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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

REG-140379-02; REG-142599-02

RIN 1545-BC07; 1545-BB23

General Allocation and Accounting Regulations under Section 141

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains proposed regulations on the allocation of, and accounting for, tax-exempt bond proceeds for purposes of the private activity bond restrictions that apply under section 141 of the Internal Revenue Code (Code) and that apply in modified form to qualified 501(c)(3) bonds under section 145 of the Code. The proposed regulations provide State and local governmental issuers of tax-exempt bonds with guidance for applying the private activity bond restrictions. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by December 26, 2006. Requests to speak with outlines of topics to

be discussed at the public hearing scheduled for January 11, 2007, must be received by December 26, 2006.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-140379-02; REG-142599-02), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8:00 a.m. to 4:30 p.m. to CC:PA:LPD:PR (REG-140379-02; REG-142599-02), Internal Revenue Service, Crystal Mall 4, 1941 Jefferson Davis Hwy., 1901 S. Bell St., room 108, Arlington, Virginia 22202. Alternatively, submissions may be made electronically to the IRS Internet Site at www.irs.gov/regs or via the Federal eRulemaking Portal at www.regulations.gov (IRS-REG-140379-02). The public hearing will be held in the auditorium of the New Carrollton Federal Building, 5000 Ellin Rd., Lanham, Maryland 20706.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Johanna Som de Cerff (202) 622-3980; concerning submissions and the hearing, Kelly D. Banks, (202) 622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the

Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by December 26, 2006. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collections of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The recordkeeping requirement in this proposed regulation is in §1.141-6(a)(4). The recordkeeping requirement will apply only to State and local governmental issuers of tax-exempt bonds used to finance a facility that will be used for both governmental use and more than a de minimis amount of private business use. The recordkeeping is voluntary to obtain a benefit. The records will enable the Service to examine compliance by State and local governmental issuers of tax-exempt bonds used to finance a facility that will be used for both governmental use and more than a de minimis amount of private business use.

Estimated total annual recordkeeping burden: 3000 hours.

Estimated average annual burden hours per recordkeeper: 3 hours.

Estimated number of recordkeepers: 1000.

Estimated annual frequency of responses: the frequency of responses will depend on how often the recordkeeper issues tax-exempt bonds used to finance a facility that will be used for both governmental use and more an a de minimis amount of private business use, which will vary from rarely to a few times a year.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains proposed amendments to 26 CFR part 1. Final regulations (TD 8712) under section 141 of the Internal Revenue Code (Code) were published in the **Federal Register** on January 16, 1997 (62 FR 2275) (the 1997 Final Regulations) to provide comprehensive guidance on most aspects of the private activity bond restrictions. The 1997 Final Regulations, however, reserved most of the general allocation and accounting rules for purposes of section 141. An advance notice of proposed rulemaking was published in the **Federal Register** on September 23, 2002 (REG-142599-02) (67 FR 59767) (the 2002 Advance Notice) regarding allocation and accounting rules for tax-exempt bond proceeds used to finance mixed-use output facilities.

This document amends the Income Tax Regulations under section 141 by proposing rules for the allocation of, and accounting for, tax-exempt bond proceeds. Special rules for allocating proceeds used to finance mixed-use facilities and rules regarding the treatment of partnerships as owners or users

of facilities for purposes of section 141 are also included. This document also amends regulations under section 145 by proposing rules on certain related matters that apply to qualified 501(c)(3) bonds. These regulations are published as proposed regulations (the Proposed Regulations) to provide an opportunity for public review and comment.

Explanation of Provisions

I. Introduction

In general, the interest on State and local governmental bonds is excludable from gross income under section 103 of the Code upon satisfaction of certain requirements. Interest on a private activity bond, other than a qualified private activity bond within the meaning of section 141, is not excludable under section 103. Section 141 provides certain tests used to determine whether a State or local bond is a private activity bond. These tests look to whether the proceeds of tax-exempt bonds comply with certain restrictions, including private business use restrictions, private payment restrictions, and private loan restrictions. Similar restrictions apply in modified form to qualified 501(c)(3) bonds under section 145.

In general, these private activity bond restrictions permit certain de minimis amounts of private business use for proceeds of tax-exempt governmental bonds without causing such bonds to be classified as private activity bonds under section 141 (de

minimis permitted private business use). De minimis permitted private business use generally means private business use of not more than 10% of the proceeds. Section 141(b)(3) further limits this de minimis permitted private business use to a 5% amount for certain unrelated or disproportionate use. Sections 141(b)(4) and 141(b)(5) further limit this de minimis permitted private business use to a prescribed \$15 million nonqualified amount for certain output facility issues generally and for certain larger issues absent volume cap allocations for private business use in excess of the \$15 million nonqualified amount.

The Proposed Regulations provide guidance regarding general allocation and accounting rules for purposes of the private activity bond restrictions under section 141. The Proposed Regulations provide guidance regarding allocations of proceeds of an issue of tax-exempt bonds (proceeds) and other funds to expenditures (as contrasted with investments), to property, and to uses (that is, governmental use or private business use).

The Proposed Regulations include certain special accounting rules for projects which have both governmental use and private business use (mixed-use projects), as described further herein. One purpose of these special accounting rules is to provide flexibility to allow issuers to use tax-exempt governmental bonds to finance the portion of a mixed-use project to be used for governmental use where private business use of the entire

project may exceed the amount of de minimis permitted private business use.

The Proposed Regulations provide several general allocation rules. First, proceeds and other sources of funds generally may be allocated to expenditures using any reasonable, consistently applied accounting method that is consistent with how proceeds are allocated for purposes of the arbitrage investment restrictions of section 148. Second, under a general pro rata allocation method (which also applies to mixed-use projects absent an election to use one of two elective special allocation rules), proceeds and other sources allocated to capital expenditures for a capital project generally are treated as allocated ratably throughout the project in proportion to the relative amounts of proceeds and other funds spent on that project (general pro rata allocation method). Third, allocations of sources of funds to uses, that is, governmental use and private business use, generally are made in a manner that reasonably corresponds to the relative amounts of the sources of funding spent on the property.

The Proposed Regulations provide special elective allocation rules for mixed-use projects. In general, the intent of these special allocation rules is to provide reasonable flexibility to allow issuers to finance portions of projects that are reasonably expected to be used for governmental use

with tax-exempt governmental bonds, provided that the portions can be reasonably determined and measured in administrable ways. In particular, the Proposed Regulations provide two special elective allocation methods, the discrete physical portion allocation method and the undivided portion allocation method. These two special elective allocation methods permit proceeds to be allocated to a portion of a mixed-use project using certain prescribed reasonable, consistent allocation methods that properly reflect the proportionate benefit to be derived by the various users of the mixed-use project. These two special allocation methods for dividing mixed-use projects for financing purposes are based on principles similar to those used for measuring ongoing use under §1.141-3(g) and are closely coordinated with those measurement rules. These methods may be elected for mixed-use projects only if they meet certain eligibility criteria. Absent a proper election to use one of these two special elective allocation methods, the general pro rata allocation method applies to a mixed-use project. The special allocation rules for mixed-use projects are described further herein.

In addition to general allocation and accounting rules and special allocation rules for mixed-use projects, the Proposed Regulations also provide guidance on certain related topics.

II. General Allocation Rules for Proceeds: General Pro Rata Allocation Method

The Proposed Regulations provide a general pro rata allocation method under which proceeds and other funds, if any, allocated under section 148 and §1.141-6(a)(1) to capital expenditures for a project are treated as being allocated ratably throughout the project in proportion to the relative amounts of proceeds and other funds spent on the project. Generally, the project is the bond-financed property for purposes of section 141. Except where the issuer has elected to use one of the special allocation methods permitted for certain mixed-use projects, the Proposed Regulations provide that a general pro rata allocation method applies to mixed-use projects. Except as otherwise provided in the Proposed Regulations, if financed property is financed with two or more sources of funding (including two or more tax-exempt governmental bond issues), those sources of funding must be allocated to multiple uses (that is, governmental use and private business use) of that financed property in proportion to the relative amounts of those sources of funding expended on that financed property.

The Proposed Regulations prescribe the manner and timing of elections to use the special allocation rules for mixed-use

projects and rules regarding final allocations of sources of funding to a project generally.

