



[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 5f

[TD 9845]

RIN 1545-BG91

Public Approval of Tax-Exempt Private Activity Bonds

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulation.

SUMMARY: This document contains final regulations on the public approval requirement applicable to tax-exempt private activity bonds issued by State and local governments. The final regulations update and replace existing regulations to address statutory changes, streamline the public approval process, and reduce administrative burdens. The final regulations affect State and local governments that issue tax-exempt private activity bonds.

DATES: Effective date: These regulations are effective **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Applicability date: For dates of applicability, see §1.147(f)-1(h).

FOR FURTHER INFORMATION CONTACT: Spence Hanemann, (202) 317-6980 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under OMB Control Number 1545-2185. The collection of information in these final regulations 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) of the Internal Revenue Code.

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 amendments to 26 CFR part 1 under section 147(f) of the Internal Revenue Code of 1986 (Code) and 26 CFR part 5f under section 103(k) of the Internal Revenue Code of 1954 (1954 Code). In the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Public Law 97-248, 96 Stat. 324, Congress redesignated subsection (k) of section 103 of the 1954 Code as subsection (l) and

inserted a new subsection (k) that imposed 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 21115) temporary regulations under section 103(k) of the 1954 Code (TD 7892) (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 states 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 remained in effect even after the 1986 Tax Act became law.

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 (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. On September 28, 2017, the Treasury Department and the IRS withdrew the

2008 Proposed Regulations and published a second notice of proposed rulemaking (REG-128841-07) in the **Federal Register** (82 FR 45233) (2017 Proposed Regulations). The Treasury Department and the IRS received comments on the 2017 Proposed Regulations but did not hold a public hearing because none was requested. After consideration of all of the comments, the 2017 Proposed Regulations are adopted as amended by this Treasury decision (Final Regulations).

Summary of Comments and Explanation of Revisions

This section discusses the public comments received on the 2017 Proposed Regulations and explains the revisions made in the Final Regulations in response to those comments.

1. Section 1.147(f)-1(d): Public Hearing and Reasonable Public Notice

Under the 2017 Proposed Regulations, an issue of private activity bonds is approved by a governmental unit if a qualifying elected representative of that governmental unit approves the issue following a public hearing for which there was reasonable public notice. For this purpose, a public hearing is generally defined as a forum that provides 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. Reasonable public notice generally means a published notice that is reasonably designed to inform residents of the approving governmental unit, including residents of the issuing unit and the host governmental unit where a project is to be located, of the proposed issue.

A. Public Hearing

The 2017 Proposed Regulations provided that a governmental unit may impose reasonable requirements on persons who wish to participate in a public 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. One commenter suggested that the Final Regulations allow a governmental unit to cancel a scheduled public hearing if the governmental unit received no timely requests to participate in the hearing and published a supplemental public notice. However, section 147(f)(2)(B)(i) specifically requires a public hearing before an elected official may approve the issue. Furthermore, members of the public may not always provide timely notice of their intent to participate in a public hearing and, in such cases, canceling the hearing could frustrate the purpose of the public hearing requirement. Therefore, the Treasury Department and the IRS have concluded that the Final Regulations should not disregard the express requirement of holding a public hearing in section 147(f)(2)(B)(i) by permitting a governmental unit to cancel a public hearing. Accordingly, the Final Regulations do not adopt this comment.

Other commenters suggested alternative means to satisfy the public hearing requirement. One commenter suggested allowing a public hearing by teleconference or webinar. The Treasury Department and the IRS have determined that, although these technologies may be effective for other purposes, they cannot replace a conventional public hearing conducted in-person because they are not sufficiently reliable, publicly available, susceptible to public response, or uniform in their features and operation. Another commenter suggested allowing a public hearing performed for any other

federal, state, or local purpose to satisfy the public hearing requirement under section 147(f), regardless of the procedures by which the organizer publishes notice or conducts the hearing. The Final Regulations defer to a certain degree to state and local procedures for conducting a public hearing and publishing notice of that hearing. See §1.147(f)-1(d)(3) and (d)(4)(iv) of the Final Regulations. Furthermore, to the extent that a hearing conducted for another governmental purpose satisfies all of the requirements of section 147(f) and the Final Regulations, such a hearing may serve for both purposes. The Treasury Department and the IRS have determined, however, that state and local procedures may not supersede a specific requirement of the Final Regulations. Accordingly, the Final Regulations do not adopt either of these comments.

