

**PROPOSED REGULATION OF THE DIRECTOR OF THE
DEPARTMENT OF BUSINESS AND INDUSTRY**

LCB File No. R104-08

May 30, 2008

EXPLANATION – Matter in *italics* is new; matter in brackets ~~omitted material~~ is material to be omitted.

AUTHORITY: §1, NRS 348A.040; §§2-5, 7 and 8, NRS 349.630; §6, NRS 232.520 and 349.630.

A REGULATION relating to bonds; revising various fees for certain bonds issued in this State; providing various structural and procedural requirements for certain bonds issued in this State; providing various duties for the Director of the Department of Business and Industry; revising the requirements for an application related to certain bonds issued in this State; revising various provisions regarding a trustee relating to certain bonds issued in this State; and providing other matters properly relating thereto.

Section 1. NAC 348A.300 is hereby amended to read as follows:

348A.300 1. If a portion of the state ceiling for private activity bonds allocated to or controlled by the Director is assigned, transferred or committed to a recipient or an allocation certificate is issued by the Director, the sponsor of the project shall pay or become obligated to pay to the Director a fee for the allocation of that portion of the state ceiling for private activity bonds in the amount of ~~1\$5001~~ *\$600* per \$1,000,000 or any fraction thereof of the portion that is the subject of the transfer, assignment, commitment or allocation certificate.

2. The payment must be remitted at the time of:

- (a) The assignment or transfer;
- (b) The issuance of the allocation certificate; or
- (c) The issuance of the bonds,

↪ whichever date of payment is agreed to by the Director and the applicant or recipient.

3. The Director will use the fees collected pursuant to this section exclusively to support the operations of his office that are in connection with the programs administered pursuant to the provisions of chapters 348A and 349 of NRS and any regulations adopted pursuant thereto.

4. The Director will establish the appropriate accounts and procedures for the deposit and expenditure of money received pursuant to this section.

5. This section applies to:

(a) Any transfer or assignment of, or any allocation certificate issued for, any portion of the state ceiling for private activity bonds that is subject to the authority of the Director; and

(b) Any other official act performed by the Director that allocates, obligates, uses or commits any such portion of the state ceiling for private activity bonds.

Sec. 2. Chapter 349 of NAC is hereby amended by adding thereto the provisions set forth as sections 3, 4 and 5 of this regulation.

Sec. 3. *Any bonds issued pursuant to NAC 349.010 to 349.080, inclusive, and sections 3, 4 and 5 of this regulation must:*

1. Be at the lowest cost of capital to the obligor, as measured by a standard true interest cost calculation;

2. Have an interest rate commensurate with the level of risk of the bonds, as determined by the Director; and

3. Have their proposed structure approved by the State Board of Finance.

Sec. 4. *1. Bonds issued pursuant to NAC 349.010 to 349.080, inclusive, and sections 3, 4 and 5 of this regulation, whether tax-exempt or taxable:*

(a) If the amount of the requested bonds is \$5,000,000 or more, must have a credit enhancement and be sold into the public bond market;

(b) If the amount of the requested bonds is less than \$5,000,000, may be:

(1) Sold into the public bond market; or

(2) Privately placed with sophisticated investors if all bond purchase agreements and transaction documents ensure that the bonds are only sold or transferred to other sophisticated investors;

(c) If variable-rate bonds, must:

(1) Use hedging or interest rate protection mechanisms to maintain the interest rate of the bonds within an acceptable range, as determined by the Director, for so long as the bonds are outstanding; and

(2) Have the cost of any hedging or interest rate protection mechanisms fully accounted for when calculating the cost of the bonds for comparison with alternative bond structures;

(d) Must have the proposed costs of bond issuance preapproved by the Director before any preliminary official statement or marketing materials are released; and

(e) Must be for a project which:

(1) Does not have less than 25 percent of its total financing from equity sources;

(2) Maintains its funds from equity sources in the form of cash or other similarly liquid assets; and

(3) Conforms with all applicable environmental and energy-efficiency related federal and state laws and regulations.

2. As used in this section, “sophisticated investor” means an investor viewed by an issuer or underwriter as having sufficient resources, market knowledge and experience to understand and bear the risks involved in a particular investment.

