August 14, 2023

Submitted via www.regulations.gov

(IRS REG – 101607-23)

Mr. Douglas W. O'Donnell
Deputy Commissioner for Services and Enforcement
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C. 20224

Ms. Holly Porter
Associate Chief Counsel
Office of the Chief Counsel
Passthroughs & Special Industries (CC:PSI)
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C. 20224

RE: Comments Re: REG – 101607-23 (Proposed §§1.6417-1 through 1.6417-6) Section 6417 Elective Payments of Applicable Credits

Ladies and Gentlemen:

The National Association of Bond Lawyers ("NABL") appreciates the work of the Internal Revenue Service (IRS) and U.S. Department of Treasury providing guidance pertaining to tax law changes made by the Inflation Reduction Act of 2022 (Pub. L. 117-169) (the "IRA"). We wish to provide comments, attached hereto, to REG-101607-23 (proposed §§1.6417-1 through 1.6417-6) Section 6417 Elective Payments of Applicable Credits. We are also supplementing our comments in our letter, dated November 4, 2022, responding to IRS Notice 2022-49, 2022-43 I.R.B. 321 and Notice 2022-50, 2022-43 I.R.B. 325 (the "November 2022 Letter"),[1] as supplemented by our letter dated March 9, 2023 (the "March 2023 Letter").[2] Our comments address not only the above-referenced proposed regulations but certain other issues relating to section 6417 of the Internal Revenue Code.

---

[1] See NABL letter to Ms. Holly Porter re: "NABL Response to IRS Notice 2022-49 and IRS Notice 2022-50" sent on November 4, 2022. Web access: https://www.nabl.org/resources/response-to-irs-requests-on-ira-implementation/

[2] See NABL letter to Ms. Holly Porter re: "Supplemental Comments on IRS Notice 2022-49 and IRS Notice 2022-50" sent on March 9, 2023. Web access: https://www.nabl.org/resources/suppl-comments-ira-notices/

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. The following comments were prepared by a working group of the NABL Tax Law Committee (whose members are listed in Appendix 1 hereto) and were approved by the NABL Board of Directors.

Thank you in advance for your time and attention on this important matter. 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 (NABL)

CC:

- Lily Batchelder, Assistant Secretary for Tax Policy, U.S. Department of Treasury
- Brett York, Deputy Tax Legislative Counsel, U.S. Department of Treasury
- Praveen Ayyagari, Attorney-Advisor, Office of Tax Policy, U.S. Department of Treasury
- Helen Hubbard, Associate Chief Counsel, CC:FIP, Internal Revenue Service
- Vassiliki Tsilas, Special Counsel to Associate Chief Counsel, CC:FIP, Internal Revenue Service
- Jian H. Grant, Branch Chief, CC:FIP:B5, Internal Revenue Service

NATIONAL ASSOCIATION OF BOND LAWYERS
COMMENTS ON REG-101607-23
(PROPOSED §§1.6417-1 THROUGH 1.6417-6)
SECTION 6417 ELECTIVE PAYMENT OF
APPLICABLE CREDITS

I. Introduction

The Inflation Reduction Act of 2022, Public Law 117-169 (the "IRA"), made a number of changes to the Internal Revenue Code of 1986 (the "Code") relating to the eligibility for, and determination of, tax credits under various production tax credit ("PTC") and investment tax credit ("ITC") provisions, including the addition or modification of sections 45, 45U, 45Y 48, and 48E.[3] Among these were provisions providing reductions of available credits in circumstances where all or a portion of the applicable credit property is financed in whole, or in part, with tax-exempt bonds.

The IRA also added section 6417, which provides that, in the case of an "applicable entity" (including, e.g., a tax-exempt organization or any state or political subdivisions thereof) that makes an election under section 6417 with respect to any of the various PTCs or ITCs determined with respect to such entity, the entity is treated as having made a tax payment equal to the amount of such credit. The electing entity would be entitled to claim a refund of the deemed payment, thereby effectively permitting the entity to "monetize" the credit.

Finally, the IRA added section 6418, which permits taxpayers not eligible to take advantage of section 6417 to transfer certain credits to third parties in exchange for a cash payment. As in the case of section 6417, section 6418 effectively permits taxpayers that might not otherwise be able to take

[3] All references herein to a "section" are to the referenced section of the Code, and all references herein to "Treas. Reg. §" are to the Treasury Regulations as promulgated as of the date hereof. "Prop. Treas. Reg. §1.6417-1 through 1.6417-6" references proposed Treasury Regulations. Because there are different references depending on the Code section to the property that is the subject of the credit, these comments for simplicity refer to the "applicable credit property" as the property giving rise to the respective credit.

advantage of these tax credits (e.g., because of a lack of sufficient tax liability to utilize the credit) to monetize them.

In Notices 2022-49, 2022-43 I.R.B. 321, and 2022-50, 2022-43 I.R.B. 325, the IRS requested comments on certain issues arising under the IRA. By letters of November 4, 2022 and March 9, 2023 (the "November 2022 Letter" and "March 2023 Letter", respectively, copies of which are appended hereto for ease of reference), the National Association of Bond Lawyers ("NABL") submitted preliminary comments responding to these notices and undertook to follow up those submissions with more detailed comments.[4] On June 21, 2023, proposed Treasury Regulations were published with respect to section 6417 of the Code (the "Proposed Regulations").

II. Comments Relating to Elections and Prefiling Review

Section 6417 Election – Generally.

Proposed Treasury Regulation §1.6417-2(b) provides guidance for taxpayers making an election to monetize refundable credits. It provides that the election must generally be made on the original tax return (not an amended return) filed not later than the due date (including extensions of time). Prop. Treas. Reg. §1.6417-2(b)(1)(ii). For governmental entities that do not normally file returns, the due date is the 15th day of the fifth month after the end of the taxable year determined under section 441 of the Code (generally the end of the fiscal year for financial purposes). Prop. Treas. Reg. §1.6417-2(b)(3). The proposed Treasury Regulation helpfully provides for an automatic, paperless six-month extension. Prop. Treas. Reg. §1.6417-2(b)(3).

