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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

TD 9150

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Remedial actions applicable to tax-exempt bonds issued by state and local governments

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations on the exempt facility bond rules applicable to tax-exempt bonds issued by state and local governments. The regulations affect issuers of tax-exempt bonds and amend provisions in the current regulations permitting remedial actions for tax-exempt bonds issued by state and local governments.

DATES: Effective Date: These regulations are effective August 13, 2004.

Applicability Date: For dates of applicability, see §1.141-16(c) and (d) of these regulations.

FOR FURTHER INFORMATION CONTACT: Vicky Tsilas, (202) 622-3980 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document amends 26 CFR part 1 under sections 141 and 142 of the Internal Revenue Code by amending rules pertaining to remedial actions (the final regulations). On July 21, 2003, the IRS published in the **Federal Register** a notice of proposed rulemaking (REG-132483-03) (68 FR 43059) (the proposed regulations). The proposed regulations would amend (1) the definition of nonqualified bonds in §1.141-12, (2) the rules in §§1.141-12 and 1.142-2, pertaining to the allocation of nonqualified bonds, and (3) the effective date provisions under §§1.141-15(e) and 1.141-16(c). A public hearing was scheduled for November 4, 2003. The public hearing was cancelled because no requests to speak were received. Written comments on the proposed regulations were received. After consideration of the written comments, the proposed regulations under §§1.141-16 and 1.142-2 are adopted as revised by this Treasury decision. The revisions are discussed below.

Explanation of Provisions

A. Proposed Regulations

The proposed regulations propose two changes to the remedial action rules contained in §§1.141-12 and 1.142-2. First, the proposed regulations would change the definition of nonqualified bonds under §1.141-12 to provide that the nonqualified bonds are a portion of the outstanding bonds in an

amount that, if the remaining bonds were issued on the date on which the deliberate action occurs, the remaining bonds would not satisfy the private business use test or private loan financing test, as applicable. For this purpose, the proposed regulations provide that the amount of private business use is the greatest percentage of private business use in any one-year period commencing with the deliberate action.

Second, the proposed regulations would amend the provisions of §1.141-12 (relating to redemption or defeasance) and §1.142-2 relating to allocations of nonqualified bonds. Under the proposed regulations, allocations of nonqualified bonds must be made on a pro rata basis, except that an issuer may treat any bonds of an issue as the nonqualified bonds so long as (i) the remaining weighted average maturity of the issue, determined as of the date on which the nonqualified bonds are redeemed or defeased (determination date), and excluding from the determination the nonqualified bonds redeemed or defeased by the issuer, is not greater than (ii) the remaining weighted average maturity of the issue, determined as of the determination date, but without regard to the redemption or defeasance of any bonds (including the nonqualified bonds) occurring on the determination date.

The proposed regulations also would amend §§1.141-15(e) and 1.141-16(c) to provide that for bonds issued before May 16,

1997, issuers may apply §§1.141-12 and 1.142-2 without regard to the 10½ year limitation on defeasances contained in those regulations.

B. Final Regulations

Public comments were received regarding the proposed regulations. These comments request that the amount of nonqualified bonds be determined in a manner consistent with the general measurement rules under § 1.141-3(g). Because of the interrelationship between the remedial action provisions of §1.141-12 and the allocation and accounting rules of §1.141-6 (which are currently reserved), the proposed regulations under §§1.141-12 and 1.141-15 are not being finalized at this time. It is anticipated that these proposed regulations will be finalized in connection with the provision of the allocation and accounting rules.

Commentators agreed with the proposed change that allows any bonds of an issue to be treated as the nonqualified bonds, provided that the redemption or defeasance does not have the effect of extending the weighted average maturity (WAM) of the issue. However, the commentators stated that under the bond indentures for certain fixed rate bonds, the redemption or defeasance of bonds with the longest maturities in an issue could result in an extension of the WAM of the issue. Under some bond indentures, optional redemptions of a portion of a

term bond must be used first to reduce the earliest mandatory sinking fund payments on the bond. In this case, the redemption or defeasance of the longest bonds could result in an extension of the WAM. Commentators indicated that requiring an issuer to use the pro rata allocation method in these circumstances is inappropriate and recommended that the regulations be revised to permit the longer bonds to be treated as the nonqualified bonds, which is permitted under the existing regulations. The IRS and Treasury Department agree that additional flexibility should be provided for outstanding bonds with bond indentures that prevent compliance with the WAM rule, but believe that extensions of the WAM should not be permitted on a prospective basis. As a result, the final regulations provide that for purposes of §1.142-2(e)(2), in addition to the allocation methods permitted in §1.142-2(e)(2), an issuer may treat bonds with the longest maturities (determined on a bond-by-bond basis) as the nonqualified bonds, but only with respect to failures to properly use proceeds that occur on or after May 14, 2004 with respect to bonds sold before August 13, 2004.

