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**Sent Electronically VIA: [IRS.gov/FormComments](https://www.irs.gov/FormComments)**

Edward T. Killen  
Deputy Commissioner  
Tax Exempt and Government Entities Division  
Internal Revenue Service  
999 N. Capitol Street, NW  
Washington, DC

*Re: Instructions for Form 8038 and Form 8038-G*

Dear Mr. Killen:

The National Association of Bond Lawyers (NABL) respectfully submits this set of comments and proposals for consideration by the United States Department of the Treasury and the Internal Revenue Service with respect to the instructions for Form 8038 and Form 8038-G.

The enclosed comments were prepared by an ad hoc task force comprising the individuals listed on Appendix A and were approved by the NABL Board of Directors.

If NABL can provide further assistance, please do not hesitate to contact Jessica Giroux, Director of Governmental Affairs in our Washington DC office, at (518) 469-1565 or at [jgiroux@nabl.org](mailto:jgiroux@nabl.org).

Sincerely,

Teri M. Guarnaccia  
President, National Association of Bond Lawyers

**Enclosures:**

Clean and marked copies of proposed 8038 instructions  
Clean and marked copies of proposed 8038-G instructions

**CC:**

**Allyson Belsome**, Program Manager, Tax Exempt Bonds  
**Angela Gartland**, Acting Director, Government Entities;  
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**Johanna Som de Cerff**, Acting Chief, Financial Institutions & Products, Branch 5

## Executive Summary

The current instructions for Form 8038 and Form 8038-G include provisions that are ambiguous and inconsistent with each other and with published guidance. These inconsistencies and ambiguities have resulted in differing interpretations and differing approaches to information reporting. Our recommended modifications to the instructions are intended to provide greater consistency, clarity, and completeness in reporting.

The ambiguity and inconsistency of the instructions (or lack of instructions) for many line items has led not only to inconsistent completion of the forms but also to many different practices of providing annotations, supplemental schedules and attachments to Forms 8038 and 8038-G that make form preparation more difficult and may make the completed forms less useful to the IRS.

In 2012, the Advisory Committee on Tax-Exempt and Government Entities (the “ACT”) published its 11<sup>th</sup> report, which included recommended changes to forms, including to Form 8038 and to Form 8038-G. The IRS has, since 2012 made modifications to the forms and instructions, but has not yet implemented most of the changes recommended in the ACT report. The most recent changes to the forms and instructions occurred in 2018. These changes were made in large part to conform to 2017 statutory changes, particularly to address the elimination of tax-exempt advance refunding bonds. Some of those changes raised new or additional questions about how the forms should be completed.

NABL understands that changes to the forms may be time consuming. Although NABL believes that a major overhaul of the forms would be beneficial, NABL also believes that certain changes to the instructions can simplify reporting obligations of issuers without sacrificing the usefulness of the information to the federal government. We believe that changes to the instructions should reflect the purposes of Section 149(e).<sup>1</sup> The information returns collect information related to new issues of tax-exempt bonds that can be used to evaluate the use and tax expenditure of different types of bonds, provide meaningful statistical conclusions and to assist in enforcement. Instructions and changes to instructions should avoid imposing burdens that do not assist such purposes.

Not every recommended change is of equal importance. We have organized our main comments in the order of the current versions of the instructions. We have included even minor grammatical corrections that do not by themselves improve tax law administration but can easily be made at the same time as other more important changes.

The goals of our recommendations include removing ambiguity, reducing the need or perceived need of return preparers to provide supplemental information that may not be useful, and ensuring consistency between Form 8038 and Form 8038-G. Information provided outside the data fields of the forms may be less useful to the IRS than information reported in a prescribed manner. Instructions that minimize the need to provide supplemental information outside of the forms will reduce burdens on issuers and improve the usefulness of the information that is reported.

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1       References to Sections are to sections of the Internal Revenue Code of 1986 unless otherwise noted.

Treasury Regulation §1.149(e)-1(d)(1)(i) provides that a Form 8038 or Form 8038-G is treated as completed if the issuer (or a person acting on behalf of the issuer) has made a good faith effort to complete the form (taking into account the instructions to the form). Particularly in light of the ambiguities and inconsistencies in the forms and instructions, we emphasize that many different approaches to information reporting should be treated as reasonably meeting this “good faith” standard. We understand that some of our recommended instruction changes, if adopted, may cause practitioners in the future to prepare information returns differently from the way such forms are prepared in current practice. We recommend that the IRS make clear (whether through the revised instructions or otherwise) that the IRS does not intend for the revisions to the instructions to create an implication that returns prepared prior to the release of new instructions were (or are) not correctly prepared.

## I. Consistency among Forms

The next two sections of these comments provide specific recommended changes to the instructions for Forms 8038 and 8038-G. While these comments are limited to the instructions for those two forms, some of these comments may also be suitable with respect to other Series 8038 forms.

In general, an important goal of our comments is to maximize consistency of the instructions to Forms 8038 and 8038-G. At present, they are not always consistent.<sup>2</sup> There are some differences between the instructions that reflect differences in substantive law or differences in common practice. In those cases, we have not recommended conforming the instructions to one another. Many of the comments for the Form 8038-G instructions are the same as those for the Form 8038 instructions. These comments take the approach of repeating comments for each set of instructions. That makes these comments longer, but easier to follow.

For each set of instructions, we provide comments in the order of the current instructions, including line-by-line items in the order of the forms. Portions of the current instructions that we do not see reason to change are skipped.<sup>3</sup> The order of these comments is not reflective of the importance of the suggested changes.

We also are providing suggested revisions to the current instructions in attachments to these comments.<sup>4</sup> In some cases (as described in these comments), we recommend that ambiguities be eliminated by one or more than one alternative possible change to the instructions. Elimination of ambiguity is often more important than the way that the instructions are clarified. In those cases, our instruction markups recommend one of the possible methods. We believe that our markups will be useful guides even if only some of the suggested revisions are made.

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2 For example, the current instructions for Form 8038-G specifically provide that a paid preparer may sign with a facsimile signature. The current instructions to Form 8038 do not so provide.

3 Those portions often provide excellent guidance to form preparers.

4 These suggested revisions are provided in both clean and compare versions highlighting the suggested changes to the current forms.

## II. Form 8038 Instructions

### A. What's New?

1. Current instructions to Form 8038 include a **Note** indicating that the authority to issue certain types of bonds has generally expired.<sup>5</sup> Notice 2019-39 provides authority to issue tax-exempt private activity refunding bonds under otherwise expired provisions. The instructions should be changed to acknowledge that such refunding bonds can be issued within the parameters of that Notice.

2. As set forth below in Part D relating to Specific Instructions for Line 20b, NABL recommends that the IRS refine the instructions for identifying reissuances. Current instructions explain that such identification is new. That portion of the instructions should be modified to reflect changes to the specific instructions as to when bonds should be identified as reissued.

3. Some of the items currently identified as new may be deleted from revised instructions. We have not marked up the instructions to delete such matters because the changes highlighted in the 2018 revisions to the instructions remain relatively new.

4. We recommend a number of changes that are new. To the extent that such changes are adopted, it may be appropriate to add a reference to those changes in the "What's New" section of the instructions.

### B. General Instructions

#### 1. Background, Definition of issue:

Section 149(e)(1) requires that information be reported for each tax-exempt bond. Section 149(e)(2) specifically requires the filing of a "statement concerning the issue of which the bond is a part." Section 149(e)(2) also enumerates many types of information that should be reported, most of which relate to the issue rather than to individual bonds.

Current instructions require a separate Form 8038 to be filed for each issue of bonds.<sup>6</sup>

A source of ambiguity is that there are two different definitions of "issue" that might be used to interpret the instructions. A definition of issue found in Treas. Reg. §1.150-1(c) generally applies for purposes of Sections 103 and 141 through 150. A separate definition of issue is found in Treas. Reg. §1.149(e)-1(e)(2) applicable to Section 149(e).<sup>7</sup>

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5 The instructions contain paragraphs that explain certain aspects of the law that are generally preceded by the word "**Note**" in bold. We refer to these as **Notes**.

6 This requirement is found under "**Who Must File**."

7 A third definition of "issue" appears in Treas. Reg. §1.1275-1(f) and applies to matters related to original issue discount.

In general, we are of the view that information reporting that is applicable to “issues” as generally defined for purposes of Sections 103 and 141 through 150 is more consistent with the purposes of Section 149(e) than reporting relating to “bonds” on a different basis, absent a clear and compelling reason to take a different approach.<sup>8</sup> That is, in general, the best approach would be to apply the consistent standard of “issue” as defined under Treas. Reg. §1.150-1(c) to information reporting where possible, and that any ambiguity in the regulations should be resolved and interpreted to reflect that approach. Final regulations under Section 149(e) were published in 1992, and revised in 1994, and have not been revised since. Final regulations concerning the general definition of “issue” under Section 150 were first published in 1992, but have been revised several times since. Some of our comments concern the ambiguity of the relationship between these two sets of regulations. In general, we are of the view that, given the ambiguity of this relationship, the IRS should treat reporting as meeting the “good faith” reporting standard set forth in Treas. Reg. 1.149-1(d)(1)(i) if the reporting of “issues” follows the approach of either of these regulations.<sup>9</sup>

Treas. Reg. §1.149(e)-1(e)(2) provides a definition of “issue” for purposes of information reporting that in some cases causes bonds that are generally analyzed together as a single issue under Treas. Reg. §1.150-1(c) to be treated separately for information reporting purposes. For example, bonds issued by separate issuers are treated as part of separate issues under Treas. Reg. §1.149(e)-1(e)(2) even when those bonds are treated under the general definition of an “issue” in Treas. Reg. §1.150-1(c)(1) as part of a single issue because they are part of a single plan of financing, sold at the same time and payable from the same source of funds.<sup>10</sup> In the case of separate issuers, this helpful rule means that each issuer needs to report only on bonds that it is issuing.<sup>11</sup>

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8 As discussed later, we think that there is such a compelling reason in the case of a bond issue issued by two different issuers, each of which should report on the bonds it issued.

9 By comparison, we observe that the instructions to Schedule K of Form 990 (Supplemental Information on Tax-Exempt Bonds), which apply to qualified 501(c)(3) bonds, expressly reference and require reporting based on the definition of “issue” set forth in Treas. Reg. §1.150-1(c)(3). The instructions for Schedule K further clearly contemplate that at least some of the information reported will be consistent with reporting in Form 8038, including the reporting relating to “issue date” and “issue price.” That is, it appears that the underlying assumption of the instructions to Schedule K of Form 990 is that the Form 8038 reporting would generally pertain to “issues” as defined in Treas. Reg. §1.150-1(c)(3). We believe that this aspect of the information reporting approach of Form 990 Schedule K is generally appropriate for both Schedule K and Form 8038.

We observe that in Notice 2010-81 and Notice 2011-63, the IRS set forth significant interpretations of the “issue date” of tax-advantaged bonds and issues. There is some ambiguity whether the interpretations of “issue date” were assumed to be the applicable law when the final regulations under Section 149(e) were published in 1992 and revised in 1994 and whether and how that guidance should apply to information reporting.

10 For example, such bonds may be issued as part of a financing for a multi-location qualified §501(c)(3) organization.

11 This assumes that the definition of Treas. Reg. §1.149(e)-1(e)(2) applies.

Similarly, under Treas. Reg. §1.149-1(e), for purposes of information reporting, bonds issued on different dates are treated as part of separate issues, even if issued by the same issuer and even if they are treated as parts of a single issue under Treas. Reg. §1.150-1(c).<sup>12</sup> This has led many to conclude that separate filings are required for bonds issued on different issue dates even if part of a single issue for analysis of the substantive rules related to tax-exemption.

Both the general definition of issue in Treas. Reg. §1.150-1(c) and the information reporting definition of issue in Treas. Reg. §1.149(e)-1(e)(2) contain special rules for drawdown loans and commercial paper. Each definition lumps together in one issue bonds that are issued and sold at different times. However, the rules contained in these two regulatory provisions for commercial paper are not the same. Under Treas. Reg. §1.149(e)-1(e)(2)(A), only commercial paper issued during the same calendar year can be part of the same issue, while under Treas. Reg. §1.150-1(c)(4)(ii) there is no calendar year limit.<sup>13</sup> This is important because in a typical commercial paper program (treated as a single issue under Treas. Reg. §1.150-1(c)), individual commercial paper notes may be issued over a 30-year span.

Although the instructions for both Form 8038 and Form 8038-G clearly provide that issuers must file a separate Form for each issue, the two different regulatory definitions of “issue” create ambiguity. An example of the ambiguity is whether multiple Forms 8038 are required for commercial paper that is treated as a single issue for all of the substantive rules related to tax-exempt bonds.

While changes to the regulatory definition of “issue” could remove the ambiguity, much ambiguity can also be removed by changing the requirement in the instructions that a separate return is required for each issue.

## **2. Who Must File. Separate returns, consolidated returns:**

Some bond issues under the general definition of Treas. Reg. §1.150-1(c) include bonds that are issued on two or more dates and are hence parts of separate issues for purposes of information reporting.<sup>14</sup> Many, but not all issuers have been filing separate returns for each bond issue date. When separate Forms 8038 refer to the same bond issue for purposes of compliance with the substantive rules for tax-exemption, confusion can occur. For example, since rebate under

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12 Special rules apply for commercial paper and drawdown bonds.

13 The general rule under Treas. Reg. §1.150-1(c)(4)(ii) also limits single issue treatment to commercial paper issued during an 18-month period plus additional notes used to immediately refund notes of the same issue. Although this requirement is not found in Treas. Reg. §1.149(e)-1(e)(2)(ii)(A)(2), issuers would generally not choose to combine into a single issue for information reporting requirements commercial paper of separate programs under the general rule.

14 Treas. Reg. §1.149(e)-1(e)(2)(i)(B). Such split closing transactions are often used when bond issues include refunding components that cannot be issued more than 90 days before the refunded bond redemption date. In other cases, split closing issues are used as a matter of convenience. Commercial paper and drawdown loans are subject to special rules under both sets of regulations.

Section 148(f) depends on the entire issue under Treas. Reg. §1.150-1(c), a compliance examination of just a part of that issue makes little sense.

One way to ease the burden and eliminate inconsistent filings is to clarify that issuers have the option to apply the Treas. Reg. §1.150-1(c) definition of issue when determining the scope of bonds covered by a single Form 8038.<sup>15</sup>

To prevent confusion, and to reduce the burdens of filing, NABL recommends that issuers of tax-exempt bonds should be clearly told in the instructions that they have the option to file consolidated returns for bonds that would constitute two or more issues under Treas. Reg. §1.149(e)-1(e)(2) but a single issue under Treas. Reg. §1.150-1(c).<sup>16</sup>

Consolidated returns for bonds of different issues are already expressly permitted for issues of no more than \$100,000 each, for which Form 8038-GC is the appropriate information return. Under the instructions for Form 8038-GC, a single composite return may be filed for any number of bond issues issued in the same calendar year, even if they are not part of the same issue under Treas. Reg. §1.150-1(c) or Treas. Reg. §1.149(e)-1(e)(2).

NABL believes that consolidated returns are appropriate for bonds comprising a single issue under Treas. Reg. §1.150-1(c) even if the due date for the Form 8038 for some of the bonds precedes the issue date of other bonds for which the consolidated filing is made.<sup>17</sup> The instructions could provide that such a consolidated filing be expressly permitted when the issuer reasonably believes that the information on the consolidated return will reflect the facts on all issue dates.<sup>18</sup>

A properly filed consolidated return should satisfy the information-reporting requirement for all bonds described in the return. Such consolidated returns should be limited to bonds that are part of a single issue under Treas. Reg. §1.150-1(c) issued by a single issuer. NABL recommends that the use of such consolidated filings be optional (as it currently is for Form 8038-GC). There are times when separate filings are helpful. For example, in the case of bonds to be issued in

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15 The regulations could be amended to make them more consistent. However, we note that the only authority under current law for the requirement that a separate Form 8038 be filed for a separate bond issue is the provision of the current instructions to Form 8038 under “**Who Must File.**”

16 Our recommendation relates to removing ambiguity and clarifying the instructions. We are not implying that current instructions do not permit this.

17 When the issue dates are in the same calendar quarter plus approximately 45 days of the following quarter, a single filing could timely be made after all bonds of the composite issue have been issued.

18 To the extent that the instructions permit a Form 8038 to be filed before the issuance of all bonds covered by a consolidated return, the reported facts might change before all the reported bonds are issued. We believe that such fact changes between the initial issuance date and a later issuance date of bonds that have all been sold at substantially the same time are rare. The instructions could provide that an amended return be filed to reflect any changes in the reported facts between issue dates; however, we do not recommend this additional change because current instructions related to amended returns are adequate to cover this situation, which we expect will be quite rare.

different calendar years, reporting for bank qualification purposes is simpler with separate filings. Also, in some cases, information that would be required for a consolidated return might be unknown as of the due date for such consolidated return. For example, if an anticipatory hedge was to be terminated in connection with the second closing of the split closing bond issue, the issue price to be reported might not be known until the hedge is terminated. In any case, consolidated returns should not be required for bonds of different issuers. An issuer should not have to report on bonds it is not issuing.

### **3. Who Must File. Information to be reported on consolidated returns:**

If the IRS adopts our recommendations above permitting consolidated returns, then the values to be provided on the consolidated return should relate to all the bonds covered by the return. This is consistent with the current instructions for Line 21e, which requires the yield to be used for purposes of Section 148, which will apply to all of the bonds of a single issue under the general definition in Treas. Reg. §1.150-1(c) to be given, even where the bonds are separate issues under Treas. Reg. §1.149(e)-1.

### **4. Who Must File. Information to be reported on separate returns:**

Whether or not consolidated returns are permitted, some Forms 8038 will be filed for just part of a larger issue under Treas. Reg. §1.150-1(c). Such bonds may, for example, be issued by more than one issuer or be issued on more than one date. The limitations imposed by substantive law are based, however, on data related to an entire bond issue under Treas. Reg. §1.150-1(c). The filing of consolidated returns, if permitted, could be used to minimize the situations in which multiple returns would be filed for a single issue under the Treas. Reg. §1.150-1(c) definition. Such returns would not however be eliminated. The current instructions are ambiguous about the information to be used for returns covering only some of the bonds of a single issue under the broad definition of issue. The instructions to Line 21e clearly inform the issuer that the yield to be used is the “yield,” as defined in Section 148(h), which is based on all the bonds in the larger issue (as defined in Treas. Reg. §1.150-1(c)).<sup>19</sup> Similar guidance is not provided for other information to be entered onto Form 8038. For example, it is unclear if the final maturity or the weighted average maturity should be that of the entire bond issue as defined in Treas. Reg. §1.150-1(c) or that of just the particular bonds for which the Form 8038 is being filed. While Section 147(b) limits the weighted average maturity of the entire issue as defined in Treas. Reg. §1.150-1(c), bonds issued as part of that larger issue by one of two separate issuers, which would be reported on a separate 8038, might have a very different weighted average maturity.<sup>20</sup> We believe

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19 In the case of a pooled conduit bond issue in which the conduit loans are themselves tax-exempt bond issues, each yield on the bonds allocable to each separate tax-exempt conduit loan is computed separately based only on such allocated bonds. These transactions are not common and should be viewed as special cases that need not be addressed in the instructions to the forms.

