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**COMMENTS ON PROPOSED REGULATIONS ON  
ARBITRAGE RESTRICTIONS APPLICABLE TO TAX-EXEMPT BONDS  
(FI-28-96)**

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The comments in this Report were prepared by the Arbitrage and Rebate Committee of the National Association of Bond Lawyers ("NABL") with the participation of a number of NABL members. Those members who contributed to the preparation of this Report are as follows:

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Dated: October 17, 1996

## ***Introduction***

This report contains the comments of the Arbitrage and Rebate Committee (the "Committee") of the National Association of Bond Lawyers ("NABL") on the proposed Treasury Regulations regarding Arbitrage Restrictions Applicable to Tax-Exempt Bonds (FI-28-96) (the "Proposed Regulations") published in the Federal Register on June 27, 1996. NABL was incorporated as an Illinois nonprofit corporation on February 5, 1979, for the purposes of educating its members and others in the law relating to state and municipal bonds and other obligations and participating in national and local forums in order to advise and comment on legislative, regulatory and judicial issues affecting said bonds and obligations. NABL currently has over 2,900 members.

## ***General Comments***

The Committee believes that, to the extent problems exist concerning the fair market value of securities purchased with tax-exempt bond proceeds, such problems are rarely, if ever, caused by willful acts of issuers. Therefore, as stated in the Committee's letter commenting on the means of establishing the fair market value of open market investments purchased for advance refunding escrows submitted to the IRS and Treasury on September 13, 1995 (the "1995 Letter"), a copy of which is attached, we believe that the current definition of fair market value contained in §1.148-5(d) of the Treasury Regulations is adequate, although a workable safe harbor providing additional guidance would be useful. In our view, enforcement efforts should be aimed at those who may have engaged in deceptive pricing practices (including those who are not issuers) to deal with any pricing problems that may exist. Moreover, as described below, we believe a rebuttable presumption provides no significant benefit to issuers and, in fact, imposes significant compliance burdens. Therefore, unless the rebuttable presumption is replaced with a workable safe harbor, we request that the IRS withdraw the Proposed Regulations and that it not promulgate further guidance in this area. In the event the IRS determines to go forward with this regulatory project, we have provided detailed comments, summarized as follows:

1. The rebuttable presumption should be changed to a safe harbor.

2. The scope of the Proposed Regulations should be limited to open market securities purchased for advance refunding escrows.
3. A safe harbor should be provided for certifications of fair market value by qualified financial professionals.
4. A safe harbor should be provided for securities purchased with significant negative arbitrage.
5. The requirements that three bids actually be received and the definition of parties with a “material financial interest” should be modified.
6. The comparability requirement relating to other Treasury yields should be deleted.
7. The comparable SLGS yield requirement should be deleted.
8. The requirement that the terms of the agreement to purchase Treasury securities be “reasonable” should be clarified or deleted.
9. The “date and time stamp” and other technical requirements relating to retaining copies of bids should be deleted.
10. The “statement” requirement should be modified such that (i) it only applies to the bidding agent, (ii) the term “reasonably competitive sellers” is deleted, and (iii) the penalties of perjury requirement is deleted.
11. The comparability requirement for bidding agent fees should be dropped and an objective safe harbor should be added.

### ***Relationship Between the Proposed Regulations and Rev. Proc. 96-41***

It is apparent that the Proposed Regulations and Rev. Proc. 96-41 were written together and are based on a common set of underlying assumptions by the IRS. Many of these assumptions are evident in the "background" section of Rev. Proc. 96-41. The more important of these assumptions are that (1) certifications from providers of securities are not meaningful evidence of a fair market value transaction; and (2) forward delivery, contingent sales of securities for escrows should not be priced significantly different than non-contingent next-day delivery sales. The underlying rationale for both the Proposed Regulations and Rev. Proc. 96-41 is that yield burning transactions are so pervasive in the market that rules akin to those applicable to tax shelter promoters should be applied to issuers of state and local bonds.

