

Notice of Proposed Rulemaking and Notice of Public Hearing

Mortgage Revenue Bonds

REG-146692-03

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains proposed regulations that provide guidance regarding the limitation on the effective rate of mortgage interest for purposes of mortgage revenue bonds issued by State and local governments. This document also contains a notice of public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by January 7, 2004. Outlines of topics to be discussed at the public hearing scheduled for January 28, 2004, at 10 a.m., must be received by January 7, 2004.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG-146692-03), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-146692-03), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit comments electronically to the IRS Internet site at www.irs.gov/regs. The public hearing will be held in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Michael P. Brewer, (202) 622-3980; concerning submissions of comments, the hearing, and requests to be placed on the building access list to attend the meeting, Treena V. Garrett, (202) 622-3401 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 103(a) of the Internal Revenue Code of 1986 (Code) provides that, generally, interest on any State or local bond is not included in gross income. However, this exclusion does not apply to any private activity bond that is not a qualified bond.

A. Mortgage Revenue Bonds

Section 141(e)(1) provides that a qualified mortgage bond or a qualified veterans' mortgage bond (together, mortgage revenue bonds) issued under section 143 may be a qualified bond.

Sections 143(a)(2)(A)(ii) and 143(b) provide, in part, that for an issue to be an issue of qualified mortgage bonds or qualified veterans' mortgage bonds, respectively, the issue must satisfy the requirements of section 143(g). Section 143(g)(1) provides that an issue will meet the requirements of section 143(g) if the issue satisfies the requirements of section 143(g)(2) and, in the case of an issue 95 percent or more of the net proceeds of which are to be used to provide residences for veterans, if the issue satisfies the requirements of section 143(g)(3).

Section 143(g)(2)(A) provides that an issue will meet the requirements of section 143(g)(2) only if the excess of (1) the effective interest rate on the mortgages provided under the issue, over (2) the yield on the issue, is not greater than 1.125 percentage points.

Section 143(g)(2)(B)(i) provides that in determining the effective rate of interest on any mortgage for purposes of section 143(g)(2), all fees, charges, and other amounts borne by the mortgagor that are attributable to the mortgage or the bond issue are taken into account.

Section 143(g)(2)(B)(ii) provides that, for purposes of determining the effective rate of mortgage interest, the following items (among others) shall be treated as borne by the mortgagor: (1) All points or similar charges paid by the seller of the property; and (2) the excess of the amounts received from any person other than the mortgagor by any person in connection with the acquisition of the mortgagor's interest in the property over the usual and

reasonable acquisition costs of a person acquiring like property when owner-financing is not provided through the use of mortgage revenue bonds.

Section 143(g)(2)(B)(iii) provides that, for purposes of determining the effective rate of mortgage interest, the following items shall not be taken into account: (1) Any expected rebate of arbitrage profits; and (2) any application fee, survey fee, credit report fee, insurance charge, or similar amount to the extent such amount does not exceed amounts charged in such area in cases when owner-financing is not provided through the use of mortgage revenue bonds. The exclusion for application fees, survey fees, credit report fees, insurance charges, or similar amounts does not apply to origination fees, points, or similar amounts.

In the case of an issue 95 percent or more of the net proceeds of which are to be used to provide residences for veterans, section 143(g)(3) provides that certain earnings on nonpurpose investments must either be paid or credited to mortgagors, or paid to the United States, in certain circumstances.

In the Tax Reform Act of 1986, Pub. L. No. 99-514 (the 1986 Act), Congress reorganized sections 103 and 103A of the Internal Revenue Code of 1954 (1954 Code) regarding tax-exempt bonds into sections 103 and 141 through 150 of the Code. Congress intended that to the extent not amended by the 1986 Act, all principles of pre-1986 Act law would continue to apply to the reorganized provisions. 2 H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II-686 (1986), 1986-3 (Vol. 4) C.B. 686.

Interpreting section 103A(i)(2)(B)(iii) of the 1954 Code, which is substantially identical to section 143(g)(2)(B)(iii) of the Code, §6a.103A-2(i)(2)(ii)(C) of the Temporary Income Tax Regulations provides the following: "For example, amounts paid for FHA, VA, or similar private mortgage insurance on an individual's mortgage need not be taken into account so long as such amounts do not exceed the amounts charged in the area with respect to a similar mortgage that is not financed with qualified mortgage bonds. Premiums charged for pool mortgage insurance will be considered amounts in excess of the usual and reasonable amounts charged for

insurance in cases where owner financing is not provided through the use of qualified mortgage bonds.” Pool mortgage insurance is not defined in the regulations.

