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March 25, 2020

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Re: *NABL COVID-19 Proposals*

Dear Mr. Kautter, Mr. Vallabhaeni, and Mr. Desmond,

The National Association of Bond Lawyers (“NABL”) respectfully submits the enclosed draft guidance document, which addresses certain tax issues that may affect the functioning of the tax-exempt bond markets during the current outbreak of the novel coronavirus disease (the “COVID-19 Outbreak”). The COVID-19 Outbreak is the subject of the emergency declaration made by the President of the United States pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act on March 13, 2020. The COVID-19 Outbreak has also been the subject of numerous emergency declarations by state and local governments.

The COVID-19 Outbreak has prompted state and local governments to severely limit, or in some cases prohibit, in-person gatherings by members of the general public. Many such entities are prepared to offer public hearings using telephone access, with or without online access. To the extent that these forms of access comply with State procedural requirements, they seemingly meet the requirement of Section 1.147(f)-1 of the Income Tax Regulations (the “TEFRA Regulations”) that “interested individuals have a reasonable opportunity to express their views” but language in the preamble to the TEFRA Regulations indicates that the conduct of such hearings without the possibility of in-person attendance may not satisfy the public approval requirements of Section 147(f) of the Internal Revenue Code of 1986.

In addition, numerous reports have emerged in recent days indicating that the current economic environment is preventing certain issuers of tax-exempt bonds from refunding or remarketing their bonds, forcing some issuers to buy in their bonds and hold them for a period of time. With the length of the COVID-19 Outbreak and its damaging effects on the tax-exempt bond market being uncertain, issuers forced to hold their bonds are concerned that they will not be able to successfully remarket those bonds within the 90-day period prescribed by Notice 2008-41 and Proposed Regulation 1.150-3, REG 141739-08; 83 F.R. 67701-67705; 2019-9 IRB 757 published December 31, 2018. Recent reports also indicate that issuers of commercial paper are similarly having trouble rolling such paper at maturity. In addition, other

issuers are questioning whether they may hold bonds if using their “best efforts” could see such bonds remarketed, but only at significantly steeper interest rates.

The enclosed draft guidance applies to these specific, narrow issues that are affecting many issuers of tax-exempt bonds. NABL appreciates your consideration of this submission and welcomes the opportunity to discuss these comments with you.

This letter was prepared by an ad hoc task force comprising the individuals listed on Appendix A and was approved by the NABL Board of Directors.

NABL exists to promote the integrity of the municipal market by advancing the understanding of and compliance with the law affecting public finance. A professional association incorporated in 1979, NABL has approximately 2,500 members and is headquartered in Washington, DC.

If you have any questions, please contact me at 415/773-5938 or through email at rmoore@orrick.com or Jessica Giroux, Director of Governmental Affairs, at 518/469-1565 or through email at jgiroux@nabl.org.

Thank you again.

Sincerely,



Richard J Moore
President, National Association of Bond Lawyers

CC:

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NABL Proposal re: COVID-19 Outbreak

NOTICE 2020 – ____

SECTION 1. Purpose

This Notice is intended to provide temporary flexibility to issuers of state and local tax-exempt bonds to fulfill applicable public hearing requirements by holding public hearings that are accessible to the general public using a toll-free telephone call, with or without an additional option to access such public hearings online, and to assist state and local governments in their efforts to promote liquidity and stability in the tax-exempt bond market. The tax-exempt bond market has been disrupted by the novel coronavirus disease outbreak (the “COVID-19 Outbreak”), which was the subject of the emergency declaration made by the President of the United States on March 13, 2020 under the Robert T. Stafford Disaster Relief and Emergency Assistance Act and numerous emergency declarations by state and local governments.

