

# Bond Case Briefs

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## IRS Issues Procedures for Appealing Adverse Bond Determinations.

### **SUMMARY BY TAX ANALYSTS**

The IRS has issued procedures ([Rev. Proc. 2021-10](#)) for an issuer of tax-advantaged bonds to request an administrative appeal to the Independent Office of Appeals of a proposed adverse determination made by the Office of Tax Exempt Bonds (TEB Examination Office) regarding issues within the scope of the guidance.

The IRS is required to allow bond issuers to contest a proposed adverse determination to a senior officer in Appeals before the agency proceeds to tax bondholders. [Rev. Proc. 2006-40](#) sets forth procedures for an issuer of bonds to appeal a proposed adverse determination regarding the qualification of an issue of bonds as tax-exempt bonds or a claim for recovery of asserted overpayments of arbitrage rebate under [section 148](#). However, the procedures in Rev. Proc. 2006-40 do not apply to an appeal of a proposed adverse determination regarding the qualification of other types of tax-advantaged bonds, such as tax credit bonds. Rev. Proc. 2021-10 describes the circumstances and procedures under which an issuer may request that specified adverse determinations by the TEB Examination Office be reviewed by Appeals.

An issuer of bonds is eligible to request an appeal under Rev. Proc. 2021-10 after receiving from the TEB Examination Office (1) a proposed adverse determination that the issuer fails to qualify for the exclusion of the interest on the bonds from the gross income of the bondholders under [section 103](#); (2) a proposed adverse determination that the issuer fails to qualify for the tax credits for the bondholders or direct payments to the issuer regarding the bonds under provisions of the tax code applicable to tax-advantaged bonds; or (3) a proposed adverse determination that denies a claim for recovery of an asserted overpayment of arbitrage rebate under section 148 regarding tax-exempt bonds or under section 148 as modified by relevant provisions of the tax code regarding other tax-advantaged bonds.

A bond issuer's appeal request must be submitted in writing to the TEB Examination Office within 30 days of the date of the proposed adverse bond determination or arbitrage rebate claim denial and must include the information specified in Rev. Proc. 2021-10. The TEB Examination Office may extend the 30-day period if the issuer submits a written request justifying the extension before the 30-day period expires. Upon receipt of an appeal request, the TEB Examination Office will review the request to determine whether it meets the requirements of the revenue procedure. If it does not, the issuer will have 30 days from the date of the notification to correct the deficiencies. If the request meets the requirements and contains no new information or analysis of the taxpayer's position, the TEB Examination Office will transfer the case file to Appeals.

If an issuer does not submit a written appeal request in the manner and within the time periods described in the revenue procedure, the proposed adverse bond determination or arbitrage rebate claim denial will become final. If a proposed adverse bond determination becomes final, then, depending on the type of bond that was issued (1) the interest on those bonds will no longer be

treated as excludable from gross income under section 103; (2) holders will not be allowed any credit against income tax for interest on those bonds; or (3) issuers will not be allowed a direct payment. The IRS may also initiate procedures to impose tax on interest on the bonds, disallow the tax credits, or if it has not already done so, disallow direct payments regarding the interest on the bonds. Moreover, a notice of deficiency may be issued to recover overpayments of direct payments.

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## **FULL TEXT PUBLISHED BY TAX ANALYSTS**

### **Modifies Rev. Proc. 2006-4**

#### **SECTION 1. PURPOSE**

This revenue procedure provides procedures for an issuer of tax-advantaged bonds (as defined in [§ 1.150-1\(b\)](#) of the Income Tax Regulations (Regulations)) to request an administrative appeal to the Independent Office of Appeals (Appeals) within the Internal Revenue Service (IRS) of a proposed adverse determination made by the office that is responsible for examinations of tax-advantaged bonds, presently the Office of Tax Exempt Bonds (and including any successor IRS office performing such examinations, the TEB Examination Office), with respect to issues within the scope of this revenue procedure.

#### **SECTION 2. BACKGROUND**

**.01 Appeals jurisdiction.** Section 3105 of the Internal Revenue Service Restructuring and Reform Act of 1998, P.L. 105-206, 112 Stat. 685 (1998 IRS Restructuring Act), directed the IRS to modify its administrative procedures to allow issuers an expeditious appeal of a proposed adverse determination by the IRS with respect to a bond issue to a senior officer in Appeals before the IRS proceeds to tax bondholders.

**.02 Bond appeals guidance.** Rev. Proc. 2006-40, 2006-2 C.B. 691, sets forth procedures for an issuer of bonds to appeal a proposed adverse determination regarding the qualification of an issue of bonds as tax-exempt bonds (as defined in [§ 150\(a\)\(6\)](#) of the Internal Revenue Code (Code)) or a claim for recovery of asserted overpayments of arbitrage rebate under § 148. However, the procedures in Rev. Proc. 2006-40 do not apply to an appeal of a proposed adverse determination regarding the qualification of other types of tax-advantaged bonds, such as tax-credit bonds.

