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Douglas O'Donnell
Acting Commissioner
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Principal Deputy Chief Counsel and
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Internal Revenue Service (IRS)
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RE: Request for Guidance under I.R.C. § 142(a)(16) Relating to Bonds for Qualified Broadband Projects

Dear Ms. Batchelder, Mr. O'Donnell, and Mr. Paul:

The National Association of Bond Lawyers ("NABL") respectfully submits the attached request for guidance concerning the provisions of section 142(n) of the Internal Revenue Code of 1986 (the "Code") for the issuance of bonds to finance qualified broadband projects.

Sections 142(a)(16), 142(n) and 146(g)(5) of the Code were added as part of the Infrastructure Investment and Jobs Act to encourage investment in highspeed broadband projects for underserved areas. These provisions are a welcome tool that has the potential to substantially reduce the digital divide between those who do, and those who do not, have access to affordable, reliable, and fast broadband. However, we believe that administrative guidance or legislative amendments are necessary to address fundamental interpretational concepts in section 142(n) of the Code. Several aspects of this section have proven difficult to apply such that, to our knowledge, few if any projects for expanding broadband service have moved forward under section 142(n) of the Code.

The enclosed comments address points that we believe would benefit from guidance. These comments were prepared by a working group comprising those individuals listed on Appendix 1 hereto and were approved by the NABL Board of Directors.

NABL is a nonprofit organization and specialty bar association of approximately 2,500 lawyers whose purposes include, among other things, providing advice and comment

at the federal, state, and local levels with respect to legislation affecting state and municipal obligations. NABL believes that participating in the guidance process supports clarification of, and facilitates compliance with, tax laws and regulations. Accordingly, NABL members would welcome the opportunity to discuss the enclosed comments with you to facilitate the use of the new provisions of section 142(n) of the Code.

Thank you in advance for your time and attention. I have asked our Director of Governmental Affairs, Brian Egan, to answer any questions you may have. You can reach Brian via email at began@nabl.org or via phone at (202) 503-3290. We look forward to hearing from you.

Best,

Joseph (Jodie) E. Smith
President
National Association of Bond Lawyers

Cc: Brett York, Deputy Tax Legislative Counsel, U.S. Department of Treasury
Edward Killen, Commissioner, TE/GE, Internal Revenue Service
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NATIONAL ASSOCIATION OF BOND LAWYERS
COMMENTS REGARDING APPLICATION AND
INTERPRETATION OF SECTION 142(n) RELATING TO
EXEMPT FACILITY BONDS FOR QUALIFIED
BROADBAND PROJECTS

I. BACKGROUND REGARDING STATUTORY PROVISIONS

In section 142(n) of the Internal Revenue Code of 1986 (the "Code"), Congress allows for the issuance of tax-exempt exempt facility bonds for the financing of qualified broadband projects.[1] Section 142(n) was introduced in section 80401 (Division H of Title IV) of the Infrastructure Investment and Jobs Act, H.R. 3684, enacted in November 2021 (the "Infrastructure Act").[2] The text of section 142(n) and related amendments to section 142(a) and section 146(g) are shown in Appendix 2 hereto.

Section 142(n) arose from legislation introduced in May 2021 by Senator Margaret Wood Hassan of New Hampshire and Senator Shelley Moore Capito of West Virginia in S. 1676 (the "Original Senate Proposal")[3] and by Representative Kat Cammack of Florida in H.R. 3377 (the "Original House Proposal").[4] The Original Senate Proposal aimed to incentivize development of gigabit-capable internet access in rural areas. The bill limited bonds to rural areas as specifically defined in 7 U.S.C. 1991(a)(13), which refers generally only to an area other than a city or town with a population of greater than 50,000 inhabitants and any urbanized area contiguous and adjacent to such a city or town. The Original House Proposal would have determined qualification of a project based generally on low-income communities (as that term is used in section 45D(e) of the Code) where residential and commercial locations are either provided no broadband service at all or where fixed terrestrial broadband service does not meet certain benchmark speeds determined by the Federal Communications Commission (the "FCC"). As noted in the discussion below, section 142(n) as finally enacted does not limit bonds to rural areas or low-income communities but instead looks to the general degree to which an area is unserved or underserved by broadband facilities.[5]

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1 Unless otherwise noted, all references herein to "section" are to the referenced section of the Code.

2 Infrastructure Investment and Jobs Act, Pub. L. 117-58 (2021). Available online at https://www.congress.gov/bill/117th-congress/house-bill/3684.

3 Rural Broadband Financing Flexibility Act, S. 1676, 117th Cong. (2021). Available online at https://www.congress.gov/bill/117th-congress/senate-bill/1676.

4 Gigabit Opportunity Act, H.R. 3377, 117th Cong. (2021). Available online at https://www.congress.gov/bill/117th-congress/house-bill/3377.

5 References herein to unserved or underserved areas or locations are intended to refer to areas or locations not served by broadband service with minimum speeds of 25 megabits per second (Mbps) download capacity and 3 Mbps upload capacity.

