

William & Mary Environmental Law and Policy Review

Volume 25 (2000-2001)
Issue 1 *Symposium: Water Rights and
Watershed Management: Planning for the
Future*

Article 8

October 2000

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Robert A. Fisher, *Better America Bonds: Better Is in the Eye of the Beholder*, 25 Wm. & Mary
Envtl. L. & Pol'y Rev. 233 (2000), <https://scholarship.law.wm.edu/wmelpr/vol25/iss1/8>

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BETTER AMERICA BONDS: BETTER IS IN THE EYE OF THE BEHOLDER

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I. INTRODUCTION

On January 11, 1999, Vice President Gore announced a "Livability Agenda."¹ The purpose of the Livability Agenda is "to ensure a high quality of life and strong, sustainable economic growth."² The goals of the Livability Agenda include the preservation of "green spaces that promote clean air and clean water, sustain wildlife, and provide families with places to walk, play and relax."³ To that end, a program called Better America Bonds was introduced in early 1999.⁴ Better America Bonds are tax-credit bonds designed to aid local communities with problems involving open spaces, water quality, and abandoned, contaminated industrial sites known as "brownfields."⁵ Although the problems addressed by Better America Bonds are not at issue here and in fact, for purposes of this writing, the problems are deemed to exist, the use of Better America Bonds to solve such problems, even partially, is bad policy. The following is a discussion of the structure and purposes of the Better America Bond program, an exploration into the flaws of Better America Bonds, and finally a look at alternatives.

In Part II, the discussion centers on the Better America Bonds program, specifically, the purposes for and the details of the program. Part III is a discussion of traditional tax-exempt bonds as compared to tax-credit bonds such as Better America Bonds. Part IV is a discussion of the favorable aspects of Better America Bonds. Part V focuses on the disadvantages of Better America Bonds. In Part VI, alternatives to Better

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¹ Office of the Vice President, Press Release, Clinton-Gore Livability Agenda: Building Livable Communities for the 21st Century (Jan. 11, 1999), at <http://www.pub.whitehouse.gov/urles/I2R?urn:pdi://oma.eop.gov.us/1999/1/11/14.text.1>.

² See *id.*

³ See *id.*

⁴ See *id.*

⁵ See *id.*

America Bonds are discussed. Finally, Part VII concludes with a selection of the best alternative.

II. WHAT ARE BETTER AMERICA BONDS?

As America's population has expanded urban sprawl has become a major issue in communities across the country.⁶ What were once sparsely populated areas of farm and ranch land have become highly concentrated caches of house farms buffered by super retailers and twenty-four screen cinemas.⁷ As the American people continue their migration away from the cities, and as cities continue to grow outward with development, compromises occur where open spaces and water quality are concerned.⁸ Open spaces are gobbled up by hungry home consumers,⁹ and then by the necessary support for these consumers, i.e., grocery stores, convenience stores, dry cleaners, car dealerships, restaurants, etc.¹⁰ Open spaces become scarce, people move farther away, and the cycle begins again.¹¹

With the construction of new roads and parking lots to support the increased motor vehicle traffic that necessarily follows massive sprawl, water quality is adversely affected due to the runoff from such roads and parking lots.¹² When it rains, the oils, salts, grime, and other contaminants are carried by the rainwater into nearby lakes, streams, rivers, and even water tables and other sources of drinking water.¹³ "Most water pollution today is attributable to runoff. . . ."¹⁴

Another problem for many localities results from the "lingering effects of past practices in toxic waste storage and disposal."¹⁵ Some sites formerly used for a variety of industrial and commercial purposes have problems ranging from "large quantities of buried waste of unknown toxicity to leaking gasoline tanks at automobile service stations."¹⁶ The

⁶ See Douglas R. Porter, *Reinventing Growth Management for the 21st Century*, 23 WM. & MARY ENVTL. L. POL'Y REV. 705, 711-12 (1999).

⁷ See *id.* at 708.

⁸ See LAND USE IN AMERICA 5 (Henry L Diamond & Patrick F. Noonan eds., 1996).

⁹ See Porter, *supra* note 6, at 705.

¹⁰ See *id.* at 708.

¹¹ See *id.* at 706-12.

¹² See LAND USE IN AMERICA, *supra* note 8, at 75-77.

¹³ See *id.* at 322.

¹⁴ See *id.* at 77.

¹⁵ Douglas R. Porter, MANAGING GROWTH IN AMERICA'S COMMUNITIES 195 (1997).

¹⁶ *Id.* at 196.

latter types are known as “brownfields”.¹⁷ Many communities have these brownfields sitting dormant because the cost of clean up is prohibitive.¹⁸

Financial aid for communities burdened with strained open spaces, water quality problems, or abandoned, contaminated land is now being proposed.¹⁹ Open space preservation, restoration, and enhancement; brownfields clean up and recovery; and water quality restoration and protection: all of these goals are at the heart of the Better America Bonds program.²⁰

The Better America Bonds program is designed to provide federal assistance to local communities, enabling them to borrow money for environmental projects at no cost.²¹ Currently existing as a stand-alone bill introduced by Rep. Robert Matsui and co-sponsored by 120 House Members,²² and as a provision in the tax bill vetoed by President Clinton in September of 1999,²³ the Better America Bonds program would aid local communities by allowing them to issue bonds to finance certain environmental projects.²⁴ According to the EPA, the permitted projects are those that attempt to accomplish the following:

- **Preserve and Enhance Open Space:** State, Tribal and local governments can create, restore or enhance parks, preserve green spaces, and protect threatened farmland and wetlands. Land can be protected either by acquiring title or purchasing permanent easements.
- **Protect Water Quality:** Rivers, lakes coastal waters, and wetlands—and drinking water sources—can be restored or protected through reducing polluted runoff, the largest remaining threat to the nation’s waterways. Eligible projects to curb runoff include purchase of sensitive lands, wetlands restoration, settling ponds, and

¹⁷ *Id.*

¹⁸ See Environmental Protection Agency, *Better America Bonds, Frequently Asked Questions*, at <http://www.epa.gov/bonds/faqs.htm> [hereinafter *Frequently Asked Questions*].

¹⁹ See Environmental Protection Agency, *Better America Bonds*, at <http://www.epa.gov/bonds/> [hereinafter *Better America Bonds*].

²⁰ See *id.*

²¹ See *id.*

²² See Amy B. Resnick, *Clock is Ticking on Environment, Conservation Bond Legislation*, THE BOND BUYER, Oct. 1, 1999, available at 1999 WL 19926199.

²³ See *id.*

²⁴ See *Better America Bonds*, *supra* note 19.

the creation of planted or forested buffer strips along waterways.

