National Association
of Bond Lawyers

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September 22, 2015

VIA EMAIL

Internal Revenue Service
CC:PA:LPD:PR (REG-138526-14)
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044
www.regulations.gov (IRS REG-138526-14)

RE: Proposed Arbitrage Regulations Addressing Definition of "Issue Price" for Tax-Exempt Bond Purposes (REG-138526-14)

Ladies and Gentlemen:

The National Association of Bond Lawyers (*"NABL"*) respectfully submits the enclosed comments relating to the definition of "issue price" in the proposed arbitrage regulations, REG-138526-14, which were published in the Federal Register on June 24, 2015 (the "Proposed Regulations"). These comments were prepared by members of NABL's Tax Law Committee listed in Exhibit B, and were approved by the NABL Board of Directors.

NABL requests an opportunity to speak at the public hearing to be held on October 28, 2015 at 10:00 AM. An outline of the topics to be discussed is attached as Exhibit C.

NABL exists to promote the integrity of the municipal market by advancing the understanding of and compliance with the law affecting public finance. We respectfully provide this submission in furtherance of that mission.

If you have any questions regarding the enclosed comments, please contact Bill Daly in our Washington, D.C., office at (202) 503-3300.

Thank you in advance for your consideration of these comments.

Sincerely,

Kenneth R. Artin
Enclosure

COMMENTS OF THE NATIONAL ASSOCIATION OF BOND LAWYERS ON THE DEFINITION OF "ISSUE PRICE" IN THE PROPOSED ARBITRAGE REGULATIONS PUBLISHED ON JUNE 24, 2015

EXECUTIVE SUMMARY

On June 24, 2015, the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") published proposed regulations (the "Proposed Regulations") relating to the definition of issue price for purposes of the arbitrage restrictions under Section 148 of the Internal Revenue Code of 1986, as amended (the "Code"), and withdrew the issue price portion of its notice of proposed rulemaking published on September 16, 2013 (the "2013 Proposed Regulations"). The Proposed Regulations would amend the published comprehensive final regulations on the arbitrage investment restrictions and related provisions for tax-exempt bonds under sections 103, 148, 149 and 150 of the Code, in place since June 18, 1993 (the "Existing Regulations").

The stated purpose of the 2013 Proposed Regulations was to address market developments, simplify certain provisions, address certain technical issues and make the regulations more administrable. One of the significant changes in that effort related to the definition of issue price. The preamble to the Proposed Regulations indicates that, after considering the comments and the statements made at the public hearing with respect to the 2013 Proposed Regulations, Treasury and the IRS determined to withdraw §1.148-1(f) of the 2013 Proposed Regulations and re-propose the definition of issue price.

The National Association of Bond Lawyers ("NABL") appreciates the careful consideration that Treasury and the IRS gave to comments they received on the definition of issue price, which plays a critical role in the interpretation and application of the arbitrage rules by municipal bond market participants. NABL believes that the Proposed Regulations are responsive to the concerns expressed by NABL and others in their comments.

NABL's members represent issuers, conduit borrowers, underwriters and investors in the process of issuing bonds, monitoring post-issuance compliance and responding to audits. These comments reflect the comments and concerns of members as they focus on the implementation of the new rules. NABL respectfully requests consideration of certain changes and clarifications described in more detail below in order to facilitate a smooth transition to a new definition of issue price and to avoid market disruption. Further, NABL believes the clarifications will make the regulations more administrable by issuers and the IRS.

In particular, NABL's requests can be summarized as follows:

(1) Confirm that an issuer need not choose between the general method and the alternative method prior to the issue date, such that for bonds of a maturity a substantial amount of which is sold between the sale date and the issue date, the issuer

may use the general rule, and for bonds of a maturity a substantial amount of which is not sold by the issue date, the issuer may use the alternative method.

(2) Confirm that, under the alternative method, the issuer's obligation with respect to a prohibition (absent market changes) on the sale of bonds between the sale date and the issue date at a price in excess of the initial offering price is limited to obtaining a covenant from the sole or lead underwriter to refrain from such activity, and clarify the definition of "issue price" to reflect that if the issuer receives appropriate certifications from the sole underwriter or the lead underwriter regarding the sale of bonds pursuant to orders received on or before the sale date, the issue price of bonds will not be affected as a result of a false or otherwise inaccurate certification.

(3) Clarify that the issuer's due diligence obligation with respect to issue price is that of a prudent person, and provide specific examples in the regulatory language of documentation to be reviewed and retained by the issuer that would meet that prudent person standard.

(4) Eliminate the uncertainty created in the definition of "underwriter" under proposed §1.148-1(f)(3)(ii)(B) by (i) deleting the language in §1.148-1(f)(3)(ii)(B), referencing any person that directly or indirectly enters into an "other arrangement" and (ii) clarifying the circumstances in which certain parties "related" to an underwriter may fall within the definition of "public."

(5) Provide additional alternative methods for determining issue price for bonds sold pursuant to a competitive bid that do not meet the 10% actual sales requirement on the sale date.

(6) Confirm that bonds purchased directly from an issuer by a bank or another party for its own investment would fall under the general private placement and buyer rules of Section 1273 of the Code.

(7) Add a cross-reference to the definition of "issue price" under §1.148-1(f) for other similar concepts in the tax rules under sections 54 through 57, 103, 141 through 150 and 6431.

INTRODUCTION

The Proposed Regulations maintain the general rule in the Existing Regulations that, except as otherwise provided, "issue price" is defined in sections 1273 and 1274 of the Code and the regulations thereunder. The Proposed Regulations under section 148 provide a general rule for determining the issue price of bonds exchanged for cash. The general rule provides that the issue price of bonds issued for money, determined separately for bonds having different credit and payment terms (referred herein as "bonds" or "maturities" for brevity), is the first price at which a substantial amount of the bonds is sold to the public. A substantial amount is defined as 10%. The Proposed Regulations provide a definition of "public," focusing on any person other than an underwriter or a related party to an underwriter. The definition of underwriter is concise and based on contractual relationships with the issuer to participate in the initial sale of the bonds to the public.

