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January 24, 2007

John J. Cross III
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Department of the Treasury
1500 Pennsylvania Avenue, N.W., 4212 B MT
Washington, D.C. 20220

RE: Guidance Recommendations for Update and Clarification Regarding Public Approval Requirements for Private Activity Bonds under Internal Revenue Code Section 147

Dear John:

Enclosed are guidance recommendations by the National Association of Bond Lawyers (NABL) for an update and clarification regarding public approval requirements for private activity bonds under Internal Revenue Code Section 147. A list of the NABL TEFRA Study Group who participated in the preparation of the recommendations is also enclosed as Exhibit II.

NABL has continued interest in clarifying and facilitating compliance with the tax law and regulations and believes that this area is particularly in need of such clarification. NABL also continues to offer assistance in developing alternatives that would achieve clarity, certainty and administrability for its members.

If you have questions, please contact me at 949/725-4237 or through email at clew@sycr.com or Elizabeth Wagner, Director of Governmental Affairs, at 202/682-1498 or through email at ewagner@nabl.org.

Thank you for the opportunity to submit NABL's recommendations. We look forward to working with you.

Sincerely,

Carol L. Lew

Carol L. Lew

Enclosures

cc: Eric Solomon
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National Association *of* Bond Lawyers

RECOMMENDATIONS
BY THE
NATIONAL ASSOCIATION OF BOND LAWYERS
TO THE DEPARTMENT OF THE TREASURY
OFFICE OF TAX POLICY
AND THE
INTERNAL REVENUE SERVICE

REQUESTING AN UPDATE OF GUIDANCE AND CLARIFICATION
UNDER INTERNAL REVENUE CODE SECTION 147
REGARDING PUBLIC APPROVAL REQUIREMENTS
FOR PRIVATE ACTIVITY BONDS

Introduction

The following comments are submitted on behalf of the National Association of Bond Lawyers ("NABL") TEFRA Study Group ("Study Group") for the purpose of offering specific recommendations regarding the "public approval requirements" under Section 147(f) of the Internal Revenue Code of 1986, as amended, (the "Code") and Treas. Reg. **§** 5f.103-2.[1]

Consistent with NABL's "Tax Simplification Recommendations to Treasury on Tax-Exempt Bonds," dated June 14, 2002 (the "2002 Report"), the Study Group continues to recommend repeal of the TEFRA public approval requirement for private activity bonds under Section 147(f) of the Code. (*See* attached excerpt, Exhibit I.) The Study Group agrees with the 2002 Report that a "sunshine" policy generally promotes good government, but that "this requirement has outlived its original purpose in 1982 of helping to control private activity bond volume."

Absent repeal, the Study Group also concurs with the 2002 Report's assertion that simplification of the public approval requirement could be accomplished through public administrative guidance, "given that many of the excessive details reside in old regulations in this area." Specifically, the Study Group has addressed below the application of these old rules to bond issues involving complex projects, such as projects for multi-property borrowers, and projects that change either during the issuance process or after bond issuance is completed, such as under-budget projects. In addition, the Study Group has identified areas needing clarification, such as what constitutes an "insubstantial deviation" from the published notice for an otherwise qualifying project

[1] Section 147(f) the Code was enacted by the Tax Equity & Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 ("TEFRA"). Treas. Reg. § 5f.103-2 was promulgated under Section 103(k) of the Internal Revenue Code of 1954, as amended (the "1954 Code").

Except as noted, all references to the Code are to the Internal Revenue Code of 1986, as amended.

due to change in business conditions. Simplification in the TEFRA rules should prove helpful to issuers and practitioners, as well as afford assistance to the Internal Revenue Service (the "IRS") in tax administration.

I. TEFRA Notice – Definitions of "Facility" and "Integrated Operation"

Section 147(f) of the Code provides that, in order to qualify for tax exemption, a private activity bond issue must satisfy the necessary public approval requirements. Public approval can be obtained by voter referendum or, more commonly, a public hearing following "reasonable public notice."