- **Clean Up Brownfields:** Pressure to develop green space can be eased through cleaning up and reusing brownfields—abandoned, contaminated industrial sites. Communities can assess and clean up brownfields for use as open space or for redevelopment (in most cases) where the brownfield is owned by the local government.²⁵

The interest on Better America Bonds is paid not by the issuing communities but rather by the federal government.²⁶ Payment would be in the form of a tax credit that could be applied against the current federal income tax liability of an investor,²⁷ or, if the credit exceeds the current tax liability, the investor could carry the credit forward for up to five years.²⁸ In essence the tax credit is a direct subsidy; it is as if the federal government were paying the interest on a taxable bond in cash.²⁹ The Joint Committee on Taxation offers the following explanation:

Though called a tax credit, the Federal subsidy for [Better America Bonds] is equivalent to the Federal Government directly paying the interest on a taxable bond on behalf of the State or local government that benefits from the bond proceeds. To see this, consider any taxable bond that bears an interest rate of 10 percent. A thousand dollar bond would thus produce an payment of \$100 annually. The owner of the bond that receives this payment would receive a net payment of \$100 less the taxes owed on that interest. If the taxpayer were in the 28-percent Federal tax bracket, such taxpayer would receive \$72 after Federal taxes. Regardless of whether the State government or the Federal Government pays the interest, the taxpayer receives the

²⁵ *Frequently Asked Questions*, *supra* note 18.

²⁶ *See Better America Bonds*, *supra* note 19.

²⁷ *See Frequently Asked Questions*, *supra* note 18.

²⁸ *See* DEPARTMENT OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S REVENUE PROPOSALS 30 (1999), at <http://www.ustreas.gov/press/releases/grnbk99.htm>.

²⁹ *See* JOINT COMMITTEE ON TAXATION, 106TH CONG., DESCRIPTION OF REVENUE PROVISIONS CONTAINED IN THE PRESIDENT'S FISCAL YEAR 2000 BUDGET PROPOSAL 14 (Comm. Print 1999).

same net of tax return of \$72. In the case of tax credit bonds, no formal interest is paid by the Federal Government. Rather, a tax credit of \$100 is allowed to be taken by the holder of the bond. In general, a \$100 tax credit would be worth \$100 to a taxpayer, provided that the taxpayer had at least \$100 in tax liability. However, for tax credit bonds, the \$100 credit also has to be claimed as income. Claiming an additional \$100 in income costs a taxpayer in the 28-percent tax bracket an additional \$28 in income taxes, payable to the Federal Government. With the \$100 tax credit that is ultimately claimed, the taxpayer nets \$72 on the bond. The Federal Government loses \$100 on the credit, but recoups \$28 of that by the requirement that it be included in income, for a net cost of \$72, which is exactly the net return to the taxpayer. If the Federal Government had simply agreed to pay the interest on behalf of the State or local government, both the Federal Government and the bondholder/taxpayer would be in the same situation.³⁰

The tax credit represents a significant subsidy by the federal government.³¹

Tax-credit bonds such as Better America Bonds should not be confused with tax-exempt bonds. With tax-exempt bonds, the issuer pays the interest, but the interest is not taxable income to the investor.³² Because the investor is not required to pay federal income tax on the interest income from a tax-exempt bond, the bond can be issued at a lower rate of interest than a taxable bond and still provide the same after-tax rate of return, depending on the tax bracket of the individual investor.³³

In contrast, with a tax-credit bond the issuer does not pay the interest on the bond.³⁴ Rather, the federal government pays the interest in the form of a tax credit.³⁵ The investor is taxed on the tax credit received

³⁰ *Id.* at 18-19.

³¹ See Amy B. Resnick, *The Cost of Complexity: Tax-Credit Debt Subsidy Requires Oversight*, THE BOND BUYER, June 15, 1999, available at WL 19922913.

³² See WILLIAM F. SHARPE, INVESTMENTS 202 (2nd ed. 1981).

³³ See *id.* at 203. Generally taxpayers in the 30 percent to 40 percent tax bracket find that the return on tax-exempt bonds is competitive with the after-tax return on taxable bonds.

See *id.*

³⁴ See *Frequently Asked Questions*, *supra* note 18.

³⁵ See *id.*

as if the interest were paid in cash.³⁶ Because the investor receives no tax break, the interest rate on the bond must be the same as that on other taxable bonds in order for the investor to receive a competitive return on the investment and thus be willing to invest.³⁷

Although the federal government pays the interest, the federal government does not guarantee the return of principal.³⁸ As is the case with most tax-exempt bonds, the issuers will be required to establish and make regular payments into a sinking fund to provide for the return of principal when the bonds mature.³⁹ Another similarity to tax-exempt bonds is that Better America Bonds are freely negotiable.⁴⁰ In fact, it has been suggested that the tax credit interest payments be severable from the actual bonds, in the form of coupons that could be freely negotiated.⁴¹

As is the case for other federal programs, funds are limited. The proposal is for \$700 million in tax credits over five years.⁴² This equates to \$1.9 billion in bond authority that could be given each year.⁴³ Because the funds are limited, a selection process is necessary.⁴⁴ One might think that a program such as this should be allocated to the states based on some criteria such as population. That is not the case.⁴⁵ Because rapid growth and sprawl problems vary from state to state, to enable local communities to have direct access to the resources and to "encourage stronger, more creative and innovative applications,"⁴⁶ the process for gaining bond authority is competitive.⁴⁷ The Environmental Protection Agency ("EPA") will chair a panel of government agencies including the Department of the Interior and the Treasury Department.⁴⁸ The panel will

³⁶ *See id.*

³⁷ *See generally* Sharpe, *supra* note 32, at 4-10.

³⁸ *See Frequently Asked Questions*, *supra* note 18.

³⁹ *See id.*

⁴⁰ *See id.*

⁴¹ *See Tax Benefits for Land Conservation: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 106TH Cong. (1999) (testimony of Deputy Assistant Treasury Secretary for Tax Analysis Leonard Burman).

⁴² *See id.*

⁴³ *See id.*

⁴⁴ *See Better America Bonds*, *supra* note 19.

⁴⁵ *See Frequently Asked Questions*, *supra* note 18.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

decide on the necessary criteria on which to base decisions about granting bond authority.⁴⁹

Although the criteria have yet to be determined, they will be based on three principles.⁵⁰ First, the purpose of the bonds must fall under one or more of the three categories of allowed uses: open space preservation, brownfields clean up, and water quality protection.⁵¹ Second, there must be evidence of strong community support.⁵² Third, collaborative efforts of neighboring communities, especially among cities, suburbs and rural areas, will be given preference.⁵³ In addition, any local rules regarding the issuance of bonds would still apply to Better America Bonds.⁵⁴ For instance, if a county would normally require a referendum before a bond or other debt issuance could occur, such referendum would still be required.⁵⁵ Naturally, the voter approval could be contingent on the award of bond authority from the EPA.⁵⁶

The EPA will administer the Better America Bonds program, but, like the issuers of tax-exempt bonds, the issuers of Better America Bonds will be under the watchful eye of the Internal Revenue Service ("IRS").⁵⁷ If, during the fifteen year term of the bond more than five percent of the proceeds are used for anything other than the allowed uses, the accrual of tax credits will cease, the issuer will have to reimburse the IRS for credits that accrued within the previous three years, with interest, and, if the issuer cannot pay, the bondholders will be liable for the reimbursement.⁵⁸

When the fifteen year term is up and the principal has been returned to the investors, one further restriction remains. If the property financed with Better America Bonds is to be sold, environmental protection organizations must be given the right of first refusal to purchase the land.⁵⁹

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *See Frequently Asked Questions, supra* note 18.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *See Frequently Asked Questions, supra* note 18.

⁵⁸ JOINT COMMITTEE ON TAXATION, *supra* note 29, at 54.

⁵⁹ *See Frequently Asked Questions, supra* note 18.

