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Re: Comments Regarding Proposed Treasury Regulations that Address When Tax-Exempt Obligations are Treated as Retired for Purposes of Section 103 and Sections 141 through 150 of the Internal Revenue Code

Ladies and Gentlemen:

The National Association of Bond Lawyers ("NABL") respectfully submits comments with respect to Proposed Treasury Regulation § 1.150-3 and proposed amendments to Treasury Regulation § 1.1001-3 (the "Proposed Regulations"), regarding the reissuance of tax-exempt obligations for purposes of Section 103 and Sections 141 through 150 of the Internal Revenue Code of 1986, as amended (the "Code"). NABL exists to promote the integrity of the municipal market by advancing the understanding of and compliance with the law affecting public finance. We submit these comments in furtherance of that mission.

These comments were prepared by a working group comprised of individuals listed in the attachment to the comments and approved by the Board of Directors of NABL. If NABL can provide further assistance, please do not hesitate to contact Jessica Giroux in our Washington, DC office at (202) 503-3290.

Sincerely,

Dee P. Wisor

Dee P. Wisor
President, National Association of Bond Lawyers

Introduction

We greatly appreciate the efforts of the Department of the Treasury and IRS to provide comprehensive and workable rules relating to when tax-exempt obligations are treated as retired and reissued for purposes of Sections 103 and 141 through 150 (the "Tax-Exempt Provisions") of the Internal Revenue Code of 1986, as amended (the "Code"). The release of Proposed Treasury Regulation § 1.150-3 and the proposed amendment to Treasury Regulation § 1.1001-3 (together referred to herein as the "Proposed Regulations") are a helpful step in providing rules to address some of the unique issues applicable to the reissuance of tax-exempt obligations. The Proposed Regulations build upon the history of guidance in this area. Spanning over thirty years, the IRS has released Notice 88-130, 1988-2, C.B. 543 (prior to the landmark decision of Cottage Savings Ass'n v. Commissioner, 499 U.S. 554 (1991)), Treasury Regulation § 1.1001-3, which addresses both tax-exempt and taxable obligations and was promulgated in response to the Cottage Savings case, and Notice 2008-41, 2008-1 C.B. 742, superseding Notice 2008-27, 2008-10 I.R.B. 543, which provide workable rules governing the reissuance of tax-exempt obligations for purposes of the Tax-Exempt Provisions. The existing guidance has acknowledged the unique issues presented by tax-exempt obligations, such as the general need to "retest" tax compliance upon the "reissuance" of tax-exempt obligations, and special considerations presented by tax-exempt obligations issued as tender option bonds. We believe the structure presented by the Proposed Regulations is helpful, and we offer the following comments for your consideration.

Executive Summary

The existing guidance in this area contains several appropriate and helpful rules (such as those that permit premium pricing, security changes, and qualified corrective changes, among others) that should be maintained and incorporated into any final regulations that address the subject of reissuance of tax-exempt obligations for purposes of the Tax-Exempt Provisions as the need for such rules still exists and issuers have come to rely on these helpful rules. Additionally, to eliminate complexity, reduce taxpayer burden, and provide workable and administrable rules, we suggest that issuers be allowed to affirmatively elect the existence of a reissuance for purposes of the Tax-Exempt Provisions, and also former Sections 54 through 54AA, and former Section 6431 of the Code (the "Tax-Advantaged Provisions"), upon any alteration of a bond, as described below. We also suggest that the special rules for "qualified tender bonds" in Proposed Regulation § 1.150-3(c) be made applicable for purposes of tax-advantaged obligations because such obligations might also have a qualified tender bond structure. Lastly, we suggest that guidance be provided that altering the terms of tax-exempt and tax-advantaged obligations, and any interest rate swaps hedging such obligations, to replace an index utilizing LIBOR with one based on the Secured Overnight Financing Rate ("SOFR"), or other index, to address the phase-out of LIBOR, will not result in a reissuance or termination, as applicable, of the obligations or swaps.

