

TITLE 2 PUBLIC FINANCE
CHAPTER 61 STATE INDEBTEDNESS AND SECURITIES
PART 4 DISTRIBUTION OF PRIVATE ACTIVITY BOND ALLOCATIONS

2.61.4.1 ISSUING AGENCY: State Board of Finance, 181 Bataan Memorial Building, Santa Fe, New Mexico.
[12/13/89; 11/29/97; 2.61.4.1 NMAC - Rn, 2 NMAC 61.4.1, 01/01/06]

2.61.4.2 SCOPE: State agencies and issuing authorities that are not state agencies.
[12/13/89; 2/29/96; 2.61.4.2 NMAC - Rn, 2 NMAC 61.4.2, 01/01/06]

2.61.4.3 STATUTORY AUTHORITY: Sections 6-20-1 through 6-20-11 NMSA 1978 (Act).
[12/13/89; 2.61.4.3 NMAC - Rn, 2 NMAC 61.4.3, 01/01/06]

2.61.4.4 DURATION: Permanent.
[12/13/89; 2.61.4.4 NMAC - Rn, 2 NMAC 61.4.4, 01/01/06]

2.61.4.5 EFFECTIVE DATE: November 29, 1997 unless a different date is cited at the end of a section or paragraph and applies to all private activity bonds issued after this date.
[12/13/89; 2/29/96; 11/30/96; 11/29/97; 2.61.4.5 NMAC - Rn, 2 NMAC 61.4.5, 01/01/06]

2.61.4.6 OBJECTIVE: To establish rules and regulations governing the distribution of allocations of private activity bonds provided for by the Private Activity Bond Act (Sections 6-20-1 through 6-20-11 NMSA 1978).
[12/13/89; 2/29/96; 2.61.4.6 NMAC - Rn, 2 NMAC 61.4.6, 01/01/06]

2.61.4.7 DEFINITIONS:

A. "Allocation" means an allocation of the state ceiling issued by the board to an issuing authority to issue private activity bonds.

B. "Board" means the state board of finance.

C. "Bond counsel" means an attorney or a firm of attorneys listed in the most recently available "directory of municipal bond dealers of the United States", published by the bond buyer and commonly known as the "red book", in the section listing municipal bond attorneys of the United States or the successor publication thereto.

D. "Code" means the internal revenue code of 1986, as amended.

E. "Issuing authority" means the state, state agencies, counties and incorporated municipalities.

F. "Mortgage credit certificate election" means an election pursuant to Section 25(c)(2)(A)(ii) of the code, by an issuing authority not to issue qualified mortgage bonds which the issuing authority is otherwise authorized to issue, in exchange for the authority under Section 25 of the code to issue mortgage credit certificates in connection with a qualified mortgage credit certificate within the meaning of Section 25(c)(2) of the code.

G. "Private activity bond" means any bond or other obligation which is a qualified bond under Section 141 of the code which is not excluded by Section 146(g),(h) and (i) of the code, or a bond or other obligation issued under Section 1312 or 1313 of the Tax Reform Act of 1986; and the private activity portion of government use bonds allocated by an issuing authority to an issue under Section 141(b)(5) of the code.

H. "State agency" means the New Mexico finance authority, the New Mexico educational assistance foundation, the New Mexico mortgage finance authority and any other agency, authority, instrumentality, corporation or body, now existing or hereafter created, which under state law can issue private activity bonds on behalf of the state.

I. "State ceiling" means, for any calendar year, the amount as provided by Section 146(d) of the code.

[2/29/96; 11/29/97; 2.61.4.7 NMAC - Rn & A, 2 NMAC 61.4.7, 01/01/06; A, 10/15/08]

2.61.4.8 DISTRIBUTION OF PRIVATE ACTIVITY BOND ALLOCATIONS:

A. Capitalized terms.

(1) Single family housing purpose bonds shall mean private activity bonds issued pursuant to Section 143 of the code or mortgage credit certificates issued pursuant to Section 25(c)(2) of the code.

(2) Multifamily housing purpose bonds shall mean private activity bonds issued pursuant to Section 142(a)(7) of the code.