More recently, and after the enactment of section 142(n), in June 2022, legislation was proposed by Representative Ted Budd of North Carolina in H.R. 8099 (the "Subsequent House Proposal").[6] The legislation would amend section 142(n) to broaden the definition of areas eligible for a qualified broadband project compared to the definition set forth in the Infrastructure Act (by increasing the threshold for determining whether an area is underserved) and to eliminate the requirement for volume cap.

There is no legislative history or commentary in the Congressional Record accompanying the Original Senate Proposal, the Original House Proposal, the provision as passed in the Infrastructure Act, or the Subsequent House Proposal to explain or provide additional insight into any of the provisions contained in section 142(n). This lack of legislative history and commentary exacerbates the interpretational issues with the statutory text of section 142(n). Below, we identify issues related to section 142(n) that would benefit from guidance by the Treasury Department to assist in implementing the legislation, or for which clarifying statutory amendments in future legislation would be appropriate.

II. COMMENTS AND GUIDANCE REQUESTS

A. Source of Data

The definition of "qualified broadband project" in section 142(n)(1) requires an issuer to determine who is expected to be, and who will actually be, served by the project. This analysis involves an understanding of the geographical scope of the project and penetration of broadband services in the area to be served by the project. Section 142(n) itself, however, does not indicate what data source an issuer needs to consult to make these determinations. We request guidance or legislative instructions indicating specifically what sources of data may be relied on in applying section 142(n).

We note that section 60102(a)(1)(A) of the Infrastructure Act, which relates to grants for broadband deployment and not to bonds, refers to "broadband DATA maps" as the source for determining locations that are underserved by broadband services. The term "broadband DATA maps" is more specifically defined in section 60102(a)(2)(C) of the Infrastructure Act as "the maps created under section 802(c)(1) of the Commissions Act of 1934 (47 U.S.C. 642(c)(1))" (the "Commissions Act"). The Commissions Act was amended in March 2020 by the Broadband DATA Act[7] by inclusion of Title VIII thereto, which directs the FCC to create a "Broadband Map" that is to depict, among other things, "the extent of the availability of broadband internet access service in the United States," including "fixed broadband internet access service" and "areas of the United States that remain underserved by providers," and "maps to determine the areas in which terrestrial fixed, fixed wireless, mobile, and satellite broadband internet access is and is not available." As contemplated by FCC notice DA 22-668 (Jun. 23, 2022), various departments of the FCC collected and aggregated broadband availability data for the Broadband Map to update the FCC's previously available broadband maps. The data framework the FCC is using for

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[6] Encouraging Private Investment for Better Broadband Act, H.R. 8099, 117th Cong. (2022). Available online at https://www.congress.gov/bill/117th-congress/house-bill/8099.

[7] Pub. L. 116-130. Available online at https://www.congress.gov/116/plaws/publ130/PLAW-116publ130.pdf. This act is also referred to as the "Broadband Deployment Accuracy and Technology Availability Act."

collection and aggregation of availability data is referred to by the FCC as the "Broadband Serviceable Location Fabric" (the "Fabric"). The Fabric defines standard terms and data standards that are used to overlay information from broadband providers to create the Broadband Map. On November 18, 2022, the FCC released the pre-production draft of the Broadband Map, which commences an iterative, ongoing challenge and update process to improve the accuracy of the Broadband Map.[8]

While the drafters of section 142(n) may have intended that the analysis for qualified broadband projects be based on broadband DATA maps that depict the availability of fixed broadband internet access service and information otherwise collected under the Broadband DATA Act, there is no guidance confirming such intent. The source of data for analyzing qualified broadband projects currently is significantly unclear in section 142(n). Likely the only practical approach to determining compliance with the various requirements of section 142(n) will be to refer to, and to rely on, the Broadband Map, at least initially, in the absence of other data. To make such reliance possible, we believe it would be beneficial to receive guidance from the Treasury Department allowing use of the Broadband Map and the Broadband DATA Act in applying technical broadband-related terms in section 142(n). We believe that such guidance would be best provided in the form of a safe harbor. The safe harbor should specifically permit an issuer to consult other data if the issuer reasonably believes such other data provides adequate information to apply the tests of section 142(n). Such other data may be relevant if, for example, the issuer concludes that the Broadband Map does not provide data that is sufficiently granular or accurate to determine whether locations have broadband access.

B. Timing of Data Maps

A key requirement for qualification of a project as a qualified broadband project is the lack of a minimum level of broadband service in a particular area. The statute leaves unanswered the question of *when* this lack of service must exist in relation to the qualified broadband project. In the case of the 50 percent "design" test of section 142(n)(1)(A), the date is not specified. In the case of the 90 percent "results" test of section 142(n)(1)(B), the date is vaguely specified as "before the project."

