing. While strengthening requirements will decrease flexibility, so too will ill-advised budgetary maneuvers that undermine the stability of the budget for generations. At the very least, stronger balanced budget requirements ensure political accountability for those currently in office and limit the shift in responsibility that occurs as a result of scoop and tossing.

C. *Power to the People: Sparking Civil Engagement in the Mundane*

Lastly, public involvement in municipal bonds and budgets must increase. First, revenue bonds, not just general obligation bonds, should receive voter approval. While taxpayers do not directly back revenue bonds,[175] the debt generated by revenue bonds still weighs on the municipal budget. More importantly, revenue bonds can still be scoop and tossed. Requiring voter approval helps ensure that all debt, not just debt directly backed by taxpayers, is given appropriate scrutiny. Some may argue that requiring voter approval for revenue bonds, not just general obligation bonds, will create too much friction and grind issuance to a halt. Even if this were true, the benefit of increased public involvement and transparency outweighs any delayed timetables.

Second, there must be greater public involvement in municipal budgets. While this is not an original idea,[176] it is more important than ever to stress this point as municipalities continue to navigate the economic fallout of COVID-19. Government officials are undoubtedly under immense pressure, but the public must hold them accountable and make sure the economic impact of the pandemic does not last longer than necessary. There have been many proposals on how to spark this engagement, some more controversial than others.[177] For example, one scholar suggests a system of retroactive taxation, where citizens who fail to hold politicians accountable for shady budgetary maneuvers are forced to pay for their "carelessness."[178] Regardless of how it is accomplished, public involvement gets results.[179] As shown in Chicago, public outcry forced former mayor Rahm Emanuel to end scoop and tossing.[180]

175. *See Bonds*, *supra* note 39 ("[Revenue] bonds also are not guaranteed by the state's general taxing power and do not require voter approval.").

176. *See, e.g.*, Roin, *supra* note 75, at 561.

177. *See id.* Roin proposes retroactive taxation as a way to both increase public involvement and hold people accountable when they approve shortsighted budgetary maneuvers and then move away from the municipality before the bill comes due. *Id.*

178. *Id.* at 559.

179. *See, e.g.*, Dietrich, *supra* note 69.

180. *See id.*

Of course, some may argue that increased public involvement is too inconsistent to be an effective check on governments. This is a valid concern. Even in Chicago, current mayor Lori Lightfoot has returned to scoop and tossing.[181] However, if processes are put into place, like voter approval for revenue bonds, public involvement can become a consistent factor in municipal budgets. Even in the absence of regulatory frameworks, the public can still hold officials accountable.[182]

Overall, public involvement is a fail-safe for deficiencies and loopholes in federal and state regulations. For one last time, you are the mayor of Splitsville. It is March 2020, and things are not looking good. Tax revenues have fallen, and spending is astronomical. Even worse, millions of dollars in bonds are expiring soon and you cannot risk defaulting. A few months prior, the markets were favorable and interest rates were low so you wanted to refinance existing debt at a lower rate and use those savings to help pay off the expiring loans. Unfortunately, since the Tax Cuts and Jobs Act of 2017 is still in effect, you could not get enough people interested in your taxable bonds to have any real effect. However, under the Act, you still have the option to scoop and toss since there is no limit on the number of times you can refund the expiring bonds. That is exactly what you plan to do. After all, you actually want to win your next election, so raising taxes or cutting spending is out of the question. Before you can execute your plan, you have to make it through the state regulations. Luckily, your state only requires that the proposed budget be balanced. You can definitely get creative enough in your budget to make this work. But there is one last obstacle—the public. Tired of Splitsville's long history of scoop and tossing, there is a mass public outcry over your plan. Criticism is everywhere—newspapers, social media, nerdy municipal bond blogs. You are in a lose-lose situation. What do you do? You make the difficult decision. You decide not to scoop and toss and go the traditional route of balancing the budget.

181. *See* Heather Cherone, *Chicago To Return to 'Scoop-And-Toss' Borrowing, Chief Financial Officer Acknowledges*, WTTW (Oct. 22, 2020, 3:46 PM), https://news.wttw.com/2020/10/22/chicago-return-scoop-and-toss-borrowing-chief-financial-officer-acknowledges [https://perma.cc/6DY6-GMLX] ("Mayor Lori Lightfoot's plan to bridge the city's massive budget gap relies on a tactic used by former Mayors Rahm Emanuel and Richard M. Daley, and will force the next generation of Chicagoans to pay off tens of millions of dollars in debt . . . .").

182. *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 110, at 9 ("For the majority of states, however, the most important factor contributing to balanced budgets is not an enforcement mechanism or a provision specifying how a shortfall will be resolved. Rather, it is the *tradition* of balancing the budget that has created a forceful political rule to do so. Although states with enforcement provisions emphasize their importance, the *expectation* that state budgets will be balanced is the most important force in maintaining a balanced budget.").

CONCLUSION

Municipalities are in a tough position. The COVID-19 pandemic has taken a toll on state and local governments across the country.[183] While the dangers of scoop and tossing existed before the emergence of COVID-19, the pandemic has only exacerbated these threats to political accountability and the long-term stability of municipal budgets. Faced with two unpopular choices—raising taxes or cutting spending—some officials, operating under the current system, have already chosen a third option.[184] It is obvious that changes must be made to the existing regulatory framework. At the federal level, the Tax Cuts and Jobs Act must be undone and tax-exempt refundings must be reinstituted to give municipalities a valuable tool to decrease long-term debt. A limit must also be set on the number of times a bond can be refunded to decrease instances of scoop and tossing. At the state level, balanced budget requirements must be applied to capital budgets and strengthened across the country. Lastly, there must be greater public involvement in municipal bonds and budgets. Revenue bonds, not just general obligation bonds, should receive voter approval. Most importantly, the public must consistently act as a fail-safe for the regulatory framework and call out unsound budgetary maneuvers, like scoop and tossing, whenever they occur.

While these are unprecedented times, economic turmoil is nothing new.[185] When hard times come, shortsighted budgetary maneuvers like scoop and tossing can, understandably, tempt any elected official, even the mayor of Splitsville. However, it is up to all of us to strengthen the current regulatory framework and, above all else, make sure officials make the best decision not only for current voters, but for generations to come.

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183. *See* Siripurapu & Masters, *supra* note 1.

184. *See* Cherone, *supra* note 181.

185. *See* Siripurapu & Masters, *supra* note 1 ("Many still bear the scars of the 2008 financial crisis, which forced painful spending cuts to public services.").

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