Background Section 4944(a) of the Internal Revenue Code (Code) imposes an excise tax on a private foundation that makes an investment that jeopardizes the carrying out of any of the private foundation’s exempt purposes (a “jeopardizing investment”). Section 4944(a) also imposes an excise tax on foundation managers who knowingly participate in the making of a jeopardizing investment. Section 4944(b) imposes additional excise taxes on private foundations and foundation managers when investments are not timely removed from jeopardy.

Generally, under § 53.4944–1(a)(2), a jeopardizing investment occurs when, based on the facts and circumstances at the time the investment is made, foundation managers fail to exercise ordinary business care and prudence in providing for the long- and short-term financial needs of the foundation. The determination of whether an investment is a jeopardizing investment is made on an investment-by-investment basis, taking into account the private foundation’s entire portfolio. In exercising the requisite standard of care and prudence, foundation managers may take into account the expected investment return, price volatility, and the need for portfolio diversification.

Section 4944(c) excepts program-related investments (“PRIs”) from treatment as jeopardizing investments. The regulations under section 4944(c) define a PRI as an investment: (1) The primary purpose of which is to accomplish one or more of the purposes described in section 170(c)(2)(B); (2) no significant purpose of which is the production of income or the appreciation of property; and (3) no purpose of which is to accomplish one or more of the purposes described in section 170(c)(2)(D) (attempting to influence legislation or participating in or intervening in any political campaign).

An investment is made primarily to accomplish one or more of the purposes described in section 170(c)(2)(B) (referred to as “charitable purposes”) if it significantly furthers the accomplishment of the private foundation’s exempt activities and would not have been made but for the relationship between the investment and the accomplishment of those exempt activities. In determining whether a significant purpose of an investment is the production of income or the appreciation of property, § 53.4944–3(a)(2)(iii) provides that it shall be relevant whether investors who are engaged in the investment solely for the production of income would be likely to make the investment on the same terms as the private foundation.

The regulations under other Code sections in Chapter 42 accord special tax treatment to PRIs. For example, § 53.4942(a)–2(c)(3)(ii)(d) excludes PRIs from the assets a private foundation takes into account when determining how much it must distribute under section 4942 as a “distributable amount” for the taxable year. In addition, § 53.4942(a)–3(a)(2)(i) generally includes distributions that qualify as PRIs as “qualifying distributions” for purposes of meeting the distribution requirements under section 4942. Section 53.4943–10(b) excludes PRIs from being treated as business holdings for the purpose of calculating excess business holdings subject to excise tax under section 4943. Sections 53.4945–5(b)(4) and 53.4945–6(c)(1)(i) also make clear that PRIs will not constitute taxable expenditures under section 4945, provided the private foundation exercises “expenditure responsibility” in circumstances in which it is required to do so. Among other expenditure responsibility requirements, a private foundation must require a written commitment from the recipient of the PRI that the funds received will be used only for the purposes of the program-related investment. As noted, the primary purpose of a program-related investment must be the accomplishment of a charitable purpose.

Section 53.4944–3(b) contains nine examples illustrating investments that qualify as PRIs and one example of an investment that does not qualify as a PRI. The existing examples focus on domestic situations principally involving economically disadvantaged individuals and deteriorated urban areas.

The Treasury Department and the IRS are aware that the private foundation community would find it helpful if the regulations could include additional PRI examples that reflect current investment practices and illustrate certain principles, including that: (1) An activity conducted in a foreign country furthers a charitable purpose if the same activity would further a charitable purpose if conducted in the United States; (2) the charitable purposes served by a PRI are not limited to situations involving economically disadvantaged individuals and deteriorated urban areas; (3) the recipients of PRIs need not be within a charitable class if they are the instruments for furthers a charitable purpose; (4) a potentially high rate of return does not automatically prevent an investment from qualifying as program-related; (5) PRIs can be achieved through a variety of.
investments, including loans to individuals, tax-exempt organizations and for-profit organizations, and equity investments in for-profit organizations; (6) a credit enhancement arrangement may qualify as a PRI; and (7) a private foundation’s acceptance of an equity position in conjunction with making a loan does not necessarily prevent the investment from qualifying as a PRI.

