Part III - Administrative, Procedural, and Miscellaneous

State and Local Bonds: Volume Cap and Timing of Issuing Bonds

Notice 2011-63

SECTION 1. PURPOSE

This Notice provides supplemental guidance on the determination of when State and local bonds (as defined in § 103(c) of the Internal Revenue Code (the “Code”)) are considered “issued” for purposes of volume cap limitations on private activity bonds under § 146 and other bond volume caps and limitations under Federal law. This Notice amends and supplements Notice 2010-81.

SECTION 2. BACKGROUND

In Notice 2010-81, 2010-50 I.R.B. 825 (December 13, 2010), the Treasury Department and the IRS provided guidance regarding when State and local bonds (as defined in § 103(c)) are considered issued for purposes of various deadlines on issuing bonds. Under the general rule set forth in Notice 2010-81, a bond is treated as issued on the “issue date” of the “bond” under § 1.150-1(b) of the Income Tax Regulations (as contrasted with the “issue date” of the “issue” that includes the bond). This analysis particularly affects certain financing structures, such as draw-down loans and commercial paper, in which bonds of the same issue are issued at different times. Notice 2010-81 applies to various types of deadlines on issuing bonds, including, among others, volume caps on private activity bonds under § 146 and other bond volume caps under Federal law such as national limitations for the amount and timing of bonds issued as Qualified Zone Academy Bonds or Qualified Gulf Opportunity Zone Bonds.

In general, § 146 imposes annual State volume caps on private activity bonds and allows issuers to "carry forward" unused volume cap for use during a three-year carryforward period after the calendar year in which the original bond volume cap authorization arose. Other volume caps on bonds issued by State or local governments may apply in a similar manner, subject to different carryforward periods based on statutory deadlines, depending on the particular program.

The Treasury Department and the IRS have received comments that prior to Notice 2010-81, various States and issuers treated a bond as issued on other than its issue date as provided in Notice 2010-81, creating concerns for the treatment of draw-down loans and commercial paper for purposes of allocation, use, and administration of volume caps on private activity bonds under § 146.

SECTION 3. SCOPE AND APPLICATION

01. Bond Issuance for Purposes of Volume Cap Allocations. Solely for purposes of the private activity bond volume cap under § 146 and other bond volume caps on

State and local bonds under Federal law, an issuer may treat a bond as issued either: (1) on the issue date of the bond under the general rule in Notice 2010-81 or (2) in the alternative, on the issue date of the issue provided that the issuer meets the additional requirements of this § 3.01. An issuer that treats the bonds as issued on the issue date of the issue may not retroactively alter such treatment.

The issuer meets the additional requirements of this § 3.01 if the issuer issues all of the bonds of the issue, determined for this purpose by treating each bond of the issue as issued on the issue date of that bond under the general rule in Notice 2010-81, by no later than the earlier of: (i) the statutory deadline for issuing the bonds or (ii) the end of the maximum carryforward period for unused volume cap under the applicable statute, treating all of the unused volume cap for the issue as volume cap arising in the year in which the issue date of the issue occurs.

02. Example. In Year 1, an issuer receives a $1 million volume cap allocation from state volume cap that arose in Year 1 under § 146 for a draw-down bond issue of exempt facility bonds under § 142 and issues $50,000 in Year 1. Thus the issue date of the issue under § 1.150-1(c)(4)(i) occurs in Year 1. In Years 2 through 4, the issuer issues the $950,000 in remaining bonds of the issue. Under the general rule in Notice 2010-81, $50,000 of the bonds would be treated as issued in Year 1 on the issue date of those bonds, $50,000 of volume cap would be treated as used in Year 1, the remaining $950,000 of the bonds would be treated as issued upon funding of the draws in Years 2 through 4, respectively, and the issuer would use carryforward volume cap

(or obtain additional volume cap) to cover those remaining bonds. Under the alternative option, for volume cap purposes, if the issuer in Year 1 treated all of the $1 million in bonds as issued on the issue date of the issue, the entire $1 million of bonds of the issue is treated as issued on the issue date of the issue and the entire $1 million of volume cap is treated as used in Year 1. If the $1 million in volume cap in Year 1 were a carryforward volume cap, the issuer would have three years from Year 1 to use the carryforward because the alternative option in § 3.01 would treat the amount of the carryforward as volume cap arising in Year 1 (the year in which the issue date of the issue occurs). If the bonds were small issue bonds under § 144(a), the alternative option would not be available because under § 146 there is no carryforward period for unused volume cap for small issue bonds.

.03. Information Reporting. Section 1.149(e)-1(e)(2)(ii) of the Income Tax Regulations provides guidance on applicable information reporting requirements under § 149(e) for State and local bonds issued as draw-down bonds and commercial paper. For such information reporting purposes, in the case of issues issued after August 3, 2011, issuers who apply the alternative option under § 3.01 of this Notice should write or type "Filed in Accordance with Notice 2011-63 State and Local Bonds: Volume Cap and Timing of Issuing Bonds" at the top of the applicable information reporting return. Pursuant to §1.149(e)-1(e)(2)(ii), amended information reporting returns are not required for this purpose for bonds treated as issued under this notice before August 3, 2011.

SECTION 4. EFFECT ON OTHER DOCUMENTS

This Notice amends and supplements Notice 2010-81.

SECTION 5. DRAFTING INFORMATION

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