(3) Housing purpose bonds shall mean single family housing purpose bonds and multifamily housing purpose bonds.

(4) Education purpose bonds shall mean private activity bonds issued pursuant to Section 144(b) of the code.

(5) Small issue economic development purpose bonds shall mean private activity bonds issued pursuant to Section 144(a) of the code.

(6) Exempt facility purpose bonds shall mean private activity bonds requiring an allocation of the state ceiling under the code other than education purpose bonds, housing purpose bonds and small issue economic development purpose bonds.

(7) Other purpose bonds shall mean small issue economic development purpose bonds and exempt facility purpose bonds.

(8) Single family housing purpose allocation percentage shall mean the percentage, determined annually by the board, of the state ceiling that the board finds appropriate to reserve in a calendar year for single family housing purpose bonds.

(9) Multifamily housing purpose allocation percentage shall mean the percentage, determined annually by the board, of the state ceiling that the board finds appropriate to reserve in a calendar year for multifamily housing purpose bonds.

(10) Education purpose allocation percentage shall mean the percentage, determined annually by the board, of the state ceiling that the board finds appropriate to reserve in a calendar year for education purpose bonds.

(11) Other purpose allocation percentage shall mean the percentage, determined annually by the board, of the state ceiling that the board finds appropriate to reserve in a calendar year for other purpose bonds.

(12) Single family housing purpose carryforward allocation percentage shall mean the percentage (which need not be the same as the single family housing purpose allocation percentage), determined annually by the board no later than the December meeting of the board, of the balance of the state ceiling that can be the subject of a carryforward election allocation that the board finds appropriate to allocate for carryforward purposes relating to single family housing purpose bonds.

(13) Multifamily housing purpose carryforward allocation percentage shall mean the percentage (which need not be the same as the multifamily housing purpose allocation percentage), determined annually by the board no later than the December meeting of the board, of the balance of the state ceiling that can be the subject of a carryforward election allocation that the board finds appropriate to allocate for carryforward purposes relating to multifamily housing purpose bonds.

(14) Education purpose carryforward allocation percentage shall mean the percentage (which need not be the same as the education purpose allocation percentage), determined annually by the board no later than the December meeting of the board, of the balance of the state ceiling that can be the subject of a carryforward election allocation that the board finds appropriate to allocate for carryforward purposes relating to education purpose bonds.

(15) Other purpose carryforward allocation percentage shall mean the percentage (which need not be the same as the other purpose allocation percentage), determined annually by the board no later than the December meeting of the board, of the balance of the state ceiling that can be the subject of a carryforward election allocation that the board finds appropriate to allocate for carryforward purposes relating to other purpose bonds.

(16) Allocation percentage means single family housing purpose allocation percentage, multifamily housing purpose allocation percentage, education purpose allocation percentage and other purpose allocation percentage, respectively.

(17) Carryforward allocation percentage means single family housing purpose carryforward allocation percentage, multifamily housing purpose carryforward allocation percentage, housing purpose carryforward allocation percentage, education purpose carryforward allocation percentage and other purpose carryforward allocation percentage, respectively.

B. Issuing authorities requesting at any time during the year distributions of allocations or carryforward election allocations shall submit the following.

(1) For all requests:

(a) a letter from the issuing authority setting forth the amount of the state ceiling requested, the actual or expected date of adoption of the bond resolution or similar documentation by the issuing authority, the expected date of the sale of the bonds, the expected date of closing of the bonds, a statement of any significant conditions that need to be satisfied before the bonds can be issued, and a statement categorizing the private activity bonds as education purpose bonds, single family housing purpose bonds, multifamily housing purpose bonds, small

issue economic development purpose bonds or exempt facility purpose bonds, in accordance with the definitions contained in this part, which categorization is subject to board review and recategorization, if appropriate;

(b) a letter from bond counsel for the issuing authority or the user, with supporting citations to state statutes, stating that the private activity bonds can validly be issued under state law by the issuing authority, which the board may refer to its bond counsel or to the state's attorney general for review and comment; if the board is advised by its bond counsel or the attorney general that the opinion of the issuing authority's bond counsel is incorrect, the board may refuse to issue the allocation requested;

(c) a letter from bond counsel for the issuing authority or the user, with supporting citations to the code and the regulations, stating that the bonds are private activity bonds requiring an allocation of the state ceiling; and

(d) a letter from the issuing authority or the user stating why the public purpose to be served by the issuance of the private activity bonds could not be as economically or effectively served by a means not involving an allocation of the state ceiling;

(e) any fees required by Section 2.61.4.9 NMAC.

