Volume 17, No. 4 *December 1, 1996*

CONTENTS

Washington Saga (Amy K. Dunbar) 2
The Eighteenth Annual Meeting 5
President McBride's Remarks 6
President Ebert's Remarks 8
The New Directors 12
Actions by the Board of Directors on September 18, 1996 (Susan Weeks) 13
Actions by the Board of Directors on September 19, 1996 (Susan Weeks) 17
Actions by the Board of Directors on November 7 and 8, 1996 (Susan Weeks) 18
Shared Tax Observations (Sharon Stanton White) 23
Ethical Ruminations (Joseph H. Johnson, Jr.) 29
Voice From the Past (Manly W. Mumford) 33
Naming Rights ... and Wrongs (David A. Caprera) 35
National Securities Markets Improvement Act of 1996 and Municipal Securities (Martin R. Miller) 36
Beware of Mis-Sent Faxes and E-Mails (Larry Bodine) 39
Comments Submitted on Proposed Regulations on Arbitrage Restrictions Applicable to Tax-Exempt Bonds 42
Legal Assistants' Corner: Surfin' the Web (Susan M. Parker) 51
Letter to the Editor 53
Employment Opportunity 55
The Hilderbrand Fund 55
Editor's Notes 55
Quarterly Haikus 57
Quarterly Limerick 57

The Quarterly Newsletter of the National Association of Bond Lawyers is published on or about March 1, June 1, September 1 and December 1 of each year, for distribution by first class mail solely to members and associate members of the Association. Membership information may be obtained by writing to Patricia F. Appelhans, Executive Director, National Association of Bond Lawyers, 1761 S. Naperville Road, Suite 105, Wheaton, Illinois 60187, or by calling 630/690-1135. Explicit or implicit editorial positions presented herein do not necessarily reflect policies adopted or approved by the Board of Directors of the Association.

MEMBERSHIP SERVICES

Education Program

The Association conducts seminars and workshops dealing with matters of interest to the bond law community. Those ahead include:

- ☐ February 20 and 21, 1997: **Tax Seminar**, Orlando — covering issues arising under the Internal Revenue Code and Treasury Regulations
- ☐ April 9, 10 and 11, 1997: **Fundamentals of Municipal Bond Law**, New Orleans — intended for those with less than three years of experience in bond law
- ☐ May 8 and 9, 1997: **Washington Seminar** — covering the areas of securities, tax, and other timely Washington topics
- ☐ September 24, 25 and 26, 1997: **Bond Attorneys' Workshop**, Chicago — for lawyers with more than three years of bond experience — the preeminent annual gathering of bond lawyers, covering virtually all aspects of municipal bond law

These events offer members opportunities to exchange ideas about law and practice with fellow practitioners. For more information, call Executive Director Patricia F. Appelhans at 630/690-1135.

Law Reform: Committee Participation

Through its Committees on Arbitrage and Rebate, General Tax Matters, and Securities Law and Disclosure, as well as *ad hoc* committees and task forces, the Association regularly testifies and files written comments about proposed tax, securities and other federal legislation and regulations, and acts as an *amicus curiae* in judicial and administrative proceedings of general interest to the membership. (*Amicus curiae* guidelines are available from the Executive Director.) NABL members are invited to participate in committee activities. The Association works closely with public interest groups and industry organizations on matters of mutual interest.

Office of Governmental Affairs

In Washington, D.C., Director of Governmental Affairs Amy K. Dunbar represents the Association in federal regulatory and legislative matters. The Director cooperates with state and local government groups, congressional and regulatory staffs, the Association's substantive committees and individual members to help identify, inform and educate Congress and federal regulatory agencies about public finance issues. Members may contact the Director at 202/778-2244 (e-mail adunbar@hunton.com), or at 1900 K Street N.W., 12th Floor, Washington, DC 20006-1109, to discuss legislative and regulatory issues, request copies of current public finance proposals before Congress or regulatory agencies, and obtain NABL comments on proposed securities and tax regulations. For those with Internet access who send their e-mail address to her, she maintains e-mail contact with members on timely issues.

Other Membership Benefits

- Subscription to *The Quarterly Newsletter*
- Information of immediate concern is mailed to the membership
- "NABLnet" home page on the World Wide Web: http://www.nabl.org/nabl *or* http://www.qadas.com/nabl
- Preferential admission to the Association's educational programs at substantially reduced rates and reduced air fares
- Discounts on many of the Association's publications, including *Disclosure Roles of Counsel in State and Local Government Securities Offerings, Second Edition*; *Federal Taxation of Municipal Bonds* (through Aspen Law & Business); *Blue Sky Regulation of Municipal Securities*; and seminar course books
- Free access to the Association's Job Bank through which members can receive job listings and firms can seek members interested in employment opportunities
- No charge for placement in *The Quarterly Newsletter* of brief notices of employment opportunities available or sought
- Budget Rent-A-Car discount

National Association of Bond Lawyers
Officers and Directors

Julianna Ebert . . . . . . President
Quarles & Brady
Milwaukee, Wisconsin

William H. Conner . . . . . . President-Elect
Squire, Sanders & Dempsey L.L.P.
Cleveland, Ohio

Susan Weeks . . . . . . Secretary
Foley & Judell
New Orleans, Louisiana

Floyd C. Newton III . . . . . . Treasurer
King & Spalding
Atlanta, Georgia

Virginia D. Benjamin . . . . . . Director
Calfee, Halter & Griswold
Cleveland, Ohio

Jeannette M. Bond . . . . . . Director
LeBoeuf, Lamb, Greene & MacRae
New York, New York

Robert W. Buck . . . . . . Director
Palmer & Dodge
Boston, Massachusetts

John M. Gardner . . . . . . Director
Hogan & Hartson
Denver, Colorado

Pamela S. Robertson . . . . . . Director
Edwards & Angell
Providence, Rhode Island

Lisa P. Soeder . . . . . . Director
Nixon, Hargrave, Devans & Doyle LLP
Hartford, Connecticut

Howard Zucker . . . . . . Director
Hawkins, Delafield & Wood
New York, New York

William H. McBride . . . . . . Director
Hunton & Williams — Immediate Past President
Raleigh, North Carolina

Frederick O. Kiel . . . . . . Honorary Director
Cincinnati, Ohio — Editor of *The Quarterly Newsletter*

○ ○ ○

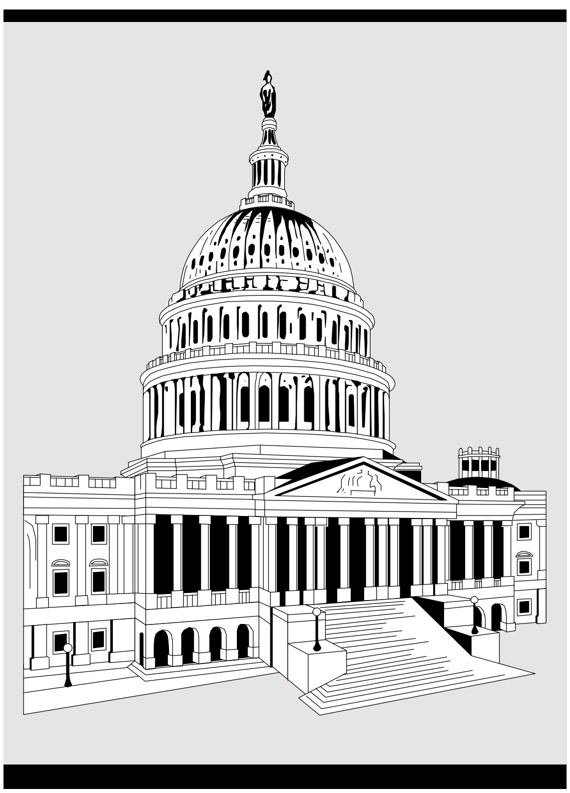
Patricia F. Appelhans . . . . . . Executive Director
Wheaton, Illinois

Amy K. Dunbar . . . . . . Director of Governmental Affairs
Washington, D.C.

WASHINGTON SAGA

Peace and Quiet

Congress has adjourned, the elections are over, and on the legislative front, we have peace and quiet for the next two months. The only major items to report from Congress' concluding days were the resolution of the securities reform legislation and Senator Moynihan's efforts on stadium bonds. See the column herein written by Marty Miller regarding the effects of the securities reform legislation on federal preemption of state securities regulation for a full analysis of the effects of that bill. On the stadium front, Senator Moynihan announced that he would not reintroduce his legislation with a retroactive effective date, but rather with a date no earlier than the date of committee action on the legislation as introduced in the next Congress. Realistically, this would be no earlier than mid- to late-February and probably considerably later than that. The issuing community did an extremely good job of conveying the message that retroactive application of changes in the law are inappropriate and unfair to state and local governments, and Senator Moynihan responded accordingly.



Conflict and Noise

In contrast to the congressional calm, the regulatory agencies, and in particular their enforcement staffs, have been very active. Life as we know it as bond lawyers is changing dramatically. Until now we practiced in a world in which the IRS looked to us as the gatekeepers or policemen of the tax code and our willingness to render opinions was the enforcement tool we used with issuers and underwriters. During the close of 1996 and throughout 1997, the context of our practice will change dramatically because the IRS is now actively pursuing its enforcement program. The preparation has already begun. The IRS has finally gotten the 8038s from previous bond issues computerized and has access to the information necessary to pursue both targeted and random audits. It has announced that the random audit program will be focused on small issue IDBs. However, the same 8038s will serve as the basis for enforcement actions across the board in the bond area. Significant time and effort is being put into educating auditors on tax-exempt bond issues. Once the auditors are educated, compliance and enforcement audits will become a common part of our practice. Not only is the IRS now looking over our shoulders as we render opinions, but the SEC is turning over any cases it pursues on issues related to disclosure of "the risk of taxability" to the IRS, so that if a transaction has a potential tax-related securities fraud problem, it will likely have an IRS inquiry as well.

Equally important for us to understand is the unfortunate reality that "we have met the enemy and he is us." Most of the sources for enforcement actions continue to be tips or public statements reported in the press by those who are familiar with the transactions. Underwriters and bond counsel who did not get the deals and political opponents are turning deals in to the SEC, IRS, and the press. The Freedom of Information Act and public scrutiny provided by the press makes municipal deals relatively easy for enforcers to pursue once they are trained to understand the substantive law and practices in the industry. The agencies are actively engaged on both the securities and tax sides in that education process and as a consequence, bond counsel are well advised to practice recognizing that all participants and "participant want-to-bes" are now potential government informants. It is not a pretty picture, but unfortunately it is reality. Issuers and their counsel should assume that their transcripts are open books for SEC and IRS auditors and recognize that the environment in which we practice has changed dramatically and permanently.

Pocket Guide

One of the changes in practice that will presumably be helpful is that the public issuer groups have worked together to provide a pocket guide for issuers to highlight questions they should ask themselves and their advisors, including counsel, prior to approving a bond issue. This project was undertaken in response to ongoing concern by issuer groups that issuers did not understand the ramifications of applying the securities laws to municipal bond issuers. As a consequence, they developed a list of 15 questions aimed at ensuring that issuers adequately understand the transactions they are approving and, in so doing, that the transactions are adequately described pursuant to their disclosure responsibilities. This document is due for release next week and you may begin to see heightened issuer attention in 1997 to bond issues in which you are engaged.

Web Page

NABL has finally worked out most of the kinks in its web page and I encourage you to participate in chat groups as a means of gathering information. The address is http://www.nabl.org/nabl and until we change servers is also http://www.qadas.com/nabl. We will be working to enhance the web page and its usefulness to you as members. I would appreciate it if you would e-mail or write me ideas about how to make it more useful to you. One thing we will do is start developing the capacity to give you reference sites for materials on the Internet, with the ultimate goal of being able to link announcements of documents to their availability elsewhere on the Net. The following is a list of web site recommendations I have received. The Legal Assistants Committee will work on a more extensive list with descriptive analysis. Please post on the chat groups your suggested resources or convey them to me and we will expand this list over time. For those of you interested in communicating via e-mail with the National office, its e-mail address is www.nabl@ntsource.com.

Government

- *Congressional Quarterly*: http://www.cq.com
- Council of State Governments: http://www.csg.org
- FEDWORLD (federal databases): http://www.fedworld.gov/
- Statesearch: http:// www.state.ky.us/nasire
- THOMAS (federal government information): http://thomas.loc.gov
- U.S. states: http://galaxy.einet.net/galaxy/Community/US-States.html
- Board of Governors of the Federal Reserve System: http://www.bog.frb.fed.us/
- IRS: http:///www.irs.ustreas.gov/prod/
- FedWorld: http://www/fedworld.gov/
- Library of Congress World Wide Web: http://marvel.loc.gov/
- National Archives: http://www.nara.gov/gils/gils.html
- Policy.Net: http://policy.net/
- The Federal Court Locator: http://www.law.vill.edu/Fed-Ct/fedcourt.html
- The Federal Web Locator: http://www.law.vill.edu/FedAgency/fedwebloc.html

- The U.S. Department of the Treasury: http://www.ustreas.gov/
- THOMAS: Library of Congress: http://thomas.loc.gov/
- U.S. House of Representatives: http://www/house.gov
- U.S. Securities and Exchange Commission: http://www.sec.gov/
- Division of Enforcement (SEC) Complaint Center: http://www.sec.gov/enforce/comctr.htm

Municipal Finance

- ABA Business Law Section home page: http://www.abanet.org/buslaw/home/html
- Bloomberg PERSONAL: http://www.bloomberg.com/
- CUSIP HOME PAGE: http://www.cusip.com/
- Dow Jones: http://www.dowjones.com/
- Dow Jones BIS: http://bis.dowjones.com/
- Dun & Bradstreet Information Services: http://www.dbisna.com/
- FASB Home Page: http://anet.scu.edu.au/mirror/anet/raw/fasb/
- Financial Guaranty Insurance Company: http://www.fgic.com/
- Fitch Products: Municipal Revenue Ratings: http://www.fitchinv.com/revenue.htm
- Government Accounting Standards Board: http://www.financenet.gov/gasb.htm
- Government Finance Officers Association: http://pula.financenet.gov:80/ gfoa.htm/
- GRANT'S Municipal Bond Observer - May 3, 1996: http://www.wsrn.com/grants/muni/index/html
- FITCH***: http://www.fitchinv.com/
- Introduction to the Blue Sky Laws: http://www.seclaw.com/bluesky.htm
- J.J. KENNY: http://www.jjkenny.com/
- MSRB Home Page: http://www.msrb.org/msrb.htm
- Municipal Bond Scandals - The Web Site: http://lissack.com/
- NYU EDGAR Development Site: http://edgar.stern.nyu.edu/
- Securities Act of 1933: http://www.law.uc.edu/CCL/33Act/index.html
- Securities Exchange Act of 1934: http://www.law.uc.edu/CCL/34Act/index.html
- Standard & Poor's Ratings Services Home Page: http://www.ratings.standardpoor.com/spwww.htm
- State and Local Government Administration: http://pula.financenet.gov:80/stategov.htm
- Welcome to the PSA Home Page: http://www.psa.com/home.htm

Research Files

Let me alert you to the fact that I try to keep extensive files on issues in the municipal finance arena as they unfold, so if you are trying to research for a first speech or other purpose, feel free to give me a call to see if I have background materials in my file.

1997

With the re-election of President Clinton and most of the incumbents in Congress and repudiation of the Dole-Kemp tax reform agenda, I expect 1997 to be a year in which municipal bond issues arise in the context of the overall budget balancing agenda. If President Clinton and the congressional leaders pursue their enthusiasm for budget balancing, serious revenue constraints face them. In order to achieve long term balance they will have to deal with the big dollar items -- entitlements. In the meantime, while they are sorting out the bigger issues, items like bonds are always at risk in the search for revenues.

Stay tuned for more news from the Nation's Capitol . . .

Amy K. Dunbar
Director of
Governmental Affairs
November 15, 1996

THE EIGHTEENTH ANNUAL MEETING

The eighteenth annual meeting of the National Association of Bond Lawyers was called to order by President William H.McBride at 5:40 p.m., Central Daylight Savings Time, on September 18, 1996, at the Downtown Chicago Marriott, in Chicago.