Section 3.1 of this Notice provides that any public hearing that is conducted between March 1, 2020, and the later of (1) December 31, 2021, or (2) ninety (90) days after the date on which the jurisdiction in which the public hearing is held is no longer covered by a state, local, or federal declaration of emergency or disaster related to the COVID-19 Outbreak and, either: (1) is determined by the issuer to provide a reasonable opportunity for interested individuals to express their views, or (2) satisfies §§ 3.1(a) through (d) of this Notice, shall be treated as satisfying the public hearing requirements of § 147(f) and § 1.147(f)-1. Except as noted, section references in this Notice are to the Internal Revenue Code of 1986 and the Income Tax Regulations.

Section 5 of this Notice temporarily amends and supplements the reissuance standards for tax-exempt bonds contained in Notice 2008-41, 2008-15 I.R.B. 742 (April 14, 2008). Notice 2008-41 was modified, amended and supplemented by Notice 2008-88, 2008-42 I.R.B. 933 (October 20, 2008), and Notice 2010-7, 2010-3 I.R.B. 296 (January 19, 2010), to provide relief from liquidity constraints in the tax-exempt bond market during the financial crisis that began in 2008. A portion of the relief provided by Notice 2008-41, Notice 2008-88 and Notice 2010-7 expired, most recently as of December 31, 2010, and this Notice reinstates such relief with a few changes noted below. Sections 5.2 and 5.3 of this Notice expand the circumstances and time periods during which the Treasury Department and the Internal Revenue Service (“IRS”) will treat a tax-exempt bond that is purchased by its state or local governmental issuer as continuing in effect without resulting in a retirement of the purchased tax-exempt bond solely for purposes of § 103 and §§ 141 through 150. In addition, to alleviate the economic and liquidity constraints that are currently present in the tax-exempt bond market that were not present in 2008, § 5.4 of this Notice suspends any requirements of Notice 2008-41 relating to the use of “best efforts” to remarket tax-exempt bonds until December 31, 2021. Sections 5.5 and 5.6 of this Notice reinstate certain arbitrage rules addressed in §§ 5.1 and 5.2 of Notice 2008-41. Section 5.7 of this Notice addresses certain temporary waivers of interest rate caps in a manner similar to the provision of Section 6.2 of Notice 2008-41. Section 5.8 of this Notice provides that issuers of tax-exempt bonds that apply the Proposed Reissuance Regulations (as defined below) may also rely on Section 5 of this Notice. Defined terms in Notice 2008-41 and Notice 2008-88 shall have the same meanings when used in this Notice.

SECTION 2. BACKGROUND – PUBLIC HEARING

Interest on a private activity bond is excludable from gross income under § 103(a) only if the bond meets the requirements for a “qualified bond” as defined in § 141(e). In order to be a qualified bond as defined in § 141(e), a private activity bond, among other things, must meet the public approval requirements of § 147(f). Pursuant to § 147(f)(2)(A), a private activity bond meets the requirements of § 147(f) only if the issue of bonds is approved by the governmental unit that issues the bond or on behalf of which the bond is issued and by each governmental unit having jurisdiction over the area in which a facility which is financed by the net proceeds of the issue is located. Section 147(f)(2)(B) provides that an issue shall be treated as approved by any governmental unit if such issue is approved: (i) by the applicable elected representative of such governmental unit after a public hearing following reasonable public notice or (ii) by voter referendum of such governmental unit.

Section 1.147(f)-1(a) provides that a private activity bond meets the requirements of § 147(f) only if the bond is publicly approved pursuant to § 1.147(f)-1(b) or the bond qualifies for the exception for refunding bonds in § 147(f)(2)(D). Section 1.147(f)-1(b)(1) provides that, except as otherwise provided in § 1.147(f)-1, a bond meets the requirements of § 147(f) if, before the issue date, the issue of which the bond is a part receives issuer approval and host approval (each a public approval) in accordance with the method and process set forth in § 1.147(f)-1(c) through (f). Section 1.147(f)-1(c) provides that the method of public approval of an issue must satisfy either § 1.147(f)-1(c)(1) or (2) and that such approval may satisfy § 1.147(f)-1(c)(1) or (2) without regard to the authority under State or local law for the acts constituting the approval. Section 1.147(f)-1(c)(1) provides that an applicable elected representative of the approving governmental unit may approve the issue following a public hearing for which there was reasonable public notice.

