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June 26, 2008

Internal Revenue Service
CC:PA:LPD:PR (REG-129243-07)
Room 5203
PO Box 7604
Ben Franklin Station
Washington, DC 20044

RE: REG-129243-07: Proposed Rulemaking Regarding the Preparer Penalties under Sections 6694 and 6695

Ladies and Gentlemen:

The National Association of Bond Lawyers (NABL) respectfully submits the enclosed comments with respect to REG-129243-07: Proposed Rulemaking Regarding the Preparer Penalties under Sections 6694 and 6695 ("Proposed Rulemaking").

NABL appreciates both the significant effort of the Department of the Treasury and the Internal Revenue Service in the preparation of the Proposed Rulemaking 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 listed in Exhibit I.

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 or Scott Lilienthal at 202/637-5849 or through email at srlilienthal@hhlaw.com.

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

Sincerely,



J. Foster Clark

Enclosure

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National Association of Bond Lawyers

COMMENTS BY THE NATIONAL ASSOCIATION OF BOND LAWYERS TO THE INTERNAL REVENUE SERVICE

REGARDING REG-129243-07

PROPOSED RULEMAKING REGARDING TAX RETURN PREPARER PENALTIES UNDER SECTIONS 6694 AND 6695

The following comments are submitted on behalf of the National Association of Bond Lawyers (“NABL”) with respect to REG-129243-07, Proposed Rulemaking Regarding Tax Return Preparer Penalties under Sections 6694 and 6695 of the Internal Revenue Code of 1986, as amended (the “Code”)(the “Proposed Regulations”), pursuant to the Comments and Public Hearing section therein. The following comments with respect to the Proposed Regulations incorporate comments submitted by NABL following the issuance of Notice 2008-13, Guidance under the Preparer Penalty Provisions of the Small Business and Work Opportunity Tax Act of 2007, Pub. L. No. 110-28, 121 Stat. 90 (the “Act”).

BACKGROUND

Definition of Tax Return Preparer. The Act amended the definition of “tax return preparer” set forth in Section 7701(a)(36) of the Code to read:

“In general. The term ‘tax return preparer’ means any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by this title or any claim for refund of tax imposed by this title. For purposes of the preceding sentence, the preparation of a substantial portion of a return or claim for refund shall be treated as if it were the preparation of such return or claim for refund.”

On December 31, 2007, the IRS released Notice 2008-13, implementing certain provisions of the Act relating to tax return preparers and their responsibilities under Section 6694 of the Code. Among other things, Section A.2. of Notice 2008-13, relating to information returns, states:

“A person who for compensation prepares any of the forms listed on Exhibit 2, which form does not report a tax liability but affects an entry or entries on a tax return and constitutes a substantial portion of the tax return or claim for refund that does report a tax liability, is a tax return preparer who is subject to section 6694.”

Exhibit 2 of Notice 2008-13 includes the following forms, each of which is usually prepared by bond counsel:

“Form 8038, Information Return for Tax-Exempt Private Activity Bond Issues;

Form 8038-G, Information Return for Government Purpose Tax-Exempt Bond Issues;
and

Form 8038-GC, Consolidated Information Return for Small Tax-Exempt Government Bond Issues.”

Consistent with Notice 2008-13, the Proposed Regulations revise the definition of “return” and “claim for refund” under Treas. Reg. § 301.7701-15(b)(4) to only include preparers of returns and claims for refund that are specifically identified in published guidance in the Internal Revenue Bulletin. The Explanation of Provisions section of the Proposed Regulations states:

“The Treasury Department and the IRS will publish this guidance simultaneously with the publication of final regulations and will likely maintain the three tiered approach used in the exhibits to Notice 2008-13, subject to any appropriate modifications. Under the substantial portion rule in section 7701(a)(36)(A), preparation of a broad range of information returns, schedules, and other documents can subject a person to the section 6694 penalties even though the documents may not themselves give rise to an understatement. Accordingly, the Treasury Department and the IRS believe that including a list of returns or other documents, the preparation of which may subject a tax return preparer to penalties, will further compliance by not unduly increasing the burden on persons preparing information returns and other documents.”