NABL disagrees with the assumptions explicitly underlying the Proposed Regulations and Rev. Proc. 96-41. NABL intends to submit comments on Rev. Proc. 96-41 in accordance with the IRS' request. However, given that it is clear that much of what the IRS has provided in the Proposed Regulations is based on the notions expressed in Rev. Proc. 96-41, we believe that the Proposed Regulations should not be finalized without a thorough review of the comments submitted with respect to Rev. Proc. 96-41. To do otherwise without a thorough review of the comments on the underlying assumptions, would make Notice 96-49 and the comments thereunder next to meaningless.

In this context we also note that while we are pleased that the Proposed Regulations were issued in proposed, prospective form, the issuance of a retroactive revenue procedure on the same subject virtually eliminates the prospective aspect of the Proposed Regulations. Further, while we were pleased by the release of Notice 96-49 requesting comments on Rev. Proc. 96-41 and postponing the one-year deadline, we continue to view this as an inadequate response; Rev. Proc. 96-41 should be suspended until a thorough review of industry comments is made.

### ***Rebuttable Presumption versus a Safe Harbor (§1.148-5(d)(6)(v))***

We do not consider the concept of a "rebuttable presumption" to be workable or useful to issuers. A safe-harbor (as is the case under §1.148-

5(d)(6)(iii) of the Treasury Regulations) at least provides certainty in an area that calls for certainty. The rebuttable presumption, as proposed, operates more as a burden-shifting evidentiary rule in anticipation of litigation than as clear guidance for establishing fair market value. As a practical matter, issuers are already advised to maintain records relating to the purchase prices of investments, particularly in view of the rebate requirement. The information already retained by the issuer may well be adequate to shift the burden of proof to the IRS. To the extent that the Proposed Regulations attempt to limit the shifting of the burden of proof to situations where an issuer follows substantially burdensome compliance rules, they may well be invalid. In any event, it is difficult to see any substantial benefit to issuers from complying with these rules if all they obtain is a rebuttable presumption. Investments in certificates of deposit and in guaranteed investment contracts are given safe harbors and there is no reason why investments in Treasuries should be any less favored. A properly structured safe harbor gives issuers a substantial benefit in exchange for a new compliance burden. To the extent that the Treasury is concerned that a particular bidding procedure may be rigged or tainted, we suggest that these concerns be addressed by penalizing those engaged in the flawed bidding. The presumption approach ignores the fact that generally an issuer has no way of knowing whether the bidding is rigged.

In the event bidding procedures are not bona fide (something issuers can rarely, if ever, determine), we suggest that the Treasury penalize those engaged in the flawed bidding through the use of other remedies such as those provided under Section 6700 of the Code and under fraud statutes. A review of the legislative history of the 1989 changes to Section 6700 makes clear that Congress intended that this provision be a meaningful, effective penalty to be used by the IRS against participants in tax-exempt financings who contribute to tax violations. This legislative history indicates that Congress contemplated that issuers should be able to continue to rely on experts and that those experts could and should be punished if they do wrong. Further, the legislative history clarifies that Congress intended that the Section 6700 penalty be available whether or not the IRS taxes the issuers' bonds. By ignoring the availability of the Section 6700 penalty, the IRS is reverting to the pattern of adding complex new rules rather than attempting to enforce existing rules, which in the case of

the arbitrage regulations, were intended to be complimented by effective enforcement.