III. Mixed-use Projects

(A) In general

The Proposed Regulations provide two special allocation methods that issuers may elect to use for certain mixed-use projects. Here, a mixed-use project refers to a project (as defined in the Proposed Regulations) that, absent the application of the special proposed rules, is reasonably expected to have both governmental use and private business use, and where the private business use is expected to be in excess of the amount of de minimis permitted private business use under section 141 for a project financed with an issue of tax-exempt governmental bonds.

The Proposed Regulations treat property as part of the same defined project if the property consists of capital projects that have reasonable nexus characteristics based upon functional and physical proximity, time of placement in service, and a common plan of financing for proceeds and other sources of funds expended on the capital projects.

The Proposed Regulations provide two special elective methods of allocating proceeds of tax-exempt governmental bonds and other funds, that is, proceeds of taxable bonds and funds that are not derived from proceeds of a borrowing (qualified

equity), to capital expenditures within mixed-use projects: the discrete physical portion allocation method and the undivided portion allocation method. Absent eligibility and a proper election by an issuer to use one of these special elective allocation methods for mixed-use projects, the general pro rata allocation method applies.

(B) Discrete physical portion allocation method

In general, the discrete physical portion allocation method allows allocations for a mixed-use project based on dividing the project into physically discrete portions. Under the discrete physical portion allocation method, the percentage of capital expenditures that is allocable to a particular discrete portion of a mixed-use project is determined using a reasonable, consistently applied method that reflects the proportionate benefit to be derived by the various users of the mixed-use project. The Proposed Regulations provide several objective proportionate benchmarks (for example, cost, space, or fair market value) to determine the measure of a discrete portion.

An anti-abuse rule requires use of relative fair market values to measure the discrete portions when an allocation to a discrete portion expected to be used by a private business is significantly greater using relative fair market values than such allocation would be under the otherwise-chosen measure. This anti-abuse rule is comparable to a similar existing anti-

abuse rule regarding the ongoing measurement of private business use under §1.141-3(g)(4)(v). The Treasury Department and the IRS solicit public comment on this anti-abuse rule and whether quantifying the significantly greater than under fair market value standard (for example, an allocation under the fair market value standard is significantly greater if it exceeds an allocation made under another measure by more than X percent) would assist taxpayers in making effective use of the discrete physical portion allocation method.

In order to allow for targeting of tax-exempt bond proceeds to governmental use, an issuer generally may determine which source or sources of funds spent on a mixed-use project are allocated to a particular discrete portion. For example, an issuer may allocate tax-exempt bond proceeds to one discrete portion of a mixed-use courthouse project which will be used in public court proceedings for governmental use and the issuer may allocate qualified equity to another discrete portion of the courthouse which will be used in private retail business operations as a restaurant for private business use.

Further, while final allocations generally may not be changed, an issuer may reallocate funds from one discrete portion to another if the discrete portions are comparable under certain criteria. For administrability reasons, the Proposed

Regulations limit such reallocations to a frequency of not more than once every five years.

(C) Undivided portion allocation method

In general, the undivided portion allocation method permits separating a mixed-use project into a governmental use portion and a private business use portion, each of which represents a fixed percentage of the use of the entire mixed-use project (for example, a fixed percentage of unreserved parking spaces in a parking garage). Unlike the discrete physical portion method, the undivided portion allocation method involves the allocation of a mixed-use project between portions that are not physically distinct but that can be notionally represented by percentages based on objective proportionate measures. Certain eligibility conditions apply to the undivided portion allocation method. This method may be used only for mixed-use projects where private business use and governmental use may be measured under §1.141-3(g) because that use occurs: (1) at the same time and on the same basis (within the meaning of §1.141-3(g)(4)(iii)); or (2) at different times (within the meaning of §1.141-3(g)(4)(ii)). The issuer must reasonably expect as of the issue date that the undivided portion of the mixed-use project to be financed with proceeds of tax-exempt governmental bonds will not have private business use in excess of the amount of de minimis permitted private business use. The total capital expenditures

for the mixed-use project are allocated between two undivided portions based on measures of the proportionate benefit to be derived by the various users. The Proposed Regulations list some reasonable allocation methods for determining the relative size of the portions. The undivided portion allocation method has an anti-abuse rule similar to that described previously with respect to the discrete physical portion allocation method which requires use of relative fair market values to measure the portions in certain circumstances.

Proceeds are allocated only to the undivided portion that is reasonably expected to be used for governmental use (and any de minimis permitted private business use). Qualified equity is allocated to the other undivided portion.

A number of special rules apply to the undivided portion allocation method for purposes of allocating sources to uses. In general, the entire mixed-use project is treated as the bond-financed property whose use must be measured. Also, in measuring ongoing use of a mixed-use project under the undivided portion allocation method, the measurement rules in §1.141-3(g) (or §1.141-7 in the case of a mixed-use output facility) apply. The issuer must use the same method for measuring use that it used for determining the allocation of funds to the undivided portions of the mixed-use project. After use of the entire mixed-use project is measured, however, the governmental use and

private business use are generally allocated to the undivided portions financed with proceeds and qualified equity, respectively. Generally, in any year, the percentage of governmental use and private business use that is specially allocated to an undivided portion is limited. That percentage of use cannot exceed the percentage of capital expenditures for the mixed-use project that makes up that undivided portion. For example, the percentage of private business use that is specially allocated to the undivided portion financed with qualified equity cannot exceed the percentage of capital expenditures for the mixed-use project that makes up that undivided portion. In determining whether the private business use test is met, only use of the undivided portion to which proceeds are allocated is taken into account.

(D) Operating rules for mixed-use projects

The Proposed Regulations provide certain general operating rules for mixed-use project allocations. An issuer may elect to apply the discrete physical portion allocation method or the undivided portion allocation method only if the mixed-use project is wholly-owned by governmental persons. An exception to this rule applies to certain mixed-use output facilities. (See paragraph (E) Special rules for mixed-use output facilities.) Consistent with §1.141-1(b), common areas cannot be treated as discrete portions of the project. Proceeds and

other sources of funds spent on common areas are allocated to the discrete portions in the same proportion as funds spent for the discrete portions are allocated.

Under the Proposed Regulations, the funds that may be allocated under the discrete physical portion allocation method or the undivided portion allocation method to a particular mixed-use project include proceeds of one or more issues of tax-exempt governmental bonds and qualified equity. If a project is financed with more than one issue of governmental bonds, proceeds of those issues are allocated ratably to a discrete portion or undivided portion to which any proceeds are allocated in proportion to the amounts of proceeds from each issue used for the project.

(E) Special rules for mixed-use output facilities

The Proposed Regulations provide special rules for the application of the undivided portion allocation method to mixed-use projects that are output facilities. An issuer may apply the undivided portion allocation method to a mixed-use project that is an output facility if the facility is wholly-owned by governmental persons or if undivided ownership interests in the facility are owned by governmental persons or private businesses, provided that all owners of the undivided ownership interests share the ownership, output, and operating expenses in proportion to their contributions to the costs of the facility.

The relative measures of the undivided portions of a mixed-use output facility are determined using the proportionate benefit to be derived by the users of the mixed-use project. For an output facility in which private business use arises from a private business owning an undivided ownership interest in the facility (with a governmental person owning the other undivided portion of the facility), the undivided portions are based on the ownership percentages. This rule implements the principles illustrated by §1.141-7(i), Example 1. When private business use of a facility solely owned by a governmental person or of an undivided ownership interest of a facility owned by a governmental person arises from an output contract that meets the benefits and burdens tests under §1.141-7, the undivided portions of that facility or ownership interest are determined by the proportionate shares of the available output of that project to be used for governmental use (and any de minimis permitted private business use) and for private business use. Section 1.141-7(h) controls allocation of output contracts to output facilities.

IV. Redemption of bonds in anticipation of nonqualified private business use

The Proposed Regulations provide a new special rule which permits certain proceeds of taxable bonds and certain funds that are not derived from proceeds of a borrowing that are used to

retire tax-exempt governmental bonds (anticipatory redemption bonds) to be treated as qualified equity. In prescribed circumstances, this new special rule allows targeting of funds other than tax-exempt bond proceeds to redeem outstanding tax-exempt bonds and thereby to finance portions of projects which are expected to be used for nonqualified private business use in the future. This special rule has certain eligibility requirements. In general, the intent of this proposed rule is to encourage retirement of tax-exempt bonds before the occurrence of unqualified use to reduce the burden on the tax-exempt market. The eligibility requirements for this special rule address when the anticipatory redemption bond must be retired, the issuer's reasonable expectations regarding use of the project and actual use of the project prior to the redemption, and the length of the term of the issue of which the anticipatory redemption bond is a part.