B. *Qualified Guarantees*

Under §1.148–4(f), for purposes of computing yield on an issue, fees paid for a qualified guarantee for the issue are treated as additional interest on the issue. In general, a guarantee is a qualified guarantee if: (1) As of the date the guarantee is obtained, the issuer reasonably expects that the present value of the fees for the guarantee will be less than the present value of the expected interest savings on the issue as a result of the guarantee; (2) the arrangement creates a guarantee in substance; and (3) the fees for the guarantee do not exceed a reasonable, arm’s-length charge for the transfer of credit risk. The regulations provide that the guarantee of a loan of proceeds of an issue, as opposed to a guarantee of the issue, may constitute a qualified guarantee, but this rule does not apply to guarantees of mortgages financed with mortgage revenue bonds.

Explanation of Provisions

A. *Pool Mortgage Insurance*

Recently, questions have arisen regarding whether an issuer should be required to treat the portion of the interest payments on a pool of mortgages used to pay fees for a guarantee of a pass-through security backed by the pool of mortgages as an amount borne by the mortgagors that must be taken into account in determining the effective rate of interest on the mortgages for purposes of section 143(g). Taking the guarantee fees into account results in a higher effective rate of interest on the mortgages than if the fees were not taken into account.

The IRS and Treasury Department have determined that the guarantee fees should not be treated as amounts borne by the mortgagors that must be taken into account in determining the effective rate of interest on the mortgages for purposes of section 143(g). An issuer may achieve substantially the same result as not taking the guarantee fees into account in computing the effective rate of interest on the mortgages by substituting a qualified guarantee on the bonds for the guarantee of the pool

of mortgages. If an issuer does not take the mortgage guarantee fees into account in computing the effective rate of interest on the mortgages, the difference between the bond yield and the effective rate on the mortgages is reduced because the effective rate on the mortgages is reduced. A qualified guarantee of the bonds accomplishes the same result by increasing bond yield, rather than reducing the effective rate of interest on the mortgages. Issuers should not be required to change the form of their transactions in these circumstances.

Accordingly, to the extent the amounts charged for a guarantee of a pool of mortgages do not exceed amounts charged in the area in cases when owner-financing is not provided through the use of mortgage revenue bonds, the proposed regulations provide that such amounts are not treated as borne by the mortgagors and are not taken into account in determining the effective rate of interest on the mortgages for purposes of section 143(g).

B. *Proposed Regulations*

The proposed regulations create a new §1.143(g)–1. The proposed regulations provide that an issue satisfies the requirements of section 143(g) only if the issue meets the requirements of §1.143(g)–1(b) and, in the case of an issue 95 percent or more of the net proceeds of which are to be used to provide residences for veterans, the issue also meets the requirements of §1.143(g)–1(c). The requirements of section 143(g) and the proposed regulations are applicable in addition to the requirements of section 148 and §§1.148–0 through 1.148–11.

The proposed regulations provide that an issue shall be treated as meeting the requirements of §1.143(g)–1(b) only if the excess of (1) the effective rate of interest on the mortgages financed by the issue, over (2) the yield on the issue, is not greater over the term of the issue than 1.125 percentage points.

In determining the effective rate of interest on any mortgage, the proposed regulations provide that all fees, charges, and other amounts borne by the mortgagor that are attributable to the mortgage or to the bond issue are taken into account. Such amounts include points, commitment fees, origination fees, servicing fees, and prepayment penalties paid by the mortgagor.

The proposed regulations provide that items that are treated as borne by the mortgagor and are taken into account in calculating the effective rate of interest also include: (1) All points, commitment fees, origination fees, or similar charges borne by the seller of the property; and (2) the excess of any amounts received from any person other than the mortgagor by any person in connection with the acquisition of the mortgagor’s interest in the property over the usual and reasonable acquisition costs of a person acquiring like property where owner-financing is not provided through the use of mortgage revenue bonds.

The proposed regulations further provide that the following items are not treated as borne by the mortgagor and are not taken into account in calculating the effective rate of interest: (1) Any expected rebate of arbitrage profit; and (2) any application fee, survey fee, credit report fee, insurance charge or similar settlement or financing cost to the extent such amount does not exceed amounts charged in the area in cases where owner-financing is not provided through the use of mortgage revenue bonds.

