



National Association  
of Bond Lawyers

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March 2, 2009

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RE: Recommendations for Guidance under ARRTA

Dear John and Jim:

I have enclosed recommendations by the National Association of Bond Lawyers (NABL) for guidance by the Department of the Treasury and Internal Revenue Service under the municipal bond provisions of the American Recovery and Reinvestment Tax Act of 2009.

NABL and the task force look forward to the possibility of meeting or talking with you to help in this process.

Primary drafting responsibility for the recommendations was assumed by Frederic L. Ballard, Jr., Perry E. Israel, and Scott R. Lilienthal, of NABL's Tax Committee. Other participants in preparing the recommendations are identified in an attachment to the recommendations.

If you have any questions, please contact me at 404-572-4663 or through email at [bholby@kslaw.com](mailto:bholby@kslaw.com), or Frederic L. Ballard, Jr. at 202-661-2210 or through email at [flb@ballardspahr.com](mailto:flb@ballardspahr.com).

Thank you again for the opportunity to submit these recommendations.

Sincerely,

William A. Holby

Enclosure

**NATIONAL ASSOCIATION OF BOND LAWYERS**  
**Recommended Guidance for Municipal Bonds under ARRTA**

**February 27, 2009**

Volume Limits

1. Per-state figures should be provided as early as practicable for tax credit bonds, particularly qualified school construction bonds, qualified energy conservation bonds, and recovery zone bonds, where new allocation indexes are used. Similarly, per tribal government volume cap under Section 7871(f)(3)(C), where no index is used, should be provided as early as practicable.
2. Clarification that States may provide that allocations of issuance authority for Qualified School Construction Bonds and Qualified Energy Conservation Bonds to large local education agencies and to large local governments, respectively, may lapse to the State if not used in connection with the designation of such bonds within a time period established by the State. The State may elect to carry forward unused issuance authority to future years during which the State may make allocations to local issuers.

Bonds held by Financial Institutions

3. Confirm that qualified tax-exempt obligations "QTEOs" (issued under either the \$30,000,000 or \$10,000,000 limit) do not count against the 2% de minimis limit, including refunding bonds that qualify as QTEOs but could not (as refunding bonds) qualify for the 2% de minimis allowance. Tax credit bonds do not count against the 2% de minimis limit. This is consistent with statutory language treating such bonds as if they were acquired on August 7, 1986.
4. Confirm that private activity bonds are eligible for the de minimis rule along with governmental purpose bonds.
5. "Refundings" of pre-2009 bonds that are ineligible for the de minimis rule do not include issuance of tax-exempt bonds to repay (a) a taxable bond issue by a governmental issuer or (b) a taxable loan by a conduit borrower who uses the proceeds of the tax-exempt bonds to repay the loan.
6. If one borrower in a QTEO pool exceeds the \$30,000,000 limit, no borrower may qualify for the limit, as indicated under the Joint Explanatory Statement.

7. Issuers can use their annual \$30,000,000 QTEO limit for refunding bonds. Bonds that have been designated as \$30,000,000 QTEOs can be refunded after 2010 with “deemed designated” QTEOs.
8. The 2% de minimis rule under 265 applies to post-2010 refundings of any bonds issued in 2009 or 2010 that themselves qualified for the de minimis rule.
9. A conduit loan to a qualified borrower from the issuer of the BQ bonds does not itself count against \$30,000,000 limit even if it is tax exempt.
10. 501(c)(3) bonds without a conduit loan (e.g., 501(c)(3) manages a governmental facility) are treated as issued by the issuer.

#### Alternative Minimum Tax

11. Confirm that AMT exemption applies to refunding bonds issued in 2009-10 to refund bonds issued in 2004-08 that refunded pre-2004 bonds. Confirm that refundings of 2004-08 housing bonds are exempt from AMT similarly to refundings of other private activity bonds notwithstanding that 2008 Housing Act AMT exemption for housing bonds did not apply to refunding bonds.
12. AMT exemption applies to advance refundings of governmental or 501(c)(3) bonds (as well as current refundings) if refunded bonds were issued post-2003. (Although governmental and 501(c)(3) bonds are already exempt from treatment as AMT preference items, the exemption is needed for the current earnings adjustment for corporate AMT.) The Joint Explanatory Statement reference to only current refundings is contrary to statutory language.
13. AMT exemption applies to post-2010 refundings of any bonds issued in 2009 or 2010 that themselves qualify for the AMT exemption.

