



[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 5f

[REG-128841-07]

RIN 1545-BG91

Public Approval of Tax-Exempt Private Activity Bonds

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Withdrawal of notice of proposed rulemaking and notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations to update and streamline the public approval requirement provided in section 147(f) of the Internal Revenue Code applicable to tax-exempt private activity bonds issued by State and local governments. The proposed regulations would update the existing regulations on the public approval requirement to reflect statutory changes, to streamline the public approval process, and to reduce burden on State and local governments that issue tax-exempt private activity bonds. This document also withdraws two previous notices of proposed rulemaking on this topic. The proposed regulations affect State and local governments that issue tax-exempt private activity bonds.

DATES: Comments and requests for a public hearing must be received by **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG-128841-07), room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC

20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-128841-07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC 20224, or sent electronically via the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov) (IRS REG-128841-07).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Spence Hanemann at (202) 317-6980; concerning submissions of comments and requesting a hearing, Regina Johnson at (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

### **Paperwork Reduction Act**

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review under OMB Control Number 1545-2185 in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). The collection of information in this proposed regulation is the requirement in §1.147(f)-1 that certain information be contained in a public notice or public approval and, consequently, disclosed to the public. This information is required to meet the statutory public approval requirement provided in section 147(f). The likely respondents are the governmental units required to approve an issue of private activity bonds under section 147(f).

Estimated total annual burden: 2,600 hours.

Estimated average annual burden per respondent: 1.3 hours.

Estimated number of respondents: 2,000.

Estimated frequency of responses: annual.

Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

## **Background**

This document contains proposed amendments to 26 CFR part 1 under section 147(f) of the Internal Revenue Code of 1986 (the Code) and 26 CFR part 5f under section 103(k) of the Internal Revenue Code of 1954 (the 1954 Code). In the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Public Law 97-248, 96 Stat. 324, Congress added section 103(k) to the 1954 Code to impose a public approval requirement on tax-exempt industrial development bonds. On May 11, 1983, the Department of the Treasury (Treasury Department) and the IRS published in the **Federal Register** (48 FR 21117) temporary regulations under section 103(k) of the 1954 Code (TD 7892) (the Existing Regulations). See §5f.103-2. A notice of proposed rulemaking (LR-221-82) by cross-reference to the temporary regulations was published in the **Federal Register** (48 FR 21166) on the same day.

In the Tax Reform Act of 1986 (1986 Tax Act), Public Law 99-514, 100 Stat. 2085, Congress reorganized the tax-exempt bond provisions and carried forward the public approval requirement of section 103(k) of the 1954 Code in expanded form in section 147(f) of the Code. In section 147(f), Congress extended the public approval requirement to apply to all types of tax-exempt private activity bonds, as provided in section 141(e). The legislative history of the 1986 Tax Act indicates that “[t]he conferees intend that, to the extent not amended, all principles of present law continue

to apply under the reorganized provisions.” H.R. Rep. No. 99-841, at II-686 (1986) (Conf. Rep.). Thus, the Existing Regulations in §5f.103-2 remain in effect.

On September 9, 2008, the Treasury Department and the IRS published a notice of proposed rulemaking (REG-128841-07) in the **Federal Register** (73 FR 52220) that proposed regulations to amend and supplement the Existing Regulations (the 2008 Proposed Regulations). The Treasury Department and the IRS received public comments on the 2008 Proposed Regulations and held a public hearing on January 26, 2009. As discussed more fully in the Explanation of Provisions section of this preamble, the Treasury Department and the IRS have decided to withdraw the 2008 Proposed Regulations in full and to propose new regulations. This document contains those new proposed regulations (the Proposed Regulations).

## **Explanation of Provisions**

### *1. Introduction*

In general, pursuant to section 103 of the Code, interest received by investors on eligible State and local bonds is tax-exempt for Federal income tax purposes. Interest on private activity bonds qualifies for this tax-exempt treatment only if the bonds meet the requirements for “qualified bonds” as defined in section 141(e) and other applicable requirements provided in section 103. Section 141(e) of the Code requires, among other things, that qualified bonds meet the public approval requirement of section 147(f).

The Proposed Regulations would update the Existing Regulations to address subsequent statutory changes and to streamline the public approval process. The Proposed Regulations provide greater flexibility to State and local governments with respect to the public approval process to reduce administrative burdens associated with

the public approval requirement. The Proposed Regulations recognize advances in technology and electronic communication that may facilitate more streamlined procedures for providing reasonable public notice of a public hearing.

## *2. The 2008 Proposed Regulations*

The 2008 Proposed Regulations proposed to update, clarify, and simplify discrete aspects of the Existing Regulations regarding the public approval requirement. The 2008 Proposed Regulations focused on the scope, information content, methods, and timing for the public approval process, and generally did not focus on the governmental entities from which public approval is required. Overall, the public comments on the 2008 Proposed Regulations were favorable.

The Proposed Regulations generally incorporate the amendments proposed in the 2008 Proposed Regulations with modifications in response to the public comments. One comment focused on the structure of the 2008 Proposed Regulations. The 2008 Proposed Regulations would have revised the Existing Regulations by amending existing rules and adding new rules. The 2008 Proposed Regulations further provided that the Existing Regulations would remain in effect to the extent not inconsistent with the final version of the 2008 Proposed Regulations. Commenters expressed concern about potential confusion over two distinct and partially inconsistent regulation sections governing the public approval requirement. The Treasury Department and the IRS understand this concern. Accordingly, the Proposed Regulations consolidate the guidance in the Existing Regulations and the 2008 Proposed Regulations, with modifications in response to the public comments and other recent developments, into new proposed guidance and provide a further opportunity for public comment.