DISCUSSION

NABL recommends that the Treasury Department (the “Treasury”) and the Internal Revenue Service (the “IRS”) withdraw the references to Forms 8038, 8038-G, and 8038-GC (the “Forms 8038”) from the successor guidance to Notice 2008-13 when the Proposed Regulations are finalized, as the Forms 8038 are strictly information returns that do not contain information affecting entries on any tax returns. If the Forms 8038 are not withdrawn from the successor guidance to Notice 2008-13 when the Proposed Regulations are finalized, NABL recommends that the Treasury and the IRS list the Forms 8038 on the successor to Exhibit 3 of Notice 2008-13, rather than Exhibit 2.

Inclusion of Forms 8038 Not Appropriate. NABL believes that, as a technical matter, the Forms 8038 should not be referenced in successor guidance to Notice 2008-13 because the forms are information returns that are not described in Section A.2. of Notice 2008-13 -- *i.e.*, they do not include “...information that is or may be reported on a taxpayer’s tax return or claim for refund...” that “...constitutes a *substantial portion* of that taxpayer’s tax return or claim for refund...” The Forms 8038 are information returns providing data to the IRS¹; the Forms 8038

¹ See Section 149(e)(2) of the Code and Treas. Reg. § 1.149(e)-1.

are not required nor expected to be typically transmitted to holders of the obligations referred to in such forms.² Moreover, if the Forms 8038 were so distributed, a holder of the obligations would not derive any information from such forms that is needed or necessary with respect to that holder's own tax return. The information on the Forms 8038 is not in a format useful to a holder to ascertain information for his or her tax return; the Forms 8038 do not include the stated interest rate, the minimum denomination, or the various maturities of the obligations, all of which would be necessary information to a holder for his or her tax return to itemize tax-exempt interest. Rather, such information is found on the Form 1099 received by the holder. Further, the Forms 8038 do not provide any of the requisite information for a secondary market purchaser, since the information set out in such forms is purely related to the original issuance of the obligations. The Forms 8038 are unique among the forms listed in Exhibit 2 of Notice 2008-13 in that every other form provides information to taxpayers who use that information for their own tax returns. The Forms 8038 do not provide such information, even on an aggregate basis.

Exhibit 3 Treatment. The Forms 8038 are listed on Exhibit 2, which is titled "Information Returns That Report Information That is or May be Reported on Another Tax Return That May Subject a Tax Return Preparer to the Section 6694(a) Penalty if the Information Reported Constitutes a Substantial Portion of the Other Tax Return."³ This exhibit designation is distinguished from Exhibit 3, which is for "Forms That Would Not Subject a Tax Return Preparer to the Section 6694(a) Penalty Unless Prepared Willfully in any Manner to Understate the Liability of Tax on a Return or Claim for Refund or in Reckless or Intentional Disregard of Rules or Regulations." Exhibit 3 includes the Forms 990, 990-EZ and 990-N. NABL recommends that, if the above given reasons for eliminating the Forms 8038 from the successor guidance to Notice 2008-13 are not deemed adequate, then Treasury and the IRS move Forms 8038 to Exhibit 3. The information thereon and the use thereof are more compatible with the other forms in such category.

CONCLUSION

Based on the foregoing, NABL recommends that Treasury and the IRS remove the Forms 8038 from the successor guidance to Notice 2008-13 when the Proposed Regulations are finalized. Alternatively, if NABL's recommendation is not accepted, NABL recommends that Treasury and the IRS include Forms 8038 in Exhibit 3.

² Further, since the Forms 8038 are to be filed soon after issuance of the obligations, any distribution would be to initial holders of the obligations, *e.g.*, institutions. No purchaser of the obligations on the secondary market would receive them.

³ Note that the phrasing of this language indicates the information on the listed forms must be needed on another tax return. Again, since no information is included which is necessary to holders of the obligations, the language is inapplicable to the Forms 8038.



National Association of Bond Lawyers

EXHIBIT I

NABL TAX LAW COMMITTEE
AD HOC SUBCOMMITTEE MEMBERS

REG-129243-07

Proposed Rulemaking Regarding Preparer Penalties under Sections 6694 and 6695

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