

# IRS REVISED FORM 990 SCHEDULE K WEBINAR

Presented by

The Connecticut Health and Educational Facilities  
Authority

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Delafield  
& Wood

Attorneys and  
Counsellors at Law

Hawkins Delafield & Wood LLP



Robinson & Cole LLP



# Overview

- Review the origin of Schedule K and IRS efforts to ensure post-issuance compliance with tax-exempt bond issuance
- Explore Private Business Use compliance in depth
- Review IRS Form 990 filing requirements
- Look at IRS suggested guidelines for a post-issuance bond compliance procedures and record retention practices
- Supplement: Completing Schedule K in depth



# Agenda

- INTRODUCTION
  - Background
  - IRS Enforcement Efforts
- PRIVATE BUSINESS USE
  - Revised IRS Form 990 & Schedule K
  - Private Business Use Compliance
- POST-ISSUANCE COMPLIANCE
  - Schedule K Filing Requirements
  - Post-Issuance Compliance Program
- RELIEF FROM VIOLATIONS
- SUPPLEMENT: IRS FORM 990 - SCHEDULE K
  - Completing Schedule K in Detail
- QUESTION & ANSWER



# INTRODUCTION

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# BACKGROUND

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- The requirement that 95 percent of the proceeds of a qualified 501(c)(3) bond be used for qualified costs has been in place since the effective date of the Tax Reform Act of 1986.
- This requirement applies to limit the use of assets financed with the proceeds of qualified Tax-Exempt Bonds to purposes that are in furtherance of the Borrower's 501(c)(3) exemption, as long as the Tax-Exempt Bonds are outstanding, including refunding bonds, if any.



# BACKGROUND (cont'd)

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- In 1997 the IRS enacted regulations defining and describing private activity measurement tests.
- Prior to the enactment of such regulations, unqualified use was measured on the basis of a “snap shot”. The measurement period rules established that qualified use is to be determined over a continuum of time, commencing on the later of the date the bonds are issued or the date the facility is placed in service and ending on the earlier of the date the economic life of the asset is exhausted or the date the bonds, including any refunding bonds, in respect of the asset have been retired.



# BACKGROUND (cont'd)

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- The continuing compliance requirement has been observed more often in the breach.
- The use of facilities financed with the proceeds of a qualified Section 501(c)(3) bond issue has typically not been revisited, except in the case of a refunding or a compliance audit.



# IRS ENFORCEMENT EFFORTS

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- As part of its general activities in respect of the area of Tax-Exempt Bonds, the IRS embarked on a project intended to elicit information regarding ongoing compliance by 501(c)(3) organizations with the statutorily imposed use requirements and limitations.
- In September of 2007 the IRS sent approximately 200 questionnaires regarding post-issuance compliance to 501(c)(3) organizations, beneficiaries of tax-exempt bond issues.



# IRS ENFORCEMENT EFFORTS (cont'd)

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- The Questionnaire Noted: “The Tax-Exempt status of qualified 501(c)(3) bonds remains throughout the life of the bonds if all applicable federal laws are satisfied while the bonds are outstanding.
- “To comply with these and any other applicable federal tax requirements, issuers and 501(c)(3) organizations must ensure that the rules are met at the time the bonds are issued and throughout the term of the bonds.



# IRS ENFORCEMENT EFFORTS (cont'd)

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- “Generally, this includes continued maintenance of records sufficient to establish compliance with all applicable federal tax requirements until three years after the final maturity date of the bonds” including refunding bonds.
- The first question asked:
- “Do you have written procedures or guidelines that qualified 501(c)(3) bond financings remain in compliance with the following federal tax requirements after the bonds are issued:
  - A. Proper and timely use of bond proceeds and bond-financed property?
  - B. Arbitrage yield restriction and rebate?
  - C. Timely return filings and other general requirements?
- For each yes answer, briefly describe your procedures and guidelines.”



# IRS ENFORCEMENT EFFORTS (cont'd)

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- The procedures and guidelines alluded to in the questionnaire are generally set forth in the borrower's tax compliance certificate entered into when the Tax-Exempt bonds are issued; however, the IRS does not consider this responsive to the question.
- Most of the organizations that responded did not really have procedures or guidelines (other than those in the tax certificate) in place to ensure the required continuing compliance.



# PRIVATE BUSINESS USE

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# REVISED IRS FORM 990 - SCHEDULE K

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- Schedule K of the revised Form 990 serves to compel 501(c)(3) organizations to establish procedures and guidelines sufficient to respond to the questions regarding private business use, (Part III) and arbitrage rebate (Part IV).



