

Notice of Proposed Rulemaking and Notice of Public Hearing

Obligations of States and Political Subdivisions

REG-165706-01

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations on the definition of refunding issue applicable to tax-exempt bonds issued by States and local governments. This document provides a notice of public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by July 9, 2002. Outlines of topics to be discussed at the public hearing scheduled for July 30, 2002, at 10 a.m., must be received by July 9, 2002.

ADDRESSES: Send submissions to: CC:ITA:RU (REG-165706-01), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered between the hours of 8 a.m. and 5 p.m. to: CC:ITA:RU (REG-165706-01), courier's desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC. Alternatively, submissions may be made electronically to the IRS Internet site at www.irs.gov/regs. The public hearing will be held in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Michael P. Brewer (202) 622-3980; concerning submissions and the hearing, Treena Garrett (202) 622-7190 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 150 of the Internal Revenue Code (Code) provides certain definitions and special rules for purposes of applying the tax-exempt bond limitations contained in sections 103 and 141 through 150. On June 18, 1993, final regulations (T.D. 8476, 1993-2 C.B. 13) under section 150 were published in the **Federal Register** (58 FR 33510). On May 9, 1997, additional final regulations (T.D. 8718, 1997-1 C.B. 47) under section 150 were published in the **Federal Register** (62 FR 25502). This document proposes to modify the definition of refunding issue under § 1.150-1(d).

Explanation of Provisions

Section 1.150-1(d) of the current regulations provides a definition of *refunding issue*. In general, a refunding issue is an issue of obligations the proceeds of which are used to pay principal, interest, or redemption price on another issue. The current regulations contain certain exceptions to this general rule. One exception (the *change in obligor exception*) provides that an issue is not a refunding issue to the extent that the obligor of one issue is neither the obligor of the other issue nor a related party with respect to the obligor of the other issue. Another exception (the *six-month exception*) provides that if a person assumes (including taking subject to) obligations of an unrelated party in connection with an asset acquisition (other than a transaction to which section 381(a) applies if the person assuming the obligation is the acquiring corporation within the meaning of section 381(a)), and the assumed issue is refinanced within six months before or after the date of the debt assumption, the refinancing issue is not treated as a refunding issue.

Section 1.150-1(b) of the current regulations provides that the term *related party* means, in reference to a governmental unit or a 501(c)(3) organization, any member of the same controlled group. Section 1.150-1(e) of the current regulations provides that the term *con-*

trolled group means a group of entities controlled directly or indirectly by the same entity or group of entities. The determination of control is made on the basis of all the relevant facts and circumstances. One entity or group of entities (the *controlling entity*) generally controls another entity or group of entities (the *controlled entity*) if the controlling entity possesses either of the following rights or powers and the rights or powers are discretionary and non-ministerial: (i) the right or power both to approve and to remove without cause a controlling portion of the governing body of the controlled entity; or (ii) the right or power to require the use of funds or assets of the controlled entity for any purpose of the controlling entity.

Recently, questions have arisen regarding the application of these provisions with respect to certain issuances of bonds for 501(c)(3) organizations that operate hospital systems. In question, generally is whether bonds issued in connection with the combination of two or more 501(c)(3) organizations to refinance outstanding bonds should be characterized as refunding bonds. One question is how the change in obligor exception and the six-month exception should be applied when the obligor of the new issue becomes related to the obligor of the other issue as part of the refinancing transaction. Another question is whether the acquisition by a 501(c)(3) organization of the sole membership interest in another 501(c)(3) organization should be treated as an asset acquisition for purposes of the six-month exception. A third question is what assets should be treated as financed by the new bonds under both the change in obligor exception and the six-month exception.

In general, the proposed regulations retain the change in obligor exception and the six-month exception, with certain modifications. The proposed regulations clarify that the determination of whether persons are related for purposes of the change in obligor exception and the six-month exception is generally made immediately before the transaction. However, a refinancing issue is a refunding issue under the proposed regulations if the obligor of the refinanced issue (or any person

that is related to the obligor of the refinanced issue immediately before the transaction) has or obtains in the transaction the right to appoint the majority of the members of the governing body of the obligor of the refinancing issue (or any person that controls the obligor of the refinancing issue).

The proposed regulations state that the six-month exception applies to *acquisition transactions*. An acquisition transaction is a transaction in which a person acquires from an unrelated party: (i) assets, other than an equity interest in an entity, if the acquirer is treated as acquiring such assets for all Federal income tax purposes; (ii) stock of a corporation with respect to which a valid election under section 338 is made; or (iii) control of a governmental unit or a 501(c)(3) organization through the acquisition of stock, membership interests or otherwise.