Treas. Reg. § 5f.103-2(f)(2) (promulgated under Section 103(k) of the 1954 Code, the predecessor to Section 147(f) of the Code), specifies that the public notice must contain:

(1) A general, functional description of the type and use of the financed *facility*;

(2) The maximum amount of obligations to be issued *with respect to the facility*;

(3) The initial owner, operator or manager of the *facility*; and

(4) The prospective location of the *facility* by its street address or, if none, by a general description designed to inform readers of its specific location (emphasis added).

Each of these public notice requirements refers to the "facility." Treas. Reg. § 5f.103-2(f)(4) currently defines "facility" as a tract or adjoining tracts of land, improvements thereon, and personal property used in connection therewith. It further provides that separate tracts of land may be treated as one facility only if they are used in an integrated operation. Therefore, if separate facilities are being financed with one issue of obligations, Treas. Reg. § 5f.103-2 requires that the public notice contain the maximum amount of the obligations, the initial owner, operator or manager and the location, for each facility that is not part of an integrated operation. Because "integrated operation" is not defined, determination of when the public notice requirements must be separately stated for a particular facility proves difficult.

Deciding what constitutes an "integrated operation" is most difficult for borrowers that are complex organizations with multiple campuses and/or physical locations (for purposes of this paper, an "Organizational System"), such as health care delivery systems, airports, utility systems, universities and other similar organizations. These Organizational Systems are often located on several non-adjoining tracts of land, at times within several jurisdictions, but function as an integrated operation. Their operations often are conducted, sometimes for various state law and/or regulatory purposes, through use of subsidiaries, affiliates and related parties having different names, but under common ownership, management or control.[2] These Organizational Systems generally represent themselves to the public, and, in fact, are often viewed by the public, as integrated operations. Frequently, they are publicly known by one name, usually the name of the main operating entity or the Organizational System. Notwithstanding this public perception, bond counsel are often uncertain how to comply with Treas. Reg. § 5f.103-2 in the context of an Organizational System, so may err on the side of concluding that an entity is not an "integrated operation." Accordingly, if there is any doubt that the borrower is an "integrated operation" for purposes of Treas. Reg. § 5f.103-2, the parties are forced to describe the "facility" by multiple street addresses or locations in a cumbersome way.[3]

Additionally, tax-exempt financings for multi-property Organizational Systems often involve large-scale or numerous capital improvements that are to be financed with multiple funding sources. Organizations that benefit from these financings (*i.e.*, the borrowers) are often dependent on sources of funding (*e.g.*, donations, loans and grants from public and private parties) that (i) are not under their direct control, and (ii) are unpredictable as to timing and amounts. Moreover, the extent and nature of the contemplated capital projects can change, depending on these other funding sources. This situation results in greater uncertainty for the Organizational Systems and bond counsel regarding which facilities may ultimately be financed with the proceeds of the obligations and which facilities may need to be included in any notice published under Treas. Reg. § 5f.103-2.

Due to the absence of public administrative guidance concerning what constitutes an integrated operation and the practical considerations relating to funding sources described above, current practice is often to over-state the number of "facilities" in the notice by providing a long list of separate street addresses, the amount of obligations[4] and the name of the controlling affiliate and/or subsidiary to be used to finance each "facility" within the Organizational System. Under Treas. Reg. § 5f.103-2, when this information is identified in the public notice, the borrower is generally considered to be locked into

[2] Allowing a simpler and broader definition of "facility" for identification purposes in the context of Organizational Systems does not alter the requirement to continue to inform the public of the initial owner, operator or manager of the facility, which is discussed later in this paper.

[3] For example, the location of a medical or university campus or similar large facility may sometimes be described in public notices with reference to adjacent roads (e.g., the campus bounded on the north by X Street, on the west by Y Street, on the south by Z Street and on the east by A Avenue). The problem arises when all properties are not on adjoining tracts of land, but are situated in the same general vicinity. Current guidance is unclear whether the entire campus of a university, though interspersed with book stores or other properties not owned and operated by the university, is part of a single "facility," so long as the outside boundaries are provided; or if a "facility," by means of application of the integrated operation rule, includes dormitories or medical office facilities that are located one block away from the main buildings. Bond counsel typically would err on the side of treating the dormitory or medical office facility as a separate "facility," resulting in separate inclusion in the public hearing notice. The problems multiply as there are more non-adjoining dormitories, offices or other properties.

