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Charles P. Rettig
Commissioner
Internal Revenue Service
U.S. Department of the Treasury
1111 Constitution Avenue, NW
Washington, DC 20224

Re: User Fee Charges for State and Local Governments

Dear Commissioner Rettig,

The National Association of Bond Lawyers (NABL) respectfully submits this letter for consideration by the United States Department of the Treasury and the Internal Revenue Service with respect to user fee charges to state and local governments for private letter rulings related to tax advantaged bonds.

The enclosed comments were prepared by an ad hoc taskforce comprising the individuals listed on Appendix A and were approved by the NABL Board of Directors.

If NABL can provide further assistance, please do not hesitate to contact Jessica Giroux, Director of Governmental Affairs, in our Washington DC office, at (202) 503-3290 or at jgiroux@nabl.org.

Sincerely,

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President, National Association of Bond Lawyers

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The National Association of Bond Lawyers (“NABL”) respectfully requests that the Internal Revenue Service (“IRS”) significantly lower the user fee it charges State and local governments for private letter rulings related to tax-advantaged bonds¹ (the “User Fee”) and in particular, recommends that the User Fee not exceed the amount of the reduced user fee for governmental entities for the applicable year. The current User Fee of \$30,000 is so high that it deters issuers of State and local bonds (“Issuers”) from seeking clarification of the tax law through the private letter ruling (“PLR”) process and, in some cases, makes the PLR program effectively unavailable for Issuers that do not have the resources to pay the User Fee. The negative impacts of an Issuer not seeking a PLR reach beyond that particular Issuer and are discussed further below.

PLRs play an important role in voluntary compliance for many Issuers, and in doing so provide public benefits that include helping the IRS achieve its mission of helping taxpayers understand and meet their tax responsibilities, applying the tax law with integrity and fairness for all, and ensuring taxpayer dollars are used for authorized purposes. PLR requests also assist the IRS in understanding areas in which guidance is needed and developing regulations and other published guidance that meet taxpayer needs. These public benefits support NABL’s recommended reduction in the User Fee.

Private Letter Rulings Are an Important Compliance Tool for Issuers and the IRS

Issuers have many compelling reasons to ensure that their tax-advantaged bonds comply with the Internal Revenue Code (the “Code”). To sell their bonds, Issuers must generally obtain an “unqualified opinion” of bond counsel regarding the federal tax status of those bonds. Any uncertainty about the tax law applicable to tax-advantaged bonds lessens the ability of Issuers to obtain such an opinion, increases the cost of financing by increasing fees, and potentially increases the interest rate on the financing. Issuers may also be concerned in public offerings that a tax issue may raise disclosure issues and potential liability under federal securities law. Furthermore, an Issuer could face potential financial exposure if the IRS determines its bonds not to qualify as tax-advantaged bonds.

The Code sections applicable to tax-advantaged bonds are complex and generate many questions for Issuers. Despite the highly complex nature of tax-advantaged bond financing and the applicable tax law, there is limited precedential guidance and many unanswered questions remain. This problem is likely to continue with the April 11, 2018, *Memorandum of Agreement Department of the Treasury and the Office of Management and Budget Review of Tax Regulations under Executive Order 12866*, requiring more OMB involvement and overview of tax regulations, and the March 5, 2019, Policy Statement on the Tax Regulatory Process, signaling a reduction in guidance that is not subject to notice and comment. With this in mind, and understanding that guidance implementing the Tax Cuts and Jobs Act of 2017 is likely to absorb guidance resources, it is reasonable to expect that guidance directed to specialized tax areas, such as tax-advantaged bonds, will see a decline. Further, relative to other areas of the law, there are few court cases that have decided tax-advantaged bond matters to provide precedent for how the tax law should be interpreted.

Issuers look for ways to fill in for the lack of precedent; one way is through PLRs, which provide an Issuer with a definitive conclusion on whether a particular tax-advantaged bond transaction will comply with the tax law. Congress understood the importance of the PLR process to Issuers by providing them with one of the few areas in which a declaratory judgment of an IRS determination is possible.

¹Section 1.150-1(b) of the Treasury Regulations defines a “tax-advantaged bond” as “a tax-exempt bond, a taxable bond that provides a federal tax credit to the investor with respect to the issuer’s borrowing costs, a taxable bond that provides a refunding federal tax credit payable directly to the issuer for the bond for its borrowing costs under 6431, or any future similar bond that provides a federal tax benefit that reduces an issuer’s borrowing costs.”

Code section 7478 provides Issuers of tax-exempt bonds with the ability to request a PLR that is reviewable by a Tax Court and implicitly mandates that the IRS respond to such a request (by providing the Tax Court with jurisdiction upon the failure of the IRS to respond to the PLR request).

