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Submitted via electronic mail

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RE: Request for Guidance under I.R.C. § 141 Relating to Application of Private Business Use Rules to Modern Technologies

Dear Mr. Bessent, Mr. Salinger, and Mr. Kies:

The National Association of Bond Lawyers ("NABL") respectfully submits the attached request for guidance concerning the application of the private business use rules of Section 141 of the Internal Revenue Code of 1986 ("Code") to uses of bond-financed facilities involving modern technologies.

Section 141 of the Code limits the amount of proceeds of tax-advantaged bonds that may be used in the trade or business of persons other than governmental units. We believe additional guidance under Section 141 would provide much needed clarity and would promote uniformity in the application of the private business use rules with respect to incidental, remote, and tenuous use. The need for guidance is partially due to changes in technology and to market mechanisms that were not contemplated when the existing guidance was issued. Examples include technologies such as wireless network technologies (such as 5G networks) and electric vehicle charging stations. In the enclosed comments, we request clarifications to the existing incidental use exceptions to private business use as well as exemptions for certain uses. 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 over 2,000 lawyers and public finance professionals 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 with you the enclosed comments to improve the application of Section 141 to modern technologies.

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,

M. Jason Akers
President
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CC:

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NATIONAL ASSOCIATION OF BOND LAWYERS
REQUEST FOR GUIDANCE UNDER SECTION 141 RELATING TO
INCIDENTAL USE EXCEPTIONS TO PRIVATE BUSINESS USE RULES

I. INTRODUCTION

The Code and Title 26 of the Code of Federal Regulations ("Treasury Regulations") limit the amount of non-governmental use (generally referred to as "private business use") that may be financed with proceeds of tax-advantaged bonds, including governmental bonds and qualified 501(c)(3) bonds. The Treasury Regulations and other guidance provide exceptions for certain incidental, remote or tenuous use of bond-financed projects (referred to herein as a "Project" or "Projects"). We believe that additional guidance, such as an Internal Revenue Service ("IRS") notice, with respect to incidental, remote, and tenuous use is warranted. For some types of physical nonpossessory use, the existing Incidental Use Exception (defined below) provides the framework for quantifying such costs; however, we request a clarification that the Incidental Use Exception applies to and should be measured with respect to usable square footage of a Project. For nonpossessory arrangements not meeting the Incidental Use Exception, we request guidance as to the scope of the exceptions to private business use. Inclusion in such a notice of examples for the evolving technology and other uses described herein would be beneficial.

II. SUMMARY

A. Existing Guidance

Treasury Regulation 1.141-3(b) describes a variety of arrangements that may convey special legal entitlements to a Nongovernmental Person[1] resulting in private business use of a Project. These arrangements can involve both actual and beneficial use. Actual physical use of a Project by Nongovernmental Persons in a trade or business is generally considered private business use unless an exception applies. Output contracts, as described in Treasury Regulation 1.141-7, are an example of nonpossessory beneficial use that may result in private business use of a Project. As described in the examples in Treasury Regulation 1.141-3(f), private business use can also result from nonpossessory beneficial use such as rights to control use of the Project (example 5) or from a special economic benefit that may result from physical proximity and functional relationship of the Nongovernmental Person's facility to the Project (examples 6 and 7).

Treasury Regulation 1.141-3(d)(5) sets forth an exception to private use for certain physical, nonpossessory uses so long as certain elements are met ("Incidental Use Exception"). The Incidental Use Exception provides illustrations of certain types of nonpossessory uses that are deemed "incidental" (e.g., pay phones, vending machines, television cameras for use for broadcasting proceedings or events at the facility, or certain advertising displays). For the

[1] As used herein, "Nongovernmental Person" means any private person or entity other than state or local governmental entities (or 501(c)(3) organizations with respect to qualified 501(c)(3) bonds) or members of the public generally.

Incidental Use Exception to apply, nonpossessory uses of the facility cannot, in the aggregate, involve the use of more than 2.5 percent of the facility ("2.5% Limit").