20 Treas. Reg. §1.150-1(c)(3), applicable to both Section 147 and Section 149(e), among others, in some cases permits (but does not require) issuers to treat bonds that would otherwise be a single (multipurpose) issue under Treas. Reg. §1.150-1(c) as separate issues. In cases where Treas. Reg. §1.150-1(c)(3) is used to divide

that it would promote consistency and generally be beneficial and appropriate for the instructions to remove such ambiguity. The matter does not need to be resolved in the same way for all information. Rather, the IRS should resolve this issue as most appropriate for the type of information being reported. Some information forms the measure by which substantive rules are tested.<sup>21</sup> It seems reasonable for the IRS to instruct issuers to report such values calculated or determined for the entire issue as defined in Treas. Reg. §1.150-1(c). Other information seems to more appropriately relate to specific bonds covered by the return.<sup>22</sup> It may be appropriate for the instructions to include special rules for commercial paper filing.<sup>23</sup> We recommend providing instructions that in general, unless the instructions for a particular Line or Part provide otherwise, the information to be reported should apply to the particular bonds covered by the Form 8038, and not other bonds that are part of the same issue under Treas. Reg. §1.150-1(c) but are to be reported on a different Form 8038.

## **5. When to File. Issue Date:**

Under current instructions, the due date of a Form 8038 is based on the “calendar quarter in which the bond was issued.”<sup>24</sup> Nevertheless, Forms 8038 are filed for issues of bonds, even if the due date is in terms of the issue date of the bond.<sup>25</sup> The current instructions provide that the Form 8038 may not be filed before “the issue date.” This provision is ambiguous because it does not indicate whether it refers to the issue date of the issue or the issue date of a bond of that issue. The best interpretation of the current instructions is that the Form 8038 must be filed by the 15th day of the second month after the close of the calendar quarter in which any bonds of the issue are issued, but not before the issue date of the issue. Another reading could be that the Form 8038 could not be filed before the issue date of any bonds of the issue.<sup>26</sup> We recommend that the ambiguity be cleared up by referencing the issue date of the issue (rather than the bond) in both

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a multipurpose issue into separate portions, and where that division matches the bonds issued by separate issuers, there would be no ambiguity about the weighted average maturity to be provided on the form.

- 21 Examples include weighted average maturity, yield, arbitrage elections, qualified hedge information and information on written procedures.
- 22 Examples include issuer name, date of issue, name of issue, CUSIP, issue price (including issue price of bonds of various categories), final maturity date, stated redemption price at maturity, accrued interest, proceeds used for various purposes, bond amounts used for various purposes, information about refunded bonds, designation as bank qualified, investment information and volume cap information,
- 23 For example, we recommend that the final maturity date to be reported for commercial paper be the final maturity date for the entire commercial paper program, not just the final maturity date for commercial paper issued in one calendar year.
- 24 Current instructions refer to the issue date of the singular “bond.” Most Forms 8038 are filed for multiple bonds of an issue.
- 25 The requirement to file separate returns for each issue is found under the heading “Who Must File.”
- 26 This interpretation would be problematic for commercial paper, perhaps requiring quarterly filing. We do not believe it is intended.

places. If consolidated returns are permitted, Form 8038 should be permitted to be filed no earlier than the earliest issue date of any issue (as defined in Treas. Reg. §1.149(e)-1(e)(2)) to which the filing relates.

## **6. When to File - Commercial Paper:**

NABL recommends the following changes to the instructions targeted specifically to tax-exempt commercial paper.

Both definitions of “issue,” Treas. Reg. §1.149(e)-1(e)(2) for information reporting purposes, and Treas. Reg. §1.150-1(c) applicable to the substantive requirements for tax-exemption, contain special rules for commercial paper. The special rules are not the same, however. The differences have resulted in confusion regarding appropriate filing practices for commercial paper.

In particular, for commercial paper issues, which consist of notes with individual maturities of up to 270 days, Treas. Reg. §1.149(e)-1(e)(2)(ii)(A) allows two or more commercial paper notes to be part of the same issue only if they are issued in the same calendar year. In contrast, the general definition of an “issue” of commercial paper obligations in Treas. Reg. §1.150-1(c)(4)(ii)(A) contains no such calendar year limitation.<sup>27</sup> If a separate Form 8038 is required for each “issue” under the definition applicable to Section 149(e) rather than for each issue under the more general definition, then, for commercial paper, a new filing is required for every calendar year during which the commercial paper program remains outstanding.<sup>28</sup> Currently, some bond counsel take the position that such annual filings are required.<sup>29</sup> Such annual filings may be beneficial to the IRS if there are significant changes from year to year in the information reported, but multiple filings are burdensome and not helpful to the IRS or Congress, particularly when the same information is being reported year after year.<sup>30</sup>

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27 Treas. Reg. §1.150-1(c)(4)(ii)(A) does contain both an 18-month and a 30-year limitation. Under Treas. Reg. §1.150-1(c)(4)(ii)(A), commercial paper notes other than rollover notes of a single issue must be issued during an 18-month period. All commercial paper in a single issue must mature within a 30-year period beginning on the date of issue of the issue.

28 No filing would be required for the final calendar year in which the commercial paper is outstanding if the program ended before any rolls during that calendar year.

29 Other counsel take positions that either only one filing is required for a commercial paper program or that even one filing per year is not sufficient and provide a filing with respect to each date on which a commercial paper note is issued.

30 The burden involved in annual filings is exacerbated by the general lack of professionals, including paid preparers, involved in routine rolls of commercial paper. Hiring of such professionals on an ongoing basis is expensive and has in some cases resulted in avoidance of commercial paper issuances. Although commercial paper may be more efficient and involve simpler documentation, most of the economics of a commercial paper program may be duplicated using long term qualified tender bonds subject to mandatory puts at intervals of no more than 270 days. Issues of such “commercial paper mode” (also called “flexible mode”) bonds do not raise the same questions concerning information reporting as “true commercial paper” because the bonds of such issues are only issued once at the initial issue date of the issue. A single bond is remarketed rather than rolled. No apparent purpose of Section 149(e) is served by having different reporting

NABL's primary consideration is that the instructions provide certainty as to when the filing is required. Secondly, our recommendation would ease the burden on commercial paper issuers by eliminating redundant filings.

Our recommendation to accomplish both goals is for the instructions to clarify that after the initial filing for a commercial paper program that is treated as a single issue under Treas. Reg. §1.150-1(c), annual filing is only required if significant information (other than the issue date, the CUSIP number<sup>31</sup> and the weighted average maturity) is different from that reported on the initial return.<sup>32</sup>

NABL does not view this recommendation as inconsistent with Treas. Reg. §1.149(e)-1(e)(2)(ii)(A). The recommendation would just eliminate redundant filings when no significant information has changed. No Code or regulatory provision requires a separate filing for each issue.<sup>33</sup>

Regardless of whether our recommendation to eliminate redundancy is taken, we believe it is important that the instructions explicitly indicate when filings are required for commercial paper programs in order to provide greater consistency of filing practices (ranging from separate filings for each commercial paper note to a single filing for a multi-year commercial paper program) caused by differing interpretations of the filing requirements. Consistency is important if Congress and the IRS are to obtain useful information from the filing. We do not believe that at present, Forms 8038 and 8038-G filed with respect to commercial paper programs provide such information, nor do the current instructions provide a clear path to consistent reporting.

Our recommendations would eliminate the redundancy of annual filing when information has not changed. However, if annual filings are to be required, our markup provides the necessary clarifications. In such case, some of our inserted text could be used while other recommended text could be ignored.

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rules for such commercial paper and qualified tender bonds, and the existing guidance is best interpreted in that light.

31 Our specific comments on Line 9 provide that the CUSIP number to be reported should not change on subsequent filings with respect to the same commercial paper program but should always be the same CUSIP number reported on the first filing.

32 This recommendation may be viewed as a special case of the consolidated return recommendation (see above). If consolidated returns for bonds that constitute a single issue under Treas. Reg. §1.150-1(c) are permitted, the initial filing for a commercial paper program may be viewed as a consolidated return applicable to the entire commercial paper program, which is treated as a single issue for purposes of Treas. Reg. §1.150-1(c).

33 We recognize that the IRS may take the position that changing the instructions (however beneficial) to allow consolidated returns and no longer require a separate filing for every bond issue under Treas. Reg. §1.149(e)-1(e)(2)(ii)(A) may be beyond the scope of what can be accomplished with only a change to instructions. If so, we recommend modifying Treas. Reg. §1.149(e)-1(e)(2)(ii)(A) to eliminate any need for such redundancy. In general, we recommend that Treas. Reg. §1.149-1(e) could be greatly improved and simplified by taking the simple approach of referencing the rules of Treas. Reg. §1.150-1 more completely.

In our comments on the line-by-line instructions for Form 8038, we address several technical questions concerning the specific information requested for commercial paper issues. Generally, such information is more useful for the administration of the substantive rules of tax law if the information applies to the entire issue for purposes of Treas. Reg. §1.150-1(c).

If annual filing were to be required, most issuers would prefer that it be required at the same time each calendar year.<sup>34</sup> For this reason, we recommend that if annual filings are to be required, an issuer may fulfill its annual filing requirements by filing between January 1 and May 15 of a particular year (other than the initial filing made when the commercial paper program is commenced), whether or not any commercial paper rolls occur during the first calendar quarter. This approach eases administrative tracking for commercial paper issuers and would likely increase timely filing.

#### **7. Other Forms that may be required – Deadwood:**

Current instructions to Form 8038 reference bond issues that are treated as not being private activity bonds under transition rules from the Tax Reform Act of 1986. Due to the passage of time, these instructions, while not incorrect, are rarely applicable today. Deleting this deadwood would not change the rules, but would serve to remove clutter from the instructions.

#### **8. Rounding to Whole Dollars:**

Current instructions appear to require dollar amounts to be provided to the nearest dollar. In some places, the instructions ask for a reasonable estimate, allocation or proration of proceeds. In such cases, making such allocations or prorations to the nearest dollar is not reasonable. Instead, whenever a reasonable estimate, allocation or proration is explicitly called for in the instructions, there should be no need for such artificial precision. The instructions should provide that the totals of such estimates, allocations or prorations should add to a total that is precise to the nearest whole dollar, but that individual estimates, prorations or allocations need not be so precise, so long as the estimate, allocation or proration is reasonable.

### **C. Definitions**

1. Bond. NABL recommends that there be added to the instructions a new definition of “bond,” which makes clear that “bond” refers to any obligation *of a State or political subdivision*. This addition reflects the definition of “bond” set forth in Treas. Reg. §1.150-1. The proposed definition also sets forth examples of types of obligations that are included in the definition, making clear that many types of debt instruments may qualify as a bond under the definition.

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<sup>34</sup> The exact “date of issue” in each calendar year of the first commercial paper issued that year may be burdensome to determine. Individual commercial paper notes may be up to 270 days and, accordingly, there might or might not be any commercial paper notes issued during the first calendar quarter (or even the first half of the year), although most commonly, once a commercial paper program has started, the notes mature and are rolled almost every month (or even every week).

2. Commercial Paper. NABL recommends adding definitions of “commercial paper” and “commercial paper program.” Several of our recommendations relate to clarifications with respect to reporting of commercial paper. NABL’s recommendation for a definition of “commercial paper program” borrows from the definitions of commercial paper in Treas. Reg. §1.150-1(c)(4) and Treas. Reg. §1.149(e)-1(e)(2)(ii)(A)(2).

Commercial paper is a bond issued under a program to issue short-term bonds, each having a maturity of 270 days or less (commercial paper) to finance or refinance the same governmental purpose pursuant to a single master legal document. A commercial paper program is a program under which commercial paper is issued under common documents.

3. Drawdown Bond. Because there are several recommended changes to the instructions that reference drawdown bonds, NABL recommends the addition of a definition of “drawdown bond” to the instructions. The recommended language is based on Treas. Reg. §1.149(e)-1(e)(2)(ii)(A)(1) and Treas. Reg. §1.150-1(c)(4).

4. Tax-exempt bond. NABL recommends that the existing definition be revised to refer to any “bond” instead of any “obligation.” This change reflects the definition of “tax-exempt bond” set forth in Treas. Reg. §1.150-1.

5. Taxable Bond. The definition of taxable bond in the current instructions leaves an ambiguity about whether taxable corporate debt of a conduit borrower is a taxable bond. NABL does not have a strong recommendation about whether such corporate debt should be included in the definition but does believe that the ambiguity should be removed by inclusion of a clear answer to this question in the instructions. The instruction markup that we have provided would have such non-governmental taxable debt treated as taxable bonds. Another alternative is to have taxable bonds include debt of qualified 501(c)(3) organizations, but not of other non-governmental borrowers. That would be consistent with the treatment of the use of bond proceeds to pay such debt under Treas. Reg. §1.142-4(b) and Treas. Reg. §1.150-2.<sup>35</sup>

6. Private Activity Bond. The current language of the second paragraph of the second bullet (dealing with the private loan test) is confusing.<sup>36</sup> The correct concept is that the term private activity bond also includes a bond that is part of an issue, the proceeds of which are to be used (directly or indirectly) to make or finance loans (other than loans described in section 141(c)(2)) to persons other than governmental units in an amount in excess of the lesser of 5% of the proceeds or \$5 million. Also, there is no mention in the current definition of private activity

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35 The definition of “prior issue” in Treas. Reg. §1.150-1(d)(5) refers to an “issue of obligations” rather than just to an “issue.” The reference to “issue of obligations” is widely interpreted as including debt of corporate borrowers of tax-exempt bond proceeds. Including debt of 501(c)(3) corporations as taxable bonds would also be consistent with that definition of “prior issue.”

36 The language that contains the problem is designated (b) in the last paragraph of the definition. That language appears to us to not reflect its intended meaning.

bonds of bonds that are treated as private activity bonds if they are used to acquire nongovernmental output property.<sup>37</sup> We have provided language that corrects this definition.

7. Issue Price. As a minor grammatical correction, we suggest changing this definition so that the subject “amount” is followed by the word “is” rather than “are,” since “amount” is singular.

8. Issue. We recommend changes to the definition of “issue” to reflect the different meanings given to the word under Treas. Reg. §1.149(e)-1(e)(2) and Treas. Reg. §1.150-1(c). Because we have recommended adding a definition for commercial paper and drawdown loan, we recommend shortening the definition of “issue” to avoid repeating the requirements of commercial paper and drawdown loans.

#### **D. Specific Instructions**

- Amended Return, Original Information. Current instructions provide that in the case of an amended return, the issuer must provide all the information included in the original Form 8038 being amended. The purpose of this requirement is unclear, and the requirement has led to inconsistent interpretations. To appreciate the ambiguity, imagine a Form 8038 filed with one piece of information that is incorrect, the wrong yield on Line 21e. Without the instructions, an issuer might just provide an amended return with a number filled in on Line 21e with the rest of the Form 8038 blank other than the information in Part I needed to identify the issue and the check mark showing an amended return. One interpretation of the current instructions is that the amended Form 8038 should not leave blank the fields that did not need to be corrected. For example, the amended return should include the weighted average maturity on Line 21d even if that number was correct on the original form. Under this interpretation, amended returns are filed with all relevant fields completed and with the amended return box checked, but without repeating the information incorrectly reported on the original return. Another interpretation is that the issuer must provide not only a fully completed amended return, but also must provide the information originally submitted, even if that information is being corrected in the amended return. This has led some issuers to attach a copy of the original Form 8038 (which usually is at least partially incorrect) to the amended Form 8038 and perhaps add a cover letter explaining what has changed.

NABL recommends revisions that would provide for more consistent reporting in amended returns. The instructions should be clarified to promote the practice that the IRS finds best matches the procedures used by IRS personnel to process amended returns. Generally, it is our view that re-submission of incorrect information should be avoided and the need for explanations should be minimized. We therefore recommend that the instructions concerning amended returns be modified through the insertion of a single word, “correct,” as shown here:

The amended return must provide all the **correct** information reported on the original return, in addition to the new or corrected information.

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<sup>37</sup> As provided in Section 141(d). This category of private activity bond is listed under “Who must file.”

Alternatively, if the IRS prefers that the information on the original return be resubmitted, whether or not it is being corrected, the instructions should say so. If a copy of the original return is to be attached to the amended return, the instructions should say so.

- Line 1, Current instructions provide that the issuer's name not be the name of the entity receiving the benefit of the financing. We recommend adding the word "necessarily" to the phrase in the instructions so that there is no implication that the issuer may not receive benefit. In many cases, the name of the entity receiving the benefit of the financing is the name of the issuer.

- Line 3, Expiration of Authority. On Line 3 of Form 8038, an issuer is provided an option to include an outside contact person. Line 3 is often left blank (which is permitted in the current instructions). We believe that the option to include such an outside contact person is beneficial, but that current instructions discourage the use of Line 3. A knowledgeable representative listed on Line 3 may provide benefits if the IRS has questions about the form as filed. In many cases, the form preparer (who also often serves as the bond counsel) would be such a knowledgeable person. However, many bond counsel are unwilling to be so listed on Line 3 because their engagement as bond counsel ends on (or shortly after) the bond issue date. Such counsel might agree to be listed if the period during which they could be contacted and during which they were authorized to receive taxpayer information was strictly limited. For example, if the authorization created by Line 3 ended 60 days after the issue date, many counsel could structure their engagements to end on such date rather than on the issue date. If the purpose of Line 3 is to allow the IRS to contact someone during the process of accepting the return, a termination of authority within a reasonable period would not interfere with the usefulness of inclusion of such a contact. However, under current instructions, such counsel are concerned that if their names are included, they may be contacted possibly years later when the IRS has a question about the bond issue. In its 2012 report, the Advisory Committee on Tax-Exempt and Government Entities recommended that the Form be modified to allow the issuer to enter an expiration date. Providing that flexibility without changing the form itself is difficult, but the instructions could be modified to have the authority expire in a set number of days after the date of issue in all cases. That is the approach we recommend.