(2) For all requests not involving a project, i.e., for single family housing purpose bonds and education purpose bonds, a letter from the issuing authority setting forth the following:

(a) a general description of the location of the proposed borrowers;

(b) experience of the issuing authority in utilizing allocations of the state ceiling.

(3) For all requests involving a project, a letter from the issuing authority or the user including the following:

(a) a copy of the inducement resolution, certified by an official of the issuing authority;

(b) a description of the user, the project and the project's specific location;

(c) the estimated number and types of jobs, both construction and permanent, indicating which are expected to be filled by persons who are residents of the state at the time of submission of the request for allocation and which are expected to be filled by persons who are non-residents at the time of submission of the request for allocation; and a representation that the issuing authority, if it receives an allocation of the state ceiling for the project and issues the related bonds, will provide to the board annually, for four (4) years following the issuance of the bonds, on or before June 1, and after that period upon request of the board, employment reports on a form prescribed by the board setting forth in reasonable detail the numbers and types of workers, and their residency, employed at the project on a full-time equivalent basis during the preceding 12 month period;

(d) the present use or conditions of the project site and evidence that the proposed user of the project has obtained a legally enforceable right to acquire the project site; evidence of approved zoning of the proposed site must be submitted; this requires that project types for which the cap is being requested are not prohibited by the existing zoning of the proposed site;

(e) the maximum amount of the private activity bonds and other obligations to be issued;

(f) a proposed starting date and estimated completion date of the construction of the project, if applicable;

(g) information relating to the feasibility of the proposed project showing that the project or the user will generate revenues and cash flow sufficient to make payments to pay debt service on the bonds, if applicable;

(h) the amount and source of private capital which will be used for the project in addition to bond financing, as well as a brief table showing estimated sources and uses of funds;

(i) conceptual site plans for the project and a map locating the project area;

(j) in the case of multifamily housing purpose bonds, an explanation of why the housing needs of individuals whose income will make them eligible under Section 142(d) of the code are not being met by existing multifamily housing; information as to the number and percentage of units set aside for households at various income levels or with special needs; the legal mechanisms to monitor and enforce compliance with the set-aside provisions and the experience of the monitoring entity with respect to similar projects; a representation that the issuing authority, if it receives an allocation of the state ceiling for the project and issues the related bonds, will provide to the board annually, for four (4) years following the issuance of the bonds, on or before June 1, and after that period upon request of the board, occupancy reports on a form prescribed by the board setting forth in reasonable detail information as to the occupancy of the rental units by category of household; and the duration of the set-aside provisions;

(k) information relating to the feasibility and proposed utilization of environmentally protective technologies, energy and water efficiencies, and sustainable development practices;

(l) any other information regarding the economic benefits to the project's community and to the state or which the user believes will aid the board in considering the request for allocation; and

(m) a commitment letter or letter of intent, which may be subject to common contingencies or closing conditions, from the proposed underwriter, placement agent or bond purchaser to underwrite, place or purchase the bonds.

(4) For all requests for an allocation for single family housing purpose bonds where the issuing authority seeks an allocation to be used by the issuing authority for mortgage credit certificates or, in its discretion, for either qualified mortgage bonds or mortgage credit certificates, a letter from the issuing authority stating that a qualified mortgage credit certificate program has been adopted by the issuing authority and a description of how the issuing authority is proposing to use the mortgage credit certificates.

(5) For all requests for an allocation for multifamily housing purpose bonds, the board may condition any allocation on the agreement, on behalf of the issuer or the user of the project or projects, to set aside a specified minimum number of units for households at certain income levels or with special needs.