As described herein, existing guidance from the legislative history to the predecessor to Section 147(e) of the Code (i.e., § 103(b)(18) of the Internal Revenue Code of 1954) ("1984 Legislative History") support an issuer's ability to structure financings to exclude certain components or facilities from a Project. As a result, any use of the excluded facilities is not treated as private business use of the bond proceeds. In addition, the 1984 Legislative History and various private letter rulings support the position that where costs are not specifically incurred for the benefit of a Nongovernmental Person and do not result in the increased cost of a Project, then no private business use of the Project should result. In many of the examples of use described herein, and in cases where the uses described herein arise long after the original tax-exempt financing of the Project (such that the Project was not undertaken with a view toward such use), the use does not result in increased costs of the Project and the Project is not undertaken specifically to accommodate such use, the 1984 Legislative History and private letter rulings should be instructive as to whether private business use results. The size and the scope of these Projects are determined in a manner to accomplish the governmental or 501(c)(3) purpose of the Projects and without regard to the use that may result by third parties as described herein, and as a result, no private business use should result.

As noted above, nonpossessory beneficial use may result in private business use of a Project. However, there is little formal guidance with respect to private business use arising from contractual arrangements other than management contracts and output contracts. Example 5 in Treasury Regulation 1.141-3(f) and certain private letter rulings conclude that a contractual right to control the operation and use of a Project will give rise to private business use. Other private letter rulings conclude that benefits received by a third party were incidental or too remote to provide special legal entitlements and did not result in private business use. In addition, Treasury Regulation 1.141-3(b)(4)(iii)(A) describes certain incidental service contracts that do not create private business use.

B. Guidance Requested

We request guidance under Section 141 of the Code and the related Treasury Regulations with respect to (a) application of the Incidental Use Exception and (b) certain nonpossessory uses relating to bond-financed facilities. Because the relevant private letter rulings are limited to specific fact patterns (where relevant facts may be redacted) and may be relied upon only by the requesting taxpayer, more broadly applicable and reliable guidance would provide much needed clarity and would promote uniformity in the application of the private business use rules.

With respect to the Incidental Use Exception, we request guidance that the 2.5% Limit is applied only to square footage within the measurable floor footprint of facilities within a Project or specifically assignable outdoor space.[2] Nonpossessory uses of non-assignable space, such as installations on rooftops, sides of buildings, airspace above a Project, advertising on wall space, wiring within facility walls or underground at or near a Project, are not included in the

[2] Such outdoor space is central to Project use and is assignable, such as outdoor parking lots, amphitheaters, park shelters, or athletic fields.

measurement of the 2.5% Limit. Other square footage outside the floor footprint and not measured in the 2.5% Limit would include public sidewalks and streets and open space not otherwise assignable for other purposes.

We recognize that private use of facilities or assets ("Ancillary Facilities") located on or adjacent to a Project and not measured as part of the 2.5% Limit may result in private business use in some circumstances. We request clarifying guidance that private use of Ancillary Facilities does not result in private business use of the Project if: (1) the Project was constructed for governmental or public use, (2) establishment of the Ancillary Facilities was not a primary purpose of the Project, (3) no incremental costs were incurred with respect to the Project solely to support the Ancillary Facilities, (4) no private user of Ancillary Facilities has significant control rights over the use and management of the Project[3], and (5) use of the Ancillary Facilities does not impede the governmental or public use of the Project. Examples of such Ancillary Facilities include solar panels installed on the roof of a governmental administration building or EV chargers installed on public sidewalks or streets.

We request guidance that is consistent with prior private letter rulings[4] setting forth some examples of incidental use or benefits (together, "Ancillary Arrangements") relating to a Project that do not result in private business use. Ancillary Arrangements may include contracts relating to broadcast rights, marketing contracts, merchandising or pouring rights, and the transfer of saleable credits (like renewable energy credits) generated by a Project. None of the Ancillary Arrangements restrict the issuer's use or operation of the Project or provide priority rights to use the Project to a Nongovernmental Person. Although a Nongovernmental Person may receive an economic benefit from such Ancillary Arrangements, the benefit is too remote or tenuous to rise to the level of a special legal entitlement. Any physical use of the Project related to an Ancillary Arrangement, such as storage space, would be analyzed separately.

We believe the requested guidance is consistent with the legislative history and previous private letter rulings, and the exceptions should apply both in connection with newly financed projects and existing projects financed by tax-advantaged bonds.

