

IRS Issues New Regulations Governing TEFRA Approvals of Tax-Exempt Private Activity Bonds

Description

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On December 31, 2018, the IRS issued new regulations governing public approval requirements for tax-exempt private activity bonds under 26 U.S.C. § 147(f), which were originally enacted as part of the Tax Equity and Fiscal Responsibility Act of 1982, or TEFRA. The regulations make several significant changes to these requirements.

By way of background, § 147(f) imposes certain requirements for private activity bonds to be issued on a tax-exempt basis, including approval by either voter referendum, or by an elected representative after a public hearing following reasonable public notice. Prior regulations required public notice to be published no fewer than 14 days before the hearing. However, under the new regulations, this timeframe is shortened to 7 calendar days.

Additionally, under the prior regulations the public notice was deemed reasonable if it was published in one or more newspapers of general circulation, or announced by radio or television broadcast. The new regulations, however, permit alternative means of publication provided under state law, as well as website publication as permissible means of providing notice. Electronic posting may be on the website of the approving governmental unit or the entity that issues bonds on behalf of that governmental unit. However, the notice must be posted in an area of the website used to inform residents about events affecting the residents (such as notices of public meetings). Moreover, issuers will be required to maintain records showing that a public notice containing the requisite information was timely posted to an appropriate website.

In addition, if an issue finances multiple projects (such as facilities at different locations on non-proximate sites), the public notice and approval must separately specify the maximum stated principal amount of bonds to be issued to finance each individual project. As such, public notices can no longer aggregate the par amount of bonds for separate projects within the same issue. However, the definitions under the new regulations make clear that capital projects or facilities that are not located on the same site or adjacent or proximate sites may still be treated as one project if they are used in an integrated operation. Additionally, the regulations permit issuers to determine the maximum stated principal amount on any reasonable basis and issuers may take into account contingencies, without regard to whether the occurrence of any such contingency is reasonably expected at the time of the public notice.

Significantly, the new regulations provide that substantial deviations between the stated use or amount of proceeds included in the public notice and approval compared to the actual use or amount of proceeds will cause the issue to fail to meet the public approval requirement. The regulations provide a safe harbor for determining that a deviation in the principal amount of bonds is insubstantial. The regulations state that a deviation between the maximum stated principal amount listed in the public notice and approval compared with the actual stated principal amount is considered insubstantial if the actual amount is no more than ten percent (10%) greater than amount stated in the notice, or if the actual amount is any amount less than the stated amount. Moreover, the regulations also provide for a cure of a substantial deviations, in some circumstances, if certain procedures are followed, which include obtaining a supplemental approval prior to using proceeds in a manner or amount not stated in the original approval.

The regulations also set forth special rules for qualified 501(c)(3) pooled loan financings, which permit an optional two-step public approval process. Under these rules, a pre-issuance approval that lists a general

description of the type of project to be financed can be obtained first. Subsequently, a post-issuance approval that meets all the requirements under the new regulations must be obtained prior to originating loans to any 501(c)(3) borrowers.

The new regulations apply to any bonds issued pursuant to a public approval occurring on or after April 1, 2019. However, issuers have the option to apply the specific rules related to deviations in public approval information, in whole, but not in part, to bonds issued pursuant to a public approval occurring prior to that date.

Please contact [Eugene G. Bernardo II](#) or [David M. DiSegna](#) at [Partridge Snow & Hahn LLP](#) if you have questions about these regulations.

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