Typically, for a tax-exempt bond project, compliance with tax requirements depends both on facts and reasonable expectations as of the issue date and on future compliance with those requirements. Compliance with such requirements is sometimes within the control of the issuer or borrower. For qualified broadband projects, however, we note that tax requirements could change as and when the Broadband Map is changed (which we understand is expected to happen biannually but could happen at any time), or as and when other applicable data sources change. This means the eligibility to issue bonds for qualified broadband projects could change at any time including during the planning process for a transaction. The risk of change may make it extremely difficult to structure a bond financing, because a bond financing in practice requires a significant amount of structuring time and resources and because section 142(n)(2)(C) appears to require notice to broadband service providers at least 90 days prior to the issue date of any bonds.

[8] *See* FCC Public Notice DA 22-1210 (Nov. 18, 2022).

To address these practical difficulties, we recommend guidance permitting an issuer to apply the same date for both timing tests of sections 142(n)(1)(A) and (B). Guidance should also permit an issuer to use a date that allows for enough time for structuring the financing without the risk of changes in map data. For example, an issuer could be allowed to set the testing date by reference to the earliest date on which expenditures could be reimbursed from a reimbursement bond (disregarding the *de minimis* and preliminary expenditure provisions of the reimbursement rules), with protection if the Broadband Map data (or other data on which the parties rely) subsequently changes, similar to the hold harmless provisions for determining area median gross income in section 142(d)(2)(E) for qualified residential rental project bonds. Such guidance could be in the form of a statutory change to section 142(n) but could more easily be addressed via regulatory or administrative guidance. As an illustration of this rule, if on March 2, 2023, an issuer adopted a declaration of intent that satisfies section 1.150-2 of the Treasury Regulations (the "Regulations"), then the issuer could choose any date on or after January 1, 2023 (60 days prior to March 2, 2023) and before the issue date of the first bonds issued for the project to test whether, based on the Broadband Map or other applicable data, the project is designed solely to serve census block groups where more than 50 percent of residential households were underserved and whether 90 percent of the residential and commercial locations to be actually served by the project were underserved at the time.

C. Definition of Qualified Broadband Project

Section 142(n)(1) defines a "qualified broadband project." Paragraph (A) describes the design requirements for the project and paragraph (B) describes what the completed project must accomplish. We believe clarification and guidance is needed for both paragraphs of the definition, as noted below:

a. What are "census block groups"?

The project must be designed to provide service solely to one or more underserved census block groups. Neither the Code nor the Regulations define the term "census block group." We assume the intent is to refer to census block groups established by the U.S. Census Bureau and currently published online at https://data.census.gov/cedsci/. As precedent for using data from the Census Bureau for purposes of tax-exempt bond compliance, we note that, in connection with qualified mortgage bonds, section 6a.103A-2(b)(4) of the Regulations indicates that a "census tract" is intended to refer to a census tract as defined by the Secretary of Commerce. We believe a similar clarifying definition is needed to provide that the term census block group for purposes of section 142(n) is likewise intended to follow the Census Bureau's definition of the term.

b. What does it mean to "provide" service?

Section 142(n)(1)(A) states that the project must be designed to "provide" broadband service but does not elaborate on what it means to "provide." For example, if a project is designed to allow for broadband connections within certain areas of a census block group (for example, along the main road), does this satisfy the provision requirement even if there are areas within the same census block group (for example, residential areas farther away from the main road) that will not have the ability to connect to the project? Census block groups frequently include very large geographic areas that could be difficult for any individual provider to serve entirely. A requirement

for a project to allow broadband connections in every area of the census block group could be technically impossible to achieve and raises another interpretational issue of what the "areas" of the census block group should be. We note that section 142(n)(1)(B) looks to whether a project actually results in access to a certain percentage of locations. We believe guidance or statutory amendments are warranted to clarify that, in determining whether a project is "designed" properly, there is no requirement to serve all areas within the census block group. Instead, it should be enough for the design to have a scope that eventually complies with the requirement for resulting in access to a sufficient number of locations.

c. How does the 50 percent test apply to phased or multiple projects?

A practical issue arises under the 50 percent test of section 142(n)(1)(A) if a project is to be financed in phases from more than one bond issue or if multiple projects are planned and the timing of the bond issues does not coincide. In this circumstance, once one project or project phase is completed, the resulting "provision" of access to a particular census block group could cause the remaining underserved locations in the same area to fail the 50 percent threshold. The consequence may be that, for such a census block group, financing under section 142(n) is possible only if all bond issues and all projects for the area are completed and placed in service at substantially the same time. We believe this issue could significantly impede the use of bonds under section 142(n) for underserved areas, especially with respect to projects that require phased implementation of high-speed broadband. One approach to solving this issue would be statutory or regulatory clarification to the effect that the 50 percent test may be applied at the time of the first bond issue for a qualified broadband project for the entire census block group or groups. Subsequent bond issues for broadband projects for the same census block group or groups would, in this case, not need to retest the 50 percent threshold. An alternative would be to define census block groups for the purpose of section 142(n)(1)(A) as excluding portions of such groups already served by other qualified broadband projects. There is precedent for this "project-based" satisfaction of the tax-advantaged bond requirements in numerous other areas of law, including the rules for qualified equity in Section 1.141-6 of the Regulations and the "plan of financing" concept allowing multiple tax-exempt private activity bond issues to use a single TEFRA approval under section 147(f).

d. What does "solely" mean?

