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## IRS Teeing Up More Flexible Rules for Public Approval of PABs.

WASHINGTON  Rules increasing the flexibility of the public approval process for tax-exempt private activity bonds will probably be the next released for municipal bonds by tax regulators, an Internal Revenue Service official recently told lawyers.

“The 2008 regulations permitted quite a bit of flexibility,” IRS Branch 5 chief Vicky Tsilas said during a conference sponsored by Georgetown University Law Center, according to Tax Notes. “I would argue these regulations – as they get finalized or re-proposed, whatever it is – will permit even greater flexibility in response to comments received over the years.”

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On the same panel with Tsilas, Mike Bailey, a lawyer at Foley & Lardner in Chicago, noted that the new issue price rules provide no guidance about whether they are to be applied to many tax requirements that bond lawyers have historically complied with using issue price rules. These include the 2% limitation on issuance costs for private activity bonds, the requirement that at least 95% of the net proceeds of qualified exempt-facility bonds be spent on a project’s capital costs, and the 5% limit on private use for 501(c)(3) bonds for nonprofits.

Tsilas told Bailey that those issues will be addressed by another regulatory project, according to Tax Notes.

The public approval requirements for PABs are in the Tax Equity and Fiscal Responsibility Act (TEFRA) of 1982. The act said that for PABs, including 501(c)(3) bonds for nonprofits, to be tax-exempt the state or local government issuing the bonds or the borrower of the proceeds would have to approve them. The PABs would be treated as approved if either residents voted for them in a referendum or an elected representative approved them after a public hearing was announced and held. The Treasury and IRS published temporary rules in 1983 to implement the TEFRA provisions.

The tax-writing agencies then proposed rules in September 2008 to update, streamline and simplify those temporary rules. The proposed rules were generally supported at the time and Treasury officials expected them to be quickly finalized. Whereas the existing rules had required a very specific and detailed description of the facility to be bond-financed, the proposed rules would allow a general reference to the type of facility for which bonds were being issued.

The proposed rules also would allow a government or its authority to cancel a hearing if, after timely notice of the hearing, no one had asked to participate in it. They allowed the government to post notice of the hearing on its website. Some community and labor groups claimed the proposed rules claiming they would come close to removing public input from the process of issuing PABs. Nine years later, the proposed rules have still not been finalized.

The National Association of Bond Lawyers in June 2015 submitted recommendations to Treasury and the IRS on ways to further streamline, modernize and clarify the public approval requirements from those proposed in 2008.

“The TEFRA public approval requirement is arguably one of the more burdensome requirements for tax exemption,” NABL said in the letter. “NABL believes that ways in which the requirement may be made less burdensome to issuers and conduit borrowers, while still achieving the underlying objectives of the requirement, should continually be reassessed, with deference given to how state and local governments carry out their day-to-day operations and with recognition of technological advances as tools for implementation.”

NABL made several specific recommendations including that the final rules allow PAB proceeds to be used for working capital without the public notice specifically mentioning that. It also said that the issuer should be allowed to provide a notice of cancellation of a hearing on its website in the same manner that it posts other public notices.

**The Bond Buyer**

By Lynn Hume

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