- Line 3, Preparer. If the concern about expiration of authority is addressed, the person acting as paid preparer is likely to be the most common person to be provided as the outside contact person with authority to discuss the form with the IRS. The contact information for the paid preparer is already provided on Form 8038 in the signature block.<sup>38</sup> In order to make completion of the form simpler and to reduce redundancy, we recommend that if the issuer wishes to authorize the person acting as paid preparer to communicate with the IRS concerning the form, the issuer should just enter the word "PREPARER" on Line 3. Even if the instructions do not generally provide an expiration date for the authority resulting from a name inserted on Line 3, the instructions should provide that the authority of the paid preparer to receive taxpayer information and to discuss the form with the IRS should expire within a short specified period (*e.g.* 60 days after issuance) if the word "PREPARER" is inserted on Line 3.

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38 The paid preparer block includes preparer name, phone number, firm name and an address.

- **Line 3, Address.** Another source of confusion concerning an outside contact is created by the absence of a separate address line for the contact listed in Line 3. Current instructions provide that the address on Lines 4 and 6 should be the address of the person listed in Line 3, if any, or, if no person is listed on Line 3, then that address is to be the address of the issuer. Because the IRS may need to contact the issuer by mail, it is important for the issuer's address to be provided.<sup>39</sup> (The form and current instructions do provide for separate phone numbers.) If the Form were being modified, we would recommend (as the ACT recommended) that separate lines for two different addresses be provided. That approach is not open to us in the recommendations of this project because we are not recommending changes to the Form itself. We note however that the address of the paid preparer (if any) is already provided at the bottom of the Form 8038, below the signature block. Therefore, if the issuer names the paid preparer on Line 3 (for example, by writing the word "PREPARER" on that line), it could still use Lines 4 and 6 to enter the issuer's address.

Because the signing preparer might not be the person that the issuer wants to include on Line 3, we recommend that the instructions should provide an alternate way to provide both the mailing address of the issuer and the mailing address of an alternative person in the case that someone other than the signing preparer be selected. Exclusion of the issuer's mailing address can create problems later in the life of the bond issue if the IRS needs to contact the issuer. Although, as a general matter, we believe that the instructions should avoid requiring attached schedules, in this case, we believe that the usefulness of Line 3 would be enhanced if (1) Lines 4 and 6 always provided the issuer's mailing address and (2) the issuer were instructed to attach a schedule with the mailing address of the person listed on Line 3 if any person other than the paid preparer were specified. If such schedule is attached, such schedule could also include an expiration date for any authority created by inclusion on Line 3.

- **Lines 4 and 6, Whose address to include.** Current instructions provide that the address to be inserted be the address of the outside representative, if any, listed on Line 3 or if none, the address of the issuer. We believe that it is important that Form 8038 always include the Issuer's address. Accordingly, we recommend that the instructions be modified so that Lines 4 and 6 always refer to the issuer's address. If the address for a person listed on Line 3 is required, it should be provided on a separate schedule unless that person was the paid preparer, whose address is already on the Form 8038. See our comments to the instructions to Line 3.

- **Lines 4 and 6, Permitted issuer address.** Some issuers of tax-exempt bonds do not maintain a mailing address separate from that of their agents (e.g., their lawyers). The instructions should clarify that an issuer address can be in care of another entity. Use of such an address does not authorize IRS communication with the entity in whose care mail is delivered to the issuer. Mail addressed to the issuer and sent to such address is for the issuer.

- **Line 7, Date of Issue for Commercial Paper.** Treas. Reg. §1.149(e)-1(e)(2)(ii) provides that commercial paper issued as part of the same program in a single calendar year may be treated as part of the same issue, but suggests that commercial paper issued in separate

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<sup>39</sup> For example, the IRS will need to contact the issuer in the case of an examination of the bond issue.

calendar years is not part of a single issue for information reporting purposes even if such paper is part of a single issue for substantive tax-exemption compliance purposes under the general definition in Treas. Reg. §1.150-1(c)(4)(ii). This has led some to conclude that under current instructions (which require a separate filing for each issue) annual filings are required for commercial paper programs. As set forth above under the heading “When to File,” NABL recommends that redundant filings not be required. However, in case that recommendation is not taken and also to cover the case when an additional filing is required because significant information has changed, the instructions should explain what date is to be provided on Line 7 with respect to Forms 8038 filed with respect to a commercial paper program other than the Form 8038 filed in connection with the original issuance in the first calendar year of the commercial paper program.

One possible approach is for the instructions to provide that the original issue date from the first Form 8038 filed with respect to the program be used on all subsequent filings. However, we have concerns that if this approach is adopted, filings in subsequent years might be flagged as late by the IRS creating needless administrative burdens on both the IRS and the issuer.<sup>40</sup> While NABL believes that this concern could be overcome by proper instructions from the IRS to its personnel reviewing the submitted forms, we recommend below other ways to clarify the date to be used that would not be burdensome.

NABL recommends that, to provide a more uniform reporting of continuations of existing commercial paper programs, the instructions provide that annual filings each year other than the first year of a commercial paper program, if any are required, may be based on an assumed January 1 issue date. While the issue date for a particular calendar year of a commercial paper program originally commenced in a prior calendar year would, in general, be the first date on which commercial paper notes of the program were issued or rolled in that year, the dates on which commercial paper is rolled is of no real significance to the issuer or ultimate borrower. Rolls of commercial paper occur without issuer involvement. Application of a January 1 issue date convention to such commercial paper programs for Forms 8038 filed with respect to continuations of existing programs would reduce administrative burdens on issuers and encourage timely reporting by providing for a consistent filing date from year to year. Because January 1 is never a business day, using a January 1 issue date convention has the additional advantage of flagging the filing as a continuation of an existing program (and not a new issue) for enforcement purposes. This convention would provide the IRS with an “as of” date for the information reported for the commercial paper program.

- Line 7, Date of Issue for Consolidated return. If the instructions are modified to allow consolidated returns covering bonds of more than one issue under the definition of Treas. Reg. §1.149(e)-1(e)(2), the issue date should be the earliest issue date of any bonds covered by the filing.

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40 If this choice were adopted, the issue date listed on Line 7 would often be more than 6 months prior to the filing date.

- Line 9, Single CUSIP to be reported. CUSIP numbers are utilized to provide a concise unique identification for a tax-exempt bond issue. The actual name of the issue is often long and unwieldy. The existing instructions for the Form 8038 provide that the CUSIP number of the bond with the latest maturity be reported. Often, especially with an issue of bonds that includes multiple series of bonds, there are multiple bonds with separate CUSIP numbers that share the latest maturity date. Currently, some issuers report all such CUSIP numbers and others report only one of such CUSIPs. To provide for more consistent reporting across issuers and reduce the number of attachments to the Form 8038, we recommend that the instructions provide that, if there are multiple bonds sharing the latest maturity, only one of such CUSIP numbers is to be reported.

- Line 9, CUSIPs assigned after initial issuance. New CUSIPs can be assigned to bonds on a date long after the issue date for a variety of reasons.<sup>41</sup> Our recommendation is that the CUSIP number assigned to a bond issue on the initial issue date be used for all reporting purposes relating to an issue of bonds, even if a new CUSIP number is assigned at a later date.<sup>42</sup> To this end, NABL’s recommended changes to the instructions note that no amended filing is required for a change in the CUSIP number.

In the case of commercial paper, the final maturity of the issue (using either definition of issue) and the CUSIP number eventually assigned to that maturity is likely unknown as of the issue date of the commercial paper issue. In the case of the first filing for a commercial paper program, NABL recommends that Line 9 be completed based only on CUSIP numbers for notes issued on that initial issue date. NABL acknowledges that such CUSIP number may relate to a note that actually matures (and is expected to be rolled) in as little as a week after closing. However, we believe that reporting the initial CUSIP serves the purpose of identifying the issue. To the extent that the instructions require issuers to make annual filings, the CUSIP number should remain constant allowing an easy way to link those filings. Using separate CUSIP numbers for each filing of a commercial paper program treated as a single issue for enforcement purposes would complicate administration.

- Line 18, Qualified Non-Hospital Bonds – Box. Current instructions provide guidance about filling in a dollar amount for qualified non-hospital bonds, but do not expand upon the instructions printed on the form, which provide: “Check box if 95% or more of net proceeds will be used **only** for capital expenditures.”<sup>43</sup> The purpose of the box on Line 18 appears to most practitioners to relate to Section 145(b), the \$150,000,000 limit on non-hospital qualified 501(c)(3) bonds for a related group of §501(c)(3) borrowers, particularly in light of the **Note** included at the

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41 For example, a new CUSIP is often assigned to a portion of the bonds of a particular maturity that have been defeased, or if certain other changes not resulting in a reissuance are made to a portion of a maturity.

42 For example, that CUSIP number should be used on Form 8038-T even if at the time of the filing of a Form 8038-T, that CUSIP number does not apply to any bonds then outstanding and even if a new CUSIP has been assigned (after closing) to a longer maturity. Fully implementing this recommendation this may require changes to the instructions for Forms 8038-T and 8038-R.

43 The word “only” is in bold on the form.

end of the instructions related to this Line 18. The **Note** is fairly accurate.<sup>44</sup> Section 145(b) generally applies to non-hospital bonds unless 95% or more of the proceeds finance or refinance capital expenditures made after August 5, 1997. The instructions for checking the box (including those printed on the Form 8038 itself) do not distinguish between pre- and post- August 5, 1997 capital expenditures, even though the relevant substantive law does. Completion of this Line 18 for refunding issues is particularly unclear. A small clarification to the instructions will ensure that the relevant information provided in Line 18 will properly identify those bond issues that raise questions about the \$150,000,000 limit and will distinguish such bond issues from those that do not. If the box is not checked, the current instructions then require additional information on an attached schedule. That additional information will indicate if the benefitted organizations exceed the \$150,000,000 limit after the issuance of the issue. That is appropriate if the failure to check the box is an indication that the issue is not excluded from the substantive analysis. The instructions could provide that the box should be checked if 95% or more of the proceeds of the issue directly or indirectly are being used to finance capital expenditures made after August 5, 1997. Alternatively, the instructions could provide that the box be left unchecked for all refunding transactions, which would provide clarity, but would not provide a useful distinction related to the \$150,000,000 test and would create an undue burden on persons completing the form.<sup>45</sup>

- Line 18, Completion of the schedule for a current refunding. In determining compliance with the \$150,000,000 limit on certain non-hospital qualified 501(c)(3) bonds, bonds that have been currently refunded (and therefore will remain outstanding for no more than 90 days) are ignored. However, the current instructions for Line 18 of Form 8038 do not provide such an exclusion. Current instructions provide that the issuer is to attach a schedule providing the name of each organization benefitting from the bonds and, if the box is not checked, the amount of other non-hospital qualified 501(c)(3) bonds outstanding as of the issue date. NABL recommends clarifying item 4 of the current instructions to exclude bonds currently refunded by the issue being reported. Making this change is needed to make the **Note** included in the instructions accurate.

- Line 18, Nonhospital bonds included on schedule. Current instructions require that if the box is not checked, the attached schedule include the amount of all “other nonhospital bonds” outstanding as of the date of issue benefitting the listed entity. The intent of this provision (as indicated by the **Note** following) is to demonstrate compliance with the \$150,000,000 limit on nonhospital bonds that financed pre-August 6, 1997 capital expenditures (or financed working capital). NABL recommends that the instructions specifically indicate that nonhospital bonds issued after August 5, 1997 and financing post-August 5, 1997 capital expenditures be excluded from the reported total. Many issuers have interpreted the instructions in this way, but the current instructions do not expressly address this point.

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44 The **Note** addresses the date of issue of the bond rather than the date of the capital expenditure. A bond can finance a capital expenditure made before or after the date of issue. For example, proceeds of the issue could reimburse for capital expenditures made before the date of issue. We have provided additional language to the **Note** to clarify this.

45 NABL does not support this alternative.

- **Line 18, Note.** The Note included in the current instructions for Line 18 describes the provisions of Section 145(b)(5) related to the termination of the provision. At this time, most qualified nonhospital 501(c)(3) bond issues, including most refunding transactions relate to capital expenditures made after August 5, 1997. Very few qualified 501(c)(3) bond issues involve use of more than 5% of the net proceeds for working capital expenditures. The **Note** however needs to be clarified to properly reference the numbers to be included in item 4 of the attached schedule. Also, the relevant date is the expenditure date rather than the issue date of the bonds. For example, a bond issue issued after August 5, 1997 to reimburse a capital expenditure made before that date would be subject to the limit. We have provided language to clarify the **Note**.

- **Line 20b Reissuances.** The current instructions ask that Line 20b be completed if the bonds are treated as reissued (i) pursuant to Treas. Reg. §1.141-12 or other applicable authority concerning remedial actions or (ii) due to a significant modification under Treas. Reg. §1.1001-3.

In the former instance, a bond is deemed reissued, although the bond is not considered to be sold or exchanged under Section 1001. In this case, there is no actual new bond issue to which the Form 8038 relates. There are good reasons for the instructions to require bond issuers to distinguish such a deemed reissuance from an actual reissuance. Since no bonds are actually being issued in such cases, statistical information might otherwise be skewed by treating such filings in the same way as filings for actual new issues. For purposes of enforcement, it may be important for the IRS to know that the bonds deemed to be refunded by such deemed reissued bonds are in fact still outstanding and therefore still subject to examination.

In contrast, we note that a requirement to identify actual reissuances under Treas. Reg. §1.1001-3 is less clear because, for federal income tax purposes, a reissuance is a type of refunding transaction. While in certain transactions, existing bonds are significantly modified without utilizing new paper, in others new bonds are exchanged for existing bonds. Because the tax treatment for a bond issued in exchange for an earlier bond is similar, whether or not the bond is considered “reissued,” we recommend that the use of Line 20b that would create the least amount of ambiguity in reporting is for its application to be restricted to situations in which there is no sale or exchange under Section 1001, as described in the prior paragraph. Under this approach, a reissued bond that is treated as a new debt instrument for purposes of Section 1001 would be reported in the same way as any other refunding bond and not noted on Line 20b.

If the IRS prefers to retain special reporting for bonds treated as reissued under Section 1001, we recommend that the instructions provide either that Line 20b be used in all exchange refundings in which a bond owner exchanges an existing bond for a refunding bond without any cash payments, or that Line 20b be used in an exchange refunding only if the CUSIP (if any) and bond name remain the same as that of an earlier issue after the deemed refunding transaction.

- **Part III, Line 21, Returns for part of a larger issue.** Lines 21d and 21e on which weighted average maturity and yield are reported should relate to the entire issue as defined in Treas. Reg. §1.150-1(c), even if some bonds of the issue are to be (or have been) reported on a separate Form 8038. The limitations imposed by substantive law are based on data related to an

entire bond issue under Treas. Reg. §1.150-1(c). Our recommendation is consistent with the current instructions to Line 21e, which inform the issuer that the yield to be used is the yield, as defined in Section 148(h), on the entire bond issue.<sup>46</sup>

- Part III, Line 21a, Commercial Paper. The present instructions provide that the final maturity date of an issue is the last date on which the issuer must redeem the entire issue.<sup>47</sup> For commercial paper, there is some ambiguity about the meaning of “the entire issue.” Under one reading, if the date is to be based on the definition of “issue” found in Treas. Reg. §1.149(e)-1(e), the final maturity date of the issue would be September 27 (or September 26 depending on leap years) of the following year, the last date on which 270-day commercial paper notes issued that same calendar year could mature. A better interpretation, which we recommend that the instructions adopt, is that the final maturity date reported for commercial paper should be the final date on which commercial paper notes of the issue for purposes of Section 150 could mature.<sup>48</sup> We recommend that the instructions remove any ambiguity about the the final maturity date for commercial paper issues. NABL believes that the final maturity date for the commercial paper program is the most helpful to the IRS, as it provides information regarding how long commercial paper might be outstanding under the commercial paper program.

- Part III, Line 21b, Issue price of commercial paper and drawdown loans. When first issued, many commercial paper programs (and all drawdown loans) are not fully funded. An issue of commercial paper or drawdown loan may be “ramped up” during a startup period. While the full issue price of an issue of drawdown bonds or a commercial paper issue may be unknown at the time of initial issuance, the issuer knows as of closing all of the following: (i) the initial amount issued, (ii) a maximum amount to be issued, (iii) a maximum amount to be outstanding, (iv) a reasonably expected amount that will be issued and (v) a reasonably expected maximum amount that will be outstanding under the program.<sup>49</sup> For the purposes of determining the maximum amount to be issued, commercial paper notes used to immediately refund (roll) other notes of the same program should not be included. NABL believes that it is most important that

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46 In the case of a pooled conduit bond issue in which the conduit loans are themselves tax-exempt bond issues, each yield on the bonds allocable to each separate tax-exempt conduit loan is computed separately based only on such allocated bonds. These transactions are not common and should be viewed as special cases that do not need to be addressed in the instructions to the forms.

47 The instructions consistently use the concept of redemption to apply to the payment of and retirement of a bond. In common use, redemption would not apply to the payment of a bond at final maturity. Such bond matures rather than being redeemed. The use of the word “redeem” in this context is not consistent with common usage, but we have not recommended changing the wording because people understand what is meant. If the IRS wishes to be more consistent with common usage within the bond community, it could substitute “pay and retire” for “redeem.”

48 Treas. Reg. §1.150-1(c)(4)(ii)(A)(2)(ii) limits such final maturity date to 30 years after the issue date of the issue.

49 Most tax-exempt commercial paper notes and drawdown bonds are issued at par. The principal amount of commercial paper, the issue price of commercial paper and the stated redemption price at maturity of commercial paper are usually the same. Some drawdown loans and commercial paper programs can ramp back up after the issue has been reduced in size.

the instructions be clear on the issue price amount to be included. We recommend that the issue price be the maximum amount of commercial paper to be outstanding regardless of the year in which such maximum is expected.

- Part III, Line 21c Treatment of long coupon bonds. The stated redemption price at maturity for most bonds is the same as the bond's nominal principal amount for state law purposes. This is true even for bonds with original issue discount (OID) or premium, so long as all stated interest is qualified stated interest. Many tax-exempt bonds (although a small percentage of all tax-exempt bonds) are sold with interest that is not payable at intervals of one year or less.<sup>50</sup> For example, a bond issue may be structured to pay interest at a fixed rate with semiannual interest payments, but with interest starting 15 months after the issue date. Because some or all of the interest on such bonds is not qualified stated interest, such bonds are properly treated as having OID even if sold at a premium over the stated principal amount. As a result, the stated redemption price at maturity may in certain cases be in excess of the stated principal amount.<sup>51</sup> Such result confuses the reporting, as the origin of such difference is a technical OID matter and may not be obvious to an issuer.

