

The Shutdown Can't Stop the Release of the Final TEFRA Regulations

Sunday, December 30, 2018

The most recent partial shutdown of the federal government has halted many operations of the U.S. Department of the Treasury, including those of the Internal Revenue Service. The shutdown has, however, evidently left untrammelled the Treasury Department's ability to promulgate regulations. On Friday, December 28, the Treasury released final regulations under Internal Revenue Code Section 147(f) regarding the public notice, hearing, and approval requirements that apply to qualified private activity bonds (the "[Final TEFRA Regulations](#)"). The Final TEFRA Regulations put into final, effective form the proposed TEFRA regulations that were issued on September 28, 2017 (the proposed TEFRA regulations are available, and are analyzed, [here](#)). The promulgation of the Final TEFRA Regulations allow the IRS and Treasury to check-off a perennial item on their annual priority guidance plan, and during a shutdown of the federal government, no less. That's dedication. For a brief summary of the Final TEFRA Regulations, hit the jump.



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The Final TEFRA Regulations adopt the beneficial aspects of the proposed regulations, with three significant improvements on the proposed regulations:

- Notice of a public hearing on qualified private activity bonds will be presumed to be reasonable if the notice is published no fewer than seven days before the hearing. The existing and proposed TEFRA regulations require the notice to be published at least 14 days before the hearing to be presumed reasonable.
- The Final TEFRA Regulations jettison the requirement in the proposed regulations that if the issuing governmental unit publishes on its website notice of the public hearing on qualified private activity bonds, it must also provide "reasonable alternative notice" to residents who do not have access to the internet. The proposed regulations did not define what constitutes "reasonable alternative notice," and they also did not provide any standard for determining whether a resident lacks access to the internet (for example, is any resident who is served by a city or county library bereft of access to the internet?). The ambiguities of the "reasonable alternative notice" requirement dissuaded many issuers of qualified private activity bonds from electing to apply the proposed TEFRA regulations to publish public hearing notices on their websites. In response to comments demonstrating that many more people consume news and information from the internet than from any newspaper, radio station or television station, the Final TEFRA Regulations provide that an issuer of qualified private activity bonds can post notice of a public hearing on such bonds on the part of its website that informs residents of events that affect them (for example, the portion of the issuer's website that announces public meetings) without having to publish the notice in any alternative manner. The issuer must maintain evidence of this web-based publication of the hearing notice.
- The Final TEFRA Regulations retain the use of the term "project" from the proposed regulations, and they also retain the requirement that the public hearing notice and approval set forth a maximum principal amount of bonds applicable to each project to be financed by the subject issue of qualified private activity bonds, rather than stating only the aggregate principal amount of bonds to be issued for all projects to be financed by that bond issue. The definition of "project" in the Final TEFRA Regulations includes land, buildings, equipment, and other property located on the same site, adjacent sites, or proximate sites, as well as such items that are located on non-proximate sites if they will be used in an "integrated operation" on those non-proximate sites. The "integrated operation" element is contained in the existing TEFRA

regulations, but it was excluded from the proposed regulations. The proposed regulations also did not define what comprises sites that are “proximate.” The preamble to the Final TEFRA Regulations makes clear that a college campus located on sites that are not adjacent is an example of a project that is located on proximate sites. Ultimately, with the inclusion of the “integrated operation” element and some clarity as to the meaning of a “proximate sites,” many bond-financed assets that will not be located on the same site or contiguous sites should be able to be treated as a single project for purposes of the public hearing and approval under the Final TEFRA Regulations (for example, an issue of qualified 501(c)(3) bonds for the benefit of healthcare system or educational institution that has several campus sites). This should help to minimize the need to state principle amounts that are applicable to separate projects.

The Final TEFRA Regulations apply to qualified private activity bonds issued pursuant to a public approval given on or after April 1, 2019. We will continue to analyze the Final TEFRA Regulations and will provide additional posts as this analysis develops.

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