

HAWKINS ADVISORY

PROPOSED TEFRA PUBLIC NOTICE, HEARING & APPROVAL REGULATIONS

Proposed Treasury Regulations (the “**Proposed Regulations**”) governing the application of the so-called TEFRA public notice, hearing and approval requirements (the “**TEFRA Requirements**”) set forth in section 147(f) of the Internal Revenue Code of 1986, as amended (the “**Code**”), were published in the Federal Register on September 28, 2017. Comments are requested to be received by December 27, 2017. Satisfaction of the TEFRA Requirements is a precondition to the issuance of exempt facility bonds and qualified section 501(c)(3) bonds.

The Proposed Regulations suggest a more streamlined approach to satisfying certain of the TEFRA Requirements, including how the requisite notice may be disseminated, the identification of the beneficiary of the bond issue, the description of the project, and clarification that no “host” approval is needed in respect of qualified mortgage bonds, qualified student loan bonds and qualified 501(c)(3) bonds issued to finance working capital.

The Proposed Regulations require the amount of bond proceeds to be spent at different locations be identified in the public notice.

The Proposed Regulations also allow an issuer to re-TEFRA in situations involving “unexpected events or unforeseen changes in circumstances” occurring after the bonds are issued.

I. What should be included in the Public Notice.

The Proposed Regulations retain the requirement that the notice include a general description of the project to be financed, with certain refinements. The notice should set forth:

- the maximum stated principal amount (we believe this is intended to mean the amount borrowed or proceeds) of bonds to be issued for the project; if the project encompasses multiple locations, a dollar amount per location must be provided;
- the initial legal owner or principal user of the facility, or, in the alternative, the true beneficial party at interest (*e.g.*, the name of the 501(c)(3) organization that is the sole member of the LLC that is the legal owner);
- the location of the project by street address or, if none, by a general description designed to inform readers of the specific location of the project, including reference to boundary streets or other geographic boundaries;
- the general functional description of the type and use of the project to be financed, which may be satisfied by identifying the category of exempt facility bond to be issued or by reference to another general category of

private activity bond together with information regarding the type and use of the project; for example, a qualified 501(c)(3) bond for a hospital.

The Proposed Regulations apply special rules to issuances of qualified mortgage bonds pursuant to which the TEFRA notice is only required to state that the bonds will finance residential mortgages, identify the maximum stated principal amount of bonds to be issued (see comment above), and provide a general description of the geographic jurisdiction in which the residences to be financed with the proceeds of such bonds are to be located; for example, residences located throughout a State should be described in connection with bonds issued by an issuer with a statewide jurisdiction. Similar provisions apply to issuances of qualified student loan bonds and qualified 501(c)(3) bonds issued to provide working capital.

Special rules apply to pooled qualified 501(c)(3) bonds issued pursuant to section 147(b)(4)(B) of the Code.

II. Deviations in Public Notice and Approval Information.

Deviations between the stated use of proceeds approved pursuant to the TEFRA Requirements and the actual use of proceeds will cause an issue to fail to meet the requirements of the Code, unless such deviations are determined to be “insubstantial”.

The Proposed Regulations identify the following “insubstantial deviations”:

- a 10 percent increase and any decrease in the amount approved in accordance with the TEFRA Requirements and the amount actually issued or spent;
- the use of proceeds to pay working capital costs directly associated with any project specified in the approval; and
- the initial legal owner or actual user being other than the entity identified in the approvals, provided such entities were a related party on the issue date of the bonds.

Interestingly, a change in the address of a project is not included in the examples of what constitutes an “insubstantial deviation”.

The Proposed Regulations allow a supplemental public approval to cure a substantial deviation in the actual use of proceeds in situations in which the issue originally met the TEFRA Requirements, provided that:

- on the issue date of the bonds, the issuer reasonably expected there would be no substantial deviations between the use of proceeds described in the approval materials and the actual use of proceeds;

- the actual use is a result of unexpected events or unforeseen changes in circumstances that occur after the issue date; and
- the issuer obtains a supplemental public approval in respect of the actual use of proceeds **before** such amounts are used for the different purpose.

No examples of an “unexpected event” or an “unforeseen change” are provided.

III. Reasonable Public Notice, Hearing and Approval.

The Proposed Regulations generally follow the existing regulations in respect of certain procedural guidelines.

(A) Issuer Approval & Host Approval. The TEFRA Requirements must be satisfied by the governmental unit that is the issuer or on behalf of which the issuer issues the bonds. If the project is not entirely situated within the geographic jurisdiction of the issuer, the governmental unit within whose geographic jurisdiction the project is located (the “host”) must also satisfy the TEFRA Requirements.