Specific Comments

As recognized in Section 2 of Notice 2008-41, a reissuance of a tax-exempt obligation triggers the retesting of various requirements under the Code, which may result in negative consequences. The IRS has repeatedly recognized that tax-exempt obligations require special reissuance rules for purposes of the Tax-Exempt Provisions. See Notice 88-130, 1988-2 C.B. 543; Notice 2008-27, 2008-10 I.R.B. 543 (superseded); Notice 2008-41, 2008-1 C.B. 742. We agree with the approach of the Proposed Regulations that provides special guidance for tax-exempt obligations for purposes of the Tax-Exempt Provisions because of the unique issues presented in this area. We note, however, that the Proposed Regulations make certain changes from previous guidance, and provide the following comments with respect thereto. We also provide comments with respect to other important related matters.

A. Final regulations should clarify how the Unilateral Exception applies to tax-exempt obligations.

The Proposed Regulations refer to and interrelate with Treasury Regulation § 1.1001-3 and generally provide that any tax-exempt obligation is retired when one of the following occurs:

> "(1) A "significant modification" of the bond occurs under § 1.1001-3; (2) The issuer or its agent acquires the bond in a manner that liquidates or extinguishes the bondholder's investment in the bond; or (3) The bond is otherwise redeemed. . ." Prop. Reg. § 1.150-3(b).

Our first comment focuses on element (1) above. Treasury Regulation § 1.1001-3, referred to in the Proposed Regulations, provides guidance for both tax-exempt obligations and taxable obligations. It generally establishes that an alteration to an obligation results in a reissuance for purposes of Section 1001 of the Code if the alteration produces a "modification" of the obligation and the modification is "significant." Treas. Reg. § 1.1001-3(b). The testing of a "significant modification" is generally a facts and circumstances test and Treasury Regulation § 1.1001-3 provides for certain safe-harbor exceptions for specific types of modifications.

Treasury Regulation § 1.1001-3 provides that the exercise of an option of the holder or issuer of an obligation does not result in a "modification" (and therefore not a reissuance) if the exercise is "unilateral," meaning:

> "(i) There does not exist at the time the option is exercised, or as a result of the exercise, a right of the other party to alter or terminate the instrument or put the instrument to a person who is related . . . to the issuer; (ii) The exercise of the option does not require consent or approval of . . . the other party; . . . and (iii) The exercise of the option does not require consideration. . . ." Treas. Reg. § 1.1001-3(c)(2)(iii) and (c)(3).

In these comments, we refer to this exception as the "Unilateral Exception." The Proposed Regulations contain certain concepts that interrelate with the Unilateral Exception, and they provide guidance on how to apply Treasury Regulation § 1.1001-3 to a "qualified tender bond." In particular, the Proposed Regulations provide that, when applying Treasury Regulation § 1.1001-3 to a "qualified tender bond," issuers can ignore the existence and exercise by the holder of the qualified tender bond of a "qualified tender right" in determining whether an obligation is reissued for purposes of the Tax-Exempt Provisions. Prop. Reg. § 1.150-3(c)(1).

Under the Proposed Regulations, a "qualified tender bond," as explained below, requires a "qualified tender right." A "qualified tender bond" is defined under the Proposed Regulations as "a tax-exempt bond that . . . includes a qualified tender right," bears interest at "a fixed interest rate, a qualified floating rate under § 1.1275-5(b), or an objective rate for a tax-exempt bond under § 1.1275-5(c)(5)," that is unconditionally payable at periodic intervals of no more than one year, and has a term to maturity date of no more than forty years. Prop. Reg. § 1.150-3(e)(2). A "qualified tender right" is defined as "a right or obligation of a holder of the bond to tender the bond for purchase" to "the issuer, its agent or another party" on at least one date before the stated maturity date, at par (plus accrued interest). Prop. Reg. § 1.150-3(e)(3). The Proposed Regulations provide that a tender right is not a qualified tender right unless "the issuer or its remarketing agent either redeems the bond or uses reasonable best efforts to resell the bond within the 90-day period beginning on the date of the tender." Prop. Reg. § 1.150-3(e)(3). To address unique issues associated with qualified tender bonds, the Proposed Regulations provide that when issuers apply Treasury Regulation § 1.1001-3 to qualified tender bonds "the existence and exercise of a qualified tender right are disregarded." Prop. Reg. § 1.150-3(c)(1). Thus, the Proposed Regulations propose that a conversion or resetting of the interest rate mode on a qualified tender bond must be tested under Treasury Regulation § 1.1001-3, but generally would not be treated as a reissuance under the Unilateral Exception. Prop. Reg. § 1.150-3(c)(1). In contrast, Notice 2008-41 provides that an issuer generally does not have to test a "qualified interest rate mode change" (defined under the notice) under Treasury Regulation § 1.1001-3 to see if it results in a reissuance for purposes of the Tax-Exempt Provisions.