Informal statements by IRS staff have suggested that there is a belief that Section 6700 may not provide a meaningful penalty. We do not believe that to be the case and we offer to work with the IRS and Treasury to help resolve this problem. If there are interpretive problems with Section 6700, we believe that these can be addressed by regulations. It is difficult to believe that the Treasury, which sought and approved the changes made to Section 6700 in 1989, is now unwilling to use this tool to enforce the law. If the Section 6700 penalty is deemed to be insufficient, Congress should be asked to strengthen it. The arbitrage prohibition in Section 148 of the Code applies to proceeds "which are reasonably expected at the time of issuance of the bond" to be used in a manner resulting in impermissible arbitrage. When an issuer has done all it can practically do to ensure that securities were purchased at their fair market value, it has satisfied the reasonable expectations test and that ought to be the end of the inquiry insofar as the tax status of the issuer's bonds are concerned. Any adverse consequences should be borne by those who have benefited by charging more than fair market value, not issuers.

***Scope of Application (§1.148-5(d)(6)(v))***

We believe that the application of the Proposed Regulations should be limited to escrow investments acquired with the proceeds of tax-exempt advance refunding bonds. The Proposed Regulations should not apply to new money bond issues or to non-yield restricted funds (*e.g.*, reserve funds). Even if the three-bid rule is literally written as a safe harbor, as a practical matter, based on our experience with other safe harbors (*e.g.*, Rev. Proc. 93-19), issuers will be advised by most bond counsel that they deviate from the safe harbor only at their peril. In practice, because bond counsel give unqualified opinions, safe harbors become rules when tax-exemption is at stake. While in many cases an issuer may choose to apply the three-bid rule by analogy to investments in other than advance refunding escrows, for the reasons stated below, its use should not be mandated in those cases.

The investment of bond proceeds in an advance refunding escrow raises the greatest concern about securities pricing, because large amounts of proceeds are invested for specified periods of time on one specific date with no reinvestment risk. It is on that single specific investment date, however, that an issuer has the best opportunity to meet certification and record-keeping requirements of a three-bid rule. At that time, professionals are on hand to prepare or deliver the various certifications required. In contrast, proceeds in a project, construction, or reserve fund will generally be invested and reinvested by the financial officer of the issuer or the trustee during the project construction or acquisition period or during the term of the bonds without the involvement of financial advisors or bond counsel. Also, because these investments are usually subject to reinvestment risk, the issuer is motivated to maximize its investment return. We believe it would be extremely burdensome for most state and local issuers to conduct biddings and obtain or deliver the required certifications that conform to the requirements of the Proposed Regulations other than in the context of advance refunding escrows. We note that most non-escrow investments are typically purchased for next-day delivery, making comparisons between the purchase price of these investments and published prices somewhat simpler.

Most construction or project funds are invested for relatively short periods of time. Issuers who try to meet a rebate exception expect to expend their proceeds within periods of 6, 18, or 24 months and invest taking into account periodic draws. The burden of complying with the three-bid rule is not justified based on the possible arbitrage that might result in these short periods, especially if compliance with those requirements entails retaining bond counsel and a "comparability" consultant.

Although reserve funds may be invested for a slightly longer term than construction funds and may not be so frequently managed, they again pose little opportunity for significant arbitrage profit to justify the burden of the bidding and certification process. First, by their very nature, reserve funds are not normally invested long term since their purpose is to provide a source of funds in the event of an interruption in cash flow. Second, proceeds in reserve funds are limited to ten percent of an issue. In absolute dollar amounts, the potential profit is relatively limited.

### ***Request for Inclusion of a Certification Safe Harbor***

In our 1995 Letter, we urged that if the Treasury were to promulgate guidance providing safe harbors, one of the safe harbors ought to be the certification by a qualified financial professional that the purchase price of the securities, taking into account the facts and circumstances, is the fair market value thereof. Though not explicitly stated, we envisioned that such certification would be provided in many cases by the seller of the securities, as has been the widespread practice in the municipal bond industry for many years. In transactions in which the issuer has a financial advisor or in a negotiated underwriting where there is an identified underwriter, it has been customary to ask the financial advisor, the underwriter, or both, to provide such certification. Congress recognized that tax-exempt municipal bond issuers often rely on statements of other responsible parties when it extended the penalty under Section 6700 of the Code to those who "know or have reason to know that their opinions, offering documents, reports, or other statements (or material on which they relied in making such statements) are false or fraudulent as to any matter material to the tax exemption of the interest on the bonds" (House Committee Report to the Omnibus Budget Reconciliation Act of 1989). Therefore, the practice of accepting certifications by qualified financial professionals should remain an acceptable means of establishing the fair market value of securities.

