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June 16, 2008

Internal Revenue Service  
Draft 2008 Form 990 Instructions  
ATTN: SE:T:EO  
1111 Constitution Ave., NW  
Washington, DC 20224

RE: IR 2008-60: IRS Releases Draft Instructions for 2008 Form 990, Seeks  
Public Comments

Ladies and Gentlemen:

The National Association of Bond Lawyers (NABL) respectfully submits the enclosed comments with respect to IR 2008-60, relating to Draft Instructions for 2008 Form 990 ("Draft Instructions"). These comments are in addition to the comments submitted by NABL on September 11, 2007, regarding the 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, the preparation of the Draft Instructions, as well as the request for and consideration of NABL's submission.

These comments were prepared by an Ad Hoc Subcommittee of the NABL Tax Law Committee, chaired by Frederic L. Ballard, Jr. of Ballard Spahr Andrews & Ingersoll, LLP, and Lauren K. Mack of Sonnenschein Nath & Rosenthal LLP. Substantial contributions were made by other NABL members listed in Exhibit II.

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.



If you have any questions, please contact me at 205/226-3482 or through email at [fclark@balch.com](mailto:fclark@balch.com) or Elizabeth Wagner, Director of Governmental Affairs, at 202/682-1498 or through email at [ewagner@nabl.org](mailto:ewagner@nabl.org).

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

Sincerely,



J. Foster Clark

Enclosures

cc: Steven T. Miller  
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NABL Ad Hoc Tax Law Subcommittee Members



# National Association *of* Bond Lawyers

**RECOMMENDATIONS  
BY THE  
NATIONAL ASSOCIATION OF BOND LAWYERS  
TO THE INTERNAL REVENUE SERVICE  
RELATING TO DRAFT INSTRUCTIONS  
FOR REDESIGNED FORM 990**

**(IR 2008-60)**

## **General Comment**

The National Association of Bond Lawyers (“NABL”) commends the Internal Revenue Service (“IRS”) for addressing many of the NABL comments submitted on September 11, 2007, regarding IR 2007-117, with respect to the Draft Redesigned Form 990, and for the improvements reflected in the final draft Form 990 (“Form 990 Core”) released by the IRS with accompanying schedules on December 19, 2007. While NABL continues to believe that the redesigned Form 990 will require many exempt organizations to create systems for compilation and retention of information beyond the systems currently in use (particularly for past transactions that may be years or decades old), NABL recognizes the policy and tax administration goals underlying the requests for information regarding a Section 501(c)(3) organization’s tax-exempt bond liabilities.

NABL respectfully submits the comments below in response to IR 2008-60, dated April 7, 2008, regarding the 2008 Form 990 draft instructions for the Form 990 Core (“Draft Instructions for Form 990 Core”) and for Schedule K (“Draft Instructions for Schedule K”). These comments are keyed to lines in the Form 990 Core and/or headings in either the Draft Instructions for Form 990 Core or the Draft Instructions for Schedule K, regarding recommended alterations (or clarifications) to the information required so that the questions are clear, and the information is relevant and obtainable.

In addition to comments relating specifically to the Draft Instructions, NABL has attached Exhibit I with comments relating to Part II of Schedule K on Use of Proceeds. Implementation of these comments would require amendments to Schedule K, itself, as well as to the instructions, and for this reason, NABL has presented them separately from its other comments.

## **Specific Comments**

### **Form 990 Core**

Part IV, line 24(a), Tax-exempt bonds. Part IV, Line 24a of the Draft Instructions for Form 990 Core provides that outstanding bonds issued after December 31, 2002, are to be reported on Schedule K and that the reporting requirement applies to refunding bonds issued after 2002 as well as non-refunding bonds. While NABL believes that, in general, the reporting requirement for post-2002 refunding bonds is reasonable, NABL recommends that the IRS clarify the instructions for Form 990 Core that the sections of Schedule K relating to Private Business Use

(Part III) do not have to be completed with respect to facilities financed by the original bonds being refunded, if the original bonds were issued before 2003. In providing relief from the new reporting requirements for bonds issued before 2003, the IRS recognized the burden on 501(c)(3) organizations of being required to produce detailed information relating to the uses of bond proceeds that occurred before any notice had been given that such reporting may be required, and this burden is the same even if those bonds are refunded after December 31, 2002.

Part IV, line 24b, Temporary period exception. Part IV, Line 24b of the Form 990 Core asks whether the organization invested any proceeds of tax-exempt bonds beyond a temporary period exception. Unlike the Draft Instructions for Schedule K, the Draft Instructions for Form 990 Core, Line 24b, do not provide any definition or examples of the phrase “temporary period exception.” NABL believes that many organizations will be unfamiliar with the term “temporary period exception.” NABL recommends that the IRS add the language used in the Draft Instructions for Schedule K, Part IV, Line 5 to the beginning of the instructions for Form 990 Core, Line 24b.