III. 2.5% INCIDENTAL USE EXCEPTION: TANGIBLE USES

As noted above, Treasury Regulation 1.141-3 sets forth an Incidental Use Exception to private use for certain physical, nonpossessory uses of Projects so long as certain elements are met. A small amount of the Project space may be allocable to the nonpossessory use, but the Incidental Use Exception allows issuers[5] to exclude such use when calculating the private business use allocable to the bonds. The Incidental Use Exception has been helpful for issuers to utilize their

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[3] Private users may have limited access rights to the Project, such as licenses to install and maintain the Ancillary Facilities.

[4] Including PLR 200323006, PLR 201049003, PLR 200336001, PLR 200915002, and PLR 201037006 described herein.

[5] When used herein, "issuer" or "governmental issuer" can also refer to 501(c)(3) conduit borrowers of bonds under Section 145 of the Code.

facilities and improvements in ways that benefit the governmental or public purposes of a Project or further public policy initiatives of the issuer.

A. Existing Guidance

Treasury Regulation 1.141-3(d)(5)

The Incidental Use Exception in Treasury Regulation 1.141-3(d)(5) provides that "incidental uses" are disregarded for purposes of applying the private trade or business use limitations of the Code to tax-advantaged bonds. The elements of this exception are as follows:

(i) Use of a facility by a Nongovernmental Person is incidental if:

(A) Except for vending machines, pay phones, kiosks, and similar uses, the use does not involve the transfer to the Nongovernmental Person of possession and control of the space that is separated from other areas of the facility by walls, partitions, or other physical barriers, such as a night gate affixed to a structural component of a building ("nonpossessory use");

(B) The nonpossessory use is not functionally related to any other use of the facility by the same person (other than a different nonpossessory use); and

(C) All nonpossessory uses of the facility do not, in the aggregate, involve the use of more than 2.5 percent of the facility.

(ii) Illustrations. Incidental uses may include pay telephones, vending machines, advertising displays, and use for television cameras, but incidental uses may not include output purchases.

PLR 201049003 – Broadcast Rights Ruling

In this ruling, the IRS considered a contract between a governmental entity and a Nongovernmental Person relating to multimedia rights at a sporting venue. These rights generally included (1) radio broadcast and telecast rights, (2) advertising sales and corporate sponsorship program rights, and (3) publishing and vending rights. Certain tangible uses of the space were analyzed under the Incidental Use Exception. The IRS said: "The use of television cameras and advertising displays are specifically mentioned as examples of an incidental use in § 1.141-3(d)(5), as are kiosks. Corporation's use of broadcast equipment and temporary vendor booths are similar to these examples. It broadcasts from the press room with many other broadcasters or courtside. The promotional activities and announcements occur during the games and involve no physical barriers." Based on representations of the issuer, the IRS determined that the uses were within the 2.5% Limit and that no private use was allocable to the bonds; however, there was no additional discussion of the measurement of the 2.5% Limit.

B. Application

The Incidental Use Exception provides illustrations of certain types of nonpossessory uses that are deemed "incidental." The illustrations include tangible, physical uses of the Project that do not interfere with or impede the proper functioning of the Project.[6] These uses usually occur under easements, licenses or other similar arrangements.

While the Incidental Use Exception is useful, limited interpretative guidance is available to determine a reasonable methodology to calculate use for purposes of the 2.5% Limit. Often nonpossessory uses that may qualify for the Incidental Use Exception utilize a portion of a Project that may be required because of the nature of the Project but is not within the floor footprint or otherwise usable space. These nonpossessory uses may occupy areas within interior walls, on sides of buildings, on rooftops, underground space, or airspace above a Project. A significant challenge arises when trying to compare the portion of the Project used by the nonpossessory use with the usable portions of the Project and thereby arriving at the percentage of use for the 2.5% Limit. We have provided examples below.

Technology Infrastructure

As a result of the emergence and development of enhanced wireless networks (such as 5G networks), fiberoptic and telecommunications networks, private entities may request a license or other similar arrangement with an issuer to install infrastructure on or adjacent to a Project. For example, fiberoptic conduit may be buried on land adjacent to a highway or public roadway that was all financed with proceeds of bonds. The adjacent land is a necessary cost of the overall Project for safety purposes, establishing a shoulder and a buffer between the highway and other privately owned property or pedestrian improvements. None of the costs were incurred to enable installation of the privately owned infrastructure. Further examples include the attachment of wireless equipment and antennas to bond-financed utility poles, the placement of cell towers and other telecommunications equipment on the roof of a Project, or fiberoptic and other networking conduit within the walls of a Project. The private user enters into an easement, license, or similar arrangement to install the infrastructure and may have certain limited and immaterial access rights to the Project, but none of the Project's floor footprint is used and the governmental or public use of the Project would not be impacted.

