

**DEPARTMENT OF THE TREASURY****Fiscal Service****31 CFR Part 356**

[Docket No. BPD GSRS 05-02]

**Sale and Issue of Marketable Book-Entry Treasury Bills, Notes, and Bonds—Bidder Definitions****AGENCY:** Bureau of the Public Debt, Fiscal Service, Treasury.**ACTION:** Final rule.

**SUMMARY:** The Department of the Treasury (“Treasury,” “We,” or “Us”) is issuing in final form an amendment to 31 CFR part 356 (Uniform Offering Circular for the Sale and Issue of Marketable Book-Entry Treasury Bills, Notes, and Bonds) by modifying its definitions of different types of bidders in Treasury marketable securities auctions. This final amendment allows a certain business relationship between two entities that currently would be treated as a single bidder under the auction rules to be treated as separate bidders. Specifically, the amendment states that an entity that is more than 50-percent-owned by a corporation or partnership is not deemed to be an affiliate of the corporation or partnership if the ownership is for investment purposes only and certain other conditions are met. The amendment updates the auction rules to acknowledge a business practice that currently is not accommodated in the rules.

**DATES:** Effective July 22, 2005.

**ADDRESSES:** You may download this final rule from the Bureau of the Public Debt’s Web site at <http://www.publicdebt.treas.gov> or from the Electronic Code of Federal Regulations (e-CFR) Web site at <http://www.gpoaccess.gov/ecfr>. It is also available for public inspection and copying at the Treasury Department Library, Room 1318, Main Treasury Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220. To visit the library, call (202) 622-0990 for an appointment.

**FOR FURTHER INFORMATION CONTACT:** Lori Santamorena (Executive Director) or Chuck Andreatta (Associate Director), Bureau of the Public Debt, Government Securities Regulations Staff, (202) 504-3632 or e-mail us at [govsecreg@bpd.treas.gov](mailto:govsecreg@bpd.treas.gov).

**SUPPLEMENTARY INFORMATION:** The Uniform Offering Circular (UOC), in conjunction with the announcement for each auction, provides the terms and

conditions for the sale and issuance in an auction to the public of marketable Treasury bills, notes and bonds.<sup>1</sup> For the most part, these terms and conditions apply to “bidders”<sup>2</sup> in an auction.<sup>3</sup> In this document, we provide some background on the bidder definitions in Appendix A of the UOC. Then we discuss why certain “merchant banking” relationships should be excluded from the definition of an “affiliate” in the “Corporation” and “Partnership” bidder categories. Next we discuss the public comment we received in response to a proposed rule amendment of the bidder definitions published on September 8, 2004.<sup>4</sup> We then describe the final amendment.

**I. Background**

Appendix A of the UOC provides bidder definitions that describe the categories of bidders eligible to bid in Treasury auctions. We provide these definitions so that persons and entities can use them to determine whether they are considered to be one bidder or more than one bidder for the purpose of bidding in auctions, and for compliance purposes.

Two of the bidder categories in Appendix A are “Corporations” and “Partnerships.” We consider a corporation or partnership and all of its “affiliates”—in other words, the entire corporate or partnership structure—collectively to be one bidder. Using the “Corporation” category as an example, Appendix A defines an “affiliate” as “any:

- Entity that is more than 50-percent owned, directly or indirectly, by the corporation;
- Entity that is more than 50-percent owned, directly or indirectly, by any other affiliate of the corporation;
- Person or entity that owns, directly or indirectly, more than 50 percent of the corporation;
- Person or entity that owns, directly or indirectly, more than 50 percent of any other affiliate of the corporation; or
- Entity, a majority of whose board of directors or a majority of whose general partners are directors or officers of the

<sup>1</sup> The Uniform Offering Circular was published as a final rule on January 5, 1993 (58 FR 411). The circular, as amended, is codified at 31 CFR part 356. A final rule converting the UOC to plain language and making certain other minor changes was published in the **Federal Register** on July 28, 2004 (69 FR 45202).

<sup>2</sup> See § 356.2 and Appendix A of 31 CFR part 356.

<sup>3</sup> For example, we will not award more than 35 percent of an auction’s offering amount to any particular competitive bidder to help ensure broad distribution of Treasury securities at original issuance. See § 356.22(b).

<sup>4</sup> 69 FR 54251 (September 8, 2004).

corporation, or of any affiliate of the corporation.”<sup>5</sup>

The more-than-50-percent ownership standard is an important part of the definition because it implies at least potential, if not actual, control of an entity.