III. COMPARING TAX-EXEMPT BONDS WITH TAX-CREDIT BONDS

Touched upon briefly above is the difference between tax-exempt bonds and tax-credit bonds such as Better America Bonds. A more detailed analysis of the differences and the similarities is in order. From a purely financial standpoint the difference for the issuer is quite striking. As previously mentioned, an issuer borrows money at a lower rate of interest when issuing a tax-exempt bond.⁶⁰ For the investor, the lower interest received is compensated for by the fact that the interest received is not subject to federal income tax.⁶¹ In effect, the federal government subsidizes the savings for the issuer.⁶² Compare tax-credit bonds, where the federal government is subsidizing the entire interest payment. Stated another way, the issuer is able to borrow money for free. Leonard Burman, Deputy Assistant Treasury Secretary for Tax Analysis, explained the difference as follows:

Compared to traditional tax-exempt bonds, Better America Bonds would significantly reduce the financing costs to local taxpayers of environmental projects. For example, annual payments of principal and interest on a traditional 30-year, \$1 million tax-exempt bond issue would, at current interest rates, be about \$71,000. In comparison, the annual payments into a sinking fund that would repay after 15 years the \$1 million principal of an issue of Better America Bonds would be about \$42,000. A state or local government issuing the bonds would thus save about \$29,000 per year over the initial 15 years, and \$71,000 per year over the remaining 15 years of a 30-year bond's term. Better America Bonds would cost state and local governments only about half of what a tax-exempt bond would (in present value terms).⁶³

Thus the subsidy provided to localities via Better America Bonds is much deeper than the subsidy accompanying tax-exempt bonds.⁶⁴

⁶⁰ See *supra* text accompanying note 33.

⁶¹ See *supra* text accompanying note 33.

⁶² Resnick, *supra* note 31.

⁶³ *Tax Benefits for Land Conservation*, *supra* note 41.

⁶⁴ See Resnick, *supra* note 31.

Along with the financial differences between tax-exempt and tax-credit bonds there are differences between the respective markets for such bonds. The market for tax-exempt bonds is well established as it has been around for many years.⁶⁵ Issuers, investors, traders, and brokers are all familiar with the tax-exempt bond market.⁶⁶ As a result, tax-exempt bonds are predictable and comfortable, and for investors, risk of the unknown is absent.⁶⁷ Of course other types of risk are present, such as the risk that some or all of the principal will not be paid and the risk that the purpose for which the bond proceeds are used will fail to remain qualified and thus the bonds will lose preferential tax status.⁶⁸ However, the market has long since adjusted the price for these and many other risks.⁶⁹ Because the investors are comfortable in that they are able to accurately predict the results of their investments, it is not necessary for issuers to offer tax-exempt bonds at a discount in order to sell them, other than the discount (or premium) necessary to account for any changes in the market interest rate between the printing of the bonds and the sale of the bonds.⁷⁰

Another consequence of having a well established market is that the costs involved in issuing and servicing tax-exempt bonds have had time to decline as the attorneys, brokers, and issuers have become familiar with the specifics of the process.⁷¹ The learning curve was passed long ago.⁷² Previously unforeseen contingencies have been confronted and adjustments have been made.⁷³

⁶⁵ See *The Impact of Tax Law on Land Use, Conservation, and Preservation: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 106th Cong. (1999) (prepared statement of the Bond Market Association).

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ See generally Sharpe, *supra* note 32, at 289-317.

⁶⁹ See generally *id.*

⁷⁰ For instance, if a bond is offered with a stated annual interest rate of eight percent, but at the time of issuance the market rate for such a bond has increased to nine percent, the issuer must sell the bond for less than face value, i.e., at a discount, to compensate the buyer for the below-market interest rate that accompanies the bond. See generally Sharpe, *supra* note 32, at 290-94. The discount effectively increases the investor's return. Conversely, if the market rate decreases, the bond can be sold at a premium, thereby reducing the investor's rate of return down to a level more in line with the market. See *id.*

⁷¹ See generally *The Impact of Tax Law on Land Use, Conservation, and Preservation*, *supra* note 65.

⁷² See generally *id.*

⁷³ See generally *id.*

Related to the risk of the unknown is the risk that the issuer will fail to repay. In a well-established market such as the tax-exempt bond market, many issuers have issued bonds in the past and have a history.⁷⁴ This enables bond rating companies to make predictions as to the risk involved in dealing with a particular issuer.⁷⁵ As the name suggests, bond rating companies actually assess the risk of default, or conversely the probability that an issuer will pay as agreed, and publish a grade or rating for bond issuers alerting investors of the relative risk involved in purchasing bonds from a particular issuer.⁷⁶

Perhaps the most advantageous quality of a mature market is the fact that a market actually exists.⁷⁷ Buyers are available.⁷⁸ There is already a demand.⁷⁹ Even when bonds are issued with a low rating, the bonds can still be sold because the risk is known.⁸⁰ In order to accomplish this, the bonds are discounted to compensate for the increased risk.⁸¹

The tax-credit bond market is almost nonexistent.⁸² The few tax-credit bonds that have been issued are Qualified Zone Academy Bonds.⁸³

⁷⁴ See Sharpe, *supra* note 32, at 305-08.

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See *The Impact of Tax Law on Land Use, Conservation, and Preservation: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 106th Cong. (1999)* (prepared statement of the Bond Market Association).

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See Sharpe, *supra* note 32, at 305-15.

⁸¹ See *id.*

⁸² See *The Impact of Tax Law on Land Use, Conservation, and Preservation: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 106th Cong. (1999)* (prepared statement of the Bond Market Association).

⁸³ See Fowler W. Martin, *U.S. Bond Market Association Welcomes Treasury QZAB Rate Moves*, DOW JONES NEWS SERVICE, July 2, 1999 (WL, DJNSPLUS Database). Qualified Zone Academy Bonds are tax-credit bonds issued by a state or local government the proceeds of which are used for renovations, equipment, course materials development, and teacher training at certain schools categorized as "qualified zone academies." JOINT COMMITTEE ON TAXATION, *supra* note 29, at 14. The following is a description of a "qualified zone academy":

A School is a "qualified zone academy" if (1) the school is a public school that provides education and training below the college level, (2) the school operates a special academic program in cooperation with businesses to enhance the academic curriculum and increase graduation and employment rates, and (3) either (a) the school is located in one of the 31 designated empowerment zones or one of the 95 designated enterprise communities, or (b) it is reasonably expected that at least 35

The universe of taxpayers permitted to be holders of Qualified Zone Academy Bonds is limited to include banks, insurance companies, and other institutions actively engaged in the business of lending money.⁸⁴ Furthermore, because the interest is paid in the form of a tax credit, the pool of investors is pragmatically limited to those lenders who can take advantage of a tax credit. Qualified Zone Academy Bonds have only been in existence a short time.⁸⁵ The total issuance was limited to \$400 million per year.⁸⁶ The narrow universe of eligible investors and the relatively low annual issuance limit have combined to stifle the emergence of a tax-credit bond market.⁸⁷

IV. THE ADVANTAGES OF BETTER AMERICA BONDS

The positive aspects of the Better America Bonds program include the following: First, the environmental purposes behind the program, assuming the underlying problems and potential problems do in fact exist, are certainly laudable and worthy of encouragement. Second, the money spent (actually forgone) by the federal government would be leveraged into greater spending power. Third, because a tax credit is allowed in lieu of a cash interest payment, a tax credit that is not refundable and that expires in five years, there is a chance that the credits will not be used in full or that their use will be deferred, thus reducing the cost of the program. In addition, because cash is not paid out, the program avoids the often unpleasant appropriations process. Finally, the bureaucracies, namely the EPA and the IRS, are already in place to administer and police the program.

