



National Association  
of Bond Lawyers

PHONE 312-648-9590 250 South Wacker Drive  
FAX 312-648-9588 Suite 1550  
www.nabl.org Chicago, Illinois 60606-5886

*President*  
**MONTY G. HUMBLE**  
Dallas, TX

*President-Elect*  
**WALTER J. ST. ONGE III**  
Boston, MA

*Secretary*  
**J. FOSTER CLARK**  
Birmingham, AL

*Treasurer*  
**CAROL L. LEW**  
Newport Beach, CA

*Directors:*  
**JOHN MCNALLY**  
Washington, DC

**SCOTT LILIENTHAL**  
Washington, DC

**WILLIAM A. HOLBY**  
Atlanta, GA

**CYNTHIA M. WEED**  
Seattle, WA

**THOMAS YATES**  
Bloomfield Hills, MI

*Immediate Past President*  
**LINDA B. SCHAKEL**  
Washington, DC

*Honorary Director*  
**FREDERICK O. KIEL**  
Cincinnati, OH

*Executive Director*  
**KENNETH J. LUURS**  
Chicago, IL

*Director of  
Governmental Affairs*  
**ELIZABETH WAGNER**  
Suite 800 South  
601 Thirteenth Street, N.W.  
Washington, DC 20005-3875  
PHONE 202/682-1498  
FAX 202/637-0217

August 25, 2005

Eric Solomon  
Deputy Assistant Secretary - Regulatory Affairs  
U.S. Department of Treasury  
1500 Pennsylvania Avenue, NW 3104 MT  
Washington, DC 20220

Cono R. Namorato  
Director  
Internal Revenue Service  
Office of Professional Responsibility  
1111 Constitution Avenue, NW  
Washington, DC 20224

Donald L. Korb  
Chief Counsel  
Internal Revenue Service  
1111 Constitution Ave., NW 3026 IR  
Washington, DC 20224

Re: Circular 230--State and Local Bond Opinions  
Notice 2005-47, REG - 159824-04

---

Dear Sirs:

Our letter of July 13, 2005, on the above subject suggested that the "separate written advice" that accompanies a bond counsel opinion should not have to be in any particular form but could be a combination of tax certificates, questionnaires, checklists, or other writings as appropriate.

To give an example of how the process could work, we have enclosed a sample checklist that could be used by bond counsel for an issue of governmental bonds. As indicated by the

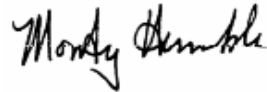
Eric Solomon  
Cono R. Namorato  
Donald L. Korb  
August 22, 2005  
Page 2

instructions at the beginning of the checklist, it would be reviewed with an official responsible for issuing the bonds, signed by counsel, and made available to the issuer. Counsel would thereby fulfill its obligation to provide separate written advice in support of the bond counsel opinion under § 10.39 of Circular 230. No other written advice would be necessary unless deemed necessary by counsel as a supplement to the checklist.

The sample checklist was prepared by a task force of members and staff of the National Association of Bond Lawyers and the Government Finance Officers Association, identified on the attachment to this letter.

Please accept this letter and the sample checklist as a supplement to our letter of July 13.

Sincerely,

A handwritten signature in black ink that reads "Monty G. Humble". The signature is written in a cursive style with a large initial "M".

Monty G. Humble  
President

Enclosure

cc: Michael J. Desmond  
Stephen A. Whitlock  
Catherine E. Livingston

NAME	COMPANY
Rick Ballard	Ballard Spahr Andrews & Ingersoll, LLP
Kimberly Casey	White, Bear & Ankele Professional Corporation
Kevin L. Cooney	Frost Brown Todd LLC
Suewan Johnson	Vinson & Elkins, LLP
Kathleen C. McKinney	Haynsworth Sinkler Boyd, P.A.
Barron F. Wallace	Vinson & Elkins, LLP
Walter J. St. Onge, III	Palmer & Dodge LLP
Elizabeth Wagner	National Association of Bond Lawyers
Patrick P. Born	Chief Financial Chair City of Minneapolis
Timothy L. Firestine	Director of FinanceMontgomery County, Maryland
Julia Cooper	Deputy Director of Finance, City of San Jose
Frank R. Hoadley	Capital Finance Director, Wisconsin Dept. of Administration
David S. Goodman	Squire, Sanders & Dempsey, LLP
Thomas E. Lanctot	William Blair & Company
Mitch H. Rapaport	Nixon Peabody LLP
Thomas J. Glaser	Chief Financial Officer, County of Cook, Illinois
Susan Gaffney	Director, Federal Liaison Center, GFOA

**TAX COMPLIANCE CHECKLIST**  
**GOVERNMENTAL BONDS FOR CAPITAL PROJECTS**

Counsel should indicate for each item one or more of the following that apply:

- (1) The item is addressed in the issuer's tax matters certificate.
- (2) The item is addressed in some other certificate or document in the transcript (identify by transcript index number).
- (3) The item is addressed in advice of counsel contained in the transcript.
- (4) The item is addressed in a document outside the transcript (identify in attachment).
- (5) The item is not relevant to the facts of the bond issue.