Appendix A also provides a mechanism by which a major organizational component (for example, a parent or a subsidiary), or group of components, in a corporate or partnership structure may obtain recognition by us as a bidder separate from the larger corporate or partnership structure. Separate-bidder status may be sought for a variety of reasons, the most common being that it simplifies the process of net long position reporting that applies to large competitive bidders.<sup>6</sup>

To obtain recognition as a separate bidder, each component or group of components must request such recognition from us, provide a description of the component or group and its position within the corporate or partnership structure, meet certain criteria, and provide a certification that it has policies or procedures in place designed to prevent any improper exchanges of information about participation in an auction or in any way acting together with respect to participating in an auction.<sup>7</sup> As previously noted, these requests for separate-bidder status come from the component or group of components seeking to be separated from the larger corporation or partnership structure. In general, these entities requesting separate-bidder status are financial in nature and are likely to participate in Treasury auctions.

**II. Discussion**

We have become aware that a business relationship, commonly referred to as “merchant banking,” can under certain circumstances make technical compliance with the auction rules impractical. In this business relationship, a corporation or partnership typically makes investments in other commercial enterprises, not for the purpose of actually engaging in the business of the enterprise, but rather to seek a return on the investment. Usually these other commercial enterprises are

<sup>5</sup> The “Partnership” category uses the same definition of “affiliate” except that “partnership” is used in place of “corporation.”

<sup>6</sup> See § 356.13. A bidder must report its net long position when the total of all of its bids in an auction plus its net long position in the security being auctioned equals or exceeds the net long position reporting threshold amount stated in the offering announcement, generally 35 percent of the offering amount.

<sup>7</sup> See Appendix A, section II.

not financial in nature, although they may, on occasion, purchase and hold Treasury securities.

It is during those instances when a corporation's or partnership's investment in another enterprise causes its ownership percentage to exceed 50 percent that the complications can arise. For example, if the corporation or partnership is a large enough bidder in Treasury securities auctions that it has to calculate and possibly report its net long position, under the auction rules it is supposed to contact the acquired enterprise and find out if it has any position in the security being auctioned. This can be impractical since the net long position must be calculated as of one-half hour prior to the deadline for competitive bidding and enterprises acquired through merchant banking activities generally do not participate in Treasury securities auctions.

We believe entities acquired through merchant-banking activities pose much less potential for acting in concert with their acquiring corporation or partnership in regard to transactions in, and holdings of, Treasury securities. Corporations or partnerships invest in such entities generally to seek a return on investment and not to engage in the business of the entity, they do not exercise any control over or make operational or investment decisions for such entities and, in general, such entities are not engaged in the securities business and generally do not participate in Treasury securities auctions. Therefore, we believe the public interest is served by allowing the exclusion of merchant-banking activities from a corporate or partnership structure, as described below.

### III. Comments Received in Response to the Proposed Rule

On September 8, 2004, we published a proposed rule amendment<sup>8</sup> in which we proposed that an entity that is more than 50-percent-owned by a corporation or partnership be deemed not to be an affiliate of the corporation or partnership if the ownership is for investment purposes only. Such entities would be deemed to be separate bidders from the corporation or partnership that owns them.

Because majority ownership still carries the potential for the acquiring corporation or partnership to exercise management control of the acquired entity, we further proposed that any corporations or partnerships that intend to make use of this proposed change in the bidder definitions notify us in advance in writing. This written

communication would have included a certification that the corporation or partnership does not exercise any control over or make operational or investment decisions for such acquired entities, and that it has written policies in place to prevent any inappropriate exchange of information concerning participation in Treasury marketable securities auctions. We did not intend, however, to prevent a corporation or partnership from submitting bids on behalf of acquired entities, as long as the corporation or partnership met these certification requirements, and the transaction was otherwise in compliance with the regulations.

We received one comment letter on the proposed rule amendment, from The Bond Market Association ("TBMA"), which supported the proposal.<sup>9</sup> "The Association fully supports the objective of the Rule Proposal because it makes the administrative burden of complying with the NLP reporting requirements much more reasonable for firms that engage in merchant banking or private equity investment activities," TBMA commented.