Many communities have expressed a desire for more livable communities that include "more green spaces, less traffic congestion, improved water and air quality, and enhanced quality of life."⁸⁸ That desire is evidenced by data from the 1998 election, where "240 'green' ballot initiatives were considered in communities across the country."⁸⁹

percent of the students at the school will be eligible for free or reduced-cost lunches under the school lunch program established under the National School Lunch Act.

Id. at 14-15.

⁸⁴ *See id.*

⁸⁵ *See id.*

⁸⁶ *Id.*

⁸⁷ *See id.*

⁸⁸ *Frequently Asked Questions*, *supra* note 18.

⁸⁹ *Id.*

Over half of these measures “to protect open space and enhance local livability were adopted.”⁹⁰ Those ballot initiatives authorized an additional \$7.5 billion in state and local spending.⁹¹ Certainly \$9.5 billion in bonding authority would help communities with these problems. However, the federal government will not be paying \$9.5 billion; the tax credits allowed over five years would total approximately \$700 million.⁹²

The ability to leverage large amounts of directed spending at a relatively low cost is one of the great advantages of subsidizing a bond issue. Although the leverage is greater with tax-exempt bonds where the federal government subsidizes only a portion of the interest, Better America Bonds “provide a much deeper subsidy for communities.”⁹³ For example, the issuer of a million dollar bond would save nearly 60 percent over a fifteen year period.⁹⁴ In reality, however, as the following explanation will show, the actual cost will probably be even less.

Because interest is “paid” in the form of a tax credit, there is a chance that the “payment” will be delayed or even remain unpaid. The reason for this is that the tax credit is not refundable.⁹⁵ It can only be used to reduce a tax liability.⁹⁶ If the tax liability is less than the credit, the credit can be carried forward for five years.⁹⁷ After five years the unused portion of the credit is lost.⁹⁸ Obviously if the credit is lost in whole or in part the program cost is reduced. However, even if the credit is merely delayed the program cost is likewise reduced.⁹⁹ The worst case scenario for the federal government is that in which the program operates as expected and all bondholders are able to use all of their tax credits in the year in which they were earned. Otherwise, use of the credits is delayed or credits expire unused. Either way the government enjoys a savings, reducing the overall program cost.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *See id.*

⁹³ *Better America Bonds*, *supra* note 19.

⁹⁴ *Id.*

⁹⁵ *See* DEPARTMENT OF THE TREASURY, *supra* note 28.

⁹⁶ *See id.*

⁹⁷ *See id.*

⁹⁸ *See id.*

⁹⁹ The time value of money is the reason for the lower program cost when a tax credit is not taken in the year it is earned. At the very least, the government will enjoy the free use of the revenue not currently forgone due to the delayed tax credit.

Because tax credits are used instead of cash payments, appropriations from Congress are unnecessary.¹⁰⁰ Naturally, Congress must pass the provision, but getting a program passed and getting a program funded are two separate hurdles. Funding a program with a multiyear bond program would "avoid making [the program] subject to the often-unpredictable federal appropriations process."¹⁰¹

The final favorable characteristic of Better America Bonds is that the bureaucracy currently exists to administer and police the program.¹⁰² The EPA is staffed with experienced professionals who have previously worked with local communities on water quality projects and brownfields clean up.¹⁰³ Once the projects have been approved and bond authority has been given, the IRS steps in to police the various projects.¹⁰⁴ Currently the IRS is responsible for insuring that tax-exempt bond funds are being used for allowed purposes.¹⁰⁵ Thus, bureaucracy exists to oversee the use of tax-credit bond funds.

The EPA sums up the program as follows: This is not a big government program. The federal government will not purchase one square inch of land. Nor will it micromanage local zoning and land use decisions. States and communities will build this legacy themselves. All decisions will be made at the state or local level. The federal government is just providing them new tools they need to grow in ways that are best for them.¹⁰⁶

¹⁰⁰ In fact, being a part of the appropriations process may not work at all. Bruce Davie, a Treasury Department economist, explained the problem as follows:

Budgetary policies and budgetary rules don't permit the creation of a pot of money to write checks to issuers to pay interest. Using the tax system and (tax-credit bonds) are [sic] the only way we have been able to think of to deliver a deeper subsidy than traditional tax-exempt bonds.

Amy B. Resnick, *EPA Defends Tax Credits*, THE BOND BUYER, Mar. 3, 1999, available at 1999 WL 5728888.

¹⁰¹ Resnick, *The Cost of Complexity*, *supra* note 31 (quoting from an interview with Deputy Assistant Treasury Secretary for Tax Policy Jonathan Talisman).

¹⁰² See *Frequently Asked Questions*, *supra* note 18.

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ See WEST'S FEDERAL TAXATION 1-18 (William H. Hoffman, Jr. et al. eds., 1997) (stating that the IRS is responsible for administering the tax laws); I.R.C. § 103 (1999) (providing for the tax-exempt status of certain bonds).

¹⁰⁶ *Better America Bonds*, *supra* note 19.

V. THE DISADVANTAGES OF BETTER AMERICA BONDS

On the surface Better America Bonds appear to be a great way to help communities help themselves and the environment. However, there are significant disadvantages. First, there is a possibility that no new projects will be funded with the tax-credit bonds, and instead projects that were going to be funded with tax-exempt bonds will now be funded with more highly subsidized tax-credit bonds, and even if more open space is created, the change may be incremental. Second, the pool of investors is limited, the market is virtually nonexistent, and the risks may force investors to keep it that way. Third, Better America Bonds will not provide cost free borrowing as promised. Fourth, the program may discriminate against poorer communities. Fifth, local communities may relinquish some control over their projects. In addition, avoiding the appropriations process may unjustly favor environmental projects over other projects and programs. Finally, the IRS should not be burdened with yet another policing function, putting more pressure on an exceedingly understaffed agency, and the tax code should not be made more complex with policy provisions that have nothing to do with assessing and collecting taxes.

Having tax-exempt bonds available is great for localities because, as explained above, the cost of borrowing is partially subsidized by the federal government.¹⁰⁷ However, making Better America Bonds available could be problematic financially for the federal government. The danger is that localities will only shift already existing plans that were to be financed with tax-exempt bonds into the Better America Bonds program.¹⁰⁸ The problem is that the federal government will end up fully subsidizing the borrowing for a plan which would have come to fruition had the borrowing been subsidized only in part through the use of tax-exempt bonds.¹⁰⁹ Actually the plan need not be in existence for the problem to occur. So long as the project would have been undertaken using tax-exempt bonds, the project, if financed with Better America Bonds, would represent an unnecessary cost to the federal government.¹¹⁰

Not only would there be unnecessary costs involved, but the purpose of the program, to spur localities to instigate more environmental projects to enhance open space, improve water quality and clean up

¹⁰⁷ See *supra* text accompanying note 2.