B. Reasonable Public Notice

The Existing Regulations provide that public notice is presumed reasonable if published no fewer than 14 days before the hearing. The 2008 Proposed Regulations proposed to shorten this minimum notice period from 14 days to seven days. The 2017 Proposed Regulations proposed to retain the 14-day period between notice and hearing, citing a statement in the legislative history of TEFRA referring to such a time period. Several commenters recommended shortening this minimum notice period to seven days before the public hearing, as proposed in 2008. These commenters noted that, although a portion of the legislative history includes a reference to a 14-day notice period, the statute does not require it. Commenters also reasoned that the substantial increases in the speed at which information spreads to individual members of the public and advances in technology since the original enactment of this public approval requirement in 1982 should warrant a shorter public notice period. Accordingly, the

Final Regulations adopt this comment. The Final Regulations treat notice as presumed to be reasonably designed to inform residents of an approving governmental unit if, among other things, the notice is given no fewer than seven days before the public hearing.

The 2017 Proposed Regulations proposed to treat notice as presumed to be reasonably designed to inform residents of an approving governmental unit if, among other things, the notice was posted to the approving governmental unit's public Web site. Many commenters supported this proposed rule. Some commenters suggested modifications to this rule. Several commenters noted that issuers that issue bonds on behalf of a governmental unit may be unable to use this rule as proposed. The proposed rule would permit publication on the Web site of the approving governmental unit, but an on-behalf-of issuer (such as a constituted authority that acts on behalf of a city or county) may not have the authority to post content to the approving governmental unit's Web site. Commenters suggested permitting publication of a public notice on the Web site of the on-behalf-of issuer as an alternative to the Web site of the approving governmental unit. The Final Regulations adopt this comment. The Final Regulations provide that, for an issuer approval by an issuer that acts on behalf of a governmental unit, public notice may be posted on the public Web site of either the on-behalf-of issuer or the approving governmental unit.

The 2017 Proposed Regulations required that, for public notices by Web site, a governmental unit also offer a reasonable alternative notice method for residents without access to the Internet. Commenters presented evidence that more people regularly use the Internet than use a particular newspaper, radio station, or television

station. These commenters recommended removing the requirement for an alternative notice method in the case of publication by Web site. The Final Regulations adopt this comment and eliminate the requirement for an alternative method of obtaining the information in a Web site notice.

Further, to address concerns that a public notice posted on a large, complex Web site may be difficult for the intended recipients of that public notice to locate, the Final Regulations clarify that a public notice must be posted on the governmental unit's primary public Web site in an area of that Web site that is used to inform its residents about events affecting the residents. In addition, issuers remain responsible for maintaining records showing that a public notice containing the requisite information was timely posted to an appropriate Web site. See §1.6001-1.

The 2017 Proposed Regulations included a provision in §1.147(f)-1(d)(4)(iv) that presumed notice to be reasonable if, among other things, the notice was given in a way permitted under a general state law for providing public notice of a public hearing held by the approving governmental unit. The 2017 Proposed Regulations also included a provision in §1.147(f)-1(d)(3) that treated a public hearing performed in compliance with state procedural requirements as meeting the public hearing requirements of section 147(f) except to the extent in conflict with a specific requirement of the proposed regulations. One commenter expressed a concern that these two provisions were inconsistent. The Treasury Department and the IRS have determined that these two provisions of the 2017 Proposed Regulations are not inconsistent. In this regard, §1.147(f)-1(d)(3) addresses public hearings and §1.147(f)-1(d)(4) addresses public notices. Upon consideration of this comment and in response to concerns raised about

the accessibility of notices given under state laws, the Final Regulations clarify that notice given in a way a state permits under a general law must still be reasonably accessible to the residents of the approving governmental unit.

2. Section 1.147(f)-1(e): Applicable Elected Representative

The 2017 Proposed Regulations provided that an applicable elected representative of the approving governmental unit may execute a public approval. The 2017 Proposed Regulations provided that the applicable elected representative of a governmental unit consists of any one of the following: (1) The governmental unit's elected legislative body; (2) the governmental unit's chief elected executive officer; (3) in the case of a state, the chief elected legal officer of the state's executive branch of government; or (4) any official elected by the voters of the governmental unit and designated by the governmental unit's chief elected executive officer or by state or local law to approve issues for the governmental unit. One commenter suggested expanding the definition of an applicable elected representative to include the chairman of the governing board of a conduit issuer, if that person is appointed by an elected official to execute public approvals and empowered to approve a bond resolution to authorize an issuance of private activity bonds. The 2017 Proposed Regulations reflected the statutory definition of an applicable elected representative in section 147(f). This statutory definition generally requires that an applicable elected representative be either an elected official or a body comprised of elected officials. Under section 147(f)(2)(E)(i), the statute allows an appointee of an elected official to serve as an applicable elected representative only in the event that the office of an applicable elected representative is vacated and only for the remaining term of the elected official who vacated that office.