President McBride announced that the first order of business was a report from Treasurer William H. Conner. Treasurer Conner stated that the audited financial statement of the Association for the year ended December 31, 1995, shows a decrease in assets of $81,000. He also pointed out that the Association currently has a fund balance approximately equal to one year's expenses and predicted that revenues and expenses at the end of the current year would be substantially even despite a budgeted deficit of $89,000. In summary, Treasurer Conner indicated that the financial condition of the Association continues to be sound.

President McBride thanked Treasurer Conner for his report and spoke about those members, directors, officers and other volunteers as well as the staff of the Association who had made great contributions to the Association during the prior year. He gave special thanks to NABL's Committee Chairs and Vice-Chairs and praised them for their work. Mr. McBride's remarks are presented *supra*.

President McBride then called for a vote on the Amended and Restated By-Laws which had been approved by the Board at its July meeting and previously circulated to the members, whereupon those members present at the meeting approved the Amended and Restated By-Laws.

After pointing out that the Nominating Committee was expanded in 1996 to five persons, a majority of whom were not directors or officers of the Association, President McBride introduced Immediate Past President Andrew R. Kintzinger as Chair of the 1996 Nominating Committee. Mr. Kintzinger presented the report of the 1996 Nominating Committee (previously circulated to the membership). President McBride stated that, pursuant to the By-Laws, because no member of the Association had indicated an intention to make any other nominations, no other nominations would be accepted. Accordingly, the nominations of the Nominating Committee were presented for adoption. Upon motion of Immediate Past President Kintzinger, seconded by member John R. Axe, the nominees of the Nominating Committee were approved by unanimous vote of the members present at the meeting and, therefore, William H. Conner became President-Elect, Floyd C. Newton III became Treasurer, Susan Weeks became Secretary, and Pamela S. Robertson, Lisa P. Soeder and Robert W. Buck became members of the Board of Directors. It was noted that Julianna Ebert became President automatically upon the election of a new President-Elect and that Virginia D. Benjamin would become a member of the Board of Directors by virtue of her being the next Chair of the Bond Attorneys' Workshop. William H. McBride, as Immediate Past President, will continue as a director pursuant to Section 5.02 of the By-Laws.

President Ebert then addressed the membership. Her remarks are presented *supra*.

The meeting was adjourned by President Ebert at 6:17 p.m.

Susan Weeks

Secretary

PRESIDENT McBRIDE'S REMARKS

Editor's Note: The following remarks were delivered by outgoing President William H. McBride at the Association's annual meeting on September 18, 1996.

Well, finally I get to deliver a speech at an annual meeting of NABL. Last year's meeting was exciting enough without my speaking at the end of it. But this year I get to go first and therefore neither you nor I have a choice about hearing me. Some of you read last year's speech in the President's Column in the subsequent issue of *The Quarterly Newsletter*. I know that because I heard from several critics. Notwithstanding that, some of what I said in that and later columns bears repeating at this time.

To paraphrase Justice O'Connor's dissent in the 1988 Kentucky Bar Association case on attorney solicitation, the hallmark of a profession is adherence to standards of conduct not enforced either through legal fiat or market discipline. Without such standards and the effort to abide by them we would be much closer to being mere service providers with the filing cabinet mentality disparaged by Jimmy Breslin. Yet many factors make it ever more difficult for bond attorneys to live up to such standards. Continued legislative threats adversely affect the volume of business. In addition, some of our clients seem more and more often unable to discriminate among firms on the basis of quality bond counsel work. Worse, there are now even some clients who *can* discern quality bond counsel work but are not willing to pay for it. They, and others, would like to treat our services as susceptible to commodity pricing and make all engagement decisions based on factors other than quality of the counsel given.

Nevertheless, our obligations to those we benefit as well as to our partners and ourselves demand we maintain our professionalism. NABL is vital in this effort -- it not only helps nurture and clarify the standards of conduct which are adhered to by the bond counsel community, but also it has a huge role in explaining the arcane nuances of the practice to less well-informed attorneys and others.

But this would not be possible without significant work by volunteers, and there are a score of people to be thanked as some of NABL's hardest workers during the current year.

The tax committees -- Arbitrage and Rebate chaired by David Walton and General Tax Matters chaired by John Cross -- were extremely busy. Numerous projects were undertaken including comments on IRS and Treasury actions concerning alleged yield-burning, SLGS and audit practices. David and John particularly, but also the other members of those two committees, deserve the warm thanks of all of us for their efforts.

Mike Budin as chair of the Opinions Committee has also had a very busy year. The Board charged that committee with revising the model opinions as a result of the thoughts and policies espoused in the most recent version of NABL's *The Function and Professional Responsibilities of Bond Counsel*. Mike and his committee have done a great deal of work, including two presentations of interim drafts to the Board of Directors.

Similarly, the Professional Responsibility Committee under the guidance of Margaret Angel as its chair, and particularly Roy Koegen as vice-chair, has been working on revisions to the model engagement letters, again as a result of the revisions to *The Function and Professional Responsibilities of Bond Counsel*. The Board looks forward to approving their efforts next year.

After several years of hectic action, the Securities Law and Disclosure Committee has been a bit less busy this year. Nevertheless, John Overdorff as its chair has provided valuable insights and forwarded the work of several subcommittees, including those on enforcement and bondholder notification.

The Legal Assistants Committee has furthered its work on a Legal Assistants handbook and the Chair and Vice-Chair, Kathryn Hanzsek and Michelle Kelly, respectively, are due a lot of kudos for that effort.

As always, the Section 103 Editorial Board for NABL's cooperative venture with Aspen on the *Federal Taxation of Municipal Bonds* book has done an excellent job. Jeff McHugh, Linda D'Onofrio and Cliff Gerber have all contributed greatly to the scholarship in our practice area.

Helen Atkeson was a great help to the Association this year with her work as the Editor of the *Rule 15c2-12 Handbook*. This has quickly become known as the best source book for this arcane area.

Thanks are also due to Sharon White who held herself ready and reviewed a number of cases in connection with possible NABL *amicus* briefs, and to Bill Noth and Scott Lilienthal, who, as *The Quarterly Newsletter* Committee, reviewed proofs of each issue. Sharon is also everyone's benefactor through her tax articles in the *Newsletter*.

The Education Committee had its normal excellent year under the tutelage of Chair Charlie Henck. The Tax Seminar in February in San Francisco chaired by Kristin Franceschi was excellent. Bill Nelson's efforts as the chair of the Fundamentals Seminar in April in Boston, notwithstanding a veritable blizzard and the 100th Boston Marathon, were outstanding. Buddy Downs' work as chair of the Washington Seminar in May was a memorable example of efficiency.

It should also be noted that Perry Israel, the former Secretary of your Board of Directors, kindly agreed to be the chair of a seminar on private activity regulations, when and if issued. I very much appreciate Perry's willingness to do this and his maintaining a high level of preparation on the subject.

I would like to thank former director Morris Knopf who is chairing the Form Indenture effort for the Association. Next year should see the finish of this tome.

As usual, your Board of Directors has worked hard this year. Each of them got involved on numerous questions and more than a few were very active participants in committee projects. I should not single any of them out without mentioning them all, but retiring directors Dave Caprera and Steve Matthews provided especially valuable comments and did major work on a number of projects during the year. I am sure that neither of them has finished his work for the Association. Also, our Editor Fred Kiel deserves much praise for this year's *Newsletters*. He has set a very high standard and the *Newsletter* is truly a service to our members of which we can all be proud.

Bob Buck as chair of this year's Workshop was a member of the Board. In that role, in addition to all his efforts for this fine meeting, he deserves applause for his work on the By-Laws of the Association. Through numerous drafts, critiques and policy ruminations, Bob kept us all on track and did a very lawyer-like job of putting it all together.

I would also like to thank Sharon White, Ruth West and Drew Kintzinger for allowing NABL to place their names in nomination for a position on the MSRB. As you know, Dean Pope was asked to be on the MSRB and we are pleased to have a bond lawyer there after so many years. However, Sharon, Ruth and Drew are certainly no less qualified and were kind enough to allow their names to be submitted, for which they deserve our thanks.

I would like also to mention the non-Board members of the Nominating Committee who prepared the slate of officers and directors that we will vote on very soon. Carolyn Truesdell, David Walton and David Baker Lewis were instrumental in the selections made, which show, I believe, the merit of broader Nominating Committee participation.

Of course, Drew Kintzinger, last year's President, was the chair of the Nominating Committee. For that, as well as for all of his other efforts during the year and his support of me during my term, I must thank Drew very much. He has truly earned some time off from the Association but somehow I don't think he will be allowed to leave the scene entirely.

Julie Ebert was a great help during the year as President-Elect, and I leave assured that we are all in good hands for next year.

Of course, the work of Pat Appelhans and others in the National Office and Amy Dunbar in D.C. was exemplary. NABL is exceedingly well-served by them and I congratulate myself on being the first President to have a full 12 months with this staff composition.

If I missed any hard workers, and no doubt I have, then I apologize. NABL every year seems to have more and more active participants and that is all to the good. Please do not think your efforts were unappreciated.

As a final thought, I would like to thank my partners and all the attorneys and staff at Hunton & Williams. Through the years of my very active involvement with the Association, they have been supportive at a level higher than I had a right to expect. I can only say that each person on our public finance team exemplifies to me all that is honorable and brilliant about our profession. I do not have to look very far to see some of the greatest people around and it has been and continues to be a distinct pleasure to practice with them.

PRESIDENT EBERT'S REMARKS

Editor's Note: The following remarks were delivered by President Julianna Ebert at the annual meeting on September 18, 1996.

Ladies and gentlemen, it is a great honor and privilege to have the opportunity to serve you as your President. I have had the good fortune to work with many dedicated and distinguished bond lawyers over the years while serving on committees, assisting with seminars and participating on the Board. I am grateful to all for their inspiration and support, especially my immediate predecessors Wally McBride, Drew Kintzinger and Neil Arkuss.

And while I am proud to serve our fine organization as its President, I am even prouder to be a bond lawyer. Bond lawyers make a difference. We spend our time and talent helping our clients, state and local governments, and others understand and follow often complex and sometimes intimidating laws so that public projects can be financed ... projects that improve the quality of life. We work hand in hand with dedicated, responsible elected and appointed public officials who try to sustain and improve their communities. We share in the pride of those who have built new schools, added to libraries, developed parks, improved roads and cleaned up the environment for the betterment of their communities. Our profession is truly one of *public* service.

We know there are easier ways to make a living. We face constant challenges: not the just the challenges of more complicated and confounding laws and regulations, but of more difficult and demanding transactions. When the pressure on bond lawyers increased significantly in 1986, a Special Committee on Standards of Practice was created by the Association's Board of Directors. In its paper, entitled "The Question of Lawyer Competence and Professionalism," the Committee, under the inspired leadership of Joe Johnson, stated:

> *Bond counsel work in a far more complex, complicated world today than did our counterparts of thirty years ago. The frequency of massive changes in the Federal tax law relating to state and local government bonds, increased awareness of disclosure responsibilities, the development of novel and complex financing schemes and credit support mechanisms, the growth of public-private partnerships, the litigation explosion (with the resulting exponential increase in the case law with which bond counsel must be familiar) and a considerable expansion of the notion of "public*

purpose" have all contributed to the increased complexity of the bond counsel world, but these are all matters with which competent, experienced and well-prepared lawyers are equipped to deal, if they have the time to do so.

The resolution of novel and difficult legal questions and the careful and thorough drafting of complicated documents cannot, however, be accomplished overnight, and bond counsel are under increasing pressures to do just that. Clever and aggressive bankers and financial advisers, as well as hard-pressed state and local government finance officers and other public officials, daily suggest imaginative new ways to approach real (or imagined) problems. Those of the present generation of bankers, financial advisors and public officials may not appreciate that painstaking, time-consuming and serious study and drafting efforts are required to execute and perfect some of their more innovative concepts in a manner adequate to protect investors; and they often attempt to impose unrealistic limits on the time within which bond counsel must study and consider the legality and workability of these concepts and then prepare the clear, workable documents necessary to implement their concepts. Often implicit in the imposition of unrealistic time schedules by bankers, financial advisers or public officials is the suggestion that if the particular bond counsel involved cannot meet the schedule, another can be found to do so.

What is the appropriate response of bond counsel in these situations? It is easy ... to say that the appropriate response is to resist the imposition of unrealistic time schedules and to decline employment if a more realistic schedule cannot be agreed upon. This is difficult for many lawyers to do, but ... it can and has been done (and, when it is done, usually results in increased respect for the lawyer who does it). The alternative -- to accept unrealistic time schedules and to close financings on the basis of inadequate study and less than careful and thorough supporting documentation -- results in lowering the standards of practice to which bond counsel should aspire, in exposing issuers (and their officers and bond counsel) to serious consequences that might have been avoided and, more importantly, in failing to give investors the legal protections that they expect and deserve.

That Special Committee's advice is as sound today as it was a decade ago. For each of us to continue to add value, to maintain our high standards and to do our part to preserve the integrity of the municipal marketplace, we need to have the strength and courage to "Just Say No:" "No" to overly-ingenious or ill-conceived financings, "No" to unrealistic time schedules, and "No" to unreasonable fees. While the pressure builds to do our work faster and cheaper, we must continue to be committed to excellence. And while in the short run it may be a lot easier to say "Yes," we must resist the temptation. In order to do what we do responsibly, sometimes we just have to say "No."

But there also is a time to say "Yes." Now is the time to say "Yes" to the National Association of Bond Lawyers. I know I am "preaching to the choir" at this annual meeting, but I hope that this challenge reaches NABL members reading it in *The Quarterly Newsletter*. I urge you to become actively involved in NABL.

NABL helps us to become better lawyers through its educational activities:

- the almost one thousand strong Bond Attorneys' Workshop which provides the opportunity to share common problems, to seek appropriate solutions, to unravel complex regulations, to become updated on current developments in the law, to learn of coming trends and to enjoy the fellowship of colleagues;

- the Tax Law Seminar, scheduled this year for Orlando, Florida, where the devoted tax lawyers in our organization will again diligently educate the rest of us simple bond lawyers in the nuances of bond tax law and discuss difficult problems;
- the Washington Seminar, which in recent years has provided our members with the opportunity to have direct access to the hearts and minds of influential regulators in Congress, at the SEC, Treasury and IRS;
- the Fundamentals Seminar which grounds our young associates and other public finance professionals in the basics of bond law; and
- the special seminars NABL is ready to sponsor to meet its members' needs as new issues arise.

NABL helps us stay better informed of federal law developments through the Director of Governmental Affairs, Amy Dunbar's Washington reports in *The Quarterly Newsletter* and e-mail updates. NABL will also help you stay better informed through its Home Page located at *http://www.nabl.org/nabl* or *http://www.qadas.com/nabl*.

NABL helps promote high standards of practice. We recently republished *The Function and Professional Responsibilities of Bond Counsel* as revised and redrafted through the considerable efforts of the Professional Responsibility Committee. Currently, the Professional Responsibility Committee is redrafting the Model Engagement Letters and may be able to begin revising and updating the pamphlet, intended for issuers and others, entitled "Selection and Evaluation of Bond Counsel." Meanwhile, the Opinions Committee is in the process of reviewing and updating the previously published Model Opinions.

NABL helps us all by working toward rational administration of tax and securities law. Each year NABL supplies faculty who meet with SEC and IRS staff to provide background and information. The Hilderbrand Fund, our Section 501(c)(3) affiliate organized exclusively to support and benefit NABL's educational activities, grants stipends for government officials to attend our educational seminars. Through the Arbitrage and Rebate, General Tax, and Securities Law and Disclosure Committees, NABL provides written comments and oral testimony on developing tax and securities laws to help improve the law.