**Explanation of Provisions**

The proposed regulations add nine new examples that illustrate that a wider range of investments qualify as PRIs than the range currently presented in § 53.4944–3(b). The proposed regulations do not modify the existing regulations; rather, they provide additional examples that illustrate the application of the existing regulations. Generally, the charitable activities illustrated in the new examples are based on published guidance and on financial structures described in private letter rulings.

The new examples demonstrate that a PRI may accomplish a variety of charitable purposes, such as advancing science, combating environmental deterioration, and promoting the arts. Several examples also demonstrate that an investment that funds activities in one or more foreign countries, including investments that alleviate the impact of a natural disaster or that fund educational programs for poor individuals, may further the accomplishment of charitable purposes and qualify as a PRI. One example illustrates that the existence of a high potential rate of return on an investment does not, by itself, prevent the investment from qualifying as a PRI. Another example illustrates that a private foundation’s acceptance of an equity position in conjunction with making a loan does not necessarily prevent the investment from qualifying as a PRI, and two examples illustrate that a private foundation’s provision of credit enhancement can qualify as a PRI.

The last example demonstrates that a guarantee arrangement may qualify as a PRI. The proposed regulations address solely the impact of section 4944 on the facts described and do not address whether there is a qualifying distribution under section 4942. However, the Treasury Department and the IRS conclude that, based on the facts described in the last example, there would be no qualifying distribution under section 4942 at the time the foundation enters into the guarantee arrangement. Under certain circumstances, a private foundation may treat payments made under a guarantee arrangement as qualifying distributions.

Finally, the proposed regulations include examples illustrating that loans and capital may be provided to individuals or entities that are not within a charitable class themselves, if the recipients are the instruments through which the private foundation accomplishes its exempt activities.

**Proposed Effective/Applicability Date**

Paragraph (b), Examples 11 through 19 of this section will be effective on the date of publication of the Treasury decision adopting these examples as final regulations in the Federal Register. Taxpayers may rely on paragraph (b), Examples 11 through 19 of this section before these proposed regulations are finalized.

**Special Analyses**

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. 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 this regulation, and because the regulation does 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 regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on business.

**Comments and Requests for Public Hearing**

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the ADDRESSES heading. The IRS and the Treasury Department request comments on all aspects of the proposed rules. All comments will be available at www.regulations.gov or upon request. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the Federal Register.

**Drafting Information**

The principal author of these proposed regulations is Courtney D. Jones, Office of the Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the Treasury Department and the IRS participated in their development.

**List of Subjects in 26 CFR Part 53**

Excise taxes, Foundations, Investments, Lobbying, Reporting and recordkeeping requirements, Trusts and trustees.

**Proposed Amendments to the Regulations**

Accordingly, 26 CFR part 53 is proposed to be amended as follows:

**PART 53—FOUNDATION AND SIMILAR EXCISE TAXES**

**Paragraph. 1.** The authority citation for part 53 continues to read in part as follows:

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

**Par. 2.** Section 53.4944–3 is amended by adding Examples 11, 12, 13, 14, 15, 16, 17, 18, and 19 to paragraph (b) and adding paragraph (c) to read as follows:

§ 53.4944–3 Exception for program-related investments.

* * * * *

(b) * * *

Example 11. X is a business enterprise that researches and develops new drugs. X’s research demonstrates that a vaccine can be developed within ten years to prevent a disease that predominantly affects poor individuals in developing countries. However, neither X nor other commercial enterprises like X will devote their resources to develop the vaccine because the potential return on investment is significantly less than required by X or other commercial enterprises to undertake a project to develop new drugs. Y, a private foundation, enters into an investment agreement with X in order to induce X to develop the vaccine. Pursuant to the investment agreement, Y purchases shares of the common stock of S, a subsidiary corporation that X establishes to research and develop the vaccine. The agreement requires S to distribute the vaccine to poor individuals in developing countries at a price that is affordable to the affected population. The agreement also requires S to publish the research results, disclosing substantially all information about the results that would be useful to the interested public. S agrees that the publication of its research results will be made as promptly after the completion of the research as is reasonably possible without jeopardizing S’s right to secure patents necessary to protect its ownership or control of the results of the research. The expected rate of return on Y’s investment in S is less than the expected market rate of return for an investment of similar risk. Y’s primary purpose in making the investment is to advance science. No significant purpose of the investment involves the production of income or the appreciation of property. The investment significantly furthers the accomplishment of Y’s exempt activities and would not have been made but for such relationship between the investment and Y’s
exempt activities. Accordingly, the purchase of the common stock of S is a program-related investment.