In order to provide certainty as to the issue price on the sale date, the Proposed Regulations provide issuers with an alternative method for determining issue price for those bonds for which the issue price was not established under the general rule. The alternative method permits the issuer to use the initial offering price as the issue price, so long as the issuer receives certifications from the underwriter (or the lead underwriter in the case of a syndicate or selling group) that no underwriter will sell bonds prior to the issue date at a price higher than the initial offering price unless the higher price is due to a documented change in market conditions. If the issuer receives the required certifications on the sale date, and exercises due diligence with respect to those certifications, the issuer may rely conclusively on the initial offering price for the maturities not meeting the 10%

test as the issue price on the sale date. If the certifications received by the issuer are determined at a later date to be inaccurate or false, the issue price will not change.

In general, NABL believes that the Proposed Regulations provide a fair and administrable rule for negotiated sales, but believes the overall objective of Treasury and the IRS to simplify the regulations and make them more administrable could be enhanced through clarifications and changes discussed below.

DISCUSSION

Confirm that an issuer need not choose between the general method and the alternative method prior to the issue date, such that for bonds of a maturity a substantial amount of which is sold between the sale date and the issue date, the issuer may use the general rule, and for bonds of a maturity a substantial amount of which is not sold by the issue date, the issuer may use the alternative method.

The general definition of issue price for bonds issued for money under the Proposed Regulations is the first price at which a substantial amount of the bonds is sold to the public, with 10% constituting a substantial amount. As under the Existing Regulations, and subject to obtaining appropriate documentation as to that first price (discussed in more detail below), subsequent sales of that maturity[1] above or below the first price do not alter the issue price for those bonds established under the general 10% actual sales rule. This is confirmed by the statement in the preamble to the Proposed Regulations that no substantive change is intended by the removal of the sentence in the Existing Regulations that the issue price does not change if part of the issue is later sold at a different price. It follows from this principle that the issuer has no obligation to obtain certifications and information as to the price of bonds once the first price at which a substantial amount of the bonds has been sold is established.

The Proposed Regulations provide an alternative method under §1.148-1(f)(2)(ii) with respect to those bonds for which the underwriter has not received orders placed by the public for a substantial amount (10%) of tax-exempt bonds on or before the sale date. The alternative method is available for orders received from the public and filled between

[1] Under the Existing Regulations and the Proposed Regulations, bonds with the same credit and payment terms are analyzed together, such that bonds of separate maturities of an issue are analyzed separately.

the sale date and the issue date, and provides that the issuer "may treat" the initial offering price to the public as the issue price of the bonds if certain requirements are met.

The use of the phrase "may treat" gives the issuer the option to use the alternative method or to continue to rely on the general rule of 10% actual sales for bonds having the same credit and payment terms for which the underwriter received orders from the public and filled before the issue date. Thus, in the case of a maturity for which the underwriter sold 8% by the sale date and sells an additional 2% of the maturity the day following the signing of the bond purchase agreement at the same price as the earlier 8%, the issuer could use the actual price and would not be required to use the alternative method. Further, as indicated above, at that point the issuer would no longer have the administrative burden of obtaining price information from the underwriter for subsequent sales of those bonds. Conversely, if in the above example the sale of bonds at their initial offering price stayed at 8% as of the day prior to the issue date, and the issuer obtained the various certifications under, and otherwise met the rules of, the alternative method, the issuer may choose to use the alternative method with respect to those bonds.

NABL appreciates that Treasury and IRS have provided the alternative method to address the need for issuers to have an issue price on the sale date. Recognizing that the actual first price may or may not be the initial offering price, an issuer may prefer to use the first price under the general method in order to avoid the uncertainty as to the issue price which may arise under the alternative method, and to reduce the administrative and due diligence burden on the issuer of obtaining certifications. Depending on the way in which sales of bonds occur between the sale date and the issue date, an issuer may wish to "hold back" in deciding, until just prior to the issue date, whether to use the alternative

method or the general rule. We request that Treasury and the IRS confirm that an issuer has until the issue date of bonds to decide whether to use the general rule or the alternative method with respect to bonds having the same credit and payment terms.

Confirm that, under the alternative method, the issuer's obligation with respect to a prohibition (absent market changes) on the sale of bonds between the sale date and the issue date at a price in excess of the initial offering price is limited to obtaining a covenant from the sole or lead underwriter to refrain from such activity, and clarify the definition of "issue price" to reflect that if the issuer receives appropriate certifications from the sole underwriter or the lead underwriter regarding the sale of bonds pursuant to orders received on or before the sale date, the issue price of bonds will not be affected as a result of a false or otherwise inaccurate certification.

Under the alternative method set forth in §1.148-1(f)(2)(ii), the issuer may treat the initial offering price of bonds to the public as the issue price if all of subdivisions (A), (B) and (C) are met. Subdivision (A) requires that (i) the underwriters fill all orders placed by the public and received by the underwriters on or before the sale date at the initial offering price, and (ii) no underwriter fills an order placed by the public and received by the underwriters on or before the sale date at a price higher than the initial offering price. Subdivision (B) requires the issuer to obtain from the sole or lead underwriter a certification of a number of items, including that the underwriters met the requirements of subdivision (A), that the sole or lead underwriter will provide supporting documentation that subdivision (A) was met, and that no underwriter will fill an order placed by the public and received after the sale date and before the issue date at a price higher than the initial offering price unless the higher price is the result of a market change. Subdivision (C) covers issuer due diligence (discussed separately in these comments).

Confirmation of issuers' ability to rely on covenants with respect to the sale of bonds between the sale date and the issue date.

One of the welcome objectives of the alternative method, as we understand it, is to provide certainty to the issuer as of the sale date, for arbitrage-related reasons and for compliance with other sections of the Code. In this regard, presumably the sole or lead underwriter will require there to be covenants woven into the appropriate underwriting documents, including the Agreement Among Underwriters ("AAU") and selling group agreements, to contractually obligate members of the underwriting syndicate and/or selling group to sell at prices no higher than the initial offering price (putting aside for the moment the market adjustment vehicle of the alternative method). One potential concern is that a member of the underwriting syndicate breaches this covenant and sells a bond at a price higher than the initial offering price between the sale date and the issue date. Assume further that, as of the sale date, a prudent issuer would not have reason to believe that a member of the underwriting syndicate would breach this covenant. The sole recourse of the IRS is to pursue any remedies it may have with respect to the behavior of an underwriter directly with such underwriter. Because it is critical to determine the issue price on the sale date, this should be the result regardless of whether the issuer learns of a potential breach of a certification or covenant after the sale date.

