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Happy New Year! IRS Celebrates with Two Regulatory Notices for the Tax-Exempt Bond Community.

The Internal Revenue Service celebrated New Year's Eve this year by issuing two rule-making notices of interest to the tax-exempt bond community, on the topics of public approval of private activity bonds and reissuance.

The first notice contains final regulations on the public approval requirement of section 147(f) of the Internal Revenue Code, 26 U.S.C. §147(f). You can access a copy of the final regulations here.

The final regulations on section 147(f) make several significant modifications to the proposed regulations, which were published by the Service on September 28, 2017 (read our prior analysis of the 2017 proposed regulations here). Some of the key highlights of the final regulations are as follows:

- **7-Day Notice Period:** The current regulations, at 26 C.F.R. §5f.103-2, require that the public notice be given at least 14 days before the date of the public hearing. The IRS had previously issued proposed regulations in 2008, shortening this requirement to 7 days, but went back to 14 days in the 2017 proposed regulations. The stated reason for this decision was a reference in the legislative history to a 14-day notice period. However, in response to comments to the 2017 proposed regulations, the IRS has determined to restore the 7-day notice period, as the statutory text makes no mention of a 14-day notice period.
- **Website Notices:** The current regulations require that the notice must be published in a newspaper or announced by radio or television broadcast. The 2017 proposed regulations introduced website notices, but required that the issuer offer to residents without access to the Internet an alternative method for obtaining the information contained in the website notice. The final regulations drop this "alternative notice" requirement. Therefore, a notice that is published solely through the governmental unit's website will satisfy the public notice requirement of section 147(f). The notice must appear in an area of the government's website that is used to inform residents about events affecting the residents.
- **Deviations and Ability to Cure:** The 2017 proposed regulations introduced the concept of insubstantial deviations, that is, deviations from the notice and public approval that are so minor as to not cause the notice and public approval to fail to meet the requirements of section 147(f). Additionally, for deviations that were substantial, the 2017 proposed regulations afforded issuers the opportunity to cure the resulting violation through a supplemental notice and hearing that met the requirements of the regulations. The final regulations largely implement these concepts as originally proposed.
- **Effective Date and Retroactive Use:** The final regulations are generally effective April 1, 2019. However, the IRS in response to comments it received agreed to afford issuers the option of retroactively applying the "deviation" provisions (including the ability to cure) to any bond issued pursuant to a public approval that occurred prior to April 1, 2019. This presents an excellent opportunity for issuers of bonds with faulty public approvals to reduce their audit risk.

The second New Year's Eve notice from the IRS contains proposed regulations on the reissuance of tax-exempt bonds, particularly qualified tender bonds. You can access a copy of the proposed regulations here. The proposed regulations follow the guidance previously provided by the IRS in Notices 88-130 and 2008-41, related to qualified tender bonds. Each of those Notices will be rendered obsolete once the regulations are finalized.

The proposed regulations are not intended as a departure from previous guidance. Thus, the proposed regulations, like the Notices before them, provide that the existence or exercise of a qualified tender right of a qualified tender bond will not, in and of itself, result in a reissuance for tax purposes. And, the terms “qualified tender bond” and “qualified tender right” carry meanings substantially similar to the definitions that were ascribed to these terms in the Notices.

The IRS is requesting that any comments to the proposed regulations or requests for a public hearing in connection with them be delivered by March 1, 2019.

by Timothy Horstmann

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