Other comments were received that are beyond the scope of this project. The IRS and Treasury Department continue to consider these comments.

Effective Dates

The final regulations apply to failures to properly use proceeds that occur on or after August 13, 2004 and may be applied by issuers to failures to properly use proceeds that occur on or after May 14, 2004, provided that the bonds are subject to §1.142-2. The final regulations that amend §1.141-16(c) apply to bonds issued before May 16, 1997, that are subject to §1.142-2, for purposes of failures to properly use proceeds that occur on or after April 21, 2003.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the rule does not impose a collection of information on small entities, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply.

Drafting Information

The principal authors of these regulations are Rebecca L. Harrigal and Vicky Tsilas, Office of Associate Chief Counsel (Tax-exempt and Government Entities), IRS. However, other personnel from the IRS and Treasury Department participated in

their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.141-0 is amended by adding an entry to the table for §1.141-16(d) to read as follows:

§1.141-0 Table of contents.

* * * * *

§1.141-16 Effective dates for qualified private activity bond provisions.

* * * * *

- (d) Certain remedial actions.
- (1) General rule.
- (2) Special rule for allocations of nonqualified bonds.

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Par. 3. Section 1.141-16 is amended by revising paragraph (c) and adding paragraph (d) to read as follows:

§1.141-16 Effective dates for qualified private activity bond provisions.

* * * * *

(c) Permissive application. The regulations designated in paragraph (a) of this section may be applied by issuers in whole, but not in part, to bonds outstanding on the effective date. For this purpose, issuers may apply §1.142-2 without regard to paragraph (c)(3) thereof to failures to properly use proceeds that occur on or after April 21, 2003.

(d) Certain remedial actions--(1) General rule. The provisions of §1.142-2(e) apply to failures to properly use proceeds that occur on or after August 13, 2004 and may be applied by issuers to failures to properly use proceeds that occur on or after May 14, 2004, provided that the bonds are subject to §1.142-2.

(2) Special rule for allocations of nonqualified bonds. For purposes of §1.142-2(e)(2), in addition to the allocation methods permitted in §1.142-2(e)(2), an issuer may treat bonds with the longest maturities (determined on a bond-by-bond basis) as the nonqualified bonds, but only with respect to failures to properly use proceeds that occur on or after May 14, 2004 with respect to bonds sold before August 13, 2004.

Par. 4. Section 1.142-0 is amended by revising the entry to the table for §1.142-2 paragraph (e) to read as follows:

§1.142-0 Table of contents

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§1.142-2 Remedial actions.

* * * * *

(e) * * *

- (1) Amount of nonqualified bonds.
- (2) Allocation of nonqualified bonds.

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Par. 5. Section 1.142-2 is amended by revising paragraph (e) to read as follows:

§1.142-2 Remedial actions

* * * * *

(e) Nonqualified bonds--(1) Amount of nonqualified bonds.

For purposes of this section, the nonqualified bonds are a portion of the outstanding bonds in an amount that, if the remaining bonds were issued on the date on which the failure to properly use the proceeds occurs, at least 95 percent of the net proceeds of the remaining bonds would be used to provide an exempt facility. If no proceeds have been spent to provide an exempt facility, all of the outstanding bonds are nonqualified bonds.

(2) Allocation of nonqualified bonds. Allocations of nonqualified bonds must be made on a pro rata basis, except that an issuer may treat any bonds of an issue as the nonqualified bonds so long as--

(i) The remaining weighted average maturity of the issue, determined as of the date on which the nonqualified bonds are redeemed or defeased (determination date), and excluding from the determination the nonqualified bonds redeemed or defeased by the issuer to meet the requirements of paragraph (c) of this section, is not greater than

(ii) The remaining weighted average maturity of the issue, determined as of the determination date, but without regard to the redemption or defeasance of any bonds (including the nonqualified bonds) occurring on the determination date.

Nancy Jardini
Acting Deputy Commissioner of Internal
Revenue.

Approved: July 18, 2004

Gregory Jenner
Acting Assistant Secretary of the
Treasury.