

California Health Facilities Financing Authority (“CHFFA”)

Agenda Item 9 – Resolution No. 2012-09

Staff Report: Amended Post-Issuance Tax Compliance Procedures

Executive Summary

The Authority approved post-issuance tax compliance procedures at its June 30, 2011 meeting and amended procedures at its December 1, 2011 meeting. At each meeting, staff informed the board members that from time to time further changes to the procedures would be recommended as the Internal Revenue Service (“IRS”) may provide additional guidance.

The IRS released a publication in May 2012 entitled “Your Responsibilities as a Conduit Issuer of Tax-Exempt Bonds”, which provides an overview of a conduit issuer’s responsibilities with respect to tax compliance for tax-exempt bonds. The publication serves to assist conduit issuers in developing tax compliance policies and procedures to ensure that tax-exempt bonds remain in compliance with all post-issuance related federal tax requirements and maintain the tax-exempt status of the bonds.

State Treasurer’s Office legal counsel reviewed the IRS publication and, based on that review and input from bond and tax counsels, now recommends additional changes to CHFFA’s Post-Issuance Tax Compliance Procedures.

The most significant change is that the Authority will designate an “Issuer Compliance Officer” who shall perform the following:

- Review, at least annually, the Borrower’s statements regarding the investments and transactions involving Bond proceeds
- Review, at least annually, certification of compliance and summary of information collected by the Borrower,
- Perform any other action as the Authority may deem necessary or appropriate.

The Issuer Compliance Officer will elevate resolution of a violation to the Executive Director of the Authority if the Issuer Compliance Officer is aware that a violation has occurred or is expected to occur.

Other changes to the procedures outline additional responsibilities of the Borrower and CHFFA, including the following:

- The Borrower and CHFFA shall be aware of the availability of the United States Treasury’s Tax-Exempt Bonds Voluntary Closing Agreement Program (“TEB VCAP”) and other remedial actions to resolve violations, and shall cooperate with one another to take such corrective action when necessary or appropriate.
- Education and training shall be provided to relevant staff of the Borrower and CHFFA.

These procedures may need to be amended from time to time due to any changes or further guidance from the IRS.

Recommendation:

Staff recommends the Authority approve Resolution No. 2012-04 authorizing the adoption of the amended Post-Issuance Tax Compliance Procedures for Tax-Exempt Bonds.

Attachments:

- CHFFA's amended written procedures in track changes
- CHFFA's amended written procedures (clean)
- IRS publication "Your Responsibilities as a Conduit Issuer of Tax-Exempt Bonds"

CHFFA's Amended Written Procedures

Red Lined Version

**California Health Facilities Financing Authority
Post-Issuance Tax Compliance Procedures
For Tax-Exempt Bonds**

~~December 1~~October 25 _____, 20121

The purpose of these Post-Issuance Tax Compliance Procedures is to establish written policies and procedures in connection with tax-exempt bonds or other obligations (“Bonds”) issued by the California Health Facilities Financing Authority (“Authority”) so as to maximize the likelihood that ~~ertain~~ applicable post-issuance requirements of federal income tax law needed to preserve the tax-exempt status of the Bonds are met. The Authority reserves the right to use its discretion as necessary and appropriate to make exceptions or request additional provisions as circumstances warrant. The Authority also reserves the right to change these policies and procedures from time to time.

General

Inasmuch as the Authority is a responsible conduit issuer authorizing the issuance of Bonds for non-profit borrowers, the Authority now identifies post-issuance tax compliance procedures for all Bonds issued by the Authority on behalf of non-profit borrowers, as well as the Authority’s expectations of and requirements for all such borrowers (each a “Borrower”) concerning these procedures.

The Authority will designate an “Issuer Compliance Officer” who shall monitor compliance with post-issuance federal tax requirements for the Bonds for and on behalf of the Authority. The Issuer Compliance Officer shall review these post-issuance tax compliance procedures and conduct compliance reviews at least annually by reviewing the Borrower’s statements regarding the investments and transactions involving Bond proceeds, certification of compliance and summary of information collected by the Borrower, and by performing any other action as the Authority may deem necessary or appropriate. The Issuer Compliance Officer will elevate resolution of a violation to the Executive Director of the Authority if the Issuer Compliance Officer is aware that a violation has occurred or is expected to occur.

If the Authority is contacted by the Internal Revenue Service (“IRS”) regarding post-issuance tax compliance on the Bonds, including an examination or audit, the Borrower will cooperate with the Authority in responding to the IRS.

The Authority and Borrower shall be aware of the availability of the United States Treasury’s Tax-Exempt Bonds Voluntary Closing Agreement Program (“TEB VCAP”) and other remedial actions to resolve violations, and shall cooperate with one another to take such corrective action when necessary or appropriate.

The Borrower shall be responsible for any and all costs, including but not limited to attorney’s fees, associated with or related to post-issuance tax compliance, including but not limited to costs to respond to an IRS examination or for TEB VCAP.

Post-Issuance Compliance Requirements

External Advisors / Documentation

The Authority and the Borrower shall consult with bond counsel and other legal counsel and advisors, as needed, throughout the Bond issuance process to identify requirements and to establish procedures necessary or appropriate so that the Bonds will continue to qualify for tax-exempt status. Those requirements and procedures shall be documented in the tax certificate and agreement (“Tax Certificate”) and/or other documents pertaining to the Bonds that are finalized in connection with the issuance of the Bonds. Those requirements and procedures shall include future compliance with applicable arbitrage rebate requirements and other applicable post-issuance requirements of federal tax law throughout (and in some cases beyond) the term of the Bonds.

The Borrower also shall consult with bond counsel and other legal counsel and advisors, as needed, following issuance of the Bonds to ensure that all applicable post-issuance requirements in fact are met. This shall include, without limitation, consultation in connection with any potential changes in the use of Bond-financed or refinanced assets. This requirement shall be documented in the Tax Certificate and/or other documents pertaining to the Bonds that are finalized in connection with the issuance of the Bonds.

The Authority shall require the Borrower to engage expert advisors (each a “Rebate Service Provider”) to assist in the calculation of arbitrage rebate payable in respect of the investment of Bond proceeds in the manner more fully set forth in the California Health Facilities Financing Authority Model Borrower Post-Issuance Tax Compliance Procedures for Tax- Exempt Bonds (Attachment A).

Unless otherwise provided by the indenture (or similar document) relating to the Bonds, unexpended Bond proceeds shall be held by a trustee or other financial institution, and the investment of Bond proceeds shall be managed by the Borrower. The Borrower shall prepare (or cause the trustee or other financial institution to prepare) regular, periodic statements regarding the investments and transactions involving Bond proceeds and such statements shall be delivered to the Authority if it so requests and at least annually. The statements shall include a certification of compliance and a summary of information collected by the Borrower. The Authority shall, as necessary and appropriate, address concerns raised or actions requested by the Borrower, and may request additional information from the Borrower.

Arbitrage Rebate and Yield

The Borrower shall be responsible for compliance with all requirements under the Federal arbitrage regulations. As more fully set forth in the California Health Facilities Financing Authority Model Borrower Post-Issuance Tax Compliance Procedures for Tax- Exempt Bonds (Attachment A), the Borrower is responsible for:

- determining the likelihood of satisfying an exception to the arbitrage rebate requirement for all or a portion of the proceeds of the Bonds;
- engaging the services of a Rebate Service Provider and, prior to each rebate calculation date, causing the trustee or other financial institution investing Bond proceeds to deliver periodic statements concerning the investment of Bond proceeds to the Rebate Service Provider;

- providing to the Rebate Service Provider additional documents and information reasonably requested by the Rebate Service Provider;
- monitoring the efforts of the Rebate Service Provider;
- assuring the payment of required rebate amounts, if any, no later than 60 days after each 5-year anniversary of the issue date of the Bonds, and no later than 60 days after the last Bond of each issue is redeemed;
- during the construction period of each capital project financed in whole or in part by Bonds, monitoring the investment and expenditure of Bond proceeds and consulting with the Rebate Service Provider to determine compliance with any applicable exceptions from the arbitrage rebate requirements, including during each 6-month spending period up to 6 months, 18 months or 24 months, as applicable, following the issue date of the Bonds;
- retaining copies of all arbitrage reports and trustee statements as described below under “Record Keeping Requirements” and, upon request, providing such copies to the Authority; and
- establishing procedures to ensure investments acquired with Bond proceeds are acquired at their fair market value.

