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RE: Proposed Regulations Concerning Guidance on Tax-Exempt Refunding Bonds and Allocation and Accounting Rules [REG-117298-21]

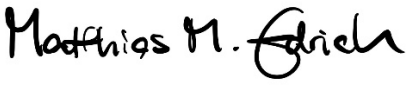
Dear Mr. Bessent, Mr. Kies, and Mr. Salinger:

The National Association of Bond Lawyers ("NABL") respectfully submits the attached comments to the proposed regulations published in 91 Fed. Reg. 12118 (Mar. 12, 2026) titled "Guidance on Tax-Exempt Refunding Bonds." The comment focuses particularly on Paragraph 7 affecting the general allocation and accounting rules contained in Treas. Reg. § 1.148-6 (the "Proposed Regulations"). The comments were prepared by a working group comprised of the individuals identified in the attachment to the comments and were approved by the NABL Board of Directors. NABL respectfully requests to testify at a public hearing regarding the Proposed Regulations. These comments provide an outline of NABL's expected testimony.

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, and would welcome the opportunity to discuss these recommendations.

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,



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NATIONAL ASSOCIATION OF BOND LAWYERS

COMMENTS TO PROPOSED REGULATIONS CONCERNING GUIDANCE ON TAX-EXEMPT REFUNDING BONDS AND ALLOCATION AND ACCOUNTING RULES

The National Association of Bond Lawyers ("NABL") respectfully submits the following comments to the proposed regulations published in 91 Fed. Reg. 12118 (Mar. 12, 2026) titled "Guidance on Tax-Exempt Refunding Bonds." The comment focuses particularly on Paragraph 7 affecting the general allocation and accounting rules contained in Treas. Reg. § 1.148-6 (the "Proposed Regulations"). NABL appreciates the continued work of the Internal Revenue Service ("IRS") and the Treasury Department ("Treasury" or the "Treasury Department") in providing guidance relating to arbitrage and rebate rules for tax-advantaged bonds under section 148 of the Internal Revenue Code of 1986 (the "Code").[1]

The Proposed Regulations purport to clarify the existing allocation and accounting rules in Treas. Reg. § 1.148-6(d)(1)(ii) by adding the following bolded language to the existing regulation:

> An allocation of gross proceeds of an issue to an expenditure must involve a current outlay of cash for a governmental purpose of the issue. A current outlay of cash means an outlay reasonably expected to occur not later than 5 banking days after the date as of which the allocation of gross proceeds to the expenditure is made. **To allocate funds from a specific source to an expenditure, those funds must be held by or on behalf of the issuer on the date of the cash outlay.**

The allocation and accounting rules relating to tax-advantaged bonds are part of an essential regulatory framework that has developed over several decades. NABL appreciates efforts to provide additional clarity and precision to the operation of these fundamental rules. However, because the rules are fundamental, any changes, even ones intended to be fairly minor, can have significant unintended consequences on the operation and application of the existing provisions. The Proposed Regulations, if finalized, would do just that.

Accordingly, NABL requests that the Proposed Regulations be withdrawn because (i) the Proposed Regulations are inconsistent with the text, history, and logic of the tax-exempt bond rules (both those governing arbitrage and those governing other requirements), (ii) the Proposed Regulations would thwart long-standing practices, well-known to Treasury and the IRS, that have been used to finance projects, and (iii) the Proposed Regulations impose significant regulatory and business costs on issuers and conduit borrowers with little benefit to the federal government.

Moreover, if finalized, the Proposed Regulations could cause tax-advantaged bonds to be issued earlier than otherwise necessary for projects, increase costs of projects, and result in the downsizing or even loss of a wide range of projects serving important governmental and public

[1] 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. § 1.148-6" refers to Treas. Reg. § 1.148-6 as affected by the Proposed Regulations.

purposes, such as those addressing issues related to housing affordability, rising utility costs, and modernization and construction of public water, wastewater and education facilities.