NABL believes this result is consistent with the manner in which the Proposed Regulations were drafted, *i.e.*, there is no independent requirement governing underwriter behavior under the alternative method as to sales of bonds between the sale date and the issue date. The requirement is instead that the issuer obtain a covenant that limits the ability of the underwriting syndicate to sell bonds between the sale date and the issue date

at a price in excess of the initial offering price. We ask that this be confirmed via example or otherwise in the final regulations.

Clarification that the issue price of bonds will not be affected by inaccurate certifications of underwriter as to sales of bonds pursuant to orders received on or before the sale date.

Another potential concern is the apparent independence of subdivision (A) based on the way the Proposed Regulations are currently drafted. Assume, for example, that, on or immediately following the sale date, the sole or lead underwriter provides the certification in subdivision (B)(2) to the issuer that subdivision (A) was met and also certifies, under subdivision (B)(4), that it will provide the issuer with supporting documentation relating to adherence with subdivision (A), but on the issue date it is discovered that (i) the sole underwriter (or one of the underwriters in the underwriting syndicate) did in fact fill an order received on or before the sale date at a price higher than the initial offering price, and that (ii) the sole or lead underwriter is therefore unable to provide the supporting documentation it certified to the issuer it would provide. Subdivision (A) would not be met, and the issuer would therefore be prevented from using the alternative method.

Although this situation is likely the rare occurrence, we suggest that the protections in (B) are sufficient for the IRS not to make subdivision (A) an independent requirement. One way of addressing this concern is to eliminate subdivision (A) and fold the requirements of it into the certification requirement of subdivision (B). Another way is to alter the relationship between subdivisions (A) and (B) such that subdivision (A) is

presumed to be satisfied upon the receipt by the issuer of the certifications required in subdivision (B). Assuming no collusive behavior on the part of the issuer, if there were a false or otherwise inaccurate certification provided to the issuer, the sole recourse of the IRS should be to pursue any remedies it may have with respect to inaccurate or false certifications directly with the party having made the inaccurate or false certifications.

Example

A potential example that clarifies the first of the two points made in this section might include the following:

On date X City A enters into a bond purchase agreement with Underwriter concerning the City A's Bonds, which have a single maturity and all of which have the same terms. The Bonds will be delivered on date Y (which is two weeks later). On date X, City A receives from Underwriter a certification of the initial offering price for the Bonds, a certification that Underwriter filled all orders for the Bonds placed by the public and received by Underwriter on or before date X and that no Bonds were sold on or before date X at a price higher than the initial offering price for the Bonds, and a certification that Underwriter will not fill any order placed by the public and received after the date X and before date Y at a price that is higher than the initial offering price except if the higher price is the result of a market change after date X. Underwriter also supplies City A with a copy of the pricing wire for the Bonds evidencing the initial offering price for the Bonds and with a copy of a summary of orders showing that no Bonds were sold for prices higher than the initial offering price prior to date X. The bond purchase agreement contains a covenant on the part of Underwriter that no Bonds will be sold after date X and before date Y at a price higher than the initial offering price except if there is a market movement and then only if Underwriter provides evidence of the market movement. City reasonably believes that the covenants in the bond purchase agreement are enforceable against Underwriter. No information has come to the attention of City or its representatives that suggests that any of the certifications of Underwriter are incorrect or false. City may rely upon the initial offering price of the Bonds to the public as establishing the issue price, and the issue price of the Bonds will not change after date X if it is later determined that the price at which the first 10% of the Bonds was sold differed from the initial offering price to the public.

Clarify that the issuer's due diligence obligation with respect to issue price is that of a prudent person, and provide specific examples in the regulatory language of documentation to be reviewed and retained by the issuer that would meet that prudent person standard.

As indicated above, NABL appreciates the willingness of Treasury and the IRS to provide issuers with conclusiveness as to the issue price of bonds on the sale date under the alternative method. In general, under the Proposed Regulations the issuer will have the obligation to obtain factual certifications from the underwriter respecting sales to the public, as is the current practice, plus documentation from the underwriter to back up the factual representations. NABL is concerned that the conclusiveness of the issue price is compromised by the language of §1.148-1(f)(2)(ii)(C), which conditions the use of the alternative method on the issuer meeting the requirement that it "does not know or have reason to know, after exercising due diligence, that the certifications described in (f)(2)(ii)(B) of this section [relating to sole or lead underwriter certifications] are false." There is no discussion in the preamble to the Proposed Regulations relating to this requirement, which on its face imposes a high standard of due diligence with respect to factual representations obtained from the party with direct knowledge and expertise in the subject matter. The stakes are high, as the alternative method is conditioned on exercising this vague standard of due diligence.

The language "does not know or have reason to know" is not otherwise used in the arbitrage regulations. Under the general principles of §1.148-2(b) of the Existing Regulations, the determination of whether an issue consists of arbitrage bonds under section 148 is based on the issuer's reasonable expectations as of the issue date regarding the amount and use of the gross proceeds of the issue. An officer of the issuer responsible for issuing the bonds must, in good faith, certify the issuer's expectations as

of the issue date. The certification must state the facts and estimates that form the basis for the issuer's expectations. The certification is evidence of the issuer's expectations, but does not establish any conclusions of law or any presumptions regarding either the issuer's actual expectations or their reasonableness. "Reasonable expectations or reasonableness" under §1.148-1(b) of the Existing Regulations is a prudent person standard, and generally is based on all the objective facts and circumstances. Factors relevant to the determination of reasonableness include the level of inquiry by the issuer into factual matters, and in making such inquiry the issuer is under an obligation to apply the prudent person standard.

By contrast, the "does not know or have reason to know" language of the Proposed Regulations would impose the tax shelter standard of section 6700 on the definition of issue price in instances where the initial offering price is being used to establish issue price for maturities that do not meet the 10% actual sales rule. NABL believes that this anti-abuse standard is inappropriate in the context of the general requirements for determining issue price under the Proposed Regulations. Under the alternative method described in the Proposed Regulations, the issuer will not be accepting mere certifications of an underwriter as to reasonable expectations regarding issue price, which appears to have been an ongoing concern of Treasury and the IRS. Under the Proposed Regulations, as discussed in more detail below, the issuer will require appropriate contemporaneous documentation relative to the certifications it receives. The tax shelter standard of due diligence implies that an issuer can and should independently verify the certifications and documentation provided by the underwriter. Independent verification is not consistent with a prudent person standard, particularly in the context of

a highly specialized and regulated industry where the issuer must hire professionals in order to market and sell its bonds. The heightened due diligence obligation will fall especially hard on small and infrequent municipal issuers, but even the larger, more sophisticated issuers do not possess the expertise in the market to independently verify documentation and must rely on professionals.