[4] Especially in response to the recent examinations by the IRS of 'telephone book' TEFRA violations, many tax practitioners provide an amount of obligations to be issued for every non-contiguous building that might be financed. Arguably, this over-inclusive approach does not provide the public adequate notice regarding what is being financed.

the allocation of proceeds to separate "facilities." This approach limits the borrower's flexibility to direct the bond proceeds where needed as the other sources of funds change or are identified. Essentially, a borrower can end up with bond proceeds "siloed" into separate facilities as a result of the public hearing approval process even if, from the borrower's perspective, the various facilities comprise a single, integrated operation. While identification of the "facility" and the amount of bond proceeds applicable to the "facility" is designed to inform the public of the type and extent of a project, the public approval rules should not be a technical trap that removes all flexibility in a complex borrower's operations, if its project and plan of finance otherwise comply with applicable tax laws.

The Study Group recommends that public administrative guidance define an integrated operation to include the facilities of an Organizational System. For Organizational Systems with central headquarters or a center of main operations, ancillary or supporting campuses of the Organizational System can be identified in the public notice without street addresses. These types of Organizational Systems are generally universities with properties, such as dormitories, that may not be located on the main campus or immediately adjacent to it, but are still in the same general vicinity, or hospitals with laboratories, outpatient care and other supporting properties that are close to but not contiguous with the main hospital campus. If these ancillary campuses and the central headquarters are located in different jurisdictions, the host approval requirement in Section 147(f)(2)(A) of the Code (described below) would ensure public notification of these ancillary properties. This clarification would result in a more efficient and potentially more informative application of the public approval rules and remain true to the policy purposes of the public approval requirement by informing the public of the beneficiaries of, and types of facilities being provided with, tax-exempt financing.

To ensure adequate public notice, the Study Group recognizes that when an Organizational System does not have a main site of operations and/or has ancillary facilities of significant size or operational importance, these facilities and their locations should be individually identified. For example, a university system with multiple but significant campuses or a health care delivery system composed of several large, physically separate hospital properties should be separately identified.

II. Post-Approval Changes – "Insubstantial Deviation"

Treas. Reg. § 5f.103-2(f)(2), which specifies the requirements for public notice, also provides that "insubstantial deviation" in any of the required information will not render a public approval invalid. Alternatively, any change in information or mistake in the original notice that is not an insubstantial deviation, will (i) require a new public approval process, if discovered prior to the bond issuance, or (ii) possibly preclude the issuer from proceeding with the revised project, if discovered after bond issuance. Each of these scenarios can be costly and cause delays.

The Study Group recommends that public administrative guidance delineate what constitutes an insubstantial deviation to assist issuers in complying with the public approval rules, while simultaneously reducing costs and delays caused by obtaining multiple public approvals through an overabundance of caution. The Study Group further recommends that the delineation be in the form of safe harbors or additional examples, such as fact patterns in Private Letter Rulings ("PLRs") issued in these contexts, for each of the public notice content requirements.

A. Description of Facility

The Study Group believes that the description of the facility may be the component of the public notice for which it is most difficult to formulate a safe harbor for interpreting insubstantial deviation. Based on the examples given in Treas. Reg. § 5f.103-2(f)(4), the size specification (such as square footage or number of stories) of a project is not expressly required. But once given, it is uncertain whether, and to what extent, a specification can be changed without affecting the validity of the public notice. For example, in PLR 200703017, a new contiguous property was added to the original facility, and the combined property exceeded the square footage described in the public notice. This change in the facility description was determined by the IRS to be an insubstantial deviation for purposes of the public notification requirements. Because PLRs are redacted, however, the ruling shed no light on what the IRS regards as insubstantial for changes in facility description specifications. To comply with current law, a borrower has more incentive to keep a project description vague, since a more detailed description may limit the type of change a borrower can later make to the project. As noted above, the result is often that the project description is generalized or over-stated. This result is contrary to the stated goal of providing notice to the public.