We note that the dimensions and costs of certain facilities (e.g., utility poles and cables) are established by reference to standards applicable and customary in the particular industry and are built to such specifications solely to comply with or accommodate the public purpose of the Project. No additional costs of the Project are usually incurred to enable the addition of privately owned equipment, antennas, or wiring to these facilities.

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[6] In PLR 200323006 ("Naming Rights Ruling"), the IRS suggested that the Incidental Use Exception might, in some circumstances, apply to certain non-physical special legal entitlements resulting from control rights over a Project. If the Incidental Use Exception applied, the IRS determined that the 2.5% Limit could be measured based on proportionate benefit of the parties to use of the Project. The examples herein and the request for guidance in this section apply solely to physical use but are not intended to preclude application of the Incidental Use Exception to special legal entitlements or other non-physical private use of a Project.

Solar Panels

A long-standing concern exists regarding private business use as a consequence of the installation of solar panels or arrays on Projects. Private entities often contract with beneficiaries of bonds to place solar panels on building exteriors, frequently on the roof, and on canopies over parking areas. The cost of constructing such building exteriors or parking areas, which are otherwise necessary to carry out the public purpose of the Project, is generally not impacted by the solar panels. These areas are generally used only for building systems if used at all. Solar panels can also be directly mounted on the ground adjacent to road improvements or around Projects that may have open areas because of the nature of the Project, such as open space needed around wastewater facilities or secure areas around prisons or other secure facilities. The solar panels occupy space that is not otherwise usable and are placed in these locations specifically because they will not impact the intended governmental or public use of the Project.

Grazing, Hunting, or Trapping Rights

As described under "Solar Panels" above, Projects may include unused land as open space because of the nature of the facility. In some cases, an issuer may provide a private user or users with permits to graze livestock, to hunt, or to trap animals on the bond-financed open space. These arrangements are generally mutually beneficial, and the permitted use provides a habitat and wildlife management service with respect to the otherwise unused land. Although the open space is a necessary part of the Project, it is ancillary to the primary governmental purposes of the Project (e.g., the wastewater facilities or prison). The permitted use of the land does not interfere with the intended governmental use or operation of the Project and does not increase the cost of the Project.

EV Chargers

As electric vehicles become more common and the shift to zero emission vehicles continues, governmental issuers have installed or may install electric vehicle ("EV") chargers in their Projects. In some cases, these EV chargers may be owned by private users. Most arrangements for EV chargers installed within a Project, like a bond-financed parking garage, are analogous to the pay phones and vending machines included in the Incidental Use Exception and are not possessory use. They are installed for the benefit of the general public using the parking spaces.[7] We believe, in this case, that nonpossessory use can be measured under the 2.5% Limit based on the footprint taken up by such EV chargers within the usable square footage of the Project. In other instances, the measurement of the 2.5% Limit proves more difficult to quantify. EV chargers may be affixed to an exterior wall of a Project that is not part of the interior usable square footage or installed on public streets or sidewalks financed with tax-advantaged bonds. In these instances, it can be challenging to determine to which portion of the Project the EV charger use should be compared (e.g., the entirety of the sidewalks and streets, areas of the sidewalk or streets used by pedestrians and vehicles, or just areas used by vehicles).

C. Guidance Requested

The tangible nonpossessory uses described above (i) do not occupy usable square footage of the Project or (ii) lack the adequate methodology measure for purposes of the 2.5% Limit because of the nature and location of the space they occupy. In contrast to an interior office lease (typically analyzed under the discrete portion methodology), or a naming rights contract (see, e.g., the Naming Rights Ruling) involving nonphysical control rights, such usage does not implicate any space potentially usable for other purposes. In addition, the uses do not interfere with the governmental or public use of the Project and, in fact, may provide services to the general public using the Project or further a policy objective of the issuer. We believe these types of uses should be excluded from calculation of the 2.5% Limit.[8] For purposes of applying the Incidental Use Exception, measurement of the 2.5% Limit should include only those uses that utilize or impact of the floor footprint of the Project that is actually usable for governmental or public uses. Uses of space outside the floor footprint of the Project for nonpossessory uses like those described above, such as installations on rooftops, sides of buildings, airspace above a Project, advertising on wall space, wiring within facility walls, underground at or near Project, or open space not otherwise usable for other purposes and not acquired for the purpose of such use by a Nongovernmental Person, should not be included in the measurement of the 2.5% Limit.

