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March 13, 2007

Internal Revenue Service
CC:PA:LPD:PR (Notice 2006-63)
Room 5203
PO Box 7604
Ben Franklin Station
Washington, DC 20044

RE: Notice 2006-63: Record Retention Requirements for Tax Exempt
Bonds

Ladies and Gentlemen:

The National Association of Bond Lawyers (NABL) respectfully submits the attached comments in response to Notice 2006-63 relating to record retention requirements for tax exempt bonds. The comments were prepared and substantial contributions were made by a NABL Task Force on Record Retention.

NABL appreciates both the willingness of the Internal Revenue Service (“IRS”) to take action on record retention standards as well as the request for, and consideration of NABL’s submission.

NABL believes that participating in the guidance process supports clarification of and facilitates compliance with the tax law and regulations. Accordingly, NABL members would welcome the opportunity to discuss these recommendations to achieve clarity, certainty and administrability in this area of the law.

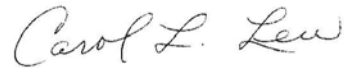
NABL exists to promote the integrity of the municipal market by advancing the understanding of and compliance with the law affecting public finance. A professional association incorporated in 1979, NABL has approximately 3,000 members and is headquartered in Chicago.



If you have any questions, please contact me at 949/725-4237 or through email at clew@sycr.com or Elizabeth Wagner, Director of Governmental Affairs at 202/682-1498 or through email at ewagner@nabl.org.

Thank you again for the opportunity to submit NABL's comments.

Sincerely,



Carol L. Lew

Enclosures

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National Association of Bond Lawyers

**RECOMMENDATIONS
BY THE
NATIONAL ASSOCIATION OF BOND LAWYERS
TO THE DEPARTMENT OF THE TREASURY
OFFICE OF TAX POLICY
AND THE
INTERNAL REVENUE SERVICE**

**RELATING TO RECORD RETENTION STANDARDS
FOR
TAX-EXEMPT BOND ISSUES
IN RESPONSE TO NOTICE 2006-63**

I. INTRODUCTION

The National Association of Bond Lawyers (“NABL”) submits the following comments in response to the request in Notice 2006-63, 2006-29 I.R.B. 87 (2006), relating to record retention standards for tax-exempt bond issues. Various people contributed to the preparation of these comments, including a task force formed by NABL to examine record retention issues (*see* Exhibit A for a list of members). NABL received input from others, including various issuer representatives; these issuers represented diverse jurisdictions, including large statewide issuers, large cities and counties, and smaller local political subdivisions.

NABL appreciates both the willingness of the Internal Revenue Service (the “IRS”) to explore and potentially provide guidance with respect to record retention standards as well as the request for, and consideration of, NABL’s comments. NABL commends the IRS for the release of Notice 2006-63, and the recognition that it is appropriate to develop record retention standards which equitably balance (1) the needs of issuers to manage “the burdens potentially associated with the record retention standards...” and (2) the interests of the IRS in substantiating the basis for compliance with section 103 and related provisions of the Internal Revenue Code of 1986, as amended (the “Code”), with respect to tax-exempt bonds.

Current published guidance with respect to record retention is limited. These comments describe some of the factors that, in NABL’s view, should be considered in developing guidance

in this area and recommend procedures for developing safe harbors with respect to common record retention issues.

II. FACTORS FOR CONSIDERATION IN DEVELOPING STANDARDS FOR RECORD RETENTION

A. Related Regulatory Provisions Regarding Record Retention

The current published authorities addressing record retention requirements are fairly narrow.¹ The existing final and proposed Treasury Regulations promulgated under Sections 103 and 141 to 150 of the Code (and those promulgated under the Internal Revenue Code of 1954, as amended) already contain some very specific record-keeping requirements and include some assumptions that are inferred, if certain records are maintained. The following are a few examples of record retention provisions:

