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Because opinions with respect to the interpretation of state and federal laws relating to municipal obligations frequently differ, the National Association of Bond Lawyers ("NABL") has given the authors who contribute to The Quarterly Newsletter, and its editor, the opportunity to express their individual legal interpretations, opinions, and positions. These interpretations, opinions, and positions, whether explicit or implicit, are not intended to reflect any position of NABL or the law firms, branches of government, or organizations with which the authors and editor are associated, unless they have been specifically adopted by such organizations. For educational purposes, the authors and editor may employ hyperbole or offer suggested interpretations for the purpose of stimulating discussion. Neither the authors, the editor, or NABL can take responsibility as to the completeness and accuracy of the materials contained herein; accordingly, readers are encouraged to conduct independent research of original sources of authority. The Quarterly Newsletter is not intended to provide legal advice or counsel as to any particular situation. Errors or omissions should be called to the editor's attention.
PRESIDENT'S COLUMN

This is my final President's Column for The Quarterly Newsletter. The 1996-1997 year has presented a number of challenges and produced a number of projects that I hope are beneficial for members.

Political Contributions

I wrote to members following the July Board of Directors' meeting to report the Board's action with respect to a resolution being offered by an ABA group as an alternative to the proposal of The Association of the Bar of the City of New York (the "City Bar") and the possibility that I would speak on behalf of the Association before the ABA House of Delegates at its August meeting in San Francisco.

Prior to the House of Delegates meeting, the City Bar representatives accepted a compromise resolution (a copy of which is printed in this edition of The Quarterly Newsletter) and the President of the City Bar, Michael Cardozo, spoke before the House of Delegates recommending its adoption. Both Securities and Exchange Commission Chairman Arthur Levitt and I were given seven minutes to speak before the House. Chairman Levitt's remarks are reprinted on the Association's web page.

Since the language in the Resolution before the ABA House of Delegates was fundamentally consistent with the Association's stated position on political contributions (set forth in the Statement of Professional Principles with Respect to Political Contributions (the "Statement") reprinted in the June edition of The Quarterly Newsletter), I spoke in support of it, although I noted our objections to the gratuitous references to "municipal finance engagements" contained in the Resolution. (My remarks are reprinted in this edition; they are similar to those I made before a forum sponsored by the City Bar in June.) The Association has been on record condemning making political contributions for the purpose of obtaining business, advocating the hiring of bond counsel based on professional qualifications, and calling on lawyers to be vigilant in adhering to all laws and ethical mandates, as evidenced by our publications in 1988 of Selection and Evaluation of Bond Counsel, and in 1989 of Standards of Practice and the Statement.

Whether or not there is any empirical evidence that bond counsel make political contributions for the purpose of obtaining or retaining municipal finance engagements, the SEC's extensive public relations campaign has certainly created a perception, at least among certain members of the press, certain law school deans, and the securities bar, that we do. That perception is damaging to all lawyers, not just those engaged in the public finance practice, and needs to be addressed. I believe the task force called for by the ABA resolution is the best forum to do that. I am encouraged that ABA President Shestack is forming that task force and hope the Association will be represented and that any policies or proposed rules that develop from the efforts of the task force will be applicable to all lawyers representing public bodies, not solely public finance lawyers.

I know that many members are offended by the accusations being made against us and our colleagues. So am I. The vast majority of bond counsel are remarkably diligent, competent, hard-working and public spirited. We know that the marketplace relies on our opinions as to
the validity and tax exempt status of municipal obligations and expects them to be based on the NABL standard. We must take the steps necessary to meet that expectation every day. Regulators at the Treasury, IRS and SEC look to bond counsel to educate our clients as to the pertinent tax and securities laws. Most issuers, underwriters and financial advisors understand the requirements of federal law because lawyers serving as bond counsel or underwriters’ counsel are well-trained, experienced, thorough and conscientious -- and take time to keep current with new developments in the law and to advise their clients as to such developments. In a market climate that pressures lawyers to work faster and cheaper, we and our colleagues spend countless hours educating ourselves and others and increasing our professionalism -- hours that by and large are not billable to any client. To assist our members and others, the Association sponsors programs and publications. Just in the past year, over 1,800 public finance professionals attended our programs and over 3,100 received one or more of our publications. There simply is no shortcut to becoming a knowledgeable, well-respected and successful bond lawyer, and we are troubled by the suggestion that there is.

On behalf of the Association, I am grateful to those active in the recent discussions and debate regarding political contributions by lawyers who strongly stated that bond lawyers should not be singled out -- and that rules regarding professional conduct do -- and should -- apply to all lawyers. I am grateful to those participating in the discussions and debates at the ABA meeting prior to the House of Delegates meeting and in the proceedings before the House of Delegates who gave the Association’s views thoughtful consideration and extended every possible courtesy to us. Thank you, Larry Fox, Peter Moser, Pat Arey, Ray Trombadore, A. P. Carlton, Barbara Mendel Mayden, Lee Cooper and others for all you did on our behalf. And special thanks to Board member Howard Zucker, who has provided thoughtful and insightful guidance to the Board throughout its consideration of the issue of political contributions by lawyers.

Committee Projects

Since the last edition of The Quarterly Newsletter, all members should have received a complimentary copy of the revised edition of the Model Bond Opinion Report. Additional copies are available at a nominal cost from the National Office. My thanks to Opinions Committee Chair Michael Budin, his Vice-Chair Ed Lucas, and Board Advisor Howard Zucker and the active committee participants for completion of this important report.

The efforts of the General Tax Committee are evidenced in this edition of The Quarterly Newsletter. My thanks to Chair John Cross, Board Advisor Jeannette Bond, and the long list of other volunteers who participated in producing the extensive and helpful comments on the January, 1997 Private Activity Bond Regulations. You will find that a thorough review of the technical amendments and substantive changes suggested by the Committee provides a better understanding of the final Private Activity Bond Regulations. As you recall, the Arbitrage and Rebate Committee submitted comments on the temporary regulations on the arbitrage restrictions, which were published in the last edition of The Quarterly Newsletter.

The Securities Law and Disclosure Committee continues to have a number of projects underway including bondholder notification, electronic communication, comments to pro-
posed MSRB rules, coordination with the Opinions Committee on a model underwriters' counsel opinion and consideration of a compilation of securities law materials.

The Education Committee is in the process of reviewing last year's programs and considering the Association's educational programs for next year, including the possibility of undertaking a joint seminar with one or more issuer groups to provide issuer officials with an understanding of the role of bond counsel and the basic state, tax and securities law issues that must be considered when municipal obligations are issued.

The Professional Responsibility Committee is continuing its work on model engagement letters and plans to discuss an exposure draft at the Bond Attorneys' Workshop. The Committee is also working on an update to the Association's 1988 publication of Selection and Evaluation of Bond Counsel and on a pamphlet version of the Function and Professional Responsibilities of Bond Counsel.

Committees will hold meetings at the Bond Attorneys' Workshop on Friday morning. The recently mailed notice of the annual meeting provides the times and places of the committee meetings. If you cannot attend, please volunteer to participate in a committee -- or to serve on the faculty of a seminar -- by contacting the committee chair, any board member, or the Executive Director. Again, I urge you to become involved in the Association's committees and seminars. Participation provides a real opportunity to make a contribution to the profession.

Annual Meeting And Workshop

The Nominating Committee met and, following the guidelines set forth in the last edition of The Quarterly Newsletter, nominated a slate of candidates for officer and director positions. By now you have received the report of the Committee. Please come to the annual meeting to show your support for these deserving candidates.

At the Bond Attorneys' Workshop, Aspen Law and Business, publisher of Federal Taxation of Municipal Bonds, will be introducing the CD-ROM version. I am very grateful to the Section 103 Editorial Board, particularly its Chair, Linda D'Onofrio, for all its efforts this year to improve and update the publication in preparation for the CD-ROM version. Members will find the enhancements to be very helpful. Make plans to arrive in Chicago Wednesday morning to participate in the debut of the CD-ROM. Additionally, Aspen representatives have been given space at the Marriott so that the CD-ROM can be demonstrated throughout the Workshop.

Gigi Benjamin and her Vice-Chairs and Steering Committee have put together an impressive program for the Workshop. Registrations are running ahead of past years. If you have not yet registered, please consider doing so as soon as possible. I look forward to seeing you there.

As I reflect on the past year, I am confident that the projects the Board has undertaken will serve the members and the Association in the years to come. I am grateful to all who have contributed. Thank you for the honor and privilege of serving as your president.

Julianna Ebert
August 18, 1997
REMARKS OF PRESIDENT JULIANNA EBERT TO THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION ON AUGUST 5, 1997

Thank you for inviting me to speak on behalf of the National Association of Bond Lawyers. Founded in 1979, NABL's principal mission is to educate its members and others in the law relating to state and municipal obligations and to participate in national and local forums in order to advise and comment on legislative, regulatory and judicial issues affecting such obligations. NABL is a voluntary association of over 2,900 individual members and cannot impose rules or sanctions on members or their law firms. NABL is governed by a Board of Directors. I currently serve as President.

As an association, we recognize the special role bond counsel plays in the raising of billions of dollars of capital for a wide variety of public purposes by state and local governments. We know that the services rendered by bond counsel have a significant effect, not just on our issuer clients, but on the municipal marketplace. We know that the issuers and the marketplace itself rely on the competency and integrity of bond counsel. And we know that the municipal marketplace functions as efficiently as it does because the vast majority of bond lawyers are ethical and competent.

We are concerned that issuers select bond counsel who can protect and promote their interest in issuing bonds that the market accepts without questioning -- or pricing for questions about -- their validity, enforceability and tax exempt status. To assist issuers in selecting bond counsel based on professional qualifications, in 1988 NABL published Selection and Evaluation of Bond Counsel which discussed appropriate criteria to be considered in the selection of bond counsel. In 1989, a special NABL Committee on Standards of Practice published three reports emphasizing measures bond lawyers should take to enhance their professionalism -- recognizing that the integrity, diligence, competence, motives and values of the public finance bar are essential to the municipal marketplace -- and again stressing that bond counsel should be selected based on professional qualifications.

In 1993, Chairman Levitt asked NABL to take action on the "pay to play" issue. NABL appointed a special task force and in February, 1994, prior to the SEC's approval of MSRB Rule G-37 which governs political contributions by underwriters of municipal securities, the NABL Board approved a Statement of Professional Principles with Respect to Political Contributions which restated NABL's earlier affirmative statements that bond counsel should be selected based on professional qualifications, NOT on the basis of political contributions; condemned "pay to play" conduct by strongly stating that no lawyer should make ANY direct or indirect political contribution for the purpose of retaining or obtaining municipal finance engagements; emphasized that lawyers must be vigilant in their adherence to all applicable laws, regulations and ethical mandates; and, finally, endorsed a significant role for meaningful disclosure of political contributions. The NABL Statement strikes a balance between the goals of protecting and promoting the rights of individuals to participate in the political process and severing any real or perceived connection between political contributions and municipal finance engagements.

In light of recent developments concerning political contributions, including the proposal of the Bar Association of the City of New York, the NABL Board reviewed and discussed the Statement at its April meeting and, noting that the adoption of the Statement was the first action by a bar group to condemn the making of political contributions to obtain business and that the Statement applies to all lawyers in a firm (not only to public finance lawyers) and covers so-called "soft money" in addition to direct contributions to candidates, decided to stand by the Statement.

At its July meeting, the NABL Board reviewed the draft resolution of the ABA Section Officers Conference "Pay to Play" Committee, and it was the consensus of the Board that since the draft of the resolution portion of the recommendation and report was fundamentally consistent with our past policy positions, we should support it insofar as it concerns our members. While we object to the gratuitous references to "municipal finance engage-
ments” contained in the compromise resolution, believing there is no reason to single out bond lawyers, to the extent the principles stated in the proposed amendment to revised Recommendation 10D are consistent with our Statement of Professional Principles With Respect to Political Contributions, we support it and the appointment of a task force to continue to review issues related to political contributions and welcome the opportunity to participate on the task force.

NABL has been on record condemning making political contributions for the purpose of obtaining business, advocating the hiring of bond counsel based on professional qualifications, and calling on lawyers to be vigilant in adhering to all laws and ethical mandates as evidenced by our earlier publications including the Statement. At the time the NABL Board approved its Statement, it offered to work with other organizations, including the ABA, with respect to issues raised by political contributions. We are pleased that this issue is now being considered by the ABA. We are honored to be here today to offer our support and encouragement to those considering the issue and working toward an appropriate resolution that would apply to all lawyers engaged by public bodies.

Thank you for the opportunity to speak on behalf of NABL to urge the House of Delegates to adopt the proposed amendment to revised Recommendation 10D.

THE ABA CONDEMNS PAYING TO PLAY

The following resolution, denominated “Revised 10D,” was adopted by the House of Delegates of the American Bar Association on August 6, 1997:

RESOLVED, that the American Bar Association:

1) condemns the conduct of lawyers making political campaign contributions to, and soliciting political campaign contributions for, public officials in return for being considered eligible by public agencies to perform professional services, including municipal finance engagements;

2) calls upon bar associations, lawyer disciplinary agencies and the judiciary to enforce, when applicable to prohibit this conduct, existing Rules of Professional Conduct, such as Model Rule 7.2(c) prohibiting a lawyer from giving "anything of value to a person for recommending the lawyer's services”;

3) condemns the conduct of public officials considering as eligible for engagement by public agencies to perform professional services, including municipal finance engagements, only those lawyers who make political campaign contributions to, or solicit political campaign contributions for, public officials, and

4) calls upon legislative bodies, judicial rule-making agencies, bar associations, lawyer disciplinary agencies and public agencies to enact or adopt and enforce laws, rules and regulations that will discourage the conduct condemned in these resolutions.

FURTHER RESOLVED, that the House of Delegates requests the President of the American Bar Association to appoint a task force:

(a) to review issues related to political campaign contributions made or solicited by lawyers and effective solutions thereto, including the “pay-to-play” rule proposed by The Association of the Bar of the City of New York in its Recommendation 10D dated August 1997.

(b) to determine whether additional professional standards, laws or procedures relating to political campaign contributions are necessary and desirable, including the conduct of lawyers making significant political campaign contributions to judicial candidates before whom the lawyers appear, and

(c) to submit for consideration by the House of Delegates at its meeting in August 1998 recommendations as to any additional professional standards, laws or procedures found to be necessary and desirable in the form of amendments to the Model Rules of Professional Conduct, aspirational
ethical standards of [sic] other appropriate measures.

WASHINGTON SAGA

Washington is very, very quiet these days. Congress has gone home until after Labor Day, and most everyone else in Washington is on vacation. We survived a major tax bill relatively intact, even having made a few gains. What the fall holds for us remains to be seen, but I anticipate a busy season.

The Taxpayers' Relief Act of 1997 (H.R. 2014)

Senator Moynihan turned out to be our best friend during this tax bill, both for what he did and didn't do. Senator Moynihan authored the repeal of the $150 million cap for bonds issued after the date of enactment. Also, he did not push his stadium bond elimination provision.

Our other champion was Senator Bob Graham of Florida, who was responsible for the $5 million increase in the arbitrage rebate exception for school construction bonds. Unfortunately, the increase in the capital expenditure limit for small issue IDBs was not included in the final bill.

Some modifications were made to the enterprise zone bond provisions of current law and 20 new zones were designated with only the 35% residency requirement applicable. Congressman Rangel is responsible for a new provision called "qualified zone academy bonds." This is a tax credit program for $400 million dollars in each of 1998 and 1999, targeted to school districts with individuals below the poverty line. Issuers issue taxable bonds to financial institutions which receive a tax credit from the federal government. Relatively little explanation of this provision exists, and it was in neither the House nor Senate bills, so future explanation will be needed to understand the program and its usefulness. There were some very technical simplifications as well. See Sharon White's "Shared Tax Observations" for a full description of these changes.

Happily, repeal of the 2% de minimus provision was not included in the final bill, due to the hard efforts of the issuing community in conveying to their Representatives and Senators the importance of maintaining the status quo. It became clear that the tax policy advocates of the Joint Committee and Treasury strongly endorsed inclusion of this provision. Unfortunately, we can expect to fight this battle again.