Section 1.147(f)-1(d)(1) provides that a public hearing means a forum providing a reasonable opportunity for interested individuals to express their views, orally or in writing, on the proposed issue of bonds and the location and nature of the proposed project to be financed. Section 1.147(f)-1(d)(2) provides that the public hearing must be held in a location that, based on the facts and circumstances, is convenient for residents of the approving governmental unit. The location of the public hearing is presumed convenient for residents of an approving governmental unit if the public hearing is located in the approving governmental unit's capital or seat of government. If more than one governmental unit is required to hold a public hearing, the hearings may be combined as long as the combined hearing affords the residents of all of the participating governmental units a reasonable opportunity to be heard. The location of any combined hearing is presumed convenient for residents of each participating governmental unit if it is no farther than 100 miles from the seat of government of each participating governmental unit beyond whose geographic jurisdiction the hearing is conducted. Section 1.147(f)-1(d)(3) further provides that in general, a governmental unit may select its own procedure for a public hearing, provided that interested individuals have a reasonable opportunity to express their views. Thus, a governmental unit may impose reasonable requirements on persons who wish to participate in the hearing, such as a requirement that persons desiring to speak at the hearing make a written request to speak at least 24 hours before the hearing or that they limit their oral remarks to a prescribed time. For this purpose, it is unnecessary, for example, that the applicable elected representative of the approving governmental unit be present at the hearing, that a report on the hearing be submitted to that applicable elected representative, or that State administrative procedural requirements for public hearings be observed. Except to the extent State procedural requirements for public hearings are

in conflict with a specific requirement of this section, a public hearing performed in compliance with State procedural requirements satisfies the requirements for a public hearing in § 1.147(f)-1(d). A public hearing may be conducted by an individual appointed or employed to perform such function by the governmental unit or its agencies, or by the issuer. Thus, for example, for bonds to be issued by an authority that acts on behalf of a county, the hearing may be conducted by the authority, the county, or an appointee of either.

The Internal Revenue Code and the Department of Treasury published § 1.147(f)-1 as part of T.D. 9845, 83 F.R. 67685-67694, 2019-8 IRB 570 on December 31, 2018 (the “2018 Final Regulations”). The Preamble to the 2018 Final Regulations discusses comments to the proposed Public Approval Regulations REG-128841-07, 82 F.R. 45233-45241; 2017-42 IRB 327, published on September 28, 2017 that were received by the IRS. In particular, the Preamble discusses a comment that suggested allowing a public hearing by teleconference or webinar. The Preamble provides that “[t]he Treasury Department and the IRS have determined that, although these technologies may be effective for other purposes, they cannot replace a conventional public hearing conducted in-person because they are not sufficiently reliable, publicly available, susceptible to public response, or uniform in their features and operation.”

Due to the COVID-19 Outbreak many governmental entities are required to severely restrict or, in some cases, cancel in-person meetings.

SECTION 3. SCOPE AND APPLICATION

3.1 Access to Public Hearing By Toll-free Telephone Call.

A public hearing that allows access to the general public by toll-free telephone call with or without an additional option to access such public hearing online between March 1, 2020, and the later of: (1) December 31, 2021, or (2) ninety (90) days after the date on which the jurisdiction in which the public hearing is held is no longer covered by a state, local or federal declaration of emergency or disaster related to the COVID-19 Outbreak will be treated as satisfying the requirements of § 147(f) and § 1.147(f)-1 if such public hearing either: (a) is determined by the issuer to provide a reasonable opportunity for interested individuals to express their views or (b) satisfies all of the following requirements:

(i) Members of the general public are provided the opportunity to attend the public hearing via a toll-free telephone call;

(ii) Members of the general public are able to provide comment in the manner described in § 1.147(f)-1(d)(3) via the toll-free telephone call; and

(iii)

(I) for a public hearing for which public notice was provided on or before [DATE WHICH IS 7 DAYS AFTER THE PUBLICATION DATE OF THIS NOTICE] the toll-free telephone number and the link to the online hearing, if applicable, are provided at least 48 hours prior to the public hearing on a governmental website posting that meets the requirements of § 1.147(f)-1(d)(4)(iii); or

(II) for a public hearing for which public notice is provided after [DATE WHICH IS 7 DAYS AFTER THE PUBLICATION DATE OF THIS NOTICE] the toll-free telephone number and the link to the online hearing, if applicable, are provided in the reasonable public notice provided pursuant to § 1.147(f)-1(d)(4).

