

Application of Circular 230 to State or Local Bond Opinions

Notice 2005-47

The purpose of this notice is to provide interim guidance and information concerning State or local bond opinions under Treasury Department Circular No. 230, 31 C.F.R. part 10 (Circular 230). Specifically, this notice provides (1) interim guidance relating to the definition of *State or local bond opinion* in section 10.35(b)(9) of Circular 230 and (2) information on changes to the requirements that are under consideration for State or local bond opinions.

BACKGROUND

On December 20, 2004, the Treasury Department and the IRS published in the Federal Register final regulations setting standards for practice before the IRS relating to written advice provided by tax practitioners (the Final Covered Opinion Regulations). The Treasury Department and the IRS simultaneously issued a notice of proposed rulemaking (the Proposed Regulations) proposing standards for practice before the IRS relating to State or local bond opinions. Section 10.35 of the Final Covered Opinion Regulations is effective for written advice rendered after June 20, 2005, and section 10.39 of the Proposed Regulations is proposed to be effective no sooner than 120 days after final regulations are published in the Federal Register.

Section 10.35 sets forth the requirements applicable to covered opinions. A covered opinion is written advice (including electronic communications) that concerns one or more Federal tax issues arising from: (1) a listed transaction; (2) any plan or arrangement, the principal purpose of which is the avoidance or evasion of any tax; or (3) any plan or arrangement, a significant purpose of which is the avoidance or evasion of tax if the written advice (A) is a reliance opinion, (B) is a marketed opinion, (C) is subject to conditions of confidentiality, or (D) is subject to contractual protection. Written advice regarding a plan or arrangement having a significant purpose of tax avoidance or evasion is excluded from the definition of covered opinion if the written advice (1) concerns the qualification of a qualified

plan, (2) is a State or local bond opinion, or (3) is included in documents required to be filed with the Securities and Exchange Commission. The Final Covered Opinion Regulations also adopt an exclusion for certain preliminary advice and allow practitioners to provide limited scope opinions in some circumstances.

A State or local bond opinion is not subject to the requirements of section 10.35, but will be subject to proposed section 10.39 when it is finalized. Under the Final Covered Opinion Regulations, a *State or local bond opinion* is defined as written advice with respect to a Federal tax issue included in any materials delivered to a purchaser of a State or local bond in connection with the issuance of the bond in a public or private offering, including an official statement (if one is prepared), that concerns only the excludability of interest on a State or local bond from gross income under section 103 of the Internal Revenue Code, the application of section 55 of the Internal Revenue Code to a State or local bond, the status of a State or local bond as a qualified tax-exempt obligation under section 265(b)(3) of the Internal Revenue Code, the status of a State or local bond as a qualified zone academy bond under section 1397E of the Internal Revenue Code, or any combination of the above. Under the Final Covered Opinion Regulations, written advice with respect to a Federal tax issue involving a State or local bond that does not meet this definition is subject generally to the standards in section 10.35. Written advice with respect to one of the four enumerated issues involving a State or local bond that is delivered other than at the time of issuance is subject generally to the standards in section 10.35.

INTERIM GUIDANCE

Commentators have requested clarification regarding the scope of the definition of *State or local bond opinion* and the treatment of opinions relating to State or local bonds that may be subject to the standards in section 10.35. In response to these comments, the Treasury Department and the IRS have determined that the definition of *State or local bond opinion* in section 10.35 should be amended. Accordingly, the IRS will apply the following interim definition of *State or local bond opinion*

under section 10.35(b)(9) until the Treasury Department and the IRS amend the regulations:

§ 10.35 Requirements for covered opinions.

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(b) * * *

(9) *State or local bond opinion.* A *State or local bond opinion* is written advice (including electronic communications) that concerns —

(i) The excludability of interest on a State or local bond from gross income under section 103 of the Internal Revenue Code;

(ii) The status of a State or local bond as a qualified zone academy bond under section 1397E of the Internal Revenue Code;

(iii) One or more other Federal tax issues reasonably related and ancillary to advice described in paragraph (b)(9)(i) or (ii) of this section. Such issues include, but are not limited to—

(A) The application of section 55 of the Internal Revenue Code to a State or local bond;

(B) Whether a State or local bond has been reissued for Federal tax purposes;

(C) The status of a State or local bond as a qualified tax-exempt obligation under section 265(b)(3) of the Internal Revenue Code;

(D) The treatment of original issue discount or premium on a State or local bond under the Internal Revenue Code; and

(E) Whether the organization that is borrowing the proceeds of the State or local bond is described in section 501(c)(3) of the Internal Revenue Code; or

(iv) Any combination of the above.

EFFECTIVE DATE FOR INTERIM GUIDANCE

This interim definition of *State or local bond opinion* is applicable to opinions rendered after June 20, 2005. Thus, when the Final Covered Opinion Regulations go into effect, the requirements in section 10.35 for covered opinions will not apply to an opinion that meets the interim definition of *State or local bond opinion* set forth in this notice. This relief applies regardless of whether the amendment to section 10.35 has been published prior to June 20, 2005.

CHANGES TO PROPOSED SECTION 10.39 UNDER CONSIDERATION

The Treasury Department and the IRS also are considering other modifications to the requirements for State or local bond opinions in the Proposed Regulations, including, but not limited to: adding a provision that would permit a practitioner under certain circumstances to render an opinion that addresses less than all the significant Federal tax issues raised by a State or local bond issue; and permitting exclusions from the requirements of section 10.39 for opinions that would otherwise be State or local bond opinions if the opinion is a preliminary, post-filing, or negative opinion, or is in-house counsel advice, similar to the exclusions for these opinions from the requirements for covered opinions in section 10.35.

DRAFTING INFORMATION

The principal authors of this notice are Heather L. Dostaler of the Office of Associate Chief Counsel (Procedure & Administration) and Vicki Tsilas of the Office of Associate Chief Counsel (Tax Exempt/Government Entities). For further information regarding this notice, contact Heather L. Dostaler at (202) 622-4940 or Vicki Tsilas at (202) 622-3980 (not toll-free numbers).