# REVISED IRS FORM 990 - SCHEDULE K - (cont'd)

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- Questions relative to Private Business Use in Part III include:
  - Was the organization a partner in a partnership or a member of an LLC which owned property financed by Tax-Exempt Bonds?
  - Are there any lease arrangements with respect to the bond-financed property which may result in a private business use?



# REVISED IRS FORM 990 - SCHEDULE K - (cont'd)

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- Are there research agreements with respect to the bond-financed property which may result in a private business use?
- Provide the percentage of bond-financed property used in a private business use.
- Does the organization routinely engage counsel to review management contracts and/or research arrangements?
- Has the organization adopted management practices and procedures to ensure the post-issuance compliance?



# PRIVATE BUSINESS USE COMPLIANCE

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- The answers to these questions and the arbitrage questions set forth in Part IV of Schedule K require a review of how the proceeds of a bond issue were actually spent.
- At initial issuance (and in connection with a refunding), bond counsel undertake a due diligence review by means of a due diligence questionnaire.
- The due diligence questionnaire asks questions about the intended use of bond proceeds in terms of the timing of expenditures, including reimbursement of project costs paid prior to the issue date of the bonds, and investment earnings on bond proceeds pending the expenditure thereof for qualified project costs.



# PRIVATE BUSINESS USE COMPLIANCE

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- The due diligence questionnaire also elicits questions regarding the anticipated use of the bond financed facilities in terms of private business uses and unrelated trade or business uses. The questions seek to both identify and quantify such uses.
- The due diligence questionnaire identifies other sources of money required to be accounted for in respect of the assets to be financed with the Tax-Exempt Bond proceeds. Such other amounts may be available as a consequence of institution fund raising efforts, grants from private or governmental sources, and unsolicited gifts.



# PRIVATE BUSINESS USE COMPLIANCE

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- For purposes of demonstrating actual compliance with these requirements, we would recommend a review of the expenditure of bond proceeds of each issue of which a Borrower is the Beneficiary
  - The two percent cost of issuance limitation,
  - The debt service reserve fund deposit limitation, and
  - The requirement that at least 95 percent of the proceeds of the issue has been spent on assets that have been, are being and will be used in a manner that is in furtherance of the borrower's exempt purposes, including any working capital use.
  - Such review should also demonstrate the borrower's ability to comply with a spending exception to rebate or the borrower's obligation to pay a rebate liability, if any.



# PRIVATE BUSINESS USE COMPLIANCE

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- Once the use of proceeds analysis has been completed, the borrower should also seek to identify the amount of bond proceeds, including investment earnings, represented by each asset financed, including whether any other amounts, borrower equity or charitable contributions (solicited or unsolicited) or grants have been applied to the total cost of the asset. Moreover, the borrower should record where monies other than the proceeds of Tax-Exempt Bonds have been allocated.



# PRIVATE BUSINESS USE COMPLIANCE

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- The borrower should record the placed-in-service date and the economic life of the asset as the “measurement period” during which the private or unrelated trade or business use limitations apply rely on information regarding these two pieces of information.



# PRIVATE BUSINESS USE COMPLIANCE

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- The borrower should review the ownership of the asset, as well as the use of the asset pursuant to any:
  - Leases
  - Management Contracts
  - Service Agreements
  - Vending machines, including laundry and cell towers
  - Private Physicians
  - Any other access to the asset(s) by persons other than persons who comprise borrower staff, employees, residents, students, patients, etc., as the case may be
  - Unrelated trade or business use



# PRIVATE BUSINESS USE COMPLIANCE

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- Use of infrastructure improvements financed with Tax-Exempt Bond proceeds will involve an examination of the use of buildings and structures served by such improvements.
- Measurement of private or unrelated business use depends on the amount of Tax-Exempt Bond proceeds of an issue is associated with the cost of the asset.



# PRIVATE BUSINESS USE COMPLIANCE

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- Use is measured by the methodology that best represents the benefit derived by the private or unrelated trade or business use:
  - Square Footage
  - Time
  - Fair Market Value
- The IRS default measurement criteria, under currently proposed regulations, is fair market value.



# PRIVATE BUSINESS USE COMPLIANCE

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- Exceptions to private business use:
  - De minimis use (Vending machines, phone booths)
  - Satisfaction of safe harbor guidelines Rev. Proc. 97-13 for management contracts, Rev. Proc. 2007-47 sponsored research contracts
  - Qualified building improvements (available only to the extent there is no mortgage on the property securing the payment of debt service on the bonds)
  - Short-term use exceptions
- These exceptions do not apply in respect of situations involving unrelated trade or business activities.



