

COVID-19 RESPONSE UPDATE FOR INDUSTRIAL DEVELOPMENT AGENCIES

Hodgson Russ Public Authority Alert
June 9, 2020

In light of the public health threat from the spread of the novel coronavirus that causes COVID-19, on March 3, 2020, the New York State Legislature overwhelmingly approved legislation expanding the emergency powers of the Governor and expanding the definition of disaster under Article 2-B of the Executive Law. Since its enactment in March, the Governor has issued 39 executive orders pursuant to the legislation.

Many of the Governor's executive orders as well as other temporary changes in state and federal regulations in response to COVID-19 directly impact industrial development agencies (IDAs). The following provides an update on the recent changes in the law that impact IDAs:

What are the options for holding a meeting? On March 12, 2020, the Governor issued Executive Order 202.1, which suspended the in-person meeting requirement under Article 7 of the Public Officers Law, the Open Meetings Law (OML). As a consequence of this exception to the OML, a public body (i.e., an IDA) is authorized to meet by conference call, video conference, or similar service. The suspension of the in-person meeting requirement under the OML was extended **until July 6, 2020** by Executive Order 202.38 issued by the Governor on June 6, 2020.

What are the requirements for holding a meeting by conference call, video conference, or similar service? While the suspension of the in-person meeting requirement under the OML is in effect, an IDA must ensure the public has the ability to view or listen to such proceeding and that such meetings are recorded and later transcribed (minutes are insufficient).

Does an IDA need to post the recordings of a meeting on its website? On January 1, 2020, a new Section 857 was added to Article 18-A of the General Municipal Law (GML). Section 857 of the GML requires all meetings and public hearings of an IDA to be streamed live and recorded. Additionally, the recordings of meetings and public hearings must be posted to an IDA's website within 5 business days of the meeting or public hearing and maintained on the IDA's website for a period of not less than 5 years. The Governor's executive orders have not changed that requirement.

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What are the options for holding a public hearing? On April 9, 2020, the Governor issued Executive Order 202.15, which authorized a public body (i.e., an IDA) to hold a public hearing remotely, through the use of telephone conference, video conference, and/or other similar service. The authorization to hold a public hearing remotely was extended **until July 7, 2020** by Executive Order 202.39 issued by the Governor on June 7, 2020.

What are the requirements for holding a public hearing by conference call, video conference, or similar service? While the authorization to hold a public hearing remotely is in effect, an IDA must ensure the public has the ability to view or listen to such proceeding. While Executive Order 202.15 does not expressly state a public hearing must be recorded, as noted above all public hearings of an IDA must be streamed live and recorded pursuant to GML Section 857. Additionally, the recordings must be posted and maintained in the same manner as stated above for meetings.

What are the options for holding a TEFRA Hearing under the federal tax code for tax-exempt bonds? On May 4, 2020, the Internal Revenue Service (IRS) issued Revenue Procedure 2020-21, which provides temporary guidance regarding the public approval requirement under § 147(f) of the Internal Revenue Code (Code) for tax-exempt qualified private activity bonds. Specifically, in light of COVID-19, Revenue Procedure 2020-21 authorizes the required hearing (TEFRA Hearing) to be held by teleconference for the period between May 4, 2020 and December 31, 2020. Revenue Procedure 2020-21 can also be applied retroactively if a telephonic TEFRA Hearing was held prior to May 4, 2020 due to COVID-19. The toll-free number for a telephonic TEFRA Hearing must be included in the notice required for the TEFRA Hearing. <https://www.publicfinancetaxblog.com/wp-content/uploads/sites/18/2020/05/Rev.-Proc.-2020-21.pdf>.

How are the PARIS reporting deadlines for the ABO impacted by COVID-19? On March 27, 2020, the Governor issued Executive Order 202.11, which authorized the director of the Authorities Budget Office (ABO) to disregard the annual reporting deadlines for an IDA due to an IDA's failure to meet those requirements as a result of the state of emergency in response to COVID-19. The ABO subsequently published guidance on its website to allow IDAs to submit required reports no later than 90 days after the original deadline. The ABO extended the deadline for filing the annual, audit, procurement, and investment reports due on April 1, 2020 for up to 90 days or July 1, 2020. If an IDA will be unable to submit those reports by the extended deadline of July 1, 2020, that IDA can request in writing an additional 30 day extension from the ABO. An IDA that submits a report after July 1, 2020 utilizing a 30 day extension must provide the reasons for the delay at the time the reports are submitted in PARIS in the "Additional Comments" section on the submittal page in PARIS.

With the delay in receiving the reports originally due on April 1, 2020, is the ABO focused on other issues involving IDAs? On December 5, 2018, the regulations issued by the ABO regarding the posting of documents for approved projects on the IDA's website went into effect. Part 250 to Title 19 NYCRR. The ABO recently increased its review of IDA websites to confirm that IDAs are posting the required approving resolution, completed application, and project agreements for every approved project providing financial assistance. In addition, the ABO issued Policy Guidance No. 20-01 on February 3, 2020, which outlines the enforcement powers of the ABO in regards to IDAs and their officers and members. In light of the recent efforts by the ABO to confirm compliance with the website posting requirements and the focus of the ABO on its enforcement powers, we encourage IDAs to review their websites for compliance with all posting requirements under the ABO's regulations and Policy Guidance No. 19-01 (outlining website requirements for public authorities, including IDAs).

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What is the status of the State Disaster Emergency Loan Program? On May 27, 2020, the New York State Legislature approved a bill for the creation of the “State Disaster Emergency Loan Program.” The program will be administered by IDAs, and we published a Client Alert regarding the program on June 1, 2020. The bill was delivered to the Governor on June 5, 2020, but the Governor has not yet signed the bill. We will provide notification as soon as the Governor signs the bill to enact the legislation. We have had discussions with policy makers and legislators on this legislation, and they anticipate that the Governor will sign the bill. We expect that once the bill is signed, there will be significant pressure on IDAs to take action to begin making loans and grants under the State Disaster Emergency Loan Program. We recommend that IDAs take action now to determine if they want to establish a State Disaster Emergency Loan Program, and, if yes, to consider what steps it should take to implement the Program.

If you have questions about this alert, contact Joe Scott (518.433.2419) or Chris Canada (518.736.2921).

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

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