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## **NABL Presses Treasury to Ease Public Approval Requirement for PABs.**

WASHINGTON - The National Association of Bond Lawyers submitted recommendations to the Treasury Department and Internal Revenue Service on ways to ease and clarify the public approval requirement for private-activity bonds.

NABL sent the recommendations on Friday to James Polfer, chief of the tax-exempt bond branch of the IRS chief counsel's office, and John Cross, Treasury associate tax legislative counsel. The group started working on the document after conversations with Treasury and the IRS about temporary and proposed regulations on public approval, said Clifford Gerber, a partner at Sidley Austin and one of the drafters of the latest comments.

Under federal tax law, PABs cannot be tax exempt unless they are approved by the governmental unit that issued the bonds or on whose behalf the bonds were issued. PAB issues are treated as being approved by governmental units if they were approved by voter referendum or "by the applicable elected representative of such governmental unit after a public hearing following reasonable public notice."

The public approval requirement was added to tax law by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA). In 1983, temporary regulations concerning the requirement were published, and in 2008, Treasury and the IRS released proposed regulations that have not yet been finalized. The temporary and proposed regulations, among other things, describe what information needs to be included in the public notice.

"The TEFRA public approval requirement is arguably one of the more burdensome requirements for tax exemption," NABL said. "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 submitted comments on the TEFRA requirement in 2007 and 2008. In its new paper, NABL affirmed those comments and applauded features of the 2008 proposed regulations that would streamline and modernize the rules.

The purpose of NABL's paper is to provide additional comments for Treasury and the IRS to consider before they release the next set of public approval regulations, whether those are proposed, temporary or final rules.

"Our comments weren't intended to cover the landscape. Rather, we wanted to address several important aspects of the TEFRA approval requirement that were not addressed in our previous comments or that we thought were in need of further explanation," Gerber said. "We hope that these comments will be helpful to the IRS and Treasury in issuing the next set of TEFRA regulations."

NABL recommended that regulations broaden the allowance for PAB proceeds to be used for working capital without the public notice specifically mentioning that proceeds would be used for that purpose. NABL said it doesn't think issuers need to include reference to working capital in their notices because there are already restrictions on working capital for PABs and because working capital expenditures don't give rise to facilities, "which were the original basis for giving notice to the public, and have long been recognized as such."

Another recommendation was for the next set of regulations to clarify what constitutes "integrated operation." The temporary regulations can be interpreted as requiring public notices to state the maximum dollar amount for bonds for each facility being financed by the issue. Separate tracts of land can be treated as one facility if they are used in an integrated operation, but that term is not defined in the temporary regulations or the proposed regulations. NABL is recommending that new regulations allow properties to be considered part of an integrated operation to the extent that the bond-financed improvements made at multiple locations are owned and operated by the same or related entities, under common management, or are part of a controlled group.

The temporary regulations and the proposed regulations don't explain how the public approval requirements should be applied to PAB-financed property that is movable or intangible, such as mobile libraries or medical vans. NABL is proposing that the next set of regulations include a safe harbor under which the location listed in a TEFRA notice for movable or intangible property is: the location where the property must be licensed, titled, registered or insured; where the property returns after assignments; where the property is assigned to under applicable law; or where transmission of output associated with the property originate.

The rules proposed in 2008 allow supplemental, post-issuance public approval for projects that substantially deviate from what was described in pre-issuance TEFRA notices, so long as the deviation meets certain conditions. First the issuer has to have reasonably expected when the bonds were issued that the actual facts wouldn't substantially deviate from the information on the public notice. The second condition is that either the cost of the facility being financed was less than expected, or the issuer or borrower has to prove that originally expected use of the proceeds "is no longer feasible or viable."

NABL would like Treasury and the IRS to eliminate the second condition in the next set of regulations because it is "unnecessarily limiting," the group said.

NABL also made a recommendation relating to the cancellation of public hearings. Under the proposed regulations, if a government provides reasonable notice for a public hearing and receives no timely requests to participate, the government can cancel the hearing and treat the hearing requirement as met. NABL suggested that in the next set of regulations, the issuer should be allowed to provide notice of the cancellation of a public hearing on its website in the same manner that it posts other public notices.

Additionally, NABL suggested that if the next set of rules is still in proposed form, that issuers and borrowers be able to rely on them before they are adopted. "Because many provisions of the proposed regulations are intended to reduce the burden on issuers and borrowers and are ameliorative, it is important that the new TEFRA regulations provide for the ability of issuers and borrowers to apply the regulations prior to their adoption in final form," the group said.

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