TBMA asserted, however, that the proposed required certification was overly broad given the purpose of the rule. Specifically, TBMA said that it was concerned with the certification language that states that "the bidder does not exercise *any* control over or make operational or investment decisions for the entity (emphasis added)." TBMA contended that this language was too broad given that the certification's purpose was to ensure that the entities involved will not act in concert with respect to a Treasury securities auction. Merchant-banking firms reserve the right, TBMA pointed out, "to influence or control certain material operations and investment decisions of their merchant banking and private equity-type investments. These include occasionally firing senior management of the company, approving the purchase of another company by the investment and making a decision to sell the company or partnership to another company."<sup>10</sup>

### IV. Analysis

We agree with TBMA's comment. We do not intend to restrict merchant-banking firms' ability to exercise non-routine influence or control over operational or management aspects of

<sup>9</sup>Treasury's proposed rule amendment and TBMA's comment letter, dated November 23, 2004, are available for downloading from <http://www.publicdebt.treas.gov> and for inspection and copying at the Treasury Department Library at the address provided earlier in this final rule.

<sup>10</sup>Ibid.

their investments, or even over investments that are not related to Treasury securities. After considering the comment letter received, we are amending the proposed certification to specify that the corporation or partnership does not routinely exercise operational or management control over entities acquired through merchant-banking activities. In addition, we are adding a new certification statement that the corporation or partnership does not exercise any control over investment decisions of such entities regarding U.S. Treasury securities.

This final rule becomes effective July 22, 2005. This will provide sufficient time for corporations or partnerships that intend to make use of the change in the bidder definitions to notify us in writing and submit the required certifications. In the meantime, we do not expect any such corporations or partnerships to change their current practices regarding the reporting of positions of majority-owned entities.

### Procedural Requirements

This final rule is not a significant regulatory action for purposes of Executive Order 12866. Although we issued a proposed rule on September 8, 2004, to benefit from public comment, the notice and public procedures requirements of the Administrative Procedure Act do not apply, under 5 U.S.C. 553(a)(2).

Since a notice of proposed rulemaking is not required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

The Office of Management and Budget previously approved the collections of information in this final amendment in accordance with the Paperwork Reduction Act under control number 1535-0112. We are not making substantive changes to these requirements that would impose additional burdens on auction bidders.

### List of Subjects in 31 CFR Part 356

Bonds, Federal Reserve System, Government Securities, Securities.

■ For the reasons stated in the preamble, 31 CFR part 356 is amended as follows:

### PART 356—SALE AND ISSUE OF MARKETABLE BOOK—ENTRY TREASURY BILLS, NOTES, AND BONDS (DEPARTMENT OF THE TREASURY CIRCULAR, PUBLIC DEBT SERIES NO. 1-93)

■ 1. The authority citation for part 356 continues to read as follows:

**Authority:** 5 U.S.C. 301; 31 U.S.C. 3102 *et seq.*; 12 U.S.C. 391.

<sup>8</sup>69 FR 54251 (September 8, 2004).

■ 2. In Appendix A to Part 356, amend section I by revising the introductory text and paragraphs (a) and (b) to read as follows:

### Appendix A to Part 356—Bidder Categories

#### I. Categories of Eligible Bidders

We describe below various categories of bidders eligible to bid in Treasury auctions. You may use them to determine whether we consider you and other persons or entities to be one bidder or more than one bidder for auction bidding and compliance purposes. For example, we use these definitions to apply the competitive and noncompetitive award limitations and for other requirements. Notwithstanding these definitions, we consider any persons or entities that intentionally act together with respect to bidding in a Treasury auction to collectively be one bidder. Even if an auction participant does not fall under any of the categories listed below, it is our intent that no auction participant receives a larger auction award by acquiring securities through others than it could have received had it been considered one of these types of bidders.

(a) *Corporation*—We consider a corporation to be one bidder. A corporation includes all of its affiliates, which may be persons, partnerships, or other entities. We consider a business trust, such as a Massachusetts or Delaware business trust, to be a corporation. We use the term “corporate structure” to refer to the collection of affiliates that we consider collectively to be one bidder. An affiliate is any:

- Entity that is more than 50-percent owned, directly or indirectly, by the corporation;
- Entity that is more than 50-percent owned, directly or indirectly, by any other affiliate of the corporation;
- Person or entity that owns, directly or indirectly, more than 50 percent of the corporation;
- Person or entity that owns, directly or indirectly, more than 50 percent of any other affiliate of the corporation; or
- Entity, a majority of whose board of directors or a majority of whose general partners are directors or officers of the corporation, or of any affiliate of the corporation.