Recognizing that reliance by issuers on certifications has been customary, Congress extended the Section 6700 penalty to these types of certifications in the tax-exempt bond context, giving the IRS and Treasury an enforcement tool to use in dealing with improper certifications. No one but the actual seller of securities in a particular transaction is better qualified to evaluate the unique risks inherent in that sale for forward delivery. The pricing premium charged is not susceptible of mathematical precision on the basis of a formula that works in all - if it works in any - cases. To simply write-off certifications, as the Proposed Regulations do, is precipitous at this point.

If the IRS decides to apply these rules other than in the context of advance refunding escrows, certification of a qualified financial professional becomes even more important as an acceptable safe harbor. It is simply not feasible for

issuers in such cases to use a bidding procedure to acquire open market securities (see the discussion regarding scope of application above). Even though prices for many securities for next day delivery are quoted on a national medium and in financial newspapers, these prices ignore intra-day price fluctuations, may reflect inapplicable lot prices, contain no premium for non-closure risk, and omit many federal securities (e.g., REFCORP Strips). In addition, issuers often lack the sophistication and resources necessary to determine whether the prices being charged are greater than those otherwise available in the market. Issuers are usually counseled to obtain fair market value certifications from sellers in connection with the purchase of all securities with tax-exempt bond proceeds - unless they are otherwise satisfied that they are paying fair market value (e.g., a trustee's fiduciary duty to an issuer requires investments to be at arm's length). To provide, in effect, that such certifications should play no role in the fair market value standard, we believe, is completely unwarranted. Certifications from sellers of the securities and other qualified professionals should be equally acceptable to the Treasury for advance refunding escrows.

### ***Request for Inclusion of "Negative Arbitrage" Safe Harbor***

While the Proposed Regulations focus on the establishment of bidding procedures to document the purchase of securities at fair market value, the Proposed Regulations ignore fact patterns that would otherwise establish the fairness of the prices paid. A typical fact pattern indicating fair market value is where a substantial amount of "negative arbitrage" exists.

The fair market value of a security has always been, and (as we understand the changes in the Proposed Regulations) will continue to be, the price at which a willing buyer would purchase from a willing seller in an arms length, bona fide transaction. One measure of the arm's-length nature of any transaction is whether the buyer had an incentive to obtain a lower price than that which was offered by the seller in question, regardless of whether it be from that seller or from a different potential seller. (Cf. Rev Proc. 96-41 and *Raymond v. Commissioner*, 114 F.2d 140 (7th Cir.), cert. denied, 311 U.S. 710 (1940)). In the case of the purchase of Treasuries for a refunding escrow or similar transaction, if the yield on the Treasuries is significantly below the relevant yield permitted under the arbitrage and rebate rules, it is self evident that the issuer has every incentive

to reduce the purchase price of the securities in question. The fact that the higher yield earnings could have been retained under the arbitrage and rebate rules ought to be compelling, and indeed virtually conclusive, evidence that a fair market price was paid for the securities in question.

Therefore, the Committee renews the recommendation made in its 1995 Letter that a safe harbor be created providing that, if the yield on all investments subject to yield restriction and/or rebate to the purchase date, in the aggregate, is significantly less than the bond yield for arbitrage and rebate purposes, the fair market value of the securities in question will be the prices actually paid by the issuer. For purposes of this proposed safe harbor, we suggest that the yield on the investments is significantly below the bond yield if either: (1) the composite investment yield is 25 basis points or more lower than the yield on the issue (note that this is double the amount defined as "material" under §1.148-2(i)), or (2) the present value of the amount of additional investment earnings that could be retained without violating the arbitrage rules or subjecting the issuer to a rebate payment is at least \$200,000. These thresholds are sufficiently material that issuers can be deemed to have had every incentive to minimize the price paid to purchase the securities.