If the Proposed Regulations are not withdrawn, NABL strongly urges that the Proposed Regulations be limited to allocations under section 148, and that the IRS and the Treasury Department provide significant further proposed guidance related to how the Proposed Regulations interact with the existing Treasury Regulations and guidance under sections 141, 142, 144, 145, 147, 148, 149 and 150 before finalizing the Proposed Regulations.

I. NABL Requests that Treasury Withdraw the Proposed Regulations.

The Proposed Regulations are inconsistent with the existing allocation rules under Treas. Reg. § 1.148-6 and other Code sections. While we understand that the proposed change contemplated by the Proposed Regulations may appear to be consistent with certain private letter rulings addressing discrete arbitrage issues and, as such, may appear to be a formalization of existing interpretations, the change instead directly conflicts with the regulatory history of the existing section's most recent rulemaking on point, Treas. Reg. § 1.141-6, and with the other Code sections and administrative guidance described further below. Moreover, read literally, the Proposed Regulations would prohibit reimbursement allocations under Treas. Reg. § 1.150-2. Rather than providing clarification, the Proposed Regulations introduce a new rule that limits the ability of issuers to implement the flexibility provided under the current allocation provisions. Treasury should withdraw them.

A. Existing Guidance under Section 148

The Proposed Regulations require that in order for a source other than bond proceeds to be allocated to an expenditure, that source must be available on the *date that the expenditure is paid* rather than *at the time of the allocation*. The Proposed Regulations base the new rule on the "current outlay of cash" rule, which provides that an allocation of gross proceeds to an expenditure must involve a current outlay of cash (*i.e.,* an outlay reasonably expected to occur not later than 5 banking days after the allocation date) for a governmental purpose. The Proposed Regulations misapply the "current outlay of cash" concept.

The "current outlay of cash" concept derives from a time when issuers used paper checks sent through the mail to pay invoices associated with projects. They consequently had no actual control over when the check would arrive or be deposited.[2] The five-day safe harbor was established to provide issuers with a reasonable way to establish that the gross proceeds of an issue of tax-advantaged bonds could be considered allocated to an expenditure. The "current outlay of cash" rule is an expenditure timing rule, not an allocation rule. Allocations, on the other hand, are allowed to be made at any time after the original expenditure, subject to certain time limitations. By imposing a rule centered on the date of an expenditure and applying it to sources of funds other than gross proceeds, the Proposed Regulations conflate two different concepts: (1) when proceeds are spent on a direct tracing basis; and (2) how proceeds are finally allocated. Stated another way, the current outlay of cash rule provides the timing of when an expenditure is considered paid, while the allocation rule provides what the source of that payment is.

[2] *See* Prop. Treas. Reg. § 1.148-4, 57 Fed. Reg. 3562 (Jan. 30, 1992).

These concepts are separate. An issuer or conduit borrower must account for its allocation of funds in a manner that satisfies both the arbitrage and non-arbitrage rules. For example, large infrastructure projects are often funded from proceeds of tax-exempt bonds and from federal grants. These grants often are received only upon completion of the portion of the facility that is to be grant-funded. This is one reason why Treas. Reg. § 1.148-6(a)(2) allows for *bona fide* deviations from accounting methods.[3]

Timing restrictions on the allocation of proceeds are already adequately addressed by the reimbursement bond rules under Treas. Reg. § 1.150-2, which impose timing limitations on the allocation of the proceeds of tax-advantaged bonds to project costs paid prior to the issue date of such bonds, and Treas. Reg. § 1.148-6(d)(1)(iii), which provides timing limitations regarding the allocation of different sources of funds to project costs to ensure compliance with the applicable provisions of the Code, as well as any restrictions regarding other sources of funds for a project. That section provides as follows:

> An issuer must account for the allocation of proceeds to expenditures not later than 18 months after the later of the date the expenditure is paid or the date the project, if any, that is financed by the issue is placed in service. This allocation must be made in any event by the date 60 days after the fifth anniversary of the issue date or the date 60 days after the retirement of the issue, if earlier.[4]

