

## A Richer Understanding of What's Already Understood - Treasury Issues Proposed Regulations to Clarify the Meaning of "Investment-Type Property" in an Already Obvious Way

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The Minutemen's seminal album *Double Nickels on the Dime* includes the song "The Big Foist," which opens with the lyrics, "A richer understanding of what's already understood." These lyrics are called to mind (my mind, at least) on occasions such as the Treasury Department's publication today of proposed regulations ("[Proposed Regulations](#)") that clarify the definition of "investment-type property" for purposes of complying with the arbitrage yield restriction and rebate requirements set forth in Section 148 of the Internal Revenue Code.

As a general matter, if proceeds of a bond issue are reasonably expected to be used (or are intentionally used) to acquire "investment property" that has a materially higher yield than the yield of the bond issue, then the bond issue is comprised of taxable arbitrage bonds, rather than tax-exempt bonds. Investment property includes, among other things, "investment-type property." The current regulations define investment-type property as any property "that is held principally as a passive vehicle for the production of income" and that is not a specifically defined type of investment property (*i.e.*, securities, obligations, annuity contracts, and certain residential rental property for family units). The Proposed Regulations make clear that investment-type property:

does not include real property or tangible personal property (for example, land, buildings, and equipment) that is used in furtherance of the public purposes for which the tax-exempt bonds are issued. For example, investment-type property does not include a courthouse financed with governmental bonds or an eligible exempt facility under [Internal Revenue Code] section 142, such as a public road, financed with private activity bonds.

This conclusion is obvious from the legislative history of Section 148, which Treasury cites in the preamble to the Proposed Regulations. It's also obvious from the canon of statutory and regulatory construction that a general item in a list must be read in light of the specific items that precede it. Although an obvious conclusion, Treasury is to be commended both for allowing issuers of tax-exempt bonds to rely on the Proposed Regulations before they become final and for using an [Oxford comma](#) in the above-quoted parenthetical.<sup>1</sup>

If Treasury is inclined to publish proposed regulations to clarify that which is already clear, perhaps Treasury can provide guidance on whether [tax-exempt bonds can be issued to advance refund taxable \(but not tax-advantaged\) bonds](#).

The logo for Squire Patton Boggs, featuring the word "SQUIRE" in a large, bold, serif font, followed by a stylized blue and green circular icon. Below it, the words "PATTON BOGGS" are written in a smaller, all-caps, sans-serif font.

Article By  
[Michael A. Cullers](#)  
[Squire Patton Boggs \(US\) LLP](#)  
[The Public Finance Tax Blog](#)  
[Tax](#)  
[All Federal](#)

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[1] Not using an Oxford comma? You should. You'd join the good company of my colleagues, Rob Lowe, and Neil deGrasse Tyson. Had I not used an Oxford comma, you could be left with the impression that I work with Rob Lowe and Neil deGrasse Tyson (to be clear, I do not).

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