Prior to making an election, an applicable entity must use a pre-filing registration process to register and describe itself and the applicable credit property. The process, described in proposed Treasury Regulation §1.6417-5, involves use of an electronic portal and appears to include an IRS

[4] See "NABL Response to IRS Notice 2022-49 and IRS Notice 2022-50" sent on November 4, 2022. (Web access: https://www.nabl.org/resources/response-to-irs-requests-on-ira-implementation/); "Supplemental Comments on and IRS Notice 2022-50" sent on March 9, 2023. (Web access: https://www.nabl.org/resources/suppl-comments-ira-notices/)

review and generation of a registration number (or numbers) to be entered on the tax return. The applicable entity, if a state or local government, will make the election by filing Form 990-T and Form 3800, which are forms such entities do not normally file.

Because the registration and prefiling process under section 6417 will be new for the applicable entities involved, we strongly suggest the following:

- The IRS should widely publicize the registration requirements, existence of the electronic portal (when it is operational) and estimated time period for prefiling review, so applicable entities will be aware of requirements and meet the timing deadline for elections.
- We anticipate that in many instances registration (and use of the electronic portal) will be done by attorneys, accountants, and financial advisors, on behalf of applicable entities, due to the complexity of the requirements. Access to the portal should be constructed so that such advisors can easily (and timely) submit information and obtain registration numbers. Please note that many advisors access portals utilizing computers networked to their company servers, which likely will have typical IT security protections. The network configuration of the portal should be designed to allow advisors to easily access it.
- For purposes of the tax return preparer definition in Treasury Regulation §301.7701-15, we assume, and would appreciate guidance, that attorneys, accountants or other advisors completing pre-filing registration documentation on behalf of applicable entities do not, by virtue of such activity, become “tax return preparers.”
- It is important to provide easily accessible information regarding utilizing the electronic portal and an adequately staffed phone number to call if problems exist.

- Guidance indicating the situations when multiple registration numbers are needed for applicable credit property also would be beneficial to prevent confusion.

<u>Election Forms</u>.

Proposed Treasury Regulation §1.6417-1 provides that the payment election is to be made on the entity's annual tax return and that the return will need to include any required form pertaining to the underlying refundable credit, a completed Form 3800 and any additional information required. For entities that are not normally required to file an annual return, such as state or local governmental entities, proposed Treasury Regulation §1.6417-1(b)(2) states that the annual tax return to be filed for the entity is Form 990-T. Because state or local governmental entities have never previously filed Form 990-T or Form 3800, it is important to provide guidance to state or local governmental entities regarding how they should complete the forms. Entities who do not normally have to file these forms should be required to provide only the information on those forms that is necessary to receive a credit under section 6417. Combining the information required on Form 990-T and Form 3800 into a single form would also be helpful to eliminate burden on applicable entities.

In particular, we note that the current version of Form 990-T is not in a compatible form for state and local governments to complete. State and local governments do not fall into any of the exemptions listed in Line B, they are not any of the organizations listed in Line G, and they are filling the form only to claim a credit; however, the applicable credits under section 6417 are not listed in Line H. Parts II and III involve the filer's tax amount for the year. Therefore, NABL requests guidance on how Form 990-T should be completed by entities who are only filing the form to make the elective payment election. Alternatively, a revised version of this form or updated instructions to this form incorporating specifics related to the elective payment election, such as those noted above for Line B, Line G, and Line H, would be beneficial for state and local governments making this election.

For Form 3800, filers are directed to begin with Part III, which is where they select the type of general business credit being reported. In its current form, there is not a clear box that filers should check to make the election with respect to the elective payment. The IRS should clarify which box should be checked for applicable entities electing the elective payment. Alternatively, there are several "reserved" boxes in Part III, and one of these could be changed to something such as "Section 6417 Applicable Entity Making Elective Payment Election." Additionally, Part II of Form 3800 requires the filer to enter the amount of regular tax the filer has for the tax year. The amount of tax entered is then used throughout the rest of the form to determine the credit amount. However, for applicable entities that are state or local governmental units, the number entered here will be zero. NABL requests that the IRS provide guidance on how applicable entities that are tax-exempt should complete the regular tax information requested in Part II, Line 7.

Overall, a lack of clear guidance in how to properly file these forms will likely result in unintentionally erroneous filings with the IRS. In turn, this will burden both the IRS and filers trying to elect the credits.

Annual Registrations.

We request, in recognition of the limited budgets and staff of governmental entities and nonprofits filing for refundable credits, that any required annual registration process, such as for the PTC, be simple and streamlined to eliminate taxpayer burdens.

III. Comments Relating to Applicable Entities

Ownership.

Because of the procedural requirements relating to the required election under section 6417, as well as the nature of the tax credit deal that will generate refundable credits, a determination that the owner of a tax credit eligible project is an applicable entity must be made early in the deal. An incorrect conclusion in that regard could result in no tax credits for the project or result in cancellation of the project altogether. Because ownership for federal income tax purposes is a facts and circumstances analysis, that determination can be quite complicated and the result of the analysis may not be certain.

Therefore, it would be very helpful for the final Treasury Regulations under section 6417 to provide a safe harbor for determining the federal tax owner of the tax credit eligible project.

Fortunately, such a safe harbor exists for governmental units in section 142(b)(1). That safe harbor applies to certain types of exempt facility bonds, such as airport or dock and wharf facilities, in which governmental ownership is a requirement for tax-exempt financing. The policy supporting the need for an ownership safe harbor for elective pay tax credit projects is the same as the policy supporting the need for an ownership safe harbor for these exempt facility bonds. In addition, the safe harbor has been in the Code for many years, and tax practitioners are very familiar with it. Thus, using this same safe harbor for elective pay tax credit projects will make it easier for worthy projects to claim the refundable credit.

The safe harbor in section 142(b)(1) could be adapted to the elective pay provisions as follows: *Property owned under state or local law by an applicable entity and that is subject to a lease, management or operating contract, power purchase contract or similar agreement, shall be treated as owned by such applicable entity for purposes of section 6417 if-*

(i) the counterparty to the agreement makes an irrevocable election (binding on the counterparty and all successors in interest under the agreement) not to claim depreciation or tax credits with respect to such property,

(ii) the agreement term is not more than 80 percent of the reasonably expected economic life of the property, and

(iii) the counterparty to the agreement has no option to purchase the property other than at fair market value (determined as of the time such option is exercised).

<u>Certain Governmentally Owned Single-Member Entities</u>.