As described below, the IRS has provided and approved of other methods for analyzing the private use, if any, resulting from nonpossessory or intangible arrangements outside the 2.5% Limit in the Incidental Use Exception.

IV. ANCILLARY FACILITIES

It has been long established that issuers may structure financings to exclude certain components or facilities from the Project. As a result, any use of the excluded components (as described below, Ancillary Facilities) is not treated as private business use of the bond proceeds. As set forth below, this basic tenet is set forth in the legislative history, several private letter rulings, and Treasury Regulation 1.141-6. In addition, the legislative history, as well as various private letter rulings, support the position that where costs are not specifically incurred for the benefit of a private business use and do not result in the increased cost of the Project (*i.e.,* the "normal" cost does not change irrespective of the use), then no private business use should result.

A. Existing Guidance

Legislative History

Applicable legislative history from 1984 prohibiting the use of industrial development bonds ("IDBs") to finance skyboxes and luxury boxes provides the following:

> In the case of skyboxes or other private luxury boxes, the committee does not intend to prohibit the use of IDBs to finance the construction, renovation or refurbishing of a facility solely because

[8] The proposed exclusion is not intended to cover the use of bond proceeds to incremental costs, if any, incurred solely to enable the nonpossessory use.

> skyboxes are included in the project, so long as the project otherwise qualifies for tax-exempt financing. Rather, no portion of the proceeds of the IDB may be used to provide any skybox. For this purpose, the skybox shall be deemed to include the interior furnishing of the box (e.g., the box's plumbing, electrical and decorating costs) and the structural components required for the box (e.g., the box's walls, ceilings, special enclosures), but does not include the normal components of the stadium, such as structural supports, to the extent they would have been required for the remaining portion of the stadium if no skyboxes (and no regular seats in lieu of skyboxes) had been built.[9]

PLR 200441025 – Parking Ramp Ruling

In this ruling, the IRS considered a City's mixed-use project involving retail facilities, a parking facility that served both public and private purposes and a roof deck that was to be used to support a privately owned and operated condominium project. Citing the 1984 Legislative History, the IRS determined, in relevant part, that if all the costs of constructing the roof deck, including costs of the structural components of the parking ramp that are required solely because of the location of the roof deck, were paid with monies other than the proceeds of the City's tax-advantaged bonds, such bonds could be properly issued to pay the remaining eligible costs of the parking ramp.

PLR 201847001 – Wineshop Ruling.

This ruling presented a situation involving the demolition and reconstruction of a boarding area in an airport facility, and the basis for allocating the issuer's equity contribution and proceeds of its private activity bonds to the costs of the project based on the expectation that "retail locations the principal business is which is the sale of alcoholic beverages for consumption off premises," within the meaning of Section 147(e) of the Code, would be included in the project. The IRS cited the 1984 Legislative History in support of its conclusion that the issuer could apply a reasonable allocation method to avoid using tax-advantaged bond proceeds for those project costs that were not eligible to be financed on a tax-exempt basis, while still being able to finance eligible project costs with the proceeds of such bonds, and that the two sources of funding would be allocated on a floating basis to the qualified and non-qualified portions of the project over the life of the bonds.

Treasury Regulation 1.141-3(b)(7)(ii)

In the case of property that is not available for use by the general public, private business use may result if a Nongovernmental Person has a "special economic benefit," even if the Nongovernmental Person does not have special legal entitlement to the use of the Project. Treasury Regulation 1.141-3(b)(7)(ii) enumerates factors to be considered when assessing whether a use of a facility may be considered a "special economic benefit" under all the facts and circumstances:

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9 The Supplemental Report of the Committee on Ways and Means of the U.S. House of Representatives on H.R. 4170, H. Rep. No. 98-432 (Part 2), at 1693 (1984).

