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September 11, 2007

Internal Revenue Service
Form 990 Redesign
ATTN: SE:T:EO
1111 Constitution Ave., N.W.
Washington, DC 20224

RE: IR 2007-117: IRS Releases Discussion Draft of Redesigned Form 990 for Tax-Exempt Organizations

Ladies and Gentlemen:

The National Association of Bond Lawyers (NABL) respectfully submits the attached comments in response to the IRS Discussion Draft of Redesigned Form 990 for Tax-Exempt Organizations (IR 2007-117).

NABL appreciates the effort of the Internal Revenue Service in addressing tax-exempt organization reporting issues as well as the request for and consideration of NABL's submission.

The comments were prepared by a NABL Task Force on Redesigned Form 990 identified in Exhibit A to this letter.

NABL believes that participating in the reporting 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 reporting clarity, certainty and administrability.

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 though 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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NABL Task Force on Redesigned Form 990

RECOMMENDATIONS

BY THE

NATIONAL ASSOCIATION OF BOND LAWYERS

TO THE INTERNAL REVENUE SERVICE
RELATING TO DRAFT REDESIGNED FORM 990

(IR 2007-117)

General Comment

Congress has long recognized the public benefit of charitable and educational organizations described in section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Code"). The Code allows these organizations to receive tax-exempt income and tax deductible contributions, and it grants them the ability to be the beneficiary of tax-exempt financing through qualified 501(c)(3) bonds issued by State and local government entities that lend the proceeds to the 501(c)(3) organizations.[1] Information about qualified 501(c)(3) bonds is reported to the Internal Revenue Service (the "IRS") through bond-related filings by the issuer and through the current version of Form 990. Citing "noncompliance with recordkeeping and record retention requirements" relating to 501(c)(3) bonds, the IRS has released a draft of a significantly redesigned Form 990 for comment, which would require substantially more 501(c)(3) bond information (IR 2007-117). The comments below, keyed to lines in the draft form, recommend alterations (or clarifications) to the information required so that the questions are clear, and the information is relevant, and obtainable.

NABL believes that the draft redesigned Form 990 will require, in many, if not most instances, exempt organizations to create systems for compilation and retention of information beyond the systems currently in use. NABL further believes that completing the information requested for past transactions that may be years or decades old will be extremely difficult and burdensome.

Specific Comments

Form 990 Core

<u>Part IV, Statement of Revenue, line 6, Income from investment of tax-exempt bond proceeds</u>. The instructions for line 6 require the organization to report all investment income from "unspent bond proceeds, reserves, escrows, and similar amounts." The use of the term "escrows" implies the possibility that (similarly to the explicit instruction for Part VII, line 6), the reported income is to include investment income on refunding proceeds held by an escrow agent in a "defeasance escrow." A defeasance escrow secures and pays bonds that, because of the escrow, are "defeased" (or "legally defeased") and no longer "outstanding" for financial purposes because

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[1] Qualified 501(c)(3) bonds are exempt from: (i) the State-wide volume ceilings under section 146 of the Code that apply to most other categories of private activity bonds, (ii) the prohibition of "advance refunding" a private activity bond in section 149 of the Code, and (iii) the limitations on use of proceeds to acquire existing facilities under section 147(d) of the Code that apply to all other categories of private activity bonds.

the organization no longer has to provide for payments of debt service. The income in a defeasance escrow is applied, pursuant to the terms of the escrow agreement, generally to pay debt service on the defeased bonds until they are retired. NABL believes that an organization should not report this income as "its" income on Form 990 because, in many instances, these monies belong to the issuer since the 501(c)(3) organization borrower paid off the applicable loan with those proceeds, and the issuer has deposited such funds in an escrow for the benefit of bond holders. Because proceeds in a defeasance escrow may not be "owned" by the borrower, NABL recommends that a requirement for income reporting in this situation be eliminated.

The instructions are explicit as to inclusion of income on "reserves." However, under certain plans of finance, the reserve fund may be held and invested by the bond issuer as distinguished from the exempt organization borrower; the borrower may not have access to the information necessary to complete what is required. Consequently, NABL recommends that such information not be provided in such instance.