This concern that issuers must somehow independently verify or do something more than review documentation stems in part from the preamble to the 2013 Proposed Regulations, in which, in the context of discussing the changes to the definition of issue price, Treasury and the IRS stated that heightened scrutiny of the issue price standards derived from increasing market transparency about pricing information in the municipal bond market, citing as the only example, publicly-available pricing information from the Municipal Securities Rulemaking Board ("MSRB") through its Electronic Municipal Market Access ("EMMA") platform. In its comments to the 2013 Proposed Regulations, NABL expressed its concerns as to whether EMMA is, in fact, a reliable source of data for purposes of determining issue price under the tax regulations. NABL noted at that time that while EMMA provides *some* information about actual sales, it is difficult to correctly interpret this information, in large part because EMMA does not provide all of the information required to determine issue price under the tax regulations (*e.g.*, record of orders as opposed to completed trades, true timing of trades, information necessary to determine whether a purchaser is an "underwriter" or a member of the "public"). While there have been further refinements to EMMA since 2013, it remains the case that data from the publicly-available EMMA system is not designed to address the tax

requirements and at this point would be inappropriate as a way to independently verify certifications made by the underwriter to the issuer.

For this reason, NABL believes it is more appropriate and productive for the IRS and Treasury to eliminate the tax shelter standard of due diligence and focus on identifying, through examples in the regulations, the documentation that a prudent person would review and retain in its books and records to establish issue price. In the preamble to the Proposed Regulations the IRS asked for comments on the proposed collection of information necessary for the proper performance of the IRS, including how the quality, utility and clarity of the information to be collected may be enhanced. Issuers, underwriters and other market participants will need clarity as to what documentation is required to properly perform their obligations to provide certifications, perform appropriate due diligence and retain records. Assuming that discrete, easily obtainable documentation is specified in the final regulations, the burden of obtaining documentation should not be unduly burdensome for issuers. This is much preferable to a vague standard of establishing that the issuer did not know or have reason to know that certifications were false.

As an additional matter, the preamble to the Proposed Regulations states that under the general rule, an issuer should include in its books and records any certification from the lead (or sole) underwriter regarding the first price at which a substantial amount of the bonds were sold to the public and reasonable supporting documentation for this price (emphasis added). No specific examples of reasonable supporting documentation with respect to the general rule are provided. As we understand it, there is currently no single document prepared or filed with other agencies or third parties that would provide

all of the specific information needed to establish the first price at which 10% of the bonds are sold. For example, the data entered into EMMA directly does not currently provide the issuer with the first price in the context of a syndicate or selling group, and information submitted to a third party, such as IPREO, does not address all of the tax requirements and such a third party system is not used by all entities that would be deemed underwriters under the Proposed Regulations. The IRS, Treasury, MSRB and SEC have established a working relationship to deal with common issues in the municipal market. NABL would welcome the opportunity to participate in an effort to develop the documentation of sales of bonds in a summary format, both for purposes of the general rule and for meeting the documentation requirements under the alternative method.

With respect to the alternative method, the Proposed Regulations require certifications of the sole underwriter, or the lead underwriter in the case of an underwriting syndicate or selling group (referred to generally in these comments as "underwriter" for convenience). The alternative method requirements of Proposed Regulation §1.148-1(f)(2)(ii)(A) are that the underwriters fill all orders at the initial offering price placed by the public and received by the underwriters on or before the sale date (to the extent the orders do not exceed the amount of bonds to be sold), and that no underwriter fills an order placed by the public and received by the underwriter on or before the sale date at a price higher than the initial offering price. The preamble notes that this alternative method should cover a limited number of cases, based on comments Treasury and the IRS received to the 2013 Proposed Regulations to the effect that (1) the number of maturities not meeting the 10% actual sales threshold was relatively small, (2)

the bonds sold after the sale date tended to be sold at less than the initial offering price and (3) sales at other than the initial offering price were a reflection of market movement. The requirement as to a certification that this test is met is found in a subsequent section dealing with certifications, but no mention is made of appropriate documentation in the preamble. NABL recommends that this language of the regulations be expanded to include a statement as to the appropriate documentation the IRS would deem sufficient to support a determination that this requirement has been met. We believe that the same pricing summary documentation used to establish the first price requirement should be sufficient for this purpose also.

Separately, we recommend that the language of this first requirement be modified to provide that the underwriters may fill all orders at a price not in excess of the initial offering price placed by the public and received by the underwriters on or before the sale date, as our understanding is that Treasury and the Service do not believe that bonds sold at a price lower are a tax concern in establishing issue price.

The second requirement under §1.148-1(f)(2)(ii)(B) has three specific elements for which the issuer must obtain the certifications of the underwriter, together with supporting documentation which is generally described in the preamble. The first certification relates to the initial offering price, and the preamble states that documentation of the initial offering price "may" include a copy of the pricing wire or equivalent communication. The second certification relates to the requirements of §1.148-1(f)(2)(ii)(A) discussed above.

The third certification is that no underwriter will fill an order placed by the public and received after the sale date and before the issue date at a price higher than the initial offering price, except if the higher price is the result of a market change (such as a decline in interest rates) for those bonds after the sale date. This certification appears to be required to be made as of the sale date, and is therefore more in the nature of a covenant. As we understand it, the appropriate documentation for review by the issuer for this requirement would be a provision in the bond purchase agreement.

The documentation required for this third certification under §1.148-1(f)(2)(B)(4) is somewhat inconsistent with the forward looking nature of the requirement, as it requires the underwriter, at a date later than the sale date, to provide either (1) documentation with respect to any bonds for which the underwriter filled an order at a higher price and the corresponding market change for those bonds, or (2) a certification that no underwriter filled such orders at a price higher than the initial offering price. The final regulations should specify that documentation is not required to prove the negative, that is, that no orders were filled at a higher price. The preamble states that documentation of orders filled at a higher price would include amounts, prices and sale dates, presumably in a summary form similar to what might be required to meet the general first price rule.