For more uniform facility descriptions, the Study Group recommends a safe harbor that allows the public notice to state only the category (as listed in Sections 141(e) and 142(a) of the Code) of exempt facility that is being financed with the bonds. No further description of the facility would be required, even though all other elements of the public notice and approval process would still apply. Under this rule, there would be no insubstantial deviation analysis needed. The Study Group believes that the statutory categories are already sufficiently descriptive to adequately inform the public of the nature of the facility. Other elements required in the public notice would complete the process of providing public notification of the nature and scope of the project being financed.

B. Maximum Amount of Obligations

In contrast to the facility description requirement, the Study Group believes the requirement that the public notice list the maximum amount of obligations to be issued for a facility may be the most suitable requirement for which to create an insubstantial deviation safe harbor. Therefore, the Study Group recommends a safe harbor for an insubstantial deviation (*e.g.*, varying the amount of 10% could be automatically considered an insubstantial deviation). Based on a recent PLR, a new use for 20% of the amount of bond proceeds was considered an insubstantial deviation.[5] To avoid

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[5] *See* PLR 200049022.

confusion, this safe harbor should reference that the deviation applies to each "facility" described in the public notice, as previously discussed.

C. Initial Owner, Operator or Manager

The Study Group believes that an insubstantial deviation in the name of the initial owner, operator or manager should not be limited solely to typographical errors. As previously stated, many private activity bonds are issued for the benefit of Organizational Systems, which have affiliates, subsidiaries and other related parties, where the actual owner, operator or manager ultimately may be any one of many entities under the system. Additionally, pending negotiations for the operation or management of a facility, these borrowers may intend to enter into agreements with unrelated parties or even other related parties with different names closer in time to completion of the facility (which can be long after the issuance of the bonds). Also possible, single-purpose entities could be formed for the sole purpose of owning the facility, where the name of the entity may not be known (even though the real party in interest is known) at the time of public approval. Under Treas. Reg. § 5f.103-2(f)(2), any change of the entity (including a change of name) identified in the public notice casts doubt on whether the change is an insubstantial deviation, although the new entity and the published entity may be part of the same Organizational System.[6]

The Study Group believes that appropriate safe harbors here should include (i) treating the substitution of the party identified in the public notice with any "related party" (as defined under any applicable Treasury Regulation[7]) or, in the case of nonprofit organizations, any member of the same "controlled group" (as defined in Treas. Reg. § 1.150-1(e)) as an insubstantial deviation; (ii) allowing a listing of the potential controlling owners, operators or managers within the same Organizational System; and (iii) allowing the true party in interest (*e.g.*, the 501(c)(3) organization who is the sole owner of a disregarded single-member limited liability company, as opposed to the limited liability company itself) to be listed, instead of the ultimately named borrower-entity. All of the above provisions will publicly identify the party in interest or the main entity with whom the public is more familiar. The Study Group questions what public purpose is served when a single-purpose entity or a small affiliate with an Organizational System is identified as the initial owner, operator or manager rather than the true party in interest.

D. Location of Facility

The Study Group also believes that an insubstantial deviation in the location or street address of a facility should not be limited solely to a typographical error. Instead, the Study Group recommends a safe harbor that, subject to other conditions, treats an

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[6] This situation is distinguished from the circumstance where the initial owner, operator or manager is not known, in which case, pursuant to Treas. Reg. § 5f.103-2(f)(2), the public notice is considered inadequate. In the interest of public information, the Study Group is not advocating altering this rule.