With respect to insurance charges, the proposed regulations provide that amounts paid for Federal Housing Administration, Veterans’ Administration, or similar private mortgage insurance on an individual’s mortgage, or amounts paid for pool mortgage insurance on a pool of mortgages, are not taken into account so long as such amounts do not exceed the amounts charged in the area with respect to a similar mortgage, or pool of mortgages, that is not financed with mortgage revenue bonds. Moreover, for this purpose, amounts paid for pool mortgage insurance include amounts paid to an entity (for example, the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, or other mortgage insurer) to directly guarantee the pool of mortgages financed with the bonds, or to guarantee a pass-through security backed by the pool of mortgages financed with the bonds.

The proposed regulations do not provide guidance regarding all aspects of the application of section 143(g)(2). The proposed regulations provide that to the extent not inconsistent with the 1986 Act or subsequent law, the provisions of

§6a.103A–2(i)(2) (other than paragraphs (i)(2)(i) and (i)(2)(ii)(A) through (C)) apply to provide additional rules relating to compliance with the requirement that the effective rate of mortgage interest not exceed the bond yield by more than 1.125 percentage points.

The proposed regulations also do not provide guidance regarding the application of section 143(g)(3). The proposed regulations provide that to the extent not inconsistent with the 1986 Act or subsequent law, the provisions of §6a.103A–2(i)(4) apply to provide guidance regarding the application of section 143(g)(3).

Proposed Effective Dates

The proposed regulations will apply to bonds sold on or after the date of publication of final regulations in the **Federal Register**, that are subject to section 143. Issuers may also apply the proposed regulations in whole, but not in part, to bonds sold on or after November 5, 2003, and before the date of publication of final regulations in the **Federal Register**, that are subject to section 143. In addition, issuers may apply the proposed regulations in whole, but not in part, to any bonds that are sold before November 5, 2003, and subject to section 143. Finally, subject to the applicable effective dates for the corresponding statutory provisions, issuers may apply the proposed regulations in whole, but not in part, to any bonds that are subject to section 103A(i) of the 1954 Code.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments that are submitted timely (preferably a signed original and eight copies) to the IRS. The IRS and Treasury Department request comments on all aspects of the proposed regulations. Comments are also requested on the clarity of the proposed regulations 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 28, 2004, at 10 a.m. in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Because of access restrictions, visitors will not be admitted beyond the lobby 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 comments by January 7, 2004, and submit an outline of the topics to be discussed and the amount of time to be devoted to each topic by January 7, 2004.

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 Timothy L. Jones and Michael P. Brewer, Office of Associate Chief Counsel (Tax-Exempt and Government Entities), IRS, and Bruce M. Serchuk, Office of Tax Policy, Treasury Department. However, other personnel from the IRS and Treasury Department participated in their development.

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Adoption of 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 1.143(g)–1 is added to read as follows:

§1.143(g)–1 Requirements related to arbitrage.

(a) *In general.* Under section 143, for an issue to be an issue of qualified mortgage bonds or qualified veterans’ mortgage bonds (together, mortgage revenue bonds), the requirements of section 143(g) must be satisfied. An issue satisfies the requirements of section 143(g) only if such issue meets the requirements of paragraph (b) of this section and, in the case of an issue 95 percent or more of the net proceeds of which are to be used to provide residences for veterans, such issue also meets the requirements of paragraph (c) of this section. The requirements of section 143(g) and this section are applicable in addition to the requirements of section 148 and §§1.148–0 through 1.148–11.

(b) *Effective rate of mortgage interest not to exceed bond yield by more than 1.125 percentage points—(1) Maximum yield.* An issue shall be treated as meeting the requirements of this paragraph (b) only if the excess of the effective rate of interest on the mortgages financed by the issue, over the yield on the issue, is not greater over the term of the issue than 1.125 percentage points.

(2) *Effective rate of interest.* (i) In determining the effective rate of interest on any mortgage for purposes of this paragraph (b), there shall be taken into account all fees, charges, and other amounts borne by the mortgagor that are attributable to the mortgage or to the bond issue. Such amounts include points, commitment fees, origination fees, servicing fees, and prepayment penalties paid by the mortgagor.

(ii) Items that shall be treated as borne by the mortgagor and shall be taken into account in calculating the effective rate of interest also include:

(A) All points, commitment fees, origination fees, or similar charges borne by the seller of the property; and

(B) The excess of any amounts received from any person other than the mortgagor by any person in connection with the acquisition of the mortgagor's interest in the property over the usual and reasonable acquisition costs of a person acquiring like property when owner-financing is not provided through the use of mortgage revenue bonds.