The Treasury Department and the IRS also received numerous comments regarding the level of specificity of information required to be contained in reasonable public notice of a public hearing or a public approval. Generally, the 2008 Proposed Regulations proposed to allow the issuer to provide streamlined information about projects to be financed, and the Existing Regulations require a greater level of specificity of information about such projects. The 2008 Proposed Regulations also proposed to afford issuers more flexibility regarding the effect of post-issuance changes from the reasonably expected facts provided in the reasonable public notice or public approval. Commenters expressed differing views on whether these proposed amendments in the 2008 Proposed Regulations should be adopted. Commenters in favor of these amendments generally applauded the reduced burden that issuers would bear under the 2008 Proposed Regulations and suggested ways in which that burden could be reduced further. Commenters opposed to these amendments generally argued that reducing the amount of public information would limit the public's ability to approve or oppose on an informed basis new private activity bonds and proposed projects to be financed. The legislative history of the public approval requirement emphasizes the importance of "a reasonable opportunity for persons with differing views on both issuance of the bonds and the location and nature of the proposed facility to be heard." S. Rep. No. 97-494, at 171 (1982). With respect to these proposed amendments, the Treasury Department and the IRS have determined that the information that would have been required by the 2008 Proposed Regulations is sufficient to permit the public to evaluate the merits of both the issuance of the bonds and the location and nature of the financed facility. Thus, the burden imposed by the

Existing Regulations may be reduced as provided in the 2008 Proposed Regulations without significantly impairing the public's consideration of new private activity bonds. Accordingly, the Proposed Regulations generally retain the streamlined information and post-issuance flexibility proposed in the 2008 Proposed Regulations and provide for additional post-issuance flexibility. (See section 6 of this Explanation of Provisions.)

Commenters also provided differing views on the amendments in the 2008 Proposed Regulations that proposed changes to the procedures for providing reasonable public notice of a public hearing. The Existing Regulations generally permit an issuer to publicize notice by newspaper, radio, or television, and presume notice to be reasonable if published at least 14 days prior to the date of the public hearing. The 2008 Proposed Regulations proposed to expand the permitted methods of providing public notice to include notice by newspaper, radio, television, Web site, or other permitted methods of giving public notice under State law, and would have shortened the presumptively reasonable notice period to seven days in advance of the hearing. Commenters in favor of these amendments generally stated that the proposed amendments would ease the burden of providing the public notice. Commenters opposed to these amendments generally expressed concern that seven days' notice of a public hearing would not provide the public sufficient time to make an informed decision and to make arrangements to be present at the hearing. The legislative history of TEFRA indicates that Congress expected notice to be published no fewer than 14 days before the scheduled date of the hearing. See S. Rep. No. 97-494, at 171 (1982). In response to these comments, the Proposed Regulations adopt and expand the permitted methods for giving notice of a public hearing that were proposed in the 2008

Proposed Regulations, but retain the 14-day notice period presumed reasonable under the Existing Regulations consistent with the expectations of Congress.

### *3. Host Approval and Issuer Approval*

Section 147(f) generally requires that both the governmental unit that issues the bonds (or on behalf of which the bonds are issued) and a governmental unit with jurisdiction over the location of the financed project approve an issue of private activity bonds (and the approvals are referred to as the issuer approval and the host approval, respectively). The Proposed Regulations generally carry forward the rules on issuer approval and host approval from the Existing Regulations, with limited revisions to address statutory changes that affect the application of these rules to certain types of private activity bonds. Thus, for example, the Proposed Regulations include guidance to address subsequent statutory changes in section 147(f)(3) and (4) that added special provisions regarding the issuer approval and host approval requirements for certain financings involving airports, high-speed rail facilities, qualified scholarship funding corporations, and volunteer fire departments.

The 1986 Tax Act extended the public approval requirement beyond the traditional, facility-focused industrial development bonds subject to the requirement under the 1954 Code to include certain special types of financings that are not facility-specific, including “qualified mortgage bonds” as defined in section 143(a), “qualified veterans’ mortgage bonds” as defined in section 143(b), “qualified student loan bonds” as defined in section 144(b), and “qualified 501(c)(3) bonds” as defined in section 145. For these types of bonds, obtaining a host approval may be impractical or unworkable. For example, for qualified mortgage bonds, the locations of many of the homes to be

financed with qualified mortgage loans generally are unknown at the time of issuance of the bonds and thus it may be difficult to identify appropriate governmental units to provide host approval. Moreover, for qualified student loan bonds and for qualified 501(c)(3) bonds used to finance working capital expenditures, the application of the host approval requirement is unworkable because the assets and expenditures financed have no physical location. In recognition of the practical difficulties faced by issuers of these types of bonds under the Existing Regulations, the Proposed Regulations provide that no host approval is necessary for mortgage revenue bonds (defined as qualified mortgage bonds, qualified veterans' mortgage bonds, and certain refundings of bonds issued to finance mortgages of owner-occupied residences under the law prior to enactment of section 143), qualified student loan bonds, or qualified 501(c)(3) bonds used to finance working capital expenditures.