Amounts that are treated as qualified equity under this special rule may be allocated to a discrete portion or undivided portion of the project in a manner provided in the discrete physical portion allocation method or undivided portion allocation method if such allocation would have satisfied the applicable allocation method had that portion been identified for purposes of financing it in a new issue at the time of the retirement of the anticipatory redemption bond.

V. Allocations of private payments, common costs, and bonds

The Proposed Regulations provide that private payments generally are allocated in accordance with §1.141-4, subject to certain special rules for allocating payments under output contracts. Private payments from output contracts that meet the benefits and burdens test under §1.141-7 are allocated to the undivided portion financed with qualified equity (notwithstanding §1.141-4(c)(3)(v)) in the same manner as is the private business use from such contracts. Thus, private business use and private payments arising under such an output contract are both allocated to the undivided portion financed with qualified equity (to the extent all such contracts do not exceed the percentage of such portion) without regard to whether the qualified equity consists of proceeds of taxable bonds or funds that are not derived from proceeds of a borrowing.

The Proposed Regulations provide ratable allocation rules for common costs (for example, issuance costs).

The Proposed Regulations provide that proceeds generally are allocated to bonds in accordance with the rules for allocations of proceeds to bonds in multipurpose issues under §1.141-13(d). In the case of an issue that is not a multipurpose issue, proceeds are allocated to bonds ratably in a manner similar to the allocation of proceeds to projects under the general pro rata allocation method.

VI. Partnerships

The Proposed Regulations generally treat a partnership as a separate entity that is a nongovernmental person for purposes of section 141. For purposes of section 141, a limited exception disregards a partnership as a separate entity if each of the partners is a governmental person and treats such a partnership as an aggregate of its partners (that is, as governmental persons) for these purposes. In applying the private business tests for purposes of qualified 501(c)(3) bonds, the Proposed Regulations generally treat a partnership as an aggregate if each of the partners is either a governmental person or a section 501(c)(3) organization. The Proposed Regulations, however, do not apply such aggregate treatment for purposes of the ownership test under section 145(a)(1).

In general, the proposed treatment of partnerships reflects certain administrability concerns with partnerships which have both governmental persons and private businesses as partners and the associated potential for shifting allocations of various partnership items. The Treasury Department and the IRS understand that governmental persons or section 501(c)(3) organizations may be partners in partnerships that include private businesses. Permitting tax-exempt bonds used to finance facilities owned by such partnerships to qualify as governmental bonds rather than private activity bonds would raise

administrability issues, including but not limited to, questions of how to measure use by an owner and questions regarding common profit or cost reduction motives and allocation of partnership items. Permitting such ownership by partnerships without administrable rules for tracking these items has the potential to allow the benefits of tax-exempt financing to inure to private business users.

One limited circumstance in which the Treasury Department and the IRS are considering favorable aggregate treatment for partnerships (that is, disregarding eligible partnerships as separate private business entities) and are soliciting specific comment is that of a partnership of governmental persons (or section 501(c)(3) organizations for 501(c)(3) bonds) and private businesses in which the respective partners receives the same distributive share of each partnership item for Federal tax purposes (including income, gain, deduction, loss, credit and basis) as their respective interests in the partnership and this share remains the same for the entire measurement period for the bonds or the entire period that the person is a partner. The Treasury Department and the IRS solicit specific public comment regarding whether it would be useful to treat such a partnership as an aggregate in this limited circumstance involving straight-up allocations of all partnership items in accordance with constant percentage interests in the partnership.

The contemplated limited circumstance in which the Treasury Department and the IRS are considering aggregate treatment for partnerships for private activity bond purposes involves partnership allocations similar to those treated as qualified allocations to tax-exempt entities for purposes of the tax-exempt use property provisions under section 168(h)(6).

VII. Multipurpose Issue Allocations

In general, §1.141-13(d) provides guidance on multipurpose issue allocations for purposes of section 141. That guidance was included as part of the final regulations (TD 9234) under section 141 that were published in the **Federal Register** on December 19, 2005 (70 FR 242) (the 2005 Final Refunding Regulations) and that mainly provided rules for refunding bonds.

The Proposed Regulations also make a clarifying change to §1.141-13(d). In response to the 2005 Final Refunding Regulations, the Treasury Department and the IRS have received comments seeking clarification of how those multipurpose rules work under section 141 in relation to an existing general multipurpose issue allocation rule under §1.150-1(c)(3). The Proposed Regulations provide certain clarifying guidance on the multipurpose issue allocation rule under §1.141-13(d) and provide an expanded example to illustrate how those rules operate in various circumstances.

In particular, the Proposed Regulations modify §1.141-13(d) regarding multipurpose issue allocations to clarify how that provision applies when an issuer wants to elect the multipurpose issue rule for an issue that would consist of qualified private activity bonds in part and governmental bonds in part with an appropriate allocation. The Proposed Regulations amend §1.141-13(d) to eliminate a requirement that a multipurpose issue must consist of tax-exempt bonds prior to being allocated into separate issues. The Proposed Regulations retain the requirement that, after the multipurpose issue allocation, each of the separate issues must consist of tax-exempt bonds. This proposed amendment clarifies that an issuer may issue bonds intended to be qualified private activity bonds in part and governmental bonds in part as one issue (within the meaning of §1.150-1(c)(1)) and make allocations under the section 141 multipurpose issue allocation rule in §1.141-13(d) in conjunction with the general multipurpose issue allocation rule in §1.150-1(c)(3), to treat the qualified private activity bonds and governmental bonds as separate issues, respectively.

VIII. Proposed Effective Dates

The Proposed Regulations are proposed to apply to bonds (1) that are sold on or after the date that is 60 days after the date of publication in the **Federal Register** of final regulations under §1.141-6 and (2) that are subject to the 1997 Final

Regulations. Issuers may apply §§1.141-13(d) and 1.141-13(g) Example 5 of the Proposed Regulations to bonds sold before the date of publication of final regulations in the **Federal Register** to which §1.141-13 applies. Except as otherwise provided in the preceding sentence, issuers may not apply or rely upon the rules contained in these Proposed Regulations until these rules are adopted as final regulations and made effective pursuant to a Treasury decision published in the **Federal Register**.

IX. Continued Reliance on Mixed-Use Output Notice

Pursuant to the 2002 Advance Notice, the Treasury Department and the IRS provided previous limited guidance regarding certain allocation and accounting rules for mixed-use output facilities. Issuers may continue to rely on the rules in the 2002 Advance Notice for bonds sold before the date of publication in the **Federal Register** of final regulations under §1.141-6 (or such later effective date as may be specified in those final regulations or in future proposed regulations).

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It has also been determined that 5 U.S.C. 553(b) does not apply to this notice of proposed rulemaking. It is hereby certified that the collection of information (recordkeeping requirement)

in this notice of proposed rulemaking will not have a significant economic impact on a substantial number of small governmental jurisdictions. This certification is based upon the fact few small governmental jurisdictions issue tax-exempt bonds to finance facilities that will be used for both governmental use and more than the amount of de minimis permitted private business use. Also, the amount of time required to meet the recordkeeping requirement is not significant. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Small Business Administration for comment on its impact on small governmental jurisdictions.

Comments and Public Hearing

Before these Proposed Regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The Treasury Department and IRS specifically request comments on the clarity of the proposed rules and how they may be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for January 11, 2007 at 10:00 a.m., in the auditorium of the New Carrollton Federal Building, 5000 Ellin Rd., Lanham, Maryland 20706. Due to building security procedures, visitors must enter at the main entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the "FOR FURTHER INFORMATION CONTACT" section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments by December 26, 2006, and submit an outline of the topics to be discussed and the amount of time to be devoted to each topic (a signed original and eight (8) copies) by December 26, 2006. A period of 10 minutes will be allotted to each person for making comments.

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

Drafting Information

The principal authors of these regulations are Rebecca L. Harrigal, Johanna Som de Cerff, and Michael P. Brewer, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), IRS. However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

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

PART 1--INCOME TAXES

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

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

Par. 2. Section 1.141-0 is amended by adding an entry for §1.141-1(e), revising entries for §1.141-6, and adding an entry for §1.141-15(k) and (l) as follows:

§1.141-0 Table of Contents

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§1.141-1 Definitions and rules of general application

* * * * *

- (e) Partnerships.
- (1) In general.
- (2) Governmental partnerships.

