
Section 148.—Arbitrage

26 CFR 1.148-4: Yield on an issue of bonds.

T.D. 8718

DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Parts 1 and 602

Arbitrage Restrictions on Tax-Exempt Bonds

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations on the arbitrage and related restrictions applicable to tax-exempt bonds issued by State and local governments. Changes to the applicable law were made by the Tax Reform Act of 1986, the Technical and Miscellaneous Revenue Act of 1988, the Revenue Reconciliation Act of 1989, and the Revenue Reconciliation Act of 1990. These regulations affect issuers of tax-exempt bonds and provide guidance for complying with the arbitrage and related restrictions.

DATES: These regulations are effective May 9, 1997.

For dates of applicability of these regulations, see §§ 1.103-8(a)(5), 1.142-4(d), 1.148-11, 1.148-11A, 1.149(d)-1(g)(3), and 1.150-1(a)(2).

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

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in these final regulations have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1347. Responses to these collections of information are required to obtain a benefit from treating a

contract as a qualified hedge or treating certain general obligation bonds as a single issue.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The estimated average annual burden hours per recordkeeper: 2 hours.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be sent to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, T:FP, Washington, DC 20024, and to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Books or records relating to collections of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

Section 148 of the Internal Revenue Code restricts the use of proceeds of tax-exempt State and local bonds to acquire higher yielding investments. On June 18, 1993, final regulations (T.D. 8476) relating to the arbitrage restrictions and related rules under sections 103, 148, 149, and 150 (the June 1993 regulations) were published in the **Federal Register** (59 FR 33510). Corrections to the June 1993 regulations were published in the **Federal Register** on August 23, 1993 (58 FR 44451), and May 11, 1994 (59 FR 24350).

On May 10, 1994, temporary and final regulations (T.D. 8538) to clarify and revise certain provisions of the June 1993 regulations were published in the **Federal Register** (59 FR 24039). A notice of proposed rulemaking (FI-7-94) cross-referencing the temporary regulations and proposing additional changes to the June 1993 regulations was published in the **Federal Register** on the same day (59 FR 24094). Written comments were received, and a public hearing was held on September 25, 1995.

After consideration of all the comments, the proposed regulations have been modified and are adopted in final form, and the corresponding temporary

regulations are redesignated as final regulations. The principal changes to the regulations, as well as the major comments and suggestions, are discussed below. Comments relating to regulations under section 148 other than those in the proposed regulations also were received. The changes requested by those comments are not addressed in these final regulations, but are under consideration.

Explanation of Provisions

A. Section 1.142-4—Interest on Bonds to Finance Certain Exempt Facilities

The proposed regulations provide generally that costs incurred before the issue date of an exempt facility bond may not be financed with the proceeds of that bond unless an official action was taken within 60 days of the date those costs were incurred. For tax-exempt bonds subject to § 1.150-2, however, a reimbursement allocation may be made if the official action was taken within 60 days of the date that the costs were paid. One commentator requested that the official action and reimbursement allocation rules for exempt facility bonds be the same as the rules in § 1.150-2. The final regulations generally adopt this suggestion. The final regulations also clarify that a refinancing of a taxable debt other than a State or local bond is not treated as a refunding for purposes of this rule. In addition, the final regulations redesignate this provision, which was previously contained in § 1.103-8(a)(5), as new § 1.142-4.

B. Section 1.148-1—Definitions and Elections

1. Bonds Financing a Working Capital Reserve

The June 1993 regulations provide that replacement proceeds may arise if a working capital reserve is directly or indirectly financed with bond proceeds, but not to the extent the issuer has maintained a working capital reserve. The proposed regulations provide a method for determining whether an issuer has maintained a working capital reserve. This method is based on the average amount of working capital maintained by the issuer before the issue date of the bonds.

One commentator stated that start-up operations are unable to demonstrate

any average reserves for past periods and, therefore, cannot show that they have not indirectly financed a working capital reserve with bond proceeds.

The determination of whether an issuer has financed a working capital reserve with bond proceeds is based on facts and circumstances. The method in the proposed regulations provides one way of making that determination. An issuer may use alternative methods to establish that a working capital reserve is not indirectly financed with bond proceeds. Therefore, the final regulations adopt the provision in the proposed regulations.

2. Definition of Investment-type Property

The proposed regulations clarify that the definition of investment-type property includes a contract that would be a hedge under § 1.148-4(h) except that it contains a significant investment element. The proposed regulations also provide that an interest rate cap contains a significant investment element if the payments for the cap are made more quickly than in level annual installments over the term of the cap, the cap hedges a bond that is not a variable rate debt instrument (VRDI) under § 1.1275-5, or the cap rate is less than the on-market swap rate on the date the cap is entered into.

Commentators requested that the provisions relating to whether an interest rate cap contains a significant investment element be deleted because they asserted that those conditions do not give rise to an expected return from the cap. One commentator stated that these rules were misplaced and should be included in the provision in § 1.148-4(h) dealing with significant investment element.

The final regulations modify the proposed regulations in several ways. First, the provision that a cap contains a significant investment element if the cap rate is less than the on-market swap rate has been deleted. The deletion of this rule is balanced by another rule addressing the timing of payments for a cap. (See discussion below.) Second, the requirement relating to the pattern of payments for a cap and the prohibition on hedging an instrument other than a VRDI have been moved to § 1.148-4(h). (See discussion below.) Third, the final regulations clarify that investment-type property includes only the investment element of a hedge that contains a significant investment element. This ele-

ment does not necessarily include all payments on or receipts from a hedge.

C. Section 1.148-4—Yield on an Issue of Bonds

1. Yield on Certain Mortgage Revenue and Student Loan Bonds

The proposed regulations provide that, for purposes of applying sections 148 and 143(g) to a variable yield issue of qualified mortgage bonds, qualified veterans' mortgage bonds, or qualified student loan bonds, the yield on the issue is computed over the term of the issue, and § 1.148-4(d) (relating to conversion from a variable yield issue to a fixed yield issue) does not apply. The proposed regulations also address how to compute yield over the term of the issue.

One commentator requested that this rule be amended so it applies only for yield restriction purposes or only to variable yield issues that are expected to convert to fixed yield issues. The commentator explained that applying the rule for rebate purposes may be inappropriate. The final regulations generally adopt this comment by providing that the rule applies only to issues that are expected to convert to a fixed yield and only for purposes of applying sections 148 and 143(g) to purpose investments.

2. Qualified Hedging Transactions

a. Definition of hedge. The final regulations expand the definition of hedge to include certain hedges of bonds of an issue that would otherwise be a fixed yield issue (a fixed-to-variable hedge). Generally, a fixed-to-variable hedge must be entered into no later than 15 days after the issue date of the issue (or the deemed issue date under § 1.148-4(d)) or no later than the expiration of another qualified hedge with respect to the bonds. The permitted fixed-to-variable hedges are limited in this manner to minimize the complex computations and potential for abuse that may arise if an issue switches between fixed yield treatment and variable yield treatment during the term of the issue. Comments are requested on the extent to which other fixed-to-variable hedges should be treated as a hedge.

b. Significant investment element. The definition of investment-type property in the proposed regulations provides that an interest rate cap contains a significant investment element if the payments for the cap are made more quickly than in

level annual installments. Commentators requested that this provision be deleted because they asserted that early payment of a cap premium never gives rise to an expected return from the cap.

Amounts paid for an interest rate cap generally relate increasingly to the later years of the term of the cap. Thus, this rule reflects the concern that the issuer receives an arbitrage benefit by making a prepayment. This prepayment concern also arises in connection with other types of hedges when an issuer makes payments before the period to which those payments relate. Therefore, the final regulations provide that a hedge contains a significant investment element if the issuer's payments for the hedge are significantly front-loaded. In addition, a hedge contains a significant investment element if the issuer's payments are significantly back-loaded. The final regulations also include a special rule for caps that permits cap fees to be paid in level installments over the term of the cap.

c. Interest based. The definition of investment-type property in the proposed regulations provides that an interest rate cap contains a significant investment element if the cap hedges a bond that is not a VRDI within the meaning of § 1.1275-5. Commentators requested that this provision be deleted because they asserted that hedging a bond that is not a VRDI does not give rise to an expected return from the cap.