- Prop. Treas. Reg. § 1.141-6(a)(4) of the allocation and accounting rules requires elections for the use of a special allocation methodology (other than the pro rata method) to be noted on the records of the issuer.
- Treas. Reg. § 1.141-1(c) requires all elections under Section 141 of the Code to be in writing and maintained as part of the bond documents.
- Treas. Reg. § 1.148-5(d)(6)(iii)(E), addressing the arbitrage restrictions of Section 148 of the Code, requires that certain information be retained with the bond documents until three years after the last outstanding bond is redeemed in order to take advantage of the safe harbor for establishing the fair market value of a guaranteed investment contract and

¹ The IRS did release in January of 2004 “Frequently Asked Questions” concerning record retention that suggest a broad interpretation of record-keeping requirements. However, no published guidance clearly describes the overall extent of the record retention requirement for tax-exempt bonds.

investments purchased for a yield restricted defeasance escrow.

- Treas. Reg. § 1.148-4(h)(2)(viii), addressing the arbitrage restrictions of Section 148 of the Code, requires that the identification of “qualified hedge” contracts be identified by the bond issuer on its books and records maintained for the hedged bonds.
- Treas. Reg. § 1.103(n)-3T Q/A 8, 13 & 14 requires that certain agreements and assignments between governmental units that affect volume cap allocations under Section 146 of the Code be maintained in the records of the government that issues the bonds for the term of the bonds.
- Treas. Reg. § 1.103(n)-2T Q/A 7 requires that certain elections not to take depreciation on leased property that must be treated as owned by a government in order to be financed with tax exempt bonds be retained by the lessee and issuer of the bonds for the term of the lease.
- Treas. Reg. § 1.103-10(b)(2)(vi) requires that an election to utilize the \$10,000,000 small issue manufacturing bond limit be noted affirmatively at or before the issue date of the bonds on the “books and records” of the issuer.

In at least two instances, the existing Treasury Regulations also provide for the use of assumptions in the absence of applicable records. For example, Treas. Reg. § 1.141-4(c)(3)(iii) provides that for purposes of certain allocations of private payments under Section 141 of the Code, where property is financed with two or more sources of funding and the issuer has not retained records of amounts expended on the property, the issuer may use reasonable estimates of those expenditures. In addition, Treas. Reg. § 1.148-6(a)(3) provides that if an issuer fails to maintain books and records sufficient to establish the accounting method for an issue and the

allocation of the proceeds of that issue, the rules of that regulation are applied using the “specific tracing” method.

The existence of the above-cited Treasury Regulations setting out specific record-keeping requirements and the assumptions applicable in the absence of pertinent records implies that, under current law, while certain key records may need to be retained, not necessarily all records relating to a bond issue need be retained for the life of the issue. NABL, therefore, believes that guidance which does not require the retention of every record relating to a bond for the life of a bond issue would be consistent with existing law.

B. Long Period of Relevancy of Records

The long period for which records may be relevant for a tax-exempt bond issue is an important factor for consideration in developing guidance for record retention. A tax-exempt bond issue may well remain outstanding for thirty years or more, and refundings with new issues of bonds can extend the effective maturity even further. Thus, the potential period for an audit by the IRS and the consequent record retention standards may be more prolonged for a tax-exempt bond issue than for some other types of transactions. As previously stated, in preparing this report, NABL consulted with several issuers that represented a fairly broad range of different types and sizes of State and local governmental entities. While their current record retention policies and practices varied considerably, the issuers were uniformly concerned about their responsibilities and skeptical about their practical ability to keep every record relating to a bond issue for the term to maturity of that issue. While NABL believes that the overwhelming majority of issuers share the IRS’s objective of identifying a record retention regime that is adequate to substantiate the tax exemption of bonds at issuance and at relevant times after issuance, the challenge is to implement a reasonable and administrable regulatory scheme that serves the legitimate needs of the IRS without imposing undue, impractical, or unrealistic burdens on State and local issuers or their conduit borrowers.