[7] Currently, 'related parties' are defined in Treas. Regs §§ 1.141-1(d), 1.150-1(b), and 'affiliated persons' are defined in Prop. Reg. § 1.150-1(d)(2)(ii). The Study Group recommends the inclusion of all of these provisions for TEFRA purposes.

incorrect facility location as an insubstantial deviation to the actual location as long as the two are within close proximity of each other. (In addition to the change in the facility description cited above, in PLR 200703017, the new contiguous property that was added to the original facility also had a different street address than that published in the notice, and the IRS treated the difference as an insubstantial deviation. Also, in PLR 8831046, an incorrect address that was one city block from the correct address was considered an insubstantial deviation.) The Study Group recognizes that a close proximity differs between urban and rural areas. For example, half a mile in a densely populated urban area is not comparable to the same distance in an undeveloped area. Therefore, different safe harbors should apply to urban or rural areas. Following the private letter ruling, a city block safe harbor would provide helpful guidance in an urban area, while a safe harbor of a mile would be reasonable in an undeveloped or otherwise rural area. Further conditions could be imposed that the category of exempt facility cannot be different, and all issuer and host approval requirements (as described below) cannot be affected by use of this safe harbor (in the event that the actual facility lies in another jurisdiction).

Public administrative guidance should also focus on what constitutes "same geographical area," a concept introduced by the IRS in PLRs that have provided welcome flexibility for post-issuance changes in the facility. The rulings illustrate how the IRS has interpreted insubstantial deviation in the context of a change in the location of the facility.

For example, in PLR 200050026, the IRS considered the use of a small amount of unexpended proceeds on a parcel of land that was not identified in the public approval as an insubstantial deviation. The IRS noted in that PLR that the new parcel was in the same geographical area as the parcels that were originally identified, and that the borrower and purpose remained the same.

In PLR 200049022, the original hospital borrower was acquired by a hospital system. In connection with the acquisition, the hospital system ceased the operations of the borrower and sought a ruling to permit use of 20% of the borrower's bond proceeds for another hospital that was also part of the system. The IRS determined the new use to be an insubstantial deviation even though one-fifth of the proceeds were to be used by a different hospital and at a new facility, neither of which was listed in the public approval. The ruling stated that both hospitals were located in the same geographical area. This PLR provides a good illustration of the application of the insubstantial deviation exception to accommodate practical circumstances. Project plans and borrower entities sometimes change. These changes are usually not related to the bond issuance and not driven to achieve arbitrage. If the IRS had not agreed to the use of proceeds by the new hospital, the hospital system would have had to issue additional bonds to finance the alternate project, obtain a new public approval and seek some lawful way to account for the unspent proceeds.

The Study Group believes that the incorporation of the PLR examples into public administrative guidance would reduce unnecessary redemptions of prior bonds, issuances of new bonds and the attendant costs, delays and inefficiencies of these actions. However, the Study Group recommends that because these rulings do not provide any specific factors or guidelines, public administrative guidance should expand on when facilities would be considered to be in the "same geographical area."

III. Hearing and Approval Process

A. Issuer and Host Approval

Currently, Section 147(f)(2)(A) of the Code requires that qualified private activity bonds must have both (i) issuer approval from the issuer or the governmental unit on whose behalf the issuer is issuing *and* (ii) host approval from all governmental units in which the financed facilities are to be located. "Governmental unit" can be as broadly defined as a State, and narrowly defined as a political subdivision. Treas. Reg. § 5f.103-2(d) states that "the location of a hearing will be presumed convenient for residents of the unit if it is located in the governmental unit's capital or seat of government." For a State issuer, this rule is often interpreted to require a hearing in the State capital, where it may have no geographical bearing on the locations of the financed projects. For example, in the context of an incinerator financing with solid waste disposal bonds, the immediate community is most likely to be concerned about the project and bond issuance; however, the wording of Treas. Reg. § 5f.103-2(d) often precludes holding the hearing in the community near the project site, resulting in a hearing in a more distant State capital. While the underlying goal of requiring these approvals is to inform nearby residents and businesses of the project, the current rules governing them often awkwardly serve, if at all, that underlying goal of public notification. Accordingly, the Study Group recommends that public administrative guidance provide explicitly that, while governments may continue to use their capital or seat of government for these hearings, a hearing held in a public location in the more immediate community (*e.g*., school or another local governmental building in the part of the jurisdiction more proximate to the proposed facility) may also be presumed convenient.