The Borrower, in the Tax Certificate and/or other documents pertaining to the Bonds that are finalized in connection with the issuance of the Bonds, shall designate an officer or employee responsible for the tasks listed above.

Use of Bond Proceeds and Bond-Financed or Refinanced Assets

The Borrower shall be responsible for:

- monitoring the use of Bond proceeds (including investment earnings and including reimbursement of expenditures made before bond issuance) and the use of Bond-financed or refinanced assets (e.g., facilities, furnishings or equipment) throughout the term of the Bonds to ensure compliance with covenants and restrictions set forth in the Tax Certificate relating to the Bonds;
- maintaining records identifying the assets or portion of assets that are financed or refinanced with proceeds of each issue of Bonds, including a final allocation of Bond proceeds as described below under “Record Keeping Requirements”;
- consulting with bond counsel and other legal counsel and advisers in the review of any change in use, or potential change in use, of Bond-financed or refinanced assets to ensure compliance with all covenants and restrictions set forth in the Tax Certificate relating to the Bonds;
- maintaining records for any contracts or arrangements involving the use of Bond-financed or refinanced assets as described below under “Record Keeping Requirements”;
- conferring at least annually with personnel responsible for Bond-financed or refinanced assets to identify and discuss any existing or planned use of Bond-financed or refinanced

assets and to ensure that those uses are consistent with all covenants and restrictions set forth in the Tax Certificate relating to the Bonds; and

- to the extent that the Borrower discovers that any applicable tax restrictions regarding use of Bond proceeds and Bond-financed or refinanced assets will or may be violated, consulting promptly with bond counsel and other legal counsel and advisers to determine a course of action to remediate all nonqualified Bonds or take other remedial action, if such counsel advises that a remedial action is necessary.

The Borrower, in the Tax Certificate and/or other documents pertaining to the Bonds that are finalized in connection with the issuance of the Bonds, shall designate an officer or employee responsible for the tasks listed above.

All relevant records and contracts shall be maintained as described below.

Record Keeping Requirement

The Borrower shall be responsible for maintaining the following documents for the term of each issue of Bonds (including refunding Bonds, if any) plus at least three years:

- a copy of the Bond closing transcript(s) and other relevant documentation delivered to the Borrower at or in connection with closing of the issue of Bonds;
- a copy of all material documents relating to capital expenditures financed or refinanced by Bond proceeds, including (without limitation) construction contracts, purchase orders, invoices, trustee requisitions and payment records, as well as documents relating to costs reimbursed with Bond proceeds and records identifying the assets or portion of assets that are financed or refinanced with Bond proceeds, including a final allocation of Bond proceeds;
- a copy of all contracts and arrangements involving the use of Bond-financed or refinanced assets; and
- a copy of all records of investments, investment agreements, credit enhancement, arbitrage reports and underlying documents, including trustee statements, in connection with any investment agreements, and copies of all bidding documents, if any.

The Borrower, in the Tax Certificate and/or other documents pertaining to the Bonds that are finalized in connection with the issuance of the Bonds, shall designate an officer or employee responsible for retaining the records listed above.

Education and Training

The Issuer Compliance Officer and relevant staff of each the Authority and Borrower shall be provided with education and training on federal tax requirements for post-issuance compliance applicable to the Bonds. The Authority and Borrower, respectively, will enable and encourage relevant personnel to attend and participate in educational and training programs offered by professional organizations and other entities with regard to monitoring compliance with federal tax requirements for the Bonds.

MODEL PROCEDURES

California Health Facilities Financing Authority Borrower Post-Issuance Tax Compliance Procedures For Tax-Exempt Bonds

The purpose of these Post-Issuance Tax Compliance Procedures, established by _____ (“Borrower”), is to maximize the likelihood that post-issuance requirements of federal income tax law applicable to the various issues of bonds issued by the California Health Facilities Financing Authority (“Authority) for the benefit of the Borrower (the “Bonds”) are met. The Borrower reserves the right to use its discretion as necessary and appropriate to make exceptions or request additional provisions as circumstances warrant. The Borrower also reserves the right to change these policies and procedures from time to time.

General

The Borrower now identifies post-issuance tax compliance procedures for all Bonds issued on its behalf by the Authority.

The Borrower will cooperate with the Authority in responding to the Internal Revenue Service (“IRS”) regarding post-issuance tax compliance on the Bonds, including IRS examinations and audits. The Borrower shall be aware of the availability of the United States Treasury’s Tax-Exempt Bonds Voluntary Closing Agreement Program (“TEB VCAP”) and other remedial actions to resolve violations, and shall cooperate with the Authority to take such corrective action when necessary or appropriate. The Borrower is responsible for any and all costs, including but not limited to attorney’s fees, associated with or related to post-issuance tax compliance, including but not limited to costs to respond to an IRS examination or for TEB VCAP.

Post-Issuance Compliance Requirements

External Advisors / Documentation

The Borrower shall consult with bond counsel and other legal counsel and advisors, as needed, throughout the Bond issuance process to identify requirements and to establish procedures necessary or appropriate so that the Bonds will continue to qualify for tax-exempt status. The Borrower also shall consult with bond counsel and/or other legal counsel and advisors, as needed, following issuance of the Bonds to ensure that all applicable post-issuance requirements in fact are met. This shall include, without limitation, consultation in connection with any potential changes in the use of Bond-financed or refinanced assets.

The Borrower shall determine (or obtain expert advice to determine) whether arbitrage rebate calculations have to be made for the Bond issue. If it is determined that such calculations are, or are likely to be required, the Borrower shall engage expert advisors (each a “Rebate Service Provider”) to assist in the calculation of arbitrage rebate payable in respect of the investment of Bond proceeds. The Borrower shall make any rebate payments required on a timely basis, and

shall involve the Authority as necessary and appropriate, including the signing and filing of appropriate IRS forms (e.g., Form 8038-T).

Unless otherwise provided by the indenture (or similar document) relating to the Bonds, unexpended Bond proceeds shall be held by a trustee or other financial institution, and the investment of Bond proceeds shall be managed by the Borrower. The Borrower shall prepare (or cause the trustee or other financial institution to prepare) regular, periodic statements regarding the investments and transactions involving Bond proceeds and such statements shall be delivered to the Authority upon request and at least annually. The statements shall include a certification of compliance and a summary of information collected by the Borrower. The Borrower will cooperate with the Authority to address any concerns.

Arbitrage Rebate and Yield

[TITLE OF EMPLOYEE/OFFICER OF BORROWER] shall be responsible for overseeing compliance with arbitrage rebate requirements under federal tax law:

- (1) If, at the time of Bond issuance, based on the Borrower's reasonable expectations, it appears likely that the Bond issue will qualify for an exemption from the rebate requirement, the Borrower may defer taking any of the actions set forth in subsection (2) below. Not later than the time of completion of construction or acquisition of the capital projects financed with proceeds of the Bonds, and depletion of all funds from the project fund, the Borrower shall make, determine, or cause its Rebate Service Provider to determine, whether any of the Bond proceeds qualified for a spending exception or other exception from the rebate requirements. If a rebate exception is determined to be applicable for all of the proceeds of the Bonds, the Borrower shall prepare and keep in the permanent records of the Bond issue a memorandum evidencing this conclusion together with records of expenditure (or other records) to support such conclusion. If the transaction does not qualify for an exception to the rebate requirement, for all of the proceeds of the Bonds, the Borrower shall initiate the steps set forth in subsection (2) below.
- (2) If, at the time of Bond issuance it appears likely that arbitrage rebate calculations will be required, or upon determination that calculations are required pursuant to subsection (1) above, Borrower shall:
 - engage the services of a Rebate Service Provider and, prior to each rebate calculation date, cause the trustee or other financial institution investing Bond proceeds to deliver periodic statements concerning the investment of Bond proceeds to the Rebate Service Provider;
 - provide to the Rebate Service Provider additional documents and information reasonably requested by the Rebate Service Provider;
 - monitor the efforts of the Rebate Service Provider;
 - assure the payment of required rebate amounts, if any, no later than 60 days after each 5-year anniversary of the issue date of the Bonds, and no later than 60 days after the last Bond of each issue is redeemed;

- during the construction period of each capital project financed in whole or in part by Bonds, monitor the investment and expenditure of Bond proceeds and consult with the Rebate Service Provider to determine compliance with any applicable exceptions from the arbitrage rebate requirements, including during each 6-month spending period up to 6 months, 18 months or 24 months, as and if applicable, following the issue date of the Bonds;
- retain copies of all arbitrage reports and trustee statements as described below under “Record Keeping Requirements” and, upon request, provide such copies to the Authority; and
- establish procedures to ensure that investments that are acquired with Bond proceeds are so acquired at their fair market value.

