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Final Reissuance Regulations Released (Finally)

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On December 30, 2024, the IRS and Treasury Department released final regulations regarding the reissuance analysis of tax-exempt bonds which finalize proposed regulations issued in 2018 (with some technical corrections). The final regulations are significant in that, firstly, they are intended to coordinate prior guidance in Notices 88-130 and 2008-41 regarding qualified tender bonds with Treasury Regulations § 1.1001-3 to determine when a tax-exempt bond is retired; and secondly, Notice 88-130 first promised these final regulations in July 1988—over 36 years ago (when hairstyles and tender bonds needed regulating). The final regulations amend § 1.1001-3 to incorporate and reference newly added § 1.150-3 which provides three general rules for when a tax-exempt bond is retired:

(1) a significant modification occurs under § 1.1001-3,

(2) the issuer or its agent acquires the bond in a manner that extinguishes the bond, or

(3) the bond is otherwise redeemed.

The final regulations set forth three exceptions to retirement or reissuance treatment (the first two exceptions apply to qualified tender bonds[1], and the third applies to all tax-exempt bonds:

(1) a qualified tender right[2] is disregarded in applying § 1.1001-3 to determine whether a change to the interest rate or interest rate mode (pursuant to the terms of the qualified tender bond) is a modification,

(2) an acquisition of a qualified tender bond by the issuer or its agent does not extinguish the bond if done pursuant to the operation of a qualified tender right and neither the issuer nor its agent holds the bond after the close of the 90-day period starting from the tender date.

(3) an acquisition of a tax-exempt bond by a guarantor or liquidity facility provider acting on the issuer's behalf does not extinguish the bond if done pursuant to the terms of the guarantee or liquidity facility and the acquirer is not a related party to the issuer of the bond.

Consistent with Notice 2008-41, the final regulations permit a qualified tender bond to be resold at a premium or discount when the qualified tender right is exercised in connection with a conversion of the interest rate mode to a fixed rate for the remaining term of the bond. However, the final regulations, do not retain some rules from the prior guidance, including (i) that modifications to collateral or credit enhancement are significant only if there is a change in payment expectations, (ii) a specific exception for corrective changes, and (iii) permitting a conduit borrower under certain circumstances to purchase bonds that financed its conduit loan. The stated reasons for discontinuing these rules are that § 1.1001-3 is sufficient or that the rules were specific to the extraordinary circumstances of the 2008 financial crisis and no longer necessary.

Issuers may continue to apply Notice 88-130 or Notice 2008-41 until December 30, 2025 at which point such Notices will become obsolete and § 1.150-3 will govern the reissuance analysis in all instances.

And finally, the final regulations authorize the publication of further guidance in the Internal Revenue Bulletin to address "appropriate, tailored circumstances" where flexibility may be needed in determining when retirement and reissuance has occurred. So hold your breath (or don't) for possibly *final* final guidance at which point we will likely all be retired (and hopefully not extinguished).

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[1] Section 1.150-3 defines qualified tender bond as "a tax-exempt bond that, pursuant to the terms of the bond, has all of the following features: (1) during each authorized rate mode, the bond bears interest at a fixed interest rate, a qualified floating rate under § 1.1275?5(b), or an objective rate for a tax-exempt bond under § 1.1275?5(c)(5); (2) interest on the bond is unconditionally payable (as defined in § 1.1273?1(c)(1)(ii)) at periodic intervals of no more than one year; (3) the bond has a stated maturity date that is not later than 40 years after the issue date of the bond; and (4) the bond includes a qualified tender right."

[2] Section 1.150-3 defines a qualified tender right as "a right or obligation of a holder of a tax-exempt bond pursuant to the terms of the bond to tender the bond for purchase as described [herein]. The purchaser under the tender may be the issuer, its agent, or another party. The tender right is available on at least one date before the stated maturity date. For each such tender, the purchase price of the bond is equal to par (plus any accrued interest). Following each such tender, the issuer, its agent, or another party either redeems the bond or uses reasonable best efforts to resell the bond within the 90-day period beginning on the date of the tender. Upon any such resale, the resale price of the bond is equal to the par amount of the bond (plus any accrued interest), except that, if the tender right is exercised in connection with a conversion of the interest rate mode on the bond to a fixed rate for the remaining term of the bond, the bond may be resold at any price, including a premium price above the par amount of the bond or a discount price below the par amount of the bond (plus any accrued interest). Any premium received by the issuer pursuant to such a resale is treated solely for purposes of the arbitrage investment restrictions under section 148 of the Code as additional sale proceeds of the bonds."

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