Section 142(n)(1)(A) also states that the design must allow for the broadband service to be provided *solely* to underserved census block groups. This requirement may be impossible to satisfy for many types of broadband projects. Assume, for example, that fixed, terrestrial broadband includes fixed wireless service.[9] Fixed wireless service typically includes a fixed antenna (for example, installed on a nearby mountaintop) that is connected by wire to the main broadband network, and individual residential receiver antennas that send and receive signals to and from the fixed antenna. The fixed antenna would probably be accessible to anyone within view of the antenna, including those who reside outside the targeted census block groups. We believe guidance or statutory amendments are needed to clarify what is meant by the term "solely," and we suggest the guidance or amendments allow a design even if the project will be accessible

[9] Please note the lack of guidance we describe in (f) below relating to fixed wireless service.

to other areas that are not targeted census block groups, perhaps based on a ratable calculation that looks to the extent to which the project serves the targeted area, or who the targeted customers are.

e. When is there "access"?

Sections 142(n)(1)(A) and (B) both refer to "access" to internet service. There is no guidance interpreting when access is deemed to exist. Does a location have access to internet service if it has an actual, existing connection to the service, or is mere availability enough? And if mere availability is enough, when is service "available"? Is service available if the owner of the location can readily receive an actual connection by calling an existing provider and receiving a connection without undue delay or extraordinary installation costs? Related to the lack of a definition of "access" and the uncertainty regarding the term "provide" as noted in (b) above is the phrase "where, before the project, a broadband service provider – . . . did not provide service" in section 142(n)(1)(B)(i) and (ii). Not only is the use of the word "provide" unclear, but does "providing" service require actual "access" in the form of an existing connection? For example, for purposes of the requirements of section 142(n)(1)(B), what if a location had the ability to connect (and perhaps had "access") but the broadband provider did not actually "provide" active service? We are not sure what the intent of the drafters was and believe the uncertainty that arises from the various uses of the words "access" and "provide" without clarification could hinder tax-exempt financing of qualified broadband projects altogether. We request guidance or statutory amendments to address these issues, along with regulatory examples to explain how to interpret these provisions.

We note for your consideration that the concept of a "standard installation" exists in the Broadband DATA Act relating to the Broadband Map. A provider that submits data to the Broadband Map stating that service is "available" in a certain area is certifying that, for an actual connection to exist, only a standard installation is necessary, which means "[t]he initiation by a provider of fixed broadband internet access [within 10 business days of a request] in an area in which the provider has not previously offered service, with no charges or delays attributable to the extension of the network of the provider." Also, an additional item to consider in providing clarifying guidance or statutory amendments is whether "access" should take into account latency or affordability, concepts that are raised in other portions of the Infrastructure Act relating to broadband grants.

f. What is a "residential household," "commercial location" or "location"?

Section 142(n)(1)(A) refers to "residential households" while section 142(n)(1)(B) refers to "residential locations" and introduces the concept of "commercial locations" (which is also used in section 142(n)(2)(B)). There is no Code or Regulation section defining these terms. We request guidance or statutory amendments to clarify what these terms mean in the context of section 142(n) and whether there is a distinction between households and locations, at least in the context of residences. Specific guidance should address (1) whether the terms "household" and "location" refer only to a structure or whether such terms are also intended to reflect living arrangements by occupants, (2) how to address multifamily apartment buildings or group quarters (*e.g.*, college residence halls, residential treatment centers, skilled nursing facilities, group homes, military barracks and prisons) and multiunit commercial structures (*e.g.*, strip malls and office buildings),

(3) what to do if, for example, specified data sources have inaccurate information, and (4) that the reference to "commercial locations" also includes industrial and agricultural locations. We believe issuers should be given flexibility to take into account facts and circumstances of the particular project area when looking at location data. For example, if an issuer is aware of an inaccuracy in the data for a particular location, the issuer should be able to replace information from the Broadband Map with its own information about the location. This would be especially important in urban areas where data may omit information about multifamily buildings such that adjustments are necessary to avoid undercounting multifamily units in favor of single-family units. We believe consideration should also be given to using the same term "location" in both paragraphs of section 142(n)(1) and indicating that the definition of location to be used for the purpose of the statute should be consistent with the definition of location used for purposes of the Broadband Map.

We note for your consideration that the Fabric lists locations but distinguishes between "broadband-serviceable locations" (a "BSL") and other locations. A BSL is described as "a business or residential location in the United States at which fixed broadband Internet access service is, or can be, installed."[10] Other locations would include "structures that have or should have broadband service but likely do not take or would not take mass market service (and therefore do not fall within the definition of a BSL) based on available data. Examples of such locations include certain Community Anchor Institutions and large enterprises."[11] We propose that one way to clarify the term "location" for purposes of section 142(n) would be to define it as including only a BSL. Alternatively, guidance could provide that all locations identified in the Fabric be considered "locations" for purposes of section 142(n). Yet another alternative would be to allow an issuer to choose between (1) all locations in the Fabric or (2) only BSLs, at its election.