Further, NABL believes that the instructions are ambiguous as to whether line 6 should include the earnings on a debt service fund. A debt service fund is typically used by the bond trustee to accumulate monthly deposits of operating revenues which will pay semiannual principal or interest on the bonds. Income from investment of a debt service fund will generally serve as a credit against future deposit requirements. While the amounts in a debt service fund are derived from revenues, they are treated as "gross proceeds" of the issue under the statutory definition in section 148(f)(6)(B) of the Code. In certain instances, the borrower will not have access to investment information regarding debt service monies. For example, in the context of pooled financings, these funds may be held for multiple entities, and often earnings accrue to the benefit of the issuer. NABL recommends that, if these debt service fund amounts are to be reported on line 6, the instructions state that reporting of income from gross proceeds as defined in section 148(f)(6)(B) of the Code not include debt service fund monies that are not under the control of the borrower.

Part VI, Balance Sheet, line 21, Tax-exempt bond liabilities, and Part VII, Statements Regarding General Activities, line 6a, Tax-exempt bonds outstanding. The instructions to these lines require reporting of bonds issued by the exempt organization on behalf of a governmental unit, as well as bonds issued by a governmental unit that loans the proceeds to the exempt organization. NABL recognizes that, in this respect, the instructions are similar to the instructions for line 64a of the current version of Form 990. Nonetheless, NABL believes that potential confusion could arise in the reference to bonds issued by the organization. The conditions under which a nonprofit corporation can issue tax-exempt bonds "on behalf of" a governmental unit are set forth generally in Revenue Ruling 63-20, 1963-1 C.B. 24, and NABL recommends that the instructions for all lines where this point is raised refer to Revenue Ruling 63-20 (as is done in the instructions for Schedule K, Part I, column (h)). In addition, NABL recommends that a reference to organizations issuing student loan bonds under section 150(d) of the Code (or volunteer fire departments issuing bonds under section 150(e)) be included in the instructions to clarify that these organizations are considered "on behalf of" issuers for this purpose if such organizations are filing Form 990 as exempt organizations.

The instructions for Part VII, line 6a, require the organization to report not only bonds "outstanding" (in an amount more than $100,000), but also bonds which, because they have been

defeased, are no longer "outstanding" financially or included in the balance sheets of the exempt organization borrower. NABL believes that organizations would not likely have historically reported "outstanding" bond liability on the current version of Form 990, line 64a in this manner. Because defeased bonds are not included on an organization's balance sheet, the organization may not have the required information available (*e.g.*, because of the passage of time). Reporting information on legally defeased bond issues will involve significant legal and accounting work to provide the necessary information which, NABL believes, would be redundant, at best, since much of the same information should be available for the outstanding bond issues which refunded and defeased such bonds, and which information will also be reported on Schedule K.[2] For these reasons, NABL recommends that reporting on Form 990 be limited to those bonds which are "outstanding," because they have not been paid or defeased. NABL does not believe that a transitional rule in which defeased bonds are reportable only if the defeasance occurred after some specific prospective date is workable or worthwhile. However, if this recommendation is not adopted, NABL strongly recommends that reporting of defeasances be limited to reporting years beginning on or after January 1, 2009. NABL also recommends that reporting of defeasances under a remedial action subject to Treas. Reg. § 1.141-12 be eliminated because such a defeasance results in the elimination of tax restrictions with respect to the applicable property.

Part VII, line 6b, Investments beyond temporary period. The instructions state that the organization may disregard investments of "customary reserve funds." NABL recommends that the phrase "customary reserve funds" be replaced by "reasonably required reserve and replacement funds" to track the definition of net proceeds in section 150(a)(3) of the Code. Also, NABL recommends further clarification language in the instructions to exclude advance refunding escrows, since these are always invested beyond the 30-day temporary period provided in Treas. Reg. § 1.148-9(d)(1).

More broadly, the Code and regulations permit unspent proceeds to be invested subsequent to a temporary period in many circumstances, so long as arm's length investment yield does not exceed permitted limits or "yield reduction payments" are paid to the United States under Treas. Reg. § 1.148-5(c). Yet this line item requires a "yes" or "no" response, with no opportunity to state that investments subsequent to a temporary period have been made in compliance with the Code and regulations. At a minimum, NABL recommends that the form be revised to allow the organization to state that, for any investments which are identified as being invested beyond a temporary period exception, such investments were made in a manner allowed by the Code and regulations.

