Part III - Administrative, Procedural, and Miscellaneous

Build America Bonds and Other State and Local Bonds: Timing of Issuing Bonds

Notice 2010-81

SECTION 1. PURPOSE

This Notice provides guidance on the determination of when State and local bonds (as defined in § 103(c)) of the Internal Revenue Code (the "Code") are considered "issued" for purposes of deadlines on issuing bonds. This Notice provides guidance on the relevant distinction between the "issue date" of a "bond" versus the "issue date" of an "issue" for purposes of this determination. One instance, among others, in which this Notice applies is in determining when Build America Bonds, structured as "draw-down" bonds or loans in which draws are funded at different times, are considered issued for purposes of statutory deadlines on issuing these bonds under § 54AA.

This Notice does not apply for purposes of applying the qualified small issuer and de minimis exceptions to the tax-exempt carrying cost disallowance provision under § 265(b)(3) and § 265(b)(7) to draw-down loans.

SECTION 2. BACKGROUND

Section 1531 of Title I of Division B of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) ("ARRA") added § 54AA to the Code, which authorizes State and local governments, at their option, to issue Build America Bonds as taxable governmental bonds and receive Federal subsidies for a portion of their borrowing costs. Sections 54AA(d), 54AA(g), and 6431 require that Build America Bonds be issued before January 1, 2011.

In a related provision, § 1401 of ARRA added §§ 1400U-1 through 1400U-3 to the Code, which authorizes two types of "Recovery Zone Bonds," including a type of Build America Bond known as "Recovery Zone Economic Development Bonds" and a type of traditional tax-exempt bond known as "Recovery Zone Facility Bonds." These Recovery Zone Bonds have bond volume limitations and a statutory deadline that requires the bonds to be issued before January 1, 2011.

Section 1503(a) of ARRA amended § 57(a)(5)(C) to add new clause (vi), which provides, in part, that for purposes of the alternative minimum tax preference for interest on certain tax-exempt private activity bonds under § 57(a)(5)(C)(i), the term "private activity bond" shall not include any bond issued after December 31, 2008, and before January 1, 2011. Section 1503(b) of ARRA amended § 56(g)(4)(B) to add new clause (iv), which provides that the adjusted current earnings (ACE) adjustment under § 56(g)(4)(B)(i) for interest on certain tax-exempt bonds shall not include any interest on certain bonds issued after December 31, 2008, and before January 1, 2011.

In addition, other statutory provisions impose statutory time periods for issuing State and local bonds in both targeted circumstances and in more general circumstances. Another selected example of a targeted bond program that imposes a statutory time period on issuing bonds is the Gulf Opportunity Zone Bond program under § 1400N. One general provision that imposes statutory time periods on issuing bonds is the annual State private activity bond volume cap under § 146, which generally limits the amount of tax-exempt private activity bonds that may be issued in a State in a particular year. Similarly, certain types of qualified tax credit bonds under § 54A have volume caps and statutory time periods for issuing bonds. Another general provision is § 265(b)(3), which generally provides an exception to the carrying cost disallowance provision for financial institutions that purchase tax-exempt obligations from "qualified small issuers" that reasonably expect to issue no more than $10 million in tax-exempt bonds in a calendar year. ARRA raises the amount of this exception to $30 million for bonds issued in 2009 and 2010. Thus, the determination of when bonds are issued is relevant to the statutory limitations affecting Build America Bonds and many other State and local bond programs.

Recently, questions have arisen about which issue date rule applies for the statutory deadline on issuing Build America Bonds with respect to a financing structure known as "draw-down" loans in which funds are advanced at different times. The regulations provide issue date rules for "bonds" and for "issues" of bonds (with subsidiary special rules which treat bonds issued under draw-down loans or commercial paper programs as part of the same issue). Section 1.150-1(b) of the Income Tax Regulations includes a general definition for the “issue date” of a “bond,” that provides the issue date is the date on which the issuer receives the purchase price in exchange for that bond, provided that in no event is the issue date of a bond earlier than the first day on which interest begins to accrue on such bond for Federal income tax purposes. See also Harbor Bancorp v. Commissioner, 105 T.C. 260 (1995), aff’d 115 F.3d 722 (9th Cir. 1997)(citing regulatory predecessors to this general definition in interpreting statutory deadlines for issuing bonds under the Tax Reform Act of 1986).

Section 1.150-1(b) defines a “bond” to mean any “obligation” of a State or political subdivision thereof under § 103(c)(1). Section 1.150-1(b) also defines an “obligation” to mean any valid evidence of indebtedness under general Federal income tax principles.