The completed checklist should be reviewed with an official responsible for issuing the bonds, signed by counsel and made available to the issuer. The purpose of the signed checklist and the referenced documents if true, correct, and complete, is to provide support for the bond opinion establishing that the bond interest is excludible from gross income in conformity with the closing opinion of bond counsel. Accordingly, if it is necessary for counsel to provide further documentation in addition to the checklist in order to support their due diligence obligations in conjunction with the bond opinion, that documentation will be in a separate written document. Checking off an item in the checklist indicates that counsel has either reviewed the material as noted, or discussed the matter with the issuer.

Diligence procedures will depend on particular facts but can include (1) discussion and review with public officials of the plan of finance, the use of financed facilities, and any certificates prepared by bond counsel for execution by the public officials, (ii) review of authorizing legislation or resolutions for the issue, (iii) review of feasibility studies prepared by consultants or internal staff, (v) review of description of payment sources in draft offering materials, (vi) review of draw schedule for expenditure of proceeds, and (vii) review of the issuer's procedures for calculation and payment of arbitrage rebate.

	Issuer tax certificate	Other document	Transcript advice	External document	Not relevant
1. <u>General</u>					
(a) Issuer is a State, the District of Columbia, or a political subdivision with substantial sovereign powers of taxation, eminent domain, police power. See Treas. Reg. § 1.103-1; Rev. Rul. 77-165.					

	Issuer tax certificate	Other document	Transcript advice	External document	Not relevant
(b) Issuer is a constituted authority created by or under special state law and issuing on behalf of a State or political subdivision.					
(c) Issuer is a nonprofit corporation issuing under Rev. Rul. 63-20 (Rev. Proc. 82-26) or another qualified form of entity.					
(d) Bonds meet state law requirements for valid issuance, public purpose, voter approval, and maturity.					
(e) Bonds are issued in registered form.					
(f) Issuance of bonds is reported to IRS on Form 8038-G.					
<b>2. <u>Debt Obligations</u></b>					
(a) Dates and amounts of payments are specified.					
(b) Interest rate is a fixed rate or a qualified floating rate. See Treas. Reg. § 1.1275-4(d)					
(c) Obligation to make payments is incurred in exercise of power to borrow. See Rev. Rul. 72-77 (interest on condemnation award is not tax-exempt).					

3. <u>Governmental Bonds: Use of Proceeds.</u>				
(a) No private business user owns or leases the facilities.				
(b) No management contract, or				
(c) qualified management contract under Rev. Proc. 97-13.				
(c) No arrangement for sponsorship of research in the facilities, or				
(d) sponsorship meets guidelines of Rev. Proc. 97-14.				
(d) No private business user has a contract, arrangement, or special legal entitlement for the use of the facilities.				
(e) Facilities do not confer special economic benefits on any private business user.				
(f) No private business use of facilities, or				
(g) private business use does not exceed 10% (5% for unrelated or disproportionate use).				
(h) Nonqualified amount (private business use portion of the facilities or private payment portion if less) does not exceed \$15,000,000 (or else issuer must obtain an allocation of state private activity bond ceiling for the excess.)				

(i) No proceeds are used to finance output facilities (electricity, gas, water), or

(j) issue complies with special rules for output facilities in IRC § § 141(b)(4) and 141(d) and Treas. Reg. § 141-7.

(k) Bonds to finance prepayment for gas or electricity comply with 2003 regs and/or 2005 Energy Policy Act safe harbor.

(l) Costs financed by the proceeds are capital costs rather than operating expenses.

(m) No proceeds are loaned to any private party, including nonbusiness borrowers as well a business borrowers.

(n) If bonds refund a prior issue, the use of facilities complies with the public use requirements on the basis of combined measuring period for both issues, or

(o) prior issue and refunding issue each comply on basis of separate measurement periods. See Prop. Reg. § 1.141-13.

**4. Governmental Bonds:  
Private Business Payments.**

(a) Debt service on bonds is payable from generally applicable taxes.


(b) There are no private payments for the use of the facility (other than as members of the general public) even if not pledged to debt service.

(c) No private business use property that is financed by the bonds is pledged to secure them.

