



Public Finance Practice Group

New Regulation Streamlining TEFRA Process Effective April 1, 2019

Syracuse, New York

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The Internal Revenue Service published the final public approval regulation in the Federal Register on December 31, 2018. The regulation will apply to bonds issued pursuant to a public approval occurring on or after April 1, 2019.

The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) added to the Internal Revenue Code a public approval requirement in order for private activity bonds to qualify for tax-exempt status. The approval must be given by the governmental unit issuing the private activity bonds or on behalf of which such bonds are to be issued after the issuer conducts a public hearing following reasonable public notice. This public approval requirement is commonly referred to as the TEFRA approval. Private activity bonds are often issued by conduit issuers on behalf of a state or local governmental unit and finance projects of 501(c)(3) borrowers, low income housing projects, airports, and other exempt facilities as defined in the Internal Revenue Code.

The new regulation streamlines the TEFRA process and clarifies the requirements. Some highlights are discussed below.

Shortened 14-day Publication Requirement: Notice of a public hearing must now be given not fewer than 7 calendar days before the public hearing.

Expanded Methods of Publication: Notice of a public hearing must be to residents of the governmental unit issuing the bonds or on behalf of which the bonds are to be issued. Under the new regulation, the permissible methods include: (1) publication in one or more newspapers of general circulation available to those residents, or (2) radio or television broadcast to those residents, or (3) electronic posting on the governmental unit's primary public website in an area used to notify residents of events affecting them or on the conduit issuer's website, or (4) a way that is permitted under state law for public notices of public hearings for the approving governmental unit, provided that the public notice is reasonably accessible. In the commentary, the IRS specifically rejects previous proposals that would have required a second method of publication when an issuer publishes notice on its website. The IRS also rejected the comments that would have allowed public hearings to be conducted by teleconference or webinar.

Clarification of Content of Public Hearing Notice: The information required to be stated in the notice remains the same. The notice must include (a) a general functional description of the type and use of the project, (b) the maximum stated principal amount of the bonds to be issued to finance the project or projects, (c) the name of the initial legal owner or principal user of the project, and (d) a general description of location of the project.

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However, the IRS provides some clarification and examples in the new regulation. For example, a project description will be sufficient if it identifies the category under Section 142 or 145 of the Internal Revenue Code that applies and describes the type and use of the project, such as, "a qualified 501(c)(3) bond as defined in Section 145 for a hospital facility." The regulation clarifies that for a project involving multiple capital projects or facilities located on the same or proximate sites, a consolidated description of the location will be sufficient, such as, identifying the campus of a college by outside street boundaries rather than specific locations within the campus.

Guidance on Deviations: The new regulation provides guidance on addressing deviations in the actual use or amount of bond proceeds occurring after the public hearing or after the public approval. Several factors are identified to assist in determining whether a deviation is substantial and will require a new public hearing or public approval.

The attorneys in our Public Finance Practice Area will continue to review the new regulation and are available to assist issuers in modifying their public approval policies to implement the changes. The new regulation can be accessed by clicking on: <https://www.govinfo.gov/content/pkg/FR-2018-12-31/pdf/2018-28371.pdf>

Bousquet Holstein Public Finance Practice Group

The team of professionals in the Bousquet Holstein Public Finance Group has broad and deep experience assisting our clients in delivering and taking advantage of tax incentives offered by the Internal Revenue Code and New York State law to encourage and support projects that serve the public, promote economic development and advance charitable and public purposes. These incentives include tax-exempt bonds, tax credits and the abatement of real property, sales and use and mortgage recording taxes. If we can provide you with additional insight and information regarding changes to the law please contact:

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