On the buy side of the equation, the tax bill hurt the muni market by providing several IRA options that will compete for tax-exempt purchasers. The impact of those provisions will be recognized in the future. If it is dramatic, I would expect the issuing community to go back to Congress, seeking assistance on other provisions to enhance the muni market. Many of these tax provisions are posted on the Association's web page, or you can call our office at 202/778-2200 for copies.

John J. Cross III, Chair of the Committee on General Tax Matters, would like to receive comments, via mail, fax or the Association's web page, regarding the need for clarifications of the bond-related provisions of the Taxpayers' Relief Act of 1997.

Bondholder Notification

Early in September, NABL, the GFOA, PSA The Bond Market Trade Association, the American Bankers Association, and the National Association of State Auditors, Comptrollers and
NABL has a JOB BANK for members and public sector lawyers seeking employment opportunities with private law firms. Contract Patricia Appelhans at 630/690-1135.

Treasury and IRS Vacancies

Linda Schakel left the Treasury Department to return to Ballard Spahr in September as a partner. Her position as an attorney-advisor at the Treasury Department has not been filled as of this writing. There is also a Docket Attorney position available in Branch 5 of Financial Institutions and Products, the tax-exempt bond branch. Anyone interested in these challenging positions, and in learning a lot about tax policy, should apply.

SLGS

The Treasury Department plans to issue a notice clarifying that the SLGS Program is not intended to be used as a "hedge" or "option." Due to the pendency of the tax bill and the loss of Linda Schakel, I anticipate such notice will be forthcoming in the fall. Treasury officials are still considering the possibility that sanctioned use of the program with compensation to the Treasury could be permitted.

Yield Burning

We have now passed the one-year anniversary of our meeting with the Internal Revenue Service and the Treasury on Rev. Proc. 96-41. Since then, we have met with the Assistant Secretary of Tax Policy, and still there has been no guidance. I anticipate that the first public actions by the government will come this fall in the form of SEC enforcement actions, or at the latest in February, when the trial of LAMTA v. Lazard Freres is scheduled. Of course, the IRS is pursuing...
settlement with the issuers on individual cases. In the meantime, the issuing community is endeavoring to encourage the federal government to consider minimizing the cost and impact of these investigations on the issuing community.

Private Activity Bond Regulations

Mike Bailey of the IRS was quoted at the ABA Summer Meeting as saying that the release of the reserved portions of the private activity bond regulations would be soon. Knowing that Treasury is on vacation, exhausted by the grueling tax bill, and (with the departure of Linda Schakel) now laboring without internal advice on tax-exempt bonds, I wonder how quickly those regulations will be seen. However, hope springs eternal. The Bond Attorneys' Workshop has often been a helpful incentive for the release of projects by either the IRS or SEC. I hope to see you there with whatever news is released.

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

Amy K. Dunbar
Director of Governmental Affairs

August 14, 1997
ACTIONS BY THE BOARD OF DIRECTORS ON JULY 17 AND 18, 1997

The Board of Directors met at the Spring Creek Hotel and Conference Center, in Jackson Hole, Wyoming, on July 17 and 18, 1997. President Julianna Ebert presided. Also present were: 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; Patricia F. Appelhans, Executive Director; and Amy K. Dunbar, Director of Governmental Affairs.

Report of the Treasurer

Treasurer Newton provided an overview of the Association's financial results as of June 30, 1997. Citing positive seminar results and membership dues which are approaching budget, Treasurer Newton reported that the financial position of the Association is sound and noted that the overall assets of the Association approximate one-year's operating expenses. There followed a brief discussion of particular line items of the June 30, 1997, financial statements, at the conclusion of which President Ebert requested Treasurer Newton's input on whether to increase membership dues in 1998. Treasurer Newton recommended that dues be maintained at their current levels as financial results in 1997 are expected to be positive and no extraordinary expenditures are anticipated in 1998, whereupon it was moved by Treasurer Newton, seconded by Director Robertson and unanimously approved that 1998 membership dues be set at 1997 levels.

Securities Law and Disclosure Committee

Director Gardner referred to the July 7, 1997, report of William L. Nelson, Chair of the Securities Law and Disclosure Committee, which seeks the Board's input on whether to comment on the MSRB's recently proposed amendments dealing with underwriter requirements. It was the consensus of Board members that the Committee should provide to the MSRB narrowly crafted comments which focus on the selection of counsel and stress the importance of competent counsel to the integrity of the underwriting process. President Ebert requested that the Board be given the opportunity to review the comment letter at its September meeting prior to its submission to the SEC by the Committee.

Board members joined Director Gardner in his praise of the final report of the Enforcement Subcommittee submitted by Subcommittee Chair John M. McNally and discussed the need to update the report and disseminate it to members, including its use in seminar materials and publications of portions of the report in The Quarterly Newsletter. President Ebert called on the Enforcement Subcommittee to provide input on the best method to keep the report current and to make it available to members.

Director Gardner advised the Board that the Bondholder Notification Subcommittee is in the final stage of preparing its "best practices" memorandum concerning bond default notification procedures and will soon disseminate a final draft for approval of the task force participants' organizations.

Pay-to-Play

After summarizing her remarks as well as the comments of the audience and other participants concerning pay-to-play at the June 11, 1997, forum sponsored by The Association of the Bar of the City of New York, President Ebert updated the Board on the statements of other lawyer groups, including the American Bar Association Section Officers Conference "Pay to Play" Committee ("SOC"), the American College of Bond Counsel, the Pennsylvania Association of Bond Lawyers and a group of lawyers assembled by SEC Chairman Arthur Levitt, Jr. Director Zucker urged the Board to support the draft proposal of SOC since it sets forth principles consistent with those contained in NABL's 1994 Statement of Professional Principles with Respect to Political Contributions (the "NABL Statement"), which condemned pay-to-play, supported the hiring of bond counsel on the merits rather than on the basis of political contributions and recommended coordination with other groups to address the issue of pay-to-play.

Following an analysis of the pay-to-play positions of the above groups in which members of the Board noted the similarity of the draft SOC
resolution to the NABL Statement and the desirability of positioning the Association to provide future input, the Board directed President Ebert to write a letter to NABL members and to interested groups reaffirming the NABL Statement which advocates the hiring of lawyers on the basis of professional qualifications rather than on the basis of political contributions, supporting the draft resolution of SOC condemning pay-to-play insofar as it covers public finance lawyers, and offering to be a part of a task force as described in the SOC resolution. After circulating a revised draft of a press release concerning the Board's decision to support the draft resolution of SOC condemning pay-to-play and to participate in an ABA-appointed task force, President Ebert led the Board in a follow-up discussion in which members agreed that President Ebert should speak on NABL's position at the annual meeting of the ABA in San Francisco. It was noted that President Ebert's participation would serve to provide further education to the ABA as to the NABL Statement. Thereupon, upon motion of Director Zucker, seconded by Director Bond, the Board adopted a resolution supporting the SOC draft resolution insofar as it concerns public finance lawyers and offering to participate in the task force contemplated by the SOC resolution. The Board also directed the President to issue a press release, to correspond with NABL members and interested groups and to speak at the ABA annual meeting in San Francisco on NABL's position on pay-to-play.

Seminar Review

Executive Director Appelhans attributed the smaller-than-expected attendance at the Washington Seminar in part to the lack of specificity of the first two mailings, noting that reservations picked up following the third mailing, which included a detailed agenda. Director of Governmental Affairs Dunbar observed that the survey of Washington Seminar attendees indicates that the opportunity to interact with SEC and IRS officials and the size of the Washington Seminar are of importance to attendees. Treasurer Newton recommended that staff work with the Washington Seminar Chair to improve the marketing of this Seminar by publicizing the participation of government officials and circulating a detailed agenda as early as possible. After debating and referring to the Education Committee possible name and date changes for the Washington Seminar, the Board concurred in President Ebert's conclusion that the Washington Seminar serves a purpose which is of value to NABL members, and urged staff to work with the Washington Seminar Chair to monitor the expenses of the Seminar.

In discussing the format of the Tax Seminar, Board members recommended that the Education Committee consider whether topics should be divided into separate bond and tax lawyer presentations. The Board also requested the Education Committee to study whether there should be a more basic approach at the Fundamentals Seminar. Finally, Board members offered Executive Director Appelhans suggestions on ways to secure feedback from faculty and seminar attendees, and agreed with President Ebert's observation that a representative of the Board should take the opportunity at each seminar to publicize the member benefits provided by NABL as well as to seek volunteers for its projects.

Committee Reports

1. Legal Assistants - President Ebert suggested that the vacancy in the Vice-Chair of the Legal Assistants Committee remain unfilled until new committee chairs and vice-chairs are appointed in September. Following a review of the draft Statement on the Utilization of Legal Assistants in the Public Finance Practice by Director Benjamin, upon the motion of Director Benjamin, seconded by Secretary Weeks, the Board resolved to accept the statement as a report of the Legal Assistants Committee for publication in The Quarterly Newsletter. Following a discussion of the Legal Assistants Handbook in which it was noted that an editor is needed to assist the Committee in moving to a more finished product, Director Benjamin volunteered to assist in the editing process.

2. Arbitrage and Rebate - Director Soeder reported that the Arbitrage and Rebate Committee submitted comments to the IRS on the expiring temporary arbitrage regulations as well as the final arbitrage regulations, and will coordinate with the General Tax Matters Committee on yield-burning matters.
3. **Bond Attorneys' Workshop** - Following her update on the details of the Bond Attorneys' Workshop book printing, hotel renovation and exhibitor space, Director Benjamin agreed to remind Steering Committee members of the NABL press policy and to arrange to have the press policy distributed to all Workshop attendees.

4. **General Tax Matters** - Board members concurred in Director Bond's suggestion that the comments of the General Tax Matters Committee on the final private activity bond regulations be forwarded to the IRS as soon as possible in order to give the IRS input and to educate NABL members on private activity bond issues, despite the fact that additional problem areas will undoubtedly be identified as bond lawyers attempt to apply the regulations in their practice. The Board then returned to a discussion of yield-burning issues, considering ways that NABL might work with issuer groups to find alternative remedies in IRS enforcement actions, including legislative solutions. Director of Governmental Affairs Dunbar volunteered to meet with General Tax Matters Committee Chair John J. Cross III and representatives of issuer groups on this matter.

5. **Education** - Director Robertson reviewed the July 14, 1997, report of Education Committee Chair Charles S. Henck, which recommends that the Vice-Chairs of the 1997 seminars step into the chair roles of their respective seminars in 1998, and noted that Mr. Henck also recommended that John M. McNally be appointed as Vice-Chair of the 1998 Washington Seminar. Thereupon, upon motion of Director Benjamin, seconded by Director Buck, the Board unanimously approved following persons as the Chair or Vice-Chair of the respective 1998 seminars listed below:

- **Tax Seminar**
  - Chair: Patti T. Wu
- **Fundamentals Seminar**
  - Chair: Eric E. Ballou
- **Washington Seminar**
  - Chair: Mitchell H. Rapaport
  - Vice-Chair: John M. McNally

The Board directed Committee Chair Henck to submit recommendations for the positions of Vice-Chair of the Tax Seminar and of the Fundamentals Seminar for consideration by the Board at its September meeting.

6. **Section 103 Editorial Board** - Treasurer Newton noted that Section 103 Editorial Board Chair Linda L. D'Onofrio had provided a number of marketing suggestions to Aspen Press for *Federal Taxation of Municipal Bonds*, and that Aspen planned to demonstrate its CD-ROM product at the Bond Attorneys' Workshop. Treasurer Newton recommended that NABL members be reminded that subscriptions to *Federal Taxation of Municipal Bonds* must be in an individual member's name rather than in a law firm's name in order to receive a discount. Following a brief discussion of the contents of *Federal Taxation of Municipal Bonds*, President Ebert reiterated the Board's appreciation of the efforts of the Section 103 Editorial Board.

7. **Form Indenture** - President Ebert reported that, according to Director McBride, the Board can expect a draft of the model indenture at its fall or winter meeting.

**Engagement Letters**

President Ebert called upon Director Buck to lead the Board in a discussion of the model engagement letter report. Director Buck remarked that the revised conflicts paragraphs in the model governmental bond engagement letter are clearer and suggested certain editorial changes to further improve the paragraphs. He also reported that Professional Responsibility Committee member Mary Ann Braymer had provided a bibliography, as requested by the Board.

Director Buck then led a detailed discussion of the text and commentary of the model governmental bond engagement letter, at the conclusion of which Director Buck agreed to circulate a redraft by early September so that it could be discussed at the Bond Attorneys' Workshop and to provide to the Board for the September meeting a revised draft of the model private activity bond engagement letter. President Ebert thanked Director Buck and the members of the Professional Responsibility Committee for their progress in this matter and requested that existing Committee members focus on completing the engagement letters, while additional Committee members are enlisted to begin the task of updating NABL's
Selection and Evaluation of Bond Counsel in order to bring it in line with the revisions to The Function and Professional Responsibilities of Bond Counsel.

Report of the Director of Governmental Affairs

1. Home Page - Director of Governmental Affairs Dunbar circulated and reviewed a NABL home page website status report, which showed 1623 hits on the NABL home page and 313 user sessions in June, 1997, noting that the monthly report will serve as a basis of comparison for future use of the home page. She reported that Syscom, NABL’s web page consultants, and Microsoft are engaged in a program to provide professional, trade and business associations and their members web page services at no cost, including home page design, technology training, software licenses and a news content frame. Ms. Dunbar indicated that she, her assistant Laura A. Butera, William L. Gehrig and David L. Miller met with Syscom and recommend that NABL pursue an arrangement with Microsoft since it will save consultant fees and provide free software and training. Upon motion of Director Bond, seconded by Director Soeder, the Board adopted a resolution directing Ms. Dunbar to obtain a more specific proposal from Microsoft with respect to NABL’s website and authorized the Executive Committee to finalize the agreement with the goal of demonstrating the improved NABL home page at the Bond Attorneys’ Workshop.

2. SLGS - Ms. Dunbar described her July 7, 1997, meeting with Treasury representatives concerning the SLGS program and predicted that Treasury would proceed in a two-step process to address the use of the SLGS program as a hedge.

3. Updates - Ms. Dunbar also updated the Board on recent activities involving Senator Bob Graham’s education incentives proposal, the Bankruptcy Commission, yield-burning enforcement, the tax bill and office matters.

The Board continued its discussion of educational publications and seminars including the feasibility of compiling the Association’s securities law and disclosure materials into a single work and the desirability of sponsoring a seminar for issuers in coordination with issuer groups. It was the consensus of those present that the Securities Law and Disclosure Committee should appoint an editorial board to consider the issues involved in producing a securities law work, including marketability and content, and that the Education Committee should explore with issuer groups NABL’s sponsorship of a seminar for issuers on bond-related topics.

Nominating Committee

President Ebert advised the Board that the Nominating Committee plans to meet on August 8, 1997, and that members have not commented on the Nominating Committee guidelines or offered suggestions for directors and officers following the publication of the guidelines in the June 1 issue of The Quarterly Newsletter. Upon motion of President-Elect Conner, seconded by Secretary Weeks, the Board approved the Nominating Committee guidelines for use by the 1997 Nominating Committee and by future Nominating Committees.

Susan Weeks
Secretary
1998 NABL SEMINARS

Tax — February 4-6
Loews Coronado Bay Hotel, San Diego

Fundamentals — April 15-17
Grand Hyatt Hotel, Atlanta

Washington, DC — May 7-8
Renaissance Mayflower Hotel

For more information, please contact:

NATIONAL ASSOCIATION
OF BOND LAWYERS
Suite 105
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Wheaton, IL 60187

630/690-1135
SHARED TAX OBSERVATIONS

The smooth surface of the Potomac may belie the fanged fish below. Tax-exempt bonds are a continuing focus of all branches of the federal government as shown by the following bits and pieces.