# POST-ISSUANCE COMPLIANCE

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# SCHEDULE K FILING REQUIREMENTS



- Form 990 is generally required to be filed by the 15<sup>th</sup> day of the 5<sup>th</sup> month after the fiscal year end (i.e., 02/15 for FYE 9/30)
  - Extensions can be permitted
- Required if Form 990, Part IV, Line 24a is checked "Yes" - indicating outstanding tax-exempt bonds issued after 12/31/2002 with \$100,000 or more outstanding
- Schedule K must be completed in full for fiscal year 2009
  - Part III and Part IV are optional for 2008
- Start early this year
  - Different information is required
  - May need to consult with CHEFA or bond counsel to complete



# BOND ISSUE FILING REQUIREMENTS



- Tax-exempt bonds issued after 12/31/2002 with a balance of \$100,000 or greater on the last day of the tax year in question
- For bonds issued after 12/31/2002 to refund bonds issued before 01/01/2003, Part III, Private Business Use, is not required
- Any bond issues with post-2002 changes that trigger a “reissuance” and a new “issue date” must be reported
  - Liquidity replacements, document amendments, mode changes (i.e. auction rate to variable rate)
- Must identify which bond issues are separate for tax purposes and list them individually



# COMPLIANCE PROGRAM



- Adopt a formal post-issuance compliance program
- IRS Form 14002 for governmental bonds provides guidance for post-issuance bond compliance procedures and record retention practices
- Adopt procedures for:
  - Record retention
  - Compliance monitoring
  - Private Business Use
    - Use of bond proceeds
    - Use of bond financed property
  - Arbitrage rebate
    - Timely expenditure of bond proceeds
- Assign personnel responsible for post-issuance compliance
  - Provide specialized ongoing training and education of personnel



# RECORD KEEPING INCLUSIONS



- Period of time for retention of documents
- Format (paper, electronic, etc.)
- Types of records
  - Tax returns
  - Financial statements
  - Bond transcripts
  - Bond resolutions and minutes of Board meetings
  - Trustee statements
  - IRS correspondence



# ONGOING MONITORING



- Investment earnings
  - Investment agreements, bidding documentation
- Arbitrage matters
  - Computations of bond yield, rebate, yield reduction payments
  - Forms 8038-T
- Expenditures
  - Allocation of proceeds to specific property, issuance costs, reimbursement of expenditures prior to bond issue
  - Allocation of proceeds to issuance costs
  - Requisitions, invoices, draw schedules
- Private Business Use
  - Management and service contracts
  - Research contracts
  - Ownership documents, leases, naming rights
  - Partnerships, joint ventures



# RELIEF FROM VIOLATIONS



- Schedule K identifies tax issues which require continuing compliance for the life of a bond issue
  - Consistency is key
  - Failure to comply may affect tax exemption of interest retroactive to date of issuance
- Treasury regulations provide “remedial actions” to cure some tax law violations
  - May require redemption of bonds or other specific use of disposition proceeds
- IRS also offers a Voluntary Closing Agreement Program (VCAP)
  - Allows issuer (CHEFA) to negotiate settlement on borrower’s behalf
  - Interest on bonds may remain tax-exempt
  - IRS terms more reasonable prior to discovery of violation during an audit
- Consult CHEFA or your counsel to answer questions you are not sure about



# SUPPLEMENT: IRS FORM 990 - SCHEDULE K

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# PART I: BOND ISSUES



- Information found on IRS Form 8038

- a) Issuer name: Part I, Line 1

<b>Part I</b> Reporting Authority	
1 Issuer's name	
State of Connecticut Health and Educational Facilities Authority	

- b) Issuer EIN: Part I, Line 2

2 Issuer's employer identification number	
06	0806186

- c) CUSIP #: Part I, Line 8

8 CUSIP number	
20074UYV1	

- d) Date issued: Part I, Line 6

6 Date of issue	
May 22, 2008	

- e) Issue price: Part III, Line 21(b)

<b>Part III</b> Description of Bonds (Complete for th		
	(a) Final maturity date	(b) Issue price
21	July 1, 2038	\$ 49,782,265



# PART I: BOND ISSUES (cont'd)



- (f) Description of Purpose:
  - Purpose of bond issue, not projects
  - Examples:
    - Construct all or a portion of a hospital, a dormitory, athletic facility, etc.
    - Refund prior issue (include date of issue - IRS Form 8038, Part VI, Line 36)

36 Enter the date(s) the refunded bonds were issued ►

Series A - Oct. 7, 1998: Series B - Feb. 11, 2004

- Description included in Tax Regulatory Agreement/Tax Certificate (Appendix)
- Schedule O for additional space



