

INSIGHTS

It's Official! Final Public Approval Regulations Now Reflect the 21st Century

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Treasury has released final regulations (the “***Final Regulations***”) relating to the public approval requirements for private activity bonds (aka the “TEFRA approval” process). The Final Regulations effectively track the proposed regulations issued in 2017 (the “Proposed Regulations”), but make a few additional tweaks that provide some additional flexibility for issuers and conduit borrowers navigating the process. The Final Regulations are effective for all private activity bonds issued pursuant to a public approval occurring on or after April 1, 2019. Further, certain provisions regarding insubstantial deviations may also be applied in whole, but not in part, to a prior public approval.

As we previously reported, the IRS recognized that technological advances have made the existing public approval regulations outdated and that updates were required to address statutory changes, streamline the public approval process, and reduce administrative burdens. While there are several adjustments to current law to address these objectives, the changes that issuers and conduits borrowers may view as the most impactful are as follows:

- ***Electronic Posting of Notice of Public Hearing Permitted; Newspapers Still Allowed***

Recognizing that the Internet is probably more than just a fad and that the public has increasingly relied on the Internet as its “go to” source for information, the Final Regulations permit the public notice requirement to be fulfilled by making an electronic posting on either (i) the approving governmental unit’s website for issuer approvals (as opposed to host approvals) only, or (ii) in the case of an issuer that acts on behalf of a governmental unit, on the issuer’s public website. To make the posting easy for residents to locate, such a posting must be on the entity’s primary public website in an area used to inform residents about events affecting residents. The Final Regulations go on to clarify that issuers remain responsible for maintaining records showing that a public notice containing the requisite information was timely posted to an appropriate website.

For those that do not have a website or simply would prefer to continue past practices, notice may still be given by publication in a newspaper, radio or television broadcast, or by an alternative method permitted for public notices under state law.

The Final Regulations provided welcome response to comments on the Proposed Regulations. The Proposed Regulations would have required electronic postings to be accompanied by another alternative method for those without Internet access, which would have severely

undercut the benefits of administrative ease that come with the move to electronic posting. No such requirement for an alternative method is included in the Final Regulations. Further, the Final Regulations clarify that notice may be posted on the issuer's website, acknowledging the fact that some issuers do not have the authority to post content on the website of the approving governmental entity (e.g. a housing issuer seeking approval of the city in which the project will be located).

- ***Time for Posting Public Notice Reduced to Seven Days***

Under the Final Regulations, public notice is presumed reasonable if it is published no fewer than seven days in advance of a public hearing. Both current law and the Proposed Regulations included a 14-day period. In making this change, the IRS agreed with public comment that the speed at which information spreads through the public and technological advance warrant a shorter notice period.

- ***Integrated Operations on Non-Proximate Sites Can Constitute a Single Project***

The Final Regulations require that the published public notice include a description of each "project" to be financed by the bonds. A "project" includes projects and facilities that are located on the same, adjacent or proximate sites used for similar purposes, but may also include projects and facilities on non-proximate sites if they are used in an integrated operation, as might be the case with a large university or a health care system.

The Proposed Regulations had sought to clarify that a single project might extend beyond a single or adjoining tracts of land and had abandoned the "integrated operation" standard in current law as being difficult to apply. However, based on public comment, the Final Regulations both kept the clarifying "proximate site" language and retained the existing "integrated operation" standard for non-proximate sites. What qualifies as an "integrated operation" continues to be a question of interpretation.

- ***Maximum Principal Amount of Bonds Must Be Specified Separately for Each Project***

The Final Regulations retain a new requirement introduced in the Proposed Regulations that the public notice and approval must specify separately the maximum stated principal amount of bonds to be issued to finance *each separate project*. As a result, issuers and conduit borrowers may find themselves locked into projected allocations between projects financed by the issue earlier in the process than to which they have become accustomed to under current law.

The good news is that the reintroduction of the "integrated operations" provision described above may lead to the conclusion that separate facilities constitute a single "project" – meaning that only a single maximum principal amount need be included in the notice. The Final Regulations also provide for a 10% cushion to allow for "insubstantial deviations" in the noticed amount and the amount actually issued for a project. Additionally, the Final Regulations provide that the maximum stated principal amount of bonds to be issued to finance a project may be determined on any reasonable basis and may take into account contingencies, without regard to whether the occurrence of any such contingency is reasonably expected at the time of the notice. As a result, issuers and conduit borrowers have flexibility to account for uncertainties in determining the maximum principal amount of the bonds to be issued to finance a project.

If you have any questions regarding the foregoing or any other provision of the Final Regulations, or would like information as to their effect on a particular issue, please contact [**Brian Teaff**](#).

Note: this article was previously published by *The Bond Buyer*.