Technical Advice Memoranda and Private Letter Rulings

Certificates of Participation. In technical advice memorandum 9721003 (January 24, 1997), the IRS holds that interest payable with respect to certificates of participation is not entirely tax-exempt. The holding is based upon the conclusion (among others) that, even assuming the described financing arrangement represented an investment trust, the pass-through amounts paid by the trust to the certificate holders did not represent interest on obligations “issued” by the political subdivision.

The ruling is also important for the emphasis placed upon proof of “issuance” and “issue date.” As with the false delivery transactions (see, for example, the reference to Harbor Bancorp below), the IRS stressed failure or delay of issuance and the importance of proof of (i) delivery of the evidence of debt, (ii) receipt of the purchase price by the issuer, and (iii) commencement of accrual of interest.

Allocation. The form of the transaction was also stressed by the IRS in technical advice memorandum 9723012 (March 21, 1997). In that ruling, proceeds requisitioned to reimburse a hospital for pre-issuance expenditures actually related in part to a non-501(c)(3) clinic operated by the hospital. Reallocation by the hospital was not permitted (relief from the alleged mistake was held not warranted), and the bonds were held taxable. Again, the paper trail binds.

Local Furnishing. Although the financed facilities examined in private letter ruling 9721004 (February 5, 1997) provided electric flows outside of the two-county area, those flows were matched or exceeded by inbound flows, at least on a calendar year basis. As a result, the periodic outbound electric flows did not, the IRS concluded, cause the facilities to be other than facilities for the local furnishing of electric energy. The ruling notes, however, that if at any time (measured on a calendar year basis) the utility experiences net outbound flows of electric energy, the bond-financed facilities that comprise the utility’s system will fail to qualify as local furnishing facilities.

Rebate. The rebate requirement is the subject of technical advice memoranda 9722002 (September 25, 1996), 9723002 (September 25, 1996) and 9725003 (March 7, 1997). In the first two memoranda, the IRS holds that the issuer is not entitled to opt out of its election to pay the penalty-in-lieu-of-rebate. Having failed to meet the spending requirements, the penalty is owed. Period. In the third memorandum, the IRS has no sympathy for the argument that because the reasonably required reserve fund was properly sized, above-yield interest earnings were not subject to the rebate requirement. “[T]he fact that the yield restriction is not required does not relieve

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the Issuer from its responsibility to rebate earned arbitrage . . . .” (Ah, the old boot and suspenders.)

Political Subdivisions Defined. Based upon the facts described in private letter ruling 9725038 (March 25, 1997), a water district is held to be a division of the state and, having a broad power of eminent domain, is also held to be a political subdivision. Also, in the unique facts described in technical advice memorandum 9730001 (October 4, 1996), where authority directors were selected from candidates offered by local governments, the authority was held to continue to qualify as a political subdivision.

Judicial and Administrative Continued Proceedings

Harbor Bancorp. On August 6, 1997, the Ninth Circuit Court of Appeals amended its June 10, 1997, decision in Harbor Bancorp et al v. Comm’r. In that case, you may recall, the bonds were held taxable as arbitrage bonds because, based upon the issuer’s incorrect view that the bonds were issued in December of 1985, rather than February of 1986, there was no compliance with the rebate requirement. The amendment makes three corrections. In these corrections, the Court indicates that provisions permitting the exclusion of interest must be interpreted narrowly; that there was ample ground for the conclusions of the Commissioner and the Tax Court; and that the Commissioner’s interpretation was persuasive (rather than reasonable).

Thorn Alvis. The Bond Buyer (July 3, 1997) indicates that settlement has occurred in certain proceedings relating to Thorn Alvis. The IRS did not, apparently, concur with the theory of the financing (that costs of issuance were partially paid by conduit borrowers) and concluded instead that five percent, rather than two percent, of the proceeds were used to pay costs of issuance. You will remember that the SEC administrative law judge for similar (or the same?) financings reached the same conclusion on the implied basis that the documents did not support the theory of the financing. Once again, the documentation was crucial to the appropriate conclusion.

Arbitrage Regulations

Correction. In Treasury Department release RIN 1545-AS49, Preamble references to the effective date of the final arbitrage regulations are modified to refer to the date bonds were “sold” rather than the date bonds were “issued.” The Preamble references are thereby changed to conform to the text (see §1.148-11(a)). (The date in question is July 8, 1997.)

Request for Comment. As part of its responsibility under the Paperwork Reduction Act of 1985, the Treasury Department has requested comments (62 F.R. 43198) relating to the record-keeping burden imposed by the final arbitrage regulations. Comments are invited on whether the collection of information is necessary for the proper functions of the Treasury Department, whether the Department’s estimate of the burden of record keeping is accurate, and similar matters.

Taxpayer Relief Act of 1997

On August 5, 1997 (the “Enactment Date”), the President signed the Taxpayer Relief Act of 1997 (H.R. 2014) (the “Act”). The Act contains 13 provisions (including 5 regarding qualified enterprise zone facility bonds) relating directly to the issuance of tax-exempt bonds. The Act also establishes a new tax credit program for “qualified zone academy bonds”. These provisions are summarized below. (“Code” means the Internal Revenue Code of 1986.)

(1) Repeal of $150 Million Cap for Most Qualified 501(c)(3) Non-Hospital Bonds

The $150 million cap is repealed for qualified 501(c)(3) bonds issued after the Enactment Date if at least 95 percent of the net proceeds are to be used to finance capital expenditures incurred after the Enactment Date. The Conference Report relating to H.R. 2014 acknowledges that the cap will continue to govern other qualified 501(c)(3) non-hospital bonds, including refunding bonds and new bonds issued for capital expenditures incurred before the Enactment Date. It also states that the conferees expect that the Treasury Department will continue to provide interpretative rules regarding application of the limit to bonds not covered by the repeal. (Section 222 of the Act amending Code section 141(b) by adding new paragraph (5).)
(2) Increase of $5 Million Small Issuer Rebate Exemption for Schools

The $5 million limit for the small issuer rebate exemption is increased “by the lesser of $5,000,000 or so much of the aggregate face amount of the bonds as are attributable to financing the construction . . . of public school facilities.” The term “construction” is defined by cross-reference to the definition of “construction issue” for purposes of the 2-year expenditure rebate exemption. Under that definition, construction includes reconstruction and rehabilitation.

In describing the new limitation, the Conference Report for H.R. 2014 states that small issuers will continue to benefit from the rebate exemption “if they issue no more than $10 million in governmental bonds per calendar year and no more than $5 million of the Bonds is used to finance expenditures other than for public school capital expenditures.”

The provision is effective for bonds issued after December 31, 1997. (Section 223 of the Act amending Code section 148(f)(4)(D) by adding new clause (vii).)

(3) Empowerment Zones and Enterprise Communities

(a) District of Columbia Enterprise Zone. The District of Columbia Enterprise Zone is created, consisting of all census tracts now a part of the District of Columbia enterprise community and all other census tracts within the District of Columbia where the poverty rate is not less than 20 percent. The designation is effective for calendar years 1998 through 2002. The new Zone is treated as an empowerment zone for most purposes, including for the purpose of issuance of tax-exempt qualified enterprise zone facility bonds except that the $3 million limit on the amount of bond proceeds that can be borrowed by a qualified business is increased to $15 million in the case of qualified businesses within the new Zone. (Section 701(a) of the Act amending Code sections 1400 and 1400A.)

(b) Two New Empowerment Zones with Same Tax Incentives. Two additional empowerment zones with generally the same tax incentives as previously designated zones (including tax-exempt qualified enterprise zone facility bonds) are permitted to be designated and such designations must occur within 180 days after the Enactment Date, but will not take effect before January 1, 2000. The designations will remain in effect for 10 years. (Section 951(a) of the Act amending Code section 1391(b)(2).)

(c) Twenty New Empowerment Zones with Expanded Tax Incentives. An additional 20 areas (15 urban and 5 rural) are permitted to be designated as empowerment zones before January 1, 1999, with the designation to remain in effect for 10 years. Modified designation criteria apply and, for empowerment zone facility bonds for the new zones, the private activity bond volume cap of Code section 146 and the special limits on issue size applicable to qualified enterprise zone facility bonds under present law do not apply. Instead, an aggregate of $60 million is permitted for zones in rural areas, $130 million for zones in urban areas with a zone population of less than 100,000 and $230 million for zones in urban areas with a zone population of at least 100,000. (Section 952 of the Act amending Code section 1391 by adding new subsection (g) and section 953 of the Act amending Code section 1394 by adding new subsection (f).)

(d) Alaska and Hawaii. The criteria for census tracts eligible to be designated as enterprise zones in Alaska and Hawaii are relaxed. (Section 954 of the Act amending Code section 1392 by adding new subsection (d).)

(e) Modification of Certain Bond Criteria. For bonds for existing and new empowerment zones and existing enterprise communities, the definition of “qualified enterprise zone business” is modified (i) to delay application of the requirement that proceeds be spent for a qualified enterprise zone business until the end of a startup period (as defined), (ii) to waive the requirements of an enterprise zone business (other than the requirement that 35
percent of the businesses’ employees be residents of the zone or community) for all years after a testing period (equal to the first 3 taxable years after the startup period), and (iii) to relax the rehabilitation requirement for financing of existing property. The provisions are effective for bonds issued after the Enactment Date. (Section 955 of the Act amending Code sections 1394(b)(2) and 1394(b)(3).)

(4) Qualified Mortgage Bonds for Disaster Areas

The first-time homebuyer requirement does not apply, and the purchase price and income limitations apply as if the residence were a targeted area residence, in the case of loans made from the proceeds of qualified mortgage bonds for residences located in Presidentially-declared disaster areas, provided that (a) the loans are made within two years after the date of the disaster declaration, and (b) the bonds are issued after December 31, 1996, and before January 1, 1999. (Section 914 of the Act amending Code section 143(k) by adding new paragraph (11).)

(5) Second Advance Refunding for Virgin Islands

A second advance refunding is permitted for a certain bond issue of the Virgin Islands. (Section 967 of the Act, relating to Code section 149(d)(3)(A)(i)(I).)

(6) 6-Month Rebate Exception, Technical Change

Under present law, the rebate requirement does not apply if proceeds are spent within 6 months of issuance and, in the case of governmental and qualified 501(c)(3) bonds, an additional 6-month period is permitted for expenditure of the lesser of $100,000 or 5 percent of the proceeds. The $100,000 limitation is repealed, effective for bonds issued after the Enactment Date. (Section 1441 of the Act amending Code section 148(f)(4)(B)(ii)(I) and Section 1445 of the Act relating to the effective date.)

(7) 2-Year Rebate Exception, Exclusion of Bona Fide Debt Service Fund Earnings

If the spending requirements of the 2-year exemption are otherwise met, then the rebate requirement does not apply to earnings on a bona fide debt service fund. This provision is effective for bonds issued after the Enactment Date. (Section 1442 of the Act amending Code section 148(f)(4)(C) by adding new clause (xvii) and Section 1445 of the Act relating to the effective date.)

(8) Repeal of 150 Percent Limit on Reserve Funds

The maximum limitation of 150 percent of annual debt service, relating to unrestricted yield investments for reserve and similar funds established for certain private activity bonds, is repealed, effective for bonds issued after the Enactment Date. (Section 1443 of the Act amending Code section 148(d) by striking paragraph (3) and Section 1445 of the Act relating to the effective date.)

(9) Repeal of Expired Student Loan Bond Provisions

Expired provisions relating to application of the rebate requirement and the pooled financing bond temporary period rules to certain student loan bonds issued before January 1, 1989, are repealed. This provision is effective for bonds issued after the Enactment Date. (Section 1444 amending Code section 148(c)(2) by striking subparagraph (B) and Code section 148(f)(4) by striking subparagraph (E) and Section 1445 of the Act relating to the effective date.)

(10) Tax Credit for Qualified Zone Academy
**Bonds**

An annual tax credit is permitted for banks, insurance companies and lending companies that hold “qualified zone academy bonds.” The amount of the credit will be determined monthly by the Treasury Department and generally will be that percentage rate which will permit the issuance of qualified zone academy bonds “without discount and without interest cost to the issuer.” There is no requirement for the bonds to be tax-exempt and, as a consequence, private activity, arbitrage, rebate, federal guarantee, information reporting and other limitations do not apply.

The aggregate national amount of qualified zone academy bonds that may be issued is $400 million in 1998 and $400 million in 1999. This amount is to be allocated by the Treasury Department among the States on the basis of population of individuals below the poverty line. Each State education agency may allocate the State’s allocation to qualified zone academies within the State.

A “qualified zone academy bond” is a bond issued by a State or local government as part of an issue where at least 95 percent of the proceeds are to be used for a “qualified purpose” for a “qualified zone academy” located within the jurisdiction of the issuer, if the issuer (i) designates the bond for purposes of the credit, (ii) certifies that it has received written assurances that the “private business contribution requirement” will be met for the academy, and (iii) certifies that it has received the written approval of the eligible local education agency for bond issuance.

“Qualified purposes” for which bond proceeds may be used are limited to repair and rehabilitation, providing equipment, developing course materials and training teachers.

A “qualified zone academy” is either a public school or academic program within a public school that provides pre-college education or training if the school or the program satisfies certain requirements, including that the program is designed in cooperation with business and that either the school is located in an empowerment zone or enterprise community or it is reasonably expected that at least 35 percent of the students will be eligible for free or reduced cost lunches under the national school lunch program.

The “private business contribution requirement” is satisfied if the local education agency has received written commitments from private entities to make qualified contributions (including contributions of equipment, technical assistance and internships and similar opportunities) having a present value equal to at least 10 percent of the proceeds of the bonds.

The credit is included in gross income and the credit may not exceed the excess of the sum of the taxpayer’s regular income tax liability plus the alternative minimum tax over the sum of all tax credits. (Section 226 adding new Code section 1397E.)

Because the permitted volume of bonds for which the new credit is available is so low and because the aided localities are so limited, the implementation of a credit in lieu of tax-exemption is not likely to be perceived as a threat to tax-exemption generally. Still, we will wish to continue vigilant concern regarding Congressional development of alternatives to tax-exemption.

**Audits**

Some of the negative results of technical advice memoranda (see above) stem from audits of bond issues. Clearly, no bond lawyer would apply for a ruling based upon a theory obviously inappropriate to the financing (as the IRS implies in those memoranda); nor would any experienced bond lawyer provide a tax opinion based upon such a theory. It is more likely that the problems found by the Service are not the result of the bond lawyer’s tax analysis but rather are the consequence of the reflection of that analysis in the financing documents. This means, then, that IRS audits will be catching errors that are largely cosmetic rather than substantive. The ultimate threat of taxability hardly balances against the types of errors so far discovered and revealed.

All of which might cause you also to conclude (in a mis-rhymed fashion):

Theory and fact, theory and fact:
As we draft words, focus on that.
Have care for the words, have care for
COMMITTEE ON GENERAL TAX MATTERS COMMENTS ON FINAL REGULATIONS ON THE PRIVATE ACTIVITY BOND TESTS APPLICABLE TO TAX-EXEMPT BONDS

Editor's Note: The following comments were submitted to the Internal Revenue Service on August 1, 1997, by the Committee on General Tax Matters on behalf of the Association. Perry E. Israel, Carol L. Lew, Jeremy A. Spector, and Committee Chair John J. Cross III were principally responsible for their preparation. Other contributors included Jeannette M. Bond, Walter R. Calvert, William H. Conner, Daniel C. Waugh, Howard J. Eichenbaum, Lucy A. Emison, Robert G. Goldman, Brenda S. Horn, Scott R. Lilienthal, Mitchell H. Rapaport, Sharon Stanton White, Milton S. Wakschlag, and Dean M. Weiner. The Committee complimented the IRS on the regulations, saying that "they significantly advance the state of the law in many respects with analytically sound and workable standards," but urged the Service "to provide needed technical amendments and certain substantive changes ... in a timely manner as part of your priority guidance project on the currently-reserved portions of these regulations."