The proposed regulations retain the exclusion under which the six-month exception does not apply to transactions to which section 381(a) applies, and broaden its scope. In particular, under the proposed regulations the exclusion may apply even if the person assuming the obligations is not the acquiring corporation within the meaning of section 381(a) (for example, a transaction in which a corporation assumes the obligations of a target corporation in a transaction to which section 381(a) applies and then contributes all of the assets of the target corporation to a controlled subsidiary). The proposed regulations also extend the application of this rule for section 381(a) transactions to the change in obligor exception.

The proposed regulations provide two new, additional requirements for purposes of the change in obligor exception and the six-month exception. In certain circumstances where the obligors of the issues are affiliated before the transaction or become affiliated as part of the transaction, the proposed regulations provide that an issue will be treated as a refunding issue unless: (i) the refinanced issue is redeemed on the earliest date on which the issue may be redeemed, and (ii) the new issue is treated as being used to finance the assets that were financed with the proceeds of the refinanced issue. These new requirements are intended to

further the Congressional policy against overburdening the tax-exempt bond market, as expressed in sections 148 and 149(d). In particular, they are intended to prevent overburdening in the case of transactions between affiliated persons that contain certain economic characteristics of a refunding.

Proposed Effective Date

The proposed regulations will apply to bonds sold on or after the date of publication of final regulations in the **Federal Register**. However, issuers may apply the proposed regulations in whole, but not in part, to any issue that is sold on or after the date the proposed regulations are published in the **Federal Register** and before the applicability date of the final regulations.

Special Analyses

It has been determined that this notice of proposed rulemaking 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 regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments that are submitted timely (preferably a signed original and eight copies) to the IRS. All comments will be available for public inspection and copying.

A public hearing has been scheduled for July 30, 2002, at 10:00 a.m. in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Because of access restrictions,

visitors will not be admitted beyond the lobby more than 15 minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons who wish to present oral comments at the hearing must submit written comments by July 9, 2002, and submit an outline of the topics to be discussed and the amount of time to be devoted to each topic by July 9, 2002.

A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal authors of these regulations are Bruce M. Serchuk, Office of Chief Counsel (Tax Exempt and Government Entities), Internal Revenue Service and Stephen J. Watson, Office of Tax Legislative Counsel, Department of the Treasury. However, other personnel from the IRS and Treasury Department participated in their development.

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Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.150-1 is amended as follows:

1. Paragraph (a)(2)(iii) is added.
2. Paragraphs (d)(2)(ii) and (d)(2)(v) are revised.

The added and revised provisions read as follows:

§ 1.150-1 Definitions.

(a) * * *

(2) * * *

(iii) *Special effective date for paragraphs (d)(2)(ii) and (d)(2)(v)*. Paragraphs (d)(2)(ii) and (d)(2)(v) of this section apply to bonds sold on or after the

date of publication of final regulations in the **Federal Register**, and may be applied by issuers in whole, but not in part, to any issue that is sold on or after April 10, 2002.

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(d) * * *

(2) * * *

(ii) *Certain issues with different obligors*—(A) *In general*. An issue is not a refunding issue to the extent that the obligor (as defined in paragraph (d)(2)(ii)(B) of this section) of one issue is neither the obligor of the other issue nor a related party with respect to the obligor of the other issue. The determination of whether persons are related for this purpose is generally made immediately before the issuance of the refinancing issue. This paragraph (d)(2)(ii)(A) does not apply to any issue that is issued in connection with a transaction to which section 381(a) applies.

(B) *Definition of obligor*. The obligor of an issue means the actual issuer of the issue, except that the obligor of the portion of an issue properly allocable to an investment in a purpose investment means the conduit borrower under that purpose investment. The obligor of an issue used to finance qualified mortgage loans, qualified student loans, or similar program investments (as defined in § 1.148-1) does not include the ultimate recipient of the loan (e.g., the homeowner, the student).

(C) *Certain integrated transactions*. If, within six months before or after a person assumes (including taking subject to) obligations of an unrelated party in connection with an acquisition transaction (other than a transaction to which section 381(a) applies), the assumed issue is refinanced, the refinancing issue is not a refunding issue. An acquisition transaction is a transaction in which a person acquires from an unrelated party—

(1) Assets (other than an equity interest in an entity);

(2) Stock of a corporation with respect to which a valid election under section 338 is made; or

(3) Control of a governmental unit or a 501(c)(3) organization through the acquisition of stock, membership interests or otherwise.

(D) *Special rule for affiliated persons*. Paragraphs (d)(2)(ii)(A) and (C) of this

section do not apply to any issue that is issued in connection with a transaction between affiliated persons (as defined in paragraph (d)(2)(ii)(E) of this section), unless—

(1) The refinanced issue is redeemed on the earliest date on which it may be redeemed (or otherwise within 90 days after the date of issuance of the refinancing issue); and

(2) The refinancing issue is treated for all purposes of sections 103 and 141 through 150 as financing the assets that were financed with the refinanced issue.