This year our General Tax Matters Committee will continue to stand by to react to the final or reproposed private activity bond regulations when they are released. Since these regulations will have an impact on so many transactions, the Committee continues to urge the Service to repropose them so that we and our clients and their representatives have ample opportunity to review, discuss and comment on the changes. The General Tax Matters Committee also is prepared to comment on any proposed tax reform legislation which would dramatically affect outstanding municipal bonds; break the contract between our municipal clients and their bondholders; jeopardize the creditworthiness of state and local governments; or adversely affect future investment in municipal bonds and in infrastructure improvements.

Our Arbitrage and Rebate Committee will continue its dialog with the Service and Treasury and other groups to develop a more balanced and administratively feasible approach to problems alleged with certain open market escrows. The Committee's efforts resulted in the welcomed modifications to Rev. Proc. 96-41 released today. The Committee also will comment on the proposed fair market value regulations.

Our Securities Law and Disclosure Committee will continue to provide our members with information regarding the SEC's procedures and positions in recent enforcement actions so that our members can better educate and advise our issuer clients of their rights and responsibilities. The Committee also intends to continue its dialog with SEC staff to encourage them to achieve their enforcement goals in a way that balances the costs to the issuers with any benefit to the investors. In addition, the Committee hopes to have the opportunity to work with the SEC and issuer groups with respect to any guidance that may be developed. The Securities Law and Disclosure Committee also will continue its efforts to improve bondholder communication and to explore the legal aspects of Internet offerings.

NABL also looks for opportunities to improve the law by participating as an *amicus* in appropriate cases in accordance with the recommendations of our *Amicus* Review Committee and by monitoring developments in bankruptcy law through our Bankruptcy Committee.

NABL provides practice tools by supporting the efforts of our Section 103 Editorial Board to edit, revise and improve the remarkable publication, *The Federal Taxation of Municipal Bonds*, our Form Indenture Committee's project to produce an annotated model of the most uniform provisions of an indenture, and the Legal Assistants Committee's determination to produce a handbook.

The National Association of Bond Lawyers, through the efforts of its volunteers, has a long tradition of sponsoring educational programs, promoting standards, trying to improve the law and providing member services. I urge you to become actively involved in NABL to assist those efforts. But I also urge you to become actively involved because the collegiality and professionalism of those you will have the pleasure of meeting and working with in NABL will not only provide you with great enjoyment but also inspire you and help you to have the strength and courage to do the right thing.

On this year's membership application and renewal form, you will be asked to enlist in the work of one or more NABL committee. When you do, your name will be provided to committee chairs and vice-chairs and you may be called upon to help in the year ahead. This is one of those times when you *should* say "Yes." Become an active member of NABL. Work with some incredibly interesting, intelligent, dedicated and responsible lawyers; discuss and debate important issues; work toward reasonable and rational regulations; participate in educational projects; make a contribution; and do it with people who are extraordinarily talented and delightful to work with.

As Will Rogers said, "Even if you're on the right track, you'll get run over if you just sit there." Don't sit there. Get involved. Participate in NABL.

[Photograph of Board of Directors]

The Association's 1996-1997 Board of Directors and executive staff

Sitting, left to right: Virginia D. Benjamin, Lisa P. Soeder, Julianna Ebert, Amy K. Dunbar, Pamela S. Robertson, and Susan Weeks.

Standing, left to right: Jeannette M. Bond, Frederick O. Kiel, Robert W. Buck, Howard Zucker, William H. McBride, Floyd C. Newton III, William H. Conner, John M. Gardner, and Patricia F. Appelhans.

Thank you for this opportunity to serve as your President. And thank you to all who already have committed to serve NABL in the coming year, by chairing and participating in committees and by chairing and speaking at seminars, and to all who volunteer now to serve in any capacity in the coming year. I look forward to working with all of you. There is much to be done and together we can and will make a difference -- for our profession, for our clients and for each other.

THE NEW DIRECTORS

Lisa P. Soeder, a partner with Nixon, Hargrave, Devans & Doyle LLP, resident in its New York office and in its Hartford, Connecticut, office (where she serves as the managing partner) was elected a director of the Association for a term expiring in 1999. Ms. Soeder has previously served on the Section 103 Editorial Board with respect to *Federal Taxation of Municipal Bonds* (1992-1995) and as a member of the Steering Committee of the Bond Attorneys' Workshop (1992-1995). She has also served as a panelist on one or more topics at each Bond Attorneys'

Workshop since 1986 and at various Arbitrage Seminars.

Ms. Soeder joined Nixon, Hargrave in September, 1996. She was previously a partner at Hawkins, Delafield & Wood where she practiced since 1983 when she graduated from the University of Notre Dame Law School with a J.D. She received her LL.M. in Taxation from New York University in 1987. Ms. Soeder's primary area of practice involves Federal tax issues in public finance.

Pamela S. Robertson, a partner with Edwards & Angell, Providence, was elected a director of the Association for a term expiring in 1998. Ms. Robertson has served as a member of the Steering Committee of the Bond Attorneys' Workshop (1992-1995), and as a panelist for various seminars. She graduated from Georgetown University Law Center, where she was an editor for *Law & Policy in International Business*, in 1981. Ms. Robertson joined Edwards & Angell in 1987; her primary practice has included all aspects of public finance.

Virginia D. Benjamin, a partner with Calfee, Halter & Griswold, Cleveland, will serve a one-year term as a director by virtue of her election as Chair of the Steering Committee of the Bond Attorneys' Workshop. Ms. Benjamin's practice areas include general obligation bonds and notes, industrial development bonds, healthcare financing, and public law.

Ms. Benjamin received her A.B. from Smith College in 1973, and her J.D., *cum laude*, from Boston University School of Law in 1976, when she joined Calfee, Halter as an associate. She has been a member of the Steering Committee of the Bond Attorneys' Workshop since 1992, and is a member of the American, Ohio State and Cleveland Bar Associations, a member of the Boards of Trustees of the American Cancer Society-Cuyahoga County Unit and the YWCA of Cleveland, and Vice President of the Board of Trustees of Fund for the Future of Shaker Heights.

ACTIONS BY THE BOARD OF DIRECTORS ON SEPTEMBER 18, 1996

The Board of Directors met on September 18, 1996, at the Downtown Chicago Marriott, in Chicago. President William H. McBride presided. Also present were: Julianna Ebert, President-Elect; William H. Conner, Treasurer; Susan Weeks, Secretary; Directors Jeannette M. Bond, Robert W. Buck, David A. Caprera, John M. Gardner, Steve A. Matthews, Floyd C. Newton III and Howard Zucker; Andrew R. Kintzinger, Immediate Past President; Honorary Director Frederick O. Kiel; Patricia F. Appelhans, Executive Director; and Amy K. Dunbar, Director of Governmental Affairs.

As Board members scrambled for chairs and commiserated with President McBride over the recent hurricane damage to his house, President McBride welcomed Board members and gave a brief overview of items to be discussed at the Board meeting pursuant to his agenda.

Minutes

The Board unanimously approved the minutes of its meeting of July 18 and 19, 1996.

Report of the Executive Director

Executive Director Appelhans gave her report, including the following:

1. *Bond Attorneys' Workshop* - Executive Director Appelhans updated Board members on the status of Bond Attorneys' Workshop, focusing on her efforts to secure a substitute printer for the Bond Attorneys' Workshop book when the original printer announced in early September that it could not meet the mid-September printing deadline. After recounting a saga which included the location of a printer in Virginia, a trip by truck to collect the books and the insertion of 30,000 tabs in the books (at the rate of eleven books per hour per worker) by NABL's staff and Hilton Hotel representatives during the weekend prior to the Workshop, Executive Director Appelhans predicted that as a result of the last-minute printer

change, the printing costs of the Bond Attorneys' Workshop book would be increased, but would still be below the budget for Bond Attorneys' Workshop book printing. Upon motion of President McBride, seconded by Director Matthews, the Board unanimously authorized Bond Attorneys' Workshop Chair Buck to explore what action should be taken against the original printer and to delegate to the Executive Committee authority to take actions necessary to collect damages attributable to the Association's increased printing costs. Executive Director Appelhans also advised the Board that there are currently 1,015 registrants for the Bond Attorneys' Workshop, and described the seven exhibitors.

2. *Membership and Dues* - As of September 16, 1996, the Association has 2,625 regular members, 126 associate members, 176 legal assistant members and 7 retired members for a total of 2,934, an increase of 8 regular members and 1 legal assistant member since September 10, 1996.

Report of the Treasurer

President McBride called on Treasurer Conner to give his financial report.

In summarizing the expenses of the Association, Treasurer Conner observed that higher-than-expected National and Washington Office expenses (11% and 7% over budget, respectively) are offset by reduced seminar, committee, and director and officer expenses, with the result that overall Association expenses are in line with budget projections. Treasurer Conner predicted that the Association's year-end results would be no worse than a deficit in the $5,000 to $10,000 range, significantly less than the budgeted deficit of $89,000. Treasurer Conner concluded that the Association remains in sound financial condition.

Bond Attorneys' Workshop

After thanking Executive Director Appelhans and her staff for their extraordinary efforts on behalf of the Bond Attorneys' Workshop, Director Buck reported that J. Douglas Rollow had been proposed as 2nd Vice-Chair of the Workshop. Director Buck also pointed out that ALAS had coordinated with him and Executive Director Appelhans in planning a forum on municipal finance for the participants in its insurance program which was being held at a nearby university that morning. Director Zucker suggested that NABL follow up with the insuror to coordinate future efforts.

Report of the Director of Governmental Affairs

Director of Governmental Affairs Dunbar gave her report, including the following:

1. *Tax Developments* - Director of Governmental Affairs Dunbar announced that she expected to receive momentarily a 5-page announcement from Treasury regarding Rev. Proc. 96-41 relating to yield-burning, and that she would cover other matters in the meantime. She informed the Board that Treasury expects that the proposed SLGS regulations will be finalized and the new SLGS program implemented within four to eight weeks. She reported that Treasury staff had assured her that the final SLGS regulations would address problems previously noted in the comment letter of the General Tax Matters Committee involving the Treasury Secretary's discretion to revoke SLGS, and that she anticipated that the problem of blacklisting conduit issuers as a result of a borrower's failure to take delivery of SLGS would be dealt with by allowing conduit issuers to substitute the borrower's taxpayer identification number.

Director of Governmental Affairs Dunbar also reported that, in light of the Treasury action anticipated that morning affecting Rev. Proc. 96-41, Linda Schakel, Attorney-Advisor, Office of Tax Legislative Counsel, Department of the Treasury, was willing to confirm the willingness of the IRS to accept comments up to one week prior to the hearing date on the Treasury's proposed fair market value regulations.

2. *Stadium Bill* - After recounting her conversations with staff advisors to Senator Moynihan, Director of Governmental Affairs

Dunbar predicted that the Senator would narrow somewhat the scope of his stadium bill and change the effective date (which, as changed, might still be retroactive). She also described her attempts to collect from NABL members (including those planning to attend the arena, stadium and convention center panel at the Bond Attorneys' Workshop) additional information concerning the impact of the Moynihan bill on actual stadium financings.

3. *International Municipal Lawyers Association ("IMLA")* - Director of Governmental Affairs Dunbar requested the Board's input on a request from IMLA (formerly NIMLO) that a representative of NABL write an article on the basics of state and tax law aspects of municipal finance to appear in IMLA's January, 1997 magazine. It was the consensus of the Board that the article was a worthwhile effort. Director Gardner volunteered to assist Ms. Dunbar with this project, and President McBride agreed to review the article.

4. *Miscellaneous*- In reporting an increase in the number of persons accessing the NABL home page on the World Wide Web, Director of Governmental Affairs Dunbar observed that the jobs service portion is up and running and that the home page has been reformatted, with the result that it is now more user-friendly though not yet problem-free. Director of Governmental Affairs Dunbar concluded her report by advising the Board that no congressional action affecting municipal bonds is expected to occur prior to the October adjournment.

Committee Reports

President McBride then called for Committee reports by Board members.

1. *Arbitrage and Rebate* - Secretary Weeks called the Board's attention to the draft of the comments of the Arbitrage and Rebate Committee on the fair market value regulations before the meeting, noting that the deadline for comments would be extended beyond the September 25, 1996, date noted in Committee Chair David A. Walton's cover letter.

2. *Education* - Director Matthews advised the Board that Patti T. Wu had been selected as Vice-Chair of the 1997 Tax Seminar and that the Education Committee would implement the Board’s reorganization of this committee as a standing committee consisting of the Chair and Vice-Chair of the Education Committee, together with the Chairs and Vice-Chairs of the current year's seminars.

3. *Legal Assistants* - Treasurer Conner reported that Kathryn A. Hanzsek had resigned as Chair of the Legal Assistants Committee as a result of leaving the profession. Treasurer Conner referred the Board to the outline of the *Legal Assistants' Handbook* before the meeting, noting that the Committee plans to finalize one chapter per month in order to complete this project by the end of May, 1997. After describing additional projects proposed by the Committee, including updating the 1994 Legal Assistants Survey, Treasurer Conner suggested that no Board action was necessary at this meeting and that the Committee should continue to focus its efforts on the *Handbook*.

4. *Opinions* - Director Zucker praised the Committee's redraft of the model opinions and circulated to Board members his written notes and comments thereon. In response to President McBride's request for Board member input, Director Matthews suggested that the Opinions Committee expand the cross-references to *The Function and Professional Responsibilities of Bond Counsel* ("*Function*") and *Disclosure Roles of Counsel* in the commentary to incorporate additional discussion of relevant concepts (rather than mere cross-references). He also recommended that the revising and editing of the model opinions follow a process similar to that utilized in the latter stages of *Function*. Director Newton stated that the Board would need to review another draft of the model opinions before taking action. President McBride requested that the Board Advisor work with the Opinions Committee to expand the commentary.

5. *Professional Responsibility* - Director Buck informed the Board that members of the Professional Responsibility Committee have worked diligently to revise the model engagement letter to reflect the Board's input at the July meeting. Praising the Committee's efforts, President McBride reported that the revised engagement letter and commentary were circulated earlier in the week and characterized them as "a great leap forward." Director Buck stated that the Committee planned a review session on Friday morning and President McBride requested that the Committee circulate to the Board either the current draft of the engagement letter and commentary or a revised draft resulting from the Committee's discussion at its Friday meeting.

6. *Securities Law and Disclosure* - Director Newton distributed a status report from Committee Chair John Overdorff which predicted that the SEC Enforcement and Bondholder Notification Subcommittees will ultimately produce valuable work. Director Newton also noted that the Securities Law and Disclosure Committee and the Bondholder Notification Subcommittee would be meeting Friday morning.

7. *Nominating Committee* - Immediate Past President Kintzinger described the Nominating Committee's process in reviewing candidates for officer and director positions, characterizing the discussions as thorough, serious and substantive. He relayed the Committee's recommendation that a report be given to the membership describing those factors and criteria considered by the Committee in the selection process. Director Zucker concurred and suggested that the Committee also invite membership input on the criteria to be considered.

IRS Notice 96-49

At this point in the meeting, Director of Governmental Affairs Dunbar distributed the promised IRS action with respect to Rev. Proc. 96-41, consisting of a 5-page Notice 96-49 which suspends the one-year deadline contained in Rev. Proc. 96-41 for issuers to seek a closing agreement with the IRS. Director of Governmental Affairs Dunbar briefly hit its high points, observing that the Notice (i) disclaimed any inference that spot price necessarily reflects fair market value in any particular case, (ii) solicited comments on certain questions by December 17, 1996, and (iii) scheduled a public hearing on January 15, 1997.

Political Contributions

Director Zucker reviewed briefly the ABA's handling of the pay-to-play proposal of the Bar Association of the City of New York and indicated that the current status of the proposal is that a number of ABA sections have replied to a request by the Bar Association of the City of New York for comments on its proposal. Immediate Past President Kintzinger predicted that there will be renewed focus on this issue and Director Zucker recommended that NABL participate in the ABA's political contribution discussion. Director of Governmental Affairs Dunbar reminded the Board that its *Statement of Professional Principles with Respect to Political Contributions* contemplated that NABL would participate with other groups on certain aspects of the political contribution issue in the future. After additional discussion, the Board authorized the incoming President to (i) send a letter to the ABA expressing the Association's desire to participate in the ABA's review of the pay-to-play issue and (ii) appoint a liaison for this purpose.