#### *4. Reasonable Public Notice and Public Hearing*

The Existing Regulations generally provide that an applicable elected representative of the approving governmental unit may approve an issue following a public hearing for which there was reasonable public notice. The Existing Regulations provide guidance on permitted methods for giving reasonable public notice and holding public hearings. The Proposed Regulations would expand these methods to provide greater flexibility to State and local governments for providing reasonable public notice.

The Existing Regulations provide generally that reasonable public notice must be published in a newspaper of general circulation available to residents of the relevant locality or announced by radio or television broadcast to those residents. The Proposed Regulations would expand the permitted methods of providing reasonable public notice

to provide greater flexibility and to recognize advances in technology and electronic communications. Thus, the Proposed Regulations would allow reasonable public notice by newspaper publication, radio or television broadcast, postings on a governmental unit's public Web site, or alternative methods permitted under a general State law for public notices for public hearings of a governmental unit. The Treasury Department and the IRS solicit comment on other possible methods of providing reasonable public notice to foster flexibility and to reduce administrative burdens.

## *5. Content of Reasonable Public Notice and Public Approval*

### *A. General rules for content of reasonable public notice and public approval*

The Existing Regulations generally require that the reasonable public notice and the public approval contain the following information: a general, functional description of the type and use of the facility to be financed; the maximum aggregate face amount of the bonds to be issued for the facility; the initial owner, operator, or manager of the facility; and the location of the facility by street address or, if none, by a general description designed to inform readers of the specific location. The required level of specificity of information for the public approval process under the Existing Regulations has proven to be unduly limiting and burdensome in certain respects. The Proposed Regulations generally retain the requirements that information (public approval information) be provided for the public approval process but refine the required public approval information to reduce burden and enhance flexibility.

Initially, the Existing Regulations focus on an individual "facility" as the unit of financed property for which the issuer must provide the relevant information. The definition of "facility" in the Existing Regulations includes facilities on multiple tracts of

land only if the facilities are used in an integrated operation. Whether facilities are part of an “integrated operation” has proven difficult to determine.

The Proposed Regulations use the term “project” in lieu of the term “facility” because “project” more clearly indicates that financed property may consist of multiple buildings and multiple sites. The Proposed Regulations define the term “project” generally to mean one or more capital projects or facilities, including land, buildings, equipment, and other property, to be financed with an issue, that are located on the same site, or adjacent or proximate sites used for similar purposes. In addition, to address certain special types of loan financings, the definition of a project under the Proposed Regulations also includes mortgage loans financed by mortgage revenue bonds, student loans financed by qualified student loan bonds, and working capital expenditures financed by qualified 501(c)(3) bonds.

The Proposed Regulations would continue to require a general functional description of the type and use of the financed project. The Proposed Regulations, however, would mitigate the required level of specificity of that information. Thus, the Proposed Regulations would allow an issuer of exempt facility bonds to satisfy this requirement through a statement that identifies the category of exempt facility bond (for example, bonds financing an airport or a mass commuting facility). Similarly, an issuer of other types of private activity bonds may satisfy this requirement through a statement that identifies the type of bonds and the type and use of the project (for example, qualified small issue bonds for a manufacturing facility).

The Proposed Regulations would continue to require that the public approval information include the name of the expected initial owner or the principal user of the

project. The Proposed Regulations, however, would permit an issuer to name the true beneficial party of interest as an alternative to naming a legal owner or user (for example, the name of a nonprofit hospital organization instead of a limited liability company that serves as the legal owner of a hospital).

The Proposed Regulations would continue to require that the public approval information include the location of the project by street address. The Proposed Regulations, however, would clarify that a description by boundary streets or other geographic boundaries suffices to meet this location requirement. The Proposed Regulations would allow a consolidated description of the location of a project on the same site or on adjacent or proximate sites (for example, a college campus).

*B. Special rules for mortgage revenue bonds, qualified student loan bonds, and certain qualified 501(c)(3) bonds*

The 1986 Tax Act extended the public approval requirement to mortgage revenue bonds, qualified student loan bonds, and qualified 501(c)(3) bonds. The Existing Regulations were promulgated before the 1986 Tax Act and thus provide no guidance tailored to the application of the public approval requirement to these types of bonds. In the General Explanation of the 1986 Tax Act, the Staff of the Joint Committee on Taxation stated that, “[i]n extending this requirement to all private activity bonds, Congress intended that the applicable Treasury regulations will be amended for student loan bonds (where no facilities are financed), mortgage revenue bonds (where the exact residences to be financed may not be identified before issuance of the bonds), and qualified 501(c)(3) bonds that qualify for the special exception to the maturity limitation for pooled financings (where the facilities need not be identified before issuance of the bonds).” Joint Committee on Taxation, General Explanation of the Tax Reform Act of

1986 (JCS-10-87), at 1219 (May 4, 1987). Accordingly, the Proposed Regulations provide special rules for public approval of mortgage revenue bonds, qualified student loan bonds, and qualified 501(c)(3) bonds issued for pooled financings as described in section 147(b)(4).

For mortgage revenue bonds, the Proposed Regulations would require the public approval information to state that the bonds will finance residential mortgages, provide the maximum stated principal amount of the bonds, and generally describe the issuer's geographic jurisdiction in which the residences to be financed with the mortgage loans are expected to be located. Similarly, for qualified student loan bonds, the Proposed Regulations would require the public approval information to state that the bonds will finance student loans and provide the maximum stated principal amount of the bonds. For these two types of bonds, the Proposed Regulations would not require the names of borrowers to be included in the public approval information.