If the term "residential household" is determined to be different from "residential location," then residential household could, for example, be defined to mean any space designed to be, or customarily, occupied by an individual or a group of related individuals on other than a transient basis that contains complete facilities for living, sleeping, eating, cooking, and sanitation.

g. What is "fixed, terrestrial broadband"?

The lack of legislative history or other authoritative commentary relating to section 142(n) makes it difficult to discern what type of technology is contemplated by the term "fixed, terrestrial broadband." In determining whether a project is designed properly under section 142(n)(1)(A), the issuer must determine whether residential households have access to fixed, terrestrial broadband service.[12] The FCC defines "fixed" service as

> one that serves end users primarily at fixed endpoints using stationary equipment, such as the modem that connects an end user's home router, computer, or other Internet access device to the network. This term encompasses fixed wireless

[10] FCC, Frequently Asked Questions about the Broadband Serviceable Location Fabric (Updated 1/10/2023). Available online at https://help.bdc.fcc.gov/hc/en-us/articles/7412732399003-Fabric-FAQs.

[11] *Id.*

[12] There does not appear to be a requirement under section 142(n)(1)(B) that the project itself must consist of a fixed, terrestrial broadband service.

broadband services (including services using unlicensed spectrum). The term does not include a broadband service that serves end users primarily using mobile stations. See 47 U.S.C. § 153(34) ("The term 'mobile station' means a radio-communication station capable of being moved and which ordinarily does move.").[13]

The word "terrestrial" suggests that satellite service need not be considered. But does such term exclude fixed wireless broadband services, even though such services are clearly considered "fixed" services as contemplated by the FCC?[14] Fixed wireless broadband service is, as we understand, one of the most important conventional and affordable types of broadband services in many rural areas. We would suggest clarifying guidance on this point. Similarly, internet provided through mobile stations appears to be excluded. However, it is not clear whether service provided through a mobile network but accessed through a fixed router should be excluded. For example, several mobile phone providers currently offer 5G residential service that must be accessed through a dedicated, fixed router. We request guidance to clarify the scope of the term "fixed, terrestrial broadband."

h. How is the "90%" test applied?

Section 142(n)(1)(B) states that, for at least 90 percent of locations provided access by the qualified broadband project, a broadband provider did not previously provide service or did not provide service meeting the minimum speed requirements of the statute. It is unclear whether, for the purpose of this test, all types of broadband must be considered, including, for example, satellite and mobile broadband providers, or whether the test may be limited to fixed, terrestrial broadband providers, as is the case with the design test in section 142(n)(1)(A). The language as currently written suggests that satellite and mobile broadband providers must be included in the test. This reading of the statute could severely limit the number of projects that qualify under section 142(n) if satellite and mobile services exist that provide the minimum service requirements of the statute. We request clarification of this aspect of the statute.

i. Is there an implied "100%" test?

Section 142(n)(1)(B) includes an implied 100 percent test, which is that the project must result in broadband service with minimum speeds of 100 Mbps download/20 Mbps upload. This suggests that the portion of a project that provides service at a lower speed is not part of a qualified broadband project. We are concerned that this 100 percent test could be read to conflict with the

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[13] *USF/ICC Transformation Order*, 26 FCC Rcd at 17701, para. 103. Available online at https://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0206/FCC-11-161A1.pdf.

[14] A publication by a wireless industry group suggests that the speed test in section 142(n)(1)(B) was originally contemplated by Congress to require 100 Mbps (rather than 20 Mbps) of upload speed, which, according to a source referenced in the publication, "was code for 'fiber-only,'" meaning that, for example, fixed wireless projects would not be able to qualify under section 142(n). *See* "Senate puts it in writing: Fiber will not keep wireless from benefitting from $65 Billion broadband bill," Featured News by Wireless Estimator, August 2, 2021, available online at https://wirelessestimator.com/articles/2021/senate-puts-it-in-writing-fiber-will-not-keep-wireless-from-benefitting-from-65-billion-broadband-bill/.

95 percent test applicable to exempt facility bonds generally.[15] We request confirmation that a project may be considered a qualified broadband project even if a portion of the project results in speeds below the required minimum, as long as the cost allocable to the project for such lower speeds fits within the existing five percent "bad money" limit of section 142(a). Furthermore, we request confirmation that temporary outages or system failures that may cause the project's speed to fall below the minimum speed requirement can be ignored and will not immediately cause the project to fail to be a qualified broadband project. We also request guidance allowing the minimum speed of a project to be determined based on daily, monthly or annual average speeds, in recognition that internet communication technologies commonly experience network slowdowns from time to time.

