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of Bond Lawyers

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December 20, 2010

Internal Revenue Service
CC:PA:LPD:PR (Notice 2008-41)
(REG-118788-06)
Room 5203
PO Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Request for Relief from Application of Notice 2010-81 to Certain Existing Bond Issues for Purposes of Internal Revenue Code Section 146

Ladies and Gentlemen:

The National Association of Bond Lawyers ("NABL") requests that the Internal Revenue Service (the "Service") provide prompt relief from the application of Notice 2010-81 (the "Notice"), issued on November 23, 2010, to certain "draw-down" bond issues for purposes of Section 146 of the Internal Revenue Code of 1986 (the "Code").[1] These comments were prepared by members of an ad hoc subcommittee of the NABL Tax Law Committee and were approved by the NABL Board of Directors.

NABL appreciates that, prior to release of the Notice, representatives of the Treasury Department and the Service advised the bond community that they were evaluating issues associated with draw-down bonds issued before and after 2010 pursuant to arrangements entered into before the end of 2010 under the special provisions of the American Recovery and Reinvestment Act ("ARRA"). A concern is that issuers might simply meet the minimum thresholds of Section 1.150-1(c)(4)(i) of the Treasury Regulations with the intention of claiming the tax-advantaged status of the entire borrowing (including draw-down bonds issued after the December 31, 2010, sunset date). For example, John J. Cross III, Associate Tax Legislative Counsel, Office of Tax Policy, Department of the Treasury, specifically addressed the interplay between the draw-down rules and sunsetting ARRA bond provisions during his presentation to the General Session of the National Association of Bond Lawyers Bond Attorneys' Workshop in San Antonio, Texas, on October 27, 2010. This advance notice was helpful to bond practitioners who were anticipating that many ARRA bond-related transactions would be proposed in such a way as to facilitate issuance prior to the December 31, 2010 sunset date, including by means of draw-down structures.

[1] All section references herein shall be to the code unless otherwise indicated.

No such notice was forthcoming, however, in respect of bonds issued in accordance with the generally applicable provisions of Section 146, nor with respect to the special housing cap created in Section 146(d)(5) by the Housing Assistance Tax Act of 2008 (the "Special Housing Cap"), with the result that issuers who for many years have structured their bond issues in reliance on existing law and customary practices could not have anticipated the direction of the Notice relative to their non-ARRA bond issues.

The Notice provides guidance relating to the ability of issuers to issue draw-down bonds in the context of certain provisions of ARRA that are scheduled to "sunset" on December 31, 2010, as well as the volume cap limitations of Section 146. The Notice states that, other than for purposes of Section 265,[2] each draw made under a draw-down bond structure is treated as a separate bond, which bond is treated as issued on the date when such the draw is actually made and begins to accrue interest.

Such treatment, however, differs from the treatment many issuers and their counsel have customarily used in respect of bonds issued using a draw-down bond structure in accordance with Section 1.150-1(c)(4)(i) of the Treasury Regulations for purposes of applying the volume cap provisions of Section 146 of the Code and, in particular, obtaining allocations of volume cap from their respective states. The specific reference to "various volume cap limitations on State and local bonds (as defined in [Section] 103(c)),"in Section 3 of the Notice, was the first time many issuers of bonds requiring an allocation of volume cap, including the Special Housing Cap, became aware of the import of the Notice, *i.e.*, that "all of the bonds that are part of the issue should be issued by the applicable statutory deadline." Further, for the reasons stated in these comments, NABL believes that issuers of bonds pursuant to the Special Housing Cap that sunsets on December 31, 2010, unlike the regular volume cap, should be provided the same relief as issuers of any bonds subject to a newly announced rule would hope to receive; they also had no notice of such rule at the time they structured and consummated their financings.

We note that the Notice preserves the guidance of Rev. Rul. 89-70, 1989-1 C.B. 88 (the "Ruling"), which deliberately imports the Treasury Regulation definitions of issue date and amount, currently set forth at Section 1.150-1(c)(4)(i), for purposes of applying the small issuer and de minimis exceptions to the tax-exempt carrying cost disallowance provision under Section 265(b)(3) and Section 265(b)(7) to draw-down bonds.

Accordingly, NABL respectfully requests the Service to announce that issuers who (1) either issued draw-down bonds subject to the provisions of Section 146 on the basis of Treasury Regulations Section 1.150-1(c)(4)(i), or (2) had entered into binding commitments with purchasers with respect to such bonds as of November 24, 2010, may continue to rely on the provisions of the Ruling for purposes of establishing the issue date of all the bonds of such issues as regards the application of Section 146, including Section 146(d)(5). In the alternative, the Service could announce that it has made a determination not to challenge the existing practice of issuers to obtain the full amount of volume cap, whether regular volume cap or the Special Housing Cap, in the calendar year in which the draw-down bond agreement is executed and the de minimis draw-down amount has been issued.

[2] Section 1 of the Notice, second paragraph.

Although NABL did not address, more broadly, the merit of having the principles of the Notice apply for purposes of Section 146, we would anticipate providing comments to the Service with respect to this question at some point in the near future, including, among other things, a discussion that highlights the complexity of the carryforward ordering requirements under Section 146 in the context of such issues.

Sincerely,

John M. McNally
President