

# HAWKINS ADVISORY

## Final Public Notice, Hearing & Approval Regulations

On December 31, 2018, the Internal Revenue Service published final regulations (the “**Final Regulations**”) amending and modernizing certain provisions of the existing regulations (the “**Existing Regulations**”) in respect 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**”). The TEFRA Requirements must be satisfied as a precondition to the issuance of tax-exempt private activity bonds, including exempt facility bonds and qualified section 501(c)(3) bonds.

The Final Regulations include a broadening of the acceptable methods for publication of notice of the hearing to include electronic publication, a shortening of the required notice period from 14 to 7 days, and permission 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 Final Regulations retain the requirement that the public notice include a general description of the project to be financed, with certain refinements. The notice should set forth:

- 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 (e.g., a qualified 501(c)(3) bond for a hospital facility);
- the maximum stated principal amount<sup>1</sup> of bonds to be issued for the project; if the issuance includes financing for multiple projects, a dollar amount per project must be provided. The term “project” generally means one or more capital projects or facilities to be financed with an issue that are located on the same site, or adjacent or proximate sites used for similar purposes; however, projects or facilities that are not located on the same site or adjacent or proximate sites may be treated as one project if those capital projects or facilities are used in an “integrated” operation. The maximum principal amount(s) included in the notice may be determined on any reasonable basis and may take into account contingencies without regard to whether the occurrence of such contingencies are reasonably expected at the time of the notice;

- 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, or the name of a general partner of a partnership that owns the project); and
- 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. For a project involving multiple capital projects or facilities located on the same site, or on adjacent or reasonably proximate sites with similar uses (such as a project for a university involving multiple buildings on that entity’s main urban campus), a consolidated description of the location of those capital projects or facilities (such as a reference to the outside street boundaries of the university campus described above) provides a sufficient location description.

### II. Reasonable Public Notice, Hearing and Approval

The Final Regulations generally follow the Existing Regulations in respect of certain procedural guidelines, with certain updates to modernize the requirements applicable to the timing and methods available to provide a reasonable notice of the hearing.

#### A. Issuer Approval and Host Approval

The bonds and the project must be approved by the issuer of the bonds (or the governmental unit on behalf of which the issue is issued) (referred to as “issuer approval”) and, if the project is not located entirely within the jurisdiction of the issuer, the governmental unit the geographic jurisdiction of which contains the site of the project (referred to as “host approval”). If the entire project is situated within the geographic jurisdiction of more than one governmental unit, then any one of those governmental units may provide host approval for that issue. If, however, the project is located within the geographic jurisdiction of two or more governmental units but not entirely within any one of those governmental units, each portion of the project must be approved by the respective governmental unit the geographic jurisdiction of which includes a portion of the project.

#### B. Reasonable Public Notice

The purpose of the public notice is to inform residents of the approving governmental unit(s) of the proposed bond issue. Notice is presumed to be reasonable if it is given no fewer than 7 calendar days prior to the hearing. This represents a shortening of the notice period from the 14 calendar day requirement prescribed by the Existing Regulations.

<sup>1</sup> Actual proceeds, and not only the principal or par amount, may be constrained by the maximum figure included in the notice as well.

The notice may be disseminated by:

- publication in one or more newspapers of general circulation available to the residents of the applicable jurisdiction; or
- radio or television broadcast; or
- electronic posting on the approving governmental unit's primary public website in an area of the website used to inform its residents about events affecting the residents (such as notice of public meetings of the governmental unit); except that with respect to an issue issued by an on-behalf-of issuer that acts on behalf of a governmental unit, such notice may be published on the public website of the on-behalf-of issuer as an alternative to the public website of the approving governmental unit; or
- any manner that is permitted under a general state law for public notices for public hearings for the approving governmental unit provided that public notice is reasonably accessible.

Notably, the Final Regulations omit the requirement set forth in certain proposed regulations that an approving governmental unit that posts a notice on its public website must also use an alternative notice method to reach persons without access to the internet.

### **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 bond 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.*, 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 of the hearing 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. In situations in which both issuer approval and host approval are required, the applicable elected representative of each jurisdiction must approve the issue and the project.

An applicable elected representative may approve the bond 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 unit that derives its authority from another governmental entity 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 Hearing and Issue Date**

There is no maximum time limitation between the date of the public hearing and the date of public approval by the applicable elected representative; however, such public approval is timely only if obtained within one year prior to the issue date of the bonds. Public approval of a "plan of financing" is timely only if the issuer (and host, if applicable) 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.