We are grateful for the addition of proposed Treasury Regulation §1.6417-1(c)(7), which states that the term applicable entity includes "[a]n agency or instrumentality of any applicable entity described in paragraphs (1)(ii), (2), or (3)." For a number of state law and business reasons, states, territories, tribal governments and their political subdivisions regularly undertake financing activities for a wide variety of projects through such agencies or instrumentalities, or single-member subordinates to such entities. Therefore, we anticipate many applicable entities will want to establish special purpose entities to own their tax credit eligible projects. For example, a city might normally issue bonds through an industrial development authority that is treated as an agency or instrumentality of the city. For a tax credit eligible project, the city might want the industrial development authority to create a wholly-owned corporation or limited liability company to be the owner.

The determination of whether an entity is an agency or instrumentality is a facts and circumstances analysis that applies the factors originally set forth in Revenue Ruling 57-128, 1957-1 C.B. 311. Consider the industrial development authority example in the previous paragraph. It is harder to conclude that the wholly-owned corporation or limited liability company (itself wholly-owned by an instrumentality) is an agency or instrumentality than to conclude that the industrial development authority, which the city directly owns, is an agency or instrumentality. Under the entity classification regulations of section 7701, a limited liability company that is wholly owned by an agency or instrumentality of a state or local governmental unit may be treated as a separate corporation and, therefore, may not be treated as a disregarded entity. Thus, it may need to be an agency or instrumentality of a state or local governmental unit in its own right. See Treas. Reg. §301.7701-2(b)(6). We see no policy reason why an entity wholly-owned by an applicable entity should not be treated as an applicable entity.

Considering the foregoing, we believe it would be beneficial to states, territories, tribal governments and their political subdivisions, and also to existing agency and instrumentality entities, for the following language to be added to the list of applicable entities contained in proposed Treasury Regulation §1.6417-1(c) as new paragraph (8):

any corporation or single-member entity wholly-owned by an applicable entity described in paragraphs (1)(ii), (2), (3) or (7).

IV. Comments Relating to Refundable Tax Credits When Used in Conjunction with Tax-Exempt Bonds

Allocation of Bond Proceeds.

In our March 2023 Letter, we provided comments regarding the allocation rules that could apply to calculate the reduction of the ITC and PTC when tax-exempt bond proceeds are used to finance the applicable credit property. As amended by the IRA, a number of tax credit provisions, including the PTC and ITC under sections 45 and 48, contain rules, set forth in section 45(b)(3) (which is cross-referenced by the other tax credit provisions), mandating that those credits be reduced, but not by more than 15%, by a fraction, the numerator of which is the portion of the cost of the applicable credit property financed with tax-exempt bonds and the denominator of which is the total cost of the applicable credit property. The allocation of bond proceeds to expenditures, for purposes of section 103 and sections 141 through 150, is determined under specific rules prescribed for that purpose, such as the rules contained in Treas. Reg. §§1.141-6 and 1.148-6. As stated in our March 2023 Letter, we ask that the IRS apply the existing rules for allocating tax-exempt bond proceeds to expenditures to determine what portion of the cost of applicable credit property has been financed with tax-exempt bond proceeds, assuming such property is treated as a "mixed-use project," as defined in Treas. Reg. §1.141-6. Further, the IRS should confirm that the cost determination necessary to calculate the extent of any tax-exempt financing reduction with respect to a PTC facility should be based on criteria and guidance developed in the context of ITCs. NABL believes that guidance in this area is crucial for taxpayers who utilize tax-exempt financings to access ITC and/or PTC refundable credits. See our March 2023 Letter for detailed comments and examples.

Tax-Exempt Bond Usage Timing Issues.

As mentioned in our March 2023 Letter and above, we suggest applying the existing allocation and accounting rules set forth in Treasury Regulation §1.141-6 with respect to the reduction under section 45(b)(3) relating to tax-exempt bonds. With respect to such rules, we note that final allocations of tax-exempt bond proceeds to expenditures for purposes of the tax-exempt bond rules might not be due until the fifth anniversary of the bond issuance date. However, elections may be due for a refundable credit prior to the date of a final allocation for tax-exempt bond purposes if the applicable property is placed in service prior to that date. Further, as our March 2023 Letter describes, an election for an applicable credit might be due even prior to the issuance of tax-exempt bonds financing the applicable credit property. If final regulations adopt the proposal in our March 2023 Letter regarding the reduction under section 45(b)(3), as described above, then the IRS should provide for an automatic extension of time to file a superseding return indicating changes regarding tax-exempt financing or provide other guidance to accommodate this situation. It is also crucial for the guidance to clarify that the excessive payment provisions under proposed Treasury Regulation §1.6417-6 do not apply in the situations described above in which the timing of the allocations of bond proceeds to expenditures occur after the applicable project has been placed in service.

<u>Effect of Basis Reduction.</u>

The IRA provides that rules similar to section 50 apply to section 6417. Section 50(c) provides that, in the case of any ITC allowed for energy property, the cost basis of the property will be reduced by an amount equal to 50% of the tax credit taken into account. As stated in our March 2023 Letter, we urge the IRS to provide guidance that section 50(c) will not cause tax-exempt bond proceeds to be deallocated from project costs because the cost of those assets has been deemed to be reduced under section 50(c). If an applicable entity had to treat bond proceeds as deallocated from project costs, it would be inconsistent with Congress's intended 15 percent (at most) credit reduction for combined tax-exempt financing and tax credit usage. See the March 2023 Letter.

<u>Tax Character of Direct Payments</u>.

Section 6417(a) provides that an applicable entity may make an election to treat an applicable credit determined with respect to such entity as "making a payment against the tax imposed by subtitle A (for the taxable year with respect to which such credit was determined) equal to the amount of such credit." In other words, an applicable entity may elect to receive a direct payment in lieu of an applicable tax credit. In implementing the direct pay election under section 6417, the Proposed Regulations acknowledge the special character of applicable entities as non-taxpayers, although subparagraphs (B), (C) and (D) of subsection 6417(d)(l) provide that in certain circumstances, the election is available to taxable entities that do not qualify as applicable entities.

The IRA recognizes that certain applicable entities may finance all or a portion of an eligible project with the proceeds of tax-exempt bonds and provides that the credit is reduced by up to 15% in such circumstances. The treatment under tax-exempt bond rules of the payment received pursuant to the election under section 6417, however, and how the direct payment impacts an issue of tax-exempt bonds that financed the applicable credit property have not been clearly addressed in the current guidance.

