

rebate or yield characteristics, or (2) would normally be bid together as a single investment unless there was a good business reason for the separation.

The final regulations retain the per-issue safe harbor and increase the \$75,000 amount to \$85,000. To maintain simplicity and certainty, the final regulations do not adopt the suggestion to replace the per-issue safe harbor with an anti-abuse rule. The IRS and Treasury Department have concluded that the per-issue safe harbor in the final regulations limits artificial separation of investments without requiring issuers to pay less than fair market value for brokers' fees.

D. Fees in Excess of Safe Harbor

Some commentators requested guidance on the factors for determining whether a fee in excess of the safe harbor is reasonable. Suggested factors included the duration of the contract, the complexity of its terms, the creditworthiness of the issuer, the availability of providers to deliver the contract, the presence of unusual features in the issue or the contract, custom in the industry, and the level of risk to the broker. The IRS and Treasury Department have considered the suggested factors and have concluded that they do not represent administrable standards for determining whether a particular fee is reasonable. Therefore, the final regulations do not specify factors for determining the reasonableness of fees in excess of the safe harbor. Under the final regulations, the determination of whether a fee is reasonable is made based on all the facts and circumstances, including whether the fee satisfies the comparability standard in § 1.148-5(e)(2)(i).

Some commentators suggested that the portion of a fee that is within the safe harbor should be a qualified administrative cost, even if the total fee exceeds the safe harbor. The final regulations adopt this suggestion.

E. Computational Base for Guaranteed Investment Contracts

Commentators suggested that the computational base for a guaranteed investment contract should be determined as of the date the contract is acquired, rather than the issue date, so that the safe harbor may be applied to guaranteed investment contracts that are not anticipated on the issue date. The final regulations adopt this suggestion.

F. Cost-of-Living Adjustments

Commentators requested that the final regulations provide for periodic adjustments to the dollar limits in the safe harbor to reflect inflation. The final

regulations provide a cost-of-living adjustment for both the per-investment safe harbor and the per-issue safe harbor. The adjusted safe harbor dollar amounts will be published in the annual revenue procedure that sets forth inflation-adjusted items.

G. Interpretative Rule

One commentator questioned whether the proposed regulations should have been classified as a legislative rule. The IRS and Treasury Department have reviewed the applicable authorities and have determined that the regulations are properly classified as an interpretative rule.

Effective Dates

The final regulations apply to bonds sold on or after February 9, 2004. In the case of bonds sold before February 9, 2004, that are subject to § 1.148-5 (pre-effective date bonds), issuers may apply the final regulations, in whole but not in part, with respect to transactions entered into on or after December 11, 2003. If an issuer applies the final regulations to pre-effective date bonds, the per-issue safe harbor is applied by taking into account all brokers' commissions or similar fees with respect to guaranteed investment contracts and investments for yield restricted defeasance escrows that the issuer treats as qualified administrative costs for the issue, including all such commissions or fees paid before February 9, 2004. For purposes of §§ 1.148-5(e)(2)(iii)(B)(3) and 1.148-5(e)(2)(iii)(B)(6) of the final regulations (relating to cost-of-living adjustments), transactions entered into before 2003 are treated as entered into in 2003.

Special Analyses

It has been determined that this Treasury decision 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 rule does not impose a collection of information on small entities, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply.

Drafting Information

The principal authors of these final regulations are Rose M. Weber and Rebecca L. Harrigal, Office of Chief Counsel, IRS (TE/GE), and Stephen J. Watson, Office of Tax Policy, Treasury Department. However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ 2. Section 1.148-0 is amended by revising the entry in paragraph (c) for § 1.148-11 (i) to read as follows:

§ 1.148-0 Scope and table of contents.

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(c) Table of contents.

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§ 1.148-11 Effective dates.

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(i) Special rule for certain broker's commissions and similar fees.

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■ 3. In § 1.148-5, paragraph (e) is amended as follows:

■ 1. Paragraph (e)(2)(iii) is revised.

■ 2. Paragraph (e)(2)(iv) is removed.

The revision reads as follows:

§ 1.148-5 Yield and valuation of investments.

* * * * *

(e) * * *

(2) * * *

(iii) *Special rule for guaranteed investment contracts and investments purchased for a yield restricted defeasance escrow—(A) In general.* An amount paid for a broker's commission or similar fee with respect to a guaranteed investment contract or investments purchased for a yield restricted defeasance escrow is a qualified administrative cost if the fee is reasonable within the meaning of paragraph (e)(2)(i) of this section.

(B) *Safe harbor—(1) In general.* A broker's commission or similar fee with respect to the acquisition of a guaranteed investment contract or investments purchased for a yield restricted defeasance escrow is reasonable within the meaning of paragraph (e)(2)(i) of this section to the extent that—

(i) The amount of the fee that the issuer treats as a qualified administrative cost does not exceed the lesser of:

(A) \$30,000 and

(B) 0.2% of the computational base or, if more, \$3,000; and