The requirement most in need of clarification is the documentation required to establish market change in the case of bonds sold at a higher price. While the preamble states market change documentation might include "proof of the values of a broad-based index of municipal bond interest rates on bonds similar to the type and credit rating of the

bonds being sold," no particular index is specified, so presumably there are several that might be relevant.

This market change certification is essential to use of the alternative method, so examples of the appropriate documentation should be included in the text of the final regulations. Given the sophistication and volatility of the municipal market, NABL believes it would be appropriate to expand the examples beyond broad-based indices currently available, which may only represent a snapshot of prices for a day and not provide evidence of a change in the market for "those bonds" sold at the higher prices at the particular time of day that the order for the bonds was received. Further, it may not be appropriate to require that the market change be determined on a formulaic basis. NABL believes the reference to market changes with respect to the particular bonds sold at a higher price may also include factors specific to the issuer, market demand for a specific maturity or bonds from a particular state or credit quality, any of which may not coincide with a general market movement. For example, higher prices may be warranted by an increase in the credit rating of the issuer, an announcement that a major employer has committed to move into the jurisdiction, or a university has received a significant donation to increase programs offered. As such it may be appropriate to include other documentation that, in the judgment of the underwriter, supports a conclusion that a market change has occurred.

NABL would be happy to work with IRS and Treasury to develop regulatory language and examples that would clarify the due diligence obligation and documentation requirements.

Eliminate the uncertainty created in the definition of "underwriter" under proposed §1.148-1(f)(3)(ii)(B) by (i) deleting the language in §1.148-1(f)(3)(ii)(B), referencing any person that directly or indirectly enters into an "other arrangement" and (ii) clarifying the circumstances in which certain parties "related" to an underwriter may fall within the definition of "public."

NABL believes the revisions made by the Proposed Regulations to the definitions of "public" and "underwriter" that were included in the 2013 Proposed Regulations will greatly assist issuers, underwriters and their respective counsel in applying the new definition of issue price. In particular, defining public as any person other than an underwriter, combined with a focus on limiting the definition of underwriter to persons having a contractual relationship with the issuer (or with the lead underwriter to form an underwriting syndicate) to participate in the initial sale of the bonds to the public is helpful and administrable. The contractual relationship with the issuer or an underwriter to form an underwriting syndicate provides the type of privity which NABL recommended in its comments to the 2013 Proposed Regulations. For example, we believe the language of the Proposed Regulations clarifies that the sale by an underwriter of entire maturities to other broker-dealers who have no contract with the issuer or the underwriter other than a confirmation of sale would be treated as a sale to the public.

We have concerns, however, about the ability of an issuer to determine whether a sale is to the public under the language included in the Proposed Regulations that would also define an underwriter as any person who, on or before the sale date, directly *or indirectly* enters into a contract *or other arrangement* with an underwriter to sell the bonds. It is not clear how an issuer would perform due diligence to determine whether a person indirectly entered into an "other arrangement" with an underwriter (with whom the issuer does have a contractual relationship) to sell the issuer's bonds. This added

language undercuts the effort to establish a definition of issue price that can provide certainty to the issuer with respect to this very important term and be administered fairly and efficiently by the IRS.

The preamble to the 2013 Proposed Regulations expressed concerns related to the manner in which municipal securities are offered and distributed, and implied that the conduct of municipal underwriters is sometimes inappropriate and perhaps illegal. If the language regarding indirect contracts and other arrangements is intended to be an anti-abuse rule related to these concerns, NABL continues to believe that the agencies, such as SEC, MSRB and FINRA, that regulate the activities of municipal underwriters are in a better position to identify, investigate and take appropriate regulatory and enforcement action than an issuer trying to determine the issue price of its bonds for tax purposes. As we stated in our comments to the 2013 Proposed Regulations, issuers do not have the resources to police inter-dealer conduct, nor do they benefit from any form of perceived manipulation.

Clarity as to the determination of which persons are treated as related to an underwriter will be essential to assure the issuer that it has received all of the certifications and appropriate documentation from parties falling outside of the definition of public. As we understand it, other municipal market participants are commenting on various scenarios that may raise questions as to whether a party is related to the underwriter in the context of contractually agreeing to participate in the initial sale of the bonds to the public. NABL recommends that any final regulations address this question, perhaps providing examples of instances of sales that would result in treatment of a party as being within or outside of the definition of public.

Provide additional alternative methods for determining issue price for bonds sold pursuant to a competitive bid that do not meet the 10% actual sales requirement on the sale date.

NABL urges Treasury and the IRS to establish additional alternative methods to accommodate the different manner in which bonds are priced and sold when they are bought by an underwriter pursuant to a competitive bid.[2] As indicated in our comments to the 2013 Proposed Regulations, competitive bidding is required by many state and local laws to assure that the issuers obtain the best price for their bonds and the overall lowest interest rate cost. The sale of bonds through competitive bidding, even when not required by state or local law, may be undertaken to adhere to an issuer's debt policy, or is otherwise the desired method of selling bonds for issuers whose credit and reputation is well-known to the market or when the security structure is well-known in the market (such as general obligation and revenue bonds). Because of the nature of the competitive bid process, failure to provide an additional safe harbor will place undue burdens on those issuers required or wishing to pursue competitive sales of bonds, including many smaller issuers.

An alternative safe harbor would acknowledge the different relationship of the purchaser of bonds to the issuer in a competitive bid. Unlike in a negotiated sale, there is no bond purchase agreement in a competitive sale. Typically, the offering of bonds by competitive sale is accomplished through a preliminary official statement accompanied by a notice of sale (or notice inviting bids), prepared by the issuer, its bond counsel

[2] We note that SIFMA's September 17, 2015 submission on the Proposed Regulations suggests providing an additional alternative method for establishing issue price not only to issues of bonds that are sold entirely through a competitive bidding process but also to bonds that are part of a larger negotiated transaction (typically the earliest maturities of such an issue) that are sold pursuant to a bidding process among the lead underwriters.

and/or its financial advisor, which briefly describes the issue and provides for, among other things, the time of the bid and the terms of the bonds (*i.e.*, the principal amounts to come due in each year (often requiring more maturities than might be found in a negotiated deal if state or local law requires a minimum debt service payment each year)).[3] These terms may or may not fit with supply and demand in the market at the time the bid is submitted, but do meet state or local law requirements. The notice of sale also typically includes the bid form.