The final regulations clarify that a contract meets the requirement that it be interest based only if, (i) before the contract is taken into account, each hedged bond is a type of obligation that is respected as solely tax-exempt debt under the original issue discount regulations (i.e., a fixed rate bond, a VRDI within the meaning of § 1.1275-5 that is not based on an objective rate other than a qualified inverse floating rate or a qualified inflation rate, a tax-exempt obligation described in § 1.1275-4(d)(2), or an inflation-indexed debt instrument within the meaning of § 1.1275-7T), and (ii) after the contract is taken into account, each hedged bond is substantially the same as one of these types of debt instruments.

d. Timing and allocation of payments. The proposed regulations provide that the period to which a payment made by the issuer relates is based on general Federal income tax principles, and that generally a payment received by the issuer is taken into account in the period

that the interest payment that the payment hedges is required to be made. The final regulations amend these rules to provide that payments made or received by the issuer under a qualified hedge are taken into account in the period that those amounts would be treated as income or deductions under § 1.446-4 (without regard to the exclusion from § 1.446-4 for tax-exempt obligations).

e. Certain variable yield bonds treated as fixed yield bonds—certain terminations disregarded. Under the June 1993 regulations, a variable yield issue is treated as a fixed yield issue if the issuer enters into a qualified hedge that meets certain requirements. The proposed regulations in general provide that upon a termination of this type of qualified hedge, the issue of which the hedged bonds are a part is treated for purposes of § 1.148-3 (relating to rebate) as if it were reissued as of the termination date. The proposed regulations also provide that the termination will be disregarded (i.e., the issue will continue to be treated as a fixed yield issue) if (i) the issuer immediately replaces the terminated hedge and there is no change in the yield or (ii) the termination is caused by the bankruptcy or insolvency of the hedge provider and the Commissioner determines that the termination occurred without any action by the issuer. The final regulations modify the proposed regulations by deleting the provision relating to terminations of a qualified hedge caused by the bankruptcy or insolvency of the hedge provider because, unless the issuer enters into a replacement hedge, any termination of the hedge may cause a change in the yield on the bonds.

f. Certain acquisition payments. The proposed regulations provide that if an issuer receives a single, up-front payment relating to the off-market portion of an otherwise qualified hedge, the hedge does not fail to be a qualified hedge as long as the off-market rates are separately identified and are not taken into account in determining yield on the bonds. The proposed regulations also provide that the on-market rates are determined as of the date the parties enter into the contract. The final regulations adopt this rule. In the case of hedges entered into before the issue date (e.g., a forward swap), the on-market rate is the forward on-market rate on the date the parties enter into the hedge.

g. Treatment of hedges entered into before issue date of hedged bonds. The proposed regulations provide that a hedge entered into before the issue date may be a qualified hedge, even if the payments received by the issuer do not correspond to interest payments on the hedged bonds. Commentators requested clarification about what other special rules apply to these types of hedges. In particular, commentators suggested that payments made or received by an issuer before the issue date should not prevent these types of hedges from treatment as a qualified hedge.

The final regulations clarify the treatment of two different types of hedges entered into before the issue date. First, if an issuer expects that a hedge will be closed in connection with the issuance of bonds, payments on the hedge made or received, or deemed made or received, adjust the issue price of the hedged bonds. For this purpose, issue price is adjusted by taking into account the future value as of the issue date of the payments made or received before the issue date. Second, if an issuer does not expect that a hedge will be closed in connection with the issuance of the bonds and does not close the hedge in connection with the issuance of the bonds, the payments and receipts on the hedge adjust payments and receipts on the hedged bonds in the same manner as other qualified hedges. Payments on the hedge made by the issuer before the issue date, however, are not taken into account for purposes of determining yield on the hedged bond.

h. Authority of Commissioner. The proposed regulations permit the Commissioner to determine that a contract is not a qualified hedge if treating the contract as a qualified hedge provides a material potential for arbitrage. In addition, the proposed regulations permit the Commissioner to recompute the yield on an issue by taking into account a hedge if the issuer fails to meet the qualified hedge rules and the failure distorts the yield or otherwise fails to clearly reflect the economic substance of the transaction.

Some commentators asserted that this grant of authority is too broad and adds uncertainty about the proper treatment of certain transactions that are not specifically addressed by the regulations, such as asset hedges.

In general, an issuer may choose whether a hedge is treated as a qualified hedge, as long as that choice is prospec-

tive. Section 1.148-10(e) gives the Commissioner the authority to depart from the rules of §§ 1.148-1 through 1.148-11 to reflect the economic substance of a transaction if a principal purpose of the transaction is to obtain an arbitrage benefit that is inconsistent with the purposes of section 148. Therefore, in general a separate anti-abuse rule is unnecessary. The final regulations amend § 1.148-10(e) to clarify that the actions the Commissioner may take to clearly reflect the economic substance of a transaction include treating a hedge as a qualified hedge or treating a hedge as other than a qualified hedge. Because special considerations apply to identification of hedges entered into before the issue date of the hedged bonds, the final regulations also provide that this type of hedge will be treated as a hedge of bonds that are similar to the bonds that the issuer expected to issue when it entered into the hedge.

i. Asset hedging. The proposed regulations do not provide specific rules for the treatment of hedges of assets allocable to the proceeds of tax-exempt bonds. One commentator suggested that the regulations extend the integration principles currently applicable to qualified hedges to include comparable principles for hedges of assets allocable to the proceeds of tax-exempt bonds. The final regulations do not adopt this comment or provide specific rules for asset hedging. However, comments are requested relating to the proper treatment of asset hedges for purposes of section 148.

D. Section 1.148-5—Yield and Valuation of Investments

1. Permissive Application of Single Investment Rules to Certain Yield Restricted Investments for all Purposes of Section 148

The proposed regulations provide that for all purposes of section 148, an issuer may blend the yield of all yield restricted, nonpurpose investments in a refunding escrow and a sinking fund that is reasonably expected as of the issue date to be maintained to reduce the yield on the investments in the refunding escrow. Commentators requested that this rule be amended to permit blending of the yield on all yield restricted nonpurpose investments. The final regulations do not adopt this comment because a more flexible yield blending rule could permit avoidance of the requirement that rebatable arbitrage

must be paid for periods of no greater than 5 years. In addition, the final regulations clarify that the rule applies only to sinking funds that are reasonably expected as of the issue date to be established and maintained solely to reduce the yield on the investments in the refunding escrow. For example, the rule does not apply to investments in a reasonably required reserve fund that the issuer intends to use to reduce the yield on the investments in a refunding escrow.

2. Manner of Payment of Yield Reduction Payments

The proposed regulations provide that yield reduction payments must be made at the same time and in the same manner as rebate amounts are required to be paid under § 1.148-3(f), and that the date a payment is required to be paid is determined without regard to § 1.148-3(h), which allows the issuer to pay a penalty in lieu of loss of tax-exemption in certain situations. The proposed regulations also provide that a yield reduction payment that is paid untimely is not taken into account unless the Commissioner determines that the failure to pay timely is not due to willful neglect.

One commentator noted that this rule imposes a procedural standard that is different from the rules regarding late rebate payments and requested that this rule be amended to eliminate the requirement of action by the Commissioner and to otherwise conform to the rules for late payment of rebate. The final regulations adopt this comment.

3. External Commingled Funds

The June 1993 regulations provide that an issuer that invests in a commingled fund may take indirect administrative costs of the commingled fund into account for purposes of determining payments and receipts on nonpurpose investments if certain requirements are met. In general, the issuer and any related parties must not own more than 10 percent of the beneficial interest in the fund. The proposed regulations provide a test for determining whether the 10 percent limit is met.

One commentator stated that under the method for determining whether the 10 percent requirement is met the investor is uncertain whether its deposit will cause it to exceed the 10 percent limit, whether actions of another investor will cause it to exceed the 10 percent limit at any time for the duration of this invest-

ment, whether the whole fund is tainted if one investor exceeds the 10 percent limit, whether the impact is limited to those days that the 10 percent limit is exceeded, how the 10 percent limit is measured, and whether the semiannual period is a fixed or a floating period. The commentator suggested that the test should be applied only at the time that a deposit is made and the result should not be affected by simultaneous or subsequent activity in the pool.

The final regulations generally adopt this suggestion. The final regulations clarify that this rule applies only to widely held commingled funds and that the determination of whether a fund is widely held is based on the average number of investors during the immediately preceding, fixed, semiannual period chosen by the fund (e.g., semiannual periods ending June 30 and December 31). Thus, the determination of whether any issuer that has invested in a commingled fund may take indirect administrative costs into account may change from one 6-month period to another. The final regulations also provide that the determination of whether an investor exceeds the 10 percent limit is made on the date of deposit into the commingled fund and whether that investor exceeds the 10 percent limit is not affected by subsequent actions of investors in the fund. In addition, if any investor exceeds the 10 percent limit, no investor in the fund may take indirect administrative costs into account until that investor makes sufficient withdrawals from the fund to meet the 10 percent limit. Thus, if a fund continues to be widely held and does not accept any deposits from an investor that exceeds the 10 percent limit, all issuers that have invested tax-exempt bond proceeds in the fund may take the indirect administrative costs of the fund into account.

