

Lesson 6

Exempt Facility Bonds

Overview

Introduction Phase I, Lesson 11 and Phase II Lesson 4 discussed the private activity bond tests. In those lessons, you learned that if a bond met the private business tests or the private loan financing test, then it was a private activity bond. You know from those Lessons that the interest on private activity bonds is not tax-exempt (under IRC § 103(b)(1)), unless the bonds are **qualified** private activity bonds.

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Objectives At the end of this module, you will, with respect to exempt facility bonds listed under IRC § 142, be able to:

- Identify and define each type of exempt facility
- Explain the requirements of each of these exempt facility bonds
- Describe the special requirements of each type of these exempt facility bonds
- Identify rules found in other sections of the Code that apply to exempt facility bonds

Section 1

General Rules

Overview

Introduction

This Section discusses the definition of a “qualified” private activity bond and the general rules applicable to this type of bond.

Statutory Provisions

Remember that IRC § 103(a) states that except as provided in subsection (b), gross income does not include interest on any State or local bond.

(b) Exceptions.--Subsection (a) shall not apply to--

(1) Private activity bond which is not a qualified bond.--Any private activity bond which is not a qualified bond (within the meaning of [section 141](#)).

(2) Arbitrage bond.--Any arbitrage bond (within the meaning of [section 148](#)).

(3) Bond not in registered form, etc.--Any bond unless such bond meets the applicable requirements of [section 149](#).

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Overview, Continued

Statutory Provisions (continued)

Also remember under IRC § 141 that a **Private activity bond** means any bond issued as part of an issue--

(1) which meets—

(A) the private business use test of paragraph (1) of subsection (b), and

(B) the private security or payment test of paragraph (2) of subsection (b), or

(2) which meets the private loan financing test of subsection (c)

When a bond is issued as a “qualified private activity bond” the Issuer has determined that the bonds are private activity bonds and have met the applicable tests under IRC §141. The interest paid on a private activity bond is not excludible from income unless it is “qualified” under IRC §141(e)

“Qualified” Private Activity Bonds

IRC §141(e) defines the term “qualified bond” means any private activity bond if--

(1) In general.--Such bond is--

(A) an exempt facility bond (IRC § 142(a)),

(B) a qualified mortgage bond (IRC § 143(a)) ,

(C) a qualified veterans' mortgage bond (IRC § 143(b)),

(D) a qualified small issue bond (IRC § 144(a)) ,

(E) a qualified student loan bond (IRC § 144(b)),

(F) a qualified redevelopment bond (IRC § 144(c)), or

(G) a qualified 501(c)(3) bond (IRC § 145)

(2) Volume cap.--Such bond is issued as part of an issue which meets the applicable requirements of [section 146](#), and [\[FN1\]](#)

(3) Other requirements.--Such bond meets the applicable requirements of each subsection of [section 147](#).

Section 2

Introduction to Exempt Facility Bonds

Overview

Introduction

This Section focuses on the requirements of an exempt facility bond under IRC § 141(e)(1)(A). This is only one type of “qualified” private activity bond. The others listed in IRC §141(e)(1)(A) are covered in later lessons.

Statutory Provisions

The specific requirements for exempt facility bonds are provided in IRC § 142.

An exempt facility bond is any bond issued pursuant to IRC § 142, at least 95 percent of the net proceeds of which are to be used, to finance the following facilities (“exempt facilities”):

- airports,
- docks and wharves,
- mass commuting facilities,
- facilities for furnishing of water,
- sewage facilities,
- solid waste disposal facilities,
- qualified residential rental facilities,
- facilities for the local furnishing of electric energy or gas,
- local district heating and cooling facilities,
- qualified hazardous waste facilities,
- high-speed intercity rail facilities,
- environmental enhancements of hydroelectric generating facilities,
- qualified public educational facilities,
- qualified green building and sustainable design projects,
- qualified highway or surface freight transfer facilities

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Overview, Continued

Regulations Treas. Reg. §§ 1.142-0 through 1.142-3 apply for purposes of the rules for exempt facility bonds under IRC § 142, except that, with respect to net proceeds that have been spent, Treas. Reg. §1.142-2 does not apply to bonds issued under IRC §142(d) (relating to bonds issued to provide qualified residential rental projects) and IRC §142(f) (2) and (4) (relating to bonds issued to provide local furnishing of electric energy or gas).
Treas. Reg. § 1.142-2 contain rules about remedial actions, which are applicable to exempt facility bonds.

Use of Proceeds At least 95 percent of the net proceeds of the bonds (bond proceeds less amounts in the reasonable required reserve or replacement fund) must be used to finance the facilities described in IRC § 142(a).

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Legislative History

Tax Reform Act of 1986

Prior to the Tax Reform Act of 1986, the following facilities were also considered exempt facilities:

- sports facilities,
- convention and trade show facilities,
- parking facilities, and
- pollution control facilities
- certain hydroelectric generating facilities (except for transition through 1988 if FERC application docketed before 1/1/86)

The Tax Reform Act of 1986 added qualified hazardous waste facilities; the Technical and Miscellaneous Revenue Act of 1988 added high-speed intercity rail facilities; the Energy Policy Act of 1992 added environmental enhancements of hydroelectric generating facilities; the Economic Growth and Tax Reconciliation Act of 2001 added qualified public education facilities; the American Jobs Creation Act of 2004 Act added qualified green building and sustainable design project bonds; and the Safe, Accountable, Flexible, Efficient, Transportation Equity Act of 2005 Act added qualified highway or surface freight transfer facilities .

IRC §§ 146-150 provide other requirements applicable to qualified private activity bonds, including exempt facility bonds.

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Legislative History, Continued

Use of Proceeds Prior to the 1986 Act, “substantially all” of the proceeds of the bonds had to be used to finance exempt facilities. **(See section 103(b)(4) of the 1954 Code.)**

Substantially all Treas. Reg. § 1.103-8(a)(1) provides that substantially all of the proceeds are used to provide an exempt facility if 90 percent or more of such proceeds are so used.

To determine “substantially all,” two rules apply:

- the proceeds are reduced by amounts properly allocable on a pro rata basis between providing the exempt facility and other uses of proceeds, and
 - amounts used to provide an exempt facility include amounts paid or incurred which are properly chargeable to the facility’s capital account
-

Example 1 In Rev. Rul. 77-122, 1977-1 CB 23, the Service ruled that 11 percent of the bond proceeds were used to reimburse prior construction expenditures that were a theoretical and thus were not valid costs of the facilities. Accordingly, the “substantially all” requirement was not met.

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Legislative History, Continued

Example 2

In Rev. Rul. 80-171, 1980-2 CB 44, in determining whether “substantially all” of the proceeds of the bonds (100x) are used for qualifying costs, the Service ruled that proceeds are first reduced by costs of issuance (5x) and amounts deposited in the reserve fund (15x). An amount (5x) was used for working capital and is a nonqualifying use of proceeds. Because 90 percent of 80x (100x less 5x less 15x) were used for qualifying costs, the “substantially all” requirement was met.

However, see Rev. Rul. 90-51, 1990-1 CB 22, which made Rev. Rul. 80-171 obsolete with respect to exempt facility bonds issued after August 15, 1986 (subject to transitional rules contained in sections 1312-1318 of the TRA 1986), as amended by section 1013 of the Technical and Miscellaneous Revenue Act of 1988, P.L. No. 100-647, 102, Stat. 3537. In Rev. Rul. 90-5, the Service ruled that the payment of issuance costs of a private activity bond from the proceeds of such bond is a non qualifying use of bond proceeds for IRC § 142(a).

General Requirements

Introduction In addition to specific requirements for each type of Exempt Facility Bond listed in IRC § 142(e) there are general requirements applicable to all “qualified” private activity bonds that are “exempt facility bonds”.

Government Ownership IRC § 142(b)(1)(A) provides that a facility shall be treated as described in IRC § 142(a) (1) (airports), (2) (docks and wharves), (3) (mass commuting facility), or (12) (environmental enhancements of hydroelectric generating facilities) only if all of the property to be financed by the net proceeds of the issue is to be owned by a governmental unit.

Safe Harbor for Leases and Management Contracts IRC § 142(b)(1)(B), provides that rules similar to the rules set forth below shall apply to management contracts and similar types of operating agreements.

For purposes of IRC § 142(b)(1)(A), property leased by a governmental unit shall be treated as owned by such governmental unit if—

- the lessee makes an irrevocable election (binding on the lessee and all successors in interest under the lease) not to claim depreciation or an investment credit with respect to such property,
- the lease term (as defined in IRC § 168 (i)(3)) is not more than 80 percent of the reasonably expected economic life of the property (as determined under IRC § 147 (b)), and
- the lessee has no option to purchase the property other than at fair market value (as of the time such option is exercised).

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General Requirements, Continued

Limit on Office Space

IRC § 142(b)(2), provides that an office shall not be treated as described in IRC § 142(a) unless:

- the office is located on the premises of a facility described in such a paragraph, and
 - not more than a de minimis amount of the functions to be performed at such office is not directly related to the day-to-day operations at such facility
-

Public Use

To qualify as an exempt facility under IRC § 142, a facility must serve or be available on a regular basis for general public use, or be part of a facility that is so used. See Treas. Reg. § 1.103-8(a)(2).

Functionally Related and Subordinate

Treas. Reg. § 1.103-8(a)(3) provides that an exempt facility includes any land, building or other property functionally related and subordinate to such facility. Property is not functionally related and subordinate to a facility if it is not of a character and size commensurate with the character and size of such facility.

Note: This applies to exempt facility bonds issued before 1986, as well as bonds issued after the Tax Reform Act of 1986.

Remedial Action

Regulation

Treas. Reg. § 1.142-2 provides that if less than 95 percent of the net proceeds of an exempt facility bond are actually used to provide an exempt facility, and for no other purpose, the issue will be treated as meeting the use of proceeds requirement of IRC §142(a) if the issue meets the condition of Treas. Reg. § 1.142-2 (b) and the issuer takes the remedial action described in Treas. Reg. § 1.142-2 (c).

When has a failure occurred

A failure to properly use proceeds occurs when:

- *Proceeds not spent.* For net proceeds that are not spent, a failure to properly use proceeds occurs on the earlier of the date on which the issuer reasonably determines that the financed facility will not be completed or the date on which the financed facility is placed in service.
- *Proceeds spent.* For net proceeds that are spent, a failure to properly use proceeds occurs on the date on which an action is taken that causes the bonds not to be used for the qualifying purpose for which the bonds were issued.

See Treas. Reg. §1.142(d)

Qualification for Remedial Action

Treas. Reg. § 1.142-2 (b) requires the issuer must have reasonably expected on the issue date that 95 percent of the net proceeds of the issue would be used to provide an exempt facility and for no other purpose for the entire term of the bonds (disregarding any redemption provisions). To meet this condition the amount of the issue must have been based on reasonable estimates about the cost of the facility.

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Remedial Action, Continued

Remedial Action

The remedial requirements of Treas. Reg. § 1.142-2 (c) are met if all of the nonqualified bonds of the issue are redeemed on the earliest call date after the date on which the failure to properly use the proceeds occurs pursuant to Treas. Reg. § 1.142-2 (d). Proceeds of tax-exempt bonds (other than those described in Treas. Reg. § 1.142-2 (d)(1) of this section) must not be used for this purpose. If the bonds are not redeemed within 90 days of the date on which the failure to properly use proceeds occurs, a defeasance escrow must be established for those bonds within 90 days of that date.

In addition, Treas. Reg. § 1.142-2 (c) requires other procedures to properly carry out the remediation-

- The issuer must provide written notice to the Commissioner of the establishment of the defeasance escrow within 90 days of the date the escrow is established.
- The establishment of a defeasance escrow does not satisfy the requirements of Treas. Reg. § 1.142-2 (c) if the period between the issue date and the first call date is more than 10 1/2 years.
- For dispositions of personal property exclusively for cash, the requirements of Treas. Reg. § 1.142-2 (c) are met if the issuer expends the disposition proceeds (as defined in Treas. Reg. § 1.141-12(c)) within 6 months of the date of the disposition to acquire replacement property for the same qualifying purpose of the issue under IRC § 142.