The Proposed Regulations include special rules exempting bonds issued in connection with airports or high-speed intercity rail facilities from any host approval requirements where the issuer of the bonds is also the owner or operator of the facilities to be financed. Special provisions also apply in respect of certain qualified scholarship funding bonds and certain volunteer fire department bonds.

No host approval is required under the Proposed Regulations for qualified mortgage revenue bonds, qualified student loan bonds or the portion of an issue qualified 501(c)(3) bonds expected to finance working capital expenditures.

(B) Reasonable Public Notice. The public notice must be reasonably designed to inform residents of approving governmental unit, *i.e.*, the issuer (issuer approval) and, if different from the issuer, the geographic jurisdiction in which the project is to be located (host approval), of the proposed issue. The notice must state the time and place for the hearing, as well as set forth the information described in Section I. above.

Notice is presumed to be reasonable, if it is given no fewer than 14 calendar days prior to the date of the hearing.

The notice may be disseminated by:

- publication in a newspaper of general circulation available to the residents of the applicable jurisdiction;
- radio or television broadcast;
- **governmental website electronic posting, if such website is used to inform residents about events affecting them; provided, however, such governmental unit offers a reasonable publicly known alternative method for obtaining the information contained in the public notice for residents without access to the Internet (such as telephone recordings); or**
- any manner that is permitted under a general State law for public notices for public hearings for the approving governmental unit.

(C) Public Hearing. The public hearing must be a forum that provides a reasonable opportunity for interested individuals to express their views, orally or in writing, on the proposed issue and the location and nature of the proposed project to be financed.

The hearing must be held in a location that, based on the facts and circumstances, is convenient for residents of the approving governmental unit. The location is presumed convenient if located in the approving governmental unit’s capital or seat of government. If more than one governmental unit is approving the issue (*i.e.*, the issue requires both issuer approval and host approval) the hearing may be combined, as long as the residents of each participating governmental unit are afforded a reasonable opportunity to be heard. This requirement is presumed to be satisfied if the location is not more than 100 miles from the seat of government of each governmental unit beyond whose geographic jurisdiction the hearing is conducted.

In general, the governmental unit may select its own procedure for a public hearing, provided interested individuals have a reasonable opportunity to express their views. The governmental unit may impose reasonable requirements and limitations on persons wishing to speak.

A public hearing may be conducted by an individual appointed or employed by the governmental unit or the issuer to perform such function.

(D) Applicable Elected Representative. The final step in the TEFRA Requirements is to secure approval by the applicable elected representative of the approving governmental unit following the public hearing for which there was reasonable public notice. In situations in which both issuer and host approval are required, the applicable elected representative of both jurisdictions must approve the issue and the project.

An applicable elected representative may approve the issue and the project; in the alternative, the approval may be by voter referendum.

“Applicable elected representative,” for this purpose, includes:

- the governmental unit’s elected legislative body;
- the governmental unit’s chief elected executive officer;
- for a State, the chief elected legal officer of the State’s executive branch; or
- any official elected by the voters of the governmental unit and designated for purposes of the TEFRA Requirements by the governmental unit’s chief elected executive officer or by State or local law to approve issues for the governmental unit. In general, an official is considered elected only if popularly elected at-large by the voters of the governmental unit.

If a governmental unit has no “applicable elected representative,” approval may be obtained from the applicable elected representative of the next higher governmental unit (with an applicable elected representative) from which the governmental unit derives its authority; for

example, a governmental authority derives its authority from another governmental unit that enacts a specific law (*e.g.*, a provision in a State constitution, charter or statute) by or under which the governmental unit is created.

(E) Timing of Approval Relative to Issue Date. Public approval of an issue is timely only if the issuer obtains the public approval (including host approval, if necessary) within one year before the issue date of the bonds. Public approval of a plan of financing is timely only if the issuer (and host) obtains the public approval within one year before the issue date of the first issue issued under the plan of financing and the issuer issues all issues under the plan of financing within three years after the issue date of such first issue.

IV. Effective Date.

Final Regulations will apply to bonds for which a public approval occurs 90 days after their publication in the Federal Register. Section 5f.103-2 continues to apply to bonds issued pursuant to a public approval occurring before such date. The Preamble to the Proposed Regulations affords issuers the ability to elect to apply the Proposed Regulations in whole, but not in part, to bonds issued pursuant to a public approval that occurs on or after September 28, 2017 and before the effective date of any final regulations.

Any questions regarding the foregoing may be addressed to a member of the Hawkins Delafield & Wood LLP Tax Department.

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