This section of the Treasury Regulations has provided certainty and flexibility since its effective date of May 16, 1997. The Proposed Regulations would directly undermine these long-standing allocation rules. For example, read literally, the Proposed Regulations would prohibit reimbursement allocations under Treas. Reg. § 1.150-2. By definition, in a reimbursement allocation, an issuer is allocating the reimbursement bond proceeds to an expenditure paid long before the issuer issued the reimbursement bonds and received the bond proceeds. Thus, by definition, the bond proceeds were not "held by or on behalf of the issuer on the date of the cash outlay." While we acknowledge that Treasury probably did not intend the Proposed Regulations to have this effect, it highlights the fundamental flaws of the Proposed Regulations.

We acknowledge that certain private letter rulings suggest that having all sources of funding on hand at the time of the cash outlay is a relevant factor when determining compliance with section 148; however, these rulings do not appear to be entirely consistent on this point. Further, private letter rulings are not precedential and (as the IRS always notes) are based on an application of existing law to the issuer's specific facts.

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[3] After proposed regulations focusing on the rebate requirement were released in 1989 and were widely criticized, the IRS scrapped the proposed regulations and drafted a new, comprehensive set of arbitrage regulations. In those regulations, which were finalized in 1993, Treasury made a fundamental policy choice to make the allocation and accounting rules flexible and easy to apply to a wide range of situations except in specific areas where flexibility could lead to arbitrage abuses, such as certain advance refunding transactions and mixed defeasance escrows.

[4] Treas. Reg. § 1.148-6(d)(1)(iii).

On the other hand, several private letter rulings provide that the existing allocation rules be interpreted to take into account "day-to-day practicalities" and "require some flexibility" in the allocation of proceeds to expenditures.[5] The historical and policy context described in these other rulings and in our comments, taken together with the direct conflict with other rules discussed in these comments, outweigh the private letter ruling history as a compelling justification for the Proposed Regulations.

B. Consistency with Allocations for Other Code Sections; Long-Standing Practices

The existing regulatory framework imposes a consistency requirement among the different allocation and accounting rules. Treas. Reg. § 1.141-6(a)(1) requires consistent allocations for purposes of sections 141 and 148, and Treas. Reg. § 1.149(g)-1(b) applies Treas. Reg. § 1.148-6 to the hedge bond limitation. Since the effective date of Treas. Reg. § 1.148-6, practitioners and the IRS generally have tried to apply the arbitrage allocation and accounting rules for all purposes of sections 103 and 141 through 150, even where there is not a specific link between those sections and the arbitrage allocation and accounting rules. The Proposed Regulations create unnecessary rigidity in how the consistency requirement might be applied, and they are contrary to long-standing practices, as described below.

Section 141: Treas. Reg. § 1.141-6(b) provides special rules under sections 141 and 145 for eligible mixed-use projects that allocate "qualified equity" first to private business use regardless of the actual tracing of proceeds to an expenditure for a project. The Proposed Regulations conflict with these flexible rules because they require issuers and borrowers to ensure that they have the necessary amount of equity on hand at a particular time. The current rules provide that qualified equity merely needs to be available as part of the same plan of financing. The process of crafting Treas. Reg. § 1.141-6(b) was intensive and deliberative and should be taken into account.