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Remedial Action, Continued

Nonqualified Bonds

Treas. Reg. §1.142(e)(1) provides that the nonqualified bonds are a portion of the outstanding bonds in an amount that, if the remaining bonds were issued on the date on which the failure to properly use the proceeds occurs, at least 95 percent of the net proceeds of the remaining bonds would be used to provide an exempt facility. If no proceeds have been spent to provide an exempt facility, all of the outstanding bonds are nonqualified bonds.

Allocations of nonqualified bonds, pursuant to Treas. Reg. § 1.142-2(e)(2), must be made on a pro rata basis, except that an issuer may treat any bonds of an issue as the nonqualified bonds so long as—

- the remaining weighted average maturity of the issue, determined as of the date on which the nonqualified bonds are redeemed or defeased (determination date), and excluding from the determination the nonqualified bonds redeemed or defeased by the issuer to meet the requirements of paragraph Treas. Reg. § 1.142-2 (c), is not greater than
 - the remaining weighted average maturity of the issue, determined as of the determination date, but without regard to the redemption or defeasance of any bonds (including the nonqualified bonds) occurring on the determination date
-

Use of Proceeds

In General

Treas. Reg. §1.142-4(b) relates to reimbursement allocations and provides that if an expenditure for a facility is paid before the issue date of the bonds to provide that facility, the facility is described in IRC § 142(a) only if the expenditure meets the requirements of Treas. Reg. §1.150-2 (relating to reimbursement allocations). For purposes of Treas. Reg. §1.142-4(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, Treas. Reg. §1.150-2(g) does not apply.

Substantial Users

Treas. Reg. §1.142-4(c) relates to use of facility by substantial users and provides that 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 IRC §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—

- an official intent for the facility is adopted under Treas. Reg. §1.150-2 within 60 days after the date on which acquisition, construction, or reconstruction of that facility commenced; and
- 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

Note: This section applies to bonds sold on or after July 8, 1997. See Treas. Reg. §1.103-8(a)(5) for rules applicable to bonds sold before that date. An issuer may elect to apply this section to any bond sold before July 8, 1997.

Section 3

Specific Rules for Qualified Exempt Facilities

Overview

Introduction This section discusses the specific rules applicable to each type of facility described as an exempt facility bond under IRC §142(e), which requires 95 percent or more of the net proceeds be used to provide one of the facilities listed.

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Overview, Continued

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Overview, Continued

Definition

Under Treas. Reg. § 1.103-8(e)(2), airport facilities are facilities which are directly related and essential to:

- servicing aircraft or enabling aircraft to take off and land, or
- transferring passengers or cargo to or from aircraft

The facility must be located at, or in close proximity to, the take-off and landing area in order to perform its functions. See Treas. Reg. § 1.103-8(e)(2)(ii)(a).

The examples provided in the regulations of airport facilities are:

- terminals, runways, hangars, loading facilities, repair shops, and
- land-based navigation aids, such as radar installation

Limitations apply regarding the financing and use of certain facilities. These limitations are discussed below.

Governmental Ownership

IRC § 142(b)(1)(A) provides that to qualify as an exempt facility, the airport facility financed with proceeds of bonds must be owned by a governmental unit.

Airport Facilities

Safe Harbor

IRC § 142(b)(1)(B) provides a safe harbor for determining governmental ownership in cases of leases or management contracts if:

- the lessee makes an irrevocable election not to claim depreciation or an investment credit with respect to the property,
 - the lease term is not more than 80 percent of the reasonably expected economic life of the property, and
 - the lessee has no option to purchase the property other than at fair market value
-

Limitation on Office Space

An office is not included in the definition of “airports” under IRC § 142(b)(2) unless:

- it is located on the premises of the airport, and
 - not more than a de minimis amount of the functions performed at the office are unrelated to the day-to day operations of the airport
-

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Airport Facilities, Continued

Storage or Training Facilities

Under IRC § 142(c)(1), storage or training facilities directly related to an airport are treated as “airport facilities.”

Changes after the 1986 Act—facilities for private business use not included

IRC § 142(c)(2) provides that the term “airport” does not include any of the following facilities if used for any private business use:

- hotels (or other lodging facilities),
 - retail facilities (including food and beverage facilities), if the facilities are in excess of a size necessary to serve passengers and employees at the airport,
 - retail facilities for passengers or the general public (other than parking) located outside the terminal,
 - office buildings for individuals who are not employees of a governmental unit or of the public airport operating authority for the facility, or
 - industrial parks or manufacturing facilities
-

Public Use

Treas. Reg. § 1.103-8(a)(2) provides that the facilities must satisfy the public use requirement. The facility must serve or be available on a regular basis for general public use or be part of a facility that is so used.

A hangar or repair facility at a municipal airport will qualify as a facility for general public use even if it is owned by, leased, or permanently assigned to a private person, provided that such facility services the general public, such as a common passenger carrier or freight carrier.

An airport owned or operated by a nonexempt person for general public use is a facility for public use. However, a landing strip which by reason of a formal or informal agreement or by reason of geographic location, which will not be reasonably available for general public use, is not a facility for public use.

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Airport Facilities, Continued

Functionally Related and Subordinate Facilities

Treas. Reg. § 1.103-8(e)(2)(ii)(b) provides that a facility is not functionally related and subordinate to an airport if the facility (or a part thereof)

- is not of a character and size commensurate with the character and size of the airport or adjacent to which the facility is located, or
- is not located at or adjacent to that airport

Under Treas. Reg. § 1.103-8(e)(2), airport facilities are facilities which are directly related and essential to:

- servicing aircraft or enabling aircraft to take off and land, or
- transferring passengers or cargo to or from aircraft

The facility must be located at, or in close proximity to, the take-off and landing area in order to perform its functions. See Treas. Reg. § 1.103-8(e)(2)(ii)(a).

The examples provided in the regulations of airport facilities are: terminals, runways, hangars, loading facilities, repair shops, and land-based navigation aids, such as radar installation

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Airport Facilities, Continued

Example 3 Facilities used primarily for the manufacture and modification of aircraft in the immediate vicinity of an airport do not qualify as facilities that are functionally related and subordinate to the airport. See Rev. Rul. 77-324, 1977-2 CB 37.

Example 4 A 270-room hotel located within $\frac{1}{4}$ of a mile of an airport's main terminal, was of the character and size commensurate with the airport, the number and size of the rooms were reasonable for the airport and the number and size of the meeting rooms were reasonable based on the size and number of the guest rooms. Thus, the hotel qualified as functionally related and subordinate to the airport. The airport had a restaurant, pub/lounge, a lobby lounge, and a spa and whirlpool, but such facilities were not extensive. (see PLR 8634008)

Note: This PLR was issued before August 15, 1986 See Changes After the '86 Act Above

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Airport Facilities, Continued

Mixed Use Airport Facilities

In determining the portion of costs of mixed-use airport facilities financed with tax-exempt bonds, the cost of the portions that do not qualify as “airport facilities” include only:

- The structural components required for the nonqualifying portion, such as: interior walls, partitions, ceilings, and special enclosures; and
- The interior furnishings of the nonqualifying facilities, such as: additional plumbing, electrical, and decorating costs

The cost of the general components of the terminal or other airport facility, such as land, structural supports, and exterior walls, are not to be allocated to property ineligible for exempt facility bond financing to the extent that these general components are required for the remaining portion of the airport. See H.R. Rep. No. 99-426, 99th Cong., 1st Sess., December 7, 1985, page 528.

Other Requirements

The private activity bond rules stated in IRC §§ 147(a) through (g) and 150(b)(4) and (b)(5) are applicable to bonds issued to finance airports under IRC § 142(a)(1). The rules of IRC § 148 and 149 also apply to bonds issued to finance airports.

IRC § 146(g)(3) provides that no volume cap allocation is required for bonds issued to finance airports.

These rules are discussed in other Lessons of this text.

Docks and Wharves

Definition Exempt facility bonds may be issued to finance docks and wharves and their related storage or training facilities. IRC § 142(a)(2) provides that the term “exempt facility bond” means any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to provide docks and wharves.

Public Use Treas. Reg. § 1.103-8(a)(2) provides that the facilities must satisfy the public use requirement. The facility must serve or be available on a regular basis for general public use.

A private dock or wharf owned by or leased to, and serving only a single manufacturing plant would not qualify as a facility for general public use. However, if the private owner or lessee of such dock or wharf who serves the general public, such as a common passenger or freight carrier, the facility will be considered to be available for general public use.

Example 5 Facilities to store and handle shipping oil owned by a corporation qualified as dock and wharves in Rev. Rul. 79-385, 1979-2 C.B. 40. The owner was required by license and statute to construct and operate the facilities in a nondiscriminatory manner so that the facility will not be limited to use by the owners but will be equally available to nonowner shippers. The facilities were part of a larger system for interstate transportation of oil. The corporation was subject to Interstate Commerce Commission regulations and was required to accept offers from any oil producer for transportation through the dock and wharf facilities. Because the facility was available to other oil producers, the offshore docking terminal met the public use requirement. The storage facilities were used in connection with the docking facilities and were directly related to and located adjacent to the docking terminal.

See also Rev. Rul. 78-247, 1978-1 C.B. 29. See also PLR 8337060 which distinguished facts from Rev. Rul. 79-385.

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Docks and Wharves, Continued

Changes after the 1986 Act— facilities for private business use not included

IRC § 142(c)(2) provides that property shall not be treated as described in docks and wharfs if such property is to be used for any of the following private business uses:

- any lodging facility
 - any retail facility (including food and beverage facilities) if the facilities are in excess of a size necessary to serve passengers and employees at the exempt facility,
 - any retail facilities (other than parking) for passengers or the general public located outside the exempt facility,
 - any office building for individuals who are not employees of a governmental unit or of the operating authority for the exempt facility, or
 - any industrial park or manufacturing facility
-

Functionally Related and Subordinate Facilities

Treas. Reg. § 1.103-8(a)(3) provides that an exempt facility includes any land, building, or other property functionally related and subordinate to such facility. To be considered functionally related and subordinate, the facility should be of a character and size commensurate with the character and size of the dock or wharf or located at or adjacent to it.

Treas. Reg. § 1.103-8(e)(2)(d)(iii) provides examples of functionally related and subordinate facilities, such as:

The structure alongside which a vessel docks, the equipment needed to receive and to discharge cargo and passengers from the vessel, such as cranes and conveyors, related storage, handling, office, passenger areas and similar facilities.

Docks and Wharves, Continued

Example 6 In Rev. Rul. 77-233, 1977-2 CB 30, the Service held that a dry dock located in a public port and used for repair and maintenance qualified as an exempt facility. The dry dock was of adequate size to repair all ships using the port and was open to the general public and was functionally related and subordinated to the dock.

Governmental Ownership IRC § 142(b)(1)(A) provides that to qualify as an exempt facility, docks and wharves financed with proceeds of bonds must be owned by a governmental unit.

Safe Harbor IRC § 142(b)(1)(B) provides a safe harbor for determining governmental ownership in cases of leases or management contracts if:

- the lessee makes an irrevocable election not to claim depreciation or an investment credit with respect to the property (binding his successors),
- the lease term is not more than 80 percent of the reasonably expected economic life of the property, and
- the lessee has no option to purchase the property other than at fair market value

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Docks and Wharves, Continued

Limitation on Office Space

Under IRC § 142(b)(2), an office is not included in the definition of a “dock” or “wharf” under IRC § 142(a) unless:

- it is located on the premises of the dock or wharf, and
 - not more than a de minimis amount of the functions performed at the office are unrelated to the day-to day operations of the dock or wharf
-

Storage or Training Facilities

Under IRC § 142(c)(1), storage or training facilities directly related to dock and wharves are treated as part of such dock and wharf facilities.

Other Requirements

The private activity bond rules stated in IRC §§ 147(a) through (g) and 150(b)(4) and (b)(5) are applicable to bonds issued to finance docks and wharves. The rules of IRC § 148 and 149 also apply to bonds issued to finance docks and wharves.

Allocation rules for mixed-use facilities are similar to those for airports. See H.R. Rep. No. 426, 99th Cong., 1st Sess., December 7, 1985, page 530.