¹⁰⁸ See JOINT COMMITTEE ON TAXATION, *supra* note 29, at 18.

¹⁰⁹ See *id.*

¹¹⁰ See *id.*

brownfields, would “not be achieved.”¹¹¹ If no *new* projects emerge, the program would be nothing more than a revenue loser with nothing to show for it save some colorful environmental propaganda in the form of brochures, web pages, and maybe some Microsoft PowerPoint presentations. However, the localities would realize a windfall which they could “spend the savings on other government functions or use to reduce taxes.”¹¹² Furthermore, even if there were environmental changes of the type contemplated by Vice President Gore, et al., the changes could be incremental.

The incremental increase problem could occur if, for example, a locality had a pre-existing plan for land acquisition to build a park and thus increase open space. If the locality were able to gain authority to issue Better America Bonds instead of issuing tax-exempt bonds, the money saved could then be used to acquire more land for the park. As a result, instead of encouraging the creation of new projects, Better America Bonds would merely be allowing for an incremental expansion of existing plans. If this occurs the valuable leverage on federal funds is all but lost; the amount of environmental help has increased, but only by an amount equal to the additional subsidy provided by the Better America Bonds program. In other words, the subsidy may not encourage new projects. The subsidy may just moderately increase the size of the projects by an amount equal to the present value of the future interest payment savings realized by the localities.

In the unlikely event that all Better America Bonds projects are neither replacements for nor additions to prior plans of local projects, i.e., even if the program encourages only the creation of new projects, the bonds still must be sold. That requires a market of willing investors. The pool of investors for Better America Bonds is smaller than that of other bonds.¹¹³ For an investor to be willing to buy a tax-credit bond, that investor must have a federal tax liability to which the tax credit can be applied.¹¹⁴ Immediately the investor pool is limited to domestic taxpayers, individuals and corporations.¹¹⁵ Furthermore, there are some large

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See Amy B. Resnick, *TBMA Says Tax-Credit Plan Flawed*, THE BOND BUYER, Mar. 11, 1999, available at 1999 WL 5729152.

¹¹⁴ See JOINT COMMITTEE ON TAXATION, *supra* note 29, at 15-16 (describing that in lieu of an interest payment, a credit would be given for federal income tax purposes).

¹¹⁵ See Resnick, *supra* note 113 (reasoning that only domestic individuals and corporations would actually have a potential tax liability to which a tax credit could be applied).

investors that pay no income tax.¹¹⁶ Pension funds have become substantial investors in securities markets.¹¹⁷ However, income earned in pension funds is not taxed currently.¹¹⁸ Rather, the income is taxed when distributed to pensioners, and the pensioners are then liable for the tax.¹¹⁹ Thus the pension fund managers would have no interest in tax credits that they could not use. Assuming that the remaining pool of potential investors is adequate to support a tax-credit bond market, there is still something missing—a market! There exist investors who are not completely adverse to tax-credit bonds,¹²⁰ i.e., investors who potentially could have a tax liability to which the credit could be applied, but a market requires investors who are *willing* to purchase the bonds.

For an investor to be willing to purchase any investment, the return must be sufficient to compensate the investor for the risk associated with the investment.¹²¹ With Better America Bonds the risks are significant. First, there is no secondary market; thus the bonds have poor liquidity, if any.¹²² Second, the bonds could be issued by a group of smaller communities,¹²³ none of which have the financial resources to pay into the sinking fund extra money to cover for an insolvent co-issuer. Third, if at some point the proceeds from the bonds are not used for an allowed purpose,¹²⁴ the tax credits will be lost;¹²⁵ in addition, the investors may be liable to the IRS for repayment of tax credits already taken.¹²⁶ Fourth, the value of the tax credit depends on the tax situation of the investor.¹²⁷

As mentioned previously, tax-credit bonds are relatively new.¹²⁸ The only ones actually in existence are Qualified Zone Academy Bonds.¹²⁹ Because these bonds can only be held by investors such as

¹¹⁶ See *infra* text accompanying notes 117-18.

¹¹⁷ See JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE* 570 (1995).

¹¹⁸ See WEST'S FEDERAL TAXATION, *supra* note 105, at 19-11.

¹¹⁹ See *id.*

¹²⁰ See Resnick, *supra* note 113.

¹²¹ See Sharpe, *supra* note 32, at 6-8.

¹²² See Resnick, *supra* note 113.

¹²³ See *Frequently Asked Questions*, *supra* note 18.

¹²⁴ See *supra* text accompanying note 51.

¹²⁵ See DEPARTMENT OF THE TREASURY, *supra* note 28, at 31.

¹²⁶ See *id.*

¹²⁷ See Resnick, *supra* note 113.

¹²⁸ See *supra* text accompanying note 85.

¹²⁹ See *supra* text accompanying note 83.

banks, insurance companies, and other institutions actively engaged in the business of lending money,¹³⁰ and because of the small volume,¹³¹ there is no secondary market.¹³² Even if Better America Bonds were added to the potential market, along with the other proposed type of tax-credit bonds called School Modernization Bonds, the situation would not improve, i.e., a secondary market would either not exist or it would be very small.¹³³ The Bond Market Association describes the expectation as follows:

[T]he relatively small size of the tax-credit market—\$29 billion over five years if the [Better America Bonds and School Modernization Bonds] programs are enacted—“would ensure that little secondary market trading” in tax-credit bonds would take place, making them illiquid investments. As a result, investors would demand a higher rate of return from issuers as compensation.¹³⁴

Thus investors would be forced to hold the bonds until maturity, which further increases risk.¹³⁵

Risk is also increased due to the nature of the preferences that will be given by the EPA when determining the projects to which it will award bond authority. The EPA will give preference to “regional proposals that reflect collaborative planning by neighboring communities.”¹³⁶ Participants in these regional proposals may or may not have ever been involved in a bond issue, but even if all participants have a bond rating, the investor has the unenviable task of reconciling the different ratings to arrive at a risk level.¹³⁷ Then the risk must be increased to consider the possibility that one or more of the participants will become unable to continue contributions to the sinking fund.¹³⁸ The remaining participants

¹³⁰ See Martin, *supra* note 83 and text accompanying note 84.

¹³¹ See Martin, *supra* note 83. The “small volume” to which the article refers is \$400 million per year in 1997 and 1998. See *supra* text accompanying note 84.

¹³² See *supra* text accompanying note 84.

¹³³ See Resnick, *supra* note 113.

¹³⁴ *Id.*

¹³⁵ See generally Sharpe, *supra* note 32, at 301-03 (discussing how bond prices are calculated over time).

¹³⁶ *Frequently Asked Questions*, *supra* note 18.

¹³⁷ See generally Sharpe, *supra* note 32, at 305-15 (discussing bond ratings and how the bond's risk of default affects its premiums).

¹³⁸ *Id.*

may be rated as to their own bond issues, but none are rated as to being able to cover another participant's share.¹³⁹

Another risk that stems from the issuer is the risk that the requirements of the bonds might be violated.¹⁴⁰ Those provisions include strict time periods and proceed percentage limits that must be adhered to.¹⁴¹ The consequences to the investor for mismanagement by the issuer have the potential to be quite severe.¹⁴² The Treasury Department provides the following explanation:

¹³⁹ *Id.*

¹⁴⁰ For a discussion of permissible projects for the Better America Bonds program, see *supra* text accompanying note 25.

