National Association
of Bond Lawyers

PHONE 202-503-3300 601 Thirteenth Street, NW
FAX 202-637-0217 Suite 800 South
www.nabl.org Washington, D.C. 20005

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WASHINGTON, DC

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John J. Cross III
Associate Tax Legislative Counsel
United States Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, DC 20220

Vicki Tsilas
Branch Chief (Financial Institutions and Products)
Office of the Chief Counsel
Internal Revenue Service
1111 Constitution Ave., NW
Washington, DC 20224

Re: Comments to Proposed Regulations Under Section 147(f) of the Internal Revenue Code

Dear Mr. Cross and Ms. Tsilas:

The National Association of Bond Lawyers ("NABL") respectfully submits the attached comments to the proposed Treasury Regulations under section 147(f) of the Internal Revenue Code, Public Approval of Tax-Exempt Private Activity Bonds, published in the Federal Register on September 28, 2017. These comments were prepared by a working group comprised of the individuals listed in the Attachment to the comments and approved by the Board of Directors of NABL.

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 the attached comments in furtherance of that mission.

If NABL can provide further assistance, please do not hesitate to contact Jessica Giroux in our Washington, DC office at (202) 503-3290.

Sincerely,

Alexandra M. MacLennan

**COMMENTS TO PROPOSED REGULATIONS GOVERNING THE PUBLIC APPROVAL REQUIREMENT IN SECTION 147(f) OF THE INTERNAL REVENUE CODE**

The National Association of Bond Lawyers ("NABL") respectfully submits the following comments to the Proposed Treasury Regulations (the "Proposed Regulations") governing the "TEFRA" public approval requirement under Section 147(f) of the Internal Revenue Code of 1986, as amended (the "Code"), published in the Federal Register on September 28, 2017. NABL believes that the Proposed Regulations represent a significant improvement over the Section 5f.103-2 Temporary Treasury Regulations (the "Current Regulations") and the prior Proposed Treasury Regulations published on September 9, 2008, and thanks the Treasury Department and Internal Revenue Service for their efforts in limiting the administrative burden imposed by the public approval requirement. That being said, NABL has a few suggestions for improvement.

A. Maximum Stated Principal Amount for Each Separate Project to be Financed by the Issue. The Proposed Regulations provide that the notice and approval must specify the maximum stated principal amount of bonds to be issued to finance each separate project.[1]

1. Statement of Maximum Principal Amount of Bond Issue Should Satisfy This Requirement. NABL suggests that the final Regulations clarify that this requirement is satisfied if the notice of public hearing and approval specify the aggregate of the maximum principal amount of bonds of the issue that may be used to finance all of the projects financed by the issue.

Unless clarified as suggested above, this requirement is inconsistent with the tenor and intent of the Proposed Regulations to streamline the public approval process, provide greater flexibility, and reduce administrative burdens associated with the public approval process. For example, the Proposed Regulations would reduce the required level of specificity needed under the Current Regulations of setting forth the general functional description of the type and use of the financed project, e.g., airport terminal, parking garage, and hangar, by merely requiring the identification of the category of exempt facility bond, e.g., an airport facility. NABL believes that requiring the notice and approval to specify the maximum stated principal amount of bonds to be issued to finance each separate project is inconsistent with this approach and that it is unnecessary to mandate the burdensome detail of identifying individual projects and the maximum dollar amount of bonds allocable to each project.

The Proposed Regulations, like the Current Regulations, provide no express limit on the ability of an approving governmental unit to overestimate the principal amount of bonds that may be used to finance a project. Both with respect to the principal amount of bonds to be used to finance a project and, in the case of the Proposed Regulations, for the purpose of determining whether a deviation from the notice and approval is "substantial," an approving governmental unit may actually utilize less than the maximum stated principal amount on a project without violating the public approval requirement, presumably because by stating the maximum principal amount of a bond issue that may be used to finance a project, the public has been provided with the "worst case" scenario in terms of the scope and size of the tax-exempt financing for the contemplated project. This same rationale should apply to allow an approving governmental unit to specify a single aggregate maximum stated principal amount of bonds to be issued to finance all of the projects contemplated as part of the bond issue.