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§1.141-6 Allocation and accounting rules

- (a) Allocation of proceeds to expenditures, property, and uses in general.
 - (1) Allocations to expenditures.
 - (2) Allocations within property; general pro rata allocation method.
 - (3) Allocations of sources of funds to ultimate uses of financed property.
 - (4) Manner and time for electing to apply special allocation methods for mixed-use projects; final allocations generally.
- (b) Special rules on reasonable proportionate allocation methods for mixed-use projects.
 - (1) In general.
 - (2) Definition of a mixed-use project.
- (c) The discrete physical portion allocation method.
 - (1) In general.
 - (2) The measure of a discrete portion.
 - (3) Allocations to expenditures for discrete portions.
 - (4) Allocations of uses to discrete portions.
 - (5) Certain reallocations among discrete portions.
- (d) The undivided portion allocation method.
 - (1) In general.
 - (2) The measure of an undivided portion.
 - (3) Allocations to expenditures for undivided portions.
 - (4) Allocations of uses to undivided portions.
- (e) Certain general operating rules for mixed-use project allocations.
 - (1) In general.
 - (2) Governmental ownership requirement for undivided portion and discrete portion allocations.
 - (3) Sources of funds for mixed-use project allocations.
 - (4) Common areas.
 - (5) Allocations regarding multiple issues.
- (f) Special rules for bond redemptions in anticipation of unqualified use.
- (g) Special rules for applying the undivided portion allocation method to mixed-use output facilities.
 - (1) In general.
 - (2) Governmental ownership requirement for mixed-use output facilities.
 - (3) The measure of an undivided portion of a mixed-use output facility.
- (h) Allocations of private payments.
- (i) Allocations of proceeds to common costs of the issue.
- (j) Allocations of proceeds to bonds.
- (k) Examples.

§1.141-7 Special Rules for Output Facilities

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§1.141-15 Effective dates

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(k) Effective date for certain regulations related to allocation and accounting.

(l) Permissive retroactive application of certain regulations.

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Par. 3. Section 1.141-1 is amended by adding additional definitions under paragraph (b) and by adding a new paragraph (e) as follows:

§1.141-1 Definitions and rules of general application

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(b) Certain general definitions

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De minimis permitted private business use means the amount of private business use permitted for proceeds of tax-exempt bonds without causing such bonds to be classified as private activity bonds under section 141.

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Financed property means, except as otherwise provided, any project (as defined in §1.141-6(b)(2)(ii)) to which proceeds of an issue of tax-exempt bonds are allocated under §1.141-6.

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Governmental use or government use means any use that is not private business use under §1.141-3.

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Private business use means use by a person other than a governmental person in a trade or business, as more particularly defined in §1.141-3.

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(e) Partnerships--(1) In general. Except as provided in paragraph (e)(2) of this section, a partnership (as defined under section 7701(a)(2)) is treated as a separate entity that is a nongovernmental person for purposes of section 141.

(2) Governmental partnerships. For purposes of section 141, in the case of a partnership (as defined in section 7701(a)(2)) in which each of the partners is a governmental person (as defined in §1.141-1(b)), the partnership is disregarded as a separate entity and is treated as an aggregate of its partners.

Par. 4. Section 1.141-6 is revised to read as follows:

§1.141-6 Allocation and accounting rules

(a) Allocations of proceeds to expenditures, property, and uses in general--(1) Allocations to expenditures. Except as otherwise provided in this section, for purposes of §§1.141-1 through 1.141-15, the provisions of §1.148-6(d) apply for purposes of allocating proceeds and other sources of funds to expenditures (as contrasted with investments). Except as otherwise provided in this section, allocations of proceeds and other sources of funds to expenditures generally may be made

using any reasonable, consistently applied accounting method. Allocations of proceeds to expenditures under section 141 and section 148 must be consistent with each other. For purposes of the consistency requirements in this paragraph (a), it is permissible to employ an allocation method under paragraph (a)(2), (c), or (d) of this section (for example, the general pro rata allocation method under paragraph (a)(2) of this section) to allocate sources of funds within a particular project for purposes of section 141 in conjunction with an accounting method allowed under §1.148-6(d) (for example, the first-in, first out method) to determine the allocation of proceeds or other sources of funds to expenditures for that project.

(2) Allocations within property; the general pro rata allocation method. Except as otherwise provided in this section, proceeds and other sources of funds allocated to capital expenditures for a project (as defined in paragraph (b)(2)(ii) of this section) under section 148 and paragraph (a)(1) of this section are treated as allocated ratably throughout that project in proportion to the relative amounts of proceeds and other funds spent on that project (the general pro rata allocation method). For example, if a building is financed with proceeds and other funds and the issuer allocates the proceeds and other funds to the capital expenditures of the

building using a gross proceeds spent first allocation method under section 148 and paragraph (a)(1) of this section, the proceeds and other sources of funds so allocated to the building are treated as being allocated ratably throughout the building under this paragraph (a)(2).

(3) Allocations of sources of funds to ultimate uses of financed property. Except as otherwise provided in this section, if financed property is financed with two or more sources of funding (including two or more tax-exempt governmental bond issues), those sources of funding must be allocated to multiple uses (for example, governmental use and private business use) of that financed property in proportion to the relative amounts of those sources of funding expended on that financed property.

(4) Manner and time for electing to apply special allocation methods for mixed-use projects; final allocations generally. If an issuer is making an election under paragraph (c) or (d) of this section to use one of the special allocation methods for mixed-use projects, the issuer must make this election in writing by noting in its records the method of allocation chosen and the preliminary amounts and sources of funds it expects to allocate to specific discrete or undivided portions within the mixed-use project. The time for making this election is on or before the start of the measurement period.

An issuer must make final allocations of proceeds and other funds under this section by noting in its records the final amounts of such allocations. The time for making these final allocations is set forth in the timing rules under §1.148-6(d)(1)(iii). Except as otherwise provided in this section, once the time for making final allocations under §1.148-6(d)(1)(iii) has passed, allocations cannot be changed.

(5) References to proceeds. For purposes of this section, except where the context clearly requires otherwise (for example, in references to "proceeds" of taxable bonds) and regardless of whether expressly specified, references to proceeds generally are intended to refer to proceeds of tax-exempt governmental bonds.

(b) Special rules on reasonable proportionate allocation methods for mixed-use projects--(1) In general. Once proceeds and other sources of funds are allocated to a mixed-use project (as defined in paragraph (b)(2) of this section) under section 148 and paragraph(a)(1) of this section, there are three methods for allocating those proceeds and other sources of funds to capital expenditures (as defined in §1.150-1(b)) within the mixed-use project. These methods are the general pro rata allocation method in paragraph (a)(2) of this section, the discrete physical portion allocation method, and the undivided portion allocation method. Allocations will be made under the

general pro rata allocation method unless the issuer elects to use either the discrete portion method or the undivided portion method and meets the requirements for making such election under paragraph (a)(4) of this section and using such a method. The discrete portion and undivided portion allocation methods are elective and permit, to the extent provided, proceeds to be allocated to a portion of a mixed-use project based on a consistent application of a permitted reasonable allocation method that properly reflects the proportionate benefit to be derived by the various users of those portions of the mixed-use project. Paragraph (c) of this section sets forth the rules for the discrete physical portion allocation method and paragraph (d) of this section sets forth the rules for the undivided portion allocation method. Paragraph (e) of this section sets forth certain general operating rules for all mixed-use project allocations. Paragraph (g) of this section provides special rules for applying the undivided portion allocation method to output facilities.

(2) Definition of a mixed-use project--(i) In general. For purposes of this section, the term mixed-use project means a project (as defined in paragraph (b)(2)(ii) of this section) that, absent the application of the special elective allocation methods for mixed-use projects under paragraphs (c) and (d) of this section, is reasonably expected as of the issue date to

have private business use in excess of de minimis permitted private business use.

(ii) Definition of project--(A) In general. For purposes of this section, the term project means one or more facilities or capital projects, including land, buildings, equipment, or other property, that meets each of the following requirements:

(1) The facilities or capital projects are functionally related or integrated and are located on the same site or on reasonably proximate adjacent sites;

(2) The facilities or capital projects are reasonably expected to be placed in service within the same 12-month period; and

(3) The proceeds and other sources of funds that are expended on the facilities or capital projects are expended pursuant to the same plan of financing.