We believe that additional clarification is needed regarding the scope of the above rule. Certain other alterations might be made to an obligation in addition to merely converting the interest rate mode pursuant to the bond documents. For example, upon a fixed to maturity conversion, the bond documents might require or permit the issuer to make other changes, such as serializing maturities pursuant to a formula in the documents. Final regulations should clarify that additional changes made to an obligation pursuant to the bond documents need not be additionally treated as a modification under Treasury Regulation § 1.1001-3 and tested for significance for purposes of the Tax-Exempt Provisions.

We also note that in certain instances, amendments to the bond documents for a qualified tender bond might require neither consent nor consideration from a bondholder because of the existence of the qualified tender right. Thus, it is unclear under the Proposed Regulations whether such alterations are covered under the Unilateral Exception. For example, in connection with the exercise of a qualified tender right, an issuer might have the ability under the bond documents to not only reset an interest rate or select a new interest rate mode, but also to make other amendments to the terms of the obligation (such as altering the obligation's security or payment dates), all without requiring consent or consideration of the obligation holder. For clarity, it would be helpful to provide guidance as to the scope of the changes that can be made under the Unilateral Exception without resulting in a reissuance for purposes of the Tax-Exempt Provisions.

In addition, we note that some tax-advantaged obligations that are not tax-exempt obligations have been structured as qualified tender bonds. Given the complexity associated with programmatic restrictions for tax-advantaged obligations that are qualified tender bonds, we suggest that the qualified tender bond exception of Proposed Regulation § 1.150-3(c) be made applicable to such tax-advantaged obligations that are not tax-exempt obligations. We note that the above comment is not suggesting that the other general rules of Treasury Regulations § 1.1001-3 applicable to taxable obligations (including tax-advantaged obligations) be changed, such as what would be considered a significant modification (e.g., certain maturity extensions or the defeasance of taxable obligations).

B. Final regulations should allow qualified tender bonds to be remarketed at a premium when the issuer converts them to a fixed rate to maturity.

As noted above, Notice 2008-41 provides that a “qualified interest rate mode change” does not result in a reissuance. Notice 2008-41 provides that an interest rate mode change is not a qualified interest rate mode change if the bond documents allow the bonds to be remarketed at a price other than par, except for a conversion in the interest rate to a fixed rate to maturity. In contrast, under the Proposed Regulations, qualified tender bonds must be sold at par, including upon a fixed to maturity conversion, to have a “qualified tender right” that is disregarded for purposes of testing whether an action is unilateral under the Unilateral Exception for purposes of the Tax-Exempt Provisions. Prop. Reg. § 1.150-3(c)(3). We understand that the IRS made this change because the rule in Notice 2008-41 was originally intended to address the impact of the 2008 financial crisis that has since abated. We believe, however, that issuers still need the flexibility to remarket qualified tender bonds at a premium without facing reissuance testing under the Tax-Exempt Provisions, when they convert the bonds to a fixed rate to maturity, because this flexibility allows issuers to access the long-term fixed rate market, which frequently prefers obligations sold at prices other than par. This flexibility allows issuers to achieve the lowest borrowing costs efficiently. For example, in a relatively lower or rising interest rate environment, investors might seek premium bonds which appear better in a portfolio to other investors because they bear relatively higher interest rates. If issuers can remarket bonds at a premium, they can effectively respond to the market and minimize market inefficiency.

