

Part III - Administrative, Procedural, and Miscellaneous

Guidance regarding WHFITs

Notice 2008-77

SECTION I: PURPOSE

This notice informs trustees and middlemen of widely held fixed investment trusts (WHFITs) that the Internal Revenue Service (Service) will not assert penalties under § 1.671-5(m) of the Income Tax Regulations with respect to calendar year 2008. This notice also informs trustees and middlemen of widely held mortgage trusts (WHMTs) that, pending future published guidance, certain modifications of mortgages held by a WHMT that has entered into a guarantee arrangement are not required to be reported under the WHFIT reporting rules.

SECTION II: BACKGROUND

A WHFIT is an arrangement classified as a trust under § 301.7701-4(c), provided that: (i) the trust is a United States person under § 7701(a)(30)(E); (ii) the beneficial owners of the trust are treated as owners under subpart E, part I, subchapter J, chapter 1 of the Code; and (iii) at least one interest in the trust is held by a middleman. See § 1.671-5(b)(22). A WHMT is a WHFIT the assets of which consist only of mortgages, regular interests in a REMIC, interests in another WHMT, reasonably required reserve funds, amounts received with respect to these assets, and during a brief initial funding

period, cash and short-term contracts to purchase these assets. See § 1.671-5(b)(23).

SECTION III: PENALTY RELIEF

Section 1.671-5(n) provides that the WHFIT reporting rules are applicable January 1, 2007. The preamble to final regulations under § 1.671-5 (T.D. 9308, 2007-8 I.R.B. 523 [71 FR 78351]) (December 29, 2006) informed trustees and middlemen that the Service would not impose any penalties that would otherwise apply as a result of a failure to comply with the WHFIT reporting rules with respect to the 2007 calendar year in cases where the trustee or middleman was unable to change its information reporting systems to comply with the WHFIT reporting rules.

Recent comments received by the Service indicate that although WHFIT trustees and middlemen have taken steps to implement the WHFIT reporting rules, additional time is needed to update the computer and information systems of trustees and middlemen to fully comply with them. These commentators have requested that the Service not assert penalties under the WHFIT reporting rules with respect to the 2008 calendar year. In response to these requests, this notice informs middlemen and trustees of WHFITs that the Service will not assert penalties as a result of a failure to comply with the WHFIT reporting rules with respect to calendar year 2008.

SECTION IV: REPORTING EXCEPTION FOR CERTAIN MORTGAGE MODIFICATIONS

The Treasury Department and the Service have determined that pending the publication of future guidance certain modifications, under the circumstances described below, that are made to mortgage loans held by a WHMT need not be reported in cases

where a guarantee arrangement compensates the trust or all the trust interest holders for any shortfalls that would otherwise be experienced as a result of the modification.

Specifically, this notice excepts from reporting under § 1.671-5(c)(2)(iv) of the WHFIT rules any modification made to mortgage loans held by a WHMT if all of the following conditions are satisfied:

- (1) The WHMT directly holds mortgage loans that are secured by real property;
- (2) The WHMT modifies a mortgage loan under circumstances that do not cause the trust to be classified other than as a trust as a result of the modification (a “Modification”) (for example because the Modification does not result in there being a power to vary the investment under § 301.7701-4(c));
- (3) The WHMT has entered into a guarantee arrangement that requires the guarantor to pay to the WHMT any shortfalls in payments from the mortgage loans held by the WHMT (including as a result of a Modification) to the extent that mortgage loan payments are insufficient to make required distributions to trust interest holders under the governing documents of the WHMT; and
- (4) The Modification and the guarantee arrangement, taken together, are such that the stated interest rate and the aggregate amount of the principal payments paid with respect to every trust interest of the WHMT is not altered by the Modification.

Any future guidance eliminating or modifying this exception will allow reasonable time for WHMT trustees and middlemen to alter their computer and information reporting systems to comply with the change.

SECTION V: REQUEST FOR COMMENTS

The Treasury Department and the Service request comments regarding the scope and description of the reporting exception described in SECTION IV in the notice. Comments should be submitted on or before November 1, 2008, and should include a reference to Notice 2008-77. Send submissions to CC:PA:LPD:RU (Notice 2008-77), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, D.C. 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8:00 a.m. and 4:00 p.m. to CC:PA:LPD:RU (Notice 2008-77), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224, or sent electronically via the following email address: *Comments@irs.counsel.treas.gov*. Please include the notice number 2008-77 in the subject line of any electronic communication. All materials submitted will be available for public inspection and copying.

SECTION VI: EFFECTIVE DATE

This notice is effective September 12, 2008. Trustees and middlemen may apply Section IV of this notice as of January 1, 2007.

SECTION VII: DRAFTING INFORMATION

The principal author of this notice is Faith P. Colson of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice contact Faith P. Colson at (202) 622-3060 (not a toll-free call).