For an Organizational System, such as a hospital system with properties throughout the State that is not using a State-level issuer, obtaining host public approval in every jurisdiction where bond proceeds may be spent, regardless of whether proceeds will actually be spent there, may be burdensome and expensive. Likewise, a borrower that does not expect to, and in actuality does not, spend a substantial amount of proceeds on a facility may face burdensome approval requirements relative to the proceeds spent. Therefore, the Study Group recommends that issuer approval and "limited" host approval be the only requirements in these instances. "Limited" host approval should include the State capital or jurisdictions where a substantial amount of bond proceeds is expected to be, and will be, spent on a project. "Substantial" should be defined as at least 10% of the maximum amount of the bond issue.

B. Communication of Public Notice

Under Treas. Reg. § 5f.103-2(g)(3), a "reasonable public notice" means that it (i) be communicated no fewer than 14 days prior to the hearing for purposes of the issuer and host approvals of the facility; (ii) be published in at least one newspaper of general circulation available to residents of the applicable locality or announced by radio or television broadcast to those residents for purposes of the host approval of the facility, and, (iii) be given in the same manner and locations as required by the approving governmental unit for any other purposes for which applicable State or local law specifies a notice or public hearing requirement for purposes of the issuer public approval of the facility.

The Study Group recommends that, if applicable State or local law exists, then it be made a safe harbor regardless of whether the public approval is an issuer or a host approval. Thus, publication requirements for all public approvals would be presumed met if they complied with *either* applicable State or local law *or* the current 14-day newspaper safe harbor. Deference should be given to a local entity's regular process of hearing and approval, with the presumption that local officials are in the best position to ensure that residents receive proper notice and the opportunity to be heard.

Further, given the tremendous technological advances made over the last two decades and the high costs associated with both newspaper publication and radio/television broadcasting, the Study Group recommends that some form of electronic publication, which is relatively cost-free, should be adopted. This change would be consistent with other recent federal law changes, such as the allowance of electronic submission of tax filings and the mandate for use of SLGSafe (*i.e.*, requiring the electronic submission of subscriptions for the purchase of United States Treasury Securities - State and Local Government Series). Since the last consideration of the public approval requirements, State and local jurisdictions have changed and expanded their methods for publication of similar notices, and any public administrative guidance issued pursuant to Section 147(f) of the Code should reflect these advances. In fact, local newspapers are decreasing in number and effective reach, while radio channels have multiplied and expanded in areas, so that choosing just one can be difficult. Even a large circulation newspaper, such as one that serves a county or even several counties, may not provide proper notice to residents within a particular city.

For a State or local government that regularly provides information to its residents via a web site, the Study Group recommends that reasonable public notice requires publication under the existing methods (*i.e.*, newspaper), but with a general notice that bonds are to be issued and that specific information is available on the government's web site. If desired, this provision could be applicable only for issuers which customarily provide public notices via their web sites. To illustrate, a notice published on the governmental entity's official web site in a location where similar notices are published, plus a short newspaper publication referring the public to the applicable web address for details and a telephone number for those without Internet access, would be sufficient.

Note that this recommendation can be distinguished from PLR 8411077 (where the IRS found inadequate a notice which provided only that information regarding the project was available upon request), because the communication landscape has changed dramatically since the 1984 release date of that PLR.

The Study Group believes that public administrative guidance encompassing these recommended changes would put public notices for purposes of Section 147(f) of the Code on the same level as other public notices issued by a particular governmental unit, which could serve the goal of most efficiently and effectively informing the public.

C. Supplemental or Corrective Notice

The Study Group recommends that public administrative guidance provide a means for correcting or supplementing a published notice where the defect is discovered prior to the hearing date. For example, if the original notice were published 14 days prior to the hearing date and two days later a defect was discovered, rather than canceling the hearing and restarting the public approval process, the Study Group recommends that an issuer have the option to publish a correction notice. The allowance of a corrective notice could apply to the same items as covered by insubstantial deviation and be published up to three business days before the hearing date. A correction notice could also be allowed for changes to the date, time or location of the public hearing and be published no fewer than three business days prior to the ultimate hearing date.