For qualified 501(c)(3) bonds that finance loans described in the special provision for pooled loan financings in section 147(b)(4), the Proposed Regulations would permit the issuer to choose to apply a two-stage public approval process if the issuer has insufficient information at the time of the reasonable public notice or public approval to meet the general public approval information requirements. To apply this special rule, the issuer must first obtain public approval within the time specified in the Proposed Regulations for public approval generally. For this first-stage public approval, the public approval information must state that the bonds will be qualified 501(c)(3) bonds used to finance loans described in section 147(b)(4)(B), provide the maximum stated principal amount of the bonds, generally describe the type of project to be financed with such

loans (for example, loans for hospital facilities or college facilities), and state that the issuer will obtain an additional public approval with specific project information before origination of any such loans. In addition, before loan origination, the issuer must obtain a supplemental public approval of that loan containing all of the project-specific information that the public approval information rules generally require.

*6. Deviations from the Information in the Reasonable Public Notice and Public Approval*

Differences or “deviations” between information regarding a proposed project to be financed with a proposed issuance of private activity bonds that serves as the basis for a public approval and the actual project financed with the bonds may affect the validity of the public approval. The Existing Regulations and the Proposed Regulations provide that insubstantial deviations do not invalidate a public approval. The Proposed Regulations provide additional guidance concerning differences that constitute insubstantial deviations and also allow remedial actions to cure certain substantial deviations.

The Proposed Regulations provide that whether a deviation is substantial generally depends on all of the facts and circumstances. The Proposed Regulations, however, would always treat a change in the fundamental nature or type of a project as a substantial deviation.

The Proposed Regulations would treat certain specified deviations from the public approval information provided as insubstantial deviations. For example, a deviation from the size of a proposed bond issue for a proposed project specified in public approval information is an insubstantial deviation if the stated principal amount of bonds actually issued and used for the project is no more than ten percent (10%)

greater than the maximum stated principal amount publicly approved for the project or is any amount less than that maximum stated principal amount. Furthermore, if an issuer applies proceeds of an issue approved for use on one project to pay working capital expenditures directly associated with any project approved in the same public approval, that deviation is an insubstantial deviation. Finally, a deviation between the initial owner or principal user of the project identified in the public approval information and the actual initial owner or principal user of the project is an insubstantial deviation if the parties are related on the issue date.

The Proposed Regulations would allow supplemental post-issuance public approvals to cure certain substantial deviations that result from unexpected events or unforeseen changes in circumstances that occur after the issuance of the bonds. This remedial action is similar to a permitted post-issuance public approval under §1.141-12(e)(2) and (f) used for remedial actions for purposes of the private business restrictions.

#### *7. Applicability Dates and Reliance*

The Proposed Regulations are proposed to apply to bonds issued pursuant to a public approval that occurs on or after the date that is 90 days after publication of a Treasury decision adopting these rules as final regulations in the **Federal Register**. Issuers may apply the Proposed Regulations, in whole but not in part, to bonds that are issued pursuant to a public approval that occurs on or after **INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER** and before the applicability date provided in a Treasury decision adopting these rules as final regulations in the **Federal Register**.

In addition, the Treasury Department and the IRS propose to remove the Existing Regulations under §5f.103-2 from 26 CFR part 5f effective on the general applicability date of the final regulations, which is proposed to be the date that is 90 days after publication of a Treasury decision adopting these rules as final regulations in the **Federal Register**.

### **Special Analyses**

Certain IRS regulations, including these, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. The Existing Regulations provide guidance on the minimum informational content, procedures, and timing for the statutorily required public notices, public hearings, and public approvals. Although the Proposed Regulations are expected to affect a significant number of small State or local governmental units that issue tax-exempt private activity bonds, the Proposed Regulations are not expected to have a significant economic effect on those governmental units because the Proposed Regulations generally would streamline and simplify the Existing Regulations in various respects to reduce the administrative burdens of meeting the statutory public approval requirement. For example, the Proposed Regulations would permit publication of public notice by Web site to reduce costs associated with print publication or radio or television broadcast, reduce the information required to be contained in public notice and public approval for certain types of bonds, liberalize the consequences of insubstantial changes in project information, and permit curative actions to address certain

circumstances in which finished projects differ from descriptions provided in the public notice or public approval. Accordingly, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small entities.

### **Comments and Requests for Public Hearing**

Before the Proposed Regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the “ADDRESSES” heading. The Treasury Department and the IRS request comments on all aspects of the proposed rules. All comments will be available at [www.regulations.gov](http://www.regulations.gov) or upon request. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

### **Drafting Information**

The principal authors of these regulations are Spence Hanemann and Vicky Tsilas, Office of Associate Chief Counsel (Financial Institutions and Products). However, other personnel from the Treasury Department and the IRS participated in their development.

### **List of Subjects**

*26 CFR Part 1*

Income taxes, Reporting and recordkeeping requirements.

## 26 CFR Part 5f

Income taxes, Reporting and recordkeeping requirements.

### **Withdrawal of Notice of Proposed Rulemaking**

Accordingly, under the authority of 26 U.S.C. 7805, the notice of proposed rulemaking (REG-128841-07) that was published in the **Federal Register** (73 FR 52220) on September 9, 2008, is withdrawn. Also, under the authority of 26 U.S.C. 7805, §1.103-17 of the notice of proposed rulemaking (LR-221-82) published in the **Federal Register** (48 FR 21166) on May 11, 1983, is withdrawn.