(B) Subsequent improvements or replacements. Subsequent improvements and replacements of portions of a project that are within the size, function, and usable space of the original design of the project are treated as part of that same project even if placed in service beyond the 12-month period in paragraph (b)(2)(ii)(A)(2) of this section. Thus, for example, improvements and replacements of damaged walls or worn-out fixtures within an original building that do not expand the

scope or function of usable space are part of the original project.

(c) Discrete physical portion allocation method--(1) In general. An issuer may elect the discrete physical portion allocation method when a mixed-use project can be separated into discrete portions (as defined in §1.141-1(b)). With a proper election, an issuer may use the discrete physical portion allocation method to allocate proceeds and qualified equity to capital expenditures for a discrete portion within a mixed-use project and to allocate those sources of funds to uses. The issuer must use a reasonable, consistently applied allocation method that reflects the proportionate benefits to be derived by the various users of the discrete portions to determine the aggregate amount of proceeds and qualified equity allocable to a particular discrete portion in a mixed-use project.

(2) The measure of a discrete portion. An issuer is treated as using a reasonable allocation method that reflects the proportionate benefits if the issuer determines the amount of proceeds and qualified equity to be allocated to the discrete portions based on reasonable discrete portion benchmarks. These benchmarks generally include expected actual costs of the discrete portions, a percentage of total space of the mixed-use project to be used in the discrete portion, a percentage of the total fair market value of the mixed-use project that will be

associated with the discrete portion, or another objective measure that is reasonable based on all the facts and circumstances. A discrete portion benchmark other than relative fair market value may not be used to make an allocation to a discrete portion that is reasonably expected to be used for private business use if an allocation to that same discrete portion using relative fair market value, determined as of the start of the measurement period, would result in a significantly greater percentage of the total capital expenditures of the project being allocated to such discrete portion.

(3) Allocations to expenditures for discrete portions.

Except as otherwise provided in this section, an issuer may determine how each source of funds (for example, proceeds or qualified equity) spent on a mixed-use project is allocated among discrete portions of that project. For example, proceeds may be specially allocated to capital expenditures for costs of a discrete portion that is reasonably expected to be used for governmental use (or for de minimis permitted private business use), and qualified equity may be specially allocated to capital expenditures for costs of a discrete portion that is reasonably expected to be used for private business use.

(4) Allocations of uses to discrete portions. In applying the measurement rules under §1.141-3(g) to measure ongoing use of a discrete portion of a mixed-use project, the measurement

rules under §1.141-3(g) generally apply to the same extent and in the same manner that they otherwise would. If an issuer properly elects to apply the discrete physical portion allocation method, the financed property is limited to the discrete portion to which any proceeds are allocated under paragraph (c)(3) of this section, and under §1.141-3(g)(4)(iv), the only use of the mixed-use project that is taken into account is the use of the discrete portions to which proceeds are specially allocated.

(5) Certain reallocations among discrete portions. An issuer may reallocate in whole, but not in part, proceeds and qualified equity that it allocated to capital expenditures for one discrete portion of a mixed-use project under paragraph (c)(3) of this section to another discrete portion of the same mixed-use project if the proportionate benefits to be derived by the users of the two discrete portions are reasonably comparable both at the time of the original allocation and at the time of the reallocation. For purposes of this paragraph (c)(5), the proportionate benefits are reasonably comparable only if the measures of the discrete portion benchmarks are within five percent of each other. In determining whether the proportionate benefits of the discrete portions are reasonably comparable at the time of the reallocation, the same discrete portion benchmark used originally to determine the discrete portions and

the fair market value of the discrete portions as of the time of the reallocation must be used. Reallocations under this paragraph (c)(5) may be made only once every five years.

(d) The undivided portion allocation method--(1) In general. An issuer may elect the undivided portion allocation method to make allocations with respect to a mixed-use project, provided that the undivided portions to which the allocations are made generally represent fixed percentages of the use of the entire mixed-use project (for example, a fixed percentage of unreserved parking spaces in a parking garage). The measures of the undivided portions may be based on physical or nonphysical characteristics of the project. In addition, the undivided portion allocation method may be applied separately to a discrete portion within a mixed-use project for which the issuer has elected to apply the discrete physical portion allocation method in which event the references in this paragraph (d) to mixed-use project generally shall be deemed to mean that discrete portion within which the undivided portion allocation method is applied separately. Upon a proper election, an issuer may, to the extent provided, use the undivided portion allocation method both to allocate proceeds or qualified equity to capital expenditures for the undivided portions and to allocate those sources of funds to uses of the mixed-use project. The issuer must use a reasonable consistently applied

allocation method that properly reflects the proportionate benefit to be derived by the various users of the mixed-use project to determine the amount of proceeds or qualified equity allocable to a particular undivided portion of a mixed use project. See paragraph (g) of this section for special rules for output facilities. To apply the undivided portion allocation method, the following conditions must be met:

(A) The issuer must reasonably expect as of the start of the measurement period that private business use and governmental use of the mixed-use project will occur simultaneously and be on the same basis (within the meaning of §1.141-3(g)(4)(iii)) or will occur at different times (within the meaning of §1.141-3(g)(4)(ii)); and

(B) The issuer must reasonably expect as of the start of the measurement period that private business use allocated to the proceeds under paragraph (d)(4) of this section will not exceed de minimis permitted private business use.

(2) The measure of an undivided portion. An issuer is treated as using a reasonable allocation method that reflects the proportionate benefits if the issuer determines the amount of proceeds and qualified equity to be allocated to the undivided portions based on reasonable undivided portion benchmarks. Such benchmarks generally include a measure of how many units produced from the facility will be used by the

various users, a percentage of the space in the mixed-use project to be used by the various users (for example, a percentage of the number of parking spaces or a percentage of square feet of usable leased office space), a percentage of the fair market value of the mixed-use project that will be used by the various users (for example, a dollar amount per parking space for a percentage of a total number of parking spaces or a dollar amount per square foot for a percentage of usable leased office space), a percentage of time that the project will be used by the various users (determined in a manner consistent with §1.141-3(g)(4)(ii)), or another objective measure, which may include the present value of reasonably expected revenues associated with each user's use in circumstances in which no other measure is reasonably workable (for example, expected revenues from space in a research facility in which the qualified and nonqualified research is operationally fungible), that is reasonable based on all the facts and circumstances. An undivided portion benchmark other than relative fair market value may not be used to make an allocation to an undivided portion that is reasonably expected to be used for private business use if an allocation to that same undivided portion using relative fair market values, determined as of the start of the measurement period, would result in a significantly greater percentage of the total capital expenditures of the project

being allocated to such undivided portion. For example, if a private business and a governmental person use a financed facility each for 50 percent of the time, but the relative fair market value of the private business use is significantly greater than 50 percent because the private business uses the facility during prime hours, the relative fair market values of the undivided portions must be used as the undivided portion benchmark.

(3) Allocations to expenditures for undivided portions.

Except as otherwise provided in this section, proceeds are specially allocated to capital expenditures for costs of an undivided portion that is reasonably expected to be used for governmental use (or for de minimis permitted private business use). Qualified equity is specially allocated to capital expenditures for costs of an undivided portion of a mixed-use project that is reasonably expected to be used for private business use.

(4) Allocations of uses to undivided portions--(i) General rule. If an issuer elects to apply the undivided portion allocation method, then for purposes of section 141, the financed property is the mixed-use project. In measuring ongoing use of a mixed-use project, the measurement rules under §1.141-3(g) (or §1.141-7 in the case of an undivided portion of a mixed-use project that is an output facility) apply to the

same extent and in the same manner that they otherwise would to the mixed-use project. However, under the undivided portion allocation method, after measuring private business use of the mixed-use project, subject to the limits in paragraph (d)(4)(ii) of this section, private business use of the mixed-use project is specially allocated to the undivided portion of that project financed with qualified equity (as contrasted with the entire mixed-use project) for purposes of determining whether the issue meets the private business use test. Corresponding allocation rules apply to the undivided portion of a mixed-use project that is financed with proceeds and that is reasonably expected to be used for governmental use (or for de minimis permitted private business use). Thus, subject to the limitations in paragraph (d)(4)(ii) of this section, governmental use is specially allocated to the undivided portion that is financed with proceeds. Private business use of the mixed-use project that is properly allocated under this paragraph to an undivided portion financed with qualified equity is not private business use of proceeds. To determine whether the undivided portion to which proceeds are allocated is used for private business use, the measurement rules under §1.141-3(g) (or §1.141-7 for output facilities) apply, taking into account the special allocation rules for the undivided portion allocation method under this section.