4. Qualified Administrative Costs of Guaranteed Investment Contracts

The June 1993 regulations generally provide that administrative costs must be reasonable in order to be qualified administrative costs. The proposed regulations provide that a broker's commission for a guaranteed investment contract is treated as an administrative cost and is not a qualified administrative cost to the extent that the present value of the fee exceeds the present value of annual payments equal to .05 percent of the weighted average amount reasonably expected to be invested each year during the term of the contract. The final

regulations clarify that a broker's commission is a qualified administrative cost to the extent it does not exceed the lesser of a reasonable amount or the .05 percent limit. No inference should be drawn that there are necessarily any situations in which a commission equal to .05 percent is reasonable.

E. Section 1.150-1—Definitions

The proposed regulations define "issue" for all purposes of sections 103 and 141 through 150. The final regulations adopt the definition as proposed with one modification. The final regulations delete the rule that a variable yield bond is treated as sold on its issue date and clarify that the definition of "sale date" applies to all bonds.

The proposed regulations also provide a special rule relating to the treatment of general obligation bonds sold and issued on the same dates pursuant to a single offering document as part of the same issue. Commentators expressed concern that this special rule is mandatory and conflicts with other rules relating to the determination of whether bonds are part of a single issue. The commentators requested that the relationship of the rules be clarified and that the general obligation rule not be mandatory.

The final regulations generally adopt these comments by permitting an issuer to elect to treat tax-exempt general obligation bonds sold and issued on the same dates pursuant to a single offering document as part of the same issue. However, taxable bonds still must be treated as a separate issue. A proposed amendment to the exception for taxable bonds in § 1.150-1(c)(2), proposed in regulations published in the **Federal Register** on December 30, 1994, is not addressed by these final regulations.

F. Effective Dates

The final regulations generally are effective for bonds issued on or after July 8, 1997. An issuer generally may apply the final regulations to bonds that are outstanding on July 8, 1997, and to which certain prior regulations apply. In addition, the rules in the temporary regulations have been redesignated as §§ 1.148-1A through 1.148-6A, 1.148-9A, 1.148-10A, 1.148-11A, 1.149(d)-1A, and 1.150-1A and, together with the applicable provisions of the June 1993 regulations, continue to apply to bonds issued before July 8, 1997.

Special Analysis

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has 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 notice of proposed rulemaking preceding the regulations was issued prior to March 29, 1996, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal authors of these regulations are Brigitte Finley and William P. Cejudo, Office of Assistant Chief Counsel (Financial Institutions and Products). However, other personnel from the IRS and Treasury Department participated in their development.

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Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 602 are amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by removing the entry for § 1.148–11T to read in part as follows:

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

Par. 2. In § 1.103–8, paragraph (a)(5) is revised to read as follows:

§ 1.103–8 Interest on bonds to finance certain exempt facilities.

(a) * * *

(5) *Limitation.* (i) A facility qualifies under this section only to the extent that there is a valid reimbursement allocation under § 1.150–2 with respect to expenditures that are incurred before the issue date of the bonds to provide the facility and that are to be paid with the proceeds of the issue. In addition, if the original use of the facility begins before the issue date of the bonds, the facility does not qualify under this section if any person that was a substantial user of the facility at any time during the 5-year period before the issue date or any

related person to that user receives (directly or indirectly) 5 percent or more of the proceeds of the issue for the user’s interest in the facility and is a substantial user of the facility at any time during the 5-year period after the issue date, unless—

(A) An official intent for the facility is adopted under § 1.150–2 within 60 days after the date on which acquisition, construction, or reconstruction of that facility commenced; and

(B) For an acquisition, no person that is a substantial user or related person after the acquisition date was also a substantial user more than 60 days before the date on which the official intent was adopted.

(ii) A facility, the original use of which commences (or the acquisition of which occurs) on or after the issue date of bonds to provide that facility, qualifies under this section only to the extent that an official intent for the facility is adopted under § 1.150–2 by the issuer of the bonds within 60 days after the commencement of the construction, reconstruction, or acquisition of that facility. Temporary construction or other financing of a facility prior to the issuance of the bonds to provide that facility will not cause that facility to be one that does not qualify under this paragraph (a)(5)(ii).

(iii) For purposes of paragraph (a)(5)(i) of this section, *substantial user* has the meaning used in section 147(a)(1), *related person* has the meaning used in section 144(a)(3), and a user that is a governmental unit within the meaning of § 1.103–1 is disregarded.

(iv) Except to the extent provided in §§ 1.142–4(d), 1.148–11A(i), and 1.150–2(j), this paragraph (a)(5) applies to bonds issued after June 30, 1993, and sold before July 8, 1997. See § 1.142–4(d) for rules relating to bonds sold on or after July 8, 1997.

* * * * *

§ 1.103–8T [Removed]

Par. 3. Section 1.103–8T is removed.

Par. 4. Section 1.142–4 is added to read as follows:

§ 1.142–4 Use of proceeds to provide a facility.

(a) *In general.* [Reserved].

(b) *Reimbursement allocations.* If an expenditure for a facility is paid before the issue date of the bonds to provide that facility, the facility is described in section 142(a) only if the expenditure

meets the requirements of § 1.150–2 (relating to reimbursement allocations). For purposes of this paragraph (b), if the proceeds of an issue are used to pay principal of or interest on an obligation other than a State or local bond (for example, temporary construction financing of the conduit borrower), that issue is not a refunding issue, and, thus, § 1.150–2(g) does not apply.

(c) *Limitation on use of facilities by substantial users—*(1) *In general.* If the original use of a facility begins before the issue date of the bonds to provide the facility, the facility is not described in section 142(a) if any person that was a substantial user of the facility at any time during the 5-year period before the issue date or any related person to that user receives (directly or indirectly) 5 percent or more of the proceeds of the issue for the user’s interest in the facility and is a substantial user of the facility at any time during the 5-year period after the issue date, unless—

(i) An official intent for the facility is adopted under § 1.150–2 within 60 days after the date on which acquisition, construction, or reconstruction of that facility commenced; and

(ii) For an acquisition, no person that is a substantial user or related person after the acquisition date was also a substantial user more than 60 days before the date on which the official intent was adopted.

(2) *Definitions.* For purposes of paragraph (c)(1) of this section, *substantial user* has the meaning used in section 147(a)(1), *related person* has the meaning used in section 144(a)(3), and a user that is a governmental unit within the meaning of § 1.103–1 is disregarded.

(d) *Effective date—*(1) *In general.* This section applies to bonds sold on or after July 8, 1997. See § 1.103–8(a)(5) for rules applicable to bonds sold before that date.

(2) *Elective retroactive application.* An issuer may apply this section to any bond sold before July 8, 1997.

Par. 5. In § 1.148–0, paragraph (c) is amended as follows:

1. An entry for § 1.148–1, paragraph (e) is added.

2. The entries for § 1.148–4, paragraph (h)(4) and (h)(5) are revised.

3. An entry for § 1.148–4, paragraph (h)(6) is added.

4. An entry for § 1.148–11, paragraph (b)(3) is added.

5. Entries for § 1.148–11, paragraphs (c)(1) and (g) are revised.

6. Entries for § 1.148–11, paragraphs (h) and (i) are removed.

The revised and added provisions read as follows:

§ 1.148–0 *Scope and table of contents.*

* * * * *
(c) * * *

§ 1.148–1 *Definitions and elections.*

* * * * *
(e) Investment-type property.
* * * * *

§ 1.148–4 *Yield on an issue of bonds.*

* * * * *
(h) * * *

(4) Certain variable yield bonds treated as fixed yield bonds.

(5) Contracts entered into before issue date of hedged bond.

(6) Authority of the Commissioner.
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§ 1.148–11 *Effective dates.*

* * * * *
(b) * * *

(3) No elective retroactive application for hedges of fixed rate issues.

(c) * * *

(1) Retroactive application of overpayment recovery provisions.
* * * * *

(g) Provisions applicable to certain bonds sold before effective date.

§§ 1.148–1T, 1.148–2T, 1.148–3T, 1.148–4T, 1.148–5T, 1.148–6T, 1.148–9T, 1.148–10T, and 1.148–11T [Redesignated as §§ 1.148–1A, 1.148–2A, 1.148–3A, 1.148–4A, 1.148–5A, 1.148–6A, 1.148–9A, 1.148–10A, and 1.148–11A]

Par. 6. Sections 1.148–1T, 1.148–2T, 1.148–3T, 1.148–4T, 1.148–5T, 1.148–6T, 1.148–9T, 1.148–10T, and 1.148–11T are redesignated as §§ 1.148–1A, 1.148–2A, 1.148–3A, 1.148–4A, 1.148–5A, 1.148–6A, 1.148–9A, 1.148–10A, and 1.148–11A, respectively, and added under an undesignated center heading immediately preceding the undesignated center heading “Deductions for Personal Exemptions” to read as follows:

Regulations Applicable to Certain Bonds Sold Prior to July 8, 1997.