(i) Whether the financed property is functionally related or physically proximate to property used in the trade or business of the Nongovernmental Person;

(ii) Whether only a small number of Nongovernmental Persons receive the special economic benefit; and

(iii) Whether the cost of the financed property is treated as depreciable by any Nongovernmental Person.

See, also, Example 7 in Treasury Regulation 1.141-3(f).

B. Application

Solar panels, EV chargers, and technology infrastructure described in Part III above are all examples of Ancillary Facilities located on or adjacent to a Project. In these fact patterns, there is a Project financed with tax-exempt bond proceeds for governmental purposes, and Ancillary Facilities located on or adjacent to the Project. The Ancillary Facilities are not allocable to bond proceeds either because they have been excluded from the Project (as defined in Treasury Regulation 1.141-6(a)(3)) or because qualified equity of the eligible mixed-use project (as defined in Treasury Regulation 1.141-6(b)) can be allocated to the facilities. Although a Nongovernmental Person may receive an economic benefit from the use of the Ancillary Facilities, establishment of the Ancillary Facilities was not a primary purpose of construction of the Project. The Project does not include any incremental costs incurred solely to support the Ancillary Facilities.[10] Any private user of Ancillary Facilities has no control rights over the Project and use of the Ancillary Facilities does not impede the governmental or public use of the Project. None of the Ancillary Facilities are located on otherwise usable square footage within a Project, and the Incidental Use Exception is not readily applicable.

C. Guidance Requested

We request guidance that any private business use arrangement with respect to Ancillary Facilities does not give rise to a private business use of the Project Facilities if: (1) the Project was constructed for governmental or public use, (2) establishment of the Ancillary Facilities was not a primary purpose of the Project, (3) no incremental costs were incurred with respect to the Project solely to support the Ancillary Facilities, (4) no private user of Ancillary Facilities has significant control rights over the use and management of the Project, and (5) use of the Ancillary Facilities does not impede the governmental or public use of the Project.

We believe this approach is consistent with the legislative history and private letter rulings described above and that these arrangements do not transfer any part of the benefit of the tax-exempt financing to the private entity. See, e.g., Treasury Regulation 1.141-2(a). The facts in each of the fact patterns are clearly distinguishable from Example 7 in Treasury Regulation 1.141-3(f), which describes private use of a bond-financed pollution control facility that was not available for public use and was expected to be solely used in connection with the nearby factory. In that case,

[10] As described in the skybox example in the 1984 Legislative History, costs of structural components or other features required for the Ancillary Facilities would be part of the Ancillary Facilities and excluded from the Project.

establishment of the Ancillary Facilities was a primary purpose of the Project. The Project was not available for public use and did not have a governmental use separate to the pollution control for the private factory.

V. ANCILLARY RIGHTS AND ARRANGEMENTS

The IRS has analyzed potential private business use in situations not involving physical use of a Project by a Nongovernmental Person but rather beneficial use through certain contractual arrangements. Possession or physical use is not necessary to a finding of private business use when there is significant control of the Project (or its output) resulting in a special legal entitlement or special economic benefit (for Projects not available for public use). In instances where a Nongovernmental Person does not have direct or indirect control of operations of a Project and rights or benefits to a third party have been determined to be too remote or tenuous to provide special legal entitlements, the IRS has held such Ancillary Arrangements do not result in private business use.

A. Existing Guidance

PLR 200323006 – Naming Rights Ruling

In this ruling, a city sold naming rights with respect to a governmental stadium to a private party ("Naming Party") for a term of years. The IRS noted that the naming rights contract did not involve the transfer to the Naming Party of possession of space that is separated from other areas of the facility by walls, partitions, or other physical barriers (analogizing to the Incidental Use Exception) and did not rise to the level of a management contract. However, the contract did give the Naming Party control over elements of how the facility was operated, and such control was found to be significant enough to result in private business use. The IRS noted: "Certain rights are inherent in an asset. In the example[11], this includes the right to control the parking rates. In the case at hand, it is the right to the name of the Facility and control over its use."

PLR 201049003 – Broadcast Rights Ruling

In this ruling, a governmental entity granted rights to the airing, distribution, and syndication and the sale of the advertisements to be aired during certain sporting events ("broadcast rights") occurring at a bond-financed arena. The IRS concluded that while the broadcast rights constituted a valuable, intangible legal entitlement, the value of such intangible rights was too remote to be considered a use of such facilities, since the rights did not give the private entity any control over the teams, ticket sales, security, personnel management, or general management of the facilities. The agreement also gave the private entity rights to certain tangible

[11] Example 5 in Treasury Regulation 1.141-3(f).

uses of the bond financed facilities, and the IRS analyzed those rights under the Incidental Use Exception as described above.