### ***Comments on Specific Regulatory Provisions***

#### ***§1.148-5(d)(6)(v)(A) - Issuer Bid Solicitations***

The Proposed Regulations state that underwriters and financial advisors for an issue are considered to have a material financial interest in the issue and are not "qualified bidders". Certainly the senior managers are properly treated as having a material financial interest within the intent of the Proposed Regulations. However, underwriters who are merely members of the managing group of underwriters or the underwriting syndicate, but who are not senior managers, should not be treated as parties with a material financial interest. The non-senior managing underwriters, as a practical matter, do not participate in the structuring of the transaction and, therefore, should not be treated as "interested" parties. Their independence is really not comprised.

For example, a recent bond issue by a large city had one senior manager, four co-senior managers, and twenty-two other underwriters (total 27), representing virtually all of the leading banks and investment banks in the city. If all of these underwriters were deemed to be "non-qualified" providers of escrow securities, there may have been no bidders within the city who are familiar with municipal escrows who would be deemed to be "disinterested" parties - an obviously absurd result. At the very least we recommend that Treasury establish guidelines with which to identify the parties with a material financial interest, so that a workable rule can be fashioned that will not automatically treat all members of the underwriting syndicate as interested parties.

The Proposed Regulations require that an issuer actually receive three bids from qualified (*i.e.*, "non-interested") bidders. We believe a more workable rule would be to require a bona fide solicitation which is reasonably expected to generate at least three bids from bidders with no material financial interest in the issue and, if fewer than three bids are actually received, such bid or bids will still meet the requirements of §1.148-5(d)(6)(v)(A).

We also ask that the IRS and Treasury clarify that parties with a material financial interest may make qualified bids as long as at least three bids from parties with no material financial interest are actually received by the issuer or, in accordance with our suggestion in the preceding paragraph, the solicitation was reasonably expected to generate at least three qualifying bids from bidders with no material financial interest in the issue. We note that under a proper bidding method, the "fourth bid" from the interested party would only be awarded the investment if it provided a higher yield. In addition, we believe that the bidding requirements may be overly burdensome for small issuers, and ask that exempting portfolios of less than an amount equal to the small issuer rebate threshold (currently \$5,000,000), or the small issuer exception under Section 265(b) (currently \$10,000,000) from a bidding requirement be considered.

Finally, we note that the Proposed Regulations require that all bidders have an equal opportunity to bid and that no bidder can be given the opportunity to review other bids. While we understand the concerns inherent in "last look" bidding, we believe that, in appropriate circumstances, allowing all

bidders the opportunity to review all other bids could result in more competitive pricing. For example, an auction-type bidding format allowing all bidders to review the bids and submit better bids should result in competitive bidding. We ask that the Regulations not prohibit this type of open bidding.

***§1.148-5(d)(6)(v)(C) - Comparable Treasury Yields***

The requirement that the yield on the purchased Treasuries not be "significantly less than the yield then available from the provider of reasonably comparable Treasury obligations offered to other persons for purchase on terms comparable to those offered to the issuer from a source of funds other than gross proceeds of tax-exempt bonds" is unworkable and should be deleted. Because the sale of open market Treasuries for forward delivery, with the ability to cancel the trade if the transaction does not close, is generally unique to tax-exempt bond transactions, we believe that, in fact, "closely comparable forward prices are not offered to other persons for purchase from a source other than gross proceeds of tax-exempt bonds." If closely comparable forward prices are not offered from a source other than gross proceeds of tax-exempt bonds, the bidding agent is required under the Proposed Regulations to certify a comparison "by reference to implied forward prices for Treasury obligations based on standard financial formulas". Investment bankers and financial advisors have indicated that they are not aware of such standard financial formulas and that they cannot provide the required certification. We note that §1.148-5(d)(6)(iii)(c) relating to guaranteed investment contracts contains the phrase "if any" in referring to "comparable guaranteed investment contracts", thereby recognizing that such comparisons may not be available.