Retention problems for State and local governmental issuers resulting from the long-lived nature of tax exempt bonds are numerous and include geographical moves of governmental headquarters, changes in government organizations (*e.g.*, the responsibility for keeping records with respect to a bond-financed facility are moved from one department to another), and

accounting and technological changes. Further, files and records may deteriorate or be lost or damaged as a result of poor storage environments, inferior materials or natural catastrophes. Changes in technology also may make older expenditure and/or investment records inaccessible. Even the most secure facilities and diligently maintained systems may be disrupted by unforeseen events (*e.g.*, a flood or a terrorist attack). Issuer representatives noted that one significant problem of retaining records over a long period of time is the lack of institutional memory. For example, a new courthouse is financed and constructed during the term of one mayor; the mayor is eventually replaced by a newly elected mayor, the newly elected mayor changes the professional staff, and no one knows the history of the project or its financing.

Thus, NABL believes that safe harbors which address the issues presented by the typically long period that a bond issue is outstanding would be extremely helpful to those who must comply with the restrictions.

C. Large Volume of Potentially Relevant Records

The large volume of records that may be potentially relevant with respect to a tax-exempt bond issue should also be considered in developing guidance with respect to record retention. Typically, the volume of records which relate to a tax-exempt bond issue (including records relating to the use and investment of proceeds as well as the use of financed assets) is considerable in most contexts, but can be staggering in the case of a large issue financing multiple projects (*e.g.*, a governmental general obligation bond issue or qualified 501(c)(3) bond issue benefiting a hospital or university system). Moreover, the record retention costs associated with housing records and with employee management are material. Another complicating factor is that most issuers have multiple bond issues outstanding at a given point in time, further expanding the extent of the record retention responsibility.

While volume may make record retention practically unadministrable or at least burdensome and costly, maintaining records to prove a negative (*e.g.*, that no private business use under Section 141 of the Code existed 30 years ago) could render tax-exempt financing inefficient in cases where the subsidy provides a high and direct public benefit. An example of this problem would be record retention for a large governmental issuance financing multiple public facilities, some of which are recreational facilities or garages that might have *de minimis*

private business use, but could also have a multitude of agreements for use each year that do not give rise to private use. Multiplied over the typical term to maturity of a bond issue, thousands of agreements relating to this type of bond issue could yield a low likelihood of Code violations. Similarly, hospital and university systems often have many agreements at any given time, the vast majority of which do not give rise to private use.

Therefore, NABL believes that guidance that addresses the significant difficulties of retaining and maintaining a large volume of information is necessary in this area.

D. Issuer Structural or Management Issues

In developing guidance for record retention, NABL notes that certain structural or management issues may impact the manner in which records are retained by State and local governments. Issuer representatives that provided input to NABL frequently noted that relevant records may be diffused over a number of people and offices because different departments or officials of State or local government may be responsible for various aspects of an issuer's financing program. For example, a finance director's office may be responsible for the issuance of bonds; a treasurer for the entity may oversee the investment of bond proceeds; a purchasing or construction department may manage the construction of the bond-financed facilities; and a comptroller may oversee the expenditure of the bond proceeds. Many of these separate roles are created under a State constitution or a political subdivision's charter in order to create a system of checks and balances and public accountability; however, in the context of record retention, these systems of checks and balances result in dispersed records.

Although the advent of computer storage has assisted issuers with record retention and accessibility on some level, not infrequently, the computer systems used by different agencies and/or departments "communicate" only in a limited fashion, reducing the issuer's ability to access the information on a comprehensive basis. For example, a State-level accounting system might be structured so that agencies or departments of the State request payment for project expenditures which are to be initially made against the State's general fund. The comptroller's office of the State would then, monthly, determine whether the expenditures should be allocated to bond proceeds, and, if so, make an allocation of bond proceeds from the appropriate bond

issue account to reimburse the general fund for the interim advance. The agency constructing the project may be unaware of the source of funding for its expenditures because its computer system does not have this information. While a comptroller's office may have a computer system that retains records relating to the allocation of bond proceeds to expenditures, a treasurer's office that handles rebate compliance may have access only to information relating to fund balance and investments.

In addition, a substantial number of State and local governmental issuers invest and account for their bond proceeds without the assistance of a trustee bank, so that the records and detail are set by the issuer's generally applicable accounting system, and, if any records are lost, they cannot be recovered from a third party's system.