PLRs also help inform the published guidance process. PLR requests help the IRS and Treasury identify industry issues for which outstanding guidance is unclear or insufficient, and allow the IRS and Treasury to craft guidance in a way that more fully addresses industry concerns. This allows Issuers to more fully participate in identifying the guidance that is needed for voluntary compliance.

We further note the well-established IRS priority of resolving tax issues with Issuers. This is the fundamental precept of the tax-advantaged bond enforcement program and one that has been affirmed by Congress. See IRS Restructuring and Reform Act of 1998, Section 3015 (granting Issuers the right to use the IRS Appeals process). The PLR process itself recognizes this construct and the importance of PLRs to Issuers by permitting Issuers to request PLRs.

Issuers requesting a PLR seek voluntary compliance with the Code. While PLRs apply only to the bond transaction at issue, they provide insight into how the tax regulators will interpret the Code, and accordingly help other Issuers ensure that their tax-advantaged bond transactions comply with the tax laws. The PLR process benefits not only Issuers, but also the IRS and taxpayers generally through reduced IRS enforcement costs and greater assurance that taxpayer funds are used for authorized purposes.

The Special Relationship Between the Federal Government and States and Local Governments Provides a Principled Basis for Special Consideration of User Fees

Further support for reducing the User Fee can be found in the special relationship between the Federal government and State, local and tribal governments. This relationship is compelled and mandated by the following.

- **The Constitution.** The Constitution, recognizing the unique role of States, reserves the powers not delegated to the United States to the States. This fundamental concept should be read into all interactions between the Federal government and States whether or not expressly stated in a federal agency's administrative procedures.
- **Federal Legislation.** Federal legislation mandates special treatment of State, local, and tribal governments. For example, the Unfunded Mandates Reform Act of 1985 not only limits the number of unfunded federal mandates that the Federal government may impose on State, local, and tribal governments, it also strengthens the partnership and communications between these entities, including by providing a critical exemption to the Federal Advisory Committee Act ("FACA") to promote free communication between the federal government and State, local, and tribal governments. By taking steps to enable State, local, and tribal governments easier access to the PLR process, the IRS would be advancing the principles underlying this legislation.
- **Federalism Executive Order.** Executive Order 13132 directs federal executive departments and agencies, including the IRS, to ensure that principles of federalism guide the formulation and implementation of policies, including not only regulations but also "policy statements and actions that have substantial direct effects on the States," which is defined to include "units of local government and other political subdivisions established by the States." Executive Order 13132 requires the IRS to have "an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications."

The PLR program affords States and local governments the opportunity to inform the regulatory process by presenting and discussing interpretations of the Code through “real world” examples.

- **Intertwined Regulatory Roles.** The basis for special treatment of State and local governments by federal administrative agencies is particularly strong in cases in which State and local governments and a federal agency have intertwined regulatory roles. The tax-advantaged bond rules contain provisions that in substance delegate to State and local governments some of the responsibilities for administering the federal income tax rules, such as requiring State and local governments to oversee allocation of the federally imposed “volume cap” to tax-advantaged bond financings.
- **Representation of the Interests of the General Public.** Finally, State and local governments, unlike other “taxpayers,” directly represent and serve the interests of the general public.

User Fees Present a Significant and in Some Cases Impossible Burden to Obtaining a PLR for State and Local Governments

The current \$30,000 User Fee poses a significant hurdle to obtaining a PLR and oftentimes prevents Issuers from requesting a PLR even when they and bond counsel are uncertain about how the IRS will apply the tax law to a particular transaction. Many Issuers do not have the resources to pay the User Fee without sacrificing services provided to constituents, making PLRs (a needed compliance tool) effectively unavailable to those Issuers.

The IRS provides for reduced User Fees for governmental entities with annual operating revenues below stated thresholds (there are two levels of reduced fees -- one for governmental entities with revenues up to \$250,000 and another higher reduced fee for governmental entities with revenues up to \$1 million). The difficulty with these thresholds is that they fail to recognize those situations where the margin between revenues and expenses does not allow room for such a large expense. In other words, even if an Issuer has revenues in excess of these thresholds and therefore is subject to the current \$30,000 User Fee, it simply may have to choose between the fee and services it would otherwise deliver to constituents.