Further, if the Proposed Regulations eliminated the flexibility to remarket at prices other than par because the IRS is concerned about additional proceeds generated by selling at a premium, the final regulations could address the investment and expenditure of these additional proceeds in the same way that Notice 2008-41 addressed this question. Under Notice 2008-41, solely for arbitrage purposes, the additional proceeds are treated as gross proceeds of the remarketed issue.[1] This treatment is similar to the treatment of other proceeds of a tax-exempt bond issue that arise after the bonds are issued, such as the release of funds in a debt service reserve fund upon a surety bond substitution. If this change from Notice 2008-41 is indeed motivated by a concern about additional proceeds from a premium remarketing, we also note that when issuers convert the interest rate on a qualified tender bond to a

[1] We do not believe that any additional provisions addressing yield restriction or arbitrage rebate, such as providing for a new temporary period, are needed, as such monies can be generally treated as yield restricted to the extent they exist.

fixed rate to maturity, the remarketing may often contain discount bonds that have the effect of netting out the additional proceeds received from the bonds that are remarketed at a premium. Specifically, when an issuer converts the interest rate on a qualified tender bond to a fixed rate to maturity, the issuer frequently will exercise its option under the original bond documents to serialize term bonds of the issue. While some of the serial maturities might be priced at a premium, others might be priced at a discount. The net effect of the serialization might result in no net premium, presenting no additional issues relating to expenditure or investment. In addition, for issues that are subject to an "amount to amount" limitation (such as the volume cap refunding exception), the issuer will reduce the issue price (taking into account the net premium) to be not in excess of the outstanding par amount.

For the reasons stated above, we suggest that remarketing at a price other than par should be allowed for fixed to maturity conversions. Fixed to maturity conversions, priced at other than par, when expressly provided for in the original financing documents, should not be considered a modification of the obligation and should not defeat the characterization of the tender right as a "qualified tender right." Further, final regulations should provide for appropriate rules consistent with Notice 2008-41 regarding the investment and expenditures of any net premium. In any event, pricing at other than par on a fixed to maturity conversion should be allowed if there is no net premium for the issue. Alternatively, the final regulations should allow remarketing at a price other than par upon a fixed to maturity conversion, so long as the issuer reduces the issue size so that the issue price is not in excess of the outstanding par amount.

C. <u>Final regulations should clarify the circumstances under which a bond is extinguished because the issuer or the issuer's agent purchased it and whether the subsequent resale of that bond is treated as a refunding</u>.

The Proposed Regulations provide that when a tax-exempt obligation is resold to an unrelated third party after it is deemed to be extinguished because the issuer or the issuer's agent purchased it, the resale might be treated as a refunding. Prop. Reg. § 1.150-3(d). We recognize the importance of providing guidance to issuers about what happens after an issuer or issuer's agent purchases the issuer's own debt and the debt is treated as extinguished. The final regulations should clarify the circumstances in which the resale of a tax-exempt obligation (after extinguishment due to the purchase by the issuer or issuer's agent) would be treated as a refunding given the constraints of what constitutes a valid expenditure for purposes of the Tax-Exempt Provisions.

We suggest that a reimbursement-type rule be specifically provided to address the above situation to provide clarity and reduce burdens on issuers. We note that currently there is no exception for extinguishment for tax-exempt bonds that are not qualified tender bonds. When an issuer needs to refinance its existing debt, circumstances beyond the issuer's control may prevent it from either remarketing the existing bonds or issuing refunding bonds in a timely manner. Such circumstances could include litigation, financial distress or pending legislation that would either prevent issuance of refunding bonds or make the refunding bonds prohibitively expensive. Under these circumstances, the issuer may have to resort to acquiring the outstanding bonds with moneys not intended for that use with the intent to reimburse itself with proceeds of tax-exempt bonds once the external issues have been resolved.