As noted in our March 2023 Letter, in addition to the important questions we raised about the allocation of tax-exempt bond proceeds and other funds to eligible project costs, issuers and beneficiaries of tax-exempt bonds need to know how to treat payments received under section 6417. For example, if the amount received pursuant to a direct pay election is treated as "proceeds" of a tax-exempt bond issue, then it would be subject to use and investment limits under the tax-exempt bond rules. These limits, if they apply, will make the tax credit transaction more expensive and may make it so that using tax-exempt bonds will ruin the economics of the deal. Hence, transaction participants need to know if they apply before they start planning the transaction.[5]

Congress previously enacted a tax credit regime in respect of certain tax-advantaged bonds, such as Build America Bonds under section 54AA and provided a direct payment election option for them under section 6431. Under that regime, direct payment is treated as an overpayment of tax and

[5] While the provisions of section 6418 are beyond the scope of these comments, we note that amounts received from the sale of tax credits under that section also raise similar questions.

not as proceeds of a bond issue. See section 3.3 of Notice 2009-26, 2009-1 C.B. 833. This treatment worked well for issuers and conduit borrowers of tax-advantaged bonds.

The tax character of a payment received in connection with a direct payment election under section 6417 should be consistent with the precedent set forth in Notice 2009-26. This approach would advance the purpose of the IRA by smoothing the implementation of the direct pay election for applicable credits, it would recognize that the interplay between the tax credits and issues of tax-exempt bonds has already been addressed in section 45(b)(3), and it would be consistent with prior treatment of elected direct payment options in respect of tax-advantaged obligations.

<u>Federal Guarantee</u>.

As stated in our March 2023 Letter, we urge the IRS to provide guidance that pledging refundable credits as security for a bond issue or using the credit payments to pay debt service will not result in a federal guarantee of the bonds under section 149 of the Code, similar to the treatment of federal grants.[6]

<u>Bridge Loans</u>.

As noted above, a PTC or ITC is reduced under section 45(b)(3) by an amount which is the product of the credit and the lesser of fifteen percent or a fraction the numerator of which is "the sum, for the taxable year and all prior taxable years, of the proceeds of an issue of any obligations the interest on which is exempt from tax under section 103 and which is used to provide financing for the qualified facility, and the denominator of which is the aggregate amount of additions to the capital account for the qualified facility for the taxable year and all prior taxable years."

Applicable entities frequently use tax-exempt bridge financing for a project before more permanent funding sources are available. Guidance is needed regarding application of the credit reduction where the parties use tax-exempt bridge financing for the applicable credit property and retire

[6] See Private Letter Ruling 8537037 (grant anticipation note secured by federal grant not federally guaranteed).

it before the facility is placed in service. (By definition, this will be before it is time to claim the ITC or PTC for that property, because those credits can be claimed only after its owner places it in service for tax purposes.) Because, in this case, the tax-exempt financing is not outstanding at the same time the owner of the applicable credit property claims the ITC or PTC, it does not seem that a reduction should occur as there is no "double dipping" of tax benefits.

Appendix 1

NABL Working Group Members

Peter Lam, Co-Chair
Holland & Knight LLP
New York, NY

Carol Lew, Co-Chair
Stradling Yocca Carlson & Rauth
Newport Beach, CA

Eorl Carlson
Jones Hall, APLC
San Francisco, CA

Jillian Christiansen
Kutak Rock LLP
Denver, CO

Michela Daliana
Hawkins Delafield & Wood LLP
New York, NY

Charles ("Charlie") Henck
Ballard Spahr LLP
Washington, DC

Christi Jacobsen
Hillis Clark Martin & Peterson P.S.
Seattle, WA

Marybeth Orsini
Ballard Spahr LLP
New York, NY

Brian Teaff
Bracewell LLP
Houston, TX

Alison Benge
Pacifica Law Group
Seattle, WA

Charles Cardall
Orrick Herrington & Sutcliffe LLP
San Francisco, CA

Brandon Caywood
Gust Rosenfield P.L.C.
Phoenix, AZ

Louis Couture
Saul Ewing Arnstein and Lehr
Philadelphia, PA

Matthias Edrich
Kutak Rock LLP
Denver, CO

Timothy Horstmann
McNees Wallace & Nurick LLC
Harrisburg, PA

Martye Kendrick
Greenberg Traurig, LLP
Houston, TX

Stefano Taverna
McCall Parkhurst & Horton LLP
Dallas, TX

Appendix II
November 2022 Letter
March 2023 Letter

National Association of Bond Lawyers

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

November 4, 2022

Holly Porter
Associate Chief Counsel
Office of the Chief Counsel, Passthroughs & Special Industries (CC:PSI)
Internal Revenue Service (IRS)
1111 Constitution Avenue, NW
Washington, DC 20224

RE: NABL Response to IRS Notice 2022-49 and IRS Notice 2022-50

Ms. Porter,

The National Association of Bond Lawyers ("NABL") appreciates the work of the Internal Revenue Service ("IRS") and the U.S. Department of Treasury to provide guidance pertaining to tax law changes made by the Inflation Reduction Act of 2022 (Pub. L. 117-169) (the "IRA").

In the near future, NABL intends to provide detailed comments in response to IRS Notice 2022-49 (regarding changes to the reduction in energy-related tax credit value used in conjunction with tax-exempt financing) and IRS Notice 2022-50 (regarding certain non-taxpaying entities to receive refundable energy-related tax credits as a direct payment).

NABL's comments will emphasize that fundamental principles of tax-advantaged bonds set forth under sections 103 and 141 through 150 of the Internal Revenue Code of 1986 (the "Code") and the Treasury Regulations promulgated thereunder, such as those relating to projects that are financed in part with proceeds of tax-advantaged bonds and in part with other sources, as well as certain timing rules, should be respected and applied consistently in the context of energy tax credits. Consistent application of the principles applicable to tax-advantaged bonds and certain energy tax credits will help further the policy objectives of the IRA.

As a preview, NABL's comments are likely to address the following:

Comments Relating to Reduced Tax Credits When Used in Conjunction with Tax-Advantaged Bonds

- Considerations relating to the overlap, and/or lack thereof, between (i) the "project" financed with proceeds of tax-advantaged bonds for purposes of section 103 of the Code and (ii) the "eligible project" for purposes of investment tax credits or production tax credits.