By comparison, § 1.150-1(c) defines the broader term bond “issue” under a general definition and various special rules that may include bonds as part of the same issue even if they are issued at different times under a common tax plan. Section 1.150-1(b) defines the “issue date” of an “issue” to mean the first date on which the issuer receives the purchase price in exchange for delivery of the evidence of indebtedness representing any bond included in the issue, provided that in no event is the issue date of an issue earlier than the first day on which interest begins to accrue on the first bond included in the issue for Federal income tax purposes. Section 1.150-1(c)(1) provides a general rule which treats bonds as part of the same issue if the bonds are sold (versus issued) at substantially the same time (meaning sold less than 15 days apart), the bonds are part of the same plan of financing, and the bonds are reasonably expected to be paid from the same source of funds.

Section 1.150-1(c)(4)(i) treats bonds issued pursuant to a “draw-down loan” as part of the same bond issue. This special rule further provides that the issue date of the issue is the first date on which the aggregate draws under the loan exceed the lesser of $50,000 or five percent of the issue price. Section 1.150-1(c)(4)(ii) allows commercial paper issued pursuant to the same commercial paper program to be treated as part of the same issue. This special rule further provides that the issue date of the issue is the first date on which the aggregate amount of commercial paper issued under the program exceeds the lesser of $50,000 or five percent of the issue price. This special rule generally allows commercial paper to be treated as part of the same issue if it is issued to finance or refinance the same governmental purposes pursuant to a single master legal document during an 18-month period or if it is issued to refinance such commercial paper for up to 30 years if there is no increase in the principal amount after the initial 18-month period. These special rules apply to the issue date of the issue. The regulations do not provide special issue date rules for the issue date of bonds issued as draws under draw-down loans or as commercial paper. In Rev. Rul. 89-70, 1989-1 C.B. 88, however, the IRS ruled that the entire stated principal amount of a draw-down loan was considered issued on the date on which more than a de minimis amount of the loan was first advanced.

SECTION 3. SCOPE

This Notice applies for determining compliance with deadlines for issuing State and local bonds such as Build America Bonds under §§ 54AA(d), 54AA(g) and 6431, and Recovery Zone Bonds under §§ 1400U-1 through 1400U-3. The analysis in this Notice also applies for other deadlines for issuing bonds, such as, among others, the exceptions to the alternative minimum tax preferences and adjustments for interest on certain tax-exempt bonds under §§ 56(g)(4)(B)(iv) and 57(a)(5)(C)(vi), Gulf Opportunity Zone Bonds under § 1400N and various volume cap limitations on State and local bonds (as defined in § 103(c)).

This Notice does not apply for purposes of applying the qualified small issuer and de minimis exceptions to the tax-exempt carrying cost disallowance provision under § 265(b)(3) and § 265(b)(7) to draw-down loans. For this purpose, Rev. Rul. 89-70 will continue in effect until further guidance is provided, which guidance will be prospective.

SECTION 4. GUIDANCE

In general, for determining compliance with deadlines on issuing bonds covered by this Notice, a bond is considered issued on the “issue date” of the “bond” under § 1.150-1(b). Section 1.150-1(b) defines the “issue date” of a “bond” to mean the date on which the issuer receives the purchase price in exchange for that bond, provided that in no event is the issue date of a bond earlier than the first day on which interest begins to accrue on such bond for Federal income tax purposes.

By contrast, the issue date of an “issue” under § 1.150-1(b) is the first date on which the issuer receives the purchase price in exchange for delivery of the evidence of indebtedness representing any bond included in the issue, provided that in no event is the issue date of an issue earlier than the first day on which interest begins to accrue on the first bond included within the issue for Federal income tax purposes. Bonds may be issued at different times and nonetheless be treated as part of the same bond "issue" under the various special provisions for single issues under § 1.150-1(c). Thus, to ensure that an entire issue of bonds meets a statutory deadline on issuing bonds, all of the bonds that are part of the issue should be issued by the applicable statutory deadline.

In the particular case of a "draw-down" loan under § 1.150-1(c)(4)(i) or a commercial paper program under § 1.150-1(c)(4)(ii), in which a bond is issued as a draw or as commercial paper at different times and interest begins to accrue on each draw or commercial paper when it is funded, each draw or commercial paper constitutes a separate bond that is issued on the issue date of that draw or commercial paper when the issuer receives the purchase price, and interest begins to accrue, on that draw or commercial paper for Federal income tax purposes. Thus, for Build America Bonds structured as draw-down loans or commercial paper programs, only those draws or commercial paper that are funded before January 1, 2011, and for which interest begins to accrue for Federal income tax purposes before January 1, 2011, may qualify as Build America Bonds for purposes of the statutory time deadlines for issuing Build America Bonds.

SECTION 5. DRAFTING INFORMATION

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