Because OID on tax-exempt bonds is treated as tax-exempt interest, there are no significant substantive consequences to classification of interest payable on such bonds as part of the stated redemption price at maturity. Completion of Line 21c however may be quite difficult and subject to different interpretations. We believe that a rule that allows Line 21c to be completed with the stated principal amount under appropriate circumstances would simplify form preparation, lead to more consistent form completion and would have no negative impact (and in fact, positive impact) on enforcement or statistical data collection. Our suggestion is that payments designated as interest be excluded from the amount entered on Line 21c as the redemption price at maturity if such interest accrues at a single fixed rate and is payable at intervals of 30 months or less.<sup>52</sup> The result of this change to the instructions would be to allow issuers of a large number of long coupon bond issues to enter the stated principal amount on Line 21c. That would be both easier for the issuers and more likely to produce consistent results.<sup>53</sup> The stated principal amount is also the amount that is probably most useful to the IRS for enforcement and for statistical data collection.

- Part III, Line 21c, Commercial Paper. To remove ambiguity about determining the stated redemption price at maturity for commercial paper, we believe that the instructions should directly address commercial paper. We recommend that the stated redemption price at maturity be consistent with the issue price in Line 21b. (Most tax-exempt commercial

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50 Such long coupons are found more often on governmental bonds to which Form 8038-G applies. We have included this comment here for consistency, but the practical significance of such a change to the Form 8038-G instructions is much greater than the significance to a change to the Form 8038 instructions.

51 The stated redemption price at maturity is defined in Treas. Reg. §1.1273-1(b) to be the sum of all scheduled payments on the bonds other than qualified stated interest.

52 Almost all long coupon bonds will satisfy this 30-month rule.

53 Anecdotal evidence may suggest that some issuers are already reporting the stated redemption price at maturity in this manner.

paper is issued at par so that the issue price and stated redemption price at maturity of any note is the same.) If the maximum issue price to be outstanding is to be reported on Line 21b, then the amount to be reported on Line 21c should also be based on the maximum principal to be outstanding.

- Part III, Line 21d, Weighted average maturity of commercial paper and drawdown loans. Current instructions do not provide guidance on how weighted average maturity should be calculated when the amount of an issue is expected to increase (ramp up) after the initial issuance.<sup>54</sup> The individual maturities to be averaged depend on the start date. Current instructions just refer to the number of years “to maturity” without specifying the beginning date. Furthermore, for commercial paper, it is unclear what maturity date is intended. If it is just the maturity date of the notes being issued on that date, the Weighted Average Maturity would be at most 0.74 years (270 days). The better approach is to use a maturity date similar to the one used for Line 21a, based on the documents of the program, including any mandatory redemption provisions (or mandatory reduction of amount to be rolled) included in the program documents. As to the start date, consistency and lack of ambiguity are most important. For simplicity and for ease of computation, we recommend that the issue date reported on the Form 8038 should be the start date for all obligations of the program, even for notes or draws to be issued later.<sup>55</sup>

- Part III Line 21d separate returns. To avoid ambiguity, the instructions should provide that the weighted average maturity may be based on all bonds that are part of the same issue under Treas. Reg. §1.150-1(c) even if some of those bonds are reported on a separate Form 8038.

- Part III, Line 21e, Precision of Yield Reporting. Reporting the bond yield to four decimal places provides unnecessary precision. The difference between monthly and semiannual compounding (either of which is allowed) would in most cases change the yield by a much bigger amount.<sup>56</sup> Small dollar changes to the issue price that would in no way affect tax compliance can also change the yield by more than 0.0001%. Even changes in day-counting conventions may have a bigger effect. Nothing on the form or instructions specifies the compounding interval to use or what day counting conventions to use. The compounding interval and other conventions used do not need to be reported. We suggest that truncation of the bond yield to two places be acceptable. Note that the entry of a bond yield on Form 8038 in no way affects the yield that an issuer must use to compute rebate or yield restriction compliance.

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54 Relevant regulations under Sections 147 and 148 also provide no guidance on this computation.

55 Because of the rules relating to single issue treatment, such ramp up draws on drawdown loans will most often occur within three years of the original issuance of the issue and in ramp ups of commercial paper will most often be made within 18 months of the original issue date.

56 A yield of 4.0000% monthly compounding is equivalent to a yield of 4.0335% semiannual compounding or 4.0742% annual compounding. Nothing in the law or in form instructions favors any particular compounding interval. The form does not ask for the compounding interval to be specified.

Yield is, of course, important for rebate computations, but rebate calculators are generally responsible for computation of bond yield as part of the rebate computations. At the time that the form is completed, there is often no professional computation agent involved in the transaction. While a verification agent could be retained, the expense of such a calculation agent would place a needless burden on bond issuers in many cases.<sup>57</sup> Often, but not always, underwriters do provide yield computations as part of numbers runs intended to show the bond issuer its anticipated debt service requirements. Some issuers (on the advice of counsel) have taken to requesting underwriters certify as to the correctness of the yield computations provided. The only reason that such certifications are requested is to aid in the completion of the form. Indeed, underwriters that do agree to provide such certifications often specifically indicate in their certifications that the yield so computed is only for purposes of completion of the form and is not to be used in future rebate computations. The certification creates an undue burden on bankers that are hired based on their ability to sell bonds rather than on their ability to do computations, and it probably increases the cost to issuers. Unlike professional verification agents, who are generally accountants and provide representations that the calculations are performed to the standards of the American Institute of Certified Public Accountants, underwriter certificates as to yield are not subject to any defined standards. Because bond yield is not needed at the time of issuance to establish compliance with any substantive tax law constraints in the vast majority of tax-exempt bond issues, we recommend that the instructions should explicitly provide that the yield entered on the form may be based on estimates or approximations. This change would have an immediate effect on underwriter representations and very likely on costs of issuance.

- Part III Line 21e, Treatment of lease transactions. For consistency, it may be appropriate to conform the Form 8038 instructions with the current Form 8038-G instructions regarding the reporting of yield for lease and installment sale transactions where the debt instrument is issued for property.<sup>58</sup> Private activity lease or installment sale transactions are uncommon. For this reason, NABL does not view such an addition to the Form 8038 instructions as a high priority.

- Line 22. Accrued interest is not included in the total issue price provided in Lines 11 through 21. The amount if any to be listed on Line 22 is in addition to any amounts listed on Line 21. Although this may be clear under current instructions, it would be helpful to those completing the form to indicate that this amount is not included in the other totals.

- Lines 27 and 28, Proceeds used to refund. There are often costs that are a result of the refunding purpose, but are not the payment of principal, interest or call premium on the refunded bonds. Examples include a termination payment relating to a qualified hedge on the refunded bonds and the payment of a yield reduction payment made with respect to transferred

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57 A verification agent is generally retained in certain special cases, such as in the case of fixed rate single-family mortgage revenue bonds because bond yield is relevant to the structure of such transactions.

58 The current instructions for Form 8038-G provide that the effective rate of interest rather than the yield be inserted on Line 21e. The purpose of this provision appears to be to avoid the burden of needless computations. In transactions covered by this rule, gross proceeds are rarely subject to yield restriction or rebate because all proceeds are treated as spent at closing.

proceeds derived from the refunded bonds. While not used to redeem or defease the refunded bonds, these costs do seem properly characterized as refunding uses of proceeds of the bonds. We understand that the ambiguity related to such costs has resulted in inconsistent reporting practices among issuers. NABL recommends that the instructions be revised to provide that costs related to the accomplishment of the refunding of tax-exempt bonds be included on Line 27 and costs related to the accomplishment of the refunding of taxable bonds be included on Line 28. This recommendation is not intended to apply to proceeds used to pay costs of issuance, which are reported on Line 24.

- Line 28, Repayment of corporate debt. Line 28 is used to record bonds refunding taxable bonds. To promote consistent reporting among issuers, NABL requests clarification of whether a refunding of taxable corporate debt, that is not state or local government debt, should be reported on Line 28. Our markup of the instructions provides that payment of corporate taxable debt of the conduit borrower should be treated as a refunding of taxable bonds.<sup>59</sup> Notwithstanding the markup, an alternative rule that clarified that bonds used to refund such corporate debt not be treated as refunding bonds is also acceptable. NABL believes that clarity is more important than the substance of the rule (whether bonds used to pay conduit borrower debt should be treated as refunding bonds or non-refunding bonds for purposes of the information reporting requirements under Section 149(e)). The clarified instructions should be consistent with any clarification provided to the definition of taxable bond earlier in the instructions.

- Line 28, Tax Advantaged Taxable Bonds. Line 28 is intended for the reporting of the refunding of taxable bonds. Taxable bonds include build America bonds and other tax advantaged direct pay and tax credit bonds.<sup>60</sup> We recommend that the instructions clarify whether taxable, but tax advantaged bonds are treated as taxable bonds for this purpose. NABL is more concerned about making the rule clear than the substance of the rule; the choice of whether bonds used to refund tax-advantaged bonds should be treated as refunding taxable or tax-exempt bonds is less important than clarity. Current instructions lead to inconsistent completion of Lines 27 and 28. Many counsel take the view that it is more appropriate to treat such taxable but tax-advantaged bonds as tax-exempt bonds for this purpose. Part V of Form 8038 is to be completed for bond issues refunding taxable bonds. Generally, this is appropriate because the information to be provided in Part V would not previously have been collected for taxable bonds. As recognized by the words printed on the Form 8038 at Lines 27 and 28, completion of Part V is not necessary in the case of a refunding of tax-exempt bonds because the information would already have been provided when the Form 8038 (or 8038-G) was filed for the refunded bonds. Completion of Part V may also be unnecessary in the case of a refunding of a taxable bond that is tax-advantaged because the required information reporting for the refunded bond (which would have been filed on Form 8038-B or Form 8038-TC when the refunded bond was issued) may serve the purposes of

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59 To avoid confusion, the payment of taxable debt that functions as a conduit loan on tax-exempt bonds should be excluded from Line 28 and included on Line 27, as also provided in the markup.

60 A Form 8038 may be used, for example in the tax-exempt refunding of a build America bond with qualified 501(c)(3) bonds, which may be undertaken in conjunction with a remedial action when a §501(c)(3) organization is brought in to run a governmental hospital. Form 8038-G will more commonly be used in tax-exempt refundings of build America bonds. A similar comment applies to Form 8038-G.

Part V.<sup>61</sup> For this reason, we recommend in our proposed revisions to the instructions to treat such refunded tax-advantaged bonds as tax-exempt bonds, and to instruct issuers to report the amount used for this purpose on Line 27. An alternative rule that clarified that bonds used to refund such taxable tax advantaged bonds should instead be reported on Line 28 and treated as refunding taxable bonds is also acceptable.

- Part V, Refunding of tax-advantaged debt. If the revised instructions indicate that Line 28 be used for the refunding of taxable but tax-advantaged bonds, it would appear that Part V should be completed for the refunding of these bonds, but this may be unnecessary for the reasons described above. We recommend that if such refunding amounts are to be reported on Line 28, that the instructions for Part V indicate that notwithstanding the words printed on the form, Part V not be completed in the case of a refunding of tax-advantaged bonds. Our markup of the instructions does not reflect this recommendation because we recommend reporting the refunding of such bonds on Line 27.

- Line 31, Private activity bonds refunding taxable debt. The instructions printed on Line 28 of the Form 8038 itself provide that Part V (including Line 31) should be completed for the refunding of bonds described on Line 28 (refunding of taxable debt).<sup>62</sup> The current instructions for Line 31 require such information on the use of proceeds of refunded taxable bonds only if the refunding bonds are qualified 501(c)(3) bonds. While that limitation in the instructions may reflect the major use of refunding of taxable debt, other private activity bonds can be used to refund taxable debt. For example, if sufficient volume cap is unavailable, an issuer may issue taxable governmental debt that is later taken out with tax-exempt debt of the same issuer. The language in the instructions for Line 31 can be simplified if the restriction to qualified 501(c)(3) bonds is eliminated.

- Line 31, Proration. The current instructions properly allow reasonable prorations to be used to divide up the bond proceeds used for project purposes into various broad categories. The use of the word “proration” indicates that the amounts should be determined by multiplying the total proceeds allocable to Part V by the percentage allocable to each category. Contrary to the current general instructions, such amounts cannot be reasonably determined to the nearest dollar. These allocations should not be required to be determined to the nearest dollar since such precision is generally not known at the time of bond issuance. We believe that in addition to changing the general rule at the beginning of the instructions (see comment number C.4), it is helpful to issuers for the instructions to flag each place where less precision is appropriate.

- Note after Line 31. After the instructions for Line 31, in the current instructions, there is a **Note** about Section 147(c). The Note is accurate but is not relevant to the completion of Form 8038. The IRS should consider deleting this **Note**.

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61 Information reporting for some build America bonds was provided on Form 8038-G.

62 If proceeds of the bonds are used to pay principal of or interest on corporate debt of a non-governmental, non-501(c)(3) borrower of the bond proceeds, the bonds would not be classified as refunding bonds and hence these instructions would not apply. Part V would be completed for such bonds as non-refunding bonds.

- Line 32, Refunding of taxable debt. On Form 8038, the issuer is instructed to enter the “amount of nonrefunding proceeds.” This leads to confusion because other instructions indicate that Part V (including Line 32) should be completed for bonds refunding taxable debt.<sup>63</sup> In order to remove confusion created by the contradictory instructions printed on the form itself, the instructions for Line 32 should clearly state that Line 32 is to be completed for proceeds used to refund taxable debt.<sup>64</sup> If the IRS determines that only non-refunding proceeds be reported on Line 32 and that Line 32 be left blank in the case of a refunding of taxable debt (not our recommendation), then the instructions to Line 32 should clearly state that amounts included in Line 28 should be excluded from Line 32.

- Line 32, Face Amount. The current instructions to Line 32 ask for the “face amount of the project.” NABL recommends that the amounts to be inserted in each place on Line 32 should be the amount of proceeds used for the specified purpose. We recommend (as provided in our markup) that the instructions specify the amount of proceeds rather than the face amount, which would also be consistent with the Form and the instructions to other lines.<sup>65</sup>

- Part VI. The instructions to Part VI should take into account the definition of taxable bond provided earlier in the instructions. If taxable bond is defined to include taxable corporate debt of a bond obligor, then the instructions to Part VI should specifically specify that Part VI applies to the refunding of such corporate debt. If the definition of taxable bond is meant to exclude such debt, then the instructions to Part VI should so state. Current instructions refer to the refunding of a “prior issue of bonds.” We are not sure what the words “issue of” was intended to convey. It is possible that those words were intended to carve out refundings of taxable corporate debt. If so, then the instructions should explicitly carve such refundings out of Part VI. We have drafted our revisions to the instructions to include non-governmental taxable debt as taxable bonds and adjusted the instructions to Part VI accordingly. NABL recommends that either interpretation is acceptable, but that clarification should be provided for greater consistency.

- Lines 33 and 34: Multiple refunded issues. We understand that, under the existing instructions, when multiple issues of bonds are being refunded, some issuers are reporting the remaining weighted average maturity of all of the refunded bonds on a combined basis (even if they come from separate “issues,” as defined in Treas. Reg. §1.150-1(c)), while others report the remaining weighted average maturity for each issue of refunded bonds separately. The proposed additional language to the instructions to Lines 33 and 34 clarifies that the weighted average

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63 That is appropriate because unlike in the situation of refunding tax-exempt debt, the information to be reported on Line 32 would not have been reported on any prior form (unless the prior taxable debt was tax-advantaged).

64 The IRS may wish to exclude refundings of taxable but tax-advantaged debt from this requirement. That is how the language provided in our markup reads.

65 “Face amount” is not a well-defined concept, which can lead to multiple interpretations and ambiguity. For example, it might be interpreted to mean the redemption price at maturity or the nominal principal amount of the allocable bonds. It might also be interpreted as provided in Treas. Reg. §1.148-8(c) to mean the issue price of the bonds unless such bonds had de minimis OID or original premium, in which case it would be par.

maturity of the refunded bonds be reported on a combined basis.<sup>66</sup> This approach provides the IRS with information regarding the relationship between the weighted average maturity of the refunding bonds and the refunded bonds and avoids inconsistent reporting practices between issuers and the need for attachments, making the report more streamlined for use by the IRS.

- Lines 33 and 34, Commercial Paper. Current instructions provide no guidance regarding how the remaining weighted average maturity of refunded commercial paper should be calculated and reported. This results in differing reporting practices. We recommend that the instructions clarify the approach to be used.

NABL recommends that the instructions provide that the remaining weighted average maturity of any refunded commercial paper be calculated based on the maturity of the commercial paper program (including any mandatory reductions in the amount of commercial paper outstanding on various dates). This approach most closely treats commercial paper like other types of borrowings and most clearly demonstrates whether the refunding is extending the average maturity over what would otherwise have been the case. If the IRS adopts this recommendation, it is important that the instructions explicitly mandate it, because for bond issues other than commercial paper issues, the remaining weighted average maturity is based only on the specific bonds that are refunded.

Another approach is to look only at the specific commercial paper notes being refunded as though they were not part of a commercial paper program. Normally, the notes are being refunded to maturity.<sup>67</sup> Therefore, the remaining weighted average maturity is very short (and indeed is often 0 years). Some feel that this produces a misleading result. If, however this approach is adopted by the IRS, the instructions should explicitly so state.

A third approach is to decide that the remaining weighted average maturity of commercial paper should be ignored as hopelessly misleading regardless of the calculation approach taken. If this approach is taken, the instructions should provide that Lines 33 and 34 be left blank or completed as “N/A” if only commercial paper is refunded and that if commercial paper and other obligations are refunded, the remaining weighted average maturity be computed only with respect to those other obligations.

- Line 35. The form itself indicates that the refunded obligation redemption date should only be entered on Line 35 with respect to refunded tax-exempt bonds. The current instructions to Line 35 do not distinguish between refunding of taxable and tax-exempt bonds. Because substantive law limits the period prior to redemption of tax-exempt bonds but not the period prior to redemption of taxable bonds, we recommend amending the instructions to clarify

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66 The substantive rules of Section 147 (which are the substantive rules that depend on the remaining weighted average maturity of prior issues refunded by an issue) are applied on a combined basis unless an election under Treas. Reg. §1.150-1(c)(3) is made to treat the refunding portions of the refunding issue separately. However, if that election is made, separate Forms 8038 will be required.

67 Since these notes all had a maximum original maturity of 270 days, they are generally non-callable prior to maturity.

that Line 35 refers only to refunding of tax-exempt bonds (as the form itself indicates) or other tax advantaged bonds.

For this purpose, it may be appropriate to treat taxable but tax-advantaged bonds in the same way as tax-exempt bonds. If so, the instructions should clearly state this. Without such statement, tax advantaged taxable bonds will be treated as taxable bonds and not reported on this line, depriving the IRS of potentially useful information.