General Introduction

Sharon Stanton White
August 20, 1997

This report contains comments prepared by members of the General Tax Matters Committee (the “Committee”) of the National Association of Bond Lawyers (“NABL”) on the final Treasury Regulations on the private activity bond tests applicable to tax-exempt bonds which were promulgated under T.D. 8712 and published in the Federal Register on January 16, 1997 (the “Final PAB Regulations”). These regulations made final, with amendments, parts of the December 1994 proposed private activity bond regulations (“Proposed PAB Regulations”). Unless noted, section references are to the Internal Revenue Code of 1986 and the Final PAB Regulations.¹

NABL was incorporated as an Illinois non-profit 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.

First, we want to compliment Treasury and the IRS on the Final PAB Regulations. As a general matter, the Final PAB Regulations significantly advance the state of the law in a number of respects with analytically sound and workable standards. These comments focus mainly on technical issues and areas of ambiguity identified to date by various NABL members. In addition, we raise several substantive issues.

These comments do not purport to be comprehensive, but we hope they will be constructive. We expect that other issues may arise as bond counsel and issuers gain experience with applying the Final PAB Regulations in practice and we may make additional comments in the future to address any such issues.

Given that the Final PAB Regulations represent the first comprehensive final regulatory project on the private activity bond tests in over 20 years and that they were substantially re-written between the proposed and final versions without further opportunity for public comment, we urge you to provide needed technical clarifications and amendments to the Final PAB Regulations in a timely manner as part of or in conjunction with the anticipated priority guidance project on the currently-reserved portions of the Final PAB Regulations.

I. §1.141-1: Definitions and rules of general application.

A. §1.141-1(b): Amend public utility property definition to clarify that rate regulation is unnecessary.

1. Comment.

Section 1.141-1(b) defines “public utility property” by reference to the definition in §168(i)(10) of the Code.

Prop. Treas. Reg. §1.168-3(c)(10)(i) proposes to interpret the scope of the Code definition of public utility property under §168(i)(10) to property of a public utility that is “regulated.” Prop. Treas. Reg. §1.168-3(c)(10)(i) further provides in relevant part, as follows:

“A taxpayer’s rates are “regulated” if they are established or approved on a rate-of-return basis. Rates regulated on a rate-of-return basis are an authorization to collect revenues that cover the taxpayer’s cost of providing goods or services, including a fair return on the taxpayer’s investment in providing such goods or services, where the taxpayer’s costs and investment are determined by use of a uniform system of accounts prescribed by the regulatory body. A taxpayer’s rates are not ‘regulated’ if they are established or approved on the basis of maintaining competition within an industry, insuring adequate service to customers of an industry, insuring adequate security for loans, or charging ‘reasonable’ rates within an industry since the taxpayer is not authorized to collect revenues based on the taxpayer’s cost of providing goods or services. Rates are considered to be ‘established or approved’ if a schedule of rates is filed with a regulatory body that has the power to approve such rates, even though the regulatory body takes no action on the filed schedule or generally leaves undisturbed rates filed by the taxpayer.”

The IRS also has taken a similar position in certain private letter rulings. See, e.g., PLR 8624005.

The use of the §168(i)(10) definition of public utility property in the Final PAB Regulations appears mainly to provide a convenient list of types of public utility facilities. The potential incorporation of rate regulation, however, seems unintended but in any event is wholly inappropriate. Frequently, rates set by a State or local governmental utility are set on a cost plus debt service basis or some other basis. It is extremely rare for municipal utilities to set rates to include any kind of profit. In addition, given the range of state deregulation initiatives for different types of public utility facilities, particularly different approaches to electric generation, transmission, and distribution facilities, any linkage of the definition of public utility facility to any regulation could lead to inappropriately disparate results.

From a tax policy standpoint, the provisions in the Final PAB Regulations which employ the term “public utility property” focus on types of facilities which warrant longer-term private management contractual arrangements, presumably in recognition of the need for longer-term operating arrangements for these types of utilities. To take one example, in the case of jointly-owned nuclear power plants, it is common for one of the joint owners to manage the plant under a “life-of-the-plant” operating arrangement.

Specific affected provisions include §1.141-3(b)(4)(iii)(C) (long-term expense-sharing oper-
ating arrangements for public utility property), and Rev. Proc. 97-13's 20-year management contract safe harbors for public utility property with certain 80% or 95% fixed fee management contracts. In short, a governmental public utility ought not be required to be subject to regulation, much less rate regulation, in a rapidly-deregulating environment, in order to employ these longer-term management contract arrangements for public utility property under the Final PAB Regulations and Rev. Proc. 97-13. We also suggest that the regulations incorporate flexibility to add to the list of “public utilities.”

2. Recommendation.

We recommend that the definition of public utility property under the Final PAB Regulations and Rev. Proc. 97-13 be amended to remove any regulation requirement. We specifically recommend that public utility property be defined without reference to §168 or any attendant regulation, as follows:

“Public utility property” means property used predominantly in the trade or business of the furnishing or sale of (1) electrical energy, water, or sewage disposal services, (2) gas or steam through a local distribution system, (3) telephone services, or other communication services if furnished or sold by the Communications Satellite Corporation for purposes authorized by the Communications Satellite Act of 1962 (47 U.S.C. 701), (4) transportation of gas or steam by pipeline, or (4) such other facilities as may be specified by revenue ruling or revenue procedure.”

B. §1.141-1(b): clarify that governmental persons include “on-behalf-of” entities.

1. Comment.

Without explanation, the Final PAB Regulations deleted from the definition of “governmental person” entities which act “on behalf of” governmental units. The Proposed PAB Regulations had included such on-behalf-of entities in the definition of governmental persons. Section 1.141-3(d)(1) of the Final PAB Regulations appears to treat certain nongovernmental on-behalf-of entities as agents of governmental persons, based on the second sentence which states that “[f]or example, use by a nongovernmental person that issues obligations on behalf of a governmental person is not private business use to the extent the nongovernmental person’s use of proceeds is in its capacity as an agent of the governmental person.”

Although we presume that no substantive change was intended, we believe that it should be clarified that no change was intended in the longstanding body of law on eligible tax-exempt bond issuers that act on behalf of governmental units, including, without limitation, governmentally constituted authorities who issue on behalf of governmental units under Treas. Reg. §1.103-1(b) and nonprofit corporations that issue on behalf of governmental units under Rev. Rul. 63-20, Rev. Rul. 57-128, and their progeny.

2. Recommendation.

Subject to our comment in the next paragraph, we generally recommend that the first sentence in the definition of governmental person in §1.141-1(b) be amended to add back at the end of that sentence the following phrase which referenced on-behalf-of entities as it appeared in the Proposed PAB Regulations:

“or any entity issuing obligations on behalf thereof”

If the intent of the change in approach was to test Rev. Rul. 63-20 issuers for their use activities (as contrasted with their issuing activities), under the principles of Section 145, it would seem appropriate to leave that narrow consideration for analysis under the agency principles of §1.141-3(d)(1). This limitation, however, would not make sense to apply to “on-behalf-of” corporations described in Rev. Rul. 57-128, which need not be 501(c)(3) organizations.

II. §1.141-2: Private activity bond tests.

A. §1.141-2(a): narrow the statement of purposes.

1. Comment.

While we recognize the need for broad statements of regulatory purposes, we believe that the statement of purposes under §1.141-2(a) is overly broad and inaccurate. This provision fails to recognize statutorily-permitted governmental financing arrangements (e.g., permissible private
benefit when the general public use exception is met) or the narrowing effect of the private payment or security test (e.g., clearly permissible grants to private businesses when there are no private payments). A more narrow and accurate statement of purpose is needed. In a similarly broad provision, §1.148-10(a) of the arbitrage regulations contains a statement acknowledging permitted financing arrangements.

2. Recommendation.

We recommend that the second and third sentences of §1.141-2(a) be amended to read as follows:

“The general purpose of the private activity bond tests of section 141 is to limit the volume of tax-exempt bonds that finances the activities of nongovernmental persons or transfers benefits to nongovernmental persons, directly or indirectly, in circumstances that are inconsistent with governmental bond financing because they meet either (i) the two-part private business use test and private payment or security test, or (ii) the private loan test, in each case based on the standards set forth in section 141 and §§1.141-1 through 1.141-16 and after taking into account financing arrangements expressly permitted for governmental bonds thereunder.”

B. §§1.141-2(d)(2)(ii) and 1.141-12(a)(1): address gap situation in which issuer has no specific reasonable expectations.

1. Comment.

In the current climate of governmental privatizations and 501(c)(3) hospital dispositions to for-profit companies, an issuer may be unable in good faith to reach a specific reasonable expectation on the issue date that it will be able to maintain its governmental bond status throughout the term of a bond issue or that it will take some future deliberate action to cause the private activity bond tests to be met. §1.141-2(d)(2)(ii) (on special redemption provisions for future expected private activity bond status) and §1.141-12(a)(1) (on conditions to all change-of-use remedies) fail to cover this gap situation. As a result, in this situation, the issuer would appear to be ineligible technically to rely on the reasonable expectations test as of closing, the reasonable expectations test under the remedial action rule, or the reasonable expectations required for the mandatory redemption exception. There would appear to be no sound tax policy reason to preclude such an issuer with uncertain expectations from using the special mandatory redemption rule to the same extent as an issuer who specifically expects to meet the private activity bond tests at some point.

2. Recommendation.

We recommend that §1.141-2(d)(2)(ii) be amended to begin, as follows:

“An action that, if reasonably expected, as of the issue date, to occur after the issue date, would cause either the private activity business tests or the private loan financing test to be met may be disregarded for purposes of those tests if—”

In addition, we recommend that the last sentence of §1.141-12(a)(1) be amended to read, as follows:

“For this purpose, if the issuer takes a deliberate action prior to the final maturity date of the issue that would cause either the private business tests or the private loan financing test to be met, the term of the bonds may be determined by taking into account a redemption provision if the provisions of §1.141-2(d)(2)(ii)(A) through (C) are met.”

We also recommend appropriate conforming changes, including a conforming change to §1.141-3(g)(2)(iii) and to §1.141-12(a)(1).

C. §1.141-2(d)(2)(ii)(A): provide a safe harbor for the “substantial period requirement.”

1. Comment.

While we understand that unquantified standards can provide useful flexibility, we nonetheless believe that the important undefined term “substantial period” under §1.141-2(d)(2)(ii)(A) causes undue uncertainty. We believe a safe harbor describing what constitutes a “substantial period” for this purpose is needed. Two obvious interpretative analogies are the five-year standard that was used in Revenue Procedure...
93-17 and the 10% of the measurement period standard under §1.141-3(g)(7). We believe that the standard based on 10% of the measurement period is more appropriate because it incorporates some consideration of the maturity structure or type of financing.

2. Recommendation.

We recommend that §1.141-2(d)(2)(ii)(A) be amended to add a second sentence, as follows:

“For this purpose, 10 percent of the measurement period (described in §1.141-3(g)(2)) generally is a substantial period.”

D. §1.141-2(d)(3)(ii)B): extend regulatory safe harbor to state or local governmental regulatory directives.

1. Comment.

The safe harbor against deliberate actions for actions taken in response to federal regulatory directives is helpful. It recognizes that states and local governmental entities do not always control their own destinies. We believe that this underlying policy applies equally to actions taken in response to state or local governmental directives that are beyond an issuer’s control. We recommend extending this safe harbor to cover these state or local governmental actions. We also note that the “in response to” language and the safe harbor nature of the rule for federal regulatory directives suggest the possibility of a broader definition of the term “deliberate.” This will be particularly useful in circumstances in which an issuer has a legal choice over its actions but no practical choice.
2. Recommendation.

We recommend that §1.141-2(d)(3)(ii)(B) be amended to add the phrase “or other unrelated state or local governmental entities” immediately after the phrase “federal government” at the end of the sentence.

E. §1.141-2(d)(4)(i): delete “established” program constraint from special rule on ordinary course dispositions of personal property.

1. Comment.

This helpful exception to deliberate action for ordinary course dispositions of personal property requires that a disposition be part of an “established” governmental program. This exception favors existing governmental programs over new governmental programs for no good tax policy reason. In addition, the word “established” is vague.

2. Recommendation.

We recommend that §1.141-2(d)(4)(i) be amended to delete the word “established.”

F. §1.141-2(d)(4): extend special rule on ordinary course dispositions of personal property to 501(c)(3) bonds.

1. Comment.

Sections 141 and 145 generally treat qualified 501(c)(3) bonds the same as governmental bonds for purposes of the private activity bond tests, with three main modifications. First, financed property must be owned by a 501(c)(3) organization or a governmental unit. Second, any property used by the 501(c)(3) organization in activities related to its exempt activities counts as qualified use. Third, the 10% private business test thresholds are reduced to 5%. Except to give effect to these modifications, the private activity bond rules should treat qualified 501(c)(3) bonds the same as governmental bonds to the fullest extent possible absent a good tax policy reason to distinguish these bonds.

Like governmental entities, 501(c)(3) organizations commonly purchase and dispose of personal property in the ordinary course. It would appear to be equally appropriate to apply the rule contained in §1.141-2(d)(4) to 501(c)(3) organizations. The ownership requirement for qualified 501(c)(3) bonds ought not preclude extension of this special rule. This special rule is the case in which narrowly-prescribed dispositions of personal property do not override reasonable expectations. As such, it should apply to reasonable expectations for both private business use and 501(c)(3) organization ownership. In addition, this special rule can be viewed as a limited change-of-use remedial action (i.e., all sale proceeds must be expected to be used to purchase new equipment). In this regard, a parallel change-of-use remedy under §1.141-12(e) permits a 501(c)(3) organization to cure a change of use by applying disposition proceeds to qualifying 501(c)(3) organization exempt purposes.

2. Recommendation.

We recommend that §1.145-2(c)(1) be amended to delete the reference to §1.141-2(d)(4).

G. §1.141-2(d)(5): amend GO bond safe harbor to make it more useful.

1. Comment.

While we appreciate the intent behind the safe harbor for large general obligation bond programs, we believe that the number of eligibility conditions unduly limit its practical usefulness. We recommend several changes to try to make this safe harbor more useful.

First, given that the purpose of this safe harbor is to relieve ongoing administrative tracking burdens for large governmental program issuers, the verification test directly undermines that purpose. The verification test is a vague awkward hybrid between a reasonable expectations test and an actual facts test. The verification test should be deleted and reasonable expectations should be determined based on all the facts and circumstances.

Second, the requirement for financing “predominantly” not fewer than four separate purposes introduces a vague new standard and seems unnecessary.

Third, the 100% capital expenditures expectation seems unduly tight regarding the nature of the expenditure. It should be loosened modestly to
cover related working capital expenditures under the de minimis rule under §1.148-6(d)(3)(ii) of the arbitrage regulations that are included in the arbitrage definition of “capital project” under §1.148-1(b).

Fourth, it is unrealistic for large governmental program issuers to establish reasonable expectations to spend all the proceeds of one general obligation bond issue before issuing another such bond issue. Numerous perfectly valid reasons (e.g., interest rates) influence the timing of bond issues for large governmental program issuers.

Fifth, the requirement that no proceeds be used to make private loans is unnecessarily restrictive. Large general obligation issues are already greatly limited to $5 million in private loans. This requirement should be deleted, and, instead, issuers should be required to track loan proceeds for deliberate actions.

2. Recommendations

We recommend that §1.141-2(d)(5) be amended in several respects to address the indicated concerns, as follows:

--In paragraph (i), delete the phrase “and does not predominantly finance fewer than four separate purposes.”

--In paragraph (iii), after the beginning language which reads “The issuer reasonably expects on the issue date to allocate all of the net proceeds of the issue to capital expenditures within 6 months of the issue date,” delete the balance of that paragraph.

--Delete paragraphs (iv) and (v).

--In paragraph (vi), change the term “capital expenditures” to “capital projects (as defined in §1.148-1(b)).”

III. §1.141-3: definition of private business use

A. §1.141-3(a)(1): clarify certain basic points

On balance, we believe that the private business use test portion of the Final PAB Regulations provides a strong analytic framework. We think it would be helpful to clarify specifically a couple of basic points in the general introductory provision in §1.141-3(a)(1). The fourth sentence of this section, which comes directly from Code §141(b)(6)(B), reads “[A]ny activity carried on by a person other than a natural person is treated as a trade or business.” Although that sentence may be technically accurate and we understand the intent, it has caused some confusion about the treatment of activities of both governmental persons and natural persons.

