

JANUARY 24, 2013

LAW ALERT

ROUND 4: PREPARING, DOCUMENTING AND DEFENDING ROPS 13-14A

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As successor agencies complete their due diligence review (the "DDR") procedures for determining unobligated assets of their former redevelopment agencies available for distribution to taxing entities, attention must quickly turn to the preparation of their next Recognized Obligation Payment Schedule (ROPS). The next ROPS will cover the fourth six-month enforceable obligation payment cycle under ABx1 26 as amended by AB 1484 (the "Redevelopment Dissolution Law"), and will control distributions from the Redevelopment Property Tax Trust Fund ("RPTTF") to pay enforceable obligations during the period from July through December 2013.

Commonly referred to as "ROPS IV", under the new ROPS numbering system being instituted by the California Department of Finance ("DOF") the next ROPS will be formally designated as "ROPS 13-14A", representing the ROPS for the first half of fiscal year 2013-14 (to be followed by a "ROPS 13-14B" for the second half of this fiscal year). This Law Alert will use that new nomenclature.

ROPS 13-14A must be prepared on a revised template form just released by the DOF, and must be approved by the successor agency's oversight board and transmitted to the DOF and other specified recipients by March 1, 2013 according to the DOF's website (although an accurate interpretation of AB 1484 indicates a March 3 submittal deadline, 90 days before the statutory date for the distribution of RPTTF funds for the ROPS 13-14A period). The DOF must approve or

disapprove the various enforceable obligations (including payment amounts and funding sources) set forth on an oversight board-approved ROPS 13-14A within 45 days of its submittal. A successor agency then has 5 business days to request a "meet and confer" session with the DOF to seek reconsideration by the DOF of any disputed enforceable obligation items.

The DOF meet and confers will generally occur within the following 30-day period, with the DOF required to provide its final determination on ROPS 13-14A enforceable obligations by May 16, 2013 (15 days prior to the next RPTTF distribution). The ROPS 13-14A preparation and approval process culminates with a June 1, 2013 distribution of RPTTF funds by each county auditor-controller to cover specified administrative costs, to the successor agency for payment of upcoming enforceable obligations during July through December 2013, and to taxing entities for pass-through payment obligations and as a distribution of any remaining residual RPTTF funds.

The DOF has sent each successor agency a pre-populated template to be used for completing the ROPS 13-14A. The pre-populated templates use each successor agency's previous ROPS (January to June 2013) as the basis for all future ROPS. The templates sent by the DOF specifically identify items denied in the previous ROPS and prevent successor agencies from in putting expenditure amounts for those items. According to the DOF, absent a reversal

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through the meet and confer process, or a favorable outcome through litigation, successor agencies should not input expenses for previously denied items. Under these circumstances, advice of counsel is suggested to determine the best course of action for preparing ROPS 13-14A with respect to previously denied items.

In preparing, documenting and defending its ROPS 13-14A, each successor agency should be aware of emerging lessons from the recently completed ROPS III process, new items that become eligible for inclusion as enforceable obligations beginning with ROPS 13-14A, and a newly designed "final and conclusive" determination process that may be appropriate to obtain permanent DOF approval of certain types of enforceable obligations.

ROPS III Lessons: DOF's recently completed review of ROPS III submittals was more systematic, complete and aggressive than its review during the first two ROPS cycles, resulting in the disallowance of a high proportion of oversight board-approved enforceable obligations over a broad spectrum of enforceable obligation types (including disapproval of many of the same items that had been approved in earlier cycles). In turn, this aggressive DOF approach engendered approximately 240 meet and confer requests by successor agencies. In a limited number of cases, the DOF reversed its disapproval of a ROPS III enforceable obligation item, but in most cases held to its original position. That stance has resulted in the filing by successor agencies of a growing number of law suits against the DOF's ROPS III determinations, with preliminary results from some of these legal actions beginning to be issued by the courts.

As a result, patterns and trends are emerging about what types of documentation and arguments are proving persuasive with DOF analysts and senior staff and with the courts.

A well-counseled successor agency that is cognizant of these emerging patterns and trends will be better prepared regarding how to present various types of enforceable obligations on its ROPS 13-14A and how to marshal the most effective documentation and persuasive arguments for successful support of its ROPS 13-14A entries with the DOF and, if necessary, a court.

New Enforceable Obligation Types: Three main types of enforceable obligations become eligible for inclusion for the first time on a ROPS 13-14A:

- Repayment to a former redevelopment agency's housing successor entity, for deposit in that entity's low and moderate income housing asset fund, of amounts borrowed by the redevelopment agency from its low and moderate income housing fund to make Supplemental Educational Revenue Augmentation Fund (SERAF) payments;
- Upon oversight board approval, repayment of amounts owed by a former redevelopment agency to the city or county that formed the redevelopment agency under loan agreements that had temporarily been declared unenforceable under the Redevelopment Dissolution Law; and
- Expenditure of unexpended non-housing bond proceeds from bonds issued prior to 2011 for their intended purpose under the applicable bond documents (a separate provision of the Redevelopment Dissolution Law already permits expenditure of available housing fund-secured bond proceeds from pre-2011 bond issuances).

The repayment amounts allowed for the first two new types of eligible enforceable

obligations are subject to detailed rules and limits on the amounts that may be repaid for each fiscal year. The latter two types of new enforceable obligations become eligible for inclusion on a ROPS 13-14A only if the applicable successor agency has received a "finding of completion" from the DOF signifying that it has made all required payments of unobligated funds for distribution to the taxing entities resulting from the DDR process. Because such findings of completion will typically only become available later in the Spring of 2013, after the ROPS 13-14A must be submitted to the DOF, inclusion of these latter two types of enforceable obligations on a ROPS 13-14A might be accompanied by a notation that the applicable item is included for funding subject to obtaining the necessary finding of completion.

Final and Conclusive Determination: The DOF has recently designed a process whereby a successor agency may apply for a final and conclusive determination that a certain irrevocable obligation requiring payment from property taxes over an extended period will constitute an enforceable obligation for the current and all future ROPS cycles. Once granted by the

DOF, such determination will give the successor agency and the payment recipient assurance that the DOF cannot deny the existence of the enforceable obligation on any future ROPS. Instead, following a final and conclusive determination, the DOF's review role with respect to such enforceable obligation will be limited in each future ROPS period to determining that the requested payment amount is required under the terms of the previously determined enforceable obligation. The following website link provides access to the DOF's application form and related instructions and guidance regarding the final and conclusive determination process:

http://www.dof.ca.gov/redevelopment/final_and_conclusive/view.php.

For more information about ROPS 13-14A preparation, lessons learned from ROPS III to be applied in the ROPS 13-14A process, new types of enforceable obligations, and other similar matters, please call Lynn Hutchins, Karen Tiedemann, Rafael Yaquian or any other Goldfarb & Lipman attorney at 510-836-6336.

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