Example 12. Q, a developing country, produces a substantial amount of recyclable solid waste materials that are currently disposed of on landfills and by incineration, contributing significantly to environmental deterioration in Q. X is a new business enterprise located in Q. X’s only activity will be collecting recyclable solid waste materials in Q and delivering those materials to recyclers. Y, a private foundation, enters into an investment agreement with X to purchase shares of X’s common stock on the same terms as X’s initial investors. Although there is a high risk associated with the investment in X, there is also the potential for a high rate of return if X is successful in the recycling business in Q. Y’s primary purpose in making the investment is to combat environmental deterioration. No significant purpose of the loan involves the production of income or the appreciation of property. The investment significantly further the accomplishment of Y’s exempt activities and would not have been made but for such relationship between the loan and Y’s exempt activities. Accordingly, the loan is a program-related investment.

Example 14. X is a business enterprise located in Y’s rural area in State Z. X employs a large number of poor individuals in Z. A natural disaster occurs in Z, causing significant damage to the area. The business operations of X are harmed because of damage to X’s equipment and buildings. X has insufficient funds to continue its business operations and conventional sources of funds are unwilling or unable to provide loans to X on terms it considers economically feasible. In order to enable X to continue its business operations, Y, a private foundation, makes a loan to X bearing interest below the market rate for commercial loans of comparable risk. Y’s primary purpose in making the loan is to provide relief to the poor and distressed. No significant purpose of the loan involves the production of income or the appreciation of property. The loan significantly furthers the accomplishment of Y’s exempt activities and would not have been made but for such relationship between the loan and Y’s exempt activities. Accordingly, the loan is a program-related investment.

Example 15. A natural disaster occurs in W, a developing country, causing significant damage to W’s infrastructure. Y, a private foundation, makes loans bearing interest below the market rate for commercial loans of comparable risk to H and K, poor individuals who live in W, to enable each of them to start a small business. H will open a roadside fruit stand and K will start a weaving business. Conventional sources of funds were unwilling or unable to provide loans to H or K on terms they consider economically feasible. Y’s primary purpose in making the loans is to provide relief to the poor and distressed. No significant purpose of the loan involves the production of income or the appreciation of property. The loans significantly further the accomplishment of Y’s exempt activities and would not have been made but for such relationship between the loan and Y’s exempt activities. Accordingly, the loan is a program-related investment.

Example 16. X is a limited liability company described in section 501(c)(3). X is a limited liability company described in section 501(c)(3). X is a limited liability company described in section 501(c)(3). X is a limited liability company described in section 501(c)(3). X is a limited liability company described in section 501(c)(3). X is a limited liability company described in section 501(c)(3). X is a limited liability company described in section 501(c)(3). X is a limited liability company described in section 501(c)(3). X is a limited liability company described in section 501(c)(3). X is a limited liability company described in section 501(c)(3).
Example 19. Assume the same facts as stated in Example 18, except that instead of making a deposit of Sh into B, Y enters into a guarantee agreement with B. The guarantee agreement provides that if X defaults on the loan, Y will repay the balance due on the loan to B. B was unwilling to make the loan to X in the absence of Y’s guarantee. X must use the proceeds from the loan to construct the new child care facility. At the same time, X and Y enter into a reimbursement agreement whereby X agrees to reimburse Y for any and all amounts paid to B under the guarantee agreement. The signed guarantee and reimbursement agreements together constitute a “guarantee and reimbursement arrangement.” Y’s primary purpose in entering into the guarantee and reimbursement arrangement is to further Y’s educational purposes. No significant purpose of the guarantee and reimbursement arrangement involves the production of income or the appreciation of property. The guarantee and reimbursement arrangement significantly furthers the accomplishment of Y’s exempt activities and would not have been made but for such relationship between the guarantee and reimbursement arrangement and Y’s exempt activities. Accordingly, the guarantee and reimbursement arrangement is a program-related investment.