In addition, we believe that a certificate from the bidding agent setting forth the pricing formula for the purchased Treasury obligations is not appropriate. The bidding agent's role is to assure the integrity of the solicitation process. The agent has no special knowledge of how the bidders arrived at their bids. If this requirement implies that the bidding agent must ask all bidders for the financial basis of their bids, the process becomes unworkable. We are not aware of any similar rule elsewhere in the Code or Treasury Regulations. One would presume in an arm's-length solicitation that the highest yield or the lowest cost itself establishes the best "value". If the solicitation process itself is so

suspicious that it cannot be trusted, it makes no sense to permit it in the first place. Either a bidding process is "clean" and bond counsel can rely on a certificate from the agent to that effect or the three-bid solicitation standard ought to be rejected in favor of some other objective determination.

***§1.148-5(d)(6)(v)(D) - Less than Comparable SLGS Yield Requirement***

Section 1.148-5(d)(6)(v)(D) provides that the bidding process is defective if "the yield on any Treasury obligation purchased [is] less than the highest yield then available on a [SLGS] with the same maturity." Because SLGS are a different type of investment than Treasuries (SLGS are priced on the basis of the prior day's Treasury rate less 12.5 basis points), SLGS rates are not comparable to current Treasury rates and, therefore, this requirement should be deleted. Furthermore, the literal language appears to require that each Treasury obligation purchased, not just the aggregate portfolio, be tested against the highest yield on SLGS available for a comparable maturity. In the context of advance refunding escrows, this requirement, if so interpreted, will make it extremely impractical to invest in open market Treasuries. First, many bids for open market purchases for advance refunding escrows are solicited and awarded on the basis of the lowest aggregate price for the portfolio of securities, not the lowest price for each security. Often, it is days after the sale date before the issuer receives trade confirmations for each security. Only at this point could an issuer determine whether the highest yield requirement is met as to each security. Of course, by then, it is too late; the test must be met before purchase, not after.

Second, in bidding for an escrow portfolio, the sellers are frequently bidding to supply a portfolio that will be sufficient to meet the debt service requirements of the refunded bonds. Thus, the portfolios constructed by each seller may not (usually will not) be identical. Given the critical timing requirements that stem from the fact that the advance refunding bonds and the escrow portfolio are both being priced at the same time, it is neither practical nor feasible to purchase securities in an escrow portfolio from more than one party.

Third, even if an issuer discovers that one maturity of open markets among many does not satisfy the highest SLGS yield test, a requirement that the

issuer purchase SLGS for that maturity would create a material and difficult burden on the parties. Mixing SLGS maturities with open market Treasuries in this fashion is no more feasible in the advance refunding context than purchasing open markets from different sellers.

Finally, it is unnecessarily burdensome to have to check each open market security yield against the highest SLGS yield for a comparable maturity. In fact, in the advance refunding escrow context, the test may not work well even on an aggregate basis. While investment bankers or financial advisers have a feel for whether SLGS yields are high enough to avoid negative arbitrage, thus dictating the use of open markets, the actual facts may be different on the day of pricing and sale. It would be unusual at that point for an escrow that was expected to be put into open markets to suddenly get switched to SLGS. This would also add needless complexity to advance refundings. The ostensibly winning open market portfolio would have to be tested against the highest yields available on SLGS, with the consequence that if the test is not met, the bid could not be accepted. We believe that even an aggregate yield test will be very difficult for issuers to comply with as a practical matter; testing each obligation against available SLGS yields will be nearly impossible. If the solicitation for bids was truly bona fide, then the fair market value for those securities has already been established by a competitive marketplace and comparisons to SLGS yields should be unnecessary. If SLGS rates are higher than bona fide bids, the market may be indicating nothing more than that SLGS rates are too high.