We recommend an express statement that a governmental person’s use can never be private business use. We understand that one of the more confusing examples in the Final PAB Regulations under §1.141-4(g), Example 9, was aimed in part to illustrate the point that a governmental person’s use of property is not private business use. A direct statement of this point would be clearer.

We further recommend a clarifying statement on the effect of a natural person’s conduct of trade or business activities (e.g., a sole proprietor’s business). In addition, in subsection B of this Section of our comments below, we further recommend an express exception to clarify the scope of coverage of trade or business activities of a natural person.

2. Recommendation

We recommend that §1.141-3(a)(1) be amended to replace the existing fourth sentence with the following:

“A governmental person’s activity is not private business use. A nongovernmental person’s (including a natural person’s) conduct

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of a trade or business activity is treated as
private business use to the extent and under the
principles set forth in this section.”

B. §1.141-3(b)(2); §1.141-3(b)(3); and
§1.141-3(b)(7): clarify when ownership,
leasing, and other arrangements by natural
persons cause private business use.

1. Comment.

In several provisions, including §§1.141-
3(b)(2), 1.141-3(b)(3), and 1.141-3(b)(7), the
Final PAB Regulations provide that ownership,
leasing, or other arrangements by any nongov-
ernmental person cause private business use.
Literally, these provisions treat a natural person
who owns, leases, or has other arrangements with
respect to property as automatically engaged in
private business use. However, ownership,
leasing, or other arrangements with respect to
property by a natural person only cause private
business use if the natural person conducts a trade
or business activity with respect to that property.

2. Recommendation.

We recommend that a new exception to private
business use be added as paragraph (d)(7) in
§1.141-3 (with appropriate conforming cross-
references in paragraphs (b)(2), (b)(3), and (b)(7)
of §1.141-3) to clarify the limitations on private
business use by natural persons, as follows:

“(d)(7) Natural persons. In the case of a
natural person, ownership of property, leasing
of property, or other arrangements that convey
special legal entitlements or special economic
benefits to use of property are private business
use by the natural person only if the natural
person conducts a trade or business activity
with respect to that property.”

C. §1.141-3(c)(1): clarify that “use on the
same basis by natural persons” applies to
the system as a whole.

1. Comment.

In applying the general public use exception to
private business use in circumstances involving
financing of an extension of the infrastructure grid
e.g., extension of a sewer line from the general
sewer system to a factory), it should be clarified
that general public use is determined based on the
system as a whole. This is a very important point.

2. Recommendation.

We recommend that a system improvement
 provision comparable to §1.141-3(e)(4) of the
Proposed PAB Regulations be added, but without
treating roads differently than other system
improvements.

D. §1.141-3(c)(3): clarify that only long-term
arrangements that would otherwise consti-
tute private use violate the 180-day rule;
change 180 days to six months.

1. Comment.

§1.141-3(c)(3) generally provides that an
arrangement is not general public use if the term of
the use under the arrangement is more than 180
days. Many governmental entities are required to
provide services for extended periods on the same
basis to all persons without regard to any priority
use. For example, a municipal utility may be
required under a contract with the Rural Economic
and Development Program to provide services on
a non-priority basis for the term of any loan from
the Program. The term of such a requirement may
exceed 180 days. Such an arrangement should not
be disqualified by §1.141-3(c)(3) so long as there
otherwise is no priority use or special rate
arrangement.

The exception for long-term arrangements
under the general public use test introduces
unnecessary complexity by using a period of 180
days instead of six months. Most contracts of this type will run on a number of months basis and will run afoul of the common perception that six months is the same as 180 days. Thus, for example, a contract that runs from January 1 to June 30 will exceed the 180-day rule.

2. Recommendation.

We recommend that the introductory clause of §1.141-3(c)(3) be amended to read as follows:

“An arrangement that would otherwise be treated as private business use is not treated as general public use...”

We also recommend that “six months” replace “180 days” in the first sentence of §1.141-3(c)(3).

E. §1.141-3(f), Example 6: modify or delete fish ladder example.

1. Comment.

The fish ladder example continues to cause confusion about its analytic basis. Although members of the general public will not physically use the fish ladders, it appears that the benefit of the fish preservation scheme benefits the entire general public. In addition, the hydroelectric facility is not physically using the fish ladders to any greater extent than any members of the general public. So long as the hydroelectric facility operator receives no special benefits from the use of the fish ladder (such as keeping the fish out of the hydroelectric facility), the fish preservation facilities should be treated as used by the general public.

2. Recommendation.

We recommend that Example 6 under §1.141-3(f) be amended to provide that the fish preservation facilities are used by the general public. So long as the facilities are not owned by K, K should be considered to have no special legal entitlement to the fish preservation facilities, and the facilities should be treated as having no private business use. It may be useful to state that general public benefit alone is insufficient to overcome private business use when a private business owns the facilities. For example, toxic waste cleanup on land owned by a private business or the satisfaction of mitigation requirements by purchasing marsh-

lands owned by a private business will still result in special legal entitlements because of the private ownership of those facilities even though their use may be restricted. In the alternative, given the confusion generated by this example, we believe that it safely could be deleted.

F. §1.141-3(f), Example 8(ii): clarify or delete residual basis lease constraint in airport runway example.

1. Comment.

It is unclear why the residual basis lease gives rise to a special legal entitlement rather than a special economic benefit. Moreover, many, if not most, airport use agreements provide that fees are determined on a cost-center basis. For example, an airport may take into account all “airfield” side costs, subtract out expected revenues from other operations (such as fueling), to determine an expected “net cost” for the cost-center. Landing fees will then be set for all aircraft (commercial or noncommercial) based upon net costs divided by expected landing weights. If revenues exceed costs (as will often be the case, particularly when bond documents impose debt service coverage requirements), the excess revenues typically will be taken into account in adjusting the landing fees for all airplanes during the succeeding period. If the fees are adjusted by reducing the fees for the signatory airlines (often the case to encourage airlines to become signatory airlines), the reduction in fees should be treated explicitly as a bulk use discount rather than as “special legal entitlement,” so long as the resultant fees for the signatory airlines are not discriminatory in violation of FAA regulations.

Moreover, on a residual basis lease arrangement, where excess net revenues are used to reduce lease payments in future years, another issue is whether those arrangements give rise to special legal entitlements even though the airlines may not be lessees in the future years. Absent unusual facts suggesting an ownership-like arrangement (such as that described in Example 8, (ii)), it would appear that the more appropriate conclusion generally should be to find no private business use of the runways. The mere reduction in rental costs for airlines alone should be insufficient to constitute a special legal entitlement...
unless the airline also has some sort of control over the airport, such as under a management contract.

2. Recommendation.

We recommend that Example 8 (iii) under §1.141-3(f)(7) be revised to conclude that, notwithstanding that the leases with the private air carriers are determined on a residual basis, the leases do not convey special legal entitlements to the runway and therefore the private business use test is not met with respect to the runway.

G. §1.141-3(g)(2)(i): consider determining reasonably expected economic life from the viewpoint of the issuer.

1. Comment.

Under the measurement period provision, it would seem that, for purposes of determining the reasonably expected economic life of the property as of the issue date, economic life properly should be determined from the viewpoint of the issuer. Thus, if an issuer reasonably expects to use financed property having a ten-year safe harbor economic life under section 147 for a shorter period of only five years, the issuer should take into account the shorter reasonably expected life. Thus, once property has exceeded its expected economic life to the issuer, the issuer should be able to sell it at its then fair market value without giving rise to private business use. Conversely, if an issuer reasonably expects to use property for a period longer than the Section 147(b) safe harbors, the issuer should take that longer life into account. To protect against inconsistent results, consideration could be given to imposing a specific consistency requirement on economic life determinations for purposes of all the related tax-exempt bond provisions (e.g., the 120% test under §1.148-1(c)(4)(i)(B) and Section 147(b) for 501(c)(3) bonds).

On the other hand, and as a caveat to this recommendation, some of our members are concerned that the recommended approach may introduce undue subjectivity into the economic life determination. Economic life safe harbors may be simpler to apply.

In any event, given the importance of the economic life determination to compliance, we believe that it would be helpful to clarify how to apply this economic life test.

2. Recommendation.

Subject to consideration of the referenced caveat, we recommend that the definition of “weighted average reasonably expected economic life under §1.141-1(b) be amended to read as follows:

“Weighted average reasonably expected economic life or reasonably expected economic life is determined under section 147(b) based upon the expected economic life to the issuer or conduit borrower. The reasonably expected economic life of property may be determined by reference to the class life of the property under section 168. The economic lives used for purposes of section 141 shall be consistent with those used for other purposes of sections 141 through 150.”

We further recommend that a consistent term be used and defined for purposes of the 10-year and 15-year term management contract safe harbors under Sections 5.03(1) and (2) of Rev. Proc. 97-13. Those safe harbors currently limit these contract terms by reference to 80% of the “reasonably expected useful lives of the financed property.” We recommend that these safe harbors incorporate a consistent defined “average economic life” concept in lieu of useful life.

H. §1.141-3(g)(4)(i) and (ii): re-consider disregard of periods in which a facility is not actively used.

1. Comment.

In the case of actual government use and private business use at different times, §1.141-3(g)(4)(ii) disregards periods in which a facility is not in use. This provision is somewhat unclear in that it fails to address whether a governmental person’s ownership suffices to count as governmental use in the absence of any countervailing private business use. Example 2 under §1.141-3(g)(8) suggests that governmental ownership fails to count as governmental use in this context. However, this approach is inconsistent with the general rules on ownership and leasing under §1.141-3(b)(2) and (3). We believe that a better way to address the isolated concern
raised by stadium financings would be to apply the existing provision under §1.141-3(g)(4)((v) which considers the effect of private business use having a significantly greater fair market value than government use.

More generally, however, we believe that it is both harsh and administratively burdensome to disregard for private business use measurement purposes those periods in which a governmental person owns or leases a financed facility, but during which, for whatever reason, the facility remains vacant or not actively used. To take several sympathetic examples, a facility may remain vacant while undergoing environmental remediation, during a real estate recession, or as a result of technological or policy changes regarding optimum way to delivery governmental services. Given that a governmental person bears the economic benefits and burdens of these legal possessory interests during these periods, these interests properly should count as governmental use. Moreover, the disregard of periods of nonuse in this circumstance also increases administrative burdens of tracking private business use because it causes a more frequently changing denominator in the private business use percentages.

2. Recommendation

We recommend that §1.141-3(g)(4)(ii) be amended to delete the word “actual” in the two places it appears in the first sentence of that section and to delete the second sentence of that section in its entirety.

I. §1.141-3(g)(8), Example (1): allocations of private business use based on costs contributed may be inappropriate in certain circumstances.

1. Comment

It is unclear from the example why the amount of private business use is properly determined from the dollar amount of contribution to the facility. The implication is that if 100% of the facility were financed by the governmental issuer, no private business use would arise. That appears to be erroneous.

2. Recommendation

We recommend that Example 1 under §1.141-3(g)(8) be clarified or deleted in conjunction with the issuance of mixed use allocation rules. One possible clarification would be to state that a governmental person will finance 90% and nongovernmental persons will finance 10% based upon their reasonable expectations as to the anticipated use of the facility. This seems a more correct result even though it may not be “reasonably practicable” to estimate the relative revenues expected to result from the various uses of the facility.

IV. Section 1.141-4: private security or payment test.


1. Comment

This provision excludes from the private security or payment test calculation those payments of debt service made or to be made from sale or investment proceeds of a bond issue. This exclusion reduces the amount of permitted private security or payments. This exclusion seems too broad in certain circumstances and may cause this test to get out of balance inappropriately.

2. Recommendation

We recommend that §1.141-4(b)(2)(ii)(A) be amended to convert the exclusion test to a reasonable expectations test. Short of that, we recommend that this section expressly carve out of the excluded payments any unexpected use of proceeds to retire bonds and any use of proceeds (including specifically investment proceeds) held in a reasonably required reserve or replacement fund to pay debt service on the bonds.

B. §1.141-4(b)(2)(iv): clarify timing of first fair market value allocation of property as private security.

1. Comment

For purposes of the private security test, §1.141-4(b)(2)(iv) imposes a mark-to-market requirement on property as of “the first date on which the property secures bonds of the issue.” This provision contains no express provision to limit the timing of the mark-to-market allocation to
take into account when property is first used for a private business use.

2. Recommendation.

We recommend that §1.141-4(b)(2)(iv) be amended to change the clause beginning after the comma to read as follows:

"the property is valued at fair market value as of the first date on which the property both secures the bonds and is used for a private business use."

C. §§1.141-4(c)(2)(i)(A), 1.141-4(d)(5), and 1.141-4(g), Example 11: clarify that private payments include only payments that directly or indirectly pay debt service.

1. Comment.

The various restatements of the private payment test under §1.141-4 have caused a fair amount of concern about the intended breadth of this test. Although helpful (albeit unofficial) public statements by Treasury and IRS officials have alleviated much of that concern, we believe that express clarification is needed on an important limitation on the private payment test. Specifically, it should be made clear that private payments properly include only those payments that, directly or indirectly, provide for payment of debt service on an issue or otherwise directly benefit the issuer. In short, the private payments test should capture underlying arrangements to pay debt service on an issue, but not more.

2. Recommendation.

We recommend that §1.141-4 be amended in several respects as follows:

--In the first sentence of §1.141-4(c)(2)(i)(A), insert the phrase "of debt service on the issue" immediately after the word "payments" the first time it appears.

--In the third sentence of §1.141-4(c)(2)(i)(A), insert the following phrase at the end of that sentence

"if made for a period of time that property is used for a private business use and debt service on the issue is directly or indirectly derived from such payments."

--In §1.141-4(c)(2)(i)(A), add the following sentence after the third sentence:

"Generally, only payments made to the actual issuer or a related party (within the meaning of Section 1.150-1) are considered private payments for purposes of the private payment test."

--In §1.141-4(d)(5), insert the following phrase at the end of the sentence:

"and debt service on the issue is directly or indirectly derived from such payments."

--In §1.141-4(g), Example 11(i), insert the following phrase at the end of the third sentence:

"and debt service on the issue will not be directly or indirectly derived from payments made to X by members of the general public or others for the period of time the stadium is used by X."

D. §§1.141-4(c)(2)(i)(A) and 1.141-4(g), Example 9: clarify that payments by a governmental person are never private payments.

1. Comment.

Consistent with our earlier comment on the private business use test, we recommend an express statement that payments by a governmental person are never private payments.

2. Recommendation.

We recommend that §1.141-4(c)(2)(i)(A) be amended to add a new sentence after the third sentence thereof as follows:

"Payments made by a governmental person are not private payments for purposes of the private payment test."

We further recommend that §1.141-4(g), Example 9, be deleted. We understand that, in large measure, the intent of this example was to illustrate the point that payments made by a governmental person are not private payments. Beyond that, however, this example seems to be technically confusing in various respects.
E. §1.141-4(g), Example 4: clarify example on moving utility lines underground.

1. Comment.

Example 4 under §1.141-4(g) illustrates a case in which a city issues tax assessment bonds to finance the cost of a project which consists of moving existing electric utility lines underground. This example appears intended to illustrate the point that whether or not financed property is used for private business use controls its status under the private payment test. Although the utility lines are privately owned, the key to this example appears to be that the financed project (i.e., the relocation of the lines) fails to be used for a private business use because it does not benefit the private utility company. Also, we understand that an unstated, but apparently important, factor in finding no private benefit was the absence of an obligation on the part of the private utility company to bear the cost of moving the utility lines underground.

2. Recommendation.

We recommend that §1.141-4(d)(2) be amended to add a new sentence at the end to read as follows:

"Since the utility company is under no obligation to pay for moving the utility lines underground and receives no special economic benefit therefrom, the undergrounding does not give rise to private business use and the assessments for the undergrounding do not give rise to private payments."

