Bond Case Briefs

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New “Remedial Actions” for BABs and other Direct Pay Bonds and Long-term Leases of Bond-financed Property.

The IRS has given us new “remedial actions” for issuers of build America bonds and other direct pay bonds and for long-term leases of bond-financed property. These new rules are in Revenue Procedure 2018-26, and you can apply them immediately to cure the violations that the Revenue Procedure covers.

The beauty of the remedial action rules is that remedial actions are largely self-effectuating. Contrast them with the Voluntary Closing Agreement Program, which requires an application, IRS approval, negotiations, a closing agreement, etc. etc. Under the remedial action rules, you take the action described to cure the violation described, and you’re done, and you don’t have to ask the IRS’s permission.

BABs and Other Direct Pay Bonds. Before this Revenue Procedure, there were no remedial actions that applied to BABs and other tax-credit and direct pay bonds. The only means for solving a problem was to go through VCAP. This Revenue Procedure provides new options.

Long-term Leases. In addition, for issuers of all bonds, generally the only remedial action available for leases of bond-financed property that caused the bonds to violate the private business limits was to redeem an amount of bonds corresponding to the amount of leased property. If you couldn’t currently redeem the bonds, you had to fund a defeasance escrow with cash until the redemption date. In recent years, that has meant earning a pitifully low return. To add insult to injury, the lease does not generate any “disposition proceeds” that could be used to help fund the defeasance escrow, so issuers had to come up with their own funds, which couldn’t be generated by issuing additional tax-exempt bonds. In contrast, if the issuer sold the bond-financed property, the issuer would receive disposition proceeds, which it could instead redeploy for qualifying assets to remedy the excess private business use. For certain long-term leases, the new Revenue Procedure provides some limited relief (though it does not directly solve the problem of having cash up front) to this situation by allowing issuers to calculate an amount equal to the present value of the lease payments, and to redeploy that amount on qualifying uses.

As always, dangers, opportunities, and questions lurk in between the lines. We’ll have much more to say about those things in future posts.

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By Johnny Hutchinson on April 12, 2018

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