IRC § 146(g)(3) provides that no volume cap allocation is required for bonds issued to finance docks and wharves.

Mass Commuting Facilities

Definition

IRC § 142(a)(3) provides that the term “exempt facility bond” means any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to provide mass commuting facilities.

Treas. Reg. § 1.103-8(e)(2)(iv) states that mass commuting facilities include real property together with improvements, and personal property used in the facility, such as machinery, equipment, and furniture, serving the general public commuting on a day-to-day basis. Such property also includes terminals and facilities functionally related and subordinate to the mass commuting facility, such as parking garages, car barns and repair shops. Use of mass commuting facilities by noncommuters in common with commuters is immaterial.

Mass commuting facilities do not include mass commuting vehicles. See Rev. Rul. 88-51, 1988-1 CB 74.

Public Use

Treas. Reg. § 1.103-8(a)(2) provides that the facilities must satisfy the public use requirement. The facility must serve or be available on a regular basis for general public use.

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Mass Commuting Facilities, Continued

**Changes after
the 1986 Act—
facilities for
private business
use not
included**

IRC § 142(c)(2) provides that the term “mass commuting facilities” does not include any of the following facilities if used for any private business use:

- hotels (or other lodging facilities),
- retail facilities (including food and beverage facilities) located in a terminal, if the facilities are in excess of a size necessary to serve passengers and employees at the airport,
- retail facilities for passengers or the general public (including, but not limited to rental car lots) located outside the terminal,
- office buildings for individuals who are not employees of a governmental unit or of the public airport operating authority, or
- industrial parks or manufacturing facilities

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Mass Commuting Facilities, Continued

**Functionally
Related and
Subordinate
Facilities**

Treas. Reg. § 1.103-8(a)(3) provides that an exempt facility includes any land, building, or other property functionally related and subordinate to such facility. To be considered functionally related and subordinate, the facility should be of a character and size commensurate with the character and size of the mass commuting facility or located at or adjacent to it.

**Governmental
Ownership**

IRC § 142(b)(1)(A) provides that to qualify as an exempt facility, mass commuting facilities financed with proceeds of bonds must be owned by a governmental unit.

Safe Harbor

IRC § 142(b)(1)(B) provides a safe harbor for determining governmental ownership in cases of leases or management contracts if:

- the lessee makes an irrevocable election not to claim depreciation or an investment credit with respect to the property,
 - the lease term is not more than 80 percent of the reasonably expected economic life of the property, and
 - the lessee has no option to purchase the property other than at fair market value
-

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Mass Commuting Facilities, Continued

Limitation on Office Space

Under IRC § 142(b)(2), an office is not included in the definition of a “mass commuting facility” under IRC § 142(a) unless:

- it is located on the premises of the facility, and
 - not more than a de minimis amount of the functions performed at the office are unrelated to the day-to day operations of the facility
-

Storage or Training Facilities

Under IRC § 142(c)(1), storage or training facilities directly related to a mass commuting facility are treated as a part of such facility.

Other Requirements

Allocation rules for mixed-use facilities similar to those used for airports apply. See H.R. Rep. 426, 99th Cong., 1st Sess., December 7, 1985, page 530.

Private activity bond rules stated in IRC §§ 146, 147(a) through (g), and 150(b)(4) and (b)(5) are applicable to bonds issued to finance mass commuting facilities under IRC § 142(a)(3). The arbitrage and rebate rules of IRC § 148 and the rules of IRC § 149 also apply to these bonds.

Facilities for Furnishing Water

Definition

IRC § 142(a)(4) provides that the term “exempt facility bond” means any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to provide facilities for the furnishing of water.

Under IRC § 142(e), a facility is a facility for the furnishing of water if:

- the water is or will be made available to members of the general public (includes electricity utility, industrial, agricultural or commercial users), and
- either the facility is operated by a governmental unit or the rates for the furnishing or sale of water have been established or approved by a State or political subdivision thereof, by an agency or instrumentality of the United States, or by a public service or public utility commission or other similar body of any State or political subdivision thereof

Artesian wells, reservoirs, dams, related equipment and pipelines, and other facilities used to furnish water for domestic, industrial, irrigation, or other purposes, are included as “water facilities” under Treas. Reg. § 1.103-8(h)(2). Note however that this regulation applied to IRC § 103(b)(4)(G) which allowed for financing of irrigation dams, which is not allowed in IRC §142(e)

Public Use

Treas. Reg. § 1.103-8(a)(2) provides that the facility must satisfy the public use requirement. Under Treas. Reg. § 1.103-8(h)(1), a water facility will satisfy the public use test if it will provide water on reasonable demand, to any member of the general public within the service area of the water system of which the facility is a part.

Use by a small number of private persons of 80 percent of the output of a water facility does not meet the public use requirement. See Rev. Rul. 76-494, 1976-2 C. B. 26. Thus, even if the facility serves a large number of members of the general public, if a large portion of the facility’s output is used by a private person, the facility will not meet the requirements of IRC § 142(e) and Treas. Reg. § 1.103-8(h)(1). See also Rev. Rul. 78-21, 1978-1 CB 26.

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Facilities for Furnishing Water, Continued

Irrigation Facility does not Qualify

In PLR 9220036, the Service ruled that bonds issued to finance irrigation equipment to be leased to farmers in a water conservation district would not be qualified. The facility would not qualify as a “facility for the furnishing of water” as described in IRC § 142(a)(4) since it did not serve the general public, including residential users.

Functionally Related and Subordinate Facilities

Treas. Reg. § 1.103-8(a)(3) provides that an exempt facility includes any land, building, or other property functionally related and subordinate to such facility. To be considered functionally related and subordinate, the property should be of a character and size commensurate with the character and size of the facility.

Limitation on Office Space

Under IRC § 142(b)(2), an office is not included in the definition of a “facility for the furnishing of water” under IRC § 142(a) unless:

- it is located on the premises of the facility, and
 - not more than a de minimis amount of the functions performed at the office are unrelated to the day-to day operations of the facility
-

Other Requirements

The private activity bond rules stated in IRC §§ 146, 147(a) through (g), and 150(b)(4) and (b)(5) are applicable to bonds issued to finance facilities for the furnishing of water under IRC § 142(a)(4). The arbitrage and rebate rules of IRC § 148 and the rules of IRC § 149 also apply to these bonds.

Sewage Facilities

Definition	IRC § 142(a)(5) provides that the term “exempt facility bond” means any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to provide sewage facilities. The Code does not define a sewage facility, however, Treas. Reg. § 1.142(a)(5)-1 provides guidance on the types of property that may be financed as sewage facilities and other applicable definitions.
Public Use	Treas. Reg. § 1.103-8(a)(2) provides that the facilities must satisfy the public use requirement; however, under Treas. Reg. § 1.103-8(f)(1)(i), sewage facilities will be treated in all events as serving the general public.
Properties Which May Be Financed	<p>Treas. Reg. § 1.142(a)(5)-1(b)(1) describes the properties that may qualify as sewage facilities under IRC § 142(a) as those:</p> <ul style="list-style-type: none">• used for the secondary treatment of wastewater that has a reasonably expected average daily raw wasteload concentration of biochemical oxygen demand (BOD) that does not exceed 350 milligrams per liter as oxygen (the BOD limit) (oxygen is measured upon entry into the facility);• used for the preliminary and/or primary treatment of wastewater, to the extent used in connection with secondary treatment without regard to the BOD limit;• used for advanced or tertiary treatment of wastewater in connection with and after secondary treatment;• used for the collection, storage, use, processing and final disposal of certain wastewater and sewage sludge, sewage sludge is without regard to the BOD limit;• used for the treatment, collection, storage, use, processing, or final disposal of septage without regard to the BOD limit; and• functionally related and subordinate to the properties described above (such as sewage disinfection property)

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Sewage Facilities, Continued

Prior Law Prior Treas. Reg. § 1.103-8(f)(2)(i) defines “sewage disposal facilities” as any property used for the collection, storage, treatment, utilization, processing or final disposal of sewage. This Regulation applies to bonds issued before February 1, 1995.

Refunding Bonds Treas. Reg. § 1.142(a)(5)-1 regulations apply to bonds issued after February 21, 1995. In the case of a refunding bond issued to refund a bond prior to this effective date, this regulation need not apply if the weighted average maturity of the refunding bonds, as described in IRC § 147(b), is not greater than the remaining weighted average maturity of the refunded bonds. Treas. Reg. § 1.142(a)(5)-1(e).

Note: See Treas. Reg. 1.142(a)(5)-1(b)(3) for further definition of the terms used in Treas. Reg. § 1.142(a)(5)-1(b)(1).

Exception for BOD Limit If a facility treating wastewater exceeds the BOD limit, it will not fail to qualify to the extent that the failure is due to implementation of a federal, state, or local water conservation program. (For example, a program designed to promote water use efficiency that results in BOD concentrations beyond the BOD limit.) See Treas. Reg. § 1.142(a)(5)-1(b)(2)(i).

Exception for Allocation of Cost In the case of property that has both a use described in Treas. Reg. § 1.142(a)(5)-1, a sewage treatment function, and use other than sewage treatment, only the portion of the cost of property allocable to the sewage treatment function is taken into account as an expenditure to provide sewage facilities. The portion of the cost of property allocable to the sewage treatment function is determined by allocating the cost of that property between the property’s sewage treatment function and any other uses by any method which, based on all the facts and circumstances, reasonably reflects a separation of costs for each use of property. Treas. Reg. § 1.142(a)(5)-1(d)

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Sewage Facilities, Continued

Anti-Abuse Rule

If there are any intentional manipulations of the BOD level to circumvent the BOD limit, the facility will not qualify. For example, increasing the volume of water in the wastewater before influent enters the facility with the intention of reducing the BOD limit. See Treas. Reg. § 1.142(a)(5)-1(b)(2)(ii).

Authority of Commissioner

In appropriate cases upon application to the Commissioner, the Commissioner may determine that facilities employing technologically advanced or innovative treatment processes qualify as sewage facilities if it is demonstrated that these facilities perform functions that are consistent with the definition of sewage facilities described in Treas. Reg. § 1.142(a)(5)-1(b)(1). Treas. Reg. § 1.142(a)(5)-1(b)(2)(iii).

Property not Included as Sewage Facility

If a property is not described in Treas. Reg. § 1.142(a)(5)-1(b)(1), it is not a sewage facility under IRC § 142(a)(5). For example, a property is not a sewage facility or functionally related and subordinate property, if such property is used for pretreatment of wastewater, or related collection, storage, use, processing, or final disposal of the wastewater. In addition, property used to treat, process, or use wastewater subsequent to the wastewater's discharge into navigable water, is not a sewage facility. Treas. Reg. § 1.142(a)(5)-1(c)

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Sewage Facilities, Continued

**Functionally
Related and
Subordinate
Facilities**

Treas. Reg. § 1.103-8(a)(3) provides that an exempt facility includes any land, building, or other property functionally related and subordinate to such facility. To be considered functionally related and subordinate, the property should be of a character and size commensurate with the character and size of the facility.

**Limitation on
Office Space**

Under IRC § 142(b)(2), an office is not included in the definition of a “sewage facility” under IRC § 142(a) unless:

- it is located on the premises of the facility, and
 - not more than a de minimis amount of the functions performed at the office are unrelated to the day-to day operations of the facility
-

**Other
Requirements**

The private activity bond rules stated in IRC §§ 146, 147(a) through (g), and 150(b)(4) and (b)(5) are applicable to bonds issued to finance sewage facilities under IRC § 142(a)(5). The arbitrage and rebate rules of IRC § 148 and the rules of IRC § 149 also apply to these bonds.

Solid Waste Disposal Facilities

2009 Proposed Regulations

On September 16, 2009 the IRS issued proposed regulations (“2009 Proposed Regulations”) regarding solid waste facilities that may be financed with tax-exempt private activity pursuant to IRC § 142. The 2009 Proposed Regulations make extensive changes to the proposed regulations that were issued by the IRS in May of 2004, which would have removed existing Treas. Reg. § 1.103-8(f)(2) and Temp. Treas. Reg. § 17.1 and proposed a new § 1.142(a)(6)-1. The end of this section contains a summary of certain of the 2009 Proposed Regulations.