Sec. 5. The Director will:

1. Determine the ratio of taxable to tax-exempt bonds that a project may receive, taking into consideration the volume cap for tax-exempt private activity bonds authorized by 26 U.S.C. § 146;

2. For investment banking services for financing pursuant to NAC 349.010 to 349.080, inclusive, and sections 3, 4 and 5 of this regulation:

(a) Establish criteria for use in selecting an investment banking company; and

(b) Based on a competitive selection process, assign an investment banking company for every issuance of publicly sold bonds; and

3. For fiduciary services for financing pursuant to NAC 349.010 to 349.080, inclusive, and sections 3, 4 and 5 of this regulation:

(a) Establish criteria for use in selecting a fiduciary, including, without limitation:

(1) The difference between the costs charged for fiduciary services by a financial institution and other similar institutions; and

(2) The amount of demonstrated experience and competency as a trustee of a financial institution; and

(b) Periodically make requests for proposals for fiduciary services.

Sec. 6. NAC 349.040 is hereby amended to read as follows:

349.040 1. The application must include, but is not limited to:

(a) ~~{The}~~ *A description of the* purpose, objective and function of the proposed project;

(b) A ~~{summary}~~ *description* of *all* the costs of the project ~~{,including any incidental costs associated with the project;}~~ *in sufficient detail to allow for an analysis of all legal and tax issues, including, without limitation:*

(1) Expected transaction costs;

- (2) *Costs expected to be reimbursed to the project's developer; and*
- (3) *A timing schedule for when costs will be incurred;*
- (c) A description of the management of the project ~~and~~, *including, without limitation:*
- (1) *A copy of the partnership agreement or articles of incorporation of the sponsor;*
- (2) *If the amount of the requested bonds is \$5,000,000 or more:*
- (I) *For the 5 years before the filing of the application, audited financial statements of the corporation or partnership; and*
- (II) *For the 5 years before the filing of the application, the federal income tax returns of the corporation or principals of the partnership;*
- (3) *If the amount of the requested bonds is less than \$5,000,000:*
- (I) *For the 3 years before the filing of the application, a financial operating history of the corporation or partnership; and*
- (II) *For the 3 years before the filing of the application, the federal income tax returns of the corporation or principals of the partnership;*
- (4) *If applicable, the certificate of registration issued by the Secretary of State pursuant to NRS 86.545 or 88.580 for the sponsor; and*
- (5) *Any resolutions or operating agreements of the sponsor that establish the authority of a person to sign documents associated with the financing of the project;*
- (d) Information on the site of the project , ~~and~~ the proposed facilities, ~~including all information related to~~ and the status of any required environmental permits , *including, without limitation:*
- (1) *A copy of the most recent Phase I Environmental Report which was done for the site of the project and must have been completed within 1 year before the application is filed;*

(2) A copy of the most recent geotechnical report which was done for the site of the project and must have been completed within 1 year before the application is filed;

(3) A copy of a certified “as-built” survey which was done for the site of the project, must have been completed within 1 year before the application is filed, is American Land Title Association qualified and shows the project in its proper place on the site and all exceptions to title;

(4) A copy of the most recent parcel map of the site of the project that is recorded with the county recorder;

(5) A copy of the zoning restrictions on the site of the project showing that the applicable zoning laws and regulations allow for the development of the project on the site; and

(6) If the site of the project is located on a flood zone as designated by the Federal Emergency Management Agency, a map that shows the bounds of the flood zone, the property on which the project is to be located and the project;

(e) ~~[The]~~ Information on the location of the project, including , without limitation:

(1) A description of the relationship of the project to any existing facilities adjacent to the site;

(2) A copy of a written contract to purchase or option to purchase or lease agreement regarding the property on which the project is to be built;

(3) A description of any relationship between any parties referred to or involved with the written contract, lease agreement or title report described in subparagraphs (2) and (5);

(4) A description of the proposed final sources for funds for the lease or purchase of land for the project; and

(5) A copy of a title report for the site of the project that includes a list of all exceptions and a pro forma American Land Title Association policy to be issued to the lending organization;