Part VIII, line 4, Income from investment of tax-exempt bond proceeds. Part VIII, Line 4 of the Form 990 Core asks for information regarding income from the investment of tax-exempt bond proceeds. The Draft Instructions for Form 990 Core, Line 4, state that the organization should report all investment income actually or constructively received from investing the proceeds of a tax-exempt bond. However, in a conduit bond issue for a 501(c)(3) borrower, amounts may be considered gross proceeds of the issue, but these amounts are under the control of the issuer rather than the 501(c)(3) borrower. For example, a defeasance escrow secures and pays bonds that, because of the escrow, are “defeased” (or “legally defeased”) and no longer “outstanding” for financial accounting purposes because 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. Under some bond documents these monies belong to the issuer, since the 501(c)(3) organization borrower paid off the applicable loan with those proceeds, the issuer has deposited such funds in an escrow for the benefit of bond holders, and any excess earnings on the escrow belongs to the issuer. Another example is a debt service fund, which typically is 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. Under some bond documents these monies belong to the issuer, and the borrower will not have access to the investment information. NABL believes that the amounts required to be reported on line 4 should not include amounts which, although technically treated as gross proceeds of the bonds, are not owned or controlled by the 501(c)(3) borrower. Accordingly, NABL recommends that the IRS clarify the instructions to provide that earnings on bond proceeds required to be reported on Form 990 only consist of earnings on amounts that are both owned by and under the control of the 501(c)(3) organization.

## **Schedule K**

Specific Instructions, Definitions, Qualified 501(c)(3) bond. NABL commends the IRS for including a plain language statement of the Internal Revenue Code Section 145 requirements in the Draft Instructions for Schedule K, Definitions, Qualified 501(c)(3) Bond. NABL believes that this plain language formulation addresses the vast majority of fact patterns and will be readily understood by organizations. The plain language statement does not address, however,

some of the less common nuances of the technical requirements of Section 145 (*e.g.*, a fact pattern in which private use occurs with no corresponding private payment). To avoid any confusion, NABL recommends that the IRS add to the instructions for Schedule K, Definitions, Qualified 501(c)(3) bond a reference to these requirements as ones that “generally” apply and include a specific cross reference to Section 145.

Specific Instructions, Definitions, Defeasance escrow; Part I, Bond Issues, Column (g); and Part II, Proceeds, Line 3. The term “defeasance escrow” is defined in the Draft Instructions for Schedule K, Specific Instructions, Definitions, Defeasance escrow. The definition includes a cross reference to the “remedial action” provisions used to correct noncompliance with the private use requirements. NABL notes, however, that a defeasance escrow may be created for other purposes than as a means to correct noncompliance with the private use requirements. For example, an issue may be defeased with an organization’s funds because of the limits on advance refundings when the issuer seeks to be released from bond covenants.

The Draft Instructions for Schedule K also use the term “defeasance escrow” in Part I, Column (g) and in Part II, Line 3. Because of the cross reference to the remedial action provision in the definition of “defeasance escrow,” one cannot determine whether the IRS is requesting information in those sections about all defeasance escrows or only those defeasance escrows established under the remedial action rules. NABL recommends that the IRS clarify whether the definition of defeasance escrow is limited to escrows established under the remedial action rules.

Specific Instructions, Definitions, Private business use. NABL commends the IRS for including a plain language definition of private use in the Draft Instructions for Schedule K. NABL notes, however, that the definition, as currently drafted, includes “any” use by a nongovernmental person and does not recognize the various exceptions to private business use established under the regulations and revenue procedures. NABL recommends that the IRS include a statement identifying the recognized exceptions to private business use in the instructions for the Definition for Private Business Use, with cross reference to the relevant regulations and revenue procedures.

## **Part I, Bond Issues**

Column (e). The plain language summary of the definition of issue price in the Draft Instructions for Schedule K, Part I, Column (e), differs in some potentially significant respects from the technical definition provided under the applicable Treasury Regulations. Because the organization will use the information previously reported on Form 8038, NABL believes a definition of the term “issue price” is unnecessary and recommends that the IRS delete the last three sentences of the instructions for Part I, Column (e).

Column (f). The Draft Instructions for Schedule K include an example for the acquisition of office equipment which implies, NABL believes, that a renovation, a purchase of purpose-related equipment, and a purchase of office equipment for administrative use would require listing for separate purposes. However, 501(c)(3) organizations often use bond proceeds to renovate or improve existing buildings, conduct routine capital maintenance, and equip such facilities, and they consider that all of these uses are for a single purpose. Therefore, NABL recommends that the IRS include additional examples in the instructions for Part I, Column (f) to provide helpful clarification with respect to the level of detail requested and the scope of multiple purposes.