Susan Weeks
Secretary

ACTIONS BY THE BOARD OF DIRECTORS ON SEPTEMBER 19, 1996

The Board of Directors met at on September 19, 1996, at the Downtown Chicago Marriott, Chicago. President Julianna Ebert presided. Also present were the following: William H. Conner, President-Elect; Floyd C. Newton III, Treasurer; Susan Weeks, Secretary; Directors Virginia D. Benjamin, Jeannette M. Bond, Robert W. Buck, John M. Gardner, Pamela S. Robertson, Lisa P. Soeder and Howard Zucker; William H. McBride, Immediate Past President; Honorary Director Frederick O. Kiel; Patricia F. Appelhans, Executive Director; and Amy K. Dunbar, Director of Governmental Affairs.

Following a rehashing by Board members of the prior evening's festivities, and entreaties to Executive Director Appelhans to speed the delivery of coffee to the meeting room, President Ebert welcomed new Board members.

Following a discussion of President Ebert's recommendations for Chairs, Vice-Chairs, and Board Advisors for the Committees, the Board approved the persons listed below as Chair, Vice-Chair, Board Advisor, or Member, as the case may be, of the respective Committees:

***Amicus* Review**
Chair
Fredric A. Weber
Vice-Chair George E. Campbell
Advisor Susan Weeks

Arbitrage and Rebate
Chair David A. Walton

Vice-Chair Jeremy A. Spector
Advisor
Lisa P. Soeder

Bankruptcy
Chair
James E. Spiotto

Vice-Chair Peter C. Kornman
Advisor Floyd C. Newton III

Education
Chair Charles S. Henck
Vice-Chair William L. Gehrig
Advisor Pamela S. Robertson

Form Indenture
Chair Morris E. Knopf
Vice-Chair Charles H. Waters, Jr.
Advisor William H. McBride

General Tax Matters
Chair John J. Cross, III
Vice-Chair Larry L. Carlile
Advisor Jeannette M. Bond

Legal Assistants
Chair Ann L. Atkinson
Vice-Chair Michelle C. Kelly
Advisor Virginia D. Benjamin

Opinions
Chair Michael A. Budin
Vice-Chair Edwin F. Lucas, III
Advisor Howard Zucker

Professional Responsibility

Chair	Roy J. Koegen
Vice-Chair	Mae Nan Ellingson
Advisor	Robert W. Buck

Securities Law and Disclosure

Chair	William L. Nelson
Vice-Chair	Walter J. St. Onge
Advisor	John M. Gardner

Section 103 Editorial Board

Members	Linda L. D'Onofrio (1997)
	Clifford M. Gerber (1998)
	Kristin H.R. Franceschi (1999)
Advisor	Floyd C. Newton III

***The Quarterly Newsletter* Committee**

Members	Joseph H. Johnson, Jr.
	Scott R. Lilienthal
	Robert Dean Pope
	Carolyn Truesdell
Advisor	William H. Conner

President Ebert then reviewed the schedule of events for the upcoming year and noted that Committee Chairs would soon need to furnish their budget items to Treasurer Newton for inclusion in the preliminary 1997 budget.

At President Ebert's request, Director of Governmental Affairs Dunbar reported on technical difficulties experienced in accessing NABL's home page and agreed to seek outside assistance to remedy these difficulties and to facilitate member access to and use of the NABL website.

President Ebert then called on Executive Director Appelhans to give a report on National Office activities in the upcoming year. Executive Director Appelhans announced that she plans to establish membership and promotion guidelines with a view to conducting a drive to enhance membership and also plans to draft a financial procedures book with the assistance of Skalitzky & Noonan, Ltd., the Association's accountants, as recommended in its 1995 management letter. Executive Director Appelhans sought the Board's input on the operation of NABL's job bank and suggestions for coordinating job listings among the National and Washington Offices and *The Quarterly Newsletter*. Immediate Past President McBride requested that Executive Director Appelhans also develop guidelines for sharing mailing lists.

Susan Weeks
Secretary

ACTIONS BY THE BOARD OF DIRECTORS ON NOVEMBER 7 AND 8, 1996

The Board of Directors met on November 7 and 8, 1996, at the Inn of the Anasazi, Santa Fe, New Mexico. President Julianna Ebert presided. Also present were the following: William H. Conner, President-Elect; Floyd C. Newton III, Treasurer; Susan Weeks, Secretary; Directors Virginia D. Benjamin, Jeannette M. Bond, Robert W. Buck, John M. Gardner, Pamela S. Robertson and Lisa P. Soeder; Immediate Past President William H. McBride; Honorary Director Frederick O. Kiel; Patricia F. Appelhans, Executive Director; and Amy K. Dunbar, Director of Governmental Affairs.

Minutes

The Board unanimously approved the minutes of the Board meetings of September 18 and 19, 1996.

Report of the Executive Director

President Ebert then requested Executive Director Appelhans to give her report, which included the following:

1. *Bond Attorneys' Workshop* - There were 924 paid attendees at the 1996 Bond Attorneys' Workshop, an increase of 6 over 1995.

2. *Membership* - Two dues mailings to current NABL members have generated 1,369 membership renewals as of November 6, 1996. The Association currently has 2,980 members.

At this point, Professional Responsibility Committee Chair Roy J. Koegen joined the meeting and was welcomed by President Ebert.

Model Engagement Letter Project

President Ebert thanked Professional Responsibility Committee Chair Koegen and his Committee for the significant progress made since the last draft of the model engagement letter. She indicated that she had received helpful comments from Opinions Committee Chair Michael A. Budin designed to coordinate the language and concepts contained in the model engagement letter with those of the model opinions currently under revision. Mr. Koegen suggested that he lead the Board in a page-by-page review of the text of the model engagement letter and commentary. In the course of the page-by-page review, the Board engaged in a far-reaching discussion and debate of the form of model engagement letter and the commentary, which explored the role of bond counsel, indemnification, conflicts arising from current and past representation of other parties to a transaction, general and specific waivers of conflicts, interpretation of non-action as consent, "non-engagement" letters, contingent fees and late-payment charges on billings. Mr. Koegen thanked the Board for its input and promised to reconvene the Professional Responsibility Committee with the goal of circulating a revised draft of the model engagement letter in the near future. President Ebert suggested that the Board consider either a meeting or conference call in January to review the revised engagement letter.

Legal Assistants Committee

President Ebert called on Director Benjamin to report on the Legal Assistants Committee.

Director Benjamin informed the Board that the Legal Assistants Committee is (i) coordinating with Director of Governmental Affairs Dunbar on an article for *The Quarterly Newsletter* concerning the development of an Internet directory of websites of interest to public finance professionals, (ii) updating the Statement on the Utilization of Public Finance Legal Assistants and Job Description for Public Finance Legal Assistants, (iii) drafting a handbook for legal assistants, and (iv) working to improve the legal assistants' break-out sessions at the Fundamentals Seminar. She also reported that the Committee has requested that the Board approve an updated legal assistants survey and the development of a directory of legal assistants.

The Board concurred in President Ebert's recommendation that the updating of the legal assistants survey be deferred so that the legal assistants can instead concentrate on their other Committee projects and that the separate directory of legal assistants not be pursued since a listing of legal assistants already appears in the Association's directory. After discussion of the intended audience of the Utilization Statement and Job Description and a strong recommendation by Immediate Past President McBride that each prominently feature a statement that legal assistants may not engage in the practice of law, the Board accepted Director Benjamin's offer to work with the Committee to revise the Utilization Statement and Job Description, to review its handbook and to encourage the Committee to select an editor for the handbook. Finally, President Ebert urged Director Benjamin to furnish the Fundamentals Seminar schedule to the Committee and to request Fundamentals Seminar Chair Lauren Mack to review its materials and coordinate its activities at the seminar.

At this point, Director Howard Zucker joined the meeting and was welcomed by President Ebert.

President Ebert then called for Committee reports by Board members and updates on special projects.

Committee Reports and Special Projects

1. *General Tax Matters* - Director Bond asked Board members to provide input to General Tax Matters Committee Chair John J. Cross III on the priority which should be given to the projects listed in his October 29 memorandum to Committee members. President Ebert suggested that the General Tax Matters Committee

coordinate with the Arbitrage and Rebate Committee on the topic of Section 6700 penalties.

2. *Bond Attorneys' Workshop* - Director Benjamin, Chair of the 1997 Bond Attorneys' Workshop, indicated that she is in the process of selecting the 1997 Steering Committee and has scheduled a Steering Committee meeting for March 7, 1997, at Marco Island. She sought the Board's input on exploring other locations for the Workshop in 2001 and thereafter since a representative of the Downtown Marriott has indicated that the hotel may not be able to commit to a Wednesday-Friday Workshop schedule in future contracts. It was the sentiment of the Board that Director Benjamin should investigate other downtown Chicago hotels as the site of future Workshops in order to maintain the Wednesday-Friday schedule.

3. *Education* - Director Robertson reported that the Education Committee is concentrating on reducing seminar costs, with special emphasis on the Washington Seminar. She also indicated that a productive meeting of the Chair and Vice-Chair of the Tax Seminar, the Executive Director, and the Chair and Vice-Chair of the Education Committee had already been held, and that similar meetings were planned for the Fundamentals and Washington Seminars. President Ebert suggested that Director Robertson direct the Education Committee Chair to coordinate the time schedule of the seminar with the Legal Assistants Committee and to review that Committee's materials.

Report of the Treasurer

After thanking Executive Director Appelhans and Director of Governmental Affairs Dunbar for their assistance in preparing the preliminary 1997 budget, Treasurer Newton described the assumptions underlying revenue projections in the preliminary budget, including an increase in new members based on expanded marketing efforts of the Executive Director, higher seminar attendance for the Tax and Fundamentals Seminars attributable to desirable meeting locations, and increased exhibitors' fees based on a survey of those exhibitors who participated in the 1996 Bond Attorneys' Workshop. On the expense side, Treasurer Newton observed that rent is a significant fixed expense and that seminar expenses are based on actual 1997 contracts for lodging and catering, while projected attendance is in line with past experience. He noted the need to improve Washington Seminar results and to eliminate duplication of materials in seminar books in order to reduce seminar costs. After reviewing director and officer expenses, committee expenses and printing costs of *The Quarterly Newsletter,* Treasurer Newton concluded his report on the preliminary 1997 budget by observing that the projected 1997 surplus will be reduced by adjustments to be made as a result of subsequent fine tuning.

President Ebert commended Treasurer Newton for his thorough and fast-paced report, and called for questions and input on the preliminary budget from Board members, whereupon a discussion of how to improve the Washington Seminar ensued, focusing on the possibility of devoting that event entirely to securities matters. A decision was deferred.

Following questions and comments on specific budget items, Treasurer Newton led the Board in a discussion of 1997 seminar fees and reminded the Board of its decision in September not to increase 1997 dues but to consider raising needed revenues through an increase in seminar fees, likening seminar fees to a "user fee" borne by attendees. He noted that the Association's two main sources of revenue are dues and seminar fees and outlined a scale of fees for each seminar under a formula allocating NABL's general overhead expenses net of dues to each seminar based on attendance. President Ebert suggested that fees of the

Fundamentals Seminar not be increased significantly since that seminar is attended by a younger group which is a source of future NABL members. President Ebert also recommended against raising Washington Seminar fees significantly so as not to discourage attendance, but suggested that the Tax Seminar member registration fee be increased to a range of $400 to $410 from the current level of $385. Citing the number of CLE credits available through the Bond Attorneys' Workshop, the length of the Workshop, the staff time involved in putting it on, the prices of other seminars, and the unique opportunity presented to members to network at a seminar attended by approximately one-third of the Association's membership, President Ebert suggested that the fee for the Bond Attorneys' Workshop be increased to $395 from its current level of $295.

There followed a discussion of the appropriate level of 1997 seminar fees whereupon the Board determined that the 1997 Bond Attorneys' Workshop member registration fee be set at $395 and that the non-member registration fee be set at $545 (in keeping with the Board's policy of setting non-member seminar registration fees at a level $150 higher than member fees in order to encourage non-members to join the Association). The Board also determined that the 1997 Fundamentals, Washington and Tax Seminars member and non-member registration fees be established at the following levels:

	Member	Non-Member
Fundamentals Seminar	$385	$535
Washington Seminar	395	545
Tax Seminar	410	560

President Ebert then called on Director of Governmental Affairs Dunbar for her report.

Report of the Director of Governmental Affairs

1. *Regulations; Legislative and PIG Activities* - Director of Governmental Affairs Dunbar updated the Board on the status of the private activity bond regulations and on the following legislative and public interest group activities: (i) the Joint Committee on Taxation staff is developing a new "Green Book," an overview of the tax system, for the incoming Congress; (ii) PSA is the primary mover in an emerging coalition of financial interests, engineering and construction companies and management consulting firms

seeking regulatory and tax code changes to allow more private involvement in financing U.S. infrastructure; and (iii) NACO and GFOA continue to promote arbitrage rebate relief for issuers, urging the adoption of a proposal which provides a three-year spending test exemption from rebate (25% by the end of the first year, 50% by the end of the second year and 95% by the end of the third year).

2. *Tax Matters* - In briefing the Board on the activities of the IRS, the SEC, and the Chair and Vice-Chair of the Arbitrage and Rebate Committee dealing with yield-burning in refunding escrows, Director of Governmental Affairs Dunbar expressed concern that, despite the fact that the IRS has issued Notice 96-49 which suspends the one-year deadline contained in Rev. Proc. 96-41 with respect to yield-burning in refunding escrows, IRS audits and SEC investigations are proceeding apace, putting pressure on issuers (who may effectively be under a gag rule) to settle and to enter into closing agreements. Director Bond noted that issuers under audit are in a difficult position as IRS auditors do not appear to be following the lead of Treasury on yield-burning, and she suggested that the interim goal of the issuers should be to suspend the audit process until Treasury takes further action on Rev. Proc. 96-41, with the ultimate goal being a legislative solution. Director of Governmental Affairs Dunbar suggested that NABL's tax and securities law committees work together on disclosure issues related to IRS enforcement actions.

3. *E-mail* - After expressing her appreciation of the efforts of Bill Gehrig and David Miller on the e-mail front, Director of Governmental Affairs Dunbar suggested a number of ways to improve or expand the use of e-mail in NABL's activities, including the following: (i) secure a local server and develop linkage with other websites of interest to NABL members, both of which the Director of Governmental Affairs is pursuing, (ii) publicize and increase the use of e-mail in the National Office, (iii) develop a list of websites relating to public finance, and (iv) include a directory of members and the tables of contents of NABL publications on NABL's home page.

4. *Greene County* - Director of Governmental Affairs Dunbar reported that Bankruptcy Committee Chair James E. Spiotto will make a recommendation to NABL on issues raised by the bankruptcy pending in Greene County, Alabama.

President Ebert thanked Director of Governmental Affairs Dunbar for providing technical input and assistance to a number of public interest groups in their development of a pocket guide on disclosure for issuers.

President Ebert then called for additional Committee reports by Board members and updates on special projects.

1. *Arbitrage and Rebate* - Director Soeder circulated the November 6, 1996 letter of Arbitrage and Rebate Committee Chair David A. Walton requesting input on issues raised at the recent public hearing held by the IRS on the proposed fair market value regulations. Immediate Past President McBride suggested that pricing matters such as the compensation of bidding agents and broker-dealer disclosure of profit and/or mark-up should not be dealt with by the Arbitrage and Rebate Committee, and Secretary Weeks suggested that the Committee focus on the applicability of Section 6700 penalties.