- Line 36, Commercial paper. For bonds refunding commercial paper, listing the issue dates of the specific short-term commercial paper notes being refunded is unwieldy and does not provide useful information. Rather, we recommend that the instructions provide that the issue date of the issue under Treas. Reg. §1.150-1(c) (which is the issue date of the commercial paper program) be used.<sup>68</sup>

- Line 38. Current instructions do not provide any guidance for completion of Line 38 on Form 8038 dealing with bank qualification. The labels printed on the form itself indicate that the box should be checked if the issuer has “designated any issue under section 265(b)(3)(B)(i)(III).” However, Section 265(b)(3)(B)(i)(III) provides a mechanism for bonds (not issues) to be designated as bank qualified.<sup>69</sup> Frequently, an issuer will only designate some bonds of an issue as bank qualified. The remaining bonds of the issue may be sold as not bank qualified, or such undesignated bonds may qualify as “deemed designated” bank qualified obligations. The absence of instructions concerning this box has led to inconsistent reporting of bond issues where some but not all of the bonds have been designated. Some issuers have added marginal notes or attachments when an issue has been partially designated. Questions have also been raised about whether the box should be checked if some or all of the bonds of the issue are deemed designated under Section 265(b)(3)(D)(ii) but none of the bonds have actually been designated by the bond issuer. The specific cite (265(b)(3)(B)(i)(III)) printed on the form itself implies that the box should not be checked for deemed designated bonds. If the form itself were being revised, it might be appropriate to change Line 38 to ask for a dollar amount designated, or for a dollar amount treated as bank qualified (whether designated or deemed designated). However, given that there is just one box to check concerning bank qualification, the instructions should provide unambiguous guidance about how to treat designation of part of an issue and how to treat deemed designated bonds. We recommend that the simplest approach, which would maximize consistency for partial designations, is for the instructions to state that the box should be checked if any of the bonds have been designated or deemed designated. The instructions should either treat deemed designated bonds in the same way as designated bonds or should state that they are not to be so treated. To promote consistency of reporting, it is important that the treatment of deemed designated bonds not be left ambiguous. NABL encourages the instructions for this line to be clear, regardless of

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68 In the case of bond issues other than commercial paper programs with bonds issued on multiple dates (often called split closing bond issues) the instructions could clarify whether the issue date of the issue under Treas. Reg. §1.150-1(c) or the issue date of the issue under Treas. Reg. §1.149(e)-1(e) should be used. NABL has no preference concerning which of these two dates are used. In either case, a Form 8038 would have been filed with respect to such issue date. That is not the case with commercial paper.

69 Section 265(b)(3)(B)(i)(III) does not deal with deemed designated bonds.

the criteria for checking the box. Our markup of the instructions provides that the box be checked for an issue of deemed designated bonds.

- Lines 43 and 44. In conduit borrowings, the issuer usually lends the proceeds to a conduit borrower, who then is contractually responsible for the investment and expenditure of proceeds and the use of the bond financed facilities. Many counsel interpret Lines 43 and 44 as pertaining to whether the governmental issuer has adopted post-issuance compliance procedures.<sup>70</sup> NABL recommends that the instructions to Lines 43 and 44 be modified to allow the box to be checked if either the issuer or the conduit borrower has implemented post-issuance compliance procedures that address the matters set forth in Lines 43 and 44 (remediation of nonqualified use and arbitrage). Conduit borrower adoption of post-issuance compliance procedures meets the policy objective of increasing the likelihood of compliance with federal income tax law.

- Line 45. Reimbursement not requiring declaration of intent. NABL requests that the instructions be clarified to address circumstances in which bond proceeds are used to reimburse prior expenditures, but for which no declaration of intent is required under Treas. Reg. §1.150-2(e) because of an exception set forth in Treas. Reg. §1.150-2(f) for preliminary expenditures (such as design and engineering costs), for costs of issuance, or for de minimis amounts. When all expenditures to be reimbursed meet one of the exceptions, issuers will often not adopt an official intent, and therefore have nothing to report on Line 45b. Some issuers are concerned, however, that reporting reimbursement expenditures on Line 45a but leaving Line 45b blank will trigger questions from the IRS. This has led to inconsistent reporting practices and to unnecessary adoption of official intent resolutions. To provide for consistent reporting and to avoid unnecessary issuer action and expense, clarification is needed regarding how the IRS would like issuers to complete Lines 45a and 45b in circumstances when all reimbursed expenditures meet an exception.

The approach that we recommend would be to modify the instructions to Line 45a so that the dollar amount entered is only the amount of the reimbursed expenditures that require an official declaration of intent.

If the IRS prefers that all reimbursement amounts be reported on Line 45a, the instructions could be modified to provide that if all reimbursed expenditures meet one of the exceptions so that no official declaration of intent is required, the issuer enter “NA” on Line 45b. Another, perhaps simpler approach would be for the instructions to provide that in the case where no declaration of intent is required, the issuer should enter the reimbursement amount on Line 45a and the issue date on Line 45b. That would have the advantage that the text to be entered would be formatted as a date.

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<sup>70</sup> The compliance procedures of conduit governmental issuers commonly require a conduit borrower to have adopted compliance procedures. We believe that some conduit governmental issuers that are infrequent issuers are more likely not to have adopted compliance procedures in addition to the procedures of conduit borrowers.

- Part VIII, Lines 47 through 52, relating to volume cap in general. The current instructions to Form 8038 and the words printed on Form 8038 create ambiguity about the scope of required reporting of volume cap limitations. If Part VIII is intended to relate only to the unified state volume cap, then the instructions and words printed for Line 52 appear inconsistent. The words on Line 49 appear to reference all volume limitations for bonds not subject to such limitations, but Lines 47 and 48 appear to refer only to the unified volume cap for bonds subject to limitations. The instructions appear to treat the special volume limitations for bonds issued under Section 142(k) differently from the special volume limitations for bonds issued under Section 142(m). Below we provide specific line-by-line comments relating to these inconsistencies.

- Part VIII, Lines 47 through 52, relating to volume cap. The instructions to Part VIII should clarify that no entries are required in Part VIII for the portion of an issue consisting of qualified 501(c)(3) bonds unless (as provided in section 141(b)(5)), the “nonqualified amount” of such portion exceeds \$15 million. This clarification would be consistent with the direction set forth in Treas. Reg. § 1.149(e)-1(b)(2), which requires the state certification (referred to in Line 47) only if an issue is subject to volume cap under Section 146. This clarification would eliminate unnecessary confusion by many issuers of qualified 501(c)(3) bonds and their advisors on how to fill out each line in Part VIII when the volume cap requirement clearly doesn’t apply.

- Line 47. The instructions for Line 47 should clarify that no entry is required, and no state certification is necessary for bonds of the issue that are not subject to state volume cap. This clarification would resolve ambiguity between the information required by Line 47 and the information to be entered in Lines 49a through 49d and would be consistent with the direction set forth in Treas. Reg. § 1.149(e)-1(b)(2) described above. There is no reason to require a state certification from the issuer if the reported bonds were not subject to the unified state volume cap for one of the reasons mentioned in Lines 49a through 49d. In this case, state volume cap Section 146 should be distinguished from other, federally allocated, volume limitations.

- Line 49. Currently, there are no instructions to Line 49. The form includes a field for a dollar amount. The field is not shaded, and it appears that an issuer is supposed to fill in a dollar amount on that line. The caption for Line 49 on the form is written in the form of a partial sentence that is completed only by the captions for Lines 49a through 49d. The captions to Lines 49a through 49d only make sense if the caption on Line 49 is appended to each. If the IRS intends that the total of the amounts that appear on Lines 49a through 49d be inserted on Line 49, the instructions should clearly so state. NABL notes that such entry does not appear to provide any useful information. We recommend the instructions provide that the field on Line 49 be left blank because the information is effectively provided in Lines 49a through 49d.

Qualified 501(c)(3) bonds are not subject to volume cap even though none of the reasons provided on Lines 49a through 49(d) apply.<sup>71</sup> We recommend that the instructions confirm that Line 49 be left blank for such bond issues even though the information is not provided on Lines 49a through 49d. These bonds are adequately identified on Lines 17 and 18.

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71 Qualified 501(c)(3) bonds are subject to volume cap to the extent that the “nonqualified amount” (as defined in Section 141(b)(5)) exceeds \$15,000,000. It is very unusual for such provision to apply to qualified 501(c)(3) bonds. If a qualified 501(c)(3) bond issue does require volume cap because of this \$15,000,000 limit, that volume cap amount would be listed on Line 48. Even in that case, there is no reason to put an

- Lines 48, 49 and 49a and Volume Cap reporting for qualified 501(c)(3) bonds. Qualified 501(c)(3) bonds are not subject to volume cap (unless the nonqualified amount is over \$15,000,000, an uncommon situation). None of Lines 49a through 49d appear to apply to qualified 501(c)(3) bonds (unless another exception also applies, such as current refunding bonds that are also qualified 501(c)(3) bonds).

To resolve such inconsistencies, the instructions should clearly state one of the following regarding the applicability of Lines 49a through 49d to qualified 501(c)(3) bonds: (i) Line 49 (and Lines 49a through 49(d)) should be left blank for all qualified 501(c)(3) bonds; or (ii) All qualified 501(c)(3) bonds should be reported on Line 49a – note that Line 49a appears to be the line on which the issuer should report bonds not requiring volume cap because of the type of issue (see Part II); or (iii) The amount of qualified 501(c)(3) bonds should be included on Line 49, and the amount shown on Line 49 might be larger than the total of Lines 49a through 49d. Any of these options are acceptable so long as the instructions are clear and resolve the inconsistency.

- Lines 49a through 49d and double reporting. A bond may qualify for more than one exception from a volume limitation. For example, a bond could be a current refunding of a qualified bond that financed an airport. Current instructions create an ambiguity about whether such bonds should be included on both Line 49a and also on Line 49d. This is especially confusing if Line 49 is intended to be the total of the bonds excepted on Lines 49a through 49d. We recommend creating a hierarchy so that if a bond is reported on Line 49a it is not to be reported on any of the subsequent Lines 49b through 49d.

- Line 49 and Line 49a. According to the wording of the Form, Line 49, including Line 49a, is for the amounts “not subject to the unified state volume cap or **other volume limitations.**” (Emphasis added.) Bonds for qualified public educational facilities and for qualified highway or surface freight transfer facilities are not subject to the unified state volume cap under Section 146 but are subject instead to volume limitations under Sections 142(k)(5) and 142(m)(2). The current instructions for Line 49a list bonds financing qualified public educational facilities and qualified highway or surface freight transfer facilities as examples of bonds that are not subject to the volume cap. To avoid confusion with the wording on the form, the instructions should specifically state that entries on Lines 49 and 49a through 49d relate only to the unified volume cap under Section 146.

Alternatively, if Lines 49 and 49a are intended to report only bonds that are not subject to any volume limitations, then the listing in the instructions of bonds not subject to volume cap should omit bonds financing qualified public educational facilities and highway and surface freight transfer facilities.

- Line 51a. The form and the rest of the current instructions under Lines 51a and 51b make it clear that Line 51a relates only to special volume cap for bonds for Empowerment Zones and Enterprise Communities. However, the first sentence of the current instructions for Line 51a merely states: “Enter the amount of volume cap allocated to the issuer.” To avoid

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amount on Line 49.

confusion, this sentence should be clarified to reference only the special volume cap under Section 1394.

- Line 52. The form and the rest of the current instructions under Line 52 make it clear that Line 52 relates only to special volume cap for bonds for Qualified Public Educational Facilities. However, the first sentence of the current instructions for Line 52 merely states: “Enter the amount of volume cap allocated to the issuer.” To avoid confusion, this sentence should be clarified to reference only the special volume cap under Section 142(k)(5).

- Signature and Consent, Facsimile signatures. NABL recommends that facsimile signatures expressly be allowed for both the issuer and the paid preparer. Many bond issues are closed by e-mailing pdf documents. Facsimile signatures are accepted for various purposes associated with bond transactions, and the use of facsimile signatures can make the logistics of closing transactions easier. While nothing in the current instructions forbids the use of facsimile signatures on the Form 8038 that the issuer files with the IRS, NABL believes that an explicit clarification that facsimile signatures are permitted would be very beneficial. Treas. Reg. §301.6061-1(b) explicitly provides that the method of signing a particular form may be provided in the instructions to that form.

- Paid preparer, Facsimile signature. Instructions to Form 8038-G currently allow the use of a facsimile signature for the paid preparer. We recommend that this be extended to Form 8038 as well. Many bond issues are closed by e-mailing pdf documents. It is often difficult to manage the logistics of obtaining two original signatures on the same sheet of paper. The use of a facsimile signature will often make the logistics of closing the transaction easier. Even if the issuer is required to file an original issuer signature, a facsimile preparer signature allows the issuer to print and sign an e-mailed document. Two original signatures require mailing the form with one signature to the other signer who then must mail it again.

- Paid Preparer, Scope. The explanation in the current instructions concerning who needs to complete and sign as a paid preparer is not completely accurate. Currently, the instructions state: “If an authorized officer of the issuer filled in this return, the paid preparer's space should remain blank.” A person is a preparer if he or she fills in or provides the details for a substantial portion of the form. Even if an authorized officer of the issuer filled in the information on the form, another person could still be a paid preparer if he or she collected, computed and otherwise prepared a substantial portion of the information in a way that made entering the information onto the form clerical. For these reasons, we recommend modifying the instructions to more properly reflect who is a paid preparer.

- Paid Preparer, Multiple preparers. A return may have more than one paid preparer (all of whom are subject to the rules concerning paid preparers and all of whom require PTINs). In such a case, only one paid preparer needs to be a signing paid preparer. The current instructions state that generally, a paid preparer must sign the return. If one paid preparer completes the paid preparer block and signs as paid preparer, other paid preparers should not also be required to sign the return. The instructions should make this clear.

### III. Form 8038-G

#### A. What's New?

1. Some of the items currently identified as new may be deleted from revised instructions. We have not marked up the instructions to delete such matters because the changes highlighted in the 2018 revisions to the instructions remain relatively new.

2. We have recommended a number of changes that are new. To the extent that such changes are adopted, it may be appropriate to add a reference to those changes in the "What's New" section of the instructions.

3. The current instructions to Form 8038-G include a paragraph about the repeal of tax credit bonds. While true, this has nothing to do with completion of Form 8038-G and we recommend deletion.

4. The current instructions include a **Note** about possible reissuance of tax credit bonds or direct pay bonds. This is irrelevant to completion of Form 8038-G and we suggest it could be deleted.

#### B. General Instructions:

1. **Who Must File:** We note that this section is more about what form to file rather than who must file. We suggest a heading change (**What Form to File**).

2. **Who Must File, Separate Returns.** The table in the current instructions explaining which form to file also includes the requirement that **separate** Forms 8038-G be filed for **each** separate issue. Because we believe that issuers should be able to combine filings in certain cases as described in III.B.3 below, we recommend moving the separate filing requirement to a separate paragraph after the table.<sup>72</sup>

#### 3. Who Must File. Separate returns, consolidated returns:

Some bond issues under the generally applicable definition of Treas. Reg. §1.150-1(c) include bonds that are issued on two or more dates and are hence parts of separate issues for purposes of information reporting.<sup>73</sup> Under Treas. Reg. §1.149(e)-1(e)(2), the bonds issued on

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72 In Section II.B.1 of these comments, we discuss the concept of an issue of bonds and how that concept has different meanings for different purposes. Those comments are equally applicable to Form 8038-G as Form 8038. We recommend that issuers be given a choice to file a consolidated return for bonds that comprise separate issues under Treas. Reg. §1.149(e)-1(e)(2) but a single issue under Treas. Reg. §1.150-1(c), at least if they are all issued by the same issuer.

73 Such split closing transactions are often used when bond issues include refunding components that cannot be issued more than 90 days before the refunded bond redemption date. In other cases, split closing issues are used as a matter of convenience.

each issue date are treated as a separate issue.<sup>74</sup> Many, but not all issuers have been filing separate returns for each bond issue date. In some cases, such separate filings may be cumbersome. When separate Forms 8038 refer to the same bond issue for purposes of compliance with the substantive rules for tax-exemption, confusion can occur. For example, since rebate under Section 148(f) depends on the entire issue under the wider issue definition, a compliance examination of just a part of that issue makes little sense. Sometimes, the different issue dates are within the same calendar quarter.

One way to ease the burden and eliminate inconsistent filings is to clarify that issuers have the option to apply the Treas. Reg. §1.150-1(c) definition of issue when determining the scope of bonds covered by a single Form 8038-G.<sup>75</sup>

To prevent confusion, and to reduce the burdens of filing, NABL recommends that issuers of tax-exempt governmental bonds should clearly have the option to file consolidated returns for bonds that would constitute two or more issues under Treas. Reg. §1.149(e)-1(e)(2) but a single issue under Treas. Reg. §1.150-1(c).

Consolidated returns for bonds of different issues are already permitted for issues of no more than \$100,000 each for which Form 8038-GC is the appropriate information return. Under the instructions for Form 8038-GC, a single composite return may be filed for any number of bond issues issued in the same calendar year, even if they are not part of the same issue for tax compliance purposes.

NABL believes that consolidated returns are appropriate for bonds comprising a single issue under Treas. Reg. §1.150-1(c) even if the due date for the Form 8038-G for some of the bonds precedes the issue date of other bonds for which the consolidated filing is made.<sup>76</sup> The instructions could provide that such a consolidated filing is permitted only when the issuer reasonably believes that the information on the consolidated return will reflect the facts on all issue dates.<sup>77</sup>

A properly filed consolidated return should satisfy the information reporting requirement for all bonds described in the return. Such consolidated returns should be limited to bonds that are

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74 Exceptions apply to commercial paper and drawdown loans.

75 The regulations could be amended to make them more consistent. However, we note that the only authority under current law for the requirement that a separate Form 8038-G be filed for a separate issue is the provision of the current instructions to Form 8038 under “**Who Must File.**”

76 When the issue dates are in the same calendar quarter plus approximately 45 days of the following quarter, a single filing could timely be made after all bonds of the composite issue have been issued.

77 To the extent that the instructions permit a Form 8038-G to be filed before the issuance of all bonds covered by a consolidated return, the reported facts might change before all the reported bonds are issued. We believe that such fact changes between the initial issuance date and a later issuance date of bonds that have all been sold at substantially the same time are rare. The instructions could provide that an amended return be filed to reflect any changes in the reported facts between issue dates. We do not recommend this addition.

part of a single issue under Treas. Reg. §1.150-1(c) issued by a single issuer. NABL recommends that the use of such consolidated filings be optional (as it currently is for Form 8038-GC). There are times when separate filings are helpful. For example, in the case of bonds to be issued in different calendar years, reporting for bank qualification purposes is simpler with separate filings. Also, in some cases, information that would be required for a consolidated return might be unknown as of the due date for such consolidated return. For example, if an anticipatory hedge was to be terminated in connection with the second closing of the split closing bond issue, the issue price to be reported might not be known until the hedge is terminated. In any case, consolidated returns should not be required (or perhaps even permitted) for bonds of different issuers. An issuer should never have to report information about bonds it is not issuing.