### **Proposed Amendments to the Regulations**

Accordingly, 26 CFR parts 1 and 5f are proposed to be amended as follows:

#### PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 \* \* \*

Par. 2. Section 1.147(f)-1 is added to read as follows:

#### **§1.147(f)-1 Public approval of private activity bonds.**

(a) *In general.* Interest on a private activity bond is excludable from gross income under section 103(a) only if the bond meets the requirements for a qualified bond as defined in section 141(e) and other applicable requirements provided in section 103. In order to be a qualified bond as defined in section 141(e), among other requirements, a private activity bond must meet the requirements of section 147(f). A private activity bond meets the requirements of section 147(f) only if the bond is publicly approved pursuant to paragraph (b) of this section or the bond qualifies for the exception for refunding bonds in section 147(f)(2)(D).

(b) *Public approval requirement--(1) In general.* Except as otherwise provided in this section, a bond meets the requirements of section 147(f) if, before the issue date, the issue of which the bond is a part receives issuer approval and host approval (each a *public approval*) as defined in paragraphs (b)(2) and (3) of this section in accordance with the method and process set forth in paragraphs (c) through (f) of this section.

(2) *Issuer approval.* Except as otherwise provided in this section, *issuer approval* means an approval that meets the requirements of this paragraph (b)(2). Either the governmental unit that issues the issue or the governmental unit on behalf of which the issue is issued must approve the issue. For this purpose, §1.103-1 applies to the determination of whether an issuer issues bonds on behalf of another governmental unit. If an issuer issues bonds on behalf of more than one governmental unit (for example, in the case of an authority that acts for two counties), any one of those governmental units may provide the issuer approval.

(3) *Host approval.* Except as otherwise provided in this section, *host approval* means an approval that meets the requirements of this paragraph (b)(3). Each governmental unit the geographic jurisdiction of which contains the site of a project to be financed by the issue must approve the issue. If, however, the entire site of a project to be financed by the issue is within the geographic jurisdiction of more than one governmental unit within a State (counting the State as a governmental unit within such State), then any one of those governmental units may provide host approval for the issue for that project. For purposes of the host approval, if a project to be financed by the issue 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

that is located entirely within the geographic jurisdiction of the respective governmental units may be treated as a separate project. The issuer approval provided pursuant to paragraph (b)(2) of this section may be treated as a host approval if the governmental unit providing the issuer approval is also a governmental unit eligible to provide the host approval pursuant to this paragraph (b)(3).

*(4) Special rule for host approval of airports or high-speed intercity rail facilities.*

Pursuant to a special rule in section 147(f)(3), if the proceeds of an issue are to be used to finance a project that consists of either facilities located at an airport (within the meaning of section 142(a)(1)) or high-speed intercity rail facilities (within the meaning of section 142(a)(11)) and the issuer of that issue is the owner or operator of the airport or high-speed intercity rail facilities, the issuer is the only governmental unit that is required to provide the host approval for that project.

*(5) Special rule for issuer approval of scholarship funding bond issues and volunteer fire department bond issues.* In the case of a qualified scholarship funding bond as defined in section 150(d)(2), the governmental unit that made a request described in section 150(d)(2)(B) with respect to the issuer of the bond is the governmental unit on behalf of which the bond was issued for purposes of the issuer approval. If more than one governmental unit within a State made a request described in section 150(d)(2)(B), the State or any such requesting governmental unit may be treated as the governmental unit on behalf of which the bond was issued for purposes of the issuer approval. In the case of a bond of a volunteer fire department treated as a bond of a political subdivision of a State under section 150(e), the political subdivision described in section 150(e)(2)(B) with respect to that volunteer fire department is the

governmental unit on behalf of which the bond is issued for purposes of the issuer approval.

(6) *Host approval not required for issues of mortgage revenue bonds, student loan bonds, and certain qualified 501(c)(3) bonds.* In the case of a mortgage revenue bond (as defined in paragraph (g)(5) of this section), a qualified student loan bond as defined in section 144(b), and the portion of an issue of qualified 501(c)(3) bonds as defined in section 145 that finances working capital expenditures, the issue or portion of the issue must receive an issuer approval but no host approval is necessary.

(c) *Method of public approval.* The method of public approval of an issue must satisfy either paragraph (c)(1) or (2) of this section. An approval may satisfy the requirements of this paragraph (c) without regard to the authority under State or local law for the acts constituting that approval.

(1) *Applicable elected representative.* An applicable elected representative of the approving governmental unit approves the issue following a public hearing for which there was reasonable public notice.

(2) *Voter referendum.* A voter referendum of the approving governmental unit approves the issue.

(d) *Public hearing and reasonable public notice--(1) Public hearing.* *Public hearing* means a forum providing a reasonable opportunity for interested individuals to express their views, orally or in writing, on the proposed issue of bonds and the location and nature of the proposed project to be financed.

(2) *Location of the public hearing.* The public 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 of the public hearing is presumed convenient for residents of the unit if the public hearing is located in the approving governmental unit's capital or seat of government. If more than one governmental unit is required to hold a public hearing, the hearings may be combined as long as the combined hearing affords the residents of all of the participating governmental units a reasonable opportunity to be heard. The location of any combined hearing is presumed convenient for residents of each participating governmental unit if it is no farther than 100 miles from the seat of government of each participating governmental unit beyond whose geographic jurisdiction the hearing is conducted.