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[2] NABL believes that retention of this rule will cause particular difficulties with respect to Part III of Schedule K, Private Use. For purposes of determining the private business use of a refunding issue, the regulations permit an issuer to use a "separate" measurement period beginning on the date of issuance of the refunding issue, provided that the refunded issue qualifies as tax-exempt by using a measurement period that ends on the date of issuance of the refunding bonds. But for purposes of determining the tax-exemption of the refunded issue itself, the measurement period will have to include the defeasance period. Thus, not only will the reporting be redundant, but the information will be inconsistent for essentially the same issue. In addition, sometimes an issue or a portion of an issue is defeased as the 501(c)(3) organization takes a "remedial action" under the regulations. Following these procedures, the assets are effectively freed from the restrictions applicable to tax-exempt bonds, are typically then private use assets and are not the property of the tax-exempt organization.

Part VII, line 6c, Defeasance escrows. NABL recommends that this line include an instruction defining the terms used in the question and indicating the purpose for which the information is sought. Furthermore, this question excludes "advance refunding escrows" from its scope, but does not exclude "current refunding escrows." NABL recommends that the failure to exclude current refunding escrows be corrected, as it appears to be an oversight.

Part VII, line 6d, Actions "on behalf of issuer." *See* discussion under Part VII, line 6a.

Schedule K, Tax-Exempt Bonds

General. The general instructions to Schedule K require the use of the same period as is covered by the Form 990. NABL recommends that this instruction be modified to permit an organization to complete Schedule K on the basis of either the Form 990 year or any other 12-month period or periods selected by the organization and used consistently for the bond issue for purposes of Schedule K and computations under sections 141-150 of the Code. For example, an organization that uses an August 31 fiscal year for financial reporting and Form 990 could likely use computation periods ending on the anniversary date of issuance for purposes of arbitrage rebate (*i.e.*, the required semiannual periods ending six, 12, 18, and 24 months after the date of issuance for purposes of the spending exceptions to rebate).

Schedule K Part I, Bond Issues

Column (e), Date Form 8038 Filed. The borrower may not have this information. This date does not appear on the Form 8038 itself or necessarily in the transcript unless an affidavit of mailing is included. Therefore, NABL recommends that this column be eliminated.

Column (g), Date Placed in Service. The tax laws do not have an across-the-board requirement that the "placed-in-service date" be specifically identified, although NABL acknowledges that such date is unquestionably relevant under the Treasury regulations in various contexts (*e.g.*, computing the measurement period for purposes of Treas. Reg. § 1.141-3(g)(2)(i) and defining restricted working capital expenditures under Treas. Reg. § 1.148-6(d)(3)). In most, if not all cases, the calendar day on which a facility is placed in service is relevant only in establishing that it fell before or after a regulatory cut-off date. 501(c)(3) organizations often finance multiple facilities and/or multiple capital equipment acquisitions entailing many different placed-in-service dates, and, with the exception of a regulatory context, record these dates in general bracket categories (*e.g.*, 1/1/07-12/31/07). NABL believes that reconstructing placed-in-service dates, except in the most general sense, for such multi-facility and multi-equipment acquisition projects, particularly with respect to those that were financed long ago, will be difficult and time-consuming. For this reason, NABL strongly recommends that Schedule K reporting be limited to bonds issued subsequent to the beginning of the first reporting year covered by Schedule K (which NABL strongly urges to be limited to reporting years beginning on or after January 1, 2009). NABL also recommends that for multi-facility and multi-equipment acquisition projects, the organization be allowed to report the placed-in-service date as the latest placed-in-service date for any of the projects financed with one bond issue.

Column (h), On Behalf of Issuer. *See* discussion under Form 990 Core, line 6a.

Schedule K Part II, Proceeds

Line 1, Issue Price. These instructions, in contrast to the instructions for Part I, columns (a) through (e), do not instruct the organization to match the issue price shown on the Form 8038 filed for each issue. NABL queries whether this omission is intended to impose some post-issuance due diligence to ascertain the accuracy of the information used to complete the Form 8038. If this item is intended to require an *ex post facto* self-audit of the issue price on the basis of actual retail sales by the underwriter (as opposed to reasonable expectation on the date of sale to the underwriter under Treas. Reg. § 1.148-1(b)), NABL believes that obtaining the information will be burdensome, if not impossible, without review of underwriting records that were likely not provided to the 501(c)(3) organization, and may no longer be retained by the underwriter. Moreover, bonds issued prior to 1986 were not subject to arbitrage rebate and bonds may qualify for a "spending exception" from rebate. For these reasons, NABL strongly recommends that Schedule K reporting be limited to bonds issued subsequent to the beginning of the first reporting year covered by Schedule K (which NABL strongly urges to be limited to reporting years beginning on or after January 1, 2009). Further, if this item is not intended to require an *ex post facto* self-audit of issue price, NABL recommends that an instruction be included that the issue price amount should match issue price reported on the Form 8038.