(iii) The following items shall not be treated as borne by the mortgagor and shall not be taken into account in calculating the effective rate of interest:

(A) Any expected rebate of arbitrage profit under paragraph (c) of this section; and

(B) Any application fee, survey fee, credit report fee, insurance charge or similar settlement or financing cost to the extent such amount does not exceed amounts charged in the area in cases when owner-financing is not provided through the use of mortgage revenue bonds. For example, amounts paid for Federal Housing Administration, Veterans' Administration, or similar private mortgage insurance on an individual's mortgage, or amounts paid for pool mortgage insurance on a pool of mortgages, are not taken into account so long as such amounts do not exceed the amounts charged in the area with respect to a similar mortgage, or pool of mortgages, that is not financed with mortgage revenue bonds. For this purpose, amounts paid for pool mortgage insurance include amounts paid to an entity (for example, the Government National Mortgage Association, the Federal National Mortgage Association (FNMA), the Federal Home Loan Mortgage Corporation, or other mortgage insurer) to directly guarantee the pool of mortgages financed with the bonds, or to guarantee a pass-through security backed by the pool of mortgages financed with the bonds.

(C) The following example illustrates the provisions of this paragraph (b)(2)(iii):

Example. Housing Authority X issues bonds intended to be qualified mortgage bonds under section 143(a). At the time the bonds are issued, X enters into an agreement with a group of mortgage lending institutions (lenders) under which the lenders agree to originate and service mortgages that meet certain specified requirements. After originating a specified amount of mortgages, each lender issues a "pass-through security" (each, a PTS) backed by the mortgages and sells the PTS to X. Under the terms of the PTS, the lender pays X an amount equal to the regular monthly payments on the mortgages (less certain fees), whether or not received by the lender (plus any prepayments and liquidation proceeds in the event of a foreclosure or other disposition of any mortgages). FNMA guarantees the timely payment of principal and interest on each PTS. From the payments received from each mortgagor, the lender pays a fee to FNMA for its guarantee of the PTS. The amounts paid to FNMA do not exceed the amounts charged in the area with respect to a similar pool of mortgages that is not financed with mortgage revenue bonds. Under this paragraph (b)(2)(iii), the fees for the guarantee provided by FNMA are an insurance charge because the guarantee is pool mortgage insurance. Because the amounts charged for the guarantee do not exceed the amounts charged in the area with respect to a similar pool of mortgages that is not financed with mortgage revenue bonds, the amounts charged for the guarantee are not taken into account in computing the effective rate of interest on the mortgages financed with X's bonds.

(3) *Additional rules.* To the extent not inconsistent with the Tax Reform Act of 1986, Public Law 99-514 (the 1986 Act), or subsequent law, §6a.103A-2(i)(2) (other than paragraphs (i)(2)(i) and (i)(2)(ii)(A) through (C)) of this chapter applies to provide additional rules relating to compliance with the requirement that the effective rate of mortgage interest not exceed the bond yield by more than 1.125 percentage points.

(c) *Arbitrage and investment gains to be used to reduce costs of owner-financing.* As provided in section 143(g)(3), certain earnings on nonpurpose investments must either be paid or credited to mortgagors, or paid to the United States, in certain circumstances. To the extent not inconsistent with the 1986 Act or subsequent

law, §6a.103A-2(i)(4) of this chapter applies to provide guidance relating to compliance with this requirement.

(d) *Effective Dates—(1) In general.* Except as otherwise provided in this section, §1.143(g)-1 applies to bonds sold on or after the date of publication of final regulations in the **Federal Register**, that are subject to section 143. Issuers may apply §1.143(g)-1, in whole, but not in part, to bonds sold on or after November 5, 2003, and before the date of publication of final regulations in the **Federal Register**, that are subject to section 143.

(2) *Permissive retroactive application in whole.* Except as provided in paragraph (d)(4) of this section, an issuer may apply §1.143(g)-1, in whole, but not in part, to any bonds that are sold before November 5, 2003, and subject to section 143.

(3) *Bonds subject to the Internal Revenue Code of 1954.* Except as provided in paragraph (d)(4) of this section, and subject to the applicable effective dates for the corresponding statutory provisions, an issuer may apply §1.143(g)-1, in whole, but not in part, to any bonds that are subject to section 103A(i) of the Internal Revenue Code of 1954.

(4) *Special rule for pre-July 1, 1993, bonds.* To the extent that an issuer applies this section to any bonds pursuant to paragraph (d)(2) or (d)(3) of this section, §6a.103A-2(i)(3) of this chapter also applies to the bonds if the bonds were issued before July 1, 1993.

Mark E. Matthews,
*Deputy Commissioner for Services
and Enforcement.*

(Filed by the Office of the Federal Register on November 4, 2003, 8:45 a.m., and published in the issue of the Federal Register for November 5, 2003, 68 F.R. 62549)