

THE
NATIONAL LAW REVIEW

Babies, Bathwater, etc. - The IRS Should Keep the Helpful Non-Reissuance Rules from the Reissuance Notices

Tuesday, February 19, 2019

The March 1 deadline for submitting comments on the [proposed reissuance regulations](#) to the IRS is coming up fast. We make a general comment here - the existing guidance contains helpful ancillary rules that aren't directly implicated by the core reissuance rules. The IRS should not exclude these helpful ancillary rules from the final regulations. They've proved helpful to issuers, and there's no policy reason to scrap them.

As [Mike noted when the proposed regulations came out](#), the proposed regulations are the culmination of a series of IRS Notices, most notably Notices 88-130 and 2008-41, which describe when and how tax-exempt bonds and, in particular, tax-exempt bonds that are qualified tender bonds, are reissued. The preamble to the proposed regulations says that Treasury and the IRS "expect that the final regulations will obsolete Notice 88-130 and Notice 2008-41."

The proposed regulations bring forward the core reissuance rules from the Notices. But the Notices also contained a number of other bells and whistles that are missing from the proposed regulations. While some of these ancillary provisions may have been prompted by acute market conditions that have dissipated, we have come to rely on many of them. If the final regulations do indeed render the prior Notices obsolete, then these rules will be lost. In particular:

1. Section 6.1 of Notice 2008-41 is a great example of this phenomenon. It put "nonrecourse" tax-exempt bonds on equal footing with "recourse" tax-exempt bonds, so that a modification of security or credit enhancement of either type of tax-exempt bond triggers a reissuance only if it leads to a change in payment expectations. (Changes to tax-exempt bonds rarely lead to a change in payment expectations.) Prior to this change, issuers had to apply a different standard to these types of modifications under the reissuance regulations to determine whether a reissuance had occurred. This rule applied to all tax-exempt bonds, not just qualified tender bonds.
2. Notice 88-130 provided that a qualified tender bond would not be treated as reissued merely because of a "qualified corrective change." Qualified corrective changes are discussed in detail in Section 7.1 of Notice 88-130; they generally allow the issuer to make very minor changes (such as the time of day when the holder must tender its bonds), to make changes to eliminate a result that couldn't have been intended on the issue date of the bonds, or to make changes required as a result of unforeseen circumstances unrelated to market conditions or the issuer's creditworthiness that weren't in the control of the issuer, borrower, or related parties.
3. Section 5.3 of Notice 2008-41 provides that if a qualified tender bond is remarketed at a premium, which is allowed under 2008-41 in connection with a remarketing after a conversion of interest on the bonds to a fixed rate to maturity, then "[s]olely for purposes of the arbitrage investment restrictions under section 148," the premium is treated as gross proceeds of the issue. The proposed regulations don't allow remarketings at a price other than par, or else the tender right on the bonds loses its status as a qualified tender right, but they should, and that's a comment that many groups will make.

Though the main point of the proposed regulations is to deal with the reissuance consequences involved with



Article By
[John W. Hutchinson](#)
[Squire Patton Boggs \(US\) LLP](#)
[The Public Finance Tax Blog](#)
[Tax](#)
[All Federal](#)

qualified tender bonds, there is no reason not to incorporate these helpful rules into the final regulations.

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