F. §1.141-4(d)(2) and 1.141-4(g), Example 9: Private security, security taken into account.

1. Comment.

In certain jurisdictions, State law limits the issuance of debt secured by generally applicable taxes. As a result, certain issuers must structure financings in the form of leases or installment sale transactions to avoid these debt limits. The remedies in the event of a default under these leases or installment sale transactions vary depending on the law of the jurisdiction and the nature of the facility financed. In certain jurisdic-
expand the definition of loan for private loan purposes beyond the general federal tax definition of a loan. The new second sentence of this section suggests such an expansion, particularly in its leading phrase. This second sentence provides that “In addition (emphasis added), a loan may arise from the direct lending of bond proceeds or may arise from transactions in which indirect benefits that are the economic equivalent of a loan are conveyed.” More properly, the legislative history suggests that the reference to economic equivalence to a loan is an illustration of substance over form. See 1986 Tax Act Conference Report, at II-692, 1986-3 C.B., Volume 4 (“Thus, the determination of whether a loan is made depends on the substance of a transaction, as opposed to its form.”) (emphasis added) We agree that substance over form should control the determination of a loan for private loan purposes. In this regard, we agree that avoidance of the private loan financing test ought not be permitted formalistically, such as through failure to specify a principal or interest component on an obligation.

In addition, the fourth sentence of §1.141-5(c)(1) converts into an example what the legislative history clearly intended to be an express limitation on the private loan definition consistent with the general federal tax definition of a loan. See 1986 Tax Act Conference Report, at II-692, 1986-3 C.B., Volume 4 (“However, a lease or other deferred payment arrangement with respect to bond-financed property that is not in form a loan of bond proceeds generally is not treated as such unless the arrangement transfers tax ownership to a nongovernmental person.”) (emphasis added)

Accordingly, to assure a reasonably administrable standard which has much existing general federal tax law precedent and to most clearly implement the legislative history, we strongly suggest that generally a loan should only exist for purposes of Section 141 if the transaction constitutes a loan in economic substance for federal income tax purposes.

2. Recommendation.

We recommend that the second sentence of §1.141-5(c)(1) be amended to delete the introductory phrase “In addition,”.

We further recommend that §1.141-5(c)(1) be amended to add a new sentence at the end of that section to read as follows:

"A loan will not exist, however, unless the arrangement transfers tax ownership of the bond-financed property to a person other than a governmental person."

B. §1.141-5(d)(3): modify required law of general application under tax assessment loan exception.

1. Comment.

Section 1.141-5(d)(3) provides in part that, for purposes of the tax assessment loan exception to private loans, a prescribed tax or assessment must be imposed pursuant to a “state law of general application.” (emphasis added) We understand that this requirement is inconsistent with certain state enabling laws (e.g., Maryland). For example, an enabling law for a special improvements tax may be a state law, may be of general application within a particular local jurisdiction, and may provide for collection and administration of the tax pursuant to statewide procedures for real property taxes, but technically may fail to be of general application throughout the state. The legislative history suggests some recognition of state law variations. See 1986 Tax Act House Report, at 525, 1986-3 C.B., Volume 2 (“The committee understands that the method of assessing residents for these improvements varies from State to State.”). In addition, the 1986 Tax Act Bluebook indicated that the relevant distinction was between “mandatory taxes or other assessments of general application” and “fees for services.” See 1986 Tax Act Bluebook, at 1166-1167.

2. Recommendation.

We recommend that §1.141-5(d)(3) be amended to delete the word “state” from the third sentence thereof.


1. Comment.

Section 1.141-5(d)(4) includes within covered essential governmental functions eligible for the tax assessment loan exception certain governmentally-owned utility system improve-
ments and certain other facilities based on a standard under which a primary factor is the extent to which the service provided by the facility is customarily performed and financed with governmental bonds by governments with general taxing powers. The role of governments, technology, and facilities financed evolves over time. The definition of "essential governmental functions" should be sufficiently flexible to take evolving customs into account so that important essential services may continue to be provided by governments in a cost effective and efficient manner.

2. Recommendation.

We recommend that §1.141-5(d)(4)(ii) be amended to add the following sentence after the second sentence to read as follows:

“For purposes of determining essential governmental functions, the changing role of government, changes in technology, and the changing nature of facilities financed by governmental persons are taken into account in determining customs.”

D. §1.141-5(d) and (e): consider providing a Mello-Roos example under tax assessment loan exception.

1. Comment.

Overall, it appears that Treasury and the IRS have been responsive to public concerns regarding the impact of certain provisions of the Proposed PAB Regulations on common tax assessment bond financing techniques, most notably so-called “Mello-Roos” financings in California. However, there continues to be some ambiguity in this area. It is unclear exactly what the requirement that a tax be imposed pursuant to a state law that “can be applied equally” to natural persons and private businesses means under §1.141-5(d)(3). It is also unclear exactly what the requirement that the terms of payment be the same under §1.141-5(d)(4) means.

2. Recommendation.

We recommend that §1.141-5(e) be amended to add a favorable example for a Mello-Roos financing. The facts should show that residential and commercial property are taxed at different rates and that some properties are exempt (in whole and in part) from taxation.

VI. §1.141-12: remedial actions.

A. Introduction.

Although the final change-of-use remedies include several more workable and notable advances over existing principles, particularly in the area of reduced emphasis on unwieldy tender offers, nonetheless we believe it is fair to say that this area in the Final PAB Regulations continues to generate more comments from our members and more concerns from issuers than any other area of the Final PAB Regulations.

B. §1.141-12(a): permit combinations of remedies.

1. Comment.

An action that causes an issue to meet the private business tests or the private loan financing test is not treated as a deliberate action if the issuer takes a remedial action under paragraph (d), (e) or (f) of §1.141-12 with respect to nonqualified
bonds if certain requirements are met. This provision appears on its face to only allow alternative remedial actions. There is no specific allowance of combined remedial actions. Thus, it is unclear whether the redemption or defeasance remedial action could be combined with the alternative use of disposition proceeds or alternative use of facility remedial actions. We believe that there is no sound tax policy reason to limit issuers from employing a combination of otherwise permitted change-of-use remedies.

2. Recommendation

We recommend that §1.141-12(a) be amended to add the following sentence at the end of that section and that conforming changes be made to the individual change-of-use remedies:

“For this purpose, an issuer may employ any combination of the remedial actions otherwise permitted under paragraphs (d), (e), (f), and (h) of this section, provided that in the aggregate, the issuer takes remedial action for all the nonqualified bonds.”

C. §1.141-12(a)(1): clarify consistent reasonable expectations test.

1. Comment.

Section 1.141-12(a)(1) provides that an issuer must have "reasonably expected" on the issue date that the bonds would be governmental use bonds for the entire term of the bonds. This provision could be read to add a reexamination requirement to the reasonable expectations test under §1.141-2(d) due to the phrasing of the reasonable expectations test in the past tense. If the reasonable expectations test was met on the date of issuance, it is unclear what this provision adds unless the Service intends that subsequent actions of the issuer be taken into account to determine whether the issuer's expectations on the issue date were reasonable. We believe that a single coordinated reasonable expectations test is the proper approach and that this reading should be made clear. In addition, to the extent that the remedial action rules apply to pre-May 16, 1997 bonds, this limitation may leave issuers without a remedial action. Since there was no corresponding provision under prior regulations, there is no assurance that every issuer had this expectation or that they stated this expectation. For these pre-effective date bonds, it should be sufficient if the issuer lacked an expectation to violate the private activity bond restrictions.

2. Recommendation

To provide a consistent reasonable expectations test, we recommend that §1.141-12(a)(1) be amended to read as follows:

“(1) Reasonable expectations test met. The issuer satisfied the reasonable expectations test under §1.141-2(d). For this purpose, the term of the bonds may take into account a special mandatory redemption provision that satisfies the provisions of §1.141-2(d)(ii).”

D. §1.141-12(a)(5): modify all-proceeds-spent condition.

1. Comment.

Section 1.141-12(a)(5) appears to limit a issuer to the bond redemption or defeasance remedy if any bond proceeds remain unspent. This seems unduly harsh. Affected circumstances could include a case in which an issuer has unspent bond proceeds in a reasonably required reserve or replacement fund or has a modest amount of unspent bond proceeds in a construction fund.

2. Recommendation.

Consistent with our earlier recommendation to permit combinations of remedies, we recommend here that §1.141-12(a)(5) be amended to read as follows:

“Any unspent proceeds of an issue affected by a deliberate action must be applied in the manner described in paragraph (d) or (e) of §1.141-12 to the extent otherwise permitted by the pertinent issue documents.”

E. §1.141-12(b)(1): permit remedial action for the private security or payment test.

1. Comment.

Since the private business tests represent a two-pronged standard, each of which must be satisfied to cause a private activity bond, it seems inappropriate as a tax policy matter to permit remedial action to cure the private business use test, but not to permit remedial action to cure the
private security or payment test. This approach requires issuers to consider burdensome bond redemption or other provisions in bond documents to try to address in different ways the alternative approaches taken towards the private business use test and the private security or payment test under the Final PAB Regulations.

2. Recommendation.

We recommend that §1.141-12(b)(1) be amended to delete the second sentence thereof and to modify the first sentence to read as follows:

“The effect of a remedial action to cure use of proceeds that causes the private business tests or the private loan financing test to be met.”

F. §1.141-12(d)(1): Redemption or defeasance of nonqualified bonds: In general.

1. Comment.

The bond redemption or defeasance remedy under §1.141-12(d)(1) literally appears to prohibit an issuer from using any unspent tax-exempt bond proceeds of the affected issue (e.g., an unspent bond-funded reserve fund) to redeem or defease nonqualified bonds. This seems unduly harsh. Here, the issuer will no longer benefit from the use of all or a portion of the tax-exempt bond proceeds and will take the bonds off the market as soon as possible. In addition, this treatment is harsher on governmental bonds than for exempt facility bonds which are permitted to so use such unspent proceeds under §1.142-2(c)(1).

2. Recommendation.

We recommend that the second sentence in §1.141-12(d)(1) be amended to read as follows:

“Except for unspent proceeds of the affected issue and for proceeds of newly-issued bonds that are qualified bonds taking into account the use of the facility after giving effect to the deliberate action, proceeds of tax-exempt bonds may not be used to effect this redemption.”

G. §1.141-12(d)(4): modify call requirement to address noncallable bonds and to address certain 11-year calls.

1. Comment.

It is unclear how noncallable bonds impact the availability of the bond defeasance remedy under the 10½-year first call date condition. Presumably, serial bonds which are technically noncallable but which mature within the 10½-year period are eligible for the bond defeasance remedy. In addition, it would seem that callable bonds (versus a bond issue) ought to be eligible for the bond defeasance remedy even if the bond issue has other bonds which are noncallable and mature beyond the 10½-year period, provided that the issuer employs another remedy for those bonds (e.g., the Rev. Proc. 97-15 payment remedy).

In addition, we understand that under certain traditional governmental bond financing practices, the first call date runs 10 years from the first scheduled principal payment date which is scheduled to coincide with tax receipts. Thus, it is not unusual in such situations for the first call date to be more than 10½-years but not later than 11 years from the issue date.

Finally, and importantly, for pre-May 16, 1997 bonds, there was no reason for issuers to that a 10½ year call would be required. For these issuers, the only remedies would appear to be the Rev. Proc. 97-15 payment procedure or a 100% successful tender offer. This seems to be an unfair result.

2. Recommendation.

We recommend that §1.141-12(d)(4) be amended to read as follows:

“In order for bonds (as contrasted with a bond issue) to be eligible for the defeasance escrow remedy, the bonds must either mature or be callable not later than 11 years after the issue date. This paragraph (d)(4) does not apply to bonds issued before May 16, 1997.”

H. §1.141-12(e)(1)(iii) and §1.141-12(f)(2): clarify that future remedial actions can be taken.

1. Comment.

§1.141-12(e)(iii) and §1.141-12(f) could be interpreted to mean that a future deliberate action
by the issuer could cause the tax-exempt bonds to be taxable, whether or not remediated. An issuer who employs one of these change-of-use remedies ought not be foreclosed from employing a change-of-use remedy for a future deliberate action. Such a result seems unduly punitive to issuers who may have little control over future events.

2. Recommendation.

We recommend that §1.141-12(e)(iii) and §1.141-12(f) each be clarified to either expressly permit future remedial actions or convert the future qualified use standard to a reasonable expectations standard.

I. §1.141-12(g): rules for deemed reissuance.

1. Comment.

The deemed reissuance rules under §§1.141-12(e)(2) and 1.141-12(f)(2) each appear to require compliance for the reissued bonds effective on the date of the deliberate action. The eligibility rules for these types of bonds, however, require that certain actions be taken (e.g., TEFRA approvals) before the issue date. Rev. Proc. 93-17 appropriately permitted an issuer a 90-day grace period after a change-in-use to obtain a TEFRA approval. Due to inadvertence, an issuer may fail to satisfy these requirements prior to the reissuance date. An issuer should be permitted a 90-day grace period after a deliberate action to comply with the rules for the deemed reissued bonds.

2. Recommendation.

We recommend that §1.141-12(g) be amended to add a new third paragraph to read as follows:

“(3) An issuer shall have a 90-day cure period after the date of a deliberate action to satisfy the applicable requirements for the issuance of the deemed reissued bonds.”

J. §1.141-12(j)(1): strongly recommend a more analytically sound, less punitive, proportionate measure of nonqualified bonds.

1. Comment.

Our single most significant substantive comment is that the measure of unqualified bonds under §1.141-12(j) based on the highest percentage of private use in any one-year period commencing with a deliberate action is unduly punitive, analytically unsound, a radical departure from existing change-of-use principles, and unworkable. The problems with this nonqualified bonds measure are particularly acute with large-scale financings involving numerous projects. We strongly urge reconsideration of this principle. This nonqualified bonds measure is inconsistent with the entire approach to the measure of private business use under the Final PAB Regulations. In addition, for purposes of curing violations of the private loan test, this provision wrongly bases the measure of nonqualified bonds on the highest annual private business use percentage.

2. Recommendation.

The tax policy aim of the change-of-use remedies should be to bring an issue into compliance going forward. To that end, we strongly recommend that the amount of nonqualified bonds be determined under the analytically sound proportionate approach of Rev. Proc. 79-5, Rev. Proc. 81-22, and §1.142-2(e) of the Final PAB Regulations. Specifically, the nonqualified bonds are a portion of the outstanding bonds in an amount such that, if the remaining bonds were issued on the date of the deliberate action, the applicable percentage (90% or 95%) of the proceeds of the remaining bonds would be used for a qualified governmental use. For bonds meeting the private loan test, we recommend that the amount of nonqualified bonds be determined under the same analytic approach.


1. Comment.

The Final PAB Regulations generally apply prospectively to bonds issued on or after May 16, 1997. For bonds issued before this general effective date, however, the scope of application of
the change-of-use remedies under the Final PAB Regulations seems both ambiguous and inappropriate in certain respects. The Final PAB Regulations appropriately permit issuers to elect to apply the new change-of-use remedies under §1.141-12 of the Final PAB Regulations retroactively to cure changes of use of pre-effective date bonds. The Final PAB Regulations further make the existing change-of-use safe harbors under Rev. Proc. 93-17 “obsolete” for actions that occur on or after May 16, 1997. It would appear that the goals here were to curtail private letter rulings on change of use and to encourage issuers to elect to use the new change-of-use remedies under the Final PAB Regulations as most representative of current tax policy.

In certain respects, however, it seems inappropriate to expect issuers of pre-effective date bonds to have structured their bond issues to satisfy these new change-of-use remedies or otherwise to leave these bond issues with the restrictive new payment option under Rev. Proc. 97-15 as their exclusive change-of-use remedy. To take one identified problem area as an illustrative example, an issuer with outstanding noncallable bonds issued say in 1986 cannot satisfy the 10½-year first call requirement under §1.141-12, but it seems unfair to leave that issuer with the restrictive new payment option under Rev. Proc. 97-15 as their exclusive change-of-use remedy. An issuer in such circumstances ought to be able to do a bond redemption or defeasance to cure a change of use under existing law, by analogy to the principles under Rev. Proc. 93-17 or otherwise. Further in this regard, it is unclear generally whether an issuer that does not elect to apply the new change-of-use remedies under §1.141-12 of the Final PAB Regulations for a pre-effective date bond issue reasonably can look to any existing law or standards in effect before the Final PAB Regulations for change-of-use remedies.