An entity that is more than 50-percent owned as described in this definition is not an affiliate, however, if:

- The purpose of such ownership is to seek a return on investment and not to engage in the business of the entity;
- The owner does not routinely exercise operational or management control over the entity;
- The owner does not exercise any control over investment decisions of the entity regarding U.S. Treasury securities;
- The corporation has written policies or procedures, including ongoing compliance monitoring processes, that are designed to prevent it from acting together with the entity regarding participation in Treasury auctions or investment strategies regarding Treasury securities being auctioned; and

- The corporation submits notice and certification to us, as provided in this appendix A.

A corporation that plans to make use of this exception to the definition of “affiliate” must inform us of this fact in writing and provide the following certification:

[Name of corporation] hereby certifies that, with regard to any entity of which it owns more than 50 percent as defined in appendix A to 31 CFR part 356, but for which the purpose of such ownership is to seek a return on investment and not to engage in the business of the entity:

- We do not routinely exercise operational or management control over the entity;
- We do not exercise any control over investment decisions of the entity regarding U.S. Treasury securities;
- We have written policies or procedures, including ongoing compliance monitoring processes, that are designed to prevent the corporation from acting together with the entity regarding participation in Treasury auctions or investment strategies regarding Treasury securities being auctioned; and
- We will continue to meet the terms of this certification until we notify the Treasury of a change.

(b) *Partnership*—We consider a partnership to be one bidder if it is a partnership for which the Internal Revenue Service has assigned a tax-identification number. A partnership includes all of its affiliates, which may be persons, corporations, general partners acting on behalf of the partnership, or other entities. We use the term “partnership structure” to refer to the collection of affiliates that we consider collectively to be one bidder. We may consider a partnership structure that contains one or more corporations as a “partnership” or a “corporation,” but not both.

An affiliate is any:

- Entity that is more than 50-percent owned, directly or indirectly, by the partnership;
- Entity that is more than 50-percent owned, directly or indirectly, by any other affiliate of the partnership;
- Person or entity that owns, directly or indirectly, more than 50 percent of the partnership;
- Person or entity that owns, directly or indirectly, more than 50 percent of any other affiliate of the partnership; or
- Entity, a majority of whose general partners or a majority of whose board of directors are general partners or directors of the partnership or of any affiliate of the partnership.

An entity that is more than 50-percent owned as described in this definition is not an affiliate, however, if:

- The purpose of such ownership is to seek a return on investment and not to engage in the business of the entity;
- The owner does not routinely exercise operational or management control over the entity;
- The owner does not exercise any control over investment decisions of the entity regarding U.S. Treasury securities;
- The partnership has written policies or procedures, including ongoing compliance monitoring processes, that are designed to

prevent it from acting together with the entity regarding participation in Treasury auctions or investment strategies regarding Treasury securities being auctioned; and

- The partnership submits notice and certification to us, as provided in this appendix A.

A partnership that plans to make use of this exception to the definition of “affiliate” must inform us of this fact in writing and provide the following certification:

[Name of partnership] hereby certifies that, with regard to any entity of which it owns more than 50 percent as defined in appendix A to 31 CFR part 356, but for which the purpose of such ownership is to seek a return on investment and not to engage in the business of the entity:

- We do not routinely exercise operational or management control over the entity;
- We do not exercise any control over investment decisions of the entity regarding U.S. Treasury securities;
- We have written policies or procedures, including ongoing compliance monitoring processes, that are designed to prevent the partnership from acting together with the entity regarding participation in Treasury auctions or investment strategies regarding Treasury securities being auctioned; and
- We will continue to meet the terms of this certification until we notify the Treasury of a change.

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Dated: May 17, 2005.

**Donald V. Hammond,**

*Fiscal Assistant Secretary.*

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## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

### 48 CFR Part 1802

#### RIN AD10

### Head of Contracting Activity (HCA) Change for Exploration Systems Directorate

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Final rule.

**SUMMARY:** This final rule revises the NASA FAR Supplement (NFS) by amending the definition of “head of contracting activity” consistent with the realignment of program management responsibilities between NASA Headquarters and the field centers.

**DATES:** Effective May 23, 2005.

**FOR FURTHER INFORMATION CONTACT:** Tom Russell, NASA, Office of Procurement, Program Operations Division; (202) 358–0484; e-mail: [trussell@nasa.gov](mailto:trussell@nasa.gov).

**SUPPLEMENTARY INFORMATION:**