



January 2, 2019

IRS Releases Final TEFRA Regs

The IRS has released final regulations (the “Final Regulations”) implementing portions of TEFRA contained in section 147(f) of the Code. These Final Regulations adopt and modify the 2017 proposed regulations on the same subject. The Final Regulations apply in circumstances where the public approval of a bond issuance occurs on or after April 1, 2019.

The Final Regulations include guidance regarding the use of an issuer’s website to publish the TEFRA notice which liberalize the rules contained in the prior proposed regulations to the extent that, we expect going forward, most notices will be solely by website (without regard to whether such notice complies with state and local law notice requirements). The Final Regulations preserve the previous regulations’ timing requirements related to issuances pursuant to plans of finance.

Some of the main points in the final regulations are:

- Public Hearings
 - Public hearings may NOT be cancelled even if no one has notified the issuer of an intent to speak.
 - Teleconferences or webinars are NOT an acceptable means of fulfilling the public hearing requirements.
- Reasonable Public Notices
 - Notices of public hearings are presumptively reasonable if they are sent SEVEN calendar days (instead of fourteen calendar days) beforehand.
 - Notices for “on-behalf-of” issuers may be published on the “on-behalf-of” issuer’s own website OR on the website of the approving governmental unit.
 - The requirement for reasonable alternative notice in the case of notice published on a website has been REMOVED. The question of what constitutes sufficient documentation for the timing of publication is an open question, but the date and time of the notice up on the website should be recorded.
 - The Final Regulations clarify where on an issuer’s website notices may be published.
 - Notices given in a way that satisfies state notice requirements must satisfy TEFRA requirements IN ADDITION TO the state requirements.
- Applicable Elected Representatives
 - Political appointees of an elected representative will NOT generally be able to execute the public approval for an issuance.
- Contents of Notice and Approval
 - Issuers may NOT aggregate maximum principal amounts for different projects and must separately identify the maximum principal amount for each project.

- In determining the maximum stated principal amount of a project, the Final Regulations ALLOW for contingencies like cost overruns or failures to receive construction approvals to be included in such cost without regard to whether the occurrence of such contingency is reasonably expected at the time of the notice or approval.
- Maximum stated principal amount means the maximum stated par amount.
- The public notice and approval MAY list the general partner of the borrower partnership as the true beneficial party in interest.
- The physical location of a project may be given in the public notice and approval by including a general description of the prospective location of the project by street address, reference to boundary streets or other geographic boundaries, or other description of the specific geographic location that is reasonably designed to inform readers of the location.
- For pooled financings with qualified 501(c)(3) bonds, no host approval is required at time of the limited pre-issuance public approval, the Final Regulations RETAIN the option to meet the general rules on public approval OR the special rules for two-stage public approval.
- No maximum amount of time between the notice of public hearing and the public hearing itself was adopted.
- The Final Regulations generally retain the definition of “project” as one or more capital projects or facilities including building and land financed with the proceeds of an issue located on the same site or proximate sites, however the Final Regulations expand the definition of “project” to include “integrated operations” on non-proximate sites to harmonize with existing regulations on the subject.

Additional Information

For further information please contact any of the members of Kutak Rock’s Section 103 Tax Group, listed below. For more information regarding our practices, please visit us at www.KutakRock.com.

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