

# **Bond Case Briefs**

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## **Permanent Dial-In Option Makes TEFRA Hearings Easier Than Ever - Forever: K&L Gates**

The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) requires a public hearing as a form of public approval for certain types of tax-exempt private activity bonds. Thanks to COVID-19, holding a hearing is easier than ever with the new permanent option to have the hearing via teleconference. Of course, issuers still have to be careful to meet state open public meeting laws when applicable.

For a long time, the Treasury Department and the IRS resisted requests to allow phone teleconferences to satisfy the public comment hearings required by TEFRA. New Treasury Regulations in 2018 specifically noted public entities' desire to hold teleconference hearings and denied the request, saying, "although these technologies may be effective for other purposes, they cannot replace a conventional public hearing conducted in-person because they are not sufficiently reliable, publicly available, susceptible to public response, or uniform in their features and operation." 83 FR 67685.

### **THEN CAME COVID-19**

With in-person hearings often impossible, issuers either had to hold virtual hearings or not issue bonds at all. The IRS stepped in to address the problem by issuing temporary guidance that allowed teleconference hearings through 31 March 2022. Rev. Proc. 2020-21, Rev. Proc. 2020-49, Rev. Proc. 2021-39. The new guidance permitted virtual TEFRA hearings so long as the public could join by calling a toll-free telephone number.

Video conference services – whether Zoom, WebEx, Microsoft Teams, Google Meet, GoTo Meeting, etc. – have proven to be reliable channels for public participation, and also generally offer the option to dial in on a toll-free line. The experience gained by governmental entities in offering meetings over video services and teleconference during the pandemic convinced the IRS to allow virtual meetings permanently.

In Rev. Proc. 2022-20, the IRS noted that "the experience using telephonic hearings during the COVID-19 pandemic has shown that telephonic access has in fact made it easier for the public to express its views regarding a proposed private activity bond issue." Therefore it determined to allow public hearings to be held telephonically indefinitely.

### **TELEPHONIC TEFRA HEARING REQUIREMENTS**

As a practical matter, most governmental entities' virtual meeting offerings have been on a videoconference service that permits access by telephone (sometimes calling the participant's number, sometimes using computer audio, sometimes providing call-in numbers.). The requirement of the regulation, however, is to provide a toll-free telephone number for the public to dial into the meeting on:

"A hearing that is held by teleconference accessible to the residents of the approving

governmental unit by calling a toll-free telephone number will be treated as held in a location that, based on the facts and circumstances, is convenient for residents of the approving governmental unit for the purpose of § 1.147(f)-1(d)(2). Provided the requirements of the preceding sentence are satisfied, governmental units are not precluded from offering additional access to the hearing by other telephone numbers, internet-based meeting technology, or in-person attendance.”

Rev. Proc. 2022-20 (emphasis added). As long as the toll-free number is available, the regulation acknowledges and allows videoconference to be offered as well.

Even though public participants in a virtual meeting may all be dialing in from the local area, a true toll-free number is required to satisfy the requirement (though the issuer may also offer a local number along with the toll free number).

#### BE AWARE OF ANY OPEN PUBLIC MEETING ACT REQUIREMENTS

The TEFRA regulations at 26 CFR § 1.147(f)-1(d)(3) give issuers broad latitude in procedures for holding the hearing, whether to create a hearing report, and which representative(s) of the issuer will hold the hearing, so long in each case that “interested individuals have a reasonable opportunity to express their views.”

Depending on whom an issuer selects to hold the TEFRA hearing, it may trigger Open Public Meeting Act (OPMA) requirements under applicable state law.

For example, Washington State’s OPMA (Chapter 42.30 RCW) passed in 2022 encourage governments to provide online and telephonic access to public meetings, but also require meetings to be held in a physical location accessible to the public (outside of a declared emergency). The Governor’s Proclamation 20-28.14 requiring virtual meeting access is due to expire on 1 June 2022. After that date, all public entities in Washington will be required to hold meetings with a physical location for the public to attend.

Therefore, if the governing body of a public entity in Washington is holding TEFRA hearing, the OPMA requirements may prevent it from holding the hearing as a teleconference. Washington Public entities may avoid triggering OPMA requirements by designating a representative to hold the TEFRA hearing. Similar situations may exist in other states.

With those few considerations understood, the new ability to hold TEFRA hearings as teleconferences is a valuable new tool provided by the IRS and should help public authorities save time and effort on coming bond issuances.

[Click here](#) to read Rev. Proc. 2022-20.

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