2. *Opinions* - Director Zucker pointed out that the latest draft of the model opinion project incorporates his and Director Gardner's most recent comments, and that Steve Matthews and Mae Nan Ellingson have been enlisted to assist the Opinions Committee in carrying out the Board's direction to include case citations and to expand references to *Function* in the commentary to the model opinions. President Ebert expressed her appreciation to Opinions Committee Chair Michael A. Budin for his comments on the model engagement letter and requested that Board members furnish their comments on the latest draft of the model opinions and commentary to Director Zucker. Director Gardner recommended a citation check by law students similar to that undertaken in the final stages of editing *Disclosure Roles of Counsel*.

3. *Securities Law and Disclosure* - Director Gardner advised the Board that the Securities Law and Disclosure Committee is off to a good start and detailed the following committee activities: (i) John McNally has circulated a first draft of the Enforcement Subcommittee's report on SEC enforcement actions; (ii) Monty Humble is preparing a "best practices" memo with respect to bondholder notification with the concurrence of the PSA and corporate trustee groups; (iii) the Committee plans to study legal issues which are raised by the increasing use of internet/electronic communications for disclosure; (iv) the Committee will also coordinate with the Opinions Committee to develop a model underwriter counsel opinion and with the Professional Responsibility Committee to undertake a study of issuers' reliance on experts; and (v) Marty Miller will prepare an article for *The Quarterly Newsletter* [printed *supra*] alerting members to new federal legislation intended to preempt most state securities law requirements, including blue sky laws.

4. *Form Indenture* - Immediate Past President McBride advised the Board that this five-person working committee has agreed on an outline for a fixed rate revenue bond governmental indenture, has assigned the drafting of articles to its members, and plans a face-to-face meeting before next summer with the goal of presenting a draft of the form indenture and commentary to the Board before the 1997 Bond Attorneys' Workshop.

Upon motion of Mr. McBride, seconded by Director Gardner, Kenneth R. Artin, of Cobb, Cole & Bell, Daytona Beach, was unanimously approved as NABL'S representative to the GASAC.

Susan Weeks
Secretary

SHARED TAX OBSERVATIONS

We seem to be in the eye of the hurricane, having passed through the storm of final and proposed regulations, revenue procedures, court decisions, federal legislation and private letter rulings referenced in my September column, and now await a second tempest of final regulations regarding investment in open market Treasury securities (FI 28-96, hearing on October 24, 1996), final regulations regarding entity classification (PS 43-95, hearing on August 21, 1996) and final regulations regarding private activity bonds (FI 72-88, hearing on June 8, 1995), as well as a revision (we hope) of Revenue Procedure 96-41 (relating to the fair market value of open market federal securities for advance refunding escrows).

Notice 96-49. In response to concerns in the bond community regarding Revenue Procedure 96-41, the Internal Revenue Service has issued Notice 96-49, requesting comment on the Revenue Procedure, extending the deadline for requesting a closing agreement under the Revenue Procedure from July 19, 1997, to a date "no earlier than one year from the date the Service publishes further guidance relating to the duration of the closing agreement program," and scheduling a public hearing for January 15, 1997.

In requesting comments, the Service invites proposals on (i) the time period for requests for closing agreements, (ii) procedures for determining spot price, (iii) other methods for determining the closing agreement amount that would be easier to apply than spot prices, and (iv) whether alternative programs are warranted for either all issues or for particular types of issues such as small issues or bonds issued before August 16, 1986.

There is no indication in the Notice that the Service is considering withdrawing, or making prospective, the closing agreement program established by Revenue Procedure 96-41.

Final SLGS Regulations. Greatly ameliorating future difficulties that may be caused by investment in open market securities, the Bureau of the Public Debt has issued final SLGS regulations that are flexible, easy to apply and generally economic. The regulations provide for time deposit (fixed rate) SLGS having maturities of 30 days to 40 years (except that maturities in excess of 30 years are subject to the 30 year rate) and demand deposit (variable rate) SLGS consisting of one-day rolling maturities. A summary of the regulations may be obtained from NABL's National Office.

Among others, the following points are significant:

- The yield of both time deposit and demand deposit SLGS is established as 5 basis points below the current federal borrowing rate (formerly, the yield of SLGS was established as 12.5 basis points below that rate).

- The order period for time deposit SLGS is established as 5 days before the desired issue date for orders of $10 million or less, and 7 days before the desired issued date for orders of more than $10 million (formerly, the order period in both cases was 15 days).

- Time deposit SLGS may be ordered in any amount of $1,000 or larger divisible by $1 and demand deposit SLGS may be ordered in any amount of $1,000 or larger (whether or not divisible by $1).

- The "all or none" rule is eliminated, with the result that an investment portfolio may consist of SLGS and other investments, such as open market federal securities, float agreements, fund deposits or guaranteed investment contracts.

- Investment in time deposit SLGS is not limited to yield-restricted gross proceeds and investment in demand deposit SLGS is not limited to gross proceeds subject to rebate, with the result that non-yield-restricted, non-rebate-required amounts such as, for example, construction funds, sinking funds, reserve funds and similar funds, may be invested in either time deposit SLGS or demand deposit SLGS or both.

- There are no restrictions against investment with amounts arising from redemption of other SLGS (except certain SLGS ordered before 1976) or from sale or redemption of open market federal securities.

- There are no substantive issuer certifications other than that the owner must be a government body and the subscriber must be authorized.

The final regulations differ (except for grammatical references) from the proposed regulations in the following eight respects:

(1) Conditions of Revocation. The modifications made by the proposed regulations regarding revocation have been deleted. The provisions of the original regulations have been restored. Thus, revocation of SLGS is permitted if a security is issued on the basis of an improper certification or other misrepresentation by the subscriber (excluding inadvertent errors) but only if the Secretary of the Treasury deems such action to be in the public interest.

(2) Permitted Funds. The provisions relating to permitted funds for investments have been clarified. Under the final regulations, SLGS may be purchased with the gross proceeds of tax-exempt bonds or with "any other amounts which assist an issuer of tax-exempt bonds in complying with applicable provisions of the Internal Revenue Code relating to such tax exemption."

(3) Penalty Permitted to be Imposed on Conduit Borrower. Under former regulations, if a government body failed to make settlement on, or to cancel, a subscription once submitted, the government body was ineligible to subscribe for SLGS for a period of six months. The final regulations permit the government body to shift this penalty to a conduit borrower that is the actual party failing to make settlement.

(4) Maximum Maturity. The final regulations permit a maximum maturity of 40 (rather than 30) years and, in that case, the maximum available rate for the 40-year SLGS is the 30-year rate.

(5) SLGS Interest Rate Locations. The final regulations provide that interest rates are available on the Internet (as well as existing locations). The Internet address is ftp://ftp.publicdebt.treas.gov/secrate/txt. (P.S.: By cross-link, they are also available at http://www.jhhw.com under "Federal Tax Matters.")

(6) "Locking In" of SLGS Rates. In response to concerns that interest rate unpredictability arises from the "receipt date" rule (under which the subscription is effective on receipt by the Bureau, rather than on the postmark date where a subscription is mailed), the final regulations provide that SLGS rate may be locked in on the date of the postmark if the subscription is actually received on or before the five/seven day notice period specified in the regulations.

(7) Modification of Initial Subscription. The final regulations permit the aggregate amount of a SLGS initial subscription to be changed in the final subscription by no more than the greater of either $10 million or ten percent above or below the principal amount specified in the initial subscription. (The $10 million reference was not included in the proposed regulations.)

(8) Redemption Value Formula. For SLGS subscribed for on or after October 28, 1996, the redemption value formula is modified so as to permit either premium or discount to be paid to the issuer in the case of early redemption.

In all, when compared with the direct and indirect costs and cumbersome procedures associated with investment in open market federal securities, the costs and procedures associated with investment in SLGS are beneficial to issuers. In most cases, there should be no need to invest in open market federal securities or other investments that create market-driven arbitrage questions. Investment in SLGS thus becomes more than a mere investment -- it creates an insurance policy against many instances of perceived arbitrage abuse.

Private Letter Rulings. During this relatively calm period, the private letter rulings referenced below have been released to the public.

Ramifications of unconstitutional waste control ordinance. Private letter rulings 9644020 and 9644021 (July 19, 1996) conclude that, where federal court cases holding unconstitutional waste flow control ordinances caused an inability to charge tipping fees at the level needed to satisfy rate covenants, the sale of governmentally-owned waste-to-energy facilities (financed with private activity bonds) to a private company is permitted if state volume cap is obtained for year of sale (not issuance). Section 150(b)(4) change of use ramifica tions (loss of interest deduction, etc.) do not apply and, in fact, the private company is not bound by its previous waiver of depreciation and investment tax credit. Under the facts of the case, the sale was proposed to occur before construction commenced.

Reimbursement and refunding. First, private letter ruling 9644019 (July 19, 1996) holds that an obligation of a city-controlled authority to the city is not an obligation that may be refunded; it is a mere bookkeeping entry. Second, the ruling holds that where a reimbursement resolution is adopted after the first bonds are issued but before cost overruns occur and especially before amounts are advanced to pay those overruns, then the proceeds of the second bond issue for the same project may be used to reimburse expenditures made from advances. This very practical ruling is likely to be helpful on both points in answering fairly common questions posed by issuers.

Output contract. Private letter ruling 9633023 (May 16, 1996) holds that private activity bond status does not arise by reason of an output contract with "B" where B pays for all electricity produced by a bond-financed power facility and sells the power to an intergovernmental entity for use by that entity's municipal electric utility members. More than 90 percent of the cumulative firm energy over the term of the bonds is allocated to those members. It is notable that the power plant is located on a site leased from a private company and uses steam produced as a result of the company's operations.

Local furnishing. Private letter ruling 9635010 (May 22, 1996) holds that the "two-county rule" of Internal Revenue Code section 142(f)(1) is not violated by reason of a gas company's emergency transfers of gas outside of the permitted city and contiguous county service area or by reason of gas brokerage arrangements outside of the service area. The ruling notes that no tax-exempt bond proceeds have been spent for distribution or storage facilities relating to gas supplied outside of the service area.

> *"On behalf of" bonds*. Private letter ruling 9632006 (May 9, 1996) grants "on behalf of" status, under the guidelines of Revenue Ruling 57-187, to a nonprofit electric cooperative formed by political subdivisions and exempt under Internal Revenue Code section 501(c)(12). The bonds are to be issued to finance a transmission line pursuant to the terms of a joint powers agreement.
>
> *Six-month expenditure exception to rebate requirement*. Private letter ruling 9634001 (July 24, 1996) denies the six-month expenditure exception to industrial development bonds issued for a company's facility, where the company completed construction within six months of issuance, but delayed disbursement for an additional four months.
>
> *Change of use*. Private letter ruling 9639052 (June 19, 1996) holds that the tax-exemption of interest on bonds is not adversely affected where the bonds, originally issued for certain health-care facilities, were later defeased with taxable bonds (issued prior to Revenue Procedure 93-17) under an arrangement providing for redemption on their first par call date (not first call date) and where health care services and products are to be offered by taxable subsidiaries of a nonprofit corporation through the bond-financed facilities.
>
> *Volume cap*. Private letter rulings 9631020 (May 3, 1996) and 9634022 (May 24, 1996) permit relief for failure to file Form 8328 (carryforward).

Audit Guidance. On September 23, 1996, the Internal Revenue Service issued Chapter L of the 1996 (fiscal year 1997) Exempt Organizations Continuing Professional Education Technical Instruction Program Textbook. This Chapter, directed to IRS field agents, explains to readers how to analyze an advance refunding transaction. Hypothetical facts are presented and each arbitrage rule and advance refunding restriction is applied to those facts. The example "does not illustrate an abusive transaction." The example is informative for inexperienced bond counsel as well as novice field agents.

Taxpayer Bill of Rights 2. This legislation (P.L. 104-168) which, for the most part, does not relate directly to tax-exempt bonds, amends Internal Revenue Code section 7805(b) to prohibit retroactive application of temporary, proposed or final regulations. This sensible rule contains an exception, however, for regulations designed "to prevent abuse" and does not apply to regulations "relating to internal Treasury Department policies, practices, or procedures." The provision also states that the Treasury may issue retroactive regulations to correct procedural defects and that the Treasury may provide that taxpayers may elect to apply a temporary or proposed regulation retroactively.

As autumn lengthens, and the seas are calm, prepare your intellect and organize your dec(s)ks for the move out of the eye of the hurricane. Year-end or not, it is likely that the next six months will bring arbitrage and (perhaps?) private activity bond tempests.

Sharon Stanton White

November 17, 1996

Try NABL's home page on the Web:
http://www.nabl.org/nabl
or
http://www.qadas.com/nabl

ETHICAL RUMINATIONS

Several years ago, as a prospective member of a Washington Workshop panel dealing with opinion and ethical issues, I was asked by the panel chair to prepare material outlining and discussing various issues and questions that might prove useful for discussion purposes during the panel session. I submitted this material in a chatty, stream of consciousness format. While some of the material was used as a basis for discussions at that Workshop, the material itself was never distributed, published or otherwise made available to the membership of the Association.

Thinking that some, if not all, of this material might possibly be challenging and thought-provoking reading for the membership of the Association, I submitted it to the Editor of *The Quarterly Newsletter* some time ago, inquiring as to whether the Editor thought it worthy of publication. Upon receiving a dollop of encouragement, I determined to edit the material a bit, and what follows is the first of these opinions/ethical musings on my part.*

I

One question I posed was whether bond counsel have an "automatic" conflict of sorts insofar as the federal tax covenants in bond documents are concerned, particularly in instances where they identify the issuer as their sole client. I well remember that when the profession was first wrestling with this entire matter of tax covenants after the enactment of the 1986 tax law, the question arose in my mind whether the issuer should (a) simply agree to take all lawful actions necessary under the provisions of the federal income tax law to preserve the exemption of the interest on the bonds from federal income taxation, or (b) agree to take all lawful action necessary under the provisions of the federal income tax law, **as it exists on the issuance date**, to preserve the exemption of the interest on the bonds from federal income taxation. This difference in the scope of the tax covenant may not be purely hypothetical.

Suppose, for example, that after the date of issuance of certain bonds, the Internal Revenue Code is changed to provide that the interest on both previously issued and subsequently issued state and local government bonds will be excludable from gross income for federal income tax purposes only if the issuer annually remits to the federal government a "user fee" equal to 15% of the annual interest paid to the holders of those bonds. Anticipating anguished cries about the improbability and injustice of this, let me make one observation and ask one question. We all know that the federal income tax-free nature of the interest on state and local government bonds is now (in view of the *South Carolina* case) nothing but a gift from the Feds, to be dispensed or withdrawn at their pleasure. And is there much difference in economic principle between (a) the loss suffered by the holder of a municipal bond as a result of the subjection of the interest on that bond to federal income taxation, and (b) the loss suffered by the holder of a corporate debt obligation as a result of an increase in federal income tax rates?

One may argue that the scenario I paint is so ridiculously far-fetched that we need not even think about it. I shall not tarry here except to note that there may be little or no limit to the extent to which the President and the Congress will go in their endless quest to get more money for their pet projects without having to commit political suicide and enact a general increase in tax rates. Further, and perhaps more to the point, the effective imposition on state and local governments that have issued bonds, as a condition to the continued exemption of the interest thereon from federal income taxation, of burdens somewhat less

---

* I am grateful to Michael A. Budin (of Wolf, Block, Schorr and Solis-Cohen of Philadelphia), who has ably chaired the Association's Opinions Committee for the last several years, for his patience and tolerance in letting me "bounce off his head" some of the thoughts and views expressed in this piece. All such thoughts and views are, of course, solely mine. My consideration of them has, however, benefitted from Michael's input.

draconian than the posited 15% user fee or surcharge may perhaps be not quite so far-fetched. Take, for example, the "change of use regulations," which while clearly (in my view) representing a change in law were effected administratively rather than legislatively. If, fifteen or twenty years ago, someone had asked me if a federal income tax exemption question concerning a "plain vanilla" general obligation local government school bond issue could plausibly be raised on account of the fact that, some twenty years after the bonds were issued, the issuer (which, on the date of issue, reasonably expected to use the school as such for at least the next 50 years) sold the school building to a for-profit entity for use by it as a child-care facility and learning center, I would have unhesitatingly answered "no." That demonstrates not only how little I knew, but also the extent to which we (and perhaps the municipal market) have become inured to an increasingly intrusive Federal role in what was once perceived to be a quintessential state and local government process.