## **Part II, Proceeds**

Line 2. The Draft Instructions for Schedule K, Part II, Line 2 indicate that “Reserve or Replacement Funds” for this purpose include any sinking fund or pledged fund. NABL recommends that the IRS include a specific cross reference to the relevant regulations in the instructions for Part II, Line 2 to identify the reserve, replacement, sinking or pledged funds to be included and specifically eliminate a bona fide debt service fund (which technically meets the definition of a sinking fund).

Line 3. NABL recommends that the IRS expand the instructions for Part II, Line 3 to clarify the limited circumstances in which “proceeds” would be deposited in a defeasance escrow with an example and a cross reference to the remedial action provisions.

## **Part III, Private Business Use**

Lines 3a and 3b. The Draft Instructions for Schedule K, Lines 3a and 3b utilize the language of Schedule K itself, regarding whether the organization has entered into any management agreement or research agreement with respect to property financed by a bond issue that “may” result in private business use. NABL is concerned that an organization could be required to answer “yes” because the agreements “may” result in private business use, even though the organization had determined, perhaps through routinely checking with bond counsel (Line 3c), that the agreement does not result in private business use. Therefore, NABL recommends that the IRS modify the instructions for Schedule K, Part III, Lines 3a and 3b to clarify that an organization is not required to answer “yes” unless the organization believes that the agreement results in private use.

Lines 4 and 5. The Draft Instructions for Schedule K, Lines 4 and 5 require reporting of the “highest percentage” of bond-financed private business use during the bond year. Private business use for purposes of the 5% limit on bond-financed private business use is determined by taking the average of the percentages of private business use during the one-year periods within the “measurement period,” generally equal to the life of the issue. The percentage of private business for any one-year period is, in turn, the average private business during that year. Treas. Reg. § 1.141-3(g)(4)(i). Because of the measurement used in the regulations, NABL believes that the “average” percentage during the year, rather than the highest would be more appropriate to report. NABL, therefore, recommends that the IRS change the instructions for Schedule K, Part III, Lines 4 and 5 to require the “average” use during the bond year, a better reflection of the relevant standard under the private use regulations.



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## EXHIBIT I

### Alternative Format for Reporting Proceeds in Part II of Schedule K

NABL recommends that the IRS consider an alternative format for proceeds reporting that would reconcile sources and uses of proceeds in a manner that NABL believes would conform to typical post-issuance analysis by a bond user. In NABL's recommended alternative, the following line numbers and captions would replace the material now found directly under the caption Part II, Proceeds:

- 1 Sale proceeds
- 2 Project period income
- 3 Total proceeds
- 4 Reserve funds
- 5 Current refunding
- 6 Advance refunding
- 7 Costs of issuance
- 8 Credit enhancement
- 9 Capital expenditures
- 10 Restricted working capital
- 11 Qualified hedges
- 12 Retirement of bonds
- 13 Other (describe)
- 14 Unexpended proceeds
- 15 Total proceeds

Instructions for these lines would be as follows:

Line 1 Enter the sales proceeds of the issue as defined in Treas. Reg. § 1.141-1, as of the date of issuance.

Line 2 Enter investment proceeds during the project period under Treas. Reg. § 1.141-1. Do not include investment income from funds used for current or advance refunding of prior bonds.

Line 3 Enter total of lines 1 and 2.

Line 4 Enter amount deposited in a reasonably required reserve fund at or in connection with the issuance of the bonds.

Lines 5 and 6 Enter amounts deposited in refunding escrows at or in connection with the issuance of the bonds. *See* definition of current and advance refunding issues in Treas. Reg. § 1.150-1.

Line 7 Enter amount of proceeds used to pay issuance costs of the bonds, including underwriter's discount. *See* Treas. Reg. § 1.150-1. Amount entered should include all costs of issuance paid through the close of the reporting period.

Line 8 Enter amount of proceeds used to pay fees for qualified guarantees during the project period as defined in Treas. Reg. § 1.141-1.

Line 9 Enter amount of proceeds used during the project period for capital expenditures described in Treas. Reg. § 1.150-1 or for working capital expenditures that are not subject to "proceeds spent last" accounting under Treas. Reg. § 1.148-6(d). Include expenditures to pay bond interest during the project period from sale proceeds or investment proceeds.

Line 10 Enter amount of proceeds used during the project period for working capital as defined in Treas. Reg. § 1.148-1. Do not include amounts reported on line 9.

Line 11 Enter amount of proceeds spent during the project period on costs of qualified hedges.

Line 12 Enter amount of proceeds used to retire bonds of the issue in remedial actions under Treas. Reg. § 1.141-12.

Line 13 Enter and describe all other expenditures of amounts included in line 3.

Line 14 Enter amount of proceeds included in line 3 and remaining unexpended at close of reporting period.

Line 15 Enter total of lines 4 through 14. Amount on this line should equal line 3; if not, attach explanation.





# National Association of Bond Lawyers

## EXHIBIT II

### NABL Ad Hoc Tax Law Subcommittee on Redesigned Form 990

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