(3) *Procedures for conducting the public hearing.* In general, a governmental unit may select its own procedure for a public hearing, provided that interested individuals have a reasonable opportunity to express their views. Thus, a governmental unit may impose reasonable requirements on persons who wish to participate in the hearing, such as a requirement that persons desiring to speak at the hearing make a written request to speak at least 24 hours before the hearing or that they limit their oral remarks to a prescribed time. For this purpose, it is unnecessary, for example, that the applicable elected representative of the approving governmental unit be present at the hearing, that a report on the hearing be submitted to that applicable elected representative, or that State administrative procedural requirements for public hearings be observed. Except to the extent State procedural requirements for public hearings are in conflict with a specific requirement of this section, a public hearing performed in compliance with State procedural requirements satisfies the requirements for a public hearing in this paragraph (d). A public hearing may be conducted by an individual

appointed or employed to perform such function by the governmental unit or its agencies, or by the issuer. Thus, for example, for bonds to be issued by an authority that acts on behalf of a county, the hearing may be conducted by the authority, the county, or an appointee of either.

(4) *Reasonable public notice.* *Reasonable public notice* means notice that is reasonably designed to inform residents of an approving governmental unit, including the issuing governmental unit and the governmental unit in whose geographic jurisdiction a project is to be located, of the proposed issue. The notice must state the time and place for the public hearing and contain the information required by paragraph (f)(2) of this section. Notice is presumed to be reasonably designed to inform residents of an approving governmental unit if it satisfies the requirements of this paragraph (d)(4) and is given no fewer than fourteen (14) calendar days before the public hearing in one or more of the ways set forth in paragraphs (d)(4)(i) through (iv) of this section.

(i) *Newspaper publication.* Public notice may be given by publication in one or more newspapers of general circulation available to the residents of the governmental unit.

(ii) *Radio or television broadcast.* Public notice may be given by radio or television broadcast to the residents of the governmental unit.

(iii) *Governmental unit Web site posting.* Public notice may be given by electronic posting on the approving governmental unit's public Web site used to inform its residents about events affecting the residents (for example, notice of public meetings of the governmental unit). In the case of public notice provided as described in the first sentence of this paragraph (d)(4)(iii), the governmental unit must offer 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).

(iv) *Alternative State law public notice procedures.* Public notice may be given in a way that is permitted under a general State law for public notices for public hearings for the approving governmental unit.

(e) *Applicable elected representative--(1) In general--(i) Definition of applicable elected representative.* The *applicable elected representative* of a governmental unit means--

(A) The governmental unit's elected legislative body;

(B) The governmental unit's chief elected executive officer;

(C) In the case of a State, the chief elected legal officer of the State's executive branch of government; or

(D) Any official elected by the voters of the governmental unit and designated for purposes of this section by the governmental unit's chief elected executive officer or by State or local law to approve issues for the governmental unit.

(ii) *Elected officials.* For purposes of paragraphs (e)(1)(i)(B), (C), and (D) of this section, an official is considered elected only if that official is popularly elected at-large by the voters of the governmental unit. If an official popularly elected at-large by the voters of a governmental unit is appointed or selected pursuant to State or local law to be the chief executive officer of the unit, that official is deemed to be an elected chief executive officer for purposes of this section but for no longer than the official's tenure as an official popularly elected at-large.

(iii) *Legislative bodies.* In the case of a bicameral legislature that is popularly elected, both chambers together constitute an applicable elected representative. Absent designation under paragraph (e)(1)(i)(D) of this section, however, neither such chamber independently constitutes an applicable elected representative. If multiple elected legislative bodies of a governmental unit have independent legislative authority, the body with the more specific authority relating to the issue is the only legislative body that is treated as an elected legislative body under paragraph (e)(1)(i)(A) of this section.

(2) *Governmental unit with no applicable elected representative--(i) In general.*

The applicable elected representatives of a governmental unit with no applicable elected representative (but for this paragraph (e)(2) and section 147(f)(2)(E)(ii)) are the applicable elected representatives of the next higher governmental unit (with an applicable elected representative) from which the governmental unit derives its authority. Except as otherwise provided in this section, any governmental unit from which the governmental unit with no applicable elected representative derives its authority may be treated as the next higher governmental unit without regard to the relative status of such higher governmental unit under State law. A governmental unit derives its authority from another governmental unit that--

(A) Enacts a specific law (for example, a provision in a State constitution, charter, or statute) by or under which the governmental unit is created;

(B) Otherwise empowers or approves the creation of the governmental unit; or

(C) Appoints members to the governing body of the governmental unit.

(ii) *Host approval.* For purposes of a host approval, a governmental unit may be treated as the next higher governmental unit only if the project is located within its

geographic jurisdiction and eligible residents of the unit are entitled to vote for its applicable elected representatives.

(3) *On behalf of issuers.* In the case of an issuer that issues bonds on behalf of a governmental unit, the applicable elected representative is any applicable elected representative of the governmental unit on behalf of which the bonds are issued.

(f) *Public approval process--(1) In general.* The public approval process for an issue, including scope, content, and timing of the public approval, must meet the requirements of this paragraph (f). A governmental unit must timely approve either each project to be financed with proceeds of the issue or a plan of financing for each project to be financed with proceeds of the issue.