3.2 No Inferences on Law.

This Notice provides administrative relief to provide for public hearings in the current environment when in-person meetings are severely limited. Except with respect to the administrative relief expressly provided in this Notice, no inference should be drawn from this Notice regarding any other Federal tax issues affecting tax-exempt bonds including the interpretation of § 147(f) or § 1.147(f)-1.

SECTION 4. BACKGROUND – REISSUANCE

Section 3.2(3)(a) of Notice 2008-41 defines a “qualified tender right” as a tender right for the purchase of a bond (regardless of whether the purchase is by or on behalf of a governmental issuer) that is authorized under the terms of a bond upon its original issuance and that meets all the following requirements: (i) the tender right must involve either an optional tender right or a mandatory tender requirement which allows or requires the bondholder to tender the bond for purchase on at least one tender date before the final stated maturity date, (ii) the tender right must entitle a tendering bondholder to receive a purchase price equal to par (which may include any accrued interest), and (iii) the terms of the tender right must require the issuer or its remarketing agent to use at least best efforts to remarket a bond upon a purchase pursuant to the tender right.

Section 3.2(3)(b) of Notice 2008-41 provides as a general rule that a bond purchased by or on behalf of a governmental issuer pursuant to a qualified tender right is treated as not retired pursuant to and as a result of the qualified tender right until not later than the end of the 90-day period from and after the date of such purchase, and subsequent to the end of this 90-day period, a governmental issuer generally may not hold its own bond without causing a retirement of such bond. Section 3.2(b) of Notice 2008-41 extended the 90-day period described in the general rule to 180-days with respect to any purchase by or on behalf of a governmental issuer pursuant to a qualified tender right as long as such purchase occurred before October 1, 2008.

Section 3.2(3)(b) of Notice 2008-41 further provides by way of example that a governmental issuer may hold a bond purchased before October 1, 2008, pursuant to the exercise of a qualified tender right for a holding period of 179 days while using best efforts under the terms of the bonds to remarket the bond and then resell the bond to a third-party guarantor, third-party liquidity facility provider, or other independent third party before the expiration of the 180-day period in compliance with the operating rules in this § 3.2(3)(b). Notice 2008-41 does not address what constitutes “best efforts” to remarket and resell bonds.

Section 5.1 of Notice 2008-41 provides that, for arbitrage purposes under § 148, a qualified hedge with respect to bonds is not deemed terminated under §1.148-4(h) as a result of the governmental issuer’s holding of the hedged bonds during either the 90-day permitted holding period under §3.2(3) of Notice 2008-41 or the 180-day permitted holding period under § 4 of Notice 2008-41 during which the governmental issuer is permitted to hold such bonds without resulting in a reissuance or a retirement of such bonds.

Section 5.2 of Notice 2008-41 provides that, a conduit borrower’s purchase of tax-exempt bonds, issued on its behalf will not cause a violation of a technical arbitrage restriction against purchases of tax-exempt bonds by conduit borrowers under the “program investment” definition in § 1.148-1(b) in certain circumstances.

Section 6.2 of Notice 2008-41 addressed certain temporary waivers of interest rate caps.