Now, getting back to the point in question as to the appropriate scope of the (post-1986) tax covenant in bond documents, I initially included the narrow "as such laws now exist" tax covenant language in several bond ordinances adopted shortly after the 1986 tax law became effective, making certain that the related bond opinion and official statement included disclosure appropriate to the document of the narrower nature of that language and the consequences resulting from its use. I know from observation that some other bond counsel also used substantially the same narrower version of the tax covenant (and some still do), but it became reasonably clear that many — if not to say most — were not doing so. I later "fell into line," so-to-speak, and ceased using the narrower language in "my" documents. But I continue to ask myself the question whether I am being fair to issuers if I do not explicitly point out to them the perhaps somewhat remote but nonetheless potentially adverse consequences to them resulting from the use of the broader language. Underwriters did — certainly in the early years after the 1986 tax law change — accept the narrower "as it now exists" language without a murmur, at least permitting an inference that the broader unconditional language was not absolutely necessary to the marketing of the bonds.

This entire question came to the fore again this year during the deliberations of the Opinions Committee on revisions to the Model Bond Opinion Project and in various sessions at the 1996 Bond Attorneys' Workshop dealing with opinion and ethical issues. One recent draft of the Model Bond Opinion Project noted the alternative ("narrow" and "broad") approaches to the tax covenant and suggested that bond counsel, if they chose to use the narrower language, should consider disclosing this fact in the official statement and in the opinion, as well as disclosing in the official statement the consequences of the use of the narrower language.

There developed, at least during one session at the 1996 Workshop, a lively discussion on this entire issue, during which it appeared that some lawyers, perhaps more than I thought, were continuing to use the narrower version of the tax covenant language. It did seem at least possible that some who had opted to use the narrow version of the covenant were doing so, not by using language such as that summarized in the third paragraph above, but rather somewhat more obliquely (though no less effectively). Those following this approach apparently first defined the term "Internal Revenue Code," in the definitional article of the bond ordinance, as "the Internal Revenue Code of 1986, as it now exists." They then cast the covenant (in the article or section of the bond ordinance dealing with federal tax matters) something like this:

> "The Issuer agrees to take all lawful action necessary under the Internal Revenue Code to preserve the exclusion of the interest on the bonds from

gross income for federal income tax purposes."*

The only question that was mooted concerning the use of this somewhat more oblique "version" of the narrower tax covenant was whether it may somewhat blur disclosure of the narrower scope of the covenant and the resulting potentially adverse consequences to the holders of the bonds.

The disclosure issue is, in this connection, not unimportant. Suppose, for example, that there is in an Official Statement respecting certain previously issued bonds something less than full disclosure of the narrower character of the issuer's tax covenant and of the possible consequences resulting from the use of this "version" of the covenant. Suppose also that Congress later imposes on issuers (as a condition to continued tax exemption) a new and burdensome requirement with which the issuer chooses — consistent with the "right" preserved for it by its bond counsel by virtue of the use in the bond ordinance of the narrow version of the federal tax covenant — not to comply. Further, suppose that, as a consequence, the interest on bonds becomes taxable. Will the issuer (or, for that matter, counsel for the issuer, whether bond counsel, disclosure counsel or other issuer counsel) then be more likely to be exposed to securities law claims by bondholders? Perhaps bond counsel should consider conferring with their litigation and securities law colleagues on this question before rejecting fuller disclosure out of hand. If fuller disclosure has no impact on the price purchasers will pay, there is no reason not to disclose. And if it does have an impact, then the case for fuller disclosure seems fairly clear. Bond counsel should of course protect the interests of their issuer-client, but — if that involves casting the federal tax covenant in form not obligating the issuer to comply with future Code requirements — the related question of fair disclosure to investors should not be overlooked. Nor, for that matter, should the function of fuller disclosure in protecting the interests of bond counsel's issuer-client in the context of securities law liability be overlooked.

II

Now, to take another side of this coin, we all remember that the profession in the 1970's and the early 1980's crafted all sorts of draconian tax calls, taxability penalties, etc. (many of which could be "triggered" by investors), applicable to exempt small issues, pollution control issues and other conduit or IDB-type issues where both institutional lenders in privately-placed transactions and underwriters in public offerings had access to and routinely utilized highly skilled lawyers and other tax advisers. These lenders, underwriters and their advisors of course did all this with a view toward protecting their investor clients from the consequences of borrower noncompliance with post-issuance and other federal tax requirements — and, in some cases, from statutory and other changes in federal tax laws. Why, then, was it decided in 1986 and 1987 (and by whom) that, in the case of general market municipals, no such investor-mandated or investor-triggered tax calls or taxability penalty provisions should be utilized and that investors should rely solely on agreements of issuers (many of which were relatively unsophisticated and had limited resources) to comply with applicable post-issuance and other federal tax requirements?

One could also ask why, in the case of post-1986 general market issues that incorporated the narrow, more restricted version of the federal tax covenant, was it determined that investors should also bear the risk of retroactive changes in statute law that would adversely affect tax exemption (which, in at least **some** pre-1986 conduit or IDB-

* I forego any discussion of the inclusion of post-issuance regulatory changes within the scope of the federal tax covenant except to note that some utilizing the narrower version of the covenant apparently make it clear that issuers must comply with post-issuance regulatory — as distinguished from statutory — changes in the tax law if noncompliance would adversely affect tax exemption. My failure to discuss this is not to suggest that it is not important, but only that it is a bit technical to deal with in a piece like this.

type issues, they did **not** bear)? Should not underwriter's counsel, or bond counsel who identified the underwriter as their client, have fought tooth-and-nail to pull the whole panoply of complex, investor-triggered IDB taxability formulas into these general market issues? Frankly, I am rather glad that they did not, since some of the more draconian provisions of this genre seemed to me to represent significant over-kill. The question recurs, though, to what extent should the official statement relating to bonds, when the tax covenant is one of the narrower type, clearly note the fact that the investors are being asked to assume the entire risk of a change in statute law — a risk that (as noted above) they were, in certain pre-1986 private activity bond financings, not always asked to assume?

III

There are areas other than those dealing with opinions that, it seems to me, present potential problems of a quasi-ethical nature to bond counsel in instances where the **issuer** is their client. One that readily comes to mind is in the negotiation of early call or redemption provisions and utility bond rate covenants, areas where the interests of the issuer and the underwriter may diverge rather dramatically.

There is of course always a certain tension between marketability concerns, on the one hand, and maximum issuer flexibility and freedom, on the other, but the so-called "golden rule" is not always the only response to this tension. I remember working, some years ago, with an NYSE-listed company and a prominent New York investment banking house on a conduit or IDB-type issue. The bankers were rather aggressively insisting on an optional call no shorter than ten years. The corporate borrower pointed out, correctly in my opinion, that there was nothing magic in a ten-year call, that a financing with a shorter call was clearly "doable" and that it was purely and simply a question of price. Stated differently, the borrower recognized that the cost of the money to it would doubtless be somewhat higher with a shorter call, but insisted that it — and not the underwriter — should decide whether the increased flexibility, etc., resulting from a short call was worth the additional cost.

All this is not to suggest that bond counsel are financial advisers. They are not. They can, however, point out that bond provisions affording shorter call options and preserving flexibility to the issuer in other substantive areas may be "doable" at a price, although bond counsel of course are not in a position to quantify that price. My point is that underwriters often present various transaction details of this general character as if they were writ in stone, when — if the truth be known — adhering to the conventional wisdom is not infrequently mainly a question of ease of marketing. I cannot emphasize too strongly that particularly in the case of a negotiated underwriting, there is (and should be) great tension between the issuer/borrower, on the one hand, and the underwriter, on the other, and that the underwriter-promoted concept that all the participants **and their lawyers** are on the same "team" is at best somewhat misleading and at worst insidiously deceptive and can get lawyers in a peck of trouble. I suggest, if you have a serious question about this point, that you ask one of your litigation colleagues how he or she would explain to a jury that the borrower's lawyers in a bank loan situation considered that they were on the same team as the bank and its lawyers.

IV

I want to say a word about counsel serving both as underwriter's counsel and bond counsel — in those instances where counsel have **not** identified the underwriter as their sole client. I first note, in this connection, that the currently prevailing view is that there is no impropriety whatever — from an ethical standpoint — in the acceptance by one lawyer of both roles where counsel makes it crystal clear that he or she **represents** no one in the transaction — either aggressively or passively — other than the underwriter. And, if it be assumed that there is no fundamental inconsistency in bond counsel who have identified the issuer as their client also acting as underwriter's counsel, some consider — though this view is certainly not universal — that there is no ethical impropriety in the acceptance by that counsel of the representation of both the issuer and the underwriter, provided of course that both consent after full disclosure of the dual representation and of its potentially adverse effect on each "client." The extent to which counsel acting in such a dual capacity may, consistent with ethical rules, accept a role in the negotiation of the bond purchase contract and in other adversarial areas is, however, subject to even more doubt.

Putting ethical considerations aside, there is at least one reason why, as a practical matter, it may often be undesirable for one lawyer to perform both roles, even if all concerned consent. Particularly under present circumstances, one of the potentially more important roles that can be played by competent and experienced underwriter's counsel in a public finance transaction may be that of "vetting" bond counsel's opinion, both as to validity and as to tax exemption.* I do not suggest that underwriter's counsel necessarily must examine into or concur with every aspect of the bond opinion, but there may, I submit, come some point at which competent and responsible underwriter's counsel will feel compelled to call to the attention of their underwriter client what they consider to be fundamental or significant infirmities in the bond opinion and to insist on adequate disclosure of those infirmities and the resulting risks, or perhaps to withdraw (whether noisily or otherwise) from the representation if those disclosures are not made. It is difficult if not impossible to imagine any of this taking place if one law firm is performing the role of both bond counsel and underwriter's counsel.

One thing that, in this connection, continues to amaze me is that some lawyers still view the preparation of an official statement by bond counsel or the assumption by them of a leading role in that process to be tacit recognition that they are acting as underwriter's counsel. We must remember that it is the issuer who, at least in law, has the primary disclosure responsibility and that there is absolutely no inconsistency in bond counsel who have identified the issuer as their client assuming a leading role in the disclosure process.

V

The preceding thoughts mostly represent some musings on my part concerning certain issues and questions that have occurred to me over the years. Nothing that I have said in this piece is meant to suggest that I have all the answers (and some may consider that I have few if any of them). Indeed, some of the thoughts in this piece may be considered as those of a so-called "devil's advocate," submitted in an effort to stimulate thoughtful consideration and discussion by bond counsel.

One further word, and I shall cease. Many if not most of the various questions posed above are evolving ones, as to which responses that may have been fully appropriate last year or last month may now be of doubtful appropriateness. Thus, not only is the federal tax area infinitely more complicated, in a technical sense, than it was even several years ago, but it is also being administered more aggressively than in the past. Then, too, the small, closely-knit, collegial and highly conservative fraternity of bond counsel of the period prior to the 1980's has been replaced by a much larger, more heterogeneous and more competitive group

---

* This is not an entirely new role for underwriter's counsel. Thus, *e.g.*, in the case of certain private activity bonds, experienced underwriter's counsel typically will ask to examine, among other bond documents, proceedings relating to the so-called "TEFRA hearing." I for one take no exception to underwriter's counsel playing this role. I need all the help I can get, although I will confess a certain irritation on one occasion when underwriter's counsel of limited experience strongly suggested (and that's putting it mildly) that the subject of a sentence in one of "my" documents mandated a singular (or was it a plural) verb and retreated only after I had produced an excerpt from *Fowler* to the contrary!

with considerably differing levels of experience and often significantly varying approaches to the practice. These factors, among others, suggest, *e.g.*, the possible usefulness of a modest "opinion-vetting" role for underwriter's counsel in public financing transactions, a role that, ten years or so ago, would have been considered of limited utility, if not totally superfluous. And who, several years ago, would have thought various conditions and circumstances in the areas of client identification and the like would change to the extent to suggest the desirability of engagement letters in many public financing transactions? There are many eternal verities in ethical and related areas. But facts and circumstances are subject to change, and we should bear in mind that yesterday's answers to today's questions may not always be the proper ones and that what may several years ago have been entirely appropriate and prevailing professional practice may not necessarily be such today.

Joseph H. Johnson, Jr.
Lange, Simpson, Robinson & Somerville

VOICE FROM THE PAST

Editor's Note: This is the first of a series of occasional columns by Manly W. Mumford, who served as the Association's second President. Mr. Mumford practiced with Chapman and Cutler from 1950 to 1990.

When I started practicing law in 1950, most of the municipal bonds being issued were school bonds to build the facilities to educate the baby boomers. These were general obligation bonds, approved at elections by the qualified voters, and were required to be sold at advertised public sale. We had to review the proceedings calling the election, canvassing the votes, directing publication of the notice of sale, and authorizing and selling the bonds, as well as one of the ballots printed for use at the election and publishers' affidavits with newspaper clippings attached showing publication of the notice of election and of the notice of sale. We also had a schedule of fees. We charged $75 for approving a small issue (under $35,000); for large issues (over $600,000) we charged sixty cents per $1,000 of principal amount. If we prepared the proceedings we charged an extra $50. I objected to this practice because when some of the local lawyers with whom we worked prepared the proceedings it took me much more time correcting them than it would have taken for me to prepare them correctly in the first place.

The amount of different kinds of law you had to know in those days was considerably greater in some respects than in the more recent days of unvoted revenue bonds sold at negotiated sales. We had to know the quirks in each State where we worked pertaining to counting the number of days between the first publication of a notice and the date of the election or sale, and whether, under the law of the State involved, a publication one day late was fatal. We had to know how to compute debt limits, and whether money in a sinking fund could be counted as an offset against the amount of outstanding debt in determining how much new debt the issuer could incur (no in Georgia, yes almost everywhere else). We had to know whether a notice published on Sunday was effective. And, most arcanely, we had to know who was qualified to vote in a bond election.

In fourteen States the right to vote in a bond election was limited to taxpayers; in Nevada and Wyoming they had one election for taxpayers only and another, at the same time, for all qualified electors. There was always the question of whether the spouse of a taxpayer was a taxpayer; we generally hid behind the official records -- if a person's name was on the tax roll he or she was a taxpayer, otherwise not. In Louisiana the vote was not only limited to taxpayers, but each had to write on his ballot both his name and the amount of his taxable property in the jurisdiction; the election had to carry in both number and amount. In Texas one merely had to have "rendered his property for taxation" to vote, whether he actually paid a tax or not.

Nowadays we are likely to think of the taxpayer requirement as a form of racial discrimination, but I doubt that it was originally intended that way. In the southern and western States it was intended to discriminate against those whom the railroads would cause to move to a town just long enough to cast their votes for railroad aid bonds and then move on. In New York and New England it was probably left over from colonial days when only male property owners were citizens. In any event, the practice was discontinued when the U.S. Supreme Court held that such restrictions violated the Equal Protection Clause of the 14th Amendment in the cases of *Cipriano v. City of Houma*, 395 U.S. 701 (1969), *Kolodzeijski v. City of Phoenix*, 399 U.S. 204 (1970) and *Hill v. Stone*, 421 U.S. 289 (1975). I wrote *amicus curiae* briefs in each of those cases and got other bond lawyers who worked in States with taxpayer qualifications to join me in submitting them. I also got the chief legal officer of a State or city to sign, too, because these signatures create exceptions to the rule that such briefs are not favored in the absence of approval of all parties to the litigation. The purpose of these briefs was to make sure that the Court did not say anything that would make outstanding bonds illegal, but I have sometimes wondered how much my pointing out to the Court that there were only 14 or 16 States with such requirements had to do with the decision to hold them unconstitutional.