To address the above issue, we believe that there should be an exception that allows issuers, who have purchased their own tax-exempt bonds with an intent to issue tax-exempt bonds in the future, to later issue such bonds on a tax-exempt basis with such transaction treated as a reimbursement refunding. We believe that an issuer, prior to acquiring or redeeming its own bonds, should be able to adopt an official intent, similar to an intent under Treasury Regulation § 1.150-2, to issue refunding bonds to reimburse the cash used to pay the redemption price of the extinguished bonds, within a reasonable period after the extinguishment. We believe that a period of eighteen months after the extinguishment would provide an issuer with sufficient time to resolve the issues that prevented it from issuing refunding bonds to redeem the outstanding bonds. We believe this exception is consistent with the structure of the Proposed Regulations, relieves issuers of the burden of events beyond their control, and is efficient because the market isn't burdened by the tax-exempt obligations while extinguished.

In addition to specifically clarifying the ability to accomplish a "reimbursement refunding," because of the unique rules governing tax-exempt obligations and tax-advantaged obligations and to address unanticipated circumstances beyond an issuer's control, final regulations should allow issuers of all tax-exempt and tax-advantaged obligations, not just qualified tender bonds, to purchase and hold such obligations for a period not exceeding ninety days without causing an extinguishment for purposes of the Tax-Exempt Provisions and Tax-Advantaged Provisions. Such a provision would reduce issue burdens while accommodating unexpected market difficulties.

D. Final regulations should retain the favorable rule from Notice 2008-41 regarding changes in security for tax-exempt bonds.

Under Section 6.1 of Notice 2008-41, an amendment to both "recourse" and "nonrecourse" tax-exempt obligations (within the meaning of Treasury Regulation § 1.1001-3) that changes the security for such obligations, does not result in a reissuance if there is no change in payment expectations. Prior to Notice 2008-41, nonrecourse and recourse obligations were treated differently for this purpose; a much more stringent rule applied to nonrecourse obligations. The helpful rule in Notice 2008-41, which puts nonrecourse obligations on similar footing as recourse obligations for purposes of a change in security for purposes of the Tax-Exempt Provisions, was originally implemented because of the need of issuers to address impacts of the 2008 financial crisis, such as the bankruptcy or downgrading of banks or bond insurers. The ability to amend tax-exempt obligation documents for "nonrecourse" obligations to alter the security without triggering a reissuance under the Tax-Exempt Provisions, unless a change in payment expectations occurs, is still needed to allow issuers and borrowers to address uncontrollable market changes. Without specific guidance in this area, issuers must apply the harsh rule regarding nonrecourse obligations in Treasury Regulation § 1.1001-3(e)(4)(iv)(B) and apply the facts and circumstances test of Treasury Regulation § 1.1001-3, resulting in needless complexity and uncertainty. For example, prior to Notice 2008-41, issuers addressed alterations in security of nonrecourse debt under Treasury Regulation § 1.1001-3 by asking remarketing agents to provide data as to whether the alteration was expected to result in more than a twenty-five basis point change in yield on the instrument. Given the relatively low interest rates on qualified tender bonds, a twenty-five basis point change was seldom expected, yet the issuer still had to incur additional time and expense to address compliance with respect to a matter frequently caused by market changes beyond its control. We therefore suggest that the final regulations retain the helpful rule of Notice 2008-41 that provides that a change in security for both nonrecourse and recourse obligations will result in a reissuance under the Tax-Exempt Provisions only if there is a change in payment expectations.

Additionally, we note that Section 7, Example 1 of Notice 2008-41, contains a helpful clarification that a modification to a debt instrument that is treated as investment grade before and after the modification is not a significant modification to that debt instrument. We suggest that this example or a similar example be included in any final regulations with a modification deleting the reference to interest at an auction rate.

E. Final regulations should retain the helpful rule regarding qualified corrective changes from Notice 88-130.

Notice 88-130 has a helpful exception for "qualified corrective changes." This exception allows issuers to make alterations to an obligation that do not materially alter the rights of bondholders and that correct a term of an obligation to eliminate a result that could not reasonably have been intended on the date of issue or make a change necessary solely by reason of unanticipated circumstances not within the control of the issuer or borrower. Section 7.1 of Notice 88-130, 1988-2 C.B. 543. Tax-exempt obligations are often outstanding for many years. Issuers and borrowers are frequently confronted with changing circumstances that could not have been anticipated at issuance, such as new requirements of liquidity providers or an absence in the market of available credit enhancers that comply with rating requirements in the bond documents. Final regulations should retain this exception to address such problems.

F. Final regulations should retain the helpful rule regarding program investments from Section 5.2 of Notice 2008-41.

Notice 2008-41 contains a helpful rule that allows a conduit borrower of a loan of tax-exempt bond proceeds to purchase the underlying tax-exempt obligations that financed the conduit loan to facilitate liquidity (under adverse market conditions) while still meeting the requirements under the special arbitrage rule for "program investments" under Treasury Regulation § 1.148-1(b), which prevents conduit borrowers from purchasing tax-exempt obligations in an amount that is "related" to the conduit loan. See Section 5.2 of Notice 2008-41, 2008-1 C.B. 742. The Proposed Regulations do not provide for such a rule. Because of adverse conditions that might confront issuers and borrowers post-issuance, the final regulations should retain this exception.

G. Final regulations should broaden the definition of a "qualified tender right."

Proposed Regulation § 1.150-3(e)(3) defines "qualified tender right" as follows:

> ". . . a right or obligation of a holder of the bond to tender the bond for purchase as described in this paragraph (e)(3). The purchaser under the tender right may be the **issuer, its agent, or another party**. . . . Following each such tender, the **issuer or its remarketing agent** either redeems the bond or uses reasonable best efforts to resell the bond within the 90-day period beginning on the date of the tender. . . . ."

(Emphasis added). There is a discrepancy between the terms used to describe the entity that may purchase the qualified tender bond (the issuer, its agent, or another party) and the entity that resells the bond (the issuer or its remarketing agent). The final regulations should use consistent terms for both sides of the transaction. Additionally, the helpful provision of the words "another party" should be maintained and be included in both parts of the definition. The words "another party" provide issuers certainty as to qualification without having to do a facts and circumstances analysis to ascertain whether "agency" status exists under state law and federal law. We note some remarketing agreements state that the remarketing agent is not intended to be an "agent" under agency doctrine.

The above change also addresses two other important matters. First, there are circumstances where an obligation is not sold at the end of a tender period to a subsequent investor pursuant to a "remarketing" by a remarketing agent, but rather the obligation is privately placed to the subsequent investor. The above-described change would accommodate such situation. Second, many tax-exempt obligations have been issued as qualified tender bonds and have been placed with banks at the initial issuance. The strict construction of the definition of a qualified tender right under the Proposed Regulations is that the bond must be "remarketed" by a "remarketing agent" of the issuer. Thus, if the bond documents allow an issuer to privately place the obligation, it is unclear whether the tender right is still a "qualified tender right." Clarifying that the obligation is allowed to be resold without a "remarketing" would provide guidance in an area that would benefit greatly from such flexibility.

H. Final regulations should not apply mandatorily to outstanding tax-exempt obligations.

The final regulations should not apply mandatorily to previously issued tax-exempt and tax-advantaged obligations. Obligation documents for qualified tender bonds are typically drafted with provisions for particular actions that might result in a reissuance, requiring a bond counsel opinion if certain actions are taken, to protect holders and the issuer. These considerations have been tailored to existing law regarding qualified tender bonds. Post-issuance changes to the rules relating to reissuance might result in actions which might result in a reissuance for purposes of the Tax-Exempt Provisions or Tax-Advantaged Provisions under the new rules that would not have resulted in a reissuance for purposes of the Tax-Exempt Provisions under the old rules, and protective provisions in the bond documents might not be triggered. Thus, grandfathering existing tax-exempt and tax-advantaged obligations is necessary to protect issuers and bondholders.

I. Final regulations should allow issuers to elect a reissuance.

It often is unclear whether a reissuance has occurred under Treasury Regulation § 1.1001-3, because the regulations provide for a facts and circumstances test. Consequently, issuers often will file protective Forms 8038-G or 8038, as applicable, and ensure appropriate payments of rebate in circumstances where it is not clear whether a reissuance has occurred under the facts and circumstances test. New bond counsel opinions might be rendered as a precautionary matter. While in many instances compliance might be achieved regardless of whether a reissuance occurred, unnecessary complexity, confusion, and costs are often introduced. If there is uncertainty regarding whether a reissuance has occurred, and the issuer, in effect, needs to comply with the tax-exempt bond requirements under two different alternative characterizations, this will result in significant taxpayer burdens. If obligations are subject to an IRS examination, it might further be unclear whether the examination will relate to the reissued obligations or to the original obligations, creating needless uncertainty. Even if the issuer accompanies the protective Forms 8038-G or 8038 with a statement explaining the situation, the explanation may cause even more confusion.

In addition to the issues relating to complexity and taxpayer burden described above, in some instances issuers and borrowers need to ensure that a reissuance occurs. Because of the facts and circumstances test of Treasury Regulation § 1.1001-3, bond issuers and other parties may need to go to great lengths to ensure that the Unilateral Exception is not applicable, building options into bond documents to ensure a significant modification under Treasury Regulation § 1.1001-3. Depending on the facts and circumstances, bond counsel might still be uncertain whether a reissuance has occurred given that the reissuance testing involves a facts and circumstances test without specific guidance in many areas. This problem has become particularly acute now that Congress has prohibited tax-exempt advance refundings under Section 149(d) of the Code. In response, issuers may want to issue taxable debt and then cause the "conversion" of the taxable debt to tax-exempt debt on or after a date once a current refunding is possible. Allowing the issuer to elect a reissuance would eliminate unnecessary complexity in this situation, as we explain below.

Ensuring that alterations result in a reissuance may be particularly complex in "Cinderella" bond structures. Cinderella bonds are taxable obligations that might be "converted" to tax-exempt obligations in the future when the obstacles to tax-exempt financing (such as lack of volume cap) fall away. Cinderella bonds are typically privately placed and the lender often commits upfront to both the taxable and tax-exempt rates offered. One complication of the Cinderella bond structure is the need to make sure that the tax-exempt obligations to be issued in the future are treated as distinct debt instruments from the initially issued taxable obligations for purposes of the Tax-Exempt Provisions. Because of the facts and circumstances test of Treasury Regulation § 1.1001-3, unnecessary complexity and cost might be necessary to ensure certainty as to reissuance status.

Another area where certainty of a reissuance would be helpful relates to privately placed tax-exempt obligations for which a taxable rate has been triggered under the financing documents. Many privately placed tax-exempt bond issues contain a term that requires the bonds to pay interest at a taxable rate upon a determination of taxability. Such provisions are rarely triggered and when they are triggered, the issuer is required to make the bond owner whole for loss of past tax-exemption. Needless complexity is introduced because an issuer, in such situation, might want to trigger a reissuance with certainty and may need to make sure that alterations that are made result in a reissuance to a taxable obligation.

The inability to elect into a reissuance of direct pay tax-advantaged obligations also creates unnecessary complexity in certain states. Because a tax-exempt advance refunding of tax-advantaged obligations that bear taxable interest, such as BABs, or other direct pay bonds, is now prohibited under Section 149(d) of the Code while the tax-advantaged obligations retain their tax-advantaged status, some issuers of direct pay obligations might want to terminate the tax advantaged status of such obligations, eliminating the subsidy. A reissuance of such taxable debt may be achieved under Treasury Regulation § 1.1001-3 if a legal defeasance occurs. <u>See</u> Treas. Reg. §1.1001-3(c)(2)(i). Unfortunately, some state and local issuers do not have the ability under state law to cause a legal defeasance. Even if an irrevocable escrow is established in certain situations, there might be no legal defeasance under state law as the issuer might retain, under state law, residual liability to pay debt service on the obligation should the escrow agent fail to do so.

Because of the above issues, we request that guidance be provided that allows issuers to elect a reissuance for purposes of the Tax-Exempt Provisions and Tax-Advantaged Provisions, so that issuers and borrowers can have certainty, minimize complexity in this area, and have the availability of a certain reissuance to allow for efficient refinancing of debt in compliance with the restrictions of the Code. The intent of such a provision would not be to trigger a sale or exchange for purposes of Section 1001 of the Code (unless the alteration already amounted to a reissuance under Treasury Regulation § 1.1001-3). Rather, such optional treatment would be only for purposes of testing the Tax-Exempt Provisions and the Tax-Advantaged Provisions. We note the IRS has already provided some rules where bonds are reissued for purposes of the Tax-Exempt Provisions, but not necessarily Section 1001 of the Code. For example, when an issuer of a governmental bond or a qualified 501(c)(3) bond takes certain remedial actions under Treasury Regulations § 1.141-12, the bond must be treated as reissued for certain purposes, but the bond is not treated as reissued for purposes of Section 1001 by reason of that remedial action rule. We suggest that the election should state that any alteration to an obligation may be electively treated as causing a reissuance for purposes of the Tax-Exempt Provisions and Tax-Advantaged Provisions. We suggest that in order to receive such treatment, the issuer would need to irrevocably elect in writing, perhaps on or before the day of deemed retirement, such treatment and would need to notify the IRS of the election. The proposed election would eliminate taxpayer burden and complexity preventing needless protective filings, provide certainty, allow for the efficient removal of tax-advantaged bond status, and facilitate compliance with the new advance refunding restriction of Section 149(d) of the Code. We have attached sample language for such an election.

We note that providing for an election for reissuance treatment for purposes of the Tax-Exempt Provisions and Tax-Advantaged Provisions is similar to procedures that allow for a remedial action and might be addressed under final regulations promulgated under Section 150 of the Code or a notice thereunder. We also note that current Treasury Regulations provide for broad anti-abuse rules that an issuer would continue to be subject to in utilizing the above-described election, as with respect to other tax considerations applicable to tax-exempt and tax-advantaged obligations.

J. Guidance should be provided to address the phase-out of LIBOR.

Many outstanding tax-exempt and tax-advantaged obligations have been issued bearing interest at a variable rate based on LIBOR. In some instances, those obligations have been hedged by interest rate swaps or other hedges with terms based on LIBOR. Because LIBOR will soon be phased out, and because the restrictions applicable to tax-exempt and tax-advantaged obligations are based on the obligation issue date or the date a swap is entered into, we request that guidance be provided clarifying that issuers (and swap providers) are permitted to substitute another index, such as but not necessarily limited to SOFR, without such alteration being considered as causing a reissuance of the obligations or considered as causing a termination and new execution of a swap for purposes of the Tax-Exempt Provisions and Tax-Advantaged Provisions. Such guidance would allow issuers to effectively address market conditions that are unexpected and outside their control.

Attachment A

Sample Election Language

NABL recommends the following changes to Prop. Reg. §1.150-3 to allow for an election of a reissuance:

- Add a new subsection (g) to read as follows:
- (g) (1) An issuer may elect to treat any modification or alteration of a bond as a retirement of the bond solely for purposes of section 103, sections 141 through 150, and former sections 54 through 54AA and former section 6431.
- (2) Any such election must be in writing and must be made at or before the date of the deemed retirement.
- (3) The issuer must provide notice to the IRS of such election.
- (4) Once made, such election is irrevocable.
- (5) The election will have no affect for purposes of section 1001 or any section other than those enumerated.

Attachment B

Comments to Proposed Regulations Relating to Reissuance

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