Under current practice, notices of sale are widely distributed and/or publicized. Notices of sale or invitations to bid are typically posted on centralized websites (primarily financial printing companies) with an email "blast" of a link to the disclosure document, notice of sale and bid documents being sent to the publishing company's subscriber list and any additional potential bidders provided by the issuer or its financial advisor. These email blasts typically reach hundreds of potential bidders. Additionally, the bid information is typically sent to *The Bond Buyer* for inclusion in its competitive sale calendar. *The Bond Buyer* sale calendar provides pertinent details about the bond sale, including sale date and identification of the financial advisor which, presumably, enables interested broker-dealers to seek out the bid documents from the appropriate party. For the many issuers utilizing an internet bidding platform to receive bids electronically, the disclosure document and notice of sale and bid form are also posted on

[3] The notice of sale (or notice inviting bids) also typically provides whether any bonds may be designated as term bonds and whether principal amounts may change (and, if so, the parameters for those changes, including the timing for the setting of the new amounts and the limits on amounts that can be changed by maturity and/or in aggregate), whether the sale may be postponed, the amount of the good faith deposit, the method of awarding the sale, whether the price to be bid must equal par or may be at a discount or premium (and any restrictions on that), and whether the coupons must escalate and any low/high amounts for the coupons.

the proprietary bidding website. Bids are often, but not always, awarded on the same platform.

Due to market conditions, competitive bids are typically delivered no more than 15 minutes before the bid deadline.[4] Due to the limited time in which a bidder is willing to hold its bid firm, the bids must be acted on within a short period of time, and the issuer has to make a very quick award of the sale. The bid is based upon the bidder's assessment of the market at the point in time at which the bid is submitted, with little or no premarketing due to the inherent uncertainty as to whether the bidder will be successful in its bid to purchase the bonds.

Upon award of the bid, a contractual relationship is established between the issuer and the underwriter. Pursuant to the terms of the notice of sale, each bidder, by submitting a bid, generally agrees to make a public offering of the bonds. The winning bidder will have very little time to receive and fill orders to establish the issue price under the general rule of the Proposed Regulations, as the notice of sale will typically require the winning bidder to deliver the reoffering price information within a half hour or perhaps up to two hours after the award. In the absence of premarketing, bidders are submitting a bid based solely on their expectations as to the appropriate reoffering price of bonds based on a variety of market factors at the time of the award. An underwriter has much less ability, and thus no incentive, to not price the bonds fairly and correctly in a competitive bid situation. Data supports the intuitive conclusion that, without premarketing and the inability to alter the fixed sale parameters to match current supply

[4] Often, the majority of bids will be electronically delivered within the last few minutes before the bid deadline.

and demand, it is more likely that the underwriter in a competitive bid will have more maturities that do not meet the 10% actual sales requirement on the sale date. This is particularly so when the winning bidder has bid aggressively (*i.e.*, producing the lowest yield to the issuer).

Although we are mindful of the distinction between the price bid by the bidder for a bond and the price at which the bond is reoffered – the spread representing the underwriter's compensation – the bid price and the reoffering price are not concepts that work independently. To the contrary: In the simplest case, an underwriter that wins a bid on a bond (assume a single maturity issue for now) wins because it has assigned the lowest interest rate coupons to that bond and/or because the underwriter's bid is at a higher price to the issuer (often called a "bid premium"). In other words, both the bid price and the reoffering price of a bond are derived from the same basic terms of the bond, tying them at the hip. Further, both the bid premium and the coupon level directly affect the amount of the underwriter's compensation: (i) A bond with a lower coupon, all things being equal, means a bond that will fetch a lower price in a given market than a bond with a higher coupon, and (ii) a higher bid to the issuer reduces the underwriter's spread from the other end (since the spread is the reoffering price minus the bid price). If an underwriter determined there was demand for a higher-coupon (*e.g.*, 5%) bond in a lower-yield market,[5] one should be able to deduce that the underwriter will be able to sell such a bond at a higher offering price to the market, but one should also be able to deduce

[5] It is understood that underwriters will more often use coupons that produce a par (or even discount) price for callable term bonds because, unlike the way in which yields must be reported to investors, often based on an early call date, the awarding of bonds is typically done based on the true interest cost ("TIC"), which does not take into account the possible early redemption of bonds. Thus, an underwriter that bids with an above-market coupon for a callable bond will have that coupon work against it in the issuer's evaluation of all bids.

that the underwrite had to provide the issuer with a richer bid in order to be awarded the bond to sell.

Most fixed-rate bond issues have multiple maturities, unlike the scenario posited above, but the analysis does not change. Where the underwriter has assigned an above-market coupon to a particular maturity, suggesting that such maturity will sell into the market at higher price than a comparable market-rate coupon bond, the "check" on the underwriter's compensation is likely the fact that other bonds of the issue had sufficiently lower interest rate coupons and/or the underwriter paid a significant enough premium to the issuer to have been awarded the issue.

While the notice of sale will require the winning bidder to submit the reoffering price to the issuer within a half hour (or perhaps up to two hours, per above) and for purposes of inclusion in the official statement, notices of sale do not contemplate that the winning bidder will continue to provide information until the issue date as to the actual sale of bonds, nor is the notice of sale process likely to provide the same type of opportunity to obtain the certifications and follow-up documentation needed for the alternative method contained in the Proposed Regulations.

NABL acknowledges the general goal of Treasury and the IRS to determine the issue price of tax-exempt bonds under sections 1273 and 1274, and is not requesting a return to the reasonable expectations test of the Existing Regulations for tax-exempt bonds sold through a competitive bid process. Instead, in recognition of the inherently different timing in the filling of orders for bonds sold through a competitive bidding process, the different contractual arrangement between the issuer and the winning bidder

and the market discipline associated with the competitive sales of bonds, we ask that Treasury and the IRS adopt a second alternative method that would be available only in connection with a competitive sale of bonds that permit the issuer to use the initial offering price as the issue price for those bonds that do not meet the general rule as of the sale date. NABL proposes the following alternatives:

