THE BOND BUYER

Shield exemption, spend more on infrastructure, Congress told

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CHICAGO -- Bond attorneys are giving proposed Tax Equity and Fiscal Responsibility Act rules a positive reception, saying the update is long overdue while suggesting some tweaks before they are finalized.

The TEFRA rules proposed Sept. 28 by Treasury and the Internal Revenue Service would update public notice and approval requirements for private activity bonds from temporary rules that were issued back in 1983.

The proposed rules take into account tax law changes that have expanded the kinds of PABs that can be issued and technological changes that have occurred since 1983 such as the Internet and electronic communications.

“They are much more flexible than what’s out there now and should save issuers a lot of money because they won’t have to publish in newspapers, which in certain states can be very expensive,” Howard Zucker of Hawkins Delafield & Wood in New York City said at the National Association of Bond Lawyers' Bond Attorneys' Workshop here.

The proposed regulations reduce the burden of having to describe the projects to be financed with PABs in detail and also take into account the fact that mortgage revenue bonds and student loan bonds are portfolio loan financings or non-project based.

Practitioners attending the BAW said the proposed rules don’t provide enough specific advice on which websites will satisfy the public notice requirement. They also asked why Treasury didn’t defer to state law in covering other notice requirements.

Two senior Treasury Department attorneys who briefed practitioners on the new proposed TEFRA rules during three hot topics tax sessions advised them that posting the notice on the issuer's website would satisfy the notice new requirement.

To the dismay of many attorneys who were encouraged by 2008 proposed rules that would have shortened the public notice requirement from 14 days to seven, the new proposed rules keep the 14 days.

Vicky Tsilas, supervisory general attorney at the IRS, one of the two principal authors of the new proposed rules, said 14 days for notice was retained because of criticism labor unions gave to the seven days.

"There were a lot of suspicions that this was a nefarious regulation," Tsilas said, noting that the 2008 proposed rules came out at the end of the Bush administration. Several practitioners said that 14 days can be a difficult standard to meet. One suggested a compromise of 10 days.

Tsilas said Treasury officials welcome suggestions for improvements during the 90-day comment period.

Treasury also plans to hold a public hearing before the end of the comment period.

Issuers have the option of using the new proposed rules in the interim.

Several bond attorneys suggested that Treasury should allow issuers to use the new rules for "old bonds" with respect to insubstantial and substantial deviations.

The new proposed rules allow a change of up to 10% to be considered insubstantial.

An issuer can deal with a substantial change in a bond-financed project by issuing a second public notice that covers those changes and by holding another hearing.

Brian Organ of Hawkins Delafield & Wood in San Francisco said he was particularly happy to see "the post issuance ability to TEFRA for substantial deviations."

"On occasion issuers issue their bonds for a particular project and that project's scope changes," said Organ. "Another project comes up that they would like to allocate bond proceeds to. So this will allow them to do that. Under the temporary regulations, that wasn't possible."

Tsilas said she believes the proposed rules “provide greater flexibility to state and local governments.” She joked that her work on TEFRA dates back to the proposed 2008 rules that were issued when she was pregnant with her son, who is now 10 years old.

Christie Martin of Minz Levin in Boston, a panelist for the tax hot topic sessions, said the attorneys in the audience were “generally happy” about the update.

“I think there are some things that need to be ironed out,” Martin said. “A couple of questions people have raised are ripe for comment projects. But on the whole I think they are a good step forward and a good modernization.”

The new rules have been proposed to implement the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), which first imposed the public notice and approval requirements for PABs. At that time the only PABs existed were industrial development bonds.

The Tax Reform Act of 1986 greatly expanded the types of projects and financings for which PABs could be used to mortgage revenue bonds, qualified student loan bonds, and qualified 501(c)(3) bonds.