# PART I: BOND ISSUES (cont'd)



- (g) Defeased - Yes/No
  - Has entire issue been defeased ?
  - May trigger an arbitrage rebate payment (see Part IV: Arbitrage)
- (h) On behalf of issuer ?
  - rare, generally "No"
  - For CHEFA borrowers, answer is "No"



## PART II: PROCEEDS



- IRS “fishing” to determine if there are unexpended bond proceeds outstanding violating tax rules
- (1) Proceeds: Sale proceeds less amounts deposited in a Reserve Fund (item 2) and used for refunding (item 3)
  - Reserve funds may be funded from other sources
  - Only account for Bond Proceeds



## PART II: PROCEEDS (cont'd)



- (4) Other unspent proceeds ?
  - Construction Account moneys ?
    - 2 year spending requirements
    - 3 year temporary period
  - Costs of Issuance Account moneys ?
    - 2 year spending requirement
    - CHEFA strives to close this account in 6 months
  - Capitalized Interest Account moneys ?
    - 3 year maximum



## PART II: PROCEEDS (cont'd)



- (5) Issuance costs from proceeds ?
  - Limited to 2% of issue price, IRS Form 8038, Part IV, Line 24
  - Some COI may have been paid by Institution
- (6) Working capital expenditures from proceeds ?
  - Rare, operating expenses
- (7) Capital expenditures from proceeds ?
  - Typical use of proceeds
- (8) Year of substantial completion ?
  - Degree of completion for intended level of use
  - Focus on the **date** of substantial completion for your records, though this form only requests the year



# PART II: PROCEEDS (cont'd)



- (9) Current refunding issue: proceeds used to refund prior issue within 90 days or less of issue date of refunding bonds

- IRS Form 8038, Part IV, Line 27

27	Proceeds used to currently refund prior issue (complete Part VI) . . . .	27	17,954,173
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- (10) Advance refunding issue: escrow for refunding outstanding longer than 90 days

- IRS Form 8038, Part IV, Line 28

28	Proceeds used to advance refund prior issue (complete Part VI) . . . .	28	N/A
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- (11) Final allocation of proceeds: no proceeds left except reserve funds

- Tax rules allow final allocation not later than 18 months after later of date of payment or date project is placed in service, but not later than 60 days after 5<sup>th</sup> anniversary of issue date

- (12) Adequate books and records

- Answering "No" would be a red flag for the IRS



# PART III: PRIVATE BUSINESS USE



- (1) Partner or member of LLC owning bond-financed property ?
  - Generally “no”
- (2) Lease of bond-financed property ?
  - Generally results in Private Business Use
- (3a) Management/Service Agreements ?
  - Only for tax-exempt bond-financed property
  - “Yes” even if complies with Rev. Proc. 97-13
  - Rev. Proc. 97-13 requirements in TRA



## PART III: PRIVATE BUSINESS USE (cont'd)



- (3b) Research Agreements ?
  - Only for bond-financed property
  - "Yes" even if complies with Rev. Proc. 2007-47
- (3c) Bond counsel or other counsel review ?
  - Consult CHEFA or borrower's counsel



## PART III: PRIVATE BUSINESS USE (cont'd)



- (4) PBU% - other than 501(c)(3)'s or state or local government
  - Bookstore, food service, summer camp contracts
- (5) Unrelated trade or business use %
  - Use by 501(c)(3)'s, but not for exempt purpose
- (6) Line 4 plus Line 5 limited to 5%
  - Including 2% COI (Schedule K, Part II, Line 5)
- (7) Post-issuance compliance procedures ?
  - Most organizations have yet adopted procedures
  - Strive to answer "Yes" in the future



# PART IV: ARBITRAGE



- (1) Form 8038-T:
  - Used to pay arbitrage rebate or yield reduction payments
  - Generally filed every 5 years after issue date, if required
  - May not be required if no arbitrage rebate liability
  - Refunding an entire issue may trigger a rebate calculation and possibly payment
  - CHEFA staff monitors arbitrage rebate compliance and submits payments on behalf of its clients
- (2) Variable rate issue
  - IRS Form 8038, Line 21(e) Yield
    - Marked "VR" or "Variable" or contains a % if a fixed rate issue
- (3a) Hedge: interest rate swap; cap; floor
  - Only if hedge is "integrated" with the bond issue and recorded/identified by CHEFA
  - List name of provider and term of hedge