(c) Effective/applicability date.
Paragraph (b), Examples 11 through 19 of this section will be effective on the date of publication of the Treasury decision adopting these examples as paragraph (b), Federal Register decision. Taxpayers may rely on paragraph (b), Federal Register decision. Examples 11 through 19 of this section before these proposed regulations are finalized.

Steven T. Miller,
Deputy Commissioner for Services and Enforcement.

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73
[MB Docket No. 08–150; RM–11390; DA 12–512]
Radio Broadcasting Services; Asbury and Maquoketa, IA, and Mineral Point, WI

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; dismissal.

SUMMARY: The Audio Division dismisses the petition for rule making filed by KM Radio of Independence, LLC, proposing the allotment of Channel 238A at Mineral Point, Wisconsin, and the substitution of reserved Channel *254A for reserved vacant Channel *238A at Asbury, Iowa, 73 FR 50,297, and terminates the proceeding.

FOR FURTHER INFORMATION CONTACT: Deborah Dupont, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission’s Report and Order, MB Docket No. 08–150, adopted April 2, 2012, and released April 2, 2012. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. The complete text of this decision also may be purchased from the Commission’s duplicating contractor, Best Copy and Printing, Inc., 445 12th Street SW., Room CY–B402, Washington, DC 20554, (800) 378–3160, or via the company’s Web site, www.bcp418.com. The Report and Order is not subject to the Congressional Review Act, and therefore the Commission will not send a copy of it in a report to be sent to Congress and the Government Accountability Office, see U.S.C. 801(a)(1)(A).

Federal Communications Commission.

Nazifa Sawez,
Assistant Chief, Audio Division, Media Bureau.

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17
[Docket No. FWS–R7–ES–2012–0009; 45000030113]
RIN 1018–AY40
Endangered and Threatened Wildlife and Plants; Special Rule for the Polar Bear

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; availability of draft environmental assessment.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to amend the regulations at 50 CFR part 17, which implement the Endangered Species Act of 1973, as amended (ESA), to create a special rule under authority of section 4(d) of the ESA that provides measures that are necessary and advisable to provide for the conservation of the polar bear (Ursus maritimus). The Secretary has the discretion to prohibit by regulation with respect to the polar bear any act prohibited by section 9(a)(1) of the ESA.

DATES: We will consider comments we receive on or before June 18, 2012. We must receive requests for public hearings, in writing, at the address shown in the for further information contact section by June 4, 2012.

ADDRESSES:


Written comments: You may submit comments on the proposed rule and associated draft environmental assessment by one of the following methods:
• U.S. mail or hand-delivery: Public Comments Processing, Attn: Docket No. FWS–R7–ES–2012–0009; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203; or

Please indicate to which document, the proposed rule or the draft environmental assessment, your comments apply. We will post all comments on http://www.regulations.gov. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT:
Charles Hamilton, Marine Mammals Management Office, U.S. Fish and Wildlife Service, Region 7, 1011 East Tudor Road, Anchorage, AK 99503; telephone 907–766–3399. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, 24 hours a day, 7 days a week.

SUPPLEMENTARY INFORMATION:
Executive Summary

Why We Need To Publish a Proposed Rule

In response to litigation against the Service challenging our December 16, 2008 final 4(d) special rule for the polar bear, the District Court for the District of Columbia (Court) found that although the final 4(d) special rule for the polar bear was consistent with the ESA, the Service violated the National Environmental Policy Act (NEPA) and the Administrative Procedure Act by failing to conduct a NEPA analysis when it promulgated the final 4(d)