The Treasury Department and the IRS have determined that expanding the statutory definition of applicable elected representative to permit the appointee of an elected official to qualify as an applicable elected representative on a permanent basis would be inconsistent with the purpose and content of the statute. Accordingly, the Final Regulations adopt this provision as proposed.

3. Section 1.147(f)-1(f): Contents of Notice and Approval

The 2017 Proposed Regulations provided that a project was within the scope of a public approval if the requisite public notice and the approval contained a general functional description of the project, the maximum stated principal amount of bonds to be issued to finance the project, the name of the initial owner or principal user of the project, and a general description of the project's location. The 2017 Proposed Regulations further provided that a substantial deviation between the information required to be provided in the notice and approval and the actual use of proceeds of the issue generally would cause that issue to fail to meet the public approval requirement.

A. Contents of Notice and Approval: Maximum Stated Principal Amount of Bonds

The 2017 Proposed Regulations provided that the public notice and public approval must include the maximum stated principal amount of the issue of private activity bonds to be issued to finance the project. The 2017 Proposed Regulations clarified that, if an issue financed multiple projects, the notice and approval must specify separately the maximum stated principal amount of bonds to be issued to finance each separate project. The 2017 Proposed Regulations further provided that a deviation between the maximum stated principal amount of bonds to be used to finance a project that is specified in the notice and approval and the stated principal amount of bonds

actually used to finance that project is an insubstantial deviation if that actual stated principal amount is no more than ten percent (10%) greater than the amount in the notice and approval or any amount less than the amount in the notice and approval.

One commenter suggested the notice and approval should require only the aggregate maximum stated principal amount of the bonds of the issue to be used to finance all of the projects financed by the issue. Another commenter similarly suggested that a deviation between the maximum stated principal amount of the bonds to be used to finance a project as provided in the notice and approval and the actual stated principal amount of the bonds so used be calculated with respect to the issue as a whole rather than individually for each project. The Treasury Department and the IRS have determined that the relative principal amounts within an issue to be spent on each separate project are relevant information for this public approval process. The approximate amount of money used to fund a particular project is evidence of the scope of that project and the project's potential impact on the local community. By contrast, the aggregate maximum stated principal amount of bonds financing all projects financed by an issue is essentially the stated principal amount of the issue and conveys little additional information about the relative scopes of the particular projects in multiple-project financings. Accordingly, the Final Regulations do not adopt these comments.

One commenter suggested clarifying that the maximum stated principal amount of bonds used to finance a project may be determined on any reasonable basis and may take into account contingencies, such as cost overruns or failures to receive construction approvals, without regard to whether the occurrence of any such contingency is reasonably expected at the time of the notice or approval. Such a rule

would give issuers the flexibility to account for uncertainties that may arise after the bonds are issued, and the prohibition against a substantial deviation would assure the accuracy of the public approval information to an acceptable degree. The Final Regulations adopt this comment.

One commenter suggested changing the term “maximum stated principal amount” of bonds to “maximum stated par amount” of bonds. The Treasury Department and the IRS have determined that, for this purpose, these two terms have the same meaning. The Final Regulations do not adopt this comment and retain the term “maximum stated principal amount” as proposed.

B. Contents of Notice and Approval: Initial Owner or Principal User

The 2017 Proposed Regulations provided that a project was within the scope of a public approval if the public notice and approval included the name of the expected initial 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. One commenter suggested clarifying that a general partner of a partnership that owns a project may be treated as a true beneficial party of interest for this purpose. Recognizing that limited partnership ownership structures are common among exempt facilities under section 142, the Treasury Department and the IRS have determined that this clarification is warranted. Accordingly, the Final Regulations adopt this comment and include an example clarifying that a public notice and approval may name a general partner of an owner of a project as a true beneficial party of interest.