Exempt Facility Bond

IRC § 142(a)(6) provides that the term “exempt facility bond” includes any bond issued as part of an issue 95 percent or more of the net proceeds of which are used to finance “solid waste disposal facilities.”

While IRC § 142(a)(6) was added to the Code as part of the Tax Reform Act of 1986, the tax-exempt financing of solid waste disposal facilities was already permitted under IRC § 103(b)(4)(E) of the Code of 1954. The Conference Report to the 1986 Act provides that “[t]he conference agreement allows exempt-facility bonds to be issued to finance solid waste disposal facilities, defined generally, as under present law.” Thus, the guidance already issued, except that the special rule for certain qualified steam-generating or alcohol-producing facilities is repealed, under § 103(b)(4)(E) is applicable to IRC §142(a)(6).

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Solid Waste Disposal Facilities, Continued

**Solid Waste
Disposal
Facilities
Defined**

Treas. Reg. § 1.103-8(f)(2)(ii)(a) provides that the term “solid waste disposal facilities” means any property or a portion thereof used for the collection, storage, treatment, utilization, processing, or final disposal of solid waste.

Treas. Reg. § 1.103-8(f)(2)(ii)(c) provides that a facility which disposes of solid waste by reconstituting, converting, or otherwise recycling it into material which is not waste shall also qualify as a solid waste disposal facility if solid waste constitutes at least 65 percent, by weight or volume, of the total materials introduced into the recycling process.

The fact that a facility which otherwise qualifies as a solid waste disposal facility operates at a profit will not, of itself, disqualify the facility as an exempt facility.

Public Use

Treas. Reg. § 1.103-8(a)(2) provides that the facilities must satisfy the public use requirement, however, under Treas. Reg. § 1.103-8(f)(1)(i), solid waste disposal facilities will be treated in all events as serving the general public.

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Solid Waste Disposal Facilities, Continued

Solid Waste Defined

Treas. Reg. § 1.103-8(f)(2)(ii)(b) provides that the term “solid waste” shall have the same meaning as section 203(4) of the Solid Waste Disposal Act of 1965 except that material will not qualify as solid waste unless:

- on the date of issue of the obligations issued to provide the facility to dispose of such waste material,
- it is property which is useless, unused, unwanted, or discarded solid material,
- which has no market or other value at the place where it is located

Where any person is willing to purchase such property, at any price, such material is not waste.

Where any person is willing to remove such property at his own expense but is not willing to purchase such property at any price, such material is waste.

The Conference Report to the 1986 Act provides that “[t]he conferees wish to clarify that solid waste does not include most hazardous waste (including radioactive waste).”

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Solid Waste Disposal Facilities, Continued

**Solid Waste
Defined**
(continued)

Section 203(4) of the Solid Waste Disposal Act provides that solid waste means:

- garbage,
- refuse, and
- other discarded solid materials, including solid waste material resulting from:
 - commercial activities,
 - industrial,
 - commercial, and
 - agricultural operations

Solid waste does not include solids or dissolved material in domestic sewage or other significant pollutants in water resources, such as:

- silt,
- dissolved or suspended solids in industrial waste water effluents,
- dissolved materials in irrigation return flows, or
- other common water pollutants

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Solid Waste Disposal Facilities, Continued

Example 7 A facility reconstituted solid materials resulting from a manufacturing process so that the materials could be reintroduced into a manufacturing process. The corporation had previously discarded the solid materials, which could not be reintroduced into the production process or sold. The facility qualified as a solid waste disposal facility since, at the time the bonds were issued to construct the facility, the discarded materials had no value at the place where they were discarded. See Rev. Rul. 72-190, 1972-1 CB 29.

Example 8 Discarded corrugated containers purchased from a waste collector by a manufacturer of fiber products did not qualify as solid waste. The containers had a value where they were located, and a corporation engaged in the business of manufacturing bleached paper board and other fiber products was willing to purchase the property at a stated price. See Rev. Rul. 75-184, 1975-1 CB 41.

Example 9 A facility leased to a corporation that collects solid waste and sells salvageable metal to scrap dealers and combustibles to an adjacent public utility plant for fuel qualifies as a solid waste disposal facility except for equipment used to transport the product to the utility. The corporation does not pay any amount for any material dumped at the collection stations. At this point, the garbage is useless and unwanted material. See Rev. Rul. 76-222, 1976-1 CB 26.

Example 10 State law prohibits use of non-returnable containers. A facility used by a beverage manufacturer to package beverages in such containers is not a solid waste disposal facility because the containers are not solid waste. When the reusable container is returned, it is reintroduced into the distribution process and may be reused by the taxpayer. Even though there was no market for the returnable containers, the reusable containers do have a value to the taxpayer. See Rev. Rul. 80-197, 1980-2 CB 44.

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Solid Waste Disposal Facilities, Continued

Example 11 A minimal amount of water content is permitted in “solid waste.” In PLR 9143036, the Service ruled that although the wastewater effluent is 99.2 percent liquid, it qualifies as solid waste when dewatered. However, the cost of the dewatering is not functionally related and subordinate and as such is a non-qualifying cost.

Example 12 In TAM 199918001, City issued two series of temporary revenue bonds on two separate dates to finance the construction of a recycling facility for the benefit of Operator and then subsequently issued revenue refunding bonds solely to currently refund the original new money issues. The relevant dates to test for value were the two issue dates of the separate new money issues since it is as of those dates that the City intended to spend bond proceeds on the construction of the facility.

Operator had historically purchased its solid material on the open market, and on the relevant issue dates, persons were willing to pay a price for the solid material at the locations where the Operator customarily acquired its material. Thus, as the material had value where it was located on the relevant issue dates, it, did not qualify as solid waste.

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Solid Waste Disposal Facilities, Continued

Example 13

Company acquires bark from outside suppliers by paying only an allowance for handling, loading, and hauling of the bark to the mill. The bark is otherwise useless, discarded, solid material that has no market value to the suppliers at the place it is located. This allowance includes a base rate plus a mileage rate which is slightly adjusted up or down depending on the moisture content of the bark delivered, based on random samples taken of bark deliveries. The Company represents that the moisture content adjustments are needed to discourage haulers from watering down the bark before delivery, compensate haulers who deliver dry loads which are bulkier and not as heavy as wet loads, and encourage haulers to deliver dry bark that can be used immediately at the mill without any delay for drying time. The adjustment for moisture content, comprising only 3.3 percent of the cost of the bark delivered to the mill, is an acceptable handling cost. See PLR 7941045.

See also Reg. § 1.103-8(f)(2)(ii)(b) which provides that where a person is willing to remove solid materials at his own expense but is not willing to purchase such material at any price, such material is waste.

The Waste Disposal Function and the Production of Valuable Material

A facility may have a solid waste disposal function and a function other than the disposal of solid waste, however, only expenditures for that portion of property which is a solid waste disposal facility qualify for tax-exempt financing under section 142(a)(6). See Treas. Reg. § 1.103-8(f)(2)(ii)(a) and Temp. Treas. Reg. § 17.1(a).

Temp. Treas. Reg. § 17.1(a) provides that where materials or heat having utility or value are recovered, the waste disposal function includes the processing of such materials or heat which occurs in order to put them into the form in which the materials or heat are in fact used or sold. However, the waste disposal function does not include any further processing which converts the material or heat into other products. An example of this principle is provided in Temp. Treas. Reg. § 17.1(c)

Continued on next page

Solid Waste Disposal Facilities, Continued

Example 14

At a processing facility, solid waste material collected by the operator is reduced to a small, uniform size and separated into combustible and noncombustible fractions. The combustible fraction is fed to a surge bin from which it is blown into boilers at an adjacent utility plant. The utility paid a stipulated amount per ton for the combustible fractions based on their BTU value. While the waste disposal function of the processing facility includes the processing of the waste material into the form that is subsequently sold, the waste disposal function does not include the equipment such as fans and ductwork used to transport the fuel from the surge bin to the boilers because during this stage the material is no longer useless and unwanted. See Rev. Rul. 76-222, 1976-1 C.B. 26.

Functionally Related and Subordinate Property

Property is related and subordinate to the solid waste facility qualifies if it is of a character and size commensurate with the character and size of the facility. See Treas. Reg. § 1.103-8(a)(3).

IRC § 142(b)(2) provides that office space which is located on the premises of the facility qualifies as part of the exempt facility provided that not more than a de minimis amount of the work performed in that space is not directly related to the day-to-day operations of the facility.

Continued on next page

Solid Waste Disposal Facilities, Continued

Example 15 In PLR 9002049, specially designed trailers, road tractors and shuttle trucks, and the garage maintenance and truck washing facilities, and landfill tippers are functionally related and subordinate to the disposal facility because they are necessary for the collection, storage, and transportation of solid waste. In this case, the city's disposal site was near capacity and the city contracted with a private entity to transport and dispose of the garbage at its landfill.

Example 16 Odor control facilities installed by a corporation to a sanitary landfill are functionally related and subordinate property. See PLR 8526018.

Allocation of Cost Temp. Treas. Reg. § 17.1(b) provides that the qualifying portion of the facility is determined by allocating cost of the facility between the solid waste disposal function and any other function. The method of allocation adopted by the issuer should, with reference to all the facts and circumstances with respect to the facility, be reasonable and reflect a separation of costs for each function of the property.

Example 17 A facility processes waste dumped by a municipality by separating metals, glass, and similar materials. As separated, some of the items are commercially salable. The metals and glass are sold after they are sorted, altered, and cleaned, and the glass is pulverized. The waste disposal function includes the processing of the metal and glass, but not any further processing.

The remaining waste is burned at an incinerator. The gases generated are cleaned by the use of an electrostatic precipitator. The incinerator exhaust gases are cooled and reduced in volume by means of a heat exchange process using boilers. The precipitator is functionally related and subordinate to the waste disposal facility. The heat is used to produce steam and sold to the operator of an adjacent electric generating facility and used by the operator to power its turbine generator. The pipes used to carry the steam from the facility to the adjacent electric generating facility are not within the solid waste disposal function of the facility.

See Example in Temp. Treas. Reg. § 17.1(c).

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Solid Waste Disposal Facilities, Continued

Volume Cap Exception for Governmental Units in IRC §146(h)

IRC §146(h) provides an exception from “private activity bond” for solid waste disposal facilities if all the property financed is owned by a governmental unit. The rules of § 142(b)(1)(B) apply and set out a safe harbor for management contracts and leases; however § 146(h) limits leases under § 142(b)(2)(B)(ii) to a term of 20 years.

Other Requirements

The private activity bond rules stated in IRC §§ 146 (unless the property to be financed is to be owned by a governmental entity), 147(a) through (g) and IRC § 150(b)(4) and (b)(5) are applicable to bonds issued to finance solid waste disposal facilities under IRC § 142(a)(6).

The arbitrage and rebate rules of IRC § 148 and the rules of IRC § 149 are also applicable to these bonds.

2009 Proposed Regulations Summary

Below is a summary of the 2009 Proposed Regulations solid waste regulations as published in the Federal Register September 16, 2009, (IRS REG 140492-02) Vol. 74, Number 178

The proposed regulations will apply to bonds to which IRC §142 applies that are sold 60 days after the date of publication of final regulations under IRC §142(a)(6) in the Federal Register. Issuers may apply the 2009 Proposed Regulations to bonds sold before the date that is 60 days after publication of final regulations in the Federal Register.

The 2009 Proposed Regulations provide new definitions and guidance on various solid waste issues. Treas. Reg. § 1.142(a)(6)-1

Treas. Reg. § 1.142(a)(6)-1(b) solid waste disposal facility means -- any facility to the extent that it –

- (1) processes solid waste in a qualified solid waste disposal process,
 - (2) performs a preliminary function, or
 - (3) is functionally related and subordinate (within the meaning of IRC § 1.103-8(a)(3)) to a facility which either processes solid waste in a qualified solid waste disposal process or performs a preliminary function
-

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Solid Waste Disposal Facilities, Continued

**2009 Proposed
Regulations
Summary**
(continued)

Treas. Reg. § 1.142(a)(6)-1-(c)(1) solid waste means-- garbage, refuse, and other solid material, derived from any agricultural, commercial, consumer, or industrial operation or activity that is either used material or residual material and that is reasonably expected by the person who purchases or otherwise acquires such material to be introduced within a reasonable time after such purchase or acquisition in a qualified solid waste disposal process.