Use of Bond Proceeds and Bond-Financed or Refinanced Assets

[TITLE OF EMPLOYEE/OFFICER OF BORROWER] shall be responsible for:

- monitoring the use of Bond proceeds (including investment earnings and including reimbursement of expenditures made before Bond issuance) and the use of Bond-financed or refinanced assets (e.g., facilities, furnishings or equipment) throughout the term of the Bonds to ensure compliance with covenants and restrictions set forth in the Tax Certificate relating to the Bonds;
- maintaining records identifying the assets or portion of assets that are financed or refinanced with proceeds of each issue of Bonds (including investment earnings and including reimbursement of expenditures made before Bond issuance), including a final allocation of Bond proceeds as described below under “Record Keeping Requirements”;
- consulting with bond counsel and other legal counsel and advisers in the review of any change in use, or potential change in use, of Bond-financed or refinanced assets to ensure compliance with all covenants and restrictions set forth in the Tax Certificate relating to the Bonds;
- maintaining records for any contracts or arrangements involving the use of Bond-financed or refinanced assets as described below under “Record Keeping Requirements”;
- conferring at least annually with personnel responsible for Bond-financed or refinanced assets to identify and discuss any existing or planned use of Bond-financed or refinanced assets and to ensure that those uses are consistent with all covenants and restrictions set forth in the Tax Certificate relating to the Bonds; and
- to the extent that the Borrower discovers that any applicable tax restrictions regarding use of Bond proceeds and Bond-financed or refinanced assets will or may be violated, consulting promptly with bond counsel and other legal counsel and advisers to determine a course of action to remediate all nonqualified Bonds or take other remedial action, if such counsel advises that a remedial action is necessary.

All relevant records and contracts shall be maintained as described below.

Record Keeping Requirement

[TITLE OF EMPLOYEE/OFFICER OF BORROWER] shall be responsible for maintaining the following documents for the term of each issue of Bonds (including refunding Bonds, if any) plus at least three years:

- a copy of the Bond closing transcript(s) and other relevant documentation delivered to the Borrower at or in connection with closing of the issue of Bonds;
- a copy of all material documents relating to capital expenditures financed or refinanced by Bond proceeds, including (without limitation) construction contracts, purchase orders, invoices, trustee requisitions and payment records, as well as documents relating to costs reimbursed with Bond proceeds and records identifying the assets or portion of assets that are financed or refinanced with Bond proceeds, including a final allocation of Bond proceeds;
- a copy of all contracts and arrangements involving the use of Bond-financed or refinanced assets; and
- a copy of all records of investments, investment agreements, credit enhancement, arbitrage reports and underlying documents, including trustee statements, in connection with any investment agreements, and copies of all bidding documents, if any.

Education and Training

The Borrower shall provide relevant staff with education and training on federal tax requirements for post-issuance compliance applicable to the Bonds. The Borrower will enable and encourage relevant staff to attend and participate in educational and training programs offered by professional organizations and other entities with regard to monitoring compliance with federal tax requirements for the Bonds.

DATED:_____

[BORROWER]

By_____

[Title]

CHFFA's Amended Written Procedures

Clean Version

**California Health Facilities Financing Authority
Post-Issuance Tax Compliance Procedures
For Tax-Exempt Bonds**

October 25, 2012

The purpose of these Post-Issuance Tax Compliance Procedures is to establish written policies and procedures in connection with tax-exempt bonds or other obligations (“Bonds”) issued by the California Health Facilities Financing Authority (“Authority”) so as to maximize the likelihood that applicable post-issuance requirements of federal income tax law needed to preserve the tax-exempt status of the Bonds are met. The Authority reserves the right to use its discretion as necessary and appropriate to make exceptions or request additional provisions as circumstances warrant. The Authority also reserves the right to change these policies and procedures from time to time.

General

Inasmuch as the Authority is a responsible conduit issuer authorizing the issuance of Bonds for non-profit borrowers, the Authority now identifies post-issuance tax compliance procedures for all Bonds issued by the Authority on behalf of non-profit borrowers, as well as the Authority’s expectations of and requirements for all such borrowers (each a “Borrower”) concerning these procedures.

The Authority will designate an “Issuer Compliance Officer” who shall monitor compliance with post-issuance federal tax requirements for the Bonds for and on behalf of the Authority. The Issuer Compliance Officer shall review these post-issuance tax compliance procedures and conduct compliance reviews at least annually by reviewing the Borrower’s statements regarding the investments and transactions involving Bond proceeds, certification of compliance and summary of information collected by the Borrower, and by performing any other action as the Authority may deem necessary or appropriate. The Issuer Compliance Officer will elevate resolution of a violation to the Executive Director of the Authority if the Issuer Compliance Officer is aware that a violation has occurred or is expected to occur.

If the Authority is contacted by the Internal Revenue Service (“IRS”) regarding post-issuance tax compliance on the Bonds, including an examination or audit, the Borrower will cooperate with the Authority in responding to the IRS.

The Authority and Borrower shall be aware of the availability of the United States Treasury’s Tax-Exempt Bonds Voluntary Closing Agreement Program (“TEB VCAP”) and other remedial actions to resolve violations, and shall cooperate with one another to take such corrective action when necessary or appropriate.

The Borrower shall be responsible for any and all costs, including but not limited to attorney’s fees, associated with or related to post-issuance tax compliance, including but not limited to costs to respond to an IRS examination or for TEB VCAP.

Post-Issuance Compliance Requirements

External Advisors / Documentation

The Authority and the Borrower shall consult with bond counsel and other legal counsel and advisors, as needed, throughout the Bond issuance process to identify requirements and to establish procedures necessary or appropriate so that the Bonds will continue to qualify for tax-exempt status. Those requirements and procedures shall be documented in the tax certificate and agreement (“Tax Certificate”) and/or other documents pertaining to the Bonds that are finalized in connection with the issuance of the Bonds. Those requirements and procedures shall include future compliance with applicable arbitrage rebate requirements and other applicable post-issuance requirements of federal tax law throughout (and in some cases beyond) the term of the Bonds.

The Borrower also shall consult with bond counsel and other legal counsel and advisors, as needed, following issuance of the Bonds to ensure that all applicable post-issuance requirements in fact are met. This shall include, without limitation, consultation in connection with any potential changes in the use of Bond-financed or refinanced assets. This requirement shall be documented in the Tax Certificate and/or other documents pertaining to the Bonds that are finalized in connection with the issuance of the Bonds.

The Authority shall require the Borrower to engage expert advisors (each a “Rebate Service Provider”) to assist in the calculation of arbitrage rebate payable in respect of the investment of Bond proceeds in the manner more fully set forth in the California Health Facilities Financing Authority Model Borrower Post-Issuance Tax Compliance Procedures for Tax- Exempt Bonds (Attachment A).