IV. Public Approval for Pooled Financings

The Study Group recognizes that pooled financings, mainly blind pools, where the initial borrowers are not known at the time of debt issuance, have been under recent scrutiny. In those pooled financings that were subject to the TEFRA requirements, the lack of information (specifically, the identity of the borrowers) called into question the reasonableness of the governmental issuer's expectations.[8] For pooled financings subject to TEFRA requirements, the Study Group believes that, with the proper administrative tools, parties could provide more accurate information on the borrowers and the projects, in order to more effectively inform the public.

Currently, Treas. Reg. § 5f.103-2(f)(2) states that a notice of public hearing will be considered inadequate, if any of the required information is unknown on the date of the approval. In certain pooled issuance deals, unknown information is a possibility. The Code provides an exception for pooled 501(c)(3) financings to the maturity limitation of Section 147(b). Moreover, the Study Group notes that the General Explanation of the Tax Reform Act of 1986, dated May 4, 1987, by the Joint Committee on Taxation of the U.S. Congress (the "Bluebook"), contemplates, in certain instances, the possibility of financing projects that are not initially identified in a public notice.[9] The Bluebook

[8] Recent 2006 tax legislation provided further guidance and restrictions on pools regarding this concern. As set forth in Section 508 of the Tax Increase Prevention and Reconciliation Act of 2005, Public Law 109-222, May 17, 2006, changes to the Code provided more structure to pooled bond financings by, among other matters, strengthening the reasonable expectations requirement, and requiring written loan commitments and redemptions for un-loaned proceeds.

[9] In the context of Section 147(b)(4) of the Code, the Blue Book, at page 1219, states, in part, that "Congress recognized that the prior-law IDB public approval requirements required identification of specific facilities. (See, Temp. Treas. Reg. sec. 5f.103-2.) In extending this requirement to all private activity bonds, Congress intended that the applicable Treasury regulations will be amended for…qualified

specifically references pooled 501(c)(3) financings as financings where not all property to be financed need be identified before issuance of the bonds.

The Study Group recommends that published guidance be consistent with the Bluebook. Specifically, to enhance public information goals, the Study Group recommends the allowance of (i) a pre-issuance public approval of the general project types and obligations amounts, and (ii) a post-issuance, but pre-expenditure public approval of the specific projects being financed. To illustrate, the bond issue as a whole -- with a description of the type of project to be financed -- would be publicly approved, and the bonds would be issued. Then, as the various projects became known, their specific locations, owners, etc., would be publicly approved (or disapproved) prior to expenditure of the bond proceeds on the individual projects, and the bond issue would ultimately have multiple hearings and approvals.

V. Post-issuance Public Approval

As a final issue, the Study Group notes that one of the most common problems in practice is meeting the public approval requirements when a project (or other matters related to the project) changes after the bonds are issued. Especially troublesome are those changes that do not fall within the remediation rules under Treas. Reg. § 1.141-12.[10] Practitioners have considered the option of forcing a re-issuance of the issue, thereby qualifying the issue for another public approval. However, whether this method is valid remains unclear, and, regardless, it is cumbersome, expensive and inefficient.

As previously stated, plans change after bond issuance for a variety of reasons related to normal operating circumstances. The nature and scope of projects can change, and costs related to the projects often change accordingly. Savings in the costs of the project can result in unexpended proceeds for which a borrower has legitimate tax-exempt purposes but for the lack of public approval. Above, the Study Group has recommended public administrative guidance with respect to the delineation of insubstantial deviation and the definition of facility, which it believes would partially reduce this complication. However, recognizing the limitations of the statutory language, the Study Group further recommends that public administrative guidance accommodate, to the extent possible, certain post-issuance public approval where unexpected events occur, subsequent to the issuance of the bonds that results in proceeds being allocated in a

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501(c)(3) bonds that qualify for special exception to the maturity limitation for pooled financings (where the facilities need not be identified before issuance of the bonds)."

