



**National Association
of Bond Lawyers**

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February 15, 2008

Internal Revenue Service
CC:PA:LPD:PR (REG-140379-02; REG-142599-02)
PO Box 7604
Ben Franklin Station
Washington, DC 20044

RE: REG-140379-02; REG-142599-02: Allocation of and Accounting for
Tax-Exempt Bond Proceeds for Purposes of the Private Activity Bond
Restrictions

Ladies and Gentlemen:

The National Association of Bond Lawyers (NABL) respectfully submits the enclosed additional comments in response to your request in the Internal Revenue Bulletin on October 30, 2006 (REG-140379-02; REG-142599-02), relating to allocation of and accounting for tax-exempt bond proceeds for purposes of the private activity bond restrictions (Proposed Regulations). These additional comments address certain provisions of the Proposed Regulations that relate to the definition of "project."

NABL appreciates both the significant effort of the Department of the Treasury and the Internal Revenue Service in the preparation of the Proposed Regulations as well as the request for and consideration of NABL's additional submission.

Primary drafting responsibilities for these comments were assumed by Perry E. Israel, Law Office of Perry Israel.

NABL believes that participating in the guidance process supports clarification of and facilitates compliance with the tax law and regulations. Accordingly, NABL members would welcome the opportunity to discuss these recommendations to achieve clarity, certainty and administrability in this area of the law.



If you have any questions, please contact me at 205/226-3482 or through email at fclark@balch.com, or Perry E. Israel at 916/485-6645 or through email at perry@103law.com, or Elizabeth Wagner, Director of Governmental Affairs, at 202/682-1498 or through email at ewagner@nabl.org.

Thank you again for the opportunity to submit NABL's comments.

Sincerely,



J. Foster Clark

Enclosure

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National Association of Bond Lawyers

**SUPPLEMENTAL RECOMMENDATIONS
BY THE
NATIONAL ASSOCIATION OF BOND LAWYERS
TO THE
DEPARTMENT OF THE TREASURY
OFFICE OF TAX POLICY
AND THE
INTERNAL REVENUE SERVICE
REGARDING THE
PROPOSED ALLOCATION AND ACCOUNTING REGULATIONS
UNDER SECTION 141 OF THE INTERNAL REVENUE CODE**

The following comments are submitted on behalf of the National Association of Bond Lawyers (“NABL”) as a supplement to NABL’s comments submitted on December 22, 2006, (the “Primary Recommendations”) pertaining to the proposed regulations published in the Internal Revenue Bulletin on October 30, 2006 (REG-140379-02; REG-142599-02) (the “Proposed Regulations”), regarding the allocation of and accounting for proceeds of tax-exempt bonds for purposes of the private activity bond restrictions under Section 141 of the Internal Revenue Code of 1986, as amended (the “Code”).

NABL continues to support the positions set forth in the Primary Recommendations, including (*inter alia*) recommendations that (a) the primary allocation method be the “undivided portion allocation method” set forth in §1.141-4(d) of the Proposed Regulations, (b) in any year, all private use of a project be first allocated to sources of funding other than proceeds of tax-exempt bonds up to a percentage of total use equal to the percentage of total funding of the project from sources other than proceeds of tax-exempt bonds, (c) the fair market value test proposed for measuring private and governmental use of a project be eliminated or greatly constrained, (d) the partnership rule for “straight up” pass-through entities be extended to all partnerships, and (e) the anticipatory redemption rule be greatly simplified. The purpose of these supplemental recommendations is to provide further comment on the definition of “project” for purposes of the Proposed Regulations.

Definition of “Project”

As discussed in the Primary Recommendations, the definition of “project” contained in §1.141-6(b)(2)(ii) of the Proposed Regulations is both overly broad and difficult to apply. NABL continues to recommend that the “project” consist of whatever the issuer treats as having been financed with bond proceeds and, in situations where the issuer chooses, include whatever assets are financed by equity¹ identified by the issuer. In most cases, a project consists of one or

¹ For this purpose, “equity” would consist of cash of the issuer, moneys derived from a taxable borrowing, and moneys derived from the proceeds of qualified private activity bonds that are allocated to qualifying costs.

more facilities or capital projects, including land, buildings, equipment, or other property, as provided in the first clause of §1.141-6(b)(2)(ii)(A) of the Proposed Regulations (without regard to the additional requirements contained in §1.141-6(b)(2)(ii)(A) of the Proposed Regulations). NABL notes, however, that a “project” may consist of something other than capital assets, such as when proceeds are used to finance temporary or long-term financial shortfalls. Similarly, when a governmental entity issues general obligation bonds to finance grants to unrelated entities, the “project” consists of the making of the grant. Therefore, NABL recommends that a special definition of “project” be added to address these atypical types of financings.

Usually, an issuer identifies the “project” to be financed with bond proceeds (and any equity) in the tax certificate or in bond offering documents when the bonds are issued. However, an issuer could identify -- or refine the definition of -- the “project” at any time that the issuer makes an allocation of bond proceeds to expenditures, as provided in Treas. Reg. §1.148-6(d)(1)(iii). NABL reiterates its recommendation that the “project” consist of whatever capital improvements, purchases, or other items that the issuer reasonably identifies as the “project” at the time of issuance of the bonds or within the period allowed for allocating expenditures under Treas. Reg. §1.148-6(d). The only limitation NABL recommends with respect to this identification rule is that bond proceeds be allocated to assets only if expenditures are made for those assets that can be allocated to the proceeds under Treas. Reg. §1.148-6(d).

If the issuer fails to make any identification of the project or allocation of proceeds to expenditures, then the “project” financed with the proceeds would be the particular costs paid out of bond proceeds on a tracing basis. In such case, NABL recommends that a rule like that of §1.141-6(b)(2)(ii)(A) of the Proposed Regulations be applied to identify the “project.” Further, NABL recommends that if the “project” determined under the default rule (*i.e.*, the rule that applies in the absence of an identification of the “project” by the issuer) is also financed from equity, then the equity applied to the project be taken into account and treated as a “mixed financing” project.

With respect to the definition of “mixed-use project” in §1.141-6(b)(2)(i) of the Proposed Regulations, NABL believes that it is inappropriate to limit projects that are treated as “mixed-use projects” to those projects for which the issuer reasonably expected, as of the issue date, to have private business use in excess of the *de minimis* permitted business use. A parking garage, for example, that is financed 75% from bond proceeds and 25% from development fees should be treated as eligible for private business use of 25% plus 10% of 75%, regardless of whether any private business use is anticipated at the time the bonds are issued. Accordingly, NABL recommends that a “mixed-use project” or a “mixed-financing project” be determined solely by whether financing from both bond and non-bond sources is properly allocated to the “project.”

Special Cases

NABL notes that at least two special cases may merit additional attention. First, for projects financed by many bond issues over a period of time, NABL recommends treating all of those bond issues as financing the entire project, at least up to the point that the project or the bulk of its components are placed in service. Second, for improvements or additions to an existing project previously financed with bond proceeds, NABL recommends treating the proceeds spent for the improvements or additions as spent for a separate project, except

improvements not readily severable, *e.g.*, new roof or new HVAC system. For improvements that are not readily severable, NABL recommends that the percentages of private and governmental use of the entire building be allocated to the improvements.

Summary

NABL believes that a definition of “project” that provides adequate flexibility to the issuer, but also provides a “default” rule in the event that the issuer fails to define the “project,” provides an administrable rule that serves the multiple requirements of a nation of different issuers. Such a definition of “project,” combined with the undivided portion allocation method and the allocation of private use first to privately financed components of the project, as described in the Primary Recommendations, address problems relating to allocation of proceeds to assets and allocation of use of assets to proceeds in a flexible manner, while preserving the ability of the IRS to ensure compliance with the law and a just administration of the rules relating to tax-exempt bonds.