C. Contents of Notice and Approval: Project Location

The Existing Regulations provide that a facility is within the scope of a public approval if the public notice and approval contain the prospective location of the facility by its street address or, if none, by a general description designed to inform readers of its specific location. The 2017 Proposed Regulations required that the public notice and approval 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. One commenter raised a concern that the phrase “specific geographic location” in the 2017 Proposed Regulations would be more restrictive than the language in the Existing Regulations and would be burdensome for projects located at well-known landmarks, which may be widely recognized by their public name but may not have a street address or identifiable geographic boundaries. The Treasury Department and the IRS do not agree with the comment because, as noted above, the 2017 Proposed Regulations and the Existing Regulations both call for a general description of the specific location. The Final Regulations adopt this provision as proposed.

D. Special Rule for Pooled Financings with Qualified 501(c)(3) Bonds

For qualified 501(c)(3) bonds issued to finance pooled loan programs that are described in section 147(b)(4)(B), the 2017 Proposed Regulations provided a special, two-stage public approval process. At the time that such bonds are issued, the issuer may have only limited information about the projects to be financed. Thus, for the first stage of public approvals occurring before the qualified 501(c)(3) bonds are issued, the

2017 Proposed Regulations allowed the public notice and approval to include limited general information about projects to be financed, such as the maximum stated principal amount of bonds expected to finance loans to section 501(c)(3) organizations or governmental units and a general description of the types of projects to be financed with those loans (for example, hospital facilities or college facilities). For the second stage of public approvals for these financings, before the issuer originates a loan to a section 501(c)(3) organization or governmental unit, the 2017 Proposed Regulations required a supplemental public approval satisfying the ordinary requirements of section 147(f) for the bonds financing that loan. One commenter recommended that no host approval be required at the time of the limited pre-issuance public approval before the qualified 501(c)(3) bonds are issued because the specific project information may be unknown at that time. The Final Regulations adopt this comment. Under the Final Regulations, for this type of financing, an issuer may either meet the general rules on the public approval requirement or, alternatively, at the issuer's option, may meet the special rules for a two-stage public approval process that reflects adoption of this comment. In particular, under this optional two-stage public approval process, a pre-issuance issuer approval is required and a supplemental post-issuance public approval, including issuer approval and host approval, is required.

E. Timing of Hearing and Approval

The 2017 Proposed Regulations provided a safe harbor for the minimum period of time between a notice of public hearing and the public hearing. The 2017 Proposed Regulations also provided that the approved bonds must be issued within a certain period of time after the public approval. Neither the Existing Regulations nor the 2017

Proposed Regulations restrict the period of time between a public hearing and a public approval. One commenter suggested that the Final Regulations impose a one-year maximum time period between a public hearing and a valid public approval. The Treasury Department and the IRS have determined that, although a period of one year between a public hearing and a public approval is reasonable, a longer period may be reasonable in some circumstances. Further, no such maximum period was proposed. Accordingly, the Final Regulations do not adopt this comment.

4. Section 1.147(f)-1(g): Definitions

The Existing Regulations define a facility to mean a tract or adjoining tracts of land, the improvements thereon, and any personal property used in connection with such real property. The Existing Regulations further provide that non-adjoining tracts of land may be treated as one facility only if they are used in an “integrated operation.” The 2017 Proposed Regulations use the term “project” rather than “facility” and generally define a project as 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. This proposed definition of project was intended to afford flexibility for a single project to extend beyond a single tract or adjoining tracts of land, such as the case of a college campus on adjacent or proximate sites. Because of the potential difficulty of determining whether facilities are used in an integrated operation, the 2017 Proposed Regulations proposed to remove the provision of the Existing Regulations that allowed financed assets on non-adjoining tracts of land to be treated as one facility if those assets were used in an integrated operation.

One commenter noted that, under the 2017 Proposed Regulations, two financed properties that are located on non-proximate sites could not be part of a single project, whereas two such financed properties could be part of a single facility under the Existing Regulations if the properties were part of an integrated operation. The commenter suggested that this aspect of the definition of project in the 2017 Proposed Regulations was more burdensome than the definition of facility in the Existing Regulations. In general, the 2017 Proposed Regulations would provide greater flexibility to permit a greater physical distance between the sites included in a project than would the Existing Regulations, as the 2017 Proposed Regulations would permit a single project to include financed property at sites that are proximate but not adjoining. The Final Regulations generally adopt this more flexible definition of project from the 2017 Proposed Regulations. In addition, to address this commenter's concern, the Final Regulations also retain the longstanding "integrated operations" standard from the Existing Regulations to allow capital projects or facilities that are located on non-proximate sites to be treated as a one project if those capital projects or facilities are used in an integrated operation.