- Certainty regarding how the "project" is defined for purposes of production tax credits.

- Instances in which the amount of tax-advantaged bonds issued for a particular project is less than the total amount of eligible project costs.

Additional Comments Regarding Various Aspects of Tax Credits and Tax-Advantaged Bonds

- Certain timing considerations, including (i) providing flexibility for non-taxpaying entities to apply for tax credits earlier than the year following the placed in service date, (ii) addressing situations where tax-advantaged bonds may be issued after a project is placed in service or after the tax credit payments are initially claimed, and (iii) coordinating the timing of tax credit deadlines with other timing provisions related to allocations of proceeds of tax-advantaged bonds and other funds.

- Confirmation that the tax credit payments do not, in and of themselves, result in "replacement proceeds" within the meaning of section 148 of the Code.

- Confirmation that any tax credit payments pledged as a source of repayment for tax-advantaged bonds will not result in a "federal guarantee" within the meaning of section 149 of the Code.

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.

Thank you in advance for your time and attention here. 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 (NABL)

CC:

- Lily Batchelder, Assistant Secretary for Tax Policy, U.S. Department of Treasury
- Brett York, Deputy Tax Legislative Counsel, U.S. Department of Treasury
- Helen Hubbard, Associate Chief Counsel, CC:FIP, Internal Revenue Service
- Jian H. Grant, Branch Chief, CC:FIP:B5, Internal Revenue Service

March 9, 2023

Holly Porter
Associate Chief Counsel
Office of the Chief Counsel
Passthroughs & Special Industries (CC:PSI)
Internal Revenue Service (IRS)
1111 Constitution Avenue, NW Washington, DC 20224

RE: Supplemental Comments on IRS Notice 2022-49 and IRS Notice 2022-50

Ms. Porter,

The National Association of Bond Lawyers ("NABL") appreciates the swift work of the Internal Revenue Service (IRS) and U.S. Department of Treasury to provide guidance pertaining to tax law changes made by the Inflation Reduction Act of 2022 (Pub. L. 117-169). We now wish to provide additional comments, attached, to supplement those made in our November 4, 2022, letter responding to IRS Notice 2022-49, "Request for Comments on Certain Energy Generation Incentives;" and Notice 2022-50, "Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits."[1]

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. The following comments were prepared by a working group of the NABL Tax Law Committee (whose members are listed in Appendix 1 hereto) and were approved by the NABL Board of Directors.

Thank you in advance for your time and attention on this important matter. I have asked our Director of Governmental Affairs, Brian Egan, to answer any questions you may have.

---

[1] See NABL letter to Ms. Holly Porter re: "Response to IRS Notice 2022-49 and IRS Notice 2022-50" sent on November 4, 2022. Web access: https://www.nabl.org/resources/response-to-irs-requests-on-ira-implementation/

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 (NABL)

CC:

- Lily Batchelder, Assistant Secretary for Tax Policy, U.S. Department of Treasury
- Brett York, Deputy Tax Legislative Counsel, U.S. Department of Treasury
- Helen Hubbard, Associate Chief Counsel, CC:FIP, Internal Revenue Service
- Jian H. Grant, Branch Chief, CC:FIP:B5, Internal Revenue Service

NATIONAL ASSOCIATION OF BOND LAWYERS
SUPPLEMENTAL COMMENTS ON
IRS NOTICE 2022-49 AND NOTICE 2022-50

I. Introduction

The Inflation Reduction Act of 2022, Public Law 117-169 (the "IRA"), made a number of changes to the Internal Revenue Code of 1986 (the "Code") relating to the eligibility for, and determination of, tax credits under various production tax credit ("PTC") and investment tax credit ("ITC") provisions, including the addition or modification of sections 45, 45U, 45Y, 48, and 48E.[2] Among these were provisions providing reductions of available credits in circumstances where all or a portion of the credit-eligible facility is financed in whole or in part with tax-exempt bonds.

The IRA also added section 6417, which provides that, in the case of an "applicable entity" (including, e.g., a tax-exempt organization or any State or political subdivision thereof) that makes an election under section 6417 with respect to any of the various PTCs or ITCs determined with respect to such entity, the entity is treated as having made a tax payment equal to the amount of such credit. The electing entity would then be entitled to claim a refund of the deemed payment, thereby effectively permitting the entity to "monetize" the credit.

Finally, the IRA added section 6418, which permits taxpayers not eligible to take advantage of section 6417 to transfer certain credits to third parties in exchange for a cash payment. As in the case of section 6417, section 6418 effectively permits taxpayers that might not otherwise be able to take advantage of these tax credits (e.g., because of a lack of sufficient tax liability to utilize the credit) to monetize them.

In Notices 2022-49 and 2022-50 the IRS requested comments on issues arising under the IRA changes described above. By letter of November 4, 2022, the National Association of Bond Lawyers ("NABL") submitted preliminary comments responding to these notices and undertook to follow up that submission with more detailed comments.[3] The comments below supplement the comments set forth in NABL's November 4 letter.

---

[2] All references herein to "section" are to the referenced section of the Code, and all references herein to "Treas. Reg. §" are to the Treasury Regulations as promulgated as of the date hereof.

[3] See NABL letter to Ms. Holly Porter re: "Response to IRS Notice 2022-49 and IRS Notice 2022-50" sent on November 4, 2022. Web access: https://www.nabl.org/resources/response-to-irs-requests-on-ira-implementation/

II. Comments Relating to Reduced Tax Credits When Used in Conjunction with Tax-Exempt Bonds

Determination of the Cost of the Project for PTC purposes.

Unlike the ITC, which is determined on the basis of the cost of the energy property eligible for the credit, historically it has not been necessary specifically to determine the cost of property generating PTCs, which are based on the output of the project. NABL believes that guidance should confirm that the cost determination necessary to calculate the extent of any tax-exempt financing reduction with respect to a PTC facility should be based on criteria and guidance developed in the context of ITCs.

Allocation of Bond Proceeds.