Par. 6a. The section headings of newly designated §§ 1.148–1A, 1.148–2A, 1.148–3A, 1.148–4A, 1.148–5A, 1.148–6A, 1.148–9A, 1.148–10A, and 1.148–11A are amended by removing the language “(temporary)”.

Par. 7. Section 1.148–1 is amended as follows:

1. Paragraph (b) is amended by revising the definition of *Investment-type property*, by adding the definition of *Replacement proceeds*, and by adding a new sentence at the end of the definition of *Sale proceeds*.

2. Paragraph (c)(4)(ii)(A) is revised.

3. Paragraph (e) is added.

The revised and added provisions read as follows:

§ 1.148–1 *Definitions and elections.*

* * * * *
(b) * * *
* * * * *

Investment-type property is defined in paragraph (e) of this section.

* * * * *
Replacement proceeds is defined in paragraph (c) of this section.
* * * * *

Sale proceeds * * * See also § 1.148–4(h)(5) treating amounts received upon the termination of certain hedges as sale proceeds.
* * * * *

(c) * * *

(4) * * *

(ii) *Bonds financing a working capital reserve*—(A) *In general.* Except as otherwise provided in paragraph (c)(4)(ii)(B) of this section, replacement proceeds arise to the extent a working capital reserve is, directly or indirectly, financed with the proceeds of the issue (regardless of the expenditure of proceeds of the issue). Thus, for example, if an issuer that does not maintain a working capital reserve borrows to fund a working capital reserve, the issuer will have replacement proceeds. To determine the amount of a working capital reserve maintained, an issuer may use the average amount maintained as a working capital reserve during annual periods of at least 1 year, the last of which ends within 1 year before the issue date. For example, the amount of a working capital reserve may be computed using the average of the beginning or ending monthly balances of the amount maintained as a reserve (net of unexpended gross proceeds) during the 1 year period preceding the issue date.
* * * * *

(e) *Investment-type property*—(1) *In general.* Investment-type property includes any property, other than property described in section 148(b)(2)(A), (B), (C), or (E), that is held principally as a passive vehicle for the production of income. For this purpose, production of

income includes any benefit based on the time value of money, including the benefit from making a prepayment.

(2) *Non-customary prepayments.* Except as otherwise provided in this paragraph (e), a prepayment for property or services gives rise to investment-type property if a principal purpose for prepaying is to receive an investment return from the time the prepayment is made until the time payment otherwise would be made. A prepayment does not give rise to investment-type property if—

(i) The prepayment is made for a substantial business purpose other than investment return and the issuer has no commercially reasonable alternative to the prepayment; or

(ii) Prepayments on substantially the same terms are made by a substantial percentage of persons who are similarly situated to the issuer but who are not beneficiaries of tax-exempt financing.

(3) *Certain hedges.* Investment-type property also includes the investment element of a contract that is a hedge (within the meaning of § 1.148–4(h)(2)(i)(A)) and that contains a significant investment element because a payment by the issuer relates to a conditional or unconditional obligation by the hedge provider to make a payment on a later date. See § 1.148–4(h)(2)(ii) relating to hedges with a significant investment element.

Par. 8. In § 1.148–2, paragraph (b)(2)(ii) is revised to read as follows:

§ 1.148–2 *General arbitrage yield restriction rules.*

* * * * *
(b) * * *
(2) * * *

(ii) *Exceptions to certification requirement.* An issuer is not required to make a certification for an issue under paragraph (b)(2)(i) of this section if—

(A) The issuer reasonably expects as of the issue date that there will be no unspent gross proceeds after the issue date, other than gross proceeds in a bona fide debt service fund (e.g., equipment lease financings in which the issuer purchases equipment in exchange for an installment payment note); or

(B) The issue price of the issue does not exceed \$1,000,000.
* * * * *

Par. 9. In § 1.148–3, the last sentence of paragraph (h)(3) is revised to read as follows:

§ 1.148-3 *General arbitrage rebate rules.*

* * * * *

(3) * * * For purposes of this paragraph (h)(3), willful neglect does not include a failure that is attributable solely to the permissible retroactive selection of a short first bond year if the rebate amount that the issuer failed to pay is paid within 60 days of the selection of that bond year.

* * * * *

Par. 10. Section 1.148-4 is amended as follows:

1. Paragraphs (b)(5), (g), (h)(1), (h)(2) introductory text, and (h)(2)(i) are revised.

2. Paragraph (h)(2)(vi) and (h)(2)(vii) are removed.

3. Paragraphs (h)(2)(ii) through (h)(2)(v) are redesignated as paragraphs (h)(2)(iii) through (h)(2)(vi) and paragraphs (h)(2)(viii) and (h)(2)(ix) are redesignated as paragraphs (h)(2)(vii) and (h)(2)(viii).

4. New paragraph (h)(2)(ii) is added. 5. Newly designated paragraphs (h)(2)(iv), (h)(2)(v), (h)(2)(vi), and (h)(2)(viii) and paragraphs (h)(3), (h)(4), and (h)(5) are revised.

6. Paragraph (h)(6) is added.

The revised and added provisions read as follows:

§ 1.148-4 *Yield on an issue of bonds.*

* * * * *

(b) * * *

(5) *Special aggregation rule treating certain bonds as a single fixed yield bond.* Two variable yield bonds of an issue are treated in the aggregate as a single fixed yield bond if—

(i) Aggregate treatment would result in the single bond being a fixed yield bond; and

(ii) The terms of the bonds do not contain any features that could distort the aggregate fixed yield from what the yield would be if a single fixed yield bond were issued. For example, if an issue contains a bond bearing interest at a floating rate and a related bond bearing interest at a rate equal to a fixed rate minus that floating rate, those two bonds are treated as a single fixed yield bond only if neither bond may be redeemed unless the other bond is also redeemed at the same time.

* * * * *

(g) *Yield on certain mortgage revenue and student loan bonds.* For purposes of section 148 and this section, section 143(g)(2)(C)(ii) applies to the computa-

tion of yield on an issue of qualified mortgage bonds or qualified veterans' mortgage bonds. For purposes of applying section 148 and section 143(g) with respect to purpose investments allocable to a variable yield issue of qualified mortgage bonds, qualified veterans' mortgage bonds, or qualified student loan bonds that is reasonably expected as of the issue date to convert to a fixed yield issue, the yield may be computed over the term of the issue, and, if the yield is so computed, paragraph (d) of this section does not apply to the issue. As of any date, the yield over the term of the issue is based on—

(1) With respect to any bond of the issue that has not converted to a fixed and determinable yield on or before that date, the actual amounts paid or received to that date and the amounts that are reasonably expected (as of that date) to be paid or received with respect to that bond over the remaining term of the issue (taking into account prepayment assumptions under section 143(g)(2)(B)-(iv), if applicable); and

(2) With respect to any bond of the issue that has converted to a fixed and determinable yield on or before that date, the actual amounts paid or received before that bond converted, if any, and the amount that was reasonably expected (on the date that bond converted) to be paid or received with respect to that bond over the remaining term of the issue (taking into account prepayment assumptions under section 143(g)(2)(B)(iv), if applicable).

(h) *Qualified hedging transactions—*
(1) *In general.* Payments made or received by an issuer under a qualified hedge (as defined in paragraph (h)(2) of this section) relating to bonds of an issue are taken into account (as provided in paragraph (h)(3) of this section) to determine the yield on the issue. Except as provided in paragraphs (h)(4) and (h)(5)(ii)(E) of this section, the bonds to which a qualified hedge relates are treated as variable yield bonds from the issue date of the bonds. This paragraph (h) applies solely for purposes of sections 143(g), 148, and 149(d).

(2) *Qualified hedge defined.* Except as provided in paragraph (h)(5) of this section, the term *qualified hedge* means a contract that satisfies each of the following requirements:

(i) *Hedge—*(A) *In general.* The contract is entered into primarily to modify the issuer's risk of interest rate changes with respect to a bond (a hedge). For example, the contract may be an interest

rate swap, an interest rate cap, a futures contract, a forward contract, or an option.

(B) *Special rule for fixed rate issues.* If the contract modifies the issuer's risk of interest rate changes with respect to a bond that is part of an issue that, absent the contract, would be a fixed rate issue, the contract must be entered into—

(1) No later than 15 days after the issue date (or the deemed issue date under paragraph (d) of this section) of the issue; or

(2) No later than the expiration of a qualified hedge with respect to bonds of that issue that satisfies paragraph (h)(2)(i)(B)(1) of this section; or

(3) No later than the expiration of a qualified hedge with respect to bonds of that issue that satisfies either paragraph (h)(2)(i)(B)(2) of this section or this paragraph (h)(2)(i)(B)(3).

