

nonqualified bonds of the issue. However, a defeasance is not a permitted remedial action if it does not satisfy the 10½ year limitation on defeasances.

For purposes of § 1.142–2, the nonqualified bonds are a portion of the outstanding bonds in an amount that, if the remaining bonds were issued on the date on which the failure to properly use the proceeds occurs, at least 95 percent of the net proceeds of the remaining bonds would be used to provide an exempt facility. If no proceeds have been spent to provide an exempt facility, all of the outstanding bonds are nonqualified bonds. The nonqualified bonds must be determined on a pro rata basis, except that an issuer may treat bonds with longer maturities (determined on a bond-by-bond basis) as the nonqualified bonds.

In general, § 1.141–16 provides that § 1.142–2 applies to bonds issued on or after May 16, 1997. However, § 1.142–2, together with certain other regulations, may be applied in whole, but not in part, to bonds outstanding on May 16, 1997.

#### D. Prior Remedial Action Rules

Prior to the release of §§ 1.141–12 and 1.142–2, Rev. Proc. 93–17 (1993–1 C.B. 507), provided remedial action rules. Rev. Proc. 93–17 does not contain the 10½ year limitation on defeasances. The preamble to the regulations that include §§ 1.141–12 and 1.142–2 provides that for actions that occur on or after May 16, 1997, Rev. Proc. 93–17 is obsolete.

#### Explanation of Provisions

Comments have been received suggesting that the definition of the amount of nonqualified bonds contained in § 1.141–12 be limited to the excess of the actual amount of the private business use or private loans over the permitted amount of private business use or private loans under section 141. The comments note that this approach is consistent with the statutory language of section 141, which permits certain *de minimis* amounts of private business use and private loans without jeopardizing the tax-exempt status of bonds, and with the definition of the amount of nonqualified bonds contained in § 1.142–2.

The comments also suggest simplifying the rules for determining the bonds to be treated as the nonqualified bonds. The comments recommend granting an issuer greater discretion in its selection of bonds, to the extent that the issuer, through such selection, does not effectively extend the remaining weighted average

maturity of the bond issue with respect to which the deliberate action occurred.

Finally, the comments request clarification of the remedial action rules applicable to bonds issued prior to May 16, 1997. In particular, the comments request that issuers be permitted to apply §§ 1.141–12 and 1.142–2 to bonds issued before May 16, 1997, without regard to the 10½ year limitation on defeasances contained in those regulations. The comments indicate that it is unfair to require issuers to comply with the 10½ year limitation for bonds issued prior to the release of §§ 1.141–12 and 1.142–2 because issuers could not have known about the limitation when structuring those bonds.

The proposed regulations generally adopt these suggestions.

First, the proposed regulations reduce the amount of outstanding bonds that are nonqualified bonds under § 1.141–12. The proposed regulations provide that the nonqualified bonds are a portion of the outstanding bonds in an amount that, if the remaining bonds were issued on the date on which the deliberate action occurs, the remaining bonds would not satisfy the private business use test or private loan financing test, as applicable. For this purpose, the amount of private business use is the greatest percentage of private business use in any one-year period commencing with the deliberate action.

Second, the proposed regulations amend the provisions of § 1.141–12 relating to redemption or defeasance and the provisions of § 1.142–2 relating to allocations of nonqualified bonds. Under the proposed regulations, allocations of nonqualified bonds must be made on a pro rata basis, except that an issuer may treat any bonds of an issue as the nonqualified bonds so long as (i) the remaining weighted average maturity of the issue, determined as of the date on which the nonqualified bonds are redeemed or defeased (determination date), and excluding from the determination the nonqualified bonds redeemed or defeased by the issuer, is not greater than (ii) the remaining weighted average maturity of the issue, determined as of the determination date, but without regard to the redemption or defeasance of any bonds (including the nonqualified bonds) occurring on the determination date.

Finally, the proposed regulations amend §§ 1.141–15(e) and 1.141–16(c) to provide that for bonds issued before May 16, 1997, issuers may apply §§ 1.141–12 and 1.142–2 without regard to the 10½ year limitation on defeasances contained in those regulations.

#### Proposed Effective Dates

The proposed regulations that amend §§ 1.141–12 and 1.142–2 will apply to deliberate actions or failures to properly use proceeds, as applicable, that occur on or after the date of publication of final regulations in the **Federal Register**, to the extent § 1.141–12 or 1.142–2, as applicable, applies to the bonds. The proposed regulations that amend §§ 1.141–15(e) and 1.141–16(c) will apply to bonds issued before May 16, 1997, that are subject to §§ 1.141–12 or 1.142–2, as applicable, for purposes of deliberate actions or failures to properly use proceeds, as applicable, that occur on or after April 21, 2003. Issuers may apply the proposed regulations to deliberate actions or failures to properly use proceeds, as applicable, that occur on or after April 21, 2003, and before the date of publication of final regulations in the **Federal Register**, to the extent (1) § 1.141–12 or § 1.142–2, as applicable, applies to the bonds, and (2) with respect to the amendments to § 1.141–15(e) and 1.141–16(c), the bonds were issued before May 16, 1997.

#### 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 request comments 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 November 4, 2003, at 10 a.m. in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Because of access