As amended by the IRA, a number of tax credit provisions, including the PTC and ITC for energy projects under sections 45 and 48, contain rules, set forth in section 45(b)(3) (which is cross-referenced by the other tax credit provisions), mandating that those credits be reduced, but not by more than 15%, by a fraction the numerator of which is the portion of the cost of the energy project financed with tax-exempt bonds and the denominator of which is the total cost of the energy project. At the same time, under the tax-exempt bond rules, the allocation of bond proceeds to expenditures is determined under specific rules prescribed for that purpose. See Treas. Reg. §§ 1.141-6 and 1.148-6. NABL believes that the existing rules for allocating tax-exempt bond proceeds should be applied when determining what portion of the cost of an energy project has been financed with tax-exempt bond proceeds.

Under Treas. Reg. § 1.148-6, an issuer may use any reasonable, consistently applied accounting method to account for expenditures of bond proceeds. Reasonable accounting methods for allocating funds from different sources to expenditures for the same governmental purpose include any of the following methods if consistently applied: a specific tracing method; a gross proceeds spent first method; a first-in, first-out method; or a ratable allocation method. An issuer may choose to make a final allocation of bond proceeds to expenditures within the time specified in the Treasury Regulations.

In many cases, issuers will specifically allocate bond proceeds to a particular facility or portion of a facility (a "discrete portion" allocation) or will allocate bond proceeds and other sources to a project on a pro rata basis. Under Treas. Reg. § 1.141-6, for purposes of the private business use rules, an issuer has the option to treat one or more facilities or capital projects (including land, buildings, equipment, or other property), collectively, as an "eligible mixed-used project." Bond proceeds and qualified equity (as defined in the Treasury Regulations) are allocated to the eligible mixed-use project on an undivided portion basis. In each bond year, qualified equity is allocated first to the private business use of the eligible mixed-use project and then to governmental use, and bond proceeds are allocated first to the governmental use and then to private business use, using the percentages of the eligible mixed-use project financed with the respective sources and the percentages of the respective uses.

Based on these principles, NABL requests guidance setting forth the following rules on these matters:

(1) Any allocation of bond proceeds made under sections 141 and 148 can be applied for purposes of the relevant tax credit provisions, including sections 45 and 48, as long as those allocations are applied consistently.

(2) For an energy project that is eligible for PTCs or ITCs and also is part of an eligible mixed-use project under Treas. Reg. § 1.141-6, the issuer may:

(a) treat the energy project as bond-financed (and therefore apply any applicable tax credit reduction), or

(b) treat all or a portion of the energy project as equity-financed if, in each year that the tax credit is claimed, there will be no nonqualified bonds of the issue if qualified equity is allocated to the energy project that is the source of the tax credit eligibility, in addition to any private business use. In effect, during the applicable PTC payout period or ITC recapture period, and solely for purposes of determining whether bond proceeds were used to pay costs of the tax credit-eligible facilities that are part of an eligible mixed-use project, the issuer may treat those facilities for purposes of Treas. Reg. § 1.141-6(b) as if they were facilities used in a private business use.

(3) The continued application of the bond allocation rules after some or all of the available tax credit has been claimed (see the Examples below and the discussion of timing issues in Part III below) will not have a negative impact on any previously claimed tax credit. In other words, after the relevant 5-year recapture period for ITCs and applicable payout period applicable to PTCs (generally 10 years), the issuer no longer needs to apply qualified equity to projects for which a relevant tax credit has been claimed.

We ask the IRS to illustrate the foregoing rules with the following examples. Moreover, if the IRS adopts rules that differ from the ones we have requested, we ask the IRS to illustrate those rules with examples as well.

Examples.

Example 1. Discrete Portion Allocation. Issuer plans a major capital improvement project (the "Project") including office buildings and improvements to its utility system. The improvements to the utility system include the installation of solar power facilities (the "Solar Facilities"). The Solar Facilities are eligible for one or more of the PTCs or ITCs that are "applicable credits" under section 6417(b). The cost of the Solar Facilities is $20,000,000, and the cost of the remainder of the Project is $80,000,000, for a total Project cost of $100,000,000.

The Project is expected to be financed with net proceeds of tax-exempt governmental bonds in the amount of $70,000,000 and qualified equity (as defined in Treas. Reg. § 1.141-6(b)(3)) in the amount of $30,000,000. For purposes of sections 141 and 148, Issuer allocates $20,000,000 in equity to the Solar Facilities, and $10,000,000 of the equity plus all $70,000,000 of the bond proceeds to the remaining portions of the Project. No bond proceeds are treated as financing the Solar Facilities. Therefore, under the rules of section 45(b)(3), there is no reduction in the amount of the tax credit.

Example 2. Undivided Portion Allocation of Eligible Mixed-Use Project. The facts are the same as *Example 1*, except Issuer elects to treat the entire Project as an eligible mixed-use project within the meaning of Treas. Reg. § 1.141-6(b)(2), and:

a. Issuer enters into an arrangement resulting in 5% (which equals $5,000,000 of the total Project cost) private business use of the Project (unrelated to the Solar Facilities) in each year during the measurement period for the bonds.

   Under Treas. Reg. §1.141-6 (as applied for purposes of section 45(b)(3)), $20,000,000 of the $30,000,000 in equity is allocated to the Solar Facilities, $5,000,000 is allocated to private business use of the Project, and the remaining $5,000,000 of the total $30,000,000 of equity is allocated to governmental use portions of the Project and is available to be allocated to additional private business use arising during the measurement period.

   No bond proceeds are allocated to the Solar Facilities or to private business use. In each year, Issuer treats the Solar Facilities as financed with equity, and, therefore, under the rules of section 45(b)(3), there is no reduction in the amount of the tax credit.

b. The facts are the same as in (a), except that there is 12% ($12,000,000) private business use of the Project (unrelated to the Solar Facilities) in each year during the measurement period for the bonds. Of the $30,000,000 of equity, $20,000,000 is allocated to the Solar Facilities, and the remaining $10,000,000 is allocated to private business use of the Project.

   Thus, $2,000,000 of bond proceeds (which equals $12,000,000 of private business use minus $10,000,000 in equity allocated to that private business use) are allocated to private business use of the Project. Accordingly, $68,000,000 of bond proceeds ($70,000,000 in total bond proceeds minus $2,000,000 of bond proceeds allocated to private business use), are allocated to governmental use of the Project. Therefore, the private business use percentage of the bonds is 2.86% ($2,000,000 divided by $70,000,000), meaning that there are no nonqualified bonds. In each year, Issuer treats the Solar Facilities as financed with the available equity. Under section 45(b)(3), there is no reduction in the amount of the tax credit.

c. The facts are the same as in (b), but in year 3 of the measurement period Issuer enters into a long-term power purchase agreement with a nongovernmental person for 50% of the output of the Solar Facilities. No private business use of the bonds results from this arrangement, because qualified equity has been allocated to the Solar Facilities.

