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IRS Releases Final TEFRA Regulations: Orrick

On December 28, 2018, the U.S. Department of the Treasury released final regulations (the "Final TEFRA Regulations") regarding the requirements for public notice, hearing, and approval of qualified private activity bonds under Section 147(f) of the Internal Revenue Code. The Final TEFRA Regulations replace temporary regulations under Section 103(k) of the Internal Revenue Code of 1954 (the "Existing TEFRA Regulations") by finalizing rules set forth in proposed regulations issued in September 2017 (the "2017 Proposed Regulations") with a few notable improvements and clarifications. [The main changes to the Existing TEFRA Regulations implemented and/or confirmed by the Final TEFRA Regulations include:

- *Shortening Notice Period to Seven Days.* Under the Final TEFRA Regulations a notice of public hearing is presumed reasonable if published no fewer than seven days in advance of the hearing. This is shorter than the 14 days presumed reasonable under both the Existing TEFRA Regulations and the 2017 Proposed Regulations.
- *Deadlines Related to Public Approval.* The Existing TEFRA Regulations do not impose any specific restriction on the period of time between a TEFRA hearing and the required public approval.

    - *Period Between TEFRA Notice and Public Approval.* The Final TEFRA Regulations do not impose any specific restriction on the permitted time between the TEFRA Notice and the required public approval. The preamble to the Final TEFRA Regulations confirms that a period of one year between the TEFRA notice and the public approval is reasonable and acknowledges that a period of more than one year also may be reasonable in some circumstances.
    - *Period Between Public Approval and Issuance of Bonds.* For bonds not issued pursuant to a plan of financing, the Final TEFRA Regulations follow the 2017 Proposed Regulations in providing that public approval is timely only if it occurs within one year before the issue date of the bonds. The Final TEFRA Regulations are clear that the one-year clock begins running on the date of the approval, not the date of the hearing.

- *Allowing Website Publication by Governmental and On-Behalf-Of Issuers.* The Final TEFRA Regulations allow the notice requirement to be satisfied with a posting on the approving governmental entity's website or, in the case of on-behalf-of issuers, with a posting on the on-behalf-of issuer's website. Publication of notice in a newspaper is no longer required (but is still permissible). Notably, the Final TEFRA Regulations eliminated the requirement in the 2017 Proposed Regulations that website publication was only permitted with "reasonable alternative notice" by other means to accommodate potential residents with no internet access.

    - *Location of Website Posting.* For issuers with complex, multipage websites, the Final TEFRA Regulations require a public notice to be posted on the issuer's "primary public website" in an area used to inform residents about events such as public meetings.
    - *Maintenance of Records.* Issuers are required to maintain records demonstrating that notices posted to a website satisfied the above requirements and, therefore, must

develop procedures for capturing and retaining the time and content data of the applicable website.

- *Expanding Definition of "Project" to Include Non-Proximate Sites Used in Integrated Operations.* One of the few burdensome requirements added by the 2017 Proposed Regulations was that the notice of public hearing must identify the maximum principal amount of bonds to be allocated to each "project" specified in the notice — rather than just stating the amount of bonds for all projects in the aggregate. The Final TEFRA Regulations retain the dollar-breakout requirement.Following the 2017 Proposed Regulations, the Final TEFRA Regulations define "project" as land, building, equipment and other property "located on the same site, or adjacent or proximate sites used for similar purposes." The Final TEFRA Regulations also provide, however, that capital projects or facilities that are used in an "integrated operation" may be treated as the same "project" even if not located on the same site or adjacent or proximate sites.

    - *Practical Compliance Considerations.* The requirement of the 2017 Proposed Regulations to assign a maximum principal amount to each project caused concern among issuers and bond counsel. Although the Final TEFRA Regulations permit an "insubstantial deviation" of 10% above the stated maximum principal amount specified for each project, the lack of specificity around the terms "proximate" and "integrated operation" will likely lead to conservative practices in specifying projects and stating expected amount of bonds.

- *Permitting Supplemental Public Approval.* The Final TEFRA Regulations retain the welcome provision in the 2017 Proposed Regulations that, in certain unforeseen and unexpected circumstances, a supplemental public approval may be obtained after bonds are issued but before proceeds are spent on a use not set forth in the original TEFRA notice.
- *Clarifying that General Partner Is a Beneficial Party of Interest.* The Existing TEFRA Regulations require that the TEFRA notice to include the name of the initial owner, operator, or manager of the facility. The 2017 Proposed Regulations provided that the notice may comply by naming a significant true beneficial party of interest for the initial owner or user. The Final TEFRA Regulations provide that the general partner of the partnership that owns the facility is a beneficial party of interest that may be named in the TEFRA notice.
- *Special Rules.* The Final TEFRA Regulations confirmed and clarified various rules in the 2017 Proposed TEFRA Regulations that relate to the approval requirements for working capital financings, pooled financings with qualified 501(c)(3) bonds, single-family housing bonds, student loan bonds, airport bonds, and high-speed rail bonds.

Effective Date. The Final TEFRA Regulations apply to bonds issued pursuant to a public approval occurring on or after April 1, 2019. Because the effective date is keyed to the date of the approval rather than the date of the public notice or the date of the bond issue, the Existing TEFRA Regulations apply to notice content, hearings, and approvals for bonds issued after April 1, 2019, provided that the approvals were obtained before that date.

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