Permitting governmental units to use an aggregate maximum stated principal amount for all projects to be financed by the issue would alleviate the burden of having to evaluate whether separate facilities or improvements constitute different "projects" under the definition set forth in the Proposed

[1] Prop. Treas. Reg. Section 1.147(f)-1(f)(2)(ii).

Regulations, would provide greater flexibility to governmental units that may not be certain as of the date of publication of the notice of public hearing as to the maximum stated principal amount of bonds to be applied to finance each project or the allocation of bond proceeds, qualified equity or other funds among different projects, and would still provide the public with the information necessary to determine whether to attend the public hearing and/or support or oppose the project.

2. Determining the Maximum Stated Principal Amount for a Project. Section 1.147(f)-1(f)(2)(ii) of the Proposed Regulations provides that the notice and approval must specify separately the maximum stated principal amount of bonds to be issued to finance each project. No guidance exists to suggest how an issuer is to determine such amount for each project to be financed by a particular issue. It would make sense to conclude that the determination be based on reasonable expectations of the issuer or the borrower on the date the notice is given. We believe an issuer or conduit borrower should be able to include in such expectation the need to address unplanned changes in circumstances at the various projects to be financed by an issue such as cost overruns or failure to receive construction approvals or zoning variances. These contingencies may not be expected at the time the public notice is given but should nevertheless be an appropriate basis for determining the maximum stated principal amount of bonds to be issued for a project. To clarify the application of the public notice and public approval provisions, if our request for clarification in Section A.1. above is not adopted, we suggest adding to Section 1.147(f)-1(f)(2)(ii) of the Proposed Regulations the following sentence: "The maximum stated principal amount of bonds to be issued to finance a project may be determined on any reasonable basis and may take into account contingencies even if the occurrence of any such contingency is not reasonably expected at the time of the notice."

B. Maximum Stated Principal Amount Definition. The Proposed Regulations state that the notice and approval must include the maximum stated principal amount of bonds to be issued to finance each project.[2] The term "maximum stated principal amount" is not defined but is most easily interpreted to mean the maximum par amount of a bond issue. However, there have been several instances when the phrase "principal amount" has been interpreted to be something other than the par amount. In order to avoid confusion and provide more certainty, NABL suggests that the term "stated principal amount" in the Proposed Regulations be defined to mean "stated par amount" of the bond issue. Alternatively, clarity on this matter may be achieved via explanation in the preamble, particularly if the IRS believes the right interpretation is consistent with the literal language in the final regulation.

C. Reasonable Public Notice – Timing for Public Notice. The 2008 Proposed Regulations proposed to adopt a rule creating a safe harbor for publication of the notice of public hearing provided that the notice was published at least 7 business days prior to the hearing date. The Proposed Regulations would maintain the current safe harbor, which says that notice is presumed reasonable if it is provided at least 14 calendar days prior to the hearing date. We note that many governmental entities not only require action of the governmental body prior to the publication of the notice, but also meet only once every two weeks. The 2008 Proposed Regulations would have allowed such a governmental body to approve publication of the notice and then to hold the hearing at its next meeting. Under the Proposed Regulations, such a governmental body could not hold a public hearing and meet the safe harbor unless it waited at least 4 weeks for the hearing. For that reason, NABL suggests that the proposed harbor of the 2008 Proposed Regulations be adopted rather than the 14-day period required by the Proposed Regulations.

D. Reasonable Public Notice – Governmental Unit Internet Posting. The Proposed Regulations state that public notice may be given by electronic posting on the approving governmental unit's public website used to inform its residents about events affecting the residents.[3] Without more, this would be a very helpful addition to the TEFRA public notice rules, but the rule goes on to state that a governmental unit desiring to take advantage of this website publication methodology "must offer a

[2] Prop. Treas. Reg. Section 1.147(f)-1(f)(2)(ii).