¹⁴¹ The following is a description of the bond requirements:

Issuers must reasonably expect, as of the date of issue, that 95 percent of the proceeds will be expended for qualifying purposes within three years and that any property financed with bond proceeds will be used for a qualified purpose for at least a 15-year period after the date of issuance. For purposes of the requirement that 95 percent of tax credit bond proceeds be used for qualifying purposes, any investment earnings (and earnings on those earnings) associated with unexpected proceeds during the three-year period following the date of issuance are treated as proceeds, i.e., they must also be used for qualifying purposes. During the three-year period, unexpended proceeds may only be invested in bank accounts or U.S. Treasury securities maturing in three years or less. If the issuer establishes a sinking fund to repay principal, sinking fund assets must be held in State and Local Government Securities (SLGS) issued by the Treasury. Issuers must incur a binding obligation with a third party to expend at least 10 percent of the proceeds of the issue within 6 months of the issue date and allocate the sale proceeds to expenditures with due diligence. If 95 percent of proceeds are not expended by the end of the three-year period for qualifying purposes, unexpended proceeds must be used to retire a portion of the bonds within 90 days. No depreciation deductions would be allowed with respect to property financed with tax credit bonds.

Acquisition of land and facilities is only a qualifying purpose if the property is intended to be available, and is in fact reasonably available, for use by members of the general public. Any agreement, other than a management contract that would be a qualified management contract if the land or facilities had been financed with tax-exempt bonds, conveying priority rights or other preferential benefits to a private person violates the general public use provision and would not constitute a qualifying purpose. Furthermore, repayment of principal may not be secured or paid with monies derived from private persons in any capacity other than that of the general public.

DEPARTMENT OF THE TREASURY, *supra* note 28, at 30-31.

¹⁴² See *infra* text accompanying note 143.

Bonds would cease to be qualified bonds and would accrue no further tax credits after the date on which the use of any bond-financed facilities changes to a non-qualifying use. The issuer would be obligated to reimburse the federal government (with interest) for any credits accruing prior to that date. If this obligation is not timely paid by the issuer, the federal government has the right to recover the credit amount *from the current holder* of the bonds. In the event the issuer fails to satisfy one of the other tax-related requirements, no further tax credits would accrue and the issuer would be obligated to reimburse the federal government (with interest) for all past credits claimed with respect to the bonds. In the event this obligation is not timely paid by the issuer, the federal government has the right to recover the credit amount *from current bond holders*.¹⁴³ (emphases added)

It is conceivable that an investor would be liable to the federal government for the reimbursement of fourteen years of tax credits plus interest.¹⁴⁴ This is certainly a risk that might deter reasonable investors because a debt to the IRS is unlike any other debt.¹⁴⁵ A tax deficiency can cause automatic liens to arise on all assets that are currently owned or that may be acquired in the future, including retirement accounts.¹⁴⁶ Furthermore, IRS debts enjoy a high preference in bankruptcy,¹⁴⁷ and if any portion of the debt remains, the liens will survive a bankruptcy.¹⁴⁸ Thus, the IRS should be on everyone's list of undesirable creditors.

Along with risks associated with the issuers are risks inherent in tax-credit bonds regardless of the issuer. There is a risk that the investor will be able to use only part of the tax credit that accrued in a given tax year, or that the tax credit will sit idle for a period of time until the tax payment is due to be paid.¹⁴⁹ The Bond Market Association explains that

¹⁴³ DEPARTMENT OF THE TREASURY, *supra* note 28, at 31.

¹⁴⁴ The bonds have a fifteen year term. See *Frequently Asked Questions*, *supra* note 18. If the use of facilities financed with such bonds changes to a non-qualified use in the fifteenth year, the taxpayer would be liable for all credits accrued to that date. See *supra* text accompanying note 143.

¹⁴⁵ See *infra* text accompanying note 146, at 379-400.

¹⁴⁶ See ROBERT S. SCHRIEBMAN, *IRS TAX COLLECTION PROCEDURES: A MANUAL FOR PRACTITIONERS* 379-82 (1985).

¹⁴⁷ See *id.* at 388-89.

¹⁴⁸ See *id.* at 395-400.

¹⁴⁹ See *infra* text accompanying note 150.

a traditional bond is continually generating a return for the investor. In contrast, "the value of a tax credit under any of the proposed tax credit bond proposals is largely dependent on timing and on the tax situation of a particular investor."¹⁵⁰ An investor earns the ability to take an annual credit on the anniversary date of a bond's issuance.

[However,] the credit becomes economically valuable to the investor only when it has the effect of reducing a tax payment and that occurs only on a day when an investor is required to make a federal tax payment . . . because the tax-credit date—the anniversary of the bond's issuance—may not coincide with a tax-payment date, . . . the investor [is forced] to incur 'a period of time when the credit has no significant economic value.' . . . The situation is worse for the investor in years when the investor has no tax liability."¹⁵¹

Even though the credit may be carried forward, if an investor has no tax liability and is forced to carry the credit forward, the time period in which the tax credit has no economic value is extended even further.¹⁵²

To summarize, there are three risks inherent in tax-credit bonds. First, there is the risk that a tax credit will be "paid," i.e. earned, before the tax due date; thus, the credit sits idle, losing value over time. Second, there is the risk that a tax credit will exceed the tax liability; thus, the remaining credit will sit idle for a year or more until there exists sufficient tax liability to which the credit can be applied. Third, there is the risk that some or all of a credit will never be used due the five year limitation on carryovers.

These risks cannot be compensated for by adjusting the interest rate on the bonds because the Treasury Department sets the interest rate.¹⁵³ Therefore, to compensate investors for the risks discussed above, the bond must be sold for an amount less than face value.¹⁵⁴ "[S]tates and localities

¹⁵⁰ Press Release, The Bond Market Association, The Bond Market Association Issues Statement to Ways and Means Taking Aim at Administration Tax Proposals; Contends Provisions Would Raise Borrowing Costs and Add Complexity to System; Association Also Identifies Market Inefficiencies in Tax Credit Bond Proposal (Mar. 10, 1999) (LEXIS, PR Newswire Library).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *See id.*

¹⁵⁴ *See id.*

would invariably be forced to sell bonds at a discount to attract investor interest. . . . The difference between the sale price of tax-credit bonds and their face value would represent interest cost to the issuer in the form of original issue discount.”¹⁵⁵ The promise of cost-free borrowing cannot come to fruition. Because of the lack of a market, low liquidity, and additional risks inherent in the Better America Bonds program, localities will have to pay for the use of the proceeds by way of original issue discount, but that will not relieve the federal government of “paying” the tax credits, in essence also paying for the localities’ use of the proceeds.¹⁵⁶ Furthermore, the discount could be substantial.¹⁵⁷ Compare the Qualified Zone Academy Bond program where the bonds must be sold “at about 90 percent or 92 percent of par to attract buyers.”¹⁵⁸ Even if suggested improvements were made to the Qualified Zone Academy Bond Program the bonds could be sold “at almost 96 percent of par.”¹⁵⁹ The tax-credit bonds are flawed; cost-free borrowing cannot be achieved using them.¹⁶⁰ Even if cost-free borrowing were achieved, other problems reside with the Better America Bonds program, beginning with the competition for obtaining bond authority.