Unless otherwise provided by the indenture (or similar document) relating to the Bonds, unexpended Bond proceeds shall be held by a trustee or other financial institution, and the investment of Bond proceeds shall be managed by the Borrower. The Borrower shall prepare (or cause the trustee or other financial institution to prepare) regular, periodic statements regarding the investments and transactions involving Bond proceeds and such statements shall be delivered to the Authority if it so requests and at least annually. The statements shall include a certification of compliance and a summary of information collected by the Borrower. The Authority shall, as necessary and appropriate, address concerns raised or actions requested by the Borrower, and may request additional information from the Borrower.Arbitrage Rebate and Yield

The Borrower shall be responsible for compliance with all requirements under the Federal arbitrage regulations. As more fully set forth in the California Health Facilities Financing Authority Model Borrower Post-Issuance Tax Compliance Procedures for Tax- Exempt Bonds (Attachment A), the Borrower is responsible for:

- determining the likelihood of satisfying an exception to the arbitrage rebate requirement for all or a portion of the proceeds of the Bonds;
- engaging the services of a Rebate Service Provider and, prior to each rebate calculation date, causing the trustee or other financial institution investing Bond proceeds to deliver periodic statements concerning the investment of Bond proceeds to the Rebate Service Provider;
- providing to the Rebate Service Provider additional documents and information reasonably requested by the Rebate Service Provider;

- monitoring the efforts of the Rebate Service Provider;
- assuring the payment of required rebate amounts, if any, no later than 60 days after each 5-year anniversary of the issue date of the Bonds, and no later than 60 days after the last Bond of each issue is redeemed;
- during the construction period of each capital project financed in whole or in part by Bonds, monitoring the investment and expenditure of Bond proceeds and consulting with the Rebate Service Provider to determine compliance with any applicable exceptions from the arbitrage rebate requirements, including during each 6-month spending period up to 6 months, 18 months or 24 months, as applicable, following the issue date of the Bonds;
- retaining copies of all arbitrage reports and trustee statements as described below under “Record Keeping Requirements” and, upon request, providing such copies to the Authority; and
- establishing procedures to ensure investments acquired with Bond proceeds are acquired at their fair market value.

The Borrower, in the Tax Certificate and/or other documents pertaining to the Bonds that are finalized in connection with the issuance of the Bonds, shall designate an officer or employee responsible for the tasks listed above.

Use of Bond Proceeds and Bond-Financed or Refinanced Assets

The Borrower shall be responsible for:

- monitoring the use of Bond proceeds (including investment earnings and including reimbursement of expenditures made before bond issuance) and the use of Bond-financed or refinanced assets (e.g., facilities, furnishings or equipment) throughout the term of the Bonds to ensure compliance with covenants and restrictions set forth in the Tax Certificate relating to the Bonds;
- maintaining records identifying the assets or portion of assets that are financed or refinanced with proceeds of each issue of Bonds, including a final allocation of Bond proceeds as described below under “Record Keeping Requirements”;
- consulting with bond counsel and other legal counsel and advisers in the review of any change in use, or potential change in use, of Bond-financed or refinanced assets to ensure compliance with all covenants and restrictions set forth in the Tax Certificate relating to the Bonds;
- maintaining records for any contracts or arrangements involving the use of Bond-financed or refinanced assets as described below under “Record Keeping Requirements”;
- conferring at least annually with personnel responsible for Bond-financed or refinanced assets to identify and discuss any existing or planned use of Bond-financed or refinanced assets and to ensure that those uses are consistent with all covenants and restrictions set forth in the Tax Certificate relating to the Bonds; and

- to the extent that the Borrower discovers that any applicable tax restrictions regarding use of Bond proceeds and Bond-financed or refinanced assets will or may be violated, consulting promptly with bond counsel and other legal counsel and advisers to determine a course of action to remediate all nonqualified Bonds or take other remedial action, if such counsel advises that a remedial action is necessary.

The Borrower, in the Tax Certificate and/or other documents pertaining to the Bonds that are finalized in connection with the issuance of the Bonds, shall designate an officer or employee responsible for the tasks listed above.

All relevant records and contracts shall be maintained as described below.

Record Keeping Requirement

The Borrower shall be responsible for maintaining the following documents for the term of each issue of Bonds (including refunding Bonds, if any) plus at least three years:

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- a copy of all contracts and arrangements involving the use of Bond-financed or refinanced assets; and
- a copy of all records of investments, investment agreements, credit enhancement, arbitrage reports and underlying documents, including trustee statements, in connection with any investment agreements, and copies of all bidding documents, if any.

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Education and Training

The Issuer Compliance Officer and relevant staff of each the Authority and Borrower shall be provided with education and training on federal tax requirements for post-issuance compliance applicable to the Bonds. The Authority and Borrower, respectively, will enable and encourage relevant personnel to attend and participate in educational and training programs offered by professional organizations and other entities with regard to monitoring compliance with federal tax requirements for the Bonds.

MODEL PROCEDURES

California Health Facilities Financing Authority Borrower Post-Issuance Tax Compliance Procedures For Tax-Exempt Bonds

The purpose of these Post-Issuance Tax Compliance Procedures, established by _____ (“Borrower”), is to maximize the likelihood that post-issuance requirements of federal income tax law applicable to the various issues of bonds issued by the California Health Facilities Financing Authority (“Authority) for the benefit of the Borrower (the “Bonds”) are met. The Borrower reserves the right to use its discretion as necessary and appropriate to make exceptions or request additional provisions as circumstances warrant. The Borrower also reserves the right to change these policies and procedures from time to time.

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Post-Issuance Compliance Requirements

External Advisors / Documentation

The Borrower shall consult with bond counsel and other legal counsel and advisors, as needed, throughout the Bond issuance process to identify requirements and to establish procedures necessary or appropriate so that the Bonds will continue to qualify for tax-exempt status. The Borrower also shall consult with bond counsel and/or other legal counsel and advisors, as needed, following issuance of the Bonds to ensure that all applicable post-issuance requirements in fact are met. This shall include, without limitation, consultation in connection with any potential changes in the use of Bond-financed or refinanced assets.

The Borrower shall determine (or obtain expert advice to determine) whether arbitrage rebate calculations have to be made for the Bond issue. If it is determined that such calculations are, or are likely to be required, the Borrower shall engage expert advisors (each a “Rebate Service Provider”) to assist in the calculation of arbitrage rebate payable in respect of the investment of Bond proceeds. The Borrower shall make any rebate payments required on a timely basis, and

shall involve the Authority as necessary and appropriate, including the signing and filing of appropriate IRS forms (e.g., Form 8038-T).

Unless otherwise provided by the indenture (or similar document) relating to the Bonds, unexpended Bond proceeds shall be held by a trustee or other financial institution, and the investment of Bond proceeds shall be managed by the Borrower. The Borrower shall prepare (or cause the trustee or other financial institution to prepare) regular, periodic statements regarding the investments and transactions involving Bond proceeds and such statements shall be delivered to the Authority upon request and at least annually. The statements shall include a certification of compliance and a summary of information collected by the Borrower. The Borrower will cooperate with the Authority to address any concerns.

Arbitrage Rebate and Yield

[TITLE OF EMPLOYEE/OFFICER OF BORROWER] shall be responsible for overseeing compliance with arbitrage rebate requirements under federal tax law:

- (1) If, at the time of Bond issuance, based on the Borrower's reasonable expectations, it appears likely that the Bond issue will qualify for an exemption from the rebate requirement, the Borrower may defer taking any of the actions set forth in subsection (2) below. Not later than the time of completion of construction or acquisition of the capital projects financed with proceeds of the Bonds, and depletion of all funds from the project fund, the Borrower shall make, determine, or cause its Rebate Service Provider to determine, whether any of the Bond proceeds qualified for a spending exception or other exception from the rebate requirements. If a rebate exception is determined to be applicable for all of the proceeds of the Bonds, the Borrower shall prepare and keep in the permanent records of the Bond issue a memorandum evidencing this conclusion together with records of expenditure (or other records) to support such conclusion. If the transaction does not qualify for an exception to the rebate requirement, for all of the proceeds of the Bonds, the Borrower shall initiate the steps set forth in subsection (2) below.
- (2) If, at the time of Bond issuance it appears likely that arbitrage rebate calculations will be required, or upon determination that calculations are required pursuant to subsection (1) above, Borrower shall:
 - engage the services of a Rebate Service Provider and, prior to each rebate calculation date, cause the trustee or other financial institution investing Bond proceeds to deliver periodic statements concerning the investment of Bond proceeds to the Rebate Service Provider;
 - provide to the Rebate Service Provider additional documents and information reasonably requested by the Rebate Service Provider;
 - monitor the efforts of the Rebate Service Provider;
 - assure the payment of required rebate amounts, if any, no later than 60 days after each 5-year anniversary of the issue date of the Bonds, and no later than 60 days after the last Bond of each issue is redeemed;

- during the construction period of each capital project financed in whole or in part by Bonds, monitor the investment and expenditure of Bond proceeds and consult with the Rebate Service Provider to determine compliance with any applicable exceptions from the arbitrage rebate requirements, including during each 6-month spending period up to 6 months, 18 months or 24 months, as and if applicable, following the issue date of the Bonds;
- retain copies of all arbitrage reports and trustee statements as described below under “Record Keeping Requirements” and, upon request, provide such copies to the Authority; and
- establish procedures to ensure that investments that are acquired with Bond proceeds are so acquired at their fair market value.

