

# **TREASURY BOARD OF THE COMMONWEALTH OF VIRGINIA**

## **Post-Issuance Compliance Policy for Tax-Exempt Qualified Obligations**

### **Statement of Purpose**

This Post-Issuance Compliance Policy (the “Policy”) sets forth specific policies of the Treasury Board of the Commonwealth of Virginia (the “Treasury Board”) designed to monitor post-issuance compliance of tax-exempt qualified obligations<sup>1</sup> (the “Obligations”) issued by the Commonwealth of Virginia (the “Commonwealth”) with applicable provisions of the Internal Revenue Code of 1986, as amended (the “Code”), and regulations promulgated thereunder (the “Treasury Regulations”). The Policy does not address bonds or other financing obligations that are issued by other state agencies, boards and authorities and that are subject to the approval of the Treasury Board, it being the intent that such bond-issuing organizations adopt their own post-issuance compliance policies for tax-exempt qualified obligations that they issue.

The Policy documents existing practices and describes various procedures and systems designed to identify on a timely basis facts relevant to demonstrating compliance with the requirements that must be satisfied subsequent to the issuance of Obligations in order that the interest on such Obligations be, or continue to be, or would be but for certain provisions of the Code, excludable from gross income for federal income tax purposes. The Treasury Board recognizes that compliance with applicable provisions of the Code and Treasury Regulations is an on-going process, necessary during the entire term of the Obligations, and is an integral component of the Treasury Board’s debt management. Accordingly, the analysis of those facts and implementation of the Policy will require on-going monitoring and consultation with bond counsel beyond the scope of its initial engagement with respect to the issuance of particular Obligations.

### **Policy Components**

The Treasury Board approves the terms and structure of Obligations executed by the Commonwealth by or for the benefit of educational institutions (the “Participating Institutions”) and state agencies (the “State Agencies”). Such Obligations are issued in accordance with the provisions of Article X, Section 9 of the Constitution of the Commonwealth. The monitoring of certain post-issuance compliance issues will involve the Participating Institutions and State Agencies. Due to differences in the types of debt issuances authorized by Article X, Section 9 of the Constitution, specific variations of the procedures outlined below will be implemented in consultation with bond counsel, the Participating Institutions and State Agencies, and representatives of the Attorney General’s office.

Specific post-issuance compliance procedures address the relevant areas described below. The following list is not intended to be exhaustive and further areas may be identified from time to time by Treasury staff in consultation with bond counsel and appropriate representatives of the Attorney General’s office.

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<sup>1</sup> For purposes of the Policy, tax-exempt qualified obligations shall include (a) obligations the interest on which is excludable from gross income for federal income tax purposes pursuant to the Internal Revenue Code of 1986, as amended, and regulations thereunder (collectively, the “Code”) (“tax-exempt obligations”), and (b) obligations the interest on which is not excludable from gross income for federal income tax purposes, but federal law otherwise requires such obligations to satisfy requirements of the Code applicable to tax-exempt obligations. For example, Section 54AA of the Code, added by the American Recovery and Reinvestment Act of 2009, authorizes the issuance of “Build America Bonds,” the interest on which is includible in gross income for federal income tax purposes, provided that (a) the interest on the bonds would, but for such Section 54AA, be excludable from gross income for federal tax purposes under Section 103 of the Code, (b) such bonds are issued before a specified date (currently January 1, 2011), and (c) the issuer makes an irrevocable election to have Section 54AA apply. Accordingly, the Policy will apply to any Build America Bonds issued by the Commonwealth.

I. General Policies and Procedures – the following policies relate to procedures and systems for monitoring post-issuance compliance generally.