(2) *General rule on information required for a reasonable public notice and public approval.* Except as otherwise provided in this section, a project to be financed with proceeds of an issue is within the scope of a public approval under section 147(f) if the reasonable public notice of the public hearing, if applicable, and the public approval (together the notice and approval) include the information set forth in paragraphs (f)(2)(i) through (iv) of this section.

(i) *The project.* The notice and approval must include a general functional description of the type and use of the project to be financed with the issue. For this purpose, a project description is sufficient if it identifies the project by reference to a particular category of exempt facility bond to be issued (for example, an exempt facility bond for an airport pursuant to section 142(a)(1)) or by reference to another general category of private activity bond together with information on the type and use of the project to be financed with the issue (for example, a qualified small issue bond as

defined in section 144(a) for a manufacturing facility or a qualified 501(c)(3) bond as defined in section 145 for a hospital facility and working capital expenditures).

(ii) *The maximum stated principal amount of bonds.* The notice and approval must include the maximum stated principal amount of the issue of private activity bonds to be issued to finance the project. If an issue finances multiple projects (for example, facilities at different locations on non-proximate sites that are not treated as part of the same project), the notice and approval must specify separately the maximum stated principal amount of bonds to be issued to finance each separate project.

(iii) *The name of the initial owner or principal user of the project.* The notice and approval must include the name of the expected initial owner or principal user (within the meaning of section 144(a)) of the project. The name provided may be either the name of the legal owner or principal user of the project or, alternatively, the name of the true beneficial party of interest for such legal owner or user (for example, the name of a 501(c)(3) organization that is the sole member of a limited liability company that is the legal owner).

(iv) *The location of the project.* The notice and approval must include 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 a project involving multiple capital projects or facilities located on the same site, or on adjacent or reasonably proximate sites with similar uses, a consolidated description of the location of those capital projects or facilities provides a sufficient description of the location of the project. For example, a project for a section 501(c)(3) educational entity

involving multiple buildings on the entity's main urban college campus may describe the location of the project by reference to the outside street boundaries of that campus with a reference to any noncontiguous features of that campus.

(3) *Special rule for mortgage revenue bonds.* Mortgage loans financed by mortgage revenue bonds are within the scope of a public approval if the notice and approval state that the bonds are to be issued to finance residential mortgages, provide the maximum stated principal amount of mortgage revenue bonds expected to be issued, and provide a general description of the geographic jurisdiction in which the residences to be financed with the proceeds of the mortgage revenue bonds are expected to be located (for example, residences located throughout a State for an issuer with a statewide jurisdiction or residences within a particular local geographic jurisdiction, such as within a city or county, for a local issuer). For this purpose, in the case of mortgage revenue bonds, no information is required on specific names of mortgage loan borrowers or specific locations of individual residences to be financed.

(4) *Special rule for qualified student loan bonds.* Qualified student loans financed by qualified student loan bonds as defined in section 144(b) are within the scope of a public approval if the notice and approval state that the bonds will be issued to finance student loans and state the maximum stated principal amount of qualified student loan bonds expected to be issued for qualified student loans. For this purpose, in the case of qualified student loan bonds, no information is required with respect to names of specific student loan borrowers.

(5) *Special rule for certain qualified 501(c)(3) bonds.* Loans financed by qualified 501(c)(3) bonds issued pursuant to section 145 and described in section 147(b)(4)(B)

(without regard to any election under section 147(b)(4)(A)) are within the scope of a public approval if the requirements of paragraphs (f)(5)(i) and (ii) of this section are met.

(i) *Pre-issuance general public approval.* Within the time period required by paragraph (f)(7) of this section, public approval is obtained after reasonable public notice of a public hearing is provided and a public hearing is held. For this purpose, a project is treated as described in the notice and approval if the notice and approval provide that the bonds will be qualified 501(c)(3) bonds to be used to finance loans described in section 147(b)(4)(B), state the maximum stated principal amount of bonds expected to be issued to finance loans to 501(c)(3) organizations or governmental units as described in section 147(b)(4)(B), provide a general description of the type of project to be financed with such loans (for example, loans for hospital facilities or college facilities), and state that an additional public approval that includes specific project information will be obtained before any such loans are originated.

(ii) *Post-issuance public approval for specific loans.* Except as provided in paragraph (f)(5)(iii) of this section, before a loan described in section 147(b)(4)(B) is originated, a supplemental public approval for the bonds to be used to finance that loan is obtained that meets all the requirements of section 147(f) and the requirements for a public approval in paragraph (b) of this section. This post-issuance supplemental public approval requirement applies by treating the bonds to be used to finance such loan as if they were reissued for purposes of section 147(f) (without regard to paragraph (f)(5) of this section). For this purpose, proceeds to be used to finance such loan do not include the portion of the issue used to finance a common reserve fund or common costs of issuance.

(iii) *Exception to post-issuance public approval requirement.* A post-issuance supplemental public approval pursuant to paragraph (f)(5)(ii) of this section is unnecessary for the initial use of proceeds to finance one or more loans if the pre-issuance notice and approval pursuant to paragraph (f)(5)(i) of this section include the information required by paragraphs (f)(2)(i) through (iv) of this section for the projects to be financed by those loans.

