



National Association  
of Bond Lawyers

*President*  
**ALEXANDRA M.  
MACLENNAN**  
TAMPA, FL

*President-Elect*  
**DEE P. WISOR**  
DENVER, CO

*Treasurer*  
**RICHARD J. MOORE**  
SAN FRANCISCO, CA

*Secretary*  
**TERI M.  
GUARNACCIA**  
BALTIMORE, MD

*Immediate Past  
President*  
**CLIFFORD M.  
GERBER**  
SAN FRANCISCO, CA

*Directors:*

**M. JASON AKERS**  
NEW ORLEANS, LA

**ANN D.  
FILLINGHAM**  
LANSING, MI

**PERRY E. ISRAEL**  
SACRAMENTO, CA

**STACEY C. LEWIS**  
SEATTLE, WA

**CAROL J. MCCOOG**  
PORTLAND, OR

**RENE A. MOORE**  
DENVER, CO

**JOSEPH E. SMITH**  
BIRMINGHAM, AL

*Chief Operating Officer*  
**LINDA H. WYMAN**  
WASHINGTON, DC

*Director of Governmental  
Affairs*  
**JESSICA R. GIROUX**  
WASHINGTON, DC

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

March 29, 2018

Christie Jacobs, Director  
Indian Tribal Governments/Tax Exempt Bonds Office  
Internal Revenue Service  
600 17th Street, Mail Stop 450 South  
Denver, CO 80202-5402

Re: Request for Guidance on Tax-Exempt Advance Refundings of  
Taxable Bonds

Dear Ms. Jacobs:

The National Association of Bond Lawyers (“NABL”) respectfully requests that the Office of Indian Tribal Governments/Tax Exempt Bonds (“ITG/TEB”) provide written guidance regarding the treatment of tax-exempt bonds issued to advance refund taxable bonds that are not tax-advantaged bonds in light of the enactment of section 13532 of P.L. 115-97, commonly referred to as the Tax Cut and Jobs Act of 2017 (the “Act”). 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 submit this request in furtherance of that mission.

NABL brings to your attention the public statements of both John J. Cross III, Associate Tax Legislative Counsel, United States Department of the Treasury, and Vicky Tsilas, Chief, Branch 5 (Financial Institutions and Products) (“Branch 5”), Office of the Chief Counsel, Internal Revenue Service (“IRS”), that section 13532 does not preclude the issuance of tax-exempt bonds to advance refund taxable bonds.<sup>1</sup> *See, e.g., B. Tumulty and L. Hume, How Municipal Issuers Can Advance Refund Taxable or Tax-Advantaged Debt, The Bond Buyer, Feb. 27, 2018* (reporting on comments at the recent Tax and Securities Law Institute sponsored by National Association of Bond Lawyers). Similarly, we understand that Branch 5 has received a number of calls from individuals asking about this issue and has advised the callers that section 13532 of the Act does not preclude the issuance of tax-exempt bonds to advance refund taxable bonds. Accordingly, this matter appears to be settled law for which your office can issue written guidance. We are requesting guidance to confirm this settled law because a sizable portion of our membership, as well as representatives of issuers and other participants in the tax-exempt bond community, have expressed concerns that ITG/TEB or its field agents might take a contrary approach regarding this issue in enforcement.

---

<sup>1</sup> Unless otherwise noted, references to “taxable bonds” in this letter refer to taxable bonds that are not tax-advantaged bonds.

Written guidance, such as issuance of an audit technique guideline by the Senior Manager, Field Operations (ITG/TEB), to ITG/TEB examination personnel, supported if necessary by a chief counsel advice memorandum following the general outline of, for example, Notice 2014-9, would eliminate unnecessary uncertainty and the resulting expenditure of scarce IRS and state and local government resources to address that uncertainty. While there do not appear to be specific Internal Revenue Manual provisions authorizing ITG/TEB to issue audit guidelines, we believe ITG/TEB has the authority to issue such guidelines; *see, e.g.*, October 19, 2017, Acting Director for EP Examinations Memorandum to Employee Plans Examination Employees, directing those employees not to challenge a particular issue.

### **Discussion of Requested Guidance**

Section 13532 of the Act amended section 149(d) of the Internal Revenue Code of 1986, as amended (the “Code”), to provide: “Nothing in section 103(a) or in any other provision of the law shall be construed to provide an exemption from Federal income tax for interest on any bond issued to advance refund another bond.” Generally, an advance refunding bond is a bond that is issued more than 90 days before the bond which it is refunding is redeemed. *See* Code § 149(d)(2); Treas. Reg. § 1.150-1(d)(3).