- A. The Director of Debt Management (the “Director”) shall identify an appropriate Treasury staff member (currently the Public Finance Manager responsible for the Treasury Board) to be responsible for monitoring Treasury Board post-issuance compliance issues (the “Staff Designee”). The Director shall be responsible for ensuring an adequate succession plan for transferring post-issuance compliance responsibility when changes in staff occur.
- B. The Staff Designee will coordinate procedures for record retention and review of such records.
- C. The Staff Designee will review post-issuance compliance procedures and systems on a periodic basis, but not less than annually.
- D. Electronic media will be the preferred method for storage of all documents and other records maintained by Treasury. In maintaining such electronic storage, the Staff Designee will comply with applicable Internal Revenue Service (the “IRS”) requirements, such as those contained in Revenue Procedure 97-22.

II. Issuance of Obligations – the following policies relate to the issuance of a specific issue of Obligations.

The Staff Designee will:

- A. Obtain and store a closing binder and/or CD or other electronic copy of the relevant and customary transaction documents.
- B. Confirm that bond counsel has filed the applicable information report (e.g., Form 8038-G, Form 8038-CP) for such issue with the IRS on a timely basis.
- C. Coordinate receipt and retention of relevant books and records with respect to the investment and expenditure of the proceeds of such Obligations with other applicable Treasury staff.

III. Arbitrage – the following policies relate to the monitoring and calculating of arbitrage and compliance with specific arbitrage rules and regulations.

The Staff Designee will:

- A. Coordinate the tracking of expenditures, including the expenditure of any investment earnings, with other applicable Treasury staff.
- B. Obtain a computation of the yield on such issue from the Treasury Board’s financial advisor for such issuance or other relevant third party (e.g., the underwriter for such issuance, the State Non Arbitrage Program (“SNAP”), or other outside arbitrage rebate specialist) and maintain a system for tracking investment earnings, whether internal to Treasury or external via SNAP.
- C. Maintain a procedure for the allocation of proceeds of the issue and investment earnings to expenditures, including the reimbursement of pre-issuance expenditures.

- D. Coordinate with SNAP and/or other applicable Treasury staff to monitor compliance by the Participating Institutions and State Agencies with the applicable “temporary period” (as defined in the Code and Treasury Regulations) exceptions for the expenditure of proceeds of the issue, and provide for yield restriction on the investment of such proceeds if such exceptions are not satisfied.
- E. Coordinate with SNAP and/or other applicable Treasury staff to ensure that investments acquired with proceeds of such issue are purchased at fair market value. In determining whether an investment is purchased at fair market value, any applicable Treasury Regulation safe harbor may be used.
- F. Coordinate with SNAP and/or other applicable Treasury staff to avoid formal or informal creation of funds reasonably expected to be used to pay debt service on such issue without determining in advance whether such funds must be invested at a restricted yield.
- G. Coordinate with SNAP and/or other applicable Treasury staff to consult with bond counsel prior to engaging in any post-issuance credit enhancement transactions (e.g., bond insurance, letters of credit) or hedging transactions (e.g., interest rate swaps, caps).
- H. Coordinate with SNAP and/or other applicable Treasury staff to identify situations in which compliance with applicable yield restrictions depends upon later investments and monitor implementation of any such restrictions.
- I. Coordinate with SNAP and/or other applicable Treasury staff to monitor compliance by the Participating Institutions and State Agencies with six-month, 18-month or 2-year spending exceptions to the rebate requirement, as applicable.
- J. Coordinate with SNAP and/or other applicable Treasury staff to procure a timely computation of any rebate liability and, if rebate is due, to file a Form 8038-T and to arrange, with any applicable Participating Institutions, for payment of such rebate liability.
- K. Coordinate with SNAP and/or other applicable Treasury staff to arrange for timely computation and payment of “yield reduction payments” (as such term is defined in the Code and Treasury Regulations), if applicable.
- L. In the case of any issue of refunding Obligations, coordinate with the Treasury Board’s financial advisor and any escrow agent to arrange for the purchase of the refunding escrow securities, obtain a computation of the yield on such escrow securities from the Treasury’s outside arbitrage rebate specialist and monitor compliance with applicable yield restrictions.

IV. Private Activity Concerns – the following polices relate to the monitoring and tracking of private uses and private payments with respect to facilities financed with the Obligations.