Line 3, Principal amount Unspent. NABL queries whether this question refers to the amount of proceeds remaining unspent, as in question 2 relating to the amount in a reserve fund. If so, NABL recommends that the term "principal" be eliminated, since this term normally refers to bond principal (*see* Schedule K, lines 4-6) rather than proceeds amounts.

Lines 5 and 6, Principal amount Defeased and Retired. The instructions ask for the principal amount retired or defeased as of the end of the year. NABL recommends a clarification of whether these amounts include only principal amounts retired or defeased during the current year, or whether they include all principal amounts that have been retired or defeased since the bonds were issued.

Line 7, Issuance Costs from proceeds. Unlike Part IV dealing specifically with compensation, Part II is not limited to expenditures during the reporting year; thus the report of issuance costs from proceeds in Part II appears to cover all costs of issuance paid (or reimbursed) from bond proceeds at any time subsequent to the issuance of the bonds. Theoretically, the reportable amount could be determined by reviewing the requisition file of the bond trustee, assuming the trustee has retained a requisition file and the requisitions indicate this information. However, NABL believes that obtaining this information will involve reliance on third parties for cooperation and record retention. Moreover, bonds issued prior to 1986 were not subject to the 2% limitation regarding the bond financing of issuance costs and have not been otherwise required to have costs classified between issuance costs and other eligible costs. For these reasons, NABL strongly recommends that Schedule K reporting be limited to bonds issued subsequent to the beginning of the first reporting year covered by Schedule K (which NABL strongly urges to be limited to reporting years beginning on or after January 1, 2009). NABL also recommends that unless the aggregate costs of issuance exceed the amount reported on Form 8038, the organization be permitted to report the Form 8038 amount.

Lines 9 and 10, Current refunding or Advance refunding. The regulations provide several exceptions under which the use of proceeds to pay principal or interest on another issue will not result in a refunding (Treas. Reg. § 1.150-1(d)(2)). NABL recommends that the instructions to the form incorporate those exceptions. Also, the instructions incorrectly state that "[a]n advance refunding occurs when the refunding bonds are issued more than 90 days after the last payment of principal or interest is made on the prior issue." NABL strongly recommends correcting the instructions by changing the word "after" to "before" in this sentence.

Line 11, Temporary period exceptions. NABL recommends that this question and/or instructions be rewritten to clarify the purpose of the information required and accommodate multi-purpose issues. In addition, a variety of temporary periods exist, such as for debt service funds and investment earnings. If the required information relates only to satisfaction of a specific temporary period (such as the three-year temporary period for project funds), NABL strongly recommends that this question be clarified to that effect.

Schedule K Part III, Private Use

Line 3b, Research agreements. NABL strongly recommends that the obsolete reference to Rev. Proc. 97-14 be replaced by a reference to Rev. Proc. 2007-47, which, by its terms, modifies and supersedes the previous Revenue Procedure.

Line 4, Management contract or research agreement percentages. NABL believes that significant effort will be required to assemble information that would fully and accurately answer the questions in Part III of Schedule K. For example, certain organizations, such as most hospitals, have multiple management contracts for a variety of bond-financed assets (*e.g.*, contracts with independent physicians staffing hospital areas such as, emergency room, anesthesiology, radiology, cardiology and pathology), and have no current manner of determining how to mechanically provide the required information, short of a major undertaking. If these questions are retained, NABL recommends that this schedule be corrected to require information for the highest percentage use of the "proceeds," not of the "project," because private use limitations are based on the percentage use of bond proceeds, not the percentage use of a particular project (*e.g.*, where a single issue finances more than one project).