(6) The board or its staff may ask for additional supplemental information from the issuing authority to aid the board in considering the request, including information as to the readiness of the issuer to issue the private activity bonds.

C. Within seven business days after an issuing authority issues any private activity bonds or makes a mortgage credit certificate election, the issuing authority or, in the case of a project, bond counsel for the issuing authority or the user or users, shall advise the board by letter of the date the bonds were issued and the total aggregate amount of the issue, or in the case of a mortgage credit certificate election, the date and the amount of the election, referencing in that letter how the applicable allocations and carryforward allocations issued by the board were used for that issue.

D. The authority of the board to issue, on behalf of the governor (as provided in Section 6-20-11 NMSA 1978), the certification required by the code or the regulations, is hereby delegated to the director of the board. The board interprets its authority to issue the certification, on behalf of the governor, as permissive, and not in substitution of the authority of the governor to issue the certification, on the governor's own behalf.

E. The board shall establish the bond issuance expiration date, pursuant to Section 6-20-2A(5) NMSA 1978, on or before the regularly scheduled meeting of the board in November of that year, except as otherwise provided in Paragraph (2) of Subsection K of 2.61.4.8 NMAC.

F. Issuing authorities shall comply with the following restrictions.

(1) Any issuing authority desiring to make a request to the board for an allocation or a carryforward election allocation must comply with established board rules for inclusion on the board's agenda. In order to be considered for inclusion on the agenda, all materials required to be submitted to the board must be submitted by the established time period prior to the meeting date. The board publishes to interested parties notice of the deadline for submission of complete materials prior to each meeting. It is an issuing authority's responsibility to ascertain that deadline and comply with it. All requests for allocations of the state ceiling appearing on the board's agenda for a particular meeting will be deemed to have been received simultaneously.

(2) An issuing authority or the user shall advise the board in writing of any unusable allocation of the state ceiling promptly after it becomes aware the allocation will not be used in full prior to the allocation expiration date. After being advised of a return of an allocation of the state ceiling, the board shall make an announcement of the amount of the return at its next board meeting. The board shall not consider any requests for allocation of the state ceiling relating to the amount of any returned allocation until the meeting following the announcement of the return. The board may waive this waiting-period requirement for returns of allocations on or after November 1 of any calendar year.

(3) The board will not consider a request for a new allocation of the state ceiling for a project whose previous allocation has expired or was voluntarily returned until the issuing authority has resubmitted all of the information required by Subsection B of 2.61.4.8 NMAC. Such request for a new allocation will not be given a priority over other requests for allocations.

G. The board may require annually, to be presented at the board's regularly scheduled meeting in November, a report from state agencies issuing housing purpose bonds or education purpose bonds of the projected need of those state agencies for allocations of the state ceiling for the remainder of the calendar year and the next three calendar years.

H. At any time during a calendar year, the board may revise current year allocation percentages and carryforward allocation percentages.

I. Whenever the board has on its agenda requests for allocations exceeding the remaining applicable amount of an allocation percentage or carryforward allocation percentage, the board will prioritize requests, as applicable:

- (1) by giving preference to small issue economic development purpose bonds over exempt facility purpose bonds;
- (2) with respect to small issue economic development purpose bonds, by considering factors such as employment, geographic location, nature and number of jobs created for residents and non-residents, nature of the industry, the utilization of environmentally protective technologies, energy and water efficiencies, and sustainable development practices, and economic benefits to the community and the state;
- (3) with respect to multifamily housing purpose bonds, by considering factors such as percentage of units devoted to persons of low income, services to special needs groups, percentage of financing provided by equity and other financing not requiring an allocation, geographic location, the experience of the agency charged with monitoring compliance with persons of low income requirements, and the utilization of environmentally protective technologies, energy and water efficiencies, and sustainable development practices;
- (4) with respect to single family housing purpose bonds, by considering factors such as targeting to persons of low income, geographic location, and experience of the issuing authority in utilizing allocations of the state ceiling;
- (5) with respect to exempt facility bonds, by considering factors such as employment, geographic location, nature of jobs created, nature of the industry, the utilization of environmentally protective technologies, energy and water efficiencies, and sustainable development practices, and economic benefits to the community and the state; and
- (6) with respect to education purpose bonds, by considering the geographic location of the prospective borrowers.