[3] See Prop. Treas. Reg. Section 1.147(f)-1(d)(4)(iii).

reasonable, publicly known alternative method for obtaining the information contained in the public notice for residents without access to the Internet (such as telephone recordings)."[4] NABL respectfully suggests that the "alternative method" described in the Proposed Regulations is both unnecessary and confusing, and undermines the usefulness of the ability to post public notices online.

The overwhelming majority of people in the United States have access to the internet. On March 24, 2015, the White House announced that 98% percent of Americans have access to high-speed wireless internet.[5] A recent Pew Research Center survey found that, as of 2016, 88% of adults in the United States used the internet and 73% of adults in the United States had high-speed (at least broadband) home internet service.[6] The number of people in a governmental unit with access to the internet is almost certainly higher than the number of people in the same unit who read a newspaper of general circulation in the area, who listen to local radio broadcasts, or who watch a particular television station, yet there is no comparable alternative notice requirement for public notice provided by these means.

Should Treasury and the IRS retain the "alternative method" requirement for public notices posted on the internet, NABL suggests that the final Regulations provide additional examples of "reasonable, publicly known alternative methods" that would be acceptable.

Additionally, NABL recommends that the final Regulations provide that notice by website posting may be accomplished either by posting notice on the public website of the approving governmental unit or, if the bond issuer is located within the same state as the approving governmental unit, posting on the public website of the bond issuer. We believe that this would be a valuable addition in the final Regulations, particularly in the case of statewide conduit bond issuers whose bonds are typically approved by the governor of the state rather than an elected official in the geographic locale where the project is to be located. State government websites (as well as those of many large metropolitan governments) are often labyrinthine, running to many thousands of web pages. We believe that members of the public would intuitively seek out public hearing notices on the issuer's website, rather than searching the state web pages, such that public access would be greater on the issuer's site.

E. Reasonable Public Notice – General Description of Project Location. Proposed Regulations Section 1.147(f)-1(f)(2)(iv) states that the notice and approval "must include a general description of the prospective location of the project by street address, reference to boundary streets or other geographic boundaries, or other description of the specific geographic location that is reasonably designed to inform readers of the location." This language differs from the language of the Current Regulations, which provides that the notice and approval must contain "the prospective location of the facility by its street address or, if none, by a general description designed to inform readers of its specific location."[7] The requirement that the notice and approval provide a "specific geographic location" would be unduly burdensome for projects located at many well-known landmarks. For example, many airports and bridges are well known by the public by name, yet lack a street address or a readily-ascertainable and identifiable boundaries. In the case of a well-known landmark, it should be sufficient for the notice and approval to state that the project is to be located at the landmark. Accordingly, NABL respectfully requests that the final Regulations retain the "general description" standard set forth in the Current Regulations, and that the language from the Proposed Regulations stating "or other description of the specific geographic location that is reasonably designed to inform readers of the location" be replaced with "or a general description designed to inform readers of its specific location."

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[4] Id.

[5] See https://obamawhitehouse.archives.gov/blog/2015/03/23/98-americans-are-connected-high-speed-wireless-internet (visited January 17, 2018).

[6] See http://www.pewinternet.org/fact-sheet/internet-broadband/ (visited January 17, 2018).

[7] Temp. Treas. Reg. Section 5f.103-2(f)(2)(iv).

F. Reasonable Public Notice – Alternative State Law Public Notice Procedure. The Proposed Regulations provide that public notice may be given in a way that is permitted under a general State law for public notices for public hearings for the approving governmental unit.[8] NABL welcomes this proposed change, but believes that there may be some tension between this new public notice alternative and the language in Proposed Regulations Section 1.147(f)-1(d)(3), which, in the context of describing permissible procedures for conducting a public hearing, states "[e]xcept to the extent State procedural requirements for public hearings are in conflict with a specific requirement of this section, a public hearing performed in compliance with State procedural requirements satisfies the requirements for a public hearing in this paragraph (d)."