***§1.148-5(d)(6)(v)(E) - The Terms of the Purchase Agreement are Reasonable***

The requirement in §1.148-5(d)(6)(v)(E) of the Proposed Regulations that the terms of the purchase agreement be "reasonable" is vague and unworkable. We believe that a bona fide bidding process will assure fair market value and ask that this requirement be deleted.

***§1.148-5(d)(6)(v)(F) - Record Keeping Requirements***

Section 1.148-5(d)(6)(v)(F) imposes onerous record-keeping requirements which, for the reasons set forth in the following two sections, are impractical and unnecessary. The issuer should only be required to retain such information as is necessary to support the bona fides of the solicitation. As set forth in more detail in the following two sections, a certification by the bidding agent included in the bond transcript and that lists the bids received and the bid accepted, should be sufficient to establish the bona fides of the solicitation.

***§1.148-5(d)(6)(vi)(C) - Copies***

Section 1.148-5(d)(6)(vi)(C) of the Proposed Regulation requires that the issuer retain copies of the bids with date and time stamps. This provision, in effect, requires bids to be made in writing. We believe that it is not necessary and is often impractical for bids to be made in writing. Given the volatility of the Treasury market, current practice is for potential bidders to wait until the deadline and then to make a bid over the telephone with written confirmation to follow by facsimile. If bids were required to be made in writing, it would be very difficult for all potential bidders to place their bids in time by facsimile and may be impractical for potential bidders to place their bids in person. Oral bids should be acceptable provided that a certificate by the bidding agent with respect to the bidding process is received. We also believe that it is unnecessary for the issuer to retain copies of the written bids since the provider or bidding agent must do so.

***§1.148-5(d)(6)(vii) - Issuer Statement***

Section 1.148-5(d)(6)(vii) of the Proposed Regulations requires the issuer to make and retain a statement under penalties of perjury certifying that (A) the bidding agent did not bid to provide the investments, (B) all bidders had equal opportunity to bid, (C) all bidders are reasonably competitive sellers of Treasury obligations and (D) the issuer received at least three bona fide bids from providers that have no material financial interest in the issue. As a practical matter, none of those statements (except possibly (A)) can be made by the issuer

other than in reliance on a certificate to that effect from the bidding agent. Why then is the issuer required to provide such certification?

We suggest that the requirement be modified to provide that the bidding agent provide such certification to the issuer and that the issuer retain such certification as part of the bond documents. Requiring issuer certification under the facts adds nothing of any practical significance. We also suggest that the "penalties of perjury" requirement be dropped from the certification. Perjury is a criminal penalty applicable to individuals and not to corporations, political subdivisions and other organizations.

Also, the requirement that all bidders be "reasonably competitive providers" is vague and unworkable. We request that this requirement be deleted.

#### ***§1.148-5(e)(2)(iv) - Bidding Agents Fees***

The comparability standard set forth in §1.148-5(e)(2)(iv)(B) of the Proposed Regulations regarding the bidding agent's fee is not workable. Outside the context of tax-exempt bonds, bidding for closely comparable investments is virtually non-existent and thus there appear to be no bidding fees against which to test the fees charged by the bidding agent in the tax-exempt bond context. We have not yet found an investment banker that understood the comparability test set forth in this provision nor one who thought the necessary certification could be provided.

We request that the comparability requirement be dropped. We suggest that the Proposed Regulations treat a bidding fee as reasonable if it does not exceed .02 percent of the amount invested in Treasury obligations.

#### ***Further Discussion of These Comments and the Proposed Regulations***

We appreciate the IRS and Treasury's consideration of these comments, and would be pleased to make ourselves available to discuss them should this be helpful. Questions should be directed to David A. Walton, chair of the Arbitrage and Rebate Committee, at (415) 391-5780.

