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of Bond Lawyers

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March 4, 2020

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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: Supplemental Letter Relating to User Fee Charges for State and Local
Governments*

Dear Commissioner Rettig,

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

These supplemental comments were prepared by an ad hoc task force 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,

Richard J. Moore
President, National Association of Bond Lawyers

CC:

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On November 4, 2019, the National Association of Bond Lawyers (NABL) submitted a letter to Commissioner Rettig (the “November Letter”) requesting that the IRS significantly reduce the \$30,000 user fee charged to state and local governments (Issuers) for private letter rulings (PLRs) relating to tax-advantaged bonds. A copy of the November Letter is attached hereto. Thereafter, representatives of the IRS Office of Chief Counsel provided NABL with the opportunity to refine its request taking into account the following considerations: 1) user fees should be based on an identified category of taxpayer and not particular Internal Revenue Code sections, 2) whether there is a rationale for providing a tiered approach to user fees for the identified category of taxpayer, and 3) whether the rationale for providing reduced user fees could apply to any other category of taxpayer. This submission modifies and supplements our November Letter to address these matters.

Governmental Entities Represent an Identified Category of Users that Merit a Reduced User Fee

Revenue Procedure 2020-1 (which applies to PLRs for tax-advantaged bonds) provides a reduced user fee regime for governmental entities having operating income below certain thresholds. This regime applies regardless of the issue raised; all requests from governmental entities under that revenue procedure are subject to the same regime. NABL’s November Letter recommended reducing user fees for Issuers seeking a PLR with respect to tax-advantaged bonds. While that request reflected the particular interests of NABL members and the special role of PLRs with respect to tax-advantaged bonds, it was not intended to suggest that governmental entity PLR requests outside the scope of NABL’s request should remain subject to the current regime; the letter simply did not address that point. In fact, many of the arguments we raised in the November Letter apply equally to all PLR requests from governmental entities submitting a ruling request.

In our November Letter, we recommended that in setting the user fees for Issuers, the IRS should consider the unique relationship between the Federal government and state and local governments; a relationship that has been recognized since the Constitution was adopted. This special relationship, including special provisions applicable to state and local governments in the Constitution, federal statutes, and executive orders, is discussed in detail in our November Letter. We also recommended that applying the factors the IRS considers in setting user fees, the \$30,000 user fee as it applies to Issuers merits reconsideration. As discussed further below, state and local governments commonly operate with little, if any, positive margin between revenues and expenses. Thus, the \$30,000 fee places a significant, and in some cases insurmountable, burden on an Issuer wishing to obtain a PLR. The current user fee (i) negatively impacts an Issuer’s voluntary compliance, the IRS mission, and an Issuer’s taxpayer burdens and rights, and (ii) appears to have resulted in Issuers seeking fewer PLRs. Because all governmental entities generally face the same financial constraints and should receive the same deference because of their unique relationship vis-à-vis the Federal government, these same points should apply to all PLR requests from governmental entities. Accordingly, NABL believes that the currently identified category of governmental entities as defined in Revenue Procedure 2020-1 is appropriate and recommends that the proposal set forth in the November Letter, as modified herein, apply to all PLR requests from such governmental entities.

Providing a Tiered Approach to User Fees

A. A Tiered Approach Based on Revenues is Not Well Suited to Governmental Entities

The current reduced user fee regime falls short in how it defines those governmental entities that merit a lower user fee, resulting in most governmental entities being subject to the \$30,000 user fee. The current system bases the user fee on annual operating revenue. Presumably the theory is that entities with more annual operating revenue should be able to more easily afford the user fee. The problem with this approach and with any other approach that attempts to measure a governmental entity's revenues or net income is that it does not take into account the fundamental nature of government operations. The revenues that a government generates are obligated or required for public services. Governmental entities that receive significant revenues are required to provide significant public services, frequently leaving them in a deficit situation. For example, it has been reported that forty states, and sixty-three of the most populous seventy-five cities, do not have enough money to pay all of their bills. Truth in Accounting (TIA) third annual, 2019 Financial State of the Cities and tenth annual, Financial State of the States 2019.

NABL recommends that the user fee for governmental entities reflect the general financial position of governmental entities; that is, that they are entities with no or very limited uncommitted income.¹ For this reason, and to reflect the fact that there is a relatively small percentage of governmental entities that have any positive net revenue, NABL recommends that the user fee for governmental entities be set no higher than \$7,600, the fee currently applicable to governmental entities with annual operating revenues of between \$250,000 and \$1 million.

B. A Possible Tiered Approach

NABL believes that a single user fee of \$7,600 for all governmental entity PLR requests would provide for the simplest processing of PLR requests and best recognize the realities of governmental entities' finances. Further, because a measure of revenues or net income is an inappropriate method for determining user fees in this context, it is difficult to arrive at a practical and effective basis on which to set a second, higher tier that would apply universally to PLR requests from governmental entities. Nevertheless, in light of your invitation to suggest a tiered approach, NABL offers the following.

One basis for setting a second, higher user fee is a measurement of the risk of loss of income tax revenue to the Treasury (referred to as "tax risk" herein). That is, when there is sufficient uncertainty about the tax position and the amount at stake is significant, a higher user fee may be justified. For governmental obligations, such a risk may be measured by the size of the obligation that would be impacted by the proposed transaction. For tax-exempt and other tax-advantaged obligations, NABL believes the tax risk is significant enough to merit the current \$30,000 user fee

¹ The realities of governmental entities' financial position are reflected in their everyday budget and expenditure process. For example, NABL members commonly find that when acting as bond counsel on a transaction, their attorney fees are limited to a fixed fee paid out of the proceeds of the issue and not out of general revenues.

when the size of the obligation that would be impacted by the legal issue(s) raised if the PLR request exceeds \$500,000,000. If this approach were to be adopted, NABL recommends the following rules to implement such a tiered approach:

- 1) For prospective obligations, the user fee would be determined based on the reasonably expected size of the issue of obligations.
- 2) For prospective transactions impacting an outstanding issue of obligations, the user fee would be determined by the outstanding par amount of the issue of obligations at the time of the PLR request.
- 3) If there is more than one outstanding issue of obligations that would be impacted by the proposed transaction for which the PLR is requested, the issue having the largest outstanding principal amount should be used to determine the user fee. For example, if a governmental entity proposes to enter into a contract with respect to a facility that was financed with three outstanding issues of obligations, the first having \$10x in outstanding principal amount, the second \$40x, and the third \$500x. The third issue (\$500x) would determine which user fee applied to the PLR request.
- 4) For purposes of determining whether tax-advantaged obligations are part of a single issue, the current statutory and regulatory rules for tax-advantaged bonds should be used.

Stated simply, the user fee for governmental entities would generally be \$7,600. The user fee would be increased to \$30,000 if the PLR relates to an issue of obligations or prospective obligations of a governmental entity, and the size of such issue exceeds \$500,000,000, determined (i) with respect to prospective issues, based on the reasonably expected size of the issue, or (ii) with respect to one or more outstanding issues of obligations, the issue to which the PLR request applies with the largest outstanding principal amount.

The Rationale for Setting a Reduced User Fee for Governmental Entities Would Apply Only to Governmental Entities

As noted above, the rationale for providing special user fees rests on the special relationship that exists between the Federal government and other governmental entities and the inability to measure financial constraints because of the unique nature of these other governmental entities. These combined considerations do not apply to other taxpayers. Accordingly, the rationale that NABL suggests should not necessarily apply to other categories of taxpayers.

APPENDIX A
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