The same commenter also suggested adopting the very broad definition of project from a different context involving mixed-use projects under §1.141-6(a)(3), which generally includes any facilities or capital projects financed in whole or in part with proceeds of the issue. The commenter reasoned that the requirement in the 2017 Proposed Regulations that the public notice and approval include the maximum stated principal amount of the issue to be used to finance each project would lock an issuer into a specific allocation of bond proceeds to the project as defined in section 147(f),

whereas §1.141-6 would permit floating allocations of bond proceeds to financed property in certain cases. These two definitions of project serve rules with different purposes, and the different definitions reflect those purposes. The Treasury Department and the IRS have determined that, if the public notice and approval presented this information as an aggregate of all property financed by the issue, members of the public and approving officials would be unable to extract and evaluate the portions of the aggregate relevant to their respective roles in the public approval process. The Final Regulations do not adopt this comment.

5. Section 1.147(f)-1(h): Applicability of the Final Regulations

The Final Regulations apply to bonds issued pursuant to a public approval occurring on or after **[INSERT DATE 90 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. In addition, in response to public comments, an issuer may apply the provisions of §1.147(f)-1(f)(6) of the Final Regulations (regarding deviations in public approval information) in whole, but not in part, to bonds issued pursuant to a public approval occurring before **[INSERT DATE 90 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Special Analyses

This regulation is not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Department of the Treasury and the Office of Management and Budget regarding review of tax regulations. 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 Final Regulations are expected to affect a significant number of small state or local governmental units that issue tax-exempt private activity bonds, the Final Regulations are not expected to have a significant economic effect on those governmental units because the Final 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 Final Regulations, unlike the Existing 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, the 2017 Proposed Regulations preceding the Final Regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business. No comments were received.

Drafting Information

The principal authors of these regulations are Spence Hanemann of the Office of Associate Chief Counsel (Financial Institutions and Products) and Vicky Tsilas, formerly of the 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.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 5f are 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 section.

(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) *Special rules for host approval 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. See also paragraph (f)(5) of this section, providing certain optional alternative special rules for certain qualified 501(c)(3) bonds for pooled loan financings described in section 147(b)(4)(B).

(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 seven (7) 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 primary public Web site in an area of that 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 an issuer approval of an issue issued by an on-behalf-of issuer that acts on behalf of a governmental unit, such notice may be posted on the public Web site of the on-behalf-of issuer as an alternative to the public Web site of the approving governmental unit.

(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, provided that the public notice is reasonably accessible.

(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 the issue.* 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 or projects. 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 to be financed as part of the issue. The maximum stated principal amount of bonds to be issued to finance a project may be determined on any reasonable basis and may take into account contingencies, without regard to whether the occurrence of any such contingency is reasonably expected at the time of the notice.

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

(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.* Qualified 501(c)(3) bonds issued pursuant to section 145 for pooled loan financings that are 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 public approval either meets the general requirements of paragraph (b) of this section or, alternatively, at the issuer's option, meets the special requirements of paragraphs (f)(5)(i) and (ii) of this section.

(i) *Pre-issuance issuer approval.* Within the time period required by paragraph (f)(7) of this section, an issuer 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 section 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.* Before a loan described in section 147(b)(4)(B) is originated, a supplemental public approval, including issuer

approval and host 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.

(6) *Deviations in public approval information--(i) In general.* Except as otherwise provided in this section, a substantial deviation between the stated use or amount 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 or amount of proceeds of the issue causes that issue to fail to meet the public approval requirement. Conversely, insubstantial deviations between the stated use or amount of proceeds of an issue included in the public approval information and the actual use or amount 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 legal owner or principal user.* A deviation between the initial legal owner or principal user of the project named in the notice and approval and the actual initial legal 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 or amount of proceeds of an issue included in the public approval information and the actual use or amount 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 or amount of proceeds of an issue included in the public approval information and the actual use or amount 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). Capital 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. 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 **[INSERT DATE 90 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. For bonds issued pursuant to a public approval occurring before **[INSERT DATE 90 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, see §5f.103-2 as contained in 26 CFR part 5f, revised as of April 1, 2018. In addition, an issuer may apply the provisions of paragraph (f)(6) of this section in whole, but not in part, to bonds issued pursuant to a public approval occurring before **[INSERT DATE 90 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**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.

Approved: November 1, 2018.

David J. Kautter,

Assistant Secretary of the Treasury (Tax Policy)

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