Thus all that knowledge about the intricacies of complying with taxpayer requirements for voting in bond elections was made obsolete. I recall one Louisiana lawyer lamenting about all the horrible things that would happen when everyone could vote in such elections; he was only partly mollified when I pointed out that Mississippi did not have such a qualification and nothing much bad seemed to have resulted from that State's liberality.

It's nice to think of the old days as simpler and more pleasant than current times. It used to be that our opinion would be double spaced yet occupy only one page. It expressed the view that the bonds were valid and legally binding and payable from taxes to be levied on all taxable property in the jurisdiction without limitation as to rate or amount. Period. No tax language was necessary because all municipal bonds were exempt and everyone knew it. No bankruptcy exceptions were invoked because our opinion was that the bonds were legal, not that they were collectable. No SEC language was used because we never looked at whatever meager information was sent to investors. We did require evidence that bonds were supported by a source of payment that would make default unlikely, not because we considered it our duty to the bondholders but because we did not want to be associated with bad bonds; the fact that we examined such evidence was not mentioned in our opinion; there just *wasn't* any opinion if the evidence was not satisfactory. Yet I have found a remedy for this nostalgia. I just try to recall the last time my bill for approving a bond issue was $75.

Manly W. Mumford

NAMING RIGHTS ... AND WRONGS

In this week's *Tax Notes*' letters to the editor appears a suggestion that Congress could raise revenue by selling the naming rights to various pieces of legislation. I believe that this could certainly be extended to our sector of the practice.

For example, the popular proposed changes to the management contract rules would probably be a piece on which law firms or even governmental issuers would want to bid. Every time someone talked about the new management contract rules, they would refer to the "Kutak Rock Management Contract Rules." Similarly, the first-time farmer regulations, if ever released, could be the "Colorado Agricultural Authority Rules."

Nor would this be limited to new law. Selling the names to old laws could confer a one-time windfall on the federal government. How about the "Chapman and Cutler Window Refunding Rule" or the "Charlie Henck Solid Waste Regulations?" They would not all have to be offered at the same time. Maybe, like Disney movies, the IRS could sell one a year or whenever it was really strapped for cash.

But the real money would be in *not* being named in a regulation or statute. How much would you pay *not* to be associated with the 1989 arbitrage regulations or, similarly, the 1986 Tax Act rebate provisions? I speculate it would be lots. And for the really vicious, one could, I suppose, buy a particularly hated law in the name of a competitor. The more worthy the competitor, the more heinous would be the statute purchased on its behalf. It would be much easier to compete for state housing agency business if the Mortgage Subsidy Bond Tax Act were renamed the Hawkins Delafield Housing Act.

The *Tax Notes* letter goes on to suggest that not-for-profits might jeopardize their exemption by participating in the naming rights game. A similar problem could arise in the event that proceeds of tax-exempt bonds were used to finance their purchase. Tax lawyers would wrestle with the percentage of use of a name in a private trade or business, making ownership of the $40 million cap rule a private activity bond problem, while leaving the anti-skybox and liquor store provisions protected (by definition they cannot be financed with private activity bonds).

Lastly, consider the arbitrage implications of all of this. Would such names be considered "investment-type property?" How could one possibly measure their rate of return? Could one purchase additional names from the federal government as an alternative to yield reduction payments or rebate? As law firm names change, would a transferred proceeds rule apply to impute yield to the new firm?

Well, all this is pretty heady stuff and no doubt we would need regulations to implement it. Of course, the regs regarding naming regs should also themselves be eligible for naming.

To start the ball rolling, who'll make the first bid for the Willis Ritter Antiabuse Regulation of 1997? "Yes, Willis, I'll put you down for two bucks."

With all necessary apologies, I remain

As Wicked As Ever,

David A. Caprera
Kutak Rock
November 15, 1996

NATIONAL SECURITIES MARKETS IMPROVEMENT ACT OF 1996 AND MUNICIPAL SECURITIES

SUMMARY

A recent revision to the federal securities laws preempts state securities regulation of the merits of a municipal securities offering except in the issuer's home state, but preserves the ability for state securities regulators to require the payment of any registration or filing fee currently due.

LAW

The National Securities Markets Improvements Act of 1996 (the "Improvement Act") was signed into law by President Clinton on October 11, 1996. Among other regulatory changes to federal securities laws, it provides for preemption of registration and merit review provisions of state securities laws with regard to specified types of securities. Such securities are described in the Improvement Act as "Covered Securities."[1] The list of Covered Securities includes municipal bonds except with respect to the issuer's home state.[2]

However, the Improvement Act also provides that the state regulators should be able to collect the same fees at the same time they would have before with respect to Covered Securities (with the exception of securities listed on the NYSE, AMEX and NASDAQ NM). Therefore, even though a full registration or exemption filing would be preempted, the fee for that filing and a cover letter explaining to the state regulator why the check is enclosed would need to be sent to the state which had required a fee before. If the fee is not sent, then the state securities regulators could require registration of the offering or suspend the offer and sale of the municipal securities in the state.[3]

EFFECT

As a practical matter, the Improvement Act should not affect the steps underwriter's counsel in municipal securities offerings should take in connection with the state securities laws, including reference to *Blue Sky Regulation of Municipal Securities* recently published by the Association.

First, home state provisions would still be applicable (*i.e.*, New York issuers will still be required to make the real estate filing under New York State law typically required for bonds payable from or secured by an interest in real estate).

Second, most types of municipal securities are already exempt from state blue sky law registration requirements in most jurisdictions. However, the municipal securities registration exemption in approximately fifteen states is qualified or not applicable to private activity bonds. The exemption under state law may also not be available for bonds with certain additional extra securities attached. Therefore, the Improvement Act would seem to provide some relief from blue sky laws for private activity bonds or bonds payable from a commercial or industrial source.

However, because the Improvement Act also provides for preservation of fees collected by the various state securities regulators, consideration of state blue sky law requirements will still be necessary under the provisions of the Improvement Act. Before an offering can commence, it will arguably still be necessary to determine which state securities laws would have required a fee for registration or exemption for the municipal securities as of the date of the enactment of the Improvement Act (*i.e.*, private activity bond provisions or New York real estate security provisions). Underwriter's counsel should then inform the underwriter which states would require such a fee and ask whether the underwriter wants to pay. In addition, any home state applications or filings would be made in the same manner as before. Should the underwriter choose to pay the fee, if any, in non-home states, underwriter's counsel would send the requisite fee with a covering letter explaining that such a fee would have been due to the state for a registration or exemption filing preempted by the Improvement Act. Should the underwriter choose not to pay the fee, underwriter's counsel should reflect in the Blue Sky Memorandum that offers and sales should be restricted to institutional purchasers in those states because the fee preserved under the Improvement Act was not paid.

The Improvement Act may provide an alternative way to qualify municipal securities for offer and sale to the public. Because only the fee payment provision is preserved for Covered Securities and not merit review, underwriter's counsel arguably now have the option of merely paying a registration fee for municipal securities in states where merit review would have precluded such registration before. For instance, Iowa, Maine, Minnesota, New Hampshire, Texas, Washington and Wisconsin, which restrict exemptions for certain municipal securities, and were not places where securities registration was often attempted because of merit review requirements, could be qualified for offers and sales by merely sending a cover letter and a fee. If a municipal issuer is in default and does not wish to disclose the fact or restrict offers and sales to institutions, the securities could arguably be qualified for offer and sale to individual investors in Florida and New Jersey by paying the filing fee of $1,000.00 in each state.

Additionally, practitioners should bear in mind that not-for-profit issuers which rely on the exemption from the Securities Act of 1933 found in Section 3(a)(4) are not preempted by the Improvement Act. Therefore, a hospital, student loan entity or other not-for-profit issuer issuing its own debt securities must comply with state blue sky laws in the same manner as before.

Martin R. Miller
Orrick, Herrington
& Sutcliffe LLP

New York

---

1. The Improvement Act modifies Section 18 of the Securities Act of 1933. Specifically, it now provides:

   "Sec. 18. EXEMPTION FROM STATE REGULATION OF SECURITIES OFFERINGS:

   (a) SCOPE OF EXEMPTION.)Except as otherwise provided in this section, no law, rule, regulation, or order, or other administrative action of any State or any political subdivision thereof -

   "(1) requiring, or with respect to, registration or qualification of securities, or registration or qualification of securities transactions, shall directly or indirectly apply to a security that -

"(A) is a covered security; or

"(B) will be a covered security upon completion of the transaction;"

2. Sec. 18 "(b) COVERED SECURITIES.) For purposes of this section, the following are covered securities:

(4) EXEMPTION IN CONNECTION WITH CERTAIN EXEMPT OFFERINGS.)A security is a covered security with respect to a transaction that is exempt from registration under this title pursuant to)

(C) section 3(a), other than the offer or sale of security that is exempt from such registration pursuant to paragraph (4) or (11) of such section, except that a municipal security that is exempt from such registration pursuant to paragraph (2) of such section is not a covered security with respect to the offer or sale of such security in the State in which the issuer of such security is located."

3. Sec. 18(c)(2)(B), (C) and (3):

"(c) PRESERVATION OF AUTHORITY.)

(2) PRESERVATION OF FILING REQUIREMENTS.)

"(B) PRESERVATION OF FEES.)

"(i) IN GENERAL.) Until otherwise provided by law, rule, regulation, or order, or other administrative action of any State, or any political subdivision thereof, adopted after the date of enactment of the Capital Markets Efficiency Act of 1996, filing or registration fees with respect to securities or securities transactions shall continue to be collected in amounts determined pursuant to State law as in effect on the day before such date.

"(ii) SCHEDULE)the fees required by this subparagraph shall be paid, and all necessary supporting data on sales or offers for sales required under subparagraph (A), shall be reported on the same schedule as would have been applicable had the issuer not relied on the exemption provided in subsection (a).

(C) AVAILABILITY OF PREEMPTION CONTINGENT ON PAYMENT OF FEES.)

(i) IN GENERAL.) During the period beginning on the date of enactment of the National Securities Market Improvement Act of 1996 and ending 3 years after that date of enactment, the securities commission (or any agency or office performing like functions) of any State may require the registration of securities issued by any issuer who refuses to pay the fees required by subparagraph (B).

(ii) DELAYS.)For purposes of this subparagraph, delays in payment of fees or underpayments of fees that are promptly remedied shall not constitute a refusal to pay fees.

"(3) ENFORCEMENT OF REQUIREMENTS.—Nothing in this section shall prohibit the securities commission (or any agency or office performing like functions) of any State from suspending the offer or sale of securities within such State as a result of the failure to submit any filing or fee required under law and permitted under this section."

BEWARE OF MIS-SENT FAXES AND E-MAILS*

Avoid Hi-Tech Malpractice With Basic Precautions

By Larry Bodine

Whoops! *Your secretary just hit the speed-dial button on the fax machine and accidentally faxed a letter to your opposing counsel — instead of to your client.*

Oh no! *You just discovered that your nosy neighbor has a radio scanner and has been listening to calls to clients you have made on your cordless phone.*

Oops! *You composed an Internet e-mail to your client, plotting your strategy and assessing the case. But you inadvertently e-mailed it to the distribution list for your marketing newsletter.*

♦♦♦

Have you made any of these mistakes? If so, you have just zapped yourself by careless use of technology, a growing malpractice problem for lawyers.

"The almost-universal use of fax machines, cellular phones and e-mail has added another level of complexity to the responsibilities of each attorney in regard to the protection of confidential information," said Mary Scott, a New York lawyer who is in charge of the Lawyers Professional Liability program at CNA Insurance Companies.

If your mistake harms a client's case, you have just gotten yourself into malpractice trouble. You may have also generated a disciplinary complaint to boot.

"Whenever such disclosures cause damage to the client, the possibility of a legal malpractice case looms," said Scott, who spoke at the recent "National Legal Malpractice Conference" sponsored by the ABA Committee on Lawyers Professional Liability at Dana Point, Calif.

Tips to Avoid Trouble

Technology is wonderful because it offers instant communication. But this immediacy is also its most dangerous characteristic. Scott offered the following tips to avoid problems:

- An opposing counsel's fax number should never be put on a speed-dial button on the machine. The same goes with "aliases" or distribution lists for Internet e-mail.
- Your fax "cover sheets" should always indicate that the document is "privileged and confidential" when it is a communication subject to the ethical duty of confidentiality.
- Take a "low-tech" approach with sensitive documents. "Use overnight delivery or courier services rather than fax machines," she advised.
- Use telephone land lines when you can instead of cell and portable phones. Lawyers "have a reasonable expectation of privacy when speaking on standard telephone lines," she said, but do not when on other phones.

Duty of Confidentiality

Lawyers are prohibited from revealing information relating to representation of a client under Rule 1.6 of the Model Rules of Professional Conduct, which has been adopted in some form in every state.

This duty of confidentiality is the essence of the attorney-client privilege, which protects

---

* Reprinted with permission from *Lawyers Weekly USA* (August 26, 1996), The National Newspaper for Small-Firm Lawyers. $125.00 per year. For subscription information, call 1-800-451-9998, or write Lawyers Weekly Publications, 41 West Street, Boston, MA 02111.

communications between attorney and client from disclosure in legal proceedings.

The privilege belongs to the client. When lawyers have made inadvertent disclosures, some courts have followed a harsh, traditional approach by holding that the attorney-client privilege is waived.

"Cases following the traditional approach have found waiver of the privilege through inadvertent disclosure when outside parties were present at the time communication was made, when bystanders overheard conversation, and even when adversaries routinely raided their opponent's trash bins," Scott said.

Some courts follow a more moderate "balancing test" in judging inadvertent disclosures, Scott noted. With this approach, courts decide whether a document has lost its privilege by considering:

(1) the reasonableness of the precautions taken;

(2) the number of inadvertent disclosures;

(3) the extent of the disclosure;

(4) any delay and measures taken to rectify the disclosures; and

(5) whether justice would be served by relieving the person of his error.

Accordingly, taking demonstrable precautions and making a prompt objection in the event of an error will help a lawyer stay out of malpractice trouble.

Mis-Sent Faxes

A law firm waived the attorney-client privilege when it faxed documents to hotels in Hong Kong, Malaysia and Boston without cover sheets labeling the transmissions "confidential," and without any other precautions, a federal judge ruled in *Ray Larsen Associates, Inc. v. Nikko, America, Inc.*, 1993 U.S. Dist. Lexis 11298 (S.D.N.Y. 1993).

"Each of these documents was handled and maintained no differently than routine non-privileged business communications," the court held. To preserve the privilege, lawyers and clients "must treat the confidentiality of attorney-client communications like jewels — if not crown jewels."

In another mis-sent fax case, a plaintiffs' lawyer cautiously removed a sensitive memo from records being disclosed in discovery to the defendants. But a secretary erroneously faxed the memo to the vice president of the defendant bank, thereby waiving the attorney-client privilege, a court held in *FDIC v. Singh, Nishimura, Kringen & Telling*, 140 F.R.D. 252 (D. Me. 1992).

As the plaintiffs' lawyer took no precautions to ensure the confidentiality of the memorandum, "the courts will grant no greater protection to those who assert the privilege than their own precautions warrant," the court held.

E-Mail Transmissions

Don't type too fast when sending Internet e-mails — your message may end up in the wrong hands, and you may end up in court.

"Attorneys and clients should be savvy enough to avoid mis-sending e-mail to distribution lists rather than individuals," Scott said. "As e-mail networks expand, however, the possibilities of misdirected e-mail increase."

Regarding the security of e-mail, she observed that there is no control over the routing of messages over the Internet, which may increase the possibilities for inadvertent disclosure. And there is also the problem of intentional interception, although many experts minimize the danger of a hacker tapping an Internet message.

"The odds of someone 'tapping into' the middle of your Internet communication path are almost nonexistent, and in that context e-mail is probably more secure than your average telephone call," said Attorney G. Burgess Allison, writing in the April 1996 issue of *Law Practice Management*.

Encrypting e-mail may be unnecessary. Attorney William Freivogel reviewed 9,000 legal malpractice claims and reported that none have involved the hacking [of] a computer message.