NABL believes that any record retention guidance should take into account the potential for State and local governmental units utilizing multiple monitoring entities that may be all internal, all external or a combination.

E. Conflicting State and Local Law

In developing guidance for record retention, NABL also notes that the existence of State and local law regarding record retention should be considered. States and local governments typically have record retention periods (*i.e.*, record destruction mandates) imposed by State or local law that are far shorter than the term to maturity of the typical long-term tax-exempt bond issue. While many issuers have recognized that these time periods may not be sufficient for documentation relating to tax-exempt bonds and have developed procedures to exempt relevant records from these requirements to the extent practicable, many records are destroyed as part of these programs, either in error or due to a record keeper's failure to recognize the records' relevance to a tax-exempt bond issue (*e.g.*, certain expenditure information in the context of a diffuse document retention situation, as that described above).

NABL believes that these concerns should be given proper weight, when trying to strike the right balance between the benefits of record retention and the burdens imposed on those who must comply.

F. Clear Guidance to Render Opinions

Clear guidance regarding record retention requirements is necessary not only for issuers who must understand and comply with the requirements, but also for bond counsel who must frequently examine records relating to a bond issue to render an opinion. Bond counsel are often called upon to determine whether a previously issued bond issue is in compliance with restrictions under the Code. For example, bond counsel may be requested to render an opinion on compliance with the arbitrage rebate rules of Section 148(f) of the Code or on compliance with the use requirements for new refunding bonds.²

To render opinions, bond counsel must be able to rely on certificates or records regarding expenditure of bond proceeds, past use of a bond financed facility and investment of bond proceeds. NABL believes that guidance with respect to record retention that provides enumeration of specific records upon which can be relied for federal tax purposes, including for purposes of rendering the advice and opinions mentioned above, would be helpful to bond issuers, bond purchasers and bond counsel.³

III. SPECIFIC RECOMMENDATIONS

In light of the long period of relevancy, the potentially large volume of information, the issuer structural management issues, the conflicting State and local law, and the need for clear administrable guidance to render opinions, published guidance regarding record retention, which appropriately balances the need of issuers and the IRS, is vital to the municipal bond industry. NABL recommends that any record retention standards be in the nature of a safe harbor rather than an absolute requirement, taking into account the wide variety of record keeping practices followed by the thousands of different issuers and beneficiaries of tax exempt bonds. The

²In order to determine what measurement period to apply and what amount of private use to permit after the issue of refunding bonds, the measurement period rules for private use under Treas. Reg. § 1.141-13(b)(2)(ii) generally require a determination of the amount of “private use” of a bond-financed facility that occurred prior to the issuance of the refunding bonds.

³ NABL recommends that the IRS consider a monetary penalty regime for record keeping noncompliance (assuming good faith compliance efforts) rather than bond taxability. On September 1, 2004, NABL released its Alternative Dispute Resolution Report relating to “intermediate sanctions” for several areas of noncompliance (www.nabl.org).

following recommendations do not address all record retention issues but outline certain safe harbors for common record retention issues of State and local governments.

A. Recommendations for Safe Harbor for Expenditure Records Relating to the Use of Proceeds Limitation

The Code and Treasury Regulations contain detailed and differing “use of proceeds” restrictions that apply to governmental bonds (*e.g.*, the private business tests of Section 141 of the Code), qualified 501(c)(3) bonds (*e.g.*, the use restriction of Section 145 of the Code), and exempt facility bonds (*e.g.*, the use of proceeds restrictions of Section 142 of the Code). The nature of these restrictions presents acute problems for issuers and conduit borrowers with respect to record retention as the allocation of proceeds to expenditures is a key event necessary in many instances to establish compliance with Code restrictions. NABL recommends that a record retention safe harbor be created for the purpose of establishing the allocation of proceeds to expenditures. Although there are many possible structures that might be developed, NABL recommends the two following structures:

