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December 20, 2018

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1600 Pennsylvania Avenue, NW  
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Dear Mr. Kautter, Mr. Paul, Ms. Hubbard, Mr. Cross, Mr. Hoelscher and Mr. Olmem,

The National Association of Bond Lawyers (“NABL”) respectfully submits this letter requesting clarification of the public use requirement for low- and moderate-income multifamily housing facilities financed with proceeds of tax-exempt bonds (“Multifamily Bonds”). One requirement applicable to Multifamily Bonds is that facilities financed with proceeds of those bonds be available to members of the general public. In addition to tax-exempt financing with Multifamily Bonds, a low-income housing tax credit (“LIHTC”) in the amount of

9% or 4% of the cost of the project is also available to owners of these projects. The LIHTC also contains a requirement that facilities receiving the LIHTC be available to members of the general public. Congress added a provision to the LIHTC which clarifies that rental preferences for specified groups (“Group Preferences”) are treated as public use. During Senate discussions of this provision, Senator Bingaman stated that veterans, farm workers, first responders, teachers, low-income parents attending college, pregnant or parenting teens, and domestic abuse victims were intended to be included in the Group Preferences.<sup>1</sup> Other groups can be specified under programs or policies implemented by States or by the Federal government. In order for low-income multifamily housing facilities to qualify for the 4% LIHTC a portion of the project must be financed with tax-exempt bonds and, generally, the only type of tax-exempt bonds that can be used for these purposes are Multifamily Bonds.

Because Group Preferences are permitted for purposes of the LIHTC and the 4% LIHTC requires financing with tax-exempt bonds, NABL believes that stakeholders and market participants would benefit from a clarification that the same Group Preferences also constitute public use for Multifamily Bonds. Without this clarification Group Preferences would not be available when the 4% LIHTC is used. This clarification would allow issuers of Multifamily Bonds to take advantage of grant and low-interest loan programs which are available only for projects with Group Preferences. Access to these other sources of funding will reduce the costs of acquiring, constructing or rehabilitating low- and moderate-income housing projects and result in more housing units available for low and moderate income individuals. Without this clarification projects for homeless veterans, public school teachers and similar groups have been abandoned, delayed or downsized. NABL’s suggested clarification would maintain flexibility for State and local governments to address regional housing affordability issues.

### **Discussion of Requested Clarification**

Proceeds of Multifamily Bonds issued under Section 142(a)(7) of the Internal Revenue Code of 1986 (the “Code”) may be used to finance multifamily housing facilities a portion of which are reserved for low- and moderate-income tenants (“Affordable Multifamily Facilities”). The Treasury Regulations require that Affordable Multifamily Facilities be available to members of the general public. Section 42 of the Code contains rules governing the eligibility of Affordable Multifamily Facilities for the LIHTC and is generally interpreted as

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<sup>1</sup> 154 Cong. Rec. S7620 (daily ed. July 29, 2009 (statement of Sen. Bingaman), available here: <https://www.congress.gov/crec/2008/07/29/CREC-2008-07-29-senate.pdf>

requiring that these facilities be available to members of the general public. Section 42(g)(9) of the Code, relating to the LIHTC, treats Group Preferences as meeting the public use requirement for purposes of the LIHTC. Group Preferences are not specifically mentioned in the Multifamily Bond provisions; however, the public use requirement under the LIHTC provisions and Multifamily Bond provisions has generally been interpreted in a similar manner due to the fact that both provisions are interrelated.

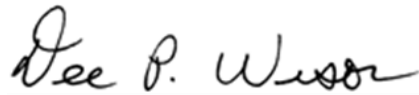
The general public use requirement applicable to Multifamily Bonds is set forth in regulations issued before the Tax Reform Act of 1986. Neither those regulations nor any other subsequent formal published guidance indicates that the general public use requirement prohibits almost all Group Preferences or indicates that “general public use” is properly interpreted differently than it is under the LIHTC provisions. However, the IRS has expressed an unwillingness to permit Group Preferences for Multifamily Bonds through the private letter ruling process. An interpretation of requirements governing Multifamily Bonds that does not incorporate Group Preferences would, in essence, make the 4% LIHTC unavailable for Affordable Multifamily Facilities with Group Preferences. We do not believe that this was the Congressional intent when Group Preferences were added to the LIHTC.

For decades, state and local issuers have used Multifamily Bonds and the LIHTC to facilitate public/private partnerships that take advantage of federal financial support and private investment to develop affordable rental housing and generate economic activity. Because all or a portion of these housing facilities are rented to individuals of low or moderate income paying lower rents, they may not be financially viable without the combination of low interest tax-exempt financing and subsidies provided by the LIHTC. In addition, States, local entities, housing authorities and charitable organizations will often provide additional low- or no-interest financing or grants in support of projects with Group Preferences. All of these sources of financing and subsidies enable a greater number of affordable housing projects to be acquired, built or renovated thereby benefiting more low-income individuals. For example, the Veterans Administration and the Department of Housing and Urban Development offer vouchers for projects providing preferences for veterans with incomes at or below Federal income thresholds. The current lack of clarity regarding the public use requirement has caused many Affordable Multifamily Projects across the country to be abandoned, delayed or downsized. We are aware of specific circumstances in which the uncertainty surrounding this issue has held up transactions for housing for homeless veterans, public school teachers and similar groups. NABL believes that stakeholders would benefit from a

clarification that Group Preferences apply for purposes of both the LIHTC and Multifamily Bonds.

We request that this clarification be made either through legislation, such as a technical correction, or through guidance published by the Treasury Department and/or Internal Revenue Service. We note that a technical correction providing a cross reference in Section 142(d)(2) of the Code to Section 42(g)(9) of the Code is contained in The Retirement, Savings, and Other Tax Relief Act of 2018 (the "2018 Bill"). If enacted, the 2018 Bill will provide the clarification that we are seeking. If the 2018 Bill is not enacted or otherwise delayed, we ask that the IRS and Treasury Department promulgate guidance clarifying that Group Preferences permitted in Section 42(g)(9) be treated as meeting the public use requirement for purposes of Section 142(a)(7). We have attached a suggested form of a Notice which would provide this guidance.

Sincerely,

A handwritten signature in black ink that reads "Dee P. Wisor". The signature is written in a cursive style with a large initial "D".

Dee P. Wisor  
President, National Association of Bond Lawyers

Enclosure