D. Examples Regarding Qualification

The complex interplay in section 142(n)(1) between the 50 percent test in (A), the implied 100 percent test in the first part of (B) and the 90 percent test in the second part of (B), together with what we are concerned are unclear references to "access" and "locations," make the qualified broadband project definition quite difficult to apply. Consider the following illustrations of the rules as they might be read in their current form:

> Example (1). A project is designed for a census block group with 500 single-family residences (households), 200 of which have access to 25 Mbps/3 Mbps fixed terrestrial broadband service (25/3 service). The other 300 residences do not have any access to 25/3 service. The project meets the 50 percent test because only 40 percent of the residential households had access to 25/3 service (200 residences with 25/3 service of 500 total residences). In addition, there are 100 commercial locations in the census block group, none of which have any access to broadband service. The new project will result in 100 Mbps/20 Mbps broadband service (100/20 service) access for all 600 locations. Of the locations provided 100/20 service under the project, 33.33 percent were provided service before the project that met the minimum 25/3 service speed requirement (200 residences with 25/3 service of 600 total locations). Since 33.33 percent exceeds 10 percent, the project fails to meet the 90 percent test and is not a qualified broadband project. This example illustrates the need to clarify the design test in (A), in particular the meaning of providing broadband service to a census block group.
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> Example (2). Same facts as in Example (1), except that the 200 residences with 25/3 service have fixed wireless broadband service (not fixed, terrestrial broadband service). Assuming the term "fixed, terrestrial broadband service" does not include fixed wireless broadband service, this means no residential households have fixed, terrestrial broadband service with 25/3 service or better, so the 50 percent test is met. But, as in Example (1), of the locations provided 100/20 service under the project, 33.33 percent were provided service before the project that met the minimum 25/3 service speed requirement (200 residences with 25/3 service of 600 total locations). Since 33.33 percent exceeds 10 percent, the project fails to meet the 90 percent test and is not a qualified

[15] The 95 percent test refers to the requirement set forth in section 142(a) that 95 percent or more of the net proceeds of an issue of exempt facility bonds (which includes bonds for qualified broadband projects) be used to provide certain specified facilities.

broadband project. This example illustrates the uncertainty of how to treat fixed wireless broadband service, and uncertainty regarding the reference to the speed requirement in (B)(ii).

Example (3). Same facts as in Example (1), except that the 500 residential households consist of 300 single-family residences and one apartment building with 200 apartment units. Only the 200 apartment units have access to 25/3 service. The project meets the 50 percent test because only 40 percent of the residential households had access to 25/3 service (200 residences of 500 total residences). There are 401 locations in the project area: 1 apartment building, 300 single family residences, and 100 commercial locations. Of the locations provided 100/20 service under the project, one location (the apartment building) out of 401 locations, or 0.25 percent, was provided service before the project that met the minimum 25/3 service speed requirement. The project meets the 90 percent test and so is a qualified broadband project. This example illustrates how the term "location," as applied to residential structures or commercial structures, could impact the qualification of the project, depending on what definition is intended by section 142(n).

We encourage the Treasury Department to consider the examples above in providing guidance.

E. Notification Rule

Section 142(n)(2) provides that a project is not a qualified broadband project unless "before the issue date of any issue the proceeds of which are to be used to fund the project," the issuer notifies "each broadband service provider providing broadband service in the area within which broadband services are to be provided under the project of the project and its intended scope." We request clarification and guidance regarding this notice requirement, as set forth below.

a. When does the notice requirement apply?

A project is not a qualified broadband project if the project is financed by any issue that was issued prior to that issue's satisfaction of the notice requirement. This disqualification can be interpreted to apply on a project basis or an issue basis. If interpreted on a project basis, projects cannot be financed on a tax-exempt basis if any portion of a project is financed by any issue (including a taxable issue) that does not satisfy the notice requirement. If interpreted on an issue basis, projects may be eligible for tax-exempt financing so long as the particular issue satisfies the notice requirement. This interpretation would permit portions of projects to be financed on a tax-exempt basis even if other portions were financed with taxable bonds. Such interpretation could also allow for tax-exempt refundings of taxable bonds that previously financed projects.

If it is determined that the notice requirement applies on a project basis, we request guidance regarding two points. First, because the term "issue" has historically applied to taxable and tax-exempt bonds,[16] we request guidance as to whether financing any portion of the project with a taxable issue that has not satisfied the notice requirement disqualifies other portions of the project from tax-exempt financing under section 142(n). If a project financed with taxable bonds

[16] *See* section 1.150-1(c)(2) of the Regulations.

must comply with the notice requirement before it may be considered a qualified broadband project, we request that such rule be applied on a prospective basis after the Treasury Department has released guidance. We are concerned that issuers may have already issued taxable bonds to finance broadband projects while waiting for guidance under section 142(n). Second, we request that issuers be granted discretion in defining what constitutes a project, even if the project ties into broadband infrastructure previously financed with an issue that did not satisfy the notice requirement, so long as the project is defined consistently for purposes of section 142(n)(1) and section 142(n)(2).

b. What form of notice is required?

While section 142(n)(2) requires notice to certain broadband providers and the opportunity to respond to such notice, the section is silent on the required form of notice and response. Furthermore, section 142(n)(2) does not clearly identify the information that must be included in notices to broadband providers.