1. NABL recommends that issuers of bonds (or in the case of conduit borrowings, conduit borrowers) be permitted after a reasonable increment of time (*e.g.*, seven years) to summarize the expenditure of bond proceeds, and then be able to destroy the underlying original purchase invoices, canceled checks, bank statements, and similar records relating to the expenditures.⁴ The expenditure summary should contain sufficient information to establish compliance with Code restrictions, such as the date, amount, and purpose of expenditures. To establish compliance in the future, the expenditure summary (or summaries) would be required to be retained in the permanent records of the issuer or conduit borrower for the term to maturity of the bond issue and any refunding bonds plus three years. Disposal of the underlying records would not be permitted, however, at any time when an examination of the bond issue or any refunding bond issue is open. The expenditure summary would establish the application of proceeds of the issue to the costs covered by the summary for use in establishing tax compliance

⁴ NABL notes that any record-keeping guidance that provides safe harbors would be more effective with an inclusion of sample documents, for example, model summaries. NABL would be pleased to assist with the development of such model summaries, if requested.

for the issue and any refunding bonds, provided that the summary was not knowingly false or fraudulent when prepared.

This recommendation for a safe harbor seeks to balance the needs of the IRS (which must be given an appropriate period of time to audit the underlying expenditures records) with the needs of issuers to have administrable rules relating to record retention. NABL notes that the recommended safe harbor would be merely a permissible alternative for issuers to document the expenditure of proceeds, and that other existing methods of retaining records would still be available, such as retaining all underlying records. In any event, NABL believes that guidance providing for this safe harbor should address both the content required for the summary and the party allowed to produce and retain the summary.

2. Another recommendation that would provide record-keeping relief (in addition to the safe harbor proposed above) is to permit earlier destruction (than the period recommended above) of records for individual expenditures below a certain dollar threshold (*e.g.*, one percent of proceeds), provided the summary described above is prepared and retained. NABL understands from issuers that this recommendation could greatly assist in reducing the volume of records to be retained.

B. Recommendations for Safe Harbor Regarding Agreements Relating to the Use of Bond Financed Assets

Certain Code restrictions (principally, but not exclusively, the private business use limitations of Section 141 and Section 145 of the Code) restrict the nature of certain agreements with respect to the use of a bond financed facility, such as agreements for sale of the financed property, and other agreements (*e.g.*, leases, management contracts, output contracts, research agreements, and agreements for comparable special legal entitlements that result in private use of the financed property). The problems of record retention in this area are particularly acute because (i) the relevant facts to ascertain Code compliance might be contained in a voluminous amount of records, some of which do not violate Code restrictions because of their nature (*e.g.*, agreements involving nonpossessory use exempted from private business use characterization under Treas. Reg. § 1.141-3(d)(5)); (ii) the records satisfy another administrative safe harbor (*e.g.*, the service contract safe harbor of Revenue Procedure 97-13, 1997-1 C.B. 632); or (iii) the

records are considered permissible under a permitted *de minimis* rule, (e.g., the ten percent permitted related private business use under Section 141(b) of the Code).

Again, many possible safe harbors could be developed to address this issue. Because of the large volume of potential agreements and the needs both to balance the interests of the IRS and State and local governments and to have administrable and practicable rules, NABL recommends that at the close of appropriate periods (such as seven-year time increments), issuers be permitted to establish the qualified use of proceeds allocated to property by relying on a certificate of qualified use (during the period covered by the certificate and with respect to the factual matters summarized), that is prepared by the issuer (or the conduit borrower) with respect to the applicable period and retained with the permanent records for the bond issue.⁵ Specifically, NABL recommends that the safe harbor provide that, if the above certificate were prepared subsequent to the close of the applicable covered period, the issuer would be permitted to destroy the applicable underlying records covered by the certificate. For evidence of compliance, NABL recommends that the safe harbor provide that the certificate include a representation by the issuer (given in good faith and after appropriate due diligence) that, with respect to the financed facilities covered by the certificate, during the applicable period covered, the appropriate parties complied with the applicable Code restrictions on bond financed facility usage (e.g., the private activity bond test of Section 141 of the Code). To provide further evidence, NABL recommends that the safe harbor also provide a summary of any arrangements for use of the applicable facilities during the applicable period.⁶