Section 3.1 of Notice 2008-88 provided that solely for purposes of § 103 and §§ 141 through 150, the Treasury Department and the IRS would treat a tax-exempt “qualified tender bond” (as defined in Notice 2008-41) or “tax-exempt commercial paper” as defined in § 2 of Notice 2008-88) that is purchased by its “governmental issuer” (as defined in Notice 2008-41) on a temporary basis as continuing in effect without resulting in a reissuance or retirement of the purchased tax-exempt bond if, irrespective of when the governmental issuer purchases the bond (including a purchase of a bond before October 1, 2008), the governmental issuer holds the bond until not later than December 31, 2009. Section 2 of Notice 2008-88 defined “tax-exempt commercial paper” as tax-exempt bonds issued pursuant to the same commercial paper program that are treated as a single issue under the special rule in § 1.150-1(c)(4)(ii).

Section 3.1 of Notice 2008-88 further provided that in the case of the purchase of any particular obligation of tax-exempt commercial paper, including a purchase of such a particular obligation at maturity, a refinancing of that purchased tax-exempt commercial paper during the permitted holding period will be treated as part of the same issue as the issue of which the purchased tax-exempt commercial paper was a part. Section 3.2 of Notice 2008-88 extended the application of the special 180-day holding period (in lieu of the general 90-day holding period) for qualified tender bonds to those qualified tender bonds purchased pursuant to qualified tender rights until December 31, 2009.

Section 3.2 of Notice 2010-7 further extended the time period described in § 3.1 of Notice 2008-88 regarding purchases by a governmental issuer of qualified tender bonds or tax-exempt commercial paper to extend the final date for a governmental issuer to purchase or hold such tax-exempt bonds without resulting in a reissuance or retirement of the purchased bonds until December 31, 2010. In addition, § 3.2 of Notice 2010-7 further clarified that refinancing of purchased tax-exempt commercial paper during this extended period will continue to be treated as part of the same issue as the purchased tax-exempt commercial paper. Section 3.2 of Notice 2010-7 also provided that the provision of § 3.2 of Notice 2008-88 that extended § 3.2(3)(b) of Notice 2008-41 regarding the purchase of bonds pursuant to qualified tender rights for which the special 180-day holding period applied was amended to extend the final date for such purchases to December 31, 2010.

The Internal Revenue Code and the Department of Treasury published Proposed Regulations Relating to the Reissuance of State or Local Bonds (REG-141739-08, 83 F.R. 67701-67705, 2019-9 I.R.B. 757 on December 31, 2018 (the “Proposed Reissuance Regulations”). As provided in the Preamble to the Proposed Reissuance Regulations, issuers of tax-exempt bonds may apply the Proposed Reissuance Regulations to events and actions taken with respect to current and future debt.

SECTION 5. SCOPE AND APPLICATION

5.1 Definition of Permitted Holding Period.

Solely for purposes of Section 5 of this Notice, the period beginning March 1, 2020, and ending on the later of: (1) December 31, 2021, or (2) ninety (90) days after the date on which no United States jurisdiction remains covered by a state or federal declaration of emergency or disaster related to the COVID-19 Outbreak shall be referred to as the Permitted Holding Period.

5.2 Expanded Temporary Rule Allowing Governmental Issuers to Purchase Their Own Tax-Exempt Bonds.

Solely for purposes of § 103 and §§ 141 through 150, the Treasury Department and the IRS will treat a tax-exempt “qualified tender bond” (as defined in Notice 2008-41) or “tax-exempt commercial paper” (as defined in Notice 2008-88) that is purchased by its “governmental issuer” (as defined in Notice 2008-41) on a temporary basis as continuing in effect without resulting in a retirement of the purchased tax-exempt bond if the issuer purchases such bond on or after the first day of the Permitted Holding Period and the issuer holds the bond until no later than the last day of the Permitted Holding Period. Subsequent to the end of the Permitted Holding Period, a governmental issuer generally may not hold its own bond without causing a retirement of such bond under the general rules in § 3.1 of Notice 2008-41 and other applicable law.