#### **4. Who Must File. Information to be reported on consolidated returns:**

In the case of a consolidated return, if that is permitted, the values to be provided on the return should relate to all the bonds covered by the return. Under our suggestion, all such bonds would be part of a single issue for purposes of Treas. Reg. §1.150-1(c) governing the substantive requirements for tax-exemption. This is consistent with the current instructions for Line 21e, which requires the yield to be used for purposes of §148 to be given.

#### **5. Who Must File. Information to be reported on separate returns:**

Whether or not consolidated returns are permitted, some Forms 8038-G will be filed for just part of a larger issue under Treas. Reg. §1.150-1(c). Such bonds may, for example, be issued by more than one issuer or be issued on more than one date. The limitations imposed by substantive law are based on data related to an entire bond issue under Treas. Reg. §1.150-1(c). The filing of consolidated returns, if permitted, could be used to minimize the situations in which multiple returns would be filed for a single issue under the Treas. Reg. §1.150-1(c) definition. Such returns would not however be eliminated. The current instructions are ambiguous about the information to be used for returns covering only some of the bonds of a single issue under the broad definition of issue. The instructions to Line 21e clearly inform the issuer that the yield is the yield, as defined in Section 148(h) be used. The yield as so defined is based on all the bonds in the larger issue.<sup>78</sup> Similar guidance is not provided for other information to be entered onto the Form 8038-G. For example, it is unclear if the final maturity or the weighted average maturity should be that of the entire bond issue for purposes of Treas. Reg. §1.150-1(c) or of just the particular bonds for which the Form 8038-G is being filed. We believe that it would promote consistency and generally be beneficial and appropriate for the instructions to remove such ambiguity. The matter does not need to be resolved in the same way for all information. Rather, the IRS should resolve this issue as most appropriate for the type of information being reported.

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<sup>78</sup> In the case of a pooled conduit bond issue in which the conduit loans are themselves tax-exempt bond issues, each yield on the bonds allocable to each separate tax-exempt conduit loan is computed separately based only on such allocated bonds. These transactions are not common and should be viewed as special cases not driving the instructions to the forms.

Some information forms the measure by which substantive rules are tested.<sup>79</sup> It seems reasonable for the IRS to instruct issuers to report such values calculated or determined from the entire substantive issue. Other information seems to more appropriately relate to specific bonds covered by the return.<sup>80</sup> It may be appropriate for the instructions to include special rules for commercial paper filing.<sup>81</sup> Perhaps the best approach is to provide instructions that in general, unless the instructions for a particular Line or Part provide otherwise, the information to be reported should apply to the particular bonds covered by the Form 8038-G, and not other bonds that are part of the same issue under Treas. Reg. §1.150-1(c) but are to be reported on a different Form 8038-G or Form 8038.

In the case of multiple filings by separate issuers of portions of a single issue under Treas. Reg. §1.150-1(c), many issuers (on the advice of counsel) provide information about the full issue under Treas. Reg. §1.150-1(c) in separate schedules. Guidance on the form or necessity of such supplemental information would promote consistency.

## **6. When to File. Issue Date:**

Under current instructions, the due date of a Form 8038-G is based on the “calendar quarter in which the bond was issued.”<sup>82</sup> Nevertheless, Forms 8038-G are filed for issues of bonds, even if the due date is in terms of the issue date of the bond.<sup>83</sup> The current instructions provide that the Form 8038-G may not be filed before “the issue date.” This statement is ambiguous since that rule in the current instructions just refers to the “issue date” without indicating if it is the issue date of the issue or the issue date of a bond. The best interpretation of the current instructions is that the Form 8038-G must be filed by the 15th day of the second month after the close of the calendar quarter in which any bonds of the issue are issued, but not before the issue date of the issue. Another reading could be that the Form 8038 could not be filed before the issue date of any bonds of the issue.<sup>84</sup> We recommend that the ambiguity be resolved by referencing the issue date of the

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79 Examples include weighted average maturity, yield, arbitrage elections, qualified hedge information and information on written procedures.

80 Examples include issuer name, date of issue, name of issue, CUSIP, issue price (including issue price of bonds of various categories), final maturity date, stated redemption price at maturity, accrued interest, proceeds used for various purposes, bond amounts used for various purposes, information about refunded bonds, designation as bank qualified, investment information and volume cap information,

81 For example, we would recommend that the final maturity date to be reported for commercial paper be the final maturity date for the entire commercial paper program, not just the final maturity date for commercial paper issued in one calendar year.

82 Current instructions refer to the issue date of the singular “bond.” Most Forms 8038-G are filed for multiple bonds of an issue.

83 The requirement to file separate returns for each issue is found under the heading “Who Must File.”

84 This interpretation would be problematic for commercial paper, perhaps requiring quarterly filing. We do not believe it is intended.

issue (rather than the bond) in both places. If consolidated returns are permitted, Form 8038 should be permitted to be filed no earlier than the earliest issue date of any issue to which the filing relates.

## **7. When to File. Commercial Paper:**

NABL recommends changes to the instructions targeted specifically to tax-exempt commercial paper.

Both definitions of “issue,” Treas. Reg. §1.149(e)-1(e)(2) for information reporting purposes, and Treas. Reg. §1.150-1(c) applicable to the substantive requirements for tax-exemption, contain special rules for commercial paper. The special rules are not the same, however. The differences have resulted in differing filing practices for commercial paper.

In particular, for commercial paper issues, which consist of notes with individual maturities of up to 270 days, Treas. Reg. §1.149(e)-1(e)(2)(ii)(A) allows two or more commercial paper notes to be part of the same issue only if they are issued in the same calendar year. In contrast, the general definition of an “issue” of commercial paper obligations in Treas. Reg. §1.150-1(c)(4)(ii)(A) contains no such calendar year limitation.<sup>85</sup> If a separate Form 8038 is required for each “issue” under the definition applicable to Section 149(e) rather than for each issue under the more general definition, then, for commercial paper, a new filing is required for every calendar year during which the commercial paper program remains outstanding.<sup>86</sup> Currently, some bond counsel take the position that such annual filings are required.<sup>87</sup> Such annual filings may be beneficial to the IRS if there are significant changes from year to year in the information reported, but multiple filings are burdensome and not helpful to the IRS or Congress, particularly when the same information is being reported year after year.<sup>88</sup>

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85 Treas. Reg. §1.150-1(c)(4)(ii)(A) does contain both an 18-month and a 30-year limitation. Under Treas. Reg. §1.150-1(c)(4)(ii)(A), commercial paper notes other than rollover notes of a single issue must be issued during an 18-month period. All commercial paper in a single issue must mature within a 30-year period beginning on the date of issue of the issue.

86 No filing would be required for the final calendar year in which the commercial paper is outstanding if the program ended before any rolls during that calendar year.

87 Other counsel take positions that either only one filing is required for a commercial paper program or that even one filing per year is not sufficient and provide a filing with respect to each date on which a commercial paper note is issued.

88 The burden involved in annual filings is exacerbated by the general lack of professionals, including paid preparers, involved in routine rolls of commercial paper. Hiring of such professionals on an ongoing basis is expensive and has in some cases resulted in avoidance of commercial paper issuances. Although commercial paper may be more efficient and involve simpler documentation, most of the economics of a commercial paper program may be duplicated using long term qualified tender bonds subject to mandatory puts at intervals of no more than 270 days. Issues of such “commercial paper mode” (also called “flexible mode”) bonds do not raise the same questions concerning information reporting as “true commercial paper” because the bonds of such issues are only issued once at the initial issue date of the issue. A single bond is remarketed rather than rolled. No apparent purpose of Section 149(e) is served by having different reporting

NABL's primary recommendation in this matter is that the instructions provide certainty as to when the filing is required.<sup>89</sup> Secondly, our recommendation would ease the administrative burden on commercial paper issuers by eliminating redundant filings.

Our recommendation to accomplish both goals is for the instructions to clarify that after the initial filing for a commercial paper program that is treated as a single issue under Treasury Reg. §1.150-1(c), annual filing is only required if significant information (other than the issue date, the CUSIP number<sup>90</sup> and the weighted average maturity) is different from that reported on the initial return.<sup>91</sup>

NABL does not view this recommendation as inconsistent with Treas. Reg. §1.149(e)-1(e)(2)(ii)(A). The recommendation would just eliminate redundant filings when no significant information has changed. No Code or regulatory provision requires a separate filing for each issue.<sup>92</sup>

Regardless of whether our recommendation to eliminate redundancy is taken, we believe it is important that the instructions explicitly indicate when filings are required for commercial paper programs in order to provide greater consistency of filing practices (ranging from separate filings for each commercial paper note to a single filing for a multi-year commercial paper program) caused by differing interpretations of the filing requirements. Consistency is important if Congress and the IRS are to obtain useful information from the filing. We do not believe that at present, Forms 8038 and 8038-G filed with respect to commercial paper programs provide such information, nor do the current instructions provide a clear path to consistent reporting.

Our recommendations would eliminate the redundancy of annual filing when information has not changed. However, if annual filings are to be required, our markup provides the necessary clarifications. In such case, some of our inserted text could be used while other recommended text could be ignored.

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rules for such commercial paper and qualified tender bonds, and the existing guidance is best interpreted in that light.

89 Resulting in consistency among issuers.

90 Our specific comments on Line 9 provide that the CUSIP number to be reported should not change on subsequent filings with respect to the same commercial paper program but should always be the same CUSIP number reported on the first filing.

91 This recommendation may be viewed as a special case of the consolidated return recommendation (see above). If consolidated returns for bonds that constitute a single issue under Treas. Reg. §1.150-1(c) are permitted, the initial filing for a commercial paper program may be viewed as a consolidated return applicable to the entire commercial paper program, which is treated as a single issue for purposes of Treas. Reg. §1.150-1(c).

92 If the instructions are not revised to clearly state annual filings are not necessary, we strongly urge a modification of Treas. Reg. §1.149(e)-1(e)(2)(ii)(A) to eliminate any need for such redundancy.

In our comments on the line-by-line instructions for Form 8038-G, we address several technical questions concerning the specific information requested for commercial paper issues. Generally, such information is more useful for the administration of the substantive rules of tax law if the information applies to what is the entire issue for purposes of Treas. Reg. §1.150-1(c).

If annual filing were to be required, most issuers would prefer that it be required at the same time each calendar year.<sup>93</sup> For this reason, we recommend that if annual filings are to be required, an issuer may fulfill its annual filing requirements by filing between January 1 and May 15 of a particular year (other than the initial filing made when the commercial paper program is commenced), whether or not any commercial paper rolls occur during the first calendar quarter. This approach eases administrative tracking for commercial paper issuers and would likely increase timely filing.

## **8. Other Forms that may be required: Form 8038-GC**

Current instructions mention that Form 8038 is used for private activity bonds, but do not mention Form 8038-GC under other forms that may be required. Since neither Form 8038 nor Form 8038-GC is required with respect to the bonds covered by Form 8038-G, both could be omitted. If the reference to Form 8038 is retained, we believe that a sentence should be added to this section to explain that Form 8038-GC should be used for issues with an issue price under \$100,000.

## **9. Rounding to Whole Dollars.**

Current instructions appear to require dollar amounts to be provided to the nearest dollar. In some places, the instructions ask (or should ask) for a reasonable estimate, allocation or proration of proceeds. In such cases, making such allocations or prorations to the nearest dollar is not reasonable. Instead, whenever a reasonable estimate, allocation or proration is explicitly called for in the instructions, there should be no need for such artificial precision. The instructions should provide that the totals of such estimates, allocations or prorations should add to a total that is precise to the nearest whole dollar, but that individual estimates, prorations or allocations not be so precise, so long as the estimate, allocation or proration is reasonable.

## **C. Definitions**

1. **Bond.** Current instructions provide a definition of “Bond” as any obligation regardless of who the issuer is. NABL recommends that for consistency, the definition be limited to any obligation *of a State or political subdivision*. This addition reflects the definition of “bond” set forth in Treas. Reg. §1.150-1. The current and the proposed amended definition also sets forth

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<sup>93</sup> The exact “date of issue” in each calendar year of the first commercial paper issued that year may be burdensome to determine. Individual commercial paper notes may be up to 270 days and, accordingly, there might or might not be any commercial paper notes issued during the first calendar quarter (or even the first half of the year), although most commonly, once a commercial paper program has started, the notes mature and are rolled almost every month (or even every week).

examples of types of obligations that are included in the definition, making clear that many types of debt instruments may qualify as a bond under the definition.

2. TAN, RAN and BAN. The form uses the terms TAN, RAN and BAN. However, such terms are not well defined in the current instructions or in regulations. Accordingly, we recommend including such definitions in the instructions. Use of specific definitions will make the application of the form more consistent, with different issuers using the same criteria to determine if the debt instrument is a BAN, a TAN or a RAN. Although the terms TAN and RAN are used in the Code in matters related to the 6-month exception from rebate, the terms are not defined in the Code or in regulations. Practitioners have generally used these terms to describe short-term bonds issued for working capital purposes. The term “BAN” is not used in any Code or regulatory provision. However, special rules for bank qualification apply to bonds that have a weighted average maturity of under 3 years and are issued in anticipation of permanent financing (Section 265(b)(3)(D)(ii)). We recommend using the following definitions for these terms:

A bond anticipation note (BAN) is a bond that is part of an issue that when issued has a weighted average maturity of no more than 3 years and is expected to be refunded with a longer-term bond

A tax anticipation bond note or warrant (TAN) or revenue anticipation bond note or warrant (RAN) refers to a tax-exempt bond with a maturity of no more than thirteen months that is issued to cover revenue shortfalls and pay working capital expenses. A short-term tax-exempt bond primarily to finance or refinance a capital expenditure is not a TAN or RAN.

3. Commercial Paper. NABL recommends adding definitions of “commercial paper” and “commercial paper program.” Several of our recommendations relate to clarifications with respect to reporting of commercial paper. NABL’s recommendation for a definition of “commercial paper program” borrows from the definitions of commercial paper in Treas. Reg. §1.150-1(c)(4) and Treas. Reg. §1.149(e)-1(e)(2)(ii)(A)(2).

Commercial paper is a bond issued under a program to issue short-term bonds, each having a maturity of 270 days or less (commercial paper) to finance or refinance the same governmental purpose pursuant to a single master legal document.

A commercial paper program is a program under which commercial paper is issued under common documents.

4. Private Activity Bond. The current language of the second paragraph of the second bullet (dealing with the private loan test) is confusing.<sup>94</sup> The correct concept is that the term

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94 The language that contains the problem is designated (b) in the last paragraph of the definition. That language appears to us to not reflect its intended meaning.

private activity bond also includes a bond that is part of an issue, the proceeds of which are to be used (directly or indirectly) to make or finance loans (other than loans described in section 141(c)(2)) to persons other than governmental units in an amount in excess of the lesser of 5% of the proceeds or \$5 million. Also, there is no mention in the current definition of private activity bonds of bonds that are treated as private activity bonds if they are used to acquire nongovernmental output property.<sup>95</sup> We have provided language that corrects this definition.

5. Issue Price. As a minor grammatical correction, we suggest changing this definition so that the subject “amount” is followed by the word “is” rather than “are,” since “amount” is singular.

6. Issue. We recommend changes to the definition of “issue” to reflect the different meanings given to the word under Treas. Reg. §1.149(e)-1(e)(2) and Treas. Reg. §1.150-1(c). Because we have recommended adding a definition for commercial paper and drawdown loan, we recommend shortening the definition of “issue” to avoid repeating the requirements of commercial paper and drawdown loans.

#### **D. Specific Instructions**

- Amended Return, Original Information. Current instructions provide that in the case of an amended return, the issuer provide all the information included in the original Form 8038-G being amended. The purpose of this requirement is unclear and has led to inconsistent interpretations. To appreciate the ambiguity, imagine a Form 8038-G filed with one piece of information that is incorrect, the wrong yield on Line 21e. Without the instructions, an issuer might just provide an amended return with a number filled in on Line 21e with the rest of the Form 8038-G blank other than the information in Part I needed to identify the issue and the check mark showing an amended return. One interpretation of the current instructions is that the amended Form 8038-G should not leave blank the fields that did not need to be corrected. For example, the amended return should include the weighted average maturity on Line 21d even if that number was correct on the original form. Under this interpretation, amended returns are filed with all relevant fields completed and with the amended return box checked, but without repeating the information incorrectly reported on the original return. Another interpretation is that the issuer must provide not only a fully completed amended return, but also must provide the information originally submitted, even if that information is being corrected in the amended return. This has led some issuers to attach a copy of the original Form 8038-G (which usually is at least partially incorrect) to the amended return and perhaps add a cover letter explaining what has changed.

NABL is most concerned with eliminating the inconsistent practice that has arisen concerning amended returns. The instructions should be clarified to promote the practice that the IRS finds best matches the procedures used by IRS personnel to process amended returns. Generally, it is our view that re-submission of incorrect information should be avoided and the need for explanations should be minimized. We therefore recommend that the instructions concerning amended returns be modified through the insertion of a single word, “correct.”

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<sup>95</sup> As provided in Section 141(d).

The amended return must provide all the correct information reported on the original return, in addition to the new or corrected information

Alternatively, if the IRS prefers that the information on the original return be resubmitted, whether or not it is being corrected, the instructions should say so. If a copy of the original return is to be attached to the amended return, the instructions should say so.

- Line 1 Current instructions for Line 1 tell the issuer that the issuer's name is not the name of the entity receiving the benefit of the financing. In most bond issues for which Form 8038-G is appropriate, the bond issuer will be the entity receiving the benefit of the financing. The instructions as currently drafted are confusing and can be clarified with a small wording change. We recommend that the instructions for Line 1 be reworded to say that the issuer's name is the "name of the entity issuing the bonds, which may be different from the name of the entity receiving the benefit of the financing."

- Line 3, Expiration of Authority. On Line 3 of Form 8038-G, an issuer is provided an option to include an outside contact person. Line 3 is often left blank (which is permitted in the current instructions). We believe that the option to include such an outside contact person is beneficial, but that current instructions discourage the use of Line 3. A knowledgeable representative listed on Line 3 may provide benefits if the IRS has questions about the form as filed. In many cases, the form preparer (who also often serves as the bond counsel) would be such a knowledgeable person. However, many bond counsel are unwilling to be so listed on Line 3 because their engagement as bond counsel ends on (or shortly after) the bond issue date. Such counsel might agree to be listed if the period during which they could be contacted and during which they were authorized to receive taxpayer information was strictly limited. For example, if the authorization created by Line 3 ended 60 days after the issue date, many counsel could structure their engagements to end on such date rather than on the issue date. If the purpose of Line 3 is to allow the IRS to contact someone during the process of accepting the return, a termination of authority within a reasonable period would not interfere with the usefulness of inclusion of such a contact. However, under current instructions, such counsel are concerned that if their names are included, they may be contacted possibly years later when the IRS has a question about the bond issue. In its 2012 report, the Advisory Committee on Tax-Exempt and Government Entities recommended that the Form be modified to allow the issuer to enter an expiration date. Providing that flexibility without changing the form itself is difficult, but the instructions could be modified to have the authority expire in a set number of days after the date of issue in all cases. That is the approach we recommend.

