

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

LCB File No. R149-18

July 31, 2018

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

AUTHORITY: §§1-3 and 5-8, NRS 349.630; §4, NRS 232.520 and 349.630.

A REGULATION relating to revenue bonds for industrial development; replacing the term “bond facilitator” with “obligor municipal advisor”; revising provisions governing applications for financing; revising requirements governing revenue bonds; authorizing the Director of the Department of Business and Industry to approve certain investment banking companies and fiduciaries; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

Existing law requires the Director of the Department of Business and Industry to adopt regulations to carry out the provisions governing revenue bonds for industrial development, including regulations for: (1) the investment and reinvestment of the proceeds from the sale of bonds; and (2) receiving, holding and disbursing proceeds from the sale of bonds by certain financial entities. (NRS 349.630)

Existing regulations provide that a bond facilitator is a person or business entity that: (1) has special education or experience in the financing of revenue bonds; and (2) is hired to provide certain services. (NAC 349.012) Existing regulations authorize the Director to maintain and make available a list of approved bond facilitators with such a list being subject to change. (NAC 349.033) Existing regulations further require bond facilitators to inform applicants or the Director of certain decisions, roles to be performed, liabilities and financial arrangements. (NAC 349.036) **Sections 1-3** of this regulation replace the term “bond facilitator” with “obligor municipal advisor.”

Existing regulations require different information to be provided in an application for revenue bonds depending upon whether the requested amount of the bonds is \$5,000,000 or more or less than \$5,000,000. (NAC 349.040) **Section 4** of this regulation removes this distinction between revenue bonds in the amount of \$5,000,000 or more and revenue bonds in an amount less than \$5,000,000 and instead requires that the application include, for the 3 years before filing the application: (1) audited financial statements of the corporation or partnership; and (2) the federal income tax returns of the corporation or principals of the partnership.

Existing law authorizes the Director to adopt by regulation a schedule of fees and deposits to be charged in connection with administering revenue bonds issued for industrial development. (NRS 232.520) Existing regulations require an application fee of \$500 if the requested amount of the revenue bonds is less than \$5,000,000 and an application fee of \$1,250 if the requested amount of the revenue bonds is \$5,000,000 or more. (NAC 349.040) **Section 4** removes this distinction and instead requires that an application must include a nonrefundable application fee of \$1,750. Existing regulations authorize the Director to extend the commitment of the revenue bonds at the expiration of the term of the revenue bonds if there has been a demonstration of good faith by the applicant. In such a case, existing regulations provide that an extension fee in the amount of \$1,250 will be charged for the costs of the extension. (NAC 349.040) **Section 4** increases the extension fee to \$1,750.

Existing regulations provide that the Director will, for revenue bonds issued for industrial development: (1) analyze similar types of financing issued for at least the 30 days before the anticipated date the bonds will be issued; and (2) maintain, in the file for each financing, records of the relevant financial markets for at least the 30 days before the anticipated date the bonds will be issued. (NAC 349.040) **Section 4** removes this requirement.

Existing regulations setting forth requirements for revenue bonds issued for industrial development distinguish between bonds requested for an amount of \$5,000,000 or more and for an amount of less than \$5,000,000. (NAC 349.045) **Section 5** of this regulation removes this distinction and instead, for all such revenue bonds: (1) authorizes the Director to require revenue bonds issued for industrial development to have bond insurance, a letter of credit, a guarantee or other credit enhancements; (2) requires revenue bonds issued for industrial development to be sold into the public bond market or privately placed with sophisticated investors; and (3) authorizes such bonds that do not have a bond rating of “BBB-” or higher to be sold or privately placed only if the revenue bonds are required to thereafter be sold or transferred only to sophisticated investors.

Existing regulations provide that the Director will establish certain criteria for use in selecting: (1) an investment banking company for investment banking services for financing of revenue bonds issued for industrial development; and (2) a fiduciary for fiduciary services for financing of revenue bonds issued for industrial development. (NAC 349.048) **Section 6** of this regulation authorizes the Director to approve the investment banking company or the fiduciary that is selected by the applicant only if the approval is based upon such criteria.

Existing regulations authorize any person desiring clarification of the regulations affecting revenue bonds issued for industrial development to address a written request to the Director at a certain address. (NAC 349.080) **Section 7** of this regulation updates this address.