(E) *Affiliated persons*. For purposes of paragraph (d)(2)(ii)(D) of this section, persons are affiliated persons if—

(1) At any time during the six months prior to the transaction, more than 5 percent of the voting power of the governing body of either person is in the aggregate vested in the other person and its directors, officers, owners, and employees; or

(2) During the one-year period beginning six months prior to the transaction, the composition of the governing body of the acquiring person (or any person that controls the acquiring person) is modified or established to reflect (directly or indirectly) representation of the interests of the acquired person or the person from whom assets are acquired (or there is an agreement, understanding, or arrangement relating to such a modification or establishment during that one-year period).

(F) *Reverse acquisitions*. Notwithstanding any other provision of this paragraph (d)(2)(ii), a refinancing issue is a refunding issue if the obligor of the refinanced issue (or any person that is related to the obligor of the refinanced issue immediately before the transaction) has or obtains in the transaction the right to appoint the majority of the members of the governing body of the obligor of the refinancing issue (or any person that controls the obligor of the refinancing issue). See paragraph (d)(2)(v) *Example 2* of this section.

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(v) *Examples*. The provisions of this paragraph (d)(2) are illustrated by the following examples:

Example 1. Consolidation of 501(c)(3) hospital organizations. (i) A and B are unrelated hospital organizations described in section 501(c)(3). A has assets with a fair market value of \$175 million, and is the obligor of outstanding tax-exempt bonds in the amount of \$75 million. B has assets with a fair

market value of \$145 million, and is the obligor of outstanding tax-exempt bonds in the amount of \$50 million. In response to significant competitive pressures in the healthcare industry, and for other substantial business reasons, A and B agree to consolidate their operations. To accomplish the consolidation, A and B form a new 501(c)(3) hospital organization, C. A and B each appoint one-half of the members of the initial governing body of C. Subsequent to the initial appointments, C's governing body is self-perpetuating. On December 29, 2003, State Y issues bonds with sale proceeds of \$129 million and lends the entire sale proceeds to C. The 2003 bonds are collectively secured by revenues of A, B, and C. Simultaneously with the issuance of the 2003 bonds, C acquires the sole membership interest in each of A and B. C's ownership of these membership interests entitles C to exercise exclusive control over the assets and operations of A and B. C uses the \$129 million of sale proceeds of the 2003 bonds to defease the \$75 million of bonds on which A was the obligor, and the \$50 million of bonds on which B was the obligor. All of the defeased bonds will be redeemed on the first date on which they may be redeemed. In addition, C treats the 2003 bonds as financing the same assets as the defeased bonds. The 2003 bonds do not constitute a refunding issue because the obligor of the 2003 bonds (C) is neither the obligor of the defeased bonds nor a related party with respect to the obligors of those bonds immediately before the issuance of the 2003 bonds. In addition, the requirements of paragraph (d)(2)(ii)(D) of this section have been satisfied.

(ii) The facts are the same as in paragraph (i) of this *Example 1*, except that C acquires the membership interests in A and B subject to the obligations of A and B on their respective bonds, and the 2003 bonds are sold within six months after the acquisition by C of the membership interests. The 2003 bonds do not constitute a refunding issue.

Example 2. Reverse acquisition. D and E are unrelated hospital organizations described in section 501(c)(3). D has assets with a fair market value of \$225 million, and is the obligor of outstanding tax-exempt bonds in the amount of \$100 million. E has assets with a fair market value of \$100 million. D and E agree to consolidate their operations. On May 18, 2004, Authority Z issues bonds with sale proceeds of \$103 million and lends the entire sale proceeds to E. Simultaneously with the issuance of the 2004 bonds, E acquires the sole membership interest in D. In addition, D obtains the right to appoint the majority of the members of the governing body of E. E uses the \$103 million of sale proceeds of the 2004 bonds to defease the bonds of which D was the obligor. All of the defeased bonds will be redeemed on the first date on which they may be redeemed. In addition, E treats the 2004 bonds as financing the same assets as the defeased bonds. The 2004 bonds constitute a refunding issue because the obligor of the defeased bonds (D) obtains in the transaction the right to appoint the majority of the members of the governing body of the obligor of the 2004 bonds (E). See paragraph (d)(2)(ii)(F) of this section.

Example 3. Relinquishment of control. The facts are the same as in *Example 2*, except that D does not obtain the right, directly or indirectly, to appoint any member of the governing body of E. Rather, E obtains the right both to approve and to remove

without cause each member of the governing body of D. In addition, prior to being acquired by E, D experiences financial difficulties as a result of mismanagement. Thus, as part of E's acquisition of D, all of the former members of D's governing body resign their positions and are replaced with persons appointed by E. The 2004 bonds do not constitute a refunding issue.

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Robert E. Wenzel,
*Deputy Commissioner of
Internal Revenue.*

(Filed by the Office of the Federal Register on April 5, 2002, 2:41 p.m., and published in the issue of the Federal Register for April 10, 2002, 67 F.R. 17309)