Assume that under State law, a city government is permitted to provide public notice for a public hearing by providing notice on its website, with no corresponding requirement that the governmental unit also utilize an alternative method for providing notice to those without internet access. This approach would seemingly comply with the reasonable public notice requirement set forth in Proposed Regulations Section 1.147(f)-1(d)(4). Arguably, however, it would not comply with the procedural requirements for conducting a public hearing in Proposed Regulations Section 1.147(f)-1(d)(3) because the State law requirements permitting public notice to be provided by website posting without an alternative method conflict with the requirement that public notice provided by website posting also be provided by providing an alternative method. This ambiguity, which NABL believes was not intended, could be resolved by inserting the following language in Proposed Regulations Section 1.147(f)-1(d)(3) –

> Except to the extent State procedural requirements for public hearings are in conflict with a specific requirement of this section, a public hearing performed in compliance with State procedural requirements satisfies the requirements for a public hearing in this paragraph (d). *For these purposes, reasonable public notice provided pursuant to an alternative State law public notice procedure described in subparagraph (d)(4)(iv) shall be deemed to have been performed in compliance with the procedural requirements of this section.*

G. Cancellation of Public Hearing If No Person Has Indicated a Desire to Speak. The Proposed Regulations retain the provision in the Current Regulations which permits a governmental unit to select its own procedure for conducting a public hearing so long as interested individuals have a reasonable opportunity to express their views. For these purposes, both the Proposed Regulations and the Current Regulations state that a governmental unit may require that individuals desiring to speak at the public hearing request in writing the opportunity to do so at least 24 hours before the hearing.[9]

In the experience of NABL's members, most public hearings are held without a single member of the public in attendance. Such hearings are a waste of the approving governmental unit's (and, often, a borrower's) time and may result in unnecessary expenses, such as travel costs, counsel fees and facility rental costs. NABL suggests that, in keeping with the ability of a governmental unit to require that individuals desiring to speak at a public hearing must provide written notice to the governmental unit within 24 hours of a public hearing, in the event the governmental unit provides in the notice of public hearing that individuals wishing to speak must provide written notice to the governmental unit no later than 24 hours prior to the scheduled hearing, and no individual provides such written notice, the governmental unit may cancel the public hearing, provided that the governmental unit publishes a notice of such cancellation no later than 12 hours prior to the scheduled hearing via the means by which the original public notice was circulated.

H. Supplemental Public Approvals to Cure Certain Substantial Deviations in Public Approval Information. We applaud Treasury and the IRS for including a provision for post-issuance TEFRA approval

[8] Prop. Treas. Reg. Section 1.147(f)-1(d)(4)(iv).
[9] See Prop. Treas. Reg. Section 1.147(f)-1(d)(3) and Temp. Treas. Reg. Section 5f.103-2(g)(2).

"cures" in certain specified situations. To extend the utility of this provision, NABL recommends that the final Regulations provide that the supplemental public approvals contemplated in Proposed Regulations Section 1.147(f)-1(d)(4)(iii) with respect to substantial deviations in public approval information for outstanding bonds be extended to issues with respect to which the original public approval was secured under the Current Regulations.

I. Certain Timing Requirements. As is the case with the Current Regulations, the Proposed Regulations provide generally that a public approval of an issue is timely only if obtained within one year before the date of the issue (this time frame is extended with respect to a so-called "plan of financing"). By contrast, the Proposed Regulations do not specify the time frame in which a public approval must be secured following a public hearing. We believe that the vast majority of public approvals under the Current Regulations have been secured within one year after the date of public hearing, and typically much sooner. Accordingly, for clarity, NABL recommends that the final Regulations provide that, in addition to the timing requirements specified in Proposed Regulations Section 1.147(f)-1(f)(7), a public approval is timely if the issuer obtains the approval within one year of the date on which the public hearing to which it relates was held.