Treas. Reg. § 1.142(a)(6)-1(c)(2) sets forth descriptions of materials that are excluded from the definitions of solid waste. These include virgin material, solids within liquids and liquid waste, precious metals, hazardous material and radioactive material.

- Used material – any material that has been used previously as an agricultural, commercial, consumer, or industrial product or as a component of any such product.
- Residual material – any residual byproduct or excess unused raw material that remains from the production of any agricultural, commercial, consumer, or industrial product, provided that material qualifies as residual material only to the extent that it constitutes less than five percent of the total material introduced into the production process and it has a fair market value that is reasonably expected to be lower than that of any product made in that production process.

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Solid Waste Disposal Facilities, Continued

**2009 Proposed
Regulations
Summary**
(continued)

Treas. Reg. § 1.142(a)(6)(d) provides three eligible types of solid waste disposal processes:

- final disposal process – either the placement of solid waste in a landfill, the incineration of solid waste without capturing any useful energy, or the containment of solid waste with a reasonable expectation that the containment will continue indefinitely and that the solid waste has no current or future beneficial use
- energy conversion process – a thermal, chemical, or other process that is applied to solid waste to create and capture synthesis gas, heat, hot water, steam or other useful energy. The energy conversion process begins at the point of the first application of such process and ends at the point at which the useful energy is first created or captured in the form of a first useful product; provided that, in all events the energy conversion process ends before any transfer or distribution of synthesis gas, heat, hot water, steam or other useful energy
- recycling process – reconstituting, transforming or otherwise processing solid waste into a useful product. The recycling process begins at the point of the first application of a process to reconstitute or transfer the solid waste into a useful product, such as decontamination, melting, repulping, shredding, or other processing of the solid waste to accomplish this purpose. The recycling process ends at the point of completion of production of the first useful product from the solid waste Note: recycling does not include refurbishment, repair or similar activities.

Treas. Reg. § 1.142(a)(6)-1(e) defines the first useful product to mean the first product produced from solid waste that is useful for consumption in agricultural, consumer, commercial or industrial operation or sold. A useful product includes both a product useful to an individual consumer as an ultimate end use consumer product and a product useful to an industrial user as a material or input for processing in some stage of manufacturing or product process to produce a different end use consumer product. In the case of a continuous or integrated production process, the determination of when a useful product may result from such an integrated process make take into account operational constraints that affect the point in production when a useful product reasonably can be extracted or isolated and sold independently.

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Solid Waste Disposal Facilities, Continued

**2009 Proposed
Regulations
Summary
(continued)**

Treas. Reg. § 1.142(a)(6)-1(f) defines a preliminary function as a function to collect, separate, sort, store, treat, process, disassemble or handle solid waste that is preliminary to and directly related to a qualified solid waste disposal process. A function qualifies as a preliminary function only if more than 50% of the total materials that result from the function are solid waste in each year that the issue is outstanding.

Treas. Reg. § 1.142(a)(6)-1(g) states, except as provided under mixed inputs, if a facility is used for both a qualified solid waste disposal function (including a qualified solid waste disposal process or a preliminary function) and a nonqualified function, that the costs of the facility allocable to the qualified solid waste disposal function are determined using any reasonable method, based on all the facts and circumstances. See IRC§ 1.103-8(a)(1).

Qualified Residential Rental Projects

Overview

Under § 142(a)(7) the term “exempt facility bond” includes any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to provide qualified residential rental projects.

Bonds issued to finance qualified residential rental projects are often referred to as multifamily housing bonds. Generally, the tax exemption for multifamily housing bonds encourages development of affordable housing for low income individuals.

In fact, “qualified residential rental project” means a project for residential rental property that, at all times during the applicable qualified project period, meets certain requirements to set aside a portion of the residential units for occupancy by individuals whose incomes do not exceed certain thresholds (generally 50 or 60 percent of area median gross income).

Qualified Residential Rental Projects, Continued

What is a Qualified Residential Rental Project?

Under § 142(d)(1), a “qualified residential rental project” means any project:

- for residential rental property
- if, at all times during the qualified project period, such project meets the 20-50 test or the 40-60 test

These requirements are described in detail in this section.

Prior Law

Tax exempt bonds for qualified residential rental projects were authorized under § 103 of the Internal Revenue Code of 1954. Regulations under that section are set forth in Regulations § 1.103-8. The 1986 Code reorganized the statutory scheme relating to tax exempt bonds. However, Congress did not intend that this reorganization affect principles of prior law which, to the extent not amended, continue to apply under the reorganized provisions. Thus, except to the extent amended or superseded by subsequent law, requirements related to the tax exempt financing of qualified residential rental projects under the 1954 Code (including certain of those set forth in Regulations § 1.103-8) apply to exempt facility bonds for qualified residential rental projects under § 142(a)(7).

Application of General Exempt Facility Bond Rules

Generally applicable rules for exempt facility bonds apply to bonds issued to provide qualified residential rental projects. These requirements are described in more detail in other parts of this section.

Application of General Private Activity Bond Rules

Additionally, generally applicable rules for private activity bonds apply to bonds issued to provide qualified residential rental projects. These requirements are described in more detail in other parts of this section.

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Qualified Residential Rental Projects, Continued

Relationship to tax credits

Section 42 provides tax credits for multifamily housing projects that include residential units set aside for rental to low income tenants at below market rates.

In many instances, financing of multifamily housing projects will include both tax-exempt facility bonds (for qualified residential rental projects) and tax credits under § 42. In this type of financing structure, the tax credits may be sold and the proceeds applied to the project.

Generally, TEB staff should be aware that some requirements relating to eligibility for tax credits for a multifamily housing project are similar to requirements for qualified residential rental projects. In some cases, requirements for § 42 tax credits and qualified residential rental projects are closely interrelated. Recent legislative changes to § 142(d) have coordinated some of the rules for qualified residential rental projects with the corresponding rules for low income housing tax credits.

Certain violations under the rules relating to exempt facility bonds for qualified residential rental projects may also be violations of requirements of § 42. In such cases, referrals may be appropriate.

Regulations § 1.42-5 requires the state or local housing credit agency to monitor compliance with the low-income housing tax credit provisions through on-site inspections of records at least once every three years. Form 8823 is the form used by housing credit agencies to fulfill their responsibility under § 42(m)(1)(B)(iii) to notify the IRS of identified noncompliance with the low-income housing tax credit provisions or any building disposition. Additionally, housing credit agencies provide a copy of Form 8823 to the owner of the project.

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Qualified Residential Rental Projects, Continued

**Relationship to
certain
qualified
501(c)(3) bonds**

In addition to exempt facility bonds as described in this section, multifamily housing projects may be financed with qualified 501(c)(3) bonds in accordance with § 145(d). Many of the requirements related to exempt facility bonds for qualified residential rental projects apply to qualified 501(c)(3) bonds issued for multifamily housing, and thus there is substantial overlap in analyzing tax law compliance for these two types of bonds. However, there are also significant differences of which TEB staff should be aware.

Qualified Residential Rental Projects, Continued

What is a Residential Rental Project?

Regulations § 1.103-8(b)(4)(i) provides that a residential rental project is a building or structure, together with any functionally related and subordinate facilities, containing one or more similarly constructed units that are:

- used on other than a transient basis, and
- rented by or available to members of the general public on a continuous basis

Hotels, motels, dormitories, fraternity and sorority houses, rooming houses, hospitals, nursing homes, sanitariums, rest homes, and trailer parks and courts for use on a transient basis are NOT residential rental projects.

EXAMPLES: Rev. Rul. 98-47, 1998-2 C.B. 399, describes residential rental property for purposes of §§ 142(d) and 145(d). The ruling determines whether three types of living accommodations in a continuing care retirement community facility are residential rental property:

- **YES:** apartments with only the basic services of the facility including laundry, housekeeping, daily meals in common dining area, 24-hour emergency call service, planned social activities, and scheduled transportation;
- **YES:** apartments with the basic services plus certain assisted-living support services; and
- **NO:** apartments with the basic and support services plus continual or frequent nursing, medical or psychological services.

The ruling applies the standards in Regulations § 1.42-11(c) in stating that if a facility makes available continual or frequent nursing, medical, or psychiatric services; the facility will not be residential rental property under §§ 142(d) or 145(d).

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Qualified Residential Rental Projects, Continued

Project

The residential rental project includes the building or structure, together with any functionally related and subordinate facilities. A building or structure is a discrete edifice or other man-made construction consisting of an independent foundation, outer walls, and a roof. See Regulations § 1.103-8(b)(8)(iv).

Single townhouses are not buildings if the foundations, outer walls, and roofs are not independent. Detached townhouses and row houses are buildings.

Unit

“Unit” is an accommodation containing separate and complete facilities for living, sleeping, eating, cooking, and sanitation. Regulations § 1.103-8(b)(8)(i). The accommodations may be served by centrally located heating/air-conditioning equipment. An apartment containing a living area, a sleeping area, bathing and sanitation facilities, and cooking facilities equipped with a cooking range, refrigerator, and sink, all of which are separate and distinct from other apartments, is a unit.

EXAMPLES: Various PLRs and guidance materials have discussed specific requirements for units:

- **NOT UNITS:** PLR 8221149 ruled that the Pullman kitchenettes in each unit were not intended for regular day-to-day cooking. The units were located in a retirement center and meals and other services were provided by the center to the residents and charges were imposed for such meals and services.
- **UNITS:** Rev. Rul. 98-47 held that apartments can be residential rental housing even though the residents were entitled to eat in a common dining facility in exchange for rent.
- **NOT UNITS:** PLR 8308051 ruled a facility not a residential rental project because residents had to use toilets in a common area.
- **UNITS:** In PLR 9711021, most units in the facility, which included a common dining area, had a sink, a cooking range, and a full-size refrigerator. Some of the units occupied by tenants with physical or mental disabilities contained a small refrigerator and a microwave instead of a cooking range. The Service concluded that the cooking areas of the units were complete given the characteristics of the intended occupants.

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Qualified Residential Rental Projects, Continued

**Single Room
Occupancy
Units**

Under § 142(d)(2)(D), a unit shall not fail to be treated as a residential unit merely because such unit is a single-room occupancy unit (within the meaning of § 42).

**Owner-
Occupied
Residences**

Under Regulations § 1.103-8(b)(4)(iv), a residential rental project does not include any building or structure that contains fewer than five units, one of which is occupied by an owner of the units.

Public Use

The facility must satisfy the public use requirement under Regulations § 1.103-8(a)(2). The units must be legally and practically available to the members of the general public. Units are not available to the general public if they are provided only for members of a social organization or a particular employer's employees.

Example: A building that is constructed adjacent to a factory, where the factory employees are given preference in selection of tenants, is not available to the general public. See Example 2 in Regulations § 1.103-8(b)(9).

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Qualified Residential Rental Projects, Continued

Corporate Units

Leasing of units to a corporation raises two concerns. Corporate units may not be considered low or moderate income units. Also, it is possible that the corporate units fail to meet the requirements of public use and are used on a transient basis.

If the corporation can lease the units on the same basis as the general public (first come, first served), the units may be considered to be used in general public use. If the corporate units provide maid service, new sheets, towels, etc., the units may be used on a transient basis. PLR 200345022 analyzes specific arrangements relating to the leasing of units to corporate entities for re-leasing to residents and clarifies certain corporate leasing arrangements that do not cause units to be occupied on a transient basis or to fail to be available for general public use.

Regarding its conclusion on transient use, the ruling notes that:

- each of the leases to corporate entities for a residential unit in the project would be for one or two years subject to the rights of the owner and the lessee to terminate the lease
- the occupancy of a leased unit by actual occupants was for a period of not less than 30 days, with notice given to the owner each time the occupant changes.
- the type of services and accommodations afforded at the project are not inconsistent with those of a modern apartment building.

