

Client Alert

March 2019

New TEFRA Regulations for Qualified Private Activity Bonds

Background

As part of the 1982 Tax Equity and Fiscal Responsibility Act (**TEFRA**), Congress implemented new rules pertaining to the issuance of tax-exempt private activity bonds. The so-called TEFRA regulations required a local government issuer to, among other things, satisfy a “public approval” process prior to issuing tax-exempt bonds for the benefit of a private party. While the IRS has long considered amending the TEFRA regulations, no official amendment has occurred in more than three decades. This changed, however, with the Treasury Department’s publication of new regulations on December 31, 2018.

Beginning April 1, 2019, issuers of qualified private activity bonds will be governed by a new set of TEFRA regulations (the **Final TEFRA Regulations**). The Final TEFRA Regulations, which stem from the Treasury Department’s 2017 Proposed Regulations (REG 128841-07, September 28, 2017), retain many of the procedures and requirements described in the 2017 Proposed Regulations. The general requirements of the existing regulations which continue under the Final TEFRA Regulations are listed below:

- Either the governmental unit issuing the bonds or the governmental unit on-behalf-of which the bonds are issued must approve the issue (**Issuer Approval**);
- The governmental unit presiding over the area in which the bond-financed project will be located must approve the issue (**Host Approval**, and together with the Issuer Approval, the **Public Approval**);
- A public hearing must be held in connection with the proposed issuance of the bonds and the location and nature of the bond-financed project (**Public Hearing Requirement**); and
- Public notice must be given as to the time and location of the public hearing, the description of the bond-financed project and the maximum principal amount of the bonds proposed to be issued (**Public Notice Requirement**).

Primary Changes

While the existing TEFRA requirements remain generally intact, the Final TEFRA Regulations offer a more flexible approach to certain procedures which allow issuers and governmental units to streamline their TEFRA obligations. The IRS stated that the new requirements “are not expected to have a significant economic effect on small state or local governmental units because the Final TEFRA Regulations generally would streamline and simplify the Existing Regulations in various respects to reduce the administrative burdens of meeting the statutory public approval requirement.” The added flexibility and simplification of the TEFRA procedures are most notable in the Final TEFRA Regulations’ Public Notice Requirements. An outline of the changes to the Public Notice Requirements is provided below:

Public Notice Requirement – Timing

- The new regulations **shortened the minimum timeframe** for providing public notice of the public hearing from fourteen (14) days to **seven (7) days**.
- The new regulations state, “Notice is presumed to be reasonably designed to inform residents of an approving governmental unit if given no fewer than seven (7) calendar days before the public hearing ...”

Public Notice Requirement – Method

- The new regulations allow public notice of the public hearing to be posted online in lieu of publication in the local newspaper (although newspaper publication is still acceptable).
- The new regulations state, “**Public notice may be given by an electronic posting** on the approving governmental unit’s primary public Web site in an area of that Web site used to inform its residents about events affecting the residents (for example, notice of public meetings of the governmental unit).”
- When the issue involves an “on-behalf-of” issuer, such as a constituted authority that acts on behalf of a city or county, the notice may be provided on the website of the “on-behalf-of” issuer in the same manner described above.
- Importantly, **issuers remain responsible for maintaining records** showing that a public notice containing the requisite information was timely posted to an appropriate website.

Public Notice and Public Approvals – Content

In addition to the above-described procedures relating to the timing and method of the Public Notice Requirement, the Final TEFRA Regulations clarified the specific content required to be stated in the Public Notice and Public Approval. The content of the **Public Notice and Public Approval must contain:**

- i.* The maximum principal amount of the bonds to be issued, and, if an issue finances multiple projects, such as facilities at different locations on non-proximate sites with dissimilar purposes, the relative principal amounts anticipated to be spent on each of the separate projects*;
- ii.* The legal name of the initial owner, principal user or beneficial party of interest for such legal owner or user of the project;
- iii.* A general description of the prospective location of the project by street address, reference to boundary streets or other geographic boundaries, or other description of the specific geographic location reasonably designed to inform readers of the location. Depending upon the nature and location of the project, multiple street addresses may be required.

* Capital projects or facilities used in an “**integrated operation**,” even if located on non-proximate sites, are treated as the same project and the Public Notice and Public Approval need only contain a single principal amount. Unfortunately for issuers and bond counsel, the IRS has not offered any significant guidance as to what constitutes an “integrated operation.” The Final TEFRA Regulations do, however, permit “insubstantial deviations” from the stated principal amounts, allowing the issuance of bonds up to 10 percent above the maximum principal amount stated for each project. Until further guidance is provided, issuers should consult with bond counsel on whether to list one or more principal amounts.

Public Hearing – Timing, Procedure and Other Changes

- The Final TEFRA Regulations do not impose any time restriction on when bonds can be issued following the holding of the Public Hearing. In fact, the IRS noted in its response to comments on the 2017 Proposed Regulations that, “... although **a period of one year between a public hearing and a public approval is reasonable**, a longer period may be reasonable in some circumstances.”
- In regard to the public's participation at the hearing, the new regulations confirm the 2017 Proposed Regulations' notable concession that “**a governmental unit may impose reasonable requirements on persons who wish to participate in the hearing**, such as a requirement that persons desiring to speak at the hearing make a written request to speak at least 24 hours before the hearing or that they limit their oral remarks to a prescribed time.”
- The Final TEFRA Regulations also confirmed that if an issue finances multiple projects, a single public hearing may be held in connection with all of the projects, although individual principal amounts for each of the projects must be specified.

Public Approval – Timing

- As was stated in the 2017 Proposed Regulations, the Final TEFRA Regulations confirmed that bonds must be issued within one year after their Public Approval.

Link to Final Regulations

While this summary discusses many of the revisions and updates of the Final TEFRA Regulations, we advise you to review the complete publication posted on the official website of the Federal Register, linked [here](#).

Compliance Date

The Final TEFRA Regulations apply to bonds issued pursuant to a Public Approval occurring on or after April 1, 2019. Hunton Andrews Kurth LLP is prepared to respond to any questions you may have regarding compliance with the Final TEFRA Regulations.

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