(C) *Contracts with certain acquisition payments.* If a hedge provider makes a single payment to the issuer (e.g., a payment for an off-market swap) in connection with the acquisition of a contract, the issuer may treat a portion of that contract as a hedge provided—

(1) The hedge provider's payment to the issuer and the issuer's payments under the contract in excess of those that it would make if the contract bore rates equal to the on-market rates for the contract (determined as of the date the parties enter into the contract) are separately identified in a certification of the hedge provider; and

(2) The payments described in paragraph (h)(2)(i)(C)(1) of this section are not treated as payments on the hedge.

(ii) *No significant investment element—*(A) *In general.* The contract does not contain a significant investment element. Except as provided in paragraph (h)(2)(ii)(B) of this section, a contract contains a significant investment element if a significant portion of any payment by one party relates to a conditional or unconditional obligation by the other party to make a payment on a different date. Examples of contracts that contain a significant investment element are a debt instrument held by the issuer; an interest rate swap requiring any payments other than periodic payments, within the meaning of § 1.446-3 (periodic payments) (e.g., a payment for an off-market swap or prepayment of part or all of one leg of a swap); and an interest rate cap requiring the issuer's premium for the cap to be paid in a single, up-front payment.

(B) *Special level payment rule for interest rate caps.* An interest rate cap does not contain a significant investment element if—

(1) All payments to the issuer by the hedge provider are periodic payments;

(2) The issuer makes payments for the cap at the same time as periodic payments by the hedge provider must be made if the specified index (within the meaning of § 1.446-3) of the cap is above the strike price of the cap; and

(3) Each payment by the issuer bears the same ratio to the notional principal amount (within the meaning of § 1.446-3) that is used to compute the hedge provider's payment, if any, on that date.

* * * * *

(iv) *Hedged bonds.* The contract covers, in whole or in part, all of one or more groups of substantially identical bonds in the issue (i.e., all of the bonds having the same interest rate, maturity, and terms). Thus, for example, a qualified hedge may include a hedge of all or a pro rata portion of each interest payment on the variable rate bonds in an issue for the first 5 years following their issuance. For purposes of this paragraph (h), unless the context clearly requires otherwise, *hedged bonds* means the specific bonds or portions thereof covered by a hedge.

(v) *Interest based contract.* The contract is primarily interest based. A contract is not primarily interest based unless—

(A) The hedged bond, without regard to the contract, is either a fixed rate bond, a variable rate debt instrument within the meaning of § 1.1275-5 provided the rate is not based on an objective rate other than a qualified inverse floating rate or a qualified inflation rate, a tax-exempt obligation described in § 1.1275-4(d)(2), or an inflation-indexed debt instrument within the meaning of § 1.1275-7T; and

(B) As a result of treating all payments on (and receipts from) the contract as additional payments on (and receipts from) the hedged bond, the resulting bond would be substantially similar to either a fixed rate bond, a variable rate debt instrument within the meaning of § 1.1275-5 provided the rate is not based on an objective rate other than a qualified inverse floating rate or a qualified inflation rate, a tax-exempt obligation described in § 1.1275-4(d)(2), or an inflation-indexed debt instrument within the meaning of § 1.1275-7T. For this purpose, differences that would not prevent

the resulting bond from being substantially similar to another type of bond include a difference between the index used to compute payments on the hedged bond and the index used to compute payments on the hedge where one index is substantially the same, but not identical to, the other; the difference resulting from the payment of a fixed premium for a cap (e.g., payments for a cap that are made in other than level installments); and the difference resulting from the allocation of a termination payment where the termination was not expected as of the date the contract was entered into.

(vi) *Payments closely correspond.* The payments received by the issuer from the hedge provider under the contract correspond closely in time to either the specific payments being hedged on the hedged bonds or specific payments required to be made pursuant to the bond documents, regardless of the hedge, to a sinking fund, debt service fund, or similar fund maintained for the issue of which the hedged bond is a part.

* * * * *

(viii) *Identification.* The contract must be identified by the actual issuer on its books and records maintained for the hedged bonds not later than 3 days after the date on which the issuer and the hedge provider enter into the contract. The identification must specify the hedge provider, the terms of the contract, and the hedged bonds. The identification must contain sufficient detail to establish that the requirements of this paragraph (h)(2) and, if applicable, paragraph (h)(4) of this section are satisfied. In addition, the existence of the hedge must be noted on the first form relating to the issue of which the hedged bonds are a part that is filed with the Internal Revenue Service on or after the date on which the contract is identified pursuant to this paragraph (h)(2)(viii).

(3) *Accounting for qualified hedges—*

(i) *In general.* Except as otherwise provided in paragraph (h)(4) of this section, payments made or received by the issuer under a qualified hedge are treated as payments made or received, as appropriate, on the hedged bonds that are taken into account in determining the yield on those bonds. These payments are reasonably allocated to the hedged bonds in the period to which the payments relate, as determined under paragraph (h)(3)(iii) of this section. Payments made or received by the issuer include payments deemed made or received when a con-

tract is terminated or deemed terminated under this paragraph (h)(3). Payments reasonably allocable to the modification of risk of interest rate changes and to the hedge provider's overhead under this paragraph (h) are included as payments made or received under a qualified hedge.

(ii) *Exclusions from hedge.* If any payment for services or other items under the contract is not expressly treated by paragraph (h)(3)(i) of this section as a payment under the qualified hedge, the payment is not a payment with respect to a qualified hedge.

(iii) *Timing and allocation of payments.* Except as provided in paragraphs (h)(3)(iv) and (h)(5) of this section, payments made or received by the issuer under a qualified hedge are taken into account in the same period in which those amounts would be treated as income or deductions under § 1.446-4 (without regard to § 1.446-4(a)(2)(iv)) and are adjusted as necessary to reflect the end of a computation period and the start of a new computation period.

(iv) *Termination payments—(A) Termination defined.* A termination of a qualified hedge includes any sale or other disposition of the hedge by the issuer or the acquisition by the issuer of an offsetting hedge. A deemed termination occurs when the hedged bonds are redeemed or when a hedge ceases to be a qualified hedge of the hedged bonds. In the case of an assignment by a hedge provider of its remaining rights and obligations under the hedge to a third party or a modification of the hedging contract, the assignment or modification is treated as a termination with respect to the issuer only if it results in a deemed exchange of the hedge and a realization event under section 1001 to the issuer.

(B) *General rule.* A payment made or received by an issuer to terminate a qualified hedge, including loss or gain realized or deemed realized, is treated as a payment made or received on the hedged bonds, as appropriate. The payment is reasonably allocated to the remaining periods originally covered by the terminated hedge in a manner that reflects the economic substance of the hedge.

(C) *Special rule for terminations when bonds are redeemed.* Except as otherwise provided in this paragraph (h)(3)(iv)(C) and in paragraph (h)(3)(iv)(D) of this section, when a qualified hedge is deemed terminated because the hedged bonds are redeemed,

the fair market value of the qualified hedge on the redemption date is treated as a termination payment made or received on that date. When hedged bonds are redeemed, any payment received by the issuer on termination of a hedge, including a termination payment or a deemed termination payment, reduces, but not below zero, the interest payments made by the issuer on the hedged bonds in the computation period ending on the termination date. The remainder of the payment, if any, is reasonably allocated over the bond years in the immediately preceding computation period or periods to the extent necessary to eliminate the excess.

(D) *Special rules for refundings.* To the extent that the hedged bonds are redeemed using the proceeds of a refunding issue, the termination payment is accounted for under paragraph (h)(3)(iv)(B) of this section by treating it as a payment on the refunding issue, rather than the hedged bonds. In addition, to the extent that the refunding issue is redeemed during the period to which the termination payment has been allocated to that issue, paragraph (h)(3)(iv)(C) of this section applies to the termination payment by treating it as a payment on the redeemed refunding issue.

(E) *Safe harbor for allocation of certain termination payments.* A payment to terminate a qualified hedge does not result in that hedge failing to satisfy the applicable provisions of paragraph (h)(3)(iv)(B) of this section if the payment is allocated in accordance with this paragraph (h)(3)(iv)(E). For an issue that is a variable yield issue after termination of a qualified hedge, an amount must be allocated to each date on which the hedge provider's payment, if any, would have been made had the hedge not been terminated. The amounts allocated to each date must bear the same ratio to the notional principal amount (within the meaning of § 1.446-3) that would have been used to compute the hedge provider's payment, if any, on that date, and the sum of the present values of those amounts must equal the present value of the termination payment. Present value is computed as of the day the qualified hedge is terminated, using the yield on the hedged bonds, determined without regard to the termination payment. The yield used for this purpose is computed for the period beginning on the first date the qualified hedge is in effect and ending on the date the qualified hedge is terminated. On the

other hand, for an issue that is a fixed yield issue after termination of a qualified hedge, the termination payment is taken into account as a single payment on the date it is paid.