Regarding its conclusion on general public use, the ruling notes that:

- units of the Project are to be leased to corporate entities on the same terms and conditions as other members of the public, so in one respect, the corporate entities rights to lease residential units of the project are no different than the right of any other member of the general public to lease a similar unit.
- Although, unlike other tenants, corporate entities may rent multiple residential units in the project, either (i) the re-leasing by the corporate tenants would be on substantially the same terms and conditions as leasing by the owner, or (ii) the number of residential units that may be leased by a particular corporate tenant, or to corporate tenants in the aggregate, would not place a corporate tenants in a position to obtain preferential treatment from the owner.

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Qualified Residential Rental Projects, Continued

Multiple Buildings

Under Regulations § 1.103-8(b)(4)(ii)(a), buildings and structures are part of the same project if they:

- are proximate to one another;
 - have similarly constructed units;
 - are owned by the same person, for purposes of federal income tax; and
 - are financed pursuant to a common plan
-

Proximate Buildings

Under Regulations § 1.103-8(b)(4)(ii)(b), buildings and structures are proximate to one another if they are located on a single tract of land. The term “tract” means any parcel or parcels of land that are contiguous except for the imposition of a road, street, stream, or similar property.

Common Plan of Finance

Under Regulations § 1.103-8(b)(4)(ii)(c), a common plan of financing exists if, for example, all such buildings are provided by the same issue or several issues subject to a common indenture. See also the definition of “issue” under Regulations § 1.150-1(c)(1).

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Qualified Residential Rental Projects, Continued

Functionally Related and Subordinate Property

Regulations § 1.103-8(b)(4)(iii) provides that functionally related and subordinate property to residential rental projects includes facilities for use by tenants, such as:

- swimming pools,
- other recreational facilities,
- parking areas, and
- other facilities reasonably required for the project, such as:
 - heating and cooling equipment,
 - trash disposal equipment, or
 - units for resident managers or maintenance personnel

General requirements for functionally related and subordinate property applicable to all exempt facility bonds (including bonds issued to finance qualified residential rental property) are set forth under Regulations § 1.103-8(a)(3). Specific requirements related to office space are set forth in § 142(b)(2).

Mixed Use Building

Section 142(d)(1) provides that any property shall not be treated as not residential property merely because part of the building in which such property is located is used for purposes other than residential purposes.

Income Requirements of Qualified Residential Rental Project

20-50 test & 40-60 test

For a residential rental project to qualify under § 142(d), it must meet one of the following tests:

- at least 20 percent of the units in the project must be occupied by individuals and families whose income is 50 percent or less of the area median gross income (the “**20-50 test**”), or
- at least 40 percent of the units in the project must be occupied by individuals and families whose income is 60 percent or less of the area median gross income (the “**40-60 test**”)

The applicable test must be continually satisfied throughout the qualified project period (discussed later in this lesson).

The income requirements are also referred to as “set-aside” requirements.

Election

The owner of the project must irrevocably elect at the time of issuance of the bonds which test will be used.

Determination of Income and Area Median Gross Income

Income of individual residents and area median gross income is determined in a manner consistent with determinations of lower income families and area median gross income under Section 8 of the United States Housing Act of 1937. See § 142(d)(2)(B).

Adjustment to Area Median Gross Income for Family Size

Area median incomes are also adjusted for family size. See § 142(d)(2)(B).

The General Explanation of the Tax Reform Act of 1986 (the “Blue Book”), at page 1172, states that the Act clarifies that adjustments for family size are made in determining the area median incomes used to qualify tenants as having low or moderate incomes. As shown in the table below, a family of four generally is treated as having low or moderate income if the family has an income of 50 percent or less of the area median gross income.

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Income Requirements of Qualified Residential Rental Project, Continued

Adjustment to Area Median Gross Income for Family Size
(continued)

Family size	Family income as a percent of area median gross income
1	35 percent or less
2	40 percent or less
3	45 percent or less
4	50 percent or less

Similar 10 percent reductions are made to family income if the 40-60 set-asides are used.

Adjustment to Area Median Gross Income for calendar years after 2008 and for military basic housing allowance

Section 142(d)(2)(E) provides certain special rules that apply to calendar years after 2008. These rules supply an alternative method for calculating area median gross income for purposes of the income set aside requirements. Generally the alternative method serves to prevent a reduction in the gross income used to determine compliance with the income set aside requirements.

The Housing Assistance Tax Act of 2008 renumbered § 142(d)(2)(B) as § 142(d)(2)(B)(i) and added new § 142(d)(2)(B)(ii), (iii) and (iv) to the Code. Section 142(d)(2)(B)(ii) excludes military basic allowance payments under § 403 of title 37, United States Code, from income for purposes of income limitations under § 142(d)(2)(B) for certain qualified buildings. Section 142(d)(2)(B)(iii) defines a “qualified building” to mean a building located: (I) in any county in which is located a qualified military installation to which the number of members of the Armed Forces of the United States assigned to units based out of such qualified military installation, as of June 1, 2008, has increased by not less than 20 percent, as compared to such number on December 31, 2005, or (II) in any county adjacent to a county described in subclause (I). Section 142(d)(2)(B)(iv) defines a “qualified military installation” to mean any military installation or facility that has at least one thousand members of the Armed Forces of the United States assigned to it as of June 1, 2008.

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Income Requirements of Qualified Residential Rental Project, Continued

Annual Income Determinations Section 142(d)(3) provides that the determination that the income of a resident meets the income tests elected by the owner must be made at least annually on the basis of the current income of the resident. In 2008, § 142(d)(3) was amended to exempt from the requirement of annual income determinations any project for any year if during such year no residential unit in the project is occupied by a new resident whose income exceeds the applicable income limit.

Maintenance of Income Requirements after Increase in Resident's Income Section 142(d)(3)(B) provides that if at the time the resident first occupied the unit the project met the set-aside requirements, then the resident is deemed to meet the low or moderate income requirement.

EXCEPTION: However, once a resident's income exceeds 140 percent of the applicable income limit, no residential unit of comparable or smaller size in the project may be occupied by a new resident whose income exceeds the applicable income limit. The next available comparably sized or smaller unit must therefore be rented to a resident meeting the income requirements. In the case of a project with respect to which credit is allowed under § 42 (that is, the low income housing tax credit), this exception is applied to each "building (within the meaning of § 42)" instead of to the "project".

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Income Requirements of Qualified Residential Rental Project, Continued

Deep Rent Skewed Project

Section 142(d)(4) provides that the owner of a project may elect to satisfy an alternate set-aside requirement:

- at least 15 percent of the low-income units in the project must be occupied by tenants whose income is 40 percent or less of the area median income;
- the gross rent of each low-income unit in the project does not exceed 30 percent of the applicable income limit which applies to individuals occupying the unit; and
- the gross rent of each low-income unit in the project does not exceed 50 percent of the average gross rent of units of comparable size which are not occupied by individuals who meet the applicable income limit

SPECIAL RULE: In addition to offering alternative set-aside requirements, in the case of such a deep rent skewed project, the application § 142(d)(3)(B) is adjusted so that if at the time the resident first occupied the unit the project met the set-aside requirements, then the resident is deemed to meet the low or moderate income requirement unless the resident's income exceeds 170 percent (instead of the normal rule of 140 percent) of the applicable income limit and a residential unit of comparable or smaller size in the project is occupied by a new resident whose income exceeds the applicable income limit.

Gross Rent

For purposes of a deep rent skewed project, gross rent means any payment under section 8 of the Housing Act and any utility allowance that are paid from the resident's rent. See § 142(d)(4)(C)(ii).

Annual Certification

Section 142(d)(7) requires the operator of the project to certify annually that the income requirements for the project are satisfied. The operator makes this certification by filing Form 8703, *Annual Certification by Operator of a Residential Rental Project*. The failure on the part of the operator to certify will not cause the bonds to become taxable. However, the operator will be subject to a penalty of \$100 for each failure to certify under § 6652(j).

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Income Requirements of Qualified Residential Rental Project, Continued

Students as Low Income Tenants

Under Regulations § 103-8(b)(8)(v), occupants of a unit are not considered to be of low or moderate income if all the occupants are students (as defined in § 151(e)(4)), no one of whom is entitled to file a joint return under § 6013. Section 142(d)(2)(C) provides rules similar to the rules of § 42(i)(3)(D) for certain students that apply for determinations of the status of qualified residential rental projects for periods beginning after July 30, 2008, with respect to bonds issued before, on, or after such date.

Under § 42(i)(3)(D), a unit shall not fail to be treated as a low-income unit merely because it is occupied -

(i) by an individual who is -

- (I) a student and receiving assistance under title IV of the Social Security Act ,
- (II) a student who was previously under the care and placement responsibility of the State agency responsible for administering a plan under part B or part E of title IV of the Social Security Act, or
- (III) enrolled in a job training program receiving assistance under the Job Training Partnership Act or under other similar Federal, State, or local laws, or

(ii) entirely by full-time students if such students are -

- (I) single parents and their children and such parents are not dependents (as defined in § 152, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof) of another individual and such children are not dependents (as so defined) of another individual other than a parent of such children or
- (II) married and file a joint return

Example: Two full-time students may qualify as low or moderate income occupants of a unit if they are married to each other and are entitled to file a joint tax return.

Qualified Project Period of Qualified Residential Rental Project

Definition

Section 142(d)(2)(A) defines the term “qualified project period.” The table below illustrates this definition:

Beginning Date	Ending Date
First day that 10 percent of residential units are occupied	The latest of: <ul style="list-style-type: none"> • 15 years after the date that 50 percent of the units are occupied; • the first day that no tax-exempt private activity bond issued for the project is outstanding; or • the date that any assistance for the project under section 8 of the United States Housing Act of 1937 terminates.

Relationship to Bonds Outstanding

Note: Because the qualified project period can include a period after the time at which the bonds that financed the project cease to be outstanding, post redemption noncompliance with the set aside requirements can adversely affect the tax status of interest on the bonds.

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Qualified Project Period of Qualified Residential Rental Project, Continued

**Revenue
Procedure
2004-39**

Revenue Procedure 2004-39 sets forth procedures for determining whether a residential rental project is in compliance with the applicable set-aside requirements contained in § 142(d) during the qualified project period. Certain terms used in the rules described below are defined in the revenue procedure.

General rule. Beginning on the first day of the qualified project period (i.e., the later of the first day on which at least 10 percent of all of the residential units in the project are occupied or the issue date of the bonds), the set-aside requirements apply to the total number of available units.

Special rule for certain existing projects. For existing residential rental projects, unless more than 90 percent of the residential units in the project are not available units (for example, because residential units are not available for occupancy due to renovations) at any time within 60 days after the later of (1) the date the project is acquired or (2) the issue date of the first bonds the following rule applies: For a period of 12 months beginning on the issue date of the first bonds (the “transition period”), the failure to satisfy the set-aside requirements as described in the general rule will not cause the project to not be a qualified residential rental project. If the set-aside requirements are not satisfied on the last date of the transition period, such failure will cause the project to not be a qualified residential rental project as of the issue date(s) of the bonds issued to finance the project unless all bonds issued to finance the project are redeemed as soon as possible, but in no event later than 18 months after the issue date of the first bonds.

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Qualified Project Period of Qualified Residential Rental Project, Continued

Effect of Noncompliance

Regulations § 1.103-8(b)(6) provides that, unless corrected within a reasonable period, noncompliance with the set-aside requirements during the qualified project period will cause the bonds to become taxable from the date of issue.

If the issuer corrects noncompliance within a reasonable period (60 days after the error is discovered or would have been discovered by the exercise of due diligence), such noncompliance will not cause the bonds to become taxable.

If the issuer fails to correct noncompliance within a reasonable time, but makes a correction after such time, the project will still be deemed to be in noncompliance, and the bonds will be taxable from the date of issuance.