J. Pre-July 1 allocations:

(1) The act provides, in Section 6-20-3A and B NMSA 1978, that until July 1 in any calendar year, the state ceiling for the calendar year shall be allocated forty percent to state agencies as a group and sixty percent to issuing authorities, as a group, that are not state agencies; provided, however, that such allocation shall be made in accordance with directives, rules or regulations governing the distribution of allocations to be established by the board. This part is such a directive, rule or regulation of the board.

(2) From January 1 until July 1 of any calendar year, allocations of the state ceiling made pursuant to Section 6-20-3A NMSA 1978 are directed to be utilized so that no single state agency may issue more than fifty percent of the allocation to state agencies as a group, except that the board may exceed that amount if the board determines it is not aware of any planned or pending requests for allocations by any state agency prior to July 1 of any year that could not be approved as a result of granting an allocation of more than fifty percent.

(3) From January 1 until July 1 of any calendar year, allocations of the state ceiling made pursuant to Section 6-20-3B NMSA 1978 are directed to be utilized so that no single issuing authority that is not a state agency may issue more than twenty percent of the allocation to issuing authorities that are not state agencies as a group, except that the board may exceed that amount if the board determines it is not aware of any planned or pending requests for allocation by any issuing authority, which is not a state agency, prior to July 1 of any year that could not be approved as a result of granting an allocation of more than twenty percent.

(4) From January 1 until July 1 of any calendar year, allocations of the state ceiling made pursuant to Sections 6-20-3A and B NMSA 1978 are directed to be utilized so that no more than the single family housing purpose allocation percentage of the state ceiling may be allocated to single family housing purpose bonds, no more than the multifamily housing purpose allocation percentage of the state ceiling may be allocated to multifamily housing purpose bonds, no more than the education purpose allocation percentage of the state ceiling may be allocated to education purpose bonds and no more than the other purpose allocation percentage of the state ceiling may be allocated to other purpose bonds except that the board may exceed an allocation percentage if the board determines it is not aware of any planned or pending requests for allocation by any issuing authority that could not be approved as a result of granting an allocation in excess of the applicable allocation percentage.

(5) The allocation expiration date for any allocation issued by the board prior to July 1 in any calendar year shall be July 1, subject to automatic and discretionary extension pursuant to Section 6-20-10 NMSA 1978, and the board may condition any discretionary extension or extensions on the completion of both a sale and issuance of the private activity bonds within the extension period.

K. Allocations on or after July 1 until November 1:

(1) On or after July 1 until November 1 of any calendar year, allocations of the state ceiling made pursuant to Section 6-20-3D are directed to be utilized so that, after taking into account any allocations still

outstanding for or previously used by any issuing authority in that calendar year, no more than the education purpose allocation percentage of the state ceiling may be allocated to education purpose bonds, no more than the single family housing purpose allocation percentage of the state ceiling may be allocated to single family housing purpose bonds, no more than the multifamily housing purpose allocation percentage of the state ceiling may be allocated to multifamily housing purpose bonds, and no more than the other purpose allocation percentage of the state ceiling may be allocated to other purpose bonds except that the board may exceed an allocation percentage if the board determines it is not aware of any planned or pending requests for allocation by any issuing authority prior to November 1 of any year that could not be approved as a result of granting an allocation in excess of the applicable allocation percentage.

(2) The allocation expiration date for any allocation issued by the board on or after July 1 and prior to November 1 of any calendar year shall be the earlier of 120 days from the date of issuance by the board of the allocation or the date of the board's regularly scheduled meeting in December of that year, subject to automatic or discretionary extension pursuant to Section 6-20-10 NMSA 1978, and the board may condition any discretionary extension or extensions on the completion of both a sale and issuance of the private activity bonds within the extension period. For purposes of this part, the board hereby establishes the date of the board's regularly scheduled meeting in December, as that date may be set by the board annually, as the bond issuance expiration date for private activity bonds that receive an allocation on or after July 1 and prior to November 1.