(4) *Certain variable yield bonds treated as fixed yield bonds*—(i) *In general.* Except as otherwise provided in this paragraph (h)(4), if the issuer of variable yield bonds enters into a qualified hedge, the hedged bonds are treated as fixed yield bonds paying a fixed interest rate if:

(A) *Maturity.* The term of the hedge is equal to the entire period during which the hedged bonds bear interest at variable interest rates, and the issuer does not reasonably expect that the hedge will be terminated before the end of that period.

(B) *Payments closely correspond.* Payments to be received under the hedge correspond closely in time to the hedged portion of payments on the hedged bonds. Hedge payments received within 15 days of the related payments on the hedged bonds generally so correspond.

(C) *Aggregate payments fixed.* Taking into account all payments made and received under the hedge and all payments on the hedged bonds (i.e., after netting all payments), the issuer's aggregate payments are fixed and determinable as of a date not later than 15 days after the issue date of the hedged bonds. Payments on bonds are treated as fixed for purposes of this paragraph (h)(4)(i)(C) if payments on the bonds are based, in whole or in part, on one interest rate, payments on the hedge are based, in whole or in part, on a second interest rate that is substantially the same as, but not identical to, the first interest rate and payments on the bonds would be fixed if the two rates were identical. Rates are treated as substantially the same if they are reasonably expected to be substantially the same throughout the term of the hedge. For example, an objective 30-day tax-exempt variable rate index or other objective index may be substantially the same as an issuer's individual 30-day interest rate.

(ii) *Accounting.* Except as otherwise provided in this paragraph (h)(4)(ii), in determining yield on the hedged bonds, all the issuer's payments on the hedged bonds and all payments made and received on a hedge described in paragraph (h)(4)(i) of this section are taken into account. If payments on the bonds and payments on the hedge are based, in

whole or in part, on variable interest rates that are substantially the same within the meaning of paragraph (h)(4)(i)(C) of this section (but not identical), yield on the issue is determined by treating the variable interest rates as identical. For example, if variable rate bonds bearing interest at a weekly rate equal to the rate necessary to remarket the bonds at par are hedged with an interest rate swap under which the issuer receives payments based on a short-term floating rate index that is substantially the same as, but not identical to, the weekly rate on the bonds, the interest payments on the bonds are treated as equal to the payments received by the issuer under the swap for purposes of computing the yield on the bonds.

(iii) *Effect of termination*—(A) *In general.* Except as otherwise provided in this paragraph (h)(4)(iii) and paragraph (h)(5) of this section, the issue of which the hedged bonds are a part is treated as if it were reissued as of the termination date of the qualified hedge covered by paragraph (h)(4)(i) of this section in determining yield on the hedged bonds for purposes of § 1.148-3. The redemption price of the retired issue and the issue price of the new issue equal the aggregate values of all the bonds of the issue on the termination date. In computing the yield on the new issue for this purpose, any termination payment is accounted for under paragraph (h)(3)(iv) of this section, applied by treating the termination payment as made or received on the new issue under this paragraph (h)(4)(iii).

(B) *Effect of early termination.* Except as otherwise provided in this paragraph (h)(4)(iii), the general rules of paragraph (h)(4)(i) of this section do not apply in determining the yield on the hedged bonds for purposes of § 1.148-3 if the hedge is terminated or deemed terminated within 5 years after the issue date of the issue of which the hedged bonds are a part. Thus, the hedged bonds are treated as variable yield bonds for purposes of § 1.148-3 from the issue date.

(C) *Certain terminations disregarded.* This paragraph (h)(4)(iii) does not apply to a termination if, based on the facts and circumstances (e.g., taking into account both the termination and any qualified hedge that immediately replaces the terminated hedge), there is no change in the yield.

(5) *Contracts entered into before issue date of hedged bond*—(i) *In general.* A contract does not fail to be a

hedge under paragraph (h)(2)(i) of this section solely because it is entered into before the issue date of the hedged bond. However, that contract must be one to which either paragraph (h)(5)(ii) or (h)(5)(iii) of this section applies.

(ii) *Contracts expected to be closed substantially contemporaneously with the issue date of hedged bond—* (A) *Application.* This paragraph (h)(5)(ii) applies to a contract if, on the date the contract is identified, the issuer reasonably expects to terminate or otherwise close (terminate) the contract substantially contemporaneously with the issue date of the hedged bond.

(B) *Contract terminated.* If a contract to which this paragraph (h)(5)(ii) applies is terminated substantially contemporaneously with the issue date of the hedged bond, the amount paid or received, or deemed to be paid or received, by the issuer in connection with the issuance of the hedged bond to terminate the contract is treated as an adjustment to the issue price of the hedged bond and as an adjustment to the sale proceeds of the hedged bond for purposes of section 148. Amounts paid or received, or deemed to be paid or received, before the issue date of the hedged bond are treated as paid or received on the issue date in an amount equal to the future value of the payment or receipt on that date. For this purpose, future value is computed using yield on the hedged bond without taking into account amounts paid or received (or deemed paid or received) on the contract.

(C) *Contract not terminated.* If a contract to which this paragraph (h)(5)(ii) applies is not terminated substantially contemporaneously with the issue date of the hedged bond, the contract is deemed terminated for its fair market value as of the issue date of the hedged bond. Once a contract has been deemed terminated pursuant to this paragraph (h)(5)(ii)(C), payments on and receipts from the contract are no longer taken into account under this paragraph (h) for purposes of determining yield on the hedged bond.

(D) *Relation to other requirements of a qualified hedge.* Payments made in connection with the issuance of a bond to terminate a contract to which this paragraph (h)(5)(ii) applies do not prevent the contract from satisfying the requirements of paragraph (h)(2)(vi) of this section.

(E) *Fixed yield treatment.* A bond that is hedged with a contract to which

this paragraph (h)(5)(ii) applies does not fail to be a fixed yield bond if, taking into account payments on the contract and the payments to be made on the bond, the bond satisfies the definition of fixed yield bond. See also paragraph (h)(4) of this section.

(iii) *Contracts expected not to be closed substantially contemporaneously with the issue date of hedged bond—* (A) *Application.* This paragraph (h)(5)(iii) applies to a contract if, on the date the contract is identified, the issuer does not reasonably expect to terminate the contract substantially contemporaneously with the issue date of the hedge bond.

(B) *Contract terminated.* If a contract to which this paragraph (h)(5)(iii) applies is terminated in connection with the issuance of the hedged bond, the amount paid or received, or deemed to be paid or received, by the issuer to terminate the contract is treated as an adjustment to the issue price of the hedged bond and as an adjustment to the sale proceeds of the hedged bond for purposes of section 148.

(C) *Contract not terminated.* If a contract to which this paragraph (h)(5)(iii) applies is not terminated substantially contemporaneously with the issue date of the hedged bond, no payments with respect to the hedge made by the issuer before the issue date of the hedged bond are taken into account under this section.

(iv) *Identification.* The identification required under paragraph (h)(2)(viii) of this section must specify the reasonably expected governmental purpose, issue price, maturity, and issue date of the hedged bond, the manner in which interest is reasonably expected to be computed, and whether paragraph (h)(5)(ii) or (h)(5)(iii) of this section applies to the contract. If an issuer identifies a contract under this paragraph (h)(5)(iv) that would be a qualified hedge with respect to the anticipated bond, but does not issue the anticipated bond on the identified issue date, the contract is taken into account as a qualified hedge of any bond of the issuer that is issued for the identified governmental purpose within a reasonable interval around the identified issue date of the anticipated bond.

(6) *Authority of the Commissioner.* The Commissioner, by publication of a revenue ruling or revenue procedure (see § 601.601(d)(2) of this chapter), may specify contracts that, although they do not meet the requirements of

paragraph (h)(2) of this section, are qualified hedges or, although they do not meet the requirements of paragraph (h)(4) of this section, cause the hedged bonds to be treated as fixed yield bonds.

Par. 11. In § 1.148–5, paragraphs (b)(2)(iii), (c)(2)(i), (c)(3)(ii), (d)(3)(ii), (e)(2)(ii)(B) and (e)(2)(iii) are revised to read as follows:

§ 1.148–5 *Yield and valuation of investments.*

- * * * * *
- (b) * * *
- (2) * * *

(ii) *Permissive application of single investment rules to certain yield restricted investments for all purposes of section 148.* For all purposes of section 148, if an issuer reasonably expects as of the issue date to establish and maintain a sinking fund solely to reduce the yield on the investments in a refunding escrow, then the issuer may treat all of the yield restricted nonpurpose investments in the refunding escrow and that sinking fund as a single investment having a single yield, determined under this paragraph (b)(2). Thus, an issuer may not treat the nonpurpose investments in a reasonably required reserve fund and a refunding escrow as a single investment having a single yield under this paragraph (b)(2)(iii).