As stated above, the EPA will administer the program.¹⁶¹ One of its duties will be to award bond authority through a competitive process where the EPA will scrutinize each proposal from potential issuers and, using criteria yet to be specifically defined, will decide on the proposals to be funded with Better America Bonds.¹⁶² Although the exact criteria have yet to be determined, the principals on which the criteria will be based have been set forth.¹⁶³ The EPA wants to “encourage stronger, more creative and innovative applications from communities across the nation”¹⁶⁴ and “strong community support will be critical.”¹⁶⁵ Inherent within these principles on which the competition will be based is discrimination against poorer communities in favor of more wealthy

¹⁵⁵ See *id.*

¹⁵⁶ See Resnick, *supra* note 113.

¹⁵⁷ Cf. Amy B. Resnick, *Tax Legislation: State, Local Officials Have Mixed Feelings on Tax-Credit Debt*, THE BOND BUYER, May 14, 1999.

¹⁵⁸ See *id.*

¹⁵⁹ See *id.*

¹⁶⁰ See Resnick, *supra* note 113.

¹⁶¹ See *Frequently Asked Questions*, *supra* note 18.

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

communities. "Stronger, more creative and innovative applications" do not come without cost because applicants may believe it necessary to hire a professional advertising firm or a marketing firm to produce an application. Poorer communities may lack the resources to compete with professionally created application packages.

Wealthier communities also have a distinct advantage in gaining "strong community support." Naturally, for a community to support a project the community must be informed of the project. The project must be "sold" to the community, possibly with the help of a costly information campaign. Thus the wealthier communities enjoy yet another advantage.

Another problem with Better America Bonds is that the localities must give up some control over their own agenda while allowing the federal government to decide which projects are most important.¹⁶⁶ The federal government exerts its control over state and local governments in two ways. First, before the state and local governments can borrow funds using Better America Bonds, approval must come from the federal government in the form of bond authority.¹⁶⁷ Second, the federal government determines the purposes for which the proceeds may be used.¹⁶⁸ The effect of the Better America Bonds program could be to force the federal government's priorities on localities whose priorities may not mirror those advanced. In effect the federal government is putting open space preservation "on sale" hoping to get more buyers. Environmental issues could be placed ahead of other programs that localities may need such as health clinics for the indigent, food banks, or homeless shelters. Here the federal government is putting parks on sale for half-price.¹⁶⁹ If the program is successful in creating only new projects, the money is coming from some other area of the local budget. As the Bond Market Association has stated, "[t]ax-credit bond programs, while commendable for their desire to finance land preservation, would create another level of federal bureaucracy and would intrude into a decision-making process that is best left to states and localities."¹⁷⁰

¹⁶⁶ See Amy B. Resnick, *Debt Committee Members Voice Reservations on Tax Credit Bonds*, THE BOND BUYER, May 25, 1999 available at 1999 WL 5731692.

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ See *supra* text accompanying note 63.

¹⁷⁰ *The Impact of Tax Law on Land Use, Conservation, and Preservation: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 106th Cong. (1999) (LEXIS, Federal News Service) (prepared statement of the Bond Market Association).

The federal government does not even attempt to evade the question of reduced local control. Edwin Oswald, the Treasury department's attorney advisor for bonds laid out the issue as follows:

The federal subsidy, in connection with traditional tax-exempt bonds, is limited to the spread between tax-exempt issues and comparable taxable offerings. When you are dealing with tax-credit bonds . . . [they represent] a deep subsidy—a significant subsidy to state and local borrowers, and with that type of deep subsidy . . . we think at least at this juncture, there should be a little more federal oversight with respect to how those dollars are allocated and what projects are financed.¹⁷¹

Jonathan Talisman, deputy assistant Treasury secretary for tax policy, agreed, adding that “because tax-credit bonds are envisioned as providing a deeper subsidy—therefore costing the federal government more than tax-exempt bonds—the federal government has a greater interest in how they are used.”¹⁷² Obviously Oswald and Talisman are not big fans of block grants. It seems to be a given that when more money is provided, greater control over the use of the money is appropriate.

By creating a subsidy that bypasses the appropriations process,¹⁷³ the federal government is again placing environmental concerns above other concerns. The reason for this is that a subsidy paid with a tax credit is paid before anything else. The tax credit reduces revenue, revenue that is then used to pay for most other expenses of the federal government. The appropriations process is for distributing the revenue, thus the environmental projects get “paid for” ahead of almost everything else. Without further basis, the preference is arbitrary.

With Better America Bonds, the Treasury department is burdened in two ways. First, regulations must be written to provide the specifics. For example, if a mutual fund buys Better America Bonds, how will the tax credits be allocated, if at all, among mutual fund investors? For any investor, is the tax credit earned as the bond is held, i.e., do investors receive a pro rata portion of the tax credit depending on the length of time that the bond was held? Second, the IRS will be forced to evaluate

¹⁷¹ Resnick, *supra* note 31.

¹⁷² *Id.*

¹⁷³ *See id.*

whether the proceeds continue to be used by issuers for allowed uses.¹⁷⁴ Will the IRS send out inspectors periodically to check on the issuers? Will this enforcement function be carried out as part of the normal examination procedures?

The EPA stated that "Better America Bonds is about the simplest law you could write to do the most good. It's just a quick addition to the tax code."¹⁷⁵ What this statement lacks in accuracy it makes up for with audacity. First of all there is no such thing as a "quick addition" to the Internal Revenue Code ("Code"). Any change to the Code must get by the House Ways and Means Committee, the floor of the House, the Senate Finance Committee, the floor of the Senate, the Joint Committee on Taxation, and the floors of the House and the Senate again, and finally the President must sign the bill into law.¹⁷⁶ Certainly "quick" is a relative term, but clearly liberties were taken when that statement was written. However, "quick" is quite accurate when compared with the term "simplest." Revisit note 140, *supra*, for a small taste of how the Code provision and accompanying regulations might appear. That rather lengthy description of the bond requirements is only a portion of the description of the proposal.¹⁷⁷ Currently the Code is so complicated that scholars and commentators use the Code as the standard by which other complicated laws and regulations are measured.¹⁷⁸ The Better America Bonds proposal is a step in the wrong direction where simplicity is concerned.

VI. ALTERNATIVES

The argument against Better America Bonds is strong, perhaps stronger than the argument in favor. Assuming that the purpose of the bonds is worthy of attention, a look at the alternatives is necessary. Reasonable alternatives include paying localities directly, in the form of a

¹⁷⁴ *Frequently Asked Questions*, *supra* note 18.

¹⁷⁵ Environmental Protection Agency, *Better America Bonds*, at <http://www.epa.gov/bonds/> (on file with the William and Mary Environmental Law and Policy Review).

¹⁷⁶ See GAIL LEVIN RICHMOND, *FEDERAL TAX RESEARCH: GUIDE TO MATERIALS AND TECHNIQUES* 45-47 (5th ed. 1997).

¹⁷⁷ See generally DEPARTMENT OF THE TREASURY, *supra* note 28.

¹⁷⁸ See Martin J. Greenberg, *Representation of College Coaches in Contract Negotiations*, 3 MARQ. SPORTS L.J. 101, 103 (1992) (comparing the complexity of the NCAA Manual to the Code); Daniel A. Farber, *Revitalizing Regulation*, 91 MICH. L. REV. 1278, 1288 (1993) (comparing the complexity of federal pollution statutes to the Code); Harvey P. Dale, *Tax Accounting for Foreign Persons*, 37 TAX L. REV. 275, 275 (1981-1982) (stating that the Code is the "most complicated statute in the world").

grant, an amount equal to their interest obligation; doing nothing, basically allowing communities to take advantage of tax-exempt bonds and real estate tax abatements; creating tax preferences for the private sector to encourage the preservation of open space; or using state revolving funds to lend money to localities at no cost.

As mentioned briefly above, tax-credit bonds are basically a direct subsidy.¹⁷⁹ As such, a simpler approach would be to pay localities directly. The Joint Committee on Taxation explains as follows:

An alternative, direct expenditure program under direct control of the EPA would avoid the involvement of the IRS in the administration of a program outside its traditional area of expertise. Because potential purchasers of the bonds must educate themselves as to whether the bonds qualify for the credit, certain "information costs" are imposed on the buyer. Additionally, since the determination as to whether the bond is qualified for the credit ultimately rests with the Federal Government, further risk is imposed on the investor. These information costs and other risks serve to increase the credit rate and hence the costs to the Federal Government for a given level of support for environmental improvements. For these reasons, and the fact that tax credit bonds will be less liquid than Treasury securities, the bonds would bear a credit rate that is equal to a measure of the yield on outstanding corporate bonds. The direct payment of interest by the Federal Government on behalf of eligible issuers, which [is] economically the equivalent of the credit proposal, would be less complex, both as to the substantive tax law, and as to the administration of the tax law, because the interest could simply be reported like any other taxable interest.¹⁸⁰

Unfortunately for the EPA, it would be forced to police its own program. Frank Hoadley, Wisconsin's capital finance director, summed it up when he stated the following: "At the end of the day, you have to step back and say [the tax-credit bond program] is a federal grant program with

¹⁷⁹ See *supra* text accompanying note 64.

¹⁸⁰ JOINT COMMITTEE ON TAXATION, *supra* note 29, at 14.

a lot of technical rules. The same benefit could be done more simply as a grant program.”¹⁸¹

Another option is to do nothing. The tax-exempt bond market is already in place to ease the burden on local borrowing.¹⁸² There is a question as to why localities should be allowed to borrow for free. If the federal government stays out of the way, communities can undertake whatever projects they desire, even if the project fails to fall into the category of those projects the federal government desires. In addition, localities could offer real estate abatements to the private sector, allowing them to be in control of deciding which entities and which projects would qualify.

Similarly, the federal government could offer tax preferences to the private sector. A tax preference would give companies a financial incentive to convert idle land into preserves or parks. In addition, “[t]he Internal Revenue Code is [already] peppered with provisions to limit suburban development.”¹⁸³ The major flaw with federal tax preferences is that the localities are completely out of the loop. They would have no direct control of the program.

Finally, the State Revolving Funds (“SRFs”) could be used to provide interest-free loans to localities. SRFs “have already provided about \$30 billion in low-interest loans to localities, and have generated about \$12 billion in tax-exempt bonds” for clean water and drinking water projects.¹⁸⁴ James Smith, retired executive director of the Council of Infrastructure Financing Authorities and the driving force behind the creation of SRFs, stated the following:

[Y]ou can use [State Revolving Funds] to accomplish basically the same purpose as the administration has proposed with the Better America Bonds. You can give zero-interest loans through [State Revolving Funds], and what Better America Bonds would do presumably is to

¹⁸¹ Resnick, *supra* note 166.

¹⁸² See *supra* note 170.

¹⁸³ Andrea Foster, *It Ain't Easy Being Green, but Now Congress is Gearing Up to Assist*, NAT'L L.J., Nov. 8, 1999. Currently there are provisions for reductions in estate taxes for donation of conservation easements and for deductions for charitable contributions of land for conservation purposes, and the Brownfields Tax Incentive Act of 1997 allows owners of brownfields to expense currently the year's full cost of cleaning a site rather than capitalizing the cost and depreciating it over several years. See *id.*

¹⁸⁴ See Ola Kinnander, *Q&A: Mr. Smith Leaves Washington and Reflects on Public Finance*, THE BOND BUYER, Dec. 20, 1999, available at 1999 WL 29982365.

provide a low-cost level of financing for communities to buy and protect lands for environmental and recreational needs. You have a ready-made tool with [State Revolving Funds]. You don't have to go out into the bond market and try to create a whole new mechanism that hasn't really been tried yet—and there are questions about how efficient it would work.¹⁸⁵

Thus, through SRFs, a system is already in place to provide interest-free loans to communities.¹⁸⁶ In fact, many states are leveraging their SRF funds by issuing tax-exempt bonds and using the SRF money to pay the interest on the bonds, but the uses for the bond proceeds remain limited to the underlying uses of the SRF money, namely drinking water programs and wastewater programs.¹⁸⁷

If the allowed uses of the SRFs were expanded to include other environmental programs, or if new SRFs were created for environmental programs generally, the resulting program would possess the best quality of Better America Bonds (a deep subsidy), and overcome some of the key disadvantages of Better America Bonds. For instance, if the SRFs are leveraged by issuing tax-exempt bonds, the “deep subsidy” touted by the EPA¹⁸⁸ is preserved because the localities would use the SRF money to pay the bond interest. In addition, because the EPA would not be choosing the projects deemed worthy, the localities would retain control. Furthermore, the problems inherent in tax-credit bonds, such as the lack of a market and probability that the borrowing would not actually be tax free, are avoided.

¹⁸⁵ *Id.*

¹⁸⁶ State Revolving Funds referred to above are those that are funded by federal and state grants. There are currently two types: wastewater SRFs and drinking water SRFs. See Ola Kinnander, *Q&A: CIFA's New President Discusses Goals*, THE BOND BUYER, Nov. 16, 1998, available at 1998 WL 13147082. SRFs are used to provide low-interest loans to local governments for wastewater and drinking water facilities, and the repayments are returned to the SRFs so that the SRFs can operate in perpetuity. See Ola Kinnander, *EPA Takes Anti-Bond Stance*, THE BOND BUYER, Aug. 19, 1999, available at 1999 WL 19924864.

¹⁸⁷ See Ola Kinnander & Lynn Stevens Hume, *Board May Push for Expanded SRF Uses*, THE BOND BUYER, Sept. 25, 1998, available at 1998 WL 13145548.

¹⁸⁸ See *Better America Bonds*, *supra* note 19.

VII. CONCLUSION

Environmental goals such as enhancing and preserving open space, protecting and improving water quality, and cleaning up and finding new uses for brownfields are certainly worthy, important projects that should be encouraged. However, using Better America Bonds as the carrot is not the best method. There is already in place a program to provide localities with a method for borrowing interest free. SRFs would keep the control of environmental projects in the hands of localities without the hazards associated with tax-credit bonds. It is completely unnecessary to create a separate program to be overseen by at least two agencies of the federal government when better results can be reached by using SRFs. Better America Bonds should be scrapped in favor of an expanded State Revolving Fund program.