#### “Direct Pay” Build America Bonds

14. Build America Bonds (BABs) with refundable tax credit to issuer (“direct pay” BABs) are allowed for refundings in 2009 or 2010 of direct pay BABs issued in 2009 or 2010 or of non-elected tax-exempt bonds issued in 2009 or 2010 to finance capital expenditures. In either case, the refunding bonds can be considered a financing (in the form of a refinancing) of the capital expenditures.
15. Direct pay BABs are allowed for reimbursements of capital expenditures under Treas. Reg. § 1.150-2.
16. The definition of capital expenditures for direct pay BABs includes any expenditures for a “capital project” as defined in Treas. Reg. § 1.148-1(b) (i.e., the definition should include the related working capital expenditures to which the de minimis rule under Treas. Reg. § 1.148-6(d)(3)(ii)(A) applies).
17. Procedures are needed by which issuers can claim and receive the direct pay credit.

### “Credit to Bondholder” BABs

18. BABs with tax credit to bondholder are allowed for any purpose for which tax-exempt governmental purpose bonds could have been issued, including capital expenditures, current or advance refundings, refundings of taxable debt under circumstances where the refunding could have been done with tax-exempt bonds, and working capital in accord with the rules for TRANS. Such BABs should not be allowed for things that could not have been financed tax-exempt, e.g., second advance refunding where only one was permitted, or abusively long maturity.

### Both Direct Pay and Credit to Bondholder BABs

19. Absent regulations providing otherwise, creditable interest costs on a BAB do not include amounts paid by the issuer for qualified guarantee fees or qualified hedge fees. In determining the arbitrage yield of a BAB, an issuer may take into account qualified guarantee fees and qualified hedge fees as permitted under the applicable Treasury regulations.
20. Section 1302 of the Tax Reform Act of 1986 provided as follows:

#### SEC. 1302. TREATMENT OF SECTION 501(c)(3) BONDS.

Nothing in the treatment of section 501(c)(3) bonds as private activity bonds under the amendments made by this title shall be construed as indicating how section 501(c)(3) bonds will be treated in future legislation, and any change in future legislation applicable to private activity bonds shall apply to section 501(c)(3) bonds only if expressly provided in such legislation.

Clarification is needed as to whether this provision allows qualified 501(c)(3) bonds to be issued as BABs.

21. Confirm that remedial action rules similar to Treas. Reg. §1.141-12 will apply to BABs.

### Qualified School Construction Bonds

22. QSCBs can be private activity bonds if proceeds are used for a qualifying purpose under new section 54F (e.g., construction of a public school). For example, the school facilities could be subject to a nonqualifying management contract.
23. QSCBs can be refunded at maturity with tax-exempt bonds if the use of proceeds and revenues qualify for tax-exempt financing.

### Recovery Zone Bonds

24. Confirm that a recovery zone needs to meet only one of the requirements of Section 1400U-1(b) (i.e., the “and” effectively means “and/or”).

25. Confirm that RZEDBs are not subject to the “capital expenditure” limit of direct pay BABs.
26. Confirm that remedial action rules similar to Treas. Reg. §1.141-12 will apply to both types of Recovery Zone Bonds.
27. States may provide that allocations of issuance authority for Recovery Zone Bonds will lapse to the State if not used within a specified period and that a county or large municipality may assign its allocation to another issuer within or coterminous with the county or large municipality.
28. Recovery Zone Facility Bonds may be used to finance the purchase of an existing building in a recovery zone without a requirement of rehabilitation, provided that the purchase is the first purchase of the property subsequent to the designation of the zone and notwithstanding that the seller has used the building subsequently to the designation of the zone.

#### Qualified Energy Conservation Bonds

29. “Green community program” for purposes of QECBs includes all organized programs or initiatives consistent with the Environmental Protection Agency Green Communities program or consistent with the green communities program as set forth in section 4 of S. 222 introduced on February 9, 2009.

#### All Tax Credit Bonds

30. Guidance is needed relating to the stripping of the right to receive credit (as per Section 54A(i) and Section 54AA(f)(2)) to stimulate market in tax credit bonds.

#### Tribal Economic Development Bonds

31. Confirm that Section 7871(f)(3)(B)(i) allows use of proceeds to finance portion of a building even if gaming takes place in another portion of the same building, so long as the financed portions do not have any gaming-related activities in them.

#### Definition of Single Issue

32. Because issuers may wish to simultaneously issue both tax credit bonds and tax-exempt bonds, the definition of “issue” in Treas. Reg. § 1.150-1 should be amended to provide that tax credit bonds (including direct pay BABs) are never part of the same issue as tax-exempt bonds or non-credit taxable bonds.
33. Confirm that, with respect to audit and other compliance enforcement, issuers of direct pay BABs will have the rights of taxpayers including judicial review of deficiency determinations and right to claim and sue for refund.

#### Circular 230

34. Definition of “qualified state or local bond opinion” should be revised to include all tax credit bonds including direct pay BABs.