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Proposed Bonds Arbitrage Regs Clarify Definition of "Investment-Type Property"

The U.S. Treasury Department and IRS today released for publication in the Federal Register a notice of proposed rulemaking (REG-106977-18) concerning the arbitrage investment restrictions under section 148 that apply to tax-exempt bonds and other tax-advantaged bonds issued by state and local governments.

According to the preamble, the proposed regulations aim to clarify existing regulations regarding the definition of "investment-type property" covered by arbitrage restrictions by expressly providing an exception for investments in capital projects that are used in furtherance of the public purposes of the bonds.

The proposed regulations would affect state and local governmental issuers of these bonds and potential investors in capital projects financed with these bonds.

Comments and requests for a public hearing must be received by a date that is 90 days after the date of publication in the Federal Register (scheduled for June 12, 2018).

Summary
Existing regulations define a catch-all category of "investment-type property" to include any property (other than securities, obligations, annuity contracts, and covered residential real property for family units) held "principally as a passive vehicle for the production of income" including any benefit based on the time value of money.

To clarify the scope of the definition of investment-type property to be consistent with congressional intent, the proposed regulations would provide an express exception to the definition of investment-type property for capital projects that further the public purposes for which the tax-exempt bonds were issued. The preamble offers as an example, investment-type property does not include a courthouse financed with governmental bonds or an eligible exempt facility under section 142 such as a public road financed with private activity bonds.

The regulations are proposed to apply to bonds sold on or after the date that is 90 days after the date that final regulations adopting these rules are published in the Federal Register. The proposed regulations, nevertheless, may be applied by bond issuers for bonds sold before the effective date of such final regulations.

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