2. Recommendation.

We believe that, if our recommendations herein on amendments to the change-of-use remedies, particularly those on the measure of nonqualified bonds and combinations of remedies, are largely incorporated into the Final PAB Regulations, Treasury and the IRS could fairly adopt the change-of-use remedies under the Final PAB Regulations for future changes of use on outstanding pre-effective date bonds.

We further recommend specifically that the first call condition under §1.141-12(d)(4) be amended to make it inapplicable to bonds issued before May 16, 1997.

Finally, we recommend that, in any event, some express clarification be made regarding the applicable change-of-use remedy standards for outstanding pre-effective date bonds.

L. Amend Example 8 under §1.141-12(k) to reconcile it with the cash sale at a loss limitation on bond redemption.

1. Comment.

Example 8 under §1.141-12(k) involves an all-cash sale of a portion of a bond-financed facility. Example 8 suggests that the amount of bonds that must be redeemed is the full amount of the nonqualified bonds. This measure is greater than and inconsistent with the limited pro rata amount of bonds required to be redeemed from disposition proceeds received in an all-cash sale at a loss under §1.141-12(d)(2) and Example 1 under §1.141-12(k). The only way to reconcile Example 8 is to assume that the sale does not occur at a loss.

2. Recommendation.

We recommend that the fourth sentence of Example 8 under §1.141-12(k) be amended to read as follows:

“G later sells one-half of the courthouse property to a nongovernmental person for cash at a sale price equal to or greater than the amount of outstanding bonds allocable to the financing of that portion of the courthouse property.”

VII. Miscellaneous provisions.

A. §1.145-2(c)(2): costs of issuance on qualified 501(c)(3) bonds.

1. Comment.

Section 1.145-2(c)(2) treats costs of issuance as bad costs for purposes of Section 145(a)(2). While we recognize that this treatment is consistent with the legislative history to the 1986 Tax Act, we nonetheless believe that this is the wrong answer,
based on a misunderstanding of how issuance costs are capitalized. Issuance costs properly are capitalized to the attendant debt. Thus, for an exempt facility in which 95% of the net proceeds must be used for capital costs of qualified exempt facilities, the issuance costs appropriately are bad costs. However, for qualified 501(c)(3) bonds under Section 145, 95% of the net proceeds need only be used for exempt purposes, not necessarily capital costs of facilities. Accordingly, consistent with the Proposed PAB Regulations and §1.141-3(g)(6) of the Final PAB Regulations, the proper answer should be that issuance costs for qualified 501(c)(3) bonds are neutral costs allocable proportionately between exempt and nonexempt uses of proceeds.

2. Recommendation.

We recommend that §1.145-2(c)(2) be deleted.

B. §1.148-6: clarify accounting timing and effective dates.

1. Comment.

The relationship between the accounting timing rules in the first two sentences of §1.148-6(d)(1)(iii) needs clarification. Specifically, it is unclear which of the following two accounting timing rules for expenditures controls: (1) 18 months after the later of the date the expenditure is paid or the project is placed in service; or (2) “in any event” by 60 days after the earlier of the fifth anniversary of the issue date or the date of retirement of the issue. The second such rule implicitly seems to recognize that accounting within that latter five-year period should suffice. We believe that result is a better and more flexible approach. While we can understand the IRS’s concern with retroactive re-allocations for accounting purposes, the first 18-month rule seems too tight for initial allocations. We can envision reasonable circumstances in which an issuer routinely uses governmental bond proceeds for governmental projects and for whatever reason may fail to focus on initial accounting before some necessary accounting review (e.g., five-year rebate calculations).

In addition, we believe that this prospectively-applicable provision should tag along to apply to earlier issues to which §1.141-6(a) applies as a result of an election to apply the Final PAB Regulations to a pre-effective date issue.

2. Recommendation.

We recommend that §1.148-6(d)(1)(iii) be amended to delete the requirement of the first sentence thereof. In any event, we recommend that the requisite accounting timing requirement be clarified.

We further recommend that §1.148-6(d)(1)(iii) and §1.148-6(d)(1)(iii) each be amended to add immediately after the date “May 16, 1997” the phrase “and to any other issue to which §1.141-6(a) applies.”

STATEMENT ON THE UTILIZATION OF LEGAL ASSISTANTS IN THE PUBLIC FINANCE PRACTICE

Editor's Note: The following statement by the Association's Committee on Legal Assistants was accepted and authorized by the Board of Directors at its meeting on July 17, 1997, for publication herein.

One valuable way in which bond lawyers can meet the challenge of offering competent, yet affordable, legal services to clients is through the greater utilization of legal assistants. The National Association of Bond Lawyers’ (“NABL”) Committee on Legal Assistants (the “Committee”) recognizes the wide differences among law firms in their practice of law and in their utilization of legal assistants. This statement is intended to suggest more effective ways to utilize legal assistants in public finance transactions and is not meant to be either limiting or inclusive.

Legal assistants, by definition, assist and aid lawyers in the delivery of legal services, although they may not practice law. The transactional nature of the bond practice is readily adaptable to the use of responsible non-lawyer professionals, given the tremendous amount of document production and coordination. A proficient legal assistant can perform many of the client-related and administrative tasks which would otherwise be
performed by a lawyer, including the myriad of tasks required before and after a transaction closes.

The benefits to lawyers who utilize legal assistants efficiently are numerous. First, lawyers benefit by having more time to concentrate on substantive legal matters and to keep up with the changes in their practices and the market. In addition, lawyers will have more time to provide legal services to a larger number of clients. Also, the use of legal assistants is cost-effective since their billing rates tend to be lower than those of lawyers. Given the changes in the market, there is constant pressure to keep legal fees at a minimum. Obviously, it is worthwhile to be able to utilize legal assistants efficiently in the practice of public finance law.

**Training Legal Assistants**

For any firm committed to the complete utilization of its employees, careful and thorough training is a short-term investment capable of producing long-term rewards. Legal assistants, like lawyers, learn about the public finance practice as apprentices. Since there are so few formal public finance training courses available, legal assistants can benefit enormously from many of the training sessions held for bond lawyers. In addition to firm training sessions, legal assistants can benefit from attending the Fundamentals Seminar held annually by NABL. To encourage efficient utilization of legal assistants, firm orientation sessions for new lawyers might also include information on the ways in which the firm’s lawyers effectively use their legal assistants. Often legal assistants experienced in public finance provide thorough training to both legal assistants and new lawyers.

Most importantly, lawyers seeking to increase utilization of legal assistants should not overlook the steep learning curve involved with developing skills in public finance. Therefore, it is important for supervising lawyers to give legal assistants constructive feedback so that legal assistants can continue to improve their work product. In order to facilitate the legal assistant’s development, lawyers in some firms work together in a stable, core group with a particular legal assistant and can thereby more effectively evaluate the legal assistant’s experience and capabilities and assess the areas in which he or she must improve. If at least one partner or senior level associate is included in a group of supervising lawyers, the legal assistant will be provided a high level of guidance and experience in learning about the bond practice.

**Assigning Work to Legal Assistants**

It may be advantageous to assign a legal assistant to a designated group of lawyers within the public finance practice. If the firm performs a significant amount of work for a particular issuer or with respect to a type of financing, an alternative method might be to assign a legal assistant to handle all transactions involving that issuer or that type of financing. For example, a legal assistant consistently working on housing financings would be most suitable to draft and make a preliminary review of documentation relating to other housing financings. In this manner, the legal assistant would become familiar with the parties involved, the required documentation and the departmental procedures associated with particular issuers and also serve as a resource with respect to other issuers or types of transactions. Moreover, lawyers will save valuable time and avoid potential errors by not having to repeat background information.
and will have more confidence in legal assistants who already know the documents, issues, parties and schedules relating to transactions.

Some firms have found that the easiest way to ensure that legal assistants have been assigned to transactions and to monitor the legal assistants’ workload is to maintain a list of transactions which are in progress, complete with the names of the lawyers and legal assistants assigned to each transaction. Also, legal assistants may be included on the distribution list of the working group, as long as they are clearly distinguished from the lawyers. This will provide an alternative contact for the working group when lawyers are unavailable.

Regardless of the way legal assistants are assigned to work, receiving work assignments directly from the lawyer responsible for the project is an effective method for delegating work assignments to legal assistants. However, many firms have a central person overseeing the work of legal assistants. One solution many firms have found useful is to designate a partner or senior level associate in the public finance practice to oversee the legal assistant program in that particular area. A lawyer should always be available to answer the legal assistant’s substantive questions on public finance transactions and firm policies. Treatment of the legal assistant as a professional by the supervising lawyer is conducive to the legal assistant receiving such treatment from other lawyers and clients.

**Working with Legal Assistants**

Once a lawyer begins to work with a legal assistant, involving one legal assistant from the beginning of a transaction through the closing may be more efficient than involving several different legal assistants to complete different tasks for the same transaction. Not only will lawyers save valuable time and avoid potential errors by not having to repeat background information, they will also have more confidence in legal assistants who already know the documents, issues, parties and schedules relating to transactions. In addition, most legal assistants find it personally rewarding to be considered part of the working group and enjoy the sense of accomplishment that follows the closing of a transaction in which they have fully participated. These benefits can encourage legal assistants to assume additional responsibility and to learn to anticipate the lawyers’ needs.

After the lawyer initially involves a legal assistant in a transaction, it is extremely helpful for the lawyer to keep the legal assistant apprised of any developments and schedule changes. A legal assistant needs to have access to information relating to the transaction in order to be efficient. When a legal assistant knows the status of a transaction well enough to take comments on documents or to answer questions regarding nonlegal matters, he or she can facilitate the lawyer’s correspondence with members of the working group. On the other hand, a lack of communication can lead to potentially embarrassing situations and duplicative work. Fortunately, information can be quickly and inexpensively disseminated today through e-mail and voice mail. Of course, there is no substitute
for direct contact between a supervising lawyer and legal assistant to discuss the transaction’s current status and future needs.

A legal assistant can be of optimum assistance to lawyers if he or she receives copies of all pertinent documentation and correspondence relating to the transaction. As long as the budget for a transaction permits, a lawyer may request a legal assistant to:

- attend document review sessions and/or the working group meetings to gain an understanding of the financing and to be able to draft the requisite documents;

- participate in conference calls when document revisions and the mechanics of the closing are discussed; and

- coordinate the parties’ documentation through the legal assistant.

**Projects for Legal Assistants**

While the specific tasks a legal assistant is assigned depend on the firm’s role in a transaction (e.g., whether the firm is serving as bond counsel, underwriter’s counsel, purchaser’s counsel or other special counsel), the Committee has identified certain areas in which public finance legal assistants may assist their supervising lawyers. The legal assistant should keep the supervising lawyer informed as to the progress of assignments. In addition, he or she should consult with the supervising lawyer about the various projects in which he or she is involved relating to the transaction, particularly when fielding comments or questions from clients, lawyers or other parties outside the firm.

**When the Lawyer is Acting as Bond Counsel:**

In general, legal assistants assisting bond counsel may effectively assist the supervising lawyer in performing one or more of the following tasks:

1. Compile and organize various materials and information relating to the issuer of the bonds;

2. Undertake a preliminary review of the sufficiency of transaction documentation as it relates to state law or federal tax law requirements;

3. Draft TEFRA notice and coordinate publication with local media;

4. In a conduit transaction, review records of the borrower of the proceeds of the bonds for due diligence purposes, prepare a memorandum discussing any findings, and assist the supervising lawyer with due diligence interviews;

5. Prepare initial drafts and continue to assist in the drafting of all financing documents, legislation, certificates, opinions and, if applicable, the official statement for review by the supervising lawyer;

6. Handle correspondence and maintain telephone contact with the client and other members of the professional working group and consult the supervising lawyer whenever a legal judgment, legal opinion or legal advice is required;

7. Coordinate the distribution of documents, receive comments on documents, transmit comments to the supervising lawyer and participate with the lawyer in telephone conferences;

8. Prepare definitions and summaries of financing documents for inclusion in the official statement;

9. Coordinate tax legend language for the official statement and coordinate disclosure review by tax lawyers;

10. Prepare applications and submissions for governmental consents and approvals of the transaction for review by the supervising lawyer;

11. Draft the bond form for review by the supervising lawyer;

12. Review the purchase contract, the indenture, the primary financing documents and the official statement for the purpose of communicating to the supervising lawyer
whether conditions to closing have been satisfied;

13. Review drafts of all documents for consistent use of defined terms and accuracy of cross-references;

14. Compile an initial draft of the closing list of documents for review by the supervising lawyer;

15. Coordinate the acceptance of letters of representation and the delivery of the bonds with DTC;

16. Obtain various items, such as good standing certificates, required for the closing from the appropriate state agencies;

17. Assemble documents for signatures and coordinate their execution;

18. Prepare all governmental filings, such as the IRS Forms 8038, 8038-G, or 8038GC, and financing statements for review by the lawyer and coordinate the necessary recordations and filings;

19. Attend closings and coordinate document handling;

20. Assist the supervising lawyer with matters involving rating agencies, letter of credit providers and municipal bond insurers; and

21. Organize documents for closing binders or bound volumes and supervise transcript preparation.

When the Lawyer is Acting as Underwriter’s Counsel:

Legal assistants assisting with underwriter’s counsel work may effectively assist the supervising lawyer in performing one or more of the following tasks:

1. Review records of the user of the proceeds of the bonds for due diligence purposes, prepare a memorandum discussing findings, and assist the supervising lawyer with due diligence interviews;

2. Prepare initial drafts and continue to assist in the drafting of the official statement, purchase contract, continuing disclosure agreement, agreement among underwriters, letters of instruction and the selling group agreement for review by the supervising lawyer;

3. Handle routine correspondence and maintain telephone contact with the client and other members of the professional working group and consult the supervising lawyer whenever a legal judgment, legal opinion or legal advice is required;

4. Coordinate the distribution of documents, receive comments on documents, transmit the comments to the supervising lawyer and participate with the lawyer in telephone conferences;

5. Assist in finalizing the official statement by coordinating comments and corrections with the printer, reviewing the final official statement prior to printing, and confirming distribution of the official statement with the printer;

6. Research blue sky and legal investment laws, draft the blue sky and legal investment memoranda, draft and coordinate blue sky filings under the lawyer's supervision; and

7. Check closing documents against purchase contract and official statement.

Non-Transactional Work:

Additionally, legal assistants may perform one or more of the following tasks to assist lawyers with their practice:

1. Monitor for the supervising lawyer proposed state and federal legislation relating to the practice;

2. Maintain form and precedent files;

3. Maintain a public finance reference library;

4. Track bond issues against volume cap and maintain status report of remaining amounts available for use;

5. Maintain a tickler file for UCC and IRS filings and monitor compliance;
6. Assist lawyers in responding to requests for proposals;

7. Coordinate the production of reports listing transactions which the lawyer has completed and maintain a list of current transactions; and

8. Coordinate the interviewing, orientation and training of legal assistants.

As the law changes and lawyers’ practices continue to evolve, the job descriptions of legal assistants may change accordingly. Therefore, lawyers are encouraged to utilize legal assistants to assist in performing any or all of the tasks listed above and to expand upon any additional tasks a legal assistant may perform.

Conclusion

The utilization of legal assistants in the public finance practice can be an integral part of the delivery of legal services at the highest professional level. Although utilization of legal assistants will vary, lawyers can efficiently utilize legal assistants in a cost-effective manner to benefit their practices. The recommendations made in this statement serve to assist lawyers to effectively incorporate the services of legal assistants. Therefore, lawyers are encouraged to explore and modify these suggestions to adapt to their practices.