- * * * * *
- (c) * * *

(2) *Manner of payment—*(i) *In general.* Except as otherwise provided in paragraph (c)(2)(ii) of this section, an amount is paid under this paragraph (c) if it is paid to the United States at the same time and in the same manner as rebate amounts are required to be paid or at such other time or in such manner as the Commissioner may prescribe. For example, yield reduction payments must be made on or before the date of required rebate installment payments as described in §§ 1.148–3(f), (g), and (h). The provisions of § 1.148–3(i) apply to payments made under this paragraph (c).

- * * * * *
- (3) * * *

(ii) *Exception to yield reduction payments rule for advance refunding issues.* Paragraph (c)(1) of this section does not apply to investments allocable to gross proceeds of an advance refunding issue, other than—

(A) Transferred proceeds to which paragraph (c)(3)(i)(C) of this section applies;

(B) Replacement proceeds to which paragraph (c)(3)(i)(F) of this section applies; and

(C) Transferred proceeds to which paragraph (c)(3)(i)(E) of this section applies, but only to the extent necessary to satisfy yield restriction under section 148(a) on those proceeds treating all investments allocable to those proceeds as a separate class.

(d) * * *

(3) * * *

(ii) *Exception to fair market value requirement for transferred proceeds allocations, universal cap allocations, and commingled funds.* Paragraph (d)(3)(i) of this section does not apply if the investment is allocated from one issue to another issue as a result of the transferred proceeds allocation rule under § 1.148-9(b) or the universal cap rule under § 1.148-6(b)(2), provided that both issues consist exclusively of tax-exempt bonds. In addition, paragraph (d)(3)(i) of this section does not apply to investments in a commingled fund (other than a bona fide debt service fund) unless it is an investment being initially deposited in or withdrawn from a commingled fund described in § 1.148-6(e)(5)(iii).

* * * * *

(e) * * *

(2) * * *

(ii) * * *

(B) *External commingled funds.* A widely held commingled fund in which no investor in the fund owns more than 10 percent of the beneficial interest in the fund. For purposes of this paragraph (e)(2)(ii)(B), a fund is treated as widely held only if, during the immediately preceding fixed, semiannual period chosen by the fund (e.g., semiannual periods ending June 30 and December 31), the fund had a daily average of more than 15 investors that were not related parties, and the daily average amount each investor had invested in the fund was not less than the lesser of \$500,000 and 1 percent of the daily average of the total amount invested in the fund. For purposes of this paragraph (e)(2)(ii)(B), an investor will be treated as owning not more than 10 percent of the beneficial interest in the fund if, on the date of each deposit by the investor into the fund, the total amount the investor and any related parties have on deposit in the fund is not more than 10 percent of the total amount that all investors have on deposit in the fund. For purposes of the preceding sentence, the total amount that all investors have on deposit in the

fund is equal to the sum of all deposits made by the investor and any related parties on the date of those deposits and the closing balance in the fund on the day before those deposits. If any investor in the fund owns more than 10 percent of the beneficial interest in the fund, the fund does not qualify under this paragraph (e)(2)(ii)(B) until that investor makes sufficient withdrawals from the fund to reduce its beneficial interest in the fund to 10 percent or less.

(iii) *Special rule for guaranteed investment contracts.* For a guaranteed investment contract, a broker's commission or similar fee paid on behalf of either an issuer or the provider is treated as an administrative cost and, except in the case of an issue that satisfies section 148(f)(4)(D)(i), is a qualified administrative cost to the extent that the present value of the commission, as of the date the contract is allocated to the issue, does not exceed the lesser of a reasonable amount within the meaning of paragraph (e)(2)(i) of this section or the present value of annual payments equal to .05 percent of the weighted average amount reasonably expected to be invested each year of the term of the contract. For this purpose, present value is computed using the taxable discount rate used by the parties to compute the commission or, if not readily ascertainable, the yield to the issuer on the investment contract or other reasonable taxable discount rate.

* * * * *

Par. 12. In § 1.148-6, paragraph (d)(3)(iii)(C) is revised to read as follows:

§ 1.148-6 General allocation and accounting rules.

* * * * *

(d) * * *

(3) * * *

(iii) * * *

(C) *Qualified endowment funds treated as unavailable.* For a 501(c)(3) organization, a qualified endowment fund is treated as unavailable. A fund is a qualified endowment fund if—

(1) The fund is derived from gifts or bequests, or the income thereon, that were neither made nor reasonably expected to be used to pay working capital expenditures;

(2) Pursuant to reasonable, established practices of the organization, the governing body of the 501(c)(3) organization designates and consistently oper-

ates the fund as a permanent endowment fund or quasi-endowment fund restricted as to use; and

(3) There is an independent verification that the fund is reasonably necessary as part of the organization's permanent capital.

* * * * *

Par. 13. In § 1.148-9, paragraphs (c)(2)(ii)(B) and (h)(4)(vi) are revised to read as follows:

§ 1.148-9 Arbitrage rules for refunding issues.

* * * * *

(c) * * *

(2) * * *

(ii) * * *

(B) *Permissive allocation of non-proceeds to earliest expenditures.* Excluding amounts covered by paragraph (c)(2)(ii)(A) of this section and subject to any required earlier expenditure of those amounts, any amounts in a mixed escrow that are not proceeds of a refunding issue may be allocated to the earliest maturing investments in the mixed escrow, provided that those investments mature and the proceeds thereof are expended before the date of any expenditure from the mixed escrow to pay any principal of the prior issue.

* * * * *

(h) * * *

(4) * * *

(vi) *Exception for refundings of interim notes.* Paragraph (h)(4)(v) of this section need not be applied to refunding bonds issued to provide permanent financing for one or more projects if the prior issue had a term of less than 3 years and was sold in anticipation of permanent financing, but only if the aggregate term of all prior issues sold in anticipation of permanent financing was less than 3 years.

* * * * *

Par. 14. Section 1.148-10 is amended as follows:

1. Paragraphs (b)(2), (c)(2)(viii) and (c)(2)(ix) are revised.

2. Paragraph (c)(2)(x) is added.

3. Paragraph (e) is revised.

The revised and added provisions read as follows:

§ 1.148-10 Anti-abuse rules and authority of Commissioner.

* * * * *

(b) * * *

(2) *Application.* The provisions of this paragraph (b) only apply to the portion of an issue that, as a result of actions taken (or actions not taken) after

the issue date, overburdens the market for tax-exempt bonds, except that for an issue that is reasonably expected as of the issue date to overburden the market, those provisions apply to all of the gross proceeds of the issue.

(c) * * *

(2) * * *

(viii) Replacement proceeds in a sinking fund for the refunding issue;

(ix) Qualified guarantee fees for the refunding issue or the prior issue; and

(x) Fees for a qualified hedge for the refunding issue.

* * * * *

(e) *Authority of the Commissioner to clearly reflect the economic substance of a transaction.* If an issuer enters into a transaction for a principal purpose of obtaining a material financial advantage based on the difference between tax-exempt and taxable interest rates in a manner that is inconsistent with the purposes of section 148, the Commissioner may exercise the Commissioner's discretion to depart from the rules of § 1.148-1 through § 1.148-11 as necessary to clearly reflect the economic substance of the transaction. For this purpose, the Commissioner may recompute yield on an issue or on investments, reallocate payments and receipts on investments, recompute the rebate amount on an issue, treat a hedge as either a qualified hedge or not a qualified hedge, or otherwise adjust any item whatsoever bearing upon the investments and expenditures of gross proceeds of an issue. For example, if the amount paid for a hedge is specifically based on the amount of arbitrage earned or expected to be earned on the hedged bonds, a principal purpose of entering into the contract is to obtain a material financial advantage based on the difference between tax-exempt and taxable interest rates in a manner that is inconsistent with the purposes of section 148.

* * * * *

Par. 15. Section 1.148-11 is amended as follows:

1. Paragraphs (a), (b)(1), (c)(1), and (g) are revised.

2. Paragraph (b)(3) is added.

3. Paragraphs (h) and (i) are removed.

The revised and added provisions read as follows:

§ 1.148-11 Effective dates.

(a) *In general.* Except as otherwise provided in this section, §§ 1.148-1

through 1.148-11 apply to bonds sold on or after July 8, 1997.

