

Part III - Administrative, Procedural, and Miscellaneous

Current Refundings of Tax-exempt Bonds in Certain Disaster Relief Bond Programs

Notice 2012-3

SECTION 1. PURPOSE

This Notice provides guidance on “current refunding issues” (as defined in § 1.150-1(d)(3)) that refund outstanding prior issues of bonds that qualify for tax-exempt bond financing under certain disaster relief bond programs. In particular, this Notice applies to current refunding issues that are used (directly or indirectly in a series of current refunding issues) to refund original tax-exempt bonds that met the qualification requirements for one of the following programs: (1) qualified Gulf Opportunity Zone Bonds under § 1400N (“GO Zone Bonds”) of the Internal Revenue Code (the “Code”); (2) qualified Midwestern disaster area bonds under § 702(d)(1) of the Heartland Disaster Tax Relief Act of 2008 (the “Heartland Disaster Act”), Subtitle A of Title VII of the Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Division C of Public Law 110-343, 122 Stat. 3765 (2008) (“Midwest Disaster Area Bonds”); and (3) qualified Hurricane Ike disaster area bonds under § 704(a) of the Heartland Disaster Act (“Hurricane Ike Disaster Area Bonds”). These original qualified tax-exempt bonds are referred to collectively in this Notice as “Qualified Bonds.”

SECTION 2. BACKGROUND

Section 101 of the Gulf Opportunity Zone Act of 2005, Pub. L. No. 109-135, 119 Stat. 2577, 2578 (2005) (“GO Zone Act”) added §§ 1400M and 1400N to the Code to provide certain tax benefits in a defined portion of the Hurricane Katrina disaster area. Section 1400N(a)(2) authorizes the issuance of tax-exempt GO Zone Bonds. Section 1400N(a)(2) sets forth certain requirements for issuing these bonds, including a requirement that such bonds be “designated” as qualified GO Zone Bonds by a specified State or local governmental official or state bond commission. Section 1400N(a)(3) imposes a bond volume cap on the maximum aggregate face amount of bonds that may be designated as qualified GO Zone Bonds. Section 764 of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296, 3324 (2010), extended the deadline for the issuance of GO Zone Bonds through December 31, 2011. For further guidance on GO Zone Bonds, see Notice 2006-41, 2006-18 I.R.B. 857 (May 1, 2006).

Sections 702(d)(1) and 704(a) of the Heartland Disaster Act provide generally that the special provisions for tax-exempt private activity bond financing in the GO Zone under § 1400N of the Code apply with certain modifications to tax-exempt private activity bond financing in the Midwestern Disaster Area and Hurricane Ike Disaster Area, respectively. Midwest Disaster Area bonds and Hurricane Ike Disaster Area bonds must be issued by December 31, 2012. For further guidance on Midwest Disaster Area Bonds and Hurricane Ike Disaster Area Bonds, see Notice 2010-10, 2010-3 I.R.B. 299 (January 19, 2010).

The statutory provisions relating to the Qualified Bonds are silent regarding the permissibility of current refundings of these bonds after the applicable bond issuance deadlines. Under a substantially similar predecessor provision for qualified New York Liberty Bonds, the Treasury Department and the IRS previously provided guidance on the allowability of current refundings within certain size limitations for purposes of bond issuance deadlines applicable to those bonds. See Notice 2003-40, 2003-27 I.R.B. 10, at Question 5 (July 7, 2003). Cf. Staff of Joint Committee on Taxation, Technical Explanation of the Revenue Provisions of H.R. 4440, The “Gulf Opportunity Zone Act of 2005,” as Passed by the House of Representatives and the Senate 5-6, JCX-88-05 (December 16, 2005) (including a description of the Liberty Bond provision in the discussion of present law and also stating that “[c]urrent refundings of outstanding [GO Zone] bonds issued under the provision do not count against the aggregate volume limit to the extent that the principal amount of the refunding bonds does not exceed the outstanding principal amount of the bonds being refunded”).

SECTION 3. SCOPE AND APPLICATION

3.01. Guidance and Reliance. Pending the promulgation and effective date of future administrative or regulatory guidance, taxpayers may rely on the guidance provided in this Notice.

3.02. Scope of Application. This Notice applies to any current refunding issue that is used (directly or indirectly in a series of current refunding issues) to refund original Qualified Bonds described in Section 1 of this Notice if the following

requirements are met:

(1) The original Qualified Bonds were issued before the deadline for the issuance of such bonds under § 1400N(a)(2)(D) for GO Zone Bonds or under the modified version of such provision for Midwest Disaster Area Bonds or Hurricane Ike Disaster Area Bonds, as applicable, or any statutory extension of such deadline.

(2) Except as provided herein, the “issue price” (as defined in § 1.148-1(b)) of the current refunding issue is no greater than the outstanding stated principal amount of the refunded bonds. For refunded bonds originally issued with more than a de minimis amount of original issue discount or premium (as defined in § 1.148-1(b)) the present value of the refunded bonds (as determined under § 1.148-4(e)) must be used in lieu of the outstanding stated principal amount to determine the maximum issue price of the current refunding issue.

(3) The current refunding issue otherwise meets all applicable requirements for the issuance of tax-exempt private activity bonds as Qualified Bonds, including, without limitation, the requirement under § 147(b) that the average bond maturity be no longer than 120 percent of the average reasonably expected economic life of the facilities financed or refinanced with the net proceeds of such issue.

3.03. Guidance. A current refunding issue that meets the requirements of Section 3.02 of this Notice may be issued after the specified deadline for the issuance of the original Qualified Bonds under § 1400N(a)(2)(D) for GO Zone Bonds (or under the modified version of such provision for Midwest Disaster Area Bonds or Hurricane Ike

Disaster Area Bonds, as applicable) and be treated as an issue of Qualified Bonds. In addition, in the case of such a current refunding issue, a designation of the original Qualified Bonds by a specified State or local governmental official or state bond commission that meets the designation requirement of § 1400N(a)(2)(C) for GO Zone Bonds (or the modified version of such provision for Midwest Disaster Area Bonds or Hurricane Ike Disaster Area Bonds, as applicable) is treated as meeting this designation requirement for the current refunding issue without further designation or further official State or local governmental action.

3.04. No Inferences. Other than bonds issued to currently refund Qualified Bonds, to which this Notice expressly applies, no inference should be drawn from this Notice that bonds issued to refund other types of bonds, such as build America bonds under § 54AA, after their statutory deadline for issuance meet the qualifications for such types of bonds.

SECTION 4. DRAFTING INFORMATION

The principal authors of this Notice are Timothy L. Jones and Vicky Tsilas of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this Notice, contact Vicky Tsilas at (202) 622-3980 (not a toll-free call).