The Staff Designee will:

- A. Coordinate with applicable Participating Institution and State Agency staff to maintain records determining and tracking which specific issues of Obligations financed which facilities and in what amounts.

- B. Coordinate with applicable Participating Institution and State Agency staff to maintain records, which should be consistent with those used for arbitrage purposes, to allocate the proceeds of an issue and investment earnings to expenditures, including the reimbursement of pre-issuance expenditures.
- C. Coordinate with applicable Participating Institution and State Agency staff to maintain records allocating to a project financed with Obligations any funds from other sources that will be used for otherwise non-qualifying costs.
- D. Coordinate with SNAP and/or Treasury or other applicable staff to monitor the expenditure of proceeds of an issue and investment earnings for qualifying costs.
- E. Coordinate with applicable Participating Institution and State Agency staff to monitor private use of financed facilities to ensure compliance with applicable percentage limitations on such use. Such monitoring should include the following:
  - 1. Procedures, including the utilization of Participating Institution and State Agency questionnaires and follow-up due diligence calls, to review the amount of existing private use on a periodic basis; and
  - 2. Procedures for identifying in advance any new sale, lease or license, management contract, sponsored research arrangement, or other arrangement involving private use of financed facilities and for obtaining copies of any sale agreement, lease, license, management contract, research arrangement or other arrangement for review by bond counsel.
- F. Consult with bond counsel as to any possible private use of financed facilities.

V. Reissuance – the following policies relate to compliance with rules and regulations regarding the reissuance of Obligations for federal law purposes.

The Staff Designee will:

- A. Identify and consult with bond counsel regarding any post-issuance change to any terms of an issue of Obligations which could potentially be treated as a reissuance for federal tax purposes.
- B. Confirm with bond counsel whether any “remedial action” in connection with a “change in use” (as such terms are defined in the Code and Treasury Regulations) would be treated as a reissuance for tax purposes and, if so, confirm the filing of any new Form 8038-G.

VI. Record Retention – the following policies relate to retention of records relating to the Obligations issued.

The Staff Designee will:

- A. Coordinate with applicable Participating Institution and State Agency staff regarding the records to be maintained by the Treasury Board and each Participating Institution and State Agency to establish and ensure that an issue remains in compliance with applicable federal tax requirements for the life of such issue.

- B. Coordinate with applicable Participating Institution and State Agency staff to comply with provisions imposing specific recordkeeping requirements and cause the Participating Institutions and State Agencies to comply with such provisions, where applicable.
- C. Coordinate with applicable Participating Institution and State Agency staff, or cause the Participating Institutions and State Agencies,<sup>2</sup> to generally maintain the following:
  - 1. Basic records relating to the transaction (e.g., any non-arbitrage certificate, Participating Institution and State Agency certificates, net revenue estimates and certifications for Section 9(c) projects and the bond counsel opinion);
  - 2. Documentation evidencing expenditure of proceeds of the issue;
  - 3. Documentation regarding the types of facilities financed with the proceeds of an issue, including, but not limited to, whether such facilities are land, buildings or equipment, economic life calculations and information regarding depreciation.
  - 4. Documentation evidencing use of financed property by public and private entities (e.g., copies of management contracts and research agreements);
  - 5. Documentation evidencing all sources of payment or security for the issue; and
  - 6. Documentation pertaining to any investment of proceeds of the issue (including the purchase and sale of securities, SLGs subscriptions, yield calculations for each class of investments, actual investment income received by the investment of proceeds, guaranteed investment contracts, and rebate calculations).
- D. Coordinate the retention of all records in a manner that ensures their complete access to the IRS. While this is typically accomplished through the maintenance of hard copies, records may be kept in electronic format so long as applicable requirements, such as Revenue Procedure 97-22, are satisfied.
- E. Keep all material records for so long as the issue is outstanding (including any refunding), plus three years.

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<sup>2</sup> For example, the Participating Institutions and State Agencies will maintain records relating to expenditures of proceeds, including requisitions, invoices, bills, asset lists of financed facilities and equipment and other documentation.