Use of Bond Proceeds and Bond-Financed or Refinanced Assets

[TITLE OF EMPLOYEE/OFFICER OF BORROWER] shall be responsible for:

- monitoring the use of Bond proceeds (including investment earnings and including reimbursement of expenditures made before Bond issuance) and the use of Bond-financed or refinanced assets (e.g., facilities, furnishings or equipment) throughout the term of the Bonds to ensure compliance with covenants and restrictions set forth in the Tax Certificate relating to the Bonds;
- maintaining records identifying the assets or portion of assets that are financed or refinanced with proceeds of each issue of Bonds (including investment earnings and including reimbursement of expenditures made before Bond issuance), including a final allocation of Bond proceeds as described below under “Record Keeping Requirements”;
- consulting with bond counsel and other legal counsel and advisers in the review of any change in use, or potential change in use, of Bond-financed or refinanced assets to ensure compliance with all covenants and restrictions set forth in the Tax Certificate relating to the Bonds;
- maintaining records for any contracts or arrangements involving the use of Bond-financed or refinanced assets as described below under “Record Keeping Requirements”;
- conferring at least annually with personnel responsible for Bond-financed or refinanced assets to identify and discuss any existing or planned use of Bond-financed or refinanced assets and to ensure that those uses are consistent with all covenants and restrictions set forth in the Tax Certificate relating to the Bonds; and
- to the extent that the Borrower discovers that any applicable tax restrictions regarding use of Bond proceeds and Bond-financed or refinanced assets will or may be violated, consulting promptly with bond counsel and other legal counsel and advisers to determine a course of action to remediate all nonqualified Bonds or take other remedial action, if such counsel advises that a remedial action is necessary.

All relevant records and contracts shall be maintained as described below.

Record Keeping Requirement

[TITLE OF EMPLOYEE/OFFICER OF BORROWER] shall be responsible for maintaining the following documents for the term of each issue of Bonds (including refunding Bonds, if any) plus at least three years:

- a copy of the Bond closing transcript(s) and other relevant documentation delivered to the Borrower at or in connection with closing of the issue of Bonds;
- a copy of all material documents relating to capital expenditures financed or refinanced by Bond proceeds, including (without limitation) construction contracts, purchase orders, invoices, trustee requisitions and payment records, as well as documents relating to costs reimbursed with Bond proceeds and records identifying the assets or portion of assets that are financed or refinanced with Bond proceeds, including a final allocation of Bond proceeds;
- a copy of all contracts and arrangements involving the use of Bond-financed or refinanced assets; and
- a copy of all records of investments, investment agreements, credit enhancement, arbitrage reports and underlying documents, including trustee statements, in connection with any investment agreements, and copies of all bidding documents, if any.

Education and Training

The Borrower shall provide relevant staff with education and training on federal tax requirements for post-issuance compliance applicable to the Bonds. The Borrower will enable and encourage relevant staff to attend and participate in educational and training programs offered by professional organizations and other entities with regard to monitoring compliance with federal tax requirements for the Bonds.

DATED: _____

[BORROWER]

By _____

[Title]



Tax Exempt
Government Entities



Your Responsibilities as a **Conduit Issuer** of **Tax-Exempt Bonds**



INTRODUCTION

The office of Tax Exempt Bonds (“TEB”), of the Internal Revenue Service (“IRS”), Tax Exempt and Government Entities division, offers specialized information and services to the municipal finance community. Municipal bonds provide tax-exempt financing for certain qualified purposes including the construction of hospitals, residential rental housing, solid waste facilities, colleges and universities and cultural institutions. Tax-exempt financing also is available for the furtherance of governmental purposes.



This IRS Publication 5005, *Your Responsibilities As A Conduit Issuer of Tax-Exempt Bonds* provides an overview for state and local governments of the responsibilities of the conduit issuer with respect to tax compliance in municipal financing arrangements commonly known as conduit financings. The term “conduit issuer” refers to an issuer of tax-exempt bonds in a conduit financing. A conduit financing generally describes a situation where tax-exempt bonds are issued by a state or local government and the proceeds are used for a defined qualified purpose by an entity other than the government issuing the bonds (the conduit borrower). For tax-exempt bonds, all applicable federal tax law requirements must be met to ensure that interest earned by bondholders is exempt from taxation under section 103 of the Internal Revenue Code (the “Code”). For information regarding the more specific rules applicable to qualified 501(c)(3) bonds, other qualified private activity bonds and governmental bonds, see IRS Publications [4077, Tax-Exempt 501\(c\)\(3\) Bonds Compliance Guide](#), [4078, Tax-Exempt Private Activity Bonds Compliance Guide](#) and [4079, Tax-Exempt Governmental Bonds](#), respectively. TEB also provides detailed information on specific provisions of the tax law through IRS publications (available online) and through outreach efforts as noted on the TEB website at www.irs.gov/bonds.

BACKGROUND

Tax-exempt bonds are valid debt obligations of state and local governments, commonly referred to as “issuers” — the interest on which is tax-exempt. This means that the interest paid to bondholders is not includable in their gross income for federal income tax purposes. This tax-exempt status continues throughout the life of the bonds provided that all applicable federal tax laws are satisfied. Various requirements apply under the Code and Income Tax Regulations (the “Treasury regulations”) including, but not limited to, information filing and other requirements related to issuance, the proper and timely use of bond-financed property, and arbitrage yield restriction and rebate requirements. The benefits of tax-exempt bond financing can apply to the many different types of municipal debt financing arrangements through which government issuers obligate themselves, including notes, loans, lease purchase contracts, lines of credit, and commercial paper.

TAX-EXEMPT CONDUIT BONDS

Bonds that are issued for the purpose of making loans to entities other than state or local governments are commonly referred to as “conduit bonds” or “conduit issues” and state or local governments which issue these bonds are commonly referred to as “conduit issuers.” Generally, to be tax-exempt, bonds issued by conduit issuers must be either governmental bonds or be otherwise qualified bonds defined in section 141(e) of the Code (e.g., exempt facility bonds, qualified small issue bonds or qualified 501(c)(3) bonds) that are not arbitrage bonds within the meaning of section 148 of the Code and meet the applicable requirements of section 149 of the Code.

The federal tax compliance rules covered in this publication are those that are the responsibility of the conduit issuer. In order to comply with these requirements, conduit issuers must ensure that certain rules are met at the time the bonds are issued and that others are met throughout the term of the bonds. The IRS encourages conduit issuers and borrowers of tax-exempt bonds to implement written tax compliance procedures that will enable them to timely identify and correct violations that might result in the loss of the tax-exempt status of their bonds.

PARTIES TO CONDUIT BOND ISSUE

A conduit issuer in a conduit bond financing typically issues the bonds and loans the bond proceeds to a conduit borrower. A conduit borrower is generally responsible for the payment of debt service on the conduit bond issue and is usually contractually obligated to maintain the tax-exempt status of the bonds. The conduit issuer is treated as a “taxpayer” for federal tax purposes and procedures. As such, the conduit issuer is the party generally responsible for tax compliance. However, the bond documents usually provide for delegation of certain responsibilities to the conduit borrower. The bondholders rely on both the conduit issuer and the conduit borrower to maintain the tax-exempt status of the bonds. The first part of this publication describes examples of the tax compliance responsibilities of the conduit issuer in a conduit financing. The second part of this publication discusses certain options the conduit issuer may consider when formulating its tax compliance policy and procedures.