# PART IV: ARBITRAGE (cont'd)



- (4a) GIC: Investment agreement
  - CHEFA typically bids fund reinvestments post-issuance
  - GIC may have been used for a refunding escrow
  - List name of provider and term of GIC
  - Compliance with "3 bid" safe harbor
    - CHEFA policy complies with safe harbor
- (5) Investments beyond temporary periods
  - 3-year construction period
  - Subject of recent IRS examination at CHEFA (Construction funds open greater than 5 years)
  - IRS trying to identify possible yield reductions payments due



## PART IV: ARBITRAGE (cont'd)



- (6) Rebate exceptions:
  - 6 months
    - 95% in 6 months, 100% in one year
  - 18 months
    - 15% in 6 months; 60% in one year; 100% in 18 months
  - 24 months for construction issues
    - 10% in 6 months; 45% in one year; 75% in 18 months; 100% in 2 years
  - Special rules; de minimis, other exceptions
  - Requirements and procedures in TRA



# Circular 230 Disclosure

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# QUESTIONS & ANSWERS

THANK YOU!



# Presenter



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Attorneys and  
Counselors at Law

- MICHELA DALIANA, Partner - Hawkins Delafield & Wood LLP
- Ms. Daliana joined Hawkins Delafield & Wood LLP in 1987 and became a partner in the firm's tax department in 1995. She has performed research involving the structuring of new issues, acquisitions, refundings, advance refundings and certificates of participation under the Code in connection with her participation in the representation of underwriters, borrowers, and issuers. Ms. Daliana was the lead tax partner involved in the Metropolitan Transportation Authority's record-breaking \$17.3 billion debt restructuring, successfully accomplished in 2002 through 2004, including numerous escrow restructurings of that debt. She was also lead tax partner for the multi-state combination of three healthcare delivery systems into Catholic Health East in 1998, during which engagement, she developed a tax position that successfully withstood an IRS audit and was coopted, in part, into proposed Treasury Regulations governing the area of acquisitions effected with the proceeds of tax-exempt bonds when the acquired facility was originally financed by the seller with the proceeds tax-exempt bonds. Ms. Daliana has participated in transactions involving the issuance of governmental obligations for numerous localities in the States of New York, New Jersey, New Hampshire, Oklahoma and Connecticut. Ms. Daliana has successfully pursued voluntary closing agreements with the IRS, as well as represented issuers and conduit borrowers in IRS audits. She has chaired workshops on private activity bond rules and has participated on Treasury Regulation, build America bonds and other comment task forces under the auspices of the National Association of Bond Lawyers.
- Ms. Daliana is a member in good standing of the New York State Bar. She is also a member of the American Bar Association and the National Association of Bond Lawyers. Ms. Daliana received a B.S.F.S. from Georgetown University, her J.D. from New York Law School cum laude; and her LL.M. (Taxation) from New York University.



# Presenter



- DAVID M. PANICO, Partner - Robinson & Cole LLP
- Chair of the Robinson & Cole LLP, Public Finance Practice Group. His practice focuses on representing State and municipal governments in the issuance of tax-exempt and taxable general obligation bonds and notes. Mr. Panico also represents issuers, borrowers, underwriters, credit facility providers and investors in structuring and documenting revenue bond issues for healthcare and higher education facilities, gaming and governmental projects for Indian tribal governments, sports arenas, parking garages, recreation projects, affordable housing, and assisted living and continuing care facilities.
- Mr. Panico began his career advising clients regarding tax law applicable to tax-exempt obligations and continues to advise clients on the tax aspects of issuing, refunding and restructuring tax-exempt debt. His tax experience includes advising clients on the use of interest rate swap agreements for new money and refunding transactions (including rate locks, swaptions and super-integrated hedges), arbitrage rebate liability, changes in use of bond-financed facilities, and restructuring tax-exempt obligations due to financial distress. He also advises issuers and financial institutions on statutory and tax law applicable to investments of bond proceeds and general fund moneys.
- Mr. Panico has written on and presented various public finance topics, including financing economic development projects, qualified 501(c)(3) bonds, Indian tribal government finance, arbitrage rebate, IRS audits, clean renewable energy bonds (CREBs), tax increment financing (TIF), and new market tax credits. Mr. Panico has authored comments which have been incorporated into Treasury Regulations. He is the author of the article *Survey of the Final Arbitrage Regulations*, published in The Urban Lawyer, an American Bar Association publication.
- Mr. Panico is a member of the National Association of Bond Lawyers, the Government Finance Officers Association and the Tax Sections of the American and Connecticut Bar Associations. Prior to joining Robinson & Cole, Mr. Panico was a certified public accountant with Ernst & Whinney and is a member of the American Institute of Certified Public Accountants and the Connecticut Society of Certified Public Accountants. He received his B.S. from Fairfield University and his J.D., with honors, from the University of Connecticut School of Law.