COMMITTEE ON LEGAL ASSISTANTS

Ann Atkinson, Chair
Carol Caponigro
Michelle Kelly
Susan Parker

REMEMBERING
HARRY FRAZIER III

Harry Frazier III, a senior partner of the law firm of Hunton & Williams, died on August 3, 1997, after a brief illness. Mr. Frazier, the son of Eleanor Lightner Frazier and Harry Frazier, Jr., was born on September 13, 1928, in Richmond, Virginia. He was educated at Woodberry Forest School, Williams College, and the University of Virginia School of Law, where he was a member of the Editorial Board of the Virginia Law Review and won the Appellate Moot Court Competition.

Mr. Frazier was a charter member of the Association. In 1991, in tandem with former Association President Robert Dean Pope, he was interviewed in aid of the Association's oral history project. He was a Fellow of the American College of Bond Counsel, served as Chairman of the American Bar Association's Section on Urban, State and Local Government Law in 1979-80, and later served as that Section's Delegate to the American Bar Association's House of Delegates. For many years he was the leading practitioner of public finance law in Virginia and the first Virginia bond lawyer whose opinions were accepted on Wall Street. He argued a number of public finance cases before the Virginia Supreme Court, as well as a major reapportionment case decided by the United States Supreme Court. A long-time member of the Bond Club of Virginia, he also was active in the Local Government Attorneys of Virginia. Mr. Frazier was Trustee Emeritus of the Virginia Foundation for Independent Colleges and served as its General Counsel for many years.

Mr. Frazier was a devoted alumnus and Trustee of Woodberry Forest School and a recipient of the School's Distinguished Service Award. He was a former Senior Warden of St. Paul's Episcopal Church, and a former member of the Board of Trustees of the Virginia Historical Society. Mr. Frazier was a former Trustee of Westminster-Canterbury Corporation and a Trustee of the Westminster-Canterbury Foundation, and for many years served as that foundation's General Counsel. He is survived by his wife, Nancy Myers Frazier, his daughter, Agnes Frazier Richard, his son, Harry Frazier IV, and five grandsons.

BOND DOGS

(Skippy and Jake, two dogs owned by prominent bond lawyers, continue their somewhat cynical and hopefully amusing chronicle of the bond business. Comments from readers, c/o The Quarterly Newsletter, are encouraged.)

Skippy: I noted recently that one of the national bond insurers announced a
name change from all capital letters to an initial capital letter followed by lower case. The company's CEO stated that the change was made to "reflect the evolution of the company's business."

Jake: I confess I have no idea what the CEO means.

Skippy: Neither do I, but it suggests a strategy that could be employed by law firms. Take, for example, the law firm of "Smith & Jones." Suppose that they had a really good year. How about changing to "S M I T H $ J O N E S"?

Jake: Okay. And if they are looking to expand to a third named partner, "Smith, Jones & _______ (your name could be here)."

Skippy: On the other hand, if their partnership is on the rocks you might see "Smith &/or Jones" or "Smith & What's His Name" together with " & Jones."

Jake: Finally, for lawyers practicing on the brink of malpractice seeking to shelter their personal assets, there is "Smith & Jones, L.L.C., L.L.P. & P.C."

Skippy: Only in California. It was recently reported that a number of local governmental units issued 15 month maturity tax anticipation notes in an attempt to generate increased amounts of arbitrage.

Jake: Yes, but the investor market for such notes proved thin because many institutional investors were limited to maturities of one year or less.

Skippy: The market was quickly flooded and the result was that some issuers may have actually realized less profit than had they done a conventional one year deal.

Jake: At least they should be able to defeat an IRS attack because there was no material economic advantage in the longer notes.

* * * *

Skippy: Speaking of our friends at the IRS, this appears to be the "summer of the terrible TAMS." Several recent rulings appear to show the flaw in the audit process where the field agent's request for guidance represented little more than one fox asking another whether the henhouse was still under guard.

Jake: My "favorite" was TAM 9723012 where the IRS appeared to back away from its prior ruling position of PLR 8448012 in holding that expenditures cannot be retroactively reallocated to correct an accounting error. Not only was this result probably a disappointment to the borrower and a surprise to its counsel, it demonstrates a willingness of the IRS to make new law in the context of the bond audit program.

Skippy: I seem to recall that when the audit program was first announced it was billed as targeting the bad guys and curbing abuses. Those less cynical among us agreed that this was a good idea and accepted, if not welcomed, these efforts. I wonder whether that is still the case.

Jake: In TAM 9721003, the IRS held that a pool loan financing was "issued" only if and when the borrowers spent the proceeds. While the facts are admittedly complicated and turn on subtle state law considerations, the general premise of the ruling calls into question all sorts of common conduit financing transactions.

Skippy: Finally, in TAM 9723002 where the IRS enforced an issuer's election of penalty in lieu of rebate, the logic of the ruling isn't the problem; rather it is the gratuitous editorializing by the IRS which goes unappreciated. While
irrelevant for purposes of the holding, the IRS nonetheless found it necessary to suggest that the issuer's reliance on bond counsel may have been "ill-advised."

Jake: I am sure bond counsel and their malpractice carrier appreciated that slap in the face, and I wonder whether the IRS will respond with equal candor when it reverses its own ruling positions. ("Taxpayer was stupider than a fence post to rely on prior IRS rulings..."

Skippy: Maybe they can air it this fall when the new schedule on the Bond Lawyers Network will have plenty of room for such exciting shows as:

"Perry Mason and the Case of the Burning Yields" | Perry's client, an unsuspecting City Treasurer, looks like he is in real trouble until an outcast investment banker brandishing a whistle takes the witness stand.

"Mission Rebatable" | A team of arbitrage specialists, armed with the latest pentium laptops, make a heroic effort to reallocate expenditures and avoid a dreaded penalty in lieu of rebate.

"Emergency Bond Lawyer" | The school district's deficit funding plan appears to be in ruins until their bond lawyer proposes a daring COP pool financing plan.

and, as movie selections:

"Bond to be Wild" | Two motorcycling bond lawyers travel the back roads looking for adventure, single malt scotch, young female C.P.A.'s and challenging financing opportunities.

"The Bondfather" | They wanted to sell their bonds at competitive sale until he made them an offer they couldn't refuse.

"The Candidates" | In its first ever contested election for an organization's presidency, a write-in candidate deadlocks the vote, necessitating a second ballot while the membership all goes out to dinner.

Jake: Have you heard about the game soon to be sweeping the nation, "Office Paging Bingo?"
Skippy: It sounds disruptive.

Jake: No, not at all. If anything it has the positive side effect of causing people to listen for their pages. Here’s how it works. Everyone in an office puts up a $1 for a card which is a grid of five squares by five squares. The managing partner’s name is printed in the middle square, "Mr. Free Space" we call him. Each entrant chooses the names of office personnel to complete the card. As names are called over the office paging system, they are checked off and the first person to get five in a row (vertically, horizontally or diagonally) claims the pot. The game ends when the receptionist pages the winner to call Mr. Bingo.

Skippy: To prevent cheating you should prohibit people from entering their own name, counting anyone that they page, or engaging in any other "abusive bingo device" which overburdens the paging system or otherwise disturbs normal operations.

Jake: This is intended to be an honorable game. And disputes are resolved by the receptionist from which there is no appeal.

Skippy: I am sure the winning strategy is to list all the tax lawyers. They are always too busy to answer their phones.

* * * * *

Skippy and Jake

HOPE TO SEE YOU ALL IN CHICAGO!

Skippy & Jake

VOICE FROM THE PAST
Chapter 4

Some time in the early 1960's I worked on one of the most complicated deals I ever experienced. Benton & Moseley of Baton Rouge and Chapman and Cutler were bond counsel for the Sabine River Authority of Louisiana, and McCall, Parkhurst & Horton of Dallas acted in like capacity for the Sabine River Authority of Texas. The project was a hydroelectric dam across the Sabine River, which separates the two States, and the bonds were to be paid from the sale of electricity on take-or-pay contracts with three different electric utilities. $15,000,000 of bonds were to be issued by each State’s Authority, an amount that seemed much larger then than now.

The lead underwriter was Ira Haupt and Company, a firm that did not survive long afterward, but for reasons unrelated to its municipal bond business. It was represented by the most memorable pair of deal-makers/doers I can recall: one was big, white-haired, handsome, articulate, polished, and oozing confidence and savoir faire. The other was slight, homely, mostly silent, and avoided eye contact. As you might guess, the former was the one who got the deals without understanding them in detail, and the latter had a very thorough grasp of each item in the transaction yet couldn’t sell a life preserver to a drowning man.

The chief legal problem confronting the transaction was the loan-of-credit provision of the Constitution of each State. It would not do to let either suffer or enjoy different treatment, not even to the extent of paying or advancing funds except in equal amounts simultaneously.

The bond trustee was Chase Manhattan Bank in New York, and there was a local co-trustee in each of the two States. The Chase was not only in charge of the things bond trustees usually do, but was also given special duties of supervising the payout of bond proceeds and revenues. This was complicated by the fact that two pools of bond proceeds were kept, one for each State, and whenever any construction payment was made, it had to be made equally and simultaneously from each pool. A similar arrangement applied to payment of costs of operation and maintenance. The revenues from the sale of electricity were paid to the Trustee who saw to it that only approved costs would be paid from the revenues before they went into the debt service and reserve funds. The local banks were disbursing agents, and they started out with modest amounts of money with which to pay
construction expenses and O & M costs; they had to provide proper evidence of approval of each such payment before the Chase would reimburse them.

This was in the days before underwriters routinely had their own counsel and sometimes the trustee’s counsel did many of the things now done by counsel to the underwriters. Although I had had a little experience with trust indentures before that deal, those indentures had been of the sort that were much like revenue bond resolutions with different faces: the guts were the same. The trustees I had worked with were merely paying agents and sometimes disbursing agents, and they lacked the sophistication of the Chase. They also lacked Horace Robinson of Dewey, Ballantine, Bushby, Palmer and Wood as trustee’s counsel. A few years older than I, Robbie had vast experience with corporate indentures, though none with municipal bonds. As I recall, I originally submitted a form of indenture that he rejected, and he sent back a form that was far longer and more detailed but that would not pass muster under Dillon’s Rule, State Constitutional loan-of-credit provisions, and various other legal restraints on what municipalities can do. He and one or two of his associates, Fred Benton, Jr., Millard Parkhurst, and I spent a week in a Dewey Ballantine conference room hammering out an amalgam that was like nothing any of us had ever seen before. I remember being concerned with the standard defeasance clause because it let the debtor off the hook if it made all payments to the trustee before the due date, even if the trustee embezzled the funds and defaulted; my position was that the debtor should remain liable until principal and interest were available to the bondholders on their respective due dates. (Subsequently I have relaxed on this point). I also doubted that the standard trustee’s indemnification language could be enforced against a public body. Robbie was willing to yield a little on this point, but not very far. I do not remember exactly how it was worked out -- possibly in reliance on the severability clause. Eventually we got a document that none of us objected to strongly, partly because we had little strength left. By the end of that week he and I had been frustrated with, and mad at, each other so many times that we developed a warm and respectful friendship.

It may have been in that week that one of Robbie’s associates, during a short break, uttered a comment about his firm’s best known partner that I still recall: “To really hate Tom Dewey you have to work closely with him.”

One feature of the transaction was especially bothersome: how to make sure that neither State’s Authority paid more interest than the other’s. Such inequality would have violated the parity-of-expenditure rule, yet Texas had a
better credit rating than Louisiana, so you might expect the latter Authority’s bonds to bear a higher interest rate. Fortunately the underwriters had someone with ingenuity working on the matter. They sold the bonds as units; each unit comprised one Louisiana bond and one Texas bond, both bearing the same rate. How the bonds would trade in the secondary market was a question we didn’t have to ask.

Manly W. Mumford

EMPLOYMENT OPPORTUNITIES

The Philadelphia office of Saul, Ewing, Remick & Saul seeks candidates for an associate position in the Firm's Public Finance Department. Applicants must have superior academic credentials. Preference will be given to candidates with 2-4 years' experience in public finance or related transactional fields. Please send résumés to: Timothy J. Carson, Esquire, Saul, Ewing, Remick & Saul, 3800 Centre Square West, Philadelphia, PA 19102 for consideration. All inquiries and résumés will be treated confidentially. The Firm is an equal opportunity employer.

The Richmond office of Sands, Anderson, Marks & Miller is seeking candidates for a position in public finance. Sands, Anderson has approximately 50 lawyers and is one of the oldest law firms in Virginia, with a broad local government and public finance practice. Applicants should have at least 5 years' experience in public finance, predominantly in traditional general obligation and revenue bond transactions, although experience in economic development financings would be helpful. The firm is an equal opportunity employer. Applicants should send a résumé in confidence to Susan Gibson, Sands, Anderson, Marks & Miller, P.O. Box 1998, Richmond, VA 23218-1998.

The Denver office of Kutak Rock is seeking attorneys with 2-4 years of experience in public finance. Positions require excellent academics and client skills. Equal opportunity employer. Send résumé in confidence to Kutak Rock, Suite 2900, 717 Seventeenth Street, Denver, CO 80202, Attention: Bill Gorham.
EDITOR’S NOTES

In the wake of the meeting in the City by the Bay of one of the national bar associations, we have dodged the projectile which would probably have killed off the small bond departments of the large law firms. Folks at the larger firms (we’re advised) make political contributions to everyone and her brother, and would not have brooked quietly a rule which said, "Thou shall not contribute, regardless of motive."

Had the case been otherwise (and it may yet be otherwise, pending court challenges), the big firms would needs have shed bond partners like dandruff, relegating them to new boutiques whereat the services they could provide to issuers would have been severely attenuated. And who would benefit from that scenario?

From former Association President Pope B. McIntire (May 26): "My granddaughter, who turned 22 in April, graduated from Tulane two weeks ago, is to be married in July and will enter Georgia Law School in the fall. She (Elizabeth by name) will be the fifth generation of my family to go there [a record]. My grandfather was a member of the first graduation class (1861), my father graduated in 1902, I graduated in 1947 and my daughter Sarah Ellen in 1981."

We note that Barbara Mendel Mayden, who (with Ruth T. West) was the subject of an Oral History interview which appeared in these pages (May 1, 1994), has hied herself off to Nashville, where, at Bass, Berry & Sims, she'll be working on health care mergers and acquisitions, of all things.

The indefatigable Ms. Mayden is also teaching at Vanderbilt University Law School, and continues to be active in the affairs of a large national bar association which was recently dissed (in a judicial selection context, with which Ms. Mayden almost certainly has little to do) by Senator Orrin Hatch (R-Utah). Ms. West, of King & Spalding, is marrying again.

Describing the hasty legislative flurry which produced this year's tax bill, Knight-Ridder News Service last month recalled that the 1981 tax legislation included the words "Call Rita," and her telephone number. If "Rita" was the Association's (and the Bond Attorneys' Workshop's) Rita, that provision may have been well-intended.

QUARTERLY LIMERICKS

I
Than Julie there ain't none much cooler
(Laid back, so collected, a fooler):
We'll miss her tough love,
Her e-mails from above
And Wisconsin: a benevolent ruler.
Now here comes this Conner from Cleveland —
A tax guy with regs up his sleeve and
A real careful guy
(Oh me, and oh my)
He might could take us into believe-land.
This peachy Princetonian Floyd —
Newton's advent leaves spirits some buoyed —
From the South with a mouth
That does not portend drouth:
Expectations are near unalloyed.

II
Orange County and Merrill be talkin'
With $30 mil the County be walkin'
But the civil impends
(Some big-tail amends
Are sought; Merrill, at that, may be balkin').
Orin Magruder
MEMBERSHIP SERVICES

Education Program

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

- 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
- February 4, 5 and 6, 1998: Tax Seminar, San Diego — covering issues arising under the Internal Revenue Code and Treasury Regulations
- April 15, 16 and 17, 1998: Fundamentals of Municipal Bond Law, Atlanta — intended for those with less than three years of experience in bond law
- May 7 and 8, 1998: Washington Seminar — covering the areas of securities, tax, and other timely Washington topics

These events offer members opportunities to exchange ideas about law and practice with fellow practitioners. For more information, call Executive Director Patricia 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, 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 NW, Suite 1200, 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: www.nabl.org
- 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