Thus, recognizing that the purchased bond is treated as continuing in effect without resulting in a retirement of that bond solely for purposes of § 103 and §§ 141 through 150 during the Permitted Holding Period, the governmental issuer may refund the purchased bond with a refunding bond, tender the purchased bond for purchase in a qualified tender right in its capacity as a bondholder, or otherwise remarket or resell the purchased bond during the Permitted Holding Period. Further, in the case of the purchase of any particular obligation of tax-exempt commercial paper, including a purchase of such a particular obligation at maturity, a refinancing of purchased tax-exempt commercial paper during the Permitted Holding Period will be treated as part of the same issue as the issue of which the purchased tax-exempt commercial paper was a part. After the end of the Permitted Holding Period, however, a governmental issuer generally may not hold its own tax-exempt bond or tax-exempt commercial paper without causing a retirement of such bond or obligation under the general rules in Notice 2008-41 and other applicable law.

5.3 Extension of Certain Other Time Limits for Special Rules in Notice 2008-41.

Section 3.2(3)(b) of Notice 2008-41, regarding operating rules for qualified tender rights, is amended to extend the final date for the purchase of bonds pursuant to qualified tender rights for which the special 180-day holding period applies (in lieu of the general 90-day holding period rule for this purpose) to the last day of the Permitted Holding Period.

5.4 Suspension of Best Efforts Requirements.

The requirement in Section 3.2(3)(a) of Notice 2008-41 that the terms of the tender right require the issuer or its remarketing agent to use at least best efforts to remarket a bond upon a purchase pursuant to the tender right is suspended until the last day of the Permitted Holding Period. During the Permitted Holding Period, neither the issuer nor its remarketing agent will be required to use best efforts to remarket a bond upon a purchase pursuant to the tender right in order to be eligible for the Permitted Holding Period described in Section 5.1 above.

5.5 No Swap Termination.

For arbitrage purposes under §148, a qualified hedge with respect to hedged tax-exempt bonds is not deemed terminated under §1.148-4(h) as a result of the governmental issuer’s holding of the hedged bonds during the Permitted Holding Period.

5.6 Special Rule for Certain Purchases by Conduit Borrowers.

In applying the special arbitrage rule for “program investments” under § 1.148-1(b), which restricts a conduit borrower's purchase of tax-exempt bonds for a governmental program in an amount “related” to the amount of its purpose investment financed by the program, a conduit borrower's purchase of a tax-exempt bond that financed its loan within the Permitted Holding Period is treated as not being so “related” for this purpose

5.7. Special Temporary Relief for Certain Waivers of Interest Rate Caps.

Solely for purposes of § 103 and §§ 141 through 150, in applying § 1.1001-3(e)(2) to determine whether a modification that results in a change to the yield on tax-exempt bonds a significant modification, a temporary waiver, in whole or in part, of the terms of a cap on the maximum interest rate on such tax-exempt bonds is disregarded to the extent that any agreement to waive such a cap and the period during which such a waiver is in effect both are within the Permitted Holding Period. Except for the special relief provided in this section, a waiver of a cap on an interest rate on a tax-exempt bond generally is required to be tested for whether it causes a significant modification under § 1.1001-3.

5.8 Reliance on this Section for Issuers Applying the Proposed Reissuance Regulations.

Issuer of tax-exempt bonds that apply the Proposed Reissuance Regulations may also rely on the provisions of Section 5 of this Notice.

5.9 No Inferences on Law.

This Notice provides administrative relief in furtherance of public policy to promote liquidity and stability in the short-term tax-exempt bond market. Except with respect to the administrative relief expressly provided in this Notice, no inference should be drawn from this Notice regarding any other Federal tax issues affecting tax-exempt bonds or any other security. In addition, this Notice is not intended to address any other Federal tax issue implicated in the transactions described in this Notice allowing governmental issuers to purchase their own tax-exempt bonds on a temporary basis in prescribed circumstances.

SECTION 6. Effective Date

This Notice is effective as of March 1, 2020.

SECTION 7. Drafting Information

The principal author of this notice is _____. For further information regarding this notice contact _____ at (202) _____ (not a toll-free call).

APPENDIX A

NABL AD HOC TASKFORCE MEMBERS

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