### **F. Special Rules**

The Final Regulations include special rules with respect to certain types of bond issues as follows:

- Qualified mortgage bonds - 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, 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 state-wide jurisdiction. No host approval is required. Similar provisions apply to issuances of qualified student loan bonds and qualified 501(c)(3) bonds issued to provide working capital.

- Pooled qualified 501(c)(3) bonds - Issuers can meet the TEFRA Requirements through a two-step process— (i) prior to the issue date, issuer approval is obtained following a public hearing with notice that describes the bonds as qualified 501(c)(3) bonds expected to be used to finance loans to section 501(c)(3) organizations or governmental units, provides a general functional description of the property to be financed, and states that an additional public approval containing project details will be obtained before any such loans are originated; and (ii) post-issuance host and issuer approval is obtained for any such loan prior to origination. No host approval is required prior to the issue date of the bonds.
- No host approval is required for bonds issued in connection with airports or high-speed intercity rail facilities 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.

### III. 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 Final Regulations identify the following “insubstantial deviations”:

- not more than a 10 percent increase and any decrease in the principal amount approved for a project and the principal amount actually issued or spent on such project;
- the use of proceeds to pay working capital costs<sup>2</sup> directly associated with any project specified in the approval; and
- the initial legal owner or actual principal user is not the entity identified in the approval, but is a related party to such on the issue date of the bonds.

In the event that a deviation in the actual use of proceeds is not an insubstantial deviation as described above, the Final Regulations allow a supplemental public approval to cure a substantial deviation in situations in which the issue originally met the TEFRA Requirements—a provision which was included in certain proposed regulations but is not available under the Existing Regulations. The supplemental public approval will be effective for this purpose provided that:

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

- the actual use in contravention to the use or amount described in the approving materials 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 or amount of proceeds **before** such proceeds are used for the different purpose or in a different amount.

### IV. Effective Date

The Final Regulations will apply with regard to bonds for which a public approval occurs on or after April 1, 2019. The Existing Regulations continue to apply to bonds issued pursuant to a public approval occurring before such date; however, issuers may apply the portion of the Final Regulations related to the rules applicable to “deviations” discussed in III, above, in whole, but not in part, to bonds issued pursuant to a public approval that occurs prior to that date, so long as the original public approval met the TEFRA Requirements under the Final Regulations.

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

Faust N. Bowerman	<a href="mailto:fbowerman@hawkins.com">fbowerman@hawkins.com</a>
Jennifer B. Cordova	<a href="mailto:jcordova@hawkins.com">jcordova@hawkins.com</a>
Michela Daliana	<a href="mailto:mdaliana@hawkins.com">mdaliana@hawkins.com</a>
Neil J. Kaplan	<a href="mailto:nkaplan@hawkins.com">nkaplan@hawkins.com</a>
Russell A. Miller	<a href="mailto:rmiller@hawkins.com">rmiller@hawkins.com</a>
Brian Organ	<a href="mailto:borgan@hawkins.com">borgan@hawkins.com</a>
Kathleen J. Orlandi	<a href="mailto:korlandi@hawkins.com">korlandi@hawkins.com</a>
Vladimir Popik	<a href="mailto:vpopik@hawkins.com">vpopik@hawkins.com</a>
Robert Radigan	<a href="mailto:rradigan@hawkins.com">rradigan@hawkins.com</a>
Kam Wong	<a href="mailto:kwong@hawkins.com">kwong@hawkins.com</a>

<sup>2</sup> There may be other prohibitions on the ability to use bond proceeds to pay working capital of which an issuer should be mindful.

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#### **New York**

7 World Trade Center  
250 Greenwich Street  
New York, NY 10007  
Tel: (212) 820-9300

#### **Washington, D.C.**

601 Thirteenth Street, N.W.  
Washington, D.C. 20005  
Tel: (202) 682-1480

#### **Newark**

One Gateway Center  
Newark, NJ 07102  
Tel: (973) 642-8584

#### **Hartford**

20 Church Street  
Hartford, CT 06103  
Tel: (860) 275-6260

#### **Ann Arbor**

2723 South State Street  
Ann Arbor, MI 48104  
Tel: (734) 794-4835

#### **Sacramento**

1415 L Street  
Sacramento, CA 95814  
Tel: (916) 326-5200

#### **Los Angeles**

333 South Grand Avenue  
Los Angeles, CA 90071  
(213) 236-9050

#### **San Francisco**

One Embarcadero Center  
San Francisco, CA 94111  
Tel: (415) 486-4200

#### **Portland**

200 SW Market Street  
Portland, OR 97201  
Tel: (503) 402-1320

*Hawkins*  
DELAFIELD & WOOD LLP