PLR 200336001 – Cable Programming Ruling

In this ruling, an educational governmental entity entered into an agreement with a for-profit cable programming provider, allocating one digital cable channel for governmental entity programming distribution. Under the agreement, the Provider distributed the programming at no cost to the governmental entity, and subscribers could access the channel through their digital cable packages without additional fees. The Provider retained all subscription fees. The governmental entity maintained complete control over the programming, including editorial content, scheduling, and production. The agreement allowed the governmental entity to distribute programming through other cable companies or broadcasters. The governmental entity programming transferred to the provider through equipment owned by the provider located at a studio owned by the District. The studio was not financed with tax-exempt bonds. The IRS concluded that the arrangement did not result in private business use of governmental entity facilities that produced the programming, citing the provider's lack of legal entitlement to facilities, lack of control over the programming, no depreciation of facility costs, and minimal anticipated economic benefit from the arrangement.

PLR 200915002 – Renewable Energy Credits #1 Ruling

In this ruling, the governmental owner of an existing generating unit wished to sell renewable energy credits ("RECs") that resulted from increased nameplate capacity where bond proceeds were spent to replace or rehabilitate the existing units. Under the contract, the purchaser was required to purchase the lesser of the stated amount of RECs or all the RECs associated with the improvements. The purchaser was not entitled to purchase any electric energy from the facility or to have any control over the facility, its operations or any decision regarding how or whether to operate or maintain the facility. In addition, the governmental entity was under no obligation to produce any renewable electricity or to operate the facility at all or at any particular level. As the purchaser had no rights to any of the output of the facility or to exercise any control over the facility, the sale of the RECs did not result in a private business use.

PLR 201037006 – Renewable Energy Credits #2 Ruling

This ruling addressed a governmentally owned wind power generating facility the operation of which also gave rise to RECs that the governmental owner of the facility desired to sell to a private entity. The IRS recognized that while "RECs are measured based in the quantity of renewable energy generated, RECs do not increase or otherwise impact the nameplate capacity of a generation facility, and the sale of RECs does not affect the units of electricity that may be sold or entitle a purchaser of RECs to any capacity of the generators. Thus . . . RECs are not output for purposes of [the Code]." In this ruling, although the governmental owner did have some liability to the private entity for failure to deliver the specified amount of RECs, the IRS concluded that "these provisions [did] not rise to the level of control over the facility or its operations;" consequently, the arrangement did not give rise to a private business use.

B. Application

Pouring and Merchandising Rights

Pouring rights contracts ("PRCs") give a beverage company exclusive rights to sell and market beverages in an institutional setting, such as a university, or at a specific venue, such as a performing arts center, in exchange for payments. Similarly, a university or other issuer may enter into merchandising contracts giving an apparel brand exclusive rights to design and market apparel. Teams are required to wear the branded apparel, with the primary benefit to the sponsor being media exposure for the brand. The Nongovernmental Person may also have certain marketing rights, such as calling itself an official sponsor. However, the Nongovernmental Person does not have broad control rights, such as general operations or pricing with respect to the Project.[12] These arrangements may also include tangible rights with respect to a Project. For example, PRCs may require branded vending machines and branded menus, cups, and dispensing valves, and merchandising contracts may involve sale of products and advertising displays at the Project.

Assets Generating Saleable Credits

Saleable offset or credit (collectively, "Saleable Credits") programs, like the REC programs described in the rulings above, provide a mechanism for entities (public, private or individual) to comply with governmental requirements or to meet voluntary environmental goals. Generally speaking, the programs create markets in various environmental attributes that are generated in one location (e.g., at a Project) and can be sold to entities having no involvement with or physical proximity to the generating Project. Existing Saleable Credit programs include the carbon offset and carbon credit markets and the establishment of wetlands mitigation banks.