Section 142: The Proposed Regulations would complicate allocations for qualified private activity bonds issued under sections 142, 144, and 145. The Proposed Regulations conflict with the accepted practice for allocating bond proceeds and other funds for qualified cost purposes under these sections to a single project. For example, assume a five-story rental housing project under section 142(d) with residential units on floors 2 through 5 and retail on the ground floor. Assume land is acquired and there is a single contract for construction of the project. Assume further, as is typically the case, that the conduit borrower is a special purpose entity (that, when it is formed, will have none of its own revenues or funds on hand), and the project is intended to be financed with tax-exempt bond proceeds, tax credit equity and taxable debt proceeds. In these transactions, all sources of funds are not necessarily available at one time. The tax-credit equity is released to a borrower as certain development milestones are achieved. Taxable debt is often drawn down after tax-exempt debt. The tax credit equity and taxable debt are generally allocated to the first-floor retail regardless of whether the funds were held at the time of the specific expenditure for that component of the project. If all of the sources of funds must be on hand on the date that the conduit borrower first pays an expenditure to allocate any of those sources to that expenditure, it would drastically upend the standard practice for housing bonds, with no real benefit to Treasury. For example, the Proposed Regulations would require the conduit borrower to build the entirety of the first floor and allocate the tax-credit equity and taxable debt to those expenditures before

[5] PLR 201435013, PLR 200924013; PLR 200248002; and PLR 9706008.

constructing the rest of the building and allocating the tax-exempt bond proceeds to that portion. Obviously, that is not how projects are done in the real world.

In PLR 201847001, the Treasury Department supported the accepted practice of allocating bond proceeds and other funds for qualified cost purposes under section 142 as part of a single project. As described in the ruling, airport bonds under section 142 were issued to finance, among other things, improvements to terminal boarding areas containing retail shops. It was expected that certain retail shops, the principal business of which is the sale of alcoholic beverages for consumption off premises within the meaning of section 147(e), *i.e.,* a non-qualified use, would be present. To address the non-qualified use, the issuer intended to use funding sources that are not proceeds of any tax-exempt or other tax-advantaged bond to finance at least the costs of the renovations allocable to the retail shops creating non-qualified use. The equity was to be allocated to costs no later than the placed in service date of the boarding areas. Under the issuer's proposed allocation methodology, the issuer would use bond proceeds only for the costs of the areas to be used for qualified use and equity for the costs of the retail shops with expected non-qualified use and the issuer would allocate the proceeds and the equity to the qualified and non-qualified uses, respectively, on a floating basis over the term of the bonds, based on the costs of the portions of the boarding areas so used, up to, but not exceeding, the respective amounts of proceeds and equity allocated to the boarding area. The IRS concluded that the allocation methodology was reasonable. No facts presented indicated that the equity was concurrently available with any cash outlay; rather, the equity infusion focused on the allocation to the project based on its placed in service date.

In addition, the Proposed Regulations would prevent issuers from using a "ratable" allocation methodology, which the current Treasury Regulations clearly allow. Specifically, under the Proposed Regulations, an issuer could make a ratable allocation across only the sources available on the date the issuer paid an expenditure (as opposed to the date on which the issuer makes the allocation). As such, the Proposed Regulations would not permit an allocation of proceeds ratably across sources available at different times during the entire construction period for the project. This result would be inconsistent with the historical purposes of the current regulations and the current definition of "current outlay of cash."[6]

Sections 141 and 142: Consider a more complex scenario at an airport where a terminal modernization project is being financed with governmental bonds, exempt facility bonds, taxable bonds, and FAA grant funds. The governmental bonds are also being used to finance the public portions of the parking garage at the airport, with taxable bonds being issued for, and allocated to, the TSA equipment and a rental car facility on the bottom floor of the parking garage at the airport. Assume, as is typical, a single construction contract for the terminal modernization and the garage financing. Under the rules in Treas. Reg. § 1.141-6, the governmental bond-financed costs and the exempt facility bond-financed costs could be split into two separate projects. The FAA grant funds and taxable bond proceeds could each be allocated to separate projects or each could be split between the two projects. In this case it would be best to include the FAA grant funds in the exempt facility project and the taxable bonds with the governmental project. But, the Proposed Regulations could prevent this. What if the equity was funded from taxable bonds, and the

[6] This is also inconsistent with the ratable allocation method for private business use set forth in Treas. Reg. §1.141-6(a)(2).

governmental bonds and the taxable bonds were issued later than the exempt facility bonds because the parking garage construction had a later start date than the terminal modernization project? Given that most FAA grants are not received until a project is substantially completed, what can be done? Should the airport delay paying some of the invoices that may be allocable to the terminal renovations such that taxable bond proceeds can be applied? Under the Proposed Regulations, that may be necessary. If taxable bonds must be issued earlier to address this issue, the cost of completing a terminal modernization project could increase significantly, and the ultimate use of the FAA grant funds would not even be taken into account. More bonds would need to be issued at an earlier time to accomplish the same purpose.

Section 144: The IRS has also applied the existing allocation rules of section 148 to the provisions of section 144(a). For example, in PLR 200050034, the IRS ruled favorably that a borrower of qualified small issue bonds under section 144(a) could unwind a transaction in which it had allocated bond proceeds to make a downpayment on an equipment purchase upon prompt discovery that this use would violate a capital expenditure limitation that applies to such bonds. The borrower was permitted to retroactively allocate the bonds to other expenditures. In reaching its conclusion, the IRS relied by analogy on the allocation and accounting provision in Treas. Reg. § 1.148-6(d)(1)(iii). The holding was not conditioned on the timing or existence of other sources of funds that could have been used when the original expenditures were paid. The Proposed Regulations are contrary to the holding of this ruling.

Section 145 Ownership: The existing allocation and accounting rules also properly accommodate the ownership requirement under section 145, and the Proposed Regulations would undermine this. Consider, for example, a hospital which uses proceeds of qualified 501(c)(3) bonds to acquire equipment as part of a larger construction project. Inadvertently, the hospital leases the equipment to a third party under a long-term lease that transfers tax ownership of the equipment, resulting in a violation of the ownership requirement. If this violation is discovered within the allocation period in Treas. Reg. § 1.148-6(d)(1)(iii), the anticipated private ownership can be cured by contributing cash equity which will then be allocated to the equipment purchase, even if the cash is contributed after the equipment has already been purchased. The private activity bond regulations, which by their terms must be administered in a consistent way with the arbitrage allocation rules, clearly allow for this allocation. Issuers and tax counsel often apply this technique as a common-sense way to deal with an unexpected problem. No provision in the private activity bond regulations would require the existence of cash equity at the time the original payment from bond proceeds was made, but the Proposed Regulations would do so. Such a requirement would defeat the entire purpose of the private activity bond allocation regime.

Section 145 and 147: The IRS has also applied the allocation and accounting rules to the two percent costs of issuance limitation in section 147(g). An example relating to draw-down bonds illustrates the application of the rule. Assume qualified 501(c)(3) bonds are issued in the form of draw-down bonds to finance a building. The borrower reasonably expects to draw and spend the full amount of the bonds and covenants to not apply more than two percent of such full amount to costs of issuance. At closing, only a small portion of the bonds is drawn to pay all costs of issuance. All subsequent draws will be for construction costs, and if all such subsequent draws happen, the portion of the bonds used for costs of issuance will comply with the costs of issuance limitation in section 147(g). In the bond documents, the borrower covenants that, if unexpectedly a lower

amount of bonds is actually drawn, the borrower will contribute cash equity to the project. The cash equity will be allocated to a portion of the costs of issuance originally paid from bond proceeds such that, upon such allocation, two percent or less of the bond proceeds will be treated as having paid costs of issuance. A commensurate portion of the bond proceeds originally used for costs of issuance will then be allocated to further construction costs. This application of the allocation rules is a common-sense tool to manage expectations and correct for changes in construction plans. The Proposed Regulations would severely hinder the ability to manage such construction projects and the use of draw-down bonds – a tool that Treasury should favor because it delays the issuance of tax-advantaged obligations until they are truly necessary.