The impact of the User Fee on Issuer behavior can be inferred from a review of the number of PLRs issued as the User Fee has increased. The chart below sets forth the User Fees for the years 2006-2018 and the number of PLRs published for each of those years (as best could be determined). The average numbers of PLRs published per year was 12.25 for the years 2006-2009. The User Fee significantly increased in 2010 and again in 2012 and 2015. The average number of PLRs per year has declined to about 6 per year since the User Fee increase in 2010. While the small data sample prevents statistically rigorous analysis, it is reasonable to correlate the higher User Fees with a precipitous drop in the average number of PLRs issued.

Year (based on PLR number)	User fee	Number of TEB PLRs issued ²
2006	\$10,000	12 (not counting designations as qualified green building)
2007	10,000	11 (not counting section 54 allocations)
2008	11,500	16

²These numbers were obtained by searching CC:FIP:B5, CC:FIP:Br5, CC:FIP:B05: CC:TEGE:EOEG:TEB, CC:FIP:Branch 5; and EOEG:TEB for the relevant years in a PLR database.

2009	11,500	10
2010	14,000	3
2011	14,000	11
2012	18,000	5
2013	18,000	6
2014	19,000	6
2015	28,300	7
2016	28,300	6
2017	28,300	7
2018	28,300	4
2019	30,000	Ongoing

The IRS has Authority to Reduce or Waive User Fees.

It is important to note that neither the Code nor any other legislation requires the IRS to charge a User Fee for all PLRs and that the IRS may reduce or waive user fees when appropriate. Section 7528 of the Code mandates that the IRS establish a program requiring payment of user fees for ruling letters, opinion letters, determination letters, and other similar requests (collectively, “Requests”). Section 7528 provides that the user fee charged be based on, among other things, the average time for (and difficulty of) complying with Requests. Section 7528 further provides that the Secretary of the Treasury (“Secretary”) shall provide for exemptions (and reduced user fees) under such program as the Secretary determines to be appropriate and that the average user fee charged for a chief counsel ruling cannot be less than \$200. Accordingly, under Section 7528, the IRS has authority to waive or reduce user fees provided that the average fee is not less than \$200. The Office of Management and Budget, Circular A-25, which also sets forth policies for setting user fees, generally requires that a user fee recapture governmental costs for providing the service, but allows an exemption to this general rule when the situation, “in the opinion of the agency head or his designee, justifies an exception.” OMB Circular A-25, 58 Fed. Reg. 38.142 (July 15, 1993).³

IRS internal procedures set forth in its Internal Revenue Manual (“IRM”) also contemplate flexibility in setting user fees. In relevant part, IRM 1.35.19.15 provides instructions on annual monitoring and review of user fees, and requires business units to:

[M]onitor services and activities to determine the potential impact of the user fee on services and activities during the annual budget cycle. The business units should consider whether evidence exists that newly implemented user fees or changes to existing fees have impacted administration and make appropriate recommendations...The IRS avoids fees that increase enforcement costs, reduce voluntary compliance or otherwise create difficulties in achieving the IRS’s mission.

IRM 1.35.19.10.16.7 further provides that:

The IRS charges a fee to recover the cost for providing rulings and determination letters. The IRS can charge a reasonable fee, which may be less than full cost.

³ While User Fees are authorized under section 7528 of the Code, government user fees are generally authorized under the Independent Offices Appropriation Act of 1952 (“IOAA”). Circular A-25 applies to agencies in their assessment of user fees under IOAA and user charges under other statutes. Section 4.b. of Circular A-25

The IRM lists several factors that the business unit should consider when establishing new user fees, including; (i) the effect of the user fee on voluntary compliance, taxpayer burden, and taxpayer rights, and (ii) the expected change in demand for services resulting from the proposed user fee. While the above listed factors are applicable to establishing new user fees, the same factors should be relevant when considering administration impacts on existing user fee changes.

NABL believes that the amount of the current User Fee has been set based on costs to the IRS to provide PLRs and that the IRS has given insufficient consideration to the impact of the amount of the User Fees on tax administration in the context of State and local governments seeking guidance related to tax-advantaged bonds.⁴

NABL Requests that the IRS Significantly Lower the User Fee by Taking into Account the Public Benefits of PLRs and the Harm from User Fees that Prevent Issuers from Requesting PLRs

The IRS has broad authority to set user fees, including the User Fee. NABL recommends that the IRS exercise this authority and in doing so, consider (i) the impact of the User Fee on Issuers with limited resources, (ii) the effect the User Fee has on Issuer voluntary compliance, taxpayer burden, taxpayer rights, and the role of State and local governments in the process of developing published guidance that applies to them, (iii) the implications of the unique relationship between the IRS and States and local governments and (iv) the change in demand for PLRs resulting from the User Fee.