Prior to the Act, section 149(d) contained a similar prohibition, but limited it to bonds that were then described in sections 149(d)(2), (3), or (4). Before the Act repealed it, section 149(d)(3), in part, limited the number of permitted advance refundings of governmental and 501(c)(3) bonds. Regulations that were promulgated under section 149(d)(3) provided that “for purposes of” applying the limits in section 149(d)(3) of the Code (prior to its repeal by the Act), a tax-exempt advance refunding of an obligation the interest of which is not excluded under section 103(a) is not taken into account. Treas. Reg. § 1.149(d)-1(e)(1); *cf.* Treas. Reg. § 1.149(d)-1(g)(2). John Cross and Vicky Tsilas have publicly stated the view that this provision continues to apply to section 149(d), as amended by section 13532 of the Act, so that, even though section 13532 of the Act does not explicitly limit its prohibition to advance refundings of tax-exempt obligations, tax-exempt advance refunding bonds may still be issued to advance refund taxable bonds.

The legislative history of section 149(d) confirms that this is the correct view, by showing why section 149(d) was originally added to the Code and why Treas. Reg. section 1.149(d)-1(e)(1) likely was added. The Senate Report on the Tax Reform Act of 1986, which added section 149(d) to the Code, states that “[a]dvance refunding results in multiple issues of bonds outstanding simultaneously, and thereby results in multiple indirect Federal subsidies attributable to tax-exempt financing for a single activity . . . .” S. Rep. No. 99-313, at 828 (1986), 1986-3 (Vol. 3) C.B. 828. Similarly, the corresponding House Report states that “[a]dvance refunding is inefficient in that it often results in many times the original volume of a single bond issue being outstanding simultaneously.” H.R. Rep. No. 99-426, at 518 (1986), 1986-3 (Vol. 2) C.B. 518. The legislative history therefore demonstrates that section 149(d) was added to limit situations in which two obligations with federal tax subsidies for the same original expenditures

remain outstanding concurrently for longer than 90 days. Treas. Reg. § 1.149(d)-1(e)(1) supports this policy by providing that the limitations on advance refundings do not apply when only one of the outstanding obligations was federally subsidized. *Cf.* Treas. Reg. § 1.149(d)-1(g)(2) (codifying PLR 200139007) (allowing an issuer to issue tax-exempt bonds to advance refund taxable private activity bonds).

The legislative history to the Act recites the same policy view. The House Report to the Act states: “The ability to issue advance refunding bonds allows State and local governments to issue and have outstanding two sets of Federally subsidized debt associated with the same activity. The Committee believes that a single activity should have a maximum of only one set of Federally subsidized debt, and so believes removing the ability to issue tax-advantaged advance refunding bonds is appropriate.” H.R. Rep. No. 115-409, at 308 (2017). The legislative history to the Act does not mention any other or conflicting policy reason for the amendment of section 149(d) by the Act. John Cross and Vicky Tsilas stated that they believe that the policy set forth in the 1986 legislative history also underlies the 2017 amendment, and, accordingly, that a tax-exempt advance refunding of a taxable issue is still permitted. As stated above, they have said they believe Treas. Reg. section 1.149(d)-1(e)(1) remains applicable to amended Code section 149(d), so that in determining whether an issuer has exceeded the number of permitted advance refundings (now zero), tax-exempt advance refundings of taxable bonds still are not taken into account.

Because Treas. Reg. section 1.149(d)-1(e) remains in effect, a taxable issue would be taken into account in determining whether there is a prohibited advance refunding under Code section 149(d) if the taxable bonds are issued to avoid the limitations of that section, such as when tax-exempt bonds previously refunded by the taxable bonds remain outstanding for more than 90 days concurrently with a purported tax-exempt advance refunding of the taxable issue. Treas. Reg. § 1.149(d)-1(e)(2).

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  
President

cc: David Horton, Acting Commissioner, Tax Exempt and Government Entities Division,  
Internal Revenue Service  
John J. Cross III, Associate Tax Legislative Counsel, Office of Tax Policy, U.S. Department  
of the Treasury  
Vicky Tsilas, Branch 5 Chief, Financial Institutions and Products, Internal Revenue Service