J. Special Rule for Certain Qualified 501(c)(3) Bonds. In recognition of the nature of pooled bond deals, Proposed Regulations Section 1.147(f)-1(f)(5) provides a special rule for qualified 501(c)(3) bonds described in Section 147(b)(4)(B) of the Code. The rule provides that, prior to bond issuance, public approval is only required to cover limited information: (1) that the bond will be qualified 501(c)(3) bonds used to finance loans described in Section 147(b)(4)(B) of the Code, (2) the maximum principal amount of the bonds, (3) a general description of the type of project to be financed with such loan (e.g., hospital facilities or college facilities), and (4) a statement that an additional public approval that includes specific project information will be obtained before any such loans are originated. Given that none of the information required for the pre-issuance public approval relates to specific project information, host approval should not be required prior to the bond issuance. No such exception is made, however. Accordingly, NABL suggests that "public approval" be changed to "issuer approval" in the first sentence of Proposed Regulations Section 1.147(f)-1(f)(5)(i) and the following sentence be added at the end of Proposed Regulations Section 1.147(f)-1(f)(5)(i): "No host approval is required prior to the issuance of the bonds."

K. Clarification of Principal User Definition. In many exempt facility financings (e.g., financings of qualified residential rental projects), the borrower is a partnership for federal tax purposes that consists of a limited partner and one or more general partners. Typically, the partnership is a single purpose entity created for the purpose of owning the bond-financed project, with the general partner(s) assuming responsibility for the management and operation of the project. In these instances, while the limited partner has the majority of the financial interests in the project, it has few rights or responsibilities with respect to the management and operation of the project. The name of the partnership typically reveals little about the identity of the partners in the borrower and simply reflects the "doing business as" name or address of the project.

For purposes of the requirement in Proposed Regulations Section 1.147(f)-1(f)(2)(iii) that the notice and approval must include the expected initial owner or principal user of the project, including the name of the general partner of the borrower should in most instances be sufficient. One example of how this can be accomplished is by amending Proposed Regulations Section 1.147(f)-1(f)(2)(iii) to include the following language –

> The name of the initial owner or principal user of the project. The notice and approval must include the name of the expected initial owner or principal user (within the meaning of section 144(a)) of the project. The name provided may be either the name of the legal owner or principal user of the project or, alternatively, the name of the true beneficial party of interest for such legal owner or user (for example, the name of a 501(c)(3) organization

that is the sole member of a limited liability company that is the legal owner *or the general partner of the partnership if that partner makes the majority of the business decisions related to the project*).

Should Treasury and the IRS not make the change suggested above, NABL respectfully requests that a clarification on this point be included in the preamble to the final regulations.

**Comments to Proposed Regulations Under Section 147(f) of the Internal Revenue Code**

**Working Group**


**Michael Larsen**
*Chair*
Parker Poe Adams & Bernstein LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
Telephone: (843) 727-6311
Email: mikelarsen@parkerpoe.com

**Jaimee L. Boyd**
Foley & Judell, L.L.P.
365 Canal Street, Suite 2600
New Orleans, LA 70130
Telephone: (504) 568-1249
Email: jboyd@foleyjudell.com

**Matthias M. Edrich**
Kutak Rock LLP
1801 California St., Suite 3000
Denver, CO 80202-2626
Telephone: (303) 297-2400
Email: matthias.edrich@kutakrock.com

**Perry E. Israel**
Law Office of Perry Israel
525 Morse Ave., Suite 201
Sacramento, CA 95864-4958
Telephone: (916) 485-6645
Email: perry@103law.com

**Thomas D. Vander Molen**
Dorsey & Whitney LLP
50 S 6th St., Suite 1500
Minneapolis, MN 55402-1498
Telephone: (612) 340-2934
Email: vander.molen.tom@dorsey.com

**Ronald A. Bell**
Coats Rose, P.C.
PNC Center
201 East 5th St., Suite 1810
Cincinnati, OH 45202
Telephone: (513) 830-0266
Email: RBell@coatsrose.com

**Richard Chirls**
Orrick, Herrington & Sutcliffe LLP
51 West 52nd Street
New York, NY 10019
Telephone: (212) 506-5250
Email: rchirls@orrick.com

**John W. Hutchinson**
Squire Patton Boggs
6200 Chase Tower 600 Travis Street
Houston, Texas 77002
Telephone: (713) 437-5603
Email: johnny.hutchinson@squirepb.com

**Antonio D. Martini**
Hinckley, Allen & Snyder LLP
28 State St.
Boston, MA 02109-1775
Telephone: (617) 378-4136
Email: amartini@hinckleyallen.com