Section 149(g): PLR 200422004 adopts a flexible allocation rule for purposes of the hedge bond rules contained in section 149(g). As set forth in this ruling, a school district undertook a multi-year modernization project. The sources of funding included proceeds of various issues of tax-advantaged bonds as well as state financial assistance. Pursuant to state law, the state financial assistance was to be applied to the project in installments and in connection with four phases. Before the state would authorize funding for each phase, the district had to have sufficient other funds to pay for the costs of that phase. State law required that state assistance be spent on phase costs ratably with the district's contribution for such costs. However, the ruling noted that for all purposes of section 148, the district would allocate funds from different sources for the same governmental purpose to expenditures using the "gross proceeds spent first" allocation method. All proceeds of bonds were allocated ratably to project expenditures prior to allocating any other funds to project expenditures, including the state assistance. Using this allocation method, the district expected to meet the hedge bond spending targets. The IRS concluded that the school district's allocation method was reasonable, even though the school district would not have both the bond proceeds and the state funding on hand at the time expenditures were paid. The IRS recognized the *bona fide* governmental purpose served by different allocations for state law and arbitrage/hedge bond purposes.

C. Benefit vs. Cost of Compliance

The Proposed Regulations would increase the regulatory and fiscal burden to issuers and borrowers alike without adding real benefits to the tax-exempt market or curtailing any known abuses. Under existing rules, issuers need to follow financial and accounting practices that are uniformly applied in a reasonable manner and that work in conjunction with the administration of federal tax laws. The Proposed Regulations are unnecessary and burdensome, as shown in the examples above.

The Proposed Regulations, though drafted very broadly, appear to be aimed at some unnamed category of transaction, perhaps encountered by the IRS on examination, that features some specific abuse. If this is the case, the anti-abuse regulations of Treas. Reg. § 1.148-10 already give the Commissioner discretion to depart from the rules of Treas. Reg. §§ 1.148-1 through 1.148-11 as necessary to reflect the economics of a particular transaction to prevent a material financial advantage based on arbitrage. As a result, to the extent there are any perceived abuses of the cash outlay rules, the reimbursement regulations or the allocation and accounting rules of Treas. Reg. § 1.148-6, the Commissioner already has the authority, among other things, to recompute yield on an issue or on investments, reallocate payments and receipts on investments and

recompute the rebate amount on an issue. This authority to deal with specific abuses is a better remedy for specific concerns than a fundamental change to foundational concepts.

The Proposed Regulations would impose significant fiscal and administrative burden on issuers and borrowers alike. The pragmatic realities of tax-exempt financing are such that they need to be able to accommodate the ways in which various states and local governments provide for the accounting and financing of these important projects. We recognize that the allocation rules under section 148 are a balancing act, but it is one that has been made without any meaningful distress on our capital markets, our economy, our healthcare, affordable housing, transportation, utility and educational system, or the IRS, for almost 30 years. The burdens of adopting the rule suggested by the Proposed Regulations, which are many, vastly outweigh the benefits of doing so, which are none. We respectfully request that the Proposed Regulations be withdrawn.

II. Proposed Regulations Require Significant Further Guidance

If the Proposed Regulations are not withdrawn, the Proposed Regulations should (1) be limited to section 148, with clarification that the Proposed Regulations do not impact any other provisions of the Code or Treasury Regulations, and (2) be accompanied by additional proposed rules to address other areas of the Treasury Regulations impacted by the Proposed Regulations. Even this approach will create different allocations for different purposes, adding significant complexity and undoubtedly raising other compliance challenges for stakeholders. Any additional proposed rules should be subject to a separate comment period and public hearing. The fact that the allocation and accounting rules under section 148 trailed the adoption of most of the other regulations under section 148, the allocation and accounting rules under section 141 trailed the adoption of most of the other regulations under section 141, and the related rules under section 142 are reserved, proves the complexity of the issues at hand. Due to the subtle interchange of the practical and technical issues, NABL also requests the opportunity to testify at a public hearing on the Proposed Regulations if they are not withdrawn.

Appendix I
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