Section 142(n)(2)(A) requires the issuer to provide notice to "each broadband service provider providing broadband service in the area within which broadband services are to be provided under the project of the project and its intended scope." Because the issuer is required to provide notice to "each" broadband service provider, this requirement could be interpreted as requiring individualized notice. Individualized notice may prove to be difficult especially if the issuer cannot identify all possible providers or cannot find the proper contact information for each provider. We request a safe harbor stating that publication of the notice in a form and manner that would satisfy the TEFRA notice provisions of section 147(f) will also satisfy the notice requirement under section 142(n)(2) (and that such notice may also be combined with an applicable TEFRA notice). If individualized notice to each broadband service provider is required, we request that the Treasury Department permit issuers to rely on the Broadband Map (as of the date of preparation of the notice) for information about the identity and contact information of providers, and that sending written notice to each provider at its address set forth in the Broadband Map be sufficient to satisfy the notice requirement.

Section 142(n)(2)(A) contains ambiguities for which we request clarification. First, we ask that the term "broadband service provider" be given the same definition as "broadband service provider" in section 142(n)(1)(B), such that if "broadband service provider" for purposes of section 142(n)(1)(B) includes only providers of fixed, terrestrial broadband service, notice does not also need to be given to satellite broadband providers (if satellite broadband is determined to not constitute fixed, terrestrial broadband service). Second, we ask that the term "broadband service" in section 142(n)(2)(A) be given the same definition as the term "service" in section 142(n)(1)(B), such that, if satellite broadband service is not included in section 142(n)(1)(B)(i) or (ii), then it is not included in section 142(n)(2)(B). Third, we ask for clarification of the term "area" and suggest that such term could be interpreted to mean the census block group or groups in which the project will be located. Finally, we ask for clarification regarding the term "scope." Specifically, we ask for a determination as to whether "scope" includes a geographic component (*e.g.*, area where the project is located), a technical component (*e.g.*, downstream and upstream speeds or whether broadband is fixed terrestrial or fixed wireless) or a cost component (*e.g.*, maximum principal amount of bonds expected to be spent on the

project). If it is determined that the term "scope" includes a geographic component, then we request that the notice need only disclose the county or counties in which the broadband project will provide access, or alternatively, need only disclose the census block group or groups in which the broadband project will provide access, as it would be burdensome for an issuer to disclose each address where the broadband project will provide access. If it is determined that the term "scope" includes a technical component, then we request that the technical component be deemed satisfied based upon the issuer's reasonable expectations of the project and that all deviations subsequent to provision of notice be permitted. Because the financing and construction process can be lengthy, and technological progress may be rapid, it would be inefficient to require issuers to build a broadband project in accordance with its projected downstream and upstream speeds if, for example, superior speeds can be obtained at the time of construction. Finally, if it is determined that the term "scope" includes a cost component, then we request that the cost component be deemed satisfied by the issuer's disclosure of the maximum principal amount of the obligations that will be issued to finance the broadband project and that such maximum principal amount may include contingencies without regard to whether such contingencies are reasonably expected. We also request that insubstantial deviations such as those permitted in section 1.147(f)-1(f)(6)(ii)(A) of the Regulations be permitted.

c. What consequences do notice responses have?

Under section 142(n)(2)(C), an issuer must allow for at least 90 days to respond to a notice. This provision could be interpreted to either (1) permit an issuer to issue bonds so long as it gives broadband service providers 90 days to respond before closing a comment period, or (2) prohibit an issuer from issuing any obligations until 90 days after notice has been given. Furthermore, the statutory text does not specify when the 90-day period begins. The statutory text also does not identify whether a response to the notice must be in writing (either via formal letter or electronic mail) or if an oral response via telephone or in-person meeting is permitted. Finally, the statutory text does not provide whether the issuer must review or formally acknowledge such responses.

We assume that the introductory language in section 142(n)(2), when read in conjunction with section 142(n)(2)(C), is intended to prohibit issuance of bonds until the 90-day comment period has expired but request confirmation of that reading of the statute. We suggest that responses should be allowed irrespective of how they are given and may consequently be written or oral and formal or informal. If the Treasury Department determines that notice given in a manner that would satisfy the TEFRA notice provisions of section 147(f) also satisfies section 142(n)(2), then we request confirmation that the 90-day waiting period begins when notice is published. If the Treasury Department determines that individualized notice must be given to each broadband service provider, then we request confirmation that the 90-day waiting period begins on the date written notice is sent to the broadband service provider. Finally, because nothing in section 142(n)(2)(C) indicates that an issuer is required to (1) review or consider responses that it has received or (2) take any formal action after receiving such responses, we request confirmation to that effect.