NABL further recommends that an issuer (or conduit borrower) that has prepared a certificate may prepare one or more subsequent certificates which would cover the applicable period referenced in the subsequent certificate. The above rule would not apply if the IRS has already opened an examination of the issue or any refunding bond issue within the prescribed period. This recommendation would create a safe harbor only. The issuer could still satisfy record retention requirements in other ways currently permitted under present law. NABL also

⁵ NABL notes that any record keeping guidance that provides safe harbors would be more effective with an inclusion of sample documents, for example, model certifications. NABL would be pleased to assist with the development of such model certifications, if requested.

⁶ NABL notes that certain categories of private activity bonds, such as multifamily housing bonds, also involve acute record retention issues because of the volume of agreements that relate to the bond issue. NABL believes that a safe harbor, analogous to that recommended above, for those types of private activity bonds would help minimize record retention burdens.

recommends that any certificate be effective with respect to any bond issue refunding the original issue. NABL recommends that any guidance provide detail regarding the content and signatory required for a certificate.

C. Recommendations for Safe Harbor for Arbitrage Restrictions: Investments in Nonpurpose Investments and Rebate

To minimize the retention of voluminous records for long periods yet provide the IRS with a reasonable period of time to audit underlying records, NABL recommends that any issuer (or conduit borrower) with respect to tax-exempt bonds, be permitted (after a reasonable period of time) to dispose of records of the purchase, disposition, and receipts of nonpurpose investments, provided the issuer or conduit borrower permanently retains a reasonable summary record of its investment transactions. Five years (after the close of the period covered by the summary) would be a reasonable period for this purpose, as the administration of record retention and destruction would be on the same cycle as most arbitrage rebate calculations. To illustrate, underlying records relating to the initial five-year period following issuance would be destroyed at the time the second rebate payment would be due (generally at the 10-year mark), provided that a copy of the rebate calculation and a summary of investment and expenditure activity was retained with the issuer's (or conduit borrower's) permanent records. NABL believes this safe harbor appropriately balances the burdens relating to record retention with the IRS's needs to substantiate compliance. NABL recommends that any guidance provide detail regarding the summary content and parties responsible for summary preparation and retention.

In addition, NABL recommends that for items below a certain dollar threshold (providing the summary described above is retained), a safe harbor permit the destruction of records after an earlier period than that recommended above.

D. Certain Other Matters

Location of Records/Delegation/Form. Because of the variety of ways that State and local governments maintain records, NABL recommends that records not be required to be held in a central location, if agreements or other procedures provide for responsible parties to retain the records (*e.g.*, a trust agreement under which a trustee agrees to maintain expenditure and investment records; a loan agreement under which a conduit borrower agrees to maintain records

with respect to use of financed assets; and procedures set up by an issuer setting out the various record retention responsibilities). In particular, it should be clear that an issuer can delegate record retention responsibilities to a conduit borrower. NABL also recommends that records be allowed to be retained in electronic media, paper or other accessible form.

Catastrophes. NABL recommends that any guidance regarding record retention should have a reasonable provision for loss of records due to fire, flood, or other contingencies which would not be accommodated in ordinary business practices.

Prospective Guidance. Due to the lack of record keeping guidance, NABL recommends that any guidance in this area be prospective, unless issuers elect to retroactively apply the provisions to previously issued bonds. Moreover, NABL recommends that any guidance in this area be easily modified by the federal government to take into account evolution of record keeping practices (*e.g.*, through revenue procedure rather than regulation).

IV. CONCLUSION

Record retention guidance is vital to the administrability of Section 103 and Sections 141 through 150 of the Code. NABL believes that guidance should take into account and appropriately balance the various factors involved in record retention, such as the interrelationship with existing State and local laws, the typical term to maturity of bond issues, volume of records, structural management practices of issuers, and the need for clear guidance to render opinions. NABL has recommended certain safe harbors which it believes balance the needs of the IRS yet minimize the burdens of issuers' record retention.



National Association of Bond Lawyers

EXHIBIT A

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