➤ **Issuers with Limited Resources.** NABL believes that there are many Issuers that have annual revenues in excess of the thresholds for reduced User Fees, but nevertheless find that the amount of their ongoing expenses is at, or close to, the amount of their revenues, making it difficult to pay the User Fee and provide necessary public services. These Issuers are effectively excluded from the PLR process.

➤ **Voluntary Compliance.** Issuers' important role in voluntary compliance is well recognized. PLRs help not only the Issuer receiving the PLR, but also other Issuers that cannot afford to seek their own PLR, with voluntary compliance. This public benefit is particularly valuable in the tax-advantaged bond industry because there is such limited guidance on which to make critical compliance determinations, and the potential for future guidance is even dimmer given the new tax regulatory policy and increased OMB review. When User Fees prevent one Issuer from seeking a PLR, they potentially impact voluntary compliance of many Issuers.

➤ **The IRS Mission, Taxpayer Burden, and Taxpayer Rights.** PLRs help Issuers comply with the Code and as a result help the IRS achieve its mission and reduce taxpayer burden, both of which provide public benefits. Congress has recognized the importance of PLRs to Issuers by providing them with Tax Court review of PLRs sought under Code section 7478. Further, in the Taxpayer Advocate's 2017 Report to Congress (the "2017 Report"), the Office of the Taxpayer Advocate identified the public benefit that PLRs provide and the authority to take that public benefit into account when setting the user fee. The 2017 Report notes the General Accounting Office position in GAO-08-386SP, *Federal User Fees:*

⁴ See Taxpayer Advocate, LR #6, *User Fees: Prohibit User Fees that Reduce Revenue, Increase Costs, or Erode Taxpayer Rights* 9 (discussing the negative impact of user fees on taxpayers and tax compliance and recommending legislation that would require a more rigorous analysis before user fees are increased). See also, Office of the Taxpayer Advocate, *Most Serious Problem #2, IRS USER FEES: The IRS May Adopt User Fees to Fill Funding Gaps Without Fully Considering Taxpayer Burden and the Impact on Voluntary Compliance*, published in 2015, which suggests that the IRS may be raising user fees to address budget shortfalls without properly considering the impact of such increases on the IRS Mission, voluntary compliance and taxpayer rights. The report suggests the IRS should do more analysis of the impact of user fee increases on the IRS mission, voluntary compliance and taxpayer rights and burdens, and that this analysis should include an estimate of the impact of the fee on demand for service.

A Design Guide 7 (May 2008), which provides that, ‘if a program primarily benefits the general public... it should be supported by general revenue, not user fees; if a program primarily benefits identifiable users... it should be funded by fees; and if a program benefits both the general public and users, it should be funded in part by fees and in part by general revenues.’ The 2017 Report further states that PLRs provide governmental benefits and “help educate the public on how experts at the IRS apply the law in similar cases, even if they do not necessarily represent the IRS’s official position and other taxpayers cannot rely on them.”

When a User Fee presents too high a hurdle for Issuers to seek a PLR, including eliminating the ability of some Issuers to request a PLR, the User Fee effectively denies Issuers the use of that service. The effective denial of the PLR service infringes on fundamental taxpayer rights as set forth in the “Taxpayer Bill of Rights,” namely, the right to be informed, the right to quality service, and the right to a fair and just tax system.⁵

➤ **Change in Demand for PLRs.** The number of PLRs related to tax-advantaged bonds issued by the IRS has decreased as the User Fee has significantly increased since 2010, as illustrated in the chart above. The average number of PLRs issued per year has decreased from an average of 12 in years 2006-2009 to 6 in years 2010-2018.

Conclusion

PLRs play an important role in helping Issuers comply with the Code and in helping the IRS to develop published guidance applicable to Issuers. User Fees have significantly increased since 2010, and the increases correlate to fewer PLRs being issued (and likely, requested). Issuers that may have sought a PLR in the past may be reluctant to seek, or even effectively prevented from seeking, a PLR now because of the significant User Fee. This means that Issuers may be taking less certain positions, which could result in less voluntary compliance and higher overall costs and risks to Issuers and taxpayers generally. It may also mean that financings that would be determined to be compliant under IRS review and would save issuers money are not being undertaken. The high User Fees can also prevent Issuers from realizing their rights under the Taxpayer Bill of Rights, particularly Issuers that simply cannot afford the User Fee. The unique relationship between IRS and State or local governments provide a principled basis for special treatment for States and local governments, and the policy goal of encouraging compliance supports the aim of encouraging Issuers to request clarification through the PLR process. The IRS should take these factors into account and significantly lower the User Fee for tax-advantaged bond transactions.

⁵ IRS Publication 5170 (7-2014)

APPENDIX A
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