- Line 3, Preparer. If the concern about expiration of authority is addressed, the person acting as paid preparer is likely to be the most common person to be provided as the outside contact person with authority to discuss the form with the IRS. The contact information for the paid preparer is already provided on Form 8038-G in the signature block.<sup>96</sup> In order to make completion of the form simpler and to reduce redundancy, we recommend that if the issuer wishes

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96 The paid preparer block includes preparer name, phone number, firm name and an address.

to authorize the person acting as paid preparer to communicate with the IRS concerning the form, the issuer should just enter the word “PREPARER” on Line 3. Even if the instructions do not generally provide an expiration date for the authority resulting from a name inserted on Line 3, the instructions should provide that the authority of the paid preparer to receive taxpayer information and to discuss the form with the IRS should expire within a short specified period (*e.g.* 60 days after issuance) if the word “PREPARER” is inserted on Line 3.

- Lines 4 and 6, Whose address to include. Current instructions provide that the address to be inserted be the address of the outside representative, if any, listed on Line 3 or if none, the address of the issuer. We believe that it is important that the Form always include the Issuer’s address. Accordingly, we recommend that the instructions be modified so that Lines 4 and 6 always refer to the issuer’s address. If the address for a person listed on Line 3 is required, it should be provided on a separate schedule unless that person was the paid preparer, whose address is already on the Form 8038-G. See our comments to the instructions to Line 3 and the corresponding comments for Form 8038.

- Lines 4 and 6, Permitted issuer address. Some issuers of tax-exempt bonds do not maintain a mailing address separate from that of their agents (*e.g.* their lawyers). The instructions should clarify that an issuer address can be in care of another entity. Use of such an address does not authorize IRS communication with the entity in whose care mail is delivered to the issuer. Mail addressed to the issuer and sent to such address is for the issuer.

- Line 7, Consolidated Returns. Current instructions to Line 7 provide that the issue date to be entered is the first date on which the issuer physically exchanges any bond of the issue for the purchaser’s funds. The use of the “first date” in these instructions implies that different bonds of the issue may be issued on different dates, contrary to the definition of “issue” found in Treas. Reg. §1.149(e)-1(e) (other than for drawdown loans and commercial paper). However, if the instructions to file a separate return for each issue are relaxed or interpreted to refer to the definition of “issue” under Treas. Reg. §1.150-1(c), then the “first date” reference makes good sense. The “first date” reference is consistent with our recommendation of explicitly allowing a single Form 8038-G to be filed on a consolidated basis for bonds that comprise a single issue under Treas. Reg. §1.150-1(c).

- Line 7, Bonds issued for property. Current instructions describe the issue date as the date that bonds are exchanged for funds of the purchaser. Since some bonds are issued for property rather than cash, we recommend that “funds” be replaced with “funds or property.”

- Line 7, Commercial Paper. The special “single issue” rule set forth in Treas. Reg. §1.149(e)-1(e)(2) provides that commercial paper issued in a single calendar year may be treated as part of the same issue for information reporting purposes. The instructions currently provide that a separate return be filed for each issue. While our recommendation is that annual filings for the same program not be required unless a change has occurred to the information previously reported, even under that suggestion, annual filings may sometimes be required. The issue date for a particular calendar year of a commercial paper program originally commenced in a prior calendar year would, in general, be the first date on which commercial paper notes of the program were rolled in that year. In many commercial paper programs, that date is in early January

because notes of the program are rolled as often as weekly even if each note has a multiple month maturity. While it is theoretically possible that the first roll in a calendar year could be as late in the year as September 27, the first roll will usually be in the first quarter. In order to lessen burdens on issuers and to provide a consistent reporting of continued commercial paper programs, we have proposed that annual filings each year other than the first year of a commercial paper program be based on an assumed January 1 issue date. The actual roll date is generally handled by bankers and not the issuer or borrower. Such roll date is nearly irrelevant to the bond issuer or borrower. Recording 01/01/YYYY on Line 7 has the extra advantage that since January 1 is never a business day, any CP filing for tax-exempt commercial paper using that date as the issue date would be flagged as a continuation of an existing program and not a new issue for enforcement purposes. This provides the Service with the “as of” date of the information provided for the commercial paper program.

- Line 9, Single CUSIP to be reported. CUSIP numbers are utilized to provide a concise unique identification for a tax-exempt bond issue. The actual name of the issue is often long and unwieldy. The existing instructions for the Form 8038 provide that the CUSIP number of the bond with the latest maturity be reported. Often, especially with an issue of bonds that includes multiple series of bonds, there are multiple bonds with separate CUSIP numbers that share the latest maturity date. Currently, some issuers report all such CUSIP numbers and others report only one of such CUSIPs. To provide for more consistent reporting across issuers and reduce the number of attachments to the Form 8038, we recommend that the instructions provide that, if there are multiple bonds sharing the latest maturity, only one of such CUSIP numbers is to be reported.

- Line 9, CUSIPS assigned after initial issuance. CUSIPS can be assigned to bonds on a date long after the issue date.<sup>97</sup> Our recommendation is that the CUSIP number assigned to a bond issue on the initial issue date be used for all reporting purposes relating to an issue of bonds, even if a new CUSIP number is assigned at a later date.<sup>98</sup> To this end, NABL’s recommended changes to the instructions note that no amended filing is required for a change in the CUSIP number.

- Line 9, CUSIPS for Commercial Paper. In the case of commercial paper, the final maturity of the issue (using either definition of issue) and the CUSIP number eventually assigned to that maturity is likely unknown as of the issue date of the commercial paper issue. In the case of the first filing for a commercial paper program, NABL recommends that Line 9 be completed based only on CUSIP numbers for notes issued on that initial issue date. NABL acknowledges that such CUSIP number may relate to a note that actually matures (and is expected to be rolled) in as little as a week after closing. However, we believe that reporting the initial

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97 For example, a new CUSIP is often assigned to a portion of the bonds of a particular maturity that have been defeased, or if certain other changes not resulting in a reissuance are made to a portion of a maturity.

98 For example, that CUSIP number should be used on Form 8038-T even if at the time of the filing of a Form 8038-T, that CUSIP number does not apply to any bonds then outstanding and even if a new CUSIP has been assigned (after closing) to a longer maturity. Fully implementing this recommendation this may require changes to the instructions for Forms 8038-T and 8038-R.

CUSIP serves the purpose of identifying the issue. To the extent that the instructions require issuers to make annual filings, the CUSIP number should remain constant allowing an easy way to link those filings. Using separate CUSIP numbers for each filing of a commercial paper program treated as a single issue for enforcement purposes would complicate administration.

- Part II, Lines 11 – 18 Allocation of issue price. The current instructions to Form 8038-G and the Form itself require breaking down the issue price of a bond issue into various categories of uses. In many cases (such as school financings), one category applies to the entire bond issue. In other cases, the proceeds of a bond issue are anticipated to be applied to several different purposes. In such cases, the issuer must allocate the issue price among multiple categories. The issuer will not in most cases know the breakdown of use into these categories to the nearest dollar. Compounding this difficulty, many of the categories overlap. For example, street lighting could be considered a public safety use, or it could be considered a transportation use (as part of a road). Current instructions to Line 31 of Form 8038, a similar item, provide that an issuer may make a reasonable proration. We believe that likewise, the instructions to Lines 11 – 18 of Form 8038-G should allow reasonable allocations or prorations of the issue price into multiple portions for assignment to uses. Such amounts should not be required to be precise to the dollar. Difficulty in completing these items have given rise to inconsistent form preparation. In some cases, issuers unable or unwilling to make reasonable allocations under current instructions have used Line 18 (other) to enter a type of use (such as general municipal purposes) that is an amalgam of uses that appear in Lines 11 – 17. Allowance of reasonable allocations may lead to better information about what is being financed. To be useful, such allocations must not be required to be precise to the nearest dollar, so long as the allocations are reasonable, and they add to the correct total.

- Line 18, Combined Purpose. Many municipalities, counties, states and other general purpose issuers find it difficult to allocate bonds among the purposes listed on Lines 11 through 17 and instead complete Part II by putting the entire issue price of the bond issue on Line 18 and insert words such as “General Municipal Purposes” in the description. Some issuers may not know a breakdown of the portion allocable to specific purposes listed on Lines 11 through 17. Some projects may also not neatly fall into one such category. Common current practice in this respect should be specifically authorized by the instructions by adding language that permits the description on Line 18 to include some (or all) of the categories that are listed on Lines 11 through 17.

- Part II, Schedule of users. The current instructions ask for an attached schedule of users, including the EIN of each. There is no place on the Form itself that relates to this schedule. Interpretation of this provision has varied and led to inconsistencies.

The information called for in the current instructions are:

- User names
- User Employer Identification Numbers
- Summary of the use by such users
- Governmental status of the users

This information closely tracks the information called for in Section 149(e)(2)(D), the names, addresses and employer identification numbers of principal users of the financed facility. However, the ending flush language of Section 149(e)(2) makes it clear that Section 149(e)(2)(D) does not apply to any bond that is not a private activity bond (which are precisely the bonds for which Form 8038-G and the instructions thereto apply).<sup>99</sup> The inapplicability of Section 149(e)(2)(D) is described in the legislative history for the Tax Reform Act of 1986 (that brought information reporting to governmental bonds). The Joint Committee on Taxation’s Bluebook for that Act describes this requirement at page 1223:

Congress recognized that certain information required under prior law with respect to IDBs and mortgage revenue bonds is inapplicable in the case of bonds for general governmental operations, because governmental bonds are not issued exclusively to finance specific facilities.

While Section 149(e)(2)(G) provides broad authority for the IRS to collect “other information as the Secretary may require,” the exclusion provided in the flush language of Section 149(e)(2) for information about users of facilities financed with governmental bonds seems to take away any statutory authority for the request for this information.

Ironically, the corresponding instructions on Form 8038, which applies to private activity bonds, which clearly are subject to the requirement in Section 149(e)(2)(D) to list the principal users of the bond-financed facilities, are much less intrusive. For example, for qualified 501(c)(3) bonds, the instructions to Line 18 of Form 8038 require attachment of a schedule of Section 501(c)(3) users benefiting from the transaction. If a non-exempt person benefits from an issue of qualified 501(c)(3) bonds, it is not necessary to list that person’s name and employer identification number. Of course, such private users are limited to using no more than 5% of the proceeds. The Form 8038 instructions recognize that it is appropriate to list only those users of bond-financed facilities whose use is sufficient to warrant a private activity analysis.

In contrast, the current instructions to Form 8038-G require a listing of all users. If, for example, an issuer is planning to lease space in its bond-financed building to another governmental unit, and the other governmental unit’s use exceeds 5% of the total use, reporting such use would seem appropriate. However, Congress has spoken clearly on this question, by enacting Section 149(e)(2)(D). As recognized by Congress, governmental bonds do not necessarily finance a discrete number of specific facilities, which can result in a wide variety of potential users of facilities financed by governmental bonds. It does not appear appropriate to list persons who are expected to use such facilities as members of the general public. Often, the plans of the issuer include allowing small amounts of use to entities (under 5% or 10% of the total use of the proceeds). Many times, the issuer will not even know the names of these anticipated users and almost certainly has not collected the Employer Identification Numbers of these users. Because issuers need to complete the Form 8038-G at or shortly after closing, this schedule is often interpreted to require just what is known as of the issue date. NABL recommends that the schedule

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<sup>99</sup> Section 149(e)(2)(C) relating to information concerning public approval also does not apply to governmental bonds.

be deleted in light of the flush language of Section 149(e)(2). If the IRS believes that this language does not deprive the IRS of the authority to request this information, then NABL recommends that it be limited to users known at the time of issuance, whose use would cause the bonds to be private activity bonds should the use be non-governmental and the corresponding private security or payment be in excess of permitted limits.

In part because of the heavy burden of collecting the information for all users or potential users of any proceeds of the bonds, the current instructions have been interpreted in many different ways. For example, use of bond-financed facilities may not be treated as use of proceeds for the completion of this schedule if the proceeds pending expenditure are used only by the issuer. Some issuers attach schedules showing users of significant portions of bond financed property. Some issuers may have determined that the statutory exclusion means that the information is not required to be reported. This lack of consistent application of the provision may mean that data collected from these attached schedules (or lack thereof) is not statistically meaningful.

NABL encourages the IRS to delete the requirement in the current instructions for attaching a list of users of bond proceeds. If the IRS wishes to retain the requirement, it should be clarified so that the information is consistently reported. Any such clarification should take into account the heavy burden that reporting such information creates and the relative benefits to the IRS, Congress and other potential users of the collected information. We note that limiting the requested information to users of more than 5% of the proceeds would reduce the burden. Because the Code clearly indicates that collecting such information is beyond the scope of Section 149(e)(2), such information should only be required if the IRS can demonstrate that the Secretary of Treasury requires the information. NABL requests that if the IRS does make such a determination, the IRS publish its reasons for collecting such information and give the public a chance to comment on such reasons.

Because our markup of the instructions to Form 8038-G indicates that this requirement be deleted entirely (as we believe is appropriate), we are providing language below as an alternative, should the IRS determine to retain the requirement.

Attach a schedule listing names and EINs of organizations that are to use **more than 5% of** proceeds of these bonds, if different from those of the issuer, include a brief summary of the use and indicate whether or not such user is a governmental or nongovernmental entity. **Do not list (or provide the EIN for) entities that use the facilities unless the issuer is to receive payments with respect to bond proceeds so used in an amount greater than 5% of the debt service on the bonds unless the proceeds so used (or the facilities financed with such assets) provide security for the payment.**

- Line 20. Line 20 is a box labeled on the form as indicating that the issue is in the form of an installment sale or lease. Current instructions to Line 20 indicate that the box should be checked if the bonds of the issue are issued for property other than money. While the form itself seems to emphasize the formal structure of the debt instrument (as a financing lease or as an installment sale), the instructions emphasize the type of compensation provided for the debt (property or money). The difference between the current instructions and the labels printed on the

form create an ambiguity and inconsistencies in when the box is or should be checked. Based on current instructions, many issuers do not check the box even if the debt issue is in the form of a lease or installment sale if such lease or installment sale is issued for money. In some transactions, bonds (in the form of bonds and not documented as leases or installment sales) are issued for property, not money. Some issuers check the box in such transactions based on current instructions and some do not. We recommend that the instructions be revised to provide clear guidance on whether the form of the documentation of the debt is relevant to whether the box should be checked.

One common situation in which debt is issued for property is debt issued in exchange for existing debt of the same issuer. For example, in the case of some reissuances, new debt is issued in exchange for old debt. We believe that the current instructions for Line 20 are ambiguous about the treatment of such debt for debt exchanges. We do not believe that there is consistency concerning the use of Line 20 for such issues. We believe that the instructions should explicitly state whether the box should be checked in the case of such a debt for debt exchange and in particular in the case of a reissuance. We note that unlike the current instructions to Form 8038, the current instructions to Form 8038-G do not ask the issuer to identify bonds issued in a reissuance. Line 20 may provide partial identification of reissuance.

Some bond issues include both debt exchanged for property, and also debt issued for money. Instructions should be clear about whether the box should be checked if the criteria for checking the box apply to some but not all of the debt of the issue.

As with the instructions to other line items, our main concern about the instructions to Line 20 is clarity and consistency of application. Our markup of the instructions states that the box should be checked if any of the debt instruments of the issue are issued in exchange for property, including bonds issued in exchange for older debt instruments of the same issuer and including reissuances. However, any clear instructions concerning these matters would improve the instructions.

- Part III Line 21, Returns for part of a larger issue. Lines 21d and 21e on which weighted average maturity and yield are reported should relate to the entire substantive issue under Treas. Reg. §1.150-1(c), even if some bonds of such substantive issue are to be (or have been) reported on a separate Form 8038-G. The limitations imposed by substantive law are based on data related to an entire bond issue under Treas. Reg. §1.150-1(c). The current instructions to Line 21e clearly inform the issuer that the yield is the yield, as defined in Section 148(h) be used. The yield as so defined is based on all the bonds in the larger issue.<sup>100</sup>

- Part III Line 21a, Commercial Paper. The present instructions provide that the final maturity date of an issue is the last date on which the issuer must redeem the entire

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100 In the case of a pooled conduit bond issue in which the conduit loans are themselves tax-exempt bond issues, each yield on the bonds allocable to each separate tax-exempt conduit loan is computed separately based only on such allocated bonds. These transactions are not common and should be viewed as special cases not driving the instructions to the forms.

issue.<sup>101</sup> For commercial paper, there is some ambiguity about the meaning of the entire issue. If the date is to be based on the definition of “issue” found in Treas. Reg. §1.149(e)-1(e), the final maturity date of the issue would be September 27 (or September 26 depending on leap years) of the following year, the last date on which 270-day commercial paper notes issued that same calendar year could mature. A better interpretation, which we recommend, is that the date should be the final date on which commercial paper notes of the issue for purposes of Section 150 could mature.<sup>102</sup> We recommend that the instructions remove any ambiguity about the final maturity date for commercial paper issues. NABL believes that the final maturity date for the commercial paper program is the most helpful to the IRS, as it provides information regarding how long commercial paper might be outstanding under the commercial paper program.

- Part III Line 21b, Issue price of commercial paper and drawdown loans. When first issued, many commercial paper programs (and all drawdown loans) are not fully funded. An issue of commercial paper or drawdown loan may be “ramped up” during a startup period. While the full issue price of an issue of drawdown bonds or commercial paper may be unknown at the time of initial issuance, the issuer knows as of closing all of the following: (i) the initial amount issued, (ii) a maximum amount to be issued, (iii) a maximum amount permitted to be outstanding, (iv) a reasonably expected amount that will be issued and (v) a reasonably expected maximum amount that will be outstanding under the program.<sup>103</sup> For the purposes of determining the maximum amount to be issued, commercial paper notes used to immediately refund (roll) other notes of the same program should not be included. NABL believes that it is most important that the instructions be clear on the issue price amount to be included. We recommend that the issue price be the maximum amount of commercial paper to be outstanding regardless of the year in which such maximum is expected.