(b) *Elective retroactive application in whole—(1) In general.* Except as otherwise provided in this section, and subject to the applicable effective dates for the corresponding statutory provisions, an issuer may apply the provisions of §§ 1.148-1 through 1.148-11 in whole, but not in part, to any issue that is outstanding on July 8, 1997, and is subject to section 148(f) or to sections 103(c)(6) or 103A(i) of the Internal Revenue Code of 1954, in lieu of otherwise applicable regulations under those sections.

* * * * *

(3) *No elective retroactive application for hedges of fixed rate issues.* The provisions of § 1.148-4(h)(2)(i)(B) (relating to hedges of fixed rate issues) may not be applied to any bond sold on or before July 8, 1997.

(c) *Elective retroactive application of certain provisions and special rules—*

(1) *Retroactive application of overpayment recovery provisions.* An issuer may apply the provisions of § 1.148-3(i) to any issue that is subject to section 148(f) or to sections 103(c)(6) or 103A(i) of the Internal Revenue Code of 1954.

* * * * *

(g) *Provisions applicable to certain bonds sold before effective date.* Except for bonds to which paragraph (b)(1) of this section applies—

(1) Section 1.148-11A provides rules applicable to bonds sold after June 6, 1994, and before July 8, 1997; and

(2) Sections 1.148-1 through 1.148-11 as in effect on July 1, 1993 (see 26 CFR part 1 as revised April 1, 1994), and § 1.148-11A(i) (relating to elective retroactive application of certain provisions) provide rules applicable to certain issues issued before June 7, 1994.

Par. 16. In newly designated § 1.148-11A, paragraph (i) is revised to read as follows:

§ 1.148-11A Effective dates.

* * * * *

(i) *Transition rules for certain amendments—(1) In general.* Section 1.103-8(a)(5), §§ 1.148-1, 1.148-2, 1.148-3, 1.148-4, 1.148-5, 1.148-6, 1.148-7, 1.148-8, 1.148-9, 1.148-10, 1.148-11, 1.149(d)-1, and 1.150-1 as in effect on June 7, 1994 (see 26 CFR part 1 as revised April 1, 1997), and §§ 1.148-1A through 1.148-11A,

1.149(d)-1A, and 1.150-1A apply, in whole, but not in part—

(i) To bonds sold after June 6, 1994, and before July 8, 1997;

(ii) To bonds issued before July 1, 1993, that are outstanding on June 7, 1994, if the first time the issuer applies §§ 1.148-1 through 1.148-11 as in effect on June 7, 1994 (see 26 CFR part 1 as revised April 1, 1997), to the bonds under § 1.148-11(b) or (c) is after June 6, 1994, and before July 8, 1997;

(iii) At the option of the issuer, to bonds to which §§ 1.148-1 through 1.148-11, as in effect on July 1, 1993 (see 26 CFR part 1 as revised April 1, 1994), apply, if the bonds are outstanding on June 7, 1994, and the issuer applies § 1.103-8(a)(5), §§ 1.148-1, 1.148-2, 1.148-3, 1.148-4, 1.148-5, 1.148-6, 1.148-7, 1.148-8, 1.148-9, 1.148-10, 1.148-11, 1.149(d)-1, and 1.150-1 as in effect on June 7, 1994 (see 26 CFR part 1 as revised April 1, 1997), and §§ 1.148-1A through 1.148-11A, 1.149(d)-1A, and 1.150-1A to the bonds before July 8, 1997.

(2) *Special rule.* For purposes of paragraph (i)(1) of this section, any reference to a particular paragraph of §§ 1.148-1T, 1.148-2T, 1.148-3T, 1.148-4T, 1.148-5T, 1.148-6T, 1.148-9T, 1.148-10T, 1.148-11T, 1.149(d)-1T, or 1.150-1T shall be applied as a reference to the corresponding paragraph of §§ 1.148-1A, 1.148-2A, 1.148-3A, 1.148-4A, 1.148-5A, 1.148-6A, 1.148-9A, 1.148-10A, 1.148-11A, 1.149(d)-1A, or 1.150-1A, respectively.

(3) *Identification of certain hedges.* For any hedge entered into after June 18, 1993, and on or before June 6, 1994, that would be a qualified hedge within the meaning of § 1.148-4(h)(2), as in effect on June 7, 1994 (see 26 CFR part 1 as revised April 1, 1997), except that the hedge does not meet the requirements of § 1.148-4A(h)(2)(ix) because the issuer failed to identify the hedge not later than 3 days after which the issuer and the provider entered into the contract, the requirements of § 1.148-4A(h)(2)(ix) are treated as met if the contract is identified by the actual issuer on its books and records maintained for the hedged bonds not later than July 8, 1997.

Par. 17. Section 1.149(d)-1 is amended as follows:

1. Paragraph (f)(3) is revised.

2. Paragraph (g)(3) is added.

The revised and added provisions read as follows:

§ 1.149(d)-1 Limitations on advance refundings.

(f) * * *

(3) Application of savings test to multipurpose issues. Except as otherwise provided in this paragraph (f)(3), the multipurpose issue rules in § 1.148-9(h) apply for purposes of the savings test. If any separate issue in a multipurpose issue increases the aggregate present value debt service savings on the entire multipurpose issue or reduces the present value debt service losses on that entire multipurpose issue, that separate issue satisfies the savings test.

(g) * * *

(3) Special effective date for paragraph (f)(3). Paragraph (f)(3) of this section applies to bonds sold on or after July 8, 1997, and to any issue to which the election described in § 1.148-11(b)(1) is made. See § 1.148-11A(i) for rules relating to certain bonds sold before July 8, 1997.

§ 1.149(d)-1T [Redesignated as § 1.149(d)-1A]

Par. 18. Section 1.149(d)-1T is redesignated as § 1.149(d)-1A, is transferred immediately following § 1.148-11A, and the section heading is amended by removing the language “(temporary)”.

Par. 19. Section 1.150-1 is amended as follows:

- 1. Paragraph (a)(2) is revised.
2. Paragraphs(c)(1) and (c)(4)(iii) are revised.
3. Paragraph (c)(6) is added.

The revised and added provisions read as follows:

§ 1.150-1 Definitions.

(a) * * *

(2) Effective date—(i) In general. Except as otherwise provided in this paragraph (a)(2), this section applies to issues issued after June 30, 1993 to which §§ 1.148-1 through 1.148-11 apply. In addition, this section (other than paragraph (c)(3) of this section) applies to any issue to which the election described in § 1.148-11(b)(1) is made.

(ii) Special effective date for paragraphs (c)(1), (c)(4)(iii), and (c)(6). Paragraphs (c)(1), (c)(4)(iii), and (c)(6) of this section apply to bonds sold on or after July 8, 1997, and to any issue to which the election described in § 1.148-11(b)(1) is made. See § 1.148-

11A(i) for rules relating to certain bonds sold before July 8, 1997.

(c) Definition of issue—(1) In general. Except as otherwise provided in this paragraph (c), the term issue means two or more bonds that meet all of the following requirements:

(i) Sold at substantially the same time. The bonds are sold at substantially the same time if they are sold less than 15 days apart.

(ii) Sold pursuant to the same plan of financing. The bonds are sold pursuant to the same plan of financing. Factors material to the plan of financing include the purposes for the bonds and the structure of the financing. For example, generally—

(A) Bonds to finance a single facility or related facilities are part of the same plan of financing;

(B) Short-term bonds to finance working capital expenditures and long-term bonds to finance capital projects are not part of the same plan of financing; and

(C) Certificates of participation in a lease and general obligation bonds secured by tax revenues are not part of the same plan of financing.

(iii) Payable from same source of funds. The bonds are reasonably expected to be paid from substantially the same source of funds, determined without regard to guarantees from parties unrelated to the obligor.

(4) * * *

(iii) Certain general obligation bonds. Except as otherwise provided in paragraph (c)(2) of this section, bonds that are secured by a pledge of the issuer’s full faith and credit (or a substantially similar pledge) and sold and issued on the same dates pursuant to a single offering document may be treated as part of the same issue if the issuer so elects on or before the issue date.

(6) Sale date. The sale date of a bond is the first day on which there is a binding contract in writing for the sale or exchange of the bond.

§ 1.150-1T [Redesignated as § 1.150-1A]

Par. 20. Section 1.150-1T is redesignated as § 1.150-1A, is transferred immediately following § 1.149(d)-1A, and

the section heading is amended by removing the language “(temporary)”.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 21. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 22. In § 602.101, paragraph (c) is amended by adding an entry in numerical order to the table to read as follows:

§ 602.101 OMB Control numbers.

Table with 2 columns: CFR part or section where identified and described, Current OMB control No. Row 1: 1.150-1, 1545-1347

Margaret Milner Richardson, Commissioner of Internal Revenue.

Approved May 1, 1997.

Donald C. Lubick, Acting Assistant Secretary of the Treasury (Tax Policy).

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