**.03 Other applicable appeals procedures.** Procedures under [§ 601.106](#) et seq. of the Statement of Procedural Rules, including those governing submissions and taxpayer conferences, apply to appeals regarding bond issues, bondholders, and arbitrage rebate. A bondholder's appeal rights under § 601.106 of the Statement of Procedural Rules are independent and separate from an issuer's appeal rights under this revenue procedure. [Section 1.148-3\(i\)\(3\)\(iii\)](#) of the Regulations also applies to appeals concerning an Arbitrage Rebate Claim Denial (as defined in section 4.02 of this revenue procedure).

**.04 Issuers as taxpayers.** To conduct an examination (including any related administrative appeal) of a tax-advantaged bond expeditiously, the IRS generally treats an issuer as the taxpayer for the bond issue under examination.

**.05 Conduit borrowers as taxpayers.** In appropriate circumstances, Appeals may consider, concurrently with an issuer's appeal, issues relating to those raised in a Proposed Adverse Bond Determination (as defined in section 4.02 of this revenue procedure) that affect the tax liability (other than any potential penalties) of the borrower of bond proceeds of a conduit financing issue.

Appeals will consider an issue relating to the borrower's tax liability only if the borrower is under examination with respect to the issue, the resolution of that issue is affected by the Proposed Adverse Bond Determination (for example, issues under [§ 150\(b\)](#) or [168\(g\)](#)), and the borrower agrees to resolve the issue concurrently with the issuer's appeal under this revenue procedure. See [§ 601.106](#) of the Statement of Procedural Rules for procedures applicable to the borrower.

**.06 Technical advice.** An issuer may submit a request to the TEB Examination Office or Appeals for referral of a tax matter to the IRS Office of Chief Counsel for technical advice while a tax-advantaged bond issue is under the jurisdiction of the TEB Examination Office or Appeals, respectively. See [Rev. Proc. 2021-2](#), 2021-01 I.R.B. 116, or annual successor revenue procedure.

**.07 Alternative dispute resolution programs.** Alternative dispute resolution methods permit Appeals officers to mediate, facilitate, or propose settlements in the resolution of matters identified during the course of an examination prior to the issuance of a Proposed Adverse Bond Determination or an Arbitrage Rebate Claim Denial. Alternative dispute resolution methods within Appeals applicable to bonds currently include TE/GE Fast Track Settlement (FTS) ([Announcement 2012-34](#), 2012-36 I.R.B. 334), Post Appeals Mediation ([Rev. Proc. 2014-63](#), 2014-53 I.R.B. 1014), and Early Referral ([Rev. Proc. 99-28](#), 1999-2 C.B. 109).

### SECTION 3. SCOPE

This revenue procedure applies to Proposed Adverse Bond Determinations and Arbitrage Rebate Claim Denials as defined in section 4.02 of this revenue procedure.

### SECTION 4. INITIATING THE APPEAL PROCESS

**.01 In general.** Section 4.02 through 4.06 of this revenue procedure set forth the circumstances and procedures under which an issuer may request that certain adverse determinations by the TEB Examination Office be reviewed by Appeals.

**.02 Availability of appeal request to issuer.** An issuer is eligible to request an appeal under this revenue procedure upon the receipt from the TEB Examination Office of a: (1) proposed adverse determination that an issue of bonds fails to qualify for the exclusion of the interest on the bonds from the gross income of the bondholders under [§ 103](#) (a Proposed Adverse Bond Determination); (2) proposed adverse determination that an issue of bonds fails to qualify for the tax credits for the bondholders or direct payments to the issuer with respect to the bonds under provisions of the Code applicable to tax-advantaged bonds, such as former §§ [54](#), [54A](#), [54AA](#), [1397E](#), and [6431](#) (also a Proposed Adverse Bond Determination); or (3) proposed adverse determination that denies a claim for recovery of an asserted overpayment of arbitrage rebate under § 148 with respect to tax-exempt bonds or under [§ 148](#) as modified by relevant provisions of the Code with respect to other tax-advantaged bonds (an Arbitrage Rebate Claim Denial). Except as provided in alternate dispute resolution programs, including any applicable programs referenced in section 2.07 of this revenue procedure or in any subsequently issued published guidance, appeal rights are not available to an issuer prior to the receipt of a Proposed Adverse Bond Determination or an Arbitrage Rebate Claim Denial.

**.03 Requesting an appeal.** An issuer's appeal request must be submitted in writing to the TEB Examination Office within 30 days of the date of the Proposed Adverse Bond Determination or Arbitrage Rebate Claim Denial. The appeal request must include the information listed in section 4.04 of this revenue procedure. The TEB Examination Office may extend this 30-day submission period based on an issuer's written request to the TEB Examination Office within the 30-day submission period that justifies such extension.

**.04 Required information and signature.** An appeal request made under this revenue procedure must include the information listed in this section 4.04.