[10] For example, if a hospital sells a facility to another nonprofit organization, bond counsel can apply the provisions of Treas. Reg. § 1.141-12 to have a new public hearing and deemed reissuance of the bonds, which would permit any changes to be made to the project definition and/or redirect any unspent proceeds. In contrast, other transactions between nonprofits do not fall within the provisions of Treas. Reg. § 1.141-12, since there are no "disposition proceeds" and no "deliberate action," so these beneficial rules would not apply.

manner not in compliance with the public approval requirements of Section 147 of the Code.[11]

VI. Summary

For several years, NABL has maintained the view that legislative or regulatory simplification of the public approval requirements for private activity bonds is essential. The Study Group has made recommendations for public administrative guidance to clarify terms such as "facility" and "integrated operation" in relation to complex organizations and projects; to delineate "insubstantial deviation" in relation to post-approval project changes; to streamline notice requirements in relation to new technologies; to provide for an alternate process, combining both pre-and post-issuance approvals, in relation to certain pooled financings; and to accommodate, to the extent possible, post-issuance approval. These recommendations should provide efficiency and cost effectiveness for issuers, practitioners and the IRS, as well as adequate notice of private activity bond issuances for the public.

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[11] The Study Group recognizes that a conforming change to Treas. Reg. § 1.147-2 to delete the reference to bonds requiring public approval would be necessary.

EXHIBIT I

Excerpt from NABL's "Tax Simplification Recommendations to Treasury on Tax-Exempt Bonds," dated June 14, 2002.

Specific Recommendations to Cut Back on Various Interim Restrictions Applicable to Most Tax-Exempt Private Activity Bonds.

1. Repeal or Significantly Simplify the Section 147(f) TEFRA Public Approval Requirement.

Our primary recommendation here is to repeal the TEFRA public approval requirement under Section 147(f) entirely. Although one is hard-pressed to object in theory to a good government "sunshine" policy in favor of public hearings and public approval (akin to mom, home, and apple pie), the reality is that most affected State and local governments and our members believe that this public approval requirement is costly, cumbersome, and ineffective. These required public hearings and public approvals have been virtually ignored by the general public at which they are aimed. It is fair to say that this requirement has long outlived its original purpose in 1982 of helping to control private activity bond volume. State procedures for obtaining volume cap serve the necessary role of providing a political check against any rare controversial projects. State volume cap allocation procedures have or presumably could incorporate a process to allow for public comment on potential volume cap allocations to address the "not in my back yard" or "NIMBY" issue.

In the 2001 Joint Tax Study, the Joint Tax Committee had several good recommendations, albeit limited, to simplify the public approval requirement. The Joint Tax Committee sensibly recommended alternative, less costly, forms of public notices, such as Internet notices. This idea could streamline the procedure and reduce the costs of public notices, particularly for large Statewide bond issues with many projects. The Joint Tax Committee also sensibly recommended permitting alternatives to public hearings, such as public comments in writing or by Internet. We concur with these recommendations.

Short of the preferred complete repeal of the Section 147(f) public approval requirement, we recommend simplifying the Section 147(f) public approval requirement to the fullest extent possible. We submit that much simplification of the Section 147(b) public approval requirement could be accomplished through regulations, given that many of the excessive details reside in old regulations in this area. In particular, we offer the following recommendations to simplify the public approval requirement. First, consider excluding refundings completely from this requirement because the public approval for the original new money financing duly addresses the nature of the financed project and the 120% economic life test under Section 147(b) duly addresses the burden on the tax-exempt market of the refunding. Second, consider giving more deference to State sunshine laws on the adequacy of various aspects of the public approval process. In many instances, these laws will be more than enough. Third, consider providing more flexibility to allow delegations of approval authority to particular State or local public officials below the "highest elected representative" to reduce the challenges of tracking down busy governors and mayors to sign these public approvals. Fourth, consider expressly permitting "post-issuance" amendatory public approvals to cure changes in the described nature and location of the financed project and, for qualified 501(c)(3) bonds, to address projects unknown at the time of the original tax-exempt bond issuance. Finally, consider replacing the old "insubstantial deviations" standard for project changes without new public approvals under Treas. Reg. §5f.103-2(f)(2) with a much stronger standard that requires new public approvals only if the fundamental nature and location of the project change.

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EXHIBIT II

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