(ii) Limit on amount targeted. In any year, the percentage of private business use of the mixed-use project, as determined under the measurement rules for any one-year period under §1.141-3(g)(4), that is specially allocated to an undivided portion financed with qualified equity cannot exceed the percentage of capital expenditures of the mixed-use project used to determine that undivided portion and allocated to that undivided portion. The percentage of governmental use (and de minimis permitted private business use), as determined in the same manner, that is specially allocated to an undivided portion financed with proceeds cannot exceed the percentage of capital expenditures of the mixed-use project used to determine that undivided portion and allocated to that undivided portion. Similarly, for output facilities, the percentage of private business use of the mixed-use project, as determined under §1.141-7, that may be targeted to an undivided portion cannot exceed the percentage of capital expenditures of the mixed-use project allocated to that undivided portion.

(iii) Consistency requirement. In applying the measurement rules under §1.141-3(g) to a mixed-use project for which an issuer has employed the undivided portion allocation method, the issuer must use the same measurement method (for example, costs, quantity, or fair market value) that it used as its benchmark measure to make the allocations to the undivided portions of the

mixed-use project under this section. For example, if the issuer made an allocation to an undivided portion using a time-based allocation, the issuer must measure private business use using a time-based allocation.

(e) Certain general operating rules for mixed-use project allocations--(1) In general. This paragraph (e) provides certain general operating rules for allocations regarding mixed-use projects under this section.

(2) Governmental ownership requirement for discrete physical portion and undivided portion allocation methods. Except in the case of an output facility, an issuer may make an election to apply the discrete physical portion or the undivided portion allocation method only if the mixed-use project is wholly-owned by governmental persons. An issuer may elect to apply the undivided portion method to a mixed-use project that is an output facility in which non-governmental persons own undivided ownership interests if those interests meet the requirements of paragraph (g)(2) of this section.

(3) Sources of funds for mixed-use project allocations--(i) In general. For purposes of applying the permitted allocation methods for mixed-use projects under paragraphs (c) and (d) of this section, the only sources of funds that may be allocated to the mixed-use project are proceeds and qualified equity (as defined in paragraph (e)(3)(ii) of this section).

(ii) Definition of qualified equity. Except as otherwise provided in special rules for anticipatory redemption bonds in paragraph (f) of this section, for purposes of this section, the term qualified equity means only proceeds of taxable bonds and funds that are not derived from proceeds of a borrowing that are spent on the same mixed-use project as the proceeds of the applicable tax-exempt governmental bonds. By contrast, for example, qualified equity does not include equity interests in real property or tangible personal property. Further, qualified equity does not include any funds spent on subsequent improvements and replacements (including any subsequent improvements or replacements described in paragraph (b)(2)(ii)(B) of this section).

(4) Common areas. Common areas may not be treated as separate discrete portions of mixed-use projects. Proceeds or qualified equity used to finance capital expenditures for common areas are allocated ratably to the discrete portions of the mixed-use project in the same manner that funds for other capital expenditures of the mixed-use project are allocated.

(5) Allocations regarding multiple issues. If proceeds of more than one issue are allocated under section 148 and paragraph (a)(1) of this section to capital expenditures of a mixed-use project, and the issuer elects to apply the discrete portion or undivided portion allocation method to such mixed-use

project, then proceeds of those issues are allocated ratably to capital expenditures for a discrete portion or undivided portion to which any proceeds are allocated in proportion to their relative shares of the total proceeds of such issues in the aggregate used for such mixed-use project.

(f) Special rules for bond redemptions in anticipation of unqualified use--(1) In general. Amounts other than proceeds of tax-exempt bonds that are used to retire a tax-exempt governmental bond (anticipatory redemption bond) are treated as qualified equity if the following requirements are met:

(i) Allocations to anticipatory redemption bonds are made in a manner similar to §1.141-12(j)(2), and the anticipatory redemption bonds are retired within the time prescribed below in anticipation of a deliberate action that otherwise would cause the project to have private business use in excess of de minimis permitted private business use. An anticipatory redemption bond is redeemed in anticipation of the deliberate act when it is retired at least five years before its otherwise-scheduled maturity date or mandatory sinking fund redemption date and it is retired within a period that starts one year before the deliberate act occurs and ends 91 days before the deliberate act occurs;

(ii) The issuer must not reasonably expect at the start of the measurement period that the project would be a mixed-use

project, and for the first five years of the measurement period, the project must not be used in a manner that would cause private business use of the project to exceed de minimis permitted private business use; and

(iii) The term of the issue of which the anticipatory redemption bond is a part must be no longer than is reasonably necessary for the governmental purpose of the issue (within the meaning of §1.148-1(c)(4)).

(2) Allocation of qualified equity. Amounts that are treated as qualified equity under this paragraph (f) may be allocated to a discrete portion or undivided portion of a project in a manner provided in the discrete physical portion allocation method under paragraph (c) of this section or the undivided portion allocation method under paragraph (d) of this section if such allocation would have satisfied the applicable allocation method had that portion been identified for purposes of financing it in a new issue at the time of the retirement of anticipatory redemption bond. Allocations under this paragraph (f) cannot later be changed.

(3) Allocations of use. Use of a project to which this paragraph (f) applies is allocated in accordance with the discrete physical portion allocation method or undivided portion allocation method, as applied under the immediately preceding paragraph.

(4) Relationship to §1.141-12. Anticipatory redemption bonds that are treated as qualified equity under this paragraph (f) have a comparable effect on continuing compliance as remedial actions under §1.141-12 and need not be further remediated under §1.141-12.

(g) Special rules for applying the undivided portion allocation method to mixed-use output facilities--(1) In general. This paragraph (g) sets forth certain special rules regarding how to apply the undivided portion allocation method to a mixed-use project that is an output facility.

(2) Governmental ownership requirement for mixed-use output facilities. An issuer may elect to apply the undivided portion method to a mixed-use project that is an output facility if it is wholly-owned by governmental persons or if it has multiple undivided ownership interests which are owned by governmental persons or private businesses, provided that all owners of the undivided ownership interests share the ownership, output, and operating expenses in proportion to their contributions to the costs of the output facility.

(3) The measure of an undivided portion of a mixed-use output facility. The measure of an undivided portion of a mixed-use project that is an output facility is based on a reasonable proportionate allocation method that properly reflects the proportionate benefit to be derived by the various

users of the mixed-use project. For an output facility that has multiple undivided ownership interests that meet the requirements of paragraph (g)(2) of this section, those undivided ownership interests are treated as undivided portions. In addition, for purposes of determining the measure of proportionate benefit to be derived from users of an output facility (or of an undivided ownership interest in an output facility treated as an undivided portion) as a result of output contracts, the measure of an undivided portion is based on a benchmark equal to the proportionate share of available output (as defined in §1.141-7(b)(1)) to be received by the user. For purposes of determining the measure of an undivided portion of an output facility based on the proportionate share of available output, the facts and circumstances test under §1.141-7(h) governs allocations of output contracts to output facilities.

(h) Allocations of private payments. Private payments for financed property are allocated in accordance with §1.141-4. Thus, private payments for a mixed-use project for which an election is made to apply the discrete physical portion allocation method are allocated under §1.141-4(c)(3)(ii), and private payments for a mixed-use project for which an election is made to apply the undivided portion allocation method are allocated under 1.141-4(c)(3) without regard to the undivided portions. However, payments under output contracts that result

in private business use are allocated to the undivided portion financed with qualified equity (notwithstanding §1.141-4(c)(3)(v) (regarding certain allocations of private payments to equity)) in the same manner as the private business use from such contracts is allocated to that undivided portion under paragraph (d)(4) of this section.

(i) Allocations of proceeds to common costs of an issue. Proceeds of tax-exempt bonds allocated to expenditures for common costs (for example, issuance costs, qualified guarantee fees, or reasonably required reserve or replacement funds) are allocated in accordance with §1.141-3(g)(6). Common costs allocable to a mixed-use project for which an election has been made to apply the undivided portion or discrete physical portion allocation method are allocated ratably to the discrete portions or undivided portion of the mixed-use project to which proceeds are allocated.