Following the completion of the ITC recapture period or the PTC payout period, as applicable, and in accordance with Treas. Reg. § 1.141-6, qualified equity previously allocated to the Solar Facilities will be available for allocation to private business use of the Project arising thereafter, including the portion of the Solar Facilities that are treated as used in a private business use because Issuer has claimed tax credits with respect to the Solar Facilities, without affecting the previously claimed ITC or PTC.

d. The facts are the same as in (b) and (c), but, under the provisions of Treas. Reg. § 1.141-6, as applied to section 45(b)(3), on the issue date Issuer treats 100% of the Solar Facilities as bond-financed. The available tax credit will be reduced by 15%. All $30,000,000 of qualified equity is available to be allocated to private business use of the Project (including the Solar Facilities).

e. The facts are the same as in (b) and (c), but Issuer treats 10% ($2,000,000) of the Solar Facilities as bond-financed in each year. Under section 45(b)(3), the amount of the tax credit will be reduced by 10%.

f. The facts are the same as in (a), except there is 25% ($25,000,000) private business use of the Project (unrelated to the Solar Facilities) expected during the measurement period for the bonds. The $30,000,000 of qualified equity is not sufficient to cover both the cost of the Solar Facilities ($20,000,000) and the private business use of the Project ($25,000,000). The Solar Facilities cannot be treated as 100% equity-financed, because as a result bond proceeds of $15,000,000 (which equals 21.4% of the $70,000,000 bond issue) would be allocated to private business use, which would result in nonqualified bonds because the bonds would satisfy the private business use and private payment tests. Interest on the bonds therefore cannot be tax-exempt unless (i) all or a sufficient portion of the Solar Facilities are treated as bond-financed (with a corresponding reduction in the amount of the tax credit) so that sufficient equity can be allocated to private business use of the Project, or (ii) Issuer reduces the amount of private business use or increases the amount of qualified equity so that the full amount of the tax credit can be claimed.

g. The facts are the same as in (f) except that, on the issue date, Issuer reasonably expected that there would be no private business use during the measurement period for the bonds. Issuer entered into the arrangement resulting in 25% private business use 3 years after Issuer allocated equity to the Solar Facilities and claimed the full amount of an ITC applicable to the Solar Facilities.

   Issuer may choose to take a remedial action for the bonds under Treas. Reg. § 1.141-12 and continue to claim the full amount of the tax credit, or Issuer may treat the Solar Facilities as bond-financed and repay the IRS for the 15% haircut amount for the ITC.

h. The facts are the same as in (g) except that Issuer had claimed the PTC at the full rate for 3 years after the Solar Facilities were placed in service. After Issuer enters into the arrangement resulting in 25% private business use, Issuer may choose to take remedial action for the bonds under Treas. Reg. § 1.141-12 and retain (in the case of an ITC) or continue to claim (in the case of a PTC) the full credit, or Issuer may treat the Solar Facilities as bond-financed and repay the IRS for the 15% haircut amount with respect to the ITC or PTC claimed for the first 3 years, and, if claiming the PTC, reduce the available tax credit for each remaining calendar years of the payout period.

Example 3. Pro Rata Allocation. Conduit Borrower proposes to finance a portion of the cost of a project that recycles biomass into biogas, which then is further processed into biofuel. The total cost of the project is $300,000,000, of which two-thirds, or $200,000,000, would qualify for financing with tax-exempt bonds (i.e., qualified exempt facility bonds) to be issued by Conduit Issuer, which issues bonds on behalf of County, which is a political subdivision of State. Of the $200,000,000, a portion, costing $100,000,000, is energy property eligible for an ITC. Because of volume cap constraints, Conduit Issuer issues only $100,000,000 of tax-exempt bonds to finance a portion of the costs of the qualifying facilities with the rest of the financing coming from equity. For purposes of sections 142 and 148, Conduit Borrower allocates the bond proceeds ($100,000,000) pro rata to the entire qualified project cost of $200,000,000. Thus, one-half, or 50%, of the cost of the energy property portion of the project is financed with tax-exempt bonds, so the amount of the ITC is reduced by 15%.

Example 4. Discrete Portion Allocation. The facts are the same as in *Example 3*, except that the Conduit Borrower allocates all of the bond proceeds to the 50% portion of the project that is not eligible for an ITC. None of the energy project portion of the project is financed with tax-exempt bonds, so there is no reduction of the ITC.

III. Additional Comments Regarding Various Aspects of Tax Credits and Tax-Exempt Bonds

<u>Eligibility Considerations.</u>

Section 6417(d)(1)(A) provides that an "applicable entity" for purposes of electing the benefits of section 6417(a) includes "any organization exempt from the tax imposed by subtitle A," and "any State or political subdivision thereof," together with several other categories of tax-exempt entities. Section 6417(d)(3)(A)(i)(I), which sets forth the deadline for making the election under section 6417, refers to "any government, or political subdivision." Given the broad scope of these provisions, the fact that any organization exempt from tax under subtitle A is an "applicable entity", the fact that section 6417 is intended to extend the benefits of tax credits to entities that generally pay no federal income tax, and the fact that Congress gave broad authority to Treasury in section 6417(h) to write regulations or other guidance "as may be necessary to carry out the purposes" of section 6417, we request guidance to confirm that any entity that (i) is legally authorized to issue tax-exempt debt, as confirmed by decades of legal authority developed in the context of section 103, (ii) is a "governmental person" as described in Treas. Reg. § 1.141-1(b), and (iii) is going to acquire ownership for federal income tax purposes of a credit eligible facility, is an "applicable entity." This would include, for example, constituted authorities, on behalf of issuers, separately incorporated entities that are "integral parts" of a State or political subdivision thereof, so-called "63-20 corporations," and the like.

Timing Considerations.