(1) In alternative one, the issuer would be required to use a bona fide bidding process similar to that currently in place for ascertaining fair market value in the pricing of guaranteed investment contracts and open-market securities deposited in advance refunding escrows. The notice of sale for a competitive bid could require the party submitting a bid to certify as to matters similar to that found in §1.148-5(c)(6)(iii), such as that the bidder did not consult with any other bidder about its bid; the bid was determined without regard to any other formal or informal agreement that the bidder has with the issuer, the bidding agent or any other person (whether or not in connection with the issuance of the bonds); the bid is not being submitted solely as a courtesy to the issuer or any other person for the purposes of satisfying the bona-fide bidding requirement; the bidder did not have the opportunity to review other bids (*i.e.*, a last look) before submitting a bid; and the bidder is a reasonably competitive underwriter of the type of bonds being purchased.[6]

(2) In alternative two, the safe harbor allowing use of initial offering prices as the issue price for bonds not meeting the general rule in competitively bid bond sales would

[6] We note that small issues and small issuers often have difficulty attracting multiple bids for their offerings. Accordingly, in the event the IRS were to require a minimum number of bids received, NABL proposes that issues not in excess of $5,000,000 be exempt from such requirement.

be available if the principal amount of bonds meeting the general rule represented at least 65% of total principal amount of the issue or 65% of number of maturities of the issue. For example, if the principal amount of the entire issue was $10 million and the number of maturities specified by the issuer in the notice of sale was ten, the issuer would be permitted to use the initial offering price for the unsold maturities if it received a certification that the 10% actual sales test was met with respect to maturities with an aggregate stated principal amount of $6,500,000 or a certification that the underwriter sold at least 10% of the principal amount of 7 of the maturities.

Confirm that bonds purchased directly from an issuer by a bank or another party for its own investment would fall under the general private placement and buyer rules of Section 1273 of the Code.

As written, the Proposed Regulations provide in §1.148-1(f)(1) that "Except as otherwise provided in this paragraph (f), issue price is defined in sections 1273 and 1274 and the regulations under those sections" and then go on to provide specific guidance on issue price for bonds issued for money in §1.148-1(f)(2) and for property under the special rules in §1.148-1(f)(4)(iii). With respect to bonds issued for money, the exclusive focus of the regulations is the sale of bonds sold to the public through an underwriter. There is no specific mention of establishing the issue price of bonds purchased directly by banks and other purchasers or privately placed with an investor by a placement agent (collectively, "Direct Purchases").

Confirmation as to the treatment of Direct Purchases is particularly important in the current market, as Direct Purchases are no longer limited to the purchase of bonds of small issuers under the qualified tax-exempt obligation provisions of section 265(b)(3) of the Code. Since the period of market disruption beginning in 2008, direct bank purchases

have extended to middle-market bond issues and frequent issuers, particularly in cases where the issuer or conduit borrower seeks to use a drawdown bond structure to reduce interest costs during construction. For bank regulatory purposes, the bank may characterize the transaction as a loan to the issuer rather than the purchase of a bond from the issuer. The bond issue typically has a single maturity with scheduled amortizations, such that there is no need to make a separate determination for any individual bonds within an issue. Under current practice, issuers request a certification from the bank purchaser that it has purchased the bond for its own account without a present intent to resell the bond.

We believe that Treasury and the IRS intended that such Direct Purchases be covered by section 1273(b)(2), which states that "[I]n the case of any issue of debt instruments not issued for property and not publicly offered, the issue price of each such instrument is the price paid by the first buyer of such debt instrument." NABL requests that the regulations expressly address the issue price for Direct Purchases, and would recommend that §1.148-1(f)(4) be amended to state that with respect to bonds to which section 1273(b)(2) applies, paragraph (f)(2) shall not apply. We believe that such an explicit statement in the regulations, or an example to that effect, would provide the necessary clarity in the determination of the issue price of bonds sold pursuant to a Direct Purchase.

Add a cross-reference to the definition of "issue price" under §1.148-1(f) for other similar concepts in the tax rules under sections 54 through 57, 103, 141 through 150 and 6431.

For more effective and efficient administration of the various tax provisions of the Code and Existing Regulations, NABL requests that the Treasury and the IRS

affirmatively state the extent to which the amount determined pursuant to the new issue price regulations under Section 148 will be synonymous with terms such as "sale proceeds," "net proceeds," "proceeds," "face amount" and "amount," each of which is an important concept in the Existing Regulations as well as other Code provisions applicable to municipal bonds. Taken together, these definitions affect most of the tests for determining whether a bond is described in section 103(b)(1), (2) or (3), and thus tax-exempt, or tax-advantaged in more limited instances. These tests include the 2% costs of issuance limit, private activity limitations, volume caps, output facility limits, small issue bond limits, weighted average maturity calculations and related tests, debt service reserve fund limits, small issuer status and certain refunding transition rules. Clarification would assist issuers in determining compliance with issue date requirements, including, for example, assuring that the appropriate amount of volume cap has been allocated by a State or other allocating agency to an issue, and in meeting their post-issuance compliance obligations.

Attached as **Exhibit A** is a copy of the comprehensive list previously provided in NABL's comments to the 2013 Proposed Regulations, illustrating the number of rules that could be positively impacted by a specific cross-reference to the proposed definition of issue price. In general, the rules could be simplified by amending §1.150-1, which provides definitions for tax-exempt bonds generally and, in many aspects, to tax-advantaged bonds.

EXHIBIT A

OTHER CODE AND REGULATORY PROVISIONS AFFECTED BY A CHANGE IN THE DEFINITION OF ISSUE PRICE

This list is meant for illustrative purposes and is not exhaustive.

Code Section	*Regulation Section*	*Impact*
54A		See Notice 2010-35, which cross-references the section 148 definition of "issue price" for purposes qualified tax credit bonds eligible for credits under section 6431.
54AA		"issue price" - cannot have more than a de minimis amount of premium (BABs)
141		"proceeds" – private activity tests
	1.141-1(b)	"proceeds" - means sale proceeds of an issue (other than those sale proceeds used to retire bonds of the issue that are not deposited in a reasonably required reserve or replacement fund)
142		"net proceeds" - 95% test for exempt facilities
143		"proceeds" - all (exclusive of costs of issuance and a reasonably required reserve fund) for qualified mortgage bonds "net proceeds" – 95% for qualified veterans mortgage bonds
144(a)		"face amount" - qualification as a qualified small issue "net proceeds" - 95% for use
144(b)		"net proceeds" – applicable percentage for qualified student loan
144(c)		"net proceeds" – 95% for qualified redevelopment
145		"net proceeds" – all property provided with net proceeds for ownership test; 5% of for private activity; 95% for qualified hospital bonds "face amount" - $150 million limitation on non-hospital bonds
146		"face amount" – general volume cap limits "amount" - carryforward

