

Alert | Tax/Public Finance



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In the Midst of a Federal Government Shutdown, Tax-Exempt Bond Community Receives Long-Awaited Final Public Notice and Approval Regulations

The Department of the Treasury and IRS provided two New Year's Eve presents to the tax-exempt bond community. The first is the finalization of the public notice and approval regulations, commonly referred to as the TEFRA Regulations (the Final Regulations), and the second is the issuance of the proposed reissuance regulations. Both developments have been long promised, and both were published in the Federal Register on Dec. 31, 2018. This GT Alert updates the [GT Alert published on Sept. 29, 2017](#), which described proposed public notice and approval regulations issued in 2017 (the 2017 Proposed Regulations), to identify changes that the Final Regulations made to those Proposed Regulations. A separate GT Alert will address the proposed reissuance regulations.

Background

Section 147(f) of the Internal Revenue Code of 1986, as amended (the Code) requires that private activity bonds meet certain public approval requirements, which very generally require that, before bonds are issued, the public receives notice of the issuance, a public hearing is held in connection with the issuance, and the issuance is approved by the appropriate governmental entity or entities. The Final Regulations address these requirements and update and expand upon the existing regulations.

There were several false starts on these regulations. The 2017 Proposed Regulations withdrew two prior notices of proposed rulemaking on this topic, including the May 11, 1983, notice of proposed rulemaking released in conjunction with temporary regulations (the Existing Regulations) under the predecessor to Section 147(f), Section 103(k) of the Internal Revenue Code of 1954 (the 1954 Code), and the Sept. 9, 2008, notice of proposed rulemaking (the 2008 Proposed Regulations) that proposed to amend and supplement, but did not revoke, the Existing Regulations, thereby allowing the Existing Regulations to continue to apply to the extent not modified by the 2008 Proposed Regulations. The **Final Regulations** incorporate changes made by the 2017 Proposed Regulations, with some revisions. This GT Alert describes the changes that the Final Regulations made to the 2017 Proposed Regulations.

Public notice requirements. The Final Regulations make the following changes to the public notice requirements proposed in the 2017 Proposed Regulations:

- *Time between public notice and public hearing.* The 2017 Proposed Regulations modified the 2008 Proposed Regulations by increasing the minimum time required between the public notice and public hearing from seven days to 14 days (which was consistent with the Existing Regulations). The Final Regulations return to seven days.
 - *Method of providing public notice.* The 2017 Proposed Regulations proposed to permit (i) notice of public hearing to be posted on the government’s website, if the government regularly uses the website to inform its residents about events affecting the residents, and the government provides a reasonable alternative for residents without access to computers, and (ii) other methods permitted under general state law for public notices and hearings. The Final Regulations modify this rule to:
 - allow the public notice to be published on the governmental unit’s website or on the “on behalf of” issuer’s website;
 - remove the requirement that there be a reasonable alternative for residents without computers;
 - require that when posting notice on the website, the location of such posting must be the area of the website that is used to inform residents about events affecting the residents; and
 - clarify that notice given that complies with state law requirements must still be reasonably accessible to residents of the approving governmental unit.
- *Stated principal amount in public notice.* The Final Regulations allow more flexibility in determining the maximum stated principal amount of bonds set forth in the public notice by permitting an issuer to determine that amount on any reasonable basis and to take into account contingencies without regard to whether the occurrence of any such contingency is reasonably expected at the time of the notice or approval;
- *General partner can be listed as beneficial owner.* The Final Regulations provide that the general partner in a partnership that owns a project may be treated as the true beneficial owner for purposes of the requirement that the public notice set forth the name of the expected initial owner or principal user of the project; and
- *501(c)(3) pool bonds.* For 501(c)(3) pool bonds, the Final Regulations retain the ability for a two-stage approval process set forth in the 2017 Proposed Regulations (allowing an abbreviated notice when the bonds are issued and a second more detailed notice when loans of those proceeds are originated and further details are known), but remove the requirement for host approval at the time the bonds are issued, thereby requiring host approval only for the second approval.

Definitions

Increased flexibility in the project definition. The 2017 Proposed Regulations proposed to modify the definition of “project” to treat as a single project those facilities that are located at sites that are adjacent, or proximate but not adjacent, which are used for similar purposes. This proposed change would have excluded from treatment as a single project those facilities used in an integrated operation that are not on adjoining or proximate sites, despite those facilities being treated as a single project under the Existing Regulations. While also retaining the rule proposed in the 2017 Proposed Regulations, the Final Regulations incorporate from the Existing Regulations the provision that facilities on non-adjoining tracts of land may be treated as one project if they are used in an “integrated operation.”

Proposed Effective Date

The Final Regulations apply to bonds issued pursuant to a public approval occurring on or after April 2, 2019, the date that is 90 days after publication of the Final Regulations in the Federal Register (Dec. 31, 2018). The 2017 Proposed Regulations may be applied, in whole but not in part, to bonds that are issued pursuant to public approval that occurs on or after Sept. 28, 2017, and before the applicable date of the Final Regulations.

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