NABL further believes that much of the effort will involve the collection of information not necessary to substantiate compliance with Code restrictions applicable to the bonds, such as collecting such percentage with respect to contracts in compliance with the safe-harbors of Rev. Proc. 97-13 and Rev. Proc. 2007-47. Thus, NABL recommends that the instructions clarify that the private use percentages reported on lines 4 and 5b should not include use pursuant to management and research contracts that qualify under the safe harbors of Rev. Proc. 97-13 or Rev. Proc. 2007-47. Use of facilities pursuant to these contracts is not considered to be "private use" for purposes of the limits on private use of facilities financed by qualified 501(c)(3) bonds, and therefore, NABL believes that the IRS did not intend for safe harbor contracts to be included in the percentage calculations. As proposed, by requiring the identification and computation of individual components of qualifying exempt use related to each management or research contract in Schedule K, the reporting organization will be required to divert significant resources away from what NABL believes the primary concern of both the organization and the IRS should be:

the identification and correction or remediation of excessive private use of facilities financed with tax exempt bond proceeds.

Moreover, NABL queries whether a separate Part III schedule is required for each management contract relating to projects financed by a specific bond issue. NABL recommends that the instructions clarify whether separate reporting is necessary for each covered user or whether aggregate reporting on a "not-to-exceed" basis (*e.g.*, "less than two percent") will be acceptable. For these reasons, NABL strongly recommends that Schedule K reporting be limited to bonds issued subsequent to the beginning of the first reporting year covered by Schedule K (which NABL strongly urges to be limited to reporting years beginning on or after January 1, 2009).

<u>Line 5a, Use other than management contracts or research agreements</u>. NABL recommends that this question be clarified so that it applies only to use that constitutes private business use. Various types of use are excluded from treatment as private business use by specific provisions of Treas. Reg. § 1.141-3, including use by service contractors that are not performing management services (*e.g.*, janitors or equipment repairmen).

Schedule K Part IV, Compensation of Third Parties.

<u>General</u>. Part IV requires information pertaining to compensation paid by the organization to third parties during the year with respect to issuance of any issue listed in Part I. The required information is not limited to issuance costs as defined in Treas. Reg. § 1.150-1(b). Thus, NABL believes that ambiguities are introduced, including whether to report on (1) qualified (or nonqualified) guarantees and hedges, and (2) post-issuance fees including trustee fees or arbitrage rebate calculation services. Therefore, NABL recommends that this question be limited to issuance costs as defined in Treas. Reg. § 1.150-1(b).

Also, the instructions solicit information on amounts paid to third parties with respect to "potential financings." However, Schedule K is not designed to accommodate information with respect to "potential financings," so the reporting of these costs would not relate to a specific issue. NABL recommends that this question be eliminated, as the information gained will not outweigh the confusion created.

<u>Column E, Formal selection process</u>. NABL recommends that this question be eliminated because of its breadth and ambiguity. Particular points of difficulty are as follows:

- "Formal selection process" is not defined.
- The selection process, whether or not formal, is not required to be identified with the particular bond issue covered by the report and may have occurred at a date some years previously for an open-ended, continuing engagement for financial transactions generally.
- The question does not adequately account for compensation amounts paid by an exempt organization in connection with an issue of qualified 501(c)(3) bonds to persons selected by the bond issuer rather than the exempt organization borrower (*e.g.*, underwriters, bond counsel, trustees and financial advisors) through

processes that the exempt organization may or may not be able (and willing for Form 990 reporting) to categorize definitively between formal and informal.

Because of these reasons, NABL strongly recommends that Schedule K reporting be limited to bonds issued subsequent to the beginning of the first reporting year covered by Schedule K (which NABL strongly urges to be limited to reporting years beginning on or after January 1, 2009).

Schedule N, Liquidation, Termination, Dissolution or Significant Disposition of Assets

This schedule requires certain information with respect to any organization that ceases its operations, but has remaining activities for the purpose of dissolving, paying debts or distributing any remaining assets. In Part I, lines 7a, b and c ask whether the organization complied with defeasance requirements under the Code and State law, and if "yes," how the organization defeased or settled those liabilities. These questions do not adequately account for the transfer of assets of the organization to another 501(c)(3) organization in the same related trade or business or to a State or local governmental entity, potentially requiring no defeasance of the bonds. Therefore, NABL recommends that these questions be modified to evidence this possibility and permit an organization to respond appropriately.

EXHIBIT A

NABL Task Force on Redesigned Form 990

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