147(b)		"issue price" – weighted average maturity (note that WAM is used in other contexts, such as public approval exception, safe harbor for creation of replacement proceeds, and deemed designated test under section 265) "net proceeds" – average life of land based upon 25%; 95% for pooled 501(c)(3) financings; 95% test for FHA-insured loans "lendable proceeds" – 120% for pooled 501(c)(3) financings
147(c)		"net proceeds" – 25% for land acquisition "proceeds" – for farming test
147(d)		"net proceeds" – for existing property
147(g)		"proceeds" – for costs of issuance limits
148(a)		"proceeds" – for reasonable expectations regarding arbitrage bonds
148(c)		"proceeds" – temporary periods
148(d)		"proceeds" – reasonably required reserve funds
148(e)		"proceeds" – minor portion
148(f)		"gross proceeds" – temporary investments; 6-month spending exception to rebate "net proceeds"/"proceeds" – tax and revenue anticipation notes tests "available construction proceeds" – refers to "issue price" "net proceeds"/"face amount" – small issuers qualification and rebate exception
148(h)		"issue price" – for determination of yield
	1.148-1(a)	definitions under this section and under section 150 apply for purposes of section 148 and regulations under section 148
	1.148-1(b)	"gross proceeds" means any proceeds and replacement proceeds of an issue. "investment proceeds" means any amounts actually or constructively received from investing proceeds of an issue. [current definition] "issue price" means, except as otherwise provided, issue price as defined in sections 1273 and 1274. Generally, the issue price of bonds that are publicly offered is the first price at which a substantial amount of the bonds is sold to the public. Ten percent is a substantial

		amount. The public does not include bond houses, brokers, or similar persons or organizations acting in the capacity of underwriters or wholesalers. The issue price does not change if part of the issue is later sold at a different price. The issue price of bonds that are not substantially identical is determined separately. The issue price of bonds for which a *bona fide* public offering is made is determined as of the sale date based upon reasonably expectations regarding the initial public offering price. If a bond is issued for property, the applicable Federal tax-exempt rate is used in lieu of the Federal rate in determining the issue price under section 1274. The issue price of bonds may not exceed their fair market value. "net sale proceeds" means sale proceeds, less the portion of those sale proceeds invested in a reasonably required reserve of replacement fund under section 148(d) and as part of a minor portion under section 148(e). "proceeds" means any sale proceeds, investment proceeds, and transferred proceeds of an issue. Proceeds do not include, however, amounts actually or constructively received with respect to a purposes investment that are properly allocable immaterially higher yield under 1.148-2(d) or section 143(g) or to qualified administrative costs recoverable under 1.148-5(e). "sale proceeds" means any amounts actually or constructively received from the sale of the issue, including amounts used to pay underwriters' discount or compensation and accrued interest other than pre-issuance accrued interest. Sale proceeds also include, but are not limited to, amounts derived from the sale of a right that is associated with a bond, and that is described in 1.148-4(b)(4). See also 1.148-4(h)(5) treating amounts received upon the termination of certain hedges as sale proceeds.
	1.148-2(b)	"issue price" - exceptions to certification requirement for small issues
149(b)		"proceeds" - 5% for Federally guaranteed
149(e)		"net proceeds", "face amount" - for information reporting
149(f)		"net proceeds" – 30%/95% for certain pooled financing bonds, with alternation to section 150 definition of "net proceeds"
149(g)		"spendable proceeds"/ "proceeds"/ "net proceeds" – hedge bond rules
150(a)		"net proceeds" means, with respect to any issue, the proceeds of such issue reduced by amounts in a reasonably required reserve or replacement fund
150(e)		"net proceeds" – 95% for qualified volunteer fire department
	1.150-1(c)	"issue price" - the lesser of $50,000 and 5% special rules for draw down financings
	1.150-2(f)	"proceeds" - less of $100K or 5% for de minimis exception

265(b)		"amount" in various places: definition of qualified small issuer (including included and excepted bonds), allocations among multiple entities, limitation on bonds designated, size limitation on overall bond issue

EXHIBIT B

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EXHIBIT C

THE NATIONAL ASSOCIATION OF BOND LAWYERS

OUTLINE OF TOPICS TO BE DISCUSSED
AT THE PUBLIC HEARING ON
PROPOSED REGULATIONS CONCERNING THE
ISSUE PRICE DEFINITION FOR TAX-EXEMPT BONDS
IRS REG-138526-14
OCTOBER 28, 2015, 10:00 AM

I. Confirm that an issuer need not choose between the general method and the alternative method prior to the issue date. (1 minute)

II. Confirm that, under the alternative method, the issuer's obligation with respect to a prohibition (absent market changes) on the sale of bonds between the sale date and the issue date at a price in excess of the initial offering price is limited to obtaining a covenant from the sole or lead underwriter to refrain from such activity, and clarify the definition of "issue price" to reflect that if the issuer receives appropriate certifications from the sole underwriter or the lead underwriter regarding the sale of bonds pursuant to orders received on or before the sale date, the issue price of bonds will not be affected as a result of a false or otherwise inaccurate certification. (2 minutes)

III. Clarify that the issuer's due diligence obligation with respect to issue price is that of a prudent person, and provide specific examples in the regulatory language of documentation to be reviewed and retained by the issuer that would meet that prudent person standard. (2 minutes)

IV. Eliminate the uncertainty created in the definition of "underwriter" under proposed §1.148-1(f)(3)(ii)(B) by (i) deleting the language in §1.148-1(f)(3)(ii)(B), referencing any person that directly or indirectly enters into an "other arrangement" and (ii) clarifying the circumstances in which certain parties "related" to an underwriter may fall within the definition of "public." (1 minute)

V. Provide additional alternative methods for determining issue price for bonds sold pursuant to a competitive bid that do not meet the 10% actual sales requirement on the sale date. (2 minutes)

VI. Confirm that bonds purchased directly from an issuer by a bank or another party for its own investment would fall under the general private placement and buyer rules of Section 1273 of the Code. (1 minute)

VII. Add a cross-reference to the definition of "issue price" under §1.148-1(f) for other similar concepts in the tax rules under sections 54 through 57, 103, 141 through 150 and 6431. (1 minute)