Carbon offsets are generated based on the carbon sequestration realized from projects including reforestation and conservation and landfill gas capture. Tree planting projects can frequently participate in the carbon offset market. Under some models, an issuer might commit to participate in a carbon credit program for a long-term period over which period the project generates carbon credits. The issuer would agree to plant a certain number of trees and to monitor such trees over the life of the program for health and is generally in charge of maintenance and cost of upkeep. Third parties may broker the sales of the credits over a short or long-term basis or the sponsor may sell the credits directly to third parties.

The wetland mitigation banking program is designed to preserve and restore natural habitats and aquatic resources using a system of debits and credits. When a wetlands mitigation bank is created, the landowner retains ownership and use of the property, and a conservation easement is placed on the property to protect its status as a wetland to generate future Saleable Credits and to prevent incompatible activities on the property. The property is then improved and restored to make it a wetland. The credits generated may be sold on a short-term or long-term basis through a broker or directly to third parties that buy the credits to offset "mitigation debits"

[12] If a Nongovernmental Person has a "bundle" of rights beyond standard pouring or merchandising rights, then an analysis similar to the Naming Rights Ruling may be needed.

resulting from commercial projects that have a negative environmental impact or the conversion of wetlands to agricultural uses.

Saleable Credits may be generated at utility plants or on land owned by an issuer and held as open space for conservation or other purposes. As the Saleable Credit market evolves and expands, other types of bond-financed facilities may be capable of generating Saleable Credits and similar transferable assets.

C. Guidance Requested

Exclusivity and Similar Arrangements

As described above, Ancillary Arrangements with respect to broadcast rights, cable programming, marketing, merchandising and pouring rights contracts may involve both (a) an intangible legal entitlement and (b) limited tangible rights with respect to a Project. We believe the intangible legal entitlements with respect to such arrangements, although they may be valuable to the providers, are too remote or tenuous to be treated as "use" of the Project. These legal entitlements may include limited control rights with respect to certain aspects of the Project, but do not include the sorts of inherent rights implicated in the Naming Rights Ruling or examples given in the Regulations.[13] We request guidance that intangible rights in Ancillary Arrangements, such as in the examples above, do not result in private business use of a Project. As described in the Broadcast Rights Ruling, any tangible rights with respect to the Project would be analyzed separately for compliance with the Incidental Use Exception.

Saleable Credits

Saleable Credits are a type of Ancillary Arrangement and are generally generated with respect to a Project acquired or constructed by the issuer for other purposes, such as solar panels built to generate energy for the issuer's residential and commercial customers or open space acquired for general conservation purposes. The purchasers of Saleable Credits usually have no connection to the Project and are not located on or in close proximity to the Project site. As long as (a) the Project was not acquired or constructed for the principal purpose of providing Saleable Credits to a particular Nongovernmental Person, (b) no purchaser that is a Nongovernmental Person has control rights over use of the Project[14], and (c) the issuer does not have any obligation to any purchaser that is a Nongovernmental Person to produce Saleable Credits at the Project, we believe that no purchaser of Saleable Credits has a special legal entitlement with respect to the Project. We agree with the IRS position in the renewable energy certificate rulings referenced above that the RECs should not be treated as output of the Project and request guidance to that effect for all Saleable Credits. We request guidance that the production and sale of Saleable Credits

[13] Examples include control over rates or pricing, control over the general nature and type of use of the Project, or priority rights to use or capacity of the Project.

[14] In some cases, Saleable Credit programs may involve long-term easements or arrangements relating to the Project. This guidance request assumes such arrangements are not with the purchasers of the Saleable Credits and would be analyzed separately.

to Nongovernmental Persons, subject to the conditions described above, is too remote and tenuous to constitute use of a Project.

VI. CONCLUSION

We request written guidance, preferably in the form of a notice, under Section 141 of the Code and the related Treasury Regulations, with respect to application of the Incidental Use Exception and other exceptions for certain nonpossessory uses of bond-financed facilities. As described hereinabove, we request a clarification that the Incidental Use Exception applies to and should be measured with respect to usable square footage of a Project. For nonpossessory arrangements not meeting the Incidental Use Exception, we request guidance clarifying the scope of certain exceptions to private business use. Inclusion in the notice of examples relating to the evolving technology and other uses described herein would be helpful. We believe the requested guidance is consistent with legislative history and previous private letter rulings, and the exceptions should apply both in connection with newly financed projects and existing projects financed by tax-advantaged bonds.

* * *

Appendix I
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