(j) Allocations of proceeds to bonds. In general, proceeds of tax-exempt bonds are allocated to bonds in accordance with the rules for allocations of proceeds to bonds for separate purposes of multipurpose issues in §1.141-13(d). In the case of an issue that is not a multipurpose issue, proceeds are allocated to bonds ratably in a manner similar to the allocation of proceeds to projects under the general pro rata allocation method in paragraph (a)(2) of this section.

(k) Examples. The following examples illustrate the application of this section:

Example 1. Discrete portions of a mixed-use project. City A constructs a 10-story office building, having 100x square foot of office space, and costing \$100x. Each floor has an equal amount of office space. Assume the building has no common areas. City A reasonably expects to use the first six floors for governmental use (and possibly for de minimis permitted private business use). City A will lease the top four floors to Corporation B for private business use. City A wants to divide the mixed-use project into two discrete portions and to allocate proceeds to the first six floors and qualified equity to the top four floors. City A treats the first six floors as one discrete portion (the Governmental Portion) and the top four floors as another discrete portion (the Private Business Portion). City A proposes to determine how much of the \$100x can be allocated to each discrete portion using relative square feet of usable office space. The percentage of the \$100x that would be allocated to the Private Business Portion using relative fair market values, determined at the start of the measurement period, would not be significantly greater than the amount that will be allocated using relative square footage. Relative square footage is an appropriate discrete portion benchmark because it is an objective measure that properly reflects the proportionate benefit to be derived by the various users. City A finances the costs of the Governmental Portion (\$60x) with proceeds of tax-exempt governmental bonds (the Bonds) and the costs of the Private Business Portion (\$40x) with qualified equity which consists of taxable bonds (the qualified equity). City A allocates Bond proceeds to capital expenditures for the costs of the Governmental Portion (that is, \$60x for capital costs of six specific floors of the building). City A allocates the qualified equity to capital expenditures for the costs of the Private Business Portion (that is, \$40x for capital costs of four specific floors of the building). The financed property to which proceeds of the Bonds are allocated is the Governmental Portion. For purposes of measuring ongoing use of the Bond proceeds, use of the Private Business Portion will be disregarded, but any private business use of the six specific floors which comprise the Governmental Portion will be taken into account during the measurement period. The proceeds of the Bonds are treated as used for the Governmental Portion and ongoing compliance depends on the amount of private business use of that Governmental Portion over the term of the applicable measurement period. Thus, if more than 10 percent of the

specific physically discrete floors which comprise the Governmental Portion of the mixed-use project (that is, more than 6x of the proceeds or 6x square feet of the office space within the Governmental Portion) were used for private business use during the measurement period as a result of deliberate actions, then the Bonds would violate the private business use test.

Example 2. Reallocations among discrete portions. City A constructs a 10-story office building having 100x square feet of office space, and costing \$100x. The top five floors are to be leased to a private business, Corporation B. Before the start of the measurement period, City A appropriately elected a discrete physical portion allocation method using a relative square footage measure and allocated \$50x of proceeds to the first five floors (the Governmental Portion) and \$50x in qualified equity to the top five floors (the Private Business Portion). After the time for finalizing allocations has passed, Corporation B defaults on its lease for the top five floors of the building and vacates the building. Corporation C, another private business, expresses interest in leasing office space, but Corporation C wants to lease the first five floors of the building rather than the top five floors previously leased by Corporation B. City A wants to reallocate the proceeds used for the Private Business Portion to the Governmental Portion. City A plans to use the Private Business Portion for governmental use. At the time of both the original allocation and this reallocation the measures of the Private Business Portion and Governmental Portion under the applicable discrete portion benchmarks are within five percent of each other. City A determines that the measures of the two discrete portions are reasonably comparable at the time of the reallocation by using the benchmarks of relative square footage and the then-current fair market values of the two discrete portions. This reallocation between discrete portions is permissible.

Example 3. Undivided portions of a mixed-use project. City A constructs a 10-story office building, having 100x square foot of office space, and costing \$100x. City A has not identified specific space to be leased to any specific private business. Instead, City A reasonably expects to use 70 percent of the office space in the building for governmental use (or possibly for de minimis permitted private business use) (the Governmental Portion). City A reasonably expects that it will lease out a maximum of 30 percent of the office space to one or more private businesses in unspecified locations in the building (the Private Business Portion). City A wants to allocate this

mixed-use project between two undivided portions and target the expected private business use to the undivided portion financed with qualified equity. City A determines how much of the \$100x can be financed with tax-exempt governmental bonds based on relative square feet of usable office space. This undivided portion benchmark is an objective measure that properly reflects the proportionate benefit to be derived by the various users. City A finances 70 percent of the costs of the building (\$70x) with proceeds (the Bonds) and 30 percent (\$30x) of those costs with qualified equity which consists of taxable bonds (the Qualified Equity). Bond proceeds are allocated to capital expenditures for the costs of the Governmental Portion. Qualified Equity is allocated to capital expenditures for the costs of the Private Business Portion. For purposes of measuring ongoing use of the mixed-use project, private business use and governmental use of the entire 10-story office building is considered. As long as average private business use of the mixed-use project under the measurement rules does not exceed 30 percent in a particular year, that private business use is allocated to the Private Business Portion. Thus, none of that private business use is allocated to the Governmental Portion, and that private business use is disregarded for purposes of determining whether there is private business use of the proceeds allocated to the Governmental Portion. If average private business use of the mixed-use project increases to 45 percent in a subsequent year, a maximum of 30 percent of that private business use is properly allocable to the Private Business Portion and thereby disregarded in determining ongoing use of the Governmental Portion. Private business use in excess of the 30 percent properly allocable to the Private Business Portion (that is, 15 percent of private business use) would be allocated to the Governmental Portion. Conversely, if private business use of the mixed-use project in a subsequent year decreased to 20 percent, all 20 percent of the private use would be allocated to the Private Business Portion and thereby disregarded for purposes of measuring private use of the proceeds in that year. Because there would be governmental use in that year in excess of the 70 percent that is properly allocable to the Governmental use Portion, the governmental use in excess of 70 percent (that is, 10 percent of governmental use) would be allocated to the Private Business Portion.

Example 4. Revenue-based undivided portion of research facility. University A is a state university. University A owns and operates research facilities. In 2008, University A plans to build a new research facility (the 2008 Mixed-Use Research Project), which it expects will be used for both

qualified research arrangements for governmental use (Governmental Research) and nonqualified research arrangements for private business use (Private Business Research). University A wants to allocate the 2008 mixed-use research facility between two undivided portions for Governmental Research and for Private Business Research and to target Private Business Research to the undivided portion financed with equity. University A proposes to make this allocation using a revenue-based undivided portion benchmark. All of University A's research activities will have the following operational characteristics:

(i) The research facilities are continuously available for both Governmental Research and Private Business Research;

(ii) Governmental Research and Private Business Research take place simultaneously in the same research facilities; and

(iii) The same research may relate to one or more research projects involving both Governmental Research and Private Business Research. University A also has a reasonable basis for determining the percentage of revenues that will be derived from Private Business Research and Governmental Research. During the past five years, of the total revenues, net of royalties and licenses, from University A's research facilities, the percentage of revenues from Governmental Research and the percentage of revenues from Private Business Research (on a present value basis) have not changed. University A reasonably expects that this split of revenues will continue with the 2008 Mixed-Use Research Project. Under all the facts and circumstances, including, among other things, the nature of the particular research arrangements (for example, the governmental or private business nature of particular research grantors or contractual terms that result in governmental use or private business use) and historic actual revenues and future expected revenues from research arrangements of a particular nature, net of royalties and licenses, the only objective measurable benchmark that can reasonably distinguish the Governmental Research portion from the Private Business Research portion is the expected percentage of revenues each will generate. Therefore, University A will be using a reasonable method for determining the undivided portions of the 2008 mixed-use research facility if it bases the portions on the revenues each is expected to generate.

Example 5. Output facility. Authority A is a governmental person that owns and operates an electric transmission facility.