F. TEFRA Approval Considerations

Additional guidance would be helpful for qualified broadband projects with respect to the notice and approval requirement of the TEFRA provisions in section 147(f). Section 1.147(f)-1(f)(2) of the Regulations requires that a notice and approval contain, among other information about the project to be financed, a "general description of the prospective location of the project." Providing a description of the location of a qualified broadband project may prove challenging because such a project could involve the installation of a complex system of fiber-optic or coaxial cable over a widespread area. Section 1.147(f)-1(f)(2)(iv) of the Regulations provides some flexibility in describing the location of a project as it states that apart from using a physical address or references to boundary streets or other geographic boundaries, a "description of the specific geographic location that is reasonably designed to inform readers of the location" will also satisfy the location description requirements. While the use of geographical coordinates (*e.g.,* GPS information) may be a sufficient description of the location of a fixed wireless antenna that is constructed on a mountaintop as part of a qualified project, such a description could be considered inadequate for the location of a system of fiber-optic cables. Describing the locations of paths of fiber-optic pipelines would require a much more extensive summary unless an abbreviated means of describing the location of certain broadband projects is made available. Qualified broadband projects will undoubtedly give rise to unconventional project location descriptions, and any further guidance that can be provided with respect to preparing TEFRA notices and approvals for such projects would be greatly appreciated.

G. Volume Cap

The Infrastructure Act added qualified broadband projects and qualified carbon dioxide capture facilities to the list of projects eligible for tax-exempt facility bond financing under section 142. Under section 146(g), as amended, 25 percent of the qualified bonds issued for these two types of projects are subject to the volume cap, although none of the bond proceeds used to finance a qualified broadband project would be subject to the volume cap if the project is owned (within the meaning of section 142(b)(1)) by a governmental unit. Despite the increase of exempt facility bonds, no increase in volume cap was adopted, besides the annual inflation adjustment. Under Rev. Proc. 2022-38, for the year 2023, the volume cap amount per state for private activity bonds is the greater of (1) $120 multiplied by the state population, or (2) $358,845,000. Over the last decade and a half, demand for private activity bonds has steadily increased, outpacing the annual volume cap adjustments and shrinking the amount of private activity bonds available. As a result, in 2020, twenty states were oversubscribed for their annual cap allocation, mostly because of the strong housing demand.[17] Legislative action should be taken so that the volume cap does not stand in the way of implementing major policies like increasing internet access through tax-exempt financing. The Subsequent House Proposal, which did not pass during the 117th Congress, included a provision fully eliminating the volume cap requirement for bonds issued under section 142(n). This measure would greatly help create momentum in favor of broadband infrastructure financing, and we hope to see the bill introduced again in the new Congress. In the alternative, consideration should be given to reducing volume cap requirements for other bonds,

[17] *See* Council of Development Finance Agencies, CFDA Annual Volume Cap Report, Nov. 2021, available online at https://www.cdfa.net/cdfa/cdfaweb.nsf/ordredirect.html?open&id=VolumeCapReport-2019-2020.html.

such as bonds for qualified residential rental projects under section 142(d), to free up volume cap for other private activity bonds.

* * *

Appendix 1
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(Thank you to John Fletcher of Kutak Rock LLP, Little Rock, Arkansas, for his technical review regarding telecommunications regulatory matters.)

Appendix 2
Text of Sections 142(n) and 146(g)

I.R.C. § 142. Exempt facility bond

(a) General rule

For purposes of this part, the term "exempt facility bond" means any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to provide— […]

(16) qualified broadband projects. […]

(n) Qualified broadband project

(1) **In general**—For purposes of subsection (a)(16), the term 'qualified broadband project' means any project which—

(A) is designed to provide broadband service solely to 1 or more census block groups in which more than 50 percent of residential households do not have access to fixed, terrestrial broadband service which delivers at least 25 megabits per second downstream and at least 3 megabits service upstream, and

(B) results in internet access to residential locations, commercial locations, or a combination of residential and commercial locations at speeds not less than 100 megabits per second for downloads and 20 megabits [per] second for uploads, but only if at least 90 percent of the locations provided such access under the project are locations where, before the project, a broadband service provider—

(i) did not provide service, or

(ii) did not provide service meeting the minimum speed requirements described in subparagraph (A).

(2) **Notice to broadband providers**.—A project shall not be treated as a qualified broadband project unless, before the issue date of any issue the proceeds of which are to be used to fund the project, the issuer—

(A) notifies each broadband service provider providing broadband service in the area within which broadband services are to be provided under the project of the project and its intended scope,

(B) includes in such notice a request for information from each such provider with respect to the provider's ability to deploy, manage, and maintain a broadband network capable of providing gigabit capable Internet access to residential or commercial locations, and

(C) allows each such provider at least 90 days to respond to such notice and request.

I.R.C. § 146. Volume cap

(g) Exception for certain bonds

Only for purposes of this section, the term "private activity bond" shall not include— […]

(5) 75 percent of any exempt facility bond issued as part of an issue described in paragraph (16) of section 142(a) (relating to qualified broadband projects).

Paragraphs (4) and (5) shall be applied without regard to "75 percent of" if all of the property to be financed by the net proceeds of the issue is to be owned by a governmental unit (within the meaning of section 142(b)(1)).

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