- Part III Line 21c, Treatment of long coupon bonds. The stated redemption price at maturity for most bonds is the same as the bond’s nominal principal amount for state law purposes. This is true even for bonds with original issue discount (OID) or premium, so long as all stated interest is qualified stated interest. Many tax-exempt bonds (although a small percentage

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101 The instructions consistently use the concept of redemption to apply to the payment of and retirement of a bond. In common use, redemption would not apply to the payment of a bond at final maturity. Such bond matures rather than being redeemed. The use of the word “redeem” in this context is not consistent with common usage, but we have not recommended changing the wording because people understand what is meant. If the IRS wishes to be more consistent with common usage within the bond community, it could substitute “pay and retire” for “redeem.”

102 Treas. Reg. §1.150-1(c)(4)(ii)(A)(2)(ii) limits such final maturity date to 30 years after the issue date of the issue.

103 Most commercial paper notes and drawdown bonds are issued at par. The principal amount of commercial paper, the issue price of commercial paper and the stated redemption price at maturity of commercial paper are usually the same. Some drawdown loans and commercial paper programs can ramp back up after the issue has been reduced in size.

of all tax-exempt bonds) are sold with interest that is not payable at intervals of one year or less.<sup>104</sup> For example, a bond issue may be structured to pay interest at a fixed rate with semiannual interest payments, but with interest starting 15 months after the issue date. Because some or all of the interest on such bonds is not qualified stated interest, such bonds are properly treated as having OID even if sold at a premium over the stated principal amount. As a result, the stated redemption price at maturity may in certain cases be in excess of the stated principal amount.<sup>105</sup> Such result confuses the reporting, as the origin of such difference is a technical OID matter and may not be obvious to an issuer.

Because OID on tax-exempt bonds is treated as tax-exempt interest, there are no significant substantive consequences to classification of interest payable on such bonds as part of the stated redemption price at maturity. Completion of Line 21c however may be quite difficult and subject to different interpretations. We believe that a rule that allows Line 21c to be completed with the stated principal amount under appropriate circumstances would simplify form preparation, lead to more consistent form completion and would have no negative impact (and in fact, positive impact) on enforcement or statistical data collection. Our suggestion is that payments designated as interest be excluded from the amount entered on Line 21c as the redemption price at maturity if such interest accrues at a single fixed rate and is payable at intervals of 30 months or less.<sup>106</sup> The result of this change to the instructions would be to allow issuers of a large number of long coupon bond issues to enter the stated principal amount on Line 21c. That would be both easier for the issuers and more likely to produce consistent results.<sup>107</sup> The stated principal amount is also the amount that is probably most useful to the IRS for enforcement and for statistical data collection.

- Part III Line 21c, Commercial Paper. To remove ambiguity about determining the stated redemption price at maturity for commercial paper, we believe that the instructions should directly address commercial paper. Not only is it important that the ambiguity be eliminated, it is also important that the stated redemption price at maturity be consistent with the issue price in Line 21b. (Most commercial paper is issued at par so that the issue price and stated redemption price at maturity of any note is the same.) If the maximum issue price of notes to be outstanding is to be reported on Line 21b, then the amount to be reported on Line 21c should also be based on the maximum principal to be outstanding.

- Part III Line 21d, Weighted average maturity of drawdown loans and commercial paper. Weighted Average Maturity of an issue of drawdown bonds or commercial paper is currently quite ambiguous. Delayed issuance of part of an issue means that the individual

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104 Such long coupons are most often found on real estate tax supported governmental bonds to which Form 8038-G applies.

105 The stated redemption price at maturity is defined in Treas. Reg. §1.1273-1(b) to be the sum of all scheduled payments on the bonds other than qualified stated interest.

106 Almost all long coupon bonds will satisfy this 30-month rule.

107 Anecdotal evidence may suggest that some issuers are already reporting the stated redemption price at maturity in this manner.

maturities to be averaged are not clearly defined. Current instructions just refer to the number of years “to maturity” without specifying the beginning date. Furthermore, for commercial paper, the instructions do not expressly state what maturity date is intended. If it were just the maturity date of the notes being issued on that date, the Weighted Average Maturity would be at most 0.74 years (270 days). The better approach is to use a maturity date similar to the one used for Line 21a, based on the documents of the program, including any mandatory redemption provisions (or mandatory reduction of amount to be rolled) included in the program documents. As to the start date, consistency and lack of ambiguity are most important. Additionally, for simplicity and for ease of computation, we recommend that the start date be the issue date reported on the Form 8038-G, even for notes or draws to be issued later.<sup>108</sup>

- Part III Line 21d, Issues other than commercial paper and drawdown loans. For bond issues other than commercial paper and drawdown bonds, there is some ambiguity about whether the weighted average maturity should be calculated on all bonds of the issue for Section 150 (and 148) purposes, or whether the weighted average maturity should be calculated only on the bonds part of the same issue for purposes of Treas. Reg. §1.149(e)-1(e)(2), if different. For example, if a governmental bond issue is issued in part on two different dates, should the weighted average maturity be the same for each Form 8038-G filed or should each one only report for the bonds of that issue date?<sup>109</sup> We note that regardless of how the ambiguity is resolved, the weighted average maturity on one or both Forms 8038-G could be different from the weighted average maturity used to test whether bonds are outstanding longer than necessary, in part because of the multipurpose rules of Treas. Reg. §1.148-9(h).<sup>110</sup>

- Part III Line 21e, Precision of yield reporting. Presenting the bond yield to four decimal places provides unnecessary precision. The difference between monthly and semiannual compounding (either of which is allowed) would in most cases change the yield by a much bigger amount.<sup>111</sup> Small dollar changes to the issue price that would in no way affect tax compliance can also change the yield by more than 0.0001%. Even changes in day-counting conventions may have a bigger effect. Nothing on the form or instructions specifies the compounding interval to use or what day counting conventions to use. The compounding interval and other conventions used do not need to be reported. We suggest that truncation of the bond

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108 Because of the rules relating to single-issue treatment, such ramp up draws will most often occur within three years of the original issuance of the issue and in the case of commercial paper within 18 months of the original issue date.

109 We note that this ambiguity does not exist with respect to the reporting of bond yield on Line 21(e) because the instructions provide that bond yield should be calculated according to Treas. Reg. §1.148-4.

110 The portions of the bond issue under the arbitrage multipurpose rules might be different from the groups of bonds reported on separate information returns. The safe harbors would be met based on the weighted average maturity of each portion regardless of the weighted average maturity of the entire issue or of the bonds reported on separate Forms 8038-G.

111 A yield of 4.0000% monthly compounding is equivalent to a yield of 4.0335% semiannual compounding or 4.0742% annual compounding. Nothing in the law or in form instructions favors any particular compounding interval. The form does not ask for the compounding interval to be specified.

yield to two places be acceptable. Note that the entry of a bond yield on Form 8038-G in no way affects the yield that an issuer must use to compute rebate or yield restriction compliance. With the demise of tax-exempt advance refunding transactions, a precise bond yield is irrelevant to the substantive tax rules applicable to most governmental bond issues. Yield is, of course, important for rebate computations, but rebate calculators are generally responsible for computation of bond yield as part of the rebate computations. At the time that the Form 8038-G is completed, there is often no professional computation agent involved in the transaction. While a verification agent could be retained, the expense of such a calculation agent would place a needless burden on bond issuers in most cases. Often, but not always, underwriters do provide yield computations as part of numbers runs intended to show the bond issuer its anticipated debt service requirements. Some issuers (on the advice of counsel) have taken to requesting underwriters certify as to the correctness of the yield computations provided. The only reason that such certifications are requested is to aid in the completion of the Form 8038-G. Indeed, underwriters that do agree to provide such certifications often specifically indicate in their certifications that the yield so computed is only for purposes of completion of Form 8038-G and is not to be used in future rebate computations. The certification creates an undue burden on bankers that are hired based on ability to sell bonds rather than on their ability to do computations, and probably increases the cost to issuers. Unlike professional verification agents who are generally accountants and provide representations that the calculations are performed to the standards of the American Institute of Certified Public Accountants, underwriter certificates as to yield are not subject to any defined standards. In the past, verification agents were generally hired for advance refunding bond transactions, because the yield on the issue was crucial to compliance with the substantive tax rules.<sup>112</sup> Because bond yield is generally not needed at the time of issuance to establish compliance with any substantive tax law constraints in the vast majority of tax-exempt governmental bond issues, we recommend that the instructions should explicitly provide that the yield entered on the information reporting form may be based on estimates or approximations. This change would have an immediate beneficial effect on underwriter representations and very likely on costs of issuance.

- Part IV, Lease or Installment sale. The current instructions indicate that “N.A.” be entered at the top of Part IV for leases or installment sales. This typically is interpreted as applying to those bond issues for which the box on Line 20 is checked. To avoid any ambiguity, the instructions should state this.

- Line 22. Accrued interest is not included in the total issue price provided in Lines 11 through 21. The amount if any to be listed on Line 22 is in addition to any amounts listed on Line 21. Although this may be clear under current instructions, it would be helpful to those completing the form to indicate that this amount is not included in the other totals.

- Lines 27 and 28. Proceeds used to refund. Current instructions provide that the amount of proceeds to be used to pay principal, interest or call premium on refunded bonds be provided. There are often costs that are for the refunding purpose, but are not the payment of principal, interest or call premium on the refunded bonds. One example of such a cost is a

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<sup>112</sup> This is still true in the case of current refundings of advance refundings in which a transferred proceeds penalty must be computed and paid. Such transactions are not however common.

termination payment relating to a qualified hedge on the refunded bonds. Another example is the payment of a yield reduction payment made with respect to transferred proceeds derived from the refunded bonds. While not used to redeem or fund an escrow for the refunded bonds, these costs do seem properly characterized as refunding uses of proceeds of the bonds. Unlike costs of issuance or deposits to a reserve fund, there is no place for such amounts other than on Lines 27 and 28 or as “nonrefunding proceeds” on Line 30. We understand that the ambiguity related to such costs has resulted in inconsistent reporting practices among issuers. NABL recommends that the instructions be revised to provide that costs related to the accomplishment of the refunding of tax-exempt bonds be included on Line 27 and costs related to the accomplishment of the refunding of taxable bonds be included on Line 28. This recommendation is not intended to apply to proceeds used to pay costs of issuance, which are reported on Line 24.

- Part V Lines 31 and 32 Multiple refunded issues. We understand that, under the existing language, when multiple issues of bonds are being refunded, some issuers are reporting the remaining weighted average maturity of the refunded bonds on a combined basis, while others report the remaining weighted average maturity for each issue of refunded bonds separately. The proposed additional language to the instructions to Lines 33 and 34 clarify that the weighted average maturity of the refunded bonds be reported on a combined basis. This approach provides the IRS with information regarding the relationship between the weighted average maturity of the refunding bonds and the refunded bonds and avoids inconsistent reporting practices between issuers and the need for attachments.

- Part V Lines 31 and 32 Refunded Commercial Paper. Current instructions provide no guidance regarding how the remaining weighted average maturity of refunded commercial paper should be calculated and reported. This results in differing reporting practices. We recommend that the instructions clarify the approach to be used.

NABL recommends that the instructions provide that the remaining weighted average maturity of any refunded commercial paper be calculated based on the maturity of the commercial paper program (including any mandatory reductions in the amount of commercial paper outstanding on various dates). This approach most closely treats commercial paper like other types of borrowings and most clearly demonstrates whether the refunding is extending the average maturity over what would otherwise have been the case. If this approach is selected, it is important that the instructions explicitly mandate this approach because in general for bond issues other than commercial paper issues, the remaining weighted average maturity is based only on specific refunded bonds.

Another approach is to look only at the specific notes being refunded, as though they were not part of a commercial paper program. Normally, the notes are being refunded to maturity.<sup>113</sup> Therefore, the remaining weighted average maturity is very short (and indeed is often 0 years). Some feel that this produces a misleading result. If, however this approach is adopted by the IRS, the instructions should explicitly so state.

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113 Since these notes all had a maximum original maturity of 270 days, they are generally non-callable prior to maturity.

A third approach is to decide that the remaining weighted average maturity of commercial paper should be ignored. If this approach is taken, the instructions should provide that Lines 31 and 32 be left blank or completed as N.A. if only commercial paper is refunded and that if commercial paper and other obligations are refunded, the remaining weighted average maturity be computed only with respect to those other obligations.

- Line 33. At present there are no instructions for Line 33 of Form 8038-G. We believe that such instructions would be useful. We recommend that the instructions should specify that only one date should be entered, and it should be the last date on which bond proceeds will be used to make a payment on a refunded tax-exempt bond. The Form indicates that only refunding of tax-exempt bonds are to be considered. Either the instructions should be consistent with those words printed on the Form, or the instructions should clearly indicate a wider scope. NABL notes that for many purposes a current refunding of a tax-advantaged bond (such as a build America bond) is treated like the refunding of a tax-exempt bond. The IRS may wish to consider expanding the scope of the instructions to Line 33 to include the latest date that any tax advantaged bonds are to be redeemed. If so, the instructions should be explicit. As currently drafted, the instructions indicate that such tax-credit bonds or direct pay bonds are to be treated as taxable bonds. Absent instructions to Line 33 to the contrary, many issuers will exclude the redemption date of a refunded build America bond from the date to be entered in Line 33.

- Line 34 Refunded Commercial Paper. Instructions should clarify the issue date to be entered for the refunding of commercial paper. We believe that it is most appropriate to enter the date of issue of the commercial paper program (which is the issue date of the issue under the meaning of Treas. Reg. §1.150-1(c)) of which the refunded commercial paper is a part rather than entering the date or dates on which particular refunded commercial paper notes were issued.

- Part VI Line 36. Some confusion has developed concerning the amount of gross proceeds to include on Line 36 in the case of a GIC used to invest a bona fide debt service fund. If such GICs are to be included at all, we recommend that the maximum amount to ever be held in the GIC should be the amount provided rather than the sum of all deposits to the GIC. Clarification on this point would be useful in any case.

- Line 39. Current instructions do not provide any guidance for completion of Line 39 on Form 8038-G dealing with bank qualification. The labels printed on the form itself indicate that the box should be checked if the issue is designated under Section 265(b)(3)(B)(i)(III). However, Section 265(b)(3)(B)(i)(III) provides a mechanism for bonds (not issues) to be designated.<sup>114</sup> Frequently, an issuer will only designate some bonds of an issue as bank qualified. The remaining bonds of the issue may be sold as not bank qualified, or such undesignated bonds may qualify as “deemed designated.” The absence of instructions concerning this box has led to inconsistent reporting of bond issues where some but not all of the bonds have been designated. Some issuers have added marginal notes or attachments when an issue has been partially designated. Questions have also been raised about whether the box should be checked if some or

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114 Section 265(b)(3)(B)(i)(III) does not deal with deemed designated bonds.

all of the bonds of the issue are deemed designated under Section 265(b)(3)(D)(ii) but none of the bonds have actually been designated by the bond issuer. The specific cite (265(b)(3)(B)(i)(III)) printed on the form itself implies that the box not be checked for deemed designated bonds. If the form itself were being revised, it might be appropriate to change Line 39 to ask for a dollar amount designated, or for a dollar amount treated as bank qualified (whether designated or deemed designated). However, given that there is just one box to check concerning bank qualification, the instructions should provide unambiguous guidance about how to treat designation of part of an issue and how to treat deemed designated bonds. We believe that the simplest approach, which would maximize consistency, for partial designations is for instructions to state that the box should be checked if any of the bonds have been designated or deemed designated. The instructions should either treat deemed designated bonds in the same way as designated bonds or should state that they are not to be so treated. To promote consistency of reporting it is important that the treatment of deemed designated bonds not be left ambiguous. NABL encourages the instructions for this line to be clear, regardless of the criteria for checking the box. Our markup of the instructions provides that the box be checked for an issue of deemed designated bonds.

- Line 45 Reimbursement not requiring declaration of intent. NABL requests that the instructions be clarified to address circumstances in which bond proceeds are used to reimburse prior expenditures, but for which no declaration of intent is required under Treas. Reg. §1.150-2(e) because of an exception set forth in Treas. Reg. §1.150-2(f) for preliminary expenditures (such as design and engineering costs) or for de-minimis amounts. When, all expenditures to be reimbursed meet one of the exceptions, issuers will often not adopt an official intent, and therefore have nothing to report on Line 45b. Some issuers are concerned, however, that reporting reimbursement expenditures on Line 45a but leaving Line 45b blank will trigger questions from the IRS. This has led to inconsistent reporting practices and to unnecessary adoption of official intent resolutions. To provide for consistent reporting and to avoid unnecessary issuer action and expense, clarification is needed regarding how the IRS would like issuers to complete Lines 45a and 45b in circumstances when all reimbursed expenditures meet an exception.

One approach, which we recommend, is to modify the instructions to Line 45a so that the dollar amount entered is only the dollar amount that requires an official declaration of intent and the box is checked only if there is reimbursement requiring a declaration of intent.

If the IRS prefers that all reimbursement amounts be reported on Line 45a, the instructions could be modified to provide that if all reimbursed expenditures meet one of the exceptions so that no official declaration of intent (“DOI”) is required, the issuer enter “NA” on Line 45b. Another, perhaps simpler approach would be for the instructions to provide that in the case where no DOI is required, the issuer just enter the reimbursement amount on Line 45a and the issue date on Line 45b. That would have the advantage that the text to be entered would be formatted as a date.

- Signature and Consent, Facsimile signatures. NABL recommends that facsimile signatures expressly be allowed for the issuer in addition to the paid preparer. Many bond issues are closed by e-mailing pdf documents. Facsimile signatures are accepted for various purposes associated with bond transactions, and the use of facsimile signatures may make the logistics of closing transactions easier. While the current instructions clearly allow a facsimile

signature for the paid preparer, the form and current instructions are unclear as to whether a facsimile issuer signature is allowed. Treas. Reg. §301.6061-1(b) explicitly provides that the method of signing a particular form may be provided in the instructions to that form.

- **Paid Preparer, Scope.** The explanation in the current instructions concerning who needs to complete and sign as a paid preparer is not completely accurate. Currently, the instructions state: “If an authorized officer of the issuer filled in this return, the paid preparer's space should remain blank.” A person is a preparer if he or she fills in or provides the details for a substantial portion of the form. Even if an authorized officer of the issuer filled in the information on the form, another person could still be a paid preparer if he or she collected, computed and otherwise prepared a substantial portion of the information in a way that made entering the information onto the form clerical. For these reasons, we recommend modifying the instructions to more properly reflect who is a paid preparer.

- **Paid Preparer, Multiple preparers.** A return may have more than one paid preparer (all of whom are subject to the rules concerning paid preparers and all of whom require PTINs). In such a case, only one paid preparer needs to be a signing paid preparer. The current instructions state that generally, a paid preparer must sign the return. If one paid preparer completes the paid preparer block and signs as paid preparer, other paid preparers should not also be required to sign the return. The instructions should make this clear.

**APPENDIX A**  
**NABL AD HOC TASKFORCE MEMBERS**

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