Existing regulations require that any revenue bonds issued for industrial development to: (1) be at the lowest cost of capital to the obligor; (2) have an interest rate proportionate to the level of risk of the bonds; and (3) have their proposed structure be approved by the State Board of Finance. (NAC 349.025) **Section 8** of this regulation repeals these regulations.

Section 1. NAC 349.012 is hereby amended to read as follows:

349.012 ~~“Bond facilitator”~~ **“Obligor municipal advisor”** means a person or business entity with special education or experience in the financing of revenue bonds that is hired to provide any or all of the following services:

1. Consultation with applicants or prospective applicants regarding the requirements for issuance of revenue bonds and the making of preliminary assessments regarding eligibility.
2. Management of the application process for the applicant, including the preparation, distribution and review of the application.
3. Management of the process for completing a financing pursuant to the program for the issuance of revenue bonds, including, without limitation, communicating with the finance team, local agencies, underwriters, bond counsel and trustee, reviewing financing documents and coordinating public meetings.
4. Coordination of the activity of all participants in each financing.

Sec. 2. NAC 349.033 is hereby amended to read as follows:

349.033 1. The Director may maintain and make available a list of approved ~~“bond facilitators”~~ **obligor municipal advisors** to applicants and prospective applicants.

2. A person or business entity may apply to the Director for placement on the list of approved ~~“bond facilitators.”~~ **obligor municipal advisors.**

3. The Director will place a person or business entity on the list of approved ~~“bond facilitators”~~ **obligor municipal advisors** if the person or business entity:

(a) Presents evidence satisfactory to the Director that the person or business entity is qualified by education or experience to assist applicants and prospective applicants in the financing of revenue bonds pursuant to the provisions of NAC 349.010 to 349.080, inclusive; and

(b) Agrees to follow the provisions for ~~{bond-facilitators}~~ *obligor municipal advisors* as set forth in NAC 349.036.

4. The Director may remove a person or business entity from the list of approved ~~{bond-facilitators}~~ *obligor municipal advisors* if, in the judgment of the Director, the person or business entity:

- (a) Fails to follow the provisions set forth in NAC 349.036; or
- (b) Charges excessive fees for the services provided to applicants and prospective applicants.

5. An approved ~~{bond-facilitator}~~ *obligor municipal advisor* may:

(a) Provide recommendations to the Director on ways to improve the administration of the bond program such as amending statutes, regulations, application materials or marketing materials;

(b) Develop new programs for the issuance of revenue bonds for the Director; and

(c) Receive compensation, as set by the Director, for providing such recommendations and developments.

Sec. 3. NAC 349.036 is hereby amended to read as follows:

349.036 An approved ~~{bond-facilitator}~~ *obligor municipal advisor* shall inform:

1. The applicant or prospective applicant, at the earliest time practicable, that the decision to use the services of a ~~{bond-facilitator}~~ *obligor municipal advisor* is solely that of the applicant or prospective applicant and that the applicant or prospective applicant is not required to use those services in order to apply for or obtain the financing of revenue bonds.

2. The applicant or prospective applicant, at the earliest time practicable, that the ~~{bond-facilitator}~~ *obligor municipal advisor* acts as the sole agent of the applicant or prospective

applicant and does not represent or have any influence over the Director in his or her decision to issue revenue bonds pursuant to the provisions of NAC 349.010 to 349.080, inclusive.

3. The applicant or prospective applicant, at the earliest time practicable, that the Director is not responsible or liable for the acts of the ~~{bond facilitator}~~ *obligor municipal advisor*.

4. The Director, upon his or her request, of the financial arrangement between the ~~{bond facilitator}~~ *obligor municipal advisor* and the applicant or prospective applicant.

Sec. 4. NAC 349.040 is hereby amended to read as follows:

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

(a) A description of the purpose, objective and function of the proposed project;

(b) A description of all the costs of 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, 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}~~ 3 years before the filing of the application ~~{, audited}~~ :

~~{(I)}~~ *Audited* financial statements of the corporation or partnership; and

~~{(II)}~~ ~~{For the 5 years before the filing of the application, the}~~ *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)~~ (4) 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, the proposed facilities, 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) 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 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) A description of the economic feasibility of the project, 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 *or financial institution* that is approved by the Director; and
 - (II) An appraisal that is approved by a credit enhancement institution *or financial institution* that is approved by the Director;
 - (h) A business history of the applicant, 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}~~ *relating to the* energy ~~{and weatherization audit}~~ *efficiency* of the project; and
 - (j) Any other information required by the Director.
2. The applicant must submit ~~{an}~~ *one* original *hard copy* and ~~{four copies}~~ *one electronic copy* of his or her 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 less than \$5,000,000; or~~
~~—(b) One thousand two hundred and fifty dollars if the amount of the requested bonds is \$5,000,000 or more.}~~ *\$1,750.*