L. Allocations on or after November 1:

(1) On or after November 1 of any calendar year, no allocations of the state ceiling will be made by the board, unless the board in its discretion deems it advisable. In determining whether it may be advisable, the board may consider, among other factors, the ability of the issuing authority seeking the allocation to issue the private activity bonds prior to the bond issuance expiration date and whether the allocation will further the board's policy to share the state ceiling among single family housing purpose bonds, multifamily housing purpose bonds, education purpose bonds and other purpose bonds in accordance with their respective allocation percentages.

(2) The allocation expiration date for any allocation issued by the board on or after November 1 of any calendar year shall be the bond issuance expiration date established by the board annually pursuant to Subsection E of 2.61.4.8 NMAC.

M. Carryforward election allocations:

(1) Requests for carryforward election allocations may be made by any issuing authority for any carryforward purpose to the board at its regularly scheduled meeting in December of the calendar year, and shall be accompanied by any fees that may be required pursuant to Section 2.61.4.9 NMAC.

(2) If and to the extent requested by issuing authorities, carryforward election allocations of the state ceiling made pursuant to Section 6-20-7 NMSA 1978 are directed to be utilized so that of the balance of any state ceiling remaining unused after the bond issuance expiration date no more than the single family housing purpose carryforward allocation percentage will be allocated to single family housing purpose bonds, no more than the multifamily housing purpose carryforward allocation percentage will be allocated to multifamily housing purpose bonds, no more than the education purpose carryforward allocation percentage will be allocated to education purpose bonds and no more than the other purpose carryforward allocation percentage will be allocated to exempt facility purpose bonds. In determining the carryforward election allocation among housing purpose bonds, the board may give first preference to qualified mortgage bonds, next preference to issuances of mortgage credit certificates and final preference to multifamily housing purpose bonds. The board may also take into account, if in its discretion it so determines, allocations used in that calendar year for housing purpose bonds, education purpose bonds and exempt facility bonds. If the board does not receive sufficient carryforward election allocation requests for any category of carryforward purpose such that issuing authorities have not requested at least the applicable carryforward allocation percentage of the balance of the state ceiling, the board may in its discretion determine, to the extent requested by issuing authorities, to exceed the applicable carryforward allocation percentage for any category of carryforward purpose.

[2/29/96; 11/30/96; 11/29/97; 2.61.4.8 NMAC - Rn & A, 2.61.4.8 NMAC, 01/01/06; A, 10/15/08; A, 01/15/09]

2.61.4.9 PRIVATE ACTIVITY BOND FEES CHARGED: The act provides, in Section 6-20-11C NMSA 1978, that the board may require a reasonable application fee, allocation deposit and extension fee to be paid by the issuing authority. Application and extension fees collected by the board shall be deposited in the general fund. Allocation deposits shall be deposited into a suspense account and after a determination has been made that the allocation has been used for the intended purpose, the board may direct the staff to refund in whole or in part the [applicant] allocation deposit without interest. Otherwise, the allocation deposit shall be deposited in the general fund.

A. All fees shall be paid by bank cashier's check, certified check, money order, or by wire transfer in US funds.

B. An issuing authority will be required to pay an application fee, an allocation deposit, and an extension fee. The board shall charge the following fees:

- (1) application fee for allocations valued at \$15,000,000.00 or less: \$750.00
- (2) application fee for allocations valued at an amount greater than \$15,000,000.00 and up to \$30,000,000.00: \$1,500.00
- (3) application fee for allocations valued at an amount greater than \$30,000,000.00: \$3,000.00
- (4) allocation deposit: \$250.00 per million allocated
- (5) extension fee: \$750.00 if approved

C. Application and extension fees are due on the date a request to appear on the board's agenda is due; allocation deposits are due 7 business days following board approval of the allocation. If required fees are not paid within the time specified, the allocation will become void.

[2.61.4.9 NMAC - N, 01/01/06; A, 10/15/08]

HISTORY OF 2.61.4 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center: SBF Rule 89-6, Distribution of Private Activity Bond Allocations, 12/13/89.

History of Repealed Material: [RESERVED]