

Bond Case Briefs

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IRS Releases New Public Approval Proposed Regulations: Mintz Levin

On September 28, 2017, the Internal Revenue Service (IRS) withdrew previous proposed regulations and released new proposed regulations (the “Proposed Regulations”) relating to public approval requirements for tax exempt private activity bonds. The Proposed Regulations (found [here](#)) are intended to update and streamline implementation of the public approval requirement for tax exempt private activity bonds provided in section 147(f) of the Internal Revenue Code, including scope, information content, methods and timing for the public approval process. They generally do not change the requirements for issuer approval and host approval set forth in the current temporary regulations originally promulgated in 1983.

Timing and Dissemination of Reasonable Notice

Despite the move from 14 days to 7 days that was included in the previous proposed regulations, the Proposed Regulations unfortunately go back to providing that notice is presumed reasonable if given no fewer than 14 calendar days before the hearing. The preamble to the Proposed Regulations explains that commenters responding to the previous proposed regulations expressed concern that 7 days’ notice would not provide sufficient time to make arrangements to be present at the hearing. It also referenced the legislative history of the original public hearing legislation that references a 14 day notice period.

Perhaps the most helpful part of the Proposed Regulations is the expansion of the permitted methods of providing reasonable public notice. In an attempt to recognize advances in technology, the Proposed Regulations allow for postings on a governmental unit’s public website or alternative methods permitted under general State law for public notices for public hearings of a governmental unit (the “alternative notice provision”) in addition to radio or television broadcast or newspaper publication. Although it is probably likely that more residents do not have access to a printed newspaper than do not have access to the internet, in the case of public notice posted on the approving governmental unit’s website, the Proposed Regulations require that there must be a publicly known alternative method for obtaining the information for those who do not have access to the internet. Practitioners also have raised questions about the requirement to post the notice on the approving governmental unit’s website. The Issuer’s website would generally be the more logical place to post. Provided that the approving governmental unit’s website links to the Issuer’s website and the notice could be found through a search of the approving governmental unit’s website, this should be acceptable. The alternative notice provision will likely prove more beneficial than the website method that requires an alternative to posting. If a governmental unit has a public meeting law that allows posting on a website alone, that should satisfy the alternative notice provision.

Content of Reasonable Notice

The Proposed Regulations generally retain the notice requirements set out in the existing regulations but require less project detail in the description. The Proposed Regulations helpfully allow the Issuer to describe the category of bonds being issued and the type and use of the project

rather than providing specific project information. For example, “exempt facility bonds financing an airport pursuant to section 142(a)(1) of the Internal Revenue Code”, “qualified small issue bonds, as defined in section 144(a) of the Internal Revenue Code, financing a manufacturing facility ” and “qualified 501(c)(3) bonds, as defined in section 145 of the Internal Revenue Code, financing a hospital facility and working capital expenditures” would all be sufficient project descriptions under the Proposed Regulations.

The notice and approval must include the maximum stated principal amount of bonds to be issued for each project. The existing regulations use the term “facility” and state that a facility may be on separate tracts of land if part of an integrated operation. The Proposed Regulations use the term “project” and a project is defined as “one or more capital projects or facilities, including land, buildings, equipment and other property to be financed with an issue that are located on the same site, or adjacent or proximate sites used for similar purposes.” This essentially means that a separate maximum amount of bonds will need to be stated for each project location. In practice, it should meet the requirements of the Proposed Regulations to state a maximum aggregate amount of bonds and say that not more than that amount will be spent at each different location.

Insubstantial Deviations and Curing Substantial Deviations

Perhaps the second most helpful part of the Proposed Regulations is the expanded description of what is an insubstantial deviation and the new ability to cure a potential substantial deviation with a subsequent approval. A deviation in actual principal amount allocated for a project is insubstantial under the Proposed Regulations if it is no more than 10% greater than the maximum amount in the notice or is any amount less. In addition, any amount used to finance working capital related to any project specified in the notice is an insubstantial deviation and any deviation in the name of an owner or user of the project named in the notice is an insubstantial deviation if the parties named in the notice and the actual parties are related parties on the issue date of the bonds.

All deviations that are not specifically treated as insubstantial deviations in the Proposed Regulations will need to be analyzed based on all the facts and circumstances. In the event a deviation is determined to be substantial, a new public approval can cure the deviation. In order to take advantage of the supplemental public approval, the issue must have had a public approval and the Issuer must have reasonably expected there would be no substantial deviation on the issue date, the substantial deviation must be as a result of unexpected events or unforeseen changes in circumstances that occur after the issue date, and the supplemental public approval must be obtained prior to using proceeds of the bonds in a manner or amount not provided for in the original public approval.

Optional Application

Issuers may apply the Proposed Regulations in whole but not in part to bonds that are issued pursuant to a public approval that occurs on or after September 28, 2017, and should give careful consideration to the potential benefits of applying the Proposed Regulations, including the ability to get new public approval in the event of a substantial deviation from the original public approval. The Proposed Regulations cannot be applied to bonds already issued or to be issued pursuant to an approval that occurred prior to September 28, 2017.

By Len Weiser-Varon on October 13, 2017

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