New Mexico Department of Finance and Administration

STATE OF NEW MEXICO
DEPARTMENT OF FINANCE AND ADMINISTRATION

STATE BOARD OF FINANCE

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POST-ISSUANCE COMPLIANCE PROCEDURES FOR TAX-EXEMPT BONDS

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I. INTRODUCTION

The Internal Revenue Code of 1986, as amended (the "***Code***") and the regulations promulgated thereunder (the "***Regulations***") impose certain requirements on tax-exempt bonds or other obligations (referred to herein as "***tax-exempt bonds***"), including but not limited to, restrictions on the use of tax-exempt bond proceeds and tax-exempt bond-financed property, arbitrage yield restrictions, and arbitrage rebate requirements. These requirements are generally applicable throughout the period that the tax-exempt bonds remain outstanding.

Form 8038-G, Information Return for Tax Exempt Governmental Obligations, and Form 8038, Information Return for Tax-Exempt Private activity Bond Issues (as applicable, and collectively, "***Form 8038***") requires issuers of tax-exempt bonds to represent whether it has established written procedures to (a) monitor the requirements of Section 148 of the Code; and (b) ensure that any nonqualified bonds (within the meaning of Section 1.148-120) of the Regulations) are remediated in accordance with the Code and the Regulations.

In light of these requirements and the general goal of the State of New Mexico to maintain compliance with all applicable federal tax laws and regulations relating to the State's tax-exempt bonds, the State Board of Finance ("***SBOF***") has developed these written procedures to monitor compliance with the Code and Regulations and to ensure that any noncompliance is remediated in accordance with the Code and the Regulations. Actions pursuant to these procedures (collectively referred to as "***post-issuance tax compliance***") are intended to assist the SBOF in documenting compliance with the applicable federal tax requirements. Post-issuance tax compliance begins with the debt issuance process itself and includes a continuing focus on the application and investment of tax-exempt bond proceeds and use of tax-exempt bond-financed property. Post-issuance tax compliance requires identifying the responsible parties and the applicable procedures.

II. GOVERNING LAWS AND PRINCIPLES

The SBOF's Bond Project Disbursements Rule, NMAC 2.61.6, provides guidance for the appropriate use of tax-exempt bond proceeds (and proceeds of taxable obligations) to ensure compliance with state laws and, where applicable, the Code. SBOF staff, in consultation with the SBOF's Bond Counsel, Tax Counsel, Financial Advisor, and Rebate Consultant, is responsible for monitoring and enforcing the Bond Project Disbursements Rule.

Although many of the tax requirements are based upon reasonable expectations as of the time of issuance, the actual failure to comply with the representations and expectations expressed at the time of issuance may influence an evaluation (upon audit or otherwise) by the Internal Revenue Service (the "***IRS***") as to whether such expectations were reasonable at the time of issuance.

III. PARTIES INVOLVED

The parties involved in a typical SBOF tax-exempt bond issuance include the following:

a. The SBOF;

b. The New Mexico State Treasurer's Office (the "***STO***"), acting as paying agent and investing authority for the tax-exempt bonds;

c. An investment banking firm, as initial purchaser of the tax-exempt bonds pursuant to a public sale (the "***Initial Purchaser***");

d. The SBOF's municipal advisor (the "***Financial Advisor***");

e. The SBOF's bond counsel ("***Bond Counsel***");

f. The SBOF's tax counsel ("***Tax Counsel***");

g. The SBOF's board counsel, being a representative of the Office of the New Mexico Attorney General or other special counsel as applicable ("***Board Counsel***"); and

h. The SBOF's arbitrage consulting and compliance services provider (the "***Rebate Consultant***").

IV. PROCEDURES

Responsible Employee

The Director of the SBOF (the "***Director***") is designated as being the "responsible employee" for post-issuance tax compliance. The Director may delegate to his or her staff or contract advisors (such Tax Counsel or the Rebate Consultant) responsibility for different aspects of post-issuance tax compliance. In carrying out his or her duties under this policy, the Director may rely on STO representatives and information retained and provided by the STO and certifications and representations of the various recipients of proceeds of the Bonds. However, the Director will be ultimately responsible for implementing the procedures described herein. The Director will take reasonable steps to collect and maintain appropriate documentation of compliance with these procedures. Upon departure, the current Director will educate and train the incoming Director with regard to the obligations and procedures set forth herein.

New Mexico State Treasurer's Office

While the SBOF is generally the issuer of tax-exempt bonds, the STO, acting as paying agent and investing authority with respect to the SBOF's tax-exempt bonds, will be the party with direct knowledge regarding the investment and expenditure of proceeds of the tax-exempt bonds. The Director and SBOF staff will provide a copy of this policy to STO and will work with STO to ensure appropriate mechanisms are in place to comply with this policy.

Activities Associated with Tax-Exempt Bond Issuance

The Director will consult with Tax Counsel to ensure all pre-issuance tax diligence is completed prior to any new issuance and to ensure that any prospective bond issue will comply with the post-issuance tax compliance set forth herein.

Activities Following Tax-Exempt Bond Issuance

Upon issuance, the Director will:

a. Confirm the filing of the Form 8038 with the IRS. Filing of the Form 8038 is required by the fifteenth day of the second month following the month in which the issue occurs. Tax Counsel or Bond Counsel is responsible for filing the timely filing of Form 8038 for each issue.

b. Obtain and store the official transcript of proceedings for each issue of tax-exempt bonds, which should include the election results (as applicable), bond authorizing proceedings, certifications from recipients of tax-exempt bond proceeds, the tax certificate or certificates relating to the issue, a copy of the Form 8038, as filed, various other customary closing certificates, pricing and final numbers, and the signed opinions of Bond Counsel, Tax Counsel and the SBOF's disclosure counsel (collectively, the "***Transcript***"). Bond Counsel is responsible for the preparation and distribution of the Transcript in a reasonable period of time following the closing of each issue of tax-exempt bonds.

Recordkeeping

The STO acts as the paying agent and investing authority for the SBOF's tax-exempt bonds. Tax-exempt bond proceeds are invested by the STO pursuant to the STO's Investment Policy and should be invested in a manner consistent with this policy.

When a request for tax-exempt bond proceed disbursement is processed by the SBOF, the SBOF delivers to the STO a record of the disbursement having been entered into the state's general ledger. The STO records the expenditure of tax-exempt bond proceeds and earnings in its investment accounting system. With relation to expenditures and earnings, arbitrage calculations are currently based on the STO's recording of expenditures and earnings.

The SBOF maintains a Capital Projects Database, which tracks the allocation of tax-exempt bond proceeds to each appropriated project and the drawdown history and balances for each project. The type of information maintained includes, but is not limited to, appropriation identification number and description, authorizing law, amount appropriated, bond series, amount sold for the project, expenditure amounts, project balances, and expiration dates. This database may be reconciled monthly to the state's general ledger. The SBOF, in consultation with the STO, may generate periodic reports for each tax-exempt bond issue outstanding showing the amount expended within six months and three years following bond issuance.

Following issuance, the Director will:

a. Coordinate with the STO to establish a plan for keeping relevant books and records as to the investment earnings and the expenditure of tax-exempt bond proceeds.

b. Assure, or coordinate with the STO to assure, such that accurate records are kept, including:

  - Basic records relating to the tax-exempt bond transactions (including the Transcript described above);

  - Documentation evidencing the expenditure of tax-exempt bond proceeds;

- Certifications from recipients of bond proceeds attesting to the reasonably expected use of tax-exempt bond-financed property by public and private sources (describing, if applicable, leases and management contracts, and any other potential private use);

- Documentation evidencing all sources of payment or security for the tax-exempt bonds (which are expected to be generally applicable statewide ad valorem taxes for general obligation bonds, and generally applicable severance taxes for severance tax bonds; additional sources of repayment, if any, should be identified and discussed with Bond Counsel and Tax Counsel promptly); and

- Documentation pertaining to any investment by the STO of tax-exempt bond proceeds (including the purchase and sale of securities, SLGS subscriptions, yield calculations for each class of investments, actual investment income received from the investment of proceeds, guaranteed investment contracts and rebate calculations).

c. Assure that accurate records are kept in a manner that ensures their complete access to the IRS so long as they are material. While this is often accomplished through the maintenance of hard copies, records may be kept in an electronic format if certain requirements are satisfied, in accordance with the guidelines in Revenue Procedure 97-22, 1997-1 C.B. 652.

d. Assure that relevant records are kept for each tax-exempt bond issue for as long as such bond issue is outstanding (including any tax-exempt bonds issued to refund such issue of bonds) plus six (6) years after the final redemption date of the bonds (or any refunding bonds).

Arbitrage Rebate and Arbitrage Yield Restriction

The Director will:

a. Engage the Rebate Consultant for assistance in compliance with arbitrage and rebate related issues.

b. Work with the SBOF's Tax Counsel, Financial Advisor and/or Rebate Consultant and the STO to monitor compliance with "temporary period exceptions" for expenditure of tax-exempt bond proceeds and earnings thereon and provide for yield restriction of investments or "yield reduction payments" if exceptions are not satisfied.

c. Work with the STO to ensure investments acquired with tax-exempt bond proceeds are purchased at fair market value. This may include use of bidding procedures under the regulatory safe harbor (Section 1.148-5(d) of the Regulations) and complying with procedures set forth in investment instructions furnished by Tax Counsel.

d. Consult with the SBOF's Tax Counsel or Rebate Consultant and the STO prior to the creation of funds which are pledged as security for, or would reasonably be expected to be used to pay debt service, on tax-exempt bonds to determine in advance whether such funds must be invested at a restricted yield.

e. Consult with the SBOF's Tax Counsel and Financial Advisor before engaging in post issuance credit enhancement transactions (e.g., bond insurance, letter of credit) or hedging transactions (e.g., any interest rate swap or cap).

f. Work with the SBOF's Tax Counsel, Financial Advisor and/or Rebate Consultant and the STO to monitor any rebate "spending exception" to the rebate requirements set forth in the Code and Regulations.

g. Consult with the SBOF's Tax Counsel, financial advisor, and/or Rebate Consultant and the STO to identify situations in which compliance with applicable yield restrictions depends upon subsequent investments (e.g., purchase of 0% SLGS from U.S. Treasury) and monitor implementation.

h. Work with the Rebate Consultant and the STO to arrange for timely computation of rebate/yield reduction payment liability and, if an amount is payable, for timely filing of Form 8038-T, Arbitrage Rebate, Yield Reduction and Penalty in Lieu of Arbitrage Rebate (or applicable successor form), and payment of such liability. Rebate/Yield Reduction payments are ordinarily due at 5-year intervals.

Private Use of Tax-Exempt Bond-Financed Facilities

In general, bonds are impermissible private activity bonds if they satisfy (i) both the private business use test and the private payment test, or (ii) the private loan and security test.

The SBOF's tax-exempt bonds are repaid from revenues of generally applicable severance taxes or ad valorem property taxes. As such, the SBOF's tax-exempt bonds are not expected to constitute private activity bonds, as bonds payable solely from generally applicable taxes fail the private payment test. Nevertheless, the SBOF monitors private use of property financed through tax-exempt bonds and should seek to minimize private business use of bond-financed property in order to further support the SBOF's tax position in the event of an IRS audit.

Prior to issuance, due diligence is performed on each project. The recipient of tax-exempt bond proceeds is required to certify the proposed ownership, operation and use of the capital assets to be financed. If there is a lease or operating agreement, the recipient of tax-exempt bond proceeds must provide a copy of that agreement for legal review. Board Counsel makes a determination that the arrangement does not violate the anti-donation clause of the New Mexico constitution (Article IX, Section 8) or the terms of the appropriation, and Tax Counsel determines that any private use is consistent with IRS rules.

Following issuance, the Director will:

a. Work with the STO to maintain records of the application of tax-exempt bond proceeds of each series to associated project costs, including all requests for disbursement of funds (which may be accompanied by affirmation of prior statements by the recipients as to the anticipated expenditure of funds and the use of the financed facilities). These records shall incorporate any refunding or partial refunding of any bond issues.

b. Inform the STO of the requirement to record the allocation of tax-exempt bond proceeds to expenditures, including reimbursements. These records will be consistent with the expenditures used for arbitrage purposes and the requirements set forth herein.

c. Inform the STO of the requirement to document the allocation of tax-exempt bond proceeds in connection with any tax-exempt bond funded project. Request information from the STO and review proposed projects and application materials/certifications with Tax Counsel to ensure tax-exempt bond proceeds are used for qualifying costs.

d. Consult with Tax Counsel and Board Counsel and reach a conclusion regarding the allowance of any proposed arrangement involving the sale or lease of a tax-exempt bond-financed facility, or the granting of a license or management contract, or any other arrangement allowing private use of a tax-exempt bond financed facility.

e. Keep records of private use, if any, of tax-exempt bond financed facilities to monitor the amount of private use of tax-exempt bond financed facilities. Private use of tax-exempt bond-financed facilities shall be monitored periodically. If a change in private use is identified, Tax Counsel will be consulted to determine if remedial action is necessary.

f. If any funds other than generally applicable ad valorem or severance tax proceeds should be pledged to any outstanding or future issue of tax-exempt bonds, Tax Counsel and STO should be consulted prior to the implementation of such pledge.

Reissuance

The Director will:

a. Consult with Tax Counsel to identify any post-issuance modification to the terms of tax-exempt bonds (such as amendments, extensions, changes in interest rates, or changes in pledged security) which could be treated as a refunding for federal tax purposes.

b. Consult with Tax Counsel to determine whether any "remedial action" (see item (e) under "Private Use of Bond-Financed Facilities" above) in connection with private use must be treated as a "re-issuance."

Identification and Resolution

In addition to regular monitoring, the Director and the SBOF shall regularly review all of the SBOF's tax-exempt obligations for post-issuance tax compliance every three years beginning three years from the date hereof.

The process of regular monitoring and a full review every three years is designed to timely identify any noncompliance. Upon discovery of any noncompliance, the Director shall contact Tax Counsel within fifteen days of discovery. The Director and the SBOF shall work with Tax Counsel, the Financial Advisor and/or Rebate Consultant and the STO to remedy any noncompliance as soon as possible.

Other Post-Issuance Compliance Responsibilities

The SBOF has various other post issuance compliance activities that do not relate directly to the IRS tax-exempt bond rules that are not included in this document. Some of these activities include the SBOF's continuing disclosure responsibilities pursuant to the Securities and Exchange Commission Disclosure Rule 15c2-12 and the Antifraud Provision Rule 10b5. The SBOF also monitors compliance with state laws, including ensuring that reversion dates are met and that proceeds are used in accordance with state appropriation language. These provisions are governed by other policies or practices of the SBOF.

Approved by the State Board of Finance this 18th day of June, 2024.

Ashley Leach, Director