(d) Bonds secured by assessments against property benefited by municipal improvements (streets, sidewalks, etc.) comply with regulations on tax assessment loans. Treas. Reg. § 1.141-5(d).

5. Continuing Compliance.

(a) Issuer reasonably expects at date of issuance that public use of facilities will continue for life of issue. See Treas. Reg. § 1.141-2(d).

(b) Issuer has date-of-issuance expectations required by Treas. Reg. § 1.141-2 to permit disregard of post-issuance private sales of personal property (or of any property financed by certain multi-purpose issues of general obligation bonds).

(c) Bond terms permit optional redemption within 10.5 years for remediation of private use. See Treas. Reg. § 1.141-12.

6. Arbitrage Bonds: New Money

(a) Issuer reasonably expects to enter binding contract for at least 5% of proceeds within six




months, to spend 85% of proceeds within three years, or five years with certification by licensed architect or engineer, and that completion of projects and expenditure of proceeds will proceed with due diligence.

(b) Issuer reasonably expects that amount of issue does not exceed reasonable needs of project.

(c) Declaration of official intent to use bond financing to reimburse prior expenditures was adopted not later than 60 days after the date of the expenditures; project not in service for more than 18 months; expenditures not more than three years old.

(d) Investment contract was purchased in bona fide competitive bidding under three-bid safe harbor.

(e) Fees for brokers of investment contract comply with Treas. Reg. § 1.148.5(e)(iii).

**7. Arbitrage: Current Refundings.**

(a) Proceeds of current refunding will be used to retire prior bonds in not more than 90 days.

**8. Arbitrage: Advance Refundings**

(a) Proceeds of advance refunding will be used to retire prior bonds more than 90 days after issuance of refunding bonds.




of project under safe harbor against creation of replacement proceeds. See Treas. Reg. § 1.148-1(c)(4).

(c) Fee for qualified guarantee cannot be taken into account in yield calculation if fee is for services or separate investment rather than credit support. See Treas. Reg. § 1.148-4(f)(4); Rev. Rul. 94-42.

(d) Payments for qualified hedge cannot be taken into account in yield calculation unless hedge is identified to issue on issuer's records within three days of being entered. See Treas. Reg. § 1.148-4(h)(2) and 4(h)(5).

(e) Advice related to 6-month, 18-month or two-year spending exceptions from arbitrage.

(f) Facts related to \$5,000,000 small issuer exemption from arbitrage rebate.

(g) Issuer agrees to pay required arbitrage rebate beginning 60 days after fifth anniversary of issuance or 60 days after bond retirement if sooner.

**10. No Federal Guarantees**

(a) Payments of principal or interest on bonds or underlying loans are not guaranteed by United States or any Federal agency (unless permitted by statutory exceptions, e.g., housing bonds).


11. <u>Pooled Financing Bonds</u> –					
(a) No loan of proceeds to two or more borrowers without compliance with statutory tests.					
12. <u>Hedge Bonds</u>					
(a) Reasonably expected expenditure of spendable proceeds is 85% in three years (with no guaranteed yield investment of more than 50% of proceeds for four years or more), <u>or</u> 10% by end of first year, 30% by end of second, 60% by end of third, and 85% by end of fifth year.					
(b) Expenditure expectations are not based on possible change in interest rates.					
(c) Hedge bond tests are satisfied for prior bonds if present issue is a refunding.					
13. <u>No Other Bonds Treated as Part of Same Issue</u>					
(a) No other bonds have been or will be sold within 15 days in common plan of finance with same source of payment. See Treas. Reg. 1.150-1(c).					
14. <u>Structural Matters</u>					
(a) Multiple bond issues or funding sources for same project with different tax theories. See Treas. Reg. 1.141-14 example 4 (one bond issue seeks to avoid private activity bond definition by showing public use of proceeds but has private payments for debt service, while second bond issue for					

same project has private use of proceeds but shows tax-supported debt service).

(b) A single party makes or receives payments having different arbitrage attributes. E.g., Treas. Reg. 1.148-4(f)(4) (service fee must be separately stated from credit charge).

(c) Financings that blend different yield-restricted escrows. See Treas. Reg. § 1.148-10(d) example 2.

(d) Transactions using or disregarding safe harbors (competitive bidding, management contracts, sponsored research contracts, replacement proceeds, cost allocations with qualified guarantees or hedges, etc.).

(e) Debt service structures involving unnecessarily long maturities or back weighted debt service (little or no current interest). See Treas. Reg. § § 1.141-14(b) example 5; 1.148-10(d) example 3.

(f) Any transaction with substantially different arbitrage consequences depending on whether the transaction is treated as a reissuance of bonds. See Treas. Reg. § 1.148-10(d) example 4.


Counsel signature: \_\_\_\_\_

Date: