

MEMORANDUM

DATE: July 5, 2012
TO: Successor Agency Clients
FROM: Susan E. Bloch
RE: **AB 1484 – RDA Budget Trailer Bill**

This Memorandum provides a summary of key provisions of Assembly Bill 1484, the redevelopment budget trailer bill that was signed into law on June 27, 2012. The bill became effective immediately upon the Governor's signature.

PURPOSE/GOALS OF THE LEGISLATION

1. Require Successor Agencies to remit the residual balance calculated to be due to taxing entities from the December 2011 tax increment distribution, net of ROPS obligations for January through June, 2012. This payment is due July 12, 2012.
2. Require Successor Agencies to remit fund balances determined to be unobligated following comprehensive "Due Diligence Reviews" of housing and non-housing asset transfers that took place after January 1, 2011.
3. Require Successor Agencies to pay passthrough obligations due to taxing entities for Fiscal Year 2011-12.
4. Provide certain "safe harbors" upon compliance, subject to significant caveats discussed below.

IMMEDIATE REQUIREMENTS

1. Separate Legal Entity. The legislation establishes Successor Agencies as separate legal entities, distinct from the city, county or city and county that formed the

To: Memo to Successor Agency Clients
From: Susan E. Bloch
Re: AB 1484 – Redevelopment Budget Trailer Bill
Date: July 5, 2012
Page: 2

- redevelopment agency (the “Sponsoring Jurisdiction”).¹ Prior to any new Successor Agency action, the City Council or Board of Supervisors, as applicable, acting in its capacity as the legislative body of the Sponsoring Jurisdiction and acting in its capacity as the governing board of the Successor Agency, should adopt authorizing resolutions acknowledging the establishment of the Successor Agency and its separate legal existence. In addition, the governing board for the Successor Agency should adopt a resolution appointing officers, adopting procedures, and ratifying or affirming prior actions.
2. Payment of January - June Residual Balance. By July 12, 2012, the Successor Agency is obligated to pay the amount that the County auditor-controller determines is owed to the taxing entities for the period January through June 2012, based upon the December 2011 distribution of tax increment and the January – June 2012 ROPS.² Failure to pay amounts due by July 18, 2012 may subject the Sponsoring Jurisdiction and the Successor Agency to civil penalties equal to 10% of the amount due plus 1.5% for each month the payment is late.³ In addition, the legislation provides that until the amount determined to be due is paid: (i) the Successor Agency is not authorized to pay any obligations other than bond debt service, and (ii) the Sponsoring Jurisdiction will not receive sales and use tax scheduled to be distributed on July 18, 2012 or any subsequent payment, up to the amount determined to be due to the taxing entities.⁴
 3. Housing Asset Inventory. By August 1, 2012, the entity that assumed the housing functions of the former redevelopment agency (the “Housing Successor”) is required to submit to the Department of Finance (“DOF”), in DOF-approved format, a comprehensive listing of all housing assets that were transferred to the Housing Successor.⁵ The legislation provides an expanded definition of “housing assets” that includes properties acquired or restricted for use as affordable housing, loans and

¹ Health and Safety Code Section 34173(g). All references are to the California Health and Safety Code unless otherwise indicated.

² Section 34183.5(b)(2).

³ Section 34183.5(b)(2)(C). If the Successor Agency fails to pay the amount determined to be payable by July 12, 2012, DOF or any affected taxing entity may file a writ of mandate to require immediate payment. DOF may request the court to waive some or all penalties if DOF finds that the imposition of penalties will jeopardize the payment of enforceable obligations.

⁴ *Id.*

⁵ Section 34176(a)(2).

To: Memo to Successor Agency Clients
From: Susan E. Bloch
Re: AB 1484 – Redevelopment Budget Trailer Bill
Date: July 5, 2012
Page: 3

grants receivable, loan repayments, and rents and other income from operations.⁶ DOF may object to the transfer of any asset within 30 days.⁷ If, following a meet and confer, the Department continues to object, the asset must be returned to the Successor Agency.⁸ The Oversight Board must review and approve the transfer of any mixed-use assets, and may direct the allocation of mixed-use assets by dividing the property or imposing a revenue-sharing arrangement.⁹

NEW DEADLINES AND REQUIREMENTS FOR ROPS.

1. By September 1, 2012, the January- June 2013 ROPS, *in form approved by the Oversight Board*, must be submitted to the State Controller and DOF.¹⁰ Subsequent ROPS must be submitted to DOF and the County auditor-controller, in form approved by the Oversight Board, no less than 90 days prior to each property tax distribution date.¹¹ The ROPS must be transmitted to DOF electronically in the form required by DOF.¹²
2. The Sponsoring Jurisdiction is subject to a penalty in the amount of \$10,000 per day if any ROPS is not timely submitted.¹³ In addition, the Successor Agency's administrative cost allowance may be reduced by 25% if the ROPS is more than ten days late (i.e., by September 11, 2012 for the January-June 2013 ROPS).¹⁴
3. All draft ROPS must be concurrently distributed to the County administrative officer, the County auditor-controller, DOF, and the Oversight Board.¹⁵ The DOF review period is expanded under the legislation. DOF now has 45 days to complete its

⁶ Section 34176(e).

⁷ Section 34176(a)(2).

⁸ *Id.*

⁹ Section 34176(f).

¹⁰ Section 34177(m).

¹¹ *Id.*

¹² Section 34177(m)(1).

¹³ Section 34177(m)(2).

¹⁴ Section 34177(m)(2).

¹⁵ Section 34177(l)(2)(B).

To: Memo to Successor Agency Clients
From: Susan E. Bloch
Re: AB 1484 – Redevelopment Budget Trailer Bill
Date: July 5, 2012
Page: 4

- review. Within five business days following the Department’s determination, the Successor Agency may request a meet and confer to discuss disputed ROPS items.¹⁶
4. The County auditor-controller may also object to items on the ROPS, and may object to funding sources specified on the ROPS. These objections may be made either prior to or following submittal of the ROPS to the Oversight Board. County auditor-controller objections must be made by October 1, 2012 for the January-June 2013 ROPS, and by not later than 60 days prior to the applicable property tax allocation date for subsequent ROPS.¹⁷
 5. When an enforceable obligation provides for an irrevocable commitment of property tax revenue over time, a Successor Agency may petition DOF to provide written confirmation that its approval of such obligation is final and conclusive and reflects the Department’s approval of subsequent payments. If DOF provides such confirmation, then DOF’s review of such payments on future ROPS is limited to confirming that the payment is required by the enforceable obligation.¹⁸

PASSTHROUGH PAYMENTS FOR FY 2011-12

AB 1484 provides that if any passthrough payment obligation has not yet been paid to the taxing entities for fiscal year 2011-12, the County auditor-controller shall make such payments and shall reduce property tax allocations to the Successor Agency by the amount of such payments.¹⁹ Alternatively, the County auditor-controller may accept payments for such purpose from the Successor Agency’s reserve funds. If the County auditor-controller made passthrough payments to taxing entities for fiscal year 2011-12 on behalf of the redevelopment agency, then the County auditor-controller is to deduct from the next allocation of property tax revenue to the Successor Agency, the amount of such payments in an amount not to exceed one-half of the total passthrough payments owed for the 2011-12 fiscal year.²⁰

¹⁶ Section 34177(m).

¹⁷ Section 34182.5.

¹⁸ Section 34177.5(i).

¹⁹ Section 34183.5(a)(1).

²⁰ Section 34183.5(a)(2).

To: Memo to Successor Agency Clients
From: Susan E. Bloch
Re: AB 1484 – Redevelopment Budget Trailer Bill
Date: July 5, 2012
Page: 5

DUE DILIGENCE REVIEW AND PAYMENT OBLIGATIONS

1. The Successor Agency must hire a licensed accountant, approved by the County auditor-controller, to perform a “Due Diligence Review” of all housing and non-housing redevelopment agency and successor agency financial activities that took place between January 1, 2011 and June 30, 2012. The purpose of the review is to determine the unobligated fund balance that will be available for distribution to the taxing entities. An audit conducted by the County auditor-controller that complies with all of the new requirements imposed by AB 1484 may be used.²¹
2. The Due Diligence Review will establish the value of all assets transferred by the redevelopment agency to the Successor Agency and by either the redevelopment agency or the Successor Agency to the Sponsoring Jurisdiction, any other public entity, and any private party during the period January 1, 2011 through June 30, 2012.²² Evidence demonstrating the purpose of, and requirement for, each transfer will be required to document that each transfer was made pursuant to an enforceable obligation.²³ For the purposes of the Due Diligence Review, the legislation defines “transfer” to mean “the transmission of money to another party that is not in payment for goods or services or an investment or where the payment is *de minimus*.”²⁴

Funds that are legally restricted (e.g. grant funds, bond proceeds), contractually committed to enforceable obligations, necessary to pay current year ROPS obligations, and non-cash assets (e.g., land) are deducted from the total asset valuation in determining the amount available for distribution to the taxing entities.²⁵ Amounts that were transferred by the redevelopment agency or the Successor Agency to the Sponsoring Jurisdiction or to any other public or private party are added back if the transfer was not made pursuant to an enforceable obligation.²⁶

It should be noted that for the purpose of the Due Diligence Review, AB 1484 modifies the definition of “enforceable obligation” to exclude (with limited exceptions) agreements executed between a redevelopment agency and its Sponsoring

²¹ Section 34179.5(a).

²² Section 34179.5(c).

²³ Section 34179.5(b)(2).

²⁴ Section 34179.5(b)(3).

²⁵ Sections 34179.5(c)(5), 34179.5(c)(6).

²⁶ Section 34179.5(c)(6).

To: Memo to Successor Agency Clients
From: Susan E. Bloch
Re: AB 1484 – Redevelopment Budget Trailer Bill
Date: July 5, 2012
Page: 6

Jurisdiction.²⁷ Under Assembly Bill x1 26 (“ABx1 26”), such agreements were only excluded from the definition of enforceable obligation up until the dissolution of the redevelopment agency. Thus, although ABx1 26 permitted payments to be made pursuant to such agreements up until February 1, 2012, AB 1484 does not categorize transfers made pursuant to such agreements as enforceable in the context of the Due Diligence Review. Furthermore, AB 1484 modifies the definition of “city, county, and city and county” to include public agencies and other organizations that are controlled by the Sponsoring Jurisdiction.²⁸ Therefore, an agreement between a redevelopment agency and an entity that its Sponsoring Jurisdiction controls would not count as an enforceable obligation for the Due Diligence Review.

3. Housing Fund Review Deadlines.²⁹

October 1, 2012 Deadline for determination of the Low/Mod Housing Fund balance and submittal to the Oversight Board, the County Auditor-Controller, the State Controller and DOF.

October 15, 2012 Deadline for Oversight Board to hold a public hearing on the housing audit and submit its findings to DOF.

November 9, 2012 Deadline for DOF comments on Oversight Board findings.

Five business days after DOF determination (not later than November 16, 2012)

Successor Agency may contest DOF findings and request a meet and confer on the Housing Fund review by not later than 5 business days after the DOF determination.

Thirty days after request for meet and confer

If a meet and confer is requested, DOF has 30 days to confirm or modify its determination.

²⁷ Sections 34179.5(b)(2), 34171(d)(2). Compare the definition of “enforceable obligation” in Section 34167(d) which was applicable to redevelopment agencies prior to dissolution with the definitions in Section 34171(d)(1) and 34171(d)(2) which apply to Successor Agencies and to the Due Diligence Review.

²⁸ Section 34167.10.

²⁹ Section 34179.6(a) through 34179.6(f).

To: Memo to Successor Agency Clients
From: Susan E. Bloch
Re: AB 1484 – Redevelopment Budget Trailer Bill
Date: July 5, 2012
Page: 7

Five business days after final determination

Successor Agency must pay the Housing Fund balance to the County Auditor-Controller for distribution to the taxing entities.

4. Non-Housing Fund Review Deadlines.³⁰

December 15, 2012 Deadline for determination of the non-housing fund balance and submittal to the Oversight Board, the County Auditor-Controller, the State Controller and the Department of Finance.

January 15, 2013 Deadline for Oversight Board to hold a public hearing on the non-housing audit and submit its findings to DOF. Oversight Board may authorize Successor Agency to retain restricted and obligated funds and assets.

April 1, 2013 Deadline for DOF review of Oversight Board findings.

Five business days after DOF determination

Successor Agency may contest DOF findings and request a meet and confer on the non-housing fund review by not later than 5 business days after the DOF determination.

Thirty days after request for meet and confer

If a meet and confer is requested, DOF has 30 days to confirm or modify its determination.

Five business days after final determination

Successor Agency must pay the non-housing fund balance to the County Auditor-Controller for distribution to the taxing entities.

³⁰ *Id.*

To: Memo to Successor Agency Clients
From: Susan E. Bloch
Re: AB 1484 – Redevelopment Budget Trailer Bill
Date: July 5, 2012
Page: 8

5. Penalties for Failure to Pay Amounts Determined by Due Diligence Review.

If the Successor Agency fails to remit the amounts determined to be payable as a result of the Due Diligence Review by the specified deadlines, and is unable to recover funds that were transferred to other public agencies without an enforceable obligation, any public agency to which funds were transferred without an enforceable obligation may be subject to an offset of its sales and use or property tax allocations.³¹ In addition, if the Sponsoring Jurisdiction is performing the duties of Successor Agency, the Sponsoring Jurisdiction may be subject to an offset of its sales and use or property tax allocations.³² Alternatively, DOF may direct the County auditor-controller to deduct unpaid amounts from future allocations of property tax to the Successor Agency.³³ Furthermore, for funds transferred to private parties absent an enforceable obligation, the County auditor-controller and DOF may demand the return of funds, pursue collection actions, and charge a penalty and interest if the funds are not repaid within 60 days.³⁴

FINDING OF COMPLETION (“SAFE HARBOR”)

1. Issuance of Finding of Completion. After the Successor Agency pays (i) the housing fund balance as determined by Due Diligence Review, (ii) the non-housing fund balance as determined by Due Diligence Review, and (iii) the balance of any outstanding taxing entity passthrough obligations and residual payments, DOF will issue a Finding of Completion (“FOC”).³⁵
2. Repayment of City Loans. Upon issuance of an FOC, loans made by the Sponsoring Jurisdiction to the former redevelopment agency may be repaid if the Oversight Board finds that the loan was for a legitimate redevelopment purpose.³⁶ Repayment is subject to the following limitations: (i) interest is recalculated from the origination date at the Local Agency Investment Fund (LAIF) rate, (ii) payments may begin no earlier than the 2013-14 fiscal year, (iii) 20% of the repayment must be deposited into

³¹ Section 34179.6(h)(1)(A).

³² Section 34179.6(h)(1)(C).

³³ Section 34179.6(h)(2). DOF may agree to an installment plan if it determines that payment of enforceable obligations would otherwise be jeopardized.

³⁴ Section 34179.6(h)(1)(B).

³⁵ Section 34179.7.

³⁶ Section 34191.4(b)(1).

To: Memo to Successor Agency Clients
From: Susan E. Bloch
Re: AB 1484 – Redevelopment Budget Trailer Bill
Date: July 5, 2012
Page: 9

a restricted housing set-aside fund, (iv) the annual repayment amount is limited to the amount which, together with repayment of SERAF loans and deferred deposits to the Low- and Moderate-Income Housing Fund, is equal to one-half of the amount of the residual payment to the taxing entities (i.e., the residual amount payable to the taxing entities after the “waterfall” of payments (County auditor-controller expenses, passthrough payments, enforceable obligations, administrative budget)) above such amount paid in 2012-13 , and (v) repayment of sums owed to the Low- and Moderate-Income Housing Fund for SERAF loans have priority for payment.³⁷

3. Use of Pre-2011 Bond Proceeds. Upon issuance of an FOC, the proceeds of bonds issued prior to December 31, 2010 may be used for purposes consistent with the bond covenants. Obligations to be paid with bond proceeds that exceed the amount for approved enforceable obligations must be separately listed on the ROPS, and thus are subject to review by the Oversight Board and the DOF.³⁸
4. Property Management Plan. Upon receiving an FOC, the Successor Agency may prepare a long-range property management plan that addresses the disposition and use of real property assets.³⁹ The plan must be prepared and submitted to the Oversight Board and DOF within six months after issuance of the FOC.⁴⁰ The plan must include a detailed inventory documenting for each property the date of acquisition, the value at acquisition and the current estimated value, the purpose for the acquisition, the income generated by the property, any history of contamination and remediation, a description of the property’s potential for transit-oriented development and the advancement of planning objectives, and the history of prior development proposals.⁴¹

Use of Properties. The plan must address the use or disposition of all properties, which may include: (i) retention of property for governmental use, (ii) retention of the property for future development (iii) sale of the property, (iv) use of the property to fulfill an enforceable obligation.⁴² For properties that are not to be used for

³⁷ Section 34191.4(b).

³⁸ Section 34191.4(c).

³⁹ Section 34191.5(b).

⁴⁰ *Id.*

⁴¹ Section 34191.5(c)(1).

⁴² Section 34191.5(c)(2).

To: Memo to Successor Agency Clients
From: Susan E. Bloch
Re: AB 1484 – Redevelopment Budget Trailer Bill
Date: July 5, 2012
Page: 10

governmental purposes or to fulfill an enforceable obligation, the following rules apply:

(A) the property shall be transferred to the Sponsoring Jurisdiction if the property management plan directs the property to be used or sold for a “project identified in an approved redevelopment plan.”⁴³

(B) sale proceeds are to be distributed to the taxing entities if the property management plan directs the property to be sold or directs that lease or other revenue generated by the property is to be used for any purpose other than to fulfill an enforceable obligation or for a project identified in an approved redevelopment plan.⁴⁴

(C) the property shall not be transferred to the Successor Agency or the Sponsoring Jurisdiction unless the property management plan has been approved by the Oversight Board and the DOF.⁴⁵

ADDITIONAL PROVISIONS

1. Annual Audit. An agreed upon procedures audit of the Successor Agency, commissioned by the County Auditor Controller, is to be completed by October 1, 2012. This audit is in addition to the housing fund and non-housing Due Diligence Reviews.⁴⁶ In addition, the Successor Agency is to cause an audit of the Successor Agency’s financial transactions and records to be conducted at least annually by a certified public accountant.⁴⁷
2. Public Purpose Properties. The Oversight Board may authorize the transfer of public purposes properties to the Successor Agency or other public entity for which a public facility was constructed.⁴⁸ This action may only be authorized at a public meeting held by the Oversight Board following 10 days’ public notice.⁴⁹ In addition, the

⁴³ Section 34191.5(c)(2)(A).

⁴⁴ Section 34191.5(c)(2)(B).

⁴⁵ Section 34191.5(c)(2)(C).

⁴⁶ Section 34182.

⁴⁷ Section 34177(n).

⁴⁸ Section 34181(a).

⁴⁹ Section 34181(f).

To: Memo to Successor Agency Clients
From: Susan E. Bloch
Re: AB 1484 – Redevelopment Budget Trailer Bill
Date: July 5, 2012
Page: 11

Department of Finance may extend its review period for public purpose transfers to 60 days.⁵⁰ The legislation creates an ambiguity in that Sections 34177(e) and 34181(a) authorize the transfer of public purpose properties with Oversight Board approval, while Section 34191.5(c)(2)(C) provides that property shall not be transferred to a Successor Agency, a city, county, or city and county, unless a property management plan has been approved by the Oversight Board and DOF. Since Sections 34177(e) and 34181(a) provide specific authority for the transfer of public purpose properties subject to Oversight Board approval and DOF's subsequent review, it is reasonable to interpret these provisions to permit such transfers in advance of approval of the property management plan. Section 34191.3 (discussed in the following paragraph) provides further support for this interpretation.

3. Land Disposition. AB 1484 suspends the “forced disposition” provisions of Section 34177(e) (which provides for disposition to be undertaken “expeditiously and in a manner aimed at maximizing value”). Instead, the legislation provides that upon issuance of a Finding of Completion, a Successor Agency may develop a property management plan, subject to Oversight Board and DOF approval as described above. Section 34191.3 provides that until DOF approves a property management plan, the requirements of Sections 34177(e) and 34181(a) (providing that the Oversight Board shall direct the Successor Agency to dispose of assets) shall be suspended except with regard to transfers for governmental use. Although this provision could be interpreted to mean that all transfers other than governmental purpose transfers are suspended pending issuance of a Finding of Completion and approval of the property management plan, arguably, a Successor Agency that wishes to voluntarily convey certain properties in advance of approval of a property management plan may do so, provided that the Oversight Board approves and DOF does not object.
4. Amended and Restated Agreements. AB 1484 restricts the ability of a Successor Agency to re-enter into agreements with its Sponsoring Jurisdiction if DOF has previously rejected the items to be funded by such agreements, unless such obligations are permitted by court order or as a result of a meet and confer process with DOF.⁵¹ The legislation specifically prohibits reauthorization of Sponsoring Jurisdiction loan agreements except as permitted pursuant to the Finding of Completion process.⁵² In addition, the legislation provides that any actions to re-

⁵⁰ *Id.*

⁵¹ Section 34178(a).

⁵² Sections 34180(a), 34180(h).

To: Memo to Successor Agency Clients
From: Susan E. Bloch
Re: AB 1484 – Redevelopment Budget Trailer Bill
Date: July 5, 2012
Page: 12

establish any other agreements in furtherance of enforceable obligations with the Sponsoring Jurisdiction are invalid until they are included on an approved ROPS.⁵³ Thus, the status of amended and restated cooperative agreements and funding agreements executed in reliance upon Section 34178(a) (authorizing re-entry into agreements with Oversight Board approval) is in question.

5. Affiliated Entities. AB 1484 expands the definition of “city, county or city and county” to include other public entities and organizations that are controlled by the Sponsoring Jurisdiction.⁵⁴ This would enable the State Controller to unwind transfers to such entities pursuant to the “clawback” provisions of the statute.⁵⁵ As noted above, this change in definition also causes agreements between redevelopment agencies and entities controlled by their Sponsoring Jurisdiction to be excluded from the definition of enforceable obligation in the context of the Due Diligence Reviews.
6. Additional Clawback Provisions. In addition to the ABx1 26 clawback provision directing the State Controller to unwind transfers that took place between redevelopment agencies and public entities after January 1, 2011 unless subject to contractual third-party commitments, AB 1484 includes additional clawback provisions. One directs the State Controller to unwind transfers that Successor Agencies undertook if not pursuant to an enforceable obligation on an approved ROPS.⁵⁶ A second provision states that Successor Agencies lack authority to, and shall not, transfer any powers or revenues to any public or private party except pursuant to an enforceable obligation on an approved ROPS, declares such transfers to be void, directs the Successor Agency to reverse such transfers, and provides that the State Controller may review and order the return of revenues or other items of value.⁵⁷
7. Bond Proceeds; Contractual Obligations. As described above, AB 1484 contains language permitting Successor Agencies to spend the proceeds of pre-2011 bonds under certain circumstances following issuance of a Finding of Completion, but similar authority is not provided for bonds issued after January 1, 2011. The statute still provides that “bond proceeds shall be used for the purposes for which the bonds

⁵³ Section 34180(h).

⁵⁴ Section 34167.10.

⁵⁵ See Section 34167.5.

⁵⁶ Sections 34167.5, 34178.8.

⁵⁷ Section 34177.3(c).

To: Memo to Successor Agency Clients
From: Susan E. Bloch
Re: AB 1484 – Redevelopment Budget Trailer Bill
Date: July 5, 2012
Page: 13

were sold unless the purposes can no longer be achieved, in which case, the proceeds may be used to defease the bonds.”⁵⁸ Although an argument can be made that this permits 2011 bond proceeds to be used pursuant to the requirements set forth in an indenture or other enforceable obligation, it should be noted that the legislation imposes additional constraints upon Successor Agency activities. For example, new Section 34177.3(a) provides that (with limited exceptions pertaining to the windup of its affairs) a Successor Agency may not create new enforceable obligations or begin new redevelopment work except in compliance with an enforceable obligation that existed prior to June 28, 2011, and Section 34177.3(c) provides that Successor Agencies may not transfer any powers or revenues to any other public or private party except pursuant to an enforceable obligation on an approved ROPS.

8. Housing Bond Proceeds. AB 1484 permits the proceeds of housing bonds issued prior to December 31, 2010 to be used by the housing successor entity even if the proceeds have not yet been encumbered for an enforceable obligation.⁵⁹ Proposed expenditures must be listed on a ROPS, and are subject to review by the Oversight Board and the DOF; provided however, such review is limited to a determination that the proposed use is consistent with the bond covenants and that sufficient bond proceeds are available.⁶⁰ The Housing Successor must notify the Successor Agency of requests to include expenditure of housing bond proceeds on the ROPS at least 20 days prior to the deadline for submittal of the ROPS to the Oversight Board.
9. Administrative Budget Allowance. Litigation expenses, property management expenses incurred prior to disposition, and project-specific employee costs are excluded from the administrative budget cap.⁶¹ AB 1484 provides the Oversight Board with authority to reduce the administrative budget below the minimum \$250,000 amount allowable under the statute.⁶²
10. Statute of Limitations. Under ABx1 26, the time period within which a legal action could be brought to challenge redevelopment agency and legislative body findings and determinations (as well as challenges to the issuance of bonds and the adoption of redevelopment plans and amendments) was extended to a period of two years for

⁵⁸ Section 34177(i).

⁵⁹ Section 34176(g)(1)(A).

⁶⁰ Section 34176(g)(1)(B).

⁶¹ Section 34171(d)(1)(F).

⁶² Section 34171(b).

To: Memo to Successor Agency Clients
From: Susan E. Bloch
Re: AB 1484 – Redevelopment Budget Trailer Bill
Date: July 5, 2012
Page: 14

actions taken after January 1, 2011. AB 1484 provides that this time period extends until DOF issues a Finding of Completion. Once a Finding of Completion is issued, the challenge period reverts to the 90-day period that was in effect prior to ABx1 26.

11. Refunding Bonds. AB 1484 provides increased flexibility permitting the issuance of refunding bonds in order to reduce financing costs, subject to Oversight Board approval.⁶³
12. Oversight Board Actions. Oversight Board actions must be taken by resolution.⁶⁴ Written notice of all Oversight Board actions must be provided to DOF in the manner prescribed by DOF.⁶⁵ Oversight Board actions are not effective for five business days pending a DOF request for review, and DOF has a 40-day period to conduct review if requested.⁶⁶

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⁶³ Section 34177.5.

⁶⁴ Section 34179(e).

⁶⁵ Sections 34179(h).

⁶⁶ *Id.*