Generally Applicable Private Activity Bond Rules Applicable to Qualified Residential Rental Project

Private Activity Bond Rules

The following private activity bond rules are applicable to bonds issued to finance residential rental projects under § 142(a)(7):

- § 146—**VOLUME CAP REQUIRED** (note (i) special increases in volume cap under § 146(d)(5) for qualified housing issues and related limitations on carryforward of such increase under § 146(f)(6) and (ii) special authorization of recycling of loan repayments for volume cap purposes and related limitations under § 146(i)).
- § 147(a) provides that a private activity bond will NOT be a qualified bond for any period during which it is held by a person who is a substantial user of the facility or a related person of the substantial user.
- § 147(b)(1)—**WEIGHTED AVERAGE MATURITY ≤ 120% OF EXPECTED ECONOMIC LIFE OF FACILITIES.**
- § 147(c) limits the amount of bond proceeds that may be used to acquire land.
- § 147(d) prohibits the acquisition of existing property unless the first use of such property is pursuant to such acquisition.
- § 147(e) prohibits the use of bonds to finance certain facilities.
- § 147(f)—**NOTICED PUBLIC HEARING AND APPROVAL REQUIRED.**
- § 147(g) limits the amount of bond proceeds that may be used for costs of issuance.
- § 148—**SUBJECT TO YIELD RESTRICTION AND ARBITRAGE REBATE REQUIREMENTS.**
- § 149 provides various rules for all private activity bonds (note exception to “federal guarantee” prohibition for multifamily housing bonds under § 149(b)(3)(C)).
- The requirements of § 150(b)(2) regarding change in use apply.

These rules are discussed in detail in other lessons of this training program.

Facilities for the Local Furnishing of Electric Energy or Gas

Definition

IRC § 142(a)(8) provides that the term “exempt facility bond” means any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to provide facilities for the local furnishing of electric energy or gas.

IRC § 142(f)(1) provides that that local furnishing of electric energy or gas from a facility shall only include furnishing solely within the area consisting of 1) a city and 1 contiguous county or 2) two contiguous counties

Treas. Reg. § 1.103-(8)(f)(2)(iii) provides that a facility for the local furnishing of electrical energy or gas is property that is:

- either property of a character subject to allowance for depreciation under IRC § 167 or land;
- used to produce, collect, generate, transmit, store, distribute, or convey electric energy or gas;
- used in a trade or business of furnishing electric energy or gas; and
- a part of a system providing service to the general populace of one or more communities or municipalities, but in no event should it provide services to more than two contiguous counties (or a political equivalent) whether or not such counties are located in one State.

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Facilities for the Local Furnishing of Electric Energy or Gas, Continued

Public Use

Treas. Reg. § 1.103-8(f)(1)(ii) provides that the facility for the local furnishing of electric energy or gas is available for use by members of the general public if:

- the owner or operator of the facility is obligated (by a legislative enactment, local ordinance, regulation, or the equivalent) to furnish electric energy or gas to all persons who desire such services and are within its service area, and
- it is reasonably expected that the facility will serve or be available to serve a large segment of the public in its service area

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Facilities for the Local Furnishing of Electric Energy or Gas, Continued

Electric Energy Transmitted Outside Area Under IRC § 142(f)(2)(A), if a facility transmits electricity outside its local area pursuant to an order of the Federal Energy Regulatory Commission (FERC), it will not be disqualified if the portion of the cost of the facility financed with tax-exempt bonds is not greater than the portion of the cost of the facility allocable to the local furnishing of electric energy. See also Treas. Reg. § 1.141-7. (Special Rules for Output Facilities.)

Special Remedial Action IRC § 142(f)(2)(B) provides for a remedy where a facility financed with tax-exempt bonds fails to meet the requirements of IRC § 142(f) due to a subsequent order by FERC. In such an event, the bonds will not become taxable if:

- an escrow is established to defease the bonds within a reasonable period of time after the order becomes final, and
- bonds are redeemed no later than the first redemption date

Termination of Future Financing IRC § 142(f)(3) provides that no tax-exempt bond may be issued for a facility described in IRC § 142(a)(8) after August 20, 1996 unless:

- the facility will be used by a person who is engaged in the local furnishing of energy on January 1, 1997, and to provide service within the area served by such person on January 1, 1997, or within a county or city any portion of which is within such area), or
- the facility will be used by a successor in interest to such person for the same use and within the same area as described above

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Facilities for the Local Furnishing of Electric Energy or Gas, Continued

Election to Terminate Tax-Exempt Bond Financing

IRC § 142(f)(4) provides that, if a facility financed with tax-exempt bonds issued before August 20, 1996 ceases to qualify under IRC § 142(f) due to an expansion of the service area, the bonds will not become nonqualified if the furnisher makes an election and agrees that the election is made with respect to all facilities for local furnishing of electricity and gas by such furnisher.

An “election” pursuant to IRC § 142(f)(4)(B) requires the furnisher to agree to the following:

- no tax-exempt bonds may be issued on or after August 20, 1996 with respect to such facilities of the furnisher;
- any expansion of the service area is not financed with tax-exempt bond proceeds described in IRC § 142(a)(8) and such expansion is not a nonqualifying use; and
- all outstanding bonds which financed the facility are redeemed not later than six months after the later of the next redemption date or the election date

Treas. Reg. § 1.142(f)(4)-1 provides guidance on the manner of making such an election.

IRC § 150(b)(4) will not apply to any bonds identified in an election filed by the furnisher under IRC § 142(f)(4).

Functionally Related and Subordinate Facilities

Treas. Reg. § 1.103-8(a)(3) provides that an exempt facility includes any land, building, or other property functionally related and subordinate to such facility. To be considered functionally related and subordinate, the property should be of a character and size commensurate with the character and size of the facility.

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Facilities for the Local Furnishing of Electric Energy or Gas, Continued

Limitation on Office Space

Under IRC § 142(b)(2), an office is not included in the definition of a “facility for the local furnishing of electric energy or gas” under IRC § 142(a) unless:

- it is located on the premises of the facility, and
 - not more than a de minimis amount of the functions performed at the office are unrelated to the day-to day operations of the facility
-

Other Requirements

The private activity bond rules stated in IRC §§ 146, 147 (a) through (g), and 150(b)(4) and (b)(5) are applicable to bonds issued to finance facilities for the local furnishing of electric energy and gas under IRC § 142(a)(8).

The arbitrage and rebate rules of IRC § 148 and the rules of IRC § 149 are also applicable to these bonds.

Local District Heating or Cooling Facilities

Definition IRC § 142(a)(9) provides that the term “exempt facility bond” means any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to provide local district heating and cooling facilities.

IRC § 142(g)(1) provides that the term “local district heating and cooling facility” means property used as an integral part of a local district heating or cooling system.

Local District Heating and Cooling System IRC § 142(g)(2) provides that a “local heating and cooling system” is any local system consisting of pipeline or network providing hot water, chilled water, or steam to two or more users for:

- residential, commercial, or industrial heating or cooling; or
- processing steam

The pipeline or network may be connected to a heating or cooling source.

A local system includes facilities furnishing heating and cooling to an area consisting of a city and one contiguous county.

Functionally Related and Subordinate Facilities Treas. Reg. § 1.103-8(a)(3) provides that an exempt facility includes any land, building, or other property functionally related and subordinate to such facility. To be considered functionally related and subordinate, the property should be of a character and size commensurate with the character and size of the facility.

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Local District Heating or Cooling Facilities, Continued

Limitation on Office Space

Under IRC § 142(b)(2), an office is not included in the definition of a “facility for the local furnishing of electric energy or gas” under IRC § 142(a) unless:

- it is located on the premises of the facility, and
 - not more than a de minimis amount of the functions performed at the office are unrelated to the day-to day operations of the facility
-

Other Requirements

The private activity bond rules stated in IRC §§ 146, 147(a) through (g), and 150(b)(4) and (b)(5) are applicable to bonds issued to finance local district heating or cooling facilities under IRC § 142(a)(9). The arbitrage and rebate rules of IRC § 148 and the rules of IRC § 149 also apply to these bonds.

Qualified Hazardous Waste Facilities

Definition

IRC § 142(a)(10) provides that the term “exempt facility bond” means any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to provide qualified hazardous waste facilities.

IRC § 142(h) provides that the term “qualified hazardous waste facility” means any facility for the disposal of hazardous waste by incineration or entombment but only if:

- the facility is subject to final permit requirements under subtitle C of Title II of the Solid Waste Disposal Act as in effect on October 22, 1986; and
- the portion of the facility financed by the issue does not exceed the portion of the facility which is to be used by persons other than the owner or operator of such facility and any related person

Hazardous Waste

Conference Rep. No. 841, 99th Cong., 1st Sess., September 18, 1986, page II-707 provides that “hazardous waste” does not include radioactive waste.

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Qualified Hazardous Waste Facilities, Continued

Applicable Treasury Regulations

Treasury regulations similar to the rules for solid waste disposal facilities apply to qualified hazardous waste facilities, including:

- limiting the hazardous waste materials to materials having no market or other value at the place where the waste is located, and
- the allocation of bond proceeds to qualifying portions of the facility

Tax-exempt financing is available only for facilities (or the portion of a facility) to be used by the public as opposed to the generator of the hazardous waste.

See Topic 6 of this Section, “Solid Waste Facilities.”, as proposed regulations to solid waste facilities could also affect qualified hazardous waste facilities.

A facility may qualify both as a solid waste disposal facility and a hazardous waste disposal facility. In this case, the waste processed at the facility consisted of at least 65 percent solid waste. (See PLR 8924009.)

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Qualified Hazardous Waste Facilities, Continued

Functionally Related and Subordinate Facilities

Treas. Reg. § 1.103-8(a)(3) provides that an exempt facility includes any land, building, or other property functionally related and subordinate to such facility. To be considered functionally related and subordinate, the property should be of a character and size commensurate with the character and size of the facility.

Limitation on Office Space

Under IRC § 142(b)(2), an office is not included in the definition of a “qualified hazardous waste facility” under IRC § 142(a) unless:

- it is located on the premises of the facility, and
 - not more than a de minimis amount of the functions performed at the office are unrelated to the day-to day operations of the facility
-

Other Requirements

The private activity bond rules stated in IRC §§ 146, 147(a) through (g), and 150(b)(4) and (b)(5) are applicable to bonds issued to finance qualified hazardous waste facilities under IRC § 142(a)(10). The arbitrage and rebate rules of IRC § 148 and the rules of IRC § 149 also apply to these bonds.

High-Speed Intercity Rail Facilities

Definition IRC § 142(a)(11) provides that the term “exempt facility bond” means any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to provide high-speed intercity rail facilities.

IRC § 142(i)(1) defines “high-speed intercity rail facilities” as any facility (not including rolling stock) for fixed guideway rail transportation of passengers and their baggage between metropolitan statistical areas using vehicles that are reasonably expected to be capable of attaining a maximum speed in excess of 150 miles per hour between scheduled stops.

The facilities must be available for use by the general public as passengers.

Governmental Ownership IRC § 142(i)(2) states that for high-speed intercity rail facilities to qualify as exempt facilities, they must either:

- be owned by a governmental unit, or
- the nongovernmental owner of the facility must irrevocably elect not to claim any depreciation deduction or tax credit with respect to the bond-financed property

Public Use Treas. Reg. § 1.103-8(a)(2) provides that the facilities must satisfy the public use requirement. The facility must serve or be available on a regular basis for general public use.

Use of Proceeds IRC § 142(i)(3) provides that for the bonds to qualify as tax-exempt bonds, any proceeds of the bonds not used within a three-year period from the date of issuance of the bonds must be used to redeem the bonds. The redemption must occur within six months after the end of this three-year period.

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High-Speed Intercity Rail Facilities, Continued

Changes after the 1986 Act—facilities for private business use not included

IRC § 142(c)(2) provides that the term “high speed intercity rail facilities” does not include any of the following facilities if used for any private business use:

- hotels (or other lodging facilities),
 - retail facilities (including food and beverage facilities) located in a terminal, if the facilities are in excess of a size necessary to serve passengers and employees at the airport,
 - retail facilities for passengers or the general public (including, but not limited to rental car lots) located outside the terminal,
 - office buildings for individuals who are not employees of a governmental unit or of the public airport operating authority, or
 - industrial parks or manufacturing facilities
-

Functionally Related and Subordinate Facilities

Treas. Reg. § 1.103-8(a)(3) provides that an exempt facility includes any land, building, or other property functionally related and subordinate to such facility. To be considered functionally related and subordinate, the facility should be of a character and size commensurate with the character and size of the mass commuting facility or located at or adjacent to it.