BONDS SUPPORTED BY LEASES

Certain bonds issued by state or local governments are not used to make loans to other entities. Nevertheless, such issues (e.g., certain airport bonds) may be used to finance facilities leased to another entity for the entire term of the bonds. While such issues are not conduit bonds, the lessee of such facilities often is the primary obligor responsible for many of the compliance requirements and such bonds may be treated as conduit bonds for many purposes. Accordingly, many of the matters described herein apply to issuers of such bonds.

EXAMPLES OF THE TAX COMPLIANCE RESPONSIBILITIES OF CONDUIT ISSUERS

The following is a general discussion of examples of the tax compliance responsibilities of the conduit issuer in the financing of conduit bonds. The provisions discussed herein are examples where conduit issuers must take specific actions. The various responsibilities described below are not all inclusive and additional actions may be required for certain types of financings or in certain circumstances.

Information Filing Requirements: At the time of issuance, conduit issuers must comply with certain information filing requirements under section 149(e) of the Code. The information return that a conduit issuer is required to file is dictated by the size and/or type of conduit issuance. However, most conduit issuers are required to file [Form 8038](#).

Information Return	Due Dates	Where to File
<p>Form 8038, <i>Information Return for Tax-Exempt Private Activity Bond Issues</i>.</p>	<p>Generally, this return is required to be filed by the 15th day of the second calendar month following the quarter in which the bonds were issued. For example, the due date of the return for bonds issued on February 1st is May 15th.</p>	<p>File these returns with the IRS at the following address: Internal Revenue Service Center Ogden, UT 84201</p>
<p>Form 8038-G, <i>Information Return for Tax-Exempt Governmental Obligations</i>, for governmental bonds with an issue price of \$100,000 or greater.</p> <p>Form 8038-GC, <i>Information Return for Small Tax-Exempt Governmental Bond Issues, Leases, and Installment Sales</i>, for governmental bonds with an issue price of less than \$100,000.</p>	<p>Generally, both of these returns are required to be filed by the 15th day of the second calendar month following the quarter in which the bonds were issued. For example, the due date of the return for bonds issued on February 15th is May 15th.</p> <p>Form 8038-GC may, however, also be filed on a consolidated basis for bond issues of less than \$100,000 each.</p> <p>Consolidated returns are due by February 15th following the calendar year in which the bonds were issued.</p> <p>Example: An issuer issues three governmental bond issues as follows: Issue A issued on 3/1/11 for an issue price of \$50,000; Issue B on 6/15/11 for \$75,000; and Issue C on 10/5/11 for \$30,000. The issuer can file one consolidated return by February 15, 2012, for all three bond issues.</p>	<p>File these returns with the IRS at the following address: Internal Revenue Service Center Ogden, UT 84201</p>

Late Filing of Information Returns: A conduit issuer may request an extension of time to file Forms 8038, 8038-G, or 8038-GC, as applicable, so long as the failure to file the return on time was not due to willful neglect. To request an extension, the conduit issuer must follow the procedures outlined in [Revenue Procedure 2002-48, 2002-37 I.R.B. 531](#). These procedures generally require that the conduit issuer: 1) attach a letter to the return filed (such as Form 8038, 8038-G, 8038-GC) briefly explaining when the return was required to be filed, why the return was not timely submitted, and whether or not the bond issue is under examination; 2) enter on top of the return “Request for Relief under section 3 of Revenue Procedure 2002-48;” and 3) file this letter and the return with the IRS at the Ogden Submission Processing Center.

Volume Cap Limit: The volume cap limit for certain qualified private activity bonds, as set forth in section 146 of the Code, limits an issuing authority to a maximum amount of tax-exempt bonds that can be issued to finance a particular qualified purpose during a calendar year. If, during a given year, an issuing authority issues qualified private activity bonds in excess of its applicable volume cap limit, the tax-exempt status of those bonds is jeopardized. A conduit issuer has an obligation to monitor volume cap allocations in order to properly file information returns and make carryforward elections. Certain types of qualified private activity bonds do not require volume cap allocations. In addition, certain current refunding bonds do not require volume cap allocations to the extent the amount of refunding bonds does not exceed the outstanding amount of the refunded bonds.

Carryforward of Unused Volume Cap: A conduit issuer may elect to carry any unused volume cap of a calendar year forward for three years. This election can be made for each of the carryforward purposes described in section 146 of the Code. This generally includes qualified private activity bond purposes subject to volume cap except for the purpose of issuing qualified small issue bonds. This election is made by filing [IRS Form 8328, Carryforward Election of Unused Private Activity Bond Volume Cap](#), by the earlier of February 15th following the year in which the unused amount arises or the date of issue of any bonds pursuant to the carryforward election. Once Form 8328 is filed, the issuer may not revoke the carryforward election or amend the carryforward amounts shown on the form. Errors on this form cannot be corrected through an amended filing. The conduit issuer may file a TEB Voluntary Closing Agreement Program request to correct mathematical, typographical, and similar errors. See [Notice 2008-31, 2008-11 I.R.B. 592](#), and section 7.2.3 of the Internal Revenue Manual.

Public Approval Requirement: Generally, prior to issuance, qualified private activity bonds (including qualified 501(c)(3) bonds) must be approved by an applicable elected representative for the governmental entity issuing the bonds and, in some cases, for each governmental entity having jurisdiction over the area in which the bond-financed facility is to be located. The public approval must occur after the holding of a public hearing following reasonable public notice in advance of the public hearing and must be completed within a prescribed period. As such, the conduit issuer is involved in certain aspects of the public approval process. Public approval by a governmental unit(s) may also be by voter referendum. Section 147(f) of the Code and section 5f.103-2 of the Treasury regulations define the specific rules for this requirement.

Limitations Relating to Fees Charged by the Conduit Issuer: Conduit issuers may charge fees payable either out of the bond proceeds or by the conduit borrower. Such fees may be used by the conduit issuer to offset all or a portion of the costs payable by the conduit issuer related to its role and may also be used to raise funds for governmental purposes of the conduit issuer. Such fees may increase the effective yield of the conduit loan when viewed by the conduit issuer as a purpose investment. Section 148 of the Code generally limits the yield on purpose investments to the yield on the bonds plus a spread. This limitation effectively limits the size of the fees that may be charged by the conduit issuer regardless of whether paid periodically or up front. Conduit issuers generally must ensure that the yield on the conduit loan does not exceed the yield on the bonds by more than the permitted spread in order to prevent the bonds from becoming arbitrage bonds.

Certification Regarding Expectations for Use and Investment of Proceeds: The Treasury regulations generally require a conduit issuer to make a certification regarding its expectations. Section 1.148-2(b)(2)(i) provides that an officer of the issuer responsible for issuing the bonds must, in good faith, certify the issuer's reasonable expectations as of the issue date. The certification must state the facts and estimates that form the basis of the issuer's expectations. The certification is evidence of the issuer's expectations, but does not establish any conclusions of law or any presumptions regarding either the issuer's actual expectations or their reasonableness. This certification is not required if the conduit issuer reasonably expects, as of the issue date, that there will be no unspent gross proceeds after the issue date, other than gross proceeds in a bona fide debt service fund or the issue price of the bond issue does not exceed \$1,000,000.

Reimbursement Declarations of Official Intent: Under section 1.150-2 of the Treasury regulations, a conduit issuer or conduit borrower is permitted to use bond proceeds to reimburse certain expenditures paid before the date of issuance subject to certain requirements. One requirement is that the conduit issuer must adopt a declaration of official intent to reimburse expenditures not later than 60 days after the reimbursed expenditure is paid. In the case of qualified 501(c)(3) bonds only, a conduit borrower may also adopt a declaration of official intent. Accordingly, for all types of qualified private activity bonds the conduit issuer must act to adopt declarations of official intent to permit reimbursement financing.

Qualified Hedge: A conduit issuer pursuant to section 1.148-4(h) of the Treasury regulations must identify a qualified hedge on its books and records maintained for the hedged bonds not later than three (3) days after the date on which the conduit issuer (or conduit borrower) and the hedge provider enter into a hedge contract. (Proposed regulations, REG 106143-07, September 26, 2007, would allow the conduit issuer to identify the qualified hedge no later than 15 calendar days).

Deliberate Actions: Bonds issued by a conduit issuer can lose their tax-exempt status if the conduit issuer or conduit borrower takes a deliberate action, subsequent to the issue date, that causes the issue to fail to meet the federal tax requirements applicable to the bonds. A deliberate action is any action taken by the conduit issuer or conduit borrower that is within its control. Intent to violate the requirements of the Code is not necessary for an action to be deliberate.

Remedial Actions: A conduit issuer, often with the involvement of the conduit borrower, may take a remedial action prescribed in section 1.141-12 of the Treasury regulations to cure a deliberate action that would otherwise cause a governmental bond issue or qualified 501(c)(3) bond to become a nonqualified private activity bond issue. If the remedial action requires providing a notice of defeasance to the IRS, such notice must be provided by the conduit issuer. Remedial actions include redemption or defeasance of bonds, alternative use of disposition proceeds, and alternative use of bond-financed facilities. Additionally, if the bonds are treated as “reissued” under the Treasury regulations, the conduit issuer must test the reissued bonds to determine if the interest on the bonds remains exempt from gross income for federal tax purposes (See Bond Modifications section below).

Redemption or defeasance of bonds are remedial actions prescribed in section 1.142-2 of the Treasury regulations for certain failures to properly use the proceeds of exempt facility bonds. The conduit issuer in this case also is required to provide a notice of defeasance to the IRS. Similar rules apply to qualified small issue bonds and qualified redevelopment bonds.



Bond Modifications: An agreement between a bondholder and a conduit issuer (or conduit borrower) to modify the terms of any bonds, whether direct or indirect, may cause the modified bonds to be treated as new bonds for federal income tax purposes (that is, to be “reissued”). If the conduit bond is considered reissued under section 1001 of the Code, then in general the conduit bond must be tested to determine if the interest on the bonds remains exempt from gross income for federal tax purposes. Revenue Ruling 81-281, 1981-2 C.B. 18, provides that interest on tax-exempt conduit bonds is not excludable from gross income after the terms of the bonds are substantially altered without action by the state or local government issuer. In general, a conduit issuer may meet this requirement to approve reissued bonds by adopting a formal resolution of the governing body of the conduit issuer approving the modification of the terms. In addition, the conduit issuer must satisfy all applicable federal tax requirements including timely filing Form 8038, 8038-G, or 8038-GC, as applicable, treating the date of the modification as the date of issuance of the modified bonds.

Elections: Various provisions of the Code and Treasury regulations require that certain elections be made by the conduit issuer.

The Treasury regulations concerning private activity bonds generally require that elections be made in writing and be retained as part of the bond documents. Elections cannot be revoked without permission of the Commissioner. Many elections have to be made on or before the issue date of the bonds.

Examples of elections include:

- The election to waive the right to treat a purpose investment as a program investment;
- The election to waive the right to invest in higher yielding investments during any temporary period;
- The election of the issuer of a pooled financing issue to apply rebate spending exceptions separately to each conduit loan;
- The election for purposes of the two-year spending exception from rebate to apply certain provisions based on actual facts rather than reasonable expectations;
- The election for purposes of the two-year spending exception from rebate to exclude from available construction proceeds the earnings on a reasonably required reserve fund;
- The election for purposes of the two-year spending exception to treat a portion of an issue as a separate construction issue from rebate;
- The election to pay one and one-half percent penalty in lieu of arbitrage rebate; and
- The election to treat portions of a bond issue as separate issues.

Arbitrage Rebate Requirements/Yield Reduction Payments: In certain circumstances, section 1.148-5(c) of the Treasury regulations permit the conduit issuer to make payments to the U.S. Department of the Treasury in lieu of restricting the yield on investments made with bond proceeds at the end of a temporary period.

Conduit issuers of tax-exempt bonds file [IRS Form 8038-T, Arbitrage Rebate, Yield Reduction and Penalty in Lieu of Arbitrage Rebate](#), to make the following types of payments:

1. yield reduction payments;
2. arbitrage rebate payments;
3. penalty in lieu of rebate payments;
4. the termination of the election to pay a penalty in lieu of rebate; and
5. penalty for failure to pay arbitrage rebate on time.

A yield reduction payment and/or arbitrage rebate installment payment is required to be paid by conduit issuers no later than 60 days after the end of every 5th bond year throughout the term of a bond issue. The payment must be equal to at least 90% of the amount due as of the end of that 5th bond year. Upon redemption or final maturity of a bond issue, a payment of 100% of the amount due must be paid no later than 60 days after the discharge date.

A failure to timely pay arbitrage rebate will be treated as not having occurred if the failure is not due to willful neglect and the conduit issuer submits a Form 8038-T with a payment of the rebate amount owed, plus penalty and interest. The penalty may be waived under certain circumstances. For more information, see section 1.148-3(h)(3) of the Treasury regulations and [Revenue Procedure 2005-40, 2005-28 I.R.B. 83](#).

In general, a request for recovery of overpayment of arbitrage rebate can be made when the conduit issuer can establish that an overpayment occurred. An overpayment is the excess of the amount paid to the U.S. Department of the Treasury for an issue under section 148 of the Code over the sum of the rebate amount for the issue as of the most recent computation date and all amounts that are otherwise required to be paid under section 148 as of the date the recovery is requested. The request can be made by the conduit issuer completing and filing [IRS Form 8038-R, Request for Recovery of Overpayments Under Arbitrage Rebate Provisions](#), with the IRS.

Record Retention Requirements: Section 6001 of the Code and section 1.6001-1(a) of the Treasury regulations generally provide that any person subject to income tax, or any person required to file a return of information with respect to income, must keep such books and records as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by that person in any return. This includes Form 8038 series and other returns filed by the conduit issuer with respect to a bond issue. Additional information regarding record retention requirements applicable to tax-exempt bonds is available on our website.

IRS Examination of Conduit Issues: The TEB administrative procedures provide that the conduit issuer, and not the conduit borrower, will be treated as the “taxpayer” in IRS examinations of tax-exempt bonds, including conduit bonds. This means that the conduit issuer will receive the letter initiating the examination and must be a party to any closing agreement resolving an IRS examination. The IRS has released detailed TEB administrative procedures under section 4.81 of the Internal Revenue Manual. These administrative procedures generally define the “issuer” as “the state or political subdivision or entity that issues bonds on behalf of a state or local government.”

Requesting Voluntary Closing Agreements (VCAP): The TEB Voluntary Closing Agreement Program (“VCAP”) is described in [Notice 2008-31, 2008-11 I.R.B. 592](#), which provides information about VCAP for tax-exempt bonds. This program provides remedies for issuers, including conduit issuers, who voluntarily come forward to resolve a violation which cannot be corrected under self-correction programs described in the Treasury regulations or other published guidance. Closing agreement terms and amounts may vary according to the degree of violation as well as the facts and circumstances surrounding the violation. This Notice and [section 7.2.3](#) of the Internal Revenue Manual provide that the conduit issuer must request and execute a voluntary closing agreement.

Requesting Private Letter Rulings: Revenue Procedure 2012-1 (and its successors after 2012) and Revenue Procedure 96-16 set forth required procedures under which an issuer of tax-exempt bonds can request a private letter ruling. Revenue Procedure 96-16 sets forth separate procedures for “reviewable” private letter ruling requests that under section 7478 of the Code may be reviewed by the U.S. Tax Court and for “nonreviewable” private letter ruling requests that cannot be reviewed by the U.S. Tax Court. Under section 7478 of the Code, a conduit issuer may appeal the denial of a reviewable private letter ruling to the United States Tax Court. The revenue procedure generally requires that, in the case of a conduit issue, the private letter ruling request must be submitted by the conduit issuer, rather than the conduit borrower.

CERTAIN PROCEDURAL CONSIDERATIONS FOR CONDUIT ISSUERS

The first part of this publication discussed examples of federal tax compliance responsibilities of a conduit issuer. The second part of this publication discusses procedures and other options conduit issuers may adopt with respect to its conduit bond program to assist them in their tax compliance responsibilities.

A “one size fits all” approach is not workable, due to the various organizational structures of conduit issuers as well as the unique features of different financings. As such, options set forth below are meant to help conduit issuers develop adequate written procedures to assist them in fulfilling their tax responsibilities with respect to their conduit financings.

Procedures for Closing & Pre-Closing Matters: The chart below identifies certain types of monitoring procedures a conduit issuer may adopt to ensure compliance with the federal tax rules required to be satisfied at or prior to the closing of the bond transaction.

Type of Procedures	Description of Procedures for Closing and Pre-Closing Matters	Applicable Responsibilities Described Above
Volume Cap	Procedures to monitor utilization of volume cap, including carryforward elections	Volume Cap Limit Carryforward of Unused Volume Cap
Public Approval	Procedures concerning public hearings conducted by the issuer and any approvals by the issuer	Public Approval Requirement
Issuer Fees	Procedures to ensure that issuer fees do not exceed applicable limits in the Code and Treasury regulations	Limitations Relating to Fees Charged by the Conduit Issuer
Closing Certifications	Due diligence procedures to ensure that certifications are reasonable	Certification Regarding Expectations for Use and Investment of Proceeds
Official Intent	Procedures to ensure that reimbursement resolutions conform to the requirements of the Treasury regulations	Reimbursement Declarations of Official Intent
Qualified Hedge	Procedures to timely identify qualified hedges	Qualified Hedge
Elections	Procedures for federal income tax elections	Elections

Designation of Officials to Assist with Certain Actions: Other than the statutory requirement that an “applicable elected representative” must provide public approval, the provisions of the Code, Treasury regulations or other guidance do not specifically provide that particular officials of a conduit issuer have specific tax compliance responsibilities. However, as discussed in the first part of this publication, the Treasury regulations and other guidance require that a conduit issuer must be involved in a number of different actions including: (1) responding to an examination of the bond issue by the IRS; (2) submitting a voluntary closing agreement request to the IRS; (3) implementing a “remedial action” upon the change of use of bond-financed property, including, where necessary, filing a Form 8038 and filing a notice of defeasance; and (4) executing a “hedge identification” permitting an interest rate swap or other interest rate hedge to be taken into account in determining bond yield.

A conduit issuer should consider whether to designate one or more officials, to be responsible for assisting in such actions. Conduit issuers may also consider requiring a conduit borrower to identify a particular official or officials to assist the conduit issuer in such actions.

Post-Issuance Compliance Monitoring: A conduit issuer may adopt written post-issuance monitoring procedures to ensure the continuous compliance of its bond issues with applicable federal tax requirements. In formulating its procedures a conduit issuer may consider:

- Designating a particular conduit issuer official or officials to assist in post-issuance compliance;
- Requiring conduit borrowers to identify a particular official or officials responsible for assisting the issuer with post-issuance compliance monitoring;
- Providing training or other technical support to designated official(s) of the conduit issuer and the conduit borrower;
- Requiring the conduit borrower to demonstrate that it has adopted written post-issuance compliance monitoring procedures before the approval of a bond issue;
- Designating time intervals within which compliance monitoring activities will be completed by the conduit issuer and the conduit borrower;
- Timely completing remedial actions to correct (including VCAP requests) or otherwise resolve identified noncompliance; and
- Requiring conduit borrowers to notify the conduit issuer of the completion of post-issuance compliance monitoring activities.

The TEB VCAP program provides an economic incentive for conduit issuers to implement written post-issuance compliance monitoring procedures. Under this program, a reduced resolution amount is appropriate when an issuer timely submits a VCAP request with respect to a violation identified in accordance with its monitoring procedures. See section 7.2.3.4.4 of the Internal Revenue Manual for more information.

Record Retention: A conduit issuer may adopt written procedures to maintain adequate records to support the tax compliance of its bond issues. In formulating its procedures, a conduit issuer may consider:

- Designating which types of records must be retained by the conduit issuer and which types of records, if any, will be retained by the conduit borrower; and
- Designating the manner in which such records will be retained, including back-ups of any electronic records.

Procedures for Post-Closing Matters: The chart below identifies certain types of compliance monitoring and record retention procedures a conduit issuer may adopt to ensure compliance with the federal tax rules required to be satisfied after the issuance of the bonds.

Type of Procedures	Description of Procedures for Closing and Pre-Closing Matters	Applicable Responsibilities Described Above
Information Return Filing	Procedures to ensure timely filing of information returns, including procedures concerning amended and late filed returns	Information Filing Requirements Late Filing of Information Returns
Change in Use of Proceeds or Financed Facilities	Procedures to timely identify and remediate deliberate actions	Deliberate Actions Remedial Actions
Reissuance	Procedures to satisfy applicable tax requirements when a modification in terms results in a reissuance for federal income tax purposes	Bond Modifications
Elections	Procedures for timely federal income tax elections	Elections
Arbitrage Compliance	Procedures for the timely computation and payment of arbitrage rebate and yield reduction payments	Arbitrage Rebate Requirements/Yield Reduction Payments
Record Retention	Procedures for the maintenance of records. See also discussion above.	Record Retention Requirements
IRS Contacts	Procedures concerning compliance check questionnaires, examinations, VCAP, and private letter rulings. See also text above concerning Designation of Officials to Assist with Certain Actions	IRS Examination of Conduit Issues Requesting Voluntary Closing Agreements (VCAP) Requesting Private Letter Rulings

CERTAIN TAX CREDIT BONDS

The tax compliance responsibilities discussed above generally apply to conduit issuers of certain other types of tax-advantaged obligations including tax credit bonds issued under section 54A of the Code. However, conduit issuers of tax credit bonds are required to file [Form 8038-TC, Information Return for Tax Credit Bonds and Specified Tax Credit Bonds](#). As such, given the similarity of applicable tax requirements, conduit issuers of tax credit bonds should also consider adoption of written post-issuance monitoring procedures to assist them in their tax compliance responsibilities.

FURTHER INFORMATION

TEB Information and Services: TEB offers information and services through its voluntary compliance programs -- (including the Voluntary Closing Agreement Program) and its education and outreach programs. You can learn about these programs through our website at www.irs.gov/bonds.

Customer Education and Outreach: TEB has reading materials about the tax laws applicable to municipal financing arrangements, tax forms and instructions, revenue procedures and notices, and TEB publications available on our website at www.irs.gov/bonds. For personal assistance, you can contact TEB directly at (202) 283-299 , or call our Customer Account Services toll-free at (877) 829-5500, Monday through Friday, 8:00 AM- 6:30 PM EST.

RESOLUTION NO. 2012-09

**RESOLUTION OF THE
CALIFORNIA HEALTH FACILITIES FINANCING AUTHORITY
APPROVING THE AMENDMENT TO THE POST-ISSUANCE
TAX COMPLIANCE PROCEDURES
FOR TAX-EXEMPT BONDS**

WHEREAS, the California Health Facilities Financing Authority (the “Authority”), a public instrumentality of the State of California, is authorized and empowered by the provisions of the California Health Facilities Financing Authority Act (the “Act”) to issue revenue bonds to finance construction, expansion, remodeling, renovation, furnishing, equipping and acquisition of educational facilities operated by participating private colleges (including by reimbursing expenditures made or refinancing indebtedness incurred for such purpose);

WHEREAS, federal income tax law requires that issuers of tax-exempt bonds (the “Bonds”) comply with certain post-issuance requirements set forth in the Internal Revenue Code;

WHEREAS, for the purpose of maximizing the likelihood that certain applicable post-issuance requirements of federal income tax law needed to preserve the tax-exempt status of the Bonds are met, the Authority desires to adopt the amended Post-Issuance Tax Compliance Procedures for Tax-Exempt Bonds, attached hereto as **Appendix A**;

NOW, THEREFORE, BE IT RESOLVED by the California Health Financing Facilities Authority, as follows:

Section 1. The amended California Health Facilities Financing Authority Post-Issuance Tax Compliance Procedures for Tax-Exempt Bonds attached hereto as Appendix A is hereby approved.

Section 2. This resolution shall take effect from and after its adoption.

Date of Adoption: _____