

Part III
Administrative, Procedural & Miscellaneous

26 CFR 601.105: Examination of Returns and claims for refund, credit or abatement; determination of correct tax liability.

(Also Part 1, §§ 7701(i); 301.7701(i)-4.)

Rev. Proc. 2009-38

SECTION 1. PURPOSE

This revenue procedure provides the conditions under which the Internal Revenue Service will not assert that certain entities (or any portion thereof) created in connection with the Public-Private Investment Program constitute taxable mortgage pools for purposes of section 7701(i) of the Internal Revenue Code.

No inference should be drawn regarding whether similar consequences would obtain if a particular structure or transaction falls outside the limited scope of this revenue procedure.

SECTION 2. BACKGROUND

.01 The Treasury Department has implemented a series of initiatives as part of its Financial Stability Plan in connection with the Emergency Economic Stabilization Act of 2008.

.02 One of these initiatives is the Public-Private Investment Program. Pursuant to this program, the Treasury Department will co-invest with private capital through specific entities known as Public-Private Investment Funds (Funds) to restore the orderly functioning of financial markets. The Funds will acquire certain commercial mortgage backed securities and certain non-agency residential mortgage backed securities issued prior to 2009 that were originally rated AAA (collectively, the Legacy Securities). The Funds intend to issue debt, secured by the assets acquired by the Funds, including debt in one or more sequential pay tranches, and equity.

.03 Section 7701(i) of the Code defines the term "taxable mortgage pool" (TMP) and provides that a TMP will be taxable as a corporation. In general, a TMP is any entity (other than a Real Estate Mortgage Investment Conduit (REMIC)) having the following qualifications: (i) substantially all of the entity's assets consist of debt obligations and more than 50 percent of these are real estate mortgages, (ii) the entity has issued its own debt obligations with two or more maturities, and (iii) the payments the entity makes as a debtor are related to the payments the entity receives as a creditor.

.04 The purpose of section 7701(i) is to support the REMIC provisions found in sections 860A through 860G. Congress sought to make a REMIC the

only arrangement capable of issuing multiple classes of mortgage-backed securities without the imposition of two levels of taxation. H. Conf. Rep. No. 841, 99th Cong., 2d Sess. II-239, 1986-3 (Vol. 4) C.B. 239. Any arrangement that functions like a REMIC but fails to qualify under section 860D is classified as a TMP.

.05 The application of the TMP rules to entities that technically fall within their scope is appropriately limited in certain cases. See section 301.7701(i)-4(a) of the Procedure and Administration Regulations. The Commissioner may also determine that an entity not described in section 301.7701(i)-4(a)(1) is not a TMP if the entity has a purpose similar to that of entities described in 301.7701(i)-4(a)(1). Section 301.7701(i)-4(a)(3).

SECTION 3. SCOPE

This revenue procedure applies to:

.01 Any Fund (or portion thereof) that holds Legacy Securities pursuant to the Public-Private Investment Program, provided the U.S. Government owns a significant equity interest in the Fund;

.02 Any entity substantially all the assets of which are equity interests in either a Fund described in section 3.01 or another entity described in this section 3.02 (For purposes of this section 3.02, U.S. Government securities held by a regulated investment company (RIC) or real estate investment trust (REIT) (or portion thereof) to fund the income distribution requirements contained in sections 852(a)(1), 857(a)(1), 860, 4981 and 4982 shall not be considered when

determining whether substantially all the assets of an entity are, directly and indirectly, equity interests in a Fund); and

.03 Any portion of an entity which consists of an equity interest in a Fund described in section 3.01 or an entity described in section 3.02.

SECTION 4. PROCEDURE

Pursuant to its authority under section 301.7701(i)-4(a)(3), the Internal Revenue Service will not assert that any Fund (or portion thereof) or entity (or portion thereof) to which this Revenue Procedure applies constitutes a TMP for purposes of section 7701(i). Thus, for example, the Internal Revenue Service will not assert that the portion of a RIC or REIT which consists of equity interests in a Fund described in section 3.01 constitutes a TMP for purposes of section 7701(i). In addition, the debt issued by a Fund (or entity wholly-owned by a Fund) will be disregarded in determining whether an entity referenced in section 3.03 (or portion thereof) is a TMP for purposes of section 7701(i).

SECTION 5. EFFECTIVE DATE

This revenue procedure is effective on August 27, 2009.

SECTION 6. DRAFTING INFORMATION

The principal author of this revenue procedure is John W. Rogers III of the Office of the Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue procedure, contact Mr. Rogers at (202) 622-3950 (not a toll-free call).