Limitation on Office Space

Under IRC § 142(b)(2), an office is not included in the definition of a “high-speed intercity rail facility” under IRC § 142(a) unless:

- it is located on the premises of the facility, and
 - not more than a de minimis amount of the functions performed at the office are unrelated to the day-to day operations of the facility
-

Storage or Training Facilities

Under IRC § 142(c)(1), storage or training facilities directly related to a high-speed intercity rail facility are treated as a part of such facility.

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High-Speed Intercity Rail Facilities, Continued

Other Requirements

The private activity bond rules stated in IRC §§ 147(a) through (g) and 150(b)(4) and (b)(5) are applicable to bonds issued to finance high-speed intercity rail facilities under IRC § 142(a)(11). The rules of IRC §§ 148 and 149 also apply to these bonds.

Regarding the volume cap, IRC § 146(g)(4) provides that no private activity bond allocation is required for 75 percent of the issue, but allocation is required for the remaining 25 percent, if the property is not owned by a governmental unit. If the bond-financed property is entirely owned by a governmental unit, then no private activity bond allocation is required.

Environmental Enhancement Hydro-Electric Generating Facilities

Definition IRC § 142(a)(12) provides that the term “exempt facility bond” means any bond issued as part of an issue 95 percent or more of the net proceeds of which are used to provide environmental enhancements to hydro-electric generating facilities.

IRC § 142(b)(2)(A) provides that all of the property to be financed by the net proceeds of the issue is to be owned by a governmental unit.

IRC § 142(j) provides that the term “environmental enhancements of hydro-electric generating facilities” means:

- property the use of which is related to a federally licensed hydroelectric generating facility owned and operated by a governmental unit, which protects and promotes fisheries or other wildlife resources, including any fish bypass facility, fish hatchery, or fisheries enhancement facility; or
 - property that is a recreational facility or other improvement required by the terms and conditions of any Federal licensing permit for the operation of such generating facility
-

Use of Proceeds At least 80 percent of the net proceeds of the issue must be used to finance property that protects and promotes fisheries or other wildlife resources, including any fish bypass facility, fish hatchery, or fisheries enhancement facility.

Other Requirements The private activity bond rules stated in IRC §§ 147(a) through (g), and 150(b)(4) and (b)(5) are applicable to bonds issued to finance environmental enhancements of hydro-electric generating facilities under IRC § 142(a)(12). The arbitrage and rebate rules of IRC § 148 and the rules of IRC § 149 also apply to these bonds.

These bonds are not subject to the volume cap under IRC § 146(g)(3).

Qualified Public Educational Facilities

Definition

IRC § 142(a)(13) provides that the term “exempt facility bond” means any bond issued as part of an issue 95 percent or more of the net proceeds of which are used to provide qualified public educational facilities.

IRC § 142(k) provides that the term “qualified public educational facility” means any school facility which is:

- part of a public elementary school or a public secondary school; and
 - owned by a private, for-profit corporation pursuant to a public-private partnership agreement with a State or local educational agency
-

Schools

IRC § 142(k)(3) provides that the term “school facility” means:

- any school building;
- any functionally related and subordinate facility and land with respect to such building, including any stadium or other facility primarily used for school events; and
- any property, to which IRC § 168 applies, for use in a facility described above

IRC § 142(k)(4) provides that the terms “elementary school” and “secondary school” have the meanings given those terms by section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801), as in effect on December 31, 2001.

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Qualified Public Educational Facilities, Continued

Public-Private Partnership Agreement

Under IRC § 142(k)(2), a public-private partnership agreement is an agreement whereby the corporation agrees to:

- either construct, rehabilitate, refurbish, or equip a school facility; and
 - to transfer title of the school facility to the State or local educational agency at the end of the term of the agreement, which may not exceed the term of the bond issue, for no additional consideration.
-

Volume of Issuance Limitations

Under IRC § 142(k)(5), a State is limited in the total aggregate face amount of qualified public educational facility bonds that may be issued during a calendar year to an amount equal to the greater of:

- \$10 multiplied by the State population, or
- \$5,000,000

The State may allocate the permitted amount for any calendar year in any manner it determines appropriate.

A State may elect to carry forward any unused limitation for any calendar year for up to 3 calendar years following the calendar year in which the unused limitation arose under rules similar to those in IRC § 146(f) except that the only purpose for which the carryforward may be elected is the issuance of exempt facility bonds for qualified public education facilities.

Other Requirements

The private activity bond rules stated in IRC §§ 147(a), (b), and (d) through (g) as well as 150(b)(4) and (b)(5) are applicable to bonds issued to finance qualified public educational facilities under IRC § 142(a)(13). The arbitrage and rebate rules of IRC § 148 and the rules of IRC § 149 also apply to these bonds. (Note that IRC § 147(c) limitation on land acquisition does not apply per IRC § 147(h). These bonds are not subject to the volume cap under IRC § 146(g)(3).

These rules are discussed in other Lessons of this text.

Qualified Green Building and Sustainable Design Projects “Green Bonds”

Definition

IRC § 142(a)(14) provides that the term “exempt facility bond” means any bond issued as part of an issue 95 percent or more of the net proceeds of which are used to provide qualified green building and sustainable design projects.

IRC § 142(l)(1) provides that the term “qualified green building and sustainable design projects” means any project designated by the Secretary of the Treasury, after consultation with the Administrator of the Environmental Protection Agency, as a qualified green building and sustainable design project which meets the requirements of IRC § 142(l)(4)(A)(i)(ii)(iii)(iv).

This Section is fully discussed in Lesson 19, “Miscellaneous Bonds”.

Qualified Highway or Surface Freight Transfer Facilities

Definition

IRC § 142(a)(15) provides that the term “exempt facility bond” means any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to provide qualified highway or surface freight transfer facilities.

IRC § 142(a)(15) was added by § 11143 of the Safe, Accountable Flexible, Efficient, Transportation Equity Act, Pub. L. 109-59 enacted August 10, 2005. See Notice 2006-45 I.R.B. 2006-20

IRC § 142(m)(1) defines “qualified highway or surface freight transfer facilities” as:

Any surface transportation project which receives Federal assistance under title 23, of the United States Code (as in effect August 10, 2005).

Any project for an international bridge or tunnel for which an international entity authorized under Federal or State law is responsible and which receives Federal assistance under title 23, United States Code (as in effect August 10, 2005).

Any facility for the transfer of freight from truck to rail or rail to truck (including any temporary storage facilities directly related to such transfers) which receives Federal assistance under either title 23 or title 24, United States Code (as in effect August 10, 2005).

Public Use

Treas. Reg. § 1.103-8(a)(2) provides that the facilities must satisfy the public use requirement. The facility must serve or be available on a regular basis for general public use.

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Qualified Highway or Surface Freight Transfer Facilities, Continued

Functionally Related and Subordinate

Treas. Reg. § 1.103-8(a)(3) provides that an exempt facility includes any land, building, or other property functionally related and subordinate to such facility. To be considered functionally related and subordinate, the facility should be of a character and size commensurate with the character and size of the mass commuting facility or located at or adjacent to it. See Notice 2006-45 for examples limiting functionally related and subordinate.

Limitation on Office Space

Under IRC § 142(b)(2), an office is not included in the definition of a “qualified highway or surface freight transfer facility” under IRC § 142(a) unless:

- it is located on the premises of the facility, and
 - not more than a de minimis amount of the functions performed at the office are unrelated to the day-to day operations of the facility
-

National Limitation on Tax-Exempt Financing

The aggregate amount allocated by the Secretary of Transportation under IRC § 142(m)(2)(C) shall not exceed \$15,000,000,000.

An issue shall not be treated as an issue described in subsection IRC § 142(a)(15) if the aggregate face amount of bonds issued pursuant to such issue for any qualified highway or surface freight transfer facility (when added to the aggregate face amount of bonds previously so issued for such facility) exceeds the amount allocated to such facility under IRC § 142(m)(2)(C).

The Secretary of Transportation shall allocate the amount described in IRC § 142(m)(2)(A) among qualified highway or surface freight transfer facilities in such manner as the Secretary determines appropriate.

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Qualified Highway or Surface Freight Transfer Facilities, Continued

Expenditure of Proceeds

An issue shall not be treated as an issue described in subsection IRC § 142(a)(15) unless at least 95 percent of the net proceeds of the issue is expended for qualified highway or surface freight transfer facilities within the 5-year period beginning on the date of issuance. If at least 95 percent of such net proceeds is not expended within such 5-year period, an issue shall be treated as continuing to meet the requirements of IRC § 142(m)(3) if the issuer uses all unspent proceeds of the issue to redeem bonds of the issue within 90 days after the end of such 5-year period.

The Secretary, at the request of the issuer, may extend such 5-year period if the issuer establishes that any failure to meet such period is due to circumstances beyond the control of the issuer.

Current Refunding Exception

IRC § 142(m)(2) shall not apply to any bond (or series of bonds) issued to refund a bond issued under subsection (a)(15) if:

- the average maturity date of the issue of which the refunding bond is a part is not later than the average maturity date of the bonds to be refunded by such issue,
- the amount of the refunding bond does not exceed the outstanding amount of the refunded bond, and
- the refunded bond is redeemed not later than 90 days after the date of the issuance of the refunding bond

For purposes of IRC § 142(m)(4)(A), average maturity shall be determined in accordance with section 147(b)(2)(A).

See Notice 2006-45, generally

Other Requirements

The private activity bond rules stated in IRC §§ 147(a) through (g) and 150(b)(4) and (b)(5) are applicable to bonds issued to finance qualified highway or surface freight transfer facilities under IRC § 142(a)(15). The rules of IRC §§ 148 and 149 also apply to these bonds. IRC § 146(g) volume cap allocation does not apply.

Summary

Review of Lesson 6

- IRC §142 provides that a bond will be considered to be an exempt facility bond if 95 percent or more of the net proceeds of the bond are used to provide any one of the following facilities:
 - airports,
 - docks and wharves,
 - mass commuting facilities,
 - facilities for the furnishing of water
 - sewage facilities,
 - solid waste disposal facilities,
 - qualified residential rental projects,
 - facilities for the local furnishing of electric energy or gas,
 - local district heating or cooling facilities,
 - qualified hazardous waste facilities,
 - high-speed intercity rail facilities,
 - environmental enhancements of hydroelectric generating facilities,
 - qualified public educational facilities
 - qualified green building and sustainable design projects
 - qualified highway or surface freight transfer facilities

- IRC § 142(b)(1) provides that certain exempt facility bonds must be governmentally owned. These are:
 - airports,
 - docks and wharves,
 - mass commuting facilities, and
 - environmental enhancements of hydroelectric generating facilities

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Summary, Continued

Review of Lesson 6 (continued)

- The “public use” and the “functionally related and subordinate” rules contained in Treas. Reg. § 1.103-8(a)(2) and (3) are still applicable to bonds issued after 1986. Remember that these rules apply to all exempt facility bonds.
- Treas. Reg. § 1.142(a)(5)-1 contains rules for sewage facilities, and applies to bonds issued after February 21, 1995.
- Treas. Reg. §§ 1.142(f)(4)-1 and 1.150-5 regarding the election to terminate tax-exempt bond financing of electric energy or gas facilities apply to elections made and notices filed on and after February 23, 1998.
- The 2009 Proposed Regulations solid waste regulations were published in the Federal Register September 16, 2009, (IRS REG 140492-02) Vol. 74, Number 178. The 2009 Proposed Regulations provide new definitions and guidance on various solid waste issues. Treas. Reg. § 1.142(a)(6)-1
- Treas. Reg. § 17.1 contains temporary rules for allocation of costs relating to property used for both a solid waste disposal function and a function other than the disposal of solid waste. See TD 7362, 40 FR 26028, June 20, 1975.
- In addition to meeting the general rules governing exempt facility bonds, there are specific requirements set forth for each particular type of bond that must be satisfied.
- Lastly, these bonds must also meet the applicable requirements of Code sections 146 through 150.

Preview of Lesson 7

Lesson 7 continues the text’s coverage of various types of private activity bonds by discussing redevelopment bonds which are issued to redevelop blighted areas. IRC § 144(c) contains various requirements specific to these types of bonds.