(f) A description of all proposed ~~expenditures of bond receipts, including a~~ sources and uses of funds for the project, including, without limitation:

(1) A list of any anticipated net bond proceeds, tax-credit equity, grants, subordinated debt or other forms of debt or equity;

(2) A detailed timing or draw schedule for the payment of costs out of available funds; and

(3) A detailed description of the machinery and equipment to be acquired by the financing;

(g) ~~The~~ A description of the economic feasibility of the project ~~is~~, including, without limitation, at least one of the following:

(1) A copy of a certified appraisal of the site of the project that was completed:

(I) Within 1 year before the filing of the application; and

(II) By an appraiser certified pursuant to chapter 645C of NRS;

(2) A copy of a market study performed by a market analysis firm approved by the Director; or

(3) A copy of:

(I) A loan underwriting package from a credit enhancement institution that is approved by the Director; and

(II) An appraisal that is approved by a credit enhancement institution that is approved by the Director;

(h) A business history of the applicant ~~[-and-]~~, *including, without limitation, a copy of any development, general contractor or management agreement between the sponsor and another party regarding the project;*

(i) *Information required by the Director for an energy and weatherization audit of the project; and*

(j) Any other information required by the Director.

2. The applicant must submit an original and four copies of his application for financing on a form provided by the Director. The application must be accompanied by a nonrefundable application fee of:

(a) Five hundred dollars if the amount of the requested bonds is ~~[\$3,000,000 or less.~~

~~—(b)— Seven hundred and fifty dollars if the amount of the requested bonds is more than \$3,000,000 and less than \$6,000,000.~~

~~—(c)— less than \$5,000,000; or~~

(b) One thousand *two hundred and fifty* dollars if the amount of the requested bonds is ~~[\$6,000,000]~~ *\$5,000,000* or more.

3. The Director will, within 30 days after receipt of a completed application, notify the applicant whether or not his application is accepted.

4. If the *completed* application is not accepted, the Director will provide the applicant an opportunity to discuss the reasons for denial ~~[-]~~ *and may allow up to an additional 30 days for the applicant to submit an updated version of the application.*

5. If the application is accepted, the Director will:

(a) Direct the applicant to submit a deposit ~~[-based on an estimate]~~ of *\$75,000 towards* the total costs of the Department to process the application and finance the project ~~[-The deposit]~~,

and such costs will not exceed ~~the~~ *the lower of any limit prescribed by the Internal Revenue Code of 1986, as amended, including, without limitation, any regulations, circulars, letter rulings and policies adopted by the Internal Revenue Service pursuant to the Code, or 2* percent of the principal amount of the financing, payable before or at the time the bonds are issued.

(b) Send the applicant an inducement letter:

(1) Stating the intention of the Director to issue bonds to finance the project subject to the continuing ability of the project to meet local, state and federal requirements;

(2) Stating the principal amount of the financing *that the Director will include in any findings submitted to a local or state governmental agency;*

(3) Directing the applicant to submit any ~~supporting~~ *additional* documentation as may be required by the Director; and

(4) Stating that the term of the Director's commitment is 1 year. At the expiration of the term, the Director may extend the commitment *once* for a similar term ~~upon receipt of a nonrefundable extension fee in the amount of \$1,500.~~ *if there has been a demonstration of good faith by the applicant in preparing and submitting additional supporting documents. An extension fee in the amount of \$1,250 will be charged for the costs of the extension, including, without limitation, the cost of redrafting an inducement certificate or other similar document.*

6. Whether or not the bonds are issued, the deposit received on behalf of the Director will be used to reimburse the Department for the cost of a project incurred in processing the application and financing the project ~~and will include the following nonrefundable, administrative charge:~~
~~—(a) If the principal amount of the financing is equal to or less than \$5,000,000, then a charge of \$2,500; or~~

~~—(b) If the principal amount of the financing is greater than \$5,000,000, then a charge of 0.05 percent of the principal amount of the financing.~~