Prior to 2009, Authority A used its equity to pay capital expenditures of \$1000x for the facility. In 2009, Authority A wants to make capital improvements to the facility in the amount of \$100x. Authority A reasonably expects that, after completion of such capital improvements, 54 percent of the available output from the facility, as determined under §1.141-7, will be sold under output contracts for governmental use and that 46 percent of such available output will be sold under output contracts for private business use. Authority A wants to allocate this 2009 project for capital improvements (the 2009 Mixed-Use Output Project) between two undivided portions based on proportionate measures of available output and to finance the maximum eligible undivided portion with tax-exempt governmental bonds (assuming use of the maximum 10 percent de minimis amount of private business use permitted for tax-exempt governmental bonds). Authority A treats a 60 percent undivided portion of the 2009 Mixed-Use Output Project as one undivided portion (the Governmental Portion), which it reasonably expects to use for output contracts involving 90 percent governmental use (representing 54 percent of the available output), plus 10 percent private business use (representing 6 percent of the available output). Authority A treats a 40 percent undivided portion of the 2009 Mixed-Use Output Project as another undivided portion (the Private Business Portion), which it reasonably expects to use for output contracts involving private business use. Authority A determines the measures of these two undivided portions based on relative shares of available output, as determined under §1.141-7. This measure uses a reasonable proportionate allocation method which properly reflects the proportionate benefit to be derived by the various users. On January 1, 2009, Authority A issues bonds with proceeds of \$60x (the Bonds) to finance the Governmental Portion of the 2009 Mixed-Use Output Project and uses \$40 million of funds that are not derived from proceeds of a borrowing (the Qualified Equity) to finance the Private Business Portion of the 2009 Mixed-Use Output Project. Authority A allocates Bond proceeds to capital expenditures for the costs of the Governmental Portion and Qualified Equity to capital expenditures for the costs of the Private Business Portion. For purposes of measuring ongoing use of the Governmental Portion financed with the Bond proceeds, use of the Private Business Portion is disregarded, but any private business use of the Governmental Portion will be taken into account during the measurement period. So long as the actual amount of private business use of the Governmental Portion's share of available output does not exceed 6 percent, the Bonds will not be private activity bonds.

Example 6. Treatment of retirement of bonds. City B issues bonds to build a parking garage (the Garage), costing \$100x, that it will own and operate. At the start of the measurement period, City B reasonably expects that the only use of the garage will be governmental use. The term of the issue is no longer than reasonably necessary for the governmental purpose of the issue. During the first six years of the measurement period, the garage is used as the issuer expected. In year seven of the measurement period, however, City B expects that in less than one year it will enter into a contract with Corporation C, a private business, which will cause 20 percent of the Garage to be used for private business use. More than 90 days before entering into a binding contract with Corporation C, City B uses \$20x of funds other than proceeds of tax-exempt bonds to retire bonds and City B determines the bonds to be retired on a pro rata basis. The applicable bonds will be retired at least 5 years prior to their scheduled maturity dates. As of the date of the anticipatory redemption, the Garage qualifies as a mixed-use project, and City B applies paragraph (f) of this section and allocates the \$20x that was used to redeem the bonds to an undivided portion to which the private business use will be allocated. If City B failed to meet the requirements of paragraph (f) of this section, amounts that City B used to redeem the bonds would not be qualified equity.

Par 5. Section 1.141-13 is amended by revising paragraph (d)(1) and paragraph (g) Example 5 to read as follows:

§1.141-13 Refunding issues

* * * * *

(d) Multipurpose issue allocations--(1) In general. For purposes of section 141, unless the context clearly requires otherwise, §1.148-9(h) applies to allocations of multipurpose issues (as defined in §1.148-1(b)), including allocations involving the refunding purposes of the issue. An allocation under this paragraph (d) may be made at any time, but once made may not be changed. An allocation is not reasonable under this

paragraph (d) if it achieves more favorable results under section 141 than could be achieved with actual separate issues. Each of the separate issues under the allocation must consist of one or more tax-exempt bonds. Allocations made under this paragraph (d) and §1.148-9(h) must be consistent for purposes of section 141 and section 148.

* * * * *

(g) Examples. * * *

Example 5. Multipurpose issue. (i) In 2006, State D issues bonds to finance the construction of two office buildings, Building 1 and Building 2. D expends an equal amount of the proceeds on each building. D enters into arrangements that result in private business use of 8 percent of Building 1 and 12 percent of Building 2 during the measurement period under §1.141-3(g). In addition, D enters into arrangements that result in private payments in percentages equal to that private business use. These arrangements result in a total of 10 percent of the proceeds of the 2006 bonds being used for a private business use and for private payments. In 2007, D purports to make a multipurpose issue allocation under paragraph (d) of this section of the outstanding 2006 bonds, allocating the issue into two separate issues of equal amounts with one issue allocable to Building 1 and the second allocable to Building 2. An allocation is unreasonable under paragraph (d) of this section if it achieves more favorable results under section 141 than could be achieved with actual separate issues. D's allocation is unreasonable because, if permitted, it would allow more favorable results under section 141 for the 2006 bonds (that is, private business use and private payments which exceeds the aggregate 10 percent permitted de minimis amounts for the 2006 bonds allocable to Building 2) than could be achieved with actual separate issues. In addition, if D's purported allocation was intended to result in two separate issues of tax-exempt governmental bonds (versus tax-exempt private activity bonds), the allocation would violate paragraph (d) of this section in the first instance because the allocation to the separate issue for Building 2 would fail to qualify separately as an issue of tax-exempt governmental bonds as a result of its 12 percent of private business use and private

payments, which exceed the 10 percent permitted de minimis amounts.

(ii) The facts are the same as in paragraph (i) of this Example 5, except that D enters into arrangements that result in 8 percent private business use for Building 1, and it expects no private business use of Building 2. In 2007, D allocates an equal amount of the outstanding 2006 bonds to Building 1 and Building 2. D selects particular bonds for each separate issue such that the allocation does not achieve a more favorable result than could have been achieved by issuing actual separate issues. D uses the same allocation for purposes of both section 141 and 148. D's allocation is reasonable.

(iii) The facts are the same as in paragraph (ii) of this Example 5, except that as part of the same issue, D issues bonds for a privately used airport. The airport bonds if issued as a separate issue would be qualified private activity bonds. The remaining bonds if issued separately from the airport bonds would be governmental bonds. Treated as one issue, however, the bonds are taxable private activity bonds. Therefore, D makes its allocation of the bonds under §§1.141-13(d) and 1.150-1(c)(3) into 3 separate issues on or before the issue date. Assuming all other applicable requirements are met, the bonds of the respective issues will be tax-exempt qualified private activity bonds or governmental bonds.

* * * * *

Par. 6. Section 1.141-15 is amended by revising paragraph (a) and (i) and adding paragraphs (k) and (l) to read as follows:

§1.141-15 Effective Dates

(a) Scope. The effective dates of this section apply for purposes of §§1.141-1 through 1.141-14, 1.145-1 through 1.145-2, 1.150-1(a)(3) and the definition of bond documents contained in §1.150-1(b).

* * * * *

(i) Permissive application of certain regulations relating to output facilities.

(1) Issuers may apply §1.141-7(f)(3) and §1.141-7(g) to any bonds used to finance output facilities.

(2) Issuers may apply §1.141-6 to any bonds used to finance output facilities that are sold on or after the date that is 60 days after the date of publication of the Treasury decisions adopting these rules as final regulations in the **Federal Register**

* * * * *

(k) Effective date for certain regulations relating to allocation and accounting. Except as otherwise provided in this section, §§1.141-1(e), 1.141-6, 1.141-13(d), and 1.145-2(b)(4), (b)(5), and (c)(3) apply to bonds that are sold on or after the date that is 60 days after the date of publication of the Treasury decisions adopting these rules as final regulations in the **Federal Register** and that are subject to the 1997 Final Regulations.

(l) Permissive retroactive application of certain regulations. Issuers may apply §1.141-13(d) to bonds to which §1.141-13 applies.

Par. 7. Section 1.145-2 is amended by adding paragraphs (b)(4), (b)(5), and (c)(3) to read as follows:

§1.145-2 Application of Private Activity Bond Regulations

* * * * *

(b) * * *

(4) References to governmental bonds in §1.141-6 mean qualified 501(c)(3) bonds.

(5) References to ownership by governmental persons in §1.141-6 mean ownership by governmental persons or 501(c)(3) organizations.

(c) * * *

(3) Partnerships. Section 1.141-1(e)(2) does not apply for purposes of section 145(a)(1). For purposes of section 145(a)(2), in the case of a partnership (as defined in section 7701(a)(2)) in which each of the partners is a governmental person or a section 501(c)(3) organization, the partnership is disregarded as a

separate entity and is treated as an aggregate of its partners.

Mark E. Matthews,
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