"Based upon the foregoing analysis, we believe the lawyers may ethically communicate with or about clients on the Internet without encryption," he wrote in the January 1996 *Loss Prevention Journal*.

Portable Phones

Cordless and cell phones are everywhere and present special dangers to lawyers.

"Their vulnerability to interception presents a significant confidentiality problem," Scott warned. "Most of us have had the experience of inadvertently 'sharing' a channel with other parties while speaking on a portable phone."

Some courts have held that there is no legitimate expectation of privacy when a person uses a phone that uses radio signals. [See, for example, *People v. Wilson*, 554 N.W.2d 545 (Ill. App. 1st Dist. 1990).]

And lawyers should also take note of the ruling in *In Re Askin*, 47 F.3d 100 (4th Cir. 1994). Government agents intercepted the conversation of a lawyer, speaking on a cell phone, to a client who was speaking on a cordless phone. The client was indicted on drug charges and the lawyer was called as a witness against his own client.

The lawyer argued unsuccessfully that the interception violated the Electronic Communications Privacy Act of 1986, 18 U.S.C. Sect. 2510 *et seq.*, as well as the Fourth Amendment. But the Fourth Circuit said the surveillance was lawful.

"Regardless of whether or not the use of intentionally intercepted transmissions is allowed," Scott said, "the confidentiality of attorney-client communications has still been lost when calls are intercepted."

COMMENTS SUBMITTED ON PROPOSED REGULATIONS ON ARBITRAGE RESTRICTIONS APPLICABLE TO TAX-EXEMPT BONDS

Editor's Note: The following comments were submitted to the Commissioner of the Internal Revenue Service on October 17, 1996.

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:

Neil P. Arkuss	Arthur M. Miller
Jeannette M. Bond	William H. Conner
John J. Cross, III	Amy K. Dunbar
Joe E. Forrester	Perry E. Israel
Mitchell H. Rapaport	Lisa P. Soeder
Jeremy A. Spector	David A. Walton
David Wolf	Patti T. Wu

Questions should be directed to David A. Walton, Chair of the Arbitrage and Rebate Committee, at (415) 391-5780.

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 benefitted 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 Agent's 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.

LEGAL ASSISTANTS' CORNER: SURFIN' THE WEB

Fun and facts galore. Controversy. Questions. Confusion. The future. Electronic correspondence is here to stay and will become a necessary part of every person's life. The world will continue to shrink into a closer community. Those who don't go with the flow are destined to drown. Legal assistants go with the flow. This article is not intended to be a listing of sites of special interest to legal assistants in the municipal securities area. My intent is to give you ideas and some of the tools you can use to get the information from the Internet.

Most of us have heard of America Online (AOL), CompuServe and Netscape. Each of these services will allow a computer with a modem to access the Internet. AOL and CompuServe are probably the easiest types of services to use because they provide the user with access to numerous WebSites through a "point and click" mouse-driven system. These services also provide an e-mail address for the user. Netscape is a "navigation" tool — a browser. If you know the address of the WebSite, Netscape will find the page for you. There is no e-mail service provided by Netscape. There are numerous service providers — servers — all over the United States, and the world, which will provide access to the Internet with the use of various programs which run on their platforms. With the independent providers, a user may use programs such as Netscape or Mosaic to browse on the World Wide Web; Eudora as an e-mail provider; GNN to access news groups; the choices seem infinite.

Now, how do you find the answer to that question of where to send Blue Sky filings in each state (http://www.webipo.com); is our latest NRMSIR filing in the system (http://www.municipal.com); what is going on with the Securities and Exchange Commission (http://www.sec.gov); is the Internal Revenue Service up to anything that concerns us (http://www.irs.ustreas.gov); where can we buy shares of Spring Street Brewing (http://www.witbeer.com); how can we send flowers to Tucson (http://go.flowerlink.com); where can we get the latest crossword puzzles; where can we get computer programs and updates for virus protection (http://www.mcafee.com); where is the best bed and breakfast in Florence — Alabama — (http://www.go.native.com); what time does the train leave from Hoboken (yes, there really is a Hoboken) (http:// www.hobokeni.com); where can I hire an illustrator (Mike Parker) (http://www2. cybernex.net/~mparker) or a new legal assistant without a bad sense of humor; where can I find a new job either in my present city or across the nation (http://www.occ.com/occ/); what is the weather like in Florence — Italy — right now (http://www.noaa.gov) or South Africa (http://cirrus.sawb.gov.za); information about the American Bar Association (http://www.abanet.org) — if you use "aba" you get the American Bankers Association; or information on state bar associations (http://www.dsi.org/statebar)? You guessed it! The Internet!

When you don't have the WebSite address and need to find information, a search engine is the answer. What is a search engine? Simply, a search engine is access to databases. They have some fun names: Yahoo (http://www.Yahoo.com), Altavista (http://www.altavista.com), and WebCrawler (http://www.webcrawler.com) are three of the best known.

All legal assistants know how to do research on the databases of Lexis/Nexis or WestLaw. Now use Internet search engines the same way. Type the topic of your search and let the search engine do the rest. However, you will probably come up with thousands of WebSites or e-mail addresses which may or may not meet your needs (a search of "Bar Association" on Altavista had over 1,000,000 hits). The fun begins when you start to read some of the contents of your search results. You may come up with helpful information beyond your wildest dreams; or you may come up with information that is unbelievable and of no help at all. It never ceases to amaze me that I can find out about things I didn't even know existed, and, in some cases, I still wish I didn't. Meet Wendell the Worm or Rodney the Roach on "the yuckyest site on the Web" (http://www.nj.com/yucky).

When you are ready to surf, start with the National Association of Bond Lawyers site (http://www.nabl.org/nabl or http://www.qadas.com/nabl). There is a wealth of information about the organization including chat areas. Remember that legal assistant without a bad sense of humor? There is a Jobs Service on the NABL homepage.

The Legal Assistants chat area is currently being utilized by the members of the Legal Assistants' Committee. We try to check the site daily and are ready to answer any questions or address any concerns you have. If we don't have the answer, we will get someone who can help you. One of our projects for next year is to provide all of our members with a listing of other members, their addresses, specialties, and their e-mail addresses. You can leave that information in the chat area right now. We also plan to distribute a listing of the WebSites we think are useful to all municipal finance professionals, and we might even include some sites that are just plain fun. Until then, keep surfin'.

Susan M. Parker
The Port Authority
of New York
and New Jersey

LETTER TO THE EDITOR

Dear Fred:

As your correspondent member who is almost certainly closest to Australia, I have taken up the linguistic challenge you made in the most recent number of *The Quarterly Newsletter*. To be honest, all I had to do was to walk to the offices of two of our associates who are either themselves Australian or closely acquainted with those of that ilk. Their responses follow:

"stood the matter over" — Trial/hearing in court is adjourned for some reason, or its proposed hearing date postponed.

"the proposed float" — A proposed listing of a private company onto the stock exchange; "going public."

"workcover" — Refers to workers' insurance cover, usually for injuries sustained in the workplace. Workcover is the responsibility of the employer.

"this special callover" — A callover is like a brief session of court when, for example, the parties are arguing over a particular point of law (not the whole case) or the judge might be giving instructions for proceedings, etc. Also referred to as a "mention."

"soapie" — A television soap-opera (day-time TV).

"served his articles" — A bit of olde English here. "Articles" were a 2-year period of training/working with law firms for law graduates intending to become solicitors, rather than barristers. One was "articled" to a person/ law firm, and during those 2 years one would be required by the Law Society to have worked ("served") in at least 3 different prescribed departments/fields of law. One was once called an "articled clerk," but nowadays the term used is "trainee solicitor."

"costing services" — In order to justify a bill to a client or to the court, especially in litigation matters, one would send the bill to a costing agency which would review the file and decide, independently, how much should be charged. When one received a figure from such an agency, it would be a pretty strong case and the losing side to the litigation (which had to pay for the victorious side's legal fees) would be very unlikely to complain/challenge that bill.

"superannuation" — Mandatory savings imposed by the government on all employers, where a contribution by an employee equal to a small percentage of employee's income would be paid into a fund for employees. The employee can generally only withdraw from the fund on retirement. The employee has a choice as to what kind of portfolios/unit trust/trust funds his superannuation could be invested in and a choice as to who his fund manager would be. The interest and returns on such "savings" are either tax exempt or pay reduced tax.

"ferals" — A slang term for people who are a bit radical or crazy.

"bovver boots" — Refers to jack-boots (18-hole army boots) worn by Bovver Boys (shaved-head thugs in London) and used to kick people in the head. As an analogy, it probably means that someone was getting tough about an issue and trying to be imposing by using an aggressive manner/attitude.

"goofy footedness" — Two possibilities here: i) a matter/issue was handled in a goofy or clumsy manner, or ii) in surfing vernacular, a "goofy foot" is someone who rides a surfboard with his right foot at the front of the board.

Opportunities to expand my linguistic horizons abound here. In addition to learning new words ("blur" = goofy/dopey; "kiasu" = anxiety about not doing as well as the next guy), I've been forced to learn to put an extra "u" in many of my words ("humour," "colour") and to change the "z" in many words to an "s" ("realise," etc.)

Office life is also different, primarily because of our close proximity to the equator. Suit coats are rare and trips to daytime meetings are carefully planned to maximize (oops, maximise) exposure to air conditioning (or, in local parlance, "air con").

Closings are "signing ceremonies," and live up to their name. The lawyers (usually from only one firm) sit off to the side at their own table (reminiscent of the children's table at Thanksgiving meals). Documents are bound before the ceremony and are formally presented by the lawyers, who must stand behind the participants. We (the lawyers) are also expected to give a short speech describing the procedure prior to the presentation. More speeches and toasts follow the actual signing. Gifts are then exchanged (with the lawyers typically getting expensive pens), and the entire gathering proceeds to a luncheon banquet. The banquet is almost always Chinese, consisting of seven or eight courses. All in all, a very civilized (oops, civilised) way to do business, particularly when you consider that you're never coerced into making political contributions.

I still continue my 103 practice out here. So far that has been surprisingly easy, aided as I am by the technological marvels of e-mail and voice-mail and by the general view that 103 lawyers should be heard and not seen (and the less heard from, the better). Amy's e-mails and NABL-Net are also great helps.

I hope to see you and my other friends in NABL again in the near future. Please keep in touch.

Best regards,

Stephen A. Edwards
Morgan, Lewis & Bockius LLP
Singapore

EMPLOYMENT OPPORTUNITY

BOND/TAX ATTORNEY WANTED

Established Southeast law firm seeks a lawyer interested in dealing with the tax aspects of municipal bonds and handling bond transaction work as well. The firm offers a rapidly growing bond practice and represents state and local agencies and political subdivisions, corporations, hospitals, developers and underwriters in the planning, issuance and sale of tax-exempt debt. Outstanding academic record, writing ability and client relationship skills are required; a minimum of three years' experience is required. Equal Opportunity Employer. Send résumé in confidence to Barry Keith, Nexsen Pruet Jacobs & Pollard, LLP, P.O. Drawer 2426, Columbia, SC 29202, or fax to (803) 253-8277.

THE HILDERBRAND FUND

Year-end presents itemizers with the opportunity to contribute charitably to The Robert H. Hilderbrand, Jr. Fund. The Hilderbrand Fund, the Association's §501(c)(3) affiliate, supports the educational activities of the Association by granting stipends to government employees to cover their personal costs of attending Association seminars or serving as panelists at the Bond Attorneys' Workshop.

Gifts to the Hilderbrand Fund may be sent in care of the Association at 1761 S. Naperville Road, Suite 105, Wheaton, IL 60187, and will be acknowledged by written receipt. Unless the donor otherwise requests, the fact (but not the amount) of his or her contribution will be mentioned in the next number of *The Quarterly Newsletter*.

EDITOR'S NOTES

This number includes new columns by old friends Manly Mumford and Joe Johnson. We hope that Manly and Joe — both former Association presidents — will become regular quarterly contributors, though we're not sure we have their feet firmly to the fire just yet.

Regardless of their politics, a good many bond market participants breathed sighs of relief when the Republicans retained control of Congress and Mr. Clinton won a second term. Their thinking is that not much can go too far wrong with the checks-and-balances that the results promise. The Republicans' flat tax proposals seem likely to be tempered by the reality that annual modifications to the Internal Revenue Code are cash cows for many members of the tax-writing committees and their friends. They are not likely to send those cows to the abattoir. Rather, they'll probably milk them for all they are worth, as their Democrat predecessors have done for years.

Tax-exempt bonds have been challenged as "tax expenditures" by those who believe all income in some sense "belongs" to the federal government. We'll hear more about this as the 105th Congress goes about its work, seeking dollars to do good work and fund the pork.

Tax-exempts are vulnerable, not least because many members of Congress focus on the benefits they provide to bondholders rather than the dollars they save issuers. It is not too soon for us and our clients to tell our Congresspersons that we are all in favor of cutting wasteful spending, but that she/he should not even think of balancing the federal budget on the backs of state and local taxpayers and ratepayers.

What needs to be said to Congress — and what Congresspersons hear only infrequently — is that our industry is respectable, basically honest, devoted to public service, and willing to send dollars to those who see it our way. Bond lawyers — as contrasted to trial lawyers — have been reluctant to send dollars. In an off-year, those dollars are really appreciated. But don't just send a check. Send a check, make your case, and send *another* check.

In a dramatic reversal of his longstanding policy, former Association President Bernard P. Friel, who chairs (some would say czars) the NABLHASBEENS, a group of former Association officers and directors and former chairs of the Bond Attorneys' Workshop, invited your editor to join the group, or at least attend its annual Chicago dinner. Unfortunately, your editor was otherwise disposed. Perhaps the invitation will be renewed . . . .

Attendees at the Bond Attorneys' Workshop's annual luncheon on September 19 were regaled by one Jim Morris (not, he said, to be confused with fellow Connecticut resident *Dick* Morris) who magically and successively *became* — in terms of voice, gesture, and countenance — Ronald Reagan, George Bush, Ted Koppel, David Brinkley, Richard Nixon, Bill Clinton, and Bob Dole, all of whom had cause to fear for their reputations at Mr. Morris's hands.

Members in the gentler precincts of the republic will find this hard to credit, but as your editor was lolling in a reclining seat at the local cinema last week, hoping that his soles wouldn't get gummed-up and that the ersatz butter on the popcorn wouldn't further gum up his already-doubtful arteries, the *telephone* rang. Or sort of *vibrated*. It was answered by a woman on the port side, perhaps three seats to port, who thereupon had a harsh conversation with the babysitter or nanny about what Ezekiel was not allowed to do before he donned his snugglies.

Arnold Schwartzwhatever didn't think much of this — he shot two or three malefactors as she remonstrated — and neither did your editor.

The real trouble started when editor and significant other departed mid-movie and asked for a refund. The cashier said that he was instructed to make restitution only in the event of earthquake or tornado, which shows that movie moguls are better at hanging on to their money than are bond lawyers.

Have you renewed your Association membership for 1997? The 1997 *Directory* goes to press soon. . .

QUARTERLY HAIKUS

The "work-in-progress"
Prompts issuers to visit
Rev-Proctologists

Rubin recuses
So that yield-burning loses
Any Sachs appeal

SEC, Justice,
IRS probe; Just say: Hai-
Ku-Ma-Matata

Leonard Weiser-Varon

QUARTERLY LIMERICK

Editor's Note: Our resident poet is really fractious this month — or quarter — and we had small success in reining him in. He does not, of course, speak for the Association, but we thought we'd let him have his say — again.

Burn Baby Burn that bad yield
(Lay waste to that smoldering field)
  Torch it and scorch it
  Put it out on the porch, it
Won't die on the right battlefield.

Those NYC jokers, they calc'ed
(Those issuers' purses, they milked)
  They hooked the large tuna
  And shot at the luna
Eclipsed in cute deals they silked.

So now come the Feds like fresh bandits
With closing agreements demanded:
  It's hard to imagine
  The species of pigeon
Who'll do what these birds have commanded.

Orin Magruder

[EasyCalc ad (@bond), full page, outside back cover]