~~↪~~, *including, without limitation, any costs for financial, legal and banking services engaged for the project.* The portion of the deposit that is not required to reimburse the Department for its ~~[cost of a]~~ *costs relating to the* project will be refunded to the applicant ~~[.]~~ *by the time the bonds are issued.* The cost of a project incurred by the Director in excess of the deposit will be charged to the applicant and must be paid ~~[on or before the date of the issuance of the bonds.]~~ *by the time the bonds are issued.*

7. If bonds are issued and by agreement or as the result of a default in payment of the bonds, the bankruptcy of the obligor or any other reason, the Director is required to provide ongoing services, expend additional resources or incur additional costs in relation to the bonds, including, without limitation, supervising, monitoring or reviewing on a regular basis the activity of the obligor or any other party to the transaction or the documentation relating to the transaction, the Director may charge and recover from the obligor a reasonable fee for such services, resources or costs.

8. The Director may modify the principal amount *of the financing downward* and *may modify* the other terms and conditions of the financing before the closing ~~[.]~~ *if the modifications are consistent with the approval of the project given by the State Board of Finance.*

9. The Director will establish ~~[the interest rate]~~ *an annual inspection and compliance fee* to be charged to the obligor for the financing . ~~[and, if]~~ *The fee will be based upon the percentage of bonds outstanding at the end of each year. If* appropriate, or otherwise in accordance with the terms of the financing agreement, ~~[will]~~ *the Director may* adjust the ~~[interest rate from time to time.]~~ *fee.*

10. *For each financing issued pursuant to NAC 349.010 to 349.080, inclusive, and sections 3, 4 and 5 of this regulation, the Director will:*

(a) Analyze similar types of financing issued for at least the 30 days before the anticipated date the bonds will be issued, including, without limitation, analyzing the differences in credit risk between other similar types of financings and the bonds at issue; and

(b) Maintain, in the file for each financing, records of the relevant financial markets containing similar types of financing for at least the 30 days before the anticipated date the bonds will be issued.

11. The Director will use the fees collected pursuant to this section exclusively to support the operations of his office that are in connection with the programs administered pursuant to the provisions of chapters 348A and 349 of NRS and any regulations adopted pursuant thereto.

~~11.1~~ 12. The Director will establish *with an appropriate fiduciary bank* the appropriate accounts and procedures for the deposit and expenditure of money received ~~pursuant to this section.~~

~~12.1~~ *from financing pursuant to NAC 349.010 to 349.080, inclusive, and sections 3, 4 and 5 of this regulation.*

13. As used in this section, “cost of a project” has the meaning ascribed to it in NRS 349.430.

Sec. 7. NAC 349.080 is hereby amended to read as follows:

349.080 Any person desiring clarification of NAC 349.010 to 349.080, inclusive, *and sections 3, 4 and 5 of this regulation*, relief from the strict application of any of the terms of those sections ~~6~~ or information concerning procedures for dealing with the Department may address a written request to the Director at:

Director of the Department of Business and Industry

~~{555 East Washington Avenue, Suite 4900~~

~~Las Vegas, Nevada 89101-1075}~~ *901 South Stewart Street, Suite 1003*

Carson City, Nevada 89701

Sec. 8. NAC 349.060 is hereby repealed.

TEXT OF REPEALED SECTION

349.060 Trustee: Selection; qualifications; resignation, discharge.

1. The applicant may select, with the approval of the Director, a bank or trust company to serve as trustee under the bond certificate, indenture or resolution for the applicable bond issue if a trustee is required. The Director will appoint a trustee if no trustee is selected by the applicant.
2. In determining the qualification of the trustee, the Director will take into consideration:
 - (a) The experience of the bank or trust company in acting as a trustee for public issuers.
 - (b) The amount of its capital stock, surplus and undivided profits.
 - (c) Its investment capabilities.
 - (d) The size and experience of its professional staff.
 - (e) The cost of the services to be provided in relation to the number of services to be offered, and the quality and experience of the professional staff which will provide the services.

3. Unless otherwise provided for in the applicable bond certificate, indenture or resolution, the trustee may at any time resign or be discharged from his duties if he gives the Department at least 60 days' written notice and provides any notice that is required by the respective bond certificate, indenture or resolution.