(6) *Deviations in public approval information--(i) In general.* Except as otherwise provided in this section, a substantial deviation between the stated use of proceeds of an issue included in the information required to be provided in the notice and approval (*public approval information*) and the actual use of proceeds of the issue causes that issue to fail to meet the public approval requirement. Conversely, insubstantial deviations between the stated use of proceeds of an issue included in the public approval information and the actual use of proceeds of the issue do not cause such a failure. In general, the determination of whether a deviation is substantial is based on all the facts and circumstances. In all events, however, a change in the fundamental nature or type of a project is a substantial deviation.

(ii) *Certain insubstantial deviations in public approval information.* The following deviations from the public approval information in the notice and approval are treated as insubstantial deviations:

(A) *Size of bond issue and use of proceeds.* A deviation between the maximum stated principal amount of a proposed issuance of bonds to finance a project that is specified in public approval information and the actual stated principal amount of bonds issued and used to finance that project is an insubstantial deviation if that actual stated

principal amount is no more than ten percent (10%) greater than that maximum stated principal amount or is any amount less than that maximum stated principal amount. In addition, the use of proceeds to pay working capital expenditures directly associated with any project specified in the public approval information is an insubstantial deviation.

(B) *Initial owner or principal user.* A deviation between the initial owner or principal user of the project named in the notice and approval and the actual initial owner or principal user of the project is an insubstantial deviation if such parties are related parties on the issue date of the issue.

(iii) *Supplemental public approval to cure certain substantial deviations in public approval information.* A substantial deviation between the stated use of proceeds of an issue included in the public approval information and the actual use of the proceeds of the issue does not cause that issue to fail to meet the public approval requirement if all of the following requirements are met:

(A) *Original public approval and reasonable expectations.* The issue met the requirements for a public approval in paragraph (b) of this section. In addition, on the issue date of the issue, the issuer reasonably expected there would be no substantial deviations between the stated use of proceeds of an issue included in the public approval information and the actual use of the proceeds of the issue.

(B) *Unexpected events or unforeseen changes in circumstances.* As a result of unexpected events or unforeseen changes in circumstances that occur after the issue date of the issue, the issuer determines to use proceeds of the issue in a manner or amount not provided in a public approval.

(C) *Supplemental public approval.* Before using proceeds of the bonds in a manner or amount not provided in a public approval, the issuer obtains a supplemental public approval for those bonds that meets the public approval requirement in paragraph (b) of this section. This supplemental public approval requirement applies by treating those bonds as if they were reissued for purposes of section 147(f).

(7) *Certain timing requirements.* Public approval of an issue is timely only if the issuer obtains the public approval within one year before the issue date of the issue. Public approval of a plan of financing is timely only if the issuer obtains public approval for the plan of financing 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.

(g) *Definitions.* The definitions in this paragraph (g) apply for purposes of this section. In addition, the general definitions in §1.150-1 apply for purposes of this section.

(1) *Geographic jurisdiction* means the area encompassed by the boundaries prescribed by State or local law for a governmental unit or, if there are no such boundaries, the area in which a unit may exercise such sovereign powers that make that unit a governmental unit for purposes of §1.103-1 and this section.

(2) *Governmental unit* has the meaning of “State or local governmental unit” as defined in §1.103-1. Thus, a governmental unit is a State, territory, a possession of the United States, the District of Columbia, or any political subdivision thereof.

(3) *Host approval* is defined in paragraph (b)(3) of this section.

(4) *Issuer approval* is defined in paragraph (b)(2) of this section.

(5) *Mortgage revenue bonds* mean qualified mortgage bonds as defined in section 143(a), qualified veterans' mortgage bonds as defined in section 143(b), or refunding bonds issued to finance mortgages of owner-occupied residences pursuant to applicable law in effect prior to enactment of section 143(a) or section 143(b).

(6) *Proceeds* means “proceeds” as defined in §1.141-1(b), except that it does not include disposition proceeds.

(7) *Project* generally means one or more capital projects or facilities, including land, buildings, equipment, and other property, to be financed with an issue, that are located on the same site, or adjacent or proximate sites used for similar purposes, and that are subject to the public approval requirement of section 147(f). For an issue of mortgage revenue bonds or an issue of qualified student loan bonds as defined in section 144(b), the term project means the mortgage loans or qualified student loans to be financed with the proceeds of the issue. For an issue of qualified 501(c)(3) bonds as defined in section 145, the term project means a project as defined in the first sentence of this definition, and also is deemed to include working capital expenditures to be financed with proceeds of the issue.

(8) *Public approval information* is defined in paragraph (f)(6)(i) of this section.

(9) *Public hearing* is defined in paragraph (d)(1) of this section.

(10) *Reasonable public notice* is defined in paragraph (d)(4) of this section.

(11) *Voter referendum* means a vote by the voters of the affected governmental unit conducted in the same manner and time as voter referenda on matters relating to governmental spending or bond issuances by the governmental unit under applicable State and local law.

(h) *Applicability date.* This section applies to bonds issued pursuant to a public approval occurring on or after the date that is 90 days after publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. For bonds issued pursuant to a public approval occurring before that date, see §5f.103-2 as contained in 26 CFR part 5f, revised as of the date of the most recent annual revision.

PART 5f--TEMPORARY INCOME TAX REGULATIONS UNDER THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982

Par. 3. The authority citation for part 5f continues to read in part as follows:

Authority: 26 U.S.C. 7805 \* \* \*

**5f.103-2 [Removed]**

Par. 4. Section 5f.103-2 is removed.

Kirsten Wielobob,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2017-20661 Filed: 9/27/2017 8:45 am; Publication Date: 9/28/2017]