Election Due Date. Section 6417(d)(3)(A) provides that any election under subsection 6417(a) shall be made "not later than (I) in case of any government, or political subdivision, for which no return is required . . . such date as is determined appropriate by the Secretary, or (II) in any other case, the due date (including extensions of time) for the return of tax for the taxable year in which the election is made. . . ." Given the broad scope of discretion granted to the Secretary under this provision, and the overall intent of section 6417, NABL requests guidance on this matter that provides flexible, "user-friendly" rules for making elections under this section. For example:

- An entity electing under section 6417 that is not otherwise required to file annual returns should be permitted to select a tax year that is the same as, or differs from, the entity's accounting fiscal year.

- The guidance should provide a simplified method for extending the filing deadline, comparable to the return extensions available to return filers such as section 501(c)(3) organizations.

- Flexible rules should be provided for filing amended elections.

- Under Treas. Reg. § 1.150-2, bonds may be issued to reimburse previous payments of expenditures for credit-eligible projects up to 18 months after the project is placed in service for tax purposes. This means that a PTC or ITC may be claimed before the planned issuance of bonds has occurred or in circumstances where it is not clear whether bonds will be issued. Guidance should be provided as to the procedure to follow (i) if an expected bond issue does not occur, or (ii) a full credit is claimed and there is a subsequent decision to issue bonds to finance all or part of the credit-eligible facility.

Examples.

Example 1. On November 15, 2022, School District, a political subdivision of State, contracts with Company to provide solar panels on several of School District's building sites. School District intends to claim the ITC under section 48 for the solar panel project. On February 12, 2023, the solar panels are placed in service. Although School District is exempt from paying income tax, School District determines that, for purposes of section 6417(d)(3), June 30 is the end of its tax year. Pursuant to section 6417, on July 1, 2023, School District elects, by filing a claim and requesting payment under procedures established by the Secretary, to have any applicable credit under section 48 be treated as a payment against tax imposed by subtitle A. Under section 6417(d)(3)(A) and section 6417(d)(4), School District's election is timely, and School District is eligible to receive payment of its refundable credit. In addition, School District could have waited and made the election no later than November 15, 2023 (i.e., the due date in 2023 for a tax return for an entity whose tax year ends on June 30). Further, School District could have requested payment at any time on or after July 1, 2023.

Example 2. Assume the facts are the same as *Example 1,* except that the solar panels are purchased by Nonprofit, an organization described in section 501(c)(3), for its own energy production on its buildings and its own usage. Nonprofit's timing eligibility for making an election and requesting payment is the same as School District in Example 1.

Example 3. Public Utility, during spring of 2023, places in service a qualified facility under section 45. Although Public Utility is exempt from paying income tax, Public Utility determines that, for purposes of section 6417(d)(3), December 31 is the end of its tax year. Pursuant to section 6417, Public Utility elects, on January 1, 2024, by filing a return and requesting payment under procedures established by the Secretary, to have any applicable credit under section 45 be treated as a payment against tax imposed by Subtitle A. Under sections 6417(d)(3)(A) and 6417(d)(4), Public Utility's election is timely, and Public Utility is eligible to begin receiving its refundable credit. Public Utility may receive its annual refundable credit, pursuant to section 45, applicable to the credit period, by filing an annual return and requesting payment, as the Secretary has so provided, on or after January 1 of each year during the applicable period under section 45.

Tax Character of Payments Under Sections 6417 and 6418.

Section 3.3 of Notice 2009-26, which provided guidance relating to the issuance of Build America Bonds (Direct Pay), provided that "in general, the refundable credits for Build America Bonds under section 6431 are payments that are treated as overpayments of tax." NABL asks the IRS to apply the same principles to refunds of the deemed tax payments provided by section 6417. In other words, conceptually, the refund of the deemed payment is a return of the issuer's funds. Accordingly:

- Guidance should confirm that tax credit "refunds" attributable to tax-exempt bond financed property under section 6417 are not treated as gross proceeds of the bonds (e.g., as either replacement proceeds or disposition proceeds of the bonds). Specifically, guidance should provide that payments received under section 6417 have no nexus to a bond issue unless the payments are applied in a manner that results in replacement proceeds of the bond issue under section 148 (e.g., by pledging the payments received to pay debt service on the bonds). Furthermore, Congress intended to treat the monetization of the tax credits under section 6417 as a non-taxable event. Thus, for example, Congress has required that the cash consideration paid in exchange for the tax credits under section 6418 is neither taxable to the payee nor deductible to the payor. By analogy, the direct payment under section 6417 should not be treated as gross proceeds of the bonds.

- Guidance should confirm that any tax credit payments pledged as a source of repayment for tax-advantaged bonds will not result in a "federal guarantee" within the meaning of section 149.

Effect of Basis Reduction Rule.

Section 6417(g) provides as follows:

> (g) Basis reduction and recapture. Except as otherwise provided in subsection (c)(2)(A) [*sic – apparently this is intended as a reference to section 6417(d)(2)(A)*], rules similar to the rules of section 50 shall apply for purposes of this section.

Section 50(c) provides that, in the case of any ITC allowed for energy property, the cost basis of the property will be reduced by an amount equal to 50% of the tax credit taken into account. Consistent with the concept developed in Notice 2009-26, discussed above, guidance should confirm that this reduction should not be treated as a reduction of the cost of the financed assets and thus does not affect the determination of the allocation of bond proceeds.

Appendix 1
NABL Working Group Members

Charles ("Charlie") Henck - *Chair*
Ballard Spahr LLP
Washington, DC

Alison Benge
Pacifica Law Group LLP
Seattle, WA

Eorl Carlson
Jones Hall, APLC
San Francisco, CA

Brandon Caywood
Gust Rosenfield P.L.C.
Phoenix, AZ

Jillian Christiansen
Kutak Rock LLP
Denver, CO

Louis Couture
Saul Ewing Arnstein and Lehr
Philadelphia, PA

Matthias Edrich
Kutak Rock LLP
Denver, CO

Timothy Horstmann
McNees Wallace & Nurick LLC
Harrisburg, PA

John Hutchinson
Nixon Peabody LLP
New York, NY

Christi Jacobsen
Hillis Clark Martin & Peterson P.S.
Seattle, WA

Martye Kendrick
Greenberg Traurig, LLP
Houston, TX

Peter Lam
Holland & Knight LLP
New York, NY

Carol Lew
Stradling Yocca Carlson & Rauth
Newport Beach, CA

Brian Teaff
Bracewell LLP
Houston, TX

M. Elizabeth Walker
Hall, Render, Killian, Heath & Lyman, P.C.
Indianapolis, IN