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Treasury Finalizes PAB Reg, Proposed Re-Issuance Reg.

WASHINGTON – Treasury and the Internal Revenue Service took two-long awaited regulatory steps important to the municipal market on New Year's Eve with publication of a finalized public notice requirement for issuing private activity bonds and a proposed regulation clarifying when tax-exempt bonds require re-issuance.

The Federal Register publication of the finalized PAB regulation takes effect April 1 but part of it can be implemented by issuers immediately.

The final regulations simplify the public notice and approval requirements for PAB issuance to require publication on an issuer's website seven days prior to a public hearing.

Proposed regulations issued in September 2017 would have required a longer notice period of 14 days and publication at a second location such as a community bulletin board.

The regulations do not – as some in the muni industry requested – drop the requirement for a public hearing if there are no advance requests to speak at the hearing nor does it allow hearings to be held by teleconference or webcast.

Mike Bailey, public finance attorney at Foley & Lardner in Chicago and a board member of the National Association of Bond Lawyers, described the final regulations as "a welcome development."

"They were, in many ways, responsive to the comments," Bailey said. NABL requested that the public notice requirement be reduced to seven days.

Although the effective date is April 1, Bailey said issuers will need to update their procedures by mid March.

Charles Samuels of Mintz Levin, counsel to the National Association of Health & Educational Facilities Finance Authorities, described the final regulations as "a mixed bag of improvements beyond the status quo and some disappointments."

"The trick is to take advantage of the new technology that exists since the original rules were published as well as to minimize the burden and the resources spent by state and local governments and issuers while, of course, complying with the requirements of the law," Samuels said in an email.

The rule overall has received praise from practitioners because it marks a long-overdue update to the 1982 Tax Equity and Fiscal Responsibility Act (TEFRA) that first imposed the public notice and approval requirement for PABs, which at the time were limited to industrial development bonds.

The Tax Reform Act of 1986 greatly expanded the types of projects and financings for which PABs can be used.

The final regulations take into account tax law changes that have expanded the kinds of PABs that can be issued and technological changes that have occurred such as ubiquitous use of the Internet.

A proposed update of the public notice requirements in September 2008 was never finalized and the new regulations finalized Monday were proposed in September 2017.

The proposed re-issuance regulation, however, may be more significant because it would be the first reissuance regulation covering the tax-exempt bond market.

It would consolidate a number of Treasury notices – such as 88130 and 2008-41 – which were issued during the 2007-2011 financial crisis.

Vicky Tsilas, a partner at Ballard Spahr who worked on both regulations as head of branch 5 in the chief counsel's office of the Internal Revenue Service, said she considers the proposed re-issuance regulation to be very important.

"That is a major regulation, Tsilas said. "Before this regulation got published, there were no re-issuance regulations for bonds. So the only regulation you had for bonds, but it didn't quite cover all types of bonds, was under Section 1001 whether something was a significant modification.''

Tsilas said the IRS has had drafts of a re-issuance regulation dating back to 1994. "I can't tell you proud I am that I worked on that regulation that actually made it out the door because it took so many years to actually get a regulation for bonds out," said Tsilas, who left the IRS in the spring of 2018.

The final public notice regulation for PABs was noncontroversial, according to Tsilas, who said she was "surprised at how long it took for them to get out."

By Brian Tumulty

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