(1) A detailed written response to the Proposed Adverse Bond Determination or Arbitrage Rebate Claim Denial, including a detailed explanation of the issuer's position regarding each issue in dispute.

(2) A declaration in the following form: "Under penalties of perjury, I declare that I have examined this request for an appeal, including accompanying documents, and that, to the best of my knowledge and belief, the facts presented are true, correct, and complete."

(3) The issuer or the issuer's authorized representative must sign an appeal request. An issuer may designate an authorized representative by submitting a duly executed Form 2848, Power of Attorney and Declaration of Representative, when making an appeal request under this revenue procedure.

**.05 Response to an appeal request.** Upon receipt of an appeal request, the TEB Examination Office will review the request to determine whether it meets the requirements of this revenue procedure. If the request does not meet such requirements, the TEB Examination Office will notify the issuer in writing of the request's deficiencies and the issuer will have 30 days from the date of the notification to correct the deficiencies. If the request meets the requirements of this revenue procedure and contains no new information or analysis of the taxpayer's position, the TEB Examination Office will transfer the case file to Appeals. If the request meets the requirements of this revenue procedure and contains new information or analysis of the taxpayer's position, the TEB Examination Office will notify the issuer that such new information or analysis may change the case's outcome and requires the TEB Examination Office's further consideration prior to transfer of the case file to Appeals.

**.06 Failure to make appeal request.** If an issuer does not submit a written appeal request in the manner and within the time periods described in section 4.03 through 4.05 of this revenue procedure, the Proposed Adverse Bond Determination or Arbitrage Rebate Claim Denial will become final.

**.07 Jurisdiction over tax matters.** Once the TEB Examination Office sends the case file to Appeals, jurisdiction over the issues raised in the Proposed Adverse Bond Determination or Arbitrage Rebate Claim Denial will transfer from the TEB Examination Office to Appeals. Except for matters considered by Appeals under section 2.05 of this revenue procedure (relating to the tax liability of the conduit borrower of the bond proceeds), the TEB Examination Office will retain jurisdiction over all tax matters related to the bond issue under examination that are not specifically raised as an issue in the Proposed Adverse Bond Determination or Arbitrage Rebate Claim Denial.

**.08 Notification to issuer.** Simultaneously with the transfer of the case file to Appeals, the TEB Examination Office will furnish to the issuer a copy of the TEB Examination Office's transmittal letter and response, if any, to the issuer's positions stated in its appeal request.

## **SECTION 5. ARBITRAGE REBATE CLAIM DENIAL FOR TIMELINES**

When an appeal of a claim described in either [§ 1.148-3\(i\)\(3\)\(iii\)\(A\)](#) or (B) of the Regulations (regarding timeliness) is determined in favor of the issuer, Appeals will release jurisdiction and return the case to the TEB Examination Office for further consideration of the substance of the claim.

## **SECTION 6. EFFECT OF CERTAIN FINAL ADVERSE BOND DETERMINATIONS OR FINAL**

## **ARBITRAGE REBATE CLAIM DENIALS**

**.01 Final Adverse Bond Determination.** If a Proposed Adverse Bond Determination becomes final under section 4.06 of this revenue procedure or because Appeals sustains the Proposed Adverse Bond Determination without entering into a closing agreement with the issuer, then, depending on the type of bond that was issued: (i) the interest on those bonds will no longer be treated as excludable from gross income under § 103 of the Code, (ii) holders will not be allowed any credit against income tax with respect to interest on those bonds, or (iii) issuers will not be allowed a direct payment. In addition, IRS functions other than Appeals may initiate procedures with respect to open years to, respectively, (i) impose tax on interest on the bonds, (ii) disallow the tax credits, or (iii) if it has not already done so, disallow direct payments with respect to the interest on the bonds. Further, a notice of deficiency may be issued to recover overpayments of direct payments.

**.02 Final Arbitrage Rebate Claim Denial.** If an Arbitrage Rebate Claim Denial becomes final under section 4.06 of this revenue procedure or Appeals sustains the Arbitrage Rebate Claim Denial in full, the IRS will notify the issuer of the final determination and the issuer's right to bring suit for recovery.

### **SECTION 7. NO USER FEE**

No user fee applies to either a request for an appeal pursuant to this revenue procedure or a closing agreement resulting from the appeal.

### **SECTION 8. EFFECT ON OTHER DOCUMENTS**

Rev. Proc. 2006-40 is modified and superseded.

### **SECTION 9. EFFECTIVE DATE**

This revenue procedure applies to Proposed Adverse Bond Determinations or Arbitrage Rebate Claim Denials issued by the TEB Examination Office on or after February 4, 2021.

### **SECTION 10. DRAFTING INFORMATION**

The principal authors of this revenue procedure are B. Darrell Smelcer, Office of Tax-Exempt Bonds (Technical), and Lewis Bell, Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue procedure, contact Mr. Smelcer at 470-639-2425 (not a toll-free call).

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