3. The Director will, within 30 days after receipt of a completed application, notify the applicant whether or not the 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 of \$75,000 , *payable before or at the time the bonds are issued*, towards the total costs of the Department to process the application and finance the project, and such costs will not exceed the lower of ~~{any}~~ :

(1) *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 ; ~~{1}~~ or ~~{2}~~

(2) *Two* percent of the principal amount of the financing ~~{, payable before or at the time the bonds are issued.}~~ *obtained from tax-exempt bonds.*

(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 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 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~~ **1,750** 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, 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 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 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 an annual inspection and compliance fee to be charged to the obligor for the financing. The fee will be **a fixed amount or an amount** 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, the Director may adjust the fee.

10. ~~{For each financing issued pursuant to NAC 349.010 to 349.080, inclusive, 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 or her 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.~~

~~{12.} 11.~~ The Director will establish with an appropriate fiduciary bank the appropriate accounts and procedures for the deposit and expenditure of money received from financing pursuant to NAC 349.010 to 349.080, inclusive.

~~{13.} 12.~~ As used in this section, “cost of a project” has the meaning ascribed to it in NRS 349.430.

Sec. 5. NAC 349.045 is hereby amended to read as follows:

349.045 1. Bonds issued pursuant to NAC 349.010 to 349.080, inclusive, whether tax-exempt or taxable:

(a) ~~{If the amount of the requested bonds is \$5,000,000 or more, must}~~ *May* have ~~{a}~~, *as required by the Director:*

- (1) *Bond insurance;*
 - (2) *A letter of credit;*
 - (3) *A guarantee as to the payment of the principal and interest of the bonds; or*
 - (4) *Other 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~~ **Must** be:
- (1) Sold into the public bond market; or
 - (2) Privately placed with sophisticated investors ;
- (c) *If the bonds are not rated by a nationally recognized rating service with a rating of at least “BBB-” or its equivalent, may be sold into the public bond market or privately placed with sophisticated investors* if all bond purchase agreements and transaction documents ~~ensure~~ **provide** that the bonds ~~are~~ **may** only **be** sold or transferred **thereafter** to ~~other~~ sophisticated investors;
- ~~(e)~~ (d) 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~~
- (e) **May** have the proposed costs of bond issuance preapproved by the Director before ~~any preliminary official statement or marketing materials are released;~~ **the bonds are priced by the Director pursuant to NRS 349.610;** and
- ~~(e)~~ (f) **Must** be for a project which:

(1) Does not have less than ~~25~~ :

(I) Twenty-five percent of its total financing from equity sources; *or*

(II) Fifteen percent of its total financing from equity sources if not less than 10 percent of its total financing is from subordinated debt;

(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. 6. NAC 349.048 is hereby amended to read as follows:

349.048 *1.* The Director will:

~~1.1~~ *(a)* 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;

~~1.2~~ *(b)* For investment banking services for financing pursuant to NAC 349.010 to 349.080, inclusive ~~;~~

~~—(a) Establish~~, *establish* criteria for use in selecting an investment banking company; and

~~1.3~~ ~~(b) Based on a competitive selection process, assign an investment banking company for every issuance of publicly sold bonds; and~~

~~3.1~~ *(c)* For fiduciary services for financing pursuant to NAC 349.010 to 349.080 ~~;~~

~~—(a) Establish~~, *inclusive, 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.~~

2. The Director may approve the investment banking company or the fiduciary selected by the applicant only if the approval is based upon the criteria established pursuant to subsection 1.

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, relief from the strict application of any of the terms of those sections 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

~~{901 South Stewart Street,}~~ *1830 College Parkway*, Suite ~~{1003}~~ *100*

Carson City, Nevada ~~{89701}~~ *89706*

Sec. 8. NAC 349.025 is hereby repealed.

TEXT